Torts – Fall 2012

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# Development of Liability Based Upon Fault

## What is a Tort

* 1. Tort is a civil wrong, other than a breach of contract, for which the law provides a remedy

## What are the major policy reasons for Tort Law

* 1. **Corrective Justice -** To provide a peaceful means for adjusting the rights of parties who might otherwise “take the law into their own hands”
  2. **Optimal Deterrence/Promotion of Prudent Action -** To deter wrongful conduct
  3. **Redress of Social Grievances -**To encourage socially responsible behavior
  4. **Compensation -** To restore injured parties to their original condition, insofar as the law can do this, by compensating them for their injury
  5. **Loss Distribution -** To vindicate individual rights of redress

## Traditional (historical) torts

* 1. Trespass
     1. Direct **AND**
     2. Forcible
     3. Injuries
        1. No proof of actual damages necessary
  2. Action on case
     1. Other tangible injuries to person or property
        1. There is no liability unless actual damages were shown.

## Major classes of torts

* 1. Intentional
  2. Negligent
  3. Stick liability

## 3 Burdens (3-P’s)

* 1. Burden of Pleading
     1. P responsibility to plead the things that are indispensable, with a failure to plead resulting in the dismissal of a case
  2. Burden of Production
     1. Get enough supporting law so that an issue of material fact can be raised
        1. Goal is to survive a motion for summary judgment
  3. Burden of Persuasion
     1. Persuading a jury of your position
        1. Evaluated based on a preponderance of evidence test

## Remedies

* 1. Law
     1. Damages
        1. Compensatory damages (ALL TORTS)
           1. Designed to make the injured party whole
           2. Types

Specific

The actual value of the damage is readily discernable, such as medical bills after an accident

General

Pain and suffering

* + - 1. Nominal damages (INTENTIONAL TORTS)
         1. Small monetary damages designed to prevent an action from reoccurring
      2. Punitive damages (INTENTIOANL TORTS)
         1. Monetary damages designed to punished especially egregious activity
  1. Equity
     1. Injunctions, specific performance, etc.

## Fault

* 1. Law of causation
     1. When D causes harm to P, intentionally, negligently, or through engaging in a strict liability activity, P is entitled to recover
     2. P is responsible for asserting causation
  2. D cannot be held liable for an event they did not know and had no reason to know the possibility of an event occurring (The world is absurd)

# Intentional Interference with Person or Property

## Intentional Tort Template

#### Intent (Desire, Knowledge to Substantial Certainty, or Transferred)

#### Act (Volitional)

#### Causation (Cause-in-Fact)

#### Invasion of Protected Interest

#### Defenses

## Intent (Subjective Test)

### General Rule

* 1. Desire or substantially certainty that an action would bring about an invasion of protected interest
     1. Malicious mind is not necessary
     2. Knowledge and appreciation of the risk, short of substantial certainty, is not sufficient to show intent (*McDonald Rule*)
     3. Mistake
        1. Parties are liable for damages caused by their own mistaken understanding of the facts, regardless of whether they have acted in good faith
     4. Involuntary acts are not, by definition, intentional acts
  2. Applies to:
     1. Minors are liable just as any other person when he has committed an intentional tort
        1. *Garret v. Dailey -* D, a five-year old kid, pulled P’s chair out from under her while she was trying to sit and P fell, which caused a hip injury. Court remanded to determine whether D knew with substantial certainty that pulling the chair out would lead to P falling.
        2. Public Policy
           1. We want minors to engage in careful behavior **AND** encourage guardians to support careful behavior.
     2. Mentally handicapped people can be liable for intentional torts
        1. *McGuire v. Almy -* P a registered nurse, was hired to care for D, an insane person. During a violent attack, D stuck P with the leg of a piece of furniture. Court maintained liability on public policy grounds
        2. Public Policy
           1. Make D’s with interest in their property more watchful/cautious
           2. Necessary to provide a mechanism for recovery for P
           3. Hard for a jury to properly determine mental state. This is a very challenging issue, that is often done wrong, in criminal courts
     3. Intoxicated people can ben held liable for their torts

### Transferred Intent

* 1. General Rule
     1. When a D intents to cause an invasion of a protected interest on one party but instead causes such an invasion on another party, he is liable for the resulting injury
        1. *Talmage v. Smith -* D discovered several boys playing on top of sheds on his property. D demanded that they get down and most complied quickly, but P and a few others remained on the roofs. D threw a stick in the direction of a few boys on one of the roofs, but the stick missed those boys and struck and injured P. Court found D liable for the tort committed
  2. Applies to: (BIG 5)
     1. Battery
     2. Assault
     3. False imprisonment
     4. Trespass to land
     5. Trespass to chattel

## Battery (B)

### General Rule

* 1. D is liable for battery if D acts desiring or knowing to a substantial certainty to cause harmful **OR** offensive contact, **OR** an imminent apprehension of such a contact, **AND** a harmful **OR** offensive contact with the P indirectly or directly occurs (R2T Section 13 & 18)
  2. An act which is not done with the *intention* stated does not make the D liable to the other for a battery with the other’s person although the act involves an unreasonable risk of inflicting it
     1. D could be liable under a theory of negligence

### Elements

* 1. Intent (Subjective standard)
     1. Desire
     2. Knowledge to a substantial certainty
     3. Transferred intent applies
  2. Act
     1. Touching a person is sufficient
  3. Causation
     1. Direct
     2. Indirect
  4. Invasion of protected interest (physical integrity/wellbeing)
     1. Harmful contact
        1. Physical contact that causes injury to P
     2. Offensive contact (Objective standard, generally) (WORDS ALONE ARE INSUFFICIENT)
        1. General Rule
           1. Physical contact that would offend a reasonable person

It is not necessary to touch the P’s body or even his clothing. Knocking or snatching anything forms P’s hand or touching anything connected with P’s person, when done in an offensive manner, is sufficient.

Connected through direct contact

*Fisher v. Carrousel Motor Hotels, Inc.* – P was eating lunch while at a conference hosted at D’s hotel when an individual employed by D snatched P’s plate and declared that a “Negro could not be served in the club.” P was not actually touched, and there was no apprehension of physical injury, but the interaction was highly embarrassing. Court found D liable for battery

Public policy

Reasonable extension of the tort, especially compared to the alternative of creating a new tort

* + - 1. Exception
         1. D knows that P is particularly sensitive to a certain type of contact

*Spivey v. Battaglia* – D put his arm around P and pulled her head toward him in a “friendly, unsolicited hug” that ultimately caused P to suffer from partial facial paralysis. D knew that P was extremely shy and would be uncomfortable because of the contact. Court ultimately ruled in favor of D, but Joyce disagrees with the decision

* + 1. Exception
       1. Absent expression to the contrary, consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life, such as a tap on the shoulder to attract attention, a friendly grasp of the arm, or a casual jostling to make a passage
          1. *Wallace v. Rosen* – During a fire drill, a teacher touched a parent on the shoulder to get her attention to stop blocking a stairway. The parent pp-she only touched the parent on the back. The parent sued for battery and on a negligence theory; the jury found in favor of the teacher on the negligence theory and the judge refused to give a jury instruction regarding battery because no intent was present.

### Damages

* 1. D is liable for all damages, regardless of the foreseeability of the risk
  2. Nominal damages are available for relatively minor batteries, such as spitting in someone’s face
  3. **Egg Shell Skull Plaintiff Rule**
     1. If P has an unusual characteristic and the injuries caused are worse than a normal person would sustain, you are still responsible

### Misc.

* 1. Every battery does not necessary include an assault
  2. Words alone are not sufficient to constitute a battery

## Assault (A)

### General Rule

* 1. D is liable for an assault if D acts desiring or knowing to a substantial certainty to cause a reasonable apprehension of an imminent battery
     1. The intentional, unlawful, offer
     2. To touch
     3. Another
     4. In a rude or angry manner
     5. Under such circumstances as to create a well-founded fear
     6. Of an imminent battery
     7. In the mind of the party
     8. Coupled with the apparent present ability to effectuate the attempt

### Elements

* 1. Intent (Subjective test)
     1. Desire
     2. Knowledge to a substantial certainty
     3. Transferred intent applies
  2. Act
  3. Causation
     1. Direct
     2. Indirect
  4. Invasion of protected interest (Peace of Mind) (WORDS ALONE ARE INSUFFICIENT)
     1. Reasonable Apprehension
        1. D must have the ability to effectuate the battery, if attempted
           1. *Western Union Telegraph Co. v. Hill* - P had a clock that required repair. Per the terms of a contract between P and D, P requested a repair. The request was not answered, so P went to one of D’s offices. After arriving at the location, she asked for her clock to be repaired. An individual employed by D responded by saying that he would repair the clock if P allowed him to “love and pet” P. The employee of D reached out and tried to touch the P. Court determined that D could accomplish the assault but the employer was free from liability
        2. P must be aware
           1. A spear thrown from behind does not count as an assault
     2. Imminent
        1. There must be some sense of immediacy; a threat in the future is insufficient
     3. Battery
        1. Harmful contact
           1. Physical contact that causes injury to P
        2. Offensive contact (Objective standard, generally)
           1. General Rule

Physical contact that would offend a reasonable person

It is not necessary to touch the P’s body or even his clothing. Knocking or snatching anything forms P’s hand or touching anything connected with P’s person, when done in an offensive manner, is sufficient.

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Words alones are insufficient

* + - * 1. Exception

D knows that P is particularly sensitive to a certain type of contact

*Spivey v. Battaglia* – D put his arm around P and pulled her head toward him in a “friendly, unsolicited hug” that ultimately caused P to suffer from partial facial paralysis. D knew that P was extremely shy and would be uncomfortable because of the contact. Court ultimately ruled in favor of D, but Joyce disagrees with the decision

* + - 1. Includes threats to
         1. Person
         2. Property
         3. Economic well-being
         4. Family

### **Misc**.

* 1. Words alone are insufficient to justify an assault

## False Imprisonment (FI)

### General Rule

* 1. D’s act done with the intent to cause the direct restraint of the physical liberty of another without adequate legal justification.
     1. Important to evaluate P ability to escape or exit the confinement
     2. Breakdown
        1. The direct restraint
        2. Of one person
        3. Of the physical liberty
        4. Of another
        5. Without adequate
        6. Legal justification
           1. Includes being kept in **OR** out

### Elements

* 1. Intent (Subjective test)
     1. Desire
     2. Knowledge to a substantial certainty
     3. Transferred intent applies
     4. Prank or short seizures do not invalidate false imprisonment
  2. Act
     1. Direct restraint
        1. Actions
        2. Verbal
  3. Causation
     1. Physical force
     2. Threats of duress
     3. Includes threats to:
        1. Person
        2. Property
        3. Economic well-being
        4. Family
  4. Invasion of a protected interest (Freedom of Movement)
     1. Physical liberty
        1. There must be no reasonable means for escape
           1. Reasonable means of escape

P must be aware

Recovery for P for injuries sustained using a reasonable means of escape

* + - * 1. Unreasonable means of escape

One that

Involves exposure of the person (P in the water and D steals clothes)

Material harm to the clothing **OR**

Danger of substantial harm to P or another

Reasonable but unknown means of escape

No recovery for P for injuries sustained while using an unreasonable means of escape

* + - 1. P must be contemporaneously aware of the confinement
         1. Majority view – contemporaneous awareness require consciousness and awareness
         2. Minority view – contemporaneous awareness is not invalidated by a sudden illness that incapacitates P
         3. Presumed to be met if P sustains an injury during the confinement
         4. P does not have to recall the confinement at a future date

*Parvi v. City of Kingston* - Police officers for the Defendant City of Kingston took custody of Plaintiff, who was intoxicated, and drove him outside the city limits instead of arresting him. After he was deposited on a golf course, Plaintiff found himself on the New York Thruway, where he was struck by a car and injured. Although he had little or no recollection of the entire evening, Plaintiff sued for false imprisonment and the court found in his favor.

* + - 1. The threat of confinement must imminent
      2. Confinement can be secured by actual or apparent physical barriers, by physical force or threats of physical force, or by other duress sufficient to make the π’s consent ineffective.

### Damages

* 1. No actual damages needed for recovery
  2. Even the briefest restraint of one’s freedom may give rise to a false imprisonment claim

### Defense

* 1. Adequate legal justification
  2. Reasonable means for escape
     1. No imprisonment if a way of escape is left open which is available without peril of life or limb

### Misc.

* 1. False arrest does not lead to a viable claim for false imprisonment
  2. Moral Suasion (no physical restraint, but pressure) does not lead to a viable claim for false imprisonment
  3. Withdrawal of a reasonable means to escape leads to false imprisonment (Can change state from non-imprisoned to imprisoned)
     1. *Whittaker v. Sandford* – Plaintiff and her husband were members of a religious group headed by Defendant and based in Tel Aviv. Plaintiff decided she would like to leave the group and return to the United States, in response to which Defendant offered transportation via his yacht and assured her she would not be detained. Upon arrival, Defendant refused to grant her use of a boat to reach the shore, and she remained on board against her will except for brief, supervised excursions until she finally obtained release through a writ of habeas corpus. Court found false imprisonment.

## Intentional Infliction of Emotional Distress (IIED)

### General Rule

* 1. One who, without a privilege to do so, intentionally or recklessly causes severe emotional distress to another is liable for such emotional distress, and for bodily harm resulting from it (R2T Section 46)

### Elements

* 1. Intent (Subjective test) **OR** recklessness
     1. Desire
     2. Knowledge to a substantial certainty **OR**
     3. Recklessness (See bystander doctrine)
  2. Act
     1. Conduct must be extreme **AND** outrageous (Objective test, generally)
        1. So outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community
        2. Conduct is evaluated in a sterile setting, detached from the surroundings in which it occurred
           1. Exception

When D knows that P is particularly sensitive to a certain type of conduct

*Harris v. Jones* – Defendant was Plaintiff’s supervisor at a factory, and was aware that Plaintiff suffered from a speech impediment causing him to stutter. Defendant frequently mocked Plaintiff and his condition on the job, causing him to feel distress. Plaintiff sued for intentional infliction of emotional distress. Court held that D was not liable because the damages were not severe, but the conduct could have been characterized as extreme and outrageous

* + - 1. Does not include mere
         1. Insults
         2. Indignities
         3. Threats
         4. Annoyances
         5. Petty oppressions **OR**
         6. Other trivialities

Pubic Policy

Society cannot be based on people getting their feelings hurt and going to court

* 1. Causation
     1. There must be a causal connection between the volitional act and the severe emotional distress
  2. Invasion of a protected interest
     1. Severe emotional distress
        1. Distress so severe that no reasonable person could be expected to endure it
        2. Words are generally insufficient

### Bystander doctrine

* 1. General Rule
     1. P can recover from recovery D if D knows of P’s presence **AND**the conduct was directed at a member of the P’s immediate family **OR** P suffered bodily harm as a result of the emotional distress.
  2. Elements
     1. Normal IIED (See above) **AND**
     2. 3 Proximities
        1. Spatial
           1. P must have been near the incident that caused the severe emotional distress
        2. Relational
           1. P must have a close relationship, usually a familial relationship, with the a harmed party in the incident

Public policy

Don’t want to water down the claim of legitimate Ps

* + - 1. Temporal
         1. P had to learn of the incident in a reasonably short period of time

Hearing about the incident from somebody else negates the awareness

* 1. Public Policy
     1. Creating the bystander doctrine
        1. Bystander recovery was incorporated to allow for the greatest amount of justice
           1. There should me a mechanism for recovery for those that satisfy the three proximities. They are harmed by the reckless actions of D.
        2. Don’t use transferred intent because courts wanted to avoid confusion in application
     2. Drawing the line for bystander recovery
        1. Common law limitation vs. statutorily created limitation

### Public policy justifications creating a IIED

* 1. Actions that cause severe emotional distress lack social utility – they are, in fact, anti-social
  2. There is no viable policy reason for protecting the actor from liability
  3. The law already acknowledges mental suffering as a principal source of damages
  4. The jury is well-equipped to determine whether outrageous conduct result in mental distress
     1. Addresses the issues of opening the floodgates to new litigation
  5. There should be a method for recovery when a person suffers mentally, but lacks any actual physical injuries
  6. Expansion of an older tort would have been abusive
  7. Flood of new litigation is limited due to narrowly construed criteria for triggering the tort

### Damages

* 1. Nominal damages are not permitted
  2. IIED claim allows for a greater recovery. Pain & anguish, mental anguish and suffering for rest of your life, lost wages, lost future wages, medical expenses and punitive damages

### Misc.

* 1. In the case of threatened harm that is deemed to be extreme and outrageous, the threat of harm does not have to be imminent like a battery
     1. *State Rubbish Collectors Association v. Siliznoff* – D, a non-member of P association, collected garbage from a company P claimed was within its domain. P agent allegedly demanded that D surrender the money derived from the collection or suffer physical consequences, in response to which D attended P’s meeting and signed notes promising to pay. P sued D to force payment of the notes, and D argued they were unenforceable and counter-sued for intentional infliction of mental distress. Court found in favor of P

## Trespass to Land

### General Rule

* 1. Every unauthorized **OR** unlawful entry onto another person’s land. The law imposes damages for every such unauthorized entry.
     1. Actual ownership of the land is not important
     2. Derives from a right to the exclusive use of one’s land
  2. Land is property that is not moveable

### Elements

* 1. Intent
     1. Desire
     2. Knowledge to substantial certainty
     3. Mistake does not exempt D from liability
  2. Act
  3. Causation
     1. Direct
     2. Indirect
        1. D pushing a third party onto P’s land creates a viable cause of action against D
        2. Casting objects onto P’s land creates a viable cause of action
  4. Invasion of a protected interest
     1. Interferences substantially with the P’s use **AND** enjoyment of the land
        1. Trespassers are held strictly liable for their unauthorized entrance into the land of another
           1. Entry

Physical entry

Casting objects

Causing a third person to enter

Continuing trespass

Remaining after revocation of consent

* + - 1. Duration is not relevant; even a momentary interruption is sufficient to justify a cause of action and damages
    1. Airspace and Subterranean
       1. Land in its legal significance has an indefinite extent, upwards as well as downwards; whoever owns the land possesses all the space upwards to an indefinite extent. The application of the rule has been to the usable area of the land. – *Blackstone*
       2. *Herrin v. Sutherland* - D, while standing on another person’s property and hunting, fired several shotgun rounds off at birds. The shots traveled over the P’s property. Court found D liable for trespass because P use and enjoyment of the land was interfered with by the bullets flying through the usable space

### Damages

* 1. Actual damages are not required in order to recover

### Misc.

* 1. To have a viable cause of action, the breach of the premises must be done by a physical object
     1. Sound will not allow a claim for trespass
  2. There is a difference between trespass to land and nuisance

## Trespass to Chattels

### General Rule

* 1. One who without consensual **OR** other privilege to do so, uses **OR** otherwise intentionally intermeddles with a chattel which is in possession of another is liable for a trespass to such person if:
     1. The chattel is impaired as to its
        1. Condition
        2. Quality **OR**
        3. Value
     2. The possessor is deprived of the use of the chattel for a substantial time **OR**
     3. Bodily harm is thereby caused to the possessor **OR** harm is caused to some person **OR** thing in which the possessor has a legally protected interest.
  2. Chattel is moveable property
     1. Intellectual property (copyrights, patents, and trade secrets) can qualify as chattel

### Elements

* 1. Intent
     1. This is the one intention tort were the intent to cause injury is insufficient. There must be an actual injury in order for P to recover.
  2. Act
  3. Causation
  4. Invasion of a protected interest
     1. Dispossession of the chattel **AND**
     2. The chattel is impaired as to its
        1. Condition
        2. Quality **OR**
        3. Value
     3. The possessor is deprived of the use of the chattel for a substantial time **OR**
     4. Bodily harm is thereby caused to the possessor **OR** harm is caused to some person **OR** thing in which the possessor has a legally protected interest.
        1. Must be more than a trifling harm

### Damages

* 1. Actual damages must exist in order to maintain a viable cause of action

### Recovery

* 1. Limited to the actual damages incurred or reimbursement for the time that chattel was missing

### Misc.

* 1. The owner of chattel is privileged to use reasonable force to protect his possessions against even harmless interference
     1. See Defense of Property
     2. See Recovery of Property

## Conversion

### General Rule

* 1. An intentional exercise of dominion **OR** control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.
     1. Physical deprivation
     2. Economic degradation
  2. Can include intellectual property
  3. Cause of action available to
     1. Owner
     2. Finder
     3. One converter against another
     4. No possession but entitlement to immediate right of converted goods.

