**Torts**

Common Themes:

1. Morality/Corrective Justice
   * want tort law to reinforce societies views of what is fair
   * does not hold those who do not cause harm wrongfully liable
2. Social utility/Policy considerations
   * want to understand reasoning and policy that drives cases and decisions
   * adopt rules of law that promote social welfare
3. Process or procedural considerations
   * where to set the bar/burden of proof, what rules should be adopted, courts as a limited resource (only for certain types of harms)
4. Compensation
5. Risk Distribution
   * spreading cost/risk across multiple parties, consumers

Types of Damages:

* Compensatory damages: compensate P’s for actual losses they incur
  + Lost wages
  + Cost of repairing/replacing damaged items
  + Medical expenses
  + Pain and suffering
* Punitive damages

General rule of torts: no liability where defendant is not at fault (McAfoos principle)

**Intentional Torts:**

1. Battery: \* Act must be voluntary \*
   1. Prima Facie Case:
      1. 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 (Garratt v. Dailey)
            3. Intent to contact another transfers to P (Stoshak)
         2. Intent to harm/offend
            1. Actual intent to harm/offend or knowledge of substantial certainty harm/offend (White v. Muniz)
            2. “Knowledge” can be found if:

People typically harmed/offended by contact (Snyder v. Turk)

D knew plaintiff would be harmed/offended (Cohen v Smith)

* + - 1. *Intent to induce imminent apprehension of harmful or offensive contact*
    1. Result:
       1. Contact, AND
          1. Direct contact between plaintiff and defendant, OR
          2. Causes plaintiff to come into contact with something/someone else (Garratt v. Dailey)
       2. Contact was harmful or offensive (offensive if reasonable P would be offended)
  1. General rule: if no fault, no liability (exception when engaged in risky activity)
     1. McAfoos: 3yo boy riding tricycle on public sidewalk, runs into D causing injury, P fails to plead intent, was there “fault”?
  2. Most jurisdictions follow dual intent requirement (both intent and result elements must be met); Single intent jurisdictions require only intent or result
  3. Children usually not liable for intentional torts, don’t have moral appreciation for their actions (opposite for mentally ill defendants, can be found liable)
  4. Doctrine of transferred intent applies
  5. Extended liability principle: defendant who commits an intentional tort, at least if it involves conscious wrongdoing, is liable for all damages caused

Cases and Issues (Battery):

*Garratt v Dailey*: Dailey deliberately pulls out chair from under P when she starts to sit down. Plaintiff sustains injuries. Appeals court remands case.

* Establishing intent: need *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.

*Stoshak:* P struck in back of head by two fighting students. P wins based on transferred intent. If you intend to hit someone and you strike someone else, transfer of intent

* If you throw a rock to hit a bottle but hit a person, not transferred intent

*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)

*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/offend

*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. D had enough information to know that regular care of duty would offend.

*Mullins:* Mullins did not give consent to presence of healthcare learners during surgery. EMT student VanHoey intubates with permission from anesthesiologist. VanHoey acquitted. He did not have knowledge that P would be offended

1. Assault
   1. Prima Facie Case: No contact required
      1. Intent:
         1. Intent to cause imminent harmful or offensive contact, or
         2. Imminent apprehension of harmful or offensive contact
         3. Knowledge of substantial certainty that your actions will cause fear
      2. Result:
         * 1. Reasonable apprehension of an imminent battery

Apprehension must be one which would normally be aroused in the mind of a reasonable person (invasion of P’s mental peace)

* 1. Extended liability principle – tortfeasor is responsible for all damages incurred by actions
  2. Transferred intent – intend to commit assault against A but actually frightens B, your intent transfers

Cases and Issues (Assault):

*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. False Imprisonment
   1. Prima Facie Case:
      1. Intent to Confine
         1. Confinement when: physical confinement, threat of physical force, 33assertion of legal authority or duress, AND P reasonably believes he cannot leave
      2. Result:
         1. Confinement within fixed boundaries, and
         2. P either (1) aware of confinement, or (2) harmed by confinement
   2. Standard is objective, could reasonable people think they are being imprisoned, not could P’s think they would being imprisoned
   3. If there is awareness of reasonable means of escape, not imprisonment

Cases and Issues (False Imprisonment)

*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.

**Intentional Torts to Property:**

1. Trespass to Land:
   1. Prima Facie Case:
      1. Intent
         1. Intentional entry without permission, or
         2. Intentionally causing an object to enter land without permission, or
         3. Unintentional entry + intentionally refusing to leave
      2. Result
         1. Entry on P’s land, or
         2. Cause object to enter P’s land
            1. Knowledge of substantial certain that object will enter land
   2. Transferred Intent – intend to trespass on X’s property but end up on Y’s property
   3. Trespass v. Nuisance:
      1. Nuisance is interference with owner’s use and enjoyment of land, no prima facie case
      2. Only comes into play where there is substantial or unreasonable interference
2. Conversion of Chattels
   1. Prima Facie Case:
      1. Intent to exercise dominion over chattel
      2. Result: Interferes with another’s right to exclusive control (needs to be substantial interference)
   2. Deals with movable or transferrable property
   3. Doesn’t require bad motive
   4. When statutes conflict with common law, statute governs
   5. Dominion – treating it as your own, you aren’t in possession of item but you restrict or control the owners access to it
   6. Damages is whole value of items
3. Trespass to Chattels
   1. Prima Facie Case:
      1. Intent to interfere with another’s use and enjoyment of personal property
         1. Can have actual intent or knowledge of substantial certainty
      2. Result (knowledge of substantial certainty of result of trespass)
         1. Interference, and
         2. P harmed thereby
            1. Harm to material valuable interest in physical condition, quality or value, or
            2. P deprived use of property for substantial period of time
   2. Damages would be the cost of repair, damage done

**Types of Affirmative Defenses:**

\* Burden of proof in affirmative defenses, shifts from the P to D\*

1. Self-defense
   1. Must show: (Touchet case)
      1. Reasonable person would have perceived an imminent threat, and
      2. Response was reasonable, not excessive
   2. Minority rule – if you act on what you think is a dangerous situation but is it not, you are then liable
   3. Transferred intent applies to self-defense
2. 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 P to law enforcement
      4. Detained in reasonable manner for reasonable amount of time; and
      5. Actions reasonable
3. Defense of property
   1. Permissible if:
      1. Action reasonably necessary to defend property, and
      2. Force used commensurate to threat (Katko)
         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
4. Privilege to discipline
   1. Parents have privilege to discipline and can use force and confinement to do so
   2. When teacher/parent crosses line of reasonable force against child considered excessive force, can be found liable
5. Arrest and Searches
   1. Officers are privileged to enter land and execute search or arrest warrant
   2. Media have no privilege to enter to cover news in absence of consent
6. Privileges to enter land/premises pursuant in connection with public right
7. Necessity
   1. Public Necessity (Surocco case)
      1. Elements: (can be invoked by private citizens)
         1. Action intended to benefit public
         2. Reasonable belief action necessary to avoid imminent public threat
         3. Reasonable response to public threat (similar to self-defense elements)
      2. Consequences:
         1. No liability for damages
         2. Owner loses privilege to defend property/expel trespasser
      3. If there is public necessity for actions, no liability, cancels out any right to property
      4. Government can spread the cost when one person suffers for the good of the public
   2. Private Necessity
      1. Elements
         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 (Vincent)
      2. When a private necessity exists
         1. Property owner loses right to defend property (Ploof)
         2. No liability for trespasser where no actual harm (Ploof)
         3. Liability for any damages where deliberately trespass knowing damages are likely (Vincent)
      3. General rule: even if you have private necessity defense, liable if knowledge of damages and choose to trespass anyway

Cases and Issues: (Affirmative Defenses)

Self-Defense:

*Touchet*: angry former employee walks into old boss’s office yelling obscenities, old boss beats him up, claims self-defense, D could not justify that there was apparent threat to his safety, his force was excessive, mere words cannot excuse a battery in the name of self defense

Defense of Property:

*Katko*: Briney and husband set up shotgun trap on property to defend against trespassers. Trespasser is shot in leg and sues homeowners. Judgment for Plaintiff.

*Brown v. Martinez:* Two boys trespassing on D property. D shot in opposite direction of two boys running away and hit plaintiff in leg. D found liable

Public Necessity:

*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.

Private Necessity:

Vincent v. Lake Erie: Violent storm throws boat against dock, resulting in damage. P sues D for damages to dock by D’s boat moored there during storm. Jury awards $500 in damages.

Ploof v. Putnam: P, during storm, ties up his boat to D’s private dock, D unmoors boat causing damages to boat and family. Court rules that necessity will justify entry upon land that would otherwise have been trespass

**Special Case of Consent:**

1. Elements of consent:
   1. Can be non-verbal
   2. Effective consent if reasonably believed P consented (look at totality of circumstances)
   3. Effective consent if P consents to the act, even if P did not consent to its consequences
   4. No consent if not voluntarily given and D knows this (coercion/duress, power imbalance)
   5. Consent ineffective if not meaningful consent and D knows this
      1. P incapable of understanding nature of act/consequences/moral significance
      2. P misled/mistaken as to true nature of act
2. Consent not technically an affirmative defense, consent negates the intent element of an intentional tort
3. Consent shifts the burden of proof (P has burden of showing there is no consent, D has burden of showing there is an affirmative defense)
4. Children and those without the mental capacity to understand meaningful consent do not give consent.
5. P can only consent if they fully understand nature of act, do not consent if they are misled
6. Patient Consent to Treatment
   1. Non-consent: batter if patient refused to consent to specific procedure (Ashcraft, Duncan)
   2. Scope of Consent: no informed consent if patient not informed of
      1. Specific procedures will/may perform (Kaplan)
      2. Reasonably foreseeable risks
   3. Incapacitated/incompetent patient: No battery if:
      1. Emergency
      2. Medically appropriate treatment; and
      3. No patient surrogate available in timely manner

Cases and Issues (Consent)

*Robins v. Harris*: Robins was a female inmate who was taken into another room to perform sexual acts on defendant. Court ruled that consent to sexual contact was no defense. 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.

