

Negligence

1. Duty
2. Breach
3. Causation
4. Injury or Damage
5. **R3d §3 Negligence:**
 - a. A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.
 - b. **Comment e.** Both “risk-benefit test” or “cost-benefit test” but mostly “balancing approach”: conduct is negligent if its disadvantages outweigh its advantages
6. R2d - Negligence is conduct which falls below the standard (reasonable man) established by law for the protection of others against unreasonable risk of harm.

Negligence - The Default Duty

7. **Duty**
 - a. **R3d §7 Duty** (a) Ordinary: actor's conduct creates risk of physical harm. (b) Exceptional cases: when articulated countervailing principle/policy warrants denying/limiting liability in a class of cases, court may decide D has no duty or ordinary duty needs modification.
 - b. Generally, duty not litigated, bc courts have found a duty would normally exist (where def engaged in risk-creating activity where harm to pl is a foreseeable result)
- **The Default Duty** (See a) D's affirmative actions risks harm to P, majority of situations)
 - **Palsgraf v. Long Island Railroad (Cardozo!)-** 2 men ran for train, one ok, second unsteady, guard pushed him in to help him, package fell (no indication fireworks), exploded, causing scales of station to harm P.
 - Majority: A duty that is owed must be determined from the risk that can reasonably be foreseen under the circumstances. D owes duty of care only to those who are in the reasonably foreseeable zone of danger
 - Negligence actionable only if involves invasion of legally protected interest, the violation of a right amount to a wrong to P
 - Guard did not violate P's rights by pushing man onto train, P cannot prove legal right actually wrong, bc there was no wrong done to her by D in a legal sense
 - Negligence – risk only to people within “range of apprehension”
 - Only matters if possibility of risk clear to the ordinarily prudent eye
 - Package did not appear dangerous
 - Guard had no duty to P, did not breach a duty, not liable to P
 - Dissent (Current Rule):
 - Negligence: Legal duty to take care (must be one owed to P and others), Act (wrongful whether damages does or does not result)
 - Negligence is an act or omission which unreasonably does or may affect the rights of others, or which unreasonably fails to protect one's self from

- the dangers resulting from such acts (must be both act or omission AND the right)
 - Act itself important, not the INTENT of the actor
 - **Default duty: everyone owes duty of refraining from acts that may unreasonably threaten the safety of others.**
 - In determining proximate cause, court must ask whether there was a natural and continuous sequence between the cause and effect and not whether act would reasonably be expected to injure another.
- **Barker v. City of Philadelphia**- Trash truck driver ran over children under paper. Densely populated. Knew neighborhood of children, across from play area
 - **Duty: D has duty to exercise ordinarily prudent and reasonable care of someone acting under similar circumstances would exert**
 - Cost-benefit helps determine what is reasonable: getting out and lifting paper takes no time, no burden, not expensive, so has a duty
 - Must foresee his actions may cause some injury or damage to person or property of another would reasonably be occur – does not need to foresee extent of injury or damage or manner in which it'll occur
 - Risk-creating activity: driving truck in child-filled area
 - Driver should have known that some injury might ensue if he were to pass huge piece of paper. Aware something might have been under, a trash collector so should have known, and children were around.
- **A.W. v. Lancaster County School District**- Kindergartener sexually assaulted in restroom during school day. Administrators and teachers knew of threat and did not have safety plan or do everything they could've to prevent attack. He was left alone.
 - Old test for duty: Risk-utility test to determine existence of a tort duty:
 - Magnitude of risk
 - Relationship to the parties
 - Nature of the attendant risk
 - Opportunity and ability to exercise care
 - Foreseeability of the harm
 - Policy interest in the proposed solution
 - New test for default duty: An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of harm
 - Primary factors in ascertaining whether person's conduct lack reasonable care are the (1) foreseeable likelihood that person's conduct will result in harm (2) foreseeable severity of any harm that may ensue (3) burden of precautions to eliminate or reduce the risk of harm
 - Genuine issue of material fact whether school breached duty (was assault foreseeable consequence of failure to initially note his entry carefully monitor him after discovering him inside school)
 - Adopts Restatement (Third): **Foreseeability is not a legal duty** analysis done by the court (matter of **law**) but **foreseeability is in negligence/breach** analysis done by finder of fact (matter of **fact**)
 - In order for risk to be foreseeable, circumstances must have a direct relationship to the harm incurred

- Question is whether D's conduct satisfied duty placed upon individuals to exercise that degree of care as would be exercised by a reasonable person under the circumstances
- **Policy Exception to Default Duty** (See b)
 - **Strauss v. Belle Realty Company**- Massive NYC blackout. P suing ConEd injuries from falling in common area of apt building due to darkness, where his landlord (not P) had contractual relationship with ConEd
 - ConEd does not have a duty to P based on public policy concerns
 - While duty can be owed to those foreseeably will be harmed and to those in privity to a contract (those who D knows or should have known was contemplated as having interest in the contract), policy can exempt
 - Here, court has responsibility to fix the orbit of duty, limit legal consequences, to a controllable degree to protect against crushing exposure to limitless litigation. (concerned more about similar cases later, precedent and limited judicial resources)
 - Dissent: Legislature controls prices for ConEd and can sanction ConEd or approve if ConEd must shift costs of damage awards from suits.
 - Court should shift costs from individuals harmed but to D who can shift costs onto the public. There will be natural limitation of those of who are in orbit of danger or are foreseeable anyways

8. **Common Law “No Duty” Rules:**

- Historically held these circumstances would not be subject to default duty rule (thought society would be better off). Some public policy exceptions to warrant an imposition of duty were created.
- In determining the existence of duty, we may consider, among other things:
 - Foreseeability of harm to the plaintiff
 - Degree of certainty that the plaintiff suffered the injury
 - Closeness of connection between D's conduct and injury suffered
 - Moral blame attached to defendant's conduct
 - Policy of preventing future harm
 - Extend of the burden to D and consequences to the community of imposing a duty to exercise care with resulting liability for breach
 - Availability of cost, prevalence of insurance for the risk involved
- **Traditional R3§37: No Duty of Care w/Respect to Risk Not Created by Actor**
 - An actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in Sections 38-44 is applicable
 - (b) There is no duty of care when another is at risk for reasons other than the conduct of the actor, even though actor may be in a position to help- pretermits consideration of the actor's negligence)
 - (c) Misfeasance (affirmatively creating risk) vs. Nonfeasance (merely failing to prevent harm): distinction misleading. What is important is whether actor's entire conduct created a risk of harm (not when failure to exercise reasonable care entails commission or omission of a specific act).
 - Instead, ask whether risk of harm would have existed even if the actor had not engaged in the conduct

