* torts is a fact driven area of law
* Pay attention to the facts & figure out rule of law
* Always want to sue all available parties
* Tort law is common law or judge made law (state law issues)-Important to argue from precedence in tort law
* Categories of torts: NEGLIGENCE, STRICT LIABILITY, INTENTIONAL TORTS

**LIABILITY**

* Forms of Liability-negligence, intentional torts, strict liability-(can organize torts thru defendant’s state of mind)
* Another way to organize torts is the plaintiff’s interest-torts protects life & personal injury (there are some property damage), business losses, reputational harm, privacy violations

1. When should unintended injury result in liability? **Purposes of Torts System** (**Concept of Liability**)
   1. **Hammontree** v. Jenner, **Strict Liability v. Negligence**
      1. Facts: plaintiffs filed suit based on personal injury & property damage due to an auto accident
         1. Defendant crashed his car into the plaintiff’s bike shop
         2. Defendant claimed he lost consciousness due to seizure; he was taking medication to prevent seizures
         3. Plaintiff withdrew negligence claim & motion for sum. judgment based on strict liability but it was denied b/c they hadn’t proven all the elements of liability (whether he was negligent)
            1. Sum. judgment- facts aren’t in dispute and whoever files the motion should prevail as a matter of law
         4. Plaintiff filed motion for directed verdict based on pleadings & counsel’s opening argument; trial judge denied
         5. Judge instructed the jury on negligence even though plaintiff had dismissed the negligence claim and didn’t instruct on absolute liability
            1. Negligence is a fault based standard; Strict liability says fault isn’t a question
            2. Strict liability comes out of product defects; the ct didn’t apply this b/c the manufacturers are making money from products by selling them in the public sphere whereas in this case it’s a private citizen; manufacturers can keep raising the price to include liability costs, private citizens don’t have that option
         6. Jury ruled for defendant
      2. Decision: trial ct held for defendant b/c he was stricken w/ an illness he had no reason to anticipate & of which he had no prior knowledge
         1. Plaintiff appeals based on judge’s denial of motion for sum. judgment & directed verdict & judge’s instruction to the jury
            1. Appeals ct-affirmed b/c to invoke a rule of strict liability on users of streets &highways would introduce too much confusion to change the precedent especially w/o comprehensive plan to how the rule should operate
      3. **Rule of Law**: (Ct of App Cali) driver isn’t liable who suddenly is stricken by an illness which he had no reason whatever to anticipate
      4. Holmes: “general principle of our law is that loss from accident must lie where it falls, & this principle isn’t affected by the fact that a human being is the instrument of misfortune” … “make the power of avoiding the evil complained of a condition of liability”
   2. Maloney v. Rath
      1. Facts: Maloney had an auto accident after brake failure after she had taken her car for a brake repair to reputable mechanic.
      2. Decision: ct held for defendant & didn’t hold her strictly liable due to a non negligent violation of traffic law
      3. **Rule of Law**-(Sup Ct Cali) Cant invoke strict liability to users of the streets & highways
   3. Litigation Process
      1. Procedure
      2. Collecting on the Judgment
      3. Attorneys & Fees
      4. Appellate Decisions
      5. Court Structure
   4. **Vicarious Liability** & **Respondent Superior** (another form of strict liability)

1/20 pgs 17-30

* + 1. Employers can be held liable for employee’s actions
       1. 2 requirements: employee/employer relationship & tortuous act occurred w/in scope of employment
       2. **Christensen** v. Swenson, 874 P.2d 125 (Utah, 1994). **Respondeat Superior; Birkner Factors**
          1. Facts: Swenson was a security guard for Burns. On her break she had an auto accident w/ Christensen’s motorcycle. Suit was brought against Swensen & Burns

To sue Swenson, have to prove negligence, but to sue employer have to prove strict liability-have to prove employer/employee relationship & performing acts w/in scope of employment during accident

* + - * 1. Decision: trial ct granted Burns a motion for sum. judgment b/c Swenson wasn’t acting w/in the scope of her employment at the time of the accident; didn’t meet 2nd birkner criteria b/c Swenson wasn’t in spatial boundaries of the employment (didn’t even address 1st or 3rd criteria)

App. Ct affirmed; Sup Ct reversed sum. judgment & remanded for further proceedings b/c they held that reasonable minds could differ to whether Swenson was acting w/in the scope of her employment

* + - * 1. Birkner v. Salt Lake City, 771 P.2d 1053, 1057 (Utah 1989).

**Birkner Criteria: 1. Employee’s conduct must be of the general kind the employee was hired to perform, 2. The employee’s conduct must occur substantially w/in hours & ordinary spatial boundaries of employment, 3. The employee’s conduct must be motivated at least in part by the purpose of serving the employer’s interest**

* + - 1. Clark v. Pangan, 998 P.2d 268 (Utah 2000). (pg 23)
         1. Facts: postal supervisor struck subordinate in a dispute
      2. Lisa M. v. Mayo Hospital (pg 22)
      3. Foster v. The Loft (pg 24)
      4. Baker v. St Francis Hospital (pg 23)
      5. **Roessler** v. Novak, **Apparent Agency**
         1. Facts: Roessler had serious complications after surgery & sued the hospital & radiologist based on negligence(Dr) & vicarious liability (hospital)

Roessler claims Dr misinterpreted abdominal scans

* + - * 1. Decision: trial ct granted motion for sum judgment for the hospital b/c the Dr was an independent contractor & not an employee of the hospital

Ct of app. Reversed & remanded for further proceedings b/c its unclear whether the hospital represented that the Dr. was its agent

* + - * 1. Dissent-favor **nondelegable duty**-hospitals are vicariously liable for independent contractors if patients have no other meaningful options
        2. **Rule-employers are liable for independent contractors who act w/ apparent authority**
        3. **Apparent agency only exists if: 1. A representation by the purported principal, 2. A reliance on that representation by a 3rd party, 3. A change in position by the 3rd party in reliance on the representation**

Only exists where the principal creates the appearance of an agency relationship

Can use employer/employee relationship or apparent agency(nondelegable duty) tests

* + - 1. Baptist Memorial Hospital v. Sampson (pg 28)

1/25 pgs 31-43 Historical Background

**NEGLIGENCE**

1. Negligence Principle (**Elements of Negligence-Duty, Breach, Causation, Damages)**
   1. Historical Development of Fault Liability
      1. Before 1850 common law cases were decided by writ; would sue for direct trespass (someone drops a log on your head) or trespass on the case (if you are injured by a log left by someone on the road-prejudicial in consequence; some level of fault)
         1. Trespass-just have to show that the log dropped (intentional tort); most trespass cases involved intent not accident;
            1. Defense of inevitable accident (pg32)
      2. Tort Law & the Economy in 19th Century America: A Reinterpretation-Schwartz, 1981 (pg 32)-Schwartz thinks some fault basis(negligence) was there; professor Gregory thinks there was some strict liability & negligence but Brown v. Kendall notes a shift in the system
      3. Historical reason that cts chose negligence over strict liability b/c its protects risk based investors
         1. Strict Liability
         2. Negligence
   2. **Duty of Care**: **general duty to exercise reasonable care**  
      1. **Brown** v. Kendall, 6 Cush. 292 (Sup Ct of Mass, 1850). (Classic trespass case-negligence, fault based) **Ordinary Care; Burden of Proof**
         1. Facts: 2 dogs owned by the defendant & plaintiff were fighting. The defendant used a stick to attempt to separate the dogs. He accidently hit the plaintiff in the eye causing severe injury. Action of trespass for assault & battery was brought against defendant.
            1. Must show that the intention was unlawful or that the defendant was in fault (if the injury was unavoidable)
            2. Defendant asked judge to charge the jury “whether at the time of the accident if the defendant & plaintiff weren’t using ordinary care?”

Trial ct didn’t use the defendant’s requested jury instruction but instead “whether it was a necessary act for the defendant to intervene”

* + - * 1. Ordinary care- will vary case to case; kind & degree of care which prudent & cautious men would use to guard against probable danger
        2. Negligence isn’t a strictly legal standard b/c have to decide what a reasonable person would do given the facts; it’s a question of fact
      1. Decision: trial ct held for plaintiff
         1. Sup Ct-held for defendant b/c plaintiff failed to sustain burden of proof; Though trial ct’s jury instruction was wrong-substantive(the ct explained that the standard is extraordinary care instead of just ordinary care) & procedural (burden of proof isn’t on the defendant but on the plaintiff)
         2. Accident-act that ordinary human care & foresight are unable to guard against; is misfortune for the sufferer & lays no legal foundation for legal responsibility
      2. Negligence is an issue to be determined by the jury unless no reasonable jury could find negligence then the judge take the case from the jury
      3. **Rule-Ordinary Care required, not extraordinary care**
      4. **Ordinary care-care that a prudent & cautious people would use under similar circumstances**
  1. **Standard of Care**-**Concept of unreasonable risk**
     1. **Adams** v. Bullock, 125 N.E. 93 (CT of App NY, 1919). **Care to avoid foreseeable risks**
        1. Facts: Defendant owns a trolley line. The plaintiff was a boy who had swung on a wire that came into contact w/ the trolley wire. The boy was shocked & burned.
        2. Decision: Trial CT & appellate division held for plaintiff
           1. T of App NY(Judge Cardozo) reversed & held for defendant b/c the accident was outside the range of prudent foresight; “only some extraordinary casualty, not fairly w/in the area of ordinary prevision, could make it a thing of danger”

nothing similar had occurred before; 1st accident of this type

* + - 1. **Rule**-**standard of care is to exercise reasonable precautions to avoid predictable dangers**
    1. Braun v. Buffalo Gen El. Co., 200 N.Y. 484 (1911) (pg 40)
    2. Negligence is doing something which a reasonably prudent person wouldn’t do or the failure to do something which a reasonably prudent person would do under similar circumstances; if you can something about a problem & you don’t then you’re negligence
    3. Ordinary or reasonable care is that care which persons of ordinary prudence would use to avoid injury
    4. Greene v. Sibley, 177 N.E. 416 (N.Y. 1931)
       1. Facts: lady waiting for her change in a store tripped when a mechanic changed his position & she failed to look up.
       2. Decision: trial ct & app ct held for plaintiff
          1. Sup ct-Justice Cardozo reversed b/c plaintiff failed to establish negligence
  1. Judge can take case from jury when they have applied an extraordinary standard of care to find negligence

1/26 pgs 44-60 Standard of Care, Reasonable Person

Balancing Issue-

* + - 1. **US v. Carroll Towing Co**., 159 F.2d 169 (2nd Cir, 1947). **If B<PL, then liability arises**
         1. Facts: employees of Carroll Towing failed to secure a barge owned by Connors while attempting to drill out another barge. Connor’s barge broke loose & hit a tanker. It sank along w/ its contents which were owned by US

The bargee had been gone for 21hrs w/ no excuse for his absence

* + - * 1. Decision: Trial CT held for plaintiff & Carroll appealed for reward to be reduced stating that if the bargee had sounded a warning that siphoning efforts would have kept the barge afloat & there wouldn’t have been sinking damages

2nd Cir reversed & remanded for reconsideration of the allocation of damages b/c(holding) w/o excuse the bargee should have been aboard the barge during daylight work hrs

A holding is particular to the facts of the case; the rule is interrupted thru the holding

* + - * 1. Carroll Towing Formula
        2. Learned Hand Formula-(balancing test) measure 3 things: magnitude of the loss, probability of accident, & burden of taking precautions that would avert it

B(burden)<L(injury)xP(precautions) =negligence

B>LxP=RC(reasonable care)

* + - * 1. Foreseeable Danger Approach
        2. Community Expectations Approach
        3. Bolton v. Stone (pg 48)-ball was hit over the fence & hit a boy. Only 6 balls had gone over the fence in 28yrs. “If cricket can’t be played on a ground w/o creating substantial risk, then it shouldn’t be played there at all.” But here the road is so small that a reasonable man would think it right to refrain from taking steps to prevent the danger
    1. Reasonable Person
       1. **Bethel v. NY City Transit Authority**, 703 N.E.2d 1214 (Ct of App NY, 1998). **Duty to act as a reasonable person**
          1. Facts: Plaintiff was hurt on defendant’s bus when the wheelchair accessible seat collapsed under him. Repairs had been made to the seat 11days prior.
          2. Decision: Trial Ct & app division held for plaintiff b/c there was a defect by constructive notice(they should have suspected something might be wrong b/c it had been fixed before)

Appeals CT NY remanded case for new trial; holding that duty of extraordinary care is no longer viable

* + - * 1. **Rule of Law: rule of common carrier’s duty to extraordinary care is no longer viable; common carrier is subject to the same duty of reasonable care as any other potential tortfeasor**
        2. Actual notice-evidence they actually known
        3. Constructive notice-there are red flags that you should have known. Can’t prove actually knew.
      1. Wood v. Groh, 7 P.3d 1163 (Kan. 2000).
         1. Facts: plaintiff was shot w/ defendant’s gun fired by 15yr old son. The son used a screwdriver to unlock gun cabinet. Trial judge gave an ordinary negligence charge
         2. Decision: Jury held for defendant & plaintiff appealed based on judge’s charge

Plaintiff claimed the charge should have included “highest degree of care”

Appeals ct held for plaintiff

* + - 1. Holmes, The Common Law-“the standards of law are standards of general application”
         1. The practical reason for having a objective standard is burden of proof & protects general welfare to hold people to the objective standard
      2. Gender
      3. Mental ability
      4. Bashi v. Wodarz, 53 Cal.Rptr.2d 635 (App. 1996).
         1. Facts: defendant hit 1 car & left the scene & then collided w/ plaintiffs. Defendant claimed to have little recall of the events. Defendant has a family history of mental illness & claims to had a sudden onset of mental illness
         2. Decision: trial judge granted sum. judgment for defendant

Ct of app reversed b/c the rules of law only protects sudden onset of physical illness not mental illness

* + - * 1. **Rule of Law-sudden onset of mental illness does not protect driver from negligence; Cohen v. Petty only applies to sudden onset of physical illness**
      1. Superior Attributes
      2. Children-don’t use objective standard when kids are performing children’s activities; held to what a normal child would do; when a child is performing an adult activity they’re held to adult standards
         1. Mastland, Inc. v. Evans Furniture, Inc., 498 N.W.2d 682 (Iowa 1993).
         2. Ellis v. D’Angelo, 253 P.2d 675 (Cal.App. 1953).

Facts: 4yr old boy was charged w/ negligently shoving a babysitter to the floor

Decision: Ct held for defendant b/c 4yr old kids don’t have mental capacity for foreseeing consequences for their actions

* + - * 1. Dellwo v. Pearson, 107 N.W.2d 859 (Minn. 1961).

When kids engage in adult activities, cts apply adult standards

Facts: 12yr driving a motor boat

* + - * 1. Goss v. Allen, 360 A.2d 388 (N.J. 1976).

Facts: 17yr old beginning skier collided w/ plaintiff

Decision: ct held for defendant b/c skiing is a sport for all ages that doesn’t qualify adult standards

* + - * 1. Stevens v. Veenstra, 573 N.W.2d 341 (Mich.App. 1997).