*Doe v Johnson*: P alleged that D 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. P consented to sex but not sex with someone who had venereal disease. P consented to act but not result, not a reasonable defense, try to narrowly define act

*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.

*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. “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.”

**Negligence**

**Prima Facie Case**

1. D owed P a legal duty
   1. Negligence per se
2. Breach of duty
3. Actual damages
4. Factual cause
5. Proximate cause

**D owed P a legal duty**

1. Dobbs: 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 circumstances to *avoid or minimize risks of harm 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.
2. General rule: duty owed to everyone
3. Prudent Person standard: exercise care that would be exercised by a reasonable person under the same or similar circumstances to avoid or minimize risks of harm to others
4. Factors to consider:
   1. Morality
   2. Foreseeability and extent of harm from D’s conduct
   3. Burden that new duty will impose on D
   4. Alternative ways to protect P interest
   5. Increased safety likely to result from imposing duty
   6. Chilling effect duty may have on D’s conduct
   7. Administration problems for courts in enforcing duty
   8. Problems of proof
5. Dangerous instrumentalities:
   1. still only reasonable care; but amount of reasonable care may be higher depending on the situation (Stewart)
   2. Duty of care is commensurate with danger; take circumstances into account
   3. *Stewart Rule*: amount of care may be higher, but standard of care is not
6. Emergency Doctrine/Contributory Negligence
   1. General rule: in judging reasonableness of conduct in emergency situations, the circumstance that D’s must act quickly is relevant
7. Intoxicated people:
   1. held to standard of care that sober person would do (not necessarily the case in the event of an emergency, unforeseen event)
8. Physical disability:
   1. General rule: reasonable standard of care for someone who is in like circumstances; what would reasonably prudent visually impaired person do (Shepherd)
9. Mental Disability:
   1. General rule: mental disability does not excuse a person from liability for conduct which does not conform to the standard of a reasonable man under like circumstances (*Creasy* rule)
   2. Justification for Creasy rule
      1. When allocating a loss between 2 innocent parties, pick the one causing the loss
      2. Rule gives caregivers incentive to prevent harm and restrain mentally disabled
      3. Removes inducement for D’s to fake mental disability
      4. Avoids administrative problems w/ courts/juries assessing actor’s mental disability
      5. Fair to force persons w mental disabilities to pay for the damages they do if they “live in a world” given the likelihood they will engage in substandard conduct
      6. Reflects public policy preference to treat mentally disabled individuals the same as non-mentally disabled
10. Extraordinary intelligence/Expertise:
    1. Required to exercise superior qualities in manner reasonable under circumstances
11. Children:
    1. General rule: duty of child to exercise same care that a reasonably careful child of the same age, intelligence, maturity, training and experience would exercise under same or similar circumstances
    2. Public policy: we should let children be children when they do traditional childhood activities
    3. Exception: draw line between activities that are for children and activities where children can be held to adult standard (Robinson):
       1. Adult activity test: it is an adult activity when it requires adult skills and normally done by adults
          1. Inherently dangerous test: operating a mechanized vehicle was not an activity that children should do
    4. Minority rule: some states have held that children of a specific age cannot be held liable for negligence

Cases and Issues (Duty of Care)

*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.

*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.

*Creasy v. Rusk:* Rusk admitted to BHC because suffered from memory loss and confusion; due to Alzheimers. 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. 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.

*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. Plaintiff should have some sort of responsibility for also engaging in adult act and being slightly contributorily negligent…

**Negligence Per Se**

**Prima Facie Case:** (O’Guin Factors)

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 is member of class of persons statute/regulation designed to protect
4. Violation of statute/regulation is proximate cause of injury

General:

1. Violation of statute determines actors negligence (includes statutes, local ordinances, federal regulations)
   1. Legal duty is what statute says, not what reasonable person would do
   2. If there is a violation of statute, usually means breach of duty
   3. Look at whether or not gov’t can enforce statute
2. Courts determine whether or not gov’t intended statute to become standard in tort claim
3. No black and white rule, develop conditions (O’Guin factors)
4. If negligence per se does not apply, move to reasonable prudent person standard

Defenses/Proof/Evidence of Negligence Per Se

1. Negligence Per Se Excuses: party who violated statute may offer evidence of an excuse or justification without violating it (Impson)
   1. Incapacity
   2. Lack of knowledge or need to comply
      1. If you are unaware of the law, no excuse
      2. If you are ignorant of facts (ie. don’t know taillights are out, can be an excuse)
   3. Inability to comply
   4. Emergency
      1. If emergency is of the D’s own making, not excused
   5. Compliance poses greater risk than obligation
2. Burden of proof: P must convince jury that in light of the violation and reasons offered, D did not behave as reasonable person would under like circumstances
3. Evidence of negligence: treat violation of statutory standard as evidence of negligence that is admissible at trial
4. Second restatement v. Third restatement:
   1. Main difference: incapacity – “reasonable in light of actor’s childhood, physical disability, or physical incapacitation”

Cases and Issues (Negligence Per Se)

*O'Guin v. Bingham County:* Two children killed while playing in 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 *per se*, relying on Idaho statutes and federal regulations.

*Martin v. Herzog:* D, driving at night, crossed over center line on curve and struck buggy occupied by P, 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"

*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.

**Breach of Duty**

1. 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. Custom/Internal policies = evidence of foreseeability
   2. Would reasonable person have taken steps to avoid or minimize the risk?
      1. Economic Considerations
      2. Risk utility balancing/Learned hand formula
      3. Community norms/customs
         1. E.g. Value life over property
      4. What people generally do
         1. E.g. Custom
      5. Evidence of what reasonable person would do
         1. Internal Policies
         2. Custom
         3. Statutes/ordinances/regulations
         4. Professional/industry guidelines
2. Considerations (only need to prove one of these considerations existed)
   1. How likely is it for risk to materialize? (Indiana Consolidated Insurance)
   2. Magnitude of risk
   3. Burden to D to take precautions
3. “Foreseeability”
   1. use foreseeable to mean the harm was too likely to occur to justify risking it without taking precautions
   2. Some harms are more considered unforeseeable, in the sense that a reasonable person would not have taken action to prevent it, because risk of harm was low and harm was improbable
   3. If something happened before, is it always foreseeable that it will happen again? Question for jury given totality of circumstances (Piper)
4. Balancing Risks and Burdens:
   1. General rule: must balance risk involved with burden of addressing that risk
   2. Usually, life outweighs property (Indiana Consolidated Insurance)
   3. Not all risks are great enough to justify cost involved to eliminate risk
      1. Policy Reasons why P should be responsible (Stinnet)
         1. P has greater knowledge
         2. Since P benefits, he should bear burden
         3. P should ensure his own safety first
   4. Occasionally reasonable to anticipate others negligence when the burden is low (United States v Carroll Towing)
5. Learned Hand Formula/Duty to Take Precaution (Consider from D point of view)
   1. Formula to evaluate burden, probability and injury foreseeable
   2. If burden is less than probability times injury, its not fair to ask for court to ask person to exercise initial care
   3. 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 you have an apples to apples comparison. If you are looking at annual salary/costs, have to make sure on other side of equation you are looking at annual risk or annual expected harm
   4. Learned Hand Formula – REDUCED RISK
      1. Negligent if B < (P do nothing \* L) – (P take precautions \* L)
         1. B = burden to actor of taking steps to avoid or minimize risk (pay out)
            1. Includes direct costs + potential risk
            2. Potential risk = (P take precautions \* L)
            3. Potential risk = risk associated with precaution that avoids or minimizes original risk
         2. P = probability of harm
         3. L = magnitude of harm
      2. Example: If no bargee, anticipate barge hit once/yr, causing average damages of $50,000. Full-time bargee reduces risk by 50%. Annual salary for bargee is $30,000.
         1. $30,000 > $50,000(1) – (.5 \* $50,000)
         2. $30,000 > $25,000 🡪 not negligent
   5. Policy Goals:
      1. Promotes fairness
      2. Promotes economic efficiency
      3. Gives jury a more concrete formula to determine if DoC breached
6. Multiple Parties and Liability
   1. In most states, damages that P can recover from P will be reduced by percentage of P’s own fault
   2. Two Approaches for recovering damages
      1. Several liability: P collects separately from each D in proportion to fault
         1. P gets less in damages if one of D’s cannot pay their portion of damages
      2. Joint and several liability (most states): P can collect in full from any D; paying D seeks contribution from other Ds
         1. One D might get stuck paying 100% of damages if one of the other blameworthy Ds cannot pay
7. Types of Evidence:
   1. Direct: evident that if believed clearly establishes a fact
   2. Circumstantial evidence: evidence of one fact that permits an inference of another fact
   3. Eye witnesses: testimony from those with first hand knowledge
   4. Expert witness: testimony from those with expertise in a field
8. Slip and Fall Cases
   1. Prima Facie Case:
      1. Premises owner negligent if
         1. Had knowledge of dangerous condition, or
         2. Created dangerous condition AND
      2. Failed to take reasonable actions to minimize/eliminate condition
   2. Standard: reasonable care is what they knew or should have known at the time (Thoma v. Cracker Barrel)
   3. Failure to follow a party’s precautionary steps or procedures is not necessarily failure to exercise ordinary care (Walmart)
   4. 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?
         1. Retailers might lower their higher standards of care.
         2. Employee manual's purpose might not be for safety but for cleanliness
9. Industry Custom/Standards
   1. Customs:
      1. Can be evidence of what a reasonable prudent person would do
      2. Custom could be balancing risk/intuition
   2. Weighing custom is evidence of the balance test using in Learned Hand formula
   3. Proof of general custom and usage is admissible because it tends to establish a standard by which ordinary care may be judged (Duncan)
   4. Rule: Even if you conform to industry custom, can still be negligent (TJ Hooper)
      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.

