In analyzing tort problems, you need to determine:

If a prima facie case has been established (are all the elements met?)

If any defenses are available

What damages have been incurred

**A. Intention**

[R3 Torts] § 1 Intent (willful misconduct - must be voluntary) - the person has the purpose of producing that consequence or knows to a substantial certainty that the consequence will ensue

[R3 Torts] § 2 Reckless conduct (wanton misconduct/gross negligence) - the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to anyone in the person's situation. Additionally, the precaution that would eliminate or reduce that risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.

**Jackson v. Brantley (AL Ct. of Appeals 1979) pg. 34**

Therefore, because of the defendant's intentional conduct, the animals were knowingly and willfully placed upon the highway (and struck a vehicle) and he was substantially certain from past experiences that the horses would be scared by headlights.

Garratt v. Dailey - Boy pulled the chair out from under his aunt, determined that he was substantially certain his aunt would try to sit where the chair had been. pg. 37-38

**Beauchamp v. Dow Chemical (MI Sup. Ct. 1986) pg. 38**

Plaintiff alleges that he was intentionally exposed to "agent orange" by Dow.

An intentional tort can be committed if the person had a substantial certainty that an intentional act would result in injury. There need not be the intent to injure. The problem with substantial certainty is that it is difficult to distinguish between substantial certainty and substantial risk. The problem with the true intentional tort test (intended the injury and the act) is that it can allow employers to injure and even kill employees and suffer only workers' compensation damages. The court favors the substantial certainty test.

All that is necessary is that the actor should have intended to do what he did, not that he have intended to commit a trespass or have known or even realized that a trespass was a possible consequence of his actions. pg. 37

**B. Battery and Assault**

Causes of action which grew out of the writ of trespass (intentional torts) need not show damages (sometimes mere offensive touching is all that is needed; nominal damages).

**Masters v. Becker (NY Sup. Ct. 1964) pg. 41**

Defendant pried plaintiff's fingers (both children) off of a tailgate which resulted in plaintiff falling and sustaining severe injury. No intent to injure, yet there was intent to remove the girl and a battery.

Battery - intended harmful or offensive contact with the person of another. In an action to recover damages for a battery founded on bodily contact, the plaintiff must prove only that there was bodily contact; that such contact was offensive; and that the defendant intended to make the contact. No intent to injure is required, just for the contact.

An offensive contact is one which offends a reasonable sense of personal dignity, as by being hostile, insulting, loathsome, or unduly personal.

A battery need not be with the body of the victim, it is enough that contact is made with something that is attached or loosely related to a person's body. (e.g. plate snatched from African-American)

Assault - intentional putting of another in immediate apprehension of a harmful or offensive contact.

Apprehension is all that is required; a plaintiff need not be afraid. Must be yourself (not third-person).

**Brzoska v. Olson (DE Sup. Ct. 1995) pg. 44**

Plaintiffs allege negligence, battery, and misrepresentation on behalf of their dentist (now deceased) who was knowingly infected with AIDS yet continued his dental practice.

Offensive contact can lead to the recovery of damages and recovery is not precluded if the person discovers the offensive nature of the contact after the event. However contact ruled not offensive as the chances of getting the disease is low (fear of contracting AIDS unreasonable).

The plaintiff does not get to decide what is offensive, the jury does. pg. 49

**Dickens v. Puryear (NC Sup. Ct. 1981) pg. 49**

Plaintiff claims assault, battery, and the intentional infliction of mental distress. Plaintiff was beaten and threatened with death of he did not leave NC. According to [R2], to qualify as assault, the apprehension of imminent contact (no significant delay) should be distinguished from contact created in the future. As noted by Prosser, threats for the future never have fallen within the boundaries of assault.

Intentional Infliction of Emotional Distress can be a threat that occurs in the future. Definition: D intentionally or recklessly causes, by outrageous conduct, severe emotional or mental distress in P

**C. Transferred Intent**

**Singer v. Marx (CA District Ct. of Appeals 1956) pg. 52**

Defendant's child threw a rock which stuck the plaintiff and was witnessed by another child. The evidence indicates that the child aimed at the witness but struck the plaintiff's child and the doctrine of transferred intent renders him liable for battery.

Transferred intent - the actor tries to batter one person and actually causes a harmful or offensive contact to another. Intent can transfer to other intentional torts (intend battery but do assault).

An infant is liable for his intentional torts and does not need to appreciate the wrongful character of the act to be liable (only intent of the act is necessary; however this is not the case with negligence must understand that his heedless conduct might foreseeably lead to some injury).

Most jurisdictions refuse to hold the parents vicariously liable for the torts of their children. pg. 55

**D. Trespass to Land**

With trespass to land (destroyed the right of exclusive possession), the only act which must be intended is the action which constitutes the invasion of another's land (knowingly or not) or the action that constitutes the physical interference with the chattels of another. pg. 56

As long as the defendant intended to take the step which resulted in his entry onto the plaintiff's land, the requisite intention exists. As s the case with other intentional torts, the defendant may be liable if he knows his actions make entry onto the land of another a substantial certainty pg. 56

D trespasses on P’s land when he intentionally (a) himself enters the land or causes a thing or third person to do so, (b) remains on the land after his privilege to be there has expired, or (c) fails to remove from the land a thing which he is under a duty to remove.

Trespass is to be distinguished from a nuisance, which infringes on your right to enjoy your land.

Not all entries onto the land of another is actionable, there are privileged entries (consent and implied consent situations, such as salesman). pg. 57

A possessor's interests include subsurface areas of the land as well as the aerospace above it. pg. 57-59

**E. Trespass to Chattels**

The consensus is that trespass to chattels will lie when the defendant has intentionally dispossessed the plaintiff. Where the defendant has merely interfered with the chattel, an action will only lie if the plaintiff can show some actual damages (physical damage or loss of use).

All that is required for trespass to chattel is that the defendant acted voluntarily. A good faith and reasonable belief that the chattels are one's own is no defense.

Conversion covers the intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.

Conversion and trespass may both be claimed In some instances and it may be beneficial to claim one over the other (e.g. when chattel not totally destroyed trespass only recovers damage caused to chattel while conversion could recover the full amount).

**F. Defenses**

**Insanity**

**White v. Muniz (CO Sup. Ct. 2000) pg. 62**

White's grandmother was placed in a nursing home where she exhibited signs of dementia and aggressive behavior. She battered Muniz. The jury reasoned that she did not possess the necessary intent to commit battery did not satisfy the dual intent rule of CO (did not appreciate the offensiveness of her contact). Minority position.

Dual intent vs. single intent - In a single intent jurisdiction, plaintiff only has to prove an intent to contact. In a dual intent jurisdiction, the plaintiff has to prove both an intent to contact and an intent either to harm or offend.

Insanity is not an affirmative defense, rather, is a denial that the plaintiff has proven an essential element of his claim (negates requisite intent).

**Consent:**

**Hellriegel v. Tholl (WA Sup. Ct. 1966) pg. 67**

A boy was in horseplay with his friends at a lake. He invited them to try to throw him in and one of them slipped and fell on the plaintiff breaking his neck. Boy's parents sue alleging battery.

The boy impliedly consented to rough and tumble horseplay and also accepted the risk of accidental injuries sustained from the participation therein. Additionally, the invasion into the boy was consented to by his participation in the roughhousing.

Consent given by mistake, duress is not consent at all (*e.g. Brzoska v. Olson* - dentist with AIDS).

You can exceed the scope of consent; and silence is not necessarily consent (*Hop Sang*).

Consent need not be expressed in words, it can be inferred from circumstances (implied consent). pg. 71

Whether or not a reasonable person would think that consent happened (by conduct or custom).

**Mulloy v. Hop Sang (Alberta Sup. Ct. 1935) pg. 73**

Man goes to a doctor and states that he does not want to have his hand amputated. Doctor amputates hand. The defendant did not understand what the doctor meant and therefore did not consent. The doctor's actions were deemed to be necessary regardless of consent.

Now there are medical consent forms to be signed before most invasive procedures pg. 75-81

**Self Defense: Defense of Person**

**Lane v. Holloway (England Ct. of Appeal 1968) pg. 81**

An elderly man punched a younger man after an argument. The older man was severely injured.

In an ordinary fight with fists there is no cause of action to either of them for any injury suffered as each voluntarily takes the risk of injuries upon himself. However, one of the parties can sue the other for damages from a subsequent injury if it was inflicted by a weapon or savage blow out of all proportion for the occasion, unless he can prove accident or self defense (excessive force will negate self defense).

**Silas v. Bowman (U.S. District Ct. SC 1967) pg. 84**

The plaintiff (trespasser) approached the armed defendant and put a hand on his shoulder (with the other in his pocket). The defendant then fired the shotgun (to scare him) into the ground and struck the plaintiff in the foot. Using deadly force allowed as he was in fear of an assault.

If conduct of another person is such as to produce in the mind of a reasonable person an apprehension of an intentional tort he may use reasonable (non-deadly) force necessary for protection against the potential injury [R2] § 63. No duty to retreat. Proportionality of force to the threat is important!

If conduct of another person is such as to produce in the mind of a reasonable person an apprehension of an intentional tort involving serious bodily injury, then the use of a deadly weapon by way of self defense is authorized. There may be a duty to retreat (not in Silas v. Bowen but in [R2] § 65).

Furthermore, if a property owner is defending his home against intrusion or dispossession, the property owner may shoot a trespasser with impunity. No duty to retreat.

In order to support a plea self defense, the defendant must not have provoked the difficulty.

Self defense - an amount reasonably necessary to stop the tort using a proportionality test: weight what defendant thought was going to happen compared with the amount of force needed to prevent

Common law – can use reasonable force to protect a 3rd person but limited to that which the person being defended would have been privileged to use in self defense under the circumstances (steps into the other's shoes - person must be entitled to defend themselves). If you make a mistake you are liable. Restatement allows for mistaken belief as long as it is reasonable.

You cannot chase someone after the tort is over and claim self defense.

Cannot use self defense if you are the initial aggressor.

You cannot use self defense when the force is used against a privileged act of another (such as being arrested).

**Defense of Property**

**Brown v. Martinez (NM Sup. Ct. 1961) pg. 89**

Some boys were engaged in nighttime watermelon stealing escapades when the property owner (defendant) shot a rifle in a direction away from the fleeing boys but striking another boy (plaintiff) whom the defendant did not see. The defendant is liable for injuries caused due to transferred intent.

The use of a deadly weapon in the protection of property (more than justifiable force) is generally held to render the property holder liable for the assault (see spring guns pg 93-94).

[R2] § 143 Deadly force can only be used to prevent the commission of a felony if the actor reasonably believes that the felony cannot otherwise be prevented and death or serious bodily harm is threatened.

**Public Necessity**

Public necessity - the public is not legally required to pay for property destroyed pursuant to a valid claim of public necessity (enforcing/protecting public good). Statutory schemes for compensating owners of destroyed property have been established in many types of situations. pg. 96-98.

**Private Necessity**

**Ploof v. Putnam (VT Sup. Ct. 1908) pg. 99**

Ploof (plaintiff) was boating when a violent wind endangered the property and crew. Ploof then moored his boat to Putnam's dock (defendant) without permission. There was a necessity for the plaintiff to moor his boat to the dock. Defendant liable for damages for unmooring and destroying boat.

**Vincent v. Lake Erie Transportation Co. (MN Sup. Ct. 1910) pg. 101**

An impending violent storm was approaching, so the defendant did not leave the dock. The lines holding the boat broke and were subsequently replaced with larger and stronger lines. As a result of the storm the boat crashed into the dock causing damage. While there was necessity to remain moored to the dock, the defendant is liable for any damages received regardless of cause.

There are many cases which hold that necessity will justify entries upon land and interferences with personal property which would otherwise have been trespasses. This doctrine of necessity applies with special force to the preservation of human life. You will be liable for damages caused.

**Negligence**

In an action of negligence the plaintiff must allege and prove:

1) Actual damage to the plaintiff - cannot be brought for merely nominal damages

2) Fault on the part of the defendant - sometimes interpreted as requiring a) duty owed by defendant towards plaintiff and b) the breach of that duty by the defendant.

3) Causation - defendant's fault was the legal cause for the plaintiff's damages

**C. THE STANDARD OF CARE**

**1. The Reasonable "Person"**

**Vaughan v. Menlove (Ct. of Common Pleas 1837) pg. 110**

Defendant maintained a stack of hay near to his neighbors wooden cottage. He was repeatedly warned that it was a fire risk but he ignored them. The hay pile spontaneously caught on fire and destroyed and consumed the cottages. Hallmark case of negligence.

**Delair v. McAdoo (PA Sup. Ct. 1936) pg. 115**

Defendant's vehicle struck plaintiff's vehicle when the defendant's tire blew out. The tire was found to be quite worn and inadequate for road travel. Defendant liable as the law requires drivers and owners of motor vehicles to know the condition of those parts which are likely to become dangerous where the flaws or faults would be disclosed by a reasonable inspection.

**2. Variations on the "Reasonable Man" Standard**

**Charbonneau v. MacRury (NH Sup. Ct. 1931) pg. 117**

Plaintiff's son was struck and killed by the defendant's automobile driven by his minor son (age 17).

A child is to be held to the standard of care of which he is capable (not for intentional torts).

**Goss v. Allen (NJ Sup. Ct. 1976) pg. 125**

A 17-year-old beginner skier struck the plaintiff while skiing in VT. Jury - no liability. The defendant is to be held to the standard of care that a 17-year-old with his experience and background should have (since skiing is not an adult only activity).

[R2] §283A comment c - a child will be held to an adult standard of care where the child engages in an activity which is normally undertaken only by adults, and for which adult qualifications are requires. Flying an airplane and driving a car are the only examples given in this comment. Hunting has been ruled as both an adult activity and not. pg. 129-30.

[R2] § 283B mentally deficient adults are to be held to the reasonable adult standard in an action for negligence. pg. 131. Diminished capacity may be taken into account for comparative negligence.

**Haley v. London Electricity Board (House of Lords 1964) pg. 133**

A blind man fell into an excavated hole and as a result became deaf. The defendants had placed signs and other objects marking the excavation which would alert ordinary people, but not the plaintiff. Liability as It is reasonably foreseeable that a blind person could happen to come across the excavation whilst walking down the street.