Facts: 14yr old student driver accompanied by instructor

Decision: ct held that it should be judged by adult standards

* + - 1. Emergency Doctrine

1/27 pgs 60-75 Judge & Jury, Custom

* 1. **Roles of Judge & Jury-Goodman, Pokora, Andrews**
     1. Negligence is to be determined by a jury on a case by case basis to be reviewed by the judge
     2. In the old rules, if the plaintiff is contributory negligent then the case is over.
     3. General
        1. Baltimore & Ohio Railroad Co. v. Goodman, 275 U.S. 66 (1927). Justice Holmes
           1. Facts: widow suing RR b/c husband was killed by train at grade crossing. Defendant claimed victim’s own negligence was the cause of his death & requested a directed verdict.

Goodman was driving a truck across the crossing but had obstructed views & couldn’t see the train coming at 60mph

Goodman traveling at 5-6mph had 18ft where the train was visible, but he failed to look & see

* + - * 1. Decision: Trial ct denied directed verdict & held for plaintiff; App Ct affirmed

Sup Ct reversed holding that it was Goodman’s actions didn’t meet the standard of conduct

* + - * 1. **Rule-when crossing RR tracks the auto driver has the duty to make sure it is safe to cross.**

**The car stops for the train not the other way around. If it is the driver’s duty to get out of the vehicle & look both ways down the tracks to ensure its safe. If the driver doesn’t he does so at his own risk**

* + - 1. **Pokora v. Wabash Railway Co**., 292 U.S. 98 (Sup Ct 1934). Justice Cardozo
         1. Facts: Pokora was driving his truck across 4 RR tracks but his view was obstructed by some parked boxcars & was hit.
         2. Decision: Trial Ct & Ct of Apps upheld a directed verdict for RR relying on Goodman holding

Sup Ct reversed & remanded for further proceedings holding that the Goodman rule is source of confusion

Making a car driver get out of his car & look can be more dangerous than looking from his seat.(\*This remark is unnecessary upon the facts & fertile source of controversy)

* + - * 1. **Rule-Shouldn’t set standard unless based in custom**
      1. Akins v. Glens Falls City School District, 424 N.E.2d 531 (NY 1981).
         1. Facts: plaintiff was hit be a foul ball while watching a baseball game. She was standing on the 3rd baseline 10-15 ft past the end of the backstop
         2. Decision: trial ct held there was no basis for a jury to hold the defendant negligent; defendant fulfilled its duty of reasonable care as a matter of law & therefore no question of negligence remains.
      2. Andre v. Pomeroy, 320 N.E.2d 853 (NY 1974).
         1. Facts: plaintiff was injured while riding in defendant’s car when it hit the car in front. Defendant admitted that she looked down in her purse while in heavy traffic
         2. Decision: trial ct granted sum. judgment for the plaintiff b/c no questions of fact & defendant’s conduct fell far below standard of care
         3. Dissent: standards of conduct can change w/ technological advances & shifts in public perception of what constitute reasonable safety measures. It has traditionally been the jury that reflects these shifts & changes
      3. **Andrews v. United Airlines**, 24 F.3d 39 (9th cir. 1994)
         1. Facts: Plaintiff was hit by a briefcase that fell from overhead compartment. She is arguing that the accident was foreseeable & the airline didn’t prevent it.
         2. Decision: trial ct granted defendant sum. judgment

App. Ct reverses & remands for trial

* + - * 1. Treadwell v. Whittier pg 68-common carriers must keep pace w/ science, art, & modern improvement
        2. Valente v. Sierra pg 68

\*KNOW (standard of care, duty of care, negligence, can a judge set the standard of care?, who decides negligence? What constitutes negligence)

A judge will take the case from the jury if no juror could reasonably find negligence as a matter of law

Pokora-could you reach a point as a judge having seen many of the same types of cases reach a standard of care (set the legal standard)

Can custom set the standard of care? Can statutes to set the standard of care?

Custom followed or not is evidence for a jury to decide

The whole custom of an industry could be negligent

Don’t want the custom to necessarily be the legal standard; the juror can take it into account as evidence

* 1. **Role of Custom-Trimarco v. Klein**
     1. **Trimarco v. Klein**
        1. Facts: plaintiff was injured when he fell thru a plain glass shower door that wasn’t safety tempered glass; in 1965 the custom becomes to replace the glass w/ tempered glass to replace broken glass or at the request of the tenant
        2. Decision: trial ct held for plaintiff
           1. app ct reversed b/c there was no common law duty on the defendant to replace the glass; custom isn’t enough to get negligence to the jury; actual notice standard; defendant didn’t have actual notice of a danger
           2. Garthe v. Ruppert, 264 N.Y. 290,296(1934)-**Rule-if certain dangers are removed by customary way of doing things safely, then the one charged w/ the dereliction has fallen below the required standard**

Facts: plaintiff slipped on wet brewery floor

* + - * 1. NY Ct of APP reversed the dismissal but ordered for a new trial b/c judge had erroneously admitted certain evidence to the defense’s detriment
        2. **Compliance w/ a custom isn’t necessarily due care; is some evidence of due care**
    1. LaVallee v. Vermont Motor Inns
       1. Facts: plaintiff fell in his room at the hotel during a power outage; plaintiff argued that the hotel should have had emergency lighting in the rooms; wasn’t the custom of the industry to have emergency lighting in hotel rooms & no one had been hurt before
       2. Decision: trial ct granted a directed verdict for defendant, b/c plaintiff failed to meet the burden; app ct affirmed
          1. Ct held the custom as the legal standard
    2. Levine v. Russell Blaine
       1. Facts: plaintiff cut herself on rope while operating a dumbwaiter. An infection of the cut led to an amputation. The building owner failed to follow the custom of using smooth ropes
       2. Decision: ct held plaintiff
       3. **Rule: the evidence of custom is admissible**
    3. Stagl v. Delta Air Lines
       1. Facts: plaintiff injured at baggage carousel

2/1 pgs 75-86

* 1. **Role of Statutes-Martin, Tedla**
     1. **Martin v. Herzog**
        1. Facts: Plaintiff is suing to recover for injuries resulting in death of her husband. They were both riding in a buggy when defendant’s car hit them. Negligence is charged to the defendant b/c he didn’t keep the car on the right side of the road & against plaintiff b/c he was traveling w/o lights (statute). A statute about keeping cars to the right of hwy. Both defendant & plaintiff violate statutes. Defendant requested jury charge that the absence of lights on the buggy was prima facie evidence of contributory negligence. Judge refused this request & said the jury may consider it as some evidence

Prima facie-means on its face it stands as conclusive evidence; its undisputed fact

* + - 1. Decision: trial ct held for plaintiff; app ct reversed & remanded for new trial
         1. NY ct of app. Affirmed & held for defendant w/ a refund of his ct costs; it is prima facie evidence; question of what is the legal standard?
      2. **Rule-violation of statute is negligence, unless it is excused**
    1. Clinkscales v. Carver
       1. Facts: defendant ran a stop sign under an ordinance that had never become effective therefore the defendant could not be held criminally liable
    2. **§286 2nd RST-the ct may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or administrative regulation whose purpose is to protect a class of persons**
    3. Sweet v. Sisters of Providence- **trial judge retains discretion to refuse to adopt the law as the standard of care**
    4. **Tedla v. Ellman**
       1. Facts: 2 junk collectors were walking along the hwy & were hit by defendant’s car. A statute provided that pedestrians shall comply w/ rules of governing vehicles
       2. Decision: trial ct entered directed verdict for plaintiff; app ct affirmed.
          1. NY ct of app. Affirmed- **a reasonable person can foresee that following the statute would be more dangerous than violating it.**
    5. Bassey v. Mistrough
       1. Facts: car stopped partially on hwy. plaintiff was standing in front of his car when his car was hit from behind; statute required illumination on the hwy. Judge refused to allow an excuse
       2. Decision: trial ct held for plaintiff; app ct reversed

If the plaintiff is contributory negligent then the lawsuit ends.

* + 1. Robinson v. DC- plaintiff hit by police van was found contributory negligent by crossing the street outside of a crosswalk
    2. Statutory Purpose
       1. Platz v. Cohoes-plaintiff hit obstruction in road causing injury. The defense claimed that if they were violating a statute about riding on Sunday they wouldn’t have been hurt. The ct rejected the defense & held for the plaintiff b/c **the statute’s purpose was public order not safety**
       2. DeHaen v. Rockwood Sprinkler(pg 82)
          1. Facts- radiator is placed on unprotected shaft. It falls & kills someone below. General contractor failed to erect a safe barrier around the hoistway. What is the purpose of the statute?
          2. Decision-upheld liability of Rockwood b/c its employees negligently put the radiator there
       3. DiPonzio v. Riordan
       4. Gorris v. Scott (pg 84)- statute requires animals to be in pens on a ship to keep from spreading disease. Sheep are washed overboard. Owners sue claiming negligence based on violation of statute
          1. Decision-**cant use statute b/c the purpose of statute wasn’t to prevent animals from going overboard but to prevent spreading disease**
    3. Licensing
    4. Compliance

2/2 pgs 86-110 Proof of Negligence; **Res Ipsa Loquitor** (questions of circumstantial evidence & res ipsa loquitor?)

Tort standard-plaintiff has to come in w/ enough evidence to meet the preponderance standard; jury can’t speculate from the evidence; if all that is there is speculative, then the defendant wins by directed verdict

* 1. Proof of Negligence
     1. Real evidence-documentary
     2. Direct evidence-eyewitness testimony
     3. **Negri** v. Stop&Shop
        1. Facts: plaintiff fell in defendant’s store b/c of some broken baby food jars on the ground
        2. Decision: trial ct held for plaintiff; app ct reversed & dismissed complaint
           1. N.Y. ct reversed & remitted to app ct for more consideration (enough evidence to get to a jury)
        3. **Rule-Defendant had constructive notice: defect is visible & apparent for a sufficient period of time prior to accident to permit employees to discover & remedy it (NOTICE)**
     4. Gordon v. American Museum of Natural History
        1. Facts: plaintiff fell on front entrance steps due to a piece of wax paper. Plaintiff argues that the museum’s employees were negligent in cleaning the steps.
        2. Decision: trial ct held plaintiff; app ct affirmed
           1. NY reversed b/c no actual evidence that the defendant had actual notice of the paper & shouldn’t have gone to the jury on that theory (no constructive notice evidence-paper could have fallen just minutes before)
        3. **Rule: to constitute constructive notice, a defect must be visible & apparent & it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover & remedy it**
     5. Farcelli v. TSS Seedman’s Inc.
        1. Facts: plaintiff slipped on banana peel in defendant’s store
        2. Decision: ct held that there wasn’t proof of constructive notice (don’t know when the peel was dropped)
     6. Moody v. Haymarket Associates, 723 A.2d 874 (Maine 1999)
        1. Facts: plaintiff slipped on wet floor in defendant’s office building
        2. Decision: held for defendant b/c there had been no accidents in 10yrs
           1. Sup ct reversed b/c trial judge erred in admitting that evidence b/c its not relevant
     7. Randall v. Kmart
        1. Facts: plaintiff fell on loose birdseed in defendant’s store
        2. Decision: held for defendant b/c no evidence regarding what Kmart’s mode of operation is for selling birdseed
        3. **Rule-Mode of operation rule: business practices that create a reasonably foreseeable risk of harm to invitees. Applies to self service such as produce, but not here.**
     8. Chiara v. Fry’s foods
        1. **Rule-looks to a business’s choice of a particular mode of operation & not events surrounding the accident; plaintiff doesn’t have to prove notice if the proprietor could reasonably anticipate that hazardous conditions would regularly arise**
     9. Lanier v. Walmart (pg91)
     10. Howard v. Walmart (pg91)-Judge Posner
         1. Facts: plaintiff falls on puddle of liquid soap on floor; accident occurred in the morning which is the same time when the employees stock the aisles.
         2. Decision: trial ct held for plaintiff; app ct reversed b/c the evidence was just speculation.
     11. **Byrne v. Boadle**, **RES IPSA**
         1. Facts: barrel struck plaintiff from above knocking him down
         2. **Rule-some accidents alone are evidence of negligence (res ipsa loquitor); some types of accidents alone is prima facie evidence of negligence**
     12. Larson v. St. Franscis Hotel
         1. Facts: plaintiff was struck by a chair thrown out of a window
         2. Decision-granted defendant’s motion for nonsuit b/c plaintiff didn’t prove that the chair was under the exclusive control of the hotel.
     13. Connolly v. Nicollet Hotel
         1. Facts: plaintiff lost an eye by something thrown out of a window
         2. Decision: held for plaintiff b/c they had constructive notice of a possible injury b/c the hotel mgr was aware that the guests were out of control all week long

Negligence is the normal rule (res ipsa is a special rule)-not every accident speaks for itself.

* + 1. Dermatossian v. NY Transit Authority
       1. Facts: plaintiff struck his head on hand grab
       2. Decision: trial ct held for plaintiff; app. Ct reversed
    2. McDougald v. Perry,
       1. Facts: plaintiff’s car was hit by a spare tire that fell off a tractor trailer.
       2. Decision: trial ct held for plaintiff; app ct reversed & remanded for consideration of remaining issues
       3. **Res ipsa loquitur-the thing speaks for itself; permits an inference of negligence under certain circumstances**
    3. Res Ipsa: presumption(Cal) v. inference (NY) v. strong inference (Farina) view (pg 99)
    4. Leonard v. Watsonville Community Hospital (pg99)
       1. Facts: a clamp was left inside the plaintiff after an operation
       2. Decision: trial ct held that Res ipsa loquitur applied against all 3 physicians, the nurse, & the hospital but after hearing defendants’ testimony, dismissed the case against MD3 (evidence was conclusive enough to show that MD3 wasn’t involved)
       3. **Presumption of Res Ipsa pushes the burden of proof on the defendant**
    5. Abbott v. Page Airways
       1. Facts: plaintiff’s husband was killed in defendant’s helicopter. The judge said the jury could use res ipsa loquitor or find negligence in the specific acts.
       2. Decision: trial ct held for plaintiff; app ct upheld the charge & affirmed
    6. Fowler v. Seaton
       1. Facts: 4 yr old went to day care fine & came home w/ a bump on his head, a concussion, & cross eyed
    7. Helton v. Forest Park Baptist Church
       1. Facts: plaintiffs left child in church nursery; during the service the child incurred a severe eye injury. The 2 adults supervising couldn’t explain how it happened.
       2. Decision: trial ct denied the plaintiffs the benefit of res ipsa loquitor
    8. Spoliation of Evidence-Killings v. Enterprise Leasing (supp. Pg 2)
    9. Automobile Cases
    10. Ybarra v. Spangard
        1. Facts: personal injury case during operation; after surgery plaintiff developed severe pain & atrophy of right arm. Other Dr who examined the plaintiff said it was due to trauma of some kind & not pathological origins. Plaintiff argues res ipsa loquitor
        2. Decision: trial ct held for defendant; app ct reversed
        3. **Rule-Patient is unconscious, all those w/ control are liable**
        4. **Res ipsa loquitor has 3 conditions:** 
           1. **1. The accident must be of the kind which ordinarily doesn’t occur in the absence of someone’s negligence;**
           2. **2. It must be caused by an agency or instrumentality w/in exclusive control of defendant;**
           3. **3. It must not have been due to voluntary action or contribution on the part of the plaintiff**
    11. **Res Ipsa is applied easily; every defendant should argue that this is rare; plaintiff has to prove elements of res ipsa before burden shifts to defendant**