- **Theobald v. Dolcimascola**- Russian Roulette, P (decedent) suing D who were only observers to his death
 - No duty owed by bystanders (D) to P decedent if Ds were mere observers (did not give him gun) to his own act of harming himself. No liability for failure to rescue
 - Fact that actor realizes or should realize that action on his part is necessary for another's aid or protection does not impose a duty to take such action
- **Hall v. Torero's II, Inc.** – Alcoholic left bar obviously intoxicated, no one stopped him from driving his car, hit and killed P. P sued the bar where he bought his drinks, lost. Sup Ct split 3-3, so upheld App Ct's finding that commercial provider of alcohol in NC owes no legal duty after service of final drink to defendant.
- **Galanti v. U.S.** – G's husband and Underhill sale of property. Both killed by Thevis, convicted felon escaped from prison who Underhill working with FBI to catch). G suing govt for not warning/protecting husband. Underhill ignored advice to retain real estate agent and handled property on his own though. Refused to go into witness protection program and put out newspaper advertisement.
 - In GA, no duty to warn EXCEPT (a) warn against danger if D has taken affirmative step to create danger (b) failed to properly exercise ability to control the foreseeably dangerous instrument (c) law enforcement have duty if voluntarily assumed or incurred that duty to that individual
 - None of exceptions met. (a) Underhill's fault (b) could not have controlled Thevis, a wanted felon (c) they had duty to Underhill, not to husband.
- Historically:
 - No duty to rescue even if rescue would be easy, inexpensive
 - Justified by autonomy, against natural law, religious would control
 - Autonomy: consent-of-the-government rationale (we legitimize govt by consenting to it bc it reflects their autonomous choices. Freedom of choice in law affront to liberty and who sustain legitimate govt); also harm principle (legal wrong constituted only when harm inflicted so nonfeasance is a nonact)
 - Change led by utilitarians (privileges of easy rescue over loss of autonomy)
 - Religion less able to hold society's moral sensibilities, social deterioration
- Exceptions!
 - **R3§38: Statutory Provision Imposing Duty to Protect (Expressly/Implied)**
 - **J.S. v. R.T.H.**- Minor girls sexually abused by neighbor. Suing abuser (intentional, negligence) and wife (negligence)
 - Balancing public policy interests (protection of children from sexual abuse, stability of marital relationships)
 - Court does not say that bc you breached this statute you are liable. Court looks at statutes generally to evaluate public policy interests to make case for duty that never previously existed (courts care about public opinion)
 - To determine whether duty to be imposed is a fluctuating, community context-driven: nature of underlying risk of harm, comparative interests of and relationships between or among the parties, considerations of public policy and justice, society interest in solution, context of contemporary circumstances
 - Societal interest in enhancing marital relationships cannot outweigh interest for protecting children from sexual abuse.

- Reasonable jury may find that: (a) wife knew/should have known of husband's proclivities/propensities, (2) may be foreseeable that he was abusing the young girls and (3) she could've taken simple measures (confront husband or warn children's parents)
- Homeowners insurance probably does not cover intentional/criminal acts but only negligence
- **R3§39: Prior Conduct**
 - Actor's prior conduct, though not tortious, creates a continuing risk of physical harm of a type characteristic of the conduct, actor has duty to exercise reasonable care to prevent or minimize harm
 - Golfer surveys area, hits golfball, hits guy that had been behind tree
 - **Ponder v. National Convoy & Trucking Co** – D truck obstructing highway, failed to warn drivers or direct bystanders to warn, P car wreck
 - Def owed duty to oncoming drivers to exercise reasonable care to warn them of peril. Failure to perform this duty was negligence. Negligence was proximate cause of collision and injury
- **R3§40: Special Relationship**
 - Only re: risks arising within scope of relationship (matter of law)
 - Common carrier to passengers
 - Innkeeper
 - Owner of land open to public or those lawfully on premises
 - Employer to employees in imminent danger or helpless
 - School to students
 - Landlord to tenants
 - Custodian with those in custody if (a) required by law to take custody or voluntarily does so AND (b) has superior ability to protect
 - **Patton v. United States of America Rugby Football** – P suing death, physical harm from being struck by lightning after rugby competition. P argued liability due to nature of sport (trusted welfare in people running event) and bc officials did not have safety protocol for storm. D says no legal duty and even if so, has immunity under Recreational Land Use Statute or barred by waiver
 - Duty? Consider: foreseeability of harm, degree certain pl suffered injury, closeness of connection between def conduct and harm, moral blame for def's conduct, policy of preventing harm, burden of defendant, consequences on community, availability/cost/ prevalence of insurance for risk
 - Special relationship for duty, Consider:
 - Policy reasons. Not just foreseeability but actual relationship between parties.
 - Established by: (1) Statute/Rule (2) contractual/other private relationship (3) indirectly or impliedly by virtue of relationship between parties
 - Requires that other party has relinquished control/is dependent. Examples: common carrier to passengers; innkeeper and guests; possessor of land open to public to public; voluntarily takes custody of other to that person

- No special relationship here. P not under the control of D, P did not lose control of himself, able to leave at any time. P able to assess weather themselves and act accordingly
- **L.A.C. v. Ward Parkway Shopping Center Company** – 12yo girl raped by 15yo boy in walkway at mall, friends couldn't stop him from carrying her away bc he carrying gun. Friends attempted to get security to stop him but security brushed them off. Security independent contractor
 - Many female victims of violent crimes in or around the mall, so mall on notice
 - Four tests to for business owners' liability for tort of criminal acts of unknown third persons.
 - Specific Harm: requires notice of specific dangers just prior to assault
 - Prior Similar Incidents: Duty found if P can prove D had notice of a sufficient number of prior similar interests
 - Balance Test
 - Totality of the Circumstances
 - Court chooses none of these and says traditional approach (foreseeability test) is all that is needed.
 - Foreseeability heart of creating duty. Generally no duty to protect against criminal acts of third parties bc acts are rarely foreseeable.
 - “Special facts and circumstances” exceptions: (1) person known to be/appears violent present or (2) duty of to protect invitees from criminal attacks of unknown third person under special circumstances (foreseeable that particular acts or omissions will cause harm or injury)
 - 2nd: P must show that reasonable person could have foreseen that injuries of the type suffered would likely occur under the circumstances
 - Continued violent crime, such as rape of LAC, was foreseeable. D had duty to take reasonable measures to protect customers, specifically LAC, from this type of violent criminal activity
 - Missouri law exception saying party entering into K may place himself in such a relation towards third persons to impose a duty to those third persons. Here, indep contractor agreed to general duty of care (whole purpose of contract) and had specific duty to act when notified by her friends that she was in danger
 - Dissent: Number, time of day, similarity of criminal incidents are principal factors that give rise to foreseeability and duty
 - Says LAC does not fit limited and narrow closeness to be in privity to contract, so cant use K to create tort
- **Woods v. District of Columbia** – P saying stroke aggravated by DC ambulance crew failure to identify stroke despite obvious signs. DC says public-duty doctrine waives liability
 - **Public-duty doctrine:** Govt and its agents owe no general duty to provide public services to particular citizens. Must show special

relationship to establish specific legal duty exists or that their affirmative acts actually and directly worsened condition

- Special relationship: Actions must exceed the response generally made to other members of the public
- No special relationship, Detrimental reliance on “judgment call” does not arise to affirmatively worsening condition exception
- Dissent: Abolish public-duty doctrine. Too broad of sweep. Need to better balance between citizenry’s interest in seeking redress when negligence/malpractice and govt’s interest in protecting ability of emergency works to respond without worrying about having to be haled into court

