I. Introduction

 1. Some Early History

 2. The Aims of the Law of Torts

 Customary Four Goals for the Law of Torts

 1. Prevention of self-help by victims and their relatives and friends against those who have caused injury

 2. Retribution against wrongdoers

 3. Deterrence of wrongdoers

 4. Compensation for the victims of wrongdoers

 Two comments about this line of argument:

 Agreement: If compensation is to be the principal justification for retaining the tort system, there is no question that there are much cheaper and more efficient means for compensating injured people than an action in tort with its emphasis on fault and causation and all the panoply of legal machinery necessary for the resolution of such questions. Indeed, if compensation is the paramount consideration, a general system of social insurance to cover almost all injuries for which redress is now sought in the tort system is the most logical answer.

 Contention: The history of the last 50 years has actually increased the importance of the retributive and appeasing functions of tort law.

 3. The Theoretical Structure of Tort Law and Its Capacity to Expand to Cover New Situations

 How well the tort system can respond to the demands made upon it to adjust to the needs of modern life will depend to some extent on its theoretical foundations.

 “Particular” Theory: Modern tort law is merely a composite of a set of discrete torts that have evolved over time and which cannot be fully understood or expanded to cover new situations without reference to their particular historical evolution.

 If a court is prepared to accept the general theory...

 It should, from the point of view of logic, be easier to argue for the extension of tort remedies to cover new situations.

 At the same time, actually stating the general theory in any reasonably concrete form is a difficult if not impossible matter.

 Could run afoul of the accepted theory of legislative supremacy.

*ROBERSON v. ROCHESTER FOLDING BOX CO.*

 Rochester Box used Robertson’s picture for advertising on their flour container without her permission. People recognized her and she sued for invasion of privacy and emotional distress.

 First case to bring up invasion of privacy. Court would not rule for P because there was no precedent to such and the court wouldn’t start one now.

 Today, if a picture taken is newsworthy you would not win if you brought suit.

 All four cases were cited by the P’s counsel in hopes of supporting their case. The first three cases are based on some sort of breach of trust and property right and are not like Roberson because none of them are based on “feelings.” Schuler is the only one involving emotional distress.

 Prince Albert v. Strange (p.11-12): Queen and Prince made etchings, workman made copies, sued for injunction. The right of privacy is separate and distinct of right of property.

 Pollard v. Photographic Co. (p.12): Photographer was contracted to take a woman’s photo and sold copies of it for Christmas cards without her consent. Breach of implied contract regarding the right of privacy.

 Duke of Queensbury v. Shebbeare (p.12): Court restrained that person from the benefit of making copies of the manuscript in print for profit.

 Schuyler v. Curtis (p.13): Ds attempted to erect a statute of a dead woman and her relatives commenced an action in equity to restrain alleged “hurt feelings.” Relatives don’t have the right to injunction based on the right to privacy of deceased.

4. The Historical Development of the Modern Law of Torts—Development of the Concept of “Fault”

 **(S) The Forms of Action:** Scott v. Sheperd; Thorns; Weaver v. Ward

*SCOTT v. SHEPHERD*

 Shepherd (D) threw a squib into the marketplace; Willis tossed it away; Ryle hit Scott (P) in eye and exploded

 Held that trespass would lie because it was causation over intent.

 What case could π bring against Scott? Willis? Ryal?

 Against Scott (trespass, despite that there were intervening factors, because he intended to throw squib at someone and consequences were direct and immediate); Willis (trespass on the case because he also intended to throw squib, but he was throwing to save himself; actions were indirect and mediate); Ryal (trespass because he intended to throw squib and it was his direct action that caused πs direct and immediate injuries); If π sued Ryal, Ryal would have to plead and prove that despite the fact that he threw squib that damaged πs eye, it wasn’t his fault and he had no other choice; Ryal would win

*THE CASE OF THE THORNS*

 Thorns fall on persons land and he went to get them off. Therefore, he was trespassing.

 Court ruled that if a man assaulted him and he lifted up his staff to defend himself and as a result battered another person, trespass lies.

 Doesn’t matter how justified your action was, you are still strictly liable

 Don’t have to have intent to be held liable in civil law

*WEAVER v. WARD*

 2 soldiers—Ward (D) accidently fired his gun and injured Weaver (P).

 Court held that trespass still held unless they could show absolute no fault on part of D. (Which in this case they couldn’t so D held liable)

 Circumstances are irrelevant. If there is an injury you are responsible unless absolutely and completely without fault

 Even involuntarily (i.e., walking onto someone else’s land) still liable [for trespass]

 Even if it was an accident you are still liable

 Big picture: If you did it, you are responsible

 Remember—This in book for historical purposes!

**(S) Emerging from the Forms: Brown v. Kendall**

*BROWN v. KENDALL*

 Brown (P) and Kendall (D) each had a dog and they started fighting. D grabbed a stick and began to beat the dogs to get them apart. During the beating, P, who was out of the range of the stick, stepped forward, the D backed up a few paces and when he swung the stick back, it hit P in the eye.

 P must show that D was committing an intentional tort and was acting negligently. Burden of proof on P. D only had to use ordinary care.

 Start of negligence torts

|  |  |  |
| --- | --- | --- |
|  | **P: Negligent** | **P: Ordinary Care** |
| **D: Negligent** | [1]D wins | [2]p. 26 (D’s instructions): D winp. 28 (Appellate judges’ instructions): P wins  |
| **D: Ordinary Care (not neg.)** | [3]D wins | [4]D wins |

\* Box 4 is the fundamental law of negligence. If someone is harmed but everyone is careful, then the defendant wins because everyone was careful. On the reverse, if both parties are negligent, then D wins.

This is a rule that dominated American tort law till ab 1970s – called Contributory Negligence rule – saying that if both sides have been careless, than the P cannot recover at all, even if there is an imbalance of carelessness. This is no longer the law – we have moved to a comparative responsibility regime, where it is attempted to be determined how much at fault the parties are.

**II. Intentional Torts**

 (Note that intention torts battery, assault, trespass to land, and trespass to chattels all come from the original trespass claim)

Chapter 2

**A. concept of Intent**

 3 elements of intentional torts

 1. act: has to be voluntary

 2. intent: a person acts with intent if:

 a) the person has the purpose a producing that consequence; or

 b) the person knows to a substantial certainty that the consequence will ensue from the person’s conduct

 Single or dual see *White v. Muniz*

 3. Causation: injury resulted from the action

 4. (Damages) Not every intentional tort has damage ex. Trespassing

 Substantial Certainty: test should be limited to the situations in which the D has knowledge to a substantial certainty that the conduct will bring about harm to a particular victim, or to someone within a small class of potential victims within a localized area.

Recklessness: if the person knows of the risk of harm and fails to take any precautions or acts indifferent to that risk

**A. Intent:**

1. Single intent – majority view; only need to show the defendant had intent to cause contact; not the intent to cause harmful/ offensive contact

2. Dual intent – minority view; need to show the D intended to BOTH cause contact and that the contact intended to be harmful/offensive; Colorado

Rs (3rd) §2:

 1. the actor desires to cause the consequences of his act OR

 2. that **he believes** the consequences are substantially certain to result

*White v. Muniz* (under insanity defense)

 Most of the time it doesn’t matter whether single or dual, but with infancy or insanity, it does.

 Colorado = dual intent standard

 Comment:

 A purpose to cause harm makes the harm intentional even if harm is not substantially certain to occur.

 Knowledge that harm is substantially certain to occur is sufficient to show that harm is intentional.

 Actor must ***know*** that harm is substantially certain to occur.

3. Transferred intent

 Where D intends to commit a tort against one person but instead:

 1. commits a different tort against that person

 2. commits the same tort as intended but against a different person; or

 3. commits a different tort against a different person

 Limitations: only where both torts are in the following list:

 Assault, Battery, False imprisonment, Trespass to land, and Trespass to Chattels

*Singer v. Marx* (pg 52)

 Three children, boy throws rock, hits Denise

 An infant who forcibly invades the person of another is liable for a battery regardless of an intent to inflict injury

 i.e. the only intent that matters is the intent of the act (throwing the rock)

 If boy aimed at Denise, he is liable for battery

 If boy aimed at other girl and struck Denise by accident, **transferred intent** would make him liable

 (Or boy Negligently threw the rock and hit Denise)

*Jackson v. Brantley* (pg 34)

 D horses escaped and he only bridled two while walking them on the side of the highway

 Affirms for P b/c D *was* substantially certain to know injury could come from this and he willingly and knowingly led the horses onto the road.

*Beauchamp v. Dow Chemical Company (*pg 38)

 P worked with agent orange, recovery was barred by an employment provision

 Ruled for P b/c Dow Chemical knew that agent orange was substantially certain to cause injury

 Until this case, ALL employee injuries fell under workers’ comp., now intentional torts can be brought up in court

**B. Battery and Assault**

Battery:

 Elements:

 1. An act by the D which brings about harmful or offensive contact to the P’s person

 2. Intent on the part of the D to bring about harmful or offensive contact to the P’s person; and

 3. Causation (= D is liable for direct and indirect contact; it will be sufficient that he sets in motion a force that brings about harmful or offensive contact to the P’s person)

(Note 4: It is not necessary to strike the body to constitute battery. Striking something that is attached or closely related to a person’s body for example a hat or cane.)