Cases and Issues (Breach of Duty)

*Indiana Consolidated Insurance Co v. Mathew*: P claims D acted in a negligent manner and should be liable for damages done to brother’s garage when lawnmower caught fire. Mathews started lawnmower, noticed a flame and shut engine off. Ran to his home to call the fire department. Returned to find the garage totally engulfed in flames. D not negligent and deems his actions an exercise of ordinary prudence. Court also says the law values human life above property.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.

*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 painting. 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. Workplace should be reasonably safe, doesn’t have to be guaranteed risk-free.

*Pipher v. Parsell*: Pipher, Parsell, and Biesel were in a pickup truck together. Biesel unexpectedly grabbed the steering wheel, causing the truck to veer off. Parsell did nothing in response. Biesel again yanked the steering wheel, causing collision. 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.

*United States v. Carroll Towing Co:* Action in determining negligence in sinking of barge. 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.

*Thoma v. Cracker Barrel:* Plaintiff took three steps away from table when she slipped and fell. She noticed a 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. Appellate court says it was possible to hold that this was a slip and fall case because actual (evidence) or constructive (should have known) knowledge exists.

*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.

*Duncan v. Corbetta:* Duncan was injured when the top step of D’s stairway collapsed under him. 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.

*The TJ Hooper:* Barges lifted cargoes of coal. Towed by two tugs of the petitioner, which were lost off the Jersey Coast. 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.

**Breach of duty: Res Ipsa Loquitor**

1. General rules
   1. Probability Rule 1: Fact of accident suggests more likely than not, negligence caused P’s harm (Byrne)
   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 Ipsa 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. Requirements of Res Ipsa
   * 1. The accident would not ordinarily occur without negligence
        1. P’s burden of proof: standard – show that “more probable” cause was negligence
     2. D’s negligence is the most probably cause of harm
        1. Not met unless instrumentality that caused harm was under D’s control, “control” loosely applied by courts
        2. R2 Torts changed requirement to “other responsible causes including conduct of P and third persons are sufficiently eliminated by evidence”
     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. P must show initial danger is attributable to D rather than herself. If it is equally probably that P’s negligence created danger, she has not brought negligence home to the D
3. Defendant’s Case
   1. D can relent a res ipsa case by proving the actual cause of the accident
   2. D 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 D doesn’t have evidence of exact cause of accident, may try to refute res ipsa by proving that he generally exercised due care
4. Procedural Effects of Res Ipsa
   1. Sufficiency of evidence: on breach of duty element, P will survive motion for directed verdit and get to jury, which can then decide the case either way
   2. Instructing on Res Ipsa: P has adduced evidence from which the jury could conclude that the D was negligent, then trial judges commonly give res ipsa instruction given to the jury
   3. Permissible inference effect: res ipsa creates permissible inference that the jury may draw if it sees fit, does not shift burden of persuasion from plaintiff, even if the D introduces no evidence, jury may reject the inference and bring in a verdict for the D
   4. No rule that requires jury to decide D is negligent, if act is so strong that reasonable jury could not conclude otherwise, we don’t bother to give it to jury
   5. When D presents evidence of nonfault, still have jury question to evaluate evidence presented
5. Proving Res Ipsa
   * 1. Majority rule: abnormally strong inference of negligence – inference of negligence is merely permitted not required, when P’s circumstantial proof is so convincing and the D’s response is so weak that the inference of D’s negligence is inescapable
        1. Posner’s rule: 51%/49%
     2. Minority Rule: the presumption effect, D has the burden of proving not negligent OR D presumed negligent, but if D presents evidence of non-negligence revert to majority rule
     3. Res ipsa is an exception to rule in Santiago, general rule: P must allege specific conduct on the part of the D but
        1. Res ipsa arises when P may not know what happened and accident speaks for itself
        2. P needs to point out specific action of D
   1. Factors
      1. Evidence eliminating non-negligent causes
      2. Failure by plaintiff/defendant to present available evidence
      3. Control condition (exclusive control idea loosened up – Giles case)
      4. Evidence eliminating other actors as tortfeasors (points more towards % of negligence)
   2. When 2 potential Ds: if cannot determine which D was negligent
      1. Majority rule: no RIL unless shared responsibility (Ds acted together)
      2. Collins: RIL if serial control (and complaint stage of litigation)
   3. General Rule: P must allege specific negligent conduct by D (Santiago)
   4. Exception for res ipsa loquitor: when fact of accident itself suggests D probably was negligent, P gets to jury (even though P does not allege specific conduct) (Byrne).
      1. Jury can infer negligence when the incident in and of itself was likely caused by negligence (send to jury)
6. Sufficiency of Pleading
   1. When evidence is obtainable, but not present, res ipsa is not appropriate (Warren v. Jefferies)
   2. Court focus on fact that P has no evidence, reasonable P investigates after accident
   3. Possible that P investigation occurred and evidence was unfavorable so they didn’t present it
7. Acts not within exclusive control of tortfeasor do not preclude guilt (Giles)
   1. Court has loosened “exclusive control” requirement
   2. Damages are still lowered proportionately to P’s contributory negligence
   3. Exclusive control requirement is like saying you have to be 100% certain that D was negligent
8. Where there are 2 D’s who had consecutive control over P, and either one could have caused P’s injuries, and both named in complaint, complaint is sufficient for pleading purposes to raise res ipsa
9. Third Restatement Rule (use for this class): 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 res ipsa on both parties is proper
10. Actual harms: element of negligence, 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 be free from it

Cases and Issues (Breach of Duty- Res Ipsa Loquitor)

*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 for insufficient evidence.

*Byrne v. Boadle*: P was walking in Scotland Road when he lost all recollection. Witness testified that barrel of flour fell on him; D'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.

*Collins v. Superior Air and Ground Ambulance Service:* Collins admitted to Alden Rehab Center and transported to/from by Superior Ambulance Service. When Collins 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.

*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.

*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

*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.

*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.

