**Introduction: Tort Principles (Aims, Approaches, Processes)**

1. Introduction:
   1. Tort Law: look at how we resolve a dispute as a result of injury, damage, loss of physical property, economic harm, emotional harm, etc.
      1. Legal issue: Does defendant’s action make him/her liable to the plaintiff?
   2. Common Themes:
      1. Morality/Corrective Justice:
         1. Holds defendant liable for harms wrongfully caused to others.
         2. Does not hold those who do not cause harms wrongfully liable to others.
      2. Social Utility/Policy:
         1. Adopt rules that promote the good of society.
         2. Based on economic welfare.
         3. Deterrence
         4. Sometimes compliments the criminal law system.
      3. Process or Procedural Considerations:
         1. Tort rules should be fairly administered.
         2. Fraud or false claims.
   3. Other Goals:
      1. Compensation: balances the terms between plaintiff and defendant.
      2. Risk Distribution
      3. Other systems: system of insurance, worker’s compensation, government compensation
   4. Types of Damages:
      1. Compensatory Damages: compensate plaintiffs for actual losses they incur.
         1. Economic: wages/earning capacity
         2. Property: cost of repairing/replacing damaged item
         3. Medical
         4. Emotional: Pain and suffering
      2. Punitive Damages: not compensating plaintiff for specific loss, but punishing the defendant
      3. Damages are calculated by the jury, but the judge can set aside or lower/raise damages if it shocks the conscience.

**Intentional Torts**

Establishing a Claim for Intentional Tort to Person or Property

1. What does it mean to be *at fault* under tort law?
   1. There has to be a moral wrong; we focus on the fact that the actual act is imprudent.
2. What is a Prima Facie Case?
   1. In torts, there are particular facts that plaintiff must show/prove in order to succeed in suit against defendant.
   2. Note: defendant can still escape with a defense.
3. **Battery Prima Facie Case:**
   1. **Intent Element (Except in Single-Intent Jurisdictions)**
      1. **Intent to touch/contact; AND**
         1. **Actual intent to contact or knowledge of substantial certainty of contact**
         2. **Intent to contact plaintiff or intent to cause plaintiff to come into contact with something/someone**
         3. **Intent to contact another transfers to plaintiff**
      2. **Intent to harm or offend**
         1. **Actual intent to harm/offend or knowledge of substantial certainty to harm/offend**
         2. **“Knowledge” can be found if:**
            1. **People typically harmed/offended by conduct**
            2. **Defendant knew plaintiff would be harmed/offended**
   2. **Result Element:**
      1. **Contact: direct contact or cause plaintiff to come into contact with something/someone. AND**
      2. **Contact was harmful or offensive: offensive if reasonable people offended or plaintiff reasonably offended.**
   3. **Intent Element (Except in Single-Intent Jurisdictions)**
      1. General rule: If no fault apparent, no liability.
         1. Exceptions: engagement of inherently risky activity.
         2. Signals shift away from strict liability: liable for actions without requirement of fault.
            1. Reasons for shift:

Does not take into account happenstance

Reduces amount of tort cases in court

* + - * 1. Arguments for strict liability:

Compensation for innocent victims

Unjust enrichment: if you receive benefits of activity, you should assume risk.

* + - 1. *McAfoos*: 3yo Mark McAfoos riding tricycle on public sidewalk. Runs into defendant, striking leg and causing injury. Plaintiff fails to plead intent.
    1. **Intent to touch/contact; AND**
       1. **Actual intent to contact or knowledge of substantial certainty of contact**
       2. **Intent to contact plaintiff or intent to cause plaintiff to come into contact with something/someone**
          1. *Garrat:* Dailey deliberately pulls out chair from under plaintiff when she starts to sit down. Plaintiff sustains injuries. Appeals court remands case.

Establishing intent: knowledge of substantial certainty of contact satisfied intent element; probability, not magnitude (99.9%).

Establishing contact: causing plaintiff to come into contact with someone/something else satisfied result element.

* + - 1. **Intent to contact another transfers to plaintiff**
         1. *Stoshak:* Plaintiff struck in back of head by two fighting students. Court rules Stoshak is entitled to benefits under assault pay provision.

Transfer of intent: If you intend to hit someone and you strike someone else = transfer of intent.

If you throw a rock to hit a bottle and you hit a person, you will not be liable for battery; maybe negligence.

* + 1. **Intent to harm or offend**
       1. Not Required For Single-Intent Jurisdictions:
          1. *White v. Muniz:* Muniz sues for assault and battery after being hit by Everly, who suffers from Alzheimers/Dementia. Muniz objects to jury instruction, which indicates that Everly must “appreciate the offensiveness of her conduct.” Dual-intent standard makes this okay. (R2T §13)

Battery: Prima Facie Case for Single Intent Jurisdictions:

Intent:

Intent to touch/contact *~~and~~*

~~Intent to harm or offend~~

* + - 1. **Actual intent to harm/offend or knowledge of substantial certainty to harm/offend**
      2. **“Knowledge” can be found if:**
         1. **People typically harmed/offended by conduct**

We recognize and uphold the idea of personal dignity.

*Snyder v. Turk:* Dr. Turk becomes frustrated with scrub nurse; grabs and pushes her face down towards surgical opening. Dr. Turk found liable for battery.

Intent to harm or offend.

* + - * 1. **Defendant knew plaintiff would be harmed/offended**

Standard for establishing intent: the plaintiff’s reasonable sense of dignity is offended.

*Cohen v. Smith:* Cohen requests that, due to religion, she not be seen or touched while unclothed by a male. Smith, male nurse, touches her while unconscious. Smith found liable for battery.

Court says defendant had enough information to know that regular care of duty would offend.

If defendant has no knowledge that plaintiff would be offended, intent cannot be established.

Ex: *Mullins:* Mullins did not give consent to presence of healthcare learners during surgery. EMT student VanHoey intubates with permission from anesthesiologist. VanHoey acquitted.

* 1. **Result Element:**
     1. **Contact: direct contact or cause plaintiff to come into contact with something/someone; AND**
     2. **Contact was harmful or offensive: offensive if reasonable people offended or plaintiff reasonably offended.**

1. **Establishing Intent to Contact:**
   1. **Intentional touching/contact if:**
      1. **Actual intent to contact, *or***
      2. **Knowledge substantial certainty of contact (*Garrat v. Dailey*)**
2. **Establishing Intent to Offend:**
   1. **If defendant’s purpose = offend plaintiff**
   2. **If people generally offended by defendant’s action:**
      1. **Intent presumed (*Snyder v. Turk)***
   3. **If people generally *not* offended by defendant’s action, but plaintiff offended**
      1. **Intent established if defendant knew plaintiff would be offended (*Cohen v. Smith*)**
      2. **Intent not established if defendant did not know plaintiff would be offended (*Mullins v. Parkview*)**
3. **Establishing Contact (Result Element):**
   1. **Direct contact between plaintiff and defendant; *or***
   2. **Causes plaintiff to come into contact with something/someone else (*Garrat v. Dailey*)**
4. **Assault:** 
   1. **Prima Facie Case:** 
      1. **Intent:** 
         1. **Intent to cause imminent harmful or offensive contact, *or***
         2. **Imminent apprehension of harmful or offensive contact.**
      2. **Result: Reasonable apprehension of a battery (does not require direct contact, because battery does not require direct contact); \*No contact**
   2. Intent to Transfer/Combined:
      1. In assault, we can transfer intent (like battery).
      2. Combined: intent to commit battery can still transfer to intent to assault, and vice versa.
   3. *Cullison:* Medley threatens Cullison by gesturing with his gun. Inflicts emotional harm. Court remands for jury to decide whether apprehension of being shot/injured was reasonable.
      1. *ARB v. Elkin:* Male and female brought action for battery against abusive father. Trial judge rejects claim on failure to produce invoices. Reversed and Remanded.
         1. Compensation for emotional pain and suffering are recoverable and they must be reasonable and fair (no set of standards or fixed measure to calculate them).
5. **False Imprisonment:**
   1. **Prima Facie Case:**
      1. **Intent Element: intent to confine**
      2. **Result Element:** 
         1. **Confinement, *and***
         2. **Plaintiff either (1) aware of confinement, *or* (2) harmed by confinement**
   2. **Confinement:** 
      1. **Physical confinement, threats, physical force, assertion of legal authority or duress, AND**
      2. **Reasonable person believes cannot leave.**
   3. *McCann*: McCanns held by Wal-Mart employees on suspicion of prior theft under belief that law enforcement on their way. Court finds this is false imprisonment.
      1. Standard is objective: could reasonable people think they were being imprisoned, *not* could plaintiffs think they were being imprisoned.
      2. If there is awareness of reasonable means of escape, this is not imprisonment.
6. **Torts to Property**
   1. **Trespass to Land:**
      1. **Prima Facie Case:**
         1. **Intent:**
            1. **Intentional entry of another’s land, *or***
            2. **Intentionally causing object to enter land, *or***
            3. **Unintentional entry and intentional refusal to leave**
         2. **Result:**
            1. **Entry on another’s land, *or***
            2. **Caused object to enter another’s land**
         3. **No harm or damage is required. Trespass is a violation of the right to exclusive possession of land.**
      2. Trespass v. Nuisance:
         1. Nuisance: interference of owner’s use and enjoyment of land.
         2. No prima facie case; balance competing interests of party to determine.
         3. Only comes into play when there’s substantial or unreasonable interference
   2. **Conversion of Chattels--Trover:**
      1. **Prima Facie Case:**
         1. **Intent: Intent to exercise dominion over chattel**
         2. **Result: Interferes with another’s right to exclusive control.**
            1. **\*Must be nontrivial interference**
         3. **\***Note: Uniform Commercial Code is adopted in almost every state. UCC says buyer wins in trover; tort law says original owner wins. Remember that state law/statute trumps common law.
   3. **Trespass to Chattels:**
      1. **Prima Facie Case:**
         1. **Intent Element: Intent to interfere with another’s use and enjoyment of personal property.**
         2. **Result Element:**
            1. **Interference, *and***
            2. **Plaintiff harmed thereby**
      2. Two ways to meet intent:
         1. Actual intent
         2. Knowledge of substantial certainty
      3. Result element:
         1. Harm to materially valuable interest in physical condition, quality, or value, or
         2. Plaintiff deprived use of property for substantial time
      4. *School of Visual Arts v. Kuprewicz:* Defendant causes porn email to be sent to plaintiff, causing other adverse effects. Court rules complaint states valid action for trespass to chattels.
         1. Plaintiff in this case argues harm to materially valuable interest.
7. Forcible Harms as Civil Rights Violations:
   1. Civil Rights Act §1983: prohibits person from using state authority to deprive person from enjoying constitutional rights.
      1. Defendant can bring a cause of action for both; but can only recover damages for one.
      2. Tort claim would be governed by state law; §1984 claim set by standards in Civil Rights Act.
      3. Why bring both suits?
         1. Different damages
         2. Might lose one and prevail in the other.
   2. Conflict of law in claim: federal law > statute > common law

**Affirmative Defenses:**

1. Affirmative Defenses:
   1. Burden of proof in affirmative defenses, shifts from the plaintiff to the defendant.
   2. Include:
      1. Self Defense
      2. Arrest and Detention
      3. Defense of Property
      4. Privilege to Discipline
      5. Arrest and Searches
      6. Privileges to Enter Land/Premises Pursuant to Connection w/ Public Rights
      7. Necessity
2. Observing Privileges:
   1. Most common law privileges have the effect of resolving issues in the case into matters of reasonableness and degree.
3. **Self-Defense**
   1. **Must establish that…**
      1. **Reasonable person would have perceived an imminent threat require defense, *and***
      2. **Response was reasonable and not excessive.**
   2. Deadly Force: If you use deadly force to defend yourself, then deadly force or serious bodily injury must be employed against you. This is a jury question.
   3. Defense of Others: Same rules as self-defense
      1. Minority rule: a few courts say that if you are mistaken about who is acting in self-defense in a situation, and you defend the wrong person, you can be held liable to the plaintiff also.
4. **Arrest and Detention**
   1. **General Requirements:**
      1. **Reasonable cause for believing crime committed**
      2. **Detained on or near premises**
      3. **Detained for purpose of investigation or delivering plaintiff to law enforcement**
      4. **Detained for reasonable amount of time; *and***
      5. **Actions reasonable**
      6. *(Understood that this privilege applies only for then and there cases).*
   2. Loophole: When both P and D act unreasonably, court will deny P’s claim because they don’t think P should be allowed to profit from unreasonableness.
   3. *Peters v. Menard:* Peters steals drill set from store, and security guards pursue him into a flooded river. Defense claims arrest and detention privileges. Summary judgment for defendant (merchant).
      1. State statute gave immunity for detention that occurred off the premises.
5. **Defense and Repossession of Property**
   1. **Permissible if:**
      1. **Action reasonably necessary to defend property, and**
      2. **Force used commensurate given threat**
         1. **Deadly force not reasonable if no threat to life or limb**
   2. RT §85: No privilege to use force intended or likely to cause death or serious harm 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.
      1. State of Texas has a different standard; if someone breaks into your home and you’re there, you can shoot them.
   3. *Katko v. Briney:* Briney and husband set up shotgun trap on property to defend against trespassers. Trespasser is shot in leg and sues homeowners. Judgment for Plaintiff.
   4. *Brown v. Martinez:* Defendant shot in opposite direction of two boys running away and hit plaintiff in leg. Trial court dismissed plaintiff’s claim; Appeals court reversed and remanded.
6. Discipline:
   1. Parents still enjoy a privilege of discipline, and can use force and confinement to do so.
   2. When teacher/parent crosses line of reasonable force against child considered excessive force, liable.
7. The Special Case of Consent:
   1. **The Elements of Consent:**
      1. **Consent can be non-verbal**
      2. **Effective consent if reasonable person would believe plaintiff consented**
      3. **No consent if not voluntarily given and defendant knows this**
         1. **Coercion/duress**
         2. **Power imbalance**
      4. **Consent ineffective if not meaningful consent and defendant knows this**
         1. **Plaintiff incapable of understanding nature of act/consequences/moral significance**
         2. **Plaintiff misled/mistaken as to true nature of act**
   2. What is Consent:
      1. Consent is different from the other defenses in that technically, it is not an affirmative defense.
         1. Generally, affirmative defenses arise after prima facie case for intentional tort has been established.
         2. Consent, however, negates the intent element of intentional torts.
      2. Shifts Burden of Proof:
         1. Plaintiff has burden of showing there is no consent.
         2. Defendant has burden of showing there is an affirmative defense.
   3. Consent can be implied by behavior
      1. Test: Did defendant reasonable believe consent was granted?
   4. Consent must be freely given.
      1. Relationships of power, with no reasonable way to say no, is not consent.
      2. Verbal consent under duress is not given freely.
      3. *Robins v. Harris*: Robins was a female inmate who was taken into another room to perform sexual acts on defendant Michael Soules. Court ruled that consent to sexual contact was no defense.
         1. Given Robin’s lack of autonomy as an inmate, it would be incongruous to withhold the defense of consent in the criminal context but allow Soules the defense in a civil claim.
   5. Mental capacity is important.
      1. Children and those without the mental capacity to understand meaningful consent do not give consent.
   6. Plaintiff only consents if they fully understand nature of the act. If they are being misled about circumstances, can’t consent.
      1. *Ashcraft:* Plaintiff consented on condition that blood would only be from family-donated blood. Hospital gave transfusions from general supply, which was infected with HIV. Plaintiff tested positive for AIDS. Patient states a valid claim for battery, because transfusions exceeded scope of consent.
         1. If patient specifically objects to procedure, then it is battery.
         2. It is more difficult to draw the line elsewhere.
      2. *Kennedy:* During appendectomy, doctor finds enlarged cysts on ovary and punctures them. Plaintiff developed phlebitis in her leg and sues doctor on basis that phlebitis was proximately caused by unauthorized extension of appendectomy. Judge entered nonsuit for defendant.
         1. “In major internal operations, both the patient and the surgeon know that the exact condition of the patient cannot be finally and definitely diagnosed until after the patient is completely anesthetized and the incision has been made. In such case the consent—in the absence of proof to the contrary—will be construed as general in nature and the surgeon may extend the operation to remedy any abnormal or diseased condition in the area of the original incision.”
         2. “The rule applies when the patient is at the time incapable of giving consent, and no one with authority to consent for him is immediately available.”
      3. *Doe v. Johnson:* Plaintiff Jane Doe alleged that Earvin Johnson transmitted HIV to her through consensual sexual contact. Alleges that Johnson knew or should have known that he had high risk of being infected with HIV. Motion to dismiss battery claim denied.
         1. One who knows he has a venereal disease and knows that his sexual partner does not know of his infection, commits a battery by having sexual intercourse.
8. Privileges Not Based on Plaintiff’s Conduct:
   1. Arrests and Searches:
      1. Officers are privileged to enter land and execute a search or arrest warrant
      2. News media have no privilege to enter to cover news in absence of landowner’s consent
   2. Public Rights:
      1. User of public utility or common carrier has the “privilege” to enter appropriate portions of the premises; in other words, the utility cannot deny the right of the public generally to patronize it.
9. **Public Necessity:** 
   1. **Action intended to benefit public**
   2. **Reasonable belief action necessary to avoid imminent public threat**
   3. **Reasonable response to public threat**
   4. Similar to **Self-Defense:**
      1. Reasonable person would have perceived an imminent threat requiring defense, and
      2. Response was reasonable and not excessive
   5. RT §196: One is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster.
   6. Common Law Rule:
      1. If there is public necessity (public is beneficiary of defense’s actions) for action, no liability.
      2. Privilege to public necessity cancels out any right to property.
      3. The final reading of this rule depends on the jurisdiction.
      4. *Surocco v. Geary:* Action to recover damages for blowing up and destroying plaintiff’s house in order to stop the progress of a fire. Court holds that defendant not liable, because blowing up the house was a necessity. Plaintiffs cannot recover for value of goods.
         1. Anyone can assert this defense (public and private individuals)
   7. Most courts will not award compensable damages, or any damages, if public necessity defense.
      1. *Wegner*: Police, pursuing two suspected felons, cause extensive damage to private house. Homeowners sue city to recover damages. City argues public defense in light of trespass. Trial court says damages are not recoverable.
         1. Case was brought under state's "taking clause." Compensation was awarded under this clause, not under the common law.
         2. However, in some states, even if the defendant can meet the elements of public necessity defense, will have to pay damages to plaintiff.
10. **Private Necessity:**
    1. **Prima Facie Case:**
       1. **Action intended to benefit private individuals**
       2. **Reasonable belief action necessary to avoid imminent threat/address immediate need**
       3. **Benefit to private individuals outweighs property owner’s interests**
    2. **When there exists a private necessity:**
       1. **Property owner loses right to defend property**
       2. **No liability when no harm (other than loss of right to exclusive possession)**
       3. **Liability for any damages where deliberately trespass knowing damages likely**
    3. You do not have to have an emergency situation to assert private necessity defense, only a need with no viable alternatives.
    4. Use balancing test. "Benefit to property outweighs property owner's interests.."
       1. *Ploof v. Putnam:* Plaintiff, during storm, ties up his boat on defendant’s private dock. Defendant unmoors boat. Boat and family sustain damage and multiple injuries. Court rules that necessity will justify entries upon land that would otherwise have been trespass.
          1. Plaintiff's private necessity cancels out right defendant has to protect against trespassers.
             1. Defendant is liable to plaintiff for damage as a result of not allowing boat to dock.
             2. Plaintiff is not liable to defendant for trespass
    5. General Rule: Even if you have private necessity defense, liable if had knowledge of damage and chose to trespass anyway.
       1. Why impose liability on a defendant who has an affirmative defense?
          1. Unjust enrichment: it's unfair for the plaintiff to bear the full cost when it was the defendant who benefitted from the actions.
          2. Negative externalities of economics: if actor doesn't have to internalize cost to other people, they only analyze cost-benefit analysis to themselves, so they might engage in actions that are less beneficial in total; ensures that people engage in efficient activity: only choose to act if the benefits of their actions outweigh the costs.
       2. Why is there a difference in liability between public necessity and private necessity?
          1. Allowing governments to decide whether to compensate victims because of competing attentions of budgets.
          2. Between private individuals, it's easier to compel private individuals to pay
    6. *Vincent v. Lake Erie:* Violent storm develops. Force of storm constantly lifts boat and throws against dock, resulting in damage. Plaintiff sues defendant for damages to dock by defendant's boat moored there during storm. Jury awards $500 in damages.
       1. Prima facie case of trespass to property assumed in this case.
          1. Hard to prove trespass, because they were invited to dock based on business dealings. They weren't told to leave.
          2. Could argue that damage to dock exceeded scope of invitation.
       2. Normally, when a defendant has an affirmative defense, they're not liable for any damage.
          1. Facts are different from *Ploof v. Putnam*. However, dicta in *Ploof* says that if damage to dock had happened, then plaintiff would have been liable to defendant.