**3. The Calculus of Risk**

**Barker v. City of Philadelphia (U.S. Dist. Ct. PA 1955) pg. 137**

Garbage truck driver tried to avoid the 6' x 2' around paper but actually ran over it and the boys which were playing inside, subsequently killing one boy.

The appearance of the paper would put an ordinarily prudent man on notice that injury might result if he ran over it, and that he should exercise additional precautions to avoid doing so. Also the driver was aware that something might be under the wrapping paper (he thought bottles) and that he also (due to being a garbage man) knew that this object was not the kind ordinarily encountered (due to its position on the curb/gutter).

**United States v. Carroll Towing Co. (2nd Circuit Ct. of Appeals 1947) pg. 140**

A group of barges with no employees on board broke loose from their moorings and struck a tanker resulting in the sinking of a barge carrying U.S. owned flour.

The barge owner was negligent in allowing the barge to be unattended during normal working hours.

Negligence is about cost/benefit analysis. If the costs of avoidance are higher than the potential costs of a negligence claim, the actor will not rationally take steps to avoid accidents. Finding the balance between safety and accidents is the goal of negligence law.

Learned Hand Formula (economic meaning of negligence):

A person's duty to provide against resulting injuries are a function of three variables: (1) the probability of the accident (P), (2) the gravity of the resulting injury (L - loss), versus (3) the burden of adequate precautions (B). If the product of the first two exceeds the burden of precautions, the failure to take those precautions is negligence. Negligence = B<PL No-negligence B>PL

This is somewhat paralleled (uses social utility) by R2 pg. 145:

§ 291 Unreasonableness; How Determined

§ 292 Factors Considered in Determining Utility of Actor's Conduct (generally B)

§ 293 Factors Considered in Determining Magnitude of Risk (generally L and P)

In a world with no transaction costs, all parties would arrive at the most efficient solution regardless of liability (Coase theorem see pg. 36). However, in the real world transaction costs are likely to be high the initial allocation of legal liability (though the Hand formula) becomes more critical.

**Pitre v. Employer's Liability Assurance Corp. (LA Ct. of Appeal 1970) pg. 145**

A boy (age 9) was struck in the temple and killed by a another boy (age 17) who was participating in a baseball throwing fair game. The deceased boy was struck during the throwing motion while observing the game.

The probability of someone becoming injured was not so great as to render the operators negligent for failing to take measures to prevent it from happening. Therefore, the risk of foreseeable harm to others, and the probability of an accident of this nature is outweighed by the utility of purpose for which the enterprise is conducted.

In *Wagon Mound*, there was no utility in the discharge of the oil; it was both his duty and his interest (there was a considerable financial loss in the discharge) to stop the discharge immediately.

*Bolton v. Stone* - cricket game; balls hit out of the park onto the road where people would travel - not unforeseeable (6 times in 28 years) but no liability (a reasonable man would have been justified in disregarding such a small risk and taking no steps to eliminate it). However, it does not follow that a reasonable man no matter the circumstances may ignore a risk of such a small magnitude; only if he had some valid reason is this proper (such as considerable expense to eliminate the risk). Pg. 325.

**4. Judge and Jury**

It is the jury's job to determine the facts and the judge's job to determine the law. Sometimes the judge can intrude upon the jury's domain; especially in mixed fact-law situations.

Essay by Roy Stone: legal universe has 3 parts (this framework has not been widely adopted):

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 the evidence is in.

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

Judges are more free 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?

Oliver Wendell Holmes Jr: 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. Holmes can now justify judicial intrusion into the role of the jury, even to envision

wholesale judicial supplanting of the jury's role. Cardozo likes the jury.

**Negligence Per Se**

**Martin v. Herzog (Ct. of Appeals of NY 1920) pg. 158**

A motorist struck an unlighted buggy when rounding a curve at night killing one of the occupants of the buggy. Liability; it was incorrect to let the jury decide negligence for a violated statute.

Negligence per se - The unexcused omission of the statutory signals is more than some evidence of negligence. It *is* negligence in itself.

The unexcused violation of a statute is negligence as a matter of law.

Some courts are prepared to hold that the violations of administrative regulations or of local ordinances as only evidence of negligence (while statutes will be negligence *per se*). Others will hold all violations of any laws to be negligence *per se*.

**Brown v. Shyne (Ct. of Appeals of NY 1926) pg. 163**

An unlicensed chiropractor allegedly paralyzed a woman who had visited the man nine times.

No liability; the absence of a license does not alone provide a basis for inferring that the training, learning, skill, and method was lacking. Failure to obtain a license as required by law gives rise to no remedy if it has caused no injury.

One must show that not only were their injuries caused by the statutory violation but that the injuries suffered were of the kind the legislature enacted the statute to guard against.

There are statutes which make it unlawful to leave your keys in automobile's ignition. If you violate this statute, are you liable for a person's injuries in a car driven by thieves? The cases are argued in terms of the intent of the statute. The statute is intended to prevent theft and teenaged joy-riders, not injuries from stolen vehicles. The cases usually split either way, with denial of recovery the most common result. pg. 340.

**Tedla v. Ellman (Ct. of Appeals of NY 1939) pg. 169**

Plaintiff was injured while her brother was killed when they were struck while walking down a road at night by the defendant's vehicle. The statute says they must walk to the left of the center line.

No liability; the pedestrians violation of the statute was not negligent and furthermore not a proximate cause of the accident (observance of the statute would place them in greater danger).

Excused violation - The general duty is established by the statute, and deviation from it without good cause is a wrong and the wrongdoer is responsible for the damages resulting from his wrong.

**Barnum v. Williams (Sup. Ct. of OR 1972) pg. 173**

The plaintiff was traveling uphill in a motorcycle around a sharp curve near the center line in the rain. The defendant was traveling downhill in a car near the center line as well and became apprehensive that a collision would occur when he saw the plaintiff. The defendant applied the brakes and slid into the motorcycle injuring the plaintiff.

No liability; there are exceptions to the negligence *per se* standard when special circumstances are encountered.

The presence of an emergency does not change the standard of care; the standard remains reasonable care under the circumstances. If a party acts unreasonably in the face of an emergency, he is negligent.

When the evidence establishes that a party is negligent *per se*, such a party has the burden of producing evidence that, nevertheless, he was acting reasonably.

You are very rarely be guilty of a tort when abstaining from doing an action.

**6. Proof of Negligence; The Use of Custom and Expert Testimony**

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

Unless a custom is of such prevalence that the jury may be entitled to make note of it of their own accord, it is normally necessary to prove the existence of the custom through persons so familiar with the custom and its scope of application that they can be considered experts with regard to it.

**Daubert v. Merrell Dow Pharm. (US Sup. Ct. 1993) Separate from book.**

Two pregnant woman took Bendectin to control their nausea and their children were born with birth defects. The District Court did not allow the plaintiff's expert testimony as evidence.

Expert should be allowed; *Frye* (1923)states that expert opinion is inadmissible unless the scientific technique is "generally accepted" as reliable in the relevant scientific community. This is no longer to be followed. Fed. R. Evid. 401, 402, and 702 are to be followed.

Rule 402 - "all relevant evidence is admissible."

Rule 401 defines relevant evidence as that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 702 states, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

The proponent bears the burden of showing by a preponderance of the evidence that a judge should admit a piece of evidence (expert testimony). The new methodology can be more restrictive than the *Frye* test as now more is required than general acceptance by the scientific community and the judge must decide if the witness is relevant and his testimony reliable.

Expert testimony can give opinion testimony while every other witness must be a fact witness. Therefore, their admissibility must be governed (reliable and relevant).

Trial judge must consider if there is sufficient evidence available to allow the expert to draw their conclusion.

Some factors which a judge may look at when judging an expert witness:

(1) Falsifiable/testability – have we tested the hypothesis and what are the results

(2) Error rate

(3) Whether the expert has gone through peer review and publication (is there literature on the issue)

(4) Frye test – i.e. general acceptance

*Daubert* makes clear that the factors it mentions do not constitute a definitive checklist or test. Daubert's gate-keeping requirement is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

Most states have evidence codes patterned after the Fed. R. Evi. and therefore a majority of jurisdictions have adopted a *Daubert*-like admissibility standard.

From Dempsey pg. 182:

One is under a duty of care in connection to one's actions to use such care as would be used by a reasonably prudent man under similar circumstances and conditions. Failure to use such due care is negligence, and if the negligence is a proximate cause of an injury to someone, the injured party may recover damages from the defendant. What constitutes due care under any particular set of circumstances depends upon the risk involved and the hazards connected with the activity in question. The degree of care that must be exercised by a person depends upon possible consequences of negligence. Then talk about Learned Hand and R2 and social utility.

**Dempsey v. Addison Crane Co. (D.D.C. 1965) pg. 182**

A crane was moving a welding machine from a construction site when the auxiliary jib (an extension of the boom) broke off and killed one worker while seriously injuring the other (the plaintiff).

Liability; defendant was negligent in its attachment of the jib as there were cheap and safer alternatives available and were in use by the industry.

The fact that a particular apparatus or method is used by the industry is admissible in evidence on the issue of negligence, but it is by no means conclusive.

Under the standard rubric neither compliance with an industry-wide custom nor the failure to comply with such a custom is conclusive evidence of due care or lack of due care. pg. 185

In activities that are engaged in by the practically everyone, customary behavior is, for all practical purposes, probably conclusive on the issue of due care (ex: failing to check brake fluid each day). pg. 186

**Shilkret v. Annapolis Emergency Hospital Association (Ct. of Appeals of MD 1975). pg. 186**

An infant has been continuously institutionalized since birth because of brain damage resulting from intracranial bleeding caused by the alleged negligence of several physicians.

Judgment for the defendants reversed as "strict locality" rule no longer should be applied (that the standard of care should be that in the physician's own community or locality).

Even within the framework of the locality rules, it has been generally accepted that where a physician hold himself out to be a specialist, he is held to a higher standard of knowledge and skill than a general practitioner.

A physician is under a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances. This same logic should be applied to hospitals as well. This may impose an obligation on local doctors to refer the patient to a large metro area with better facilities are more specialists. pg. 194

**Helling v. Carey (Sup. Ct. of WA 1974) pg. 194**

A woman (plaintiff) went to an ophthalmology practice to seek treatment for her nearsightedness; she was given contacts. Due to continued problems the doctor's eventually tested her for glaucoma and confirmed the diagnosis.

Liability; the defendants did comply with the standard of care for their specialty which does not require the giving of a routine pressure test to persons under 40 years of age. However, the test is simple and inexpensive and therefore, it is the duty of the courts to say what is required to protect patients under 40 from the damaging results of glaucoma.

The *Helling* case is unique in that it allows a jury to find the prevailing standard of medical care inadequate. pg. 198 This decision has been severely criticized. pg. 199

The modern trend is to hold both the surgeon and the hospital responsible for the activities of the operating crew, who are usually employees of the hospital. pg. 199

**Miller v. Kennedy (Ct. of Appeals of WA 1974) pg. 201**

The plaintiff lost his kidney after complications from a kidney biopsy. He sued the doctor stating that he would not have consented to the biopsy had he properly been informed of the risks.

Liability; the duty to warn and to advise of alternatives does not arise from the custom of physicians in the locality but exists as a matter of law.

The duty to warn and to advise of alternatives 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; and

(3) the patient can be advised of the risks and alternatives without detriment to his wellbeing.

In most cases expert medical testimony will be necessary to establish each of the three elements.

The plaintiff-patient must prove by a preponderance of the evidence that:

(1) the physician failed to inform the patient of material risk in submitting to the proposed course of treatment;

(2) the patient consented to the proposed treatment without full knowledge of the risks and alternatives;

(3) a reasonable prudent patient (not the actual patient) probably would have not consented to the treatment when informed of the material risks; and

(4) the treatment chosen caused injury to the patient.

Two exceptions to the general rule of disclosure:

(1) Patient is unconscious and harm from a failure to treat is imminent. The doctor should attempt to secure a relative's consent if possible and time allows.

(2) Communication of the risk information would present a threat to the patient's well being (*e.g.* complicate/hinder treatment or foreclose a rational decision). A physician may not remain silent because divulgence might prompt the patient to forego therapy the physician feels the patient really needs. pg. 208

**7. The Use of Circumstantial Evidence: "*Res Ipsa Loquitur*"**

A way to get around lack of evidence (circumstantial evidence) when there are situations where the accident could only have occurred if there was negligence.

What makes a *res ipsa loquitur* case different from the ordinary case where circumstantial evidence forms part of the proof, is that the jury is specifically instructed that from proof of the accident they may infer that the defendant was negligent and that his negligence caused the plaintiff's injuries. pg. 237

**Byrne v. Boadle (Ct. of Exchequer 1863) pg. 212**

A man walking on the street is injured by a falling barrel of flour and sues the owner of the shop from which it fell. There was no proof as to who actually was at fault.

Liability; the accident itself proves negligence.

Since most of the evidence as to exactly what happened is in the possession of the defendant, the doctrine serves as a means of putting pressure on the defendant to come forward with evidence. pg 237

Burden of proof:

(1) Burden of pleading (*i.e*. raising an issue)

(2) Burden of coming forward (evidence)

(3) Burden of persuasion (those assigned with this also bear the risk of non-persuasion [*i.e.* losing])

All three of these burdens are normally with the plaintiff, however there are exceptions (*e.g.* affirmative defenses - all three burdens are on the defendant).

**George Foltis, Inc. v. City of New York (Ct. of Appeals of NY 1941) pg. 217**

The plaintiff was injured by a broken water main installed and maintained by the city of New York. The plaintiff alleges *res ipsa loquitur*.

No liability; *res ipsa* means that the facts warrant an inference, not that they compel an inference.

*Res ipsa* relieves a plaintiff from the burden of producing direct evidence of negligence, but it does not relieve a plaintiff from the burden of proof that the person charged with negligence was at fault.

When *res ipsa* is invoked, the burden of disproving negligence never shifts to the defendant, it always rests with the plaintiff. It establishes evidence to be weighed , not necessarily to be accepted as sufficient. *Res ipsa loquitur* gives the inference of negligence which should be rebutted (direct evidence or some other cause).