**Factual Cause**

1. But-For Test
   1. “But for” this particular action, would P’s injury have happened?
      1. Sine qua non: compare what actually happened to hypothetical scenario
   2. Problem of applying but-for test: jury must decide on what actually happened but must also speculate on hypothetical alternative (Hale)
      1. Court says you can have 2+ causes of action, negligence and liability necessitates that D be a cause not the only cause
   3. Look to see that negligence caused harm to see if without negligence, same result would’ve occurred (Salientro – not but-for cause, same result even if D had asked question)
2. But-For and Res Ipsa
   1. Application: supports not only breach of duty but also cause in fact
   2. Ex: sponge left in stomach is negligent and therefore res ipsa would apply to prove cause in fact, stomach cancer due to sponge is not a but-for cause, therefore res ipsa does not apply
   3. When D’s negligence is 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 2 + tortfeasors:
      1. When divisible injury (Scenario 1):
         1. Apportion damages based on causality, with each D liable only for injuries
      2. When indivisible injury
         1. Both D’s liable
         2. “Indivisible” 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 which injury (Scenario 4)
         3. As between D’s, apportion liability based on comparative fault
      3. When unknown which negligent act caused harm:
         1. D’s jointly liable. Apportion liability based on comparative fault (Scenario 6)
   2. A tortfeasor 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 injury
      1. Applies to negligent acts that take place at different times and to negligent acts that take place simultaneously
   3. Scenarios
      1. Scenario 1
         1. D1 Negligence 🡪 Broken Leg
         2. D2 Negligence 🡪 Broken Arm
         3. D1 liable for broken leg, D2 liable for broken arm
            1. Divisible harm, D are separately liable for divisible portion of harm, joint and several liability does not apply
      2. Scenario 2
         1. D1 and D2 Negligence 🡪 Broken Leg and Arm
         2. Both D1 and D2 liable for broken leg and broken arm
            1. Indivisible harm, both Ds are “but for” cause of both injuries, can apply joint and several liability, Ds can sue each other to determine % of damages responsible for, if one is insolvent, P can collect on both
      3. Scenario 3
         1. D1 Negligence 🡪 Broken Leg
         2. D1 and D2 Negligence 🡪 Broken Arm
         3. D1 liable for broken leg, Both D1 and D2 liable for broken arm
            1. D is but-for cause of both injuries, D2 is a but-for cause of broken arm, Joint and several liability
      4. Scenario 4 (Landers)
         1. Scenario 1 but don’t know what harm each defendant caused, D1 and D2 both liable for full loss (Landers v. East TX)
            1. 2 separate tortfeasors, each responsible for portion of harm caused, injury cant be apportioned without reasonable certainty
            2. Rule: where tortious acts of 2 or more wrongdoers join to produce and indivisible injury, all wrongdoers will be held jointly and severally liable for entire damages and injured party may proceed to judgment against any or all tortfeasors in one suit, amount paid by each D depends on their level of fault
      5. Scenario 5 (Anderson)
         1. Either 2 or more negligent Ds of 1 negligent D + other force
         2. Neither is a but-for cause
            1. In absence of D’s negligence, other defendant/force would have caused same harm (vice versa)
         3. Each is a sufficient but not necessary cause
            1. In a world without other defendant/force, D’s negligence would have caused P’s harm (and vice versa)
         4. D’s negligence is a cause of P’s injury if it is a substantial factor (Anderson – indivisible harm, 2 fires combined into 1 then burned house down)
         5. If both D1 and D2’s negligence are considered a substantial factor, both are jointly liable
            1. Pre-empted cause scenario: you poison someone but before they die from the poison, someone shoots and kills them, shooter is only person liable
      6. Scenario 6 (Summers)
         1. Two Ds acted negligently but 1 caused harm to P, don’t know which one caused harm
         2. Each D’s negligence considered a cause of P’s injury (unless a D can prove otherwise) (Summers v Tice)
4. Lost Opportunity
   1. A loss of chance causation requires fact finder to compare what did happen to what would have happened if D had not been negligent
   2. Approach #1: Modified But-For-Test (TX uses this) (Mohr)
      1. Harm: actual injury
      2. Causation: P deprived at least 50% chance more favorable outcome (but-for test)
      3. Damages: recover for full loss, D responsible for 100% of liability
      4. Problem: 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
   3. Approach #2: Substantial factor test/relaxed causation rule
      1. Modified substantial factor test, relaxed standard of proof of causation, “more likely that not” that chances of a more favorable outcome were destroyed. Magnitude
         1. Damages: 100% of liability
         2. Problems: same as above, except standard even more relaxed and might cause more overdeterrence, over investment in security precautions
   4. Approach #3: Lost Chance/Value of the Chance (becoming dominant approach)
      1. Harm: lost opportunity of more favorable outcome
      2. Causation: D’s negligence reduced by possibility of more favorable outcome (but-for test)
      3. Damages: Value of lost opportunity, % actual attributable to D’s negligence (full injury recovery x % reduction in chance of recovery)
      4. 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
5. Lost Chance/Future Risk of Harm Scenarios and Legal Rules
   1. Scenario #1 (Mohr)
      1. Scenario: P had pre-existing risk of injury, D’s negligence lowers chance of recovery, P does not recover
      2. Legal Rule: 3 approaches – But-for test, substantial factor test, lost chance test (Mohr)
   2. Scenario #2
      1. Scenario: P had pre-existing risk of injury, D’s negligence lowers chance of recovery, P recovers
      2. Legal Rule: No liability – no actual damages
   3. Scenario #3
      1. Scenario: P had pre-existing risk of injury, D’s negligence lowers chance of recovery, don’t know yet whether P will recover
      2. Legal Rule: allow recover for reduced chance of recovery, require present injury – no liability
   4. Scenario #4 (Dillon)
      1. Scenario: P did not have pre-existing risk of injury, D’s negligence creates risk of injury, don’t know yet whether injury will happen
      2. Legal Rule: two approaches – allow recovery for increased risk (Dillon), require present injury – no liability

Cases and Illustrations (Factual Cause)

*Hale v. Ostrow:* Hale was walking on sidewalk when 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.

*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.

*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

*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.

*Mohr v. Grantham II*: Mohr was in car accident and brought to hospital. Was given a neurological assessment at hospital and CT scan overseen by Dr. Grantham. Results of tests were normal. Following tests Mohr reported neurological symptoms. Dr discharged her without additional testing. Mohr then became permanently brain damaged. If not for Dr negligence, Mohn would have had 50-60% chance of recovery.

*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.

**Proximate Cause:**

1. Proximate cause: reflects the idea that just because someone was negligent, there may be reasons that we decide not to hold the D liable for P’s injury
   1. D is negligent, yet most courts would deny recovery on ground that P’s injury is too unusual, too far removed from type of harm to be anticipated from D’s negligence to warrant imposing liability
   2. Was P’s harm a foreseeable result of D’s negligence
2. “Liability limited to those physical harms that result from the risk that made the actors conduct tortious”
   1. ie. Proximate cause if P’s harm resulted from a reasonably foreseeable risk that a reasonable person would have taken steps to avoid or minimize
3. Proximate Cause Summary:
   1. General rule: proximate cause if within scope of risk created by D negligence
      1. Not proximate cause if P is position of relative safety
   2. 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 superseding cause (traditional suicide rule)
         2. Some courts focus on foreseeability intervening act (Watson)
4. Scope of Risk Test – focus on foreseeability
   1. Harm within scope of risk if: Reasonable person in similar circumstances would have:
      1. Foreseen harm or risk (a) of same general type, and (b) to the general class of persons that includes the P, AND
      2. Taken greater precautions to avoid it than D took
   2. 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
   3. D who negligently creates a risk to the P 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
   4. Inherently dangerous activities: for policy reasons, courts might say proximate cause even if it technically fails under scope of risk test
   5. Rescue doctrine: Rescuer can recover from defendant whose negligence prompts rescue (public policy reasons – “danger invites rescue)
5. Multifactor Test (Palsgraf dissent), courts moving away from this test
   1. Proximate cause determined by balancing multiple factors:
      1. Foreseeability of harm to P
      2. Rough sense of justice
      3. D’s conduct a substantial factor in causing P’s harm
      4. Natural and continuous sequence of events
      5. Directness (how many intervening causes)
      6. Remoteness in time and space
6. For public policy reasons, general rule of law deems D’s negligence proximate cause (eg. Rescue doctrine)
7. Principles that narrow issues of proximate cause:
   1. If P’s injury is beyond the type of harm to be expected from D’s conduct, P will virtually always go uncompensated
   2. Where type of injury to P is foreseeable, D is liable for injury sustained even though it may be more serious than normal
   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)
8. Zone of Danger and the Multifactor Test:
   1. Zone of danger rule (Palsgraf): D’s actions create a risk within a certain vicinity; persons within the range of apprehension owed a duty by the D, persons outside 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
9. 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 precise mechanism is not foreseeable (Huges v. Lord Advocate)
   2. Scope of risk can sometimes be defined more narrowly to include a general mechanism of harm as well as the type of harm (Doughty v Turner)
   3. Hughes and Doughty: in Doughty, define scope of risk to include mechanism of harm, in Hughes we don’t care what the mechanism is, defining “general type of risk” and “class of persons” is very flexible
      1. Specific mechanism does not need to be foreseeable. However, some courts will narrow this general rule. Scope of risk test flexible, think about mechanism in loose sense
10. Foreseeability in intentional torts v. negligence
    1. In intentional torts, even though sometimes harm to the victim is unforeseeable but we still hold D liable, doesn’t apply in negligence cases, idea of blameworthiness
11. Extent of harm and thin skull rule:
    1. Even if the extent of harm is not foreseeable, you are liable for the full extent of injuries
    2. Thin skull rule: if the D is negligent, even if extent of harm is not foreseeable and due to P’s pre-existing condition or susceptibility of harm, D is still liable (Hammerstein v. Jean Development)
12. 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 proximate causes
    3. When tortfeasors act in sequence, the first tortfeasor often argues that the second is an “intervening cause” that “supersedes” his liability. A superseding cause breaks the causal chain
       1. General superseding cause arguments
          1. D is negligent
          2. Some other act happens after D’s negligence
          3. The two acts together lead to an injury to P
    4. If intervening cause is within scope of foreseeable risk, not superseding cause
13. Intervening Acts – Proximate Cause:
    1. Criminal Acts
       1. Traditional rule: criminal acts deemed a superseding cause (no proximate cause)
       2. Foreseeability rule: proximate cause only if specific criminal act is foreseeable (Marcus)
       3. Scope of risk approach: apply scope of risk principles (Collins)
       4. Proximate cause if general type of harm is foreseeable, even if specific mechanism, ie. intervening criminal act is not (and other scope of risk requirements are met)
       5. Collins approach: fire was foreseeable no matter how it started, liable if foreseeable action could result in harm
       6. Marcus approach: if tortfeasors negligence is a “substantial factor” then intervening factors don’t matter
    2. Suicide
       1. Majority rule: suicide is a superseding cause, so no proximate cause
          1. Exceptions:
             1. D’s tortious conduct induces a mental illness/suicide impulse, or
             2. Special relationship between D and P resulting in D having duty to protect against suicide, and D aware/should know P at-risk of committing suicide
             3. Ex: facebook bullying cases could fall under these exceptions
       2. Minority rule: apply scope of risk/foreseeability principles (Delaney)
    3. Negligent Acts
       1. Majority rule: apply scope of risk principles, when a third party negligently intervenes between D’s negligence and P’s harm, this automatically severs the causal chain if it’s not a normal or foreseeable consequence
          1. Derdiarian – P need not demonstrate the precise manner in which accident happened was foreseeable
          2. Marshall – consistent w general rule, fact that it was a “freak” accident doesn’t matter, D culpable act does not have to be the next or immediate cause of injury, risk created by D’s conduct was still active and reverberating in this situation
          3. Ventricelli – no proximate cause if P is in position of relative safety, rental co. was not liable because intervening act was not foreseeable
       2. Minority rule: proximate cause only if specific negligent act is foreseeable
       3. Texas: requires but-for cause and substantial factor test
    4. Negligence per se: O’Guin conditions
       1. Statute/regulation is intended to prevent type of harm D caused
       2. P member of class of persons statute/regulation designed to protect

Cases and Issues (Proximate Cause)

*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. 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. This case introduces the rule that harm must be foreseeable. But the court in applying that rule said it was not foreseeable.