2/3 pgs 110-131 **Medical Malpractice; Informed Consent**

* 1. Special Case of Medical Malpractice
     1. Robbins v. Footer- **in medical negligence cases, the standard of care is whether the defendant acted w/in the common practice of his profession**
     2. **Sheeley** v. Memorial Hospital
        1. Facts: plaintiff had complications after an episiotomy; trial ct wouldn’t let plaintiff’s expert testify b/c he was retired & not currently practicing in the same field as the defendant. Ryder is a family practioner. The expert is a certified OBGYN. Defendants argue the common locality rule. Expert was from NY & defendant practiced in Rhode Island
        2. Decision: Trial ct entered directed verdict for defendant; app ct reversed & remanded for new trial b/c trial ct erred in not allowing plaintiff’s expert witness to testify
        3. **Rule-in medical malpractice cases-the appropriate standard of care shouldn’t be compartmentalized to the area of specialization or certification. Any dr is competent to testify & the trial justice can decide the expert’s qualifications; adopted national standard**
        4. **Rule-expert testimony is an essential requirement in proving the standard of care applicable to the defendant, unless the lack of care is so obvious as to be w/in the layman’s common knowledge**
        5. **Rule-overrule strict liability & similar locality rule in allowing an expert witness from another state; standard of care is what a reasonably competent practitioner, in the class to which he belongs, would do under similar circumstances**
        6. Buja ct held that nothing in the lang of §9-19-41 requires the expert to practice in the same specialty as the defendant
     3. Sami v. Varn-**required substantial knowledge & an active clinical practice in the same medical field for expert**
     4. Dawson v. Prager-**expert must have at least 50% of professional time w/in 2 yr period preceding incident devoted to actual clinical practice in same profession**
     5. Gala v. Hamilton
     6. **States** v. Lourdes Hospital
        1. Facts: plaintiff had surgery for an ovarian cyst & the anesthesiologist injured arm
        2. **Rule: expert testimony can be used to bridge gap in jury’s knowledge in res ipsa medical cases**
     7. **Matthies** v. Mastromonaco **MEDICAL MALPRACTICE/INFORMED CONSENT**
        1. Facts: 81yr old fell & broke her hip. She went to the ER & dr recommended bed rest. Plaintiff’s expert said that w/o surgery her hip could be displaced. The defendant’s expert said that her bones were too brittle.
        2. Decision: trial ct held for dr; app reversed
        3. **Rule-informed consent-dr should explain medically reasonable invasive & noninvasive alternatives including risks & likely outcomes**
           1. **Subjective-what would the patient have chosen**
           2. **Objective-what** **would a reasonable person have chosen**
     8. **Medical malpractice is a cause of action (alternative to a negligence cause of action); medical malpractice is going to be determined by standard (makes a difference it’s a local or national standard applied)**
     9. **Informed consent-has to have a duty to disclose; there has to be causation (have to establish that being informed the plaintiff would have chosen different treatment & not been harmed)**
        1. **Have to show harm was avoidable**
        2. **Reasonable patient standard (objective)**
        3. **Duty to disclose based on reasonable physician standard**
     10. **Dr. are held to higher standard; not to a reasonable person but to a standard of a reasonable dr.**
     11. **Custom-adherence to custom is a defense in the medical cases; the custom of the profession is a defense**
     12. **Expert-that’s how the plaintiff establishes their case by having an expert witness to testify about the standard of care & how the defendant did not live up to the standard of care**

**\*special issue of res ipsa (if res ipsa is a common sense thing, then can u have an expert to testify to tell the jury there must be negligence)**

2/3 Torts Tutoring

* Hypo-Parent hired babysitter thru Babies R us. The babysitter wasn’t supervising the children in the backyard & they started a bonfire in which they were badly burned. Discuss the torts claims against babysitter & babies r us.
  + 1st thing they have to prove is that Barbara was negligent
    - Did she exercise the standard proper of care?
  + 2nd establish respondeat superior
    - Employee/employer relationship (parent agency)- If independent contractor, have to argue nondelegable agency
    - Acting w/in scope of employment (birkner factors)
* Pay attention to policy discussions, elements of a prima facie case, implications of holding
* Before the final, create a cause of action checklist
* [www.law.uh.edu/faculty/lgriffin](http://www.law.uh.edu/faculty/lgriffin)

2/8 pgs 132-148 **Affirmative Obligations to Act (1)**

1. **DUTY REQUIREMENT: PHYSICAL INJURIES**
   1. MacPherson v. Buick Motor-Judge Cardozo: car manufacturer owed a duty of due care to someone who bought a car from an intermediate dealer
   2. **AFFIRMATIVE OBLIGATIONS TO ACT-people owe a general duty of due care not to negligently inflict harm, but owe strangers no duty to rescue. The boundary duty rules involve special relationships, commenced rescue & innocent causation\*** (memorize this definition)
      1. **Harper** v. Herman (Minn. 1993).
         1. Facts: defendant had a duty to inform a guest on his boat that the water was too shallow for diving.
         2. Decision: trial ct granted sum. judgment for defendant; app ct reversed; sup ct reversed & held for defendant b/c no special relationship here
         3. **Rule- special relationship only exists if 1. Under defendant’s custody & 2. Deprived of normal opportunities for self protection**
      2. **Exceptions to the no affirmative duty rule**
         1. **Special relationships**
         2. **Non-negligent injury-common law, one who innocently injured another had no duty to exercise due care to ensure the other’s subsequent wellbeing.**
            1. **Union Pacific RR v. Cappier-RR had no duty to help a victim who was non-tortuously run over while trespassing on tracks (this attitude is fading)**
            2. **Maldonado v. Southern Pacific Trans.-plaintiff was injured attempting to board a freight train. RR employees knew & did nothing to help. Ct held that there was a duty to exercise reasonable care to prevent further harm**
         3. **Non-negligent creation of risk**
            1. **Simonsen** v. Thorin-defendant motorist w/o fault knocked a utility pole into the st drove off. The plaintiff hit the pole. **Ct held that defendant had an affirmative duty to use due care to remove the hazard or to warn others even if he isn’t liable for creating the hazard.** **Innocent Causation**
            2. Menu v. Minor- a driver lost control & hit a median. The car blocked a hwy lane. The driver called a cab & left. In a suit against the cab co., the ct held that the cab driver had no duty
            3. Tresemer v. Barke-plaintiff was injured from a birth control device. She never consulted the dr. after the device was inserted. W/in 2 yrs medical info came out about the dangers involved w/ device. Plaintiff was unaware for another yr**. The ct held that she had cause of action against the defendant for not warning her about the newly discovered dangers**.
            4. **§321** 2nd Restatement**-one who has done an act & subsequently realizes that it has created a risk of physical harm is under a duty to exercise due care to prevent risk from occurring**
            5. **Galindo** v. Clarkstown-defendant noticed a tree on neighbor’s property was in danger of falling. Clark attempted to have the tree attended to, but the tree fell on a car killing a person. The ct held that clark had no duty b/c the tree wasn’t on his property

**Rule-a person who lacks ownership or control of property cant fairly be held accountable for injuries resulting from a hazard on the property b/c they don’t have the power to correct the hazard**

* + 1. **No duty to act-impunity for allowing preventable risk to strangers**
    2. **Innocent creation-duty if you unintentionally create risk to strangers**
    3. **Farwell** v. Keaton
       1. Facts: Seigrist & Farwell were drunk & got into a fight. Farwell was badly beaten. Seigrist left Farwell in his car parked at Farwell’s grandparents house. The next morning his grandparents found him & took him to the hospital. 3days later he died.
       2. Decision: trial ct held for plaintiff; app ct reversed; Sup Ct held for plaintiff b/c Seigrist had an affirmative duty
       3. **Rule-where performance has begun, there is no doubt that there is a duty of care; companions engaged in a common undertaking have a special relationship**
          1. Recognizes an obligation on 2 independent grounds:1. Seigrist voluntarily came to the assistance of Farwell, & 2. Had an affirmative duty to aid Farwell based on their pre-existing relationship (buddies running an eron together)
    4. **Rule-when an actor voluntarily acts in a way designed to reduce risk, a duty of reasonable care exists if the actor increases risk or if other’s rely on the actor’s undertaking**
    5. **Morgan** v. County of Yuba- plaintiff’s decedent was afraid that if the sheriff released a man who had threatened her. The sheriff promised to warn her, but failed to do so. The man killed her. Ct held the county liable. **Promise creates obligation**

2/9 pgs 157-168, 175-183 **Affirmative Obligations to Act (2);** No duty Rules

**DUTY TO 3RD PARTIES**

* 1. **Nonfeasance-failure to act when it’s your duty to do so**
  2. **Misfeasance-performing a duty improperly**
  3. **Imposing a duty to 3rd parties based on physician/patient relationship**
     1. **Tarasoff** v. Regents of UC
        1. Facts: Dr. Moore was treating Poddar who told him of his intent to kill Tarasoff. Dr. informed campus police & they detained him briefly until Dr.’s superior told them to release Poddar. Poddar killed Tarasoff. No one warned Tarasoff.
        2. Decision: trial ct dismissed; sup ct reversed & allowed plaintiffs to amend their claim
        3. **Rule-duty exists if 3rd party has a special relationship of control w/ either offender or foreseeable victim**
        4. **Tarasoff holding is generally constrained to a dr. relationship where patient kills 3rd person**
        5. **Facts are important in this case**
     2. Reisner v. Regents of UC
        1. Facts: 12yr got aides from a blood transfusion. Dr never told her. At age 15, she had sex. At 17, dr finally told her & she died a month later. The boy she had sex w/ at 15 tested positive for HIV.
        2. Decision: ct held that dr had a duty to plaintiff despite the lack of physician/patient relationship
  4. **Moch** (co. failed to supply adequate water to hydrants, building burned)-**to apply negligent performance would unduly & indefinitely extend the zone of duty; denial of a benefit, not commission of a wrong**

Pgs 175-183 **NO DUTY RULES**

1. **POLICY BASES FOR INVOKING NO DUTY**
   * 1. **Strauss** v. Belle Realty (fall injury resulting from NYC blackout)**NO DUTY RULES**
        1. **Rule-no contract w/ plaintiff, no duty; indeterminate class: must limit orbit of duty on policy grounds**
     2. **Determinable class**: duty when there is a limited & identifiable group.
     3. **Foreseeability**: doesn’t create a duty, but limits a duty’s scope once set
     4. **Crushing liability** **is the #1 concern to eliminate duty**

* **Boundary Duty Questions**-special relationships, commenced rescue, & innocent causation (how you enter into a duty)

2/10 pgs 183-195 & Supp. Pgs 5-11 **NO DUTY RULES**, Gipson

* + 1. **Reynolds** v. Hicks
       1. Facts: plaintiff was injured by an intoxicated minor; defendant hosted a party(her wedding) where the alcohol was furnished. The issue is whether the defendants owe a duty to 3rd persons
       2. Decision: trial ct granted defendant motion for sum. Judgment; Sup Ct affirms holding that defendants don’t owe a duty to 3rd persons injured by intoxicated minor.
       3. **Rule-social hosts not liable on policy grounds**
    2. **Vince** v. Wilson
       1. Facts: plaintiff was injured in a car accident. She was a passenger. She brought suit against the driver’s grand aunt for giving him money to buy the car & the dealership & salesman.
       2. Decision: trial ct granted directed verdicts for dealership & salesman, but held for plaintiff in suit against Wilson (grandaunt). Sup Ct reverses directed verdict for defendants & affirm decision against Wilson.
       3. **Rule-liability arises out of the combined negligence of both, the negligence of one in entrusting the car to an incompetent driver & the incompetent driver; negligent entrustment-entrustor knew or should have known entrusting the item was foolish b/c person was incompetent & it may result in unreasonable risk to himself & others**
    3. **Gipson** **v. Kasey** **FORESEEABILITY**
       1. Facts: issue is whether those prescribed drugs owe a duty of care when they improperly give their drugs to others? Kasey gave out oxycodone out at work holiday party. One of his coworkers died from taking the pills in combination w/ alcohol
       2. Decision: trial ct granted sum. judgment for Kasey; app. Ct reversed; sup ct held there is a duty
       3. **Rule-foreseeability isn’t a factor to consider when making determinations of duty; the existence of a statute criminalizing conduct creates a duty if the statute is designed to protect a class of persons.**
    4. **Duty is a question of law; foreseeability turns on the facts (difficult for a judge to decide)**
    5. **Any duty can be trumped by statute or for policy reasons**
    6. **Negligent hiring-employer negligent in hiring, retaining, or supervising an employee who has committed a tort**

2/15 pgs 195-218 **Landowners & Occupiers**

1. **DUTIES OF LANDOWNERS & OCCUPIERS**
   1. **Carter** v. Kinney
      1. Facts: kinneys hosted a morning bible study. They had shoveled snow off the driveway the night before, but didn’t realize it had frozen again overnight. In the morning Carter slipped on the driveway & brought suit against the kinneys.
      2. Decision: trial ct granted kinneys motion for sum. judgment on the ground the carter was a licensee (not an invitee) & there is no duty to a licensee w/ respect to a dangerous condition the kinneys weren’t aware of.
         1. Sup ct affirmed
      3. **Rule-a person is an invitee when the possessor invites w/ the expectation of a material benefit from the visit (business purposes); social guests are licensees;**
   2. **Not Liable to anyone for open & obvious dangers**
   3. **Stitt** v. Holland Abundant Life-**Rule: the prospect of pecuniary gain is required for a higher duty of care owed to invitees**
   4. **Child Trespassers**-Holland v. Baltimore & OR Co.- **a possessor of land is subject to liability for physical harm to kids trespassing thereon caused by an artificial condition upon the land if: 1. The place where the condition exists is one which the possessor knows or has reason to know that kids are likely to trespass;& 2. The condition is one of which the possessor knows or has reason to know & which he realizes or should realize will involve an unreasonable risk; & 3. The kids b/c of their youth don’t discover the condition or realize the risk;& 4. Burden to eliminate the risk is less than potential danger**(pg 200)
   5. **Heins** v. Webster County
      1. Facts: issue is whether this ct should abolish the common law classifications of licensee & invitee & require a duty of reasonable care to all nontrespassers? On a visit to the hospital where his daughter worked, Mr.   
         Heins fell.
      2. Decision: trial ct granted hospital’s sum. judgment; sup ct reversed & remanded for new trial; sup ct also abandoned classifications
      3. **Rule-owes a duty of reasonable care to all lawful visitors who become injured; abolish licensee/invitee classification**
      4. Dissent: end up owing a duty to unwanted solicitors
   6. **Posecai** v. Walmart
      1. Facts: plaintiff sues Wal-Mart after she was robbed at gunpoint in the parking lot. Issue is whether Sam’s owed Posecai a duty to protect her from criminal acts of 3rd parties?
      2. Decision: trial ct held for plaintiff; app ct affirmed; sup ct reversed
      3. **Rule-although business owners aren’t the insurers of their patrons’ safety, they have a duty to implement reasonable measures to protect their patrons from criminal acts when those acts are foreseeable.**
      4. **DETERMINING FORESEEABILITY:** 
         1. **Specific harm rule-landowner doesn’t have a duty to protect patrons unless he is aware of specific imminent harm,**
         2. **Prior similar incidents test-previous crimes on or near the premises,**
         3. **Totality of circumstances,**
         4. **Balancing test-balances the interests of both proprietors & customers (burden v. foreseeable harm)**
   7. **Forseeability as a requirement for duty only comes up for criminal cases b/c its actions by a 3rd party**
   8. **Some jurisdictions still use categories & some don’t**

