**TORTS**

Spring 2012

Evans

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**LIST OF CAUSES OF ACTION**

* Negligence
	+ Negligent Infliction of Emotional Distress
	+ Vicarious Liability
	+ Negligent Economic Harm (maybe same as negligent misrepresentation)
	+ Negligence – Premises
	+ Negligent Entrustment
	+ Vs. Doctors:
		- Malpractice (bad care received)
		- Informed Consent Malpractice
		- Informed Consent Battery
		- Loss of chance
		- Wrongful Birth/Wrongful Life
* Strict Liability (non-product) (abnormally dangerous activity, etc.)
* Product Liability
	+ Strict Mfg Defect
	+ Strict Design Defect
	+ Strict Failure to Warn
	+ Neg. Mfg Defect
	+ Neg. Design Defect
	+ Neg. Failure to Warn
* Causes of Action named for their damages:
	+ Wrongful Death
	+ Loss of Consortium
* Intentional Torts against the person:
	+ Assault
	+ Battery
	+ False Imprisonment
	+ Intentional Infliction of Emotional Distress (IIED)
* Defamation
	+ Libel per se/per quod
	+ Slander per se/per quod
* Privacy
	+ Unreasonable Intrusion on a Person’s Seclusion
	+ Unreasonable Publicity Given to a Person’s Private Life
	+ Placing a Person in a False Light
	+ Appropriation of a Person’s Name or Likeness
* Harms to Economic Interests
	+ Deceit
	+ Deceit by silence
	+ Negligent Misrepresentation
	+ Interference with K relations
	+ Interference w/Advantageous Relations

Negligence

π has burden to prove elements of prima facia case by “a preoponderance of the evidence;” ie. ∆ was “more likely than not” negligent.

* Elements
	+ Duty
	+ SoC Breached
	+ Actual Cause
	+ Proximate Cause
	+ Damages

**DUTY**

Current trend is that, unless Ct or legislature IDs an exception, there’s a general duty of due care.

* Generally no duty to rescue or to warn (Harper v. Herman – guy diving out of the boat case), but there are a few exceptions (pgs.134-136):
	+ Special Relationship to π
		- Employer-Employee
		- Innkeeper-guest
		- Landlord-tenant
		- Custody of a child or other person who cannot protect themself
		- Common Social Undertaking (Farwell v. Keaton p.136)
		- Etc.
	+ Non-Negligent creation of risk - ∆ owes duty to warn π of hazard when ∆ created hazardous situation
	+ Good Samaritan/Duty of “easy” rescue – Some states place affirmative duty to act or warn so long as it can be done with little or no inconvenience.
	+ Non-negligent injury – If you hurt π, you have a duty to help them.
	+ Undertaking – When ∆ starts to perform, he takes on duty to π. (again, Farwell v. Keaton p.136)
		- R2nd§324 – one who has no duty to do so takes charge of another who is helpless is subject to liability caused by:
			* a – failure to exercise to reasonable care to secure the safety of another while within their charge, or
			* b – the actor’s discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge
			* If you pull somebody out of a trench filled with mustard gas, you’re liable for leaving them in the middle of the road, but maybe not on the sidewalk?
		- R3rd requires reasonable care when discontinuing aid
		- Undertaking to be the designated driver imposes duty (though the duty is created when you actually start performance as DD, not just by promising to be DD) (Note 7 p.181)
		- Broken promise to DD isn’t an undertaking and doesn’t create duty.
	+ Simply becoming aware of a hazard doesn’t create a duty to warn or protect others, eg:
		- You are driving down the road at night and see a car stopped half on the shoulder, half in the right lane. The car doesn’t have any lights on and poses a huge hazard. You have no duty to stop your car and put on your flashers.
		- Conversely, if you’re in an accident and it’s your car half-parked in the road at night, you have a duty to alert passersby to the hazard (the presence of your vehicle)
* **Hand’s Economic Theory of Duty** - We don’t owe a duty if the burden to safeguard against the injury would be too burdensome. - (Carroll Towing, p.43):
	+ P = Probability of Incident, L = Severity of Injury, B = Burden to safeguard against incident
	+ If B < P\*L then there’s a duty. If B > LP, then no duty
	+ This makes good economic sense (don’t want companies spending more safeguarding against injuries than the injuries themselves would cost), but it has one bad side effect:
	+ It gets the company off the hook for all those injuries. If B>LP, then there’s no duty, so the ∆ doesn’t have to pay out.
	+ Strict Liabiity helps us fix this problem.
* **Privity of K**
	+ @CL required Privity of K to get duty. Strauss v. Belle (power outtage old man falls in stairwell case) (p.168) reached back >60 years to resurrect this otherwise dead doctrine.
	+ Privity doesn’t really matter any more, except for accountants, lawyers, etc. (& product liability)

**WHEN DO COPS OWE A DUTY?**

* + Riss v. City of NY (p.228) – sovereign immunity problems w/suing cops
	+ Cops don’t owe a general duty, but they can be liable if they undertake (Note 2, p.232) – cops liable for failing to protect witness who responded to flyer soliciting witnesses
	+ Cuffy Factors (note 2.c p.233)
		- “an assumption by the municipality through promises or action, of an affirmative duty to act on behalf of the party who was injured,
		- knowledge on the part of the municipality’s agents that inaction could lead to harm,
		- some form of direct contact b/t the agents and the injured party; and
		- that party’s justifiable reliance on the municipality’s undertaking.”
	+ A 911 operator’s promise that help is being sent “right away” is an assumption of duty to respond with due care. (Note 4, p.234)
	+ Remember: For non-cop municipal employees you need some special duty beyond what’s owed to community @ large.

**DUTIES TO THIRD PARTIES**

* When is there a duty to third parties (Extended Duty)?
	+ Social Hosts generally don’t owe duty when one of their guests drives drunk and injures someone. (Reynolds v. Hicks p.176)
		- Social hosts also owe no duty to protect guests from one another (p.181)
	+ Rowland are general duty factors – go through them whenever there’s a question of whether there’s a duty – not just third parties.
	+ Factors (Tarasoff , bottom p.151) (aka Rowland v. Christian factors)
		- Foreseeability of harm to π
		- Degree of certainty that π suffered injury
		- Closeness b/t ∆’s conduct & π’s injury
		- Moral blame attached to ∆’s conduct
		- Public policy of preventing future harm
		- Extent of burden to ∆ and policy implications of such liability
		- Availability, cost, and prevalence of insurance for the risk involved
	+ Doctors – may owe duty when the third party is SPECIFIC and IDENTIFIABLE
		- Tarasoff – Psychiatrist owed duty to warn third party that his patient had threatened to hurt her.
		- Dr.s may owe duty to warn their patient’s spouse/partner when the patient has AIDS/HIV or similar.
		- Likewise, Drs may owe duty to tell kids of patient that they’re at risk for genetic diseases.
		- When Dr. doesn’t know of patient’s family/spouse/partner, he cannot owe them a duty (p.157)
		- Drs don’t owe drivers a duty to warn their patients not to drive while on meds (p.157)...unless the Dr rendered the health care that compromised the patient’s ability to drive.

**Negligent Entrustment** (R§390, top p.184)

* + - Vince v. Wilson (p.182) – providing a known bad driver with a car can create liability when the bad driver injures someone with that car.
		- Helping a drunk guy pump gas may implicate neg. entrustment
		- Anyone who supplies a chattel (seller, lessor, donor, lender, bailors, etc.) can be liable.
		- Keys in the ignition
			* Lots of states have statutes clarifying this
			* Not neg. per se b/c the purpose of the “don’t leave your keys in your car” statute isn’t to protect drivers from a wreck
			* Leaving (1) large truck the average person wouldn’t know how to drive (2) overnight (3) in a shitty neighborhood was a “special circumstance” that made it negligent entrustment (Palma v. U.S. Industrial fasteners p.186 note 6
		- π must show that ∆ knew or should have known why entrusting the chattel was foolish or negligent (p.184)

**When does a statute provide a private Right of Action? (Uhr p.161)**

* + (1) Whether the π is one of the class for whose particular benefit the statute was enacted
	+ (2) Whether recognition of a private right of action would promote the legislative purpose, and
	+ (3) Whether the creation of such a right would be consistent with the legislative scheme. (Would the legislature want us to allow this CoA?)
	+ In Uhr, Ct finds yes to 1 & 2, but says no to (3) (re: allowing parents to sue school for failing to screen their kid for scoliosis).
	+ Alternately, a statute may explicitly provide a right of action. The above analysis is to see if there’s an implied RoA.

Duty Cases:

*Adams v. Bullock* (p 40) (child injured when played with metal pole & hit overhead trolley wire)

* Duty to adopt reasonable precautions to minimize the resulting perils
* Insulated wire wouldn’t work, guards would be of little value, Only way to avoid accident would be to abandon overhead system & use underground wire (consider L. HAND formula)
* In this case – only an extraordinary accident could make the wire a thing of danger; No accident had occurred before

*US v. Carroll Towing Co.* (US Ct. App 1947) (J. L. HAND) (p44) - Carroll towing owns barge which de-barges one of the barges in the middle – causes imbalance & one of the barges crashes into another ship

* Lots of parties involved and during WWII – business time harbor had ever had (extraordinary circumstances?)
* Bargee lied & said he was about barge which was dislodged the whole time
* Applied L. HAND formula – cost of replacing bargee < injury resulted = negligence

*Reynold v. Hicks* (SC WA 1998) (p 183) – third persons injured by an intoxicated minor – more solvent D

* Concern of open ended liability for individual host/different from commercial host

Clearly violated a statute – serving alcohol to minor (negligent entrustment of a minor?)

*Vince v. Wilson* – Negligent entrustment case where gramma bought car for grandson

She “funded” instrumentality, but he passed drivers test, so complied w/statute

* Policy considerations: Background checks necessary? Liability shifted to person who relied on background checks? B/c money provided, is donor always liable? Money can be used for anything, so is use foreseeable to cause harm?

Tarasoff – woman sues shrink when shrink’s patient kills her.

**Standard of Care**

There will often times be no clear Standard of Care. Sometimes we look to statute. Sometimes we use Hand’s Duty formula, reasonable person, industry standard, or common practice. All of these things can inform what the appropriate standard of care is in a given situation.