Assault:

 Elements:

 1. an act by the D creating a reasonable apprehension in P of immediate or offensive contact to the P’s person

 2. Intent on the part of the D to bring about in the P apprehension of immediate harmful or offensive contact with the P’s person; and

 3. Causation (= P’s apprehension must have been legally caused by the D’s act or something set in motion thereby, either directly or indirectly)

*Masters v. Becker* (pg 41)

 6 and 9 yr old playing on a truck in an empty lot, one was pushed off

 A P in an action to recover for an assault must prove:

 1. That there was bodily contact

 2. Such contact was offensive

 3. And Defendant intended to make the contact

The **P does not have to prove the D intended to physically injure him**, or intended the injury that occurred

*Brzoska v. Olson* (pg 44)

 HIV positive dentist

 P cannot recover for battery b/c they could not show their alleged offense was reasonable in the absence of being actually exposed to a disease-causing agent.

 Touching in normal dentist circumstances is only offensive if it results in actual exposure to the HIV virus and court therefore adopts the “actual exposure” test.

*Dickens v. Puryear* (pg. 49)

 P was assaulted by father of the 17 yr old he was sleeping w/ and sharing drugs w/

 Because the P is asking for relief of injuries caused by assault and batteries that happened years earlier, the statute of limitations to assault and battery has run.

 The threat of killing him if he didn’t leave the state was not imminent or immediate and therefore was not assault or battery, but could only be actionable under mental distress.

**C. Transferred Intent**

 Where D intends to commit a tort against one person but instead:

 1. commits a different tort against that person

 2. commits the same tort as intended but against a different person; or

 3. commits a different tort against a different person

 Limitations: only where both torts are in the following list

 Assault, Battery, False imprisonment, Trespass to land, and Trespass to Chattels

*Singer v. Marx* (pg 52)

 Three children, boy throws rock, hits Denise

 An infant who forcibly invades the person of another is liable for a battery regardless of an intent to inflict injury

 i.e. the only intent that matters is the intent of the act (throwing the rock)

 If boy aimed at Denise, he is liable for battery

 If boy aimed at other girl and struck Denise by accident, **transferred intent** would make him liable

 Or boy Negligently threw the rock and hit Denise

**D. Trespass to Land**

 Elements:

 1. an **act of physical invasion** of the P’s real property by D

 (note that a D doesn’t have to personally come onto land; ex. Flooding)

 (also where lawful right of entry expires )

 2. **Intent** on D’s part to bring about a physical invasion of P’s real property; and

 3. **Causation** (legally caused by the act or something set in motion thereby)

Damages are not an essential element of trespass to land

Note: Trespass vs. trespass on the case: (pg 19)

 Trespass is distinguished from trespass on the case by direct or indirect effects.

 Trespass = P injured due to the immediate result of some conduct of D

 Trespass on the case = P’s injury is merely a consequential effect of the D’s activities

*Tree example:*

If tree hit someone as it fell = trespass

 If someone came later and tripped = trespass on the case

*SCOTT v. SHEPHERD*

Squib was thrown by 4 people before hitting P (people = Scott first, then A B and C)

 Trespass could be argued for C, the last person to throw before P (or for Scott but this could go for either)

 Trespass on the case would lie for intervening people

1. General

 **One who mistakenly enters another’s land in the belief that it is his own is still liable in trespass**.

 Also liable if they know their actions make entry onto another’s land a substantial certainty.

 Damages are presumed, i.e. actual injury is not an essential element

 If entry is not voluntary, no action will lie unless the entry causes damage and even then, only if the entry can be shown to be the result of reckless or negligent conduct.

2. Privileged Entries Upon the Land of Another

 Not all intentional entries onto the land of another are actionable.

 Ex. With consent of possessor, to recapture animals that have strayed from the highway,

3. Variant Situations

 Sometimes even though initial entry to land was lawful, trespass may still lie.

 One who came with permission cannot stay after having been asked to leave.

 If a person had permission to place personal property on the land and has not removed it within a reasonable time after being asked to

4. Extent of the Interest Protected

 Typical trespass involves possessor’s interest in the exclusive possession of the *surface area* of the land.

 The possessor’s interests also include an interest in the subsurface areas of land and the airspace above it.

*Herrin v. Sutherland* (pg 58)

 D fired gun which upset the “quiet, undisturbed, peaceful enjoyment” of P and committed a technical trespass.

 Also cites a telephone wire case where court rules air above is property.

**E. Trespass to Chattels**

**\*Chattel= moveable or transferable property, personal property.\*** animals = chattel

 Elements:

 1. An act of D that interferes with P’s right of possession in the chattel

 2. Intent to perform the act bringing about the interference with P’s right of possession

 3. Causation; and

 4. Damages; (note that the loss of possession itself is deemed to be an actual harm)

1. General

Modern law covers physical interference with or destruction of chattels.

Only required that D act voluntarily,

 Ex. Of D shooting what he thought was a wolf, turned out to be P dog and he was held liable for damages

 Animals are considered to be chattels.

Trespass to chattels will lie even if only for nominal damages when the defendant has intentionally *dispossessed* the P.

Where the D has merely intentionally *interfered* with the chattel, an action for trespass to chattels will only lie if the P can show some actual damages.

Internet: created new and interesting ways to trespass on another’s chattel

 EBay: eBay inc. v. Bidder’s Edge inc.

 EBay brought suit for trespass on chattel due to “spiders” of D whose purpose was to search copy and retrieve info from the web sites of others. They also threatened to reduce eBay’s system performance and system availability.

2. Relationship to Conversion

Conversion = when interference with a chattel is so serious in nature, as to warrant requiring the D to pay its full value in damages. Rs 2nd §22A

Can consist of intentional unauthorized use, destruction, possession, or wrongful disposition of the chattel.

Remedy will be the same whether the P brings it in trespass to chattel or conversion.

 Where chattel is not totally destroyed, under trespass damages are only be the damage caused to the chattel, therefore the P may want to file under conversion.

Control along with intentional refusal to return chattel can result in a conversion.

**F. Defenses for All Intentional Torts**

 1. Insanity

*White v. Muniz (*pg 62)

 Old woman w/ dementia strikes care giver

 Must show that D both intended the contact and intended it to be harmful or offensive. (Dual intent approach)

 Therefore, **insanity is not a defense to an intentional tort but** is a characteristic, like infancy, that may make it more difficult to prove the intent element of battery.

 (*Horton v. Reaves*: held that although a child need not intend the resulting harm, the child must understand that the contact may be harmful in order to be held liable)

Note 1: Jury may find intent, even if the reasons behind are entirely irrational.

Note 5: Where D loses all capacity for voluntary action, then D will not be held to be capable of forming the requisite intent. Cited cases (pg 67)

 2. Consent

**Consent may be implied from custom, conduct, or words, or by law.**

 **Consent will be implied in an emergency situation**

 **Cannot consent to a criminal act**

 **Apparent consent = consent that a reasonable person would infer. Ex. Bumping in a crowd**

**See note 1 & 2 below**

*Hellriegel v. Tholl* (pg 67)

 Boy at beach with friends and was paralyzed while horsing around

 Consent is a defense to battery except in some cases (not applicable at present) when consent cannot be given.

 P word’s amounted to consent and P assumed the risk that he might be injured during the horseplay

Note 1: consent need not be expressed in words, it can be inferred from circumstances.

Note 2: Has been consistently held that consent of the victim is NO defense to a criminal prosecution.

*Mulloy v. Hop Sang* (pg 73)

 Surgeon cut off hand w/o consent

 Hand loss and lost wages are result of the wreck…

 However, D is in entitled to damages because of the trespass to the person, which at the same time became trespass *ab initio,* having in mind the old case of *The Six Carpenters*. The damages are *per se* and should be more than nominal.

 (***trespass ab initio*** = Trespass ab initio arises where a person lawfully enters upon the property of another, under license of the law, and then abuses his license by doing some tortuous act. The doctrine of trespassor ab initio is never applied in cases where the original entry was by the consent or invitation of the party injured)

Note 1: in emergency situations where P is under anesthesia the patient’s consent will be “presumed” in the absence of express instructions from the patient to the contrary.

Note 4: current trend of cases of question of adequacy of informing is to treat it like N instead of Battery

 3. Self-Defense

 A. defense of person

1. P must have reasonable belief as to D’s actions

2. Limited to prevent the tort (no retaliation after threat of tort is gone)

3. Majority says that don’t have to retreat

 Can use **Deadly Force** when preventing death or serious bodily injury to himself

 Modern trend is must retreat before deadly force unless in your own home

Force: reasonable force necessary to prevent the harm

 Cannot use deadly force unless in danger of serious bodily injury

Rs (2nd) §63 permits defense by non-deadly force, even if he could avoid injury by retreating.

Rs (2nd) § 65: deadly force cannot be justified if retreat is possible, unless the defender is attacked within his own dwelling or is defending his own dwelling against intrusion or dispossession. A majority of jurisdictions have not adopted this “retreat to wall” rule.

Rs §143 says that deadly force may not be used in prevention of a felony unless the felony is one “threatening death or serious bodily harm or involving the breaking and entry of a dwelling place.”

Rs §131 however says you can use deadly force in order to arrest a person for a felony. (Police have additional policies)

(See notes after case on pg 84)

Defense of Others

 Must have reasonable belief that person would have right of self defense

 May use force allowed to other (step into the shoes of the other)

Rs §76 gives the right to **protect third persons** when in a situation that he would defend himself if:

 Circumstances would give the person a privilege of self defense

 And, the intervention is necessary for the protection of that person.