○ **R3§41: Special Relationships Duty to Third Parties**

- Within the scope of the relationship
- Parent and dependent children, custodian with those in custody, employer and employees when employment facilitates employee’s causing harm to third parties, mental-health professionals and patients
 - Most states have do not embrace general concept in R3 for parents, especially after Columbine and school shootings.
- **Duty of Parents**
- **Nieuwendorp v. American Family Insurance Company** – School teacher suing bc parents failed to inform re discontinuing meds and alternative treatments, failing to warn school he is off meds or develop plan to manage his behavior (ADHD, neck injury)
 - Parent have duty reasonable care to control minor child to prevent intentionally harming others or from conducting to create unreasonable risk of bodily harm to them, if the parent:
 - Knows/Should know he has ability to control child; AND
 - Knows/should know of necessity and opportunity for exercising such control
 - Comparative negligence of Pl → 31% negligent
 - Public Policy Concerns: (1) increasing # students exhibiting emotional/behavioral probs. (2) not required to control children by involuntary medication (3) parents should be allowed to make treatment decisions without fear of being sued (4) should not be required to divulge medical treatment decisions to third parties
 - D correctly argued parents’ choice to take off medication does not constitute negligence BUT parents should have taken reasonable steps to control behavior. Negligent by failing to inform selves of consequences of discontinuing meds/alternative treatment and for not notifying school meds discontinued so plan to manage could have been developed
 - Pub policy reasons for not imposing liability despite finding negligence: Injury too remote, injury out of proportion to culpability of negligent tortfeasor, too highly extraordinary that negligence brought about harm, recovery would place unreasonable burden on tortfeasor, recover would open way for fraudulent claims, recover would enter field that has no sensible or just stopping point → Not convincing to court here

- **Duty of School and Mental-health Professionals**
- **Tarasoff v. Regents of Univ of California**- Podder mentally ill, confided intention to kill Tarasoff bc she refused his marriage request (religious/cultural norm to kill to reclaim honor). Psychiatrist
 - Mental Health-Patient special relationship where duty exists to protect danger person from potential victim. Physician must exercise reasonable degree of skill, knowledge, care ordinarily possessed and exercised by members of that community under similar circumstances - to protect victim from harm
 - When therapist believes patient will kill another, therapist owes duty to protect/warn potential victim. Holds when specific threats where victim is known (not general threat to public)
 - Public interest for effective treatment (which requires confidentiality) and right to privacy are important factors, but Cali statute says there is no privilege if physician believes patient poses dangerous to himself or to the person/property of another.
 - Standard of care set by profession (expert witness) and medical ethics rules says privilege only covers up to whatever required by law and to protect welfare of the patient and the community.
 - D argue that cannot predict future human behavior but P in fact determined that patient presented serious danger of violence to PI but nevertheless failed to exercise reasonable care to protect victim. Just reporting to police is not enough.
- **R3§42: Duty Based on Actor Who Undertakes Rendering Services**
 - Actor who undertakes rendering services to another and who K/SK services will reduce risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:
 - Failure to exercise such care increases risk of harm beyond that which existed without the undertaking, or
 - Person to whom services are rendered or another relies on the actor's exercising reasonable care in the undertaking
 - Related to contract claims of promise and promissory estoppel
 - Good Samaritan statutes. States vary. Vermont has comprehensive duty to provide aid, immunizing for mere negligence, punishing willful violators with fine. Texas immunizes anyone (even if medical professional) of negligence but not gross negligence who acts in good faith during emergency
 - **Volunteer Rescue Imposing Obligation to Rescue, Aid, or Warn**
 - **Parvi v. City of Kingston** – Police transported two drunk men outside city limits (standard operating procedure), left at abandoned golf course in unlit, isolated area). Drunk men wandered onto highway and struck by car, one died, other seriously injured). Volunteer duty adopted
 - If actor removed from previous danger cannot put into new or same unreasonably dangerous situation. So question is whether reasonably foreseeable that Parvi, sufficiently intoxicated to need being taken out of

city, when in dead of night, traffic noises, might wander onto the road and be hit. Question of fact for jury

- Dissent: Men consented to location bc had lean-to shelters. Highway 350ft away. Policemen had no duty to leave Parvi in absolutely free of danger but only a duty to exercise ordinary care
- **R3§43:** Duty to Third Parties Based on Undertaking Rendering Services
- **R3§44:** Duty Based on Taking Charge of Another
 - Actor who, despite no duty to do so, takes charge of another who reasonably appears to be both imperiled AND helpless or unable to protect hself has a duty to exercise reasonable care while the other is within actor's charge

9. Premises Liability

- **R3§51 – General Duty of Land Possessors**
 - Subject to R3§52, Duty of reasonable care to entrants on the land with regard to: (a) conduct by land possessor (b) artificial conditions on land (c) natural conditions on land (d) other risks to entrants when any of affirmative duties is applicable
- **R3§52 – Duty of Land Possessors to Flagrant Trespassers**
 - Duty to not act in intentional, willful, or wanton manner to cause physical harm
 - BUT, if trespasser reasonably appears to be imperiled and either helpless OR unable to protect hself, landowner has duty to exercise reasonable care
 - Ordinary v. flagrant trespassers: Flagrant is egregious or atrocious rather than conspicuous. Flagrant use is so antithetical to rights of land possessor to exclusive use and possession of land that land possessor should not be subject to liability for not exercising reasonable care. Flagrant typically means:
 - Entry that results in commission of a crime directed at land possessor or possessor's family, guests, property
 - Entry for purpose of committing such crime even if not accomplished
 - Entry for another illegal or improper purpose
 - Entry despite efforts by possessor to prevent trespass/entrance of P
 - Extent of effort by P to defeat exclusion effort of possessor (including acts as ignoring no-trespassing signs and defeating gates, fences, locks)
 - Repeated trespasses by P especially in defiance of possessor's requests
 - Entry that results in damage to land possessor's person, family, property
- **Trichotomy (Trespassers, Licensees, Invitees)**
- **Nelson v. Freeland**- Stick in porch. D asked P to pick him up for meeting. P tripped over stick, suing. P says he's Invitee (so D k/sk of unsafe condition, breached duty of care to P), D says Licensee (D unaware of stick, no duty)
 - Historically, duty owed to P depends on status of P at time of injury:
 - Trespassers: On land w/o permission, no duty of care owed
 - Licensees: On land w/permission, duty to make safe dangers of which possessor is aware
 - Invitee: On land w/permission, owner has interest in the visit, visitor has reason to believe premises have been made safe to receive him. Duty to exercise reasonable care to protect him against both known dangers and those that would be revealed through inspection
 - NC eliminates distinction between licensees and invitees by requiring standard of care toward all lawful visitors. Unnecessary in modern industrial society (not large tracts of

land). Application of trichotomy unpredictable, complex, confusing. Focus should be on whether owner acted as reasonable person under circumstances. Owners do not need to undergo unwarranted burdens but only reasonable care.