* **ORDINARY CARE – REASONABLE PERSON STANDARD**:
	+ “Ordinary Care” – What a prudent person would do to avoid danger – p.36
	+ This can be informed by industry norms – Timarco v. Klen – Because other Ls had been doing so, L/∆ negligent for not replacing shower door w/shatterproof - customary practice needn’t be universal.. 4 factors for when custom establishes SoC:
		- Proof of existence of a customary practice
		- ∆ ignored this customary practice
		- Departure from custom caused π’s injury
		- Custom is seen as reasonable to the jury
	+ Must take reasonable care to prevent foreseeable harm. Fix or at least warn of known risks.
	+ To be negligent, ∆ must have actual or constructive notice of hazard
		- Negri v. Stop & Shop p.86 – Banana was brown & old; had been there a while - ∆ knew or should have known of its presence
		- You’re not negligent when you don’t know and have no reason to know of the hazard. Gordon p.89
		- Business Practice Rule (p.89) – Customers needn’t establish notice when there’s a continuous & foreseeable risk (as in the case of a salad bar)
* **EXTRAORDINARY STANDARD OF CARE** – may require ∆ to do things not cost-beneficial. Must fix known & inspect to find unknown risks (& fix those as well)
	+ Common Carriers @CL (Bethel v. NYC Transit Authority, updated @CL to hold Comm. Carriers to ordinary SoC)
	+ Operators of Hotels,
	+ Pilots of cruise ships
	+ Operators of nuclear plants
	+ Other highly dangerous professions
	+ Gun owner owes highest SoC (in KS) (Wood v. Groh p.51)
* Physically disabled ∆s are usually held to lower SoC, but no such allowance for mentally disabled ∆s.
* Children:
	+ Are held to a “reasonable child of X age” SoC
	+ Not “reasonable adult” SoC
	+ Unless the kid is doing “adult things,” eg: driving. In that case, may hold kid to reasonable adult SoC.

**STANDARD OF CARE AS INFORMED BY STATUTE**

* SoC informed by statute – 3 views:
	+ Neg. per se – violating a statute is automatically a negligent breach of SoC (Martin v. Herzog p.74)
		- 2 conditions must be satisfied to get neg. per se:
			* The statute must exist for the purpose of preventing the kind of harm that ∆ inflicted on π. (Note 6, p.81, cases p.82-83), AND
			* No neg. per se. when ∆ had good reason to be violating statute (Tedla v. Ellman p.77, Bassey v. Mistrough p.80)
		- Following the law doesn’t mean you’re not negligent. It just means you’re not neg. per se. (Note 10, p.83)
		- “But everybody does it” isn’t an excuse for violating statute (woman was contributorily neg. for jaywalking, Robinson v. District of Columbia p.80)
		- R§286 stipulates that the reg. in question must be found to:
			* (a) to protect a class of persons to which the π belongs
			* (b) to protect the particular interest ∆ has invaded
			* (c) protect that interest against the type of harm that has resulted, and
			* (d)to protect that interest against the particular hazard from which the harm results
		- Note 5, p. 77 – “the trial judge ‘retains discretion to refuse to adopt the law as the SoC . . . rejection of the legislative enactment is appropriate when the law is so obscure, unknown, outdated, or arbitrary as to make its adoption as [SoC] inequitable.”
		- Driving w/o Driver’s License <> Neg per se (Note 9 p.83)
	+ Violation of statute creates presumption of neg.
	+ Violation of statute is merely evidence that there may be neg.

**MEDICAL STANDARD OF CARE**

* Doctors are held to a professional SoC (experts testify as to what the SoC is in a given situation)
* @CL, had to have expert witness from same region. No more (Sheeley v. Memorial Hospital, p.107)
	+ Experts from anywhere can testify, and
	+ The expert needn’t practice in that particular field – need only be knowledgeable of the field.
* Ct may shift burden to ∆ (to prove there wasn’t negligence) if the ∆s are exhibiting a conspiracy of silence (Ybarra v. Spangard p.99, 104)
* @CL, RIL was unavailable where act was complicated enough to require expert testimony. Reversed in Sides v. St. Anthony’s p.115.

**INFORMED CONSENT**

* Informed Consent – whether Dr adequately presents info for patient to make informed decision
	+ @CL, informed Consent issues were battery. Now it’s neg. (Matthies v. Mastromonaco p.119)
		- For a given Informed Consent fact pattern, a patient can bring all 3 of the following torts. Further, the π may claim that the I.Consent was so bad that they didn’t know to what they were consenting; so effectively, they didn’t consent. 3 claims that can be brought:
			* Med Mal (π received treatment below SoC) (N/A in Matthies)
			* Battery theory of I.Consent. (also N/A in Matthies, since Dr didn’t touch π) – can be wrong dr did surgery that you didn’t consent to, they operated on the wrong organ, etc.
			* Negligence theory of I.Consent. – there’s usually IC in place, but π wasn’t sufficiently warned of risks or alternatives
		- Most states have (2). (3) is newer, generally available, and varies more state-to-state.
		- Always talk about all 3 (treatment below SoC, Informed Consent as battery, IC as neg b/c IC was below SoC)
	+ 4 IC Standards for Dr’s Duty to disclose:
		- Customary professional Std (“What do other Drs disclose?”) (9 states) – some states use this for routine procedures but more patient-centric disclosure std for risky procedures
		- Reasonable Professional Std (Was it reasonable for the Dr to disclose in the particular circumstances of the case?) (Note 1, p.124) (27 states)
		- Objective Patient-Centered (What would a reasonable patient regard as a material risk that should be disclosed?) (~32)
		- Subjective Patient-centered (What would THIS patient want to know?) (Note 8, p.126) (just a couple
* Implied Consent – you’re about to get a flu shot and Dr asks “Do you want this shot?” You say nothing, and instead pull up your sleeve & stick out your arm. This is consent.
* 2 types of patients when it comes to I.Consent:
	+ - Monitors – want all the info. & want control
		- Blunters – Don’t need to know – trust the experts

**LANDLORD/TENANT**

* + L traditionally have no duty to protect against defective conditions
	+ Exceptions:
		- Hidden danger L was aware of, but T isn’t
		- Premises leased for public use
		- Premises under L’s control (common areas)
		- Premises negligently or not repaired by L
		- Intentional torts by 3rd parties (only in some jurisdictions)
		- Also look @ foreseeability
	+ This can be informed by industry norms – Timarco v. Klen – Because other Ls had been doing so, L/∆ negligent for not replacing shower door w/shatterproof - customary practice needn’t be universal.. 4 factors for when custom establishes SoC:
		- Proof of existence of a customary practice
		- ∆ ignored this customary practice
		- Departure from custom caused π’s injury
		- Custom is seen as reasonable to the jury
* ∆ must have actual or constructive notice of hazardous condition to be liable
	+ Dirty babyfood jars and testimony from plaintiffs that the aisle hadn’t been checked for at least 50 minutes was enough to get to jury. (Negri v. Stop n Shop)
	+ But the fact that a banana peel was brown was insufficient to prove constructive notice (Faricelli)
	+ Loose piece of paper that hadn’t been there very long was insufficient. (Gordon)

SoC Cases:

Medical:

*Sheeley v. Memorial Hospital* – expert OBGYN testify on standard of care of family practitioner

* Ds argue expert is overqualified, hadn’t practiced since ’75 so expertise is outdated, from different place (NY)
* Concern is whether the treatment was administered in a reasonable manner, so the expert is qualified

*Matties v. Mastromonaco –* Doctors have to disclose treatment viable treatments, even those that they don’t recommend.

End Medical

*Bethel v. NYCTA* - Should a common carrier be held to a heighted duty of reasonable care?

* Reasonable inspection would have lead to the discovery
* In this case, said there was no special duty, only duty of a reasonable carrier

*Trimarco v. Klein* - shower door made of regular glass & not tempered glass

* Door no longer conformed to safety statutes
* When proof of accepted practice is accompanied by evidence that the D conformed to that to it, this may establish due care. When proof of customary practice is coupled with a showing that it was ignored & that this departure was a proximate cause of the accident, it may serve to establish liability
* A common practice or usage is not necessarily a conclusive or compelling test of negligence

*Negri v. Stop & Shop* (Ct App. NY 1985) (p 87) – “dirty & messy” baby food

* Constructive notice theory: aisle cleaned 50 minutes before, customers did not hear sounds of breaking glass within 20 minutes of accident, baby food jars were dirty & messy
* P given benefit of doubt on circumstantial evidence

*Gordon v. American Museum of Natural History* (Ct App. NY 1986) (p 88) – paper on the steps

* Didn’t meet constructive notice as condition of the paper wasn’t dirty or worn, any other conclusions were speculative

*Faricelli v. TSS Seedman’s* – blackened banana peel did not establish constructive notice

**ACTUAL CAUSATION**

* π’s injury would not have occured “but for” ∆’s neg.
* Does not have to be the only cause, just “a” cause, absent which the injury wouldn’t have occured.
* Degree of proof:
	+ ∆’s neg. probably (more likely than not) caused the injury
	+ Proving ∆ was “possibly” a “but-for” cause is insufficient.
	+ When there’s other possible causes, we need ev. to rule out those other possible causes.
* Cts use “reasonable certainty” standard – πs needn’t completely explain away every other possible cause. Need only make “reasonably certain” that ∆ caused π’s injury. (Stubbs v. City of Rochester, p.335)
* But-for test is problematic if multiple actors are negligent. Each ∆ could argue π would still have been injured, due to other ∆’s actions. So how does π prove neg?
	+ Don’t use but-for.
	+ Instead, “Was ∆’s neg. a substantial factor in bringing about the injury?”
	+ ∆’s neg. doesn’t have to be the only cause – just a substantial cause.
* How do we shift BOP to ∆? (top 349). 2 factors to flip burden (think in context of the drug OD case where the woman was taking a double dose of estrogen):
	+ (a) a neg. act was deemed wrongful b/c that act increased the chances that a particular type of accident would occur, and
	+ (b) a mishap of that very sort did happen.
	+ “Where such a strong causal link exists, it is up to the negligent party to bring in evidence denying but for cause and suggesting that in the actual case the wrongful conduct had not been a substantial factor.
* We don’t want to deny πs recovery just b/c of a little bit of uncertainty – don’t have to prove that double-dose of meds caused harm while single dose wouldn’t have. Basically impossible (Zuchowicz p,343)
	+ In Zuchowicz, Ct flipped the burden to ∆s, but Cts are reluctant to do so (Note 2 p.350)
* Whether an expert witness is admissable - Experts are used in almost every toxic exposure case.
	+ Daubert Test (Modern Trend) (don’t have to meet all):
		- Whether theory can be & has been tested by scientific method
		- Whether theory (technique) has been subjected to peer review & publication
		- If a particular technique, the known (or potential) rate of error
		- Daubert is a federal rule – state courts can adopt or ignore.
	+ Frye (Traditional) Test
		- Theory had to be generally accepted in the industry (“Most experts would agree”)
		- Problems:
			* Many “acceptable” theories in science
			* Sometimes no scientific consensus or data exists