**Negligence:**

1. **Negligence Prima Facie Case:**
   1. **D owed P legal duty**
   2. **D, by behaving negligently, breached that duty.**
   3. **P suffered actual damage.**
   4. **D's negligence was an actual cause of damage.**
   5. **D's negligence was a "proximate cause" of damage.**

**Duty**

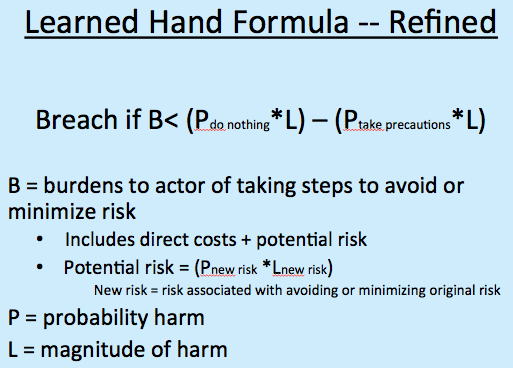
1. **D owed P a legal duty**
   1. *Dobbs:* The duty owed by all people generally--the standard of care they owe--is to exercise the care that would be exercised by a reasonable and prudent person under the same or similar circumstances to avoid or minimize risks of harms to others. The reasonable person exercises care only about the kinds of harm that are foreseeable to reasonable people and risks that are sufficiently great to require precaution.
      1. In the past: plaintiff only owed legal duty to defendant if there was some sort of relationship between plaintiff and defendant.
      2. Over time: D owed P a duty when a personal interest was entitled to protection against invasion against D.
   2. General Rule: Now, duty is owed to everyone.
2. The General Duty of Care: The Prudent Person Standard
   1. Standard of care: exercise care that would be exercised by a reasonable and prudent person under the same or similar circumstances to avoid or minimize risks of harm to others.
3. Determining Duty:
   1. Tort duties do not exist in nature; they are *made up* by judges because they conclude that a duty *ought* to exist.
   2. Major factors that judges consider in deciding whether to impose a duty in a given case:
      1. Judge’s sense of morality
      2. Foreseeability and extent of likely harm from the defendant’s conduct
      3. Burden that new duty will impose on defendant
      4. Alternative ways of protecting plaintiff’s interest
      5. Increased safety likely to result from imposing the duty
      6. Chilling effect the duty may have on defendant’s conduct
      7. Administrative problems for the courts in enforcing the duty
      8. Problems of proof
4. Duty and Proximate Cause:
   1. Classic proximate cause situation: courts refusing to impose liability for unforeseen consequences
   2. Classic duty limitation: courts refusing, for policy reasons, to impose liability for ones that are foreseeable
   3. Ex: *Palsgraf*
5. Dangerous Instrumentalities:
   1. There is only one standard—reasonable care; the amount of reasonable care may be higher, depending on the situation.
      1. Court says duty of care is commensurate with the danger; take the circumstances into account.
      2. Most courts adopt the *Stewart* rule. The amount of care may be higher, but standard of care is not.
         1. A very small number of courts say that when you have a very dangerous situation, a higher standard of care exists.
   2. *Stewart v. Motts:* P poured gas into carburetor, caused explosion, which resulted in P suffering severe burns to upper body. P sues D for negligence; procedural issue at question is whether or not jury instructions should have included that use of dangerous instrumentalities requires a standard of "extraordinary care." Court says there is one standard of care.
      1. Jury Instructions:
         1. Negligence is "the absence of ordinary care which a reasonably prudent person would exercise in the circumstances here presented."
         2. "Ordinary care is the care a reasonably prudent person would use under the circumstances presented."
6. Emergency Doctrine/ Contributory Negligence:
   1. General Rule: in judging reasonableness of conduct in emergency situations, the circumstance that defendants must act quickly is relevant.
      1. For jurisdictions that allow emergency instruction, defendants who are contributorily negligent are not usually allowed to apply emergency instructions.
      2. *Bjorndal v. Weitman:* D saw P's father waving on right, looked to left to find hazard, returned to road and found P had rapidly decelerated. Collision occurs. P brings negligence action against D. Defendant requested, and trial court gave, "emergency instruction" Court says no special instructions required.
         1. Court says jury instructions aren’t necessary because the usual standard is sufficient and this does not change under the jury instruction.
            1. Instruction may confuse the jury, who has to decide what is “wise.”
            2. Invites jury to be more sympathetic to defendant.
         2. Jury instructions are allowed only in some jurisdictions.
   2. In case of intoxication:
      1. We hold intoxicated people to the standard of care of what people who are not intoxicated would do.
      2. Same underlying rationale where somewhere earlier in the chain of events, you created the emergency or got drunk.
      3. Exception: at home having few drinks, unexpected emergency arises that requires you to drive to emergency room; might say drinking wasn’t necessarily negligent and hold this person to reasonable person who is intoxicated standard because of unforeseen emergency.
7. Physical Disability/Ability
   1. General Rule: reasonable standard of care for someone who is in like circumstances (whether decreased or exceptional physical ability); people with physical disability can be found negligent.
   2. *Shepherd v. Gardner Wholesale, Inc: .*P tripped, who suffered from cataracts, tripped over raised concrete slab. Court rules that person laboring under physical disability is not required to exercise a higher degree of care to avoid injury than is required of a person under no disability. Ordinary care is such care as an ordinarily prudent person with a like infirmitywould have exercised under the same or similar circumstances.
8. Mental Disability/Ability:
   1. General Rule: Restatement Second 238B saying that mental disability does not excuse a person from liability for conduct which does not conform t the standard of a reasonable man under like circumstances.
   2. Policy arguments for holding mentally disabled to same standard:
      1. Allocates losses to the one who caused or occasioned loss
      2. Provides incentive to those responsible for people with disabilities and interested in their estates to prevent harm and restrain those who are potentially dangerous
      3. Removes inducements for alleged tortfeasors to fake a mental disability
      4. Avoids administrative problems involved in courts and juries attempting to identify and assess the significance of an actor's disability.
      5. Forces persons with disabilities to pay for damages they do if they are to live in the world.
      6. It is harder to assess mental disability…
   3. *Creasy v. Rusk:* Rusk admitted to BHC because suffered from memory loss and confusion; due to Alzheimers. During time at BHC, Rusk experienced anxiousness, confusion, depression, disorientation, agitation, was belligerent, combative, agitated, etc. Kicked plaintiff in left knee and hip area; plaintiffs lower back popped. Plaintiff experienced pain in lower back and left knee. Creasy files suit against Rusks for damages after being kicked by defendant. Rusk moved for summary judgment. Creasy appealed. Court of Appeals reversed.
      1. Court says defendant did not owe plaintiff legal duty, because of the special relationship between them. Creasy is caretaker, so he assumes risk of patient's behavior.
9. Superior Qualities: Extraordinary Intelligence/Expertise
   1. Restatement of Torts (Second) §289. If actor has more than minimum of qualities, then he is required to exercise superior qualities that he has in a manner reasonable under the circumstances.
      1. We are not holding to a higher standard of care, but a higher amount of care.
   2. *Hill v. Sparks*: Sparks was operator of earth-moving machinery and had several seasons experience; instructed sister to stand on ladder on machine. Machine hit mound of dirt, and sister was thrown from machine, killing her. Court rules he should have exercised superior quality due to his expertise.
10. Children:
    1. General rule: duty of a child to exercise the same care that a reasonably careful child of the same age, intelligence, maturity, training, and experience would exercise under the same or similar circumstances.
    2. Exception: draw the line between activities that are for children and activities where children are going to be held to an adult standard:
       1. Adult Activity Test: It is an adult activity when it requires adult skills and is normally done by adults.
          1. Inherent danger built into this, because increased danger requires more skills.
          2. Inherently dangerous test: operating a mechanized vehicle was not an activity that children should be involved in.
       2. Minority rule: some states have specifically passed laws that children of a specific age cannot be held liable for negligence. If you are under a certain age, you don't owe anyone a legal duty
    3. *Robinson v. Lindsay*: P lost full use of thumb in snowmobile accident when she was 11yo. 13 yo D was operating the snowmobile at the time of the accident. Court ordered new trial because failed to instruct jury as to standard of care for minors operating heavy machinery.
       1. Plaintiff should have some sort of responsibility for also engaging in adult act and being slightly contributorily negligent…
    4. *Hudson-Connor v. Putney:* 14 yo defendant allowed 11yo boy to operate defendant's golf cart. Boy hit accelerator instead of brakes. Cart ran directly into plaintiff, breaking leg and requiring surgery. Court holds that defendant's conduct is not to be judged under the adult standard of care because (1) there was no evidence that adult skills were required and (2) there was no evidence that golf carts were normally operated only by adults.
11. Specific Duties: Driving
    1. Sometimes, states, cities, or courts outline specific legal standards that reasonable people are held to.
       1. Even in absence of statutory requirement, individuals must exercise ordinary care.
    2. *Marshall v. Southern Railway:* P was driving at night and was approaching defendant's railroad trestle, which narrowed road to 15 feet. As P approached, a car came toward him with bright lights and plaintiff ran into trestle supports. Motion for nonsuit.
       1. General rule: operator of motor vehicle must exercise ordinary care. Incumbent on operator of motor vehicle to keep a reasonable careful lookout and to keep same under such control at night as to be able to stop within range of his lights.
    3. *Chaffin v. Brame:* P was driving at 40mph at night. Car approached driven by Garland, who refused to dim headlights. P blinded by lights and ran into truck left unlighted and blocking entire right lane. P sued person responsible for truck, who argued that plaintiff was guilty of contributory negligence as matter of law. Trial court permitted case to go to jury, which returned verdict for the plaintiff.
       1. Court says that P shouldn't be held liable
       2. Court rejected *Marshall* rule:
          1. The court looks at what a reasonably prudent person have done under the circumstances.
          2. A person could be acting prudent but still fail the general rule test.
          3. Rigid application is not always going to make sense in every case.

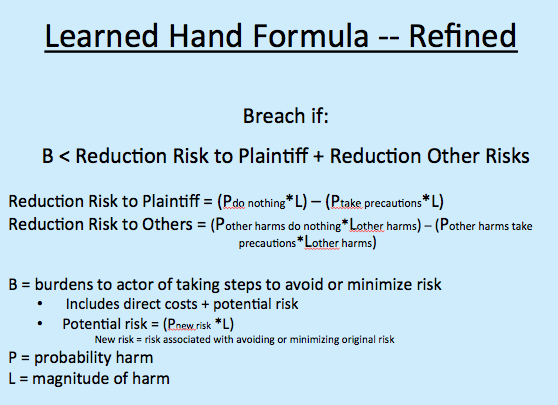
**:**

1. Negligence *Per Se*, in General:
   1. Violation of the statute determines actor's negligence.
      1. The legal duty is what the statute says, not what the reasonable person would do.
      2. If there's a violation of the statute, it's (in most cases) breach of duty
   2. Only applies to statutes that create a public right of action. It does not apply to statutes called the **private right of action.** Violations of those statutes are regulated by the state and impose what we call **civil liability**.
      1. In order to determine whether negligence *per se* doctrine is triggered, look at whether or not government can enforce statute.
      2. Ex: FILA--allows individuals to bring federal claim against railroad companies for injuries on the job; statute displaces common law of torts and governs claim.
   3. There's no automatic rule that the standard of the statute will always apply; complicated and nuanced:
      1. Courts will determine whether or not government intended statute to become standard of care in tort claim.
      2. Complicated standards should only be regulated by government agency, not courts.
      3. No straightforward black and white rule; instead have developed conditions:
         1. Discussed in *O'Guin*
         2. Excuse/justification
   4. Problem: When we introduce flexibility, might allow more fair result but also introduces potential for bias and inconsistency.
2. **Negligence Per Se Elements:**
   1. **Prima Facie Case:**
      1. **The statute/regulation clearly defines required standard of conduct**
      2. **The statute/regulation is intended to prevent type of harm D caused**
      3. **P member of class of persons statute/regulation designed to protect**
      4. **Violation of statute/regulation is a proximate cause of injury**
      5. *Under the negligence per se doctrine, you can always sue under common law.*
   2. *O'Guin v. Bingham County:* Shaun and Alex O'Guin killed while playing at Bingham County landfill. Children were walking home and went through unlocked gate at back of schoolyard and through privately-owned empty field. Border between field and landfill was unobstructed. O'Guins sued for negligence, claiming among other things that county was negligent *per se*, relying on Idaho statutes and federal regulations. Trial court granted county's motion for summary judgment. O'Guins appeal.
      1. In common law, the standard of private law is a different standard of care. The plaintiffs were not able to prevail the first time under common law, because there is no real standard of property owners to protect trespassers. This is why plaintiffs want to push negligence *per se* doctrine.
      2. Court says violation alone isn't enough to trigger rule. Elements are required to be met.
   3. Policy arguments for conditions/restrictions on negligence *per se* claims:
      1. It's unfair to hold people to an action that a statute wasn't in existence to prevent.
      2. If we do this, we broaden the legal duty to an unreasonable degree. This is unfair. These conditions limit this legal duty and make sure that the legal duty applies only when it was intended to.
3. Approaches to Negligence Per Se:
   1. Early approach; rigid in application:
      1. *Martin v. Herzog:* Defendant, driving at night, crossed over center line on curve and struck buddy occupied by decedent, causing his death. In wrongful death action, defendant contended that decedent was negligent in driving without lights in violation of statute. Appellate Division reversed for new trial. Court of Appeals: "It was negligence in itself, not just evidence of negligence"
         1. Possible Exception: "Unexcused" leaves door open for when negligence *per se* doctrine might not always apply and that some violations of statutes will be excused.
   2. Negligence Per Se w/ Excuse:
      1. Unexcused violation of relevant statute is negligence per se, but party who violated statute may offer evidence of an excuse or justification without violating it.
      2. Restatement 2d of Torts §288A: acceptable excuses (not limited to):
         1. Incapacity
         2. Lack of knowledge or the need to comply
         3. Inability to comply
         4. Emergency
         5. Compliance poses greater risk than violation
      3. Burden of proof: plaintiff as to convince jury that in light of the violation and the reasons offered, the defendant did not behave as a reasonable person under like circumstances
      4. Excuses for violations of the statute means no negligence, no jury required.
         1. Legislation has already taken into account what's reasonable and excusable.
         2. Some courts have general rule that said that plaintiff or defendant did everything that reasonable person would do to comply with law. Different and broader standard.
         3. Both approaches introduce reasonable person standard.
      5. *Impson v. Structural Metals Inc:* Driver of defendant's truck attempted to pass car within 100 feet of intersection; car turned left into intersection and was struck by truck. Injury and death results. Statute prohibits passing within 100 feet of intersection. At the trial court, jury only had to establish whether or not the defendant passed within 100 feet.
         1. Example of court adopting restatement as matter of law
         2. Knowing the law under Second Restatement of Torts:
            1. If you are unaware of the law, that isn't excuse.
            2. If you are ignorant of the facts (ie if you don't know your taillights are out), then this is an excuse.
         3. Court says that defendant's excuses don't fall into any of the categories established under the restatement.
            1. If the emergency is of the defendant's own making, this shouldn't be excused because the defendant should be exercising due care that would have prevented the existence of that emergency.
            2. The line is being drawn at what a reasonable person would do.
   3. Presumption of Negligence:
      1. Proof of statutory violation creates a presumption that violation was negligent. Violator is still free to rebut the presumption by showing that the reasonable person would have acted as he did.
      2. Not really different from restatement approach.
      3. Burden of proof: plaintiff as to convince jury that in light of the violation and the reasons offered, the defendant did not behave as a reasonable person under like circumstances
   4. Evidence of Negligence:
      1. Treat violation of statutory standard as evidence of negligence that is admissible at trial. Jury is not compelled to find defendant negligent even in absence of rebutting evidence from defendant.
   5. Policy Reasons for Shift from Rigid Approach:
      1. We want people to abide by the law, and this gives them an extra incentive to do so.
      2. Presumption that laws passed by Congress reflect what reasonable people should do.
      3. Whole idea of tort law is that we're evaluating conduct based on community norms. Statutes give us community norm.
   6. There is no difference in damages, it just makes the job easier to focus on the defendant's conduct.
4. Second Restatement v. Third Restatement:
   * 1. Main difference: incapacity: "reasonable in light of the actor's childhood, physical disability, or physical incapacitation."
     2. Mental capacity is missing.
        1. This could include something like intoxication, etc.
        2. But also, under reasonable person standard, mental capacity follows what a reasonable person without mental incapacity would do.