 Most jurisdictions say step into the shoes of that person, if they are justified self defense, so are you

*Lane v. Holloway* (pg 81)

 “monkey faced tart” case with old man and younger man hitting him

 Judge says that in an ordinary fist fight, no recover b/c each party enters willingly to the unlawful fight.

 However, the blow by D was a savage blow of such severity that he is liable in damages.

 A man does not take on himself the risk of a savage blow out of all proportion to the occasion. The man who strikes a blow of such severity is liable unless he can prove accident of self-defense.

 Also 23 yr old hitting a 64 yr old went too far, therefore damages.

*Silas v. Bowen* (pg 84)

 Military buff guys came to talk with mechanic about incorrect repairs, mechanic wasn’t there, owner asked them to leave, they wouldn’t, owner shot one in the foot accidentally

 D claims self defense

 P had become a trespasser (D had asked him to leave)

Under these circumstances, the legal rights of parties were:

 1. After asking P to leave, D had right to use reasonable force to eject them

 2. Usually right to use reasonable force not include use of gun, except when the conduct of the trespasser is such as to produce in the mind of a person of reasonable prudence and courage an apprehension of an assault by such trespasser involving serious bodily harm.

 3. “Property owner may shoot with impunity where the incursion upon his property is also attended by a threat of personal harm to himself, his family, or others he is entitled to defend.”

 4. When D is in his own place of business, where he had a right to be, does not have to retreat to in order to plead self-defense. Mere words cannot justify use of deadly weapon, but if they’re accompanied by an actual offer of physical violence…

Also consider age, size, and relative strength of individuals.

 5. D must not have been at fault for provoking difficulty, in this case he wasn’t b/c he asked them to leave.

 D acted in reasonable apprehension of serious physical harm

Note 1: fact that shooting was accidental is irrelevant

Note 2: Rs (2nd) §63 permits defense by non-deadly force, even if he could avoid injury by retreating.

 However § 65 deadly force cannot be justified if retreat is possible, unless the defender is attacked within his own dwelling or is defending his own dwelling against intrusion or dispossession. A majority of jurisdictions have not adopted this “retreat to wall” rule.

Note 3: Rs §76 gives the right to **protect third persons**

Note 4: Rs §143 says that deadly force may not be used in prevention of a felony unless the felony is one “threatening death or serious bodily harm or involving the breaking and entry of a dwelling place.”

 Rs §131 however says you can use deadly force in order to arrest a person for a felony. (Police have additional policies)

 B. defense of property

One may use **reasonable force** to protect property; may not use deadly force or cause serious bodily injury

 Rs §140 says that no force at all can be used to stop a misdemeanor that doesn’t amount to a serious breach of the peace. (note 3 after 89)

Request to desist is usually required, unless request would be dangerous

Limited to prevention of tort; (can’t do afterwards)

Superseded by Other Privileges:

 When trespasser has right to enter land b/c of necessity, right of reentry, right to enter to recapture chattels, etc.

 Rs has provisions covering use of force to recapture property and chattels (See pg 94)

*Brown v. Martinez* (pg 89)

 Boys were stealing from Watermelon patch, D fired shotgun to scare them, hit P in leg

 Court adopts view from 25 A.L.R. 508 that “he is not justified in the use of such force as to inflict great bodily harm or to endanger life” (this is only a misdemeanor)

 Doesn’t matter that it was accidental….see Rs §16 which has almost identical hypo

Note 6: Repossessions: commercial are Ok as long as done without the express, contemporaneous objection of the buyer.

 4. Discipline

 Privilege to discipline others. Ex. Teacher student, parent child.

 Statutes or local school regulation may limit or completely eliminate the teacher’s privilege to administer corporal punishment.

 Take into consideration the age and sex of child, etc.

 5. Necessity (pg 96)

 a. public necessity

 Where act is for the good of the public, this defense is absolute

 Talks about government taking or destroying of property in relation to war and troops.

 Public authorities have the right to destroy private property in emergency situations. Ex. Destroying buildings to prevent the spread of fires, destroying wall paper in small pox victims rooms, destroying mad dogs…

 Under certain circumstances, private citizens can also use the defense of public necessity.

 Ex. Shooting a rabid dog

 Whether or not the state should pay for damages ensued while taking course of public necessity is still in debate.

 Statutory compensation schemes often do cover situations. Ex. Cattle with disease, or buildings destroyed in order to stop the spread of fire.

 b. private necessity

 Where act is to protect person or property defense is qualified;

 Actor must pay for damages caused

*Ploof v. Putnam* (pg 99)

 Ploofs were sailing during a storm and needed to moor his boat on D dock

 D servant undocked them and their sloop was destroyed

 May necessity justify entries upon land and interferences with personal property that would otherwise have been trespass?

 Doctrine of Necessity is applied with special force to the **preservation of human life.**

 It is clear that an entry upon the land of another may be justified by necessity…

*Vincent v. Lake Erie Transportation Co.* (pg 101)

 D was unloading cargo when a severe storm hit

 D left his boat moored to the dock and it damaged the dock

 The infliction of the injury was a result of the D’s actions.  Those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted.

 An intervening action will hold the person liable, while a pure act of God will not

**III. Negligence** (chapter 3 pg 107)

 **A. prima facie case** for Negligence, elements that must be proven:

 1. The existence of a **duty** on the part of the D to conform to a specific standard of conduct for the protection of the P against an unreasonable risk of injury

2. **Breach of** that **duty** by the D (this element is also referred to as showing Negligence)

 3. (**causation**) That the breach of duty was the actual and **proximate cause** of the P’s injury; and

 4. **Damage** to the P’s person or property

 **The Plaintiff’s Prima Facie Case** (must prove elements above)

 P must establish what is called a prima facie case in order to survive a motion to dismiss at the close of the presentation of his evidence.

 If jury, he must prove this to get a jury, if judge he still must prove: but judge may not decide case as a matter of law, but weigh the evidence like a jury

 Most jurisdictions also made P prove the absence of contributory negligence.

 **Now** however, most make D must prove the P had contributory negligence because it’s easier for D to prove than P to prove there wasn’t any.

 One normally is considered to have a duty to refrain from exposing others to a reasonably foreseeable risk of physical injury.

 Many courts dispense with the duty analysis of fault and speak merely in terms of fault, when it has been shown that the defendant has exposed the P to a reasonably foreseeable risk of injury.

**B. Duty:** (question to be determined by the court)(factual circumstances that give rise to a duty is a jury question)

 Rs § 6 = actor has a duty to exercise reasonable care when the actor’s conduct poses a risk of physical harm

 Rs § 7 = court may determine that actor has no duty or a duty other than the ordinary duty of reasonable care in special circumstances (pg 457)

 i. Generally two classes of duty:

 1. Those who do nothing (nonfeasance [couch potato]) owe no duty

 a. exceptions:

 i. Special Relationships (see full list on pg 464)

 Rs §314 A: Special Relations giving rise to duty to aid or protect

 Rs §314 B: duty to protect endangered or hurt employees

 ii. Special Relationships to a perpetrator

 *Tarasoff*

 If you have a special relationship to the perpetrator, might have a duty to warn.

 Therapist had duty to warn the endangered party if and only if disclosure was necessary to avert danger to others.

*Eisel v. board of education of Montgomery county* (pg 491)

 Girl made suicide pact

 School therapist had a duty, b/c suicide was foreseeable

 We hold that school counselors have a special duty to use reasonable means to attempt to prevent a suicide when they are on notice of a child or adolescent student’s suicidal intent.

 iii. Innocent creation of risk

Rs (2nd) §322 was redrafted to impose a duty to aid another harmed by the actor’s conduct, even if the harm was not caused by the actor’s tortious conduct he is nevertheless under a duty to exercise reasonable care to prevent.

 iv. Failure to aid

Common law rule = no duty to aid

Some states have enacted legislation

 *Ex. Vermont:* Must give reasonable assistance if personal danger can be avoided

Rs § 42 or 43 (? See pg 504)

 Duty based on taking charge of another who is helpless:

 Duty to exercise reasonable care

 Actor who discontinues rescue efforts is subject to a duty to exercise reasonable care to secure the safety of the other before terminating the rescue

*Yania v. Bigan* pg 458

 D urged P to jump in water where p drowned

 D had no obligation unless D was legally responsible, in whole or in part, for placing Yania in the perilous position.

*Posecai v. Wal-Mart Stores Inc.* (pg 466)

 Lady was robbed in the Sam’s store parking lot

 Court adopts the balancing test:

 The foreseeability of the crime risk on the D’s property and the gravity of the risk determine the existence and the extent of the D’s duty.

 Degree of foreseeability was NOT sufficient to support a duty to implement lesser security measures.

*Farwell v. Keaton* (pg 473)

 Kid left friend who had been beaten in car and did not tell anyone he was there. Kid died.

 A duty to render aid has been predicated on the existence of a special relationship between the parties; in such a case, if D knew or should have known of the other’s peril, he is required to render reasonable care under all the circumstances.