### Elements

* 1. Intent
     1. Desire
     2. Knowledge to a substantial certainty
  2. Act
  3. Causation
  4. Invasion of a protected interest
     1. Physical deprivation of the property
        1. Convertible items
           1. Things that could be lost and found
           2. Intangibles contained in known instruments
        2. Factors
           1. The extent and duration of dominion or control
           2. The actor’s intent to assert a right in fact inconsistent with the other’s right of control
           3. The actor’s good/bad faith

Acting in good faith does not prevent liability

Bailors’ Necessity Defense – There is privilege for certain bailors and employers based out of the practical necessity of needing to limit the liability for those who receive or store or transport goods without inquiring as to the title of the person who brought the goods.

An innocent purchaser cannot obtain title from a thief because the thief does not have title

In the case of fraud, the purchasers liability is limited

* + - * 1. The extent and duration of the resulting interference
        2. The harm done to the chattel
        3. The inconvenience and expense caused to the other
      1. Examples
         1. Acquiring possession of it – e.g., stealing the chattel
         2. Damaging or altering it – e.g., intentionally running over an animal and killing it
         3. Using it – e.g., a bailee seriously violates the terms of the bailment
         4. Receiving it – e.g., obtaining possession after a purchase from a thief
         5. Disposing of it – e.g., a bailee wrongfully sells the chattel
         6. Misdelivering it – e.g., delivery to wrong person by mistake so that the chattel is lost
    1. Economic degradation of the property
       1. Factors
          1. The information is gathered and arranged at some cost and sold as a commodity on the market
          2. The ideas are formulated with labor and inventive genius, as in the case of literary works or scientific researches
          3. The information constitutes instruments of fair and effective commercial competition to those that created the documents containing the information
    2. Demand for return
       1. Minority view (some states) – possession by a bona fide purchaser or other innocent converter is not in itself a sufficiently serious defiance of the owner’s rights and hold that the possessor is liable only if refusing to return the goods on demand.
       2. Majority view (most states) – conversion occurs as soon as the D takes dominion and control over the goods in a manner inconsistent with P’s ownership.
    3. Return
       1. When a converter offers to return the converted goods and the owner accepts, the return does not bar the action from conversion, but it must be taken into account to reduce the damages recovered
       2. When the owner refuses to accept the old rule was you could not force the item on the owner, but in some jurisdictions if the conversion is innocent the court can force the acceptance, it is in the courts discretion
       3. Payment of the chattel’s value effectuates a forced sale, and precludes the owner from subsequent actions for conversion
    4. Who can maintain a cause of action
       1. Owner
       2. Finder
       3. One converter against another
       4. No possession but entitlement to immediate right of converted goods.

### Damages

* 1. Generally, FMV determined at
     1. The time of the conversion **OR**
     2. The time of the conversion plus a reasonable time for acquiring a replacement
  2. In order to mitigate damages the owner should purchase another chattel if it is possible
  3. In some cases, D could be required to return the underlying property to P
  4. Returning the property can impact the final amount of damages
  5. There is no recovery for sentimental value **UNLESS** you can prove IIED elements.

### Misc.

* 1. Conversion is the more extreme version of a trespass to chattel claim
     1. There is no bright line between the two torts

# Privileges – Asserted by D

## Consent (Totality of Circumstances Test)

### General rule

* 1. Voluntary agreement, approval, or permission given as to some invasion of a protected interest
  2. When consent is asserted as a defense to an invasion of a protected interest, the totality of the circumstances must be considered, **BUT** only overt acts and outward manifestations may demonstrate such consent or lack thereof
     1. P must have the capacity to consent or must be capable of appreciating the nature, extent & probable consequences of the conduct consented to
        1. Infancy, intoxication or mental incompetence vitiates effective consent.

### Types of consent

* 1. Express consent
     1. P explicitly tells D that P consents to the invasion of the protected
  2. Implied consent
     1. Implied-in-fact
        1. Societal customs and agreed rules
        2. Actions of P
           1. *O’Brien v. Cunard S.S. Co.* – Plaintiff was a passenger aboard one of Defendant’s ships. She was vaccinated while on the ship, and suffered from complications resulting in injury. She sued for assault and negligence.
     2. Implied-in-law
        1. P is unable to consent, but there is no reason to believe that P would withhold consent
  3. Medical/Emergency-related consent
     1. Medical providers may act as if consent was given if
        1. Patient is unable to give consent due to
           1. Unconscious
           2. Intoxicated
           3. Mentally ill **OR**
           4. Incompetent
        2. There is a risk of serious bodily injury if treatment is delayed
        3. A reasonable person would consent to the treatment
        4. The physician has no reason to believe that the patient would refuse treatment under the circumstances
     2. Informed consent doctrine
        1. A physician is required to disclose to the patient the risks of proposed medical treatment, or the doctor is liable for the injuries because actual consent does not exist

### Invalidation of consent

* 1. No consent when P
     1. Lacks capacity
     2. Consent was coerced
     3. P’s consent based on misrepresentation/fraud
  2. Conduct was one that no could give valid consent to
  3. Acting beyond agreed rules invalidates consent
     1. *Hackbart v. Cincinnati Bengals, Inc.* – Plaintiff, a professional football player, was injured when one of Defendant’s players intentionally struck him during a game. Both continued to play in the game and did not make any complaints at the time. Plaintiff later sued to recover for his injuries.

## Self-Defense

### General Rule

* 1. Anyone is privileged to use reasonable force to defend himself against a threatened battery on the part of another
  2. Pleaded and proven by D **UNLESS**,D is a police officer
  3. Provocation rule
     1. Insults, verbal threats, or degrading language do not justify the exercise of self-defense, unless they are accompanied by an actual threat of physical violence

### Elements

* 1. Reasonable belief of a threatened battery
     1. The privilege exists when D reasonably believes that the force is necessary to protect himself against battery, even though there is in fact no necessity.
     2. Mistake about ability of P to actualize the battery are still privileged
  2. Reasonable force (Facts and Circumstances Test)
     1. General Rule
        1. Reasonable is evaluated using a fact and circumstance test
           1. Look to age, size, and relative strength
        2. Deadly force
           1. General Rule

To justify resistance with a deadly weapon, D must have a reasonable apprehension of loss of life or great bodily injury

* 1. Duty to retreat
     1. Non-deadly force
        1. No retreat is necessary when non-deadly force is used
     2. Deadly force
        1. Majority view – must “retreat to the wall” before the use of deadly force **UNLESS** D has the slightest reasonable doubt that the retreat would cause injury
        2. Minority view – no retreat necessary. This view is not supported by the R2T
     3. Homeowners can use whatever force is necessary

### Retaliation

* 1. Not covered by this privilege
  2. Once the threat of battery is gone, the privilege terminates

### Injured 3rd party

* 1. No liability if original defensive action was justified
  2. Transferred intent does not apply

## Defense of Others

### General Rule

* 1. Anyone is privileged to use reasonable force to defend himself against a threatened battery on the part of another

### Elements

* 1. Reasonable mistake about reasonable belief of a threatened battery to another
     1. **Majority view** – D is privileged to use reasonable force to defend another even when he is mistaken in his belief that intervention is necessary, so long as his mistake was reasonable (R2T section 76)
        1. Mistake does not revoke the privilege
     2. **Minority view** – D steps into the shoes of the person he defends. If there would have been a viable privilege for the person whose shoes he entered, then the defense would be privileged
        1. Mistake revokes the privilege
     3. Public policy
        1. We want to discourage people from using force outside of their knowledge of the situation, therefore we hold them accountable, or … (either side can be argued)
  2. Reasonable force
     1. General Rule
        1. Reasonable is evaluated using a fact and circumstance test
           1. Look to age, size, and relative strength
        2. Deadly force
           1. General Rule

To justify resistance with a deadly weapon, D must have a reasonable apprehension of loss of life or great bodily injury

## Defense of Property

### General Rule

* 1. D can use reasonable force to defend land and chattel from being meddled with by P. Deadly force is generally prohibited
     1. The value of human life and limb, not only to the individual concerned by also to society, so outweighs the interest of a possessor of land in excluding from it those whom he is not willing to admit thereto that a possessor of land has no privilege against another whom the possessor sees about to enter his premises or meddle with his chattel, unless the intrusion threatens death or serious bodily harm to the occupiers or users of the premises (R2T Section 85)
  2. There also is a privilege to use reasonable force to prevent the commission of a crime

### Elements

* 1. P was trespassing on his or her property (unlawful intrusion)
  2. That he or she reasonably believed that the force used on the trespasser was necessary to get the trespasser off or to keep the trespasser off his or her property
  3. He or she first asked the trespasser to leave & that the trespasser refused or that he or she reasonably believed that any such attempt would have been useless or would have caused substantial harm.

### The use of deadly force

* 1. When the invader threatens the personal safety of the D or his family, the D may use deadly force if it is necessary in the circumstances
  2. The general rule prohibiting deadly force is modified in some states if D gives the P clear notice of the danger (warning about the vicious dog)

## Recovery of Property

### General Rule

* 1. There is a privilege to recapture chattels taken wrongfully by fraud or misrepresentation if it can be done without unnecessary violence to the person or a breach of the peace, but the pursuit must be “fresh”

### Elements

* 1. Actual tortious dispossession
     1. D must know that the property was taken through
        1. Fraud
        2. Misrepresentation
        3. Theft
     2. Public policy
        1. You have to be right before the exercise of force
  2. “Fresh” pursuit
     1. Elements
        1. Prompt discovery of the disposition
        2. Prompt **AND** persistent effort to recover the chattel
           1. Any undue lapse of time during which the pursuit has not been commenced, or has come to a halt, will mean that the owner is no longer privileged to fight himself back into possession
     2. Limitation
        1. Generally limited to a storekeeper’s premises **OR** immediate environment
     3. Public policy
        1. Pursuing a non-fresh pursuit, or chancing around the city, could become violent or create social inefficiencies
  3. Demand for return of property
     1. General Rule
        1. A resort to any force at all will not be justified until a *demand* has been made for the return of the property (R2T Section 103)
     2. Exception if useless **OR** dangerous
     3. Public policy
        1. No reason to escalate to violent action **UNLESS** it appears necessary
  4. Reasonable force for recovery
     1. If the wrongdoer resists, the owner may use any force reasonably required to prevent the property from being taken and defend his own person
     2. Deadly force is never merited for the recovery of property
        1. Public policy
           1. Life has a societal premium over property

### Shopkeeper’s Rule

* 1. Privilege allow shopkeepers to detain suspected thief so long as detention **AND** time for the detention are reasonable

## Necessity

### Public Necessity (Complete Privilege)

* 1. General Rule
     1. D is shielded from liability for its interference with another’s property when it is reasonably necessary to prevent an emergency substantially greater than the injury that follows
        1. *Surocco v. Geary* – Defendant had Plaintiffs’ house destroyed in an effort to save many more buildings from a fire. The demolition of the home was ordered by a city official with the appropriately vested power.
  2. Who can perform
     1. Public official with authority
        1. Burden of proof
           1. Reasonable belief it was necessary
     2. Private actor
        1. Burden of proof
           1. Must show that the action actually was necessary
           2. Mistake invalidate privilege
  3. Public policy
     1. Good of the society outweighs the good of the individual
     2. If it is appropriate to provide a remedy, the legislature should create the policy, not the courts

### Private Necessity (Partial Privilege)

* 1. General Rule
     1. D is partially shielded from liability for its interference with another’s property when it is reasonably necessary to prevent an emergency substantially greater than the injury that follows
        1. Ordinary rules regulating property rights are suspended by forces beyond human control, and if, without the direct intervention of some act by the one sought to be held liable, the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged.
           1. *Vincent v. Lake Erie Transportation Company* – Lake Erie Transportation Co. (Defendant) tied and prudently held its steamship to Vincent’s (Plaintiff’s) dock during a severe storm. In doing so, Defendant preserved its steamship at the expense of Plaintiff’s dock. Plaintiff seeks compensation for the damage done to the dock and Defendant claims the privilege of private necessity.
     2. Recovery
        1. Compensatory damages ONLY
     3. Public policy
        1. D made a conscious decision to put the value of its property over P’s property. P should have some formal mechanism for recovering in this type of situation

## Authority of Law

### General Rule

* 1. D’s actions are privileged because D was duly commanded **OR** authorized by the law to take an action
     1. Distinction between ministerial acts and discretional acts
        1. Ministerial acts
           1. These require little personal judgment, such as remitting a prisoner to jail
        2. Discretional acts
           1. These require administrative judgment, such as a DA deciding to seek an indictment or a school board dismissing a student
     2. Limits liability for arrests
        1. With warrants
        2. Without warrants

## Discipline

### General Rule

* 1. Limits D’s liability based on some type of special relationship
     1. Parent and child
        1. The privilege of exercising reasonable force and restraint upon others due to a relationship
           1. Recently courts have abandoned the concept of tort immunity between parents and children, especially in the area of intentional torts
           2. A teacher’s privilege to discipline is more properly predicated on the need to maintain reasonable order in the classroom
     2. Others
        1. Military and naval officers have privilege to exercise discipline over their subordinates and the authority of the master of a ship over both crew and passengers

## Justification

### General Rule

* 1. Limits D’s liability if it appears that D acted reasonably given the circumstances
  2. This defense is a catch-all for when other privileges won’t work

# Negligence

## Negligent Tort Template

#### Duty (Civil Statute [Per Se, RB, or ME], Criminal Statute [Per Se, RB, or ME], Rule of Law, or RPP)

#### Breach (Direct Evidence, Circumstantial Evidence, or RIL [ME, RB, or Burden Shift] )

#### Causation-in-Fact (But For or Substantial Factor)

#### Proximate/Legal Causation (Arbitrary Line Drawing, Direct Causation, or Foreseeability)

#### Damages

#### Defenses

#### Immunities

## Duty (Standard of Care)

### Overview

* 1. Duty is a question of law, but it can be driven by facts
  2. There are four possible ways to establish a standard of care. They are listed below. They are: (1) legislatively created; (2) judicially adopted from criminal statute; (3) judicially created rules of law; (4) inference through application of reasonably prudent person standard

### R2T Section 285 (A) – Legislatively imposed civil standard of care

#### When does this apply?

* + 1. Duty is created through legislative mandate. Court simply apply the standard to the case and see whether or not the D breached.
    2. Automatic application in (if you violate any of these statutes, you cannot claim contributory negligence:
       1. Child labor laws
       2. Pure Food Acts
       3. The Federal Safety Appliance Act
       4. “Safe Place” statutes
       5. Statutes prohibiting the sale of firearms and other dangerous objects

#### What is the effect of violating the statute?

* + 1. Negligence per se (Majority View)
       1. Judge determines whether to apply the statute and the validity of the excuse
       2. Unexcused violation is deemed to be evidence of a breach of duty
       3. Jury is only necessary to evaluate causation
    2. Rebuttable presumption (Minority View)
       1. Judge determines whether to import the statute, but the jury evaluates the excuse asserted by the D
       2. Indicates a duty and a breach as a matter of law, but the D can show a reason around it
    3. Mere Evidence (Minority View)
       1. Judge determines whether to import the statute, but the jury evaluates the excuse
       2. Establishes a low standard that the jury may apply in finding duty or breach, but not necessary
    4. What constitutes as an excuse
       1. The violation is reasonable because the actor’s incapacity
       2. The actor neither knows nor should know occasion for compliance
       3. The actor is unable after reasonable diligence or care to comply
       4. The actor is confronted by an emergency not due to its own misconduct
       5. Compliance would involve a greater risk of harm to the actor or others

### R2T Section 285 (B) – Judicially imported standard of care from criminal statute

#### When can a court import a standard from a criminal statute?

* + 1. Importation of a criminal standard for liability into a civil case is at the discretion of the court
    2. What conditions must be met?
       1. Harm suffered by the P must be the same as the harm that criminal statute attempt to prevent
       2. P is in the same class of person that the criminal statute attempts to protect
    3. What other factors does a court look at?
       1. Whether the importation would create ruinous liability
       2. Whether the statute clearly defines what constitutes a violation
       3. Whether importing the criminal standard would create liability without fault
       4. Whether the injury was a direct or indirect cause of the violation

#### What is the effect of violating a statute?

* + 1. Negligence per se (Majority View)
       1. Judge determines whether to apply the statute and the validity of the excuse
       2. Unexcused violation is deemed to be evidence of a breach of duty
       3. Jury is only necessary to evaluate causation
    2. Rebuttable presumption (Minority View)
       1. Judge determines whether to import the statute, but the jury evaluates the excuse asserted by the D
       2. Indicates a duty and a breach as a matter of law, but the D can show a reason around it
    3. Mere Evidence (Minority View)
       1. Judge determines whether to import the statute, but the jury evaluates the excuse
       2. Establishes a low standard that the jury may apply in finding duty or breach, but not necessary
    4. What constitutes as an excuse
       1. The violation is reasonable because the actor’s incapacity
       2. The actor neither knows nor should know occasion for compliance
       3. The actor is unable after reasonable diligence or care to comply
       4. The actor is confronted by an emergency not due to its own misconduct
       5. Compliance would involve a greater risk of harm to the actor or others

### R2T Section 285 (C) – *Rule of Law*

#### Creating of a one-size-fits all standard for determining the duty. The standard is distilled from reviewing tons of cases

* + 1. A standard of prudent conduct declared by courts as a rule of law must be taken over from the facts of life, and must be such that a failure to conform to it is negligence so obvious and certain that rational and candid minds could not deem it otherwise.
       1. *Pokora v. Wabash Ry. Co* - Plaintiff was killed while attempting to cross Wabash Ry. Co.’s (Defendant’s) four railroad tracks. Plaintiff did not get out of his vehicle to obtain a better view as required by the opinion in Baltimore & Ohio R.R. v. Goodman.  
          **HOLDING:** To require a P to get out of the car and check to see if a train is coming is not common practice and could create danger to the P.

### R2T Section 285 (D) – Reasonably Prudent Person (RPP) Standard (Objective Test)

#### Ordinary Duty of Care (Objective Test) (Facts and Circumstance Test)

* + 1. *In General -* Negligence is the omission to do something which a reasonable person would do or doing something that a RPP would not do. The RPP standard holds the D to a level of ordinary, not extraordinary, care
       1. *RPP Knowledge -* the RPP is guided by those considerations which ordinarily regulate the conduct of human affairs (actors are presumed to know the law and nature of being human and part of a community)
       2. *Unreasonable Risk -* The RPP is not a balance of probabilities. It is enough for there to be some probability that is significant enough to induce action to avoid it.
       3. *Facts and Circumstance Test -* The RPP acts based on known/knowable factors. RPP analysis will be based on the facts and circumstances of the case
    2. *Duty of a Driver*
       1. A driver owes a duty of care to his/her passengers because it is foreseeable that they may be injured if, through inattention or otherwise, the driver involve the care she/he is operating in a collision
          1. *Pipher v. Parsell* – Plaintiff and another were passengers in Defendant’s car. The other passenger yanked Defendant’s steering wheel causing the car to swerve, but Defendant regained control and did not do anything about it. The passenger again yanked the wheel, causing the car to veer off the road and hit a tree, resulting in injuries to plaintiff. Plaintiff sued Defendant for negligence.   
             **HOLDING:** Failure to prevent the conduct constituted a breach of the driver’s duty
       2. Drivers have a duty to know the condition of those parts that could cause damage to other drivers on the road
          1. *Delair v. McAdoo* – P and D were driving in cars. When D attempted to pass P, a tire exploded and D hit P.   
             **HOLDING:** There was a duty to inspect the condition of the tires in order to ensure that D did not create a dangerous condition. D breached that duty.
    3. *Duty to Inquire –* there is a presumed duty to inquire about the standard if it is unclear. Ignorance of the law/standard is not an excuse for the inapplicability of a duty
    4. *Precautions –* There is an implied duty to prevent accidents. Failure to take prudent precautions, based on facts and circumstances, is a violation of the RPP standard, which constitutes a breach of the implied duty to prevent.
       1. *Chicago, B. & Q.R. Co. v. Krayenbuhl –* Plaintiff, a four year-old child, was injured while playing on dangerous turntable owned and operated by Defendant, a railroad company. Despite the fact that Defendant had rules requiring the equipment to be locked and inaccessible to members of the public, Plaintiff was able to access it when he discovered it. Plaintiff was injured while playing on the equipment, and sued for negligence.   
          **HOLDING**: The use of a lock to prevent public access to the equipment is such a minimal restriction upon the equipment’s utility that the failure to keep such a lock in place is likely negligence.
    5. *Common Practice* 
       1. Proof of a common practice can provide evidence sufficient for asserting a duty.
          1. *Trimarco v. Klein* – Plaintiff suffered severe injuries when the glass of a bathtub he was in shattered. Defendants owned the building in which the incident occurred, and had used ordinary glass for the bathtub enclosure despite the common practice of using shatterproof glass in such cases. Plaintiff sued for his personal injuries.  
             **HOLDING:** Jury established a duty based on a common practice to remove the dangerous glass. D failure to follow the common practice was evidence of a breach.
       2. Common practice does not necessitate a RPP standard, and the jury could hold parties to a higher or lower standard than the common practice.
    6. Children vs. Adult Standard of Care
       1. A minor will be compared to a RPP minor **IF** engaged in a minor activity. If a minor is engaged in an adult activity, the minor is compared to the RPP adult
          1. The difference between minor and adult activities is based on the nature of the activity (such as driving a car or snowmobile) and the magnitude of the injury
    7. Physical Disability/Superior Ability
       1. Disability
          1. The RPP is adjusted to match the physical disability of the D. If the D is blind, the RPP is blind as well. If the D is deaf, the RPP is deaf as well.