**Breach:**

1. **D, by behaving negligently, breached that duty.**
   1. Reasonable actions depend on risk of harm involved and practicability of preventing it
   2. Once duty has been established, question is whether the defendant breached duty by failing to exercise requisite quantum of care. Breach of care is negligence.
      1. Includes failure to act if action is required.
      2. Does not include state of mind.
2. **Determining Breach of Duty:**
   1. **Would reasonable person have foreseen a risk of harm?**
      1. **If no, then not negligent**
      2. **If yes, move to #2**
   2. **Would reasonable person have taken steps to avoid or minimize risk?**
      1. **If no, the not negligent**
      2. **If yes, the negligent**
   3. **Determining Breach of Duty**
      1. **Would reasonable person have foreseen a risk of harm**
         1. **Question is not whether technically foreseeable, but how remote**
      2. **Would reasonable person have taken steps to avoid or minimize the risk?**
         1. **Value life over property**
         2. **Risk utility balancing/Learned Hand formula**
      3. **Community norms/customer expectations**
         1. **Internal policies**
         2. **Statutes/ordinances/regulations**
         3. **Custom**
3. Assessing the Language of Foreseeability and Risk: Dobbs on Torts, § 143
   1. "The reasonable person exercises care only about the kinds of harms that are foreseeable to reasonable people."
      1. Courts likely to use "foreseeable" to mean that harm was too likely to occur to justify risking it without added precautions.
      2. Courts also discuss some harms are more foreseeable than others, which can be understood to mean that risk of probability of harm is greater in some cases than in others.
   2. When courts say harm is unforeseeable, they mean that although harm was actually foreseeable, a reasonable person would not have taken action to prevent it, because the risk of harm was low and harm was improbable.
   3. If something happened before, is it always foreseeable that it will happen again?
      1. It's a question for the jury given the total circumstances. Evidence, but not conclusive.
      2. *Pipher v. Parsell*: Pipher, Parsell, and Biesel were in a pickup truck together. As they were travelling, Biesel unexpectedly grabbed the steering wheel, causing the truck to veer off onto the shoulder of the road. Parsell did not do anything in response. Biesel again yanked the steering wheel, causing Parsell’s truck to leave the roadway, slide down an embankment, and strike a tree. Parsell was injured as a result of the collision. Appeals Court agrees that the issue of Parsell’s negligence should have been submitted to the jury.
         1. "Negligence as matter of law": this is case-specific; on facts of this case, jury cannot conclude that there was a breach of duty.
         2. Disagreement between Supreme Court and Superior Court is whether or not second instance could have been foreseeable.
            1. If this is foreseeable, the next part of the analysis in breach of duty: examining contributory negligence.
4. Balancing Risks and Burdens:
   1. General Principle: must balance risk involved with burden of addressing that risk
   2. Usually, when balancing risks and burdens, life outweighs property.
      1. *Indiana Consolidated Insurance Co v. Mathew*: Appellant Indiana Consolidated Insurance Company seeks review of finding that Robert D. Mathew did not act in a negligent manner so as to be liable for damages done to brother’s garage when a riding lawnmower caught fire. Mathews started lawnmower, noticed a flame in the engine area and immediately shut engine off. He opened the hood and tried to snuff out the flames but was unsuccessful. The flames continued to grow and the machine began spewing gasoline, so he ran to his home to call the fire department. Returned to find the garage totally engulfed in flames. Court rules that Mathew is not negligent and deems his actions an exercise of ordinary prudence. Court also says the law values human life above property.
         1. Insurance company alleged that certain acts of defendant were negligent; does not have to prove all three. Establishing negligence in only one act will establish negligence for the whole act.
   3. Not every risk is great enough to justify cost involved to eliminate risk.
      1. *Stinnet v. Buchele:* Tort action filed by employee against his employer for injuries sustained during employment. Stinnet was fixing Dr. Buchele’s roof at his farm. Fell from roof while applying roof coating with a paint roller. Lower court granted summary judgment to the employer on the ground that there was no showing the injury was caused by his negligence. Court says that it was Stinnet’s responsibility, as the one with experience, to take precautions or request safety gear.
         1. Policy reasons why plaintiff should be responsible:
            1. Plaintiff has greater knowledge.
            2. Since plaintiff benefits, he should bear the burden.
            3. Also, since plaintiff's life is on the line, plaintiff would ensure safety first
   4. In some cases, it is reasonable to anticipate other people’s negligence when the burden is low; by not doing so, creating a risk
      1. *United States v. Carroll Towing Co:* Action in determining negligence in sinking of the barge Anna C. Court says that risk of not having bargee was not having anyone to tend to emergencies (vessel knocked loose and floats away; vessels collide into each other). Court concludes that bargee should anticipate other people being negligent and was negligent in not doing that.
5. **Learned Hand Formula / Duty to Take Precautions**
   1. Judge uses formula to evaluate burden, probability, and injury foreseeable.
      1. If burden is less than probability times injury, it's fair for court to ask person to exercise initial care.
   2. **Breach if B < P\*L**
      1. **B = burden to actor of taking steps to avoid or minimize risk**
      2. **P=probability of harm**
      3. **L=magnitude of harm**
         1. Note: Make sure that you have an apples to apples comparison. If you're looking at annual salary/costs, have to make sure that on the other side of the equation, you're looking at annual risk or annual expected harm.





* 1. Policy Goals of Learned Hand Formula
     1. Promotes fairness
     2. Promotes economic efficiency; if the goal of efficiency is that it makes determination of allocation of resources more concrete.
     3. Gives jury a more concrete formula to determine if duty of care if breached.
  2. Evaluating Learned Hand’s Approach:
     1. Economic: this is a good thing because this is a good investment.
     2. Justice: we might also say this is fair because this is what we intuitively do every day.
     3. Social: we might have concerns because it's hard to determine what the numbers should be.
  3. Applying Learned Hand’s Approach:
     1. In general: This might be a good way to evaluate, but in other circumstances, this might not work because the reasonable person might not have time or wherewithal to go through this formula
     2. In emergency situation, might still consider that even though you make a choice that isn't the wisest, we take into account that in the situation, you might be given leeway to make a split-second decision.

1. Multiple Parties (Not Really Breach of Duty Issue) and Liability
   1. In most states, damages that plaintiff can recover from defendant will be reduced by percentage of plaintiff's own fault.
   2. When there are two or more defendants, jury decides how much at fault first defendant was as opposed to second defendants.
   3. Two different approaches for damages;
      1. Several Liability and Comparative Fault: Plaintiff can collect 30% of damages from first and 70% from second.
         1. If one defendant can't pay up, plaintiff is out of luck. Out whatever % defendant can't pay.
      2. Joint and Several Liability (most states): Plaintiff can collect 100% damages from one defendant and then defendant can turn around and collect contribution damages from other defendant.
         1. If one defendant can't pay up, plaintiff can still collect full amount from other defendant.
      3. Difference is in case of defendant not being able to pay.
2. Proving and Evaluating Reasonable Conduct: Alternative to Learned Hand Formula
   1. Rule: Plaintiff can't prevail if they don't prove what the defendant actually did.
      1. *Santiago v. First Student:* Plaintiff alleged that when she was in eighth grade and being transported on one of defendant’s buses, it collided with car at intersection plaintiff cannot identify. Plaintiff does not know any other details. Trial judge granted summary judgment for defendant.
         1. Motion to summary judgment was granted was because there wasn't sufficient evidence.
   2. When the plaintiff does allege specific conduct, several ways of proving:
      1. Direct evidence
         1. Clearly shows fact.
         2. Ex: Moment plaintiff crashed into plaintiff's car, police officer had speed gun pointed at defendant and showed that he was travelling at 55mph.
         3. Evidence like this is often not available.
      2. Circumstantial evidence
         1. Evidence of certain facts that permit inference of facts you want to prove.
         2. Ex: In book, evidence that plaintiff's car was pushed 20-25 feet after impact, long skid marks, a lot of momentum and went into open field, etc.
      3. Eyewitness testimony
         1. Juries put a lot of weight on it. However, studies show that they're not very accurate.
         2. Studies show that 25-80% inaccurate.
      4. Expert Witnesses
         1. Experts of a particular field giving an opinion in their area of expertise.
         2. Jury has to decide which expert they believe and make their judgment on the facts accordingly.
3. **Slip and Fall Cases**
   1. **Prima Facie Case** (Essentially Reasonable Person Standard)
      1. **Premises owner negligent if:**
         * 1. **Created dangerous condition, or**
           2. **Had actual or constructive knowledge of dangerous condition,   
              And**
      2. **Failed to take reasonable actions to minimize or eliminate risk.**
   2. Standard: Reasonable care is what they knew or should have known at the time.
      1. *Thoma v. Cracker Barrel:* Plaintiff took three steps away from table when she slipped and fell. When Thoma got up, she noticed an area 1’x2’ area with water droplets, in which employees were walking back and forth with dripping pitchers of water. Court concluded that negligence a question for jury.
         1. This case did not get to the jury, but Appellate court says it should be reversed and remanded because it was possible to hold that this was a slip and fall case because actual (evidence) or constructive (should have known) knowledge exists.
   3. Dobbs, the Law of Torts §165: "Failure to follow a party's precautionary steps or procedures is not necessarily failure to exercise ordinary care.
      1. *Wal Mart Stores Inc v, Wright:* A woman slipped on a puddle of water in the outdoor garden area of a Wal-Mart store. She sued for injuries, alleging that Wal-Mart was negligent in maintenance and care of premises. Jury instruction in deciding whether Wal Mart was negligent was based on whether or not Wal Mart was in compliance with its Store Manual. Appeals court reversed because of improper jury instruction.
         1. Court says you can set standards for yourself that exceed ordinary care and the fact that you've done that shouldn't be used as standard showing ordinary degree.
            1. Why, from a legal perspective, is this a problem?

Retailers might lower their higher standards of care.

Employee manual's purpose might not be for safety but for cleanliness

* + - 1. Wal Mart's policies might be evidence of what objective reasonable and prudent person would do.

1. Industry Custom/Standards
   1. The Role of Customs:
      1. Evidence of custom is relevant as to what a reasonable and prudent person might do.
      2. Custom could be used as evidence of foreseeable risk.
   2. Weighing custom is evidence of the balancing test used in Learned Hand Formula; should only be considered if for safety reasons.
   3. Proof of general custom and usage is admissible because it tends to establish a standard by which ordinary care may be judged where an ordinance prescribes certain minimum safety requirements the custom exceeds.
      1. *Duncan v. Corbetta:* William C Duncan was injured when he began to descend wooden exterior stairway at defendant's residence and top stop collapsed. Court erred by precluding plaintiff's expert from testifying that it was common practice to use pressure-treated lumber in construction of such stairways, even though non pressure-treated lumber used was permissible under application building code.
         1. Issue is whether or not plaintiff's expert witness should be excluded.
            1. Expert witness was going to testify about industry custom that pressure treated is general custom, even though non pressure treated meets code.
            2. Plaintiff wants custom to be entered because this is the reasonable person standard.
   4. Disclaimer: Sometimes custom sets the bottom-line standard; not applicable in emergency situations.
      1. Would still want to bring custom in as evidence, but not as proof for what the reasonable and prudent person might do. Jury can choose to accept or reject.
         1. Exception: Medicine is an arena in which industry custom is usurped: sometimes, there might be a procedure where it is not clear that there is a majority custom that all physicians follow, but also existent minority custom. In that case, general custom would be usurped.
      2. *The TJ Hooper:* Barges No 17 and 30, belonging to Northern Barge Company, lifted cargoes of coal at Norfolk, VA for NY in March 1928. Towed by two tugs of the petitioner, the "Montrose" and the "Hooper" and were lost off the Jersey Coast on March 10. Tugboat owners' conduct is the issue at appeal (failure to have radio on board). Defendants argued that custom was that there was not a custom for tugboat owners to provide a radio, therefore no negligence. Court of appeals says that custom is not necessarily what a reasonable person would do.
         1. We don’t automatically equate custom with what the reasonable person would do, because the industry is lagging behind the technology in what they're doing.
         2. Judge in this case is Learned Hand; didn't specifically apply formula but does reference risk utility language in forcing an inexpensive safety precaution on the industry.

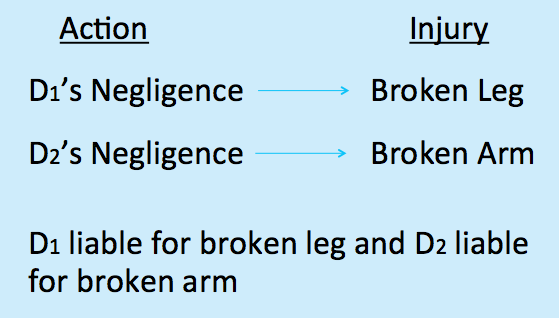
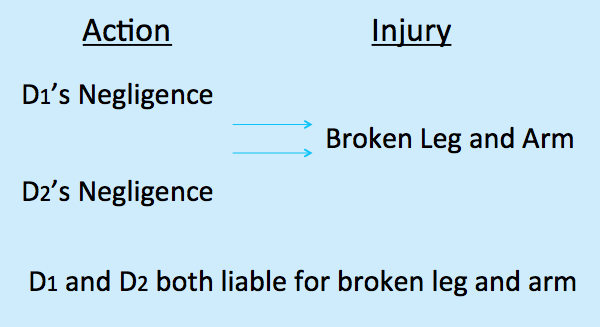
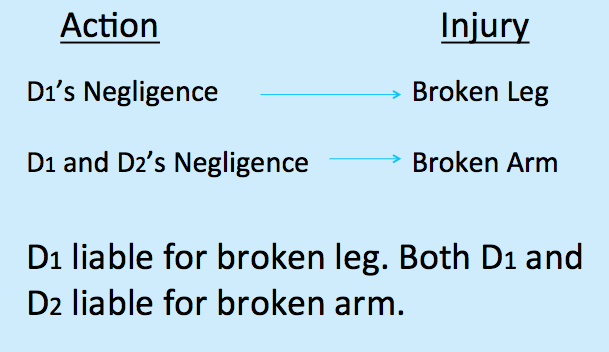
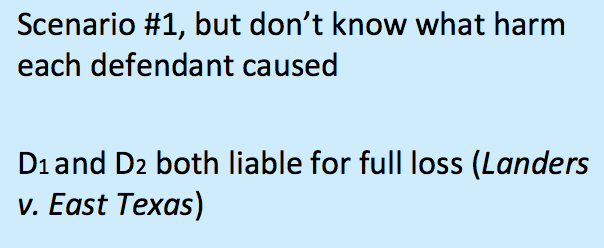
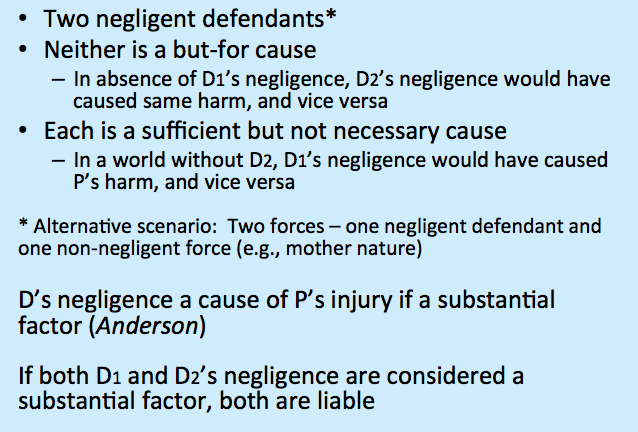
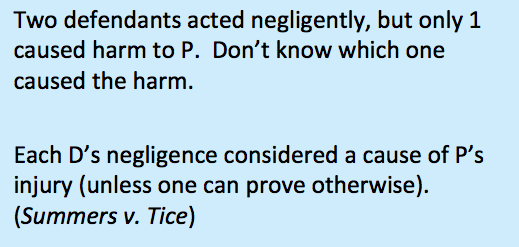
**Breach: Res Ipsa Loquitur**

1. **Res Ipsa:**
   1. **Probability Rule 1: Fact of accident suggests more likely than not, negligence caused P’s harm.**
   2. **Probability Rule 2: Defendant more likely than not: tortfeasor**
      1. **Majority rule (Restatement): When 2+ potential D’s no Res Ipsa Loquitur unless:**
         1. **D1 most likely tortfeasor or**
         2. **Shared responsibility**
      2. **Minority Rule (Collins): apply Res IpWesa when there are multiple defendants**
   3. **Factors affecting probability analysis:**
      1. **Eliminating potential non negligent causes**
      2. **Eliminating other tortfeasors**
      3. **P or D could have presented evidence and did not do so**
      4. **Exclusive control/others involvement**
2. Res Ipsa Loquitur: “the thing speaks for itself”
   1. *Res ipsa loquitur, sed quid in infernos dicet?* “the thing speaks for itself, but what the hell did it say?”
   2. Even though plaintiff can’t offer direct or circumstantial evidence of what exactly happened, he should be allowed to reach jury on the issue of negligence by proving the circumstances of the accident itself, because they bespeak negligence even without a more specific showing of the chain of events.
3. Requirements of Res Ipsa:
   1. The accident would not ordinarily happen without negligence
      1. Plaintiff’s burden of proof: standard--show that “more probable” cause was negligence
   2. Negligence, if any, is attributable to the defendant
      1. Not met unless instrumentality that caused arm was under defendant’s control.
         1. “control” loosely applied by the courts.
      2. Restatement 2d of Torts §328D changes this requirement to: “other responsible causes including conduct of plaintiff and third persons are sufficiently eliminated by evidence.”
         1. Gets rid of need for “control” element to be reconciled by courts
   3. “The event must not have been due to any voluntary action or contribution on the part of the plaintiff” (*Reber v. United States*)
      1. Does not mean that plaintiff who is partially at fault can never recover from defendant. Only means that plaintiff must show that negligence that created initial danger is attributable to defendant rather than to her. If it is equally probable that plaintiff’s negligence created danger, she has not “brought negligence home to the defendant.”
4. Defendant’s Case:
   1. Defendant can relent a res ipsa loquitur case by proving the actual cause of the accident
   2. Defendant can attack each of the foundation facts of res ipsa
      1. Can show other common, non-negligent causes of accident
      2. Can show that other persons mishandled cause of accident
   3. When defendant doesn’t have evidence of exact cause of accident, may try to refute res ipsa by proving that he generally exercised due care
   4. Cases suggest that plaintiff should be able to rely on res ipsa because defendant has better access to evidence than plaintiff; creates a strong incentive for defendant to produce any evidence he was to rebut inference that negligence caused accident
   5. Defendant sometimes doesn’t have any more evidence than plaintiff and shouldn’t be able to avoid res ipsa just because he knows no more about the cause of the accident than the plaintiff.
5. Procedural Effects of Res Ipsa:
   1. Sufficiency of Evidence: on breach of duty element, the plaintiff will survive a motion for directed verdict and get to the jury, which can then decide the case either way.
   2. Instructing on Res Ipsa: plaintiff has adduced evidence from which the jury could conclude that the defendant was negligent, then trial judges commonly give res ipsa instruction given to the jury.
   3. Permissible inference effect: res ipsa creates a permissible inference that the jury may draw if it sees fit, res ipsa does not shift the burden of persuasion from the plaintiff. Even if the defendant introduces no evidence at all, the jury may reject the inference and bring in a verdict for the defendant.
   4. Is not a rule that requires jury to decide defendant is negligent; If act is so strong that reasonable jury could not conclude otherwise, we don't even bother to give it to the jury
   5. When the defendant presents evidence of nonfault, the rule does not disappear; we still have jury question in which jury has to evaluate evidence presented.
      1. Even if you believe the defendant's evidence, that may only eliminate one of the potential causes for what happened, not all causes.
6. Proving *Res Ipsa*:
   1. Majority Rule: abnormally strong inferences of negligence--inference of negligence is merely permitted, not required, is to say that the plaintiff who makes out a permissible inference case would not be entitled to a directed verdict.
      1. *Morejon v. Rais:* When the plaintiff's circumstantial proof is so convincing and the defendant's response is so weak that the inference of defendant's negligence is inescapable, it would be proper for the trial court to grant summary judgment or a directed verdict for the plaintiff in a res ipsa case.
      2. *Posner’s Rule:*51%/49%
   2. Minority rule: the presumption effect: One of two possible outcomes:
      1. Jury is told that, once the presumption applies, the defendant has the burden of showing he is not negligent; OR
      2. Judge will direct verdict for the plaintiff unless the defendant produces some evidence that he is not negligent
   3. Res Ipsa is an exception to Rule in *Santiago* General Rule: Plaintiff must allege specific conduct on the part of the defendant but..*.*
      1. Res ipsa arises when the plaintiff may not know what happened and the accident speaks for itself.
      2. Plaintiff needs to point out specific action of defendant.
         1. Even if the defendant is not forthcoming, some can still receive compensation
         2. Not always clear to say that plaintiff can't get the evidence just because defendant is in possession of the facts.
      3. Rationale: Often hear as one of the justifications is that the defendant has better knowledge of what happened, so we should push the burden onto them.
         1. Underlying this rule is a sense of justice.
   4. *Byrne v. Boadle*: Plaintiff was walking in Scotland Road when he lost all recollection. Witness testified that barrel of flour fell on him; defendant's shop was adjacent and barrel appeared to have fallen or to have been dropped from the shop. Trial judge "nonsuited" the plaintiff, taking the view that the plaintiff had put on no evidence of negligence. Plaintiff's attorney sought review in higher court by obtaining a rule nisi (court's decree that will be come absolute unless the adversely affected party shows the court, within a specified time, why it should be set aside) to enter the verdict for the plaintiff.
      1. Defendant argues that there are no specific facts. Plaintiff should establish his case by affirmative defense.
      2. Most likely that some negligence contributed.
   5. *Koch v. Norris:* Defendant’s high-voltage line broke and fell, starting a fire that damaged plaintiff’s property. Weather was sunny and winds were ordinary. Court concludes that plaintiff can rely on res ipsa
   6. *Cosgrove v. Commonwealth Edison Co:* During storm, electric company’s power lines seen to be sparking and fell. Fire occurred; leak in buried gas line ignited by sparks. Plaintiffs injured. Court holds plaintiff can rely on res ipsa for gas company but not electric company.
7. Sufficiency of the Pleading:
   1. When evidence if obtainable, but not present, *res ipsa* is not appropriate.
      1. *Warren v. Jeffries:* Car was owned by defendant and plaintiff’s family was entering when car made a clicking sound and started rolling into ditch. Six year old Terry died after jumping from rolling car and being crushed by wheel. Car was not examined after accident. Court says can’t speculate as to what clicking sound is, and in the absence of attainable evidence, res ipsa is not applicable.
         1. Court focused on fact that plaintiff didn’t have any evidence.
            1. Reasonable plaintiff investigates after accident
            2. Possible that investigation occurred and evidence was unfavorable so not admitted
         2. Process concern: ideally, we want some evidence; hesitant to reward plaintiff who didn’t do due diligence to investigate or might be hiding evidence.
   2. Acts not within exclusive control of tortfeasor do not preclude guilt.
      1. *Giles v. City of New Haven:* Plaintiff was elevator operator with 14 years of experience. Compensation chain malfunctions in elevator and as a result, plaintiff suffers injuries. Defendant alleges that plaintiff failed to demonstrate that defendant had exclusive control over elevator because plaintiff was operating elevator. Court found that jury should determine plaintiff’s res ipsa claim.
         1. Court loosens “exclusive control” requirement.
         2. Damages are still lowered proportionately to plaintiff’s contributory negligence, if any.
         3. Exclusive control requirement is like saying you have to be 100% certain that defendant was negligent; if other people involved who are 90% certain that defendant is negligent and 10% other, still can say defendant
   3. Where there are only two defendants who had consecutive control over plaintiff, and either one could have caused plaintiff’s injuries, and both are named in complaint, complaint is sufficient for pleading purposes to raise res ipsa.
      1. *Collins v. Superior Air and Ground Ambulance Service:* Laura Collins admitted to Alden Wentworth Rehab Center and transported to/from by Superior Ambulance Service. When Laura returned, dehydrated and had broken leg. Suit against Superior and Alden. Superior argues plaintiff can’t plead that Superior along controlled instrumentality or injury. Court says res ipsa allows proof of negligence by circumstantial evidence when direct evidence is primarily in control of defendant.
8. Second Restatement v. Third Restatement:
   1. Second Restatement of Torts: if plaintiff can sufficiently eliminate other responsible causes, then res ipsa may be appropriate.
      1. Third Restatement: no longer imposes requirement that plaintiff disprove other parties are not negligent.
   2. Third Restatement: If two parties have an ongoing relationship pursuant to which they share responsibility for a dangerous activity, and if an accident happens establishing negligence of one of the two, imposing rest ipsa liability on both is proper.