- **Attractive Nuisance Doctrine**
- **Bennett v. Stanley** – D’s property included swimming pool unused for 3yrs, allowed it to fill with rainwater (depth over 6ft), removed tarp that had been on pool and fencing around two sides of pool. Tadpoles, frogs, snakes. No ladder, sides slimy with algae. P found wife and 5yo son drowned in pool. Both had trespassed.
 - On top of invitee, licensees, trespassers, Children have special status
 - **R2§339 Attractive Nuisance/Dangerous Instrumentality Doctrine:** Possessor liable for physical harm to child trespassing by artificial condition upon land if:
 - Possessor k/sk children likely to trespass on that place
 - Possessor k/sk condition will involve unreasonable risk of death or serious bodily harm to such children
 - Bc of their youth, children do not discover condition or realize risk
 - Risk of harm to children outweighs possessor’s utility of maintaining condition or his burden of eliminating it
 - Possessor fails to exercise reasonable care to eliminate danger or to otherwise protect children
 - Doctrine not ordinarily applicable to adults but may be successfully invoked by adult harmed in attempt to rescue child from danger created by d’s negligence
 - Summed up: Danger instrumentality exception to nonliability to trespassers imposes upon owner/occupier of premises higher duty of care to child trespasser when owner/occupier actively and negligently operates hazardous machinery or other apparatus, the dangerousness of which is not readily apparent to children

10. Emotional Harm, Negligent Infliction of Emotional Distress- Generally

- **Historical**
 - Emotional distress did not exist as tort on own in the beginning, bc people concerned emotional distress could be faked (lacked objective signs we could test/check/see)
 - There were obvious cases that were accepted (parent losing child, pistol to head)
 - Science of health and mind not clear (hysteria from injury to women’s birth cavity), so led to worry that if victims of emotional distress were getting paid out (with limited funds), then people who actually were harmed (physically) would not be compensated for lack of funds
 - Disproportionality argument: If we take money from def for emotional distress, then it does very little to someone with emotional distress. Not understood how the money would do any good.
 - Fear of litigation without end
- **Modern History**
 - Recognized as tort damages since the beginning of these actions
 - First cases were innkeepers and mass transit then telegraph (accidentally telling someone their loved one died) then funeral (mishandling remains)
 - First cases were IIED, then reckless (extreme/outrageous conduct), then stand-alone, then emotional harm had to be derivative or parasitic to physical harm caused by tort. Now we have **R3§46**

- Restatement 3rd **R3§45** - simplifies emotional harm down to being an impairment or injury to a person's emotional tranquility
- Body v. Mind Dichotomy – disappearing, able to measure emotional harm in physical body (MRI of brain, etc.)
 - Science now exists to understand emotional distress (expert witnesses)
 - There's a backstop for verdicts – judge NOV
- **Emotional distress cases fall into categories (connected to other torts)**
 - With negligence– bodily harm (hit me in car, hurt arm → negligence)
 - With intentional WITH emotional harm– emotional&phys harm & another tort
 - With intentional WITHOUT physical harm (whole point of assault was that there was no physical contact but intended to cause emotional harm, also false imprisonment, fraud, etc.)
 - In situations where the emotional harm is derivative or parasitic on that tort, we do not have a lot of rules (if any)
- **Negligent Infliction of Emotional Distress**
 - Duty and negligence based on risk-creating activity – created risk of (sometimes foreseeable) physical harm
 - We have no similar rule that obliges you/gives you duty where risk created by your activity is emotional distress. We have no default duty rule.
 - When we think about NIED, we think of it in the context of an **affirmative** duty in the absence of a default duty
 - There is no default duty to not cause emotional distress.
 - This is NOT a nonfeasance situation. You are acting.
 - NIED is recognized in some form in every state. (TX recognizes bystander NIED but not direct NIED- bizarre)
 - Key elements of NIED:
 - Risk-creating activity
 - Departure of ordinary care
 - Foreseeability
 - Causation
 - Damages
 - Divided into two categories:
 - Direct Victim Cases – Your negligence directly inflicts emotional distress on me (the cause)
 - Classic limitations: Victim must be placed in immediate danger of bodily harm OR distress occurs in the context of special relationships or undertakings
 - Bystander Cases- I am a bystander to other negligent conduct, and because of negligent conduct, I suffer emotional distress (running over my child)

DIRECT VICTIM CASES

11. Stand-Alone Emotional Distress

- **R3§47 Negligent Conduct Directly Inflicting Emotional Harm**
 - Actor whose negligent conduct causes **serious** emotional harm to another liable:
 - (a) places the other in danger of immediate bodily harm and the emotional harm results from the danger; or (b) occurs in the course of specified categories of activities,

undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm.

- Emotional harm has to be **severe**
 - Entails **subjective** (actually felt in P) and **objective** (reasonable person would be affected) component
- Only responsible if you are constituted emotionally as an ordinary person would be (if you have peculiar susceptibility to distress, will not compensate you).
- If defendant knew about peculiar susceptibilities, then there would be compensation.
- However, this is negligence (accident), so whether he knew or not should not make a difference. Really saying, the standard of care should be higher.
- Example: psychologist's patient suicidal should be treated with extra care
- **Hedgepeth v. Whitman Walker Clinic**- P believed he was HIV positive for 5yr bc clinic told him wrong diagnosis. Developed depression, suicidal thoughts, psychiatric wards, prescription antidepressants, lost his job, abused illegal drugs, eating disorder, sex with women who were also HIV positive, alienated from relative (incl 12yo daughter), found out negative and sued original clinic for NIED
 - Courts traditionally reluctant to compensate "pure" emotional harms. Needed to be accompanied by predicate or consequent physical injury.
 - Gradually expanded tort liability for NIED through "impact" rule, which allowed recovery when trivial physical contact was made, later through "zone-of-danger" rule, which allowed recovery absent contact when the P suffered a near miss.
 - Held zone-of-danger-rule still continues to generally be applicable to NIED claims, but court created a supplemental rule establishing a new category
 - New Rule, **Special Relationship**: Pl may recover for NIED if the P can show:
 - D has a relationship with P, or has undertaken an obligation to P, of a nature that necessarily implicates the P's emotional well-being
 - There is an especially likely risk that the D's negligence would cause serious emotional distress to P; AND
 - Negligent actions or omissions of the D in breach of that obligation have, in fact, caused serious emotional distress to P
 - Breach determined by objective standard of reasonableness applicable to the underlying relationship or undertaking
 - Absent special relationship, no general duty to avoid NIED to a stranger
 - Serious emotional distress deemed "especially likely" where D has an undertaking or relationship with P that implicates care for emotional well-being and K/SK P unusually susceptible to suffer emotional distress

BYSTANDER VICTIM CASES

12. Bystander - R3§48: NIED Resulting from Bodily Harm to a Third Person

- Actor whose negligence causes sudden serious bodily injury to a third person is subject to liability for serious emotional harm caused thereby to a person who:
 - Perceives event contemporaneously, AND
 - Is a close family member of the person suffering the bodily injury
- Emotional harm has to be **severe**
- Only responsible if you constituted emotionally as an ordinary person would be

- First cases were zone of danger– you were where negligent conduct occurred, though you were not direct recipient of bodily harm, you feared for your safety
- Car out of control, coming at mom and daughter, pushed out of way to safety, They can recover if have emotional distress and ordinary person would have similar emotional distress → stand-alone NIED claim
- In same situation, if mother did not worry for her own safety but only scared for her child's safety, some jurisdictions would still allow her to recover for herself.
- If mother not in zone of danger and watches child almost get hit by car, mother is still scared for the life of her child, yet under zone of danger rule, no recovery
- **Dylan v. Legg**- California Supreme Court case in 1968, broadened zone of danger rule to use foreseeability
 - A mother and her daughter witnessed death of other child in car accident caused by negligent driver. Both sued for emotional distress as a result of witnessing accident. Dismissed due to zone of danger rule. P needed to be in physical danger of accident to recover, but overturned.
 - Court announced 3 factors to consider:
 - P was near scene where other person was injured or threatened
 - They actually knew of danger or threat/saw person before their condition substantially changed, if they were injured
 - They were closely related (later understood as blood or marriage)
- Some variance of the above 3 factors would be included in most jurisdictions. Many required **seeing** the negligence.
- Really a question of **foreseeability** and not zone of danger
- Foreseeability is a matter for jury (typically, which is why R3 took it out of duty and would not be a matter of law)
- Some jurisdictions include fiancés, partners, extended familial relationships
 - NH – the duration of the relationship regardless of legal or genetic character and the extent and quality of the shared experience
- If bystander not in zone of danger, higher scrutiny to relationship – want relationship to be very close (to limit number of people who can sue)
- Later, Dylan was substantially modified. Now, in CA, P has to be present in and witness injury or threat.
 - **Thing v. La Chusa** - Thing, minor and son of P Maria Thing, injured when he was struck by a car driven by James La Chusa. P was closeby, but did not see or hear accident. When P arrived, she saw her bloody and unconscious son and suffered emotional distress as a result.
- New Rule in California
 - P must be closely related to the injury victim,
 - P must be present at the scene at the time of the injury, and must be aware that the victim is being injured, and
 - P must suffer emotional distress as a result
- How would you have argued?
 - Should not have brought body out
 - While they were carrying her, they were not providing adequate care, and that was done in her

