**Introduction—Tort Principles:**

* Morality/corrective justice
* Social utility/policy
* Procedural/process concerns
* Compensation
* Risk distribution

**Intentional Torts:**

**Battery:**

* **Intent Element**
	+ *McAfoos* (tricycle collision; P fails to allege intent)
	+ **Intent to touch/contact; AND**
		- **Actual intent to contact or knowledge of substantial certainty of contact**
		- **Intent to contact plaintiff or intent to cause plaintiff to come into contact with something/someone**
			* *Garrat* (boy pulls out chair; remand to determine if he had knowledge she would fall)
		- **Intent to contact another transfers to plaintiff**
			* *Stoshak* (P struck by two fighting students)
	+ **Intent to harm or offend (Except in single-intent jurisdictions)**
		- *White v Muniz* (hit by Alzherimer’s/dementia patient; no intent to harm/offend)
		- **Actual intent to harm/offend or knowledge of substantial certainty to harm/offend**
		- **“Knowledge” can be found if:**
			* **People typically harmed/offended by conduct**
				+ *Snyder v. Turk* (doctor pushes nurse’s head down)
			* **Defendant knew plaintiff would be harmed/offended**
				+ *Cohen* (no male nurses due to religion; male nurse knew and touched)
				+ *Mullins* (no consent to med student; EMT student had no knowledge)
* **Result Element:**
	+ **Contact: direct contact or cause plaintiff to come into contact with something/someone AND**
	+ **Contact was harmful or offensive; offensive if reasonable people offended or plaintiff reasonably offended**

**Assault:**

* **Intent:**
	+ **Intent to cause imminent harmful or offensive contact, or**
	+ **Imminent apprehension of harmful or offensive contact**
	+ Intent to transfer (assault🡪assault); Intent to transfer combined (assault🡪battery)
* **Result: Reasonable apprehension of a battery (does not require direct contact, because battery does not require direct contact); \*No contact**
* *Cullison* (threatened by father gunman; psychological damage)

**False Imprisonment:**

* **Intent Element: intent to confine**
* **Result Element:**
	+ **Confinement, *and***
	+ **Plaintiff either (1) aware of confinement, *or* (2) harmed by confinement**
* **Confinement:**
	+ **Physical confinement, threats, physical force, assertion of legal authority or duress, AND**
	+ **Reasonable person believes cannot leave**
* *McCann* (held by Walmart on suspicion of shoplifting; false imprisonment)

**Trespass to Land:**

* **Intent:**
	+ **Intentional entry of another’s land, *or***
	+ **Intentionally causing object to enter land, *or***
	+ **Unintentional entry and intentional refusal to leave**
* **Result:**
	+ **Entry on another’s land, *or***
	+ **Caused object to enter another’s land**
* **No harm or damage is required. Trespass is a violation of the right to exclusive possession of land.**
* Nuisance (interference of owner’s use/enjoyment; balance competing interest of owners to determine)

**Conversion of Chattels—Trover:**

* **Intent: Intent to exercise dominion over chattel**
* **Result: Interferes with another’s right to exclusive control**
	+ **\*Must be nontrivial interference**
* Note: UCC says buyer wins

**Trespass to Chattels:**

* **Intent Element: Intent to interfere with another’s use and enjoyment of personal property.**
	+ Actual intent
	+ Knowledge of substantial certainty
* **Result Element:**
	+ **Interference, *and***
	+ **Plaintiff harmed thereby**
		- Harm to materially valuable interest in physical condition, quality, or value
		- P deprived of use for substantial time
* *School of Visual Arts* (porn email bomb; harm to materially valuable interest)

**Civil Rights Violations (28 USC 1983—Civil Rights Act)**

* Can sue under both intentional tort and this action to increase chances of recovery; can only recover once.

**Affirmative Defenses to Intentional Torts:**

* Burden of proof shifts from P to D; resolve with reasonableness and degree.

**Self Defense:**

* **Must establish that…**
	+ **Reasonable person would have perceived imminent threat require defense, *And***
	+ **Response was reasonable and not excessive**
* Deadly force (only when deadly force/serious bodily injury threat against self)
* Defense of others (same as establishing regular self defense)
	+ Minority rule (defense against the wrong person means liability)

**Arrest and Detention:**

* **General Requirements:**
	+ **Reasonable cause for believing crime committed**
	+ **Detained on or near premises**
	+ **Detained for purpose of investigation or delivering plaintiff to law enforcement**
	+ **Detained for reasonable amount of time; *and***
	+ **Actions reasonable**
	+ *(Understood that this privilege applies only for “then and there” cases*)
* Loophole (when P and D act unreasonably, deny P’s claim)
* *Peters v. Menard* (drill theft drowned after chased by security; immunity for chasing off premises)

**Defense/Repossession of Property:**

* **Permissible if:**
	+ **Action reasonably necessary to defend property, and**
	+ **Force used commensurate given threat**
		- **Deadly force not reasonable if no threat to life or limb** (RT85)
* *Katko v. Briney* (shotgun trap in abandoned property)
* *Brown v. Martinez* (accidental shooting of third watermelon thief)

**Discipline Against Children:**

* Parents still enjoy this right if reasonable force used. Concern for others availing selves of right.