**Actual Harm:**

1. Actual damages are an element of negligence. Technical legal damage is not enough.
   1. General Rule: conduct that is merely negligent, without proof of an actual injury, is not considered to be a significant interference with the public interest such that there is any regret to complain of it, or to be free from it.
   2. *Right v. Breen:* Plaintiff stopped automobile at red traffic light when struck from behind by defendant. Minor damage to vehicle but no injuries reported at scene. Jury returned verdict for zero damages. Plaintiff filed motion for additur and damages for technical legal injuries.

**Cause in Fact:**

1. But-For Test:
   1. “But For” this particular action, would plaintiff’s injury have happened?
      1. *Sine qua non:* Compare what really happens to hypothetical scenario.
      2. Complicated to predict what could have happened. Could argue either way in some cases.
   2. Problems of applying but-for: Jury must decide on what actually happened but must also speculate on hypothetical alternative version of events.
      1. *Hale v. Ostrow:* Hale was walking on sidewalk when she was impeded by Ostrow’s overgrown bushes and cracked sidewalk. Hale looked to street to check for traffic before walking around it and tripped on concrete and fell into street. Action against parties whose unkempt property was responsible. Ostrow’s move for summary judgment on basis that Hale’s injury caused by sidewalk and not overgrown bushes. Court says issue of causation and allocation of comparative fault are jury questions.
         1. Later in negligence rule: applied by trial court; if there is another cause that happened later in time to the event, defendant is not liable.
         2. Court says can have 2+ causes of an injury; negligence and liability only necessitates that defendant be a cause not the cause.
   3. Look to see that negligence caused harm to see if without negligence, same result would’ve occurred.
      1. *Salinetro v. Nystrom*: Woman goes to doctor to be treated after accident. Doctor takes x-rays of lower back. Later found out she was pregnant and had to abort the baby, which was dead upon abortion. Sues for negligence in not asking if she was pregnant/when her last menstrual cycle was. Court grants judgment for doctor.
         1. This is not a “but for” cause; if defendant had asked the questions, same result.
2. But-For and Res Ipsa Parallel: (This is similar to Res Ipsa Under Breach)
   * 1. Application: supports not only breach of duty but also cause in fact.
     2. Example: a sponge in the stomach is negligent and therefore res ipsa applies to prove cause in fact; stomach cancer due to the sponge is not a but-for cause, therefore res ipsa does not apply.
     3. When defendant’s negligence generally capable of causing harm and that harm actually occurs, jury can infer causation without proof.
     4. Limits to this rule: Sometimes we might say it’s inappropriate to infer causation if the harm is not a but-for cause.
3. Liability of Two or More Persons:
   1. **Summary—When Two+ Tortfeasors:**
      1. **When divisible injury (Scenario 1):**
         1. **Apportion damages based on causality, with each D liable only for injuries it alone caused**
      2. **When indivisible injury**
         1. **Both D’s liable**
         2. **“Indivisble” when:**
            1. **Single injury and each D a but-for cause (Scenario 2)**
            2. **Single injury and each D a substantial factor (Scenario 5)**
            3. **Divisible injury, but don’t know which D caused what injury (Scenario 4)**
         3. **As between D’s, apportion liability based on comparative fault.**
      3. **When unknown which negligentd defendant caused harm:**
         1. **D’s jointly liable. Apportion liability based on comparative fault (Scenario 6)**
   2. A tortfeastor is liable for all damages of which his tortious act was a proximate cause. He may not escape this responsibility simply because another act, either an innocent occurrence such as an act of God or other tortious conduct may also have been a concurrent cause of the injury.
      1. Applies to negligent acts that take place at different times and to negligent acts that take place simultaneously.
   3. Scenario 1:   
      
      1. Divisible harm
      2. Defendants are separately liable for their divisible portion of harm
      3. Joint and several liability does not apply.
   4. Scenario 2:   
      
      1. Indivisible Harm
      2. Both defendants are “but for” causes of both injuries
      3. Can apply joint and several liability; defendants can sue each other to determine % of damages responsible for; if one is insolvent, plaintiff can collect on both.
   5. Scenario 3:  
      
      1. D is a but-for cause of injury 1 and injury 2
      2. D2 is also a but-for cause of injury 2
      3. Joint and several liability
   6. Scenario 4:   
      
      1. 2 separate tortfeasors; each is responsible for portion of harm caused.
      2. Injury can’t be apportioned with reasonable certainty
      3. *Landers v. East Texas Salt Water Disposal Co:* Pipes of East Texas Salt Water Disposal Co broke and some thousands of barrels of salt water flowed overland and into lake, killing fish and damaging land. Sun Oil Co around same time also caused large quantities of salt water to flow into lake. Court rules that both are jointly and severally liable.
         1. Rule: where tortious acts of 2 or more wrongdoers join to produce an indivisible injury, that is an injury from which its nature cannot be apportioned with reasonable certainty, all of the wrongdoers will be held jointly and severally liable for entire damages and injured party may proceed to judgment against any one separately or against all in one suit.
         2. Under pre-existing case law, since harms can’t be identified, torteasor is not individually liable, thus escaping all liability.
   7. Scenario 5:   
      
      1. Neither defendant is a but-for cause
      2. Each is a sufficient but not necessary cause
      3. In a world without D2, D1’s negligence would have caused P’s harm and vice versa.
      4. *Anderson v. Minneapolis…Railway:* Plaintiff’s property was burned by a fire which could have come from defendant’s engine or from other fires sweeping east. Jury instruction given: “you should find that fire set by engine was a material or substantial element in causing plaintiff’s damage. If it was, defendant is liable; otherwise, it is not.” Jury found for plaintiff.
   8. Exceptions to But-For: Substantial Factor Test
      1. Applies in situations where if two defendants act negligently, and either’s act would suffice to cause the plaintiff’s injury. Both defendants can make the argument that his act was not necessary to cause the harm.
      2. Substantial Factor Test: defendant would be a cause in fact of damage if jury found that its act was a material or substantial element in producing it.
      3. Test is analyzing matter of degree; jury might decide what degree of causation is substantial and whether defendant’s negligence reaches that level.
      4. Alternative test for unusual situations in which but-for test does not yield satisfactory results; most courts reserve this test only for scenario 5, but some courts will apply substantial factor as an alternative test instead of as a narrowed test tailored to specific scenarios.
      5. Even under substantial factor instruction, defendant should not be held liable (except in multiple sufficient cause cases) if harm would have occurred even if she had not been negligent.
   9. Scenario 6:   
      **
      1. *Summers v. Tice:* Plaintiff and two other men were hunting, when a bird flew up between plaintiff and defendants. Defendants shot towards plaintiff, injuring plaintiff in the eye. Only one bullet could have caused the harm. Court found that both defendants must be held liable, since both are participating in negligent activity and are in a better position to say who is responsible.
         1. In Res Ipsa, only one person is negligent, so if you hold them both liable, one of the defendants is innocent. In *Summers*, both are negligent, so there is less of a hesitation of holding both liable.
4. Note: Increased Risk Showing Causation/ Loss of Chance
   1. Loss of chance causation requires fact finder to compare what did happen to what would have happened if defendant had not been negligent.
   2. Three approaches for determining causal connection (*Lord’s* Rules):
      1. Modified but-for test; must prove that plaintiff was deprived of at least 51% chance of a more favorable outcome.
         1. Damages: 100% of liability
         2. Problems: doesn’t allow relief without meeting threshold; deterrence issue in that doctor might never be held liable for harms less than 51%; overdeterrence issue in that doctor might always be held 100% liable for cases where he is only 51% negligent.
      2. Relaxed causation rule: modified substantial factor test; relaxed standard of proof of causation; “more likely than not” that chances of a more favorable outcome were destroyed. Magnitude.
         1. Damages: 100% of liability
         2. Problems: same as above, except standard is even more relaxed and might cause more overdeterrence
      3. Did defendant cause plaintiff to lose chance at at better recovery? “Harm” here is the lost chance of a better outcome, rather than the full spinal cord injury.
         1. Damages: % actually attributable to defendant’s negligence (lost % x full injury recovery)
         2. Problem: Takes care of overdeterrence and underdeterrence; fair to both doctor and patient; also does not add burden to courts, because most likely will not bring case if damages are small.
   3. *Lord v. Lovett:* Plaintiff treated at Lakes Region General Hospital after automobile accident. Plaintiff alleges that defendants negligently misdiagnosed her spinal cord injury, failed to immobilize her properly and to administer steroid therapy, and caused her to lose opportunity for substantially better recovery. Also alleges that she continues to suffer significant residual paralysis, weakness, and sensitivity. Plaintiff may recover for a loss of opportunity injury in medical malpractice cases when the defendant’s alleged negligence aggravates the plaintiff’s preexisting injury such that it deprives the plaintiff of a substantially better outcome.
      1. Loss of opportunity is not inherently unquantifiable and can be done by providing jury with basis upon which to distinguish portion of her injury caused by defendant’s negligence from portion resulting from underlying injury through expert testimony.
      2. Backwards looking in that harm has already materialized
   4. Both *Alexander* and *Dillon* allow recovery because of the increased risk of harm going forward. Court treats possibility of harm as a present injury in order to award damages.
      1. Minority Rule: Many jurisdictions require a “present injury” and do not allow recovery on harms that have not materialized.
      2. *Alexander v. Scheid:* Radiologist discovered mass in lung, but didn’t follow up with this information. Mass grew and was not discovered until plaintiff went to another doctor months later. Suffered from advanced cancer. Probability of long-term survival was reduced because of the delay. Court reversed and remanded summary judgment ruling for defendant.
         1. Loss of chance is better understood as a description of injury than as either a term for a separate cause of action or a surrogate for the causation element of a negligence claim. Increased risk of harm may be described as decreased life expectancy or diminished probability of long-term survival.
      3. *Dillon v. Evanston Hospital:* Portion of catheter broke off and remained in body. Neither doctor or hospital told her. Later discovered that remaining portion had worked its way in two pieces into her heart. Case reversed for more adequate jury instruction. Trial judge’s instruction on increased risk damages requires reversal because it failed to require (a) evidence of increased risk and future harm and (b) damages proportioned to the probability that risks of future harm would materialize.

**ICF/Scope of Risk:**

1. Proximate Cause: Reflects the idea that just because someone was negligent, there may be reasons that we decide not to hold the defendant legally liable for plaintiff’s injury.
   1. Defendant is negligent, yet most courts would deny recovery on ground that plaintiff’s injury is too unusual, too far removed from type of harm to be anticipated from defendant’s negligence to warrant imposing liability.
      1. Legal cause problem: issue is whether liability should be imposed.
      2. Application of foreseeability: whether or not plaintiff’s harm was a foreseeable result of defendant’s negligence.
2. Direct Cause Test:
   1. *In Re Polemis:* defendant is liable if his conduct is direct cause of plaintiff’s injury as opposed to remote cause.
      1. This test says that as long the action is a direct cause of the event, then the defendant is liable.
      2. Suicide is, in a way, still a direct cause.
   2. Problem: not responsive to decisions either as test of inclusion or exclusion; does not explain real cases.
      1. More restrictive than real cases
      2. Suggests liability would be cut off where subsequent conduct contributes to accident
      3. Courts often conclude that defendant should be liable despite intervening causes
3. **Proximate Cause Summary:**
   1. **General Rule: Proximate cause if w/in scope of risk created by D’s negligence**
      1. **\*Not proximate cause in P in position of relative safety**
   2. **Alternate Approaches:**
      1. **Multifactor test (Palsgraf)**
      2. **General rule of law deems D’s negligence proximate cause (eg Rescue Doctrine)**
      3. **Intervening Acts:**
         1. **General rule of law deems intervening act as a superseding cause (traditional suicide rule)**
         2. **Some courts focus on foreseeability intervening act (Watson)**
4. **Proximate Cause: Scope of Risk Test**
   1. **In General:**
      1. **Proximate cause when the harm which occurred was of the same general nature as the foreseeable risk created by the defendant’s negligence (*Medcalf).***
      2. **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)**
      3. **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)**
      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)**
   2. ***Harm not w/in scope of risk if:***
      1. **Reasonable person in similar circumstances would not have foreseen harm risk of the same general type;**
      2. **Reasonable person would have foreseen harm or risk of same general type, but not to the general class of persons that includes plaintiff; or**
      3. **Reasonable person would have foreseen general type of harm or risk, but would not have taken greater precautions to avoid it than defendant took.**
   3. ***Harm w/in scope of risk if:***
      1. **Reasonable person in similar circumstances would have**
         1. **Foreseen harm or risk (a) of a same general type and (b) to the general class of persons that includes the plaintiff and**
         2. **Taken greater precautions to avoid it than defendant took**
         3. **\*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.**
      2. **Reasons of policy/fairness support treating defendant’s negligence as proximate cause, even if harm to plaintiff not foreseeable.**
   4. Provides analytical basis for consistent decision making
      1. Judge/jury can ask what unreasonable risks the defendant should have anticipated at the time she acted, and compare those risks to injury that actually occurred.
   5. Principles that Narrow Issues of Proximate Cause:
      1. If plaintiff’s injury is truly beyond the type of harm to be expected from defendant’s conduct, plaintiff will virtually always go uncompensated.
      2. Where particular type of injury to plaintiff is foreseeable, the defendant is liable for injury sustained even though it’s more serious than might have been anticipated.
      3. Cases distinguish unforeseeable consequences of a negligent act from consequences that are foreseeable but take place in an unusual manner (foreseeable injury in an unforeseeable manner principle).
   6. *Medcalf v. Washington:* Plaintiff picked up intercom outside lobby and called friend. System failed to work and before friend could admit plaintiff into apartment, plaintiff was attacked by man and suffered injuries as a result. Jury could not reasonably have found that assault on plaintiff and resultant injury were within foreseeable scope of risk created by defendants’ failure to maintain intercom system. Plaintiff failed to establish necessary causal relationship. Is this an example of the Direct Cause Test?
      1. Reasonable care is not breached here. The reason for having an intercom system was not to prevent people from getting attacked on the street. This harm was not foreseeable.
      2. This case introduces the rule that harm must be foreseeable. But the court in applying that rule said it was not foreseeable.
   7. *Abrams v. City of Chicago:* Plaintiff alleged that defendant was negligent in failing to send ambulance to take her to hospital for delivery of child. As a result, friend took her in her car, negligently drove through red light, and was struck by a drunk driver speeding at 75mph. Plaintiff was left in a coma and the child died.
      1. Foreseeable harm in this case is a delay of medical care.
5. Zone of Danger and the Multifactor Test:
   1. Zone of Danger Rule (*Palsgraf)*: defendant’s actions create a risk within a certain vicinity; persons within the range of apprehension are owed a duty by the defendant; persons outside of the zone are owed no duty.
   2. Multifactor Test for Proximate Cause (Dissent in *Palsgraf):* take all factors into account, including how much space there is, how much time has passed, intervening causes, how substantial a factor was defendant’s negligence, and is there a natural continuous sequence of events
6. *Palsgraf v. Long Island Railroad Co:* Plaintiff was standing on a platform of defendant’s railroad. Train stopped at station; two men rushed to catch it. Other man, carrying package, jumped aboard but seemed unsteady. Guards pulled him in/pushed him onto train. Package was dislodged and fell upon rails; contained fireworks. Nothing about appearance gave notice of contents. Fireworks exploded when they fell, which caused scales at other end of platform to become dislodged and strike plaintiff, causing injury. Court rules that there is no proximate cause, therefore no negligence.
7. Foreseeability in Intentional Torts v. Negligence:
   1. In intentional torts, even though sometimes the victim is an unforeseeable victim, we still hold the defendant liable. We don’t do this in negligence cases.
      1. Usually, in the intentional tort context, the defendant has a higher degree of culpability; it doesn’t seem as unfair to hold a person committing an intentional tort when they harm an unintended plaintiff.
      2. One reason we have the scope of risk approach is because we are concerned that overdeterrence will prevent people from engaging in any activity if there are no lines of limited liability; we are not concerned with overdeterrence in the intentional tort context.
8. Defining Scope of Risk in Cases: The Broad v. Narrow Approach:
   1. General Rule: an injury is within the scope of risk, as long as the general type of harm that happened was foreseeable, even if the precise mechanism is not foreseeable.
      1. *Hughes v. Lord Advocate:* Post office employees were working on underground telephone cable in Edinburgh. Left unguarded open manhole surrounded by kerosene lanterns. Two boys found the unguarded site, and dropped lantern into hole. Lantern broke and kerosene vaporized. Large explosion occurred followed by raging fire. Hughes fell into hole and suffered severe burns. Plaintiffs’ appeal allowed, because the harm that occurred is of the same general type.
   2. General Rule: scope of risk can sometimes be defined more narrowly to include a general mechanism of harm, as well as the type of harm.
      1. *Doughty v. Turner Manufacturing Co:* Worker knocked one of the covers into molten liquid; cover sank without causing a splash. After one or two minutes molten liquid erupted and injured plaintiff, who was standing nearby. Judgment for defendants.
   3. *Hughes* and *Doughty:*
      1. In *Doughty*, we define the scope of risk to include the mechanism of harm.
      2. In *Hughes*, we don’t care what the mechanism is.
      3. Defining the “general type of risk” and “class of persons” is very flexible.
      4. General rule: The specific mechanism does not need to be foreseeable. However, some courts will narrow this general rule. Scope of Risk test is flexible. We think about the mechanism in a loose sense.
9. Extent of Harm and the Thin Skull Rule:
   1. General Rule: Even if the extent of harm is not foreseeable, you are liable for the full extent of the injuries.
   2. Thin Skull Rule: If the defendant is negligent, even if the extent of harm is not foreseeable and due to plaintiff’s pre-existing condition or susceptibility of harm, the defendant is still liable.
   3. *Hammerstein v. Jean Development West:* Hotel knew plaintiff was diabetic and that walking up and down stairs was bad for him. There were no rooms available downstairs. During early morning, fire alarm went off and plaintiff had to walk down from fourth floor. In doing so, he twisted his ankle and found a blister on his foot, which became gangrenous due to diabetes. There was no fire and fire alarm system had gone off without fire on numerous occasions but had never been corrected. Court ruled in favor of plaintiff.
10. Rescue Doctrine:
    1. General Rule: Rescuer can recover from defendant whose negligence prompts rescue.
    2. Rationale: for public policy reasons, we treat the defendant’s negligence as proximate cause to the plaintiff’s harm, even though this harm is probably not foreseeable. We don’t want to deter people from doing good.
    3. *Wagner v. International Railway:* Plaintiff is injured after attempting a rescue a passenger who fell out of the defendant’s train. Defendant is liable to the plaintiff also. “Danger invites rescue,” suggests that rescue is foreseeable as a matter of law.
11. Intervening Causes v. Superseding Causes/Acts:
    1. Proximate cause of an injury is that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred.
    2. There may be many tortfeasors who are all liable and thus all proximate causes. When judges speak of “the” proximate cause rather than “a” proximate cause, they may be pushing jury to an unconscious bias against finding both tortfeasors liable.
    3. When tortfeasors act in sequence, the first tortfeasor often argues that the second is an “intervening cause” that “supersedes” his liability. A superceding cause breaks the causal chain.
       1. General Superseding Cause Arguments:
          1. Defendant is negligent
          2. Some other act happens after the defendant’s negligence
          3. The two acts together lead to an injury to the plaintiff
    4. Emphasis on intervening causes and causal chains obscures the more fundamental scope of risk principle: intervening cause that lies within the scope of forseeable risk, or has a reasonable connection to it, is not a superseding cause.
    5. *Medcalf:* defendants should be liable for risks or harms they negligently created but not others.
12. Intervening Criminal Acts:
    1. General Rule: Greater culpability of a criminal act should head the court to place the responsibility on the criminal rather than the actor whose prior negligence contributed to the harm.
       1. *Watson v. Kentucky and Indiana Bridge & RR:* Defendant railroad negligently spilled gas in a street; subsequently ignited by a match thrown by Duerr. Court held that if Duerr had thrown match negligently the railroad would be liable for the fire, but if he had done it intentionally, his deliberate criminal act would cut off railroad’s liability since it was not bound to anticipate the criminal acts of others.
    2. General Exception: When criminal acts are foreseeable, it will not cut off the liability of a defendant who negligently exposes the plaintiff to that risk.
       1. *Hines v. Garrett:* A train passed the plaintiff’s stop and let her off a mile down the line in an area known to be frequented by vagrants. While walking back to her stop she was assaulted. The court dismissed the railroad’s argument that the assault was a superseding cause and ruled for the plaintiff.
    3. Modern Application: most courts will not focus on the criminal act but on the general type of harm and whether or not the superseding cause was foreseeable.
13. The Special Case of Suicide as an Intervening Act:
    1. General Rule: Purposeful act of suicide will be deemed the legal cause of a decedent’s injury unless the defendant’s negligence rendered the decedent unable to appreciate the self-destructive nature of the suicidal act or unable to resist the suicidal impulse.
    2. *Delaney v. Reynolds:* Reynolds stored gun, loaded and unlocked, in bedroom. Delaney was smoking crack cocaine and took Reynolds’ loaded gun from bedroom. Pulled trigger twice, but gun did not fire. Put gun under chin and pulled trigger; gun went off, seriously injuring her. Court rules that summary judgment is improper because It should also be open to Delaney to show and the jury to find that the risk that she would handle or use Reynolds’ gun in a manner to cause intentional injury to herself was foreseeable and failure to secure gun is a proximate cause.
       1. In this case, the court uses the scope of risk test to point out a possible exception to the traditional treatment of suicide as a superseding cause.
14. Negligent Intervening Acts:
    1. General Rule: When a third party negligently intervenes between defendant’s negligence and plaintiff’s harm, this automatically severs the causal chain if it’s not a normal or foreseeable consequence.
       1. *Derdiarian v. Felix Contracting Corp.:* Against Derdiarian’s wishes, Felix insisted that he set up kettle of liquid enamel, boiling at 400 degrees on west side of excavation facing oncoming, eastbound traffic. Dickens was driving eastbound on Oak Street when he suffered seizure, lost consciousness, and his car crashed through barricade and struck plaintiff. Plaintiff was thrown into air, boiling enamel splattered over his face and body, and he erupted into a fire ball. Jury found in favor of plaintiff. Appellate Division affirmed.
          1. The intervening cause in this case: car crash caused by negligent driver who didn’t take medicine and suffered epilepsy episode.
          2. Court concluded that defendant was still liable because he didn’t safeguard worksite.
          3. In court’s view, foreseeable risk is car crashing into work area and causing injury to work area.
       2. *Ventricelli v. Kinney:* Defendant leased plaintiff a car with a defective trunk, which defendant attempted to repair. While car was parked, plaintiff and passenger were attempting to slam lid shut. Maldonado was parked several car lengths behind plaintiff; car suddenly jumped ahead and ran into plaintiff. Jury awarded plaintiff $550,000 for injuries. Appellate Division reversed and dismissed as to Kinney.
          1. Court held that car rental place was not liable because intervening act was not foreseeable.
          2. The car here is parked on a street where other cars normally park and is in a position of relative safety. This is an unforeseeable freak accident.
    2. Exception Rule: when risk created by defendant’s negligence has not stabilized and an intervening cause occurs, defendant is negligent.
       1. *Marshall v. Nugent:* Harriman saw a truck coming towards him, partly in the lane and went off the road. Driver stopped to help pull the car back on the road; effort partly blocked road against so plaintiff walked towards top of hill to flag approaching motorists. Nugent drove over hill, saw truck blocking road and in attempting to avoid it, skid into plaintiff. Plaintiff sued Nugent and truck driver. Jury found against truck driver, who appeals urging that he was not a proximate cause.
          1. Risk created by defendant’s conduct was still active and reverberating in this situation.
    3. Medical Malpractice Exception: Courts generally say that when intervening negligence is medical malpractice, this does not break the causal chain.
15. Duty v. Proximate Cause Analysis:
    1. Courts should use the duty analysis when they deny recovery for harm within the circle of foreseeability.
    2. Courts should use the proximate cause analysis in cases involving unforeseeable harm.