**Plaintiff’s Case: Negligence**

* + - 1. **Duty**
      2. **Breach of Duty (negligence)**
      3. **Causation (Cause in fact (factual cause) or proximate cause(scope of liability))**
      4. **Injury**

**Landowner duties**

* **Invitee (business visitor): known & should have known**
* **Licensee (social guest): duty to correct or warn of known dangers; duty to refrain from active negligence**
* **Trespassers: not to willfully or wantonly harm**

**Duty of Due Care**

* **Invitee (business visitor)**
* **Licensee (social guest)**
* **Trespasser (distinguishes between flagrant v. ordinary)**(pg 12 supp)

**2/16 pgs 218-229 INTRAFAMILY DUTIES**

1. **INTRAFAMILY DUTIES**
   1. Spousal Suits & Parent-Child Suits
      1. Possible legal standards-duty to world at large (Sandoval), **reasonable parent (Broadbent),** negligent supervision immunity (NY,Schleier), Goller Standard (Strenz), Parental Immunity
      2. **Broadbent v. Broadbent**
         1. Facts: defendant mother was watching 2 ½ yr old swim. When the phone rang she went inside & he drowned. He was revived but suffered severe brain damage. The father brings suit as the boys conservator of his son. Issue is whether the doctrine of parental immunity applies?
         2. Decision: trial ct dismissed ; app ct affirmed; sup ct reversed & remanded for new trial
            1. **Sup ct rejected parental immunity & replaced it w/ reasonable parent test**
         3. **Parental immunity doesn’t apply if :** 
            1. **Acting in scope of employment**
            2. **Willful or reckless**
            3. **Acting guardian, not parent**
            4. **Parent or child dies**
            5. **Child is emancipated**
            6. **Goller Standard-parental immunity doesn’t apply unless where alleged negligent act involves: 1. an exercise of parental authority & 2. An exercise of ordinary parental discretion w/ respect to provisions of food, clothing, housing, medical, etc.**
         4. **Rule-REASONABLE PARENT TEST-parent’s conduct is judged by whether that parent’s conduct comported w/ that of a reasonable & prudent parent in a similar situation**

* Traditionally at common law there were 3 immunities (no duty rule): 1. Charities, 2. Intrafamily, 3. Sovereign (but over time cts have begun to do away w/ these)

**2/17 pgs 229-251 Governmental Entities**

1. **GOVERNMENTAL ENTITIES**
   1. **MUNICIPAL & STATE LIABILITY (\*know these cases for exam)**
      1. **Riss v. New York**
         1. Facts: Riss was terrorized for 6 months by Pugach. She sought police protection 2x unsuccessfully. Pugach hired a thug to pour lye into Riss’s face which caused severe injuries to her face & eyes.
         2. Decision: trial ct dismissed; app. Ct affirmed
         3. **Rule-no liability for police protection to members of the public;** 
            1. **Sovereign Immunity. Crushing liability.**
      2. **Schuster v. NY**
         1. Facts: Schuster gives FBI info on criminal who was on a flyer in his shop. His life is threatened & he asks police for protection. They didn’t & he was killed. Did the police owe Schuster a duty to protect him?
         2. Decision: held for plaintiff
         3. **Rule-when gov has made active use of a private citizen, they create a duty to that individual**
      3. **Sorichetti v. NY**
         1. Facts: father mutilated daughter after threatening the mother. Mother contacted police. Front desk officer assured her they would take care of it but failed to do anything. Family ct had issued a series of protective orders against father.
         2. Decision: ct held for plaintiff
         3. **Rule: protective orders create a duty for police to act**
      4. **Cuffy v. NY** (neighbor attacked family members after police failed to show up)
         1. **H: Generally Police don’t have a duty unless a special relationship is created:**
            1. **promise on part of police**
            2. **knowledge inaction could led to harm**
            3. **direct contact (e.g., 911 call)**
            4. **reasonable reliance on promise**
2. **Lauer v. NY**
   * + 1. Facts: issue whether a person can recover damages against a municipality for its employee’s negligence? 3yr old boy died & the med. Examiner reported that it was a homicide caused by blunt force trauma. Wks later the med. Examiner conducted a more detail study & revealed that his death was actually due to a ruptured brain aneurysm, but the examiner failed to inform the police or correct the death cert. & autopsy report. Police investigated boy’s father for murder.
       2. Decision: trial ct dismissed; app ct affirmed except for claim of negligent infliction of emotional distress; NY app ct reversed app ct’s exception
       3. **Rule-to sustain liability against a municipality, the duty breached must be more than that owed the public generally;** 
          1. **Governmental Acts: Discretionary: grounded in policy. (immunity)**

**Duty must run directly to injured person. Fix orbit of duty**

1. **Friedman v. NY**(3 separate car accidents due to no median barrier; hwy planning)
   * + 1. **Rule: Not discretionary. Delay in putting up barrier was unreasonable since risk was known; only had a duty b/c they planned in writing to fix the barriers**

2/22 pgs 251-263 FEDERAL TORT CLAIMS ACT

* 1. **FEDERAL TORT CLAIMS ACT**
     1. Federal gov. waived its general tort immunity in 1946; **gov is liable if a private entity is liable for same act**
        1. **§2680 (b)-doesn’t apply to postal matters**
     2. **Cope v. Scott** (nat. parks service failed to maintain rd & post warning signs)
        1. Facts: cope appeals sum. judgment in favor of gov.; negligence is based on road maintenance
        2. Decision: dist. Ct concluded that gov.’s acts were discretionary therefore immune & granted sum. judgment; app. Ct affirmed in part & reversed in part (allegations of improper warnings)
        3. **Two step process to determine if action is exempt from suit under discretionary function exemption-**
           1. **1. Does any fed. statute, regulation, or policy specifically prescribe a course of action for an employee to follow? (if a specific directive exists, then the employee had no choice) - Did the employee follow the directive (exempt) or not (not exempt)?**

**If no prescription exists & gov. employee has a choice then gov exempt**

* + - * 1. **2. Are the challenged discretionary acts the type that congress has intended to shield from tort liability? (social, economic, or political goals)**
      1. **Rule-discretionary but not grounded in policy (aesthetic considerations)**
    1. Whisnant v. US (Toxic mold was allowed to accumulate at military commissary)
    2. Mastko v. US (§2680(h) – gov cant be sued for intentional torts) ct held that gov. has a duty to protect business invitees; can be held liable under FTCA is gov. employees negligently failed to prevent the assault

**What type of function is it? Ministerial or discretionary? (gov liability cases)**

2/23 pgs 264-281 EMOTIONAL HARM; DIRECT VICTIMS

1. **DUTY REQUIREMENT FOR NONPHYSICAL HARM**
   1. **EMOTIONAL HARM**

**DIRECT VICTIMS**

* + 1. **Falzone** v. Busch **(DIRECT) (**almost hit by car, fell ill & needed medical attention)
       1. Facts: issue is whether plaintiff may recover for sickness resulting from fear for her safety caused by negligent defendant? Defendant was veered into a field where Mrs. Falzone was sitting in a parked car & almost hit her causing her to be sick b/c of fear & need medical attention.
          1. He hit the husband who was outside of the car (1st count)
       2. Decision: trial ct granted sum. judgment for 2nd count; sup ct reversed (reject requirement of impact)
       3. **Rule-where negligence causes fright from a reasonable fear of immediate personal injury & from that fright results in substantial bodily injury then it should be regarded as proper elements of damage; physical injury directly traceable to fright but no physical impact is still harm (fear must be reasonable) (most cts follow Falzone holding)**
    2. **Major battleground is in the indirect cases; ex. see someone get injured**
    3. RJ v. Humana-(RJ was wrongly diagnosed w/ HIV) ct held that plaintiff would only be able to recover if treatments or injections had harmed him
       1. **Rule-plaintiff’s emotional distress suffered must flow from physical injuries the plaintiff sustained in an impact**
    4. Quill v. Trans World (plaintiff recovered based on emotional distress after plane plunged in an uncontrolled tailspin)
    5. **Sander v. Geib** (plaintiff recovered $1mil based on emotional distress after dr misread a pap smear test which led to a failure to detect cervical cancer until it was too late)- **impending doom**
    6. **Metro-North Commuter RR v. Buckley**
       1. Facts: issue is whether a RR worker negligently exposed to a carcinogen but w/o symptoms of any disease can recover under FELA for negligently inflicted emotional distress?
       2. Decision: sup ct held that worker can’t recover until he manifests symptoms of a disease
       3. **Rule-need physical impact or placed in immediate risk; only exposure w/ no symptoms manifested will not sustain a cause of action**
    7. Gottshall- zone of danger involves an immediate risk of physical harm
    8. RST-**an actor whose negligent conduct causes serious emotional disturbance to another is subject to liability to the other if the conduct:**
       1. **Places the other in immediate danger or bodily harm & emotional disturbance results from the danger or**
       2. **occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance.**

2/24 pgs 281-305 EMOTIONAL HARM; 3RD PARTY VICTIMS

**3RD PARTY VICTIMS (INDIRECT)**

* + 1. **Gammon** v. Osteopathic Hospital
       1. Facts: plaintiff’s dad died in hospital; he asked funeral home to make arrangements;
          1. negligence cause of action that led to emotional harm: instead of a bag of his dad’s personal effects, he received a bag w/ severed leg
          2. he didn’t have any medical treatment for the emotional distress
          3. issue is whether Gammon has established a claim for negligent infliction of severe emotional distress?
       2. Decision: trial ct granted directed verdict for defendants; sup ct reversed & remanded for trial
       3. **Rule-vulnerability of family of recent decedents overcomes physical impact; not eggshell personality; objective standard: reasonable person**
    2. Dobran v. Franciscan Med. Center (plaintiff had cancer; tissue was removed to test if it had metastasized, but tissue thawed & was unable to be tested) **ct rejected emotional distress claim b/c plaintiff wasn’t placed in actual physical peril**
    3. Baker v. Dorfman-**ct permitted an emotional distress claim due to negligently incorrectly informing plaintiff he had HIV**
    4. **Portee** v. Jaffee **(INDIRECT) (\*know for exam)**
       1. Facts: issue is whether a parent can recover damages for emotional anguish of watching her kid die is accident caused by defendant’s negligence? Issue is whether liability should exist where there was no potential for personal injury, but distress resulted from perceiving the negligently inflicted injuries of another?
          1. Plaintiff’s son was trapped in elevator shaft & dragged. Plaintiff watched as police attempted to rescue him; he died in the shaft.
       2. Decision: trial ct granted sum. judgment for defendant based on Falzone holding; sup ct reversed based on Dillon factors
       3. **Dillon factors: (majority of juris follow Dillon)-least restrictive**
          1. **1. Where plaintiff is located near the scene of the accident( can’t watch live on tv);**
          2. **2. Whether the shock resulted from a direct emotional impact from sensory & contemporaneous observance of the accident (can't learn about it from others);**
          3. **3. Plaintiff & victim are closely related**
       4. **Rule-emotional distress caused by watching a loved one injured is harm; Severity of emotional distress; negligence must cause death or serious physical injury**
          1. **Cause of action for negligent infliction of emotional distress requires:**

**1. Death or serious physical injury caused by defendant’s negligence**

**2. A marital or intrafamily relationship between plaintiff & victim**

**3. Observation at scene of accident**

**4. Resulting in severe emotional distress**

* + 1. **Bovsun v. Sanperi** (NY approach, more restrictive)
       1. **Rule-liability for emotional distress only if:**
          1. **Zone of danger**
          2. **Immediate family**
          3. **Severe & verifiable emotional distress**
    2. **Johnson** v. Jamaica Hospital
       1. Facts: plaintiffs daughter was born in hospital; she was abducted; police found her 4 months later
       2. Decision: trial ct denied motion to dismiss; app ct affirmed; sup ct reversed b/c hospital doesn’t owe a duty to parents
       3. **Rule-not in zone of danger; interested by-stander cant recover**
    3. Lubner v. LA-**ct held that plaintiff can’t recover for emotional disturbance caused by loss of property**
    4. Jarrett v. Jones (Supp pg. 13)
    5. **Loss of Consortium-loss of spouse’s income & companionship**

2/24 tutor session

Exam advice:

* Read thru questions 2x
  + 1st time make no marks-just figure out what’s going on
  + 2nd time make marks in margins re: causes of action
  + If several parties are suing, divide causes of action into each suit
* Headings
  + Don’t write intro; start right in to 1st issue
  + Divide by issues (I, II, III) & ALWAYS end w/ conclusion section
* Format
  + Follow a loose form of CREAC/IRAC
* Need to know facts of case law b/c you need to be able to distinguish & compare (know the determining fact which if had been different would have changed the result)

3/1 pgs 305-326 ECONOMIC HARM

* 1. **ECONOMIC HARM**
     1. **Nycal v. KPMG (3rd party cases-professional is negligent to client but b/c of negligence a 3rd party also suffers) (\*know for exam)**
        1. Facts: in 1991 plaintiff invested in Gulf based on defendant’s financial audit reports. In 1993 Gulf filed for bankruptcy making plaintiff’s investments worthless. Plaintiff is sueing b/c KPMG misrepresented the Gulf’s financial condition
        2. Decision: trial ct granted sum. judgment in favor of defendant based on §552RST; sup ct affirmed
        3. **4 tests have been applied to determine the duty of care owed by accountants to nonclients:**
           1. **Broad Foreseeability test-accountant may be held liable to any person whom the accountant could reasonably have foreseen would obtain & rely on the accountant’s opinion (not very popular)**
           2. **Actual privity (pure privity)**
           3. **Near-privity test-limits duty to those w/ whom the accountant has a relationship w/ or in privity w/; demands a linking between accountant & relying party (very restrictive)**
           4. **§552 RST-one who in the course of business in which he has a pecuniary interest, supplies false info for the guidance of others is subject to liability for pecuniary loss caused to them by justifiable reliance; loss is limited to the person for whose benefit & guidance he intends to supply the info (most moderate of all the tests)**
        4. **Rule-false info must be intended for a specific group, who relied on it detrimentally**
     2. Criminal Malpractice claims  
        1. **Wiley v. San Diego-ct held plaintiff who had been convicted could sue his defense attorney for malpractice w/o proving that he was innocent of underlying crime**
     3. **Sain v. Cedar Rapids** (highschool counselor mistakenly told student that a course would meet NCAA requirements, but it didn’t & student lost scholarship) ct imposed a duty of due care under §552 similar to that imposed on professionals who give advice
        1. **Rule-the defendant need not be in a professional relationship w/ person relying if defendant’s profession involves providing this type of info & defendant realizes that plaintiff is likely to rely on info**
     4. **532 Madison Ave** (office tower collapse shuts down 15 blocks, business loss)
        1. Facts: issues are 1)landowner’s duty in negligence where plaintiffs’ sole injury is lost income & 2)viability of claims for public nuisance
        2. Decision: trial ct dismissed plaintiffs negligence claims b/c they couldn’t establish that defendants owed a duty based purely on economic loss & couldn’t establish any intentional or negligent wrongdoing; app ct reversed; sup ct reversed app. ct
        3. **Rule-no duty to protect against pure economic loss; limit scope for duty for policy reasons; only duty against physical damage or physical injury (if you have one of these then you can add economic loss, but can’t have economic loss by itself); liability will never be for an indeterminate group for policy reasons**
        4. Goldberg v. Tishman-crushing liability (can’t recover for policy reasons); trial ct dismissed; app ct affirmed; sup ct affirmed
     5. City Express, Inc v. Express (pg 324)
        1. Facts: architect misdesigned building which made it unusable for its intended purpose but wasn’t dangerous; owner seeks to recover for lost rent & cost of remedy
        2. decision: denied tort recovery & refused to apply §552RST
        3. **Rule-if tort & contract remedies are allowed to overlap would decrease certainty & predictability in allocating risk & impede future business activity**