*Abrams v. City of Chicago:* P alleged that D 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. P was left in a coma and the child died.

*Palsgraf v. Long Island Railroad Co:* Plaintiff was standing on a platform of D’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.

*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.

*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.

*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.

*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.

*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.

*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.

*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.

**Contributory Negligence**

1. Traditional rule: if P was negligent, acted as a complete bar for damages; contributory negligence was a complete all or nothing defense (few jurisdictions still follow this rule)
2. Comparative fault scheme: compare relative fault of P and D for purposes of determining what D’s liability should be
   1. Pure comparative fault: damages allocated on P and D’s relative fault percentage (NY statute)
   2. Modified comparative fault: damages allocated on P and D’s faults only if P’s fault falls below the threshold set by the statute, if P’s fault falls above threshold, traditional rule applies and no recovery for P (Wisconsin statute, TX statute – 50% threshold)
   3. Comparative fault percentages are jury question and based on jurisdiction
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
4. Divisible harm:
   1. If there’s a divisible injury and you can say what harm is caused by P’s negligence and what harm is caused by D’s negligence, can portion harm and liability
   2. When indivisible harm, can move into comparative fault scheme
5. Mitigation of damages/avoidable consequences rule:
   1. P has obligation to minimize effects of D’s negligence, if they fail to do so, they are liable for aggravated injury 🡪 most jurisdictions do nto follow this rule anymore, this is now covered under comparative fault regime
      1. Ex: D negligently injures P but P does not seek medical treatment. As a result of delay in treatment, P condition gets worse. D is only liable for portion of original harm caused
   2. Most jurisdictions don’t follow this rule and use comparative fault scheme (TX does not follow this rule)
6. Reckless/Intentional harm by Ds
   1. P were able to escape traditional contributory negligence rule when Ds acted in reckless or intentional manner
   2. Even if P acted negligently, their negligence was not a bar that prevented them from recovering, D is held 100% liable
   3. Comparative fault states provide that P’s contributory negligence will serve to reduce damages even if D acts in reckless manner
   4. Even in states where P’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 P and D
7. Comparative fault – some wrinkles
   1. Circumstances where don’t consider P’s negligence:
      1. D has duty to protect P from P’s own negligence (Bexiga, McNamara)
      2. D has duty to protect P from P’s past negligence (usually physicians and patients)
      3. Policy reasons P has no duty to protect self (Christensen, LeRoy Fibre)
         1. Restatement provides in light of principle or policy, Ps 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.
      4. P as rescuer: usually rescuer cannot be considered contributorily negligent, unless they acted recklessly
      5. D has last clear chance to avoid harm: if D discovered or should have discovered P’s peril and could have reasonably avoided it, P’s earlier negligence would neither bar no reduce P’s recovery
      6. D’s reckless or intentional misconduct: contributory negligence was no defense to willful, wanton or reckless torts, defined as involving utter interference to or conscious disregard for safety of others
   2. Circumstances where P’s negligence is bar to liability:
      1. P committing illegal activity (Barker): based on public policy, courts should not aid one who engages in substantial violation of law
      2. Failure to mitigate damages

Cases and Issues (Contributory Negligence)

*Butterfield v Forrester:* D lays pole across road, P riding horse intoxicated doesn’t see pole in street and is injured, court says reasonable and prudent person would have watched where they were going and avoided pole, D not liable

*McNamara v. Honeyman:* Decedent who was mentally ill hanged herself while confined in state hospital and died from injuries sustained on that occasion. Judgment in favor of P. 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.

*Christensen v. Royal School District No. 160:* 13 year old girl sleeping w teacher. 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.

*Bexiga v. Havir*:  Bexiga, a minor, was injured while operating a power punch for his employer, Havir Manufacturing. His right hand was crushed during the operation of the machine, resulting in loss of fingers and deformity of the hand. At trial, an expert for P testified as to the fundamentally flawed design of the machine in question. The defense raised the issue of contributory negligence, which the Supreme Court of New Jersey rejected, citing considerations of justice and public policy. The court held that Defendant was strictly liable.

*LeRoy Fibre, Co. v. Chicago & St. Paul Railway:* P 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.

*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.

**Assumption of Risk**

1. 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 (Tunkl)
         1. Compulsory assumption of risk
         2. Lack of consideration
         3. Contract of adhesion
         4. Mistake/misrepresentation/fraud
         5. Void for being against public policy/violates statute
      3. Consequences: D not liable if waiver enforceable and D’s actions within scope of waiver
2. Assumption of risk analysis
   1. Scenario: P assumes risk of D’s negligence and no written or verbal agreement (secondary assumption of risk)
      1. Inquiry #1: Do P’s actions signal implied consent to D’s negligent act?
         1. If yes, express assumption of risk
         2. If no, implied assumption of risk
      2. Inquiry #2: If implied assumption of risk, was P’s assumption of risk negligent?
         1. If yes, P is contributorily negligent
         2. If no, D fully liable
3. Express (contractual) assumption of risk:
   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 P’s recovery and does not provide an occasion for the fact finder to assign a percentage of responsibility to any party or other person
   3. Situations in which waiver’s may not be recognized
      1. Compulsory assumption of risk: circumstances are not voluntary, P does not have other options for care
      2. Contacts of adhesion: K prepared by one party and signed by party in weaker position
      3. Fraud, mistake, misrepresentation: don’t really know what you are consenting to
      4. Public policy: when institutions provide a service necessary to the public
      5. D behavior: when D acted in a grossly negligent way, want to deter people from acting this way
4. Implied assumption of risk:
   1. P does not voluntarily encounter known risk
      1. Most courts recognize that just because a P voluntarily encounters a risk, does not mean they’re consenting to the creation of risk
   2. Betts majority rule: Ds are held liable with a reduction of P’s contributory negligence for assuming the risk
   3. Primary Assumption of risk (Avila):
      1. Arises when, as a matter of law and policy, a D owes no duty to protect P from particular harms (Avila – P assumed inherent risk of sport under primary assumption of risk)
      2. Scenario: Participants deemed to have consented to activity’s inherent risk
      3. Consequences: impacts scope of D’s legal duty; There is no duty to eliminate or decrease risks, only to not increase risks and for participants not to act recklessly
      4. P owes legal duty
         1. Not to act recklessly
         2. Not to increase risks inherent in activity
         3. No duty of ordinary care: foreseeable risk? Reasonable and prudent person do something else?
   4. Secondary assumption of risk (Betts):
      1. Arises when the D still owes a duty of care, but the P knowingly encounters the risk attendant on the D’s breach of that duty (Betts)
      2. Scenario: P voluntarily encounters risk created by D’s negligence, but does not consent to waiving D’s liability
      3. Consequences: D owes duty ordinary care. If elements prima facie case satisfied, D liable, but P’s recovery reduced if P contributorily negligent in voluntarily encountering risk

Cases and Issues (Assumption of Risk)

*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.

*Trunkl v. Regents of University of California:* Brought this action for injuries received as a result of negligence of hospital operated by defendants. P was admitted to hospital on the condition 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. Wasn’t really voluntary to sign release, healthcare is essential, public policy concerns

*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.

*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.

**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 to avoid economic burden
   3. Preserve limited resources of courts
2. Traditional analysis requires action to be brought within statutory period after claim accrues, P’s claim kicked out of court if they file after statute of limitations expires
3. When does claim “accrue”
   1. Traditional rule: When sufficient facts to support claim. 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 (still rule for med. Malpractice cases)
   2. Discovery rule: two approaches (creates more uncertainty)
      1. P discovers/could have discovered injury, or
      2. P discovers/could have discovered injury discovers/could have discovered D’s negligence caused injury
4. Tolling: clock on statute of limitations paused (extends time)
   1. Eg. P is a minor, disabled, or in bankruptcy proceedings
5. Estoppel: D estopped from raising statute of limitation defense when D’s misconduct caused P to delay filing
   1. Eg. MD conceals or fabricates medical records, D threatens P if sues
6. Negligent acts on timeline, multiple contributing acts, break down by occurrences and associated harms
   1. Harm 1 🡪 damage x (outside SoL: cant collect)
   2. Harm 2 🡪 damage y (w/in SoL: can collect y)
7. Statute of Repose: sets strict time limit regardless of when P becomes aware (for negligence claims you have x years to file, no exceptions)
   1. starts accrual from commencement of potentially negligent action and ends accrual after a fixed amount of years in which, if negligence occurs, cannot sue

Cases and Issues (Statutes of Limitations)

*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.

*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.