**PROXIMATE CAUSATION**

* Big question of proximate causation: When ∆ commits a negligent act that could foreseeably cause a harm, H
	+ Do we hold ∆ liable for all (non-foreseeable) resulting injuries (I, J, K, etc..) so long as there was at least 1 injury that was foreseeable? (Polemis), or
	+ Do we just hold ∆ liable for the foreseeable harm? (Wagon Mound)
* Other 2 big questions:
	+ Was π foreseeable from the standpoint of the ∆? (Cardozo’s majority in Palsgraf)
		- Zone of danger
		- Often construed very broadly
	+ Was the TYPE OF HARM foreseeable by ∆? (Andrew’s dissent in Palsgraf)
		- Foreseeability wears 2 hats in negligence – was the act negligent, and are damages too remote to be recoverable (prox. cause)?
		- Andrews factors:
			* Is it extraordinary that this injury occured? Prox. cause doesn’t exist if what happened is highly extraordinary,
			* And did some other force intervene and break the chain of events and cause the injury (superseding cause)? If so, no prox. cause.
			* Andrews likes Polemis – says everyone owes a duty to everyone)
		- Having tall hedges isn’t a foreseeable cause of rape (Doe v. Manheimer p.409)
* After ∆’s act, what else happened in the chain of events?
	+ Superseding v. Intervening Causes
	+ Superseding cause – not foreseeable - “break the chain” of events and stop ∆’s liability there.
	+ Intervening causes can cause additional harm, but are foreseeable and don’t break “chain” of proximate cause. ∆ still liable.
	+ @CL, intentional torts = superseding causes. Modern trend is that intentional torts may not always be superseding causes.
	+ A handful of judge-made rules for things that are always intervening (ie: don’t break chain):
		- Danger inviting rescue – If somebody gets hurt trying to rescue the π you injured, you are liable to them
		- Time – While tort SoL starts to run @ injury, some jurisdictions have lengthened window for injuries that may be hidden or take a while to manifest
		- Eggshell π – having something happen to somebody fragile in the chain doesn’t break the chain
		- Medmal – Medmal is foreseeable and doesn’t break chain
		- Ambulance accident – intervening, not superseding.
		- Intervening reaction/protection forces - ∆ liable for peoples’ reactions to the act (e.g. somebody injured while fleeing)
		- Subsequent Injury – If you put somebody on crutches and then they slip while on the crutches, you’re still on the hook for that.
* Polemis – Direct Consequence test
	+ Whether the act could cause any harm at all, then it’s negligent and ∆ is liable for ALL harms it causes.
	+ ie: if you foresee one harm, then you’re also on the hook for non-foreseeable harms
	+ “Negligence is in the air” –Andrew’s dissent
* Wagon Mound
	+ Liable only if the particular harm was foreseeable
	+ In line with the L. Hand formula
* Palsgraf v. Long Island Railroad (fireworks on the train platform)
	+ Cardozo uses foreseeability in both duty and prox. cause
	+ Orbit of danger as disclosed to the eye of reasonable vigilance would be the orbit of duty.
* Toxic torts & Prox. Cause are tricky
	+ Super long latency (small exposure over a long time)
	+ w/drug injuries, people are sure they took the drug – harder to remember/prove exposure to a specific substance.

**DAMAGES**

* @CL Cts required phyiscal impact to recover for non-physical harm. This requisite has basically disappeared (Note 4, p.264)
	+ Ct reached back and resurrected this rule in Buckley (p.272)
* Eggshell Plaintiff Rule – If π was already fragile when you injure them, you’re on the hook for their whole damages. We don’t care what damages a healthy person would’ve incurred. ∆ could’ve foreseen that somepeople are eggshells, so we let π recover. p.395 (Benn v. Thomas)
	+ eg: You rearend somebody who already had a broken rib. They puncture a lung even though a healthy person wouldn’t have. You’re on the hook for the punctured lung.

**EMOTIONAL DAMAGES**

* @CL Categories to recover on emotional distress (top p.277):
	+ Physical impact
	+ Objective manifestation
	+ Underlying accompanying tort
	+ Special Circumstances
* Ways to get emo. distress damages:
	+ Eggshell π rule doesn’t apply to emo. damages
	+ When a ∆’s neg. could foreseeably cause, to an ordinarily sensitive person, the emotional harm that π has suffered, π should be allowed to recover. (Gammon, p.277) - Gammon wants to abandon the categories.
	+ “Zone of danger” rule in Falzone p.260
		- When π was in peril of injury, they can recover for fright
		- Requires bodily injury or sickness from fright p.263
		- Zone is defined at time and place where harm occurs
	+ Generally, πs are allowed to recover for the deceased’s fear and emotional distress just before they died (Note 8, p.266)
	+ Distress to a witness – Portee v. Jaffee factors (p.284)
		- Death or serious physical injury from ∆’s neg.
		- Marital or intimate relationship b/t injured and π
		- π must have witnessed the death/injury contemporaneously at the scene
		- Resulting severe emotional distress from witnessing injury
* Cases where Cts deny emo. relief
	+ In Metro North v. Buckley, Ct. required a physical impact and said breathing asbestos wasn’t impact – Dr. Evans thinks this is bullshit.
	+ Hospital let a kid get kidnapped during a bomb scare, Kid was returned 4.5 months later, Ct denied CoA – they didn’t see it happen, no zone of danger, etc. Johnson v. Jamaica Hospital
* Why do we like categories and a physical impact requirement
	+ Helps clarify that ∆ was in the wrong
	+ limits field of potential πs
	+ Validates that ∆ had foreseeability
	+ Validates an actual harm – helps us screen out fakers.

**LOSS OF CHANCE:**

* Prior to ∆’s negligence, π had a chance at being better off with adequate care, and ∆’s negligence caused them to lose this chance. – limited to medmal suits
* eg: Doctor fails to diagnose a cancer in patient until 5 years after it should have been detected. Cancer was treatable at year 1, but is not treatable at year 5. (Brinbaum)
* Standard of Proof = “Reasonable degree of medical probability”
	+ π must prove that injury was “more likely than not” caused by ∆’s neg.
	+ π doesn’t have to prove absolute certainty of causation
	+ Negligent Dr ∆ shouldn’t be able to avoid liability just because the outcome is uncertain.
* Damages = Total damage for the tort \* (chances for good outcome before malpractice – chances after malpractice)
* All-or-nothing rule lets π who lost a 51% chance of recovery collect 100% of death damages, & someone who lost 49% chance of recovery gets nothing.
* Generally, if π survives or gets better, no loss of chance CoA Note 5 p.363
* TX doesn’t like Lost Chance – πs have to have >50% chance of recovery @ time of malpractice to recover.

**NEGLIGENT ECONOMIC HARMS**

* When a ∆ forces you to shut down your business, we still require a physical impact to recover those damages (Madison Ave. Gourmet Foods v. Finlandia Center p.310)
* **talk about the below stuff in duty, not damages**
* 4 basic approaches to accountants’ liability (Note 3, p.304)
	+ Small group of states still require actual privity b/t parties (Nycal)
	+ Near privity (NY Rule)
		- ∆ has to know work product was to be used by a known party for a known purpose
		- “Notice Plus”
		- π must rely on ∆ to π’s detriment
		- ∆ & π must have some direct link which evidences π’s reliance
	+ Modified foreseeability (NJ) – Accountant liable to any π he could reasonably have foreseen would obtain and rely on their work, including known and unknown investors
	+ Restatement test (§552)
		- ∆ negligently supplies false info.
		- π justifiably relied on ∆’s work
		- ∆ failed to exercise reasonable care
		- Limited group of πs - ∆ must have intended for π to get info or known π was going to get it.
		- ∆ must have intended to influence π
	+ Federal Securities Law may limit a practitioner’s liability
	+ MA Cts require ∆’s actual knowledge of π’s reliance & influence in a specific transaction

**WRONGFUL BIRTH/WRONGFUL LIFE**

* Most states recognize CoA for failed sterilization procedure resulting in birth
* 3 damages paradigms:
	+ Limited Recovery
		- Dr has to reimburse for the sterilization they performed
		- Dr has to pay for re-sterilization
		- loss of wages & costs associated with pregnancy & birth
	+ Rearing costs balanced vs. benefit of having a child
		- Cts assume, because π had the kid, that they will gain a benefit from having the kid
		- Award child rearing costs minus benefit π gains from being a parent
	+ Full Recovery for rearing – 2 jurisdictions
		- NM doesn’t deduct emotional benefit, but denies emotional distress damages
		- WI declines to offset economic benefit
	+ Even limited recovery jurisdictions may award extraordinary medical expenses if the kid has some sort of serious medical condition. Full recovery jurisdictions include extraordinary medical expenses.
	+ Even limited recovery jurisdictions may award full rearing costs if the Dr is on notice that the reason the parent is getting sterilized is b/c they’re scared of having a baby with a birth defect.
* Cts unanimously reject wrongful life CoA when child π sues because he should never have been born
	+ Some may award economic damages to child when their medical condition will place extraordinary medical expenses on them as an adult.
	+ This isn’t for life-shortening conditions. Rather, for those where the kid will reach maturity and have medical expenses in adulthood.
	+ Only economic damages – no emotional

**JOINT & SEVERABLE LIABILITY**

* 6 categories of changes across jurisdictions since 1980 (p.367)
	+ ∆ only responsible for his share
	+ ∆s below threshold of fault (~50%) responsible for their own share. ∆s above that J&S
	+ CA keeps J&S for economic harms. Abolished for economic harms
	+ Some have abolished J&S where π is partly at fault but use J&S when π has no fault
	+ Some keep J&S but reallocate insolvent ∆’s liability to solvent ∆s in proportion with fault.
* All ∆s liable for entire amount, even if it’s possible to allocate damages between ∆s.

**RULES FOR MULTIPLE DEFENDANTS**

* How do we shift BOP to ∆? (top 349). 2 factors to flip burden (think in context of the drug OD case where the woman was taking a double dose of estrogen):
	+ (a) a neg. act was deemed wrongful b/c that act increased the chances that a particular type of accident would occur, and
	+ (b) a mishap of that very sort did happen.
	+ “Where such a strong causal link exists, it is up to the negligent party to bring in evidence denying but for cause and suggesting that in the actual case the wrongful conduct had not been a substantial factor.
* Joint Tortfeasors – “concerted action theory”
	+ Multiple tortfeasors acting in concert hurt π are held J&S, even if it’s possible to determine who caused the injury
	+ eg: drag racers racing through a neighborhood when one of them strikes a pedestrian
* Independent tortfeasors (no concert), traceable damages
	+ They’re not acting jointly, but both were behaving negligently
	+ Each only liable for their portion of damages
	+ eg: Jane sets a fire. Jim, independently, sets a different fire. Jane’s burns the garage. Jim’s burns the kitchen – each only liable for the damage they caused.
* 2 neg. actors acting independently, but the neg. of either could have caused the full damage
	+ Same as above, but assume fires merged and burned down the whole house.
	+ Each tort was a substantial factor in burning the house down
	+ ∆s held J&S
* 2 neg. actors, independent, neither alone was sufficient to cause the damage, but the 2 acts combined to cause a greater injury than would have been caused by the neg. of either.
	+ Jim drives his car into a support beam in a garage, but nothing happens. Later, Jane drives into the same beam. Neither alone would have brought down the roof, but together they do.
	+ Jim and Jane held J&S for entire loss of roof
* 2 neg. actors, independent, and it’s impossible to apportion responsibility b/t the 2 actors.
	+ Summers v. Tice
	+ Both J&S
* Alternative liability - ∆s not acting in concert (Summers v. Tice – 2 guys shooting in hunting accident)
	+ Burden lies with each ∆ to exonerate themselves
	+ When one cause of harm isn’t tortuous, π has to prove the tortuous ∆’s % fault.
	+ Don’t want to use alternative liability when:
		- Bunch of ∆s (vs. 2 in Summers)
		- ∆s don’t know who is at fault any more than π does
		- ∆s acting in concert.
* Market Share Theory: No concerted action needed. (Hymowitz)
	+ Apportion liability among all actors in the market in the hope that this will equitably divide liability
	+ 3 big questions under the Market Share theory:
		- What’s your market share? National? State? Local?
			* National Market problem – only works if all states are participating. – if NY uses national market share and FL uses a state market and you’ve only sold pills in FL, then you’re going to be in bad shape.
		- Do we hold ∆s severable or J&S under market share?
		- Exculpation – do we let ∆s prove “They got sick from a blue pill. Our pills are red. It couldn’t have been us!”? Jurisdictions vary.
* Industry-Wide/Enterprise Theory
	+ Independantly, everyone adhered to a negligent industry standard
	+ J&S Liability