**Affirmative Defenses:**

1. Duty v. Proximate Cause Analysis: Contributory Negligence:
   1. Traditional rule under *Butterfield v. Forrester*: If plaintiff was negligent, acted as a complete bar for damages; contributory negligence was a complete all or nothing defense
      1. Rationale: unfair to hold defendant liable when plaintiff is also at fault.
      2. Criticism: Even if plaintiff is at fault, that doesn’t mean they should be responsible for 100% of the loss incurred. Defendant also acted negligently and is also partly at fault. Counters deterrence goal.
      3. A few jurisdictions still follow the traditional common law rule.
   2. Comparative Fault Scheme: In 1960s statutes passed to overrule common law approach; compare relative fault of plaintiff and defendant for purposes of determining what defendant’s liability should be.
      1. Pure Comparative Fault: Damages are simply allocated on the plaintiff and defendant’s relative fault percentage. Ex. New York Statute
      2. Modified Comparative Fault: Damages are allocated on plaintiff and defendant’s faults only if the plaintiff’s fault falls below the threshold set by the statute. If the plaintiff’s fault falls above the threshold, the traditional rule applies. Ex. Wisconsin Statute, Texas Statute (50% threshold)
      3. How at fault defendants and plaintiffs are is a jury question and based on jurisdictions.
   3. Factors which may influence the degree of fault assigned to each party: (1) whether the conduct resulted from inadvertence or involved an awareness of danger, (2) how great a risk the conduct created (3) the significance of what the actors sought by the conduct (4) the capacities of the actors, whether superior or inferior and (5) any extenuating circumstances which might require the actors to proceed in haste without proper forethought
      1. *Crownover v. City of Shreveport:* Police officer drove his police care into intersection against red light but once there, activated his overhead lights and siren. Plaintiff, entering intersection from cross street on green light, ran into police car and suffered injuries. Jury found 100% of the fault was attributable to police officer.
   4. Factors in the Restatement (Third) of Torts, Apportionment of Liability §8
      1. The nature of the person’s risk creating conduct, including awareness or indifference with respect to risks created by conduct and any intent with respect to the harm created by the conduct; and
      2. The strength of the casual connection between the person’s risk-creating conduct and harm
   5. Factors are irrelevant even to apportionment if there is no causal connection between the referenced conduct and the plaintiff’s injuries.
      1. Mental-state factors in section may be considered for apportioning responsibility even if they are not themselves causally connected to plaintiff’s injury, as long as the risk-creating conduct to which they refer is causally connected to injury.
2. Divisible Harm:
   1. If there’s a divisible injury and you can say what harm is caused by plaintiff’s negligence and what harm is caused by defendant’s negligence, can portion harm and liability.
   2. When there’s indivisible harm, can move into comparative fault scheme.
3. Mitigation of Damages/Avoidable Consequences Rule:
   1. Plaintiff has obligation to protect themselves, and part of that involves minimizing risk to self. If plaintiff fails to do so, plaintiff alone will be responsible.
      1. Ex: defendant negligently injures plaintiff and reasonable and prudent plaintiff would go to hospital and seek treatment, but plaintiff failed to do so and as a result of delay, their injuries get worse. Plaintiff is responsible for aggravation of injuries, but defendant is still liable for portion of original harm.
   2. Most jurisdictions have done away with this rule and moved to contributory negligence and comparative fault scheme.
      1. Reason: contributory negligence takes into account mitigation of damages rule.
      2. Texas does not follow this rule.
4. Reckless/Intentional Harm By Defendants:
   1. Plaintiffs were able to escape traditional contributory negligence rule when defendants acted in reckless or intentional manner.
   2. Even if plaintiff acted negligently, their negligence was not a bar that prevented them from recovering. Defendant is held 100% liable for harm.
   3. Some comparative fault states provide that plaintiff’s contributory negligence will serve to reduce damages even if defendant acts in reckless manner.
   4. Even in states where plaintiff’s negligence will be taken into account, in many states or most states, the jury can take into account how bad the state of mind was of the plaintiff and defendant.
5. Taking into Account the Prima Facie Case:
   1. Want to see if prima facie case has even been established for plaintiff and for defendant.
   2. Two approaches:
      1. Can view plaintiff’s negligence as superseding cause if negligence happened after defendant’s suicide.
      2. When looking at reasonableness of defendant’s conduct, defendant might be reasonable in assuming that plaintiff would take care and avoid hazard created by defendant’s conduct.
   3. May evaluate plaintiff’s negligence in breach of duty or proximate cause elements.
6. **Comparative Fault—Some Wrinkles:**
   1. **Circumstances where we don’t consider P’s negligence:**
      1. **D has a duty to protect P from P’s own negligence (McNamara)**
      2. **D has a duty to protect P from P’s past negligence**
      3. **For policy reasons, P has no duty to protect self (Christensen, LeRoy Fibre)**
      4. **[P as Rescuer]**
      5. **[D has last clear chance to avoid harm]**
      6. ***D’s Reckless or Intentional Misconduct***
   2. **Circumstances where P’s negligence is to bar liability**
      1. **P committing illegal activity (Barker)**
      2. **[Failure to Mitigate Damages]**
7. Comparative Fault—Wrinkles Explained:
   1. Mental-state factors in section may be considered for apportioning responsibility even if they are not themselves causally connected to plaintiff’s injury, as long as the risk-creating conduct to which they refer is causally connected to injury.
   2. All or Nothing Judgments After Comparative Fault:
      1. Comparison of plaintiff and defendant fault is only at issue when both parties are negligent.
         1. If P not negligent, no recovery.
         2. If D not negligent or no actual/proximate cause, no recovery.
      2. When plaintiff’s fault is a superseding cause, no recovery for P.
      3. When the plaintiff and the defendant cause separate injuries, no comparative fault.
      4. Avoidable consequences or mitigation of damages rule traditionally required the plaintiff to minimize her damages by reasonable efforts and expense
   3. D has duty to protect P from P’s own negligence:
      1. *McNamara v. Honeyman:* Decenent who was mentally ill hanged herself while confined in state hospital and died from injuries sustained on that occasion. Judgment in favor of. There can be no comparative negligence where the defendant’s duty of care includes preventing the self-abusive or self-destructive acts that caused the injury.
         1. Rule only arises when we say defendant has a duty to protect plaintiff from plaintiff’s contributory negligence; usually arises out of a special relationship between plaintiff and defendant.
   4. D has duty to protect P from P’s past negligence (usually physicians and patients):
      1. Don’t consider plaintiff’s prior negligence with respect to any additional or aggravation of injuries that occurred as a result of physician’s negligent treatment.
         1. Public policy argument: want physicians to use utmost care when treating patient who caused their own harm; D is in better position to provide care
         2. Quasi-contractual background; when physician agrees to treat patient, enter into contract where physician is liable for plaintiff’s care.
      2. This goes against the rule in cases where defendant causes harm: if defendant causes harm and plaintiff has to go seek medical care, defendant would be liable for initial injury and any injuries caused by bad medical treatment.
      3. Risks are not reciprocal or mutual; plaintiff’s disability or vulnerability might be especially important if (1) defendant knows of plaintiff’s disability that prevents or inhibits plaintiff’s care for himself and (2) plaintiff’s risky conduct endangers himself but not others.
   5. Policy reasons P has no duty to protect self:
      1. *Christensen v. Royal School District No. 160:* Leslie and parents brought suit against Diaz, Royal School District, and Principal Andersen. Claimed that Diaz sexually abused Leslie. District and its principal, Andersen, were negligent in hiring and supervising Diaz. In responsive pleading, District and Andersen asserted affirmative defense that Leslie’s voluntary participation in sexual relationship with Diaz constituted contributory fault. Defense of contributory negligence should not be available and is in accord with established Washington rule that school has a special relationship with students in its custody and a duty to protect them from reasonably anticipated dangers.
         1. Rule: As a matter of public policy, when defendant is entrusted with care of vulnerable child, we want to make sure that they exercise heightened care.
         2. Restatement provides that in light of principle or policy, plaintiffs might sometimes have no duty to act reasonably in self protection. If plaintiff has no duty to protect herself by use of reasonable care, she cannot be charged with contributory negligence in failing to do so.
      2. *LeRoy Fibre, Co. v. Chicago & St. Paul Railway:* Plaintiff stacked flax on land for use in manufacturing business. Alleged that railroad negligently emitted sparks and coals that set fire to and destroyed flax. Court held that contributory negligence defense presented no question for the jury. Tangibility of property in its uses, and that the uses by one owner of his property may be limited by the wrongful use of another owner of his is a contradiction.
         1. Plaintiff may be entitled to use property even if in doing so she is in danger of harm by the defendant’s negligence.
   6. The Rescue Doctrine:
      1. Rescue Doctrine is a rule of law holding that 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.
      2. Under comparative fault, some courts leave the allocation of fault between the defendant and the rescuer plaintiff to the jury.
      3. Not followed by most jurisdictions. Rescuer cannot be considered contributorily negligent. However, if they acted recklessly, that would be taken into account. If they only acted negligently, they would still be allowed to recover from defendant.
         1. Reckless: aware of risk you were creating but don’t care; based on state of mind
   7. Last Clear Chance of Discovered Peril Rule:
      1. Last clear chance doctrine: if defendant discovered or should have discovered plaintiff’s peril and could have reasonably avoided it, plaintiff’s earlier negligence would neither bar nor reduce plaintiff’s recovery.
      2. Discovery peril doctrine: applied rules only if defendant actually did discover plaintiff’s peril.
      3. In states that have adopted comparative fault systems, last clear chance and discovered peril doctrines have been discarded, mostly on the grounds that they were attempts to aid the plaintiff in a harsh system and not needed once comparative fault rules apply.
   8. D’s Reckless or Intentional Misconduct:
      1. Contributory negligence was no defense to willful, wanton or reckless torts, defined as involving utter interference to or conscious disregard for safety of others.
   9. Plaintiff charged with contributory negligence was allowed a full recovery against a reckless or wanton defendant.
   10. P’s Illegal Activity:
       1. *Barker v. Kallash:* 15yo plaintiff was making a bomb from a pipe filled with powder from firecrackers sold by 9yo defendant. Exploded and was injured. Sued the 9yo and parents; court said no recovery. Line must be drawn between lawful activities regulated by statute and those activities that are prohibited. When plaintiff’s injury is a direct result of knowing and intentional participation in criminal act, cannot seek compensation for loss.
          1. Rule: based on public policy; courts should not aid one who engages in a substantial violation of law.
8. **Assumption of Risk—Summary:** 
   1. **Contractual or Express Assumption of Risk:**
      1. **Scenario: P consents to waiving D’s liability for consequences of D’s negligence (Boyle)**
      2. **Enforceability of waiver: governed by contract law (Trunkl)**
         1. **Compulsory assumption of risk**
         2. **Contract of adhesion**
         3. **Mistake/misinterpretation/fraud**
         4. **Void for being against public policy**
      3. **Consequence: D not liable if waiver enforceable and D’s actions within scope of action**
   2. **Implied Assumption of Risk:** 
      1. **Primary Assumption of Risk (Avila)**
         1. **Scenario: P consents to risks deemed inherent in activity**
         2. **Consequence: impacts scope of D’s legal duty**
            1. **No duty to minimize or eliminate inherent risks**
            2. **Duty only to not act recklessly or increase risks beyond inherent risk**
      2. **Secondary Assumption of Risks (Betts)**
         1. **Scenario: P voluntarily encounters risk created by D’s negligence**
         2. **Consequences: D still liable, but P’s recovery reduced if P contributorily negligent in voluntarily encountering risk.**
9. Contractual or Express Assumption of the Risk:
   1. This is the intersection between contracts and torts; often governed by many traditional contracts rules.
      1. P voluntarily encounters risk and expressly agrees to waive P’s rights.
   2. Rule: Valid contractual limitation on liability creates an absolute bar to plaintiff’s recovery and does not provide an occasion for the factfinder to assign a percentage of responsibility to any party or other person.
      1. *Boyle v. Revici:* Zyjewski was diagnosed as having cancer by several doctors that all recommended immediate surgery. However, she consulted Dr. Revici who purposed to treat cancer by medications. Expressly told her that medications were not approved by FDA and could offer no guarantees. Within a year, Zyjewski died. Court rules that jury should have found that Zyjewski expressly assumed the risk of treatment and is barred from recovery. In appropriate situations, parties to a transaction should be able to agree which of them should bear the risk of injury, even when injury is caused by party’s legally culpable conduct.
         1. Physician in this case is not liable because she assumed the risk of experimental treatment by implied agreement; plaintiff agrees to put herself in his care and is aware of and agrees to non-standard methods.
   3. Scenarios in which waivers of liability might not be recognized:
      1. Compulsory assumption of risk: circumstances are not voluntary as plaintiff does not have other options for care.
      2. Contracts of adhesion: contract prepared by one party and signed by party in a weaker position.
      3. Fraud, mistake, misrepresentation: don’t know the true nature of what you’re consenting to.
      4. Public policy: when institutions provide a public service that is necessary to the public (hospitals, utility companies, etc)
      5. Defendant’s behavior: when defendant has acted in grossly negligent manner, generally want to deter people from acting this way.
      6. *Trunkl v. Regents of University of California:* Brought this action for injuries received as a result of negligence of hospital operated by defendants. Plaintiff was admitted to hospital on the condition that he execute a release absolving defendants from any and all liability for negligent or wrongful acts or omissions of its employees. Court found for plaintiff. In this situation the releasing party does not really acquiesce voluntarily in the contractual shifting of the risk; plaintiff faces the prospect of a compulsory assumption of the risk of another’s negligence.
   4. Rule: Waiver is valid where there is not a necessary service, but a voluntary service.
      1. *Moore v. Hartley:* Woman signs a release form to participate in an ATV safety class, where she is injured by the negligent conduct of the defendant. Releases in recreational activities are usually upheld as long as they are clear and unambiguous.
         1. Defendant is still negligent because of the scope of the waiver: when language is ambiguous, courts tend to interpret it against the more powerful party of the drafter.
            1. If a reasonable person cannot eliminate a foreseeable risk, they’re not negligent, so plaintiff could not have succeeded on negligent claim on basis of inherent risk.
            2. In this case, the risk is unreasonable when a reasonable person would have done something to minimize the risk under Learned Hand Formula.
10. Implied assumption of risk:
    1. P does not voluntarily encounter known risk.
       1. Most courts recognize that just because a plaintiff voluntarily encounters a risk does not mean they’re consenting to the creation of risk.
    2. *Betts* Majority Rule: the defendants are held liable with a reduction of P’s contributory negligence for assuming the risk
    3. Secondary Assumption of Risk: Secondary assumption of risk arises when the defendant still owes a duty of care, but the plaintiff knowingly encounters the risk attendant on the defendant’s breach of that duty.
       1. *Betts v. Crawford:* Plaintiff worked for defendants as housekeeper for several hours a week. Occasionally had to pick up children’s items on the stairs. One day she was carrying bundled sheets to be laundered and tripped over items left on stairs, fell down stairs, and suffered serious injuries. Judgment for plaintiff. Trial court gave instruction that comparative fault applied. Assumed risk is now merged into the comparative negligence system.
          1. Defendants ask trial judge to give special jury instruction. Trial court in this case says that homeowners owe a duty of ordinary care and gave a comparative fault instruction. Defendant wanted risk shifted to plaintiff; actual instructions shifted only partial responsibility to plaintiff.
    4. Primary Assumption of Risk: Primary assumption of risk arises when, as a matter of law and policy, a defendant owes no duty to protect a plaintiff from particular harms.
       1. *Avila v. Citrus Community College:* When Avila came to bat in top of next inning, Citrus College pitcher hit him in the head with a pitch, cracking his batting helmet. Avila alleges the pitch was an intentional “beanball” thrown in retaliation. Avila felt dizzy and in pain, but was advised to finish running the bases. No one tended to his injuries and as a result, Avila suffered unspecified serious personal injuries. District demurred, claiming it owed not duty of care to Avila. Trial court sustained demurrer and dismissed action. Court of Appeal reversed.
          1. Court says that plaintiff assumed the inherent risk of the sport under primary assumption of risk. This precludes injuries arising from risks inherent in the sport. There is no duty to eliminate or decrease risks, only to not increase risks and for participants to not act recklessly.
       2. Notes from *Avila:*
          1. When primary assumption of risk exists, there is no liability to the plaintiff, because there is no negligence on the part of the defendant to begin with; the danger to the plaintiff is not one which defendant is required to extinguish or warn about; having no duty to begin with, there is no breach of duty to constitute negligence.
          2. Where the evidence indicates an existence or assumption of duty and its breach, that risk is not one ‘assumed’ by the plaintiff. What he then ‘assumes’ is not the risk of injury, but the use of reasonable care on the part of the defendant.
          3. Plaintiff can be said to have “consented” to encounter the risks posed by the activity. Plaintiff’s ‘consent’ is not constructive; it is actual consent implied from the act of electing to participate in the activity.
11. Statutes of Limitations:
    1. Traditional statute of limitations serves purposes:
       1. Bar stale claims, the presentation of which might be unfair or costly because evidence is lost or subtly altered with time
       2. Permit both personal and business planning and to avoid economic burden that would be involved if defendants and their insurance companies had to carry indefinitely a reserve for liability that might never be imposed
       3. Preserve limited resources of courts
    2. Traditional analysis requires action to be brought within statutory period after claim accrues. Consequence: P’s claim is kicked out of court if they file after statute of limitations expires.
    3. Traditional Rule: Claim starts to accrue on the day that they could have sued for their claim, regardless of whether or not plaintiff was aware of negligence. In this case, could have shown negligence as soon as surgery ended.
       1. *Crumpton v. Humana:* Crumpton underwent surgery and sustained injury to neck and legs when nurse attempted to lower her hospital bed. Suit was filed more than three years later. Crumpton argues that injury was not ascertainable until some time after accident occurred and that statue of limitations should have been tolled during time the parties were negotiating. The statute of limitations commences running from the date of injury or the date of the alleged malpractice.
       2. *Shearin v. Lloyd:* Defendant performed operation to remove plaintiff’s appendix. A year later, defendant admitted something was wrong and that x-rays showed a sponge had been left in the abdomen. Infections continued to cause knots to flare up and burst. Plaintiff commenced action for negligence more than three years later; statute of limitations was three years. Cause of action accrues so as to start the running of the statute of limitations as soon as the right to institute the action arises. Defendant’s failure to detect or discover his own negligence in this respect did not affect the basis of his liability therefor.
    4. Discovery Rule: delays the accrual of the claim until (1) all the elements of the tort are present and (2) the plaintiff discovers, or a reasonable person should discover, both the injury and the defendant’s role in causing it. Treats the cause of action as accruing when in fact the plaintiff could reasonably sue.
       1. Introduces a new question for the jury, who has to decide when the plaintiff knew about their injury or when reasonable person would have known.
       2. Rule also slightly undermines goal of not clogging up courts with stale claims that have disappearing evidence.
       3. Side note: a lot of times, if defendant misleads through fraud, the court will let the plaintiff’s case go forward. Similar to contracts law.
       4. In the case of multiple tortious acts of the defendant, court treats each act as a separate act of negligence.
    5. In rare cases, the court will toll the statute of limitations:
       1. Plaintiff is a minor; courts might toll the statute until adulthood; plaintiff shouldn’t be denied because their parents don’t sue.
       2. Plaintiff is of unsound mind that prevents plaintiff to sue; ex: nervous breakdown
       3. *McCollum v. D’Arcy:* Plaintiff now fifty sued parents alleging childhood sexual abuse. Alleged that she repressed memory of abuse until recent flashbacks triggered by attending a therapy workshop on child abuse. If these allegations are true, the statute of limitations will be tolled under the discovery rule, so the trial court properly rejected the defendant’s motion to dismiss. Defendants can still argue that plaintiff discovered or should have discovered facts earlier.
       4. *Doe v. Maskell:* Plaintiffs filed suit alleging that during their high school years, they were physical, sexually, and psychologically abused by school chaplain. Plaintiffs claimed they ceased to recall abuse due to repression. Claims are barred by Maryland’s three-year statute of limitations. Mental process of repression of memories of past sexual abuse does not activate discovery rule.
          1. A few states reject discovery rule in childhood sexual abuse cases. Others, by statute, have treated repressed memory as if abuse had never been discovered and apply the discovery rule.
    6. Statute of Repose: limits the time in which an action may be commenced after negligence has occurred; starts accrual from commencement of potentially negligent action and ends accrual after a fixed amount of years in which, if negligence occurs, cannot sue.
       1. Limits a plaintiff’s ability to bring a lawsuit even if time did not accrue.
       2. Ex: construction company is negligent in how they build an office building; the statute of repose limits their liability for 15 years after the construction; if a plaintiff brings suit against the company for damage that occurs after 15 years, barred from suing.
12. Preemption and Compliance with Statute:
    1. Rule: Compliance with a regulation does not constitute due care per se. It is competent evidence of due care but not conclusive evidence of due care. If defendants knew or should have known of some risk that would be prevented by reasonable measures not required by regulation they were negligent if they did not take such measures.
       1. Similar to industry customs in establishing breach of duty.
    2. *Miller v. Warren:* Plaintiffs awoke in motel room to find it filled with smoke. Attempted to get out but door was too hot. Suffered serious burns. Sued motel asserting that motel should have had smoke alarms in their rooms. Motel contended that fire code did not require such alarms. Trial judge instructed jury that compliance with code meets standard of care unless other circumstances appear which would require additional care in order to comply with requirements to use ordinary care in attendant circumstances. Reversed and remanded in favor of plaintiff.
       1. Courts traditionally agree that compliance with statute or regulation is not a defense and is only some evidence of reasonable care and not conclusive.