**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.
      1. Note: Juries have a lot of discretion for nominal and punitive damages; compensatory damages require proof of loss and specific amounts.
2. Compensatory Damages: have to be proved by P, for actual losses suffered
   1. Bodily injury:
      1. Past and future medical expenses
      2. Pain and suffering (what seems “fair” based on intensity and duration or expected duration of pain and suffering, wide range of damages, inconsistent)
         1. Medical cost as well as psychological suffering
         2. No fixed method to measure, what fact finder deems fair
      3. Lost wages
   2. Property damage:
      1. If permanently dispossessed of property: fair market value at time of loss
      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
   3. Adjustments
      1. Interest for past expenses/losses
      2. Present value of future expenses/loses (inflation and investment earning potential)
3. Punitive damages: if D acted with malice or wanton conduct, recklessness
   1. Tort for profit 🡪 fiberglass case, D knows about risk they are creating but ignores it because it is profitable
   2. Tort for pleasure 🡪 D bully or intentionally harming someone (terrorists, ect)
   3. Reasons for punitive damages:
      1. Deterrent to negligent behavior
      2. Expressing societies moral condemnation
      3. How tort litigation is financed (attorney’s usually get % of damages, encourages attorneys to bring P’s case)
   4. Calculation of punitive damages
      1. Sometimes consider ratio or % of compensatory damages
      2. Consider D’s profits, high enough to deter (less common)
      3. D degree of reprehensibility, D wealth
   5. States moving to limit/cap punitive damages

**Landowners' Common Law Duty of Care**

1. Landowners – Common law duty of care
   1. Invitees: always owed a duty of care, ordinary duty of care
      1. Who are they: invited by landowner for economic purpose/purpose beneficial to D, 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 they are: not invited onto property and no legal right to be there
      2. Standard of care:
         1. General duty to refrain from willful, wanton, or reckless conduct
         2. Duty ordinary care once discover (D had reason to know of) trespasser’s presence in peril (Gladon)
   3. Licensee
      1. Who they are: everyone else (including social guests)
      2. Standard of care: same as duty of care owed to trespasser
2. Attractive Nuisance Doctrine – accepted in all states (Bennet)
   1. Possessor of land liability for child’s physical harm caused by artificial condition upon land if: (1-3, foreseeability of risk to child, 4-5, do not require landowner to eliminate risky condition, just take reasonable steps)
      1. D knows/reason to know children likely trespass in place where condition exists – doesn’t matter what originally draws them to property, and
      2. D knows/reason to know condition poses unreasonable risk of death or serious bodily harm to children (doesn’t include minor harms), and
      3. Children unlikely to discover the condition or realize the risk
      4. Utility of condition and burden of eliminating it slight compared to reducing risk to children
      5. D fails to exercise reasonable care to eliminate the danger or otherwise protect the children
3. Open and Obvious Danger Test:
   1. Test: whether dangerous condition was, objectively speaking, so obvious that D would be reasonable in concluding that an ordinary intelligent P 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 P might avoid this open and obvious risk. If it is foreseeable that P would encounter it, there might still be a duty of ordinary care (O’Sullivan)

Cases and Issues (Landowners)

*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.

*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.

*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, Nonfeasance, Duty to protect from third parties:**

Immunity

1. Immunity:
   1. Sovereign Immunity (Governments) – affirmative defense:
      1. Tort law applies law of state where tort occurs, if gov’t owns land in TX where tort occurs, apply TX law
      2. Federal gov’t retains sovereign immunity for:
         1. Combatant military activities, mail delivery, torts related to dignitary harms, strict liability, discretionary functions or duties
      3. Two part test (Whisnant): Immunity if challenged action was
         1. Discretionary (vs. mandated by statute, policy, or regulation); and
         2. Susceptible to social, economic or political policy analysis (vs. professional or scientific judgment)
      4. Test very fuzzy, what is “policy”, look for analogous cases
   2. Design (framework or policy goals) v. Implementation (courts usually more likely to say implementation)
   3. Immunity for charities: (inc. hospitals, summer camps, private schools, ect)
      1. Rationale: preserve charities’ assets for services, not payout tort claims
      2. Most states have abolished this immunity, some have retained
   4. Spousal Immunity:
      1. Rationale: necessary for state to encourage marital harmony, want to prevent insurance fraud (TX has abolished S.I.)
   5. Parent-child Immunity
      1. Rationale: necessary for state to protect family harmony, only applied between parent and unmarried minor child (majority of states – inc TX – have abolished)
   6. Parole board hypo: Parole board at federal prison paroles prisoner, who was serving time shortly following his conviction for a sex crime. Shortly after parole, prisoner rapes P. P sues parole board arguing they were negligent in paroling prisoner. Can board board invoke sovereign immunity?
      1. Yes, treat as policy. Gov’t will argue parole is discretionary function, budgetary concerns in prisons
      2. P would argue it is implementation issue, prof judgment
   7. Public Duty Doctrine: scenario: government fails to act
      1. Rule: no duty owed if general duty to protect public
      2. N/A when: duty owed to a particular group of which P is a member (ie. CPS); affirmatively undertake duty + reliance

Nonfeasance:

1. Nonfeasance: D does not owe P a legal duty
   1. General rule: D owes no duty to P to take active or affirmative steps to protect P from harm (*Yania*)
      1. A child or someone of limited mental capacity would be an exception to this rule
   2. Exceptions to nonfeasance no duty rule
      1. Duty of reasonable care for P safety when:
         1. Conduct (neg or non-neg) creates the risk
         2. Prior conduct harms P
         3. Statute/ordinance requires D affirmatively protect P (ie. keeping your sidewalk cleared)
         4. Voluntarily undertook to care for P (*Wakulich*)
            1. Even if you didn’t create the risk
         5. \*Restatement Third (more D friendly)
            1. no duty unless increased risk to P
            2. permitted to discontinue care if P not worse off than if D had not intervened
         6. Special/formal relationship (then D has duty of care 🡪 implicit understanding that D should be responsible for state of affairs, only arises when a setting implicates that relationship, see below for recognized relationships)
         7. Relationship based on fairness principles (*Podias*)
         8. Action as undertaking + Reliance (*Florence)*
      2. Duty to not unreasonably interfere with others attempts to help
         1. Most courts treat this separately
   3. Action v. Non-action: where D’s conduct creates risk, requires action, D should be responsible (hypos in 11/7 Powerpoints)
2. 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 understanding; or if other person relies on actor’s using reasonable care in the undertaking
3. Social host rule: no liability to others for providing alcohol in the home
4. 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
5. Exception Rule: judicial balancing of the mix of factors peculiar to each case balanced with burden of convenience and involvement- learned hand formula
6. Public Duty Doctrine: no liability for failure to carry out a duty owed to 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. *Florence* Exception: Duty to protect if
      1. Undertaking: assume duty to protect P or special class of persons which P is a member; AND
      2. Detrimental reliance: P actually relies on D protecting P to P’s detriment (would P have acted differently if hadn’t relied on D conduct, if not, D should not be liable)
   3. Effect: exception to public duty rule if D is a government actor, exception to nonfeasance no duty rule if D is a private actor
   4. Addition to exception rule: direct contact must occur between P and government official. Some jurisdictions do not have this req.

Duty to Protect from Third Parties (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 between P and D
      2. Risk arises within scope of relationship
      3. Foreseeable risk
         1. Some courts require imminent risk when special relationship (employer/employee)
         2. Some courts apply narrowly (*Posecai* approaches 1 and 2)
      4. Risk utility balancing (*Posecai* approach #4)
   2. Scenario 2: Based on relationship between D and third party
      1. Special relationship between D and third party
      2. Risk arises within scope of relationship
      3. Ability to control (courts typically characterize duty to protect as duty to control third party, not duty to warn P)
      4. Foreseeable risk to P
   3. Scenario 3: affirmative act facilitates third party’s risky conduct
      1. Duty if entrust with chattel + foreseeable third party apt to use chattel in dangerous way (negligent entrustment)
      2. Serving alcohol to third party – check jurisdiction
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. Four special relationships recognized by the court
      1. Common carrier-passenger
      2. Innkeeper-guest
      3. Business invitor-invitee
      4. Voluntary custodian-protectee
   3. Exception to no-duty rule (normative judgment that D responsible because created situation or responsibly arises out of special relationship)
3. Scenario 1 (Iseberg, Posecai)
   1. Court says no foreseeability so no duty
      1. Foreseeability assessed based on four standards:
         1. Specific Harm rule: no duty unless aware of specific harm 🡪 too restrictive
         2. Prior similar accidents: evidence of previous crimes on or near the premises 🡪 arbitrary results, applying different standards
         3. Totality of circumstances test: takes additional factors into account including nature, condition, location of land, ect 🡪 too broad a standard, somewhat unfair to business
         4. Balancing test (\*\*): balance foreseeability of harm against burden of imposing duty, look for prior similar incidents of crime on property 🡪 shifts learned hand approach to whether duty is established or not
4. Duty of landlords to protect tenants: generally no duty owed to tenants, courts sometimes enforce duty sometimes do not
   1. Rationale: business/contracts issue, if tenants want more security, can go elsewhere
   2. Exceptions: conditions deteriorate, landlord introduces harm, other nonfeasance conditions
5. Duties to protect P from dangerous third parties:
   1. Generally courts look at whether or not a relationship establishes a duty to control. No duty to warn
   2. *Dudley:* court says if felon committed crime at place of employment, no duty to warn, can look at past behavior to determine foreseeability
6. Social guests: serving alcohol, courts usually attribute acts to drunk person, many jurisdictions have changed rule, in TX – if person drinking is 18 or older, host is not liable
7. Family members to third parties: courts reluctant to find a duty to warn, duty to control is usually hard to prove too, unless specific fact pattern indicates otherwise
   1. Exceptions: parent has duty to control minor child only when there is specific eminent danger foreseeable
   2. Parent/family member induces harm
   3. Other conditions listed in nonfeasance rules
8. Employer-employee to third party: generally, employer has a duty to control employee if danger is foreseeable
9. Imminent danger, defined:
   1. If related to a special relationship, narrow requirement
   2. If related to third party outside relationship, broad requirement

Cases and Issues (Immunity & Nonfeasance/Protecting third parties)

*Whisnant v. US*: mold found in Naval base commissary, negligently allowed mold to remain, didn’t do health inspections often enough, was it discretionary function? If so, sovereign immunity. Did not fall under discretionary exception.