**NEGLIGENCE DEFENSES**

* Contributory Neg.
	+ @CL affirmative defense
	+ No recovery for π if π @ all negligent.
	+ ∆ must prove all 4 neg. elements against π to succeed (we assume we owe a duty of care to ourselves, so that’s a freebie), including that π’s neg. must proximately cause π’s harm.
	+ Limitations:
		- Statutes – may bar contrib. neg. relatively few have that effect
		- Recklessness – Contrib. neg. only a defense to basic negligence, not recklessness
		- Last Clear Chance
			* Here, π must prove ∆ should have known of π’s peril while ∆ was still able to avoid harm but failed to exercise due care.
			* When ∆ had the last chance to avoid the harm
			* Triggers – when π in position of helplessness or unaware of danger
			* Chronological aspect
			* Available only in a contrib. neg. jurisdiction
		- π’s contrib. neg. is usually not imputed to others except when family members are asserting loss of consortium and wrongful death CoAs
		- Juries in contrib. neg. jurisdictions would just take it on themselves and say “π wasn’t neg.” and reduce their recovery by what they thought fair.
* Comparative Neg
	+ Pure Comparative Neg. (UCFA) – damages attributed strictly to % fault of each party
		- Parties held J&S
		- Jury determines fault % & damages
		- Obligations of insolvent parties redistributed among others (including π)
		- Liable parties can seek contribution vs. each other if (1) liability of person it’s being sought against has extinguished liability, and (2) to the etent amount paid was reasonable.
		- No-Setoff Rule – each party pays the other parties what they owe them, not the net difference. e.g. C owes A $4k. A owes C $10k. There’s $14k in med bills here. Rather than A’s insurance company only having to pay out $6k (as the case with setoff rule), A’s insurance co. has to pay C’s $10k tab and C’s insurance has to pay A’s $4k tab.
		- UCFA tends to discourage settlements
	+ Modified Comparative neg. – 2 types:
		- π can recover as long as π’s neg is “not as great as” ∆’s neg (<50%)
		- π can recover as long as π’s neg is “no greater than” ∆’s neg (less than 51%)
	+ IA statute is different from UCFA
		- π barred if π’s fault >sum of ∆’s faults (>50%)
		- each ∆ w/ >50% of total allocated fault = J&S, ∆s <50% not J&S
		- ∆s only J&S for economic damages; not non-economic
		- Doesn’t re-apportion the liability of an insolvent ∆.
	+ Pro Tanto Rule
		- TX has it, but medmal ∆s can opt-out. ∆s must unanymously agree to opt-out.
		- When one party settles, rather than the other parties’ liability being reduced by the settling party’s %, their share is reduced by the dollar amount of the settlement
		- Incentivizes being the first ∆ to settle.
	+ When setting %s, Cts consider:
		- Whether conduct was inadvertent or engaged in w/awareness of danger
		- Magnitude of risk created by conduct, including # of persons endangered and potential gravity of injury
		- Significance of what actor was hoping to achieve via conduct
		- Actor’s superior or inferior capacities
		- Particular circumstances, such as the existence of an emergency requiring a hasty decision.
* Avoidable Consequences
	+ Used during era of contrib. neg.
	+ π’s damages reduced if π failed to mitigate harm
	+ Originally, duty to mitigate was created AFTER injury.
	+ Trend now is to impose duty on π to mitigate before injury
		- Anticipatory avoidance
		- Seatbelts, motorcycle helmets, etc.
* Failure to mitigate may be failure to avoid consequences.
* Assumption of Risk and waivers
	+ Express Agreements are invalid if it exhibits some or all of the following Tunkl characteristics – this is basically you signing something that says “I know this is dangerous, and I am assuming the risk.”
		- “concerns a business of a type generally thought suitable for public regulation”
		- Service performed is of great importance to public
		- The party offers service to anyone who will accept it
		- Disparity in bargaining power
		- Gives the public a standardized adhesion K
		- Person or property is placed under control of seller, subject to the risk of carelessness. (also look @ if π is powerless to discern whether, much less ensure that ∆’s service is safe)
	+ A legitimate public interest arises when there are a substantial number of sales b/c of seller’s general invitation to the public to utilize the facilities and services in question
	+ Middle Agreements:
		- Generally where a sign is posted
		- Unilateral disclaimers are not effective unless brought to the attention of π.
	+ Implied Assumption of the Risk
		- π took part in the activity having accepted obvious and necessary dangers (the case with the “ride” on the boardwalk where the sole purpose of the thing was to make people fall down – Murphy v. Steeplechase p.470)
		- There’s no implied assumption of risk when the dangers:
			* Are obscure or unobserved, or
			* Were so serious as to justify the belief that precautions would be/had been taken to avoid them; ie: assumption of risk is not a defense when your rollercoaster cart goes flying off the tracks – the danger is sufficiently serious to justify a reasonable belief that there would be safety mechanisms in place to prevent such an occurance.
* Preemption is also a defense (next page)

**FEDERAL PREEMPTION**

* Express pre-emption – Federal statute contains explicit language stating that it trumps state tort actions
	+ Savings Clause – even if law expressly pre-empts state tort actions, there may be a term that makes an exception in which a tort is allowed
* Implied Preemption
	+ Field Preemption
		- Federal law is so comprehensive that we can assume congress meant it to supplant state tort actions
		- no direct conflict b/t state and fed. laws
	+ Conflict Preemption
		- It’s impossible to comply w/both state & fed regulations
		- Or when state tort law would inhibit the fulfillment of the purpose of the fed. law.
	+ Minimal vs. Optimal Preemption (floor/ceiling Regulation)
		- State act conflicts w/fed. objective
		- Minimal regulation (Floor only)
			* eg: “Hospitals must have X privacy, but states can require more...”
			* NOT preempted (Wyeth)
		- Optimal Regulation (Floor & Ceiling)
			* eg: “...must be X safe and states can’t set a requirement over Y”
			* YES preempted
* To analyze Statutes:
	+ 1) Look for express preemption.
		- “Standards” – State regulations and statutes are preempted (not torts)
		- “Standards and requirements” – Torts ARE preempted (along w/regulations & statutes)
	+ 2) Look for a savings clause
	+ 3) Even if there’s a savings clause, you still have to do the Implied Preemption analysis.
	+ 4) Look for Implied Preemption
		- Conflict
		- Field
		- Minimal/Optimal
* Preemption of medical suits.
	+ No preemption for drug suits (Wyeth v. Levine p.501)
	+ PMA devices are preempted(Riegel v. Medtronic p.489)
	+ 510(k) devices aren’t preempted. (Riegel v. Medtronic p.489)

**VICARIOUS LIABILITY (VL):**

* First, was there a tort committed?
	+ What type?
	+ @CL, we only got VL over negligence
	+ Not intentional torts, not gross neg., certainly not crimes
	+ VL becoming more liberalized; starting to get VL for gross neg. & some inentional torts w/in scope of work (eg: night club bouncer who gets too rough with (batters) somebody)
	+ Even w/liberalization of VL, still no VL for crimes or intentional torts outside scope of work.
* We look for a principal-agent relationship, and the when the principal is on the hook for the agent’s negligence, they can make the agent indemnify them (even though the agent is probably insolvent) (Alvarez v. New Haven Register, Inc.)
* Who committed the tort?
	+ “Borrowed Servants”
		- I have a guy come in and fix my roof at my office (IK) and my secretary helps him out. Am I on the hook if the roof collapses on somebody?
		- Look @ who the agent is under the control of – If she’s not my employee while she’s doing that work; if she’s working for the IK, then I’m off the hook.
		- Nurses are Borrowed Servants of the doctor in the OR, but modern trend is to look at them more like apparent agents under Roessler.
	+ Fellow servants rule:
		- Employee A cannot sue employer under VL for Employee B’s neg. tort.
		- Mostly irrelevant now b/c worker’s comp means employers can’t sue their boss anyway.
	+ Partners
		- Are VL for the torts of their partners (big deal for law firms)
		- “joint venture” or “joint enterprise” – can be VL for your buddy’s torts (usually in business situations, but can also apply to hold the other drag racer VL when his racing buddy hits a kid)
	+ While the employer may have committed their own torts (neglecting to properly train the employee, etc.), for VL we ignore all of that. We’re just looking at the employee’s tort.
	+ No VL of parents for their kids’ torts
	+ Employee? Are they acting within their scope of employment? We use Berkner Test to figure this out (described in Christensen v. Swensen):
		- What type of activity were they doing? – Employee’s conduct must be of the general kind the employee is hired to perform
		- Employee’s conduct must occur substantially within the hours and ordinary spatial boundaries of the employment (temporal and physical/geographic bounds)
		- Employee’s conduct must be motivated, at least in part, by the purpose of serving the employer’s interest
		- Orthodoxy of action is irrelevant if within the scope
		- “cosmetic” policies don’t protect employers – if a trucking company has a policy that drivers not drive > 6 hours, but schedules deliveries in such a way that’s impossible or if they underhandedly encourage rule-breaking.
		- Commuting b/t home and work is generally not within scope of work.
	+ Independent Contractor (Iker):
		- @CL, basically no VL for torts by Ikers. In TX, it’s basically impossible to get VL on a hospital in a med-mal where the Dr is an Iker. (hospital need only post sign that says “Our Drs are Ikers”)
		- 2 paradigmes to get VL via Iker:
			* Apparent Agency Roessler Factors (p.25):
				+ Representation – representation of agency is made by principal
				+ Reliance – π relies on the principal’s representation
				+ π suffers a change in position b/c of reliance
			* De Facto Employee (Ostensible Agency)
				+ Iker only in name. What’s really going on, basically, is that they’re an employee Look for the following:
				+ Paid a salary instead of per job done
				+ (maybe) low skilled work
				+ Don’t own their own business or tools – work at Principal’s place of business and use their tools
				+ Typically long-term workers
			* Absent Successful Birkner test or de facto employee, we may still be able to get VL on an IK if:
				+ Hired to perform an injerently dangerous activity (to use dynamite, etc.)
				+ Hired to engage in nuisance – Principal knew they’d be sued if they did it themselves, so they hired it out to try to dodge liability
				+ Non-Delegable duties. Sometimes you’re responsible for something and can’t K out that liability (eg: your brakes are tricky. You hire a mechanic to fix them. You’re still on the hook if you drive your car the next day and cause an accident).