**Consent:**

* **The Elements of Consent:**
	+ Procedural differences (different from other affirmative defenses b/c negates intent element; P has burden of proof)
	+ **Consent can be non-verbal** (implied by behavior)
	+ **Effective consent if reasonable person would believe plaintiff consented**
	+ **No consent if not voluntarily given and defendant knows this**
		- **Coercion/duress**
		- **Power imbalance**
			* *Robins v. Harris* (inmate sex with warden)
	+ **Consent ineffective if not meaningful consent and defendant knows this**
		- **Plaintiff incapable of understanding nature of act/consequences/moral significance**
			* Mental capacity, children
		- **Plaintiff misled/mistaken as to true nature of act**
			* *Ashcraft* (family only blood transfusion, HIV blood instead)
			* *Kennedy* (cysts on ovary punctured during appendectomy; consent unnecessary when P can’t give and nobody around to authorize in face of medical emergency)
			* *Doe v. Johnson* (HIV through sexual intercourse)

**Other Privileges:**

* Arrest and searches by officers of the law
* Public right of patronization

**Public Necessity** (RT 196)

* **Action intended to benefit public**
* **Reasonable belief action necessary to avoid imminent public threat**
* **Reasonable response to public threat**
* Similar to **Self Defense:**
	+ Reasonable person would have perceived an imminent threat requiring defense, and
	+ Response was reasonable and not excessive
* Majority Rule (if public necessity, no liability)
	+ *Surroco v. Geary* (blew up P’s house to stop progress of fire)
* Minority Rule (some form of compensation under “taking clause” or other law)
	+ *Wegner* (police chasing felons shot through house, tear gas, etc)

**Private Necessity**

* **Prima Facie Case:**
	+ **Action intended to benefit private individuals**
	+ **Reasonable belief action necessary to avoid imminent threat/address immediate need**
	+ **Benefit to private individuals outweighs property owner’s interests** (balancing test)
		- *Ploof v. Putnam* (during storm boat tied to dock, landowner unmoored it)
* **When there exists a private necessity:**
	+ **Property owner loses right to defend property**
	+ **No liability when no harm (other than loss of right to exclusive possession)**
	+ **Liability for any damages where deliberately trespass knowing damages likely**
		- *Vincent v. Lake Erie* (boat moored to dock during storm; damages owed to dock owner)

**Negligence:**

* **D owed P legal duty**
	+ Dobb’s Prudent Person Standard (care exercised by reasonable and prudent person under same/similar circumstances)
	+ Dangerous Instrumentalities (same standard of care, higher amount of care)
		- *Stewart* (gas into carburetor, exploded; no extraordinary standard of care necessary)
	+ Emergency Doctrine (circumstance that D must act quickly relevant to determine reasonableness)
		- *Bjorndal* (collision due to stranded father; no emergency instruction required)
		- Minority Rule (emergency jury instruction allowed in some jurisdictions)
	+ Physical Disability/Ability (reasonable standard of care for someone in like circumstances—increased/decreased physical ability)
		- *Shepard* (suffered from cataracts and tripped over concrete slab)
	+ Intoxicated Persons (held to same standard as those not intoxicated)
		- Exception (unless drunk then emergency arises not of own making)
	+ Mental Disability (R2T 238) (held to reasonable standard without mental infirmity)
		- *Creasy v. Rusk* (old man with mental infirmity kicks P in knee; excused—special relationship)
	+ Superior Qualities/Extraordinary Intelligence/Expertise (R2T 289) (reasonable standard for person with extraordinary intelligence/expertise; higher amount of care)
		- *Hill v. Sparks* (driving earth moving machinery w/ sister on it, hits bump and runs over sister)
	+ Children (same as reasonable child of same age, intelligence, maturity)
		- Exception (children engaged in adult activity)
			* Adult Activity Test (adult activity when requires adult skills and normally done by adults; incorporates inherently dangerous test)
			* Inherently Dangerous Test (activity carried out only by exercise of special skill and care that involves grave risk of harm)
		- Minority Rule (children of specific age can never be liable)
		- *Robinson* (snowmobile accident; adult activity test)
		- *Hudson-Connor* (golf cart accident; adult activity test; not an adult activity)
	+ Specific Duties—Driving
		- *Marshall* (driving at night; ran into narrowed RR trestle b/c didn’t slow down)
			* Rule (operator of motor vehicle must exercise ordinary care including careful lookout, etc)
		- *Chaffin* (driving at night when blinded by headlights; ran into truck blocking lane; P not guilty of contributory negligence and court rejects *Marshall* rule)
	+ **Negligence Per Se** (alternate method of suit; not always applied; violation of statute = breach)
		- *O’Guin* (brothers killed while playing at landfill not blocked as required by statute; elements must be met to determine negligence per se)
		- **Elements to be Established (*O’Guin*):**
			* **The statute/regulation clearly defines required standard of conduct**
			* **The statute/regulation is intended to prevent type of harm D caused**
			* **P member of class of persons statute/regulation designed to protect**
			* **Violation of statute/regulation is a proximate cause of injury**
			* *Under the negligence per se doctrine, you can always sue under common law*
		- Approaches:
			* Early approach (rigid in application)
				+ *Martin v. Herzog* (driving at night struck P when crossed over center lane; P violated statute because no headlights)
			* Negligence Per Se w/ Excuse (R2T 288) (violating party may offer excuse/justification\_
				+ Excuses: incapacity (not an excuse under R3T), lack of knowledge or need to comply, inability to comply emergency, compliance poses greater risk than violation
				+ *Impson* (driver of truck attempted to pass car within 100 ft of intersection; defendant’s excuse doesn’t fall into any categories and emergency was of D’s own making)
			* Presumption of Negligence (statutory violation creates presumption of negligence where violator can still rebut by showing reasonable person would have acted this way)
			* Evidence of Negligence (violation of statute is evidence of negligence; jury not compelled to find D negligent even in absence of resulting evidence)
	+ **Landowners’ Common Law Duty of Care**
		- **Invitees:**
			* **Who are they: Invited by landowner for economic purpose (business invitee) or premises open to general public**
			* **Standard of care: Duty of ordinary care**
				+ **Entails duty to warn or make safe any known, concealed, dangerous condition**
		- **Trespasser:**
			* **Who are they: Not invited onto property and no legal right to be there**
			* **Standard of care:**
				+ **General duty refrain from willful, wanton or reckless conduct**
				+ **Duty of ordinary care once discover (D had reason to know of) trespasser’s presence in peril**
		- **Licensee:**
			* **Who are they: Everyone else (including social guests); in most jurisdictions, people who are not invited but have a legal right to be there are considered licensees.**
			* **Standard of care: Same as duty of care owed trespasser**
		- Licensees and Trespassers (generally refrain from willful/wanton conduct likely to injure)
			* Exception (landowner discovers trespasser/licensee and that individual is in danger/about to encounter danger
			* Minority exception (ordinary standard of care required if knowledge of frequent trespassers)
			* *Gladon* (railroad tracks after being attacked; train operator pulled control handle and emergency brakes; duty of ordinary care until P discovered)
		- Attractive Nuisance Doctrine (Child Trespassers)
			* The place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
			* The condition is one of which the possessor knows or has reason to know and which realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
			* The children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
			* The utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
			* The possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.
			* *Bennet* (son and mom drown in lake-like swimming pool after son falls in; court applies attractive nuisance doctrine)
		- Open and Obvious Danger Test (Is danger open and obvious?; Is it foreseeable that plaintiff might avoid this open and obvious risk?)
			* *O’Sullivan* (P dived into shallow end of pool; P knew of danger)
	+ Immunities
		- Sovereign immunity (governments; tort immunity mostly waived; still retained in narrow circumstances)
		- Charities (tort immunities mostly waived; retained in some states for certain charitable activities)
		- Parent-Child (most states abolished; retained in some)
	+ Nonfeasance
		- General Rule (D owes no duty to P to take affirmative steps to protect P from harm)
		- Exception (a child or someone of limited capacity)
		- *Yania* (engaged in coal strip mining; P fell into pit and drowned; D has no duty to rescue)
		- **Exceptions:**
			* **Duty of Reasonable Care for P’s safety when—**
				+ **Conduct creates risk**
				+ **Prior conduct harms P**
				+ **Statute/ordinance requires D affirmatively protect P**
				+ **Voluntarily undertook to care for P (*Wakulich*)**