**\*know tests for exam**

**3/2 pgs 326-338 WRONGFUL BIRTH & LIFE**

* 1. **WRONGFUL BIRTH & LIFE-concerns legal obligations doctors incur when they assist in procreation decisions**
     1. **Emerson v. Magendantz** (botched sterilization results in unwanted pregnancy)
        1. Facts: issues-Is there a cause of action when a dr. negligently performs a sterilization procedure & the patient subsequently becomes pregnant & delivers a child? If so, what is the measure of damages?
           1. Dr. performed a tubal ligation on Mrs. Emerson in January, 1991. In May, 1991, Mrs. Emerson discovered she was pregnant & gave birth to a daughter. After the birth, Mrs. Emerson had a 2nd tubal ligation.
           2. Emersons assert that b/c of the botched tubal ligation Mrs. Emerson became pregnant & also suffered severe medical pain that required invasive medical treatment
        2. Decision: **sup ct held that there was a legitimate cause of action & adopted limited recovery (but no emotional distress w/ healthy child)**
           1. **If the dr has notice that there is a reasonable expectation that the parents will give birth to a child w/ defects(before the sterilization procedure), then cost of child rearing & emotional distress become recoverable damages**
        3. Dissent-Full Recovery: expense not offset by joy
        4. **Measure of Damages-**
           1. **Limited recovery-compensation for medical expenses of the ineffective sterilization, pregnancy, & subsequent sterilization, loss wages, & sometimes emotional distress & loss of consortium (emotional distress is offset by joy of keeping child instead of aborting or putting up for adoption)**
           2. **Limited recovery plus cost of child rearing (some juris subtracts the benefits to parents)**
           3. **Full recovery**
     2. Schloss v. Miriam (failed to discern that 1 parent carried the Tay-Sachs gene)
     3. Shaheen v. Knight-denied recovery all together for healthy child due to public policy
     4. **§920RST-when the defendant’s tortuous conduct caused harm & benefit, the benefit is considered in mitigation of damages**
     5. **Birth & Life Torts**
        1. **Wrongful life (child)-cts have rejected this claim b/c it’s impossible to compare life w/ disability to nonexistence**
        2. **Wrongful birth (genetic misdiagnosis, counseling & child is disabled)**
        3. **Wrongful birth (botched contraception/sterilization)-Wrongful Conception/Pregnancy**
        4. **Wrongful living or prolongation of life (disregard DNR directive)**
     6. Martinez v. Long Island (mom had abortion b/c dr told her that baby had no brain, but he was wrong) ct upheld claim

3/3 pgs 339-359 **CAUSATION IN FACT: PROOF**

1. **CAUSATION IN FACT** (actual cause)-seeks to tie defendant’s conduct to plaintiff’s harm in a physical or scientific way  
   1. **Stubbs v. Rochester (Cause in fact)**
      1. Facts: defendant didn’t maintain city’s water system; plaintiff contracted typhoid
      2. Decision: trial ct dismissed b/c nonsuit; app ct affirmed b/c plaintiff didn’t have sufficient evidence to prove it reasonable to believe he contracted typhoid from drinking water (several ways to get typhoid); Sup ct reversed & remanded for new trial
      3. **Rule-wolf standard doesn’t apply; only need to establish reasonable certainty; apply “but for” test**
   2. **If 2 people worked together to create a tort, generally they are going to be joint & severally liable if they act independently after they pass the substantial factor test (actions were a substantial factor)**
   3. Proportional liability
   4. Dillon v. Evanston-catheter left in patient; even though no current problems ct allowed recovery
   5. **Mitchell**-ct affirmed sum. judgment b/c proof of causation was lacking (hotel guest killed in rm w/ no signs of forced entry)
   6. **Burgos**-ct held it was unreasonable to require tenant to identify the perpetrator; it’s enough for if jury could reasonably conclude that it was an intruder who entered b/c of negligently maintained entrance
      1. **Rule**-**more reasonable than not that assailant was intruder, not tenant**
   7. **Zuchowicz v US (cause in fact)**
      1. Facts: plaintiff asserts that dr negligently directed her to ingest too much medicine; she was diagnosed w/ PPH; in fed ct b/c it’s a federal tort claim act b/c it’s a VA hospital (gov)
         1. Plaintiff’s experts couldn’t directly prove that the medicine caused PPH; defendant challenged the admissibility of both experts testimony
      2. Decision: trial ct held for plaintiff; app ct affirmed
      3. McCullock v. HB-decision to admit expert testimony is left to the broad discretion of trial ct & will be overturned only when manifestly erroneous
      4. **Rule-daubert test:when “but for” cant establish then use substantial factor test:**
         1. **Increased the chances a particular type of accident occur**
         2. **Said accident did occur**
      5. **Wolf**-denied recover for death who was found at bottom of unlighted stairway; plaintiff offered no proof; too speculative; **plaintiff’s burden to show causation (this rule is disfavored by the cts now)**
         1. **Rule-need to exclude other possible causes**
      6. **Alaska-(new rule)**
   8. Frye Test
   9. **Albert v. Schultz**
      1. Facts: dr failed to order a test which led to leg amputation; issue-is there a cause of action for the increased risk of harm to a patient as a result of dr’s negligence?
      2. Decision: trial ct granted summary judgment for failure to establish a causal connection; app ct certified the case to sup ct; sup ct held for loss of chance theory but not in this case (alberts failed to prove causation)
      3. **Loss of chance-same as other medical malpractice except for the nature of the harm for which relief is sought (duty, breach, loss/damage, & causation); requires evidence that the harm for which plaintiff originally sought treatment was made worse by the lost chance**
         1. **Damages-should be awarded on a proportionality basis as determined by % value of patient’s chance for a better outcome prior to the negligent act (some states deny recover unless original chance was more than 50%)**
   10. **Williams v. Utica (supp. Pg 15)**
       1. Facts: would better security have prevented the attack? Student was assaulted in dorm rm
       2. Decision: ct granted sum judgment b/c inability to prove causation

3/8 pgs 369-392 **CAUSE IN FACT: JOINT & SEVERAL LIABILITY, MULTIPLE DEFENDANTS**

* 1. **JOINT & SEVERAL LIABILITY**
     1. **Several-means each defendant is only responsible for their share or portion of the damages; each liable for %**
     2. **Joint = each defendant liable for full amount; plaintiff goes after one that is solvent; indemnify others**
     3. Ravo v. Rogatnick
        1. Facts: plaintiff suffered brain damage at birth; suit against obstetrician & pediatrician
     4. Veazey v. Elmwood
        1. Facts: plaintiff was raped in her apt; action was brought against mgmt company
        2. Decision: trial ct refused to allow any allocation of fault to unidentified nonparty rapist; sup ct affirmed holding that it might be appropriate to compare negligence & intentional fault in some cases but this isn’t one of them
     5. Immune tortfeasors  
        1. Carroll v. Whitney
           1. Facts: plaintiff medical malpractice suit against several defendants; 2 of whom where employees of a public hospital & immune by statute (trial ct dismissed them from case)
           2. Decision: ct held 2 absent drs liable; app ct affirmed
     6. Nondelegable duties  
        1. Wigs v. Phoenix
           1. Facts: the city had a contract w/ T to keep lights up & running; a light failed which caused an accident
           2. Decision: ct held city liable b/c its duty was nondelegable
  2. **MULTIPLE DEFENDANTS**
     1. **Summers v. Tice (multiple defendants) \* know fire examples**
        1. Facts: plaintiff & defendants were quail hunting when defendants fired in plaintiff’s direction; both were using same type of gun & ammo; unable to determine who hit plaintiff; (doesn’t pass the but for rule)
        2. Decision: ct held both defendants liable b/c they’re unable to determine who shot plaintiff; app ct affirmed (both defendants are liable for the entire amount-not several liability)
        3. **ALTERNATIVE LIABILITY-each defendant acted independently but has the burden of proving the other was the sole cause of the harm**
        4. **Rule-defendants acting in concert (Oliver) vs. this holding=ALTERNATIVE LIABILITY**
     2. **Hymowitz v. Eli (multiple defendants)**
        1. Facts: plaintiffs were injured by drug ingested by their mothers during pregnancy; difficult to determine which manufacturer is responsible for making the drug
        2. Decision: hold entire market liable; **discovery of injury** instead of time of injury rule
        3. **MARKET SHARE THEORY** (instead other causation rules)
        4. Dissent-if a defendant can prove it wasn’t their pill, then that defendant should be exculpated
     3. **Proximate cause is now known as scope of liability**

Cause in Fact Fires Examples

* Defendant & Defendant both negligently set 2 fires that burn across the fire at same time causing a farmhouse to burn down
  + BUT FOR RULE (plaintiff cant establish causation b/c the farmhouse would have burn down anyway)=can’t use to prove causation then use->
  + SUBSTANTIAL FACTOR TEST (since either fire was a substantial factor in causing the fire so there is causation)
* Negligent defendant set fire & lightning struck ground causing fires that burn farmhouse down
  + Can use SUBSTANTIAL FACTOR TEST (Cant use BUT FOR TEST);
* Lightning & then defendant sets fire-
* Defendant sets fire & then lightning-
* Defendant then defendant-

3/9 pgs 401-425 PROXIMATE CAUSE-UNEXPECTED HARM & MANNER

1. **PROXIMATE CAUSE**
   1. (tends to deal w/ the oddball cases; more of a sense of right/wrong; individual cases; jury decision) (duty cases tends to deal w/ class of cases at large; policy considerations; broad legal question for class of cases; legal question for judge)
   2. **UNEXPECTED HARM**
      1. **Benn v. Thomas (eggshell plaintiff)**
         1. Facts: issue is whether the trial ct erred in refusing to instruct the jury on eggshell plaintiff rule in view of the fact that plaintiff had a history of coronary disease & died of a heart attack 6 days after injured in accident caused by defendant’s negligence?
         2. App ct concluded it was a reversible error; sup ct affirmed & remanded for new trial
         3. **EGGSHELL PLAINTIFF RULE (Thin skull)-requires defendant to take the plaintiff as he finds him, even if that means the defendant must compensate the plaintiff for harm an ordinary person wouldn’t have suffered (plaintiff request this charge)**
      2. **Steinhauser v. Hertz (Eggshell Rule)**(teen in accident but not physically injured but develops schizophrenia after)
      3. **Medical Aggravation Rule**-liability for coincidental Rx injury, not liable for other coincidental injuries
      4. **In Re Polemis & Furness (contrast w/ wagon mound; proximate cause; scope of liability)** (fire destroyed ship when plank fell into the hold & sparked; type of damage was unforeseeable[impact damage foreseeable but fire damage not foreseeable])
         1. **Rule-direct test: injury cause by direct negligent physical contact or act; doesn’t matter if the extent of harm is foreseeable**
      5. **Smith** (passing trains sparked dry grass fire burning field & cottage; extent of harm unforeseeable)
         1. **Rule-extent of injury need not be foreseen, but must be able foresee type of harm (**NY fire rule is extent must be foreseen)
      6. Overseas v. Mort’s Deck **(WAGON MOUND)(contrast w/ polemis; proximate cause; scope of liability)** (discharged oil burned wharf when molten metal fell on rag)
         1. **Rule-injury has to be foreseen** (overrules Polemis) **ACTUAL DAMAGE RESULTS must be RESONABLY FORESEEABLE TEST**
      7. **Wagon Mound 2** (same case, different action)
         1. **Rule-type of injury has to be foreseen**
      8. Linking Principle
   3. **SUPERSEDING CAUSE** 
      1. **§29RST3rd-new standard; chain of causation isn’t broken if harm is from the intervening cause is w/in scope of the risk of original negligence (only applicable when there is more than one defendant involved)**
      2. **Doe v. Manheimer (intervening/superseding causes)**
         1. Facts: issue is whether the landowner may be liable in tort for damages arising from the rape of a pedestrian committed on the landowner’s property behind brush?
         2. Decision: jury held for plaintiff & judged entered a directed verdict b/c the overgrowth of brush didn’t cause the injury (wasn’t a substantial factor); app ct affirmed; outside scope of risk
         3. SUBSTANTIAL FACTOR
         4. **Defendant’s conduct must be reasonably foreseeable to cause that type of harm; chain of causation isn’t broken if harm is from the intervening cause is w/in scope of the risk of original negligence**
      3. **Hine v. Garret** (train conductor goes 1mile past plaintiff’s stop; he makes her get out & walk back even though its well known that it is a dangerous area & she is raped on the walk back)
         1. Decision: ct holds conductor liable
         2. **Intervening wrongful act-doesn’t break chain of causation if the defendant could foresee that his conduct would put plaintiff in scope of risk; Rule-an intervening wrongful act can’t break chain of causation even if the risk was foreseen** (in this case, type of injury was foreseen); **the manner in which the injury is caused need not be foreseen; Intentional conduct**
      4. **Hines v. Morrow**
         1. Facts: 2 men sent out in service truck to tow stalled car stuck in hole; in the process one of the guy’s broke his leg
         2. Decision: ct held specific type of accident was unforeseeable but **exact consequences don’t have to be foreseen**
   4. **Proximate cause**
      1. **Extent of harm-need not be foreseeable**
      2. **Mechanism/manner of harm-need not be foreseeable (except when mechanism includes serious human wrongdoing [intervening cause])**
      3. **Type of harm-must be foreseeable (unless polemis prevails or subject to remoteness limit in the jurisdiction)**
      4. **Victim: must be foreseeable (unless Andrews dissent prevails or subject to remoteness limit in jurisdiction)**
      5. **§29 RST3rd-an actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious**
         1. **Harm w/in the risk**
         2. **Harm w/in the scope of risk**
         3. **(makes you focus on the negligence)**