- Saw them actively giving improper care.
- Causation problem
- Was she already going to die anyways
- **Portee v. Jaffee** – P’s 7yo son trapped in elevator btwn outer door and wall of shaft, dragged up to 3rd floor, P and officers arrived to attempt to save him. 4.5hr of watching him in agony. After his death, P depressed, seriously self-destructive, suicidal, cut wrists so badly causing no sensation in portion of hand. Suing owner of building.
 - Court adopts *Dillon* test for NIED. Test for ‘foreseeability (1) Proximity to scene, closer the more likely P will succeed. (2) Contemporaneous observance during the wrong (as opposed to discovering later), and (3) closeness of relationship.
 - P fails under zone of danger test bc son being wedged never posed risk to her.
 - Replaces zone-of-danger for new rule for NIED (She meets all these, so wins)
 - Death or serious physical injury of another caused by D’s negligence
 - Marital or intimate, familial relationship between P an injured person
 - Observation of death or injury at scene of accident
 - Resulting severe emotional distress in P

13. Stand-Alone Economic Harm

- As in the case of stand-alone emotional harm, courts have long rejected claims of stand-alone economic harm. Policy reasons, largely based in preference for contracts in this context, are different but notice that methodology for creating exceptions is constant
 - Reasons for why not permitted (not really that great of reasons):
 - (1) Fraud/Deceit (2) Interfere w/K (3) Interfere w/econ opportunity
 - Themes: (1) Law does not extend to these cases (2) remoteness of foreseeability (3) limitless lawsuits, judicial resources (4) people more important than profits
- **Aikens v. Debow** - Group of business owners sued D for D’s truck damaging bridge, saying it caused them economic damages bc potential customers diverted.
 - Held remoteness of the economic injuries, lack of foreseeability, and need for limits to liability (floodgates of lawsuits) all support the application of the economic loss rule (policy reasons)
 - Individual who sustains purely economic loss from interruption in commerce caused by D’s negligence may not recover damages unless he suffered damage to his person or property

Negligence - Breach

14. Defining the Standard of Care

- **Adults – “Reasonable Person”**
 - **Vaughan v. Menlove** – Seminal case, first introduced “reasonable person”
 - Def built haystack near boundary of land, told dangerous, built precautionary chimney to prevent spontaneous fire, Caught fire anyways, and burnt down two cottages. Said “He would chance it.”
 - Negligence standard of care is objective– man of ordinary prudence under similar circumstances (not def’s best intentions)
 - Landowner under a general duty of care to use his land without negligently causing injury to others.
- Oliver Wendell Holmes, “The Common Law at 107-111 (1881)”

- Standard of law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education
- Certain average conduct is necessary to general welfare
- Average man of ordinary intelligence and prudence, determines liability by that
- “A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not.”
- Dan B. Dobbs, “Objective and subjective features of the reasonable person standard”
 - First part of clause: man of ordinary negligence is objective standard
 - Second part: under similar circumstances is not necessarily subjective, bc asking what reasonable person would do in light of the risks presented

15. Knowledge and Skills

- **R3§12 Knowledge and Skills**
 - If an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person.
- **McCall v. Wilder** – D crashed car into P after seizure caused by tumor in brain in highly epileptogenic region. D had seizures before, knew had seizure disorder which caused loss of consciousness. P says foreseeable D would seizure, so took unreasonable risk to drive. D says unavoidable sudden emergency (epileptic seizure) negates negligence
 - If did not exercise reasonable care, then breach.
 - Typically fainting/momentary loss of consciousness while driving is complete defense to negligence if such fainting was **not foreseeable**
 - KEY: FORESEEABILITY --- Factors to determine if foreseeable:
 - Extend of driver’s awareness/knowledge of condition
 - Driver sought medical advice
 - Whether had been prescribed medicine
 - Previous episode while driving
 - Number, frequency, extend and duration of incapacitating episodes prior
 - Physician’s advice
 - Medical opinions regarding nature of condition, adherence to treatment, foreseeability of incapacitation
 - Potential advance warning driver would have experienced immediately prior to accident
 - Driver who knows of medically incapacitating disorder and who poses an unreasonable risk of harm to others by driving under circumstances such that a reasonably prudent person could foresee an accident, then driver liable

16. Children

- **R3§10 Children**
- (a) A child's conduct is negligent if it does not conform to that of a reasonably careful person of same age, intelligence, and experience, except as provided in (b) or (c)
 - (b) A child **less than five years** of age is incapable of negligence.
 - (c) The special rule in Subsection (a) does not apply when the child is engaging in a dangerous activity that is **characteristically undertaken by adults**.
 - Majority of jurisdictions accept Subsection (a).

- Minority hold that for children > 14yo there is a rebuttable presumption in favor of child's capacity to commit negligence; between 7 and 14, there is a rebuttable presumption against capacity; < 7 deemed incapable
 - Examples of dangerous adult activities: handling gun, driving car, tractor, motorcycle, operating vehicles like minibikes, motorscooters, dirt bikes. Third parties encountering children engaging in ordinary activities can adjust their conduct in order to make allowances for children's proximity. Yet when children engage in adult activities such as motoring, status as children often cannot be detected, impossible for third parties to respond
- Critiques of Negligence Standard of Care for Minors
 - Three major rationales: protection, welfare and fairness
 - Protection: Previously when all jurisdictions followed contributory negligence rule, harshness cried out for exceptions bc children often to blame for own harms. Now contributory negligence in dramatic decline, so unnecessary
 - Welfare: Allow children by doing. No evidence.
 - Fairness: Courts hold others incapable of exercising mature judgment to reasonable person standard (mentally ill, alcoholics, elderly) despite unfairness of applying this standard which they are unable to meet
 - Parents have insurance which cover children, so insurance moots fairness arg

17. Roles of the Legislature, the Judge, and the Jury in Deciding Reasonableness

- **Legislature**
 - At common law, unusual standard of care to be defined by legislature, but now increasingly common (Good Samaritans, children, establish negligence per se)
 - **Negligence per se** = negligence as a matter of law. Applies when judge in case borrows terms of statute, regulation, or ordinance in lieu of its own or the jury's determination of breach (generally not written w/private right of axn but used to reflect consensus of those who have studied safety/reasonableness.
 - Courts draw standard of care from an enactment when
 - Criminal statute, ordinance, or administrative regulation imposes a specific duty upon someone for the protection of others (SAFETY)
 - AND specifies a particular conduct beyond merely providing that reasonable care is required
 - D neglects to perform that duty
 - P is member of class legislature intended to protect when it enacted
 - Harm occurred that was kind intended to be address and as a result of D's acting violating the statute
 - Ex. Boy brings gun to school, it drops of child's foot injuring her, could not use statute for child carrying guns law as negligence per se bc specific harm that occurred not contemplated/purpose of statute
 - In negligence per se, if P establishes negligence per se, P has no burden to offer evidence to either issue or contrary evidence will not be received by D. P just has to show that D violated enactment, causation of harm, and compensation due
- **Role of Judge and Jury**
- **R3§8 Judge and Jury:** (a) When, in light of all the evidence, reasonable minds can differ as to the facts relating to the actor's conduct, it is the function of the jury to determine those facts. (b) When, in light of all the facts relating to the actor's conduct, reasonable minds can differ as to

whether the conduct lacks reasonable care, it is the function of the jury to make that determination.