General Rule (voluntarily undertake services liable for bodily harm caused by failure to perform services w/ due care or w/ competence and skill as he possesses)

Minority Rule (an actor who undertakes services, when actor knows that those services will risk harm, has duty to use reasonable care in rendering those services if failure to exercise case would increase risk of harm beyond which would have existed w/o undertaking; or if other reason relies on actor’s using reasonable care

*Wakulich* (drunk girl passed out and dies on couch; female voluntarily undertook care)

Social Host Rule (no liability to others for providing alcohol in the home)

* + - * + **Special/formal relationship**

Carrier-passenger

Innkeeper-guest

Landowner-lawful entrant

Employer-employee

School-student

Landlord-tenant

Custodian-person in custody

* + - * + **“Relationship based on fairness principles” (*Podias)*** (judicial balancing of mix of factors balanced with burden of convenience/involvement)

*Podias* (drunks driver hits motorcyclist who is left to die; court says fairness principles and balancing)

* + - * + **Action as undertaking + reliance (*Florence, Kircher*)**

Public Duty Doctrine (no liability for failure to carry out duty owed to general public)

Exception (if you assume a public duty to assist a special class of persons and have gone forward with performance, obligation to continue performance)

*Florence* (mother stopped walking child to school because of crosswalk guard; child struck and suffered brain damage)

Additional Requirement (direct contact b/t P and government official)

*Kircher* (couple saw woman being kidnapped, alerted police who didn’t act, woman repeatedly raped; no recovery)