**Swiney v. Malone Freight Lines (Ct. of Appeals of TN 1976) pg. 225**

A motorist (plaintiff) was struck and injured when a wheel from a heavily loaded trailer came loose from a vehicle travelling in the opposite direction.

But if the defendant merely offers evidence of his own acts and precautions amounting to reasonable care, it is seldom that a verdict can be directed in his favor (when *res ipsa loquitur* is invoked).

From *Swiney* quoting Prosser on Torts, if the defendant seeks a directed verdict in his favor, he must produce evidence which will destroy any reasonable inference of negligence, or so completely contradict it that reasonable men could no longer accept it.

From *Winter v. Scherman* pg. 229 a HI Sup. Ct. case typifying *res ipsa loquitur*... "although no evidence is introduced which tends to rebut the inference of negligence, the inference arising from the facts of a particular case might not be inescapable and might still be subject to rejection by the jury."

To defeat the application of the *res ipsa loquitur* doctrine and the express instruction to the jury, the defendant 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 defendant was negligent or that the defendant's conduct caused the accident. pg. 231

**Ybarra v. Spangard (Sup. Ct. of CA 1944) pg. 231**

Plaintiff went in for an appendectomy, when he awoke he had pain in his right arm and shoulder which eventually developed into paralysis and muscle atrophy. Plaintiff pleads *res ipsa loquitur*. The plaintiff cannot say who is responsible for the injury and what exactly caused the injury (no instrumentality under any one defendant's control).

Liability; it is manifestly unreasonable (as he was unconscious) for the defendants to insist that he identify any one of them as the person who did the negligent act.

From *Ybarra* on pg. 232-3 The doctrine of *res ipsa loquitur* has three conditions:

(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence;

(2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

New general requirement from pg. 237:

(2) the defendant has a sufficiently close connection with the instrumentality that caused the injury that it is more likely than not that he is the negligent somebody. Control and management of the instrumentality involved are highly probative on that issue, but are not logically necessary. (*e.g.* bursting bottle cases where the retailer has delivered the instrumentality to the retailer and thus has given up control, but can still be liable).

**Causation**

**A. Cause in Fact**

Was the defendant's conduct the cause in fact of the plaintiff's injuries and if it was, was the defendant's conduct also the proximate cause of the plaintiff's injuries?

The defendant's negligent conduct can thus be established as being more likely than not part of the casual chain leading up to the plaintiff's injuries. If we cannot ascribe any causal relationship between two events we are forced to conclude that, with respect to each other, they are random.

The determination of the cause in fact has been sometimes described as the *sine qua non* test, that is "but for" the defendant's conduct, the plaintiff would not have suffered his injuries.

Generally, 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 the events of type X and the occurrence of type Y; and

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

A particular event will be a cause in fact of another event 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.

**Kingston v. Chicago & Northwest Railway Co. (Sup. Ct. WI 1927) pg. 241**

A NE (defendant's locomotive negligently set) and a NW (unknown but human origin) forest fire merged into one united fire and damaged the plaintiff's property. Defendant liable for both fires. Exception to the *sine qua non* "but for" test; use substantial element test in these situations.

In cases where two separate, independent, and distinct agencies, each of which constituted the proximate cause of the plaintiff's damage, and either of which in the absence of the other would have accomplished such result, any one or more joint tortfeasors are each individually responsible for the entire damage resulting from their joint or concurrent acts of negligence. *Kingston*.

It is impossible to apportion the damages or to say that either perpetrated any distinct injury that can be separated from the whole. To allow each of the two wrongdoers to plead the wrong of the other as a defense to his own wrong doing permit both wrongdoers to escape liability at the expense of the innocent party.

A wrongdoer is exempt from liability who sets a fire which unites with a fire originating from natural causes not attributable to any human agency, resulting in damage. *Kingston*.

It is also conceivable that a fire so set might unite with a fire of so much greater proportions (such as a raging forest fire) as to be enveloped or swallowed up by the greater fire and its identity destroyed, so that the greater fire could be said to be an intervening or superseding cause. *Kingston*.

Multiple death scenario can be attacked as far as damages; what is it worth for a few more seconds of life (when boy was falling to his death from bridge but was killed by electrocution from negligently placed power lines).

**Kramer Service v. Wilkins (Sup. Ct. Miss. 1939) pg. 244**

A man was injured in a hotel when, after closing the door, a piece of glass from the transom over a door fell upon him. The transom was reported to have been in disrepair but the hotel did nothing.

Liability; the court ruled that a reasonably prudent and careful operator should have foreseen the fall of the broken glass and a subsequent injury. No liability for subsequent development of skin cancer.

It is not sufficient for a plaintiff seeking recovery for alleged negligence to show a possibility that the injury was caused by negligence. Possibilities will not sustain a verdict, it must have a better foundation.

**Daly v. Bergstedt (Sup. Ct. MN 1964) pg. 247**

The plaintiff tripped on a pile of molding placed in an aisle of a grocery store. The plaintiff fractured her leg and bruised her breast. After much recovery, it was determined that she had breast cancer which she died from. Six physicians testified at the trial with all but one showing no causal relationship between trauma and cancer.

Liability affirmed; where qualified medical witnesses differ, as they do here, it ordinarily is not for us on appeal to say that one is eminently right and the other so clearly wrong that the fact finder was obliged to accept the opinion of one and discard the opinion of the other.

General causation - Can something ever produce a given result? General causal relation between one thing and another.

Specific causation - Is the general cause the cause of this particular injury?

**Summers v. Tice (Sup. Ct. CA 1948) pg. 252**

While flushing quail uphill from the positioned shooters, the plaintiff was shot and struck by one of two possible hunters who aimed in his direction.

Liability; they were both negligent towards the plaintiff (and in the midst of a joint enterprise), hence it should rest with them to absolve himself if he can (alternative liability; exception to the *sine qua non* "but for" test). Must join all defendants. All must be negligent (certain that one Ds negligence injured).

Restatement of Torts § 876. Persons Acting in Concert. pg. 256

For harm resulting to a third person from the tortious conduct of another, a person is liable if he:

(a) orders or induces such conduct, knowing of the conditions under which the act is done or intending the consequences which ensue

(b) knows that the others conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so conduct himself.

Example on pg. 257 Illustration 3, A is liable to C (A hits shoots an animal while B strikes C) because they are in the midst of a joint enterprise (vicarious liability; joint and several liability).

Similar to *res ipsa loquitur*, in situations such as Summers, where both defendants are admittedly negligent, the burden of persuasion on the issue of causation shifts to the defendants. pg. 258

This is not a literal shift, the burden is always on the plaintiff; however the defendants must produce sufficient evidence which counters the supposition of causation.

As the number of defendants increases, the justification for shifting the burden of persuasion on the issue of causation becomes more questionable. pg. 258

Liability has been and has not been found in situations where it is not clear if safety precautions not undertaken would have prevented an injury (life preservers on a boat, no lifeguard at a pool) pg. 259.

**Hotson v. East Berkshire Area Health Authority (House of Lords, 1987) pg. 261**

The plaintiff fractured his femoral head at the epiphysis which went undiagnosed his first trip to the hospital. After the correct diagnosis was made and surgery, he developed avascular necrosis due to a lack of the blood supply to the epiphysis which will result in future deformity and disability.

No liability; unless the plaintiff proved on a balance of probabilities (anything that is more probable than not is treated as certain) that the delayed treatment was at least a materially contributory cause of the avascular necrosis he failed on the issue of causation.

In the previous case they acknowledge and in the notes it says that the issue of whether a loss of a chance should be compensable has been litigated in almost every state and a slight majority seems to have recognized the possibility that damages might be awarded for the loss of a chance to recovery.

In those successful, some have awarded full damages while others have reduced the amount by the percent chance of survival lost due to the physician's negligence. Some cases have allowed the jury to decide on cases of small decreases (39% down to 25%) while others require a greater than 50% chance of recovery (as in *Hotson*). pg. 269-70. See pg. 270 for more loss of a chance cases.

In *Hotson*, the switch was either "on or off" meaning that either the boy would have had a chance to recover or he had no chance to recover and the delay had no impact on the necrosis. In the cancer case from the notes (*Herskovitz*; 5-year survival rate of 39% down to 25%), there was a observance of progressing from a stage 1 tumor to a stage 2 tumor and it wasn't the same " survival or no survival" situation observed in *Hotson*, there was an actual degree of measurement to base a decision.

While the [R3] § 26 takes the "but for" definition of causation, many jurisdictions stick to the substantial factor definition. They are both for the most part synonymous. Use both tests on the exam.

The defendant would be cause in fact of the damage if the jury found that its act was a material or substantial element in producing it.

**B. Proximate Cause**

Even after the plaintiff has shown that the defendant was the cause in fact of the plaintiff's injuries, the plaintiff must still show that the defendant was the proximate cause of those injuries. The proximate cause requirement is a policy determination that a defendant, even one who behaved negligently, should not automatically be liable for all the consequences, no matter how improbable or far-reaching.

Proximate Cause - direct consequences test (*Polemis* - distinguishes direct vs. remote causes to limit damages) overruled by foreseeability (*Wagon Mound I* - damage must be reasonably foreseeable in all the circumstances, puts an artificial limit on the extent of damages)

***In Re* Polemis (Arbitration, Ct. of Appeal, 1921) pg. 271**

During the unloading of a cargo ship filled with petrol (some spilled during transport), a board fell into the hold creating a spark which ignited the spilt vapors, destroying the ship.

Liability; the person guilty of negligence is equally liable for its consequences, whether he could have foreseen them or not. The fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial so long as the damage is in fact traceable to the negligent act (causation).

The limitation on damages from negligence imposed in *Polemis* is via the direct or remote cause of the injury; the cause of the injury must be a direct result of the negligence. Remoteness - the further away in the chain links of causation an act is, the more remote the consequences.

**Palsgraf v. Long Island Railroad (Ct. of App. NY 1928) pg. 276**

A man carrying a package became unsteady after jumping into the train so a guard on the train reached forward to help him in, and another guard on the platform pushed him from behind. In the commotion, his package was dislodged, fell upon the rails, subsequently exploded, and the shock of the explosion threw down some scales which fell upon the plaintiff injuring her.

No liability; the conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away (risks within the "range of apprehension" *i.e.* "zone of danger").

Proximate Cause - If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. In other words, a duty to avoid injuries to others only extends to those risks the actor should anticipate from his negligent act (reasonably foreseeable risks).

**"The Wagon Mound I" Overseas Tankship v. Mort's Dock and Eng. Co. (Privy Council 1961) pg. 286**

The ship Wagon Mound carelessly spilled a large quantity of bunkering oil into the bay. The plaintiff spoke with the manager of The Wagon Mound who confirmed that the furnace oil in open water could not burn. After a few days of safe work, a piece of welding material fell into the water, ignited a fire, and severely damaged the wharf.

No liability; it does not seem consonant with current ideas of justice and morality that for an act of negligence, however slight, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and grave, so long as they can be said to be direct (vs. remote) ((Overrules *Polemis* insofar as using foreseeability as opposed to direct vs. remote causes)).

**Hughes v. Lord Advocate (House of Lords 1963) pg. 298**

Defendants removed a manhole cover and erected a shelter around the cover which was surrounded on four sides by red warning paraffin lamps. One of the boys tripped on a lamp, which fell into the hole causing an explosion with 30 ft. flames. The plaintiff fell into the hole and sustained severe burns.

Possible liability; the presence of children in the shelter and in the manhole ought reasonably to have been anticipated by the defendant as the lighted lamps in the public street adjacent to a tented shelter provided an attractive allurement to children passing along the street.

**Doughty v. Turner Manufacturing (Ct. of App. 1963) pg. 302**

When heated above 500 degrees, a chemical reaction caused water to be released as steam from a cauldron lid which threw out some of the hot molten liquid. The lid, which was porous and capable of holding water, did not have actual moisture at the time of the accident.

Potentially no liability; the defendants were in breach of no duty of care owed to the plaintiff, for this was not an act or omission which they could reasonably foresee was likely to cause him damage.

From *Hughes* - It was foreseeable that the lamp could spill and be ignited by flame. I cannot see that these are two different types (spill vs. explosion) of accident; they are both burning injuries caused by the potentially dangerous paraffin lamp (Since the same general kind of risk that made the defendant's conduct negligent has materialized to injure the plaintiff; the fact that the injury occurred in an unforeseeable manner is irrelevant - compare *Hughes* with *Doughty*). From *Doughty* - It would be quite unrealistic to describe this accident as a variant of the perils from splashing. But it was the time lapse that added an unforeseeably aspect and he was thus outside the zone of danger (both spatial and temporal zone of danger).

**("*In re* Kinsman") Petition of Kinsman Transit Co. (US Ct. of App. 2nd Cir. 1964) pg. 307**

The Shivas (due to accumulation of ice) negligently broke free and began floating down the river. The Shivas stuck and damaged other ships and the two ships continued to float down the river. Meanwhile, the operators of a drawbridge downstream were warned of the approaching ships, but due to unknown circumstances (operator likely out drinking) the bridge was not raised in time. The ships struck the bridge, which collapsed and damaged other nearby property. The ships and debris formed a dam on the river and subsequently flooded and damaged property as far as three miles upstream.

Liability for the flooding damage; where the damages resulted from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable and to the same class of persons, unforseeability of the exact developments and the extent of the loss will not limit liability. (The dissent disagreed as the flooding was not foreseeable). Broad ruling and not applied today.

Other subsequent claims against the plaintiff for economic losses due to impaired shipping on the river were denied as they were not foreseeable as a result of the negligent behavior. The claimants damages are too tenuous and remote to permit recovery. pg. 318

**"The Wagon Mound II" Overseas Tankship v. Miller Steamship Co. Pty. (Privy Council 1966) pg. 320**

Same facts as in WM I. Addressing nuisance and rehashing of the negligence claim.