VL Rundown:

1. First and foremost, always remember, whenever you’re working a VL problem, to ALSO TALK ABOUT THE NEGLIGENCE OF THE PRINCIPAL! ie: “While Agent was negligent, resulting in π’s injuries and we’re about to talk about VL for Principal b/c of that, Principal may also have been negligent in their own right by hiring Agent, by not having policies in place to prevent this injury,” etc.

2. Was it negligence or an intentional tort?

3. Was the tortfeasor an employee or Independant Contractor (IK)?

Employee – Berkner

IK – Either Roessler (Apparent Agency), de facto employee, or one of the 3 special circumstances (hired for danger, hired for nuisance, nondelegable duty)

4. Principal can sue Agent for indemnity.

VL Cases:

*Christensen v. Swensen* (SC UT 1994) (J. Durham) (p 18) - On return trip from her lunch break, was involved in auto accident

* Was she acing within the scope of duties & in the ordinary spatial boundaries of employment while going to & from the cafe?
* Breaks benefit both the employee & employer, break policy places premium on speed & efficiency – so there is a question of fact for the jury

*Roessler v. Noval* (Fl. Ct. App 2003) (J. Salcines) (p 24) - Radiology department & Dr. Lichenstein were contracted by hospital

* Radiology department (contractor) was physically located in the hospital; Exclusive provider to the hospital
* If these physicians act with apparent authority of the hospital the hospital may be held vicariously liable
* Non-delegable duty may also apply – vicariously liable for activities within the hospital for which the patient cannot & doesn’t have an opportunity to “search the market”
	+ Hospitals have a non-delegable duty to provide a radiology department for its patients
	+ Patient doesn’t have the ability to “shop the market”

**PREMISES LIABILITY**

* Premises owners can never booby trap their house (Katko v. Briney p.952)
* @CL SoCs:
	+ Invitee – must protect from both known dangers & those that would be revealed by inspection
	+ Licensee – must protect against known dangers (ordinary SoC)
	+ Trespassers – no duty
* 2 ways to make a licensee an invitee:
	+ “Business Visitor” – invited to convey material benefit to host
		- Plumbers, electricians, contractors, etc.
		- Customers
	+ “Throw open” premises to public in such a way as to imply a warranty of safety
		- Hosting bible study doesn’t change guests from licensees to invitees (Carter v. Kinney p.188)
* Heins v, Webster County (visitor π slips on snow while visiting friend in ∆’s hospital) (p.194) & Rowland v. Christian want to de-emphasize invitee/licensee distinction:
	+ Say we owe everybody a standard of reasonable care, except for trespassers
	+ Some Cts distinguish b/t regular trespassers and flagrant trespassers (those there to commit a crime) (CA & R§3rd)
	+ Only 10 states lump trespassers in & require reasonable care
	+ Factors for Iding reasonable care:
		- Foreseeability or possibility of harm
		- Purpose for which entrant entered premises
		- Time, manner, and circumstance under which the entrant entered the premises
		- The use to which the premises are put or are expected to be put
		- The reasonableness of the inspection, repair, or warning
		- The opportunity and ease of repair or correction or giving of the warning, and
		- The burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.
* Same standard of care should be provided for all users of public facilities (McCurry v. YMCA)
* Businesses owe duty to patrons to take reasonable measures to protect patrons from foreseeable crimes (Posecai v. Wal-Mart p.204); foreseeability standards:
	+ (1) Specific Harm Rule: Landowner (L) must be aware of specific imminent threat
	+ (2) Prior Similar Incidents: Previous crimes establish foreseeability
	+ (3) Totality of circumstances Test: look @ relevant factors like crime and demography in area
	+ (4) Balancing Test: Balance likelihood & severity of harm vs. burden to protect (like Hand’s formula)
	+ Ct in Posecai likes (4) – says no duty to protect b/c 2/3 previous incidents were weird, and only 1/3 were similar . So not foreseeable.
	+ Looking at Posecai via Rowland factors:
		- We look @ foreseeability – only 1 similar incident in 9 years, so this injury wasn’t foreseeable
		- Looking at alternatives; maybe Sam’s could’ve hired a guard, posted a sign, or taken an insurance policy for their patrons.
* Premises liability claims are against owners & possessors of land. Not from active operations on the property – when my movers drop my piano on your foot, look @ general negligence CoA rather than premises liability.
	+ Similarly, don’t look to premises liability when suing a third party who came on to my property and committed a tort

**STRICT LIABILITY**

* For SL, Still need duty, causation, & injury, but no need for SoC or breach.
* Diff b/t Neg. & SL:
	+ SL is status-focused
	+ SL – π proves knowledge of harm existed in the industry. For Neg., π must prove specific ∆ knew or should have known about danger (p.624)
* Categories:
	+ Wild animals
	+ Explosives
	+ Unnatural tampering w/land (Rylands v. Fletcher p.507)
	+ Escaped Livestock
* Public policy arguments for SL:
	+ While Neg. helps us motivate people to do things right, SL makes ∆s consider whether to do the activity in the first place
	+ SL helps fix problems w/L. Hand’s neg. formula
* Goals of SL:
	+ Fairness
	+ Administrative Efficiency
	+ Individual Autonomy
	+ Deterrence/Loss avoidance
	+ Loss-spreading among responsible businesses
	+ Loss allocations among industry
* Government contractors who follow gov. specs aren’t SL.

**PRODUCT LIABILITY**

* Manufacturer “in the business” incurs absolute liability when:
	+ Places product in the market
	+ Knowing that it is to be used w/o inspection
	+ Product proves to have a defect causing injury
	+ Some non-sellers subject to SL (commercial lessors, free samples, note 6c p.565
* Manufacturers have non-delegable duty for consumer safety.
	+ No requirement for privity of K – liable to anyone who comes into contact w/product; not just original buyer. (MacPherson v. Buick p.551)
* Bystanders also have CoA vs. manufacturers (ie: when your broken car veers off the road and hits π, π can sue the maker)
* π’s barriers to NIED don’t apply when π is a product user (vs. being a bystander (Note 9, p.567)
* Some products are necessarily defective (when there’s no RAD & product is of minimal use & benefit), even w/sufficient warnings. ie: above ground pools
* NJ has stepped in and said no liability when no RAD unless:
	+ product is ultrahazardous;
	+ ordinary consumer can’t be expected to know of risks; and
	+ product is of little or no usefulness
* Restatement 2nd vs. 3rd Product Liability
	+ R2nd uses consumer expectation standard
	+ R3rd uses Risk-Analysis – πs have to show a RAD to win.
* Courts are moving away from “unreasonably dangerous” definition for design defects toward a more strict “whenever there’s a defect that causes injury, ∆ is liable.” (Cronin). Barker summarizes how to ID defective products on p.572, but it’s a 5-part test; less exhaustive than Ortho factors
* Subsequent remedial measures can’t be used as evidence of a defect in any jurisdiction
	+ e.g. π can’t prove CoA by saying “See? It is dangerous! They changed it a year later!”
	+ Public Policy – don’t want to penalize mfgers for making things safer.
* 3 types of defects:
	+ **Manufacturing Defect** – product differs from how mfg’er intended it to be.
		- Dangers are almost always latent
		- May also be a CoA under negligence
		- Consumer Expectation Test
	+ **Design Defect**
		- (Can also sue for Neg.)
		- 3 elements:
			* 1) Product was made as intended to be
			* 2) But is not reasonably safe, and
			* 3) Alternative design would have made the foreseeable risk reasonable
		- Product only needs to be safe for intended consumers - you don’t have to make your miter saw safe for a 4 year old. (Note 10 p.608)
		- 2 different tests:
			* Consumer Expectation Test (Soule v. GM):
				+ Product didn’t perform as safely as an ordinary customer would expect
				+ Defect existed when it left mfger’s possession
				+ Defect caused π’s injury
				+ Product was used in a reasonably foreseeable manner
			* Reasonable Alternative Design – If Defect wouldn’t be clear to a normal person. Weigh the following factors (Ortho factors p.588):
				+ Product’s utility to the user and general public
				+ Likelihood product will cause injury and probably seriousness of injury
				+ Availability of safer substitute product
				+ Mfger’s ability to make safer while preserving utility and cost
				+ User’s ability to avoid danger with due care
				+ User’s awareness of dangers injerent in product and their avoidability in light of public knowledge or warnings/instructions
				+ Feasability of spreading loss by raising price
	+ **Failure to Warn**- product risks should have been disclosed
		- Can also be neg. CoA
		- No duty to warn of open and obvious dangers
		- Issue is the adequacy of the warning. Must:
			* Indicate scope of danger
			* Reasonably indicate extent or seriousness of harm
			* Physical aspects must alert a normally prudent person
			* Indicate consequences of not following
			* The means used to convey the warning are important.
		- Heeding presumption is a potential defense – rather than π having the burden to prove they would have heeded a more adequate warning– Mfger must show user would not have followed adequate warning
		- Addressee – Must be written in a way to inform the likely user of the product. – may not have to warn when your users are sophisticated (Note 7 p.606)
		- ∆s may be able to warn of defect instead of fixing it – makes danger open & obvious (Note 8, p.607)
		- Learned Intermediary Doctrine provides that there’s no CoA against drug mfg’ers for failing to disclose. They are immune from suit by virtue of telling the Dr (it’s doc’s job to tell you)
			* Jurisdictions are split on this. Some take a more modern view that since drug companies are marketing direct to customers, they should have to warn customers. (State v. Karl p.610)
			* There’s an exception to the doctrine for when the mfger knows or has reason to know the doc will not be in a position to provide adequate warning
			* No learned intermediary doctrine for devices.
		- Do we hold ∆s liable for failing to disclose risks they didn’t know and had no reasonable way to know? (Vassallo v. Baxter p.620)
			* R§ “State of the art” rule – mfgers only have a duty to warn of the dangers they are or should be aware of.
			* (old) hindsight rule - ∆s liable for not disclosing dangers even when they had no way to know of dangers.