- **Holmes:** proponent of reasonableness as question of law
- **Cardozo:** proponent of reasonable as matter of fact for jury. Actions in real life outside of courtroom may seem reasonable to judge but actually not reality
- **Akins v. Glen Falls City School District** – Pl hit foul ball into unscreened area of baseball stadium. Jury ruled for P \$100k award, Aff'd by App Ct. Reversed here
 - Landowner only under duty to exercise reasonable care under circumstances to prevent injury to those who come to watch games played on its field
 - Owner must screen most dangerous section of field (area behind home plate) and screening provided must be sufficient for those spectators who may be reasonably anticipated to desire protected seats on an ordinary occasion.
 - Person not in protected section injured by ball, owner not liable for negligence
 - Ordinarily, reasonable care under the circumstances is a question for the jury; however, before it becomes appropriate for the jury to consider such questions, the court, as it would in the usual negligence action, must make threshold determination as to whether P, by introducing adequate evidence on each element, has made out a case sufficient in law to support a favorable jury verdict
 - **Dissent:** Majority prescribes size, shape, location of backstops and protective devices that will satisfy field owner's duty of reasonable under circumstances. Judicial rule making, errs bc decide what reasonable care is hinges upon facts of individual situation and should be left for jury.

18. Proving Breach

- **Evidence About the Calculus of Risk: Foreseeability, the Gravity of Loss, and the Burden of Alternative Precautions**
- **United States v. Carroll Towing, Inc. (Learned Hand)**- Connors barge moored to end of pier. Paid Carroll to drill out. Barge broke free, hit tanker, tanker's propeller broke hole in barge, barge sunk, lost cargo. Sued, saying if someone on board, leak would've been noticed, cargo and barge would've been saved.
 - Famous bc Hand first uses balancing test to determine breach. Most courts employ his comparable risk-benefit model now: $C > GL$ (cost is greater than gravity of loss) or more common shorthand, BPL. An actor is in breach if the burden of taking measures to avoid the harm would be less than the multiple of the probability of the kind of incident in question times the gravity of the harm should it occur, or $B < P \times L$
 - If $(\text{Burden} < \text{Cost of Injury} \times \text{Probability of occurrence})$, then the accused will not have met the standard of care required
 - If $(\text{Burden} \geq \text{Cost of injury} \times \text{Probability of occurrence})$, then the accused may have met the standard of care.
- **Haley v. London Electricity Board**- Workmen digging trench in pavement. Went to lunch, nothing to fence so left a shovel and pick at one end and a punner at the other end to warn pedestrians. Claimant, blind man, tripped on punner and fell hitting his head, causing him to become deaf. D argued they had done all that was necessary to warn an ordinary person of the danger and there was no need to take extra precautions for blind persons bc not foreseeable that blind person would walk unaided down street.

- D was liable. Had given adequate warning to sighted people, but it was common knowledge that 1/500 people in London blind and everyone has seen them walking unaided along pavements and the duty of care extended to them as well.
- Balance of reasonableness of precautions v. likelihood of injury being sustained
- Custom
- **R3§13 Custom** (a) An actor's compliance with custom of community, or of others in like circumstances, is **evidence** that the actor's conduct is not negligent but **does not preclude** a finding of negligence. (b) An actor's departure from custom of the community, or of others in like circumstances, in a way that increases risk is **evidence** of the actor's negligence but **does not require** a finding of negligence.
- Business Custom
 - **The T.J. Hooper v. Northern Barge Corporation (Learned Hand)**- P two barges of cargo encountered storm, sank, cargo lost. D 2 tugboats accompanied P barges. TJ sued under contract saying negligent not to equip tugboats with radios. Would have received warnings and barges would've been put safely into breakwater. 4 tugs on same route avoided storm bc of radios. D asserted did not have a duty, by statute etc, to have radio sets, new technology, statute req passenger steamers to have radios not for tugs.
 - Standard not dependent on statutory enactment or inflexible standards but advancing knowledge, experience, and changed appliances of navigation. Radio so extensive as to amount almost to a universal practice
 - Held that there was a duty to supply effective receiving sets.
 - No "custom" of tugs having radios, but custom not always indicative of reasonable care. Judges can determine what is reasonable and required. Held any reasonable tug company should have radios to prevent risks related to bad weather.
- Professional Custom
 - Medical Standard of Care
 - Fairer to doctor to hold same locality, bc other places/cities have better access to better technology
 - Fairer to not have same locality, bc White Wall of Silence - only allowed doctors within town to be expert witnesses then no doctor would testify or who did have vendetta against doctor
 - Should we have a national standard of care?
 - Most if not all jurisdiction adopted national standard of care for specialists and hospitals on the basis that their accrediting and reaccrediting organization are national.
 - Hospitals v. Individual Doctors – Standards for each?
 - **Pederson v. Dumouchel** – Pl severe brain damage due to nurse heroin addict using alcohol. Doctor left while surgery happening and she put him under anesthetic.
 - Qualified medical/dental practitioner should be subject to liability for negligence if fails to exercise degree of care and skill expected of the **average practitioner in the class to which he belongs, acting in the same or similar circumstances**. (Took out same localities). This standard of care is that **established in an area coextensive** with the medical and professional means available in those centers that are readily accessible for appropriate treatment of the patient. Instant case is example: P taken immediately to hospital 110 mi away.