For liability in nuisance, fault of some kind is almost always necessary, and fault generally involves foreseeability. Here the findings show that some risk of fire would have been present in the mind of a reasonable man in the shoes of the ship's chief engineer. The engineer should have stopped the flow of oil early as this was an easy and inexpensive burden to bear to prevent the small chance that the oil would catch on fire. He would weigh the risk against the difficulty of eliminating it. That failure to stop the oil makes them liable as it had the possibility of catching fire, however remote.

While §435(2) of [R2] seems to bring forseeability into the determination of legal cause, the [R2], except for this provision, seems to adopt a direct cause approach. The provision appears to give the court an escape when the accident, although foreseeable, might be considered to be a bizarre one. pg. 332.

[R3] The actor is not liable for harm different from the harms whose risk made the actor's conduct tortious. pg. 285

There are exceptions to foreseeability for extensive consequences for physical injuries (liability in egg shell skull cases - small harm causes thin skull to fracture, causing death). In these situations the defendant is said to take his plaintiff as he finds them.

**C. Intervening Causes as Superseding Causes**

**Glasgow Realty Co. v. Metcalfe (Ct. of App. Ken. 1972) pg. 333**

While a woman was closing a window, a 9-year-old boy put both hands against the window (negligently maintained by the defendant), it broke loose and fell upon the people below. The defendants claim the boy's actions were an intervening cause relieving defendant of liability. In the panic to avoid the falling glass, a woman was knocked down and broke her hip resulting in permanent disability.

Liability; the basic principle of the law of intervening or superseding causes is that the original negligent actor is not relieved of liability by the subsequent negligent acts of another if the subsequent acts might have been foreseen.

It is not required that the particular precise form of injury 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 (*In re* *Kinsman* came to a similar determination).

Where the type of intervening negligent act is at all foreseeable, even if the specific intervening cause is not, the original tortfeasor will normally be held liable for the plaintiff's injuries.

1. *Gibson v. Garcia* - Defendant's power pole negligently allowed to rot. Plaintiff was injured when the pole fell after being struck by a negligent motorist. Defendant still liable.

2. *Gilbert v. New Mex. Const. Co.* - Defendant negligently broke a city water main. Fire damaged plaintiff's house. City's negligence in not increasing the water pressure after repairs were complete did not supersede defendant's original negligence.

Where the intervening negligence is considered unforeseeable, the originally negligent party will usually escape liability (the grossness of the intervening negligence will be a factor considered by the courts in determining its foreseeability). pg. 335

1. *Mahone v. Birmingham Elec. Co*. - Defendant's bus violated a city ordinance by failing to pull over to the curb when discharging passengers. Plaintiff slipped on a banana peel in the street and was injured. Defendant's negligence not the proximate cause of the plaintiff's injuries because the intervening cause of the accident was not to be reasonably anticipated.

**Brauer v. New York Central & Hudson River Railroad (Ct. of Errors and App. NJ 1918) pg. 336**

A train struck a wagon scattering its contents. The scattered empty barrels and keg of cider were stolen while the plaintiff was incapacitated. There were two guards on the freight train to protect RR property against thieves, but they did nothing.

Liability; the act of a third person, intervening and contributing to a necessary condition to the injurious effect of the original negligence (even if criminal), will not excuse the first wrongdoer, if such act ought to have been foreseen (since they had guards, criminal acts could have been foreseen).

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

*Watson v. Ken. & Ind. Bridge and R.R.* - A tank car with gasoline derailed and spilled and remained on the ground for several hours. A man then threw a lit match onto the ground and injured a nearby resident. Despite unforeseen intervening act, defendant liable; but not for malicious or criminal act of another. pg. 339

"Dram-shop statutes" are when vendors who sell alcoholic beverages to people are held liable for the injuries caused by inebriated patrons. These are usually not extended to social hosts, although in some cases and statutes it is. In some cases, liability has been extended to social hosts providing alcohol to a person under 21. pg. 340.

Suicide pg. 341 Initially injured by defendant and later commits suicide.

To the extent that acts of God are considered foreseeable, they will not serve to cut off responsibility of a negligent defendant. pg. 341

1. *Klinefelter* - Man hits a deer and rolls off a negligently designed embankment. Actions of the deer ruled unforeseeable.

2. *Chase* - Hawks strike a power line and start a fire. It was ruled foreseeable that many causes could have damaged the negligently placed wires and therefore defendant was liable.

It is generally held that one who negligently injures another is also responsible for any aggravation of injuries suffered by the plaintiff during the course of medical treatment, even if the in injuries are aggravated owing to the negligence of the attending physicians. Liability is justified on the grounds that such aggravation of injuries is a foreseeable consequence of the original tortfeasor's negligence (unless subsequent injuries caused by intentional conduct or grossly negligent treatment). pg. 342

1*. Squires v. Reynolds* - Tortfeasor breaks man's leg and is liable for when he slips and reinjures the leg whilst on crutches.

2. *Lucas v. City of Juneau* - Plaintiff injured and ambulance crashes causing further injury. Defendant is liable, even if accident far removed from original event (18 days in *Lucas* -transfer).

On the theory that "danger invites rescue", the original tortfeasor has been held liable for injuries suffered by those going to the rescue of those imperiled or injured by the original tortfeasor. The liability will attach even if the interest threatened is a property interest and even if the person threatened or injured is responsible for his own predicament. When the injured rescuer is a "professional rescuer" such as a fireman or policeman, there are a number of cases denying recovery.

**Others' Conduct as a Contributing Cause**

**A. Contributory Negligence**

Contributory negligence used to be a complete bar to recovery. This is still adhered to be a few states.

**B. Comparative Negligence**

Some states have adopted the "pure" form of comparative negligence which allows recovery of a percentage of damages regardless of the degree of fault (plaintiff 99% at fault can recover 1% of the damages).Others will only allow recovery if the plaintiff's fault is less than the defendant's fault. Most states that have adopted comparative negligence, however, have done so by statute.

**Hoffman v. Jones (Sup. Ct. FL 1973) pg. 351**

Whatever may have been the historical justification for it, today it is almost universally regarded as unjust and inequitable. Pure scheme.

**Bradley v. Appalachian Power Co. (Sup. Ct. WV 1979) pg. 362**

We are not willing to abandon the concept that where a party substantially contributes to his own damages, he should not be permitted to recover for any part of them. Modified scheme.

**Martel v. Montana Power Co. (Mont. Sup. Ct. 1988) pg. 373**

Plaintiff climbed a power pole, did not touch the lines, but came close enough for his body to arc and cause serious injury. No barricades surrounded the tower and only a wooden sign existed for warning. Montana statute requires utilities to construct, install, and maintain lines and equipment so as to reduce hazards to life as far as practical. By violating this statute, the defendant was negligent *per se*.

Liability; comparative negligence is applicable even when involving willful and wanton misconduct.

Cases are divided as to how to deal with reckless or willful conduct short of intentional conduct. Some follow *Martel*, while others still apply the rule that the plaintiff's negligent behavior (and application to comparative fault) is not even a partial defense to willful and wanton misconduct. pg. 376

Normally, one guilty of intentionally injuring another has not been thought able to take advantage of a comparative fault scheme to reduce the damages assessed. However, there are an increasing number of cases that treat even intentional cases under comparative fault. pg. 377

A number of states have "guest statutes" which restrict the right of a person who has been gratuitously furnished automobile transportation to bring an action against the owner or driver for injuries caused by the negligent operation of the vehicle. In some states the plaintiff must show gross negligence; in others, which are more typical, willful and wanton misconduct (i.e. recklessness) must be shown. Some states have rejected the use of aggravated degrees of negligence in a limited class of cases as unconstitutional (U.S. but more often State). pg. 379

[R2] Torts § 479 Last Clear Chance: Helpless Plaintiff

A plaintiff who has negligently subjected himself to a risk of harm from the defendant's negligence may recover if: (1) plaintiff is unable to avoid the harm; (2) defendant is negligent in avoiding the harm; and (3) knows (or should have known) of the plaintiff's situation.

[R2] Torts § 480 Last Clear Chance: Inattentive Plaintiff

If plaintiff can discover the danger caused by defendant's negligence then the plaintiff can only recover if defendant knows plaintiff is inattentive and fails to avoid the harm.

The predominant view is that last clear chance, as a separate doctrine, does not survive the introduction of comparative fault. Today, this principle is applied to the allocation of the responsibility between the two parties (helpless plaintiff has the most application in comparative fault schemes).

**C. Assumption of the Risk**

**LaFrenz v. Lake County Fair Board (Ct. of App. Ind. 1977) pg. 382**

A woman was struck and killed at a demolition derby while sitting in the special pit area. In order to gain access to this area, she signed a release which contained clear and conspicuous language.

No liability; parties are generally permitted to agree in advance that one is under no obligation of care for the benefit of the other, and shall not be liable for the consequences of conduct which would otherwise be negligent.

However, sometimes exculpatory clauses have been found to be against the public interest/policy (unequal bargaining power, great importance to the public, essential nature of the service, business thought suitable for public regulation).

Exculpatory agreements are not construed to cover the more extreme forms of negligence or any conduct which constitutes an intentional tort.

*Dalury v. S-K-I Ltd.* - Plaintiff signed a release at a ski resort but was injured when skiing into a metal pole. Release held invalid on public policy grounds. They said the defendants' area is a facility open to the public. Business invitees have a right to assume the premises, aside from obvious dangers, are reasonably safe for the purpose for which he is upon them. They alone can insure against risk and effectively spread the cost of insurance among their thousands of customers. Skiers, on the other hand, cannot insure against the ski area's negligence. pg. 387.

Express assumption of the risk - contractual consent releasing a defendant of a legal duty, as in *LaFrenz*.

Primary implied assumption of the risk arises when the plaintiff impliedly assumes those risks that are inherent in a particular activity. It is not a true affirmative defense since no cause of action for negligence is ever established; the plaintiff has failed to establish a prima facie case of negligence as there is no legal duty. Ex. a spectator in the stands at a baseball game and fly balls.

Secondary implied assumption of the risk - the risk of harm assumed by the plaintiff is created by the defendant's negligence (as in *Herod*). It is a fault-based concept and dealt with under comparative fault. It is a true defense as it is asserted only after the plaintiff established a prima facie case of negligence.

The elements which must be found in order to constitute a defense of assumption of risk are generally: (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.

A few comparative fault jurisdictions still maintain assumption of the risk as absolute defense.

**Herod v. Grant (Sup. Ct. Miss. 1972) pg. 389**

A man while hunting in a field, was injured when he fell from the toolbox situated in the back of the defendant's pickup truck. Plaintiff claims not to have appreciated the risks.

Liability; the courts have been willing to override contentions of the plaintiff (regarding subjective knowledge of activities) where they find that any person of ordinary intelligence must, as a matter of law, have known or appreciated the risk.

**Jones v. Three Rivers management Corp. (Sup. Ct. Penn. 1978) pg. 391**

Plaintiff was struck with a baseball at Three Rivers Stadium while walking in an area of the concourse. Built into the concourse were viewing openings and plaintiff stopped to view the field. As she turned to walk away, she was struck by a baseball batted during batting practice.

Liability; the viewing opening in the concourse are not an inherent feature of the spectator sport of baseball and therefore the risk of harm cannot extend here.

Only when the plaintiff introduces adequate evidence that the amusement facility deviated in some relevant aspect from established custom will it be proper for an inherent risk case to go to the jury.

**Auckenthaler v. Grundmeyer (Sup. Ct. NV 1994) pg. 396**

Plaintiff charges the defendants with negligently riding a temperamental horse (which struck her horse injuring her) and the owner with negligently supplying the rider with a aggressive and anxious horse.

Liability; no matter how the assumption of risk scenario is depicted, it is translatable into a degree of negligent conduct by the plaintiff.

As evidenced in *Auckenthaler*, there is a very distinct split between those states that include primary implied assumption of risk in the comparative negligence calculation (NV - minority opinion) and those that treat it as an absence of negligence on the part of the defendant as a matter of law because no duty of reasonable care was owed.

In sporting/recreational activities, liability can only be imposed where the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of ordinary activity involved in the sport (most states follow this view; unless gross negligence or intentional act there is primary implied assumption of the risk and no duty).

**D. Avoidable Consequences; The "Seat Belt" Defense, and Mitigation of Damages pg. 404**

Several states in adopting mandatory seat belt laws, explicitly provided that the evidence of the violation of the statute could not be used in civil cases to prove contributory negligence.

In some other states, either by judicial decision or statute, allow some reduction in damages for the plaintiff's failure to wear a seat belt. When permitted by statute, most jurisdictions will only allow limited apportionment of damages for failure to wear a seat belt (5%). pg. 405

With the advent of comparative responsibility, courts have increasingly come to the conclusion that the evidence of plaintiff's behavior ought to be admissible and then the fact finder should be allowed to assign the appropriate degree of responsibility to each party.

With respect to motorcycle helmets, a similar split of authority exists.

There is a duty of the plaintiff to mitigate damages within the comparative responsibility concept.

Example: Defendant negligently injures plaintiff and breaks leg. Plaintiff then goes skiing one week after the leg is set and plaintiff reinjured. This evidence is admissible to allow the jury to reduce the defendant's responsibility for the damages associated with the re-injury.

If the plaintiff's action is egregious enough, the court may hold that that action is a superseding proximate cause of the accident and relieve the defendant of all responsibility.

**E. Responsibility of Multiple Parties, Including the Plaintiff**

**Vicarious Liability pg. 407**

Vicarious liability - holding someone responsible for the wrongful acts of another.

An employer is liable for the actions of employees done within the scope of their employment. The employer is said to be vicariously liable for the torts of the employee (known as the doctrine of *respondeat superior*).

An employee's "frolic and detour" may relieve an employer from employee liability.

Example: An employee is instructed to drive from city A to city B 50 miles away. The employee drives 30 miles out of his way to visit a friend in city C and negligently injures somebody. If the deviation from the assigned route is considered sufficiently great to be classified as a "frolic" the employer may not be liable. pg. 408

As the relative extent of the deviation diminishes, so that the discretion becomes a mere "detour", the chances of the employer being held liable increase.

A master can be liable for intentional torts, however unauthorized, if they are committed by the employee in furtherance of the employer's business purpose.

Example: A bus driver crowded a competitor's bus off of the road.

In those involved in a joint enterprise, the general partners or other joint venturers would be legally responsible for any torts committed by the other partners or joint venturers in the course of furthering the common activity.