 Prosser:

 “If the D does attempt to aid him, and takes charge and control of the situation, he is regarded as entering voluntarily into a relation which is attended with responsibility. Such a D will then be liable for a failure to use reasonable care for the protection of the P’s interests”

Notes:

2. once someone comes to the assistance, “the D must not omit to do what an oridanry man would do in preforming the task”

*Thompson v. county of alameda* (pg 479)

 Boy was released from juvi and killed another boy like he said he would

 No duty to warn of *nonspecific threats of harm directed at nonspecific victims*.

 v. Owners and occupiers

 Rs 2nd §332 (Pg 510)

 1. Trespassers: comes on land without permission

 Undiscovered trespasser is owed no duty (exceptions of attractive nuisance)

 Discovered trespassers are owed a duty to exercise ordinary care to warn the trespasser of, or to make safe artificial conditions known to the landowner that involve a risk of death or serious bodily harm and that the trespasser is unlikely to discover. There is no duty owed for natural conditions and less dangerous artificial conditions.

 2. Licensees: enters land with permission, express or implied, for her own purpose or business rather than for the landowner’s benefit

 Duty to warn of a dangerous condition known to owner that creates an unreasonable risk of harm

 No duty to inspect for defects

 Social guests are licensees

 3. Invitees: 2 kinds:

 1) land is held open to the public

 2) enter for a purpose connected with the business or other interests of the landowner or occupier (ex. Customers, employees, persons making deliveries)

 Duty: owed is reasonable and ordinary care in keeping the property reasonably safe for the benefit of the invitee. Includes the duty to licensee and a duty to make reasonable inspections and make them safe.

 4. Attractive Nuisance: elements:

 1. dangerous condition that the owner is aware or should be aware of

 2. owner knows or should know that young persons frequent the vicinity of this dangerous condition

 3. condition is likely to cause injury = is dangerous b/c of the child’s inability to appreciate the risk; (Hand analysis) and

 4. the expense of remedying the situation is slight compared with the magnitude of the risk

 Consider the age of the child, if over about 14….argue this won’t apply

*Lunney v. Post* (pg 508 )

 P was taking a garden club tour of D’s home when she slipped and broke her hip

 Court finds P was an invitee and should be able to recover

*Nelson v. Freeland* (pg 514)

 P tripped on a stick on Ds porch while picking him up for a meeting

 **This court concludes that we should eliminate the distinction between licensees and invitees by requiring a standard of reasonable care toward all lawful visitors.**

P then has a new trial instructed under this new rule

*Bennett v. Stanley* (pg 526)

 Mother and daughter drowned in neighbors (pond like) pool

 Court adopts the attractive nuisance doctrine of Rs §339.

 Court extends attractive nuisance to adult seeking to rescue a child in danger b/c of attractive nuisance

 vi. duty of a volunteer rescue

*Parvi v. City of Kingston* (pg 499)

 Police dropped off two drunk men outside of town who then wondered into traffic and were killed

 Rs § 324 cmt. G: “if the actor has succeeded in removing the other from a position of danger to one of safety, he cannot change his position for the worse by unreasonable putting him back into the same peril, or into a new one.”

**Even when no original duty is owed to the P to undertake affirmative action, once it is voluntarily undertaken it must be performed with due care.**

Also see Good Samaritan statutes below

 2. Those who create risk by doing something (misfeasance) owe standard duty of care to others that may be foreseeably injured by his action.

 a. immunities

 Good Samaritan statutes

 Examples pg 505

 Note there could be an exception for gross N, willful or wanton misconduct

**Rs of Torts §§291, 292, 293 (pg 145)**

 §291: where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

*Pitre v. Employers Liability Assurance Corp.* (pg 145)

 Boy killed at the baseball booth at a fair

 Issue: was there a duty to in some manner warn spectators and participants of the possible dangers inherent in the game, or provide devices to effectively separate and isolate participants from spectators and other participants to prevent injury?

 **Fault is determined by** asking the question:

How would a reasonably prudent individual have acted or what precautions would he have taken under the same circumstances?

 **Risk must be both foreseeable and unreasonable (to constitute negligence)**

Ordinary care requires only that precautions be taken against occurrences that can and should be foreseen;

Court: failure to take precaution does not constitute negligence unless the danger is both foreseeable and reasonable.

**Duty to warn:**

When deciding if there is a duty, several factors to consider:

 Foreseeability of harm to the P

 Degree of certainty that the P suffered injury

 Closeness of the connection between the D’s conduct and the injury suffered

 Moral blame attached to the D’s conduct

 Policy of preventing future harm

 Extent of the burden to the D and consequences to the community of imposing a duty to exercise care with resulting liability for breach

 Availability, cost and prevalence of insurance for the risk involved

**B. Breach**

 I. Reasonable person standard

 D must have acted unreasonably

*Vaughan v. Menlove* (pg 110)

 D put a hay rick near the boundary of property that was unsafe

 The **standard for negligence** is that of a reasonable person under the same or similar circumstances.

 A landowner is under a general duty of care to use his land without negligently causing injury to others.

*Delair v. McAdoo* (pg 115)

 (1936) D attempted to pass P on the road when his tire blew out and caused a wreck

 Does a person driving a vehicle have a duty or standard of care that will produce safety usage of the vehicle and highway for other users of the highway?

 Court: yes, Drivers have an imperative duty or standard of care that they will be productive of safety for other users of the highways.  Any **ordinary individual**, whether car owner or not, knows that when a tire is worn through the fabric, its further use is dangerous and it should be removed.  An owner cannot escape simple b/c he says he does not know. He must know.

Note 1: The standard textual treatments assert that the ordinary person is “presumed” to know certain facts of common experience.

Note 2: Oliver Wendell Holmes Jr.

Oliver Wendell Holmes Jr.

 “…when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare” pg 117

 II. Variations on the “Reasonable ‘Man’” Standard

 **1. Children**

 a. exception may be made when engaged in adult/hazardous activities

*Charbonneau v. MacRury* (pg 117)

 17 yr old driver hit a 3 yr old and killed him

 Is the standard of care that of an adult, or a kid?

 Rs §167 “A child of tender years is not required to conform to the standard of behavior which it is reasonable to expect of an adult, but his conduct is to be judged by the standard of behavior to be expected **from a child of like age, intelligence and experience.**”

 Court: the mental incapacity imputable to the minor, being deemed capable of proof, is recognized as a factor to be weighed in appraising the character of his conduct. But the rule of reasonable is constant….. pg 123

Now: teenage driving is held to the standard of an adult….see Rs §283A (Goss v. Allen)

Note 1: Standard of negligence is normally that of a child the same age and experience.

 Some states have specific age limits that determine whether they are presumed capable, see pg 124

Note 2: most courts have always had a tendency to treat minors over 18 as adults.

*Goss v. Allen* (pg 125)

 17 yr old skier collided with P at ski resort

 Appellate court said D should be held to adult standard, not standard of like age

 Supreme court NJ said no, standard for under 18 yr olds (by statute 18 is adult) the standard is that of like age, intelligence and experience.

Note 1: Rs 2nd of Torts covers standard of conduct expected in a child in §283A

 Comment c: “an exception to the rule stated may arise where the child engages in an activity which is normally undertaken only by adults, and for which adult qualifications are required.” And discusses two situations: child flying a plane, and child driving car.

Note 3: Courts have been almost reluctant to disagree with the majority in Goss that there is a single standard whether negligence or contributory negligence.

Note 4: **mental deficiency is usually NOT taken into consideration**

Note 5: A reasonable person in an emergency will not be required to exercise the judgment and care of a person who has ample time to reflect about what he ought to do.

 **2. Physically disabled**

*Haley v. London Electricity Board* (pg 133)

 Blind man falls into a ditch dug by the London electric company

 P sues for N

 question for lordships’ decision is the nature and extent of the duty owed to pedestrians by persons who carry out operations on a city pavement.

 It is impossible to say that it is **not** reasonably foreseeable that a blind person may pass along a particular pavement on a particular day.

 Appeal allowed (ruled for P)

 **3. Experts/Professional**

*Barker v. City of Philadelphia* (pg 137)

 Garbage truck driver who ran over child in box (court said he was expert in waste management)

 Under Penn. law a D who has failed to exercise reasonable care under the circumstances cannot escape liability for damage upon the ground that he could not have foreseen the particular results of his negligent act.

 It is no defense for the City to say that the driver, who carelessly drove over a piece of paper which for reasons of safety he intended to avoid, did not foresee that a child was under the paper.

Note 1: it is generally agreed that a D is legally responsible for injuries whose *extent* he could not reasonably have foreseen. It is another question whether the D must not at least have been reasonably able to foresee the general type of injury he has inflicted.

 **4. Emergency**

 The existence of an emergency may be considered as among the circumstances under which the defendant acted; the emergency may not be considered if it is of the D’s own making.

**III. Learned Hand formula (Calculus of risk) – used to determine if D has met required standard of care**

*United States v. Carroll Towing Co.* (pg 140)

 D barge broke loose and damaged other barges

 Famous Hand formula.

 B<LP B = burden L = injury P = Probability

 The magnitude of the loss if an accident occurs; the probability of the accident’s occurring, and the burden of taking precautions that would avert it

 The Hand formula is to determine how liability should be apportioned (**find out if the owner had a duty**)

Note 1: “perhaps then the dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient – the cost-justified – level of accidents and safety.”

**IV. Negligence per se**

 a. elements: (also called violation of statute as Negligence)

 1. P is in the protected class

 2. particular harm to be avoided (P must show that the statute was designed to prevent the type of harm that the P suffered)

 3. Statute must be clear as to what standard of conduct is expected, where and when it is expected, and of whom it is expected.