* + - * **Duty not to unreasonably interfere w/ others attempts to help**
				+ **Most courts treat this separately**
	+ **Duty to Protect from Third Persons (Exceptions to Nonfeasance)**
		- **Scenario 1: Based on relationship between P and D (*Iseberg, Posecai*)**
			* **Special relationship** (common carier-passenger, innkeeper-guest, business invitor-invitee, voluntary custodian-protectee)
				+ *Iseberg* (P sues D for negligence in failure to warn that business partner wanted to kill him, ends up shot; court says no special relationship)
				+ *Marquay* (3 students brought separate suits for sex abuse/harassment case and claimed administration knew; special relationship)
				+ Landlord-Tenant (no duty unless deteriorated conditions, landlord introduces harm, other nonfeasance conditions met)
			* **Risk arises w/in scope of relationship**
			* **Foreseeable risk**
				+ Specific Harm Rule: no duty unless aware of specific, imminent harm
				+ Prior Similar Incidents Test: evidence of previous crimes on or near premises
				+ Totality of the Circumstances Test: takes add’l factors into account, including nature, condition, location of land and other factual circumstances
				+ Balancing Test (CA): balance foreseeability of harm against burden of imposing duty; look for prior similar incidents of crime on property
				+ *Posecai* (P robbed of $19K in jewels in Walmart parking lot; special relationship, but no foreseeability)
				+ *Brigance* (D served alcohol to minor P, clearly intoxicated and later crashed; duty based on foreseeability)
				+ **Risk must be imminent when special relationship (employer-employee)**
		- **Scenario 2: Based on relationship between D and third party**
			* **Special relationship + ability to control + foreseeable risk to P**
				+ **However, courts typically characterize duty to protect as duty to control third party, not duty to warn P.**
				+ *Dudley* (felon at halfway house breaks into nearby apartment, rapes and kills women)
				+ Family members (generally no duty unless specific imminent danger foreseeable and can control, family introduces harm)
				+ Landlord-Tenant (no duty to warn from tenants unless special knowledge to control tenants)
				+ Employer-Employee (generally employer has duty to control employee if foreseeable)
		- **Remember: \*Duty to protect if affirmative act creates risk (*Brigance*) or falls under one of the other exceptions to no duty rule.**
		- Imminent Danger (if related to special relationship, narrow requirement; if related to third party outside of relationship, broad requirement)
* **D, by behaving negligently, breached that duty.**
	+ **Would reasonable person have foreseen risk of harm?**
		- **If no, not negligent**
		- **Question is not whether technically foreseeable, but how remote**
			* Foreseeability (harm too likely to occur to justify risking it without adding precautions)
				+ *Piper v. Parsell* (passenger in car pulled steering wheel twice causing accident second instance maybe foreseeable)
	+ **Would reasonable person have taken steps to avoid/minimize risk?**
		- **If no, then not negligent**
		- **Value life over property**
			* *Matthew* (garage on fire; life more valuable than property)
		- **Risk Utility Balancing/ Learned Hand Formula**
			* *Stinnet* (fall from roof, no safety equipment; more cost efficient for worker to eliminate risk)
			* *Carol Towing* (negligence in sinking of barge in absence of bargee; reasonable person anticipates other’s negligence when burden is low)
			* Learned Hand Formula (Breach if Burden < Probability of Harm x Magnitude of Harm (B < P x L))
		- Proving and Evaluating Reasonable Conduct (Alternative to Learned Hand)
			* *Santiago* (bus collided at intersection; no other details known)
			* Rule (can’t prevail if can’t prove what defendant actually did)
			* Methods of Proof (direct evidence, circumstantial evidence, eyewitness testimony, expert witness)
		- **Slip and Fall Cases:**
			* **Premises Owner Negligent If:**
				+ **Created dangerous condition, OR**
				+ **Had actual or constructive knowledge of dangerous condition, AND**
				+ **Failed to take reasonable actions to minimize or eliminate risk**
			* *Thoma v. Cracker Barrel* (slipped and fell near area with water droplets on floor; remanded b/c owner had actual and constructive knowledge)
	+ **Community Norms/Customer Expectations**
		- **Internal Policies**
			* *Walmart v. Wright* (slipped in puddle in outdoor garden center; internal store policies can only be evidence of reasonable/prudent person standard)
		- **Statutes/Ordinances/Regulations**
		- **Custom** (evidence of reasonable and prudent person/ foreseeable risk)
			* *Duncan* (wood deck stairway collapsed; expert testimony established industry custom should not be excluded)
			* *TJ Hooper* (failure to have radio on barges is negligent despite industry custom of not having radios)
			* Exception: medicine (sometimes multiple industry customs compete; overruled by science)
	+ **Res Ipsa Loquitur** (accident speaks for itself; exception to *Santiago* Rule)
		- **Probability Rule 1: Facts of accident suggest, more likely than not, negligence caused P’s harm**
			* *Byrne v. Boadle* (flour barrel fell on Scotland road, crushing defendant)
			* *Koch v. Norris* (high voltage line broke and fell)
			* *Cosgrove* (electric company power lines sparked during storm, igniting gas line)
		- **Probability Rule 2: Defendant, more likely than not, tortfeasor**
			* **Majority Rule (Restatement): When 2+ Potential D’s, no Res Ipsa unless:**
				+ **D1 most likely tortfeasor, OR**
				+ **Shared responsibility**
			* **Minority Rule (Collins): apply Res Ipsa when there are multiple defendants**
				+ *Collins* (P transported to old folks home in ambulance; returns w/ broken leg, dehydration; two possible tortfeasors okay for res ipsa pleading)
		- **Factors affecting probability analysis:**
			* **Eliminating potential non-negligent causes**
			* **Eliminating other tortfeasors**
			* **P or D could have presented evidence and did not do so**
				+ *Warren* (car owned by D made clicking sound, rolled over child)
			* **Exclusive control/others’ involvement**
				+ *Giles* (elevator operator injured after malfunction; court loosens “exclusive control” requirement for D)
* **P suffered actual damage** (technical legal damage not enough)
	+ *Right v. Breen* (vehicle in rear end collision, no injuries no damage not covered by insurance via collateral source rule)
* **D’s negligence was an actual cause of damage**
	+ But-For Test (*sine qua non;* compare what really happens with hypothetical scenario)
		- *Hale v. Ostrow* (old woman impeded by bushes and cracked sidewalk; fell into street; but for impediments, would not have fallen)
		- *Salinetro* (woman goes to doc to x-ray, later finds out pregnant and has to abort baby; court rules asking woman if pregnant would not have changed situation)
	+ **Summary—When Two + Tortfeasors** (tortfeasor liable for all damages of which tortious act was a cause; cannot escape liability b/c another act may have also been concurrent cause; negates later in negligence rule)
		- **When divisible injury (Scenario 1)**
			* **Apportion damages based on causality, with each D liable for injuries only it alone caused**
		- **When indivisible injury**
			* **Both D’s liable**
			* **“Indivisible” when:**
				+ **Single injury and each D a but-for cause ( Scenario 2)**
				+ **Single injury and each D a substantial factor (Scenario 5)**

*Anderson* (P’s property burned by fire from east and west; court finds liability based on substantial factor test)

* + - * + **Divisible injury, but don’t know which D caused what injury (Scenario 4)**

*Landers* (pipes of salt water co burst and spill into lake; court says liable for full loss jointly)