**DEFENSES TO PRODUCT LIABILITY**

* Comparative Negligence (GM v. Sanchez p.628)
	+ πs aren’t comp. neg. simply for failing to discover or guard against defect, but other acts/omissions beyond failing to discover/guard may trigger comp. neg.
	+ Unforeseeable Misuse
	+ Subsequent Alteration (Design & manufacturing defect)
	+ Common Knowledge (Failure to Warn)
* Subsequent modification can’t be used as evidence against a ∆. We want mfgers to continue to make their products safer, so a π can’t say “see? It was defective! you can tell b/c they changed it to make it safer!”
* Preemption
* “Open & Obvious” kills a failure to warn case
* Disclaimer/Waiver – may waive neg. but not SL
* Causation – Old, worn out product
* No Reasonable Alternative Design (Design Defect)
	+ “Irreducably unsafe products” – knives
	+ May not be a defense if product doesn’t provide societal good (NJ)
* Statutes of Repose (SoL) – clock starts when product is sold (sometimes when mfgered)
* While there’s a duty foresee misuse, there’s not usually a duty to foresee modification. (some jurisdictions hold ∆ liable when the product “invites modification.”)
	+ But mfgers should put warnings on the dangerous parts instead of removable guards and stuff.
	+ When π worked at a grocery store that’d removed a guard to a meat grinder (and the guard is what had the warnings on it), he was sucessful vs. the mfger for failure to warn (Liriano v. Hobart Corp. p.641)
* In almost every jurisdiction, hospitals are service providers; not retail sellers of products (p.655)
	+ Usually the same for mechanics
	+ Same sort of analysis as when IDing a sale of goods in a K case
* Some people not usually subject to SL (Note 6 p.564-566) (but you can still get them on neg.
	+ Used good sellers
	+ Irregular Sellers (craigslist, ebay sellers, etc.)
	+ Successors (when one business buys another business including their assets – may or may not be SL – pray to God she doesn’t test on this. if she does, look at the note, part b.
	+ Government Contractors are immune from design defect suit as long as they meet gov. specs.

**WHEN YOU CAN SUE THE GOVERNMENT**

* Schools owe a duty to keep kids on campus, and the kids are invitees.
* A municipality must owe the π a particular duty, greater than that owed to the public at large, for there to be an actionable duty (Lauer v. City of N.Y. p.237)
* Coroner fucked up the autopsy for π’s kid. Negligently called it a homicide. Guy was fingered for his kids murder for week because coroner negligently failed to file the corrected form like he was supposed to.
* No duty. No CoA.
* **Federal Tort Claims Act (FTCA) p.248 (see chart a few pages below here)**
	+ Can’t sue the gov. for discretionary duties. Only Ministerial FTCA§2680(a)
		- But not if gov. employee was acting w/due care – making good faith effort to follow instructions
		- Still allows suit if they negligently failed to follow suit
		- Basically, you can sue for ministerial acts done (or not done) sloppily – if they’re meeting statute or doing a good job of trying, no suit
	+ Have to sue in fed. court
	+ No Jury
	+ Can only sue for neg. acts & omissions (w/in scope of office) when a private person doing the act would also be liable
	+ Can’t sue for discretionary acts – even if they’re abusing discretion. Cts have carved out an exception to this rule:
		- Non-policy-related discretionary acts may be actionable
		- ie: those that don’t involve cost-benefit analysis, trade-offs made subject to budgetary constraints, or evaluating interests between different groups of people.
		- Example of policy decision: Whether to put up street signs, where to put them up (these implicate budget). Non-policy example: Whether to make signs green or blue (no cost-benefit implications)
	+ No interest, no punitive damages – attorney fees up to <=25% of judgment
	+ Specifically excluded (can’t sue for):
* 2680(b) loss or fuckups in the mail
* 2680(i) fiscal operations of the treasury or fiscal regulations
* 2680(j) combatant activities during war
* 2680(k) any claim airising in a foreign country

**FTCA FLOWCHART**

**INTENTIONAL TORTS:**

* **Intent**
	+ Act for the purpose of producing a particular outcome, or
	+ Act knowing outcome is substantially likely to occur (Garratt case p.898 where the 5 y/o moves the chair)
* Consent is a prima facie element of Battery & False Imprisonment, and a defense against all intentional torts.
* Transferred intent – if you intend to commit a tort against A but B is injured, intent is still proven.

**Assault**

* + Elements:
		- ∆ intends to cause harmful or offensive contact (or create apprehension of harmful or offensive contact)
			* Actual contact not needed
			* Words alone are NOT typically sufficient
			* Transferred intent applies
			* No assault when ∆ creates fear in π for a third party. π must fear for himself.
		- π put in apprehension, believing such contact is imminent
			* Reasonability of fear is either subjective or objective (depends on jurisdiction)
			* When π is unusually brave, we use subjective standard and there’s no assault.
	+ Words can negate an assault
	+ Conditional assault – if ∆ says “Pay me $100 or I’m going to stab you,” π isn’t obligated to comply. Still an assault.
	+ Reality of threat – ∆ must appear to have apparent, present ability to cause harmful or offensive contact.
		- Sometimes shaped by norms (eg: “I’m going to break the leg on this voodoo doll and your leg will break” is only assault if π is of a culture that would take such a threat credibly)

**Battery**

* + Elements:
		- ∆ intended to do the act and/or created apprehension of contact
			* Intent doesn’t mean bad motives – You can batter by slapping someone on the back with friendly intent. You just have to intend to do the act.
			* Note: ∆ doesn’t have to intend to create contact. Can also intend to create apprehension. If I am assaulting you by pointing a gun at you and it accidentally goes off, that’s still battery.
		- Offensive OR harmful contact
			* Touching the π, their clothes, anything attached to them, ordering somebody else to touch them (“indirect touching”), or setting a chain of events in motion (pulling the chair out from under someone or poisoning them)
		- No consent (implied or express) (Consent is part of prima facie case – not a defense, so π has to demonstrate lack of consent)
			* Implied consent – “What would a reasonable ∆ have inferred from the π’s actions?” (Doc asks if you want a vaccination, you pull up your sleeve and hold out your arm)
			* Can come from custom (tapping on shoulder to ask for directions)
			* When consent is achieved via a deception involving a “misrepresentation about the essence of the touching,” it is invalid and a battery has occurred (“Let me touch you. this won’t hurt at all.” “Ok.” \*punch\*)
			* When deception involves a misrepresentation about a collateral matter, it doesn’t negate consent and there is no battery. (eg, “Let me touch you and I’ll give you $100” and then I don’t give you the money)
			* Consent procured via duress is invalid
	+ If you’re in a fight, you’re consenting to the relevant level of injury. If one party kicks it up a notch, there’s no longer consent.
	+ Can also batter by touching anything attached to a person (Picard v. Pontiac where woman was battered b/c guy touched her camera p.904)
	+ Doesn’t require injury; can also be an offense to dignity. May withhold relief for unduly sensitive πs (Wishnatsky v. Huey p.907)

**False Imprisonment:**

* + Elements:
		- ∆ has intent to restrain or confine π
		- Actual confinement occurred in a limited physical area (No reasonable apparent means of escape)
			* Words are usually not enough to constitute imprisonment (Lopez p.911)
			* Threats of future actions aren’t false imprisonment. Need assertion of authority, force, or imminent threat
		- No consent
		- π is aware of confinement (OR π was injured. Injury can be substituted for awareness of confinement)
	+ Shopkeeper exception – can confine suspected shoplifters for reasonable time so long as they don’t use physical force
	+ Cops:
		- @CL, even cops had to have a warrant to arrest ppl for misdemeanors. For ctzn’s arrest, you needed:
			* To witness the crime &
			* Perp. would have to subsequently get arrested
		- Malicious Prosecution – cop has a valid warrant, but cop faked evidence or cooked docs to get the warrant.
		- False/Wrongful Arrest – arrested when there’s no valid warrant.

**Intentional Infliction of Emotional Distress (IIED):**

* + Elements: (Womack v. Eldridge p.919)
		- ∆ has intent
			* Subjective intent - ∆ deliberately intended to cause π’s distress, or
			* ∆ acted with substantial certainty his actions would cause distress, or
			* ∆ acted with reckless disregard of the probable consequences of his/her behavior
		- ∆’sconduct was extreme or outrageous
			* Look @ social norms
			* Exception: Can be IIEED even w/in social norms if it’s outrageous b/c ∆ knows of π’s special sensitivity
		- ∆’s behavior caused severe emo. distress (requiring meds or treatment) – mere humiliation, fear, or embarrassment is insufficient.
			* Exception – in special relationship, ∆ can be on the hook absent total emo. meltdown.
				+ Common carriers, landlords, hotels, public utilities, fiduciaries, special trust relations
				+ But not all businesses (ie: department/drug stores)
	+ No transferred intent for IIED
		- exceptions: unintended victim is a family member of the intended victim or π suffers bodily harm

**Defenses to Intentional Torts:**

* Consent
	+ Can’t be obtained via misrepresentation
	+ Can’t be obtained via duress
* Privilege
	+ Self Defense
		- Reasonable amount of force (can’t use Deadly Force unless you reasonably fear DF against you or srs bodily harm.
		- @CL escape exception – can’t use DF if you have option to retreat.
		- Exception to @CL exception – you have no obligation to retreat from your home.
	+ Transferred privilege – if you’re being attacked and you accidentally push a 3rd party instead of your assailant.
	+ Defense of third party
		- Some jurisdictions hold you liable if you make a mistake when defending a third party (ie: you jump in to defend the bad guy, accidentally assault an undercover cop, etc.)
	+ Defense of property – can’t use DF, but can pursue & try to recover property. Conditions:
		- Taking of property must be illegal
		- Must be in fresh persuit (Can’t show up at the guy’s house the next day)
		- Asking for the property back must be useless
		- You’re allowed to threaten DF (which would otherwise be assault)
		- You can’t booby trap your house to protect your property (Katko v. Briney p.952)
	+ Common Interest Privilege – Communications b/t ppl w/common interest = privileged (unless malicious or reckless))
	+ Employer References (p.1015), 3 factors (Erickson v. Marsh & McLennan:
		- The appropriateness of the occasion on which the defamatory information is published
		- The legitimacy of the interest thereby sought to be protected or promoted, and
		- the pertinence of the receipt of that information by the recipient
	+ Credit Reports are privileged (but FCRA provides some consumer protections)
* Immunities
	+ @CL immunities:
		- Spousal – gone now
		- Parental – gone now
		- Governmental – still kickin’
		- Charitable – gone now