*Roberts v. State of Louisiana* – P fell when D, a blind shop attendant, ran into her. P suffered an injury and claimed that D was negligent by not walking with a walking stick  
**HOLDING:** Since D was very familiar with the area, it was reasonable to go without the cane. Moreover, P should have recognized the disability and taking action to avert the injury.

* + - * 1. Physically disabled person might need to take reasonable precautions for more dangerous situations (like walking across a street if blind)
        2. Public Policy

Physical disabilities are fairly apparent and can easily be accounted for by external actors

* + - 1. Superior Ability
         1. R2T suggests that we raise the standard for those with superior abilities (see professional care)
         2. Public Policy

We presume that the person with superior ability bring it to bear on the situation they find themselves in

* + 1. Insanity/Mental Disability
       1. There is NO adjustment to the RPP if a person is insane or mentally disabled
          1. Exception: if the insanity is **sudden AND unexpected**
       2. Public Policy
          1. When one of two innocent person must suffer a loss, it should be borne by the one who caused it
          2. Holding insane/mentally disabled people accountable makes those interested in the insane’s estate more likely to restrain and control the insane.
          3. Hard for a jury to know when a person is really crazy (what about even momentary insanity?)
    2. *Public Policy for Objective Standard*
       1. Employing a subjective standard would make the administration of justice unpredictable and would cause people to have to be watchful of everybody
       2. The goal of negligence law is to promote objectively reasonable behavior so that we can modify our behavior in an expected manner and keep the flow of society running smoothly

#### Learned Hand’s Duty Formula

* + 1. If **P x M > B**, then a **duty** exists
    2. If **P x M < B**, then **no duty** exists.
       1. **P** = probability of harm occurring
       2. **M** = magnitude of harm
       3. **B** = burden of preventing
       4. P, M, and B depends on the facts and circumstances of the case
       5. Courts acknowledge that it is hard to quantify the qualitative elements inherent in P, M, and B
          1. Modern interpretation requires that the jury evaluate the foreseeability of P and M (R3T Section 3)
    3. It is assumed that a RPP would take all of the reasonable precautions necessary to prevent an accident when a duty was created (P x M > B)
    4. FACTORS
       1. Utility of Actor’s Conduct (R2T Section 292)
          1. The **social value** which the law attaches to the interest which is being advanced or protected by the conduct
          2. The **chance** that this interest will be advanced or **protected by the particular conduct**
          3. The **chance** that this interest can be adequately advanced or protected by **another and less dangerous course of conduct**
       2. Magnitude of Risk (R2T Section 293)
          1. The **social value** of the interests that are put in peril
          2. The **chance** that the actor’s conduct will cause an invasion of the protected class
          3. The **harm** likely to be caused to the interests imperiled
          4. The **number** of persons whose interest is likely to be invaded
    5. “The Business of Life” Exception
       1. Cannot impose a duty that becomes burdensome to society
       2. Factors, such as technological capacity, engineering feasibility, and financial ability impact the determination the weight of the burden (**B**)
          1. This is a standard that will change over time

#### Emergency

* + 1. **Qualifying Emergencies Lower the Standard of Care:**In an emergency situation, the law does not hold a person to the same standard as if he had the opportunity for deliberation. To show an emergency, D must show that the situation was **(1)** sudden, **(2)** unexpected, and **(3)** unforeseen. If D is deemed to have caused or instigated the emergency, then there is no adjustment to the standard of care.
       1. Public Policy
          1. We are not going to put actors against animalistic instincts for survival.
          2. When in an emergency situation, actors do not have the same rational state
    2. Emergencies serve as an adjustment to the facts and circumstance test
       1. ***Cordas v. Peerless Transportation Co.:***P and her child were killed when a taxi operated by D flew over the curb. The driver had jumped from the vehicle because his occupant held him at gunpoint.   
          **HOLDING:** No duty was breached because the law does not hold one in an emergency to the same standard as someone in a state of peace/calm.

#### Professional

* + 1. General Rule
       1. RPP Standard = the knowledge, training, and skill of an ordinary member of the profession in good standing
          1. *Heath v. Swift Wings, Inc.* – P’s estate sued D after her husband, a pilot with training, crashed the plane that she and her child flew in.   
             **HOLDING:** The court rejected language that the standard for evaluating D should be against one with similar training to D, and held that D must be held to an objective standard. (Ordinary pilot of that same plane)
       2. Generally, expert testimony is necessary to establish the standard of care and the breach to that standard of care
       3. *Misrepresentation Regarding Expertise –* asserting that you are an expert can trigger the professional standard if P suffers an injury.
    2. Scope
       1. Anybody that holds them out as having specialized knowledge
          1. Accountants
          2. Architects and Engineers
          3. Attorneys
          4. Clergy
          5. Designer of Group Health Insurance Plan
          6. Doctors, Dentist, and Veterinarians
          7. Pharmacists
          8. Teachers
    3. Lawyer
       1. Implicit claims
          1. Attorney possess the requisite degree of learning, skill, and ability
          2. Attorney will exert his best judgment
          3. Attorney will exercise reasonable and ordinary care in the use of his skill and in the application of his knowledge to his client
       2. Mere Error of Judgment exception
          1. An attorney will not be held liable for errors that result from **(1)** mere errors of judgment **OR** **(2)** for a mistake on a point of law that has not been settled by the court of last resort

**(2)** Only applies if the reasonable lawyer would have been able to take that position

* + - * 1. *Hodges v. Carter* – The Plaintiff, Hodges (Plaintiff), is suing the Defendants, his former attorneys (Defendants), alleging that they negligently prosecuted his insurance claims against out of state insurance companies when the attorneys failed to properly serve the complaints.  
           **HOLDING:** D not liable because the high court had not decided the issue (Joyce thinks that the attorneys should be liable because this is a very rudimentary mistake).
    1. Physician
       1. 6-step process for showing liability
          1. Possesses skill and knowledge that an ordinary person in good standing has
          2. Doctor must have done something to be held liable
          3. Standard of practice must be definitely shown
          4. Negligence must be affirmatively proven
          5. **d** must be established by expert medical testimony

Exception for when the error is so egregious that any layperson would understand it as malpractice (leaving a sponge in a person’s body)

* + - * 1. **e** is not established by other physician's testifying a different course of action
        2. Locality rule – the RPP standard is adjusted to the medical practices of the particular area. The internet and an increased ability to travel makes this rule almost irrelevant.

*Boyce v. Brown* – Nannie Boyce (Ms. Boyce) suffered pain and disability seven years after the Defendant, Brown (Defendant), placed a metal screw in her ankle. The Plaintiffs, Nannie and Berlie Boyce (Plaintiffs), sued the Defendant.  
**HOLDING:** The expert testimony could not establish that the Defendant acted outside of the community standards and therefore the Defendant did not commit malpractice.

* + - 1. Informed Consent
         1. General Rule

Physician is required to inform patient about treatment protocol, available alternatives and material risks. Requires disclosure of research, economic or other personal interests in patient’s treatment.

Probability of the injury is not as important as magnitude of the injury

Treatment absent any consent constitutes a **battery (see above)**

* + - * 1. *Duty*

Reasonable physician standard (MAJORITY) – what would the reasonable physician disclose to the patient regarding the operation

Reasonable patient standard - what would the reasonable patient want to know about the operation

Actual patient standard (SUBJECTIVE TEST) (MINORITY) – what would the particular patient want to know in order to make a proper decision

Public Policy – How do we find out what the patient would have done? There is almost never sufficient evidence.

*Scott v. Bradford* - After suffering from complications from vaginal surgery, the Plaintiff, Mss. Scott (Plaintiff), seeks recovery from the Defendant doctor alleging he failed to inform her of the risks.  
**HOLDING:** D properly disclosed the material facts and there was not sufficient evidence to establish that P would have forgone the surgery had she had knowledge of the potential injury.

* + - * 1. *Establishing Breach* – To show a violation of informed consent, P must prove:

D physician failed to inform P adequately of a material risk before securing consent

A risk is material if it would change the P’s decision

If P had been informed of the risk, he would not consent to the treatment

The material risk actualized and P suffered an injury

* + - * 1. *Physician’s Defense*: **(1)** P knew of the risk because it is so obvious, **(2)** full disclosure would have been detrimental to the patient’s best interest, **AND/OR (3)** an emergency existed requiring prompt treatment and patient was in no condition to decide

#### Failure to Act

* + 1. **General Rule - No Duty:** There is no affirmative duty to act and, therefore, no liability for a failure to act.
       1. ***Hegel v. Langsam:*** P’s parents sued a university for failing to monitor their child. The child started using drugs, associated with criminals, sipped lots of class, and would not return to her parents on demand.   
          **HOLDING:** The university does not owe its students an affirmative duty to ensure that they do not “get into trouble.” However, the university does owe a duty to ensure that a student is safe (i.e., preventing intentional and negligent torts) while on campus.
       2. **Public Policy = Imposing Obligations on Innocent Parties:** Imposing a duty on a third party, where the “victim” was a competent adult, would serve to create fault where none would otherwise exist through the imposition of an obligation.
    2. **Special Relationship between D and P Exception:** When there is a special relationship between the P and the D, D is liable for its failure to act. A special relationship the D has complete control over the instrumentalities causing injury and knows about the potential injury. The following are examples:
       1. Common carriers & passengers
       2. Innkeepers & guest
       3. Temporary custodian (jailor, teacher)
       4. Occupier & entrant
          1. ***L.S. Ayres & Co. v. Hicks:***  P, a six-year-old boy, got his finger caught in an escalator in the D’s department store. The D unreasonably delayed stopping the escalator, which aggravated the P’s injury.   
             **HOLDING:**  P was an invitee and, therefore, D owed P a duty of reasonable care. Unreasonable delay violated that duty.
       5. Husband & wife; Parent & child
    3. **Reason to Know about Abuse or Potential Injury Exception:** D is under a duty to act to prevent injury to the life or limb of another when **(1) [Knowledge]** D knows or has reason to know of an abuse or potential harm and **(2) [Reasonably Safe]** acting on the duty will not cause a threat of harm to the D. The duty is the exercise reasonable care to prevent the third person form injuring the P.
       1. **Psychotherapist and Patient Relationship:** If a patient tells a doctor of a credible threat to cause an injury to a P, the doctor is under a duty to attempt to prevent P’s injury. This is not a breach of the doctor-patient relationship.
       2. ***J.S. and M.S. v. R.T.H.:*** Two young girls spent a considerable amount of time at D’s home. D’s husband molested the children. The children’s parents sued D’s husband and D. The argument against D was that she was under a duty to tell the policy.  
          **HOLDING:** A spouse has a duty to prevent sexual abuse by his or her spouse if the have actual knowledge or a special reason to know that the spouse is likely to abuse or is abusing an identifiable victim. In this case, the children spent an excessive amount of time with the husband, who had a history of sexual offenses.

#### Negligent Infliction of Emotional Distress (NIED)

* + 1. **Recovery Requires Physical Manifestation:** As long as the rest of the prima facie case for negligence is proven, D is liable for its negligently inflicted emotional distress where P suffers a definite and objective physical injury as a result of the emotional distress proximately caused by D. P’s reaction is measured against the standard of a normal person.
       1. ***Daley v. LaCroix:*** D’s negligently drove a vehicle in a manner that caused the car to fly 63 feet through the air and run into a pole near Ps’ home. Ps claimed the incident caused them to suffer traumatic neurosis, emotional disturbance, and nervous upset.   
          **HOLDING:**  No NIED because a normal person would not suffer a similar traumatic reaction to the event.
    2. **Death Telegram Exception:** A P can recover for emotional harm resulting from negligent transmission by a telegraph company of a message announcing death.
    3. **Mishandling Dead Bodies Exception:** A P can recover for emotional harm resulting from negligent handling or interference with dead bodies.
    4. **Bystander Recovery:** A bystander can recover under NIED when the bystander was a foreseeable victim of the negligence. A bystander is foreseeable three elements are present: **(1)** **[Emotional Proximity]** the bystander is closely related to the injured victim (i.e. family), **(2) [Contemporaneous Awareness]** the bystander is present at the scene of the injury-producing event at the time it occurs, and the bystander is aware that it is causing an injury to the victim; and **(3)** **[Actual Injury]** the bystander suffers emotional distress that is **(a)** beyond what a disinterested witness would suffer **and** **(b)** not abnormal given the circumstances.
       1. ***Thing v. La Chusa:*** P’s child was hit by a car driven by D. P was nearby, but neither saw nor heard the accident. P’s daughter informed her of the accident. She suffered emotional distress upon finding her injured son.  
          **HOLDING:**  P could not recover as a bystander for emotional distress because she failed the contemporaneous awareness element.

#### Unborn Children

* + 1. **Wrongful Death:** (Majority) A cause of action exists when an unborn fetus is killed as the result of a D’s negligent action. (Minority) There is no cause of action when an unborn fetus is killed as the result of D’s negligent action because (1) the fetus does not have a separate existence from the mother, (2) proving cause-in-fact would be challenging, and (3) damages were too speculative.
       1. ***Endresz v. Friedberg:*** P was seven months pregnant. She was injured in a car accident. Two days later, she delivered stillborn twins.   
          **HOLDING:**  Twins could not assert wrongful death claims because they were never alive in the eyes of the law.
    2. **Wrongful Birth (Parent’s Claim):** A cause of action brought by the parents who claim that the negligent advice or treatment deprived them of the choice of avoiding conception or terminating the pregnancy.
    3. **Wrongful Life (Child’s Claim):** A cause of action brought by or for a defective child who claims that but for the D doctor’s negligent advice, the child would not be born.
       1. ***Procanik by Procanik v. Cillo:***  P was born with congenital rubella syndrome due to the negligence of P’s mother’s doctors in diagnosing an illness that P’s mom suffered.   
          **HOLDING:** An infant may recover extraordinary medical expenses attributable to his affliction as the result of the doctor’s negligence. However, the child may not recover for general damages.

#### Landowners

* + 1. **Duty to Those Outside of the Premise Based on Status (Majority View):** A landowner is required to make a reasonable, ordinary effort to ensure the safety of those outside of the land. This duty is influenced by factors such as **(a)** whether the land is urban or rural, **(b)** the profession of the landowner, and **(c)** the number of people that cross outside of the land.
       1. **Natural Conditions:**  Except for trees a landowner has no duty to protect people outside of the land for natural conditions on the land.
          1. ***Taylor v. Olsen:*** P suffered inures when her car hit a tree that fell from D’s land into the street. The tree showed no readily identifiable signs of rotting or that it was likely to fall in a storm.   
             **HOLDING:**  The land owner did not have a duty to bore into the tree and determine whether it was rotten and, therefore, there was no liability.
          2. ***Trees:*** In the case of trees, foreseeability alone is not sufficient for assessing liability. Liability rests on D having actual or constructive knowledge of the dangerous state of the trees.
       2. **Unnatural Conditions:** Landowners who use their land in an artificial manner must take reasonable precautions to protect the pubic traveling adjacent to the land.
          1. ***Salevan v. Wilmington Park, Inc.:*** D owned a ballpark where, each game, several baseballs would fly over a fence into an adjacent street. P was hit by one of these baseballs and suffered injury   
             **HOLDING:**  The fence was insufficient for satisfying the duty owed to those outside of the premise, who had an equal right to use the property.
    2. **Duty to Those On the Premise:** The duty a landowner owes those on the landowner’s premise varies based on the entrant’s status: (1) trespasser; (2) licensee; or (3) invitee. It is important to note that a person can change their status.
       1. **Trespassers [Low Duty]:** A trespasser is an unwanted party on the D’s land. A landowner owes a duty to not willfully or wantonly injury trespassers.
          1. ***Sheehan v. St. Paul & Duluth Ry. Co.:*** P’s foot got caught while walking on D’s railroad tracks. D’s train approached, but he was unable to stop. The train severed P’s foot.   
             **HOLDING:**  P was a trespasser that entered D’s land at his own peril.
          2. **Discovered Trespassers Exception:**  When the presence of the trespasser is discovered, there is a duty to use ordinary care to avoid injury him by active operations.
          3. **Frequent Trespassers Exception:** When trespassers frequently travel on a particular area of land, a D is required to anticipate the trespassers and exercise reasonable care in his activities for their protection.
          4. **Tolerated Intruders Exception:** A D’s continued toleration of the trespasses amounts to permission to use the land the P becomes a licensee.
       2. **Licensees [Intermediate Duty]:**  A licensee, or social guest, enters the owner’s premise in furtherance of his own purpose. Licensees have the owner’s permission to enter the land. An intermediate duty of care is owed to a licensee. A licensee generally takes the premise as he finds it. The owner has a duty to **warn the licensee of any hidden dangers that the owner knows about**.
          1. ***Barmore v. Elmore:*** P entered D’s premise to discuss “lodge business.” D’s had a mental breakdown and attacked P. P was injured. D did not warn P about his son, the son had not suffered a mental breakdown for several years, and P knew about D’s son.   
             **HOLDING:**  D’s son was not a hidden danger and, therefore, D did not violate a duty by failing to warn P about his son.
       3. **Invitees [High Duty]:** An invitee is one who is either expressly or impliedly invited onto the premise of another in connection with the business carried on by that other. The owner of a premise owes an invitee a duty to exercise reasonable care in keeping the premise reasonably safe for us by the invitee.
          1. ***Campbell v. Weathers:*** D operated a lunch courter and cigar store. P entered D’s store, loitered for about 30 minutes, and went to the back to use the bathroom. P stepped on a trapdoor in a dark hallway on his way to the bathroom.  
             **HOLDING:**  Even though P did not purchase anything, he was an invitee because D received a benefit by making its bathrooms open to the public. However, a P with no intention to purchase is merely a licensee.
    3. **Children on the Land:**
       1. **Old Rule – Attractive Nuisance Doctrine:** A landowner must use ordinary care when he sets before a **(1)** young child a **(2)** temptation that **(3)** he has reason to believe **(4)** will lead to danger.
       2. **New Rule – Artificial Conditions Highly Dangerous to Trespassing Children:** A landowner is liable for physical harm to trespassing children when the following conditions are present: **(1) [Cause-in-Fact]** the artificial condition caused the harm; **(2) [Knowledge of Condition]** the landowner knows or has reason to know that the condition exists; **(3) [Knowledge of Likely Trespass]** the landowner knows or has reason to know that children are likely to trespass; **(4) [Child Doesn’t Discover]** the children do not discover the danger because of their youth; **(5) [P x M > B]** the utility of maintaining the condition and the burden of eliminating the danger are slight compared to the risk to the children; and **(6)** **[Lack of Reasonable Care]** the landowner fails to exercise reasonable care to eliminate the danger or otherwise protect the children.
    4. **Person’s Privileged to Enter Irrespective of Landowner’s Consent**
       1. **Public Officials:** There are five different views on the treatment of public officials that enter the premise – (1) classified as licensees; (2) classified as invitees; (3) entitled to the duty owed to licensee or invitee depending upon the highest duty which the landowner already owed to some other person at that time and place; (4) special classification with a special duty; (5) reasonable care.
    5. **Standard of Reasonable Care for All Entrants (Minority View):** A landowner owes a duty of reasonable care under the circumstances to all those that enter the premise.
       1. ***Rowland v. Christian:***  P suffered from a severed tendon from a broken handle on a faucet when he went to use the bathroom in D’s house. At the time, P was a social guest (licensee). D knew that the cradle was cracked, but did not tell anything to P.   
          **HOLDING:** D owed P a duty to at least warn P about the dangerous faucet so that P could arrange his own behavior accordingly.