3/10 pgs 425-439 PROXIMATE CAUSE-UNEXPECTED VICTIM

* 1. **UNEXPECTED VICTIM**
     1. **Palsgraf v. Long Island RR (unexpected victims)**
        1. Facts: man running to catch a train jumps on & drops a package of fireworks which goes off causing scales to fall & injuring plaintiff. The fireworks were wrapped in paper & there is no way the guard who held the door for the man knew that he was holding fireworks.
        2. Decision: trial ct held for plaintiff; app ct affirmed; sup ct reversed b/c guard had no duty to plaintiff
        3. **Rule-negligence isn’t actionable unless it involves an invasion of a legally protected interest; ideas of duty & negligence are strictly correlative; liable only for foreseeable victims**
        4. Dissent-duty to public at large
     2. **Wagner v. International RR-Danger invites rescue; Rescuers that become victims are foreseeable**

**Structure of Negligence Lawsuit**

**P’s Case-DUTY, BREACH, CAUSATION (CF, PC), INJURY**

**D’s Case-DUTY-[always refute P’s case, not really a defense but you say case isn’t proven];**

**CAUSATION-1. Immunities(affirmative defenses): Church, Family, Govt; 2. P’s negligence—contributory(plaintiff is at all contributory then lawsuit ends)/comparative(cts chose pure, legislature chose modified); 3. P’s assumption of the risk; 4. Preemption**

**3/22 pgs 440-466 PLAINTIFF’S NEGLIGENCE**

1. **DEFENSES**
   1. Immunity-charity, family, govt
   2. **PLAINTIFF’S FAULT**
      1. **CONTRIBUTORY NEGLIGENCE(1st major defense[includes comparative];absolute defense)-duty owed to one’s self (exception-children)**
         1. **§3 RST 3RD- “plaintiff negligence is defined by the applicable standard for a defendant’s negligence.”**
         2. **Plaintiff’s negligence must also be a proximate cause of the plaintiff’s harm**
         3. **Only applicable to negligence cases**
         4. **Dodson v. SD** (supp pg 18) [plaintiff w/ bipolar committed suicide shortly after being discharged] **ct held that a subjective standard should be used reflecting her mental capacity instead of an objective standard used for all defendants w/ mental deficiencies**
            1. **This makes it easier for the plaintiff**
         5. **Statutes-**
            1. **Chainani v. Bd of Edu** (statute requiring bus drivers to instruct kids in crossing streets) **ct held that statute was intended to protect kids from their own negligence so contributory negligence isn’t a defense**
            2. **Feisthamel v. State** (kid was badly cut when she walked thru glass drum; statute ordering mark glass revolving doors; state argued contributory negligence as a defense) **ct accepted defense & reduced damages b/c statute wasn’t enacted to protect definite class of people**
         6. **Last Clear Chance-defendant had last clear chance to avoid the accident even though plaintiff was contributorily negligent**
         7. **Refusal to impute contributory negligence**
            1. **Continental v. Campbell**- **ct held that Continental could be imputed for Kamman’s**(who rented the car from Continental & was in an accident) **negligence**
      2. **COMPARATIVE NEGLIGENCE-compare plaintiff & defendant’s negligence**
         1. **Plaintiff’s recovery depended on how serious plaintiff’s negligence was compared to defendant’s negligence**
         2. **Pure-assign % to each party**
         3. **Modified-if plaintiff >50% negligence then suit is dismissed**
         4. **Uniform Comparative Fault Act-**
            1. **Sect. 1(a) damages are diminished proportionately according to % of fault attributed to plaintiff**
            2. **Sect 2(d) any uncollectible amount will reallocated among the others according to their prospective fault %**
         5. **Iowa Code Ch 668**
            1. **Effect of Contributory Fault-claimant can recover only if their % of fault isn’t greater than the combined % of fault attributed to the defendants**
            2. **Joint & Several Liability-wont apply to defendants who are found to bear less than %50 of the total fault. If the defendant bear %50 or more then they shall be liable for all economic damages but no other damages**

Hypo (pg 447)

A: UCF-A can only recover from the defendants 60% of 40,000 (cant recover %of their own fault)B%30=12,000,C10%=4,000,D%20=8,000 (total 24,000); Iowa-A can still recover b/c defendants % is still greater, but damages are still diminished by 40%

B:UCF-D’s amount will be reallocated over the others according to their perspective %; Iowa-none of the defendants would be held liable for D’s part b/c they all bear under %50

C:UCF-C can only recover 90% from defendants; Iowa-can still recover b/c % is less than combined % but damages are diminished by 10%

D:UCF-A can recover 49% of damages; Iowa-cant recover b/c 51% liability

E:UCF-B can pay only 12,000 at 1st but A can motion for the ct to reallocate any unpaid damages by other parties which would cause B to owe more; Iowa-B isn’t liable for any additional damages

* + - 1. **Bystander Emotional Distress**
         1. **Meredith v. Hanson** (plaintiffs sued for emotional distress at watching stepfather die in car accident)  **ct held that stepfather’s negligence doesn’t matter in plaintiff’s emotional distress case against defendant for defendant’s negligence; stepfather’s negligence isn’t imputed to his children**
      2. **Fritts v. McKinne (really only applies to medical treatment)**
         1. Facts: fritts was injured in 1 car accident b/c he drunk driving; dr performed a trachestomy & hit an artery that wasn’t supposed to be in the neck. Fritts lost a lot of blood & died.

Dr. claims contributory negligence since original accident was caused by his drunk driving

* + - * 1. Decision: trial ct held for dr. mckinne; app ct held that evidence re: Fritt’s negligence in the car accident was prejudicial & unrelated to the medical procedures-reversed & remanded for new trial; **plaintiff’s DUI is irrelevant to the medical malpractice**
      1. **Harding v. Deiss** (plaintiff went horseback riding even though she knew she was allergic)
    1. **AVOIDABLE CONSEQUENCES**
       1. **Munn v. Algee-ct held that the decedent’s religious beliefs wouldn’t justify her failure to accept a blood transfusion; standard-what would a reasonable believer do?**

**3/23 pgs 466-490, 496-505**

* 1. **ASSUMPTION OF RISK (2nd major defense)**
     1. Express Agreements-parties sometimes agree in advance that defendant need not exercise due care for the safety of the plaintiff (hold harmless agreement)  
        1. **Dalury v. SKI** (**express agreement not enforceable due to public policy)**(plaintiff hit a metal pole while skiing at resort; had signed a release of liability before; plaintiff argued release was ambiguous)
           1. Decision: trial ct granted sum. judgment; sup ct reversed
           2. **Rule-release form may be unenforceable if it violates public policy. Violation of public policy determined by (Wolf): “totality of hitting a pole isn’t a inherent risk of skiing. Waiver language must be unambiguous.**
           3. **\*(know these)Tunkl Factors: express agreement is invalid if**

**A business suitable for public regulation**

**Party seeking exculpation is engaged in performing a service of great importance to the public**

**Party makes the service available to the public**

**Seller has control**

* + - * 1. **Colorado Sup Ct factors:**

**Duty to public**

**Nature of service**

**Contract was fairly entered into**

**Intention is expressed clearly**

* + - * 1. **Wolf (this ct uses)-determination of what constitutes public interest must be made considering the totality of circumstances of any given case against the backdrop of current societal expectations**
      1. **Knight v. Jewett** (defendant stepped on plaintiff’s finger while playing touch football) **While playing sports, Liability would only flow if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of ordinary activity involved in the sport**
  1. **IMPLIED ASSUMPTION OF RISK-when plaintiff accepts dangers where they are obvious & necessary; even if plaintiff assumes inherent risks, defendant is still responsible for hidden risks; generally cts are reluctant to dismiss defendant’s responsibility b/c of plaintiff’s assumption of risk**
     + - 1. **Murphy v. Steeplechase** (plaintiff fractured knee cap on Flopper)**Rule-one who takes part in a sport assumes inherent risks as long as they are obvious & necessary; liable only for intentional or reckless injuries**
         2. **Primary implied assumption of the risk is essentially a no duty rule[BAR](reasonable); lawsuit is over**
         3. **2ndary implied assumption of the risk is where there is a duty(unreasonable)**
         4. **Davenport v. Cotton** (comparative negligence; plaintiff knew stair lights weren’t working but continued to use the stairs, he fell)

Decision: trial ct granted directed verdict for defendant; ct of appeals reversed; sup ct remanded for a new trial

**Rule-Assumption of risk doesn’t bar recovery if defendant’s negligence>plaintiff’s negligence**

**4 requirements to establish a defense of assumption of risk:**

**Plaintiff must have knowledge of the facts constituting a dangerous condition**

**Plaintiff must know condition is dangerous**

**Plaintiff must appreciate the extent & nature of the danger**

**Plaintiff must voluntarily expose himself to the danger**

* + - * 1. **Assumption of the risk isn’t an absolute defense; its just mitigating factor (jury will take it into consideration)**
  1. **PRE-EMPTION (3rd major defense; affirmative,absolute defense)[\*know for test; if there is federal statute in the fact pattern then discuss preemption]; discuss policy reasons**
     1. **Recognize express preemption[look at statute wording]; then look for implied preemption (field preemption & conflict preemption**
        1. **Conflict preemption (fed addresses something that state says opposite)**
     2. **Geier v. American Honda (\*know for final)[field preemption b/c statute had savings clause]**
        1. Facts: geier’s was injured in a car accident in a car w/ no passive restraints
        2. Decision: district ct dismissed; ct app affirmed; sup ct held that the statutes requiring auto manufacturers to equip some but not all cars w/ passive restraints pre-empts a tort lawsuit based on no passive restraints

3/24 pgs 698-718 COMPENSATORY, PAIN & SUFFERING DAMAGES

1. **DAMAGES & INSURANCE**
   1. **COMPENSATORY DAMAGES-fundamental goal of damage awards in unintentional torts is to return the plaintiff as closely as possible to his/her condition before the accident; achieved by measuring certain items of harm in past & future terms; makes the plaintiff whole**
      1. **Specific-Rx, wages**
      2. **General-pain & suffering**
      3. **Seffert v. LA Transit (app. ct level standard)**
         1. Facts: defendants appeal from excessive jury award of damages; plaintiff was injured when she entered the bus doors & they shut on her & she was dragged. Her injuries will need medical care for the rest of her life
         2. **Rule-$ is excessive if it shocks the conscience & suggests jurors were motivated by passion, prejudice, or corruption**
      4. Past Pecuniary Losses- clearest category of recoverable damages ; can be reconstructed w/o much difficulty
      5. Future Pecuniary Loses- future bills & lost earnings
      6. Pain & Suffering-nonpecuniary
      7. Remittitur & Additur-when ct thinks damages are excessive, it has 2 options: 1. Grant new trial, 2. Grant remittitur (conditionally grants new trial unless plaintiff consents to reduction of damage award

3/29 pgs 732-762 COLLATERAL SOURCE RULE; PUNITIVE DAMAGES

* 1. COLLATERAL SOURCE RULE-plaintiff still recovers full amount from defendant  
     1. **Subrogation-insurance recovers what it paid out from collateral sources**
     2. **Arambula v. Wells**
        1. Facts: plaintiff was injured in a car accident; he owned 15% of family business so even though he missed work he still received his salary; plaintiff claimed he had to reimburse the salary
           1. Defendant admitted fault but contested causation & damages
           2. Plaintiff alleges brain injury which defendant denies
           3. Defendant moved in limine to exclude lost wages claim
        2. Decision: trial ct excluded lost wages; appt ct affirmed
        3. **Collateral Source Rule-shelters gratuitous gifts & allows plaintiff to still recover from defendant**
     3. Peterson v. Lou-ct refused to permit plaintiff to recover for the value of medical services received at a Shriner’s Hospital; **the purpose of compensatory damages is to compensate; not to punish defendants or bestow a windfall on plaintiffs**
  2. **PUNITIVE DAMAGES (punish the defendant)**
     1. **Taylor v. Sup Ct (requires actual intent)**
        1. Facts: plaintiff sued Stille for compensatory & punitive damages b/c he was drunk driving when they had a car accident
        2. Decision: trial ct dismissed the punitive damages; sup ct overruled demurrer
        3. **Rule-Punitive damages: there must be circumstances of aggravation or outrage; malice b/c behavior was willful & wanton**
           1. **Holding later revised that malice must be proven by clear & convincing evidence**
     2. **State Farm v. Campbell** (appeal from $145m punitive damage award)
        1. Facts: Campbells were involved in a car accident; state farm told them not to seek counsel & refused to settle. Trial ct held for plaintiffs in excess of insurance policy limits; state farm refused to cover it, but then later did. Campbells brought bad faith suit against State Farm
        2. Decision: trial ct dismissed; app ct reversed; sup ct reversed & remanded for a new trial to decide more reasonable punitive damages
        3. **Rule-there should be a single digit ration between punitive & damage awards; may not punish defendant for harm to others**
        4. **Gore test**
     3. 3 factors for punitive damages:
        1. Degree of reprehensibility
        2. Comparable Damages for comparable conduct
     4. Defendant’s wealth can’t justify an otherwise unconstitutional punitive damages award
     5. No Fault Scheme-don’t have to prove fault, waive right to negative suit, get damages quickly, & no litigation costs (ex. worker’s comp, 9/11 fund)

3/30 pgs 506-529 TRADITIONAL STRICT LIABILITY

1. STRICT LIABILITY  
   1. Traditional Strict Liability
      1. Replace duty w/ abnormally dangerous activity
      2. Replace breach w/ did defendant engage in that activity
      3. Incentive to invest in testing
      4. Cost spreading, accident avoidance, & judicial economy
   2. DOCTRINAL DEVELOPMENT  
      1. Fletcher v. Rylands (cause of action- SL); was the activity abnormally dangerous?
         1. Facts: plaintiffs land was flooded by a reservoir constructed by defendant;
         2. Decision: ct held for plaintiff; app ct affirmed
         3. **Rule-(Cairns test) a person who for his own purpose brings on his lands & collects & keeps there anything likely to do mischief if it escapes, must keep it in at his peril & if he doesn’t do so, is prima facie answerable for all the damages which is a natural consequence of its escape; strict liable for anything potentially harmful not naturally there brought to the land & that escapes**
         4. **Blackburn test-if defendant not stopping at its natural use then defendant liable**
            1. **Strict liable differs from negligence in that plaintiff doesn’t take upon any risk such as in driving, sports, etc (app ct held strict liability for non natural use)(later unreasonable use of land)**
      2. Sullivan v. Dunham (cause of action- SL)
         1. Facts: defendants employed 2 men to blow up a tree; the blast hurled a piece of wood onto a highway where it struck & killed the plaintiff
         2. Decision: trial ct held that negligence need not be proven to establish liability & held for plaintiff; app ct affirmed; sup ct affirmed b/c of public policy
         3. **Rule-for policy reasons, safety of property in general is more important than a particular use of a property by a single owner; use your property such as to not harm others**
         4. **Contra-losee: industrial activity=general good outweighs accidental injury**
      3. Indiana Harbor RR v. American Cyanamid
         1. Facts: RR seeks to recover decontamination fees from American Cyanamid; a train car carrying their toxic product was leaking; the issue is whether the shipper of a hazardous chemical by rail should be strictly liable for the consequences of a spill or other accident to the shipment en route?
         2. **Rule-§1,2RST: Strict liability for ultrahazardous or abnormally dangerous activities; leak here is negligently b/c could be avoided by reasonable care**
            1. **RST refers to activities, not properties of substances**
            2. **Purpose of strict liability is to relocate, change, or reduce the activity**
         3. **§520RST 6 factors to be considered in deciding whether activity is abnormally dangerous & actor therefore strictly liable** (pg520-521)
      4. **Abnormally Dangerous Activity (§3RST): foreseeable risk of harm that can’t be eliminated by utmost care & not a matter of common usage; value to the community & appropriateness of location have some bearing**
      5. **Airplanes: SL for crash damage & falling objects**
      6. **SL is an alternative to negligence (plaintiff argues 1st b/c its easier to prove; just have to show that something is abnormally dangerous)**