* + - * **As between D’s, apportion liability based on comparative fault**
		- When divisible injury caused by D1 leads to indivisible injury caused by D2
			* D1 liable for all of Injury 1 and D1 and D2 jointly liable for injury 2 (Scenario 3)
		- **When unknown which negligent defendant caused harm**
			* **D’s jointly liable; apportion liability based on comparative fault (Scenario 6)**
				+ *Summers v. Tice* (Ds shot towards P to kill a bird, injuring P in eye, not sure which one hit him; both negligent because both participated in negligent activity)
	+ Substantial Factor Test (2 Ds act negligently and either act is sufficient but not necessary cause of harm; D is cause in fact of damage if jury finds act was material/substantial element)
	+ Loss of Change/Increased Risk of Harm
		- *Lord v. Lovett* (doctor misdiagnosed P’s post-accident spinal cord injury, causing her to lose opportunity for substantially better recovery)
		- Tests:
			* Modified But-For (P must have at least 51% chance; 100% liability for full injury recoverable)
			* Relaxed Causation (like substantial factor test; more likely than not that P’s chance for favorable outcome destroyed; 100% liability for full injury recoverable)
			* Lost Chance % (harm is lost chance of better outcome; % liability for whatever % injury lost)
		- Minority Rule (allow recovery based on increased risk of harm going forward, despite lack of actual harm materializing)
			* *Alexander* (radiologist found mass in lung, P suffered advanced cancer and ignored; court says increased risk of harm recoverable)
			* *Dillon* (catheter broke and remained in body and into heart; risk of increased damages requires evidence of increased risk of future harm; damages proportioned to probability that risks of future harm would materialize)
* **D’s negligence was a “proximate cause” of damage**
	+ Direct Cause Test (D is liable as if conduct is direct cause of P’s injury)
	+ **Scope of Risk Test: Proximate cause if w/in scope of risk created by D’s negligence**
		- **\*Not proximate cause if P in position of relative safety**
		- **In general:**
			* **Proximate cause when the harm which occurred was of the same general nature as the foreseeable risk created by the defendant’s negligence (*Medcalf)***
				+ *Medcalf* (failed intercom system leaves P outside building where mugged; D’s failure to maintain system not proximate cause b/c harm not foreseeable)
			* **An actor’s liability is limited to those physical harms that result from the risks that made the actor’s conduct tortious (Restatement 3rd of Torts)**
			* **Liability must be rejected unless a reasonable person would have reasonably foreseen and avoids harm of the same general kind actually suffered by the plaintiff (Note 4)**
			* **The defendant who negligently creates a risk to the plaintiff is subject to liability when the risk or a similar one results in harm, but not when some entirely different risk eventuates in an entirely different harm. (Note 4)**
				+ *Abrams* (no ambulance for pregnant woman, friend’s car crashed at intersection; P in coma and child dies; not foreseeable harm)
		- **Harm not w/in scope of risk if:**
			* **Reasonable person in similar circumstances would not have foreseen harm risk of the same general type;**
			* **Reasonable person would have foreseen harm or risk of same general type, but not to the general class of persons that includes plaintiff; or**
			* **Reasonable person would have foreseen general type of harm or risk, but would not have taken greater precautions to avoid it than defendant took.**
		- **Harm w/in scope of risk if:**
			* **Reasonable person in similar circumstances would have**
				+ **Forseen harm or risk (a) of a same general type and (b) to the general class of persons that includes the plaintiff and**
				+ **Taken greater precautions to avoid it than defendant took**
				+ **\*General rule: Actual harm can be within scope of risk even if exact harm, extent of harm, or exact manner of its occurrence is not foreseeable.**
			* **Reasons of policy/fairness support treating defendant’s negligence as proximate cause, even if harm to plaintiff not foreseeable.**
		- Mechanisms of Harm: Broad/Narrow Approach
			* General Rule (injury is within the scope of risk as long as the general type of harm that happened was foreseeable, even if precise mechanism is not foreseeable)
				+ *Hughes* (boys dropped lantern into unguarded manhole; burned)
			* General Rule (scope of risk can sometimes be defined more narrowly to include a general mechanism of harm as well as a type of harm)
				+ *Doughty* (worker knocked cover into molten liquid splashing P)
		- Thin Skull Rule (If D is negligent, even if extent of harm is not foreseeable and due to P’s preexisting condition or susceptibility of harm, D is still liable)
			* *Hammerstein* (diabetic P w/ foot problem fell down stairs during fire drill and suffered gangrene)
	+ **Alternate Approaches:**
		- **Multifactor Test (*Palsgraf*)** (take all factors into account, including: how much space there is, how much time has paused, intervening causes, how substantial a factor D’s negligence was, natural continuous sequence of events)
			* *Palsgraf* (fireworks explode, scales at other end of platform injure P; no proximate cause)
		- Zone of Danger Test (D’s actions create a risk within a certain vicinity; persons w/in range of apprehension owed duty)
		- **General rule of law deems D’s negligence proximate cause (eg Rescue Doctrine)**
			* Rescue Doctrine (rescuer can recover form D whose negligence prompts rescue)
			* *Wagner* (P is injured after attempting to rescue passenger who fell out of train; D is liable to P also)
		- **Intervening Acts:**
			* **General rule of law deems intervening acts as a superseding cause (traditional suicide rule)** (intervening cause that lies within the scope of risk or has a reasonable connection to it is not a superseding cause; superseding causes break the causal chain)
				+ Suicide (generally, superseding act)
				+ Exception (D’s negligence rendered decedent unable to appreciate self-destructive nature or unable to resist suicidal impulse)

*Delaney* (crack smoking, took D’s loaded gun to shoot him and shot self; up to P to prove that risk she would handle gun was foreseeable)

* + - * **Some courts focus on foreseeability of intervening act (*Watson*)**
				+ Intervening criminal acts (generally greater culpability of criminal act should lead court to place responsibility on criminal rather than actor whose prior negligence caused harm)

*Watson* (railroad spilled gas into street, ignited by match thrown by D; if D threw match intentionally rather than negligently, deliberate criminal act cuts off railroad’s liability)

Exception (when criminal acts foreseeable, does not cut of liability of D who negligently exposes P to risk)

*Hines* (train passed P’s stop, let P off mile down line in dangerous area, where P assaulted; court finds for P)