#### Lessor and Lessee

* + 1. **No Lessor Duty (Majority View):** As a general rule, a lessor owes no duty to the tenant or others coming onto the land for defective conditions present at the time of the lease unless one of the following exceptions apply:
       1. Undisclosed Dangers Conditions Known by Lessor Exceptions
       2. Conditions Dangerous to Persons Outside Premise
       3. Premises Leased for Admission to the Public
       4. Parts of Land Retained by the Lessor’s Control Which the Lessee is Entitled to Use (Hallways or Common Areas)
       5. Where Lessor Contracts to Repair Conditions
       6. Lessor is Negligent in Making Repairs
          1. ***Border v. Roseberry:***  P slipped on an icy step while visiting a tenant in D’s building. The tenant knew about the defective condition that caused water to drip from the room onto the step.   
             **HOLDING:** No liability for the lessor because none of the exceptions applied.
    2. **Lessor Duty of Ordinary Care (Minority View):** A lessor owes a duty to exercise ordinary care to the lessor’s tenants or to anyone that enters the premise with the tenant’s consent.
       1. ***Pagelsdorf v. Safeco Ins. Co. of America:*** D owned a two-story, two-family duplex. The building had four porches. D rented the building to a tenant. P leaned against the railing of one of the porches, which broke, and suffered injuries.   
          **HOLDING:**  The lessor was liable for the damage caused by negligently maintaining the porch.

#### Aggravated Negligence

* + 1. There is no longer a distinction between the degrees of negligence. No more gross negligence
    2. The actor does not desire harm but foresees the strong possibility that harm may result and still takes the risk
    3. Willful, wanton, and reckless describe point along the continuum.
       1. Degrees of negligence
          1. Slight negligence – failure to use great care
          2. Ordinary negligence – failure to use reasonable care
          3. Gross negligence - failure to use even slight care

Synonymous with reckless

## Breach

### Overview

* 1. Once a duty (standard of care) has been adopted, the next step in the inquiry is whether the D breached that duty. A P can show that a D breached a duty through: (1) direct evidence **OR** (2) circumstantial evidence

### Direct Evidence

#### General Rule

* + 1. Evidence that directly corroborates that D breached a duty. This could be something like a video or an eyewitness.
    2. *Per Se Violation of Statue* – if a D violated a statute and the procedural effect employed by the court for a violation of the statute is a *per se* violation, the judge’s determination of the duty might constitute direct evidence of the breach.

### Circumstantial Evidence

#### General Rule

* + 1. Evidence is based on an inference from the surrounding environment. P must show more circumstantial evidence in our to meet the burden of persuasion
    2. To recover in a slip-and-fall case, a P must establish:
       1. Actual or constructive knowledge of some condition on the premises by the owner/operator
          1. Constructive knowledge can by shown by if store employee was present in the immediate area and could easily have seen the substance and remove it. **OR**
          2. By showing that the substance had been on the floor for such a time that it would have been discovered & removed had the proprietor exercised reasonable care in inspecting the premises (i.e. fresh banana peel versus gritty, black, flattened one).
       2. That the condition posed an unreasonable risk of harm
       3. That the owner/operator did not exercise reasonable care to reduce or eliminate the risk; **AND**
       4. That the owner/operator’s failure to use such care proximately caused the plaintiff’s injures.

### Res Ispa Loquitor – The thing speaks for itself (Subset of Circumstantial Evidence)

#### In general

* + 1. RIL creates a common sense inference of negligence where direct proof is lacking
       1. The application of a common-sense inference is appropriate when the facts of the accident in and other themselves establish that but for the failure of reasonable care by the person or entity in control of the injury producing object the accident would not have occurred.
    2. P is not required to eliminate will all certainty other possible causes to employ RIL.
       1. *McDougald v. Perry –* McDougald was driving behind a large truck when a 130-pound spare time came out of its cradle underneath the trailer, fell to the ground, and was flung into the air after passing under the trucks rear tires. The spare hit McDouglad’s car.**HOLDING:** Application of RIL is proper because the intrusment was entirely under D’s control and normally does not go flying out onto the street. No need to exclude other causes
    3. RIL should sufficiently eliminate other potential causes (R2T Section 328D1b)
       1. *Larson v. St. Francis Hotel* - Larson, while walking on the sidewalk on Post Street near St. Fracnis Hotel, was hit on the head by a falling armchair. She was knocked unconscious by the falling chair and suffered mental trauma.   
          **HOLDING:** RIL inappropriate because the fact that the chair fell did not provide sufficient evidence showing that the chair was completely under D’s control
          1. Public Policy: “Business of Life Exception” – we do not want to force businesses to go to extreme and disruptive measure to prevent a potential tort.
    4. Medical Malpractice Exception
       1. When a P suffers an injury while unconscious as part of a medical procedure, they can employ RIL against all parties and instruments involved and there is a shift of burden to the D to explain why they are not culpable.
          1. *Yabarra v. Spangard -* Yabarra consented to undergo treatment for an appendicitis. After being placed under anesthesia, several doctors and nurses took care of him. The operation appeared to go fine until Yabarra woke up the next day and had pain in his arm. Over the following several months, the pain worsened.   
             **HOLDING:** P could employee RIL and Ds had to explain why they were not liable for the injury. Failure to explain meant that they would all be liable
          2. Public policy – (1) P clearly suffers harm in this instance and we do not want to let all of the Ds get away because P cannot specifically identify which one caused the harm. (2) Since P was unconscious and D was conscious, D is in a better position to know who the actual perpetrator is.

#### When does RIL apply? Established by P

* + 1. When the instrument that caused the injury was under the **exclusive** control of the D **AND**
    2. When the accident is one that would not occur in the ordinary course of events without negligence on the part of D.

#### What is the procedural effect of RIL? It is determined by the jurisdiction and varies

* + 1. Mere Evidence (Majority View) – it warrants an **inference** of negligence, which the jury draw when determining its judgment
    2. Rebuttable presumption (Minority View) – it raises a **presumption** of negligence which requires the jury to find negligence if D does not produce evidence sufficient to rebut the presumption
    3. Burden shift (Minority View) – it not only raises a presumption of evidence, but **shifts the ultimate burden** of proof to the D and requires him to prove by a preponderance of all the evidence that the injury was not caused by D’s negligence

#### Public policy for the comparative different treatment between RIL and violation of statutes

* + 1. RIL is given a weaker weight in regard to evidence because there is less clarity regarding whether the D was actually at fault. We do not want to place a liability on a party when we have little or no knowledge on what caused the breach in duty, or what the extent of the duty was.
    2. In violation of statue, we have lots of information regarding the D’s actions. Therefore, it is reasonable to apply a greater weight to the evidence.

## Causation (Must Have Both Causation-in-Fact & Legal/Proximate Causation)

### Causation-in-Fact

#### There Must Be Causation for Liability

* + 1. D’s liability is premised on the idea that D caused the injury. There are two possible tests: (1) but-for causation and (2) substantial factor. P’s failure to show either will bar P’s recovery.
    2. ***Perkins v. Texas and New Orleans R. Co.:*** Perkins was killed in a train accident while riding as a guest in a truck that shot across railroad tracks. A train pulling 113 cars was speeding and hit the car. It was impossible for the train to stop before the impact.  
       **HOLDING:** While there was duty and breach, the breach did not cause the injury because the accident would likely occur regardless of the train’s speed.

#### But-For Causation

* + 1. **General Rule - But For D’s Actions:** The D is the actual cause if, but for the negligence of D, P’s injury would not have resulted.
       1. **Greatly Increasing the Risk is Sufficient:** Where the negligence of the D greatly multiplies the chance and is of a character naturally leading to P’s injury, D’s negligence will e a “but for” cause.
          1. ***Reynolds v.*** ***Texas & Pac. Ry. Co.:***  Reynolds weighed 250lbs. Other passengers attempting to get onto a train rushed her. She shilled going down a flight of stairs and suffered injuries. D failed to light the stairway.   
             **HOLDING:**  While it is possible that Reynolds could have fallen if the stairway was lit, the failure to light the stairway met the “but for” requirements.
       2. **Negligence More Likely Than Not Led to the Injury:** In order to assess liability, D’s negligence must have more likely than not led to the specific injury. Experts may be necessary to disprove a presumption in favor of the post hoc ergo proctor hoc fallacy.
          1. ***Kramer Service, Inc. v. Wilkins:*** P, a guest of D’s hotel, cut his head on a piece of glass. The cuts didn’t heal for some time. Later, P developed cancer at the location of the cut.   
             **HOLDING:**  Recovery available for the injury of receiving a cut. It was merely possible that the injury led to cancer; therefore, recovery was barred for P’s cancer.
       3. **Lost Chance (MINORITY VIEW):** The D is a “but for” cause of the P’s loss of opportunity to recover when the D’s negligence aggravates the P’s preexisting injury, depriving the P of a potentially better outcome.
          1. ***Herskovits v. Group Health Cooperative of Puget Sound:*** D negligently failed to diagnose P with lung cancer on his first hospital visit. The failure to diagnose resulted in a 14% decrease in P’s chance of survival. P’s chance of survival was initially below 50%.   
             **HOLDING:**  D’s actions were a but for cause of the reduction on the P’s opportunity to survive. The fact that survival was <50% is irrelevant.

***Calculating Damages:*** (% Negligent)(% Reduction in Chance of Survival)(Time, i.e. premature death)(Annual Income/Additional Expenses).

* + - * 1. **Public Policy: (PRO)** Traditional rule that would bar recovery is too harsh. Need to provide people an opportunity to recover when a doctor acts negligently. We also don’t want a system where physicians can escape liability when they are at fault. **(CON)** creates different standards for different industries. The outcome, the P’s death, wasn’t actually caused the by the negligence. Hard to evaluate.

#### Substantial Factor Test

* + 1. **General Rule – D’s actions were a substantial factor, + there was “but for”:** If two or more causes, which either or neither alone could have caused P’s injury, occur concurrently, cause-in-fact is established when D’s negligence is a “substantial factor” in causing P’s injury.
       1. ***Hiss v. Edmonds:*** Hill suffered injuries from running into Edmond’s tractor. Edmond left the tractor in the middle of the road without lights on. Hill saw the tractor with enough time to avoid the impact.   
          **HOLDING:** Because the harm could not have happened without the negligence of both the driver of the car and the tractor’s owner, they are both responsible for the injury.
       2. ***Anderson v. Minneapolis, St. P. & S. St. M. Ry. Co.:***  A forest fire caused by D’s negligence combined with a separate fire of unknown origin. The combined fires caused damage to P’s property.   
          **HOLDING:**  D’s fire alone would have been sufficient for causing damage to P’s property. Therefore, causation is not broken by the combination. Had the fire been triggered by another company, there would have been joint and severable liability.
    2. **Inability to Determine Negligent Party:** When a P suffers an injury and cannot determine which D was the “but for “ cause of the injury, the burden will shift to the D to shake liability. Otherwise, each D will be held joint and severally liable through substantial factor causation.
       1. ***Summers v. Tice:*** P and 2 Ds were members of a hunting party. P was negligently shot by one of the Ds and could not determine which.   
          **HOLDING:** Where a group of persons are on a hunting party and two of them negligently fire in the direction of the third, causing injury to the third, the two negligent parties are liable even though only one of them could cause the injury.
    3. **Industry Liability:** Liability that is imposed on each member of an industry for the manufacturing of a harmful or defective product.
    4. **Market Share Liability (DES ONLY):**  When a P is unable to identify the actual tortfeasor and it is unjust to preclude the P from recovery, then the group of possible tortfeasors responsible for the overall harm can be held liable. **[TRIGGER]** In order to prevail, P must bring a substantial portion of the market into the suit. D’s can prove their innocence and escape liability.
       1. ***Sindell v. Abbott Laboratories:***  P’s mother took DES. P suffered from birth defects because of the DES and developed cancer because of her mother’s ingestion. ~195 companies marketed DES. P brought suit against only a few, but those companies represented the bulk of the market.   
          **HOLDING:** Between an innocent P and a negligent D, the latter should bear the cost of injury. D is also in a better position to bear the cost of injury resulting from bad manufacturing through insurance. Recovery Equation: (Judgment)(% Market Represented)(%of D’s share of Represented Market)

### Proximate or Legal Causation

#### Proximate Cause Stems from Policy Considerations = Nearness in Time & Place

* + 1. ***Atlantic Coast Line R. Co. v. Daniels:*** A determination of whether legal liability should be imposed where cause-in-fact has been established necessarily involves a balancing of policy considerations. These policy considerations serve to make liability manageable by drawing lines between negligence and injury. The idea is not to make the D an insurer against the world.

#### Arbitrary Line Drawing

* + 1. **Liability Gets Cut Off By Court Application:** As the name indicates, arbitrary line drawing occurs when the court cuts of liability that a D caused-in-fact because of **(1) foreseeability, (2) intervening causes, or (3) public policy**.
    2. **Unforeseeable Consequence:** A D is liable for the proximate results of its acts, but not for the remote damages that result from the act.
       1. ***Ryan v. New York Central R.R. Co.:*** D’s train engine set fire to P’s woodshed and P’s house, which was about 130 feet from the sed.   
          **HOLDING:** D only liable for the first building that caught fire. Damages occurring subsequent to the first building is barred.
          1. **New York Fire Rule:** A D is liable only to for the first building that catches fire due to its negligence. Any subsequent building is deemed beyond the control of the D and liability is cut off.
          2. **Public Policy:** There is no way for D to guard against liability if it was held accountable for remote damages. No type of insurance exists and no party has the capacity to afford such a liability. It would destroy civil society.
    3. Intervening/Superseding Forces
       1. **Intervening Forces:** A force that takes effect after D’s negligence and which contributes to the negligence producing P’s injury. Intervening forces do not sever liability.
       2. **Superseding Forces:** An intervening force that severs the link between D’s liability and P’s harm.
    4. Public Policy
       1. Duties are derived from **social fairness and policy**; must balance deterrent effect and social values.
          1. Hosts Serving Social Guest Alcohol

**Majority View:** Those who furnish alcohol to adults are not subject to liability for the guest’s subsequent acts.

**Minority View:** Those who furnish alcohol to adults may be subject to liability for the actions of a drunken guest trying to get home.

***Kelly v. Gwinnell:*** Gwinnell left a party at Zak’s house after consuming lots of liquor. Zak had continued to serve Gwinnell after he was visibly drunk. Gwinnell got into an accident on his drive home.  
**HOLDING:** A host who serves liquor to an adult social guest knowing both that the guest is intoxicated and that he will be driving is liable for injuries inflicted on a third party due to the intoxicated drivers negligence.

* + - 1. **Knowledge and Insurance**, and the Ability of the **Legislature** to Solve the Problem
         1. ***Kelly v. Gwinnell:*** Gwinnell left a party at Zak’s house after consuming lots of liquor. Zak had continued to serve Gwinnell after he was visibly drunk. Gwinnell got into an accident on his drive home.  
            **DISSENT:** (1) The legislature is better equipped (more resources) to handle the issue. (2) Social hosts are not the same as bartenders; they don’t have special skill at identifying drunk individuals; (3) Social hosts don’t have complete control over their alcohol, whereas bars do; (4) Insurance is unavailable to social hosts, but it is available to bars.
      2. **Deter Wrongful Conduct vs. Provide Socially Beneficial Product/Service**
         1. Third-Generation DES Recovery

***Engright v. Eli Lilly & Co.:*** Enright’s grandmother took DES. Enright alleges that she had abnormalities during her pregnancy that led to the premature birth of her daughter. P suffers from severe cerebral palsy and other disabilities.   
**HOLDING:** Grandmother’s consumption of DES not viewed as a proximate cause because it extends the traditional bounds of tort law too far.

#### Direct Causation (Looking Back Approach)

* + 1. **Causation-in-Fact:** Satisfying the causation-in-fact test is sufficient for the assessment of liability. If Ds breach was near in place and time with the injury, then D is liable. The specific mechanics are irrelevant. At some point, arbitrary line drawing is necessary to cut liability off.
       1. ***Polemis:*** Party chartered a vessel. They put benzene and petrol in the cargo bay. While unloading the cargo bay, a plank of wood dropped into the hold and ignited vapors. The Party caused the beam to drop through its negligence.   
          **HOLDING:** If the act would normally cause damage, the exact kind of damage one would expect is material. It was foreseeable that dropping the plank could result in a spark or some type of damage. Therefore, the fact the damage was greater than expected fails to above the D.
    2. **Duty to the World [Andrew’s Dissent]:**  Whatever damages a breach of duty causes, the D must pay for it. D owes a duty to the world. There is no liability for damages that are remote from the D’s negligence, which is like arbitrary line drawing. The difference between direct causation and arbitrary line drawing is that the cut-off for liability is done on a case-by-case basis.
       1. ***Palsgraph v. Long Island R.R. Co.:*** Palsgraph is standing at a train station. A man carrying a package wrapped in newspaper tries to get on a train. Two employees push the man onto the train, but the package falls on the tracks. The package contained fireworks that exploded. The explosion caused a scale to fall on Palsgraph.  
          **ANDREW’S DISSENT:** The RR owes a duty to the world. The injury was the natural consequence of its action. The only variables impacting causation should be distance in space and time. Palsgraph was close and suffered injuries immediately after the explosion.

#### Foreseeability (Looking Forward Approach)

* + 1. **Liability for Reasonably Foreseeable Types of Harm:** **(1)** The P’s injury was of the general type, and P was party general class, who could have been foreseeably harmed by D’s negligence **and** a reasonable person would have taken steps to reduce the risk of P’s injury.
       1. ***Wagon Mound I & II:*** D negligently discharges oil into a harbor. There was cotton fiber in the water. Workers at the dock dropped molten metal into the water. This caused the oil to ignite. The fire destroyed the dock and a ship.   
          **HOLDING:** Recovery for the ship because it was foreseeable that oil lying on the water could ignite, and there was no reason why the mechanic would not guard against that risk.
    2. **Zone of Danger:** legal causation exists when: (1) the harm is the general type that made conduct unreasonable in the first place **and** (2) the P was in the “zone of danger” (i.e. in the general class of people that would be expected to be harmed by the breach). **D must have been put on notice of a danger that would lead to some class of harm to a class that included P.** Notice is evaluated using the eye of ordinary vigilance.
       1. ***Palsgraph v. Long Island R.R. Co.:*** Palsgraph is standing at a train station. A man carrying a package wrapped in newspaper tries to get on a train. Two employees push the man onto the train, but the package falls on the tracks. The package contained fireworks that exploded. The explosion caused a scale to fall on Palsgraph.  
          **HOLDING:**  Palsgraph was not in the zone of danger because the harm was not foreseeable to Palsgraph. However, the package holder could have a cause of action against the RR because it was foreseeable that the package falling was a foreseeable consequence of being pushed onto the train.
    3. **Intervening Forces are Foreseeable:**  When the imposition of a force subsequent to D’s negligent conduct can be reasonably anticipated, the causal connection between the D’s negligence and the P’s harm will stand.
       1. ***Derdiarian v. Felix Contracting Corp.:***  P was hit by a car that fell into an excavation site. The driver had an epileptic seizure. The D failed to provide an adequate barrier.   
          **HOLDING:**  Even though the driver was negligent, D could reasonable anticipate that a vehicle could fall into the excavation site because of its failure to provide an adequate barrier. Therefore, the driver was an intervening, not a superseding cause.
    4. **Superseding Force are Unforeseeable:** When the imposition of a force subsequent to D’s negligent conduct is **unexpected or extraordinary**, the force is not reasonably anticipated. Therefore, the force severs the causal connection between the D’s negligence and the P’s harm. Examples include unexpected criminal acts and third-party intentional acts.
       1. ***Watson v. Kentucky & Indiana Bridge & R.R. Co.:*** D railroad tank car filled with gasoline derailed and spilled its content into the street. A third party struck a match and ignited the gasoline vapor, causing an explosion that injured P.  
          **HOLDING:** If the third-party intentionally dropped the match, the third-party’s action would be a superseding force. If the party negligently dropped the match, it would fall within the scope of expected consequence because the explosion could not have occurred without the gasoline.
    5. **Rescue Doctrine:** The rescue doctrine allows an injured rescuer to sue the party that caused the danger requiring the rescue. In order to recover, the rescuer must show: **(1)** D’s negligence caused the need to rescue; **(2)** there was an appearance of peril; **(3)** the peril was imminent; **(4)** a reasonable prudent person would have concluded that there was the appearance of peril; **(5)** the rescuer acted with reasonable care in conducting its rescue.
       1. ***McCoy v. American Suzuki Motor Corp.:*** McCoy stopped to assist a driver of a Suzuki Samaria, who had swerved off of the road do to a manufacturing defect. At the request of a police officer, McCoy set up flares along the road to warn oncoming traffic. After the incident was completed, McCoy was hit in a drive-by accident while walking back to the accident site.   
          **HOLDING:** Since danger invites rescue, it is foreseeable that McCoy could be injured by while assisting the driver.
       2. **Firefighter Rule (Exception):** Members of professional services cannot recover for injuries they sustain during the time on-duty. This is because they are being compensated to assume that risk. However, these individuals could potentially recover for injuries sustained rescuing after their shift.
       3. **Escape Rule:** D is liable for injuries P sustains in attempting to escape from a danger.
    6. **Inherently Dangerous Activities Exception:** If someone engages in an inherently dangerous activity (i.e. shooting a gun) they might be the held the proximate cause even if actual injury wasn’t foreseeable (i.e. the bullet ricochets)
    7. **Subsequent Injuries Exception:** D can be deemed to proximately cause injuries resulting from a weakened condition of the P when: **(1)** the original injury was the result of either a disease or broken limbs **and** **(2)** D’s first injury made the P more susceptible.