3/31 pgs 550-567 LIABILITY FOR DEFECTIVE PRODUCTS

1. LIABILITY FOR DEFECTIVE PRODUCTS **(manufacturer defect is the only true SL)**
   1. **Replace duty w/ defendant supplied product**
   2. **Replace breach w/ product was defective**
   3. **Winterbottom** (19th cent., mail coach collapses, but defendant was seller not manufacturer; defendant was a repairer & manufacturer of mail coaches) **no privity of contract, no liability**
   4. MacPherson v. Buick (manufacturer) (Products Liability) (historical perspective)
      1. Facts: defective car(wheel on buick collapsed causing injury); negligence claim
      2. Decision: trial ct held for plaintiff; app ct affirmed; sup ct affirmed
      3. **Rule-imminently dangerous to life things are not limited to things which in their normal operation are implements of destruction; must be knowledge of the danger, not merely possible but probable; if forseen 3rd party use of negligently made products that are dangerous, then lack of privity doesn’t bar liability (+bystanders); the rule is foreseeability**
   5. **Warranties don’t cover injury (only cost of product) & nontransferable; warranties are strict liability**
   6. Implied warranty of merchantability **(Ryan v. progressive)**
   7. Escola v. Coca Cola (Products Liability) (historical perspective)
      1. Facts: soda bottle burst in waitress hand causing injury
      2. Decision: trial ct held for plaintiff based on res ipsa(accident doesn’t occur w/o negligence), she had enough inference evidence; one justice thought shouldn’t be based on negligence but that strict liability should be extended to manufacturers
      3. **Rule- res ipsa, burden on defendant to disprove**
         1. **Concurring opinion-absolute liability; don’t need negligence**
            1. **Policy reasons: res ipsa is needlessly circuitous legally; Manufacturer->burden of cost, better designs, discourage marketing dangerous or defective products**
   8. **SL extended to retailers, lessors, franchisers, successor co.’s, emotional distress to product users, but USED, FINANCED, BUILT TO SPECIFICATION**

4/5 pgs 567-584, N.10 593-595 MANUFACTURING & DESIGN DEFECTS

**Elements: did defendant supply product; was the product defective; did the product cause the injury**

* 1. **MANUFACTURING DEFECTS-the one in a million that comes off the line defective; true strict liability; even though no negligence, manufacturer still pays**
     1. **Welge v. Planters** (jar shattered when plaintiff tried to screw plastic top on due to a defect, but experts don’t know when it happened; plaintiff sued kmart & planters & jar manufacturing under strict liability)
        1. Decision: trial ct granted sum. judgment against plaintiff; app ct reversed & remanded for trial
        2. **Rule-strict liability: seller is liable for defects in his product even if those defects were introduced w/o slightest fault of his own for failing to discover them**
     2. Price v. GM (plaintiffs alleged their car suddenly swerved into a pole & was completely destroyed)
        1. Decision: trial ct granted sum. judgment for defendant; app ct affirmed
        2. **Rule-has to be enough evidence to at least permit an inference of defect**
  2. **DESIGN DEFECT-**
     1. **§402A RST-one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby cause to the ultimate user or consumer or to his property**
        1. **The seller engaged in the business of selling such a product, &**
        2. **It’s expected to & does reach the user or consumer w/o substantial change in the condition in which its sold**
        3. **The rule stated in subsection 1 applies although**
           1. **The seller has exercised all possible care in the preparation & sale of his product &**
           2. **The user hasn’t bought the product from or entered into any contractual relation w/ the seller**
     2. **Cronin v. JBE** (bakery truck driver was injured in a crash when trays came forward & hit him in the back)
        1. Decision: trial ct held for plaintiff; app ct affirmed
        2. R**ule-rejected RST’s “defective + unreasonably dangerous” b/c rings of negligence. Only prove defective. Applies to manufacturing defect as well as design defect; defines RST as 1 element instead of 2;**
     3. Barker v. Lull (plaintiff was injured when high lift loader overturned)
        1. Decision: trial ct held for defendant; app ct reversed b/c trial judge used “unreasonably dangerous” in charge to jury
        2. **Rule-intended or reasonably foreseen manner; ordinary customer expectation or excessive preventable danger**
     4. **Soule v. GM** (plaintiff claimed that faulty camaro bracket design resulted in ankle injury)
        1. Decision: trial ct held for plaintiff w/ charge of ordinary customer expectation; app ct affirmed but said that the ct erred in using customer expectation b/c this is a complex case
        2. **Ordinary customer expectation-when a product, used in a reasonably foreseeable manner, fails to perform as safely as an ordinary customer would expect due to a manufacturing defect & causes injury**
        3. **In complex products, where customer’s everday experience doesn’t deal w/ the situation, the test is Excessive Preventable Danger: benefits of the design outweigh its risks (defendant has the burden of proof)**
     5. **RST- defective=RAD (reasonable alternative design); plaintiff must prove that a reasonable alternative design would have reduced the foreseen risk of harm**
     6. **Campbell v. GM** (bus passenger thrown from seat w/ no grab bar; used photo showing no grab bar as evidence) **ct held that was enough for Campbell to show objective conditions of the product since public transportation is a matter of common experience**
     7. **Pruitt v. GM** (plaintiff was hurt when air bag went off in low impact collision)
        1. **Decision:** ct held for defendant; app ct affirmed
        2. Rule**- minimum safety standards of air bags are not w/in common knowledge of lay jurors so consumer expectations test not appropriate**
     8. **Obrien v. Muskin** (plaintiff was injured when he dove into 3ft above ground pool)
        1. **Decision:** trial ct held for defendant
        2. **no reasonably alternative-recourse to a unique design is more defensible**
     9. **Camacho** (severe leg injury due to lack of leg bars on motorcycle)
        1. **Rule-crashworthiness test: defect, doesn’t cause accident but enhances the injuries (common law); focus in SL should be on the product, not what the user contemplated; reliance on consumer expectation is inappropriate b/c manufacturer is in a better position to know technical info relevant to complex products**
        2. **Ortho: 7 factor risk benefits test (pg 588)**
     10. **Simple Tools-benefits & risks are evident to everyone; no liability**
     11. **Food-consumer expectation test applies**
     12. **Market & advertising-create consumer expectations**
     13. **§3 RST-INFERRING THE EXISTENCE OF AN UNIDENTIFIED DEFECT**
         1. **It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, w/o proof of a specific defect, when the incident that harmed the plaintiff** 
            1. **Was of a kind that ordinarily occurs as a result of product defect &**
            2. **Wasn’t in the particular case solely the result of causes other than product defect existing at the time of sale or distribution**

4/6 pgs 595-620 INSTRUCTIONS & WARNINGS

* 1. SAFETY INSTRUCTIONS & WARNINGS
     1. No duty to warn of open & obvious dangers (vs latent dangers)
     2. Brown v. Brune-(warning on tequila bottle) ct held no need of one
     3. Maneely v. GM-(warning of riding unrestrained in back of truck) ct held no need of one
     4. Emery v. Federated Foods (warning of small kids eating marshmellows) jury should decide if there needs to be a warning
     5. **Hood v. Ryobi** (hood removed protective shields on his saw (blade flew off & he was injured) even though there were many warnings against; claims not the right warnings; claims failure to warn & defective design)
        1. Decision: trial ct granted defendants sum. judgment; app ct affirms
        2. **Rule-don’t need encyclopedic warning of every possible mishap; must balance more detailed warnings w/ benefits (costs, likeliness of consumers to read; too many detailed warnings to undermine effectiveness)**
     6. Pittman v. Upjohn- adequacy of a warning: 1. Adequately indicates scope of danger; 2. Reasonably communicate extent of harm that could result; 3. Physical aspects must alert a reasonably prudent person to the danger;
     7. Moran v. Faberge (2 teens poured cologne on a candle which caused serious burns) ct held Faberge liable b/c it failed to warn of the cologne’s flammability
     8. Ragans v. Miriam (hair product instructions) question for the jury
     9. **Criteria for warning adequacy:** 
        1. **Scope of danger**
        2. **Extent of harm**
        3. **Physical aspects adequate to alert a reasonable person**
        4. **Consequences of failure to follow**
        5. **Means to convey must be adequate (jury question)**
     10. **Heeding presumption-party responsible for inadequate warning must show consumer would not have heeded an adequate warning (shifts burden to defendant)**
     11. **Edwards (**died while wearing 2 nicotine patches & smoking) manufacturer didn’t meet FDA mandate
         1. **Rule- learned intermediary doctrine: manufacturer doesn’t have to warn b/c physician’s duty to warn of risks** 
            1. **Exceptions: mass immunization, FDA mandates, advertising drugs**
     12. **State of the Art- standard at time of trial, not time of manufacture (Beshada asbestos)**
         1. **Beshada-is only standard that doesn’t contain some negligence**
         2. **Feldman-expert in field standard (most states followed)**
            1. **Limited beshada to asbestos (b/c turns manufacturer into insurer)**
         3. **FLA: best knowledge available (general & prevailing info) standard**
     13. **Vassallo v. Baxter** (breast implants negligently designed) **duty to warn under implied warranty presumes the manufacturer was fully informed of all the risks; defendant not held liable under implied warranty of merchantability for failure to warn or provide instructions aboust risks not reasonably foreseen at the time of sale or could have been discovered by reasonable testing prior to marketing; expert in the field standard**
         1. **RST-seller must give warning if he has knowledge**
         2. **SL focuses on the product not on the manufacturer’s actions**
     14. **Royer** (sued hospital for defective prosthetic knee) **medical services aren’t retail marketing; sale of goods are incidental to the service; also public policy for medical services; not the same as buying tires & having them installed**
     15. **Usually no SL for pharmacists, but negligence applies; can pick up duty by making warning or filling prescription incorrectly**
     16. **Food SL for foreign object, but unexpected chicken bone is negligence**
         1. **Foreign v. natural object**
         2. **Cow’s eye test (in sandwich)-could not recover under CA test**
         3. **Is a fly foreign or natural?**
     17. **Subsequent remedial measures-when defendant takes steps after the incident to make the product safer, the rules of evidence prohibit use of those remedial measures to prove the product was defective; purpose is to encourage those who might make the situation safer**
     18. **3 SL tests: was the product defective?**
         1. **Consumer expectation**
         2. **Risk-utility**
         3. **RAD**
         4. **Unreasonably dangerous**
     19. **Warnings (neg. warnings=duty to warn, breach, etc.; SL warnings=defendant supplied warning, etc)**
     20. **DEFENSES TO SL**
         1. **Defenses to failure to warn:**
            1. **State of the art vs. hindsight**
            2. **Heeding presumption**
            3. **Specificity or amount of warning**
            4. **Learned intermediary doctrine**
         2. **General defenses to SL**
            1. **Causation-at what point in process of getting product home did defect get introduced**
            2. **Ordinary contributory negligence (failure to discover the defect)- a defense**
            3. **Usual seller of the product**

**Used seller held at lower standard**

* + - 1. **Assumption of the risk (discovers defect & uses product)**
      2. **Comparative responsibility**
      3. **Preemption**

4/7 pgs 620-633 DEFENSES-PLAINTIFF’S FAULT

1. DEFENSES
   1. GM v. Sanchez (plaintiff’s fault) Products Liability
      1. Issue-when does comparative responsibility apply in a products liability case?
      2. Facts: sanchez died when his truck backed up over him; no witnesses; suit for negligence, product liability, & gross negligence based on defect in truck’s transmission & control linkage; GM presented alternative theories (jury rejected); jury found sanchez 50% responsible; truck parked between gears, pops in reverse & kills sanchez)
      3. Decision: trial ct held GM negligent; app ct affirmed; sup ct reversed punitive damages award & actual damages reduced by 50%
      4. **Comparative responsibility-no duty discover or guard against defect, but other conduct is subject to CR; more is expected of an operator b/c have to be licensed**
   2. WORK RELATED INJURIES
      1. Jones v. Ryobi (guard removed from printing machine; hand injured)
         1. **3rd party modification (by employer)**
         2. **Defenses-open & obvious danger; foreseen by party who made the modification**

4/12 supp pgs 33-52 PREEMPTION, Wyeth Case

* 1. **PREEMPTION- met duty b/c met statute requirements (gov standard)**
     1. gov standard might not be duty b/c gov standard’s primary goal may not be safety
     2. **Wyeth v. Levine**
        1. Facts: injecting drug into patient’s vein creates significant risk; can cause gangrene if it enters an artery; FDA approved current warning labels; brought as negligence & strict liability lawsuit
           1. Levine developed gangrene; amputated right hand & forearm
           2. Claimed warning label was defective b/c it didn’t instruct clinicians to use iv drip method instead of iv push
           3. Warning label did warn of gangrene if used by iv push
        2. Issue-whether FDA’s approvals provide Wyeth w/ complete defense (preemption)? Whether FDA’s drug labeling judgments preempt state law product liability claims?
        3. Decision: trial ct held that Wyeth didn’t not provide adequate warning of risk; sup ct held that FDA’s approvals don’t create preemption & affirmed
        4. **Rule-impossibility preemption is a demanding defense; congress declines to preempt state law**

physician’s assistant (negligence)-have to show she has a duty

* Negligent in not reading the warning
* Should have known to use the iv drip
* Violation of Professional (textbook) standard of care for a physician’s assistant
* Causation & proximate cause are satisfied

Res Ipsa-used in medical cases; only for hard situations

Informed Consent-look at it from what a reasonable patient wants

Even in SL, the defective product must have caused the injury (warning case: would a new warning make a difference?)