*Wakulich:* Two boys provided alcohol to underage girl offering her a prize if she drank it all without losing consciousness which she did. The boys then put her on couch downstairs, checked on her, and placed her head on pillow to avoid aspirating. They prevented others from calling 911. She was later brought to hospital and died.

*Podias v. Mairs:* Mairs, while driving drunk, lost control of the car, struck motorcycle driven by Podias, and went over guardrail. Passengers thought Podias was dead. 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. Similar to learned hand analysis, Ps should have acted.

*Yania v Bigan*: Bigan was engaged in coal strip-mining; on his property were large cuts or trenches. 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.

* Court says taunting shouldn’t influence you to the point of doing something stupid; decedent’s actions break the causal chain.
* Courts are moving away from intervening actors as breaking the causal chain.

*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.

*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.

*Posecai:* P robbed of $19k in jewels in Wal Mart parking lot. Special relationship: landowner-invitee. Court says no foreseeability so no duty.

*Marquay:* Three students brought separate suits against teachers for sexual abuse/harassment and administration knew. Court establishes special relationship.

*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.

*Dudley:* Felon at halfway house broke into nearby apartment and raped/killed woman. Court upholds halfway house’s duty to protect.

**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). PFC:
   1. **Conduct: Extreme and Outrageous (severity of regularity) (*GTE Southwest*)**
   2. **State of mind: Either**
      1. **Intent to cause severe emotional harm** 
         1. **Actual purpose of knowledge of sub. Certainty**
      2. **Recklessness: indifferent to risk of severe emotional harm**
         1. **Aware of severe emotional harm (or facts making risk obvious) and**
         2. **Burden of acting differently is slight**
   3. **Result: severe emotional harm**
   4. Does not require physical component
   5. Causation:
      1. Some courts require evidence showing causal connection
      2. Some courts allow res ipsa loquitor like doctrines
      3. If exercising a legal right (ie. divorce), no causation
   6. Public policy: set bar high, don’t want to be “rudeness” police, efficiency, concern for false claims, difficult to put monetary value on emotional distress
   7. Don’t honor thin skull rule here
   8. Damages: emotional disturbance, compensation for bodily harm
3. **IIED When Conduct Directed at Third Person**
   1. **Conduct: extreme and outrageous conduct**
   2. **Presence requirement: P must be present**
   3. **State of mind: Either**
      1. **Intent to cause severe emotional harm (actual purpose or knowledge of sub. certainty)**
      2. **Recklessness: indifference to risk of severe emotional harm**
   4. **Result: severe emotional harm**
      1. **If P not family member of third person, emotional distress must result in bodily harm**
4. Negligent Infliction of emotional distress
   1. Area of law where courts are inconsistent, no majority rule
5. Types of NIED Cases:
   1. Fight to self: D’s conduct puts P at risk of imminent physical harm 🡪 P’s emotional distress
      1. Other approaches in other jurisdictions require (TX: must have physical harm, follows court in Mitchell)
         1. Physical harm (*Mitchell*)(modifies prox cause)
         2. Physical impact (any)
         3. Physical manifestation (must show P suffered, ex: nightmares, insomnia, vomiting, ect) (modifies actual harm)
         4. Zone of danger (D negligence put P at physical risk; injury/contact not req; had to have feared for own safety)
         5. Severe emotional distress
         6. Combination of all of the above (look at juris.)
   2. Bystander: P witnesses D’s conduct harming another 🡪 P’s emotional distress (*Catron*, *Dillon, Thing*)
      1. Summary:
         1. Minority: no recovery for bystanders – period.
         2. Majoirty: *Dillon* or *Thing*  test
         3. Some courts: allow recovery if meet fight-to self requirements
      2. Policy: want to avoid fraud; if something happens in a room of 100 people, should everyone recover? Only if they felt they were in danger
      3. Zone of danger test:
         1. P w/in zone of danger
         2. P feared physical harm to self
      4. Scenario #1: emotional distress from (1) fear for own safety and (2) witnessing harm to third party
         1. Some courts: recover for all emotional distress
         2. Some courts: only recover for emotional distress resulting from fear for self
      5. Scenario #2: emotional distress due entirely to witnessing harm to third party
         1. Majority: no recovery
         2. Minority: recovery allowed
      6. Bystander cases:
         1. *Catron*: no recovery *because no physical injury to P and no imminent threat of physical injury to P*. NE court required:
            1. Reasonably foreseeable bystander victim based on familiar relationship w injured victim
            2. P was a direct victim of D’s negligence bc he was within zone of danger of negligence
         2. *Dillon:* Duty to protect bystander from emotional distress when foreseeable. Take three factors into account:
            1. Duty to protect P from emotional harm when foreseeable
            2. Factors:

P located at/near scene

Shock resulted from direct emotional impact upon P

P and victim are closely related.

* + - * 1. Actual harm: emotional distress
      1. *Thing:* Mother heard son struck by vehicle and saw blood/unconscious child in road. Court says no recovery.
         1. Duty to protect P from emotional harm if:

P and victim are closely related

P present at scene at time of event

P aware of D’s conduct harming injured party

* + - * 1. Emotional distress is:

Serious/severe; and

Not an abnormal response to circumstances

* + - 1. Jurisdictions follow *Thing* (majority). Some follow others, or combinations, or none.
      2. Thin Skull rule generally not honored (some jurisdictions take into account)
  1. Direct victim: direct duty to reasonably protect P from emotional distress when:
     1. Pre-existing relationship + negligent performance highly likely to cause serious emotional distress (*Burgess*)
     2. Must prove that the actual harm resulted in emotional distress
     3. D must assume the duty to protect P from emotional harm
     4. Duty imposed by law

1. Loss of Consortium: includes different types of harms (can sue for emotional distress *and* loss of consortium), includes love, companionship, ect
   1. Most jurisdictions: only spouses and minor children can bring claims
   2. Minority of courts allow parents and adult children to bring claims
   3. W contributory negligence – damages for loss of consortium claims are limited to same % of damages that injured love one recovered
2. Duty of care to protect emotional well-bring of independent physical risks
   1. *Heiner*: hospital erroneously diagnosed P w HIV, could not recover, no NIED where distress is caused by P’s fear of nonexistence physical peril
3. Minority rule – analyze claims under general negligence approach (*Camper*)
   1. This approach opens door to more NIED claims, small minority follow this standard
      1. D owed P a legal duty – generally owe duty of care to protect from emotional harm
      2. Beach? Was it foreseeable
      3. Actual harm: serious/severe emotional harm + expert medical/scientific proof
      4. Factual cause: “but for”
      5. Proximate cause: were D’s actions within scope of foreseeability to cause damages to P

Cases and Issues (Emotional Harm)

*GTE Southwest v. Bruce* (boss harasses workers continuously; court also looks at power imbalance in relationship)

*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.

Bystander Case Examples:

*Dillon:* Mother and sister saw vehicle strike girl as crossed street. Court says zone of danger rule: Duty to protect bystander from emotional distress when foreseeable. Take three factors into account:

*Thing:* Mother heard son struck by vehicle and saw blood/unconscious child in road. Court says no recovery.

*Catron:* P took boat out, pulling 2 of his daughters friends on tubes, watched jet-ski run into one of the girls on the tube, killing her, suffered major depression and anxiety, no recovery because no physical injury to P and no imminent threat of physical injury to P.

Direct Victim Case Example

*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.

*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.