## Damages

### Themes

* 1. **Restoration:** the purpose of compensatory damages is to restore the P to pre-injury status as far as possible
  2. **All Loses Must Translate Into Money:** The only tool at the jury’s disposal for making a P whole is money damages. Therefore, non-economic injuries must get translated into a dollar amount.
  3. **Present Value:** The award of damages covers both present and future damages.
  4. **Limited Judicial Review:** Courts only intervene with a jury’s verdict amount if the court finds the award to be either so high or so low that it shocks the conscious.
  5. **Deterrence:** Punitive damages are used to deter and punish wrongful conduct and, therefore, focus on the behavioral characteristics of the D.

### Types of Damages

#### Nominal Damages

* + 1. **Small Some of Money [Intentional Torts]:** Nominal damages are small sum of money awarded to the P to vindicate rights.

#### Compensatory Damages

* + 1. **Make P Whole [All Torts]:** Compensatory damages are intended to represent the closest possible financial equivalent of the loss or harm suffered by the P. Compensatory damages make the P whole again.
       1. Past Physical and Mental Pain
       2. Future Physical and Mental Pain
       3. Future Medical Expenses
       4. Loss of Earning Capacity
       5. Permanent Disability and Disfigurement
    2. **Maximum Recovery Rule:**  A trail judge may reduce the jury’s verdict when the jury awards an amount that exceeds the proper maximum to the maximum.
       1. ***Anderson v. Sears, Roebuck & Co.:*** P’s home was completely consumed because of a defective heater sold by D. P also suffered severe injuries. The jury awarded $2,000,000 in compensatory damages.  
          **HOLDING:**  The maximum the jury award supported by the evidence was $2,980,000. Since the jury verdict was for less than the maximum, the verdict was reasonable.
    3. **Addittitur and Remittitur:** Courts may order an addittitur or remittitur of damages when a jury’s assessment of damages is excessive based on the evidence.
       1. ***Richardson v. Chapman:*** P1 and P2 were driving in a car. D negligently hit them. P1 suffered relatively minor injuries and the jury awarded ~$100K. P2 suffered extreme injuries and the jury awarded ~$22M. The jury appeared inflamed by the injury.   
          **HOLDING:** Both jury verdicts were excessive. Excessive verdicts fall outside the range of fair and reasonable compensation or result from passion and prejudice.
    4. **Economic Damages (Special Damages)**
       1. **Lost Earning:** Income, including wages that the P was unable to earn in the past because of P’s injuries.
       2. **Loss or Impairment of Future Earning Capacity:** Income, including wages that P would have earned in the future based on pre-accident life expectancy.
       3. **Medical Expenses (Past and Future):** Expenses for medical treatment or healthcare.
       4. **Present Value and Inflation:**  Juries award a P damages in a lump sum. The damages are designed to compensate the P for the P’s entire life. Consequently, the damages are discounted and adjusted for inflation. Most jurisdictions use one of three models for discounting: (1) Interest-Discount Method; (2) Real Interest Method; or (3) Total Offset Method.
          1. *Interest-Discount Method:* Increases expended future earning to account for inflation and then discounts to the present value using the market rate of interest.
          2. *Real Interest Method:* The discounting interest rate is perceived to be stable (1%-3%) regardless of inflation.
          3. *Total Offset Method:* The market rate used to discount the judgment is completely offset by inflation when computing lost future income.
       5. **Federal Income Tax:** Compensatory damages are not subject to federal income tax. However, punitive damages are subject to federal income tax. Most jurisdictions do not inform the jury about the tax-free nature of the award.
       6. **Interest on the Award:**  Interest begins accruing once the court enters judgment.
    5. **Non-Economic Damages (General Damages)**
       1. **Physical Pain and Suffering, Mental Anguish:** Physical pain and suffering caused by the injuries that P is aware of, including pre- and post-trial suffering.
       2. **Loss of Function or Appearance:** Recovery for loss of sense of taste and small, incontinence, impotency and loss of desire for sexual intercourse, change of personality, change of attitude towards others, insomnia, inability to drive a car, and fear of injury to an unborn child.
       3. **Emotional Distress from Legal Malpractice:** P must have either (1) physical manifestations of the stress or (2) suffered the emotional distress as a result of a direct invasion of P’s right through some tortious conduct, like slander, liable, malicious prosecution, seductions, or other willful, wanton, or malicious conduct.
       4. **Litigation-Induced Stress [No Recovery]:** Most courts do not allow recovery for litigation-induced stress.
       5. **Loss of Enjoyment of Life (Hedonic Damages):** Recovery for the P’s inability to participate or enjoy the pleasures of life that were formerly enjoyed.
       6. **Per-Diem Argument:**  P’s counsel will try to break physical and mental suffering down into days, hours, or even minutes, set a value on each unit, and multiply it by the total number of the units that pain and suffering has lasted and may be expected to last. Problem is that this is incredibly imprecise.
       7. **Loss of Consortium:** P’s recovery for a harm to a relational interest that occurs when he other party to the relationship suffers physical harm. It compensates family member for their diminished relationship with the primary tort victim.
    6. **Collateral Source Rule:** Payments made to or benefits conferred on the injured party form other sources are not credited against the tortfeasor’s liability, although they cover all or part of the harm for which the tortfeasor is liable, unless one of the following four situations occurs: the collateral source is used to **(1)** rebut P’s evidence that she was financially compelled to return to work prematurely or forego additional medical care; **(2)** show P had attributed his condition to some other cause, such as sickness; **(3)** impeach the P’s testimony that he had paid medical expenses himself; or **(4)** show that P had actually continued to work instead of being out of work as claimed. **Collateral sources are not subtracted from P’s recovery.** 
       1. **Motion in Limine:** A pre-trial request to prevent evidence from entering the courtroom.
       2. ***Montgomery Ward & Co., Inc. v. Anderson:*** P reached an agreement with UAMS hospital to discount her hospital bills by 50%.   
          **HOLDING:**  The agreement to discount falls within the collateral source rule and, therefore, the D is not permitted to benefit from the reduced medical expenses.
    7. **Mitigation of Damages:** P cannot claim damages that would otherwise be a permanent injury if the permanency of the injury could have been avoided by submitting to treatment by a physician, including possible surgery, when a reasonable person would do so under the same circumstances.
       1. ***Zimmerman v. Ausland:*** P suffered a torn semilunar cartilage in her knee as a result of an automobile accident caused by the negligence of the D. She received a judgment for $7,500, which included an amount for permanent injury. There was evidence that P refused a surgical procedure that could have prevented the permanent injury.  
          **HOLDING:** The evidence was not clear enough to show that a RPP would have undergone the surgery.
    8. **Damage to Property:**  Market value before tort – market value after tort, including the cost of repair. For property with no readily identifiable value, the court may look to factors such as (1) original cost, (2) the use made of the property; and (3) its condition at the time of the tort.

#### Punitive Damages

* + 1. **Punishment Damages [Intention Torts]:**  Punitive damages are an additional sum over and above the compensation of the P, awarded in order to punish the D, to make an example of the D, and to deter D and others from engaging in similar tortious conduct. They require malicious or vindictive intent, which is genially present in intentional torts.
       1. **No Right to Punitive Damages:** punitive damages are a creature of common law, and the legislature is free to create, modify, or abolish their availability. Since no person has a vested interested or property right in any rule of common law, P does not have a right to punitive damages.
          1. ***Cheatham v. Pohle:*** P’s ex husband send nude pictures of P to several people after a nasty divorce. The jury awarded punitive damages, but Indiana law only allowed a P to retain 25% of any award for punitive damages.   
             **HOLDING:**  Since P had no right to the punitive damages, the Indiana law was constitutional.
       2. **Due Process (14th Amendment) Limits Recover [< 10 Ratio]:** The due process clause prohibits the imposition of grossly excessive or arbitrary punishment on a tortfeasor. There are three factors for determining the appropriateness of the amount of punitive damages: **(1) [Reprehensibility]** the degree of reprehensibility of the D’s misconduct; **(2) [Disparity Between Award and Harm]** the disparity between the actual or potential harm suffered by the P and the punitive damages awarded; and **(3) [Comparable Cases]** the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable case.
          1. **Reprehensibility Factors:** The harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the heath or safety of other; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit.
          2. **Disparity between Award and Harm:** While the size of the compensatory award is a factor, few awards where the ratio between punitive damages and compensatory damages exceed 10:1 survive judicial review.
          3. **Comparable Cases:** It is possible to import criminal punishment to evaluate the reasonableness of a jury’s award, but punitive damages are not a substitute or complement to criminal prosecution.
          4. ***State Farm Mutual Automobile Ins. Co. v. Campbell:*** Parties were involved in an accident. Ratio between punitive and compensatory damages was 145 to 1.   
             **HOLDING:**  The award of punitive damage was excessive and unreasonable.

## Defenses

### Contributory Negligence (Objective)

* 1. **Complete Bar to Recovery:** When a D shows that P’s negligence was a substantial factor in bringing about the harm P suffered, P’s negligence blocks recovery.
     1. ***Butterfield v. Forrester:*** P was riding his horse quickly down the road in the evening. He ran into a pole that D left in the road. P was injured after getting thrown from the horse.  
        **HOLDING:** P negligence contributed to the accident and, therefore, recovery blocked.
     2. **Not Available for Intentional/Willful/Wanton Torts:** D cannot assert this defense in the case of an intentional tort, nor can D assert the defense when the tort is willful, wanton, or reckless.
  2. **Last Clear Chance Exception:** If the D had the opportunity to avoid the accident after the opportunity was no longer available to the P, the D is the one who should bear the loss.
     1. ***Davies v. Mann:*** P’s donkey entered the street due to P’s negligence. D was riding down the road in a wagon at a decent pace. P was unable to get his donkey out of the street and D’s wagon ran over the donkey, which killed the animal.  
        **HOLDING:**  Although the donkey may have been wrongfully in the street, the D was bound to go along the road at such a pace as would be likely to prevent mischief.

### Comparative Negligence (Objective)

#### Pure Rule

* + 1. **Proportional Recovery:** The P’s recovery is reduced by the percentage fault attributable to P. There is no ceiling on P’s fault that would prevent recovery.

#### 50% Rule

* + 1. **P Not Greater Than D:** P’s recovery is reduced by the percentage of fault attributable to P as long as the P’s fault is “not greater than” the fault of the D’s.

#### 49% Rule

* + 1. **P As Great As D:** P’s recovery is reduced by the percentage of fault attributable to the P as long as the P’s fault is “not as great” as the D’s.
       1. ***McIntyre v. Balentine:*** Two drivers were involved in a car accident. Both drivers were negligent (one was driving drunk and the other was speeding).   
          **HOLDING:** Recovery is only permitted

#### **Slight** **Rule**

* + 1. **P’s Negligence Only Slight:** P’s recovery is reduced by the percentage of fault attributable to the P as long as P’s fault is only slight in comparison with the negligence of D.

### Assumption of Risk (Subjective) [Not a Favored Defense]

#### Express Assumption of Risk

* + 1. **Complete Bar Through Exculpatory Clause:** A written or oral agreement whereby the P relieves the D of any duty towards P. In general, these clauses are legally enforceable.
       1. **Exception:** **(1)** when the party protected by the clause intentionally causes harm or engages in acts of reckless, wanton, or gross negligence;
       2. **Exception: (2)** when the bargaining power of one party to the contract is so grossly unequal so as to put that party at the mercy of the other’s negligence;
       3. **Exception: (3)** when the transaction involves the public interest.
          1. ***Factors for Determining Public Interest:*** (1) a business of a type general thought suitable for public regulation; (2) the party is engage in performing a service of great importance to the public, which is often a matter of practical necessity; (3) the party holds itself out as willing to preform this service for any member of the public who seeks it, or at least for any member coming within certain established standards; (4) the party possesses a decisive bargaining strength against any member of the public seeking the service; (5) the party uses a contract of adhesion; (6) person or property is subjected to the party’s carelessness.
       4. ***Seigneur v. National Fitness Institute, Inc.:*** P was injured while undergoing an initial evaluation conducted by a fitness club owned by D. Before the evaluation, P signed an agreement with D stating that “all exercises shall be undertaken by me at my sole risk and that NFI, Inc. shall not be liable to me for nay claim…”  
          **HOLDING:** The exculpatory clause need not say “magic words” such as negligence to be enforceable. It did not fall within one of the exceptions and was clear and unambiguous.

#### Implied Assumption of Risk

* + 1. **Knowingly Accepting Risk (General Rule):** P consciously and voluntarily places himself in a position where he is subject to a known risk. This requires: (1) knowledge; (2) voluntary encounter; (3) appreciation of the magnitude; (4) P’s awareness; and (5) risk created by D’s negligence.
       - 1. ***Rush v. Commercial Reality Co.:*** P was injured when she fell through the floor of an outhouse.   
            **HOLDING:** Even if P knew about the risk, which is questionable, she did not engage the risk voluntarily. Therefore, no AOR.
       1. **Primary Assumption of Risk (No Breach Defense):**  Where a D had no duty or did not breach its duty. In these cases, P knowingly encounters a risk inherent in the activity.
       2. **Secondary Assumption of Risk (Breach Defense):** P acts voluntarily and unreasonably to encounter a known risk created by D’s negligence.

### Statute of Limitation

* 1. **Time Period to Bring an Action (3-5 years, for example):** The statute of limitations is a statutorily created time period for a P to bring a P against a D. Failure to raise a claim, absent tolling, during the period results in the claim being extinguished.
     1. **Old Accrual Rule:** Mere ignorance and failure to discover the existence of the cause of action, or the consequential damages resulting from the breach of duty or wrongful act, can prevent the running of the statue of limitations.
     2. **Discovery Accrual Rule:** A right of action accrues when the P discovers or should have discovered the resulting injury.
        1. ***Teeters v. Currrey:*** P had physician D perform a tubal ligation after giving birth to a child with medical complications. Two years later, she discovered that she was pregnant. Nine months later, she gave birth to a child with severe complications. There is a one-year statute of limitations.  
           **HOLDING:** The one-year statute of limitations started to accrue when she discovered that she was pregnant.
  2. **Continuing Torts:** When the tort continues over a period of time, the last instance is the point at which the statute of limitations begins to accrue.
  3. **Tolling:** When the “clock stops” for people that are (1) minors, (2) insane, or (3) incompetent. The clock starts once any or all of those conditions are alleviated.

### Statute of Repose

* 1. **Time Limit on Liability (18+ years, for example):** A statute of repose limits potential liability by limiting the time during which a cause of action can arise. It is, effectively, a period of time after which a person is no longer responsible for past acts. There have been carve-outs for cases, like DES.

## Immunities (Avoid Torts Based in D’s Status)

### Family

* 1. **Spousal Immunity Abrogated (Majority):** Absent express statutory provision or compelling public law, the law should not immunize tort-feasors or deny remedy to their victim. Therefore, the old rule that spouses were immunized from their inter-spousal torts is **abrogated**.
     1. ***Freehe v. Freehe:*** Husband was injured on a negligently maintained tractor owned by his wife. Husband had no interest in the tractor or the family operation.  
        **HOLDING:**  There is no basis for preventing a spouse from suing another spouse. Therefore, wife could be held liable.
  2. **Parental Immunity Partially Abrogated:** Parents have immunity for their parental actions toward their children that do not amount to willful or wanton conduct.

### Charities

* 1. **Old Rule = Complete Immunity:** Originally, charities were immune under the common law in order to foster their development in society.
  2. **New Rule = Immunity Abrogated:** Today, charities operate more like businesses and, therefore, should be held responsible for their tortious conduct. Moreover, shielding these institutions from liability results in neglect and irresponsibility.
     1. ***Abernathy v. Sisters of St. Mary’s:*** P allegedly sustained injuries when the D, and employee of Sisters of St. Mary’s, negligently failed to assist him as he moved form his bed to the bathroom.   
        **HOLDING:** Charities are now “big business.” Their previously immunized status is, consequently, abrogated.

### Employer

* 1. **Worker Compensation Statutes:** Workers compensation Statutes provide that employees may recover from their employers for work-related injuries without having to show any fault on the party of the employer.

### State and Local Government

* 1. **Immunity for Governmental Functions:** Generally, governments are immune against liability resulting from the performance of government-like functions.
     1. **Assumed/Special Duty Exception:** When the government assumes a duty, or provides a reasonable basis for the P to believe that they government assumed a duty, the immunity is completely abrogated.
        1. ***DeLong v. Erie County:*** P called 9-11 during a home invasion. D’s dispatcher took the call and told P that help would be on the way. However, D’s dispatcher did not perform the appropriate verification procedure and mistakenly wrote the wrong address down. The police arrived late and found P dead.  
           **HOLDING:** The establishment of an emergency call system is not the factor that creates the special duty. Instead, it was the statements that help was on the way and that the P should stay where she was that created a special relationship that P relied on.
        2. ***Special Duties:*** (1) informers; (2) undercover agents; (3) person under court order of protection; and (4) schoolchildren.
  2. **No Immunity for Proprietary Functions:** Governments are not immune against liability resulting from those activities that a market could provide, such as water treatment.

### The United States

* 1. **Generally Immune:** The US has sovereign immunity unless it decides to waive its immunity.
     1. **Federal Torts Claims Act (FTCA) = Waiver of Immunity for Non-Discretionary Torts:** Under the FTCA, the US waives its immunity for those torts where, under the circumstances, a private person would be liable unless the liability resulted from the execution of a discretionary function.
        1. ***Discretionary Function Exception:*** It is a statutory shield that protects the government from civil liability for claims based upon the exercise or performance of a discretionary function or duty on the part of a federal agency or employee, regardless of whether the agent abused its discretion. Discretionary conduct must involve an element of choice.
           1. ***Deuser v. Vecera:*** P was drunk at a local fair. P acted inappropriately with other women at the fair. National Park Rangers arrested P, but released him because the local jail could not take him in. They were given discretion regarding whether to take P to another jail or just let him go. There was limited staffing at the fair, so the Rangers time was better spent there. After getting released, P wandered into a road and was hit by a car.  
              **HOLDING:**  Rangers’ decision to release P was discretionary because of instructions in their handbook and the dire need for their assistance at the fair.

# Strict Liability

## Strict Liability Template

#### Activity (Animals or Abnormally Dangerous Activities)

#### Cause-in-Fact (But For or Substantial Factor)

#### Proximate Cause (Harm Resulted From Act & Nature of Activity Caused Harm)

#### Damages

#### Defenses (P Participated, Comparative Negligence, Vis Major, or Negligent Assumption of Risk)

## Animals

### Trespass Action

* + 1. **Strictly Liable for Animal’s Trespass:** Keepers of domesticated and undomesticated animals are s**trictly liable for damages resulting from the animal’s trespass** on the property of another. Owners of dogs and cats, however, are not liable for their pets’ trespasses, unless the owners have been negligent or unless strict liability is imposed by state ordinance.

### Actions Other Than Trespass

* + 1. **Domesticated Animals Liability Dependent on Knowledge and Nature of Animal:** the keeper of domesticated animals – dogs, cats, cattle, sheep, and horses – is strictly liable for the harm those animals cause **only if** the keeper had **(1) actual knowledge** that the animal had a **(2) particular trait or propensity** that **(3) caused the harm**.
    2. **Wild Animals Liability:** the keepers of wild animals are strictly liable for any harm caused by those animals.

## Abnormally Dangerous Activity

### Rule

**Blackburn Rule – Liability Based Solely on Activity:** The person who, for his own purposes, brings on his land and collects and keeps there any thing likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damages which is the natural consequence of its escape.

**Cairn Rule – Liability Based on Activity and Surrounding Circumstances:** Same basic rule, but applies a circumstantial test to determine “non-natural” means. D is only liable for non-natural uses of the land. The factors to evaluate are: **(1)** the **character** of the activity; **(2)** the **place and manner** in which it is maintained; **and** **(3)** the **relation** to the surroundings.