**DEFAMATION**

* Elements:
	+ ∆ published a communication
		- single publication rule – don’t look @ each copy sold. Rather, 1 edition = 1 CoA. (When hardcover ed. comes out after paperback as a different edition, there’s a new CoA).
		- Don’t need intent to publish; if you leave it somewhere with the expectation that somebody will find it, that’s sufficient.
		- Since a telegram is an “urgent” communication, when π’s wife reads it even though it was addressed to π, that’s publication – it was expected that she would read an urgent communication.
		- Publishing to the π isn’t publication.
		- It’s not a publication if it’s against your will. Someone steals your private diary in which you’ve defamed π? Not a publication.
	+ Statement of fact
	+ Communication concerned
	+ Communication was false
		- Part of prima facie case – π must prove communication was false.
	+ Communication was defamatory
		- Restatement Definition –
			* Tends to harm the π’s reputation, so as to lower the π in the estimation of the community, OR
			* Tends to deter third parties from associating with π. (community standard)
			* If you falsely publish that a scumbag is not a scumbag, and scumbag sues for reducing his cred in the scumbag community, not defamatory.
		- If there’s only one possible meaning of the publication and that meaning is defamatory, then it’s defam. as a matter of law. Q of fact comes in when there’s >1 potential meaning.
		- “Innocent Construction Rule” (IL) – If there’s a non-defamatory meaning, we assume that’s the meaning.
		- Letter of discharge isn’t defamation, even if employee has to explain it to prospective employers
		- Headlines & photo captions are sometimes read in the context of the surrounding text.
		- Calling someone gay was actionable in 1984 – may or may not be now (Matherson v. Marchello p.996)
	+ Person receiving communication understood it to be about π and understood it to be defamatory (reasonable reader std)
		- When you’ve got a big group that’s being defamed, it may not be possible to establish the writing was about any particular π.
			* Look to size of group (25 is probably small enough to have a CoA; 382 was too big)
			* Also look at language; “Some of them” vs. “one of them” vs. “all of them”
		- If the recipient of a communication about A mistakenly thinks it’s about B, A has no CoA.
	+ ∆ was guilty of fault
	+ Communication proximately harmed π
* **Different standards**
	+ Private citizens need only show negligence
		- if somebody makes a false statement, thinking it’s true, you can still win. ∆ would argue they took reasonable steps to ensure truth.
	+ Public figures & celebrities must show malice
		- ∆ knew it was false or acted w/reckless disregard for truth
		- New York Times Malice Standard
	+ Look at prvt citizens vs. limited-purpose public figures va. public officials kinda like premises liability πs re: different SoCs (invitee/licensee/trespasser)
		- Public Officials – all elected officials, appointed gov. officials, and public employees w/significant visibility or responsibilities
		- All-purpose public figures = People of persuasive power and influence (movie stars, athletes, cultural icons, etc.)
		- Limited-Purpose Public Figures = non-famous person who thrusts themself into the news with respect to a particular issue (eg: becomes advocate for an environmental issue)
* Inducement = claim by π that facts outside of text give text a defamatory meaning
* Inuendo – not fact; how π says text is interpreted by someone who knows the inducement.

**DEFAMATION DAMAGES:**

* + Special Damages – quantifiable (lost wages, etc.)
	+ General damages = hurt reputation, etc.
	+ @CL, Slander required Special Damages in order to collect general damages, while Libel did not.
	+ The modern trend is to not require special damages except for libel (NY Rule), but sometimes jurisdictions will still require special damages for libel unless (Note p.1005)
		- Defamatory sting clear on face, or
		- If not clear on its face, then the defamation would be libel per se w/extrensic facts (inducement)
* Slander v. Libel:
	+ @CL, Slander was spoken and Libel was written. New technology has forced us to reevaluate this distinction.
	+ Modern trend is to treat mass broadcasts and recorded speech as libel
* Libel per se – written, defamatory on its face, no special damages needed
* Libel per quod – written; not defamatory on its face – requires extrinsic evidence to be defamatory. No special damages required. The term libel per quod has nothing to do with special damages.
* Slander per se: Spoken, no special damages, 4 categories:
	+ Saying π committed a crime (serious crime/felony)
	+ Allegations affecting π’s business (requires more terpitude – saying π is a bad businessman is insufficient)
	+ Alleging serious sexual misconduct
	+ π has a “loathsome disease”
* Slander per quod – spoken defamation outside of 4 per se categories; must prove special damages.

**DEFAMATION DEFENSES:**

* + Absolute Privilege (no matter how false or defamatory):
		- Things said between spouses
		- Judicial proceedings (judges, witnesses, & attorneys)
		- Speech & Debate clause protects congressmen in the course of legislative activities & federal officials (Secretary of State)
		- Most states give privilege to high state officials (governor)
	+ Conditional Privilege (π must show malice – known false or reckless disregard to truth to succeed, even if π is a private person –
		- Lower state officials
		- Letters of Recommendation for job applicants
		- Reporting crimes to police
		- Credit Reports
	+ Consent

**PRIVACY TORTS**

**Unreasonable intrusion on a person’s seclusion**

* + Elements:
		- “One who intentionally intrudes, physically or otherwise,
		- Upon the solitude of another, or his private affairs and concerns, is subject to liability to the other for invasion of his privacy
		- If the intrusion would be highly offensive to a reasonable person”
		- Note: No publication requirement
	+ eg: bugging someone’s home

**Unreasonable Publicity given to a person’s private life**

* + Elements (R2nd):
		- “One who gives publicity to a matter concerning the private life of another is subject to liability for invasion of his privacy,
		- if the matter publicized is of a kind which:
			* would be highly offensive to a reasonable person, and
			* is not a matter of legitimate concern to the public”
			* (& isn’t a matter of public record)
		- If the publication is newsworthy, then π has no CoA.
	+ No false statement required
	+ Even if it was newsworthy when it happened, we want to encourage people to rehabilitate, so republishing an old irrelevant private fact about somebody who is no longer newsworthy would be actionable

**Placing a person in a false light**

* + Elements (R2nd):
		- “One who gives publicity to a matter that places a person before the public in a false light is subject to liability to the other for invasion of his privacy, if
			* the false light in which the person was placed would be highly offensive to a reasonable person, and
			* the actor had knowledge of or acted in reckless disregard (NYT Malice std here) for the falsity of the published matter and the false light in which the other would be placed”
	+ Distinction from defamation:
		- Can include matters not defamatory enough to be defamation; eg; publishing that somebody’s kids are going hungry following the death of their spouse. Even though being poor is not defamatory, this could be very objectionable.
		- False light can be true – if they take something you actually did say or do out of context to paint you in a particular way.
		- Reckless disregard std must be proved by all parties (public and private)

**Appropriation of a person’s name or likeness**

* + Elements:
		- “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”
	+ This tort protects both the dignitary interest as well as the commercial property rights.
	+ After death, their heirs may assert this CoA
	+ This tort doesn’t typically run into constitutional free speech issues.

**HARMS TO ECONOMIC INTERESTS**

* **Deceit** (Intentional)
	+ Elements:
		- ∆ made a misrepresentation of an existing fact
			* Broken promises are not deceitful (ie: “I think we’re going to have a good quarter coming up.”) unless ∆ knew he didn’t intend to carry through.
			* Representation of the ∆’s current state of mind can be an existing fact. ie: “I think this painting is beautiful and if you ever wanted to get rid of it, I’d probably buy it from you” is actionable when ∆ hated the painting and never wanted to see it again and π bought it in reliance on ∆’s representation
		- Fact was material
		- Intent requirement: ∆ intended to induce reliance from π (or from a class to which π is a member)
			* ∆ has to make misrepresentation to π. If π overhears it, no CoA.
			* Courts starting to liberalize and allow unintended πs, but still much more reluctant than with intentional torts that cause physical harm to unintended 3rd parties.
		- Scienter requirement: ∆ knew the statement was false or had reckless disregard for its truth or falsity
			* 1) Knew it was false,
			* 2) Without belief in its truth,
			* 3) Reckless disregard for whether it was true or false
			* An honest belief in truthfulness of a statement, even if it’s not true, keeps it from being fraud.
			* Often have to look to “would a reasonable person have honestly believed this?”
		- Detrimental reliance by π
			* Must be reasonable and justifiable
			* Sometimes look to power of parties – a commercial buyer may be expected to do their own independent research where we might not expect an unsophisticated buyer to do so.
			* Even unsophisticated buyers are expected to know when a seller is using salesmanship
	+ **When you can have deceit by silence:**
		- Special or Fiduciary Relationship - ∆ may have duty to disclose all material facts (eg: lawyers, trustee of estate)
		- Concealed Defects – if Seller knows of a defect that wouldn’t be discovered by reasonable inspection, seller has a duty to disclose
		- Partial disclosure – Even when ∆ had no duty to say anything, making a partial disclosure can create a duty to fully disclose. eg: if you disclose 1 or 2 problems with a car you’re selling, you may have duty to disclose all defects if the partial disclosure would leave the buyer with a false impression that those were the only problems.
		- Misrepresenting the law:
			* @CL, misrepresentation of the law was not actionable
			* Modern trend – distinguish statements of fact about the law (“the law says you can pick flowers from other people’s yards”) as being actionable and opnions of law (“I interpret this law as letting you pick flowers...”) as not actionable.
			* Even in jurisdictions that don’t generally treat misrepresentations of law as fraud, a fraud may still be found if: (a) disparity in knowledge that ∆ is trying to exploit, or (b) fiduciary relationship or trust
	+ Damages can vary:
		- “Out of pocket” damages – π recovers the amount he lost by making the transaction vs.
		- “Benefit of Bargain” damages – π gets what he would have received had the deal been as represented by ∆
* **Negligent Misrepresentation**
	+ Elements:
		- ∆, in performance of his/her trade or profession
		- Negligently provided erroneous info.
		- Which is used by the π to π’s detriment
	+ eg: Accountant misses a major liability of company B while preparing an analysis for a buyout for company C.
	+ Privity of K is not a requirement, however:
		- Absent privity, ∆ must know that π is going to rely on the info.
* **Interference with K Relations**
	+ Elements:
		- π had an existing K with a 3rd party
		- ∆ knew this
		- ∆ intentionally interfered w/that K
	+ Occasionally, ∆’s acts may be privileged, but business competition is usually not privileged.
* **Interference w/Advantageous Relations**
	+ Non-contractual relations that offered a prospective benefit to π
	+ eg: Interfering with Grandpa’s making of a new will which would have favored π.
	+ Very rare

**SHIT THAT SHE INDICATED WOULD BE IMPORTANT:**

**-Note 5, p.77 – R§286 – defenses to neg. per se.**

* + R§286 stipulates that the reg. in question must be found to:
		- (a) to protect a class of persons to which the π belongs
		- (b) to protect the particular interest ∆ has invaded
		- (c) protect that interest against the type of harm that has resulted, and
		- (d)to protect that interest against the particular hazard from which the harm results

**-For Informed Consent problems, talk about all 3 torts**

* + - Medmal for care below SoC, IC/Battery, and Neg. IC for IC below SoC
		- See Informed Consent page

**-If there’s a question re: Duty, go to Rowland Factors p.157**

* Foreseeability of harm to π
* Degree of certainty that π suffered injury
* Closeness b/t ∆’s conduct & π’s injury
* Moral blame attached to ∆’s conduct
* Public policy of preventing future harm
* Extent of burden to ∆ and policy implications of such liability
* Availability, cost, and prevalence of insurance for the risk involved

**-R§390 – Entrustment**

* Entrustment: One has a duty not to supply someone something, having knowledge that because of youth, inexperience, or otherwise the other is likely to use it in a manner involving unreasonable risk of harm to self or others (Vince v. Wilson, Restatement (Second) of Torts § 390). However, social hosts have no duty to a third-party victim of a minors after the host supplied the minor alcohol—they are only liable to the minor (Reynolds v. Hicks.)
* See Negligent Entrustment page

**-Know how to work a problem as per note 3 p.304 (Negligent economic harms re: privity)**

* 4 basic approaches to accountants’ liability (Note 3, p.304)
	+ Small group of states still require actual privity b/t parties (Nycal)
	+ Near privity (NY Rule)
		- ∆ has to know work product was to be used by a known party for a known purpose
		- “Notice Plus”
		- π must rely on ∆ to π’s detriment
		- ∆ & π must have some direct link which evidences π’s reliance
	+ Modified foreseeability (NJ) – Accountant liable to any π he could reasonably have foreseen would obtain and rely on their work, including known and unknown investors
	+ Restatement test (§552)
		- ∆ negligently supplies false info.
		- π justifiably relied on ∆’s work
		- ∆ failed to exercise reasonable care
		- Limited group of πs - ∆ must have intended for π to get info or known π was going to get it.
		- ∆ must have intended to influence π
	+ Federal Securities Law may limit a practitioner’s liability
	+ MA Cts require ∆’s actual knowledge of π’s reliance & influence in a specific transaction

**-When you’ve got multiple ∆s, burden can be flipped to ∆s to exonerate themselves**

* + How do we shift BOP to ∆? (Cardozo, top 349). 2 factors to flip burden (think in context of the drug OD case where the woman was taking a double dose of estrogen):
		- (a) a neg. act was deemed wrongful b/c that act increased the chances that a particular type of accident would occur, and
		- (b) a mishap of that very sort did happen.
		- “Where such a strong causal link exists, it is up to the negligent party to bring in evidence denying but for cause and suggesting that in the actual case the wrongful conduct had not been a substantial factor.