* + - * + Negligent Intervening Acts (when a third party negligently intervenes between D’s negligence and P’s harm, automatically severs causal chain if not a normal, foreseeable consequence)

*Derdiarian* (construction worker ignited into fire ball, judgment for P)

*Ventricelli* (leased car w/ defective trunk, P forced to stop on side of street and unexpectedly rear-ended, judgment for D)

Exception (when risk created by D’s negligence has not stabilized and intervening cause occurs, D is negligent)

*Marshall v. Nugent* (truck off-road, knocked car off road and blocked road; P went to road to warn drivers and got hit; jury found against truck driver)

* + - * + Exception (medical malpractice does not break causal chain; P is liable for harm caused through malpractice as a result of original negligence)

**Affirmative Defenses to Negligence:**

* Contributory Negligence
	+ Traditional Rule (complete bar)
	+ Comparative Fault (allocated based on fault %)
	+ Modified Comparative Fault (if P’s fault % is above threshold, no recovery)
	+ Factors influencing degree of fault (whether the conduct resulted from inadvertence or involved an awareness of danger; how great a risk the conduct created; the significance of what the actors sought by the conduct; the capabilities of the actors; whether superior or inferior; any extenuating circumstances which might require the actors to proceed in haste without proper forethought)
	+ *Crownover* (police officer drove intersection against red light and activated sirens, lights; 100% fault to police)
* Mitigation of Damages/Avoidable Consequences (plaintiff has obligation to minimize risk to self; if P fails to do so, P is responsible for that portion of original harm)
* **Comparative Fault—Some Wrinkles**
	+ **Circumstances where we don’t consider P’s negligence:**
		- **D has duty to protect P from P’s own negligence (*McNamara*)**
			* *McNamara* (decedent mentally ill and hanged self in state hospital; no comparative fault when duty of care includes preventing self-destructive acts that caused injury)
		- **D has duty to protect P from P’s past negligence** (usually medical; don’t consider plaintiff’s prior negligence with respect to any additional aggregation of injuries that occurred as a result of physician’s negligent treatment)
		- **For policy reasons, P has no duty to protect self (*Leroy,Christensen*)**
			* *Christensen* (allegations of sexual abuse of student; contributory defense not available in accord with established relationship between school and child)
			* *Leroy Fiber* (stacked flax on land set fire by railroad sparks; P should be able to enjoy use of property)
		- **[P as rescuer]**
			* Rescue Doctrine (one who sees a person in imminent danger caused by the negligence of another cannot be charged with contributory negligence unless the rescuer acted negligently)
		- **[D has last clear chance to avoid harm]**
			* Last Clear Chance of Discovered Peril Rule (if D discovered or should have discovered P’s peril and could have reasonably avoided it, P’s earlier negligence would neither bar nor reduce P’s recovery)
		- ***D’s reckless or intentional misconduct*** (contributory negligence no defense to willful, wanton, reckless torts defined as involving interference to or conscious disregard for safety of others)
	+ **Circumstances where P’s negligence is bar to liability**
		- **P committing illegal activity (*Barker*)** (courts should not aid one who engages in substantial violation of law)
			* *Barker* (bomb maker from D’s firecrackers)
		- **[Failure to mitigate damages]**
* **Assumption of Risk—Summary** (P voluntarily encounters risk and agrees to waive P’s rights; bar on P’s recovery)
	+ **Contractual or Express Assumption of Risk:**
		- **Scenario: P consents to waiving D’s liability for consequences of D’s negligence (Boyle)**
			* *Boyle* (cancer patient consents to nontradeitional medicine and dies)
		- **Enforceability of waiver: governed by contract law (Trunkl)**
			* *Trunkl* (negligence of hospital w/ waiver form not really waiver)
			* **Compulsory assumption of risk**
			* **Contract of adhesion**
			* **Mistake/misinterpretation/fraud**
			* **Void for being against public policy**
		- **Consequence: D not liable if waiver enforceable and D’s actions within scope of action**
			* *Moore v. Hartley* (ATV release form valid but not w/in scope of risk)
	+ **Implied Assumption of Risk:**
		- **Primary Assumption of Risk (Avila)**
			* *Avila* (baseball game, beanball, no medical care)
			* **Scenario: P consents to risks deemed inherent in activity**
			* **Consequence: impacts scope of D’s legal duty**
				+ **No duty to minimize or eliminate inherent risks**
				+ **Duty only to not act recklessly or increase risks beyond inherent risk**
		- **Secondary Assumption of Risks (Betts)**
			* *Betts* (housekeeper tripped over toys)
			* **Scenario: P voluntarily encounters risk created by D’s negligence**
			* **Consequences: D still liable, but P’s recovery reduced if P contributorily negligent in voluntarily encountering risk.**
* Statute of Limitations:
	+ Traditional Rule (claim accrues on day that P could have sued for claim, regardless of whether P was aware of negligence)
		- *Crumpton* (surgery injured in hospital bed; claim barred by SoL b/c date accrued on date of injury)
		- *Shearin* (sponge left in abdomen not discovered until later; still barred by SoL b/c claim accrued on date of injury)
	+ Discovery Rule (delays accrual until all elements of tort present and plaintiff discovers or reasonable person discovers injury or D’s role in causing it)
	+ In rare cases, Statute of Limitations is tolled:
		- *McCollum* (50yo P files sexual abuse case against parents; tolled under discovery rule)
		- *Doe v. Maskell* (adult Ps file sexual abuse case against high school chaplain; claims barred, no exception for mental repression)
* Statute of Repose (limits time action may be brought after potential negligence occurs)
* Preemption and Compliance with Statute (compliance is competent evidence, but not conclusive evidence of care)
	+ *Miller* (motel room fire no fire alarm, not against code; jury instructions say code meets standard of care unless other circumstances require more care)