[R2] § 491 comment c Joint Enterprises pg. 411:

(1) An agreement, express or implied, among the group members;

(2) a common purpose to be carried out by the group;

(3) a community of pecuniary interest in that purpose, among the members; and

(4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Example: *Murphy v. Keating* - school teachers on a road trip.

Many states have enacted statutes to impose vicarious liability on the owner for the torts committed by persons driving a vehicle with the owner's consent.

**Indemnity pg. 413**

The common law allowed a vicariously liable party to seek indemnity from the primary tortfeasor. The vicarious liability rules are designed to ensure that the injured party can get compensation while the indemnity rule is designed to promote the deterrent and punishment functions by placing the cost of the accident, when possible, on the person really at fault.

This is a situation where the defendant is said to be "passively" negligent while the other defendant was "actively" negligent. This is sometimes referred to as equitable or implied indemnity. Several states have abolished this type of indemnity to reflect the adoption of comparative fault.

Class Implied Indemnity Example: you buy a defective product from Walmart and are injured; you can sue Walmart who then is entitled to be indemnified by the manufacturer.

**Imputed Contributory/Comparative Negligence pg. 414**

Under the concept of vicarious liability, the negligence of the primary defendant is imputed to the secondary defendant. Example: "Both-Ways Rule - if A can be held vicariously liable for the torts of B, then the contributory/comparative negligence of B should be imputed to A to bar A’s recovery as plaintiff. Most states have carved out an exception to the both-ways rule for automobile accident cases.

**Joint and Several Liability pg. 416**

All the participants in a common enterprise are classified as joint tortfeasors and they will each be individually liable for satisfying the plaintiff's judgment. So long as the defendant joined in the enterprise, each member of the enterprise was liable even if he did not personally commit any of the acts that injured the plaintiff.

Persons who have been responsible for causing single, indivisible injuries to a particular plaintiff will be regarded as joint tortfeasors and may be joined in a single action and each may be found to be liable to the plaintiff (joint and several liability).

When defendants act independently of one another, a number of states use comparative fault instead of joint and several liability and each party will only be responsible for that part of the injuries for which it has been assigned responsibility. If true joint action is found, all jurisdictions still apply joint and several liability.

Different states have different laws that deal with joint and several liability; it has been completely abolished, it has been abolished only when the plaintiff was partially at fault, and abolished for defendants whose share of the responsibility is found to be below a certain percentage.

Can sue any one of the jointly and severally liable defendants and recover the full amount of damages. It is up to that defendant to collect contribution from other liable defendants. This casts the risks of non-recovery (due to lack of money) onto the defendant (sue the defendant with the most money, let them sort out the rest).

Comparative fault has upset joint and several liability and it is a mess; almost every jurisdiction has its own statute dealing with this situation.

Texas rule is a threshold rule, D more than 50% responsible is joint and severally liable, less than 50% then just severally liable (Example: P (20% liable), D1 (60%), D2 (10%), D3 (10%). D1 is jointly and severally liable while D2/3 is only severally liable. D1 will pay 80% if sued (full amount minus the 20% fault of the plaintiff)).

Only entitled to one satisfaction of your judgment, if you collect the full amount from someone who is jointly and severally liable, you cannot go to another defendant to try to collect more.

Under traditional joint and several liability, the remaining defendant against whom the plaintiff seeks to collect judgment will be charged with the defaulted share (from a defendant unable to pay). Under pure joint and several liability, since each defendant is only responsible for its apportioned share of the total damages, the plaintiff has to absorb the consequences of the default. pg. 422

**Contribution pg. 424**

Many jurisdictions have now expanded the range of situations in which contribution (partial payment of the judgment from another defendant) can be obtained among joint tortfeasors by allowing the defendant to join other potential defendant or even sue them in a separate contribution action. Contribution is to be limited to the tortfeasor's share of the entire liability.

**Defaulted Shares pg. 428**

Three possible outcomes dependent upon jurisdiction: (1) burden falls on the remaining defendants; (2) burden falls upon the plaintiff as share is uncollectable (under "several" liability schemes, defendant only responsible for his own share); (3) redistribution amongst all of the parties including the plaintiff is he was partially at fault.

Some states have allowed the assignment of a share of responsibility to an unknown party, even if not added as a party to the action, and then treating that share as a defaulted share.

Texas does not have reallocation schemes. Reallocation deals with a defendant who is only severally liable and cannot pay. The money owed by the broke defendant is divided up between all the remaining parties according to percent fault.

Two ways jurisdictions deal with settling parties: dollar-for-dollar reduction or a percentage reduction. In $-for-$ schemes a defendant can actually lose money if he settles for less than he would have been entitled to after judgment (most jurisdictions will not allow payment of over what is due; if a settling party pays the total amount due, then the other defendants are off of the hook). There is no contribution with settlers both for and against. In the percentage scheme, regardless of the amount of the settlement, the fault percentage assigned to the settling party will be reduced from the damages allowed. A recovery over 100% of entitled damages is allowable under this scheme (if settling party paid "too much").

Texas has been all over the board with settling parties, but they are now dollar-for-dollar.

**F. Group Liability**

**Sindell v. Abbott Laboratories (Sup. Ct. CA 1980) pg. 431**

Class action lawsuit of daughters who developed adenocarcinoma as a result of mothers who were given the drug DES for the purposes of preventing miscarriages. The manufacturer of the precise product was not known, but the drug was fungible (all DES produced from an identical formula).

No alternative liability (as in *Summers v. Tice*) as only 5 of 200 joined, no concert of action among manufacturers in failing to test or warn, no enterprise liability (as in *Hall* - entire blasting cap industry).

Liability under market share liability; if plaintiff joins in the action the manufacturers of a substantial share of the DES (here 90%) which her mother might have taken, the injustice of shifting the burden of proof to the defendants to demonstrate that they could not have made the substance is significantly diminished (modification of *Summers* rule - as between an innocent plaintiff and negligent defendants, the latter should bear the cost of injury). They can then cross-complaint against one another.

Some of the grandchildren of DES treated mothers have developed cancer. These have been classified as pre-conception injuries and grandchildren cannot recover (there may be cause-in-fact but no proximate cause).

The alternative liability theory of *Summers* has been rejected by most courts for the reasons given in *Sindell*. One court applied the Summers reasoning to a DES case, but they did state that all possible defendants must be brought into court (to distinguish it from *Sindell*).

Wisconsin held that according to provision in their Constitution granting remedies or wrongs, since each defendant contributed to the risk of injury to the public (and individual plaintiffs) the manufacturers of DES could be held liable. They also held that an action could proceed against only one manufacturer in the interest of judicial economy (they could figure out the participants in the DES market better than plaintiffs).

Although proof of causation-in-fact is ordinarily an indispensible ingredient of a prima facie case, exceptions have arisen which have allowed the shifting of the burden of proof of causation upon the defendant (alternative, concert, enterprise, market share).

Concert of Action - a tacit understanding or a common plan to fail to conduct adequate tests or give sufficient warnings, and that they substantially aided and encouraged one another in these omissions.

Enterprise Liability - defendants adhered to an industry-wide safety standards, delegated some functions of safety investigation and design to a trade association, and there was industry-wide cooperation in the manufacture and design of blasting caps.

**Shackil v. Lederle Laboratories (Sup. Ct. of NJ 1989) pg. 446**

Plaintiff developed chronic encephalopathy and severe retardation as a result of an adverse reaction to the DPT vaccine. It took awhile to link pertussis as the cause so the manufacturer is unknown.

No liability; DPT vaccine is not fungible (several types, some more harmful than others) and societal goals would be advanced further by allowing victims to recover via the Vaccine Act and not by imposing liability upon manufacturers. They chose to gamble for more money and lost.

**Special Situations**

Most courts agree that the question of duty is a legal issue to be dealt with by the court not the jury.

Most modern commentators take the position that the doctrine of duty is not a prerequisite for liability in ordinary cases; rather "no duty" is a defensive argument that serves to limit liability in unusual cases.

**A. The Failure to Aid**

**Yania v. Bigan (Sup. Ct. of Penn. 1959) pg. 458**

Defendant was allegedly negligent by: (1) urging, enticing, and taunting Yania to jump into the water; (2) by failing to warn Yania of a dangerous condition on the land; and (3) by failing to go to Yania's rescue.

No liability; (1) there was full mental capacity; (2) he was a coal miner and no duty to warn of obvious dangers; (3) no legal duty to go to his rescue (unless responsible for putting him in the situation).

Distinguish between malfeasance and nonfeasance. No general duty to aid or rescue.

There are presently some sort of good-Samaritan statute in all 50 states.

Some states require the reporting of an observation of certain criminal acts. pg. 463

The failure to aid was upheld in one case which relied upon the theory that one who knows that a third-person is giving necessary assistance to another to prevent physical harm and then negligently prevents the third person from giving such aid is subject to liability (*Soldano v. O'Daniels* - man refused to allow man to use phone to call police).

[R2] § 314A Special Relations Giving Rise to Duty to Aid or Protect

(1) common carrier (train, taxi, freight)must protect against unreasonable harm and must aid if injured

(2) innkeepers and guests

(3) possessor of land holding it open to the public (e.g. *Posecai*)

(4) one who takes custody of another under circumstances in which that other person is deprived of normal opportunities of self-protection (e.g. parent-child, hospital-patient, jailor-prisoner)

The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found. The law appears slowly working towards a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.

Duty to protect endangered or hurt employees (pg. 465).

**Posecai v. Wal-Mart Stores, Inc. (Sup. Ct. of LA 1999) pg. 466**

Plaintiff was robbed while in a Wal-Mart parking lot. The subdivision behind Sam's is generally a high crime area, but that this rarely extended to Sam's. There were only 3 major incidents at this Sam's location in the last 7 years.

No liability; Sam's did not possess the requisite degree of foreseeability for the imposition of a duty to provide security patrols in its parking lot (due to the low amount of serious incidents in the past).

Court employed balancing test - seeks to address the interests of both the business proprietors and their customers by balancing the foreseeability of harm against the burden of imposing a duty to protect. If this can be equated to the Hand formula then do it.

A landlord has no duty to protect tenants or others lawfully on the premises from the criminal acts of third persons. However, the landlord could be held responsible if the condition of the premises increased the risk of criminal assault. pg. 472

**Farwell v. Keaton (Sup. Ct. MI 1976) pg. 473**

Two friends while out carousing, were chased by a group of boys. One got away while the other was severely beaten. Defendant applied ice to his beaten friend, put him in the back of his car, and eventually took him home. He tried to awaken him but could not, and then left him in his car as defendant proceeded home. The next morning he was taken to the hospital but he died. If he was taken to the hospital soon after he had lost consciousness, he would have had an 85-88% chance of survival.

Liability; the two friends were companions on a social venture and engaged in a common undertaking; there was a special relationship between the parties. He assumed a duty of care and breached that duty by leaving him in his car. Sanders likes the dissent of this case. Sanders thinks that if you don’t appreciate the harm there is no duty.

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

The courts have been hesitant to find a duty of care when there is not a special relationship.

**Thompson v. County of Alameda (Sup. Ct. CA 1980) pg. 479**

A violent juvenile offender was paroled into the custody of his mother despite making generalized threats that he would kill a young boy in his neighborhood. Within 24 hours of his release he did so.

No liability; public entities and employees have no affirmative duty to warn of the release of an inmate with a violent history who has made nonspecific threats directed at nonspecific victims.

While courts are reluctant to impose duties to warn an indefinite class of people, there has not been the same hesitation in imposing liability upon psychiatric institutions which have released patients who subsequently injure third parties. pg. 490

**Eisel v. Board of Education of Montgomery County (Ct. of App. MD 1991) pg. 491**

A middle school student had entered into a satanic suicide pact with a friend. She told some of her friends who informed the school counselor. When the counselor asked the girl if she intended to kill herself she said no. The counselor and the school did not contact the girl's parents and she killed herself.

Liability; the defendants allegedly had direct evidence of the girl's intent to commit suicide and therefore it was foreseeable. A reasonable person could not conclude that the harm ceased to be foreseeable because the girl denied any intent to commit suicide (this is for a jury to decide).

There is liability in *Eisel* as there was a special relationship between the counselor and the student (493).

[R2] § 322 Duty to Aid Another Harmed by the Actor's Conduct. pg. 499

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 further harm to anyone rendered helpless by the initial accident.

Factors to consider to determine if duty arises

* Foreseeability of harm to the P
* Degree of certainty that P suffered injury
* Closeness of causal connection btwn Ds conduct and Ps injury suffered
* Moral blame of Ds conduct
* Policy of preventing future harm
* Extent of the burden to D and consequences to community of imposing duty to exercise care w/ resulting liability for breach
* Availability, cost, and prevalence of insurance for risk involved
* (when public agencies involved, consider extent of agency’s powers, role imposed on it by law and limits imposed on it by budget)

**The Duty of a Volunteer Rescuer**

**Parvi v. City of Kingston (Ct. App. NY 1977) pg. 499**

Three drunk men were told to disperse. They had nowhere to go, so the officers drove them to the outskirts of town (with a possible shelter). The men wandered to the adjacent expressway where they climbed the guardrail onto the road where one man died while the other was severely injured.

Liability; even when no original duty is owed to the plaintiff to undertake affirmative action, once it is voluntarily undertaken, it must be performed with due care.

Comment g to [R2] § 324 makes it evident that this duty cannot be fulfilled by placing the helpless person in a position of peril equal to that from which he was rescued. Compare to [R3].

The [R3] § 43 tentatively takes the position that one who undertakes a rescue has a duty to exercise reasonable care to secure the safety of the other before terminating the rescue (cannot just put a person in less peril). pg. 504

**Owners and Occupiers of Land**

**Lunney v. Post (Dist. Ct. App. FL 1971) pg. 508**

Defendant, an honorary Garden Club member, opened her home up for a tour of showplace homes. In the dimly lit library, the plaintiff tripped over a vinyl covering placed over the rugs and fractured her hip.

Liability; the plaintiff was not a business invitee as there was no mutual economic benefit. However, under the invitation test, the plaintiff would be a public invitee under and defendant would be liable (and this is the desirable outcome).