Negligence per se only relieves the second element of Negligence (and shows that there was a duty). There must still be causation and damages.

 b. Excuses for violation

 1. Where compliance would cause more danger than violation

 2. where compliance would be beyond D’s control

*Martin v. Herzog* (pg 158)

Judge: Cardozo (1920 case)

 Buggy car accident where one driver’s lights were off

 The unexcused violation of a statutory duty is **negligence per se** and a jury may not relax the duty that one traveler owes under a statute to another.

 Negligent conduct is not actionable by itself unless there is a showing that such conduct was the cause of the injuries incurred.

Note 1: Most courts adopt the position espoused by Cardozo that violation of a criminal statute is conclusive evidence of negligence or negligence per se. A minority of jurisdictions take the position that a violation of a criminal statute is merely “evidence of negligence.”

Note 2: the standard rubric is that the P will be able to bring a civil action based upon the violation of a statute if the P is within the class of persons intended to be protected by the statute and if the damage suffered by the P is within the type of harm the legislature sought to avert.

 It is urged that the courts should not routinely extend tort liability in all instances of statutory violation.

There are 2 classes of cases that give rise to the doubts as to whether the courts should be as free in allowing a civil action for a violation of statute as they are.

 1. cases in which the issue arises whether the violation of the statute was an “excused” violation. There may be situations where the D was clearly in breach of the criminal law, but for civil purposes, his actions may have been excusable

 2. where the statute in question poses strict liability.

Obviously these would overlap. They will be discussed later.

*Brown v. Shyne* (pg 163)

 Chiropractor paralyzed patient with laryngitis

 **Issues:**

 1) If a party has violated a statute, but that violation has no bearing on the injury, is evidence of that violation relevant?

 No. If a violation has no direct bearing on the injury, proof of that violation is irrelevant.

 2) Is violation of an administrative statute pertaining to the licensing of professionals negligence per se?

 No. Violation of an administrative statute related to licensing of professionals is not negligence per se.

 3) What is the standard of care for a party who practices a profession without a license?

 The standard of care for an unlicensed party is the same as that of a licensed professional in that field.

The court held that the statute was designed to protect against unfounded claims of skill, and unless P can prove that injury was caused by carelessness or lack of skill, D’s failure to obtain a license was not connected with the injury. The mere neglect of a statutory duty does not create a private cause of action.

(Dissent by Crane)

***NOTE:*** this case didn’t have evidence that D caused or else it could’ve ended up like:

 In Whipple v. Grandchamp, court held that a statute requiring physicians to be licensed did provide the basis for a civil action against an unlicensed person by “all persons suffering from harm when the violation of the statute is the proximate cause of their injuries.” (this case had evidence that chiropractor had fractured one of the P vertebra in the course of his treatment.)

Note 3: In order for the P to recover in an action based upon the violation of a statutory duty, he must show not only that his injuries were “caused” by the statutory violation but that the injuries he suffered were of the kind the legislature enacted the statute to guard against.

Note 4: leaving keys in the car statute

**Prima facie evidence** = evidence adequate to establish a fact or raise a presumption of fact unless refuted

*Tedla v. Ellman* (pg 169)

 Woman and bro who was a deaf mute were walking along highway when killed

 Ps violated the statute: that pedestrians walk on the left of the center line so that cars pass on their right

 Do statutory violations constitute contributory negligence as a matter of law and bar recovery?

 No, but in this case no b/c following the statute would not have been safer

Seldom has the courts held that failure to observe a rule of the road, constitutes negligence **as matter of law** where observance would subject a person to danger which might be avoided by disregard of the general rule.

Rs §286: (pg 172) “Such enactment however may in view of their purpose and spirit be properly construed as intended to apply only to ordinary situation….and not wrongful if b/c of an emergency or the like, the circumstances justify an apparent disobedience to the letter of the enactment.”

(here though, no emergency)

*Barnum v. Williams* (pg 173)

 Motorcycle and car met going opposite ways on a sharp curve and collided due to the crossing over the line by the motorcycle

 There is no Negligence if the person violated the statute while acting reasonable

 Statute violation creates the presumption of negligence and that party then has the burden of proving that they were acting reasonably.

 The presence of an emergency does not change the standard of care; the standard remains reasonable care under the circumstances.

(Dissent by McAllister)

 **V. Custom and Expert Testimony regarding the proof of Negligence**

 a. General

Determining what knowledge a reasonable person would have is usually a question for the jury.

Custom = a broad term that encompasses not only the unwritten but generally prevailing practices in a community or industry, but also trade rules or standards that have been explicitly adopted by a particular profession or industry.

If jury isn’t familiar, then you bring in experts that are familiar with the custom and scope of application.

Expert = a person who is able to testify before the jury on matters of fact within his special field of knowledge and to express his opinion on a variety of matters.

But with the exceptions of making an opinion based on observed facts (car was going about 30 mph, person was intoxicated) and testifying to the reputation of someone, the ordinary person is not permitted to testify as to his opinion on the matters in issue.

Experts = ok b/c they have special knowledge not available to the jury.

Experts:

First requirement: qualifying as an expert.

 Done in front of the judge, witness testifies to his qualifications, sometimes called voir dire, and the judge ultimately decides if he’s an expert and what he is an expert on.

 Jury may consider qualifications of expert.

 Experts establish the customs of industry and testify on what is “good engineering practice.”

 Gives opinion evidence

 Jury is still free to reject the expert testimony and come to their own conclusions.

 Except for a medical malpractice suit.

*Dempsey v. Addison Crane Co.* (pg 182)

 Construction workers working with a crane that dropped a machine on them

 Was the D responsible for the proximate cause of the injuries by having a type of open ended hook that allowed the machine to be unsupported?

 There was evidence that the kind of apparatus used was the one used widely in the industry but “what is usually done in a particular industry cannot be regarded as what ought to be done unless the conduct and the test are in harmony.” Pg 185 (just b/c it is custom doesn’t mean the whole industry can’t be Negligent)

 Court finds that the means and the apparatus by which the jib was attached were unsafe; that the use of this means constituted negligence on the part of the D, and this negligence was the cause of the injuries to the Ps

Note 1: Under the standard rubric neither compliance with an industry wide custom nor the failure to comply with such a custom is a conclusive evidence of due care or of lack of due care.

 **VI. Malpractice**

Standard of care is usually the national standard of that kind of Dr. or hospital. If the Dr. is a specialist, the standard of care will be the national standard for that kind of specialist.

*Shilkret v. Annapolis emergency hospital association* (pg 186)

 Infant was born with brain damage allegedly due to N of Drs.

 What is the appropriate standard of care for a medical malpractice suit?

 The National Standard

 B/c the medical profession recognizes national standards for specialists not determined by geography, so should the law.

 This court also made no distinction between physicians and hospitals holding that a hospital is required to use that degree of care and skill which is expected of a **reasonably competent** hospital in the same or similar circumstances.

 Note that specialist is held to a higher standard than a general practitioner.

*Helling v. Carey* (pg 194)

 Patient was diagnosed with advanced glaucoma when Dr. didn’t give her previous tests due to industry standards

 Holmes: “but what ought to be done is fixed by a standard of reasonable prudence whether it usually is complied with or not.”

 Hand: industry “never may set its own tests, however persuasive be its usages”

Dissenting: Utter and Finley and Hamilton concur.

Note 3: suggested no-fault plans

***Informed Consent:***

*Miller v. Kennedy* (pg 201)

 Patient had biopsy of kidney and alleges that Dr. failed to inform him that he could lose his kidney entirely

 Burden of proving the elements of an action based on an informed consent doctrine is with the P

 The burden of proving a defense when failure to disclose has been established is on the doctor.

 The duty to disclose that which the law requires exists as a matter of law if:

 1. The risk of injury inherent in the treatment is material

 2. There are feasible alternative courses available

 3. The P can be advised of the risks and alternatives without detriment to his wellbeing.

 A P in a breach of duty to disclose case must show:

 1. dr. failed to inform patient

 2. patient consented to the proposed treatment w/o being aware of the risk

 3. a reasonable patient probably would not have consented if they were informed of risk

 4. treatment chosen caused injury to the P

Note 1: two exceptions to the duty to disclose; First: patient is unconscious, second: disclosure would pose a threat to the patient’s well being

Note 2: cases that don’t have a total absence of consent tend to stick w/ N rather than battery or assault

**Other types of malpractice**:

a. Attorneys:

should have a “lost substantial possibility of recovery” standard instead of the “but for” test.

P is always seeking economic loss for malpractice with lawyers,

b. Architects

if architect negligently designs a building there is no longer much doubt that he will be held liable to those who are injured as a consequence.

 **VII. Res Ipsa Loquitor** (note jurisdictions disagree on whether burden of proof actually shifts)

 The thing speaks for itself

 Elements:

 1) The accident must be of a type that **normally would not occur in the absence of negligence**.

 2) There was **no contribution** to the P’s injuries **by the P or any third party**.

 3) The source of the negligence **falls within the scope of the duty owed by the D to the P**; this usually (but not necessarily) arises where the instrument causing the injury was within the **exclusive control** of the defendant, or where there is an inability to identity the specific source of harm. Frequently it arises where the source of negligence lies within a group of people who are unwilling or unable to divulge the actual source.