**-The 3 big questions in Market Share Liability:**

* Do we use a local/state/national market share?
* Several Liability or J&S?
* Can ∆s exculpate themselves by showing they didn’t cause that particular π’s injury? (our pills are blue. We didn’t sell in that market. We didn’t market that drug for that use)
* Hymowitz v. Eli Lilly p.372 – NY Court goes with (1)national, (2)several, & (3) ∆ can only exculpate by showing it didn’t market for pregnancy use.

**-5-6 judge-made rules for things that are categorically intervening causes and not superseding.**

* + - Danger inviting rescue – If somebody gets hurt trying to rescue the π you injured, you are liable to them
		- Time – While tort SoL starts to run @ injury, some jurisdictions have lengthened window for injuries that may be hidden or take a while to manifest
		- Eggshell π – having something happen to somebody fragile in the chain doesn’t break the chain
		- Medmal – Medmal is foreseeable and doesn’t break chain
		- Ambulance accident – intervening, not superseding.
		- Intervening reaction/protection forces - ∆ liable for peoples’ reactions to the act (e.g. somebody injured while fleeing)
		- Subsequent Injury – If you put somebody on crutches and then they slip while on the crutches, you’re still on the hook for that.

**-Read the TX Comparative Neg. statute she sent out (Pro Tanto Rule)**

* Pro Tanto Rule
	+ TX has it, but medmal ∆s can opt-out. ∆s must unanymously agree to opt-out.
	+ When one party settles, rather than the other parties’ liability being reduced by the settling party’s %, their share is reduced by the dollar amount of the settlement
	+ Incentivizes being the first ∆ to settle.

**-Neg per se defenses R§288 – Statute doesn’t become the SoC when the statute is there... (from the notes after Tedla v. Ellman)**

1. to protect the interests of the state or any subdivision of it as such, or
2. to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public, or
3. to impose upon the actor the performance of a service which the state or any subdivision of it undertakes to give the public, or
4. to protect a class of persons other than the one whose interests are invaded, or
5. to protect another interest than the one invaded, or
6. to protect against other harm than that which has resulted, or
7. to protect against any other hazards than that from which the harm has resulted.

**-Note 5 p.141** **- Undertaking**

* R2nd§324 – one who has no duty to do so takes charge of another who is helpless is subject to liability caused by:
	+ a – failure to exercise to reasonable care to secure the safety of another while within their charge, or
	+ b – the actor’s discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge
	+ If you pull somebody out of a trench filled with mustard gas, you’re liable for leaving them in the middle of the road, but maybe not on the sidewalk?
	+ R3rd requires reasonable care when discontinuing aid

**-Merging Premises Liability Categories - Notes after Heins (195-204)**

* + Say we owe everybody a standard of reasonable care, except for trespassers
	+ Some Cts distinguish b/t regular trespassers and flagrant trespassers (those there to commit a crime) (CA & R§3rd)
	+ Only 10 states lump trespassers in & require reasonable care
	+ Factors for Iding reasonable care:
		- Foreseeability or possibility of harm
		- Purpose for which entrant entered premises
		- Time, manner, and circumstance under which the entrant entered the premises
		- The use to which the premises are put or are expected to be put
		- The reasonableness of the inspection, repair, or warning
		- The opportunity and ease of repair or correction or giving of the warning, and
		- The burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.

**-Doctors’ duties to third parties - Notes after Tarasoff (p.156)**

* Look primarily to foreseeability and whether ∆ is specific and identifiable (warnings to the general public won’t do much good).
* Subsequent legislation after Tarasoff lets Drs satisfy their duty to warn by telling potential victim or victims and law enforcement.
* CA protects Drs who tell family members the patient has AIDS (as long as the Dr talks to the patient first and tries to get them to disclose.
* Dr. owed duty to girl’s future bf and breached by not telling girl she had HIV (and to kid whose mom had hereditary cancer) (but we’re likely to cut some slack if the third party isn’t specifically identifiable)
* Don’t owe duty to other drivers to warn patients of dangers re: driving while on meds (Mavrogenis)
* Do owe a duty to other drivers to warn patients... (Hardee)
* No duty to warn patient’s parents that patient might commit suicide (Bellah v. Greenson)

**-Negligent Entrustment recap - Notes after Vince v. Wilson – p.182-188**

* Keys in the ignition
	+ Lots of states have statutes clarifying this
	+ Not neg. per se b/c the purpose of the “don’t leave your keys in your car” statute isn’t to protect drivers from a wreck
	+ Leaving (1) large truck the average person wouldn’t know how to drive (2) overnight (3) in a shitty neighborhood was a “special circumstance” that made it negligent entrustment (Palma v. U.S. Industrial fasteners p.186 note 6

-Statutory Material before Cope v. Scott (227-258)

FTCA Notes, above. Chart below

**Ways to get cop duty - Notes after Riss v. City of NY**

* Cops solicit witness and π responds, then gets killed for snitching
* Sprichetti v. City of N.Y. p.232
	+ Woman’s baby daddy is abusive, he has limited visitation rights to the kid and protective orders re: mom which gave her discretion to take dad in. Dad threatens and mom calls cops and they do nothing. Dad follows through on threats.
	+ Ct makes a duty b/c of promises for action and b/c protective orders.
* Cuffy factors – “special relationship” p.233
	+ Assumption by cops via action or promises of affirmative duty to act
	+ Cops’ knowledge that inaction could cause harm
	+ Direct contact b/t cops and injured party
	+ Party’s justifiable reliance on cops’ undertaking.
* No duty for public carriers to protect patrons from third parties (even if a private carrier would have duty) (Weiner v. Metro Transit Authority)
* Mid-p.234 for note on Proprietary Acts & Governmental acts intersection
* Promise by 911 operator may create duty, but some places may still require Cuffy factors (ie: reliance)
* When cops undertake a duty to serve as crossing guards, they are liable when they don’t show up and a kid gets run over.

**-Notes after Escola v. Coca Cola Bottling (p.561)**

* Bystanders also have SL CoA vs. product manufacturers (if your car fails and veers off the road, the people you hit have CoA vs. the mfger)

**Res Ipsa Loquitor Chart**

To utilize RIL, πs must tell a story that largely (though not necessarily conclusive) rules out other causes of injury besides ∆’s negligence.

Inference v. Presumption (p.96)

|  |  |  |  |
| --- | --- | --- | --- |
|  | Π survives MSJ? | Impact of ∆’s silence? | Who has Burden of Proof @ Jury? |
| Inference | Yes | None. ∆ can be silent & won’t suffer Summary Judgment | Π |
| Middle | Yes | ∆ is @ risk of summary judgment - ∆ must say something to get to trial. (provide alternate explanation of injury) | Π |
| Strongest Theory (Byrne) | Yes | If ∆ is silent, ∆ could lose @ Summary Judgment. ∆ must provide diff. version of how accident happened or lose @ MSJ | ∆Burden flips to ∆ to convince the jury. |

RIL helps a plaintiff overcome MSJ when the evidence in support of their prima facie case is weak. The RIL paradigm of the court can have a substantial impact on how much work RIL does for the π, from just letting π survive MSJ and doing no other work for them (Inference) to completely shifting the burden of proof (as in Byrne).

Courts are more likely to adopt a more plaintiff-friendly RIL paradigm when the defendant has lost or otherwise fucked up important evidence to the case.

**RIL Elements**

* ∆ had control of the instrumentality of π’s injury (forceps that were left in after an operation, etc.)
* Default to top paradigm (inference) unless ∆ has lost or destroyed evidence.

RIL has helped plaintiffs crack the “conspiracy of silence” in med-mal suits.

Res Ipsa Cases:

*Byrne v. Boadle* (Ct. Exchequer 1863) (England) – barrel of flour fell from a window above the Ds shop & hit P

* Barrels don’t fall out of windows on their own; that when they do fall, the most likely reason is the negligence of a person in the control of the premises
* No evidence of negligence presented – any facts inconsistent with the allegations are for the D to prove

*Connolley v. Nicollet Hotel* (p94) – hotel was aware of objects being thrown out the window, majority relied on res ipsa

*McDonald v. Perry* (SC FL 1998) (p 95) – truck trailer; Failed to prove the accident won’t have occurred without negligence by the D

* Ruled out other causes – res ipsa, but the inference of negligence comes from proof of the circumstances of the accident
* P has failed to prove that there is direct evidence of negligence – evidence is not gone, must switch proof to D

*Ybarra v. Spangard* (SC Cal 1944) (p 102) – pain in right arm occurred after surgery

* P alleges res ipsa; D makes motion to dismiss as P doesn’t know the instrumentality of the incident & who was in exclusive control of the instrumentality
* D was unconscious, had never had pain before & woke up with pain
* D doesn’t have evidence as he doesn’t know what happened b/c was unconscious – shifted BOP to D
* Expert witness brought in to say that the injury was caused by a traumatic instance – timing could have been around surgery
* Holding: Ds had duty to exercise ordinary care that no unnecessary harm came to him since he was in their custody; each would be held liable for failure to exercise due care (joint liability); res ipsa enough for a jury as there is an inference of negligence (retrial held against all Ds (joint) )

*States v. Lourdes Hospital* (St. App NY, 2003) (p 119) – expert necessary for res ipsa claims

* Prior to surgery, patients are put on a board which caused injury sometime during surgery
* Held: Res ipsa can be invoked to allow a fact finder to infer negligence from mere happening of event (R328)
* Expert testimony is necessary to determine that event/injury won’t have occurred absent negligence
	+ Still have to prove all requirements before inference can be permitted
	+ Expert testimony must be based on facts & not mere opinions (fact is verifiable)