The [R1] divided visitors on land into three categories (the trichotomy):

(1) trespassers which is owed very little duty; protect from gross negligence and intentional actions

(2) licensees which came with permission as a social guest and must be protected from willful and wanton negligence; and

(3) business invitees which came with an express or implied invitation and for the mutual economic benefit of the property owner who would keep the premises reasonably safe (mutual benefit test).

Many courts believe the mutual benefit test to be too narrow and follow [R2] and the invitation test which states an invitee is either:

(1) a public invitee is invited to remain on the land for a purpose for which the land is held open to the public;

(2) a business visitor is invited to remain on the land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

When premises are open to the public, assurances of reasonable care are ordinarily given.

About half of the jurisdictions have combined the licensee and invitee into one reasonable person category (invitee standard of care). See *Nelson* below.

**Nelson v. Freeland (Sup. Ct. of NC 1998) pg. 514**

Defendant Freeland left a stick on his porch in which the plaintiff tripped upon and was injured.

Potential liability; NC will now impose the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors (*i.e.* not trespassers).

Many courts have refused to change the traditional common law (as in *Nelson*), although some have introduced subcategories.

The duty to a licensee to either remove known hidden dangers or warn of their presence (constitutes willful and wanton negligence) and is in addition to the duty not to intentionally injure the guest.

An invitee can sue for dangers which should have been discovered/known by the property owner.

An owner has a duty to protect (remove/warn) constant/anticipated trespassers from highly dangerous activities or a highly dangerous artificial condition of the land capable of causing death or serious injury.

However, if the danger is obvious, the owner or occupier has no duty to warn anybody.

**Bennett v. Stanley (Sup. Ct. OH 2001) pg. 526**

A boy (5) and his mother were found drowned in their neighbor's pool (which was filled with rainwater and more like a pond). The child first fell into the pool and then his mother went in to rescue him.

Potential liability; OH will now adopt the attractive nuisance doctrine establishing a special duty for trespassing children. This may alter the duty owed to the mother as she may be a rescuer (ordinary care) as opposed to a licensee (gross negligence).

[R2] § 339 Attractive Nuisance Doctrine

(1) A foreseeable unreasonable risk of death or serious bodily harm to children (artificial condition);

(2) also must have reason to know children are likely to trespass and do not realize the danger; and

(3) owner fails to exercise reasonable care (elevated to invitee) to eliminate the danger.

Benefit of Owner- Utility to possessor of maintaining the condition and burden of eliminating the danger are slight as compared w/ risk to children involved (Learned Hand).

[R2] § 339 has been adopted by nearly every jurisdiction, including Texas. The courts are fairly reluctant to apply the attractive nuisance doctrine to a child older than 12.

The attractive nuisance from [R2] § 339 only applies to artificial conditions and the case law thus far indicates that it does not apply to natural conditions of the land. Of course, if the landowner has taken responsibility for supervising the child, a duty of reasonable care to provide the requisite supervision is present regardless of the child's status on the land. pg. 532

Firefighters and policeman are licensees. pg. 533.

Over 40 states have enacted statutes limiting the liability of owners of land that is used for recreational purposes (typically cannot charge an entrance fee and only liable for willful or malicious failure to warn or guard against a dangerous condition). pg. 532

**Sargent v. Ross (Sup. Ct. NH 1973) pg. 534**

The plaintiff's 4-year-old daughter fell to her death from an outdoor stairwell. Plaintiff sued the landlord for the negligent construction and maintenance of the stairwell. The cause for the fall was that the stairs were steep and there was not an adequate railing.

Liability; landlords, as other persons, must exercise reasonable care not to subject others to an unreasonable risk of harm (overturning precedent, see below). While the dangerous quality of the steps might have been obvious to an adult, the danger would very likely be imperceptible to a young child.

*Sargent* has received only a limited following (although this may be changing).

Generally a lessor is not liable in tort once he transfers possession to the lessee. You are viewed as the technical owner when the lessee and held to premises liability.

Conditions for landlord liability from injuries resulting from defective and dangerous conditions:

(1) a hidden danger in the premises of which the landlord but not the tenant is aware;

(2) premises leased for public use;

(3) premises retained under the landlord's control (stairwell must be a common stairwell (in *Sargent* it serviced only one apartment); or

(4) premises negligently repaired by the landlord.

The landlord's duty to maintain common areas traditionally did not include a duty to correct natural conditions, including removal of natural accumulations of ice and snow, but there has been some movement away from that position. pg. 539.

A number of jurisdictions have read into a lease of residential property an implied warranty of habitability (owner will be strictly liable for any unsafe condition existing in the premises at the time they are leased). pg. 539.

**Negligent Infliction of Emotional Distress**

**Dziokonski v. Babineau (Sup. Jud. Ct. Mass. 1978) pg. 587**

A girl was struck by a motorist and her mother, who lived nearby, came out to see her injured daughter lying on the ground. The mother (Dziokonski) suffered severe physical and emotional shock and died as a passenger in the ambulance driving her daughter to the hospital. The father, upon hearing of the death of his daughter and wife, also exhibited physical and emotional shock which caused his death.

Possible liability; we think reasonable foreseeability is a proper starting point in determining whether an actor is to be liable for the consequences of his negligence (emotional injury can be foreseeable).

In the past, recovery has not been denied where immediate physical injuries result from negligently induced fright or emotional shock. Moreover, where the plaintiff sustained direct physical injuries as a result of negligence, recovery for emotionally based physical injuries has been allowed.

Most jurisdictions have gone from the impact rule, to a "zone of danger" rule (i.e. directly threatened with physical injury), to finally some sort of foreseeability test.

A small minority of states still follow the impact rule (must be some sort of physical contact).

*Dillon v. Legg* factors defining reasonable foreseeability for bystander recovery:

(1) whether the plaintiff was located near the scene of an accident as contrasted to one who was a distance away from it;

(2) whether the shock resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the event, as contrasted with learning of the accident from others after its occurrence; (*Thing v. La Chusa* 1989 - CA- can come across the accident later).

(3) whether the plaintiff and the victim were closely related.

Contemporaneous observance serves to separate the "grief suffered by anyone upon discovering that a relative has been severely injured" from the "actual sensory experience of the pain and suffering of the victim—personal experience of the horror."

With comparative negligence, if the primary victim is partially at fault for their injuries, the bystander might also have an action against the relative whose negligence contributed to the event (or have recovery reduced by percent fault if relative not joined). pg. 601. Not so in other jurisdictions (Wash.)

**Molien v. Kaiser Foundation Hospitals (Sup. Ct. CA 1980) pg. 603**

Plaintiff's wife was negligently and mistakenly diagnosed with syphilis. Plaintiff's wife became suspicious of an extra-marital affair resulting eventually in their dissolution of the marriage.

Possible liability; the plaintiff himself was a direct victim (to avoid application of bystander principles) of the assertedly negligent act and use reasonable foreseeable to determine the defendants owed a duty to exercise due care in diagnosing the physical condition of plaintiff's wife. The unqualified requirement of physical injury is no longer justifiable (overturned no recovery for emotional distress unaccompanied by physical injuries). The dissent likes the use as a safeguard to spurious claims.

**State Rubbish Collectors Association v. Siliznoff (Sup. Ct. CA 1952) pg. 1154**

Defendant was asked by the plaintiff association to pay the association 5-10 times the monthly rate for the taking of an account from an association member (usual practice according to the association's bylaws). He refused but was harassed and assaulted to the point that he joined the association and agreed to pay the money.

Liability; one who, without privilege, intentionally causes severe emotional distress to another is liable for such emotional distress and from bodily harm resulting from it (§ 46). In cases where mental suffering constitutes a major element of damages it is anomalous to deny recovery because the defendant's intentional misconduct fell short of producing some physical injury.

Extreme or outrageous conduct is necessary for recovery for the infliction of emotional distress.

**Boyles v. Kerr (Sup. Ct. TX 1993) pg. 615**

Defendant covertly videotaped himself and Kerr (plaintiff) having sex. He then showed the tape a few times to friends and the gossip began to spread regarding the incident. Sued for NIED.

No liability; We overrule an independent right to recover for NIED. Instead, mental anguish damages should be compensated only in connection with defendant's breach of some other duty imposed by law. However, there could possibly be recovery for intentional infliction emotional distress.

Some states have recognized an independent cause of action for the negligent infliction of "serious" or "severe" emotional distress. The destruction of the NIED in TX is the minority view. However, many states have limited the scope of recovery.

In those jurisdictions requiring the mental distress to manifest itself in physical injury, inability to sleep, nausea, loss of appetite, and dizziness have generally not been held to be bodily harm or physical injury. Other states do not need emotional distress to be manifested physically at all (Wash. obj. manifestation of injury constituting a diagnosable disorder (such as PTSD)).

**Strict Liability**

Strict liability - Imposition of liability on a party without a finding of fault.

Strict liability, either with respect to animals or dangerous activities, is an alternative to negligence. It is an answer to the question of what duty an individual owes fellow citizens. However, not only must there be a cause-in-fact relationship, courts may impose proximate cause limitations on liability (foreseeable damages).

**A. Animals**

**Duren v. Kunkel (Sup. Ct. MO 1991) pg. 624**

Plaintiff purchased a limosin bull which has normally aggressive behavior. During the sale of the bull, it acted up and was isolated on the ranch for a few days to settle down. The defendant moved the bull alone and took it very near the blood from the recently castrated calves. The bull became excited and attacked the plaintiff severely injuring him.

No liability; the evidence falls short of establishing that the defendant knew or should have known that the bull in question had a vicious propensity different from other bulls of its breed or class.

However, the plaintiff, as an invitee, was owed a duty to be protected from dangerous conditions of which the defendant knows or in the exercise of reasonable care should have known. One who possess a bull may have actual or constructive knowledge of the animal's normally dangerous propensities and be requires to take reasonable steps to prevent foreseeable harm (negligence).

[R3] § 23 As in *Duren*, for strict liability to apply, the dangerousness posed by a domestic animal must in some way be abnormal for the breed which the owner knows or should have known. One bite rule. Statutes may make you liable for dog bites whether you know or not. Also leash laws may alter duty.

A domestic animal is one that by custom is devoted to the service of mankind at the time and place where it is kept [R2] § 506(2).

A person who keeps a wild animal is strictly liable for all damage done by it, provided that the damage results from “dangerous propensity” that is typical of the species in question. pg. 628

In all cases of animal strict liability, contributory negligence of the plaintiff is no defense [R2] § 515. Only if the plaintiff has assumed the risk of harm will the action be barred. pg. 630

At common law, the possessor of livestock was strictly liable for the trespassing of the animals upon the land of neighbors. There was an exception to animals that strayed onto adjoining land while being driven along the highway. The possessor then had a privilege to enter the adjoining land to recapture the straying animals. Failure to remove the animals within a reasonable time would lead to liability. Some states adopt a "fencing out" statute which requires neighbors to erect a suitable fence to keep trespassing livestock out. Conversely, others have enacted "fencing-in" statutes. pg. 629-30.

**B. Dangerous Activities**

**Fletcher v. Rylands (Exchequer Chamber 1866) pg. 631**

The defendant constructed a mill pond in which was built on top of old and filled mine shafts. When the pond filled with water, the soil gave away and flooded the plaintiff's coal mine.

Liability; we think that the person for who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief and it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

**Rylands v. Fletcher (House of Lords 1868) pg. 634**

Two cases are cited in which there was an upper coal mine and a lower coal mine. Water dripped through the upper coal mine and flooded the lower coal mine. One case was a natural event (no liability) while the other was the result of pumping water (liability). The damage in the former case may be treated as having arisen from the act of God; in the latter from the act of the defendant.

**Losee v. Buchanan (Ct. of App. NY 1873) pg. 639**

A boiler on top of a paper company exploded and damaged neighboring property.

No liability; the ruling made in *Fletcher* is in direct conflict with the law of America. We must have factories, machinery, dams, canals, and railroads. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. ((eventually most jurisdictions embrace *Rylands*)).

The thing which stands out from the cases is that the important thing about the activity is not that it is extremely dangerous in itself, but that it is abnormally so in relation to its surroundings. Even in England and following *Rylands v. Fletcher* where water is stored in large quantities in dangerous locations in a city there has been strict liability. But where the water is collected in a rural area, with no particularly valuable property nearby, there has been no strict liability. pg. 646

See *Turner v. Big Lake Oil Co*. - TX and the necessity of salt evaporating ponds for the oil business pg. 642

**Klein v. Pyrodyne Corp. (Sup. Ct. WA 1991) pg. 648**

A fireworks display setup by defendant Pyrodyne injured the plaintiff bystander when a mortar was fired from the horizontal position. Plaintiff claims Pyrodyne improperly setup the mortar while defendant claims that an explosion of a different mortar knocked over a tube into the horizontal position.

Strict liability; liability cannot be imposed for (a)-(c) alone; (d), (e), and (f) must still be taken into account. We find (a)-(d) - relatively few people conduct public fireworks displays, therefore it is not a matter of common usage.

[R2] § 520 Abnormally Dangerous Activities and Factors Considered:

(a) existence of a high degree of risk of harm; (b) likelihood that harm will be great; (c) inability to eliminate the risk through reasonable care; (d) extent that it is not common usage; (e) inappropriateness of the place of the activity; (f) extent of value to the community vs. its dangerous attributes.

Comment f:

"Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. The essential question is whether the risk created is so unusual, either because if its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability, even though it is carried on with all reasonable care."

*Klein* follows the [R2] position that whether something is an abnormally dangerous activity is a question for the court, not the jury. This position is widely followed. However, actions brought on a theory of strict liability for defective products, in a majority of the states the issue of whether the product is defective is submitted to the jury. pg. 656

**Indiana Harbor Belt R.R. Co. v. American Cyanamid Co. (7th Cir. U.S. Ct. App. 1990) pg. 656**

While switching trains filled with acrylonitrile, it was discovered that the tank was leaking. The cleanup cost almost ~$1MM. Plaintiff asserts that transportation through Chi. metro area is an abnormally dangerous activity subject to strict liability.