P must still prove all of the other elements to prove D’s liability (i.e. proximate cause etc.)

In cases of res ipsa loquitur the P is relieved from the burden of producing evidence that the D was negligent, but does not relieve them from producing evidence that the person charged with negligence was at fault.

Jurisdictions disagree as to whether the burden of persuasion actually shifts

**Effect of Res Ipsa** –

 Burden does not shift to D; or at least the courts don’t openly admit to that (some jurisdiction say it does)

 *Usually to permit an inference that D was negligent, even w/o direct evidence*

When res ipsa is met, P has met his burden of production and is entitled to go to the jury

**Context in which it will be on the exam** –

Product is grossly defective and the suit is brought in negligence rather than strict liability – Wouldn’t apply to SL

Examples: Food with foreign objects in it, exploding bottles – there must be no direct evidence that showed the cause of it

 Airplane mysteriously crashes

 P gets surgery and someone leaves a clamp in or takes off the wrong limb (or some other mysterious injury)

**Other RIL rules** –

Only used as evidence of negligence – thus if brought in strict liability, don’t use RIL in Strict Liability all you need to prove is there was a dangerous defect and the manufacturer did not use due care

Point out that the doctrine is to produce enough circumstantial evidence to reach a jury – D can come up with evidence to show that he was careful or that someone else/thing caused the accident

**Directed Verdict** –

*If the defendant could produce enough evidence to defeat res ipsa – then could get a directed verdict* (b/c res ipsa inference is all they have)

 But it has to be “enough” evidence since the D is the one with the better opportunity to explain, to overcome the RIL raised by the P

 OVERALL – very unlikely that the plaintiff or the defendant will get a directed verdict in a res ipsa case

*Byrne v. Boadle* (pg 212)

Court of exchequer, 1863

P was struck by a barrel while walking past D’s flour shop

A party need not present direct evidence of negligence when the mere manner and facts of the accident show that it could not have happened without negligence on someone’s part.

D had a duty to ensure that those passing by his shop are not injured by objects under his control. In this case there was a scintilla of evidence with respect to negligence. D failed to show that he was not negligent and P is entitled to the verdict.

*George Foltis, Inc. v. City of New York* (pg 217)

 restaurant damaged by breaking of water main

 where defendant City of New York did not produce evidence to rebut plaintiff's prima facie case established by application of res ipsa loquitur, it was for the jury to determine whether the inference of negligence should have been drawn.

 **The P receives a directed verdict b/c he has satisfied the burden of persuasion, NOT b/c the burden was shifted to the D**

*Swiney v. Malone Freight Lines* (pg 225)

Tractor wheels came off while driving down road

Court says res ipsa loquitur applies and warranted the jury in finding in favor of the P unless the D proves that the accident was not due to their negligence.

Res ipsa loquitur is often said to be “a common-sense appraisal of the probative value of circumstantial evidence.”

Thus, **to defeat** the jury instructions of a **res ipsa**, the D must come forward with enough evidence to make it doubtful that a reasonable person would find that proof of the occurrence of the accident made it more likely than not that the D was negligent.

*Ybarra v. Spangard* (pg 231)

P went in for an appendectomy woke up with shoulder pain that eventually caused paralization in arms

Court lays out elements

NJ is one of the jurisdictions where the burden actually shifts

Court reversed in favor of P

Note 5: In California, this has given rise to “conditional res ipsa loquitur” = (a) there is evidence that the unfortunate results of an operation could have been occasioned by negligence and (b) there is some evidence of negligent acts on the part of the D that could have caused these unfortunate results but not enough proof to make it more likely than not that the unfortunate result were in fact caused by the D’s negligence. Meaning, the res ipsa is then “conditioned” upon the P’s lack of access to the evidence that he needs to support his case.

**Causation**

The search for causal relationship is usually broken down into two inquiries:

 1. was the D’s conduct the ***cause in fact*** of the P’s injuries?

 2. If so, was the D’s conduct also the ***proximate cause***of the P’s injuries?

**d. Cause in Fact (actual cause)**

 i. *Sine qua non* test: **but for** the D’s conduct – (if it passes this test, do not go on with other tests)

 But for this act, the injury wouldn’t have occurred.

 Event X can be established as a cause in fact of event Y if

 (a) there is a sufficiently high statistical correlation between the occurrence of events of type X and the occurrence of events of type Y and if

 (b) in the particular case under consideration, there is no other plausible explanation of the occurrence of event Y that does not require the occurrence of even X

*Daubert v. Merrell*(note 1 pg 251) – **Expert Testimony**

Expert testimony

 a. Sometimes you need expert testimony to show that something is the but-for cause

 b. General acceptance test (Frye test) = if it is widely accepted in the industry; then you can admit that as expert testimony

 c. Daubert test: meet the standards of reliability and relevance

 i. non expert – must be relevant to what they are tryinig to testify about

 ii. Expert – reliability

 Daubert’s 4 things to consider when deciding to admit expert testimony:

 1. Falsibility/testability: have they tested the hypothesis? What are results?

 2. Error rate: can ask the judge to look at the data himself and decide

 3. Publication/peer review

 4. Frye test = general acceptance of view

 ii. Substantial Factor test

 Where several causes concur to bring about an injury, and any one alone would have been sufficient to cause the injury, it is sufficient if D’s conduct was a “substantial factor” in causing the injury.

 A. Was this act a substantial factor that brought about this injury

*Kingston v. Chicago & NW RR Co -* 2 Fires case – two fires merge and damage P’s property - (it would’ve failed the but for test b/c doesn’t get anywhere in assigning the blame, both would’ve resulted in the same things i.e. the P property being destroyed)

If one of the acts was an act of god, argue that D should not be liable

 B. Injury cannot be a possible cause but a probable cause

*Kramer service v. Wilkins* (pg 244)

P was hit by glass from over window thing, developed skin cancer 3 years later

Did glass cause cancer? Possible but not probable

*Daly v. Bergstedt* (pg 247)

P tripped over materials in grocery store. Got bruise on breast which eventually turned into cancer

P won, there is a difference between a legal cause and a medical cause

iii. Alternative Liability test

The alternative causation test is applied when harm results from the negligent conduct of two or more parties and the party that caused the injury in fact cannot be determined. Under the alternative causation test, the **burden of proof shifts** to each of the defendants to show that she did not cause the injury.

*Summers v. Tice* (pg 252)

Hunting party, 2 people shooting and 1 injury to P. I don’t know which one shot me. So then, the burden shifts to D to prove that they didn’t do it

1 injury, 2 possible causes 🡪 burden shifts to Ds to show they weren’t responsible (and thus which one was the responsibly party).

Applies only if both D are negligent (and joint tortfeasors)

D’s had to commit the same act (equal chance they are both at fault) and there is no way to tell who did it

Only one, indivisible injury to P

Must sue EVERY D

**Burden shifts** to Ds to absolve themselves of the negligence

If two defendants are negligent in concert and damage is caused such that only one or the other would be liable, **both defendants will be liable** for the damage if the plaintiff is unable to show which defendant in fact caused the injury.

Rs §876 deals with persons acting in concert (pg 256)

Note there is actual shifting of burden here

iv. Loss of Chance

 1. Someone goes to a doctor, and he is negligent, and now instead of 39% chance I only have 25% chance to live

 a. Recovery only if you had a > 50% chance of recovery originally, then get full damages (this is Texas’)

 b. Entitled to loss of chance (increased probability of dying):

 1. (# of deaths at stage II - # of deaths at stage I)/ # of deaths at stage II

 2. Ex. Above (75%-61%)/ 75% = % of damages you get of the amount you would’ve gotten total

*Hotson v. East Berkshire area Health Authority* (pg 261)

13 fell from tree and hospital failed to diagnose a condition that led to the deformation of his femur

Trial Court said hospital denied only 25% chance so he should recover 25% (but an appeal against this was allowed)

Fall was sole cause of neurosis

v. Group Liability (Market Share theory, see below)

 Substitute for cause-in-fact – can use this to assign liability

General conclusion: A particular event will be cause in fact of another if

 (a) it can be described as part of a number of antecedent events which culminate in the event under consideration and

 (b)the absence of this particular antecedent event would diminish the probability of the occurrence of the consequent event.

If courts find this to stringent, then they will apply the “logic of causation” by declaring that they are not concerned with establishing *the* cause of an event – but rather are concerned with discovering the “substantial cause or causes” of that event.

**e. Proximate Cause**

i. direct test

*Polemnis*

 ii. Foreseeability/scope of risk

 1. Has to be the type of injury, but not the same method

 a. But see Doughty case for exception and method

 2. Within the zone of danger

 3. Liable even if injuries to greater extent (Lord Advocate)

 4. Doesn’t have to be likely or probable to occur (just foreseeable, Wagon Mound II)

Cases:

*Polemnis* (pg 271)

Workers on ship were offloading materials. They dropped a board which ignited benzene gas and destroyed ship.

The spark could not have reasonably been anticipated, though damage to the ship could have.

“when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not”

**If an act is determined to be negligent, then the question of recovery of damages depends only on if they are the direct consequence of the act**

**If whatever you did is the direct cause of something, you are liable no matter how unforeseeable it is. It doesn’t have to be foreseeable at all.**

*Palsgraf v. Long Island Railroad* (pg 276)

 Railroad platform and exploding package

 Cardozo’s zone of danger:

 **1)** A duty that is owed must be determined from the risk that can reasonably be foreseen under the circumstances. **2)** A defendant owes a duty of care only to those who are in the reasonably foreseeable zone of danger.