**Vicarious Liability** (single D, no fault apportionment; generally employer pays)

* Employer’s negligence (if employer’s actions/nonactions can determine liability, can sue directly *and* vicariously)
* **Tortfeasor=Employee: Vicarious liability if tortious act w/in scope of employment.** (*respondeat superior*)
	+ **W/in scope of employment if generally doing master’s work (*Riviello, Fruit*)**
		- *Riviello* (stabbed customer’s eye)
		- *Fruit* (drunk driving after convention)
		- Enterprise Liability (safer option is cheaper)
	+ **Applied loosely: doesn’t matter if at that exact moment employee is not doing employer’s work; SOMETHING ELSE**
	+ Employee’s Intentional Torts (foreseeability standard)
		- *Rodebush* (drunk retirement home worker slaps old person)
		- *Fahrendorff* (camp counselor sexually abuses camper)
* **Tortfeasor=Agent: Vicarious liability under multifactor test (*Hampton*)**
	+ **Control is key**
	+ *Hampton* Multifactor Test (selection and engagement of servant, payment of wages, power to discharge, power to control, whether work is part of regular business of employer; other factors—whether contractor runs own business, whether contractor has own tools, look at K itself)
	+ *Hampton* (DHS, little girl dies in foster care; no vicarious liability)
* **Tortfeasor=Non-Agent Independent Contractor:**
	+ **No vicarious liability unless nondelegable duty** (can’t delegate responsibility for inherently dangerous activities being performed within scope of employment due to risk)
		- **Nondelegable duty if (1) inherently dangerous work creating peculiar harm (*Pusey*), (2) duty imposed by statute, (3) landowners/place of business supplier of chattle, or (4) policy reasons**
			* *Pusey* (independent contractor guard shoots trespasser, vicarious liability)

Doctrine of Apparent Agency (either employer or independent contractor creates appearance of apparent authority; ex—taxi)

**Strict Liability**

* **Common Strict Liability Prima Facie Case (R3T):**
	+ **Activity creates foreseeable, highly significant risk of physical harm even if everyone exercises reasonable care (unavoidably risky)**
	+ **Activity is not common/normal**
	+ **Actual Harm**
	+ **Cause in Fact**
	+ **Proximate Cause**
	+ **\*Note: Narrower than Negligence Proximate Cause**
* **Common Law Strict Liability—Defenses (R3T):**
	+ **P or others contribute to activity causing harm**
	+ **Harm avoidable if D or P used reasonable care**
	+ **P’s contributory negligence/assumption of risk**

**Products Liability** (previously, privity requirement; no recovery for pure standalone economic harm to product itself (K warranty issue)

* **Prima Facie Case:**
	+ **P is member of class of individuals foreseeably injured by defective produce**
	+ **Defective Product**
	+ **Actual Harm**
	+ **Cause in Fact**
		- **In *Liriano*, burden of proof shifts to defendant**
	+ **Proximate Cause**
* **Defective Products:**
	+ **Manufacturing Defect**
		- **Product unreasonably dangerous for its intended use (*Lee)*/ departs from intended design (Restatement Products Liability)**
		- **Defective when leaves M’s hands**
		- *Lee v. Coca Cola* (glass bottle explodes spontaneously)
	+ **Design Defect**
		- **Consumer expectation test (*Leichtamer*)**
			* Consumer Expectations Test (whether product was dangerous beyond contemplation of the consumer)
			* *Leichtamer* (off-roading Jeep flips, defective cross-bar design does not protect all kinds of rollovers)
		- **Reasonably alternative design (*Honda*)**
			* **Reasonably Alternative Design (Revised):**
				+ **There exists an alternative design that would prevent or reduce risk of injury P incurred**
				+ **Safer alternative at time of manufacture**

**Technologically feasible**

**Economically feasible**

* + - * + **Safety benefits of alternative design > costs**

**Safety benefits = reduction in risk of injury**

**Costs include direct costs, decreased utility of product**

* + - * *Honda* (2 pt safety belt malfunctioned and P drowned; failed to establish proof that other design existed and cost < safety)
		- **Manifestly unreasonably design**
			* **No design defect if product dangerous by nature**
	+ **Information defect** (warnings do not mitigate design defects)
		- **Foreseeable risks reduced or avoided if provided reasonable warning (*Liriano*).**
		- Reasonable Warning (located somewhere where targeted user is likely to see it in a form to get the user’s attention)
		- Burden of Proof (up to D to bring in evidence tending to rebut strong inference arising from accident that D’s negligence was but-for cause of P’s injury)
		- *Liriano* (P injured self w/ meat grinder b/c cover was off and no warning label affixed; risk not obvious and cost to warn low)
	+ P’s Actions/Contributory Negligence
		- Contributory negligence not a consideration
		- Implied assumption of risk under CF rules; minority rule—complete bar
		- Express assumption of risk complete bar