**Damages:**

1. Types of Damages:
   1. Nominal Damages: A trifling sum awarded when a legal injury is suffered but there is no substantial loss or injury to be compensated.
      1. Ex: intentional tort was committed but no harm occurred, but since there was an intentional tort, plaintiff is entitled to some damages for violation of personal autonomy
   2. Compensatory Damages: damages sufficient in amount to indemnify the injured person for the loss suffered; plaintiff must prove losses and dollar amounts attached
   3. Punitive Damages: Damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; damages assessed by way of penalizing the wrongdoer or making an example to others.
   4. Note: Juries have a lot of discretion for nominal and punitive damages; compensatory damages require proof of loss and specific amounts.
2. Compensatory Damages via *Martin v. United States:*
   1. Plaintiffs were riding a motorbike and struck a sagging power line negligently maintained by government. Each suffered tragically severe and permanent injuries from burns and underwent numerous painful medical procedures and public humiliation from disfigurement.
   2. When considering damages, must consider:
      1. Probable evidence that jury will hear jurors’ probable reaction to that evidence
      2. Legal rules that guide, counsel, and constrain jurors
   3. Bodily Injury:
      1. Past and future medical expenses
         1. Future medical expenses based on expert testimony and actual hospital expenses
      2. Pain and suffering
         1. Medical cost as well as psychological suffering
         2. No fixed method to measure; based on what fact-finder senses is fair
         3. Juries encouraged to think about this on a per diem basis
         4. Can be quite variable in different cases
         5. Alternative approach: development of schedule that says that each day you have pain and suffering, you’re entitled to pre-determined and standard “X” dollars for specific pain; could take it away from jury; this could take away a sense of individualized justice.
      3. Earning capacity or Lost wages
         1. If lost wages happen in the future, calculation based on speculation
         2. If able to work some sort of job with reduced salary, partial salary is reduced from full salary due to lost wages
      4. The Special Case of Medical Monitoring Damages:
         1. Plaintiff might claim an increased present risk of cancer, a kind of lost chance claim, or emotional harm resulting from fear of future disease. Courts typically deny these claims.
         2. If plaintiffs were suffering from actual physical harm, defendant would be liable for that physical harm plus medical monitoring damages.
         3. Some courts have gone further by allowing medical monitoring damages even when no physical harm has been done and no emotional harm claim is allowable.
      5. Other specifically identifiable harms associated with tort
   4. Property Damage:
      1. If permanently dispossessed of property: FMV at time of loss (FMV = full/fair market value)
      2. If temporarily disposed: rental value during time of dispossession
      3. If property damages: Either
         1. Difference in FMV pre and post damage, or
         2. Cost of repair
            1. Usually awarded only if it’s less than difference in FMV pre and post damage
      4. Injunction is appropriate for repeated trespass.
   5. Adjustments:
      1. Interest for past expenses/losses
         1. Past medical expenses, etc.
         2. Reason: if you had been able to take the money that had been spent and put it in savings account or investment, you’d have more money today.
      2. Present value of future expenses/losses
         1. Take into account inflation
         2. Take into account the fact that future wages received today can be invested; discount amount of current average investment rate return
   6. Proving and Computing Basic Damages:
      1. “Remedies” includes damages and remedies of injunction and restitution.
      2. Supreme Court has so far said that you must prove actual damages in order to recover anything more than nominal damages.
3. Punitive Damages (Exemplary Damages)
   1. Usually awarded when defendant has acted with malice and tremendous indifference to risk that conduct creates for other people
   2. Loosely speaking, two types of cases:
      1. Tort for profit
         1. Manufacturer or business might deliberately operate at a more risky manner because they think they’ll make more money than they expect to lose in damage awards
         2. *Owens-Corning*: defendant knowingly concealed and misrepresented
      2. Tort for pleasure
         1. Defendant intentionally injures plaintiff
         2. Ex: terrorists would be an extreme example
   3. Purpose:
      1. Deterrence function:
         1. Normally when business is doing budgeting, take into account expected costs including expected liability costs.
         2. Reality: business are not always sued whenever they act negligently and when they are, compensatory damages don’t cost that much. This can result in underdeterrence.
         3. Meant to impose higher liability so therefore makes negligence conduct more likely to be unprofitable; less likely to act this way.
      2. Punishes bad moral conduct on behalf of the “bully” defendant.
      3. Finance litigation:
         1. Most plaintiffs can’t afford to pay attorneys in hourly rate; attorneys take plaintiffs case on contingency fee basis
         2. Because punitive damages raises amount of damage award, has an effect in increasing fees; helps to finance litigation.
   4. Calculation (By Jury):
      1. Some factors that we take into account in tort for profit cases under common law:
         1. Courts tend not to emphasize defendants’ profits. Instead, courts tend to emphasize ratios. Specifically look at disparity between harm suffered and the punitive damages with idea that punitive damages should be limited to some multiple of compensatory damages.
            1. No set rule of what the ratio should be.
            2. If for some reason, compensatory damages are small, punitive damages are small; this could have a limited deterrence effect, lots of criticism that it’s not enough
            3. More sophisticated form of rule: compares punitive awards to potential actual harm that could have resulted from defendant’s conduct; way of establishing seriousness of D’s misconduct.
         2. Degree of reprehensibility of defendant’s conduct; more outrageous, higher punitive damages
         3. Defendant’s wealth: if you’re wealthy, higher punitive damages; courts want this to have a deterrent effect
            1. Criticism: risks prejudice to wealthy defendant; now common to bifurcate trial so that punitive damages evidence is excluded until jury has found fault.
   5. States now are moving to limit/cap punitive damages:
      1. Rationale:
         1. If we lower damage awards, this would lower premiums for malpractice insurance.
         2. Limits on damages will make doing business less costly; cost of products reflects anticipated liability cost or liability insurance; if you lower likely damage amounts, that can raise the business’ profits (concern about chilling econ activity) and can translate into lower prices for products and services
         3. Address runaway jury awards or fact that frivolous lawsuits abound
      2. Reality: Punitive damages are awarded in only 2-5% of all cases in which plaintiffs prevail.
      3. Two types of limitations:
         1. Attempt to enhance methods for measuring/proving awards
            1. Increase P’s burden of proof.
            2. Require P to prove some specific malice or oppressive intent.
         2. Limit the number of cases in which punitive awards may be awarded.
            1. Single Liability Statutes immunize product liability defendant from all punitive liability for a given product once the D has been vaccinated by a single punitive award.
            2. Some statutes have enacted ratio caps:

Punitive damages can be multiples of actual damages (ex: 3x)

Sliding scale ratio rule: varies according to whether compensatory damages awarded were low or high

Flat cap: limits punitive damages to certain amount

* + - * 1. Some statutes redirect a portion of punitive award so that it goes to state or some beneficiary.
  1. *Owens-Corning Fiberglass Corp. v. Ballard:* P developed mesothelioma due to exposure to asbestos in D’s product. Evidence showed D concealed what it knew about dangers of asbestos and intentionally contaminated products. Jury awarded compensatory damages of $1.8mil and punitive damages of $31mil. Tort-For-Profit Punitive Damages: D has motive to continue tortious activity unless total expected damages liability will be greater than profit. Punitive damages are understood to be warranted by conduct and state of mind, not by name of legal theory used and can be made in strict liability claims.

1. Capping and Limiting Damages:
   1. Two waves of statutes:
      1. Medical malpractice insurance “crisis” of the 1970s
      2. Second malpractice “crisis” of 1980s; product of long and persistent efforts by group of defendants and insurers who felt threatened by tort law.
   2. Concern: Certain kinds of cases produce noneconomic (but real) harms, like sexual abuse, may be so harmful that victim cannot work properly. Cap on pain and suffering damages might discriminate.
   3. Caps on non-economic damages:
      1. Sometimes limited to specific type of action (often medical malpractice)
      2. Sometimes cap applies to each defendant
      3. Sometimes applies to individual plaintiff (this is the approach in Texas)
      4. Less commonly, might see a cap for any single event; usually see this when a defendant is a state actor and protected by municipality
   4. Caps on punitive damages:
      1. Portion direct percentage away from plaintiff to state or third party; plaintiff and attorney
   5. Caps in Texas:
      1. In Texas: $250,000 cap on malpractice claims on per claimant basis, regardless of number of defendant. When plaintiff is suing single healthcare institution, cap is $250,000. When suing 2-3 healthcare institutions, total cap is $500,000.
      2. In Texas: if plaintiff dies, total damages is capped at $500,000 increased annually by inflation for all damages.
      3. Caps on punitive damages based on a formula of calculation; doesn’t apply for tort cases on murder, sexual assault, aggravated assault.
      4. Cap on liability for recreational use of agricultural land (ie paintballing or hunting)
   6. Result: makes lawsuits less attractive
      1. Caps also reduce fees that lawyers collect based on contingency basis.
      2. Lawyers are less likely to take the case, because it’s less attractive to lawyers since they make less money.
      3. Have meritorious claims that are not brought because economics don’t justify lawsuit.
2. Other Rules:
   1. Periodic payment of damages: lump sum not awarded; if present value of future damages is greater than $100,000, defendant can request to carry out payment to those damages (might pay future medical costs as accrued rather than lump sum).
      1. Less attractive to plaintiff’s attorney, because plaintiffs have to pay attorneys up front.
      2. Less certainty about future damage awards in case of D’s bankruptcy, death, etc.
      3. Don’t have to build in inflation value because costs are being paid as is
   2. Sometimes states pass a law that raises bar for proving damages for awarding punitive damages
      1. In Texas, punitive damages can’t be awarded unless plaintiff can show clear and convincing (rather than more likely than not) evidence that defendant had bad state of mind.
      2. Also in Texas requires unanimous jury vote awarding punitive damages
      3. Less likely that jury is going to award punitive damages to plaintiff in malpractice case.
      4. Case is less attractive to plaintiff’s attorney
   3. What kind of evidence the plaintiffs must offer to prove pain and suffering:
      1. Might be enough for plaintiff to testify about pain, but in some states, plaintiff must present some other objective evidence establishing pain and that defendants negligence caused that injury
      2. Makes lawsuits less attractive because bar is raised for what needs to be proved, but also raises costs, because have to bring in medical expert witnesses
   4. State laws that abolish collateral source rule:
      1. Under common law: collateral source rule—often plaintiff will have insurance that covers their loss, but under this rule we don’t take into account insurance proceeds that plaintiff might collect or no lost wages, etc.
      2. Underlying public policy: negligent defendant should not escape responsibility for wrongdoing because plaintiff happened to secure collateral benefits
      3. Concern: this results in windfall for plaintiff, because they get double-compensated.
      4. Subrogation: insurance company that paid for medical cost should you prevail from lawsuit under contract that requires you to turn over to insurance company money you got for medical expenses.
3. Mitigation of Damages/ Avoidable Consequences:
   1. *Keans v. Bottiarelli:* Dentist negligently performs tooth extraction. Plaintiff did not follow up on defendant’s instructions for post-op care. Trial court thought that damages might be “mitigated” to extent of hospital damages, which might have been avoided otherwise.
   2. Rule: requires plaintiff to exercise reasonable care to minimize damages and denies recovery to extent that damages should have been but were not reasonably minimized or avoided
      1. Comparative fault rules reduce damages in proportion to plaintiff’s fault.
      2. Avoidable consequences reduce damages for discrete identifiable items of loss caused by plaintiff’s fault.
      3. Summary: comparative negligence rules are fault apportionment rules; avoidable consequences rules are “casual” apportionment rules
   3. Application will depend on jurisdiction:
      1. Some jurisdictions have done away with this rule, because comparative fault takes this rule into account through contributory negligence.
      2. In jurisdictions that do take it into account, look at harm/losses attributable to avoidable harms.
   4. Courts thought that any fault that would count as avoidable consequences should not count as comparative fault because avoidable consequences rules have never operated as defense to plaintiff’s cause of action but only to eliminate identifiable items of damage.
      1. Important in application for states that have modified comparative fault or bars for comparative negligence.
   5. One of the advantages of fault apportionment is that fault can be estimated even when evidence cannot separate out items of damages.
4. The Collateral Source Rule and Its Cousins:
   1. Collateral Source Rule: in figuring the defendant’s liability, collateral benefits to plaintiff must be ignored.
   2. Result: despite insurance, donations, etc, defendant pays full damages including medical expenses and lost earnings.
   3. Windfall Effect: plaintiff may collect twice for medical expenses and lost wages.
   4. Subrogation Protection Effect: at times, collateral source rule preserves subrogation right of insurer who paid plaintiff to recover back its loss from tortfeasor
   5. Collateral source rule does not apply to payments made by defendant himself or by a source identified with defendant.
   6. Criticisms:
      1. Protects an insurer’s subrogation recovery, but also sets up system where on insurer recovers from another, and this shift entails costs
      2. If plaintiff recovers twice under windfall effect and total cost is excessive, excess is charged against insurers who must reflect it sooner or later in premiums
      3. Tort reform movement has sought to abolish or alter collateral source rule, especially in medical malpractice claims or against public entities