Negligence focuses on someone’s conduct

SL focuses on the product

DEFENSES TO SPL

1. State of the art
2. Ordinary contributory negligence (failure to discover the defect)
3. Assumption of the risk (discovers defect & uses product)
4. Comparative negligence/responsibility (equitable apportionment of the loss)
5. Preemption

4/13 pgs 885-902 INTENT, ASSAULT, & BATTERY

1. INTENTIONAL HARM

**Only but for causation**

**Eggshell plaintiff applies**

**Self defense is a defense**

**Held to reasonable objective person standard**

**Prove: 1. Act, 2. Intent, 3. causation**

* 1. INTENT
     1. Garrat v. Dailey
        1. Facts: 5yr old boy moved chair while garret was sitting down; she fell & broke her hip
  2. ASSAULT & BATTERY
     1. **Battery-intentional infliction of harmful bodily contact w/o other person’s consent; either purpose or substantial certainty that contact would result; unconsented to touching**
        1. **(a consented to touching isn’t a battery)**
     2. **Transferred intent-contact hits 3rd party**
     3. **Picard v. Barry Pontiac** (during annual inspection, defendant dealer informed plaintiff she needed new brakes & refused to pass her inspection; she went to another place where they didn’t mention her brakes & passed her; she then contacted a newstation; Barry Pontiac asked her to bring her car back so they could show she needed new brakes; she took pictures & mechanic got in her face)
        1. **Substantial certainty that the contact was going to occur; infants liable for intentional torts; camera was extension of plaintiff’s body; she fell back & injured back; provocation isn’t a defense**
     4. **Conditional threats-are not torts unless imminent; but unlawful conditions for you to do something are**
     5. **Vosburg** (kicked other school boy in leg)
        1. **Liable despite lack of intent to harm; eggshell plaintiff**
     6. **Wishnatsky v. Huey** (attorney shut door & pushing paralegal back into hallway; rude but didn’t rise to level of battery) **no actual physical contact required for battery; could be indirect**
     7. **Assault- physical act of threatening nature that creates a reasonable apprehension of immediate offensive contact; plaintiff must feel apprehension**
     8. **Offensive contact-it offends a reasonable sense of personal dignity**
     9. **INTENTIONAL-ALIEN TORTS CLAIM ACT-foreign nationals can bring tort suit in US Fed. Dist. Ct. (since 1789)**
        1. **Gave jurisdiction , but didn’t define triable actions**
        2. **Need to find the right statute to sue under (torture victim act)**
        3. **US can’t be sued for a claim arising in a foreign country (per FTCA)**
        4. **Sosa v. Alvarez Machain-no statute applies & ATCA doesn’t cover kidnapping** (pg 901) Federal Torts Claim Act-fed gov has consented to be sued in some cases but not others; doesn’t consent to any action that occurred in another country (pg 252); alien torts claim act; torture victim act-makes clear that it creates liability under US law (pg 899)

4/14 pgs 902-925 FALSE IMPRISONMENT, IIED

* 1. **FALSE IMPRISONMENT**-**unlawful restraint of a person’s liberty or freedom of locomotion; defendant must have intent to restrain; know w/ substantial certainty that confinement will occur; must be against plaintiff’s will**
     1. **Threats of future actions don’t constitute confinement**
     2. **Confinement w/in a country isn’t FI**
     3. **Lopez v. Winchells**
        1. Facts: plaintiff claims she was falsely imprisoned & detained; clerk in defendant’s donut shop; defendants accused her of stealing
        2. Decision: trial ct granted sum. judgment against plaintiff; app ct affirmed sum. judgment; **(no FI)**
        3. **False imprisonment-unlawful restraint of an individual’s personal liberty or freedom of locomotion**
     4. Malicious Prosecution-Soares (switched price tag on sneakers; detained by dept store security) **False arrest; malicious prosecution b/c criminal case**
  2. **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**
     1. **Womack v. Eldridge** 
        1. Facts: eldridge took a pic of Womack under false pretenses; the pic was used in a child molestation case against another skateland coach, seifert; fraudulently took coach’s photo then given to attorney prosecuting a child molester; coach had no involvement
        2. Trial ct held for plaintiff; app ct reversed; sup ct reversed & upheld trial ct’s decision
        3. **RST-one who by extreme & outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress or bodily harm**
        4. **No physical injury; Intentional Infliction of Emotional Distress 4 factors:**
           1. **Intentional or reckless**
           2. **Outrageous conduct by accepted standards of decency**
           3. **Causation**
           4. **Emotional distress is severe**
     2. **Alienation of Affection-behaviour by which an outsider drives a wedge between family members**
        1. **McDermott v. Reynolds** (alienation of affection-behavior by which an outsider drives a wedge between family members)
           1. Facts: McDermott sued Reynolds for having an affair w/ his wife
           2. Decision: trial ct dismissed
           3. **Statute abolished alienation of affection tort**

**EXAM ADVICE-Use cases in essay that resemble the facts to questions!**

**4/19 pgs 931-949 DEFENSES of intentional torts**

**Policy questions on the exam-need to understand the underlying law & motivations behind it**

1. **DEFENSES & PRIVILEGES**
   1. **Consent**
      1. **Hart v. Geysel**
         1. Facts: Hamilton died in illegal prize fight w/ geysel; hamilton’s estate admininstrator filed suit; A statute made the fight illegal; there was no anger or malicious intent
         2. Decision: trial ct granted defendant’s dismissal; app ct affirmed
         3. **Rule-consent is a defense; & cant profit from illegal activity; this principle was used when women injured in illegal abortions**
            1. **Consent instead of assumption of the risk**
         4. **RST-one who has sufficiently expressed his willingness to suffer a particular invasion has no right of complaint if another acts upon his consent so given**
      2. **Hackbart v. Cincinnati Bengals** (fball player intentionally hit another in anger)
         1. **Rule-general customs of fball don’t approve the intentional injury of others**
      3. **Barbara v. John-consent obtained thru fraud is invalid**
   2. **Self Defense**
      1. **Courvoisier v. Raymond**
         1. Facts: defendant thought plaintiff was a part of group of rowdy men who trespassed on his property; he shot him in front of his building when he stepped out from the crowd; defendant claimed self defense
         2. Decision: trial ct held for plaintiff; app ct reversed
         3. **Rule-self defense if reasonable under the circumstances & the means were reasonable; means proportionate to the threat**
   3. **Protection of Property**
      1. **Katko v. Briney**
         1. Facts: plaintiff broke into old farmhouse to steal & was shot by spring loaded shot gun
         2. Decision: jury held for plaintiff; app ct affirmed
         3. **Rule-excessive for protecting property; can use reasonable force but not kill or inflict great bodily injury to protect property**
   4. **Private Necessity**
      1. **Vincent v. Lake Erie Transportation**
         1. Facts: steamship was docked during a storm; ship caused damaged
         2. Decision: trial ct held for plaintiffs for the amount of damage ($500); app ct affirmed
         3. **Rule-okay to use out of necessity, but must pay for the damages**

4/20 pgs 972-986 COMMON LAW BACKGROUND

1. **DEFAMTATION-a false statement that injures another’s reputation**
   1. **Libel-print**
   2. **Slander-spoken**
   3. **Innuendo-statement taken together w/ extrinsic facts makes it defamatory; questions can be defamatory**
   4. **Innocent construction rule-if statement is ambiguous, then interpreted as innocent (Illinois)**
   5. **Large groups-can’t sue if numbers of persons defamed is too large (policy reasons)**
   6. **4 elements of defamation (common law)**
      1. **Defamatory statement-harm to reputation**
      2. **Of & concerning the plaintiff-reasonable interpretation that P is the person identified**
      3. **Publication-related to a 3rd party**
      4. **Damages (Special & General)**
   7. **Defense-statement is true**
   8. COMMON LAW BACKGROUND
      1. Core concern re: defamation is to protect a person’s reputation
      2. **Romaine v. Kallinger**
         1. Facts: case arose out of nonfiction book about a man who went on a criminal rampage; one of the episodes involved the Romaine house
         2. Decision: trial ct granted defendants motion for sum. judgment & app ct affirmed; sup ct affirmed
         3. **Rule-a defamatory statement is one that is false & injurious to the reputation of another or exposes another person to hatred, contempt or ridicule or subjects another person to a loss of the good will & confidence in which he or she is held by others; threshold question: is the statement susceptible of a defamatory meaning? Must read in context of publication as a whole**
      3. Possible Outcomes:
         1. Defamatory as a matter of law
         2. Dismissed
         3. Ambiguous (jury question)
      4. **Publication: element of a defamation suit; someone other than the plaintiff must receive the statement; plaintiff has to show that the publication was either intentional or negligent**
      5. **Single Publication Rule- all copies of a publication are taken as a single action & statute of limitations starts to run**
      6. **Matherson v. Marchello**
         1. Facts: defendants (a band) made comments on a radio station re: fooling around w/ Matherson’s wife & boyfriend
         2. Decision: trial ct defendants granted motion to dismiss; app ct reversed **holding statements about his wife having an affair are libel & imputation of homosexuality is reasonably susceptible of defamatory connotation**
         3. **Defamation by radio or tv is libel; speech by mass communication is libel**
      7. **Defamation per se: criminal activity, sexual promiscuity, disease & business reputation**

**2ways to organize torts:**

* **Look at defendants state of mind**
* **Look at plaintiffs interests at stake**

**4/21 pgs 987-997 COMMON LAW BACKGROUND**

* 1. **OF & CONCERNING PLAINTIFF**
     1. **IDENTIFICATION-plaintiff must show that the statement was understood to refer to, although not necessarily aimed at, the plaintiff**
        1. **Colloquium**
  2. **STRICT LIABILITY**
  3. **DAMAGES: LIBEL & SLANDER**
     1. **Special Damages (Provable damages)-specific pecuniary losses that can be traced to the defendants statement; slander**
     2. **General Damages- damage to reputation; not easily calculated; libel**
     3. **Liberman v. Gelstein**
        1. Facts: landlord sued tenants’ board of governers for slander (accused Liberman of paying off cops, throwing a punch, & threatening his family
        2. Decision: trial ct dismissed; app ct affirmed; sup affirmed
        3. **Conditional Privilege (common interest privilege)-protects the flow of info between persons sharing a common interest; tenants in common are included (RST 596), but this privilege can be defeated by malice**
        4. **Malice (Times Standard)-statements were made w/ a high degree of awareness of their probable falsity**
        5. **Slander isn’t actionable unless plaintiff suffers special damages except per se slander:**
           1. **Charging plaintiff w/ serious crime**
           2. **Statements that injure another in his profession**
           3. **Saying Plaintiff has a loathsome disease**
           4. **Imputing unchastity**
  4. **4 ELEMENTS OF DEFAMATION UNDER 1ST AMEND/NY TIMES [public figure/public concern]**
     1. **Defamatory statement-harm to reputation**
     2. **Concerning the plaintiff**
     3. **Publication-related to a 3rd party**
     4. **Damages (general & punitive)**
     5. **Falsity (honest mistake v. intentional [fault malice] ACTUAL MALICE)**
  5. **Cant defame the dead**
  6. **DEFENSES (DEFAMATION & PRIVACY)**
     1. **TRUTH-complete defense to civil libel b/c action is intended to compensate those whose reputations are damaged falsely; need not prove literal truth but truth of the sting of the charge**
     2. **PRIVILEGES**
        1. **Erickson v. Marsh-3 criteria to determine qualified privilege**
           1. **Appropriateness of the occasion on which defamatory info was published**
           2. **Legitimacy of the interest sought to be protected or promoted**
           3. **Pertinence of the receipt of that info by the recipient**
        2. **After establishing a privilege, next ? is whether privilege has been abused?**
        3. **Fair Comment-only applies to literary & artistic criticism & public officials**
        4. **Fair & Accurate Report**
           1. **Medico v. Time**

Facts: time mag published docs identifying plaintiff as a member of an organized crime family

Decision: trial ct granted defendant sum. judgment; app ct affirmed

* + - 1. Carafano v. Metrosplash
         1. Facts: identity theft; to what extent is a computer match making service responsible for false content in a dating profile provided by someone posing as another person?
      2. **NY Times v. Sullivan (PUBLIC FIGURES)**(ad by AL clergy defaming police commissioner)
         1. **1st amend: freedom of speech & press**
         2. **14th amend: applies most of the bill of rights to states**
         3. **For policy reasons, freedom of speech criticizing public officials is particularly important unless actual malice proved by convincing clarity(intentionally false or reckless disregard for truth)**
      3. **Rosenbloom v. Metromedia-extends NY times standard to all issues of public interest**
  1. **PRIVATE PLAINTIFFS**
     1. **FAULT**
     2. **LIABILTIY**
     3. **DAMAGES (SPECIAL-prove actual loss/injury; unless NY malice then can have punitive/presumed damages-infer how much)**
     4. **Gertz v. Welch**
        1. Facts: plaintiff is an attorney who represented a family whose son was killed by a police officer in a civil suit; Gertz had nothing to do w/ the criminal investigation; Gertz filed defamation suit against defendant b/c he published statements that Gertz was a communist & involved in a nationwide conspiracy to discredit police; article claimed Gertz framed Nuccio
        2. Decision: jury held for plaintiff b/c he isn’t a public figure but judge ruled against jury b/c the matter was of public concern; app ct affirmed b/c no evidence of malice; sup ct reversed & remanded for a new trial
        3. **Failure to investigate w/out more doesn’t establish malice (reckless disregard for truth)**
        4. **Rule-NY Times privilege is only for public officials & doesn’t extend to private individuals b/c it would create an undue burden on a private citizen to clear their name; applies only to issues of public speech, public concern, or public issue**
        5. **Can’t impose liability w/o fault (negligence)**

DEFAMATION (COMMON LAW)

* Defamation
* Of & concerning plaintiff
* Publication
* Dmgs

DEFAMATION (NYT)

* Defamation
* Of & concerning
* Publication
* Damages
* Fault (actual malice)

DEFAMATION-PUBLIC (CON LAW 1ST AMEND)

* Defamation
* Of & concerning
* Publication
* Dmgs
* Falsity
* Fault (actual malice)

DEFAMATION (PRIVATE/PUBLIC-GERTZ) Most states have gone w/ negligence (reasonableness of investigation RST 580: 1. Time element, 2. Nature of the interest promoted by publication, 3. Potential dmg to plaintiff)

* Defamation
* Of & concerning
* Publication
* Dmgs
  + Actual injury
  + No presumed/punitive dmgs w/o NY malice
* Falsity
* Fault (negligence)

GREENMOSS- PRIVATE/PRIVATE; std is back to strict liability

* Defamatory
* Of & concerning
* Publication
* Dmgs (punitive allowed w/o malice)
* Falsity
* Fault (actual malice)

Plaintiff is always going to argue SL

**PRIVACY**

* **Public disclosure of private facts**
* **False light-publishes statements that cast you in a false light**
* **\*Intrusion-invades your privacy**
* **Appropriation-take your image w/o consent to commercial uses**

**Intrusion**

* 1. **Shulman v. Group (INTRUSION)**
     1. Facts: mom & son in accident; rescue helicopter had a film crew aboard; suit was for intrusion & disclosure of private facts;
     2. Decision: trial ct granted sum. judgment for defendants
     3. **Intrusion has 2 elements: 1. Intrusion into a private place/conversation & 2. Must be in a manner highly offensive to a reasonable person**

**Public Disclosure of Private Facts Elements:**

* **Public disclosure**
* **Of a private fact**
* **Which would be offensive & objectionable to a reasonable person &**
* **Which isn’t of public concern**

DESIGN DEFECT tests:

* + - 1. Consumer expectations
      2. Reasonable alternative design
         1. Defense to RAD-irreduceably unsafe product-so dangerous that you cant design the risk away
         2. State of the art- didn’t foresee b/c the design is the state of the art
      3. Failure to warn
         1. Defense-bulk supplier rule (duty of person who received bulk shipment to make sure the warning stays w/ each product
         2. Defense-preemption

Punitive dmgs shouldn’t be 10x greater than total dmgs