- Whether hospital accredited or not, conclude that it is negligence as a matter of law for a hospital to permit a surgical operation upon a patient under general anesthetic without the presence and supervision of a medical doctor in the operating room, in the absence of extraordinary and emergent circumstances.
 - Hospital is national organization. Hospital had its own rule and broke it. NOT dispositive but evidence that hospital knew and accepted standard
- **Effectiveness of the Medical Malpractice Standard of Care as a Tool for Fault-Based Compensation and Deterrence of Medical Errors**
 - Should we apply regular negligence or strict liability for medical field?
 - Deterrence v. moral blame?
 - One medical procedure requires team of people each with specialized training or specific tasks to work in tandem (178 actions per day, error only in 1% but 2 errors per day)
 - Increasing amount of ICU care given, half of ICU patients experience serious complication so changes of survival drops sharply
 - Simple checklist reminders of basic things to do for each procedure led to ten-day line-infection rate from 11%-0%. Average patient stay in ICU dropped by half.
 - 7.6 times as many negligence injuries as there are claims. Only 2% of injuries resulted in claims and only 17% of claims from negligent injuries
 - Tort system reasonably good at compensating P w/meritorious claims
 - 60% of \$ health system goes to administrative costs (legal fees)
 - 44k-98k people die every year in hospitals due to medical errors
 - Caused by decentralized, fragmented nature of health care delivery system. Multiple providers in different settings, none have complete information, easier to do things wrong. Little prevention efforts. Little financial incentive to improve health quality
 - Medical errors from faulty systems, processes, conditions that lead people to make mistakes or fail to prevent them
 - Establish national focus to create leadership, research, tools and protocols to enhance knowledge base about safety
 - Identifying and learning from errors by developing nationwide public mandatory reporting system and by encouraging health care organizations and practitioners to develop and participate in voluntary reporting system
 - Raising performance standards and expectations for improvements in safety through the actions of oversight organizations, professional groups, and group purchasers of healthcare
 - Implementing safety systems in health care organizations to ensure safe practices at the delivery level
 - Many states require reporting of adverse events and some require public reporting of hospital-acquired infections, patient falls, pressure ulcers.
 - Flawed system of adjudicating medical malpractice claims: (1) finding a lawyer (cost prohibitive) (2) medical experts (weak witnesses) (3) judges (should control medical experts better) – (4) evidence rules (no cumulative evidence prevents multiple witnesses, no hearsay or opinion)

- Medical malpractice insurance crisis – running doctors out of business
 - Strict liability system would engender better promotion of patient safety measures. Current negligence system breeds physician silence bc of fear, guilt, moral blame, avoidance-based model would encourage communication to optimize future patient care
 - Proposals also involve enterprise liability which shifts liability to health care entity. Therefore, economic incentive to appropriately monitor and discipline substandard care.
 - **Helling v. Cary** – Pl serious loss of vision due to glaucoma. P got eyes checked by D ophthalmologist regularly. P sued D for negligence to not give her a pressure test in time to discover and cure disease. D argues standard of his profession to not have routine pressure tests done on patients who are under 40 bc chances of disease appearing in patients under 40 is 1 in 25,000.
 - Administration of pressure test is quite inexpensive and safe. So B<PL.
 - Even if chances 1 in 25,000, reasonable prudence should have prompted D to give pressure tests even if not standard of his profession.
 - Precaution of giving test to detect glaucoma so “imperative” that irrespective of standards of profession, duty of the courts to say what is required to protect patients under 40 from glaucoma.
 - Concurring: Should instead impose strict liability (no moral blame). Attaching moral blame to doctor who used precautions common to profession even though court lacks training in his field.
 - But what about deterrence?
- **No Evidence of Breach: Res Ipsa Loquitur**
 - **R3 § 17 Res Ipsa Loquitur:** Factfinder may infer that D is negligent when accident causing P’s harm is a type that ordinarily happens as a result of negligence of a class of actors of which D is relevant member.
 - R3 took out exclusive control of instrumentality
 - **R2 § 328D Res Ipsa Loquitur:** Requires
 - (a) event is of a kind which ordinarily does not occur w/o negligence;
 - (b) other responsible causes, including the conduct of the P and third persons, are sufficiently eliminated by the evidence; and
 - (c) indicated negligence is w/in the scope of the D’s duty to P.
 - (2) Court determines whether inference may reasonably be drawn by the jury
 - (3) Jury determines whether inference is to be drawn in any case where different conclusions may reasonably be reached.
 - Aim is to compensate P when have no ability to find out what happened
 - Accident must be of a type that normally not occur w/o negligence
 - No contribution to P/s injuries by P or any third party.
 - Falls within scope of duty owed by D to P.
 - Frequently arises where source of negligence lies w/group of people unwilling or unable to divulge actual source.
 - Burden of Production shifts to D if P can establish res ipsa loquitur
 - Burden of Persuasion still on P to prove all elements of negligence
 - Typically not available in medical settings, bc need experts to define medical standard of care

- **Byrne v. Boadle** – P struck by barrel falling from window as walked past D’s flour shop, serious injuries. Witness testified seeing barrel fall from D window but did not see cause. P did not present evidence of negligence.
 - Held presumption of negligence can arise from an accident, need not present direct evidence of negligence when the mere manner and facts of the accident show that it could not have happened without negligence on someone’s part. A barrel could not roll out of a warehouse window without negligence.
 - Boadle had a duty to ensure that those passing by his shop are not injured by objects under his control.
- **Mayer v. Once Upon a Rose, Inc.** – Pl caterer hands cut by vase. Sues florist company: florist gripping vase dangerous way/vase not adequately inspected
 - R2 definition of res ipsa loquitur (exclusive control by D)
 - Only way Def overcome rep ipsa loquitur once established is to produce evidence that destroys any reasonable inference of negligence or so completely contradict it that reasonable men could no longer accept it.
 - P did not need product liability expert. Shattering glass does not need expert testimony. Average juror/common knowledge glass is fragile and too much pressure can cause break. Only need when scientific, technical, or other specialized knowledge required
 - Question is whether based on common knowledge balance of probabilities favors negligence, thus rendering fair res ipsa inference.
 - Product defective not reasonable, vase used multiple times beforehand
 - Pl met res ipsa bar, but def did not meet burden
 - References Ybarra v. Spangard – patient unconscious in operating room during injury so unable to describe either the instrumentality that caused the injury or attribute it to anyone. CA Sup Ct permitted case to go forward.

Negligence - Causation

19. Cause-in-Fact

- **“But For” cause or Proximate Cause?**
- **General v. Specific?** General: D’s actions lead to these types of injuries v. Specific: Did D’s conduct in this case lead to P’s specific injuries?
- **R3 § 26 Factual Cause:** Tortious conduct must be a factual cause of harm for liability to be imposed. Factual cause of harm when harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under § 27.
 - “but-for” or *sine qua non* test: act is a factual cause of an outcome if, in the absence of the act, the outcome would not have occurred.
 - “proximate cause” in Chapter 6, instead denominated “scope of liability.”
 - With recognition that there are multiple factual causes of an event, a factual cause can also be described as a necessary condition for the outcome.
 - Factual cause can also accelerate outcome otherwise would occur at a later time.
- **R2§9 “Legal Cause”** to encompass: factual cause and proximate cause.
 - “legal cause” used throughout Restatement to denote the fact that the causal sequence by which the actor's tortious conduct has resulted in an invasion of some legally protected interest of another is such that the law holds the actor responsible for such harm unless there is some defense to liability.