* + - 1. ***Rylands v. Fletcher:***  D constructed a reservoir. D failed to inspect the area and, therefore, was unaware of P’s mineshafts below the reservoir. Under the increased pressure from the reservoir, the mine shafts collapsed and water intruded into the area.  
         **HOLDING:** When one person in managing his own affairs causes, however innocently, damages to another, it is obviously only just that he should be the party to suffer.

### Factor Analysis:

A party that carriers on an abnormally dangerous (or ultrahazardous) activity is subject to liability for the harm to the person, land, or chattels of another resulting from the activity although the party exercised the utmost care to prevent the harm. In order to determine whether an activity is abnormally dangerous, a court looks at several factors:

* + 1. **(1)** the existence of a high degree of risk of some harm to the person, property, or chattels of another;
    2. **(2)** the likelihood that the harm that results from it will be great;
    3. **(3)** the inability to eliminate the risk by the exercise of reasonable care;
    4. **(4)** the extent to which the activity is not a matter of common usage;
    5. **(5)** the inappropriateness of the activity to the place where it is carried on; and
    6. **(6)** the extent to which its value to the community is outweighed by its dangerous attributes.
       1. **Ultrahazardous:** Categorical determination on whether an activity imposes strict liability
       2. **Abnormally Dangerous:** Situation-based determination on whether an activity imposes strict liability.
       3. ***Miller v. Civil Construction, Inc.:*** P was injured when a stray bullet ricocheted during the course of firearm practice in a nearby gravel pit.   
          **HOLDING:** The use of a gun, even though frequently classified as dangerous or even highly dangerous, is not the type of activity that must be deemed ultrahazardous.

## Defenses to Strict Liability

### The Strict Liability Activity Must Proximately Cause the Injury

Liability only for damages caused by strict liability activity: A D is only liable for those damages that lie within the extraordinary risk posed by the strict liability activity. Liability is not imposed on every extreme harm that may be caused by engaging in the strict liability activity

* + 1. ***Foster v. Preston Mill Co.:*** Blasting operations conducted by D frightened a mother mink owned by P, which cased the mink to eat its young. The blasting did not interfere with other owners’ enjoyment of their property.   
       **HOLDING:** D not liable under strict liability because the exceedingly nervous disposition on the mink was the cause of the damage, not the blasting. The risk of a mink eating its young is not party of the normal risk of operating a blasting operation.

### The P Invited the Injury

The person with the strict liability item can excuse liability by showing that the damages were caused by the P or that the escape was the consequence of an act of god.

* + 1. ***Sandy v. Bushet:*** D owned a horse that was known to attack humans. P took his mare and his colt into a pasture to graze. P drove D’s colt horse away. The horse silently returned and struck P.   
       **HOLDING:** Strict liability attached because P was unaware of the horses approach. Had P seen the horse approaching, the outcome would probably be different.

### Vis Major

No liability when the damages resulted from an act of god that the owner had no reason to anticipate. This defense applies to acts of third parties that the owner had no reason to anticipate.

* + 1. ***Golden v. Amory:*** D owned a hydroelectric plant. The Chicago River exceeded the bounds of the reservoir because of a hurricane and caused damage to Ps’ property.  
       **HOLDING:** No strict liability because the possibility of the flood was plainly beyond the capacity of any one to anticipate.

# Products Liability

## Product Liability Template

#### Was P a Member of the Class of foreseeably injured individuals?

#### Was the Product Defective (Manufacturing [Strict], Design [Neg], or Warning [Neg])

#### Cause-in-Fact (But For or Substantial Factor)

#### Proximate Cause (Exception for Misuse)

#### Damages (actual physical harm)

#### Defenses

1. Traditional Theories for Product Liability
   1. Intentional
      1. **Like Any Intentional Tort:** Where a manufacturer introduces a product into the market desiring or knowing to a substantial certainty that the product will cause a P harm.
   2. Negligent
      1. **Liability Imposed for Foreseeable Dangers to Parties Inside/Outside Privity:** A manufacturer is liable to those outside privity when the following conditions are present: **(1) [Thing of Danger]** the manufacturer created a thing that is reasonably certain to place life and limb in peril when negligently made; and **(3) [Knowledge of Use by Third Party]** the manufacturer knows that a person other than the purchaser will use the produce without conducting new tests.
         1. ***MacPherson v. Buick Motor Co.:***  P purchased a car form a retail dealer and was injured when a defective wheel broke. P sued the original manufacturer, claiming that the wheel was defectively built. D claimed that it purchased the wheel from another party and failed to inspect it before incorporating it into a vehicle.   
            **HOLDING:** The fact that the wheel came from a reputable dealer does not negate D’s duty to inspect. The more probable the danger, the greater the need for caution. A simple test would have been sufficient.
         2. **Knowledge of Danger:**  Knowledge of the thing of danger must be probable, not merely possible.
   3. Warranty
      1. Express Warranties
         1. **Strict Liability For Harmful Violation of Warranty:** A manufacturer that **(1) [DELIVERY]** delivers a lacking those qualities which the manufacturer represented it as having and **(2) [NOT READILY DETECTABLE]** the absence of those qualities are not readily detectable by the consumer is liable for the harms resulting for the consumers ordinary uses of the product.
            1. ***Baxter v. Ford Motor Co.:*** P’s eye was injured when the windshield of his car shattered. P purchased the car based on an advertisement by D saying that the car had a special shatterproof glass. P could not have known that the glass would shatter.   
               **HOLDING:**  A person of ordinary experience and reasonable prudence would not readily detect the nature of the nonshatterable class. The advertisements established a warranty.
      2. Implied Warranties
         1. **Implied Warranty of Merchantability:** The assumption that the goods sold reasonably conform to an ordinary buyer’s expectations.
         2. **Implied Warranty of Fitness of Purpose:** The seller’s assertion that the product being sold conforms the **(1)** expressly or implicitly state **(2)** purpose articulated by the buyer **(3)** to the seller and **(4)** the buyer relied on the seller’s skill, judgment, knowledge, or expertise.
         3. **Disclaimer of Warranties:** A disclaimer or limitation of liability shall not be given effect if unfairly procured. A disclaimer is unfairly procured when the consumer was not made understandingly aware of the disclaimer or the disclaimer was not clear and explicit.
            1. ***Henningsen v. Bloomfield Motors, Inc.:***  Ps was injured when the steering mechanism in the car malfunctioned. P sued D based on a violation of a implied warranties, but the contract contained a disclaimer of all warranties.   
               **HOLDING:**  The disclaimer is invalid because of the gross inequity in bargaining positions occupied by the parties and P was not aware of the warranty.
   4. Strict Liability
      1. **Special Liability of Seller of Product for Physical Harm to User or Consumer:** One who sells any product in a condition unreasonably dangerous to the user or consumer or to his property is subject to liability for the physical harm thereby caused to the ultimate user or consumer, or to his property despite lacking contractual privity and/or taking all possible care to avoid injury if: **(1) [In the Business]** the seller is engaged in the business of selling such a product (not a one-time occurrence) and **(2) [No Substantial Change]** the product is expected and does reach the user or consumer without substantial change to its condition.
         1. ***Greenman v. Yuba Power Products, Inc.:*** P was injured when his Shopsmith combination power tool threw a piece of wood, striking him in the head.   
            **HOLDING:** The fact that the P was injured while using the Shopsmith was sufficient evidence to impose strict liability on the manufacturer of the product.
   5. Texas Deceptive Trade Practices Act (DTPA)
      1. Benefits of DTPA
         1. Broad definition of **consumer**
            1. Don’t have to make arguments about the class of the product, the nature of use, or the type of user.
         2. Basically **No-Fault Liability**
            1. The fact that you need to know fault will make Tort not the most preferable mechanism for litigating. The DTPA eliminates reasonableness standards and will assess liability.
            2. When you know you liability, it will cost you less because you will be able to adjust your actions around the cost.

Insurance

Increase the cost of the product

Enter settlement arrangements in cases of violations

Buyer be ware is not a good rule because individuals: **(1)** cannot absorb the type of risk; **(2)** cannot insure against the risk.

* + - * 1. DTPA was a shift from buyer be ware to sell be ware.
      1. Lowest causation standard **(Producing Cause)**
         1. Lower threshold compared to proximate cause.
      2. Economic damages and damages for mental anguish
         1. No damages for metal suffering. 🡨 this is where Tort has everything together.
      3. Lowest standard for award of punitive damages **(Knowingly)**
         1. This is a very low standard, whereas all of Texas has a very high standard
      4. TDPA allows **fee shifting for** Attorney’s fees
         1. Mandates attorney’s fees for the P that the D will pay.
    1. Construction and Application
       1. **Liberally Construed to Protect Consumer (17.44):** This subchapter shall be liberally construed and applied to promote its underlying purpose, which are to protect consumers against **(1)** false, misleading, and deceptive practices, **(2)** unconscionable action, and **(3)** breaches of warranty and to prove efficient and economical procedures to such protection
          1. **No Judicial Discretion:** Courts are not allowed discretion in interpreting the statute.
          2. **Generally Non-Waivable (17.42):** Waivers of the DTPA are generally construed as against public and unenforceable.

**Exception:** Waiver is *enforceable* only if:

Wavier is in **writing**;

**Consumer** is not in a significant disparate **bargaining position**; **AND**

**Consumer is represented by legal counsel** in seeking or acquiring the goods.

* + 1. Who is a Consumer
       1. **Theory**-**Disparity in Market Experience:** Consumer does not have the knowledge, skill, expertise of the person they are dealing with. This begets a requirement for protection.
       2. **Broad Definition that includes Businesses:** An individual, partnership, corporation, this state or any agency of this state who seeks or acquires by purchase or lease any goods or services (**17.45.4)**.
          1. ***Individual***
          2. ***Partnership, corporation (Business)***

Business must have <$25 million in assets

***Eckman v. Centennial Savings Bank:***   
**HOLDING:** Business must prove that they fall within the statute.

* + - * 1. ***Seek or acquire***

**Seek:** Looking to buy the actual product. This does not mean that you actually have to purchase.

**Acquire:** Take ownership or receive an intended benefit from the purchase of a particular item

***Bobby Wellborn v. Sears Roebuck:*** Mother bought a defective garage door opener. Child attempted to slide under the garage door while playing a game.   
**HOLDING:**  Bobby did not seek anything since the mother made the purchase. However, the mother purchased the bed for the child and, therefore, the intended beneficiaries of a purchased product are within the scope.

***Birchfield v.*** ***Texarkana Memorial Hospital:*** Child was about to be born, but had some problems. Mother asked the hospital if they could handle the special requirements of the delivery. Hospital said that they could, but in fact were unprepared   
**HOLDING:** The child was a consumer because she acquired the services

***Holeman v.*** ***Landmark Chevrolet:*** Chevy ran an add saying that they would not refuse any offer. Five people, who denied having knowledge that they were they but worked together, came to the dealership offering between $20 and $50 for between 3 and 10 cars. They all had a connection with an attorney.  
**HOLDING:** No recovery because the parties did not seek or acquire in good faith.

* + - * 1. ***Purchase or lease***

**Free Goods Not Covered:** Free goods are not covered, but many of the things that you think are free are not actually free. If it is free, then the DTPA cannot appl. You cannot get ripped off

***Exxon v. Dunn:***   
**HOLDING:**

**Actual Purchaser is Irrelevant:** Doesn’t matter who pays

***Kennedy v. Sales:*** Meeting with insurance agency and employees. The employer supposedly bought something for its employees.   
**HOLDING:** No requirement for privity within the DTPA. The actual purchaser is almost irrelevant.

* + - * 1. ***Goods or services***

Goods = all goods.

Services

Legal Services

***Latham v. Castillo:*HOLDING:** Legal services fall within the scope of the DTPA.

Banking Services

***Riverside National Bank v. Lewis:*HOLDING:** Merely lending money is not covered. However, lending money that will be used for something is covered.

* + - * 1. ***Exceptions***

**Professional Services Exception (17.49c):** Nothing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, or similar professional skill.

**Does not apply to:** Essentially, the exception does not apply when you can show a violation of the TDPA.

**Express Misrepresentations:** An express misrepresentation of material fact that cannot be characterized as advice, judgment, or opinion.

***Plastic Surgery:*** Doctor told patient she could pick a pair of breast out of the newspaper and he would perform a surgery that would make her breast look like the photo.   
**HOLDING:** DTPA applies.

A failure to disclosure information in violation of §17.46.b.24

An unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion

Breach of an express warranty that cannot be characterized as advice, judgment, or opinion or

**Personal Injury:** Nothing in this chapter shall apply to a cause of action for bodily injury or death or for the infliction of mental anguish, except these are covered for those transaction

**Large (>$500K) Transactions Exception:** Transaction >$500,000 fall outside of the TDPA unless it is for the purchase of a personal residence.

* + 1. Potential Claims
       1. Laundry List of Claims (17.46b)
          1. Generally no culpable mental state necessary,

***Pennington v. Singleton:*** Guy wanted to sell a boat. He asked a mechanic to fix the engine. The mechanic falsely represented that it was repaired. A buyer purchased the boat and discovered that there was a defect. The seller claimed that he did not know or could have known about the misrepresentation  
**HOLDING:**  Seller was liable regardless of whether the seller meant to deceive the buyer.

**Failure to Disclose:** Duty to disclose those things you know will matter to the buyer is included in the DTPA’s Laundry List.

* + - 1. Unconsionability (Objectively Viewed)
         1. Taking advantage to a gross unfair degree

***Chastain v. Koonce:***

***Latham v. Castillo:*** Attorney misrepresented what was going on. Attorney led the family to believe that the lawyer had filed a lawsuit when he hadn’t.  
**HOLDING:** The lawyer’s action fell within unconsionability because he took unfair advantage of the family. No requirement to prove a lawsuit within a lawsuit under the TDPA.

* + - 1. Breach of Warranty
         1. Any breach of warranty is actionable

***La Sara Grain Company v. First National Bank of Mercedes:***   
**HOLDING:**

* + - * 1. Express Warranty – Import the proper law, but use the DTPA for damages.

UCC

Service

* + - * 1. Implied Warranty – Import the proper law, but use the DTPA for damages.

UCC

Services

***Melody Home v. Barnes:***

* + 1. Damages
       1. Producing cause (Lowest level of causation… looks just like cause-in-fact)
          1. ***Archibald v. Act III Arabians:  
             HOLDING:***
       2. Economic damages 17.50b
       3. If knowingly (knew or should have know), mental anguish damages
    2. Punitive damages
       1. If knowingly, up to three time economic damages 17.50b
          1. ***Tony Gullo Motors v. Chapa:***
       2. If intentionally, up to three times economic damages and damages for mental anguish
    3. Attorney’s Fee
       1. 17.50d – Each consumer who prevails shall be awarded their reasonable cost. However, on a finding that an action under this section was groundless in fact or law or brought in bad faith, or
       2. D may recover attorneys’ fees if suit was [**FILING TRIGGERS**]
          1. Groundless in law or fact; or
          2. Brought in bad faith; or
          3. Brought for the purpose of harassment.
       3. ***Arthur Anderson v. Perry:***
    4. Notice and Settlement
       1. P must send pre-suit notice 60 days before filing the actual suit including a notice of the claims and a notice of the damages.
          1. D gets two shots at offering settlement
       2. This provision is extremely pro-settlement

1. Was the Product Defective? (R3T)
   1. Manufacturing Defect (Strict Liability Standard)
      1. **Departure from Safe Design (One is Bad):** **(1)** one engaged in the business of selling or otherwise distributes **(2)** a product containing a manufacturing defect isstrictly liable for the **(3)** harm to persons or property **(4)** caused by the defect. A manufacturing defect is one where the product departs form its intended design even though all possible care was exercised in the preparation and marketing of the product.
         1. ***Rix v. General Motors Corp.:*** P was injured when the truck he was hit from the behind by a GMC two-ton chassis-cab. The cab was equipped with a water tank, which had been installed by someone other than the manufacturer, and the accident was traced to a brake failure. P argued that the breaking system was defective, and that the manufacturer should have employed a dual braking system.  
            **HOLDING:** The vehicle was altered after it left the assembly line and, therefore, liability could not trace back to the manufacturer.
   2. Design Defect (Negligence Standard)
      1. **Inherently Unsafe Design (All are Bad):** **(1)** One engaged in the business of selling or otherwise distributing **(2)** a product containing a defect in design is liable under a theory of negligence for the **(3)** harm to person or property **(4)** caused by the defect. A defective in design exists when the **(a)** *foreseeable risks of harm* posed by the product **(b)** *could have been reduced or avoided* by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, **and** the **(c)** *omission of the alternative design renders the product not reasonable safe.*
         1. **Risk-Utility Analysis:** A factor-based analysis where the utility of a product is compared with the risk of injury it poses to the public. If Risk-Utility analysis is applied at the **time of trial**, the liability is strict. However, if the Risk-Utility analysis is applied at the **time of marketing**, negligence standard is applied. The factors are:
            1. **Usefulness:** The usefulness and desirability of the product – its utility to the user and the to public as a whole.
            2. **Safety Aspects:**  The safety aspects of the product – the likelihood that it will cause injury, and the probably seriousness of the injury.
            3. **Substitutes:** The availability of a substitute product which would meet the same need and not be as unsafe.
            4. **Ability to Mitigate Risk:** The manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
            5. **Ability to Avoid Risk:** The user’s ability to avoid danger by the exercise of care in the use of the product.
            6. **Awareness of Danger:** The user’s anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
            7. **Spreading Loss:** The feasibility, on he part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

***O’Brien v. Muskin Corp.:*** P was injured when he drove into an above ground pool designed and manufactured by D. The pool was built with a vinyl liner that was extra slippery. There was evidence suggestion that the manufacturer could have used a design that allowed the bottom of the pool to be less slippery.

***Prentis v. Yale Mfg. Co.:*** P was injured when a forklift he was operating experienced a power surge, causing P to fall on the ground. P claimed that the design defect was the failure to install a char for the operator.

* + - 1. **Consumer Expectations Analysis:** The failure of the product to perform safely may be viewed as a violation of the reasonable expectations of the consumer, which could create the inference that the product suffered from a defective design.
      2. **Known/Knowable Danger:** The danger posed by a product must be known or knowable. If a product is state of the art such that nobody knows of a defect, the manufacturer is not held liable for the defect.
  1. Warning Defect (Negligence Standard)
     1. **Inadequate Labeling: (1)** One engaged in the business of selling or otherwise distributing **(2)** a product lacking adequate instructions or warning under a theory of negligence for the **(3)** harm to person or property **(4)** caused by the inadequate instructions or warnings. A product suffer a warning defect when the **(a)** *foreseeable risk of harm* posed by the product **(b)** *could have been reduced or avoided* by the provision of reasonable instructions or warning by the sell or other distributor, or a predecessor in the commercial chain of distribution, **and** **(c)** the *omission of the instructions or warning renders the product not reasonably safe*.
        1. ***Anderson v. Owens-Corning Fiberglas Corp.:*** P worked as an electrician at the Long Beach Naval Shipyard for 35 years. During this work, P was exposed to asbestos while installing and removing D’s products. P suffered lung-related health issues. D provided no warnings.   
           **HOLDING:**  Knowledge of the risk could engage a strict liability standard for a warning defect, but a D can mitigate the impact by showing that the product was state of the art.
        2. **Adequacy of Warning:** **(1)** get attention; **(2)** explain the danger; **(3)** explain how to avoid the danger/use the product safely; and **(4) [optional]** disclaim the danger.
        3. **Post-Sale Duty to Warn (Location of Product Unknown):** A manufacturer has a duty to provide post-sale warning about risks that are discovered or that develop after the sale.
        4. **Post-Sale Duty to Recall (Location of Product Known):** Governed by federal agencies.
        5. **Learned Intermediary Rule:** Warning and instructions are provided to the physician (the learned intermediary) who in turn decides which warning are best to for the patient.
           1. ***Exception:* (a)** when a product is directly marketed to consumers; **(b)** in situations where manufacturer knows there will be no medical provider to provide the learned advice; **(c)** in situations where patient is expected to take an active role in the selection of the product.