**Emotional Harm:**

* **“An actor who, by extreme and outrageous conduct intentionally or recklessly causes severe emotional disturbance to another is subject to liability for that emotional disturbance…” R3T §45**
* **Intentional Infliction of Emotional Distress (IIED):**
	+ **Conduct: Extreme and outrageous conduct**
	+ **State of mind: either—**
		- **Intent: intent to cause severe emotional harm**
			* **Actual purpose or knowledge of substantial certainty**
		- **Recklessness: indifference to risk of severe emotional harm**
			* **(Know of risk and fail to take precautions when burden is slight)**
	+ **Result: Severe emotional harm**
* **Intentional Infliction of Emotional Distress (IIED)—When Conduct Directed at Third Person**
	+ **Conduct: extreme and outrageous conduct**
		- **P must be present** (no transfer of intent doctrine)
	+ **State of mind: either—**
		- **Intent: intent to cause severe emotional harm**
			* **Actual purpose of knowledge of substantial certainty**
		- **Recklessness: indifference to risk of severe emotional harm**
	+ **Result: severe emotional harm**
		- **If P not family member of third person, emotional distress must result in bodily harm**
	+ *Homer* (D seduced P’s emotionally vulnerable wife while she was his patient in hospital)
* **Types of NIED Cases:**
	+ **Fright to Self: D’s conduct puts P at risk of imminent physical injury --> P’s emotional distress**
		- **Other approaches in other jurisdictions require:**
			* **Physical impact (*Mitchell*) (modifies proximate cause)**
			* **Physical manifestation (must be physical manifestation that shows P suffered; ex: nightmares, insomnia, vomiting, etc) (modifies actual harm)**
			* **Zone of danger (defendant’s negligence put plaintiff at physical risk; injury/contact not required; had to have feared for own safety) (modifies proximate cause)**
			* **Severe emotional distress (modifies actual harm)**
			* **Combination of the above**
		- **NIED Fright to Self Cases Examples:**
			* **Negligent Act --> Physical Harm --> Emotional Distress**
				+ **Recover under all jurisdictions**
			* **Negligent Act w/ Physical Impact --> Emotional Distress**
				+ **Recover under physical manifestation unclear. Need facts.**
				+ **Recover under zone of danger.**
			* **Negligent Act --> Emotional Distress --> Physical Manifestation**
				+ **Recover under physical manifestation**
				+ **Recover under zone of danger possible. Not enough facts.**
			* **Negligent Act w/o Physical Impact --> Emotional distress (no physical manifestation)**
				+ **Zone of danger (maybe)**
		- *Mitchell* (charging horse and carriage makes no physical impact w/ P but leads to fright and miscarriage)
	+ **Bystander: P witnesses D’s conduct harming another --> P’s emotional distress**
		- **Approaches by Court:**
			* ***Grube*** (employee of railroad/train ran into car and witnessed death of driver after trying to render aid; no recovery)
				+ Test (zone of danger test—physically at risk; fear of suffering physical harm or physical impact)
				+ Minority Rule (fear of safety is enough)
			* ***Dillon*** (mother and sister saw vehicle hit girl while she was crossing street)
				+ Test (duty to protect bystander from emotional distress when foreseeable)

P located near scene

Shock resulted from direct emotional impact upon P

P and victim are closely related

* + - * ***Thing*** (mother heard about son struck by vehicle and saw blood, unconscious child in road; no recovery)
				+ Test: Recovery if and only if—

P and victim closely related

Present and aware that it causes injury to victim

Suffer serious emotional distress; not abnormal response

No duty unless all are met

* + - * **No recovery for bystander**
			* Special Relationship determined by courts
	+ **Direct Victim: direct duty to reasonably protect P from emotional distress**
		- **Arises from pre-existing special relationship between P and D**
		- **D assumes duty**
		- **Imposed on D as a matter of law**
		- *Burgess* (child suffered prolapsed cord and brain damage during delivery; no recovery under *Thing* because not aware; recovery under direct victim)
* In general, D does not owe P duty to protect from emotional distress; Exceptions—bystander, direct victim
* Duty of Care to Protect Emotional Well-Being Independent of Physical Risks:
	+ *Washington* (funeral home delivers decomposing corpse; no recovery because no zone of danger)
	+ *Heiner* (hospital erroneously reports HIV positive; no claim based on nonexistent peril)
* *Camper* (P driving cement truck when D pulled in front of him, witnesses death and mangled body; no longer follow NIED; must be analyzed under regular negligence approach)
	+ Caveats:
		- Serious or severe emotional injury
		- Support from expert medical proof

**Loss of Consortium** (recovery to certain family members for loss of companionship, sexual relations, affections)

* Who can recover (generally—spouse, minor child, adult child (some jurisdictions), parents (some jurisdictions))
* Derivative claims (dependent on extent that P recovered for regular claims; D not liable, no loss of consortium)

**Death** (can bring both survival/wrongful death claim at same time if statute exists)

* Survival Statutes:
	+ Any cause of action P had at moment survives; losses up to moment of death recoverable (including compensatory and sometimes punitive)
	+ Decedent’s estate brings claim
* Wrongful Death Statutes:
	+ Compensates survivors for loos of decedent; can sue even if estate does not
	+ Can be brought by (two approaches) categories of people or heirs at law
	+ Methods of Recovery (loss of support, loss to estate; can also recover funeral costs, other damages including loss of consortium, emotional harm, punitive damages)
	+ *Weigel* (mom died shortly after being admitted to regular room in hospital despite being critically ill; recovery under wrongful death)
* Defenses/Bars:
	+ Decedent’s contributory negligence (except in instances where we don’t take contributory negligence into account)
	+ Survival/heir’s negligence (impacts damage apportionment for claims; might reduce/bar recovery in wrongful death claims)
	+ Statute of Limitations (for wrongful death/survival claim and sometimes underlying claim)

**Damages**:

* Nominal
* Compensatory (must be proven)
	+ Medical expenses; Pain and suffering
* Earning capacity/lost wages
* Medical monitoring damages
* Property damages (FMV)
* Adjustments:
	+ Interest for past expenses/losses
	+ Present value of future expenses/losses
* Punitive Damages (awarded when D has acted with malice and tremendous indifference to risks that conduct creates for other people)
	+ Tort for profit
	+ Tort for pleasure
	+ Calculation (ratio—compare harm suffered and punitive damages, degree of reprehensibility, D’s wealth)
	+ *Owens-Corning Fiberglass* (P developed mesothelioma due to asbestos intentionally placed in D’s product)
* Caps on damages (noneconomic, punitive, medical malpractice, Texas)
* Other rules (periodic payment, collateral source rule (windfall, subrogation), mitigation of damages/avoidable consequences)