- Has not been widely adopted nor is it helpful, need to distinguish between “factual cause” and “proximate cause”
- **R2 § 431 What Constitutes Legal Cause (“Substantial Factor” Test):**
 - (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.
 - This has failed. Taken out of Third Restatement
- **The “But For” and “Substantial Factor” Tests**
 - **Fedorczyk v. Caribbean Cruise Lines, Ltd.** – Slip and Fall on cruise. Not sure if feet on abrasive slips or not when fell. Expert said bathtub did not meet Consumer Products Safety Commission’s standard for slip-resistant bathing facilities (evidence but not determinative), said no definite way of preventing falls can happen under any circumstances (presence of bath oils/etc. can contribute)
 - Uses R2d: Causation includes cause in fact and legal causation (proximate cause). They are SEPARATE and shouldn’t be conflated
 - Cause in fact depends on whether an act or omission played a material part in bringing about an event (but for test: injury would not have happened if the particular event had not occurred)
 - If more than one act or omission could have caused harm, then must show that negligent conduct was a substantial factor in causing harm
 - Pl must provide evidence providing reasonable basis for conclusion that negligent conduct more likely than not to be cause in fact of injury
 - Circumstantial evidence should speak to common experience of mankind and must be strong enough that a jury might properly, on grounds of probability rather than certainty, exclude inferences favorable to defendant (more than speculation to support reasonable inference)
 - Expert testimony must be based on direct or circumstantial evidence and be reliable. Expert testimony stricken bc could not have been based on evidence; speculation not based on direct or circumstantial evidence of where she was when she fell, between strips, in middle of tub etc.
 - Pl failed to provide any direct or circumstantial evidence of how negligence/failure to adequately strip bathtub caused her injury. Unable to create material issue of fact for jury. Jury could only speculate.
 - **Dissent:** Believes P did provide sufficient evidence to allow reasonable jury to infer causation. If as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, conclusion may be justified that causal relationship exists. Triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case
- **R3 § 27 Multiple Sufficient Causes:** If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.
 - Need only be **one** of the factual causes of harm. Existence of other causes of harm does not affect whether specified tortious conduct was a necessary condition for harm to occur. Other causes may be innocent/tortious, known/unknown, but so long as harm *sin qua non*, conduct is a factual cause.

- All causes must precede P's harm. May occur well before P suffers harm and may require a number of subsequent events to produce the harm.
 - Courts have long imposed liability when a tortfeasor's conduct, while not necessary for the outcome, would have been a factual cause if the other competing cause had not been operating
 - As with 26, multiple sufficient causes may accelerate occurrence of harm that would have occurred at later point in absence of multiple sufficient causes.
 - Rationale: Compensation for the injured
 - If D claims an alternative cause and not D, depends on whether other forces were operating and sufficient to cause harm contemporaneously with D's conduct or alternatively were factual cause of the harm instead of D
 - Fact that other person's conduct is sufficient to cause the harm does not prevent actor's conduct from being a factual cause of harm pursuant to this section. If actor's conduct is necessary to at least one causal set.
 - Sometimes one candidate may be de minimis
- **Cause-in-Fact Based on Policy Considerations**
 - Court permits P to go ahead despite meeting burden of proof- due to policy considerations. Similar to duty (Strauss v. Belle Realty) breach (Byrne v. Boadle)
 - **Alternative Liability** (burden shifting doctrine)
 - **Summers v. Tice** – Summers (P) v. Tice, Somonson (Ds) hunting. Tice flushed quail flew btwn Summers and Ds. Ds fired shotguns, P struck eye and upper lip.
 - Ds appealed saying not joint tortfeasors and had not acted in concert. Also asserted insufficient evidence of which caused injuries
 - Held if 2 D's negligent in concert and damage is caused such that only one or the other would be liable, both defendants will be liable for damage if P is unable to show which D in fact caused the injury.
 - D's have burden of proving that other D was in fact sole cause of harm
 - Public Policy: Each tortfeasor responsible for whole damage bc of practical unfairness of denying an injured person redress simply bc he cannot prove how much damage each party did, when it is certain that between them they did all.
 - **R3 § 28 Burden of Proof:** (a) Subject to Subsection (b), P has burden to prove that D's tortious conduct was a factual cause of the plaintiff's harm.
 - (b) When P sues all of multiple actors and proves that each engaged in tortious conduct that exposed P to a risk of harm and that the tortious conduct of one or more of them caused P's harm but P cannot reasonably be expected to prove which actor or actors caused the harm, the burden of proof, including both production and persuasion, on factual causation is shifted to Ds.
 - When number of likely actors increases beyond two (so that no longer 50/50 change but 33.33%), likelihood drops that assumption of causation is acceptable
 - **Lost Chance Doctrine**
 - **R3 § 26, Comment n:** Courts have recognized lost opportunity (or lost chance) for cure of a medical condition as a legally cognizable harm. P only compensated for lost opportunity (adverse outcome discounted by the difference between the ex ante probability of the outcome in light of the defendant's negligence and the probability of the outcome absent the defendant's negligence).

- Ameliorates insurmountable problems of proof, i.e., proving what would have happened to P if proper medical care had been provided.
- Development halting, as courts have sought to find appropriate limits.
- Almost universally limited to medical-malpractice cases: (1) a contractual relationship exists between patient and physician (or physician's employer), in which the *raison d'être* of the contract is that the physician will take every reasonable measure to obtain an optimal outcome for the patient; (2) reasonably good empirical evidence is often available about the general statistical probability of the lost opportunity; and (3) frequently the consequences of the physician's negligence will deprive the patient of a less-than-50-percent chance for recovery.
- **Dickhoff v. Green** – Parents obo 6yo suing for failing to diagnose 6yo cancer. Lost chance of recovery of survival (deviated from standard of care for family practice physicians in Minnesota). P raised bump as concern at 2, 4, 6, 9 mon checkups, doc did not pay attention til 1yo. Failure resulted in delay in treatment that made it more likely than not that she will die. Likely been curable. Chance of survival is 40%, but if she had been timely diagnosed 60%.
 - Def MTD saying prohibited “loss of chance” claim (by Minnesota law)
 - Loss of Chance: This case is a loss of chance case, but finds that Minnesota law permits recovery of “loss of chance” in a medical malpractice action, so they should recover for loss
 - First step is to measure chance lost: % probability by which D’s conduct diminished likelihood of achieving some more favorable outcome. Here: loss of chance is the 5-year survival rate for ARS
 - Second: value the lost chance: proportional-recovery rule: damage for patient’s injury or death are discounted by the value of the chance that the physician’s negligence destroyed
 - Total amount recoverable is equal to percentage chance of survival or cure lost, multiplied by total amount of damages allowed for death or injury
 - Here: since cancer recurred, chance of living low but uncertain, but still alive: value of reduction of plaintiff’s life expectancy from pre-negligence life expectancy
 - Causation: P has created genuine issue of material fact (doctor’s testimony).
 - **Public Policy:** Requiring pl to adhere to “all or nothing” approach of (pre-negligence odds of survival 50% or lower can never establish as a matter of law that faulty diagnosis “more like than not” the cause of patient’s injury) which → less deterrence of unsafe conduct by health care providers, immunization of whole areas of medical practice from liability, fails to compensate victims of medical negligence
 - Medical technology improved so proving causation in loss of chance case easier
 - **Dissent:** Allowing loss of chance doctrine undermines traditional tort principles of causation and violates fundamental fairness by holding physicians liable for harms not caused by their negligence
 - First: No framework for juries to assess damage fairly without speculation, guessing, passion or prejudice

- Second: overcompensates pl under certain circumstances. (Life expectancy 80 years, delayed diagnoses causes 20% chance die by age 10 but 80% chance of living to 80. Life expectancy w/ risk is 66 years. Could sue for 14 years lost, get \$ though probable that she'll live til 80 yo.
- Third: other public policy issues of not fair to put liability on those who did not actual cause harm
 - Traditional liability does deter medical negligence. Majority assumes that doctors know that their conduct will cause harm but do nothing because know not liable. Not true. Traditional tort principles deter medical bc physician is aware that any negligence could result in harm to patient

20. Proximate Cause

- **Concept and Its History**
 - Court have long included corrective element in negligence prima facie case. That is, they required plaintiffs to allege and prove that those whom they choose to hold liable were not only the actual but also the proximate cause of their injuries