1. Defenses
   1. Plaintiff’s Conduct
      1. **Comparative Negligence:** [See Negligence Defense]
         1. ***Daly v. General Motors Corp.:*** P was killed when he was thrown from his car, which allegedly had a defective door latch. The P was not using his seatbelt, did not have the door locked, and was intoxicated at the time.   
            **HOLDING:** P’s negligence is evaluated under a comparative fault basis when determining the extent of D’s liability.
      2. **Unforeseen Misuse:** A manufacturer is not liable for an unforeseeable abnormal use of its product.
         1. ***Ford Motor Co. v. Matthews:*** P was dragged under a tractor and killed when he started the tractor while standing next to it. The tractor was started while in gear, but was equipped with a safety switch designed to prevent this from occurring.  
            **HOLDING:** P’s actions were a foreseeable misuse.
      3. **Assumption of Risk:** [See Negligence Defense] Majority = evaluate under comparative fault; Minority = complete bar to recovery.
   2. Other
      1. **State of the Art Product:** A D can submit evidence showing that the product is state of the art. State of the art products undercuts negligence elements in designing a product.
      2. **Occasional Seller:** A D that only occasionally sells a product is not liable under strict liability for a product defect.
2. D’s Other than Principal Manufacturer & Non-Personal Injury Harms
   1. Other Suppliers of Chattels
      1. **Liability If You Play a Role:** Imposition of liability upon wholesalers and retailers is justified on the ground that their position in the marketing process enables them to exert pressure on the manufacturer to enhance the safety of the product. A wholesaler or retailer who neither created nor assumes the risk is entitled to indemnity.
         1. ***Peterson v. Lou Bachrodt Chevrolet Co.:*** P’s children where injured when they were struck by a used car. The car was in an unreasonably unsafe condition when it left the used car lot.   
            **HOLDING:** Imposition of strict product liability would make the used car dealer an insurer against defect which had come into existence after the chain of distribution was complete.
   2. Services
      1. **Liability Based on Predominant Purpose:** The seller of a service that uses a product is not liable for the underlying product’s defectiveness unless the product served a predominant purpose in the transaction.
         1. ***Hector v. Cedars-Sinai Medical Ctr.:*** Physician installed a defective pacemaker in P. P suffered injuries because of the pacemaker’s defectiveness. The hospital was not in the business of selling pacemakers.  
            **HOLDING:** Hospital is not strictly liable for the manufacturing defect because the patient’s predominant purpose was seeking treatment.

# Vicarious Liability

## Respondent Superior (Imputed Negligence on “Look to the Person Higher Up.”)

### General Rule = Principal Liable for Agents

* + 1. **Vicariously Liable when Control and Benefit are Present:** A party can be held vicariously liable when **(1) [Control]** the hiring party has control over the actions of the hired party and **(2) [Financial Benefit]** the hiring party reaps a financial benefit from the actions of the hired party.

### Employer-Employee Relationship

* + 1. **Vicariously Liable When Within Scope:** an employer is ordinarily liable for the injuries its employees cause others in the course of their work, regardless of whether the injury caused by the employee is negligent. In order for liability to stick the P must prove three things:
       1. **(1) Within Scope of Employment:** the tortious act must have been committed within the scope of the general authority of the employee;
          1. **Personal Acts While At Work Within Scope:** Acts necessary to the comfort, convenience, health, and welfare of the employee while at work, though strictly personal and not acts of service, do not take the employee outside of the scope of employment.
          2. **Violations of Express Company Rules:** An employer may be held liable for an employee’s actions event though it goes against express company rules or provision.
       2. **(2) Incidental To Responsibilities:** the tortious act committed by the employee must have been incidental to the tasks that the employee was authorized to perform; and
       3. **(3) Employer’s Business Objectives:** The employee had to be acting in a furtherance of the employer’s business objective (i.e., the employer stood to have some sort of profit interest by the employee’s action).
          1. **Violations of Express Company Rules:** An employer may be held liable for an employee’s actions event though an employer does not serve to benefit form the action.
    2. **Liability for an Employee’s Intentional Torts:** If the tortuous conduct is reasonable connected to the employer’s activities or expressly authorized by the employer, then the employer may be liable for the employee’s intentional as well as negligent torts.
    3. **Punitive Damages Available:** Punitive damages are available to a P under respondent superior when: **(1) [Employer Authorized]** the principal authorized or ratified the act; **(2) [Employer Recklessness]** the employer was reckless in employing or retaining the agent; **or** **(3) [Employee as Manager]** the employee was employed in a managerial capacity and acted within the employee’s scope of employment.

### Going and Coming Rule

* + 1. **Employment Relationship Suspended:** An employee is outside of the scope of employment when that employee is engaged in his ordinary commute to and from his workplace. In these cases, the employment relationship between the employer and the employee is deemed to be suspended and, therefore, the employer is not liable under respondent superior.
       1. **Foreseeably Endangering Other’s Due to Employer’s Activity Exception:** When it is foreseeable, evaluated based on whether the employee’s actions are (1) startling or (2) unusual, that the employee could harm a third party because of the activities of the employer, the employer is liable for the actions of the employee while engaged in the ordinary commute.
          1. ***Bussard v. Minimed, Inc.:***  Employer hired a company to handle a pest problem. They sprayed the company’s building. An employee felt sick because of the fumes (several others felt sick too). She left early, after confirming that she felt safe to drive with the company. On the way home, she got into an accident.  
             **HOLDING:** An employee feeling ill and getting into an accident on a drive home after exposure to toxic fumes is not unusual or startling.

### Slight Deviation Rule

* + 1. **Liability When Naturally Foreseeable:** An employee continues to act within the employee’s scope of employment when that employee does anything which is reasonably incidental to the employment. The test for whether an activity is reasonably incidental is whether such conduct should have been fairly foreseen from the nature of the employment and duties relating to it. **Personal acts that are not far removed in time, distance, or purpose are deemed to be incidental to the employment.** 
       1. **Frolic:** The deviations results from an employee’s pursuit of the employee’s personal business that serves as a substantial deviation or abandonment of the employment. Therefore, **no liability is imposed.**
       2. **Detour:** A deviation that is sufficiently related to the employment to fall within its scope. Therefore, **liability is imposed.**
       3. **6 Factor Analysis to Determine Frolic vs. Detour:**
          1. **What was the Employee’s Intent?:** The employee’s intent
          2. **What were the Facts of the Event?:** The nature, time, and place of the deviation
          3. **How Long was the Deviation?:** The time consumed in the deviation
          4. **What was the Employee Hired to Do?:** The work for what the employee was hired
          5. **Was This Act Reasonably Expected by the Employee?:**  The incidental acts reasonably expected by the employer.
          6. **How much Autonomy was Granted to the Employee?:**  The freedom allowed to the employee in performing his job responsibilities.
       4. ***O’She v. Welch:*** Manager was driving from a store owned by the employer to the employer’s regional office to deliver tickets to a sporting event. While driving, the manager ran into P. The manager was trying to enter a service station to have a company vehicle serviced.  
          **HOLDING:** If the ticket delivery served a business purpose, then the employer would be vicariously liable for the accident. Otherwise, only the employee is liable.

### Independent Contractors

* + 1. **General Rule = No Liability:** Respondent Superior does not apply to situations where an independent contractor causes harm. **Factors** used to determine whether a person is an employee or an independent contractor are: **(1)** **[Contractor’s Time]** whether the party works on its own time; **(2)** **[Contractor’s Method]** whether the party works in its own way; **(3) [Employer’s Supervisions]** whether the party is directly supervised; **(4)** **[Contractor’s Unusual Expertise]** whether the party has a particular expertise; **(5)** **[Employer’s Right to Control]** whether another party has a right to control the manner in which the work is done.
       1. ***Murrell v. Goertz:***  Newspaper delivery person got in a brawl with a customer. The delivery buy was an independent contractor hired by a distributor. The newspaper hired the distributor.   
          **HOLDING:** there was no direct relational control between the distributor and the newspaper and, therefore, respondent superior did not extend to the newspaper.
    2. **Non-Delegable Duty Exception:** One who carries on an activity which threatens a grave risk of serious bodily harm or death unless the instrumentalities used are carefully maintained, and who employed an independent contractor to maintain such instrumentalities, is subject to the same liability for physical harm caused by the negligence of the contractor in maintain such instrumentalities as though the employer had himself done the work.
       1. **Duties:**
          1. Imposed by a public authority as a condition of granting a franchise
          2. Condemning agent to protect a severed parcel form damage
          3. General contractor to construct a building safely
          4. Exercise due care when an independent contractor is employed to do work that the employer should recognize as necessarily creating a condition involving an unreasonable risk of bodily harm to others
          5. Landowners to maintain their property in a reasonably safe condition
          6. Compliance with safety ordinances
       2. ***Maloney v. Rath:*** Driver collided into P because of a brake failure. The brake failure was the result of a mechanic’s failure to repair the vehicle. D had no reason to know about the mechanic’s failure.   
          **HOLDING:** The failure of the mechanic to repair D’s vehicle in a manner such that the vehicle adhered to statutory regulation is not a defense against liability.
    3. **Apparent Authority Exception:** One who expressly or impliedly represents that another party is his servant or agent may be held vicariously liable for the latter’s negligent actions to the extent of that representation.
    4. **Inherently Dangerous Activity Exception:** When the independent contractor engages in an activity that involves a peculiar risk of harm that calls for more than ordinary precaution, the party hiring the independent contractor may be held liable for the independent contractor’s negligent acts.
    5. **Illegal Activities Exception:** A party who hires an independent contractor to perform illegal acts is vicariously liable for any damage caused by the independent contractor in performance of the illegal act.
    6. **Public Policy:** The independent contractor’s enterprise retains the service/benefit and, therefore, should be liable for damages.

## Joint Enterprise/Joint Venture

### Liability Flows to Other Member if 4 Elements are established:

* + 1. An **express or implied agreement** among the members of the group
    2. A **common purpose** to be carried out by the group
    3. A community of **pecuniary interest** in that purpose (**profit motive** vs. recreational/family)
    4. An **equal right to a voice/control** in the direction of the enterprise
       1. ***Popejoy v. Steinle:***  Family was going to buy a calf from a farmer for their daughter as a pet. The family got into an accident while traveling to the farm. P suffered significant pain because of the accident and went after the family and the cattle farmer.   
          **HOLDING:** The family and the cattle farmer were not engaged in a joint venture because there was not business purpose to the transaction.

## Contributory Liability

### General Rule

* + 1. **Another Mechanism for Asserting Liability to a Non-Negligent Third Party:** Contributory liability asserts liability on a third part for contributing to tortious conduct when two elements are present: **(1) [Actual Knowledge of Tort]** the party had actual knowledge of the tortfeasor’s tortious intent and **(2) [Provision of Means]** the party provided the tortfeasor with the means necessary to accomplish the tort.

# Nuisance (Available to Owners or Possessors of Land)

## Public Nuisance

* 1. **Unreasonable Interference with Common Right (R2T 821B):** A public nuisance is an unreasonable interference with a right common to the general public. The following three factors should used to determine whether a D’s activities constituted a public nuisance.
     1. **Substantial Inference with Public:** Whether the conduct involves a substantial interference with the public health, safety, peace, comfort, or convenience.
     2. **Statutory Prohibition:** Whether the conduct is proscribed by a statute, ordinance, or administrative regulation.
     3. **Duration of Impact:** Whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect and, to the actor’s knowledge, has a substantial detrimental effect upon the public right.
  2. **Difference in Kind Rule:** In order to recover damages in an individual action of public nuisance, one must have suffered harm of a kind different form that suffered by other member of the public exercising the right common to the general public. New application in gang violence and environmental damage.
     1. ***Philadelphia Electric Company v. Hercules, Inc.:*** P purchased land from the predecessor of D. The Department of Environmental Resources discovered that the land was seeping toxic waste into a nearby river and required P to remedy the situation, which cost P $400,000.  **HOLDING:** Must show that it was differently harmed, which it didn’t. P’s land was the cause of the toxin and, therefore, the damages were not the result of its activities.

## Private Nuisance

* 1. **Nontrespassory Interference with Enjoyment of Property (R2T 281D):** A private nuisance is a nontrespassory invasion of another’s interest in the private use and enjoyment of land. *A threat of future injury may be treated as a present menace and interference with enjoyment (stored explosives or a vicious dog, for example).* 
     1. **Caveat Emptor Negates Private Nuisance:** A party that has a duty to inspect the land it is purchasing cannot fall back on private nuisance to shift liability back on the vendor.
        1. ***Philadelphia Electric Company v. Hercules, Inc.:*** P purchased land from the predecessor of D. The Department of Environmental Resources discovered that the land was seeping toxic waste into a nearby river and required P to remedy the situation, which cost P $400,000.  **HOLDING:** Only a temporal issue, not a territorial issue.
     2. **Balancing Utility and Harm [Majority View]:** A D is only liable for a private nuisance when the harm exceeds the societal utility derived from the nuisance-generating activity.
        1. ***Carpenter v. The Double R Cattle Company, Inc. [Majority]:*** P homeowners were near cattle feed lot. The lot expanded. The expansion led to smell, flies, and contamination of water because of the cow’s poo.  
           **HOLDING:** Sparse population makes it more useful to have the feed lot than the harm caused to the Ps.
        2. ***Hypersensitivity:*** It is generally held that the harm must be of a kind that would be suffered by a normal person in the community.
        3. ***Locality:*** A nuisance may be merely a right thing in the wrong place. It is important to evaluate where the nuisance-generating activity is located (i.e., is it properly zoned, etc.)
     3. **Serious Harm & Feasible Payment (R2T 826b) [Minority View]:** Allows a court to find private nuisance when the harm suffered by P is serious and the payment damages is feasible without forcing the business to discontinue, even though the gravity of the harm is outweighed by the utility of the conduct.
        1. ***Carpenter v. The Double R Cattle Company, Inc. [Dissent]:*** P homeowners were near cattle feed lot. The lot expanded. The expansion led to smell, flies, and contamination of water because of the cow’s poo. **HOLDING:** There is no basis or avoiding human interest. So long as it is feasible for the D to pay, they should pay for the harm suffered by Ps.
     4. **Unreasonable or Unlawful Use that Exceeds Mere Annoyance:** A lawful business creates a nuisance when it operates in a way that is **(1)** unlawful or unreasonable so as to **(2a)** produce material injury or great annoyance to other or **(2b)** unreasonably interfere with the lawful use and enjoyment of their property. *The* ***normal and necessary incidents*** *to the operation of a business cannot be condemned as a nuisance*.
        1. ***Winget v. Winn-Dixie Stores, Inc.:*** D built a supermarket with the proper zoning permits. P argued that it was a nuisance because of crowds, garbage collectors, etc.  
           **HOLDING:** (1) crowds and traffic occurred during normal business hours and were not excessive. Therefore, they were a normal and necessary part of the business’ operation. (2) No evidence that garbage collectors acted differently. (3) Evidence that pointing the fans at P’s trees and the lights staying on at night constituted a nuisance.

## Consequences

* 1. **Damages:** [See Damages within Negligence Section]
  2. **Injunction:** A party can request that the court order an injunction to prevent the party that created a nuisance from engaging in the activity that created the nuisance.
     1. **Potential Indemnification Claim Against P by D:** Where the P **(1)** voluntarily came into the nuisance and **(2)** the harm generated exceeded the utility a the underlying activity, P must indemnify D for the *foreseeable detriment* of moving or shitting down the activity that caused the nuisance.
        1. ***Spur Industries, Inc. v. Del E. Webb Development Co.:*** Cattle feedlot was encroached on by P’s development.   
           **HOLDING:** The harm of moving the city exceeded the harm of moving
  3. **Criminal Prosecution (Public Nuisance):** A political figure can get enjoined to litigation relating to public nuisance and levy criminal fines for the violation. However, this is not available in the case for private nuisance.

## Other Torts Involving Invasions of Interest in Real Property

### Interference with the Support of Land

* + 1. **Natural and Necessary Support:** If the withdrawal of support is sufficient to cause a subsidence of the land in tis natural condition, the *liability is strict* and no showing of fault on the part of the D is required.
    2. **Artificial Support:** If the withdrawal of support would not have caused a subsidence of the land in its natural condition but does cause subsidence because of artificial additions, then liability depends on the D’s negligence.

### Interference with the Use of Water (Riparian, Ground Water, and Surface Water)

* + 1. **Natural-Flow Theory:** The right to have the water flow as it would flow in nature, qualified only y the right of each riparian owner to make a limited use of it.
    2. **Reasonable-Use Theory:** The right to be free from unreasonable uses that cause harm to the proprietor’s own reasonable use.
    3. **Prior-Apportionment Rule:** Beneficial use of the water is the basis of the right to it and that priority of use if the basis of the division of it between appropriators when there si not enough for all.

# Defamation

## Nature of a Defamatory Communication (A Dignitary Tort)

### Definitions of Defamation

* + 1. **Statements Causing Ridicule or Shun (Old Rule):** Defamation is a communication to a third person which tends **(1)** to hold the P up to hatred, contempt or ridicule **or** **(2)** to cause him to be shunned or avoided.
    2. **Statements Damaging Victim’s Reputation (Modern Rule):** Defamation is a communication that tends to damage the P’s reputation, more or less in the popular sense. A P’s reputation can be damaged by diminishing the respect, goodwill confidence, or esteem in which he is held, or to excite adverse or unpleasant feelings about him.
       1. ***Belli v. Orlando Daily Newspapers, Inc.:*** D published a false newspaper article about P. P was brought in by the Florida Bar Association to speak. The FBA promised to pay hotel tab. The newspaper article said that P charged lots of clothing bills to the hotel bill. The article depicted by P as taking advantage of SBA.  
          **HOLDING:** A jury might reasonably conclude that the conduct imputed to Belli was incompatible with the standards of an ethical lawyer and as such violated one of the four traditional categories of libel per se.
       2. ***Grant v.*** ***Reader’s Digest Association:*** The party receiving the defamation is considered to be a person of normal standing. Saying something to the mob probably has no reputational damage.

### Pleading Defamation

* + 1. **Unambiguous Meaning of Words = Judge Interprets:** When the meaning that defames the P is clear upon the face of the words uttered, the cause of action is made out be pleading, and proving, the **(1)** words themselves and **(2)** their communication to a third party.
       1. ***Belli v. Orlando Daily Newspapers, Inc.:*** D published a false newspaper article about P. P was brought in by the Florida Bar Association to speak. The FBA promised to pay hotel tab. The newspaper article said that P charged lots of clothing bills to the hotel bill. The article depicted by P as taking advantage of SBA.  
          **HOLDING:** It was unclear whether the article had one meaning that was not defamatory.
    2. **Ambiguous Meaning of Words = Question for Jury:** Where the meaning is not clear, the P must plead the context that renders the words or conduct defamatory. Pleading the context requires the P to plead the following:
       1. **Words:** The defamatory words. (burned down the barn)
       2. **Publication:** Communication of the words to a third person. Malice is required, either through actual malice or malice in law. (spoke to a third party)
          1. **Actual Malice:** A statement made with knowledge that it is false or with reckless disregard of whether it was false or not.
          2. **Malice in Law:** The law implies the malice as is necessary to maintain the cause of action where a party makes a statement that is false and defamatory.
       3. **Inducement:**  Extrinsic facts, because of which the words were reasonably understood to convey a meaning defaming the P. (has an insurance policy)
       4. **Colloquium:** A formal allegation that the words were spoken of and concerning the P. (*the P* burned down its barn)
       5. **Innuendo:** An allegation of the particular defamatory meaning conveyed by the words. (P burned down the barn in order to defraud an insurance policy).
       6. **Special Damages (Optional):** In jurisdictions that requires a showing a special damages, they must also be included in the pleading. See damages section for special damages.

### Publication

* + 1. **Any Communication to Someone Else:** Publication is merely the intentional or negligent communication of the defamatory words to someone other than the person defamed.
       1. ***Economopoulos v. A.G. Pollard Co.:***   
          **HOLDING:**

### Defenses

* + 1. **Substantially True Statement (D’s Burden):** A D is not liable for defamation when the alleged statement is a true and accurate account of event which were observed the author of the article in question. The D does not need to prove complete accuracy. Substantial accuracy with mere variances in the details of the events described in the article are sufficient for supporting a plea of truth.
       1. ***Kilian v. Doubleday & Co., Inc.:*** General during WWII sued publishing company for false statements regarding his actions during the war. Professor asked students to write their stories, and he story is vivid. It talks about lashings and cruel treatment by the general.  
          **HOLDING:**  Author had no evidence to show that he had actually experienced any of the events depicted. This is not close enough to show substantial truth.
    2. **Defaming Groups:** If the group is large enough, the defamation will not stick.
       1. ***Neiman-Marcus v. Lait:*** Group defamation case where D published accusations regarding employees at Neiman-Marcus. Called the models, “the top babes in town.” The sales girls were “good to, and much cheaper.” The salesmen were “gay to boot.” No individual named, but the group was named for prostitution.  
          **HOLDING:** *Models –* Since the group was small, the mud stuck; *Salesmen –* since there were lots of salesman, mud does not stick because there were too many; and *Salesgirls –* question of fact for the jury.
    3. **Publication by Plaintiff:** Ordinarily, the D is not liable for any publication by the P alone, since it is considered that it is the P’s responsibility and not the D’s.
       1. **Consultation Exception:** When it is **(1)** reasonable for the P to consult someone else about a defamatory communication made only to the P **and** **(2)** the D might expect this, the D is liable for the resulting publication of defamatory material.