**Landowners’ Common Law Duty of Care**

1. **Landowners—Common Law Duty of Care:** 
   1. **Invitees:** 
      1. **Who are they: Invited by landowner for economic purpose (business invitee) or premises open to general public**
      2. **Standard of care: Duty of ordinary care**
         1. **Entails duty to warn or make safe any known, concealed, dangerous condition**
   2. **Trespasser:**
      1. **Who are they: Not invited onto property and no legal right to be there**
      2. **Standard of care:** 
         1. **General duty refrain from willful, wanton or reckless conduct**
         2. **Duty of ordinary care once discover (D had reason to know of) trespasser’s presence in peril**
   3. **Licensee:**
      1. **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.**
      2. **Standard of care: Same as duty of care owed trespasser**
2. Transfer of Status:
   1. Invitees can become trespassers:
      1. When they do something that exceeds the scope of the invitation
      2. Does not depend on whether you negligently or involuntarily exceeded scope of invitation
   2. Licensees can become trespassers:
      1. End up somewhere where you do not give permission
   3. Invitees can become licensees:
      1. End up somewhere that is not normally open to public or within scope of invite
3. Examples of Landowners’ Common Law Duty of Care for Licensees and Trespassers:
   1. Generally: refrain from willful or wanton conduct likely to injure.
   2. Examples: use reasonable force to expel trespassers, no duty to warn people, no duty to minimize dangers, no duty to prevent dangers
   3. Rationale: In general, we respect property owners’ rights to have autonomy of property.
   4. Exception: when a property owner discovers or should have reason to discover trespasser or licensee and that individual is in danger or about to encounter danger, standard switches to ordinary duty of care.
      1. This is a subjective standard.
   5. Minority Exception: some courts will also hold landowners liable to ordinary care if knowledge of frequent trespassers is had.
   6. *Gladon v. Greater Cleveland Regional Transit Authority:* Plaintiff remembered being on tracks but could not recall if he had run there or was pushed by attackers. While on tracks, rapid train approached station. Operator pulled control handle back and hit emergency brake. Train struck Gladon causing him serious and permanent injuries. Court rules that jury instructions in trial court was erroneous; duty of ordinary care did not arise until plaintiff was discovered.
4. Different Treatments in Different Jurisdictions (Minority Rules):
   1. Texas follows the general framework.
   2. Some states do not treat licensees and invitees differently.
   3. Some states have an ordinary standard of care for everyone.
   4. Some states have lowered standard of care for invitees, specifically those who enter land for recreational purpose (incl. Texas).
      1. In some states, recreational activities include biking, swimming, walking dog, etc.
      2. In some states, recreational use is only for unpaid pursuits; payment for recreation might not qualify for ordinary standard of care.
5. Attractive Nuisance Doctrine (Standard of Care for Child Trespassers):
   1. A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon land if:
      1. 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
      2. 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
      3. 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
      4. 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
      5. The possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.
   2. *Bennet v. Stanley:* Stanleys’ property included swimming pool that went unused for three years; pool became pond-like and contained tadpoles and frogs. Pool had no ladder and no fence enclosing pool. 5yo Chance Bennet was playing at pool on afternoon, having entered through gap in fencing, of tragedy sand somehow fell in. Mother drowned trying to save him. Court says attractive nuisance doctrine applies.
6. Open and Obvious Danger Test:
   1. Test: “Whether dangerous condition was, objectively speaking, so obvious that defendant would be reasonable in concluding that an ordinarily intelligent plaintiff would perceive and avoid it and, therefore, that any further warning would be superfluous.”
      1. Court looks to see if (a) the danger is open and obvious and (b) it is foreseeable that plaintiff might avoid this open and obvious risk. If it is foreseeable that plaintiff would encounter it, there might still be a duty of ordinary care.
   2. *O’Sullivan v. Shaw:* Plaintiff suffered injuries to neck and back when he dived into shallow end of pool. Plaintiff knew that he could be injured and his purpose in trying to clear shallow end was to avoid the sort of accident that occurred. Injury caused immediate paralysis in his lower extremities and required a two-day stay in the hospital; the paralysis was not permanent.

**Immunities and Nonfeasance:**

1. Immunity:
   1. Sovereign Immunity (Governments):
      1. Historical Rationale: under English common law, King could do no wrong, so you could not sue. Carried over to American jurisprudence. Consequence: cannot sue the government in tort.
      2. 1929: New York became first state to waive sovereign immunity; by 1960s, 1970s every state abolished or limited sovereign immunity. In 1946, federal government passed law waived sovereign immunity from tort suits.
      3. Doctrine is not completely gone; retain it in some narrow instances (ex: when government employee commits battery or assault).
   2. Immunity for Charities:
      1. Rationale: should preserve charities’ assets for services, not payout for tort claims.
      2. Most states have abolished tort immunities for charities.
      3. Few states have retained it for all charities or for certain charitable activities.
   3. Spousal Immunity:
      1. Rationale: necessary for state to encourage marital harmony; want to prevent insurance fraud
      2. Some states have abolished this (incl. Texas).
      3. Some states have retained with narrow exceptions
   4. Parent-Child Immunity:
      1. Rationale: necessary for state to protect family harmony; only applied between parent and unmarried minor child.
      2. Majority of states have abolished parent-child immunity (incl. Texas—can’t sue when what’s at issue is parental activity—supervision, providing necessities, etc).
      3. Some states have retained parent-child immunity.
2. Nonfeasance: D does not owe P a legal duty:
   1. General Rule: Defendant owes no duty to plaintiff to take affirmative steps to protect plaintiff from harm.
   2. Exception: a child or someone of limited mental capacity might be the exception to the rule.
   3. *Yania v. Bigan:* Bigan was engaged in coal strip-mining; on his property were large cuts or trenches createdS by Bigan. Yania, while helping Bigan in starting a drainage pump, stood at top of cut’s side walls. He jumped from side wall after being taunted by Bigan into water and drowned.
      1. Court says taunting shouldn’t influence you to the point of doing something stupid; decedent’s actions break the causal chain.
      2. Courts are moving away from intervening actors as breaking the causal chain.
3. Exceptions:
   1. **Nonfeasance No Duty Rule—Exceptions:**
      1. **Duty of Reasonable Care for P’s safety when:**
         1. **Conduct creates risk**
         2. **Prior conduct harms P**
         3. **Statute/ordinance requires D affirmatively protect P**
         4. **Voluntarily undertook to care for P (*Wakulich*)**
         5. **Special/formal relationship**
         6. **“Relationship based on fairness principles” (*Podias)***
         7. **Action as undertaking + reliance (*Florence, Kircher*)**
      2. **Duty not to unreasonably interfere w/ others attempts to help**
         1. **Most courts treat this separately**
4. General Rule: One who voluntarily undertakes to render services is liable for bodily harm caused by failure to perform such services with due care or with such competence and skill as he possesses.
   1. (Minority) Restatement Rule: An actor who undertakes to render services to another, when the actor knows or should know that those services will reduce the risk of harm to the other, has a duty to use reasonable care in rendering those services if the failure to exercise care would increase the risk of harm beyond which would have existed without undertaking; or if other person relies on the actor’s using reasonable care in the undertaking.
   2. *Wakulich v. Mraz:* Michael and Brian Mraz provided quart of Goldschlager alcohol and offered Elizabeth money as prize if she could drink entire bottle without losing consciousness or vomiting. After drinking, Elizabeth lost consciousness. Mrazes placed her in downstairs family room. Checked on her, removed vomit-saturated blouse and placed pillow under her head to prevent aspiration. Did not seek medical attention and prevented others from calling 911. Later, decedent was taken to hospital where she was pronounced dead. Court ruled the family voluntarily undertook to render services and are liable for bodily harm caused.
      1. Social Host Rule: no liability to others for providing alcohol in the home.
5. Special Relationships Recognized by Third Restatement:
   1. Carrier-Passenger
   2. Innkeeper-Guest
   3. Landowner-Lawful entrant
   4. Employer-Employee
   5. School-Student
   6. Landlord-Tenant
   7. Custodian-Person in custody
6. Exception Rule: judicial balancing of the mix of factors peculiar to each case balanced with burden of convenience and involvement.
   1. *Podias v. Mairs:* Mairs, while driving drunk, lost control of the car, struck motorcycle driven by Antonios Podias, and went over guardrail. Passengers in car saw Podias lying in roadway and because they saw no movement and heard no sound, told Mairs and Newell that he thought Mairs had killed cyclist. No one called for assistance, though several calls were made after the accident. Meanwhile, a motor vehicle operated by Patricia Uribe ran over Podias, who died as result of injuries sustained in these accidents. Court says due to balancing of all factors,
      1. This is like Learned Hand Formula—if the burden of helping the plaintiff is low and would help reduce significantly the harm or risk, you should act.
7. Public Duty Doctrine: No liability for failure to carry out a duty owed to the general public. Applies when government fails to act.
   1. Rationale: not appropriate for courts to second-guess policy judgments made by other branches of government
   2. Exception: If you assume a duty to a special class of persons and have gone forward with performance of that duty, had an obligation to continue performance if it would induce expectations in the reasonable person that this action would continue.
      1. *Florence v. Goldberg:* Mother took child to school and noticed city had guard posted at corner to help children cross, so she ceased to take the child to school. Regular crossing guard called in sick; no substitute was sent and the principal was not notified. Child was struck at crossing and suffered severe brain damage. Judgment for plaintiff.
   3. Addition to Exception Rule: direct contact must occur between plaintiff and government official. Some jurisdictions do not add this requirement.
      1. *Kircher v. City of Jamestown:* Plaintiff was entering her car when a man accoster her and forced her into a car. A couple witnessed the incident and alerted police, who promised to “call in,” but failed to do so. Plaintiff was repeatedly raped and beaten and suffered severe injuries. Plaintiff cannot recover.

**Duty to Protect from Third Persons (Exception to Nonfeasance):**

1. **Duty to Protect from Third Parties:**
   1. **Scenario 1: Based on relationship between P and D (*Iseberg, Posecai*)**
      1. **Special relationship**
      2. **Risk arises w/in scope of relationship**
      3. **Foreseeable risk**
         1. **Risk must be imminent when special relationship (employer-employee)**
   2. **Scenario 2: Based on relationship between D and third party**
      1. **Special relationship + ability to control + foreseeable risk to P**
         1. **However, courts typically characterize duty to protect as duty to control third party, not duty to warn P.**
   3. **Remember: \*Duty to protect if affirmative act creates risk (*Brigance*) or falls under one of the other exceptions to no duty rule.**
2. In General:
   1. Threat must arise out of a special relationship.
      1. Limit to special relationship because don’t want to hold people accountable for unforeseen circumstances (foreseeability)
   2. There are four special relationships recognized by the court:
      1. Common carrier-passenger
      2. Innkeeper-guest
      3. Business invitor-invitee
      4. Voluntary custodian-protectee
   3. This is an exception to the no-duty rule (normative judgment that D responsible because created situation or responsibility arises out of special relationship)
3. Scenario 1:
   1. *Iseberg:* P sues D for negligence in failing to warn business partner was going to kill him. Court says this does not arise out of one of four recognized forms of special relationship.
   2. *Posecai:* P robbed of $19k in jewels in Wal Mart parking lot. Special relationship: landowner-invitee. Court says no foreseeability so no duty.
      1. Foreseeability assessed based on four standards:
         1. Specific Harm Rule: no duty unless aware of specific, imminent harm
            1. Policy: Too restrictive
         2. Prior Similar Incidents Test: evidence of previous crimes on or near premises
            1. Policy: Arbitrary results because different standards application
         3. Totality of the Circumstances Test: takes add’l factors into account, including nature, condition, location of land and other factual circumstances
            1. Policy: Too broad a standard, somewhat unfair to business owner
         4. Balancing Test (CA): balance foreseeability of harm against burden of imposing duty; look for prior similar incidents of crime on property
            1. Policy: Different analysis because shifts Learned Hand approach to whether duty is actually established or not.
   3. *Marquay:* Three students brought separate suits against teachers for sexual abuse/harassment and administration knew. Court establishes special relationship.
   4. *Brigance:* D served alcohol to minors, including P, who was clearly intoxicated. P later crashed into car injuring third party. Court establishes duty, because generally when you have an affirmative act in which harm is foreseeable, you have an ordinary duty of care.
4. Duties of Landlords to Protect Tenants:
   1. Generally, no duty owed to tenants. Courts sometimes provide a duty. Courts sometimes do not.
      1. Rationale: business/contracts issue; if tenant wants higher level of security, can bargain or go elsewhere.
   2. Exceptions:
      1. Conditions deteriorated from previously-secure conditions.
      2. Landlord introduces harm
      3. Other conditions listed in nonfeaseance rules
5. Duties to Protect Plaintiff from Dangerous Third Parties:
   1. Generally, courts look at whether or not a relationship establishes a duty to control. There is no duty to warn.
   2. *Dudley:* Felon at halfway house broke into nearby apartment and raped/killed woman. Court upholds halfway house’s duty to protect.
      1. Court says if felon committed crime at place of employment, no duty to warn.
      2. Can look at past behavior to determine foreseeability.
6. Family Members to Third Party:
   1. Generally, families do not have a duty to warn people about family members.
   2. Exceptions:
      1. Parent has duty to control minor child only when there is specific eminent danger foreseeable.
      2. Parent/Family members introduces harm.
      3. Other conditions listed in nonfeasance rules.
7. Landlord-Tenant to Third Party:
   1. Generally, no duty to warn/protect third parties from tenants.
   2. Exceptions:
      1. Special knowledge of danger may require landlord to require tenant to control or leave.
8. Employer-Employee to Third Party:
   1. Generally, employer has a duty to control employee if danger is foreseeable.
9. Imminent Danger, Defined:
   1. If related to special relationship, narrow requirement.
   2. If related to third party outside relationship, broad requirement.

**Vicarious Liability:**

1. **Tortfeasor=Employee: Vicarious liability if tortious act w/in scope of employment.**
   1. **W/in scope of employment if generally doing master’s work (*Riviello, Fruit*)**
   2. **Applied loosely: doesn’t matter if at that exact moment employee is not doing employer’s work; SOMETHING ELSE**
2. **Tortfeasor=Agent: Vicarious liability under multifactor test (*Hampton*)**
   1. **Control is key**
3. **Tortfeasor=Non-Agent Independent Contractor:**
   1. **No vicarious liability unless nondelegable duty**
      1. **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**
4. Vicarious Liability, In General:
   1. Occurs when we hold a D liable not for their own acts but for the acts of somebody else they have a relationship with; similar to strict liability.
   2. Examples of special relationships: Employer-employee, charity-volunteer, leasor-lessee
   3. Procedurally, person who asserts relationship has the burden of proof.
5. Employer-Employee:
   1. *Respondeat Superior:* (Master-Servant Rule) Doctrine holding employer/principal liable for employee/agent’s wrongful acts committed within scope of employment/agency
   2. General Rule: Only liable when act is in scope of employment (very loose standard).
   3. *Riviello:* Employee accidentally stabbed customer’s eye. Empoyer is liable.
      1. Old Rule: Only liable when employer exercised close control over employee during service.
      2. New Rule: Liable when servant is doing master’s work, no matter how irregular or with what disregard to instructions.
         1. Rationale: Enterprise Liability: cost of tort and safety would be in cost of service/good; lower liability cost leads to lower price, which means customers naturally choose safer option.
   4. *Fruit:* Employee at convention after events in evening. Drove drunk and struck another, causing injury. Employer is liable.
      1. Reasons:
         1. Deterrence goal and compensation goal served (employer has liability insurance and is in better position to pass liability cost to customers)
         2. Unjust enrichment
   5. General Rule: Employer is generally not liable for employee’s torts
      1. Exceptions: *Rodebusuh* and *Fahrendorff*
      2. *Rodebush:* Employee works at retirement home is drunk, slaps elderly resident. Employer liable.
         1. If possibility of tort is foreseeable and incident to employment, and committed while working, vicariously liable.
      3. *Fahrendorff:* Employer was camp counselor who made sexual advances to camper. Employer liable.
         1. When sexual misconduct is foreseeable and involves an abuse of power, vicariously liable.
6. Employer’s Negligence:
   1. Employer’s actions and nonactions can determine liability (direct and vicarious).
   2. Ex: negligent in hiring (could be liable for both)
7. Independent Contractors:
   1. Generally, when the employee is an independent contractor, we follow more traditional test in *Riviello*: based on control of what employee was doing at time.
      1. Rationale: focus more on deterrence goal
   2. Factors that determine whether relationship exists:
      1. Selection and engagement of servant
      2. Payment of wages
      3. Power to discharge
      4. Power to control (usually determinative)
      5. Whether work is part of regular business of employer
   3. Other factors:
      1. Whether tortfeasor is running own business
      2. Whether tortfeasor provides own tools or special skills
      3. Also look at contracts (not as prevalent)
   4. *Hampton:* DHS not vicariously liable for foster family’s negligence in causing death of girl, because no relationship established.
      1. Right to inspect and set standards do not indicate control
   5. Exception: Non-Delegable Duty Rule
      1. Can’t delegate responsibility for inherently dangerous activities being performed within the scope of employment due to risk.
      2. *Pusey:* Employer who hired independently contracted security guard who shot trespasser vicariously liable, because of non-delegable duty rule.
         1. The duty to make property safe as a business owner is not delegable
   6. Exception: Doctrine of Apparent Agency:
      1. Sometimes also vicariously liable when either employer or independent contractor create appearance of apparent authority.
8. Damage Apportionment:
   1. Employer and employee are considered a single defendant and the jury doesn’t assign percentage fault.
   2. Parties themselves will allocate amounts. In case of settlements, subtract amount already paid and party at trial pays difference.
   3. In theory, can collect from employee. In practice, doesn’t happen.