 “the risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension”

Andrews: In determining proximate cause the court must ask whether there was a natural and continuous sequence between the cause and effect and not whether the act would reasonably be expected to injure another. The court must consider that the greater the distance between the cause and the effect in time and space, the greater the likelihood that other causes intervene to affect the result. In this case there was no remoteness in time and little in space. Injury in some form was probable.

Rs §281

 An actor is liable for an invasion of an interest of another if:

 a) the interest invaded is protected against unintentional invasion and

 b) the conduct of the actor is negligent with respect to such interest or any other similar interest of the other which if protected against unintentional invasion

the propose Rs 3rd § 29 is more restrictive:

 “the actor is not liable for harm different from the harms whose risk made the actor’s conduct tortious”

***(Wagon Mound No. 1)*** *(pg 286)* Must be probable and foreseeable, and it overruled Polemnis

 Ship spilled oil on water…

 Court said it wasn’t foreseeable, therefore ≠ liable

 Acts must be foreseeable to be liable

*Hughes v. Lord Advocate* (pg 298)

 Manhole was left uncovered, boys were playing and dropped a lantern causing serious explosion

 Fire was foreseeable, just not to this extent

 “precise details need not be foreseeable, it is sufficient if the accident is of a type that should have been foreseeable”

*Doughty v. Turner Manufacturing Co.* (pg 302)

 P was splashed when the cover of a chemical bath was knocked in

 Use both direct/ remote and foreseeable / unforeseeable

 Court said can’t recover b/c splash not ordinary and unforeseeable

*Petition of Kinsman transit co.* (pg 307)

 Ship came loose and floated down river, hit other ships and eventually hit bridge causing damn and flooding

 If consequences are direct and the damage was the same general sort that was risked, then = liability

***(The Wagon Mound No. 2)*** *Overseas Tankship (UK) LTD v. The Miller Steamship Co. PTY.* (Pg 320)

 Ship spilled oil on water at a wharf, told other ship it wasn’t able to ignite

 Even if the risk is remote, it is still foreseeable.

 Doesn’t have to be likely or probable, but has to be generally foreseeable.

***No the differences between WM1 and 2***

iii. Intervening/Superseding causes

 1. Superseding rarely works, but might if: (Almost nothing will cut off your liability)

 a. Bizarre, unforeseeable event

 b. Criminal Acts (but not if the person who is negligent was supposed to be preventing that criminal act, e.g. mace manufacturer

 c. Intentional torts

*Glascow Realty v. Metcalfe* (pg 333)

 Kid pushes on glass and breaks glass which falls from high floor

 Is owner of apt liable?

 Quotes Rs §439: “ the original negligent actor is not relieved of liability by the subsequent negligent acts of another if the subsequent acts might reasonable have been foreseen”

 Re: foreseeability:

 “ it is not required that the particular precise form of liability be foreseeable – it is sufficient if the probability of injury of some kind to persons within the natural range of effect of the alleged negligent act could be foreseen”

 (if the intervening act is at all foreseeable, then original P will be liable)

Rs §439 deals with situations where the original negligence and the intervening factors are in substantially simultaneous operation.

*Brauer v. New York Central & Hudson River Railroad* (pg 336)

 Carriage accident where wine was stolen while driver was unconscious and RR did nothing to stop thieves

 B/c train had detectives on board to stop theft, it had knowledge that portable property without a guard was likely to be made off with. While the thieves did not interfere with the railroad's negligence in causing the accident, the two causes were simultaneous and concurrent. The theft was a joint, and not an intervening, cause of the owners' loss. The theft did not excuse the railroad's liability for the loss of the barrels and the cider

 \*5-4 split

 Dissent: Proximate cause imports unbroken continuity between cause and effect, which in both law and logic is broken by the act of an independent criminal actor.

Note 1: Watson v. Kentucky & Indiana Bridge & Railroad:

 RR spilled gasoline all over street, later a man came and threw down a match which made P’s house explode and cause him serious injuries.

 Court said that if the 3rd person meant to start fire, then D not responsible.

 “certainly one is not bound to anticipate the criminal acts of others”

Notes:

where a person injured later commits suicide b/c of mental issues from the injury, a court held that they were responsible for wrongful death.

5. Acts of God

 To the extent where they are reasonable foreseeable, they will not serve to cut off the responsibility of a negligent D.

6. Aggravation of injuries

 It is generally held that one who in negligent in causing injuries is also responsible for the aggravation of those injuries caused during medical treatment.

 Where the aggravation is reasonable foreseeable and not the product of some outstanding circumstance or other action.

7. Rescue: “danger invites rescue”

 The original tortfeasor is liable for injuries suffered by those going to the rescue of those imperiled or injured by the original tortfeasor.

 When the rescuer is a “professional rescuer” as in firemen or policemen, recovery has been denied in a number of cases. (unless for example the firemen was injured by something other than the reason for the firemen to be there)

f. Plaintiff's Conduct

 I. Contributory Negligence

 Until 20th c. if P had any way caused accident ≠ recover (common law doctrine)

*Butterfield v. Forrester* (pg 345)

 P was riding horse as fast as possible and didn’t see pole put across road by D

 if P wasn’t using ordinary care ≠ recover

 II. Comparative Negligence

 1. Pure Comparative Negligence

 = P may recover regardless of his degree of negligence, but jury is required to reduce his award in proportion to his contributory N

 Alaska, California, Florida, Michigan,

 NY, Louisiana, Mississippi, Washington

 2. Modified Comparative Negligence

 = if P is more than 50% responsible ≠ recover

 If P is 49% responsible = recover 51%

 a. West Virginia/Bradley rule – tie goes to D

 b. Wisconsin (TX) rule – tie goes to P

 3. Last Clear Chance

 the courts tried to allocate blame for the injury to the last party that had a chance to avoid the accident under the last clear chance doctrine.

 Rs §479 – last clear chance (pg 380)

 Rs §480 – inattentive P (pg 381)

 The predominant view has been that last clear chance, as a separate doctrine, does not survive the introduction of comparative fault.

Note: Comparative fault doesn’t prevent res ipsa, with appropriate modifications.

*Smithwick v. Hall & Upson Co.* (pg 347)

 (Prof says this case belongs with proximate cause)

 Worker was standing where he wasn’t supposed to and a brick wall fell on him

 “contributory negligence” must be a negligent act or omission, and in the production of the injury it must operate as a proximate cause, or one of the proximate causes, and not merely as a condition.

 Therefore D is liable (they’re still using the contributory N rule)

*Hoffman v. Jones* (pg 351)

 Established comparative N in Florida

 1. to allow a jury to apportion fault as it sees fit between N parties whose negligence was part of the legal and proximate cause of any loss or injury; and

 2. to apportion the total damages resulting from the loss or injury according to the proportionate fault of each party.

 **This is pure comparative responsibility**

*Bradley v. Appalachian Power Co.* (pg 362)

 Est. comparative N in W. Virginia (modified)

 Discusses modified and pure comparative

Statutes of different states and topics of comparative N pg 368 – 69

*Martel v. Montana Power Co.*(pg 373)

 P had 3 beers and decided to climb a substation power co. tower

 P didn’t touch the line, but it arched to him

 (In this action a violation of law is of no consequence unless it contributed as a proximate cause to an injury found by the jury to have been suffered by the P.)

 P argued that the D was willful, and therefore the comparative Responsibility statute shouldn’t apply.

 Court said comparative N offsets all forms of N, even willful or grossly N

Note 5: case with trolley and fire truck where guy stood in trolley’s way to help direct fire truck in and was hit by trolley. Prof loves this case!

 III. Assumption of risk

 1. Express consent (*LaFrenz*)

 2. Implied consent – need: 1) P knew the risk and 2) P voluntarily agreed [(3)? Appreciation of the danger]

 a. Primary implied

 = P voluntarily accepts known risks involved in a particular situation and the D has no duty of care with respect to the P

 Sports and dangerous activities fall under this

 b. Secondary implied – usually absorbed by comparative N ***(need definition here too!!!!!!!)***

\* Assumption of risk = subjective standard of the P = jury question in all but the clearest cases (when it is obvious that any ordinary man would know of the risk)

*LaFrenz v. Lake County Fair Board* (pg 382)

 P was killed at demolition derby but she signed a waiver

 This is a K case!

 Court says by precedent, that one may make Ks exculpating another of N, but it must be done knowingly and willingly

 (said waiver was good so ≠ liability)

Notes:

3. in med cases, that agreement is contradictory to public policy. Also when a landlord make’s tenants sign an agreement before using the pool is considered unlawful.

4. skier signed a general waiver before skiing but ran into a metal pole, release was found invalid on public policy grounds.

5. Can a parent agree to relieve the D of responsibility for the risk posed to a minor?

 States are split on how to handle this

6. most courts require the release to be very clear about what exactly is covered.

7. courts will generally not honor a release when conduct more blameworthy than N is involved, no matter the clarity of the release.