## Libel and Slander

### Libel (Written Defamation)

* + 1. **Permanent – Written or Printed Embodied on a Physical Form (R2K §568.1):** Libel consists of the **(1)** publication of defamatory matter by written or printed words, or **(2)** by its embodiment in physical form, or **(3)** by any other form of communication which has the potentially harmful qualities characteristic of written or spoken words.
       1. **Factors for Differentiating between Libel and Slander:** **(1)** The area of dissemination, **(2)** the deliberate and premeditated character of its publication, and **(3)** the persistence of the defamation.
       2. **Reading Defamatory Comment from Script = Libel:** the utterance of defamatory remarks, read from a script into a radio microphone and broadcasted, constitutes a publication of libel.

### Slander (Spoken Defamation)

* + 1. **Temporary – Spoken or Gestures of Defamation (R2K §586.2):** Slander consists of the publication of defamatory matter by spoken words, transitory gestures, or by any form of communication other than libel. ***Special (pecuniary) damages must be pleaded in order to maintain the cause of action.*** 
       1. **Factors for Differentiating between Libel and Slander:** **(1)** The area of dissemination, **(2)** the deliberate and premeditated character of its publication, and **(3)** the persistence of the defamation.
       2. **Special Damages are Natural Consequence of Slander:** The special damages must have been the natural, immediate, and legal consequence of the words.
          1. ***Terwilliger v. Wands:*** D claimed that P went to a neighbor’s house in order to have intercourse with the wife. D said that he would do anything to keep the wife’s husband in prison so that he could keep having intercourse with the wife. P said that he was unable to attend the trial because he suffered mental injuries due to the accusation.  
             **HOLDING:** Mental illness is not a natural consequence of slander and no proof of pecuniary damages.
          2. **Slander Per Se Exception:** Four accusations that are deemed to be slander without evidence of the damages.

***Imputation of a Major Crime***

***Loathsome Disease***

***Serious Sexual Misconduct***

***Business, Trade, or Office***

### Categories Blurred

* + 1. **Ad-libbed Utterances on Nationwide Broadcast:** A P can assert a cause of action for libel or slander when the D utters a defamatory comment on a nationwide broadcast because it is reasonable to presume that the damage caused by the medium employed is the same.
       1. ***Shor v. Billingsley:*** Radio broadcaster ad-libbed a defamatory comment about the P. The comment was not descripted, but had the same harmful effect as if it had been written in the script because of the broadcast’s listenership.   
          **HOLDING:**  Need to look at what the law was designed to protect. Since the harm was permanent, it is properly actionable as a libel.
    2. **Repeating Defamatory Content:** The party repeating defamation is also liable for its publication, even though the party states the source and declares that the party does not believe the defamatory content.
    3. **Secondary Publishers:** A secondary publisher is not liable if the publisher did not know or had no reason to know of the libelous matter in the publication.
       1. **Replication of Material Received from Wire Service:** A secondary publisher will not be liable for libelous material it publishes if **(1)** the wire service is reputable; **(2)** D did not know of the falsity; **(3)** the story itself does not reveal its falsity; and **(4)** no substantial change was made to the story.

### Basis of Liability

* + 1. **Defamatory Statements Against Public Officials Regarding Public Issues:** The 1st Amendment grants publishers of defamatory content against a public official a partial privilege. A public official cannot recover damages for defamatory falsehoods relating to his official conduct **unless** he proves that the statement was made with **actual malice**. **Actual malice** is a statement made with knowledge that it is false or with reckless disregard of whether it was false or not.
       - 1. **“Clear and Convincing Evidence:”** D must show clear and convincing evidence of actual malice when the defamation relates to a public figure and addresses a public issue.
         2. **Public Figure – Private Issue:** Most public figures do not have any private issues. Although this is a relative scale (where less leniency is granted to Presidents and more is granted to celebrities), the idea is that the community has an interest in knowing the public figures private dealings because those dealing could impact their capacity to act as a public figure.
         3. **Public Figure:** Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classified as public figures. This includes government officials and celebrities.
       1. ***New York Times v. Sullivan:*** Commissioner of the police department brought suit because of an advertisement printed by the NYT, which contained false material and depicted the actions of the commissioner in a bad light. The article related to the civil rights movement in the 1960’s. **HOLDING:** P failed to show actual malice and, therefore, has no recovery for defamation. Concerns over safeguarding the 1st Amendment take precedent over a public figure’s right to an intact reputation.
    2. **Defamatory Statements Against Private P Regarding Public Issue:** The 1st Amendment only grants protection from punitive damages when a party negligently publishes a defamatory comment against a P what that content relates to a public issue. A court can impose whatever standard of care it deems appropriate so long as the court does not assess liability without fault. Punitive damages are available if P can prove actual malic.
       1. ***Gertz v. Robert Welch, Inc.:*** An attorney in a civil matter representing the family of a person that was killed by a police officer was called a Leninist and a Communist in a magazine by D. D accused P of attempting to promote a nationalized police service by trying to make the police look bad. **HOLDING:** The individual could be held liable, so long as the state did not formulate a strict liability standard (i.e., there is a negligence theory here).
    3. **Defamatory Statements Against Private P Regarding Private Issue:** The 1st Amendment does not grant protection any protection to a party that publishes defamatory material against a P. A court can award punitive damages without a showing of actual malice.
       1. ***Dun & Bradstreet Inc. v. Greenmos Builders, Inc.:*** A credit reporting agency erroneously reported the bankruptcy of a company to its lenders. No actual malice was show, just negligence in preparing the report.   
          **HOLDING:** Actual malice is not necessary and, therefore, the D is liable for the defamatory conduct.

## Privileges

### Absolute Privilege

* + 1. **Judicial Privilege if Reasonably Related:** A judge has absolute immunity for defamatory words published in the course of judicial proceedings. Privileges attaches to parties participating in the judicial proceeding so long as the comment had some reasonable bearing upon or relation to the subject of the inquiry.
    2. **Legislative (Congress-People) Privilege:** Members of Congress and of state legislatures have absolute immunity for defamatory words published in the performance of their legislative functions.
    3. **Federal Public Officers:** All federal officers are granted absolute immunity for defamatory words published while acting as their duties required or inherently permitted.
    4. **State Public Officers:** High state officials have an absolute immunity in the discharge of their official duties.

### Conditional or Qualified Privilege

* + 1. **Past Employer:** Can say honest facts about a prior employee’s performance as long as the bad statements are not made with malicious intent.
    2. **Fair Reporting:** Fair reporting is the privilege to report public proceedings, public records and official acts. The restriction is that the report must be **(1)** accurate and fair **or** **(2)** disinterested. This qualified privilege is effectively limited to the expression of an opinion.
    3. **Privilege to Provide Means of Publication:** When the author of the defamatory utterance is in fact privileged to publish it, those who provide him with the appropriate means of publication are likewise privileged to do so.
    4. **Fair Comment:** Fair comment allows the publisher to offer criticism on matters of public concern including activities of public officials and figures and on subjects scientific, artistic, literary and dramatic. *The criticism must be* ***(1)******comment or opinion,*** *not a misstatement of fact. The criticism must also be* ***(2)*** *fair**in that it is based upon* ***(a)*** *true facts* ***and*** *(b) expresses what an honest-minded person might conclude.*

## Remedies

### Damages

* + 1. **General Damages:** For libel and slander per se, a P is permitted to recover an estimate of the harm to the P’s reputation caused b the defamation, without the need of evidence to support the conclusion.
    2. **Special Damages:** Out-of-pocket losses that must be proven in the case of slander. They include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.
    3. **Punitive Damages:** Punitive damages are available when actual malice is show if the defamation relates to a public issue. There is no bar to punitive damages when the defamation relates to a private issue.
    4. **Mitigation of Damages:** Provocation by the P is generally regarded a admissible for the purpose of mitigating punitive damages.
    5. **Libel-Proof P (Rare):** Ps may possess such an atrocious reputation that they are immune from libel.
    6. **Incremental Harm Doctrine:** When a single publication has multiple pieces of libelous content, but the P only pleads one part, some courts will dismiss the claim on the grounds that the harm done to the P was so incremental that it practically did not exist.
    7. **Bad Reputation:** Evidence of a bad reputation may reduce the damages a P can recover. Generally, the evidence of a bad reputation must relate to the content of the supposed defamation.

### Declaratory Relief

* + 1. **Special Proceeding to Vindicate Reputation:** The purpose of declaratory relief is to obtain a judicial determination that the statement about the P is false, and thus to vindicate the P’s reputation.

### Self Help

* + 1. **Opportunity to Combat Defamation:** The first remedy of any victim of defamation is self-help – using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.
       1. **Conditional Privilege to Respond:** In responding to a defamatory comment under self-help, the P is not liable to the original defamer **unless** P abuses his privilege by making irrelevant charges, or charges of his own in reckless disregard of their truth or falsity.
    2. **Right-of-Response Statutes:** Require a public communication medium to give a right of response to a person who claims that he has been defamed by it.
    3. **Retraction Statutes:** To be effective, a retraction must be unequivocal **and** not partial or hesitant and hypothetical. An evasive or incomplete retraction may be grounds for punitive damages.

### Injunctive Relief

* + 1. **Courts Rarely Bar a Party for Publishing:** The 1st Amendment concern causes courts to rarely grant injunctive relief. However, a P can request injunctive relief when a statement is **(1)** defamatory and false **and** **(2)** the D persist in continuing to publish it.

# Privacy (The Right to be Let Alone)

## Unreasonable Intrusion Upon the Seclusion of Another

### Nature

* + 1. **Intrusion into a Private Place Offending a Reasonable Person:** To prove an intrusion tort, P must show: **(1) [Intrusion]** Intrusion into a private place, conversation, or matter **(2)** **[Highly Offensive]** in a manner highly offensive to a reasonable person. The tort is proven only if the P had an objectively reasonable expectation of seclusion or solitude in the place, conversation, or data source. Seclusion, like privacy, is a relative term.
       - 1. **Seclusion Does not Require Confidentiality:** Confidentiality is sufficient for showing that the conversation was private, but not necessary for a showing of seclusion.
         2. **Public Places Exception:** A D does not intrude into a private place, conversation, or matter, when the P has merely been observed, photographed, or recorded in a public space.
       1. ***Sanders v. American Broadcasting Companies, Inc.:*** Reporter went undercover at a telepsychic company and videotaped interaction she had with an employee of the company. The company did not secure the building from the public and employees could overhear each other’s conversations.  
          **HOLDING:** There is a reasonable expectation for privacy in the workplace, even though the workplace isn’t completely secluded. Even if the intrusion of the person was permitted, the intrusion of the device was not.

### Defenses

* + 1. **1st Amendment Concerns:** A reporter or newspaper can negate the offensive nature of the intrusion, even if it infringed on a reasonable expectation of privacy, if it can show that a legitimate motive of gathering news motivated the invasion.

## Publicity that Places Another in a False Light Before the Public

### Nature

* + 1. **Painting the Individual in False Light:** False light is an invasion of privacy by placing the P in an objectionable false light in the public eye. The tort is designed to protect the P’s emotional and mental wellbeing.
       1. **Elements of False Light: (1) [Publication]** A publication by the D about the P; **(2) [Actual Malice – NYT Test]** made with actual malice; **(3)** **[False Light]** 
          1. ***Cantell v. Forest City Publishing Co.:*** A follow-up publication of a family that lost the their father when a bridge collapsed. The follow-up article falsely depicted the family in a negative light. **HOLDING:** The First Amendment does not preclude a plaintiff from recovering against a media defendant who uses falsehoods in reporting on a matter of public concern.

## Public Disclosure of Embarrassing Private Facts about Another

### Nature

* + 1. **Publication of Matter Outside Public Concern Offending Reasonable Person (R2K 652D):** Private fact tort liability will be imposed for publication of private facts when the matter publicized is of a kind that **(1) [Offensive to Reasonable Person]** would be highly offensive to a reasonable person **and** **(2) [Outside Public Concern]** is not of legitimate concern to the public.
       1. **Elements of Private Facts Tort:** **(1)** publicity; **(2)** private facts; **(3)** offensiveness; **and** **(4)** absence of legitimate public concern.
          1. ***Hall v. Post:*** True facts about a child’s adoption were published in two newspaper articles.   
             **HOLDING:** A “private facts” invasion of privacy tort cannot be justified when it punishes Ds for broadly proclaiming the truth by speech or writing. There is also a 1st amendment concern.

### Defenses

* + 1. **Newsworthiness/Public Interest:** A D is not liable for publication of private facts when there is a public interest in the disclosure of the private facts. Public interest is evaluated on the basis of the customs and conventions of the community. The line is drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, evaluated from the perspective of a reasonable person with decent standards.
       1. ***Hall v. Post:*** True facts about a child’s adoption were published in two newspaper articles.  
          **HOLDING:** Even if the article invaded some right to privacy, it related to a matter that the community had an interest in knowing and, therefore, fell within the 1st amendment.

## Appropriation of Another’s Likeness

### Nature

* + 1. **Appropriation of Likeness to D’s Benefit (R2T 625C):** One who appropriates **(1)** to his own use or benefit **(2)** the name or likeness of **(3)** another is subject to liability to the other for invasion of the P’s privacy.
       1. **Elements of Apportionment:** **(1)** the D used the P’s name or likeness; **(2)** the use of the P’s name or likeness was for the D’s own purpose or benefits, commercially or otherwise; **(3)** the P suffered damages; **and (4)** the D caused he damage incurred.
          1. ***Joe Dickerson & Associates, LLC v. Dittmar:*** Private investigator published an article about an alleged fraud perpetrated. The fraud related to unusual transactions by someone with los of barer bonds. The article was published in a private newspaper and included a photo of the perpetrator.   
             **HOLDING:** The image was appropriated, but he was privileged by the newsworthiness of the publication.
       2. **Right of Publicity:** The right of publicity action protects the commercial value of publicity action protects the commercial value of a P’s personal image. There is an additional requirement that the D used the P’s name or likeness to obtain some advantage.

### Defenses

* + 1. **Newsworthiness:** There is a 1st Amendment privilege that permits the use of a P’s name or likeness when the use is made in the context of, and reasonably relates to, a publication concerning a matter that is newsworthy **or** of legitimate public concern.
       1. **Commercial Speech:** Commercial speech is speech that proposes a commercial transaction. It is the content of the speech, not the motivation of the speaker, which determines whether particular speech is commercial.

# Joint Tortfeasors

## Liability and Joinder of D

### Joint and Several Liability

* + 1. **Each Tortfeasor is Liable for the Whole:** When liability is “joint and several,” each tortfeasror is liable jointly with of the others for the amount of the judgment against them, and that each is also individually liable for the full amount. The P can collect from any one of them or any group of them. Joint and several liability occurs in three situations: **(1) tortfeasors acted in concert**; **(2) D fail to perform a common duty to P**; **(3) Ds who acted independently to cause an inadvisable harm.**
       1. ***Bierczynski v. Rogers:*** Two D were racing down the highway. D1 was driving in the wrong lane and ran into P. D2 claimed that he was not liable for the accident.   
          **HOLDING:**  Participation in a motor vehicle race on a public highway is an act of concurrent negligence imposing liability on each participant for any injury to a non-participant resulting from the race.

## Satisfaction and Release

### Satisfaction

* + 1. **Multiple Recoveries but 1 Satisfaction:** One who has been injured by the joint wrong of several parties may recover his damages against either or all of the parties. However, while there may be several suits and recoveries, the P can only execute on one judgment in order to prevent a P from deriving a windfall.
       1. ***Bundt v. Embro:*** Ps were part of a car accident. They joined the State of NY as a D. Jury awarded a judgment to the Ps. Ps collected on the State’s judgment before the close of their other claims.   
          **HOLDING:** Collecting on the State’s judgment satisfied the Ps for their injury and, therefore, they could not collect on a judgment against other parties.

### Release

* + 1. **Compensation for Surrendering Right to Sue:** A P can enter into an agreement whereby the P relinquishes is right to sue a D for partial satisfaction of the underlying claim.
       1. ***Cox v. Pearl Investment Co.:*** P suffered an injury when she fell on property owned by D. D executed an agreement with P whereby P relinquished D of all claims in exchange for $2,500.   
          **HOLDING:** An agreement not to sue will be enforced if the parties intended it to accomplish that end.
    2. **Mary Carter Agreements are Against Public Policy:** A Mary Carter Agreement is one whereby a Ds liability is diminished at some rate for an award exceeding an agreed amount. They are, generally, unenforceable as a matter of public policy because they **(1)** cause juries to get confused about the parties true allegiance, **(2)** promote litigation, and **(3)** result in non-representative awards.
       1. ***Elbaor v. Smith:*** P suffered serious injuries, including a compound fracture of her left ankle. P had two physicians; one in the emergency room and one as a plastic surgeon. P sued for malpractice, and several of the parties joined in a Mary Carter Agreement. The parties to the agreement effectively backstabbed the party outside of the agreement. The jury awarded $2.2M, allocating most of the fault to the party that was not a part of the agreement.  
          **HOLDING:** Mary Carter Agreements are void as a matter of public policy.

## Contribution and Indemnity (Mutually Exclusive)

### Contribution

* + 1. **Demand for Payment/Reimbursement by D against a Third Party (<100%):** Contribution is when a third party contributes less than they full amount of a judgment or settlement.
    2. **Enforceable Against Parties/Non-Parties to the Litigation:** D can enforce a right of contribution, even when the P failed to join a party to the litigation, unless D committed an intentional tort.
       1. ***Knell v. Feltman:*** Ps were passengers in a car driven by Knell. There was an accident between Knell and a taxicab owned by Feltman. Feltman filed a third-party complaint against Knell for contribution.   
          **HOLDING:** Demand for contribution enforceable because injury resulted from concurrent acts of negligence.

### Indemnity

* + 1. **Full Reimbursement/Shift Entire Cost (100%):** Indemnity allows someone who is without fault, compelled by operation of law to defend himself against the wrongful acts of another, to recover from the wrongdoer the entire amount of his loss, including reasonable attorney’s fees. The would-be indemnitee must not be negligent. Party must be vicariously or derivatively liable.
       1. ***Slocum v. Donahue:*** P filed suit against D negligently killing their son in a car accident. D filed a third-party complaint against Ford alleging that defects in the vehicle’s design led to the accident. Prior to trail, Ford entered into a settlement agreement with P.  
          **HOLDING:**  (1) D was negligent; (2) Ford’s agreement served as contribution as was enforceable.

## Apportionment of Damages

### Concurrent Tortfeasors

* + 1. **Devisable/Indivisible Damages Allocated:** If damages are divisible, the D that caused the injury bears the responsibility of compensating the P. However, the burden of indivisible is born by all D’s involved in a chain reaction that caused the injury.

### Successive Tortfeasors

* + 1. **Related Accident:** Original D liable for all damage when apportionment is impossible.
    2. **Unrelated Accident:** Original D not liable for subsequent damage.
       1. ***Bruckman v. Pena:*** P was injured when D’s truck collided with P’s car. One year later, P was injured in a second car accident and certain injuries P sustained in the first car accident were aggravated.  
          **HOLDING:**  The burden is on the P to establish that the damagers were proximately caused by the negligence of the D.

# Wrongful Death and Survival

## Wrongful Death

### Statutorily-Created Recovery for Tortious Conduct Causing P’s Death if Living Beneficiary

* + 1. ***Moragne v. State Marine Lines, Inc.:*** P brought a wrongful death claim on behalf of her husband, who was killed while working on a vessel in navigable waters. Previous case law had determined that maritime law does not afford a cause of action for wrongful death.  
       **HOLDING:** The old felony-murder rule has no more applicability and, therefore, a maritime claim for wrongful death will survive.
    2. **Beneficiaries:** Limited to legal heirs and descendants. Must have a beneficiary in order to assert.
    3. **Recovery:** (1) loss of support and (2) funeral expenses

## Survival

### Tort Claims Survive Beyond P’s Death

* + 1. ***Murphy v. Martin Oil Co.:*** P’s husband was injured in a fire on the D’s premise. P’s husband survived for nine days, then died from his injuries. P brought suit under both wrongful death and survival statutes.   
       **HOLDING:** Wrongful death and survival causes of action are not mutually exclusive remedies.
    2. **Beneficiaries:** Limited to legal heirs and descendants. Must have a beneficiary in order to assert.
    3. **Recovery:**  personal injury action damages, such as (1) conscious pain and suffering; (2) loss of earnings; and (3) medical expenses and physical disability.