No strict liability; acrylonitrile is not inherently dangerous. If a tank car is carefully maintained the danger of a spill is negligible and there is no compelling reason to move to regime of strict liability (negligence is to be the test).

Posner's emphasis on factor (c) in *Indiana Harbor* is the dominant interpretation of § 520 and it is quite rare for a court to permit recovery under a strict liability theory when the high degree of risk of the activity can be eliminated or substantially reduced by the exercise of reasonable care. Strict liability is relegated to a secondary status to be employed only when negligence will not suffice. pg. 664

The [R3] § 20 returns to the rule approach of [R1] and away from the factor approach of [R2] § 520.

§ 20 Abnormally Dangerous Activities

(a) A defendant who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.

(b) An activity is abnormally dangerous if:

(1) The activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; **and**

(2) the activity is not a matter of common usage. See comment j pg. 665.

Comment k: The location at which the activity is conducted does not independently determine whether the activity is abnormally dangerous but has an important bearing on b(1) and b(2) - such as the magnitude of risk and common activities done in rural vs. urban environments.

[R3] § 24 Scope of Strict Liability pg. 665

(a) Strict liability under § 20 is limited to physical harms that are characteristic of the risks posed by the abnormally dangerous activity.

Most strict liability cases involve a relatively small group of activities:

(a) Blasting or storage of explosives. A court may not always find strict liability in blasting cases if specific evidence shows that blasting in a certain setting does not pose a high degree of risk. pg. 667

(b) Transportation and storage of gasoline. Some courts find gas stations strictly liable when damage occurs while others maintain that the risk can be eliminated by the exercise of reasonable care and hence no strict liability. The transportation of large amounts of gasoline is another matter due to the inherent dangers of highway travel. pg. 667

(c) Impoundments. Modern cases are mixed as to whether strict liability applies to reservoirs and other bodies of water. Strict liability is frequently imposed if the escape is of something more dangerous than water. pg. 668

(d) The application of poisons. Some courts have concluded that crop dusting and fumigation are abnormally dangerous while others hold that the ground application of pesticides is not. pg. 668

(e) Landfills and toxic waste. The trend seems to be to find toxic landfills to be abnormally dangerous activities. Statutory considerations are now the focus of toxic waste strict liability. pg. 668-669

(f) Atomic energy. Strict liability under statute. pg. 669

[R2] § 520A retains strict liability for ground damage from aircraft but this has not stopped jurisdictions from ignoring § 520A and analyzing the problem under the six § 520 factors. [R3] does not take a position on this issue. pg. 670

**Foster v. Preston Mill Co. (Sup. Ct. WA 1954) pg. 671**

In rural WA, defendant logging company was blasting while making a road 2.25 miles from the plaintiff's mink farm when the vibrations from the blasting scared the mink causing them to trample and kill their newborn kittens. The plaintiff went to the loggers and informed them of the result of the blasting.

No liability; the risk of causing harm as a result of the relatively minor vibration, concussion, and noise from distant blasting is not the kind of risk which makes the activity of blasting ultra-hazardous (see [R3] § 24).The mother mink's intervention (the exceedingly nervous disposition) broke the chain of causation.

As with wild animals, [R2] permits a defendant in an abnormally dangerous activity case to raise the defense of the assumption of the risk, but not plaintiff's contributory negligence. Few courts have addressed the question of whether the movement to a comparative negligence scheme should lead to a different outcome in abnormally dangerous activity cases. [R3] takes the position that the plaintiff's comparative negligence should reduce recovery.

Coase Theorem - Ronald Coase argued that under certain circumstances the law's choice of liability rules will not alter the efficient allocation of resources. Using *Foster* as an example, when $ blasting > $ minks, if blasting costs $100 less than the cheapest alternative and the damages against the mink farmer was $90, then regardless of who has been found liable, the loggers will still blast as it is $10 cheaper than the next best alternative. The logger may wish to avoid the cost of litigation and simply pay the rancher directly. He might, for example, pay the rancher $91 for the right to blast and still realize a benefit of $9.

Alternatively, when $ minks > $ blasting, if blasting costs $90 less than the cheapest alternative and the damages against the mink farmer was $100, then regardless of who has been found liable, the loggers will not blast as it is $10 cheaper to use the next best alternative. Here the rancher may wish to avoid the cost of litigation and simply pay the loggers directly.

**Products Liability**

**I. Negligence Actions - Overcoming the Privity Barrier**

Privity is an interest in a transaction, contract, or legal action to which one is not a party arising out of a relationship to one of the parties.

**Thomas v. Winchester (Ct. of App. NY 1852) pg. 679**

Dr. Foord sold dandelion extract (which was actually deadly nightshade{ belladonna}) to the plaintiff which resulted in injury. Foord -> Aspinwall -> defendant -> another dealer. The defendant put the label of his agent Gilbert on the bottle making him the manufacturer.

Liability; normally, one can only breach to one directly contracted with (privity). The injury was much more likely on a remote purchaser, the defendant's contract of sale was the means by which the wrong was effected, and there is a distinction between an act of negligence imminently dangerous to the lives of others, and one that is not so.

**MacPherson v. Buick Motor Co. (Ct. of App. NY 1916) pg. 684**

Defendant constructed an automobile of a defective wooden wheel made by another manufacturer which injured the plaintiff. There is evidence that the defect could have been discovered through a reasonable inspection and that the inspection was omitted.

Liability; if the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger (not just poisons, explosives, and implements of destruction). The manufacturer failed in his duty to inspect and should be liable.

Wheel manufacturer is a components parts manufacturer and today you can sue them directly while also likely retaining liability against the assembling manufacturer.

**Contractually Based Remedies - Breach of Warranty**

See UCC provisions on express and implied warranties (goods fit for purpose sold) on pg. 692-93.

In products liability tort litigation UCC §2-314(2)(c) implied warranty is almost always claimed.

Most courts have held that tort strict liability remedy is only available for personal injuries and property damage caused by the defective product. For property damage solely to the product itself and consequential economic loss, most courts require the plaintiff to rely upon the UCC warranty provisions instead (to allow a tort claim would negate disclaimers of warranty ["as is"] and slow commerce).

**Strict (Defect) Liability in Torts**

**Greenman v. Yuba Power Products, Inc. (Sup. Ct. CA 1963) pg. 699**

While using the Shopsmith as a lathe, a large piece of wood flew out of the machine severely injuring him. Plaintiff sues for breach of warranty and negligence against the manufacturer.

Liability; to establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.

The rule stated in [R2] § 402A only applies where the product is, at the time it leaves the sellers hands, in a condition unreasonably dangerous to foreseeable victims, regardless of the use of ordinary care (not liable for subsequent mishandling). Safe condition at the time of delivery by the seller will include proper packaging, necessary sterilization, and other precautions to permit the product to remain safe for a normal length of time when handled in a normal manner.

Unreasonably dangerous means the product must be dangerous to an extent beyond which would be contemplated by the ordinary consumer who purchases it.

The comments to § 402A were nearly as important as the black letter. Comment f, Business of selling. It is not necessary that the seller be engaged solely in the business of selling such products (which are defective). Thus the rule applies to the owner of a motion picture theater who sells popcorn or ice cream. The rule does not apply to the occasional seller of food or other such products who is not engaged in that activity as part of his business. pg. 703

The burden of proof that the product was defective when it left a seller is upon the injured plaintiff.

Plaintiffs no longer need to search out the negligent defendant as everyone in the chain of distribution who sells a defective product becomes a proper defendant. pg. 704

The plaintiff must still show that the defendant owed a duty to the plaintiff (to manufacture safe products) and breached that duty. The plaintiff must also prove damages and a causal connection between the breach of duty and the damages. pg. 704

[R3] replaces § 402A with 21 separate sections. pg. 706

[R3]Torts Products Liability § 2 Categories of Product Defect

(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design and the omission of the alternative design renders the product not reasonably safe (risk-utility balancing);

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm could have been avoided or reduced by adequate instructions or warnings by the seller and the omission of instructions or warnings renders the product not reasonably safe.

**Manufacturing Defects**

**Whitted v. General Motors Corp. (U.S. Ct. App. 7th Cir. 1995) pg. 707**

Plaintiff Whitted crashed his Nova whilst on an S-curve during icy conditions. During impact, his seat belt malfunctioned causing him to sustain injuries. Whitted sued the dealer and manufacturer under Indiana's Strict Product Liability Act (codification of [R2] § 402A) asserting the seat belt was defective.

No liability; the general principle of *res ipsa loquitur* can still apply, that an accident itself can be evidence of liability. The mere fact that the accident occurred is not enough. The defendant did not introduce enough evidence (or expert testimony) that the product was not made defective through six years of use and did not nullify enough of the probable explanations of the seat belt break.

Of the jurisdictions which allow theories analogous to *res ipsa*, the plaintiff should employ one of the following methodologies:

(1) expert to offer direct evidence of the defect;

(2) expert to circumstantially prove the defect;

(3) direct evidence from an eyewitness of the malfunction supported by expert testimony explaining the causes of the defect;

(4) introduce inferential evidence by negating other possibilities.

The most difficult problem in products liability cases for the plaintiff is proving that the defect existed at the time the product left the possession of the defendant (especially difficult when the evidence is destroyed; must also prove that the defect was not caused by plaintiff's rough handling of the product).

TX seems unwilling to use the *res ipsa* type rule in manufacturing defects when the product has been in the possession of the consumer for longer periods of time. Also, did the defect cause the accident or did the accident cause the defect.

[R3] § 3 Circumstantial Evidence Supporting Inference of Product Defect.

It may be inferred that the harm sustained by the plaintiff was caused by a product defect, without proof of the specific nature of the defect, when:

(a) incident ordinarily would occur only as a result of a product defect; and

(b) evidence supports the conclusion that more probably than not:

(1) the cause of the harm was a defect rather than other possible causes (including plaintiff and third parties); and

(2) the defect existed at the time of the sale or distribution.

**Design Defects**

**Camacho v. Honda Motor Co., Ltd. (Sup. Ct. CO 1987) pg. 712**

Plaintiff Camacho injured his leg in a motorcycle accident. The sued defendant Honda for a design defect for the failure to include crash bars, which were effective injury reducing leg protection devises. Other manufacturers had made this equipment available as an option. Honda had done testing on crash bars. Summary judgment for Honda as the danger was obvious and foreseeable (consumer expectations test).

Liability; total reliance on upon the hypothetical ordinary consumer's contemplation of an obvious danger (comment *i* to § 402A) diverts the appropriate focus and may thereby result in a finding that a product is not defective even though the product may easily have been designed to be much safer at little added expense and no impairment of utility (against public policy).

The crashworthiness doctrine says that a manufacturer may be held negligently or strictly liable for injuries sustained through a manufacturing or design defect, though not the cause of the accident, which caused or enhanced the injuries.

Comment *i* [R2 § 402A] consumer expectation test has slowly been replaced by a risk-utility analysis. A few jurisdictions have retained consumer expectations as the sole test in design defect cases. pg. 719

As in *Camacho*, obvious dangers have become a matter to be balanced in the cost-benefit analysis as to whether the product is defective. Some courts may refuse to allow a design defect case to go to jury on a risk-utility analysis if the product is "simple" such as a knife or lighter. pg. 720

In warning defect cases, the obvious danger conveys its on warning and moots any need for the manufacturer to give warning.

Some courts do not like the risk-utility balancing test as it is merely a detailed version of the Hand negligence calculus (reintroduces negligence in strict liability). pg. 721

7 Factors used in *Camacho* and *Riley*:

(1) Utility to the public

(2) Safety aspects (likelihood to cause injury and the seriousness of the injury)

(3) Availability of substitute products to meet the same need

(4) Ability to reasonably eliminate risk (maintaining usefulness without excessive expense)

(5) User's ability to avoid the risk with due care

(6) User's anticipated awareness of the dangers and their avoidability due to obviousness or warning

(7) Feasibility of the manufacturer in spreading the loss by setting the price or through insurance

**Riley v. Becton Dickson Vascular Access, Inc. (E.D. Penn. 1995) pg. 723**

Plaintiff nurse Riley contracted HIV after being stuck by a needle when inserting a catheter into an HIV infected patient. Plaintiff claims strict liability for the defective design of the catheter as a feasible alternative is available in which the needle is retracted into a plastic sheath as it is withdrawn.

No liability; the risk of serious injury from use of an catheter is quite low (factor 2), an already small risk might by somewhat reduced, but not eliminated, by use of a protected catheter (factor 3) which is a less effective product overall and costs more and needs training to use properly (factor 4). Work. comp. (#7).

Comment *b* [R3] § 2 - sometimes a plaintiff can prove a design defect through circumstantial evidence (§ 3 as opposed to risk-utility approach of § 2). Also can prove a defect through government safety regulations § 4. Also § 2 comment *e* allows recovery when design is manifestly unreasonable even absent an alternative design. pg. 733.

Many states have passed statutes which require the presentation of alternative designs in order to prevail. pg. 735.

**Grundberg v. Upjohn Co. (Sup. Ct. Utah 1991) pg. 737**

Plaintiff shot her mother allegedly as a side effect of the FDA-approved insomnia drug Halcion. Plaintiffs claim defendant failed to warn and filed a strict liability claim based upon a design defect.

No liability; we are persuaded that all prescription drugs should be classified as unavoidably dangerous in design (comment k to § 402A unavoidable unsafe products exception to strict products liability).

Most jurisdictions have refused to conclude that all prescription drugs are unavoidably unsafe. Rather, comment *k* is an affirmative defense to be assessed on a case-by-case basis. Some jurisdictions have completely rejected comment k for all drugs (but may use risk/utility to arrive at the same result).

**Warning Defects**

**Johnson v. American Cyanamid Co. (Sup. Ct. Kan. 1986) pg. 748**

Plaintiff acquired polio from his daughter and suffered consequent paralysis. His daughter was given the Sabin type of polio vaccine (oral - weakened live virus) as opposed to the Salk (injection - killed virus). The Sabin type can spread to those in contact with a vaccinated person thereby vaccinating them. Occasionally, the full-strength virus will be replicated and spread infecting others (5-10 per year). This remote risk cannot be eliminated. This is not new information and has not been hidden from the public.