*Herod v. Grant* (pg 389)

 Rednecks hunting deer and fell off back of truck

 **Elements of assumption of risk:**

**1) knowledge on the part of the injured party of a condition inconsistent with his safety**

**2) appreciation by the injured party of the danger in the condition; and**

**3) a deliberate and voluntary choice on the part of the injured party to expose his person to that danger in such a manner as to register assent on the continuance of the dangerous condition**

Notes:

1. In employment cases not covered by workers comp, courts are reluctant to find an assumption of risk due to the P’s actions not being voluntary.

3. In England, what is American meaning of assumption of risk is part of the general doctrine of *volenti non fit injuria.*

*Jones v. Three Rivers management corp.* (pg 391)

 P was hit by baseball while walking in walkway at Three Rivers Stadium

 D says P assumed risk

 Court says P didn’t assume risk b/c being hit in walkway is not part of the normal sport of baseball

*Auckenthaler v. Grundmeyer* (pg 396)

 P was on horse watching training of dogs; D’s horse kicked her leg

 Courts (Nevada) decides to use regular N standard in all assumption of risk type cases

 (They destroyed all implied assumption of risk)

 This case is more of a no duty rule.

Notes: 1. A number of jurisdiction that have adopted comparative fault continue to recognize assumption of risk as a separate defense.

IV. Avoidable consequences/seat belt defense/mitigation of damages

 Often Ps behavior before or after an accident may affect the damages.

 P may be held to have the responsibility to take reasonable action to avoid exacerbating the injuries the D’s N would have otherwise caused.

 Seat Belt: Some states specifically provide that violation of the seat belt statute cannot be used in civil cases to prove contributory N.

 In other states recovery is reduced by Ps failure to wear a seat belt. Many states limit the apportionment of damages though.

 New Rs §3 says that if P reinjures by own actions, then jury is allowed to see evidence and reduce Ds responsibility for the damages associated with the reinjury.

V. Multiple Parties

 1. Vicarious liability

* = D is held legally responsible for the tortious conduct of another who is the one actually at fault in causing the injury.
* Employers: the employer is liable for the actions of employees done within the course of their employment.
1. There are some exceptions where the act had nothing to do with employer and they were still liable: ex. Taxi co held responsible for rape of a passenger
2. “vicarious liability is appropriate when it arises immediately out of a conflict generated by the employment and even when it is made peculiarly possible by the employment.
3. Does not apply to independent contractors
4. If the act is ultra hazardous or abnormally dangerous the employer also will be subjected to the doctrines of strict liability.
* Joint enterprise: commercial setting where two or more individuals or firms contract to form some kind of joint venture.
1. Any partner is responsible for the torts committed by the other partner.
2. A joint enterprise can exist without an express agreement
3. Rs §491 comment c has 4 elements to a joint enterprise
* Automobile is unique: vary from state to state, but many have a “family purpose” doctrine:

 2. Indemnity

* = indemnified by the primary tortfeasor for all of the damages paid to the P
* recovers the entire amount, usually when there has been no concert of action.
* Equitable or implied indemnity: when one party is passively N, and the other is actively N

 This has been abolished in some states due to the passing of comparative N rule

 3. Imputed contrib. N/comparative N – “both ways” test

* = the N of the primary defendant is imputed to the secondary D
* Both ways test = if he was N, it should be imputed to her

Most states have carved out an exception to the both ways rule for auto accidents.

 Not to impute driver’s contributory N to the owner bringing an action for damages, at least when the owner is not present in the vehicle.

 Rs §5 takes this approach:

* In most cases, where the party’s N would be imputed to the vicariously liable party in his or her posture as a D, it will also be imputed as contributory N when that party is suing as the P.

 4. Joint and Several liability:

* = Joint tortfeasors: situations where more than one party has allegedly caused P and indivisible injury.
* Under traditional principles, each tortfeasor would be liable for the entire damages.
* So long as the D had joined the enterprise, each member of the enterprise was liable even if he or she didn’t personally commit any of the acts that injured the P.
* Note that in common law you couldn’t join tortfeasors unless it was the same action or unless there were a concert of action.
* Joint and several: person responsible for causing single, indivisible injuries could be regarded as joint tortfeasors and be responsible individually for 100% of the damages.

 5. Several liability

* = fact finder will allocate injuries among the parties and they will only be responsible for that part of the injuries.
* This is only when D act independently of each other, **if true joint action is found, all jurisdictions still apply joint and several liability.**

\* Note that so many states differ in many ways that it is impossible to generalize about the applicable law, you must simply look to each state to see what changes have occurred.

**If D cannot cover share of damages:**

 Traditional joint and several liability = remaining D will be charged with the defaulted share

 Pure several liability = P has to absorb the consequence of the default

 If liability is apportioned, the injured person bears the risk of financial irresponsibility of each wrongdoer.

**Divisible v. Indivisible Injury**

* Indivisible = one c/a because you can’t divide
* Divisible = separate c/a against each D
* The law is clear that if the injuries are simultaneous and indivisible, a single c/a arises out of the occurrence, even when the D acted independently of each other
* In a case where you can show the actions were sequential but you can’t tell who caused what injury, the burden of proof is shifted to the D to prove that the damages are separable

 ex. Auto accidents

Rs 3rd § 26 Apportionment of liability when damages can by divided (pg 423)

**Settlement and Release**

* At common law a settlement of one D released all joint tortfeasors from further liability.
* Court developed the “covenant not to sue” in order to avoid this rule:
* In exchange for settlement w/ one D, the P promised not to bring suit against that D so they were free to sue the remaining Ds
* The need to use this is now gone in many states thanks to the adoption of the Uniform Contribution Among Tortfeasors Act that deals directly with the effect of settlement and release.

 Act on pg 424

 6. Contribution

* = right of one D, who has to pay a judgment to the P, in a joint and several liability situations, to recover some portion of those damages from the other joint tortfeasors.
* Many jurisdiction have now expanded the range of situations in which contribution can be obtained among joint tortfeasors by allowing the D to join other potential Ds or even sue them in a separate contribution action.

 7. Group liability (Market share theory)

*Sindell v. Abbott Laboratories* (pg 431)

 P was injured due to DES that her mother took during pregnancy

 General rule: the imposition of liability depends upon a showing by the P that his or her injuries were caused by the act of the D or by an instrumentality under the D’s control.

 Exceptions: court lists 3 and adds a fourth

 1. Summers v. Tice: burden of proof of causation shifts from P to D in certain circumstances

 2. D acted in concert

 3. “enterprise liability” or “industry-wide” liability

 4. (added by court): market share =

 each manufacturer’s liability for an injury would be approximately equivalent to the damages caused by the DES it manufactured (aka the share of the market that they had)

Reasons for market share:

 As between an innocent P and N Ds, the latter should bear the cost of the injury. The P is not at fault for the absence of evidence.

 Also D have a better standpoint to bear the cost of injury.

\*all exceptions listed and new one have mixed opinions and followings\*

*Shackil v. Lederle Laboratories* (pg 446)

 Action from a DPT vaccine of an infant

 D do not have concert in action b/c each manufacturer had separate formula and method and was separately tested.

 We conclude that the imposition of theory of collective liability in this case would frustrate overarching public policy and public-health considerations by threatening the continued availability of needed drugs and impairing the prospects of the development of safer vaccines.

***Not sure where to put this!!!***

**4. Establishment of the Standard of Care: the function of the judge and the jury**

Question of whether a reasonable jury could make a particular finding has been made a question of law.

Essay by Roy Stone: legal universe has 3 parts:

 Alpha facts: those questions that are determined by direct observation and by accepting or rejecting the testimony of witnesses who are reporting their own direct observations.

 Ex. Is D red haired? Was it raining on this night?

 There would have to be a complete absence of evidentiary support for a jury’s verdict could be rejected

 Aleph facts: also questions of fact, but they are not decided by direct observation. Questions concerning aleph facts arise when doubt remains even after all t he evidence is in.

 Ex. Did the D behave as a reasonable person? Was there an appreciable risk of injury to third persons?

 Judges are freer in disregarding the conclusions of juries on questions of aleph fact

 Questions of law: for judges alone to decide

 Ex. What duty of care does a possessor of land owe to a trespasser?

This framework has not been widely adopted.

Oliver Wendell Holmes Jr.: sometimes juries, as well as judges, exercised a purely law-making or legislative role. Passage of his on pg 151

Also passage from *Law in Science and Science in Law*

Holmes’ recognition of a law-making role of the jury may enhance their importance, but may also justify the intrusion into the role of the jury and even to envision wholesale judicial supplanting of the jury’s role.

Now read an opinion by Traynor: pg 154

Basic overview of both: that when juries decide negligence, and they decide the standard of care for negligence, they are in fact deciding a matter of law, and are not simply confining their decisions to fact finding anymore.

**Add more to this area!!!!!**

***Don’t know where to put this either***

2. various burdens in the trial of an issue of fact.

These burdens are sometimes subsumed under the generic term “burden of proof”

 Burden of Pleading: raising the issue

 Burden of coming forward: with evidence

 Burden of persuasion: person with the burden of persuasion must convince the trier of fact that his version of the facts is more likely than not

 Baseball maxim “a tie belongs to the runner”

All of these are normally on the P (civil), but not always

 Ex. D affirmative Defense, then all three are on the D

 After the P has shown all of their evidence, then the burden of coming forward with evidence is shifted to the D (in a real sense)

B/c the D doesn’t bear the burden of persuasion, he is not obliged to persuade the trier of fact that his version of the facts is more likely than the P’s version. D must only persuade the trier of fact that his version is at least as likely as the P’s version.