**Strict Liability:**

1. **Common Strict Liability Prima Facie Case (R3T):**
   1. **Activity creates foreseeable, highly significant risk of physical harm even if everyone exercises reasonable care (unavoidably risky)**
   2. **Activity is not common/normal**
   3. **Actual harm**
   4. **Cause in fact**
   5. **Proximate cause**
   6. **\*Note: narrower than negligence proximate cause**
2. **Common Law Strict Liability—Defenses (R3T):**
   1. **P or others contribute to activity causing harm**
   2. **Harm avoidable if D or P used reasonable care**
   3. **P’s contributory negligence/assumption of risk**
3. Strict Liability, In General:
   1. Liability that does not depend on actual negligence or intent to harm, but it based on the breach of an absolute duty to make something safe; usually applies to ultrahazardous activities or in products-liability cases.
   2. History:
      1. Historically, courts were hesitant to enact strict liability because of lack of harm. Additional concerns of protecting emerging industries and stifling enterprise.
      2. Mid-20s: if you’re engaging in highly-risky enterprise, even if useful, that activity should pay its own way. Similarly, businesses and manufacturers of products should be strictly liable as a cost of business.
   3. Statutes generally impose strict liability only under certain, highly-risk circumstances.
      1. Rationale: Usually, we apply strict liability to highly risky activities with low social value. Counter: there are some risky activities that have high social utility (storing toxic materials, blasting)
      2. Uncommon, because of a fear of opening the floodgates.
   4. Narrow Approach: Liable only for foreseeable risks that make activity dangerous; unforeseeable intervening cause that still leads to foreseeable harm
      1. Rationale: when we hold D strictly liable, sense that should be able to predict the extent of your risk.
      2. Some courts might still hold liable, because not all courts follow restatement approach
   5. Defenses:
      1. Traditional rule: no strict liability if P’s own conduct led up to event.
         1. Rationale: purpose of strict liability is to protect innocent plaintiffs
         2. Caveat: not all courts follow this approach
      2. Modern approach: rejects traditional rule that plaintiff’s contributory negligence doesn’t count.
      3. In cases of P’s assumption of risk, D is still liable under comparative fault
      4. No strict liability if harm avoidable by reasonable care
         1. Rationale: concerned that if we hold D strictly liable where activity could have been avoided, weaken deterrence incentive

**Products Liability:**

1. **Products Liability—Prima Facie Case:**
   1. **P is member of class of individuals foreseeably injured by defective produce**
   2. **Defective Product**
   3. **Actual Harm**
   4. **Cause in Fact**
      1. **In *Liriano*, burden of proof shifts to defendant**
   5. **Proximate Cause**
2. Products Liability, Historical Development:
   1. Historically: Until early 1900s, was covered only under contracts law.
      1. Thought that manufacturer’s liability derived from K.
      2. Courts required privity between manufacturer and injured plaintiff, which only occurred when manufacturer sold directly to plaintiff.
      3. With rise of industrialization, privity decreased and manufacturer’s faced less liability
   2. In 1916, with *MacPherson:* privity requirement discarded; manufacturers owe duty of ordinary care to foreseeable users of product.
      1. Expanded duty in sense that duty is owed to foreseeable users.
      2. Cases still based in negligence. Manufacturers still possibly liable under warranties, which are like strict liability.
         1. Problem: warranties based in contract, so only extend to actual purchaser.
   3. Mid 20th Century: courts became more receptive to idea of strict liability; huge effect on products liability standard.
      1. Does not mean plaintiffs can’t sue in other areas like negligence and contract warranty
   4. Currently, courts started to shift away from strict liability and move back to negligence regime. Still in flux.
3. Rationales:
   1. Fairness: rests on unjust enrichment; manufacturer profits from product so should bear all costs
   2. Deterrence: internalizing costs promotes efficient investment in safety by manufacturers and cause consumers to gravitate toward cheaper, safer alternative
   3. Enterprise liability: manufacturers are in a better position to spread loss
   4. Compensation
   5. Spreading risk
   6. Consumer Expectation: Recognizes consumer’s expectations as to products being reasonably safe
   7. Practicality: may be difficult for plaintiff to prove negligence, so easier to assume negligence and save litigation cost and time.
   8. Cheapest Cost Avoider: cost of accidents should be borne by acts or activities that could avoid accident costs more cheaply
4. Actual Harm:
   1. Physical harm or harm to property other than damages to product itself.
   2. Economic harms that result from physical harms still recoverable.
   3. No recovery for pure standalone economic harm because don’t want to interfere with contractual relationship between plaintiff and manufacturer
      1. In practice, hard to draw line; sometimes recovery for pure economic loss under fraud or misrepresentation.
5. **Defective Products:**
   1. **Manufacturing Defect**
      1. **Product unreasonably dangerous for its intended use (*Lee)*/ departs from intended design (Restatement Products Liability)**
      2. **Defective when leaves M’s hands**
   2. **Design Defect**
      1. **Consumer expectation test (*Leichtamer*)**
      2. **Reasonably alternative design (*Honda*)**
      3. **Manifestly unreasonably design**
         1. **No design defect if product dangerous by nature**
   3. **Information defect**
      1. **Foreseeable risks reduced or avoided if provided reasonable warning (*Liriano*).**
6. Manufacturing Defects:
   1. Consumer Expectation Test: whether product was dangerous beyond contemplation of the consumer.
   2. Restatement of Products Liability Test: when product departs from intended design
      1. Court applies this while still taking into account consumer expectations; difference: not exclusively determined by consumers
   3. P’s burden of proof: must prove product was defective, defect was actual and proximate cause of P’s harm, product was defective when it left D’s hand
   4. *Lee v. Coca Cola:* P handling Coca Cola, which spontaneously burst in her hand. Court says product is defective when unreasonably dangerous for intended use.
7. Design Defects:
   1. Consumer Expectation Test:
      1. *Leichtamer:* Ps were off-roading with Jeep, when it flipped over. Court says product is defective when fails to perform as safely as ordinary consumer would expect.
   2. Reasonably Alternative Design Test:
      1. *Honda:* P tried to get out of two-point safety restraint system and drowned. Court says no evidence of design defect under reasonably alternative design test.
         1. Failed to establish: cost is feasible in relation to safety, proof of alternative design *existed*
      2. **Reasonably Alternative Design (Honda):**
         1. **There was a safer alternative design**
         2. **Safer alternative design:**
            1. **Would have prevented or significantly reduced the risk of injury**
            2. **Would not have substantially impaired product’s utility**
         3. **The safer alternative was at the time of manufacture both**
            1. **Technologically feasible**
            2. **Economically feasible**
         4. **Safety benefits of alternative design greater than costs**
      3. **Reasonably Alternative Design (Revised):**
         1. **There exists an alternative design that would prevent or reduce risk of injury P incurred**
         2. **Safer alternative at time of manufacture**
            1. **Technologically feasible**
            2. **Economically feasible**
         3. **Safety benefits of alternative design > costs**
            1. **Safety benefits = reduction in risk of injury**
            2. **Costs include direct costs, decreased utility of product**
8. Information Defect:
   1. Information defect occurs if there was foreseeable risk of harm that could have been reduced or avoided by provision of a reasonable warning and the omission of such a warning renders the product not reasonably safe.
      1. Note: warnings do not mitigate design defects
   2. Warning must be reasonable (located somewhere where targeted user is likely to see it and in a form that is likely to get user’s attention).
   3. Burden of proof: Up to D to bring in evidence tending to rebut the strong inference arising from the accident that D’s negligence was in fact a but-for cause of P’s injury.
   4. *Liriano:* P injured self with meat grinder when safety guard removed and no warning label affixed. Court found D liable for information defect.
      1. Here, risk is not obvious and cost to warn is low; duty to warn
9. Plaintiff’s Intervening Actions:
   1. Don’t consider plaintiff’s contributory negligence.
      1. Rationale: dilutes incentive to manufacturers to try to put in safety guards/warnings in anticipation of negligent users.
   2. Might not take manufacturer’s negligence into account when there’s a separate chain that contribute to harm.
   3. Bring up plaintiff’s implied assumption of risk under comparative fault rules.
      1. Minority Rule: Complete bar
   4. Plaintiff’s express assumption of the risk is a complete bar.

**Emotional Harm:**

1. **Emotional Harm**
   1. **“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**
   2. Two types:
      1. Intentional Infliction of Emotional Harm
      2. Negligent Infliction of Emotional Harm
2. **Intentional Infliction of Emotional Distress (IIED):** (much higher bar than battery—must prove recklessness)
   1. **Conduct: Extreme and outrageous conduct** (severity and regularity)
      1. *GTE Southwest v. Bruce* (boss harasses workers continuously; court also looks at power imbalance in relationship)
   2. **State of mind: either—**
      1. **Intent: intent to cause severe emotional harm**
         1. **Actual purpose or knowledge of substantial certainty**
      2. **Recklessness: indifference to risk of severe emotional harm**
         1. **(Know of risk and fail to take precautions when burden is slight)**
   3. **Result: Severe emotional harm**
   4. Severe emotional harm does not require physical component.
   5. Causation:
      1. Some courts require evidence that shows causal connection.
      2. Some courts allow res ipsa loquitur-like doctrine to come into play
   6. Difference between IIED and battery/assault:
      1. Much higher bar in IIED for result
         1. Rationale: concern for false claims, opening floodgates, difficult to put monetary value on emotional distress, litigation itself can reinforce/prolong distress, don’t want courts to be “rudeness” police, state legislatures are passing laws that cap/eliminate pain and suffering awards
         2. Do not honor think skull rule here; don’t want to punish defendant for emotional distress when people are extremely sensitive
      2. Bad motive required
      3. Recklessness requirement creates a higher bar
   7. Defendant can also plead an affirmative defense:
      1. When defendant is exercising a legal right that might lead to P’s emotional distress.
   8. Damages:
      1. Emotional disturbance
      2. Compensation for bodily harm
      3. R3T 45
   9. Defining extreme and outrageous conduct: severity and regularity
      1. *GTE Southwest v. Bruce:* Boss continuously harasses workers. Court holds that because of continuous nature, conduct was extreme and outrageous.
         1. Court also looks at relationship, because of abuse of power issues.
   10. Note: can bring both IIED and Assault/Battery, but can only recover on one.
3. **Intentional Infliction of Emotional Distress (NIED)—When Conduct Directed at Third Person**
   1. **Conduct: extreme and outrageous conduct**
      1. **P must be present**
   2. **State of mind: either—**
      1. **Intent: intent to cause severe emotional harm**
         1. **Actual purpose of knowledge of substantial certainty**
      2. **Recklessness: indifference to risk of severe emotional harm**
   3. **Result: severe emotional harm**
      1. **If P not family member of third person, emotional distress must result in bodily harm**
   4. Presence is required.
      1. No transfer of intent doctrine here.
      2. *Homer:* D seduced P’s emotionally vulnerable wife while she was patient. Court rules no IIED.
4. Negligent Infliction of Emotional Distress:
   1. This is an area of law where courts are all over the place.
   2. No majority rule.
5. **Types of NIED Cases:**
   1. **Fright to Self: D’s conduct puts P at risk of imminent physical injury --> P’s emotional distress**
      1. **Other approaches in other jurisdictions require:**
         1. **Physical impact (*Mitchell*) (modifies proximate cause)**
         2. **Physical manifestation (must be physical manifestation that shows P suffered; ex: nightmares, insomnia, vomiting, etc) (modifies actual harm)**
         3. **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)**
         4. **Severe emotional distress (modifies actual harm)**
         5. **Combination of the above**
   2. **Bystander: P witnesses D’s conduct harming another --> P’s emotional distress**
      1. **Approaches by Court:**
         1. ***Grube***
         2. ***Dillon***
         3. ***Thing***
         4. **No recovery for bystander**
   3. **Direct Victim: direct duty to reasonably protect P from emotional distress**
      1. **Arises from pre-existing special relationship between P and D**
      2. **D assumes duty**
      3. **Imposed on D as a matter of law**
6. **NIED Fright to Self Cases Examples:**
   1. **Negligent Act --> Physical Harm --> Emotional Distress**
      1. **Recover under all jurisdictions**
   2. **Negligent Act w/ Physical Impact --> Emotional Distress**
      1. **Recover under physical manifestation unclear. Need facts.**
      2. **Recover under zone of danger.**
   3. **Negligent Act --> Emotional Distress --> Physical Manifestation**
      1. **Recover under physical manifestation**
      2. **Recover under zone of danger possible. Not enough facts.**
   4. **Negligent Act w/o Physical Impact --> Emotional distress (no physical manifestation)**
      1. **Zone of danger (maybe)**
   5. Concerns for implementing this approach:
      1. Fear of fabrication/fraud
      2. Subjective standard
      3. Hard to calculate damages
      4. Opening floodgate
   6. *Mitchell:* Horse and carriage heads towards P but stops abruptly in front of her and leads to fright and miscarriage. Court says no recovery, because no physical injury.
7. Bystander Case Examples:
   1. *Grube:* P, employee of Pacific Railroad, suffered emotional distress from witnessing death of train accident victim after trying to render aid. Threw up. Court said no recovery, because no fear of own physical safety.
      1. Court says zone of danger test (physically at risk, fear of suffering physical harm or physical impact).
      2. Some jurisdictions say fear of safety is enough.
   2. *Dillon:* Mother and sister saw vehicle strike girl as crossed street.
      1. Court says zone of danger rule: Duty to protect bystander from emotional distress when foreseeable. Take three factors into account:
         1. P located near scene
         2. Shock resulted from direct emotional impact upon P
         3. P and victim are closely related.
   3. *Thing:* Mother heard son struck by vehicle and saw blood/unconscious child in road. Court says no recovery.
      1. P can recover if and only if:
         1. P and victim are closely related
         2. Present and aware that it causes injury to victim
         3. Suffer serious emotional distress, not abnormal response
         4. No duty unless all are met
   4. Jurisdictions follow *Thing* (majority). Some follow others, or combinations, or none.
      1. Thin Skull rule generally not honored (some jurisdictions take into account)
8. Direct Victim Case Examples:
   1. *Burgess:* Child suffered prolapsed cord and brain damages during P’s labor/delivery. Court holds that *Thing* test does not apply, because she was not aware of what was happening since she was sedated.
      1. In direct victim cases, liability is limited by the relationship established by the parties themselves.
      2. Physician here owes a duty to the pregnant woman, not merely the fetus alone. If the mother were treated as a bystander, physician would have an incentive to sedate her so she could not be aware of her injuries.
      3. In direct victim cases, the only hurdle you have to overcome is proving that the actual harm must result in emotional distress.
      4. D must also assume the duty; if there’s no general duty, but person assumes it, then can breach that duty. Liability is limited to what is assumed.
9. Summary: NIED Cases
   1. Court seems to be saying in general, defendants do not owe plaintiffs protection from emotional distress. Two exceptions:
      1. Bystander
      2. Direct Victim
   2. Special Relationships from third party duties do not apply here. Special relationships is subjective—look at specific relationship and determine whether or not defendant has duty to protect plaintiff from emotional harm.
10. Loss of Consortium:
    1. Courts do allow certain family members to recover under loss of consortium claims.
    2. Recovery for loss of companionship, affection, sexual relations
    3. Viewed as different type of harm than emotional distress
    4. Some P’s may be able to recover in both cases.
    5. Generally, spouse, minor child, adult child (some jurisdictions), parents (some jurisdictions) can recover.
    6. These are derivative claims that depend on extent P recovered for regular claims, if D not liable, no loss of consortium claims.
11. Duty of Care to Protect Emotional Well-Being Independent of Physical Risks:
    1. *Washington v. John T. Rhines, Co:* Funeral home delivers casket with badly decomposing corpse of family member. Court holds no recovery, because the plaintiff was not in a zone of danger, so she can’t claim negligent infliction of emotional distress.
       1. Courts are reluctant to recognize emotional distress beyond the fright to self scenario
    2. *Heiner v. Moretuzzo:* Hospital erroneously reported to P that she was HIV positive. She sued for negligent infliction of distress. Court holds that they do not recognize a claim for negligent infliction of serious emotional distress where the distress is caused by the plaintiff’s fear of a nonexistent physical peril.
       1. Court applied fright to self-test here.
       2. No physical peril, therefore no liability.
          1. Exception: Sometimes messages erroneously announcing death of a close relative is recoverable.
12. *Camper v. Minor:* P was driving cement truck when D pulled out in front of him, causing a collision, where he witnessed her death and mangled body. P sued estate for negligent infliction of emotional distress in the form of PTSD. Court held that physical manifestation/injury rule is no longer followed and negligent infliction of emotional distress claims should be analyzed under the general negligence approach.
    1. Provide recovery only for serious or severe emotional injury where a reasonable person would be unable to adequately cope with the mental stress engendered by the circumstances of the case.
    2. Claimed injury or impairment must be supported by expert medical proof.
    3. Minority of cases are starting to follow this approach of using a regular negligence PFC; much easier for plaintiff to recover

**Death:**

1. Death:
   1. Cause of action terminates with death of plaintiff or defendant.
      1. Seems unfair or unjust not to hold defendant accountable.
      2. Goes against compensation goals of tort law
      3. Weakens deterrence effect
2. Survival Statutes:
   1. Any cause of action plaintiff had at moment of their death or defendant’s death still survives.
      1. Decedent’s estate brings the claim and sues for dead plaintiff’s harm.
      2. Plaintiff’s death does not have to be connected to defendant’s negligent harm.
   2. Any losses up to moment of death are recoverable.
      1. Most states also allow recovery of punitive damages.
      2. Some states allow compensation for loss of life, only when defendant’s negligence causes decedent’s death.
3. Wrongful Death Statutes:
   1. Recovery is dictated by existence of a state statute.
   2. Compensates survivors for loss experienced for decedent’s death. Survivors can sue in a separate lawsuit and can even sue if estate doesn’t bring survival action.
      1. Damages based on loss suffered by beneficiaries, not on the loss sustained by decedent’s estate.
         1. Can recover economic and noneconomic damages including mental anguish, emotional distress, loss of consortium
      2. Courts are reluctant to recognize emotional harm to those affected by injuries/deaths to others; some courts allow loss of consortium, but these awards are rare.
   3. Statutes generally specify who can sue. Two approaches:
      1. Categories of people who can sue.
      2. Only heirs can sue.
         1. Heirs at law: those persons who by the laws of descent would succeed to the property in case of intestacy; if members of a preferred class are precluded from recovery for reasons other than death, those next entitled to inherit may be considered beneficiaries.
      3. Note: Do not confuse the difference between persons authorized to bring an action and persons authorized to recover.
      4. Note: Often, bringer of lawsuit is spouse on behalf of everyone or estate on behalf of everyone.
         1. Reason: concerned about how to administer multiple actions per wrongful death.
   4. Methods of Recovery, in General:
      1. Two Approaches:
         1. Loss of support: how much you were receiving from decedent for life support
            1. Note: if decedent wasn’t working, loss of support is zero with no recovery
         2. Loss to estate: calculation of how much bigger estate would have been if no death
            1. Note: if decedent would have spent all earnings during lifetime, estate would not have been bigger
      2. Funeral costs
      3. Other damages:
         1. Loss of consortium (some states)
         2. Mental anguish/grief (some states; many bar recovery)
         3. Punitive damages (some states)
      4. Losses must be proven by expert witnesses; future earnings adjusted for inflation and discounted for investment
   5. *Weigel v. Lee:* Mother died shortly after being admitted to regular room in hospital despite being critically ill; children sue under wrongful death statute. District court dismisses claim based on inability to bring loss of consortium or emotional distress claims; upper court holds that because wrongful death act does not exclude decedent’s children from parties entitled to damages, claim should not have been dismissed.
4. Defenses: Bars/Limitations to Recovery
   1. Decedent’s contributory negligence:
      1. Wrongful death: in comparative fault state, jury assigns fault to both defendant and decedent; survivor’s recovery is reduced by whatever percentage at fault decedent was.
      2. Caveat: there are some circumstances where we do not take P’s contributory negligence into account; when you don’t take contributory negligence into account under survival action, also don’t take it into account for wrongful death action
         1. When D has duty to protect P from harming self
   2. Survival/heir’s negligence:
      1. Survival claim: doesn’t have an impact as to whether other tortfeasor will be liable; does impact damages, which are apportioned by rules of several or joint and several liability.
      2. Wrongful death: statute might bar/reduce amount surviving spouse can collect; subject to rules of several or joint and several liability.
         1. Note: when other beneficiaries are suing as well, can seek recovery from negligent survivor
         2. Note: if spouse is barred from recovery, child can sue (common, because of insurance and subrogation rights)
   3. Statute of Limitations:
      1. Usually two years; tolling begins when decedent dies, unless discovery rule (based on jurisdiction)
      2. Unusual situation where wrongful death statute of limitations has not expired but statute of limitations on underlying claim has expired.
         1. Some jurisdictions treat this as a bar to bringing a lawsuit.
   4. Can bring both survival action and wrongful death claims at the same time.