No liability; the vaccine is an unavoidably unsafe but not actionable on the ground of design defect. There was an adequate warning included with the product so no warning defect either.

Most courts agree that in the case of prescription drugs, the manufacturer's obligation to warn extends only to doctors who prescribe the drug ("learned intermediary" doctrine). Some cases have held that there is a duty to warn the consumer directly if the doctor plays a nominal role in the decision to use the drug. pg. 756

There is now the national Childhood Vaccine Injury Act of 1986 system of no-fault compensation for individuals injured by vaccines.

A warning is substantively inadequate when it fails to provide the consumer with the information necessary to properly assess the risk. A warning is procedurally inadequate when it involves such things as conspicuousness (i.e. size and location of warnings), the need for pictorial and other non-verbal warnings such as buzzers or bells, and the adequacy of warnings only in English. pg. 760

A number of courts have developed criteria for assessing adequacy:

(1) de designed so it can reasonably be expected to catch the attention of the consumer;

(2) be comprehensible and give a fair indication of the specific risks involved with the product:

(3) be of an intensity justified by the magnitude of the risk. pg. 760

**Burke v. Spartanics LTD. (U.S. Ct. App. 2nd Cir 2001) pg. 761**

A metal shearing machine severed the fingers of plaintiff Burke. Plaintiff's employer removed stock conveyor and installed their own ramp in which manual collection was necessary. In order to collect the metal, one had to brace oneself with a hand in the cutting plane of the machine. There was a warning label on the front of the machine that specifically warned against getting near the cutting mechanism.

No liability; plaintiff knew of the danger and therefore no duty to warn him.

Even for obvious dangers, so long as the relevant risks are not obvious to some members of the class of foreseeable users, a reasonable manufacturer might well be expected to warn.

The *Burke* case states the majority rule that the defendant is not required to warn about obvious defects. The [R3] § 2 comment j takes this position as well.

In *Liriano*, the court ruled that you did not have to warn about the dangers of the meat grinder, as this was open and obvious. The failure to warn was that there was a safer alternative (to use the guard) and that the grinder should not be operated without the guard. pg. 768.

Comment k to [R2] § 388 - one who supplies a chattel to others has a duty to warn of known dangerous characters (unless open and obvious to the user).

**Feldman v. Lederle Laboratories (Sup. Ct. NJ 1984) pg. 771**

Plaintiff Feldman was prescribed the antibiotic declomycin by her father which she took from 1960-1963 as a child. She developed tooth discoloration as a side-effect. The Physician's Desk reference (PDR) did not publish this side effect of the drug until they were known in 1965-66.

Possible liability; the timeliness of the warning issue is present in this case and is to be determined (should they have informed physicians and at what point).

*Feldman* is the last gasp of the argument of whether products liability will be strictly applied without some sort of fault by the manufacturer. **There must be some sort of fault.**

[R3] § 10 Post-sale duty to warn if seller knows or should have known that the product poses a substantial risk of harm (was not defective at the time it left the manufacturer; knowledge learned later).

**The Parties and Interests Covered by Products Liability**

Liability had been extended to manufacturers of component parts, but one must be careful in applying the majority rule as it only applies if the defect in the product causing the injury was in the component part. If the defect was the result of the installation of the component part or the incompatibility of the component part with some other aspect of the product there will be no liability; [R3] § 5 agrees. pg. 780

The general rule holds that if there is a merger or consolidation, the successor corporation assumes the liability of the predecessor firm. This does not apply to the successor when the predecessor manufacturer sells its assets and then ceases business (no fraud or *de facto* merger). pg. 780

Although there is case authority to the contrary, it is generally thought that one selling used goods is not liable under products liability law (buyer taking goods "as-is"). pg. 782.

[R3] § 14 If you sell or distribute a predict manufactured by another, you will still be liable. This rule does not apply to the owner of a trademark who licenses a manufacturer to use the trademark. pg 783.

**Admissibility of Expert Testimony to Prove Defect and Causation**

**Kuhmo Tire Co., LTD v. Carmichael (U.S. Sup. Ct. 1999) pg. 785**

Plaintiff Carmichael was driving his minivan when allegedly defective tire blew out causing death to one passenger and injuries to the others. A significant portion of the plaintiff's case rested upon the testimony of Carlson, an expert in tire failure analysis. He analyzed the tire and concluded that the blow out could only have happened due to a defective product as the tire did not meet all of the very subjective criteria for a blowout due to under-inflation.

No liability; expert testimony disallowed using Rule 702 on gate-keeping function.

**Defenses** - **Plaintiff's Behavior**

Comment n to [R2] § 402A seemingly divides plaintiff misconduct into three categories:

(1) failure to discover or guard against a product defect (should not affect recovery);

(2) assumption of the risk (should affect recovery [see below, may be absorbed by comparative fault])

(3) negligent use of a product (no position taken [see below]). pg. 795

Over time, most jurisdictions concluded , either by legislative enactment or by judicial opinion, that comparative responsibility principles applies in products liability cases [R3] § 17 takes this view. pg. 795.

**Preemption**

Preemption litigation sweeps across a number of areas of products liability law, involving both design and warning defect claims.

Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law or where state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

[R3] § 4 noncompliance with an applicable product safety statute or regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation.

With prescription drugs, the overwhelming majority of courts will permit the defendant to introduce FDA compliance evidence as a fact supporting that its product is not defective but that such evidence is not conclusive.

Some states have enacted statutes of repose, you can only sue for a product defect within a specified time period (*e.g.* 10 years). pg. 808

**Products Liability in the European Community and Japan**

The European Economic Union had adopted a Directive providing a uniform code of products liability. A "producer" is liable for damages caused by a defect in his product without proof of negligence. Article 6 of the directive seems to adopt the consumer expectations test of [R2]. Article 7 allows the defenses of compliance with mandatory regulations and a "state-of-the-art" defense. Plaintiff's comparative fault is included in Article 8. pg. 811-12

Japan is very similar to Europe.

**Damages**

Nominal damages are those that are awarded when a particular legal wrong has occurred, such as an intentional tort, and when no actual injury has resulted or when an injury cannot be proved. Nominal damages are usually minor or trivial in amount; their purpose is to symbolize or declare that a right has been violated. One significant aspect of nominal damages is that they can support an award for punitive damages. Generally, jurisdictions do not allow nominal damages for negligence alone.

Compensatory damages are awarded to compensate a party for actual injury or harm.

Punitive damages are awarded to punish the defendant for malicious, outrageous, or highly reckless conduct, and to deter the defendant and others from engaging in similar conduct in the future.

general damages - non-economic or non-pecuniary (things we cannot measure with $ and are hard to put a number on, very subjective , *e.g.* pain and suffering, loss of enjoyment of life, etc.)

special damages - either economic or pecuniary (things we can measure with $ - medical expenses, past lost wages, out of pocket expenses; usually there’s even a receipt).

Notes:

a. Can only recover present value of expenses to be incurred in the future (p837)

b. Damages can be offset by the interest you could have earned by investing the lump sum of money. This can then be offset by calculating for inflation (p840)

c. P can recover for pre-judgment interest (e.g. if P paid $50,000 hospital bill 2 yrs before judgment)

**Compensatory Damages**

1. Basic Theories Behind Compensatory Damages

a. Corrective Justice

b. Economic Efficiency

c. Distributive Justice

2. Categories of Compensatory Damages for P who Sustains Physical Injury in NonfatalPersonal Injuries

The person who sustains the physical injury

(1) Past and Future medical and Rehabilitative expenses (economic/pecuniary damages)

(2) Past and Future Lost Earning Capacity (economic/pecuniary damages)

(3) Past and Future Physical Pain and Suffering

(4) Past and Future Mental Anguish

(5) Past and Future Impairment or Disability - functional limitations other than reduced wage-earning capacity; ex= inability to run, dress, garden, etc.

(6) Past and Future Disfigurement

The injured person’s spouse - types of recovery:

1. Loss of Services of an economic nature provided by the spouse

a. Monetizable nature – child care, plumbing, cooking, etc.

2. Loss of Consortium

a. Diminution in quality of their relationship

b. Loss of companionship

These are derivative claims – conditioned on existence of a claim by the spouse

The injured person’s children – jurisdictions are split

The injured person’s parents – jurisdictions are split; but if jurisdiction allows, only parents of a minor child can make a claim

Insurance – subrogation – allows 3rd party to step into shoes of an injured person and seek recovery against the tortfeasor (D) for any payments that the 3rd party made to the injured person resulting from the Ds act

Two Categories of Compensatory Damages

1) Special compensatory/Pecuniary/Economic – hard, objective numbers (medical expenses, past

lost wages, out of pocket expenses) – usually there is even a receipt

Losses to you person

D only has to pay for life expectancy post-injury/accident, not pre-accident, for future medical bills plus past medical expenses

Losses to your earning capacity

a) The Ps earning capacity before the injury

b) The degree to which the injury has diminished the Ps earning capacity

c) The period over which this diminished capacity will be experienced, which involves considering the Ps life expectancy and work life expectancy

P should be allowed to recover not your earnings, but your earning capacity. I.e. if I had the ability to earn a certain amount of money, I should be able to recover, and determined it from your pre-injury position. If you are a Dr. in the Peace corps then you will receive a regular Dr’s salary.

Can’t instruct the jury to use golden rule or Per Diem PERIOD!!

Other Compensatory Damages Rules

1) Won't get pain and suffering if you are in a coma (designed to compensate and can’t compensate

if you aren’t in any pain). You must have some sort of mental cognition

Life Expectancy Calculation

(1) Ps life expectancy and worklife expectancy are calculated, at time of trial, as though

the tortious injury had not occurred – his pre-injury life/worklife expectancy

(2) Worklife tables – especially for infant Ps or those w/o established earning history –

not determinative but help jury – can take into account occupation, health, habits,

education, etc

3) For non-wage earners: courts usually allow recovery, by either calculating the amount P could

have earned outside the home, or by calculating the value of household services the P could have

rendered but for the injury

Medical and Rehabilitative Expenses/Collateral Source Rule

1) “past medical” – medical/rehabilitative expenses up to time of trial must be reasonable and

necessary for P to recover

2) for purposes of computing future medical expenses, the relevant time period is the Ps post-accident

life expectancy (unlike the future damages computation)

3) P is entitled to present value only of the expenses that he is expected to incur in the future

Collateral Source Rule:

1) Collateral sources – sources other than tort award, like Ps disability insurance or medical insurance

2) Collateral Source Rule: The doctrine that prevents a D form introducing evidence that the P has

received compensation from independent sources for the damages he is seeking.

3) P may recover both from the independent source and from the D

4) Recently many states have begun to abolish or substantially curtail this rule

5) You can get full damages regardless of collateral sources in most j/d, but you may need to pay

insurance company benefits paid in excess of your total award (subrogation)

Prejudgment Interest

1) Once judgment entered for P, interest accrues on unpaid portions of judgment

2) Refers to interest on losses that P has incurred before the entry of the judgment

3) At least ½ jurisdictions allow

**Loss of Consortium in Nonfatal Injuries**

Fear of Future Injury—p883

1) Must prove that current injury exists or it is more likely than not that an injury will develop

2) Can recover for increased risk, fear, anguish, and medical monitoring costs

Preexisting Conditions

1) P usually cannot recover for preexisting conditions, only further aggravation

2) The onus is on the D to prove what injuries were preexisting

Duty to Mitigate Damages

1) Doctrine of Avoidable Consequences

2) Failure to take proper care causing aggravation of injuries, such as not wearing a seat belt

3) D not liable for further injury if you didn’t try to mitigate and were injured further

**Loss of Consortium**

Husband-wife - Virtually all juries allow spouse to seek several specific items of damages:

(1) Loss of companionship and society

(2) Loss of household services

Court will allow evidence to show quality of the familial relationship (ex: if marriage is on the rocks)

Child’s can seek damages for loss of consortium and services resulting from injury to parent.

Parent’s loss of consortium and services resulting from nonfatal injury to child

Most juris do NOT allow parents to get damages for consortium for injury to their child

Roberts v. Williamson – parents could not recover for the loss of filial (relating to child) consortium

Consortium claims are derivative. Therefore, the original injury must prevail in order for consortium claim to prevail as well

**Loss of Enjoyment of Life**

1) McDougald v. Garber p.870

P suffered severe brain damage b/c negligence of D

Cannot award damages for loss of enjoyment of life if you are not aware of the loss

Most j/d require some cognition for pain and suffering as well

**Damages (Fatal Injuries)**

**Wrongful Death**

There is no common law right to recover for wrongful death

Most j/ds begin tolling statute of limitations upon actual death (p951)

Wrongful Death claims are derivative, meaning the negligence of the decedent will affect the recovery for wrongful death and survival statutes (p952)

There are wrongful death statutes (for beneficiaries [spouse, children, parents only]) and there are survival statutes ([for the estate] legally compensable losses whether or not the tortious wrong caused the death).

Wrongful Death Statutes

Damages recoverable under WD include any or all of the following:

1. Financial contributions that the decedent would have made to the beneficiary had the beneficiary lived a normal life expectancy (such as wages that decedent parent would have spent to feed, care for, and educate the child)

2. Courts will generally not allow for recovery of earnings that would have gone to personal consumption

3. Services, care and advice of a pecuniary nature that the deceased would have given to the beneficiary

4. Beneficiary’s loss of companionship and society of the deceased

5. Grief and anguish experienced by beneficiary over the death

6. Loss of the inheritance that beneficiary would have received if decedent had lived a normallife span

TX allows all of these; juries vary on what they allow

7. Damages paid to beneficiary are NOT subject to creditors

**Survival Statutes**

Refers to the claim filed by the estate of the decedent for the legally compensable losses that the decedent suffered before death (p937). Some or all tort claims survive the death of the tort victim and become an asset of the estate—regardless if the tortious wrong caused the death.

Typically recoverable damages include:

(1) Pre-death conscious pain and suffering and mental anguish that the decedent experienced

(2) Medical expenses caused by the injury

(3) Pre-death loss earnings caused by the injury

(4) Funeral expenses

Damages paid directly to the estate ARE subject to creditors

Green v. Bitner—p941

The jury should allow for pecuniary losses as well as for the loss of companionship of a child

This is NOT the rule in TX