**Wrongful Death and Survival Statutes:**

1. Death
   1. Cause of action terminates with death of P or D
      1. Seems unfair or unjust to hold D accountable
      2. Goes against compensation goal of tort law
      3. Weakens deterrence effect
2. Survival Statutes: come into play regardless of whether D conduct caused P death
   1. Applicability: Any cause of action at time of death survives death of injured party or defendant
   2. Who brings suit: estate
   3. Damages: whatever deceased could have recovered if survived; loss of life (some states)
      1. Any losses up to moment of death are recoverable
      2. Most states allow recovery of punitive damages
      3. Some states allow compensation for loss of life, only when D’s negligence causes decedent’s death
   4. Who recovers: estate/heirs
3. Wrongful death statutes: recovery dictated by state statute
   1. Applicability: when D tortuously causes decedent’s death, compensate survivors for their loss
   2. Who brings suit: specified in statute (eg. Surviving spouse, executor of estate) 🡪 difference between person who can bring action and who can recover
   3. Damages:
      1. Pecuniary loss
         1. Funeral expenses
         2. Loss of support: what financial support did deceased give to beneficiary
         3. Loss of inheritance: if lived a full life, what would estate have been
      2. Loss of consortium
      3. Mental anguish/grief (some states)
      4. Punitive damages (some states) – rarely granted
   4. Who recovers damages: survivors (defined by statute) TX: spouses, children, parents
4. Affirmative Defenses, limitations to recovery
   1. Deceased’s contributory negligence:
      1. Wrongful death: in comparative fault state, jury assigns fault to both defendant and decedent; recovery reduced by % decedent’s fault
      2. If D had duty to protect P from themselves, then don’t take into account contrib. negligence, same for survival actions
   2. Survivor/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
   3. Immunities (eg. sovereign or spousal immunity)
   4. Statute of Limitations/Repose – usually tied to date of death
      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 (some jurisdictions treat this as bar to bringing lawsuit)

**Vicarious Liability:**

1. Tortfeasor = Employee: vicarious liability if tortious act w/in scope of employment
   1. Within 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
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 created peculiar harm (*Pusey*), (2) duty imposed by statute, (3) landowners/place of business supplier of chattel, or (4) policy reasons
4. Vicarious liability, general
   1. Occurs when we hold a D liable for acts of somebody else they have a relationship with; similar to strict liability
   2. Examples of special relationships: employer/employee, charity/volunteer, leasor/lease
   3. Procedurally, person who asserts relationship has burden of proof
   4. Public policy: spread liability, unjust enrichment (employer benefiting from employee’s conduct), deterrence, compensation for innocent Ps
5. Employer-Employee
   1. Respondeat Superior – Control Test
      1. General Rule: Employers not vicariously liable for independent contractors absent a principle-agent/master-servant relationship (*Mavrikidis)*
      2. Control Test: Factors (usually if control aspect is not met, don’t pass test, other req for close call cases)
         1. \*\*Extent control work (main component – supervisory power doesn’t normally trigger this requirement, look for specific instructions, show actual control)
         2. Individual engaged in distinct occupation or business
            1. Supplies own tools, instrumentalities, place of work
            2. Length of employment
            3. How paid (by time or job)
         3. Whether work part of employer’s regular business
         4. Skill required
         5. Whether parties believe creating master-servant relationship
   2. Traditional test: narrow, usually only vicarious liability if under strict instruction from employer
   3. Modern approach: more flexible, “doing the master’s work” even if employee is not following employers instructions, loosely associated with employers business is usually enough (*Riviello*)
      1. Rationale: enterprise liability, cost of tort and safety would be in cost of service/good, lower liability cost leads to lower price, customers naturally choose safer option
6. Vicarious Liability for Intentional Torts:
   1. General rule: employers are not vicariously liable for their employee’s intentional torts
   2. Look for cases w closely related facts to determine outcomes, look to public policy
   3. Exceptions:
      1. *Rodebush*
         1. Act done while engaged in employer’s business, and
         2. Act is incident to employer’s business (ie. results from impulse or emotion arising from work)
      2. *Fahrendorff*
         1. Misconduct is foreseeable, and
         2. Involves abuse of power
7. Nondelegable Duty (exception)
   1. Rule: when applicable, the employer may delegate the work but not legal responsibility of the work
   2. Legal effect: employer vicariously liable
   3. Application: nondelegable duty if
      1. Work inherently dangerous – applies when special risks are associated with the work such that reasonable man would recognize the necessity of taking special precautions
      2. Public policy/justice
      3. Duty imposed by statute
      4. Property owners (w respect to condition of premises)
      5. Businesses supplying chattels (ie. rental car co that contracts w garage to fix cars, someone injured in car, rental co V.L.)
8. Apparent Agency (not really sufficient control, but appears that there is principal/agency relationship)
   1. Generally, look at control test (above) to determine if principle-agency relationship, what was employee was doing at time (focus more on deterrence)
   2. Employers are vicariously liable for independent contractors if:
      1. Appearance of a principle-agency relationship; and
      2. P relies on apparent agency (courts sometimes mix approaches)
         1. “But for” approach: injury would not have occurred in absence of justifiable reliance (used in TX)
         2. “Reasonable belief” approach: P reasonably believed there was a principal-agent relationship (R. Torts) (courts often apply this), example ER doctors
   3. Sometimes V.L. when either employer or independent contractor create appearance of apparent authority (ie McDonalds franchise)
9. Damages:
   1. Employer and employee are considered a single D and jury doesn’t assign percentage fault, parties themselves will allocate amounts

Cases and Issues (Vicarious Liability)

*Rodebush:* Employee works at retirement home is drunk, slaps elderly resident. Employer liable.

*Fahrendorff:* Employer was camp counselor who made sexual advances to camper. Employer liable.

*Riviello:* Employee (bar tender) accidentally stabbed customer’s eye. Employer is liable.

*Fruit:* Employee at convention after events in evening. Drove drunk and struck another, causing injury. Employer is liable.

**Strict Liability**

1. Common law strict liability – PFC
   1. Foreseeable significant risk
      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. Factual cause
   5. Proximate cause – different/narrower than negligence
      1. Limited to foreseeable risks that make activity *abnormally* dangerous (result from blasting causes woman’s cat to eat her liter – no S.L, not the foreseeable harm)
      2. Unforeseeable intervening actor/event breaks causal chain (majority rule) – no prox cause then no S.L.
         1. Ex) D stores explosives in warehouse, someone tampers w explosives as act of revenge, no S.L, intervening act breaks causal chain
2. Common law strict liability – Defenses
   1. P or others contribute to activity (R. 3rd) – not followed in some juris.
   2. P’s contributory negligence, avoidable if P used reasonable care
      1. Traditional rule – not a defense
      2. Modern rule – apply comparative fault rules (R. 3rd)
   3. P’s implied assumption of risk:
      1. Traditional rule – complete defense
      2. Modern rule – apply comparative fault rules
3. Policy: if you engage in highly-risky activity, that activity should pay its own way
4. Statutes generally impose S.L. only under certain highly-risky circumstances
5. No S.L. if harm avoidable by reasonable care

**Products Liability**

1. **Product Liability – PFC**
   1. **P is member of class of individuals foreseeably injured by defective product**
   2. **Defective product** –defective when unreasonably dangerous, does not meet consumer’s expectations
   3. **Actual Harm**
   4. **Cause in fact**
      1. *Liriano*, burden of proof shifts to D
   5. **Proximate cause** – duty owed to foreseeable users
2. Rationale:
   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
3. Actual harm:
   1. Physical harm or harm to property other than damages to product itself
   2. Economic harms that result from physical harms recoverable
   3. No recovery for pure standalone economic harm (hard to draw line)
4. Defective Products (overview)
   1. Manufacturing Defect:
      1. Product unreasonably dangerous for its intended use (*Lee*)/ departs from intended design
      2. Defective when leaves M’s hands
   2. Design Defect:
      1. Consumer expectation test (*Leichtamer*)
      2. Reasonable alternative design – RAD (*Honda*)
      3. Manifestly unreasonable design
         1. No design defect if product dangerous by nature
   3. Information defect:
      1. Foreseeable risks reduced or avoided if provided reasonable warning (*Liriano*)
5. Manufacturing Defects
   1. Consumer expectation test: whether product was dangerous beyond contemplation of consumer, when product departs from intended design
   2. 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 hands (*Lee*)
   3. Balance the products utility
6. Design Defects:
   1. Consumer expectation test: defective when it fails to perform as safely as ordinary consumer would expect (*Leichtamer*)
   2. Reasonably alternative design test: (*Honda*)
      1. There was a safer alternative design
      2. Safer alternative design:
         1. Would have prevented or significantly reduced risk of injury
         2. Would not have substantially impaired products utility
      3. 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. RAD test (Mantel revision)
      1. There exists an alternative design that would prevent or reduce risk incurred by P
      2. At time of manufacture, alternative design was technologically and economically feasible
      3. Safety benefits of alternative design > costs
         1. Safety benefits = reduction in risk of injury
         2. Costs = direct costs, decreased utility of product, and increase in other risks
      4. Harm to P foreseeable
   4. Infer design defect from event
   5. Manifestly unreasonable design – no defect if product dangerous by nature and has real utility (ie, knives)
7. Information Defect:
   1. Foreseeable risk of harm
   2. Risk reduced or avoided if provide reasonable warning
   3. Reasonable and prudent manufacture would give warning
   4. Warning given is reasonable/adequate (*Carruth*)
      1. *Liriano* – risk was not obvious and cost to warn was low therefore duty to warn
   5. Information defect PFC (Mantel revised)
      1. Defective product (information defect)
      2. Actual harm
      3. Factual cause – presume if P read warning, they would have acted differently, can be rebutted by manufacturer, usually not an issue in information defect cases
      4. Proximate cause – want manufacturers to anticipate ways in which product might be misused
         1. Scenario: defective truck bed gets stuck, P sticks head under truck bed and it falls on him, no proximate cause because not the reason why product was defective, M could not have anticipated that harm
         2. When 2 causal chains, take into account both (in some jurisdictions), ex: P gets lung cancer, claims from product containing asbestos but P was also a smoker
   6. Plaintiff’s intervening actions:
      1. Don’t consider P’s contributory negligence
      2. Might not take manufacturer’s negligence into account when there’s a separate chain that contributes to harm
      3. Bring up P’s implied assumption of risk under comparative fault rules
         1. Minority rule: complete bar
      4. P’s express assumption of risk is complete bar

Cases and Issues (Products Liability)

*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.

*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.

*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.

*Liriano*: P injured self with meat grinder when safety guard removed and no warning label affixed. Court found D liable for information defect.

*Carruth:* seven family members killed in fire, sue smoke detector manufacturer for insufficient and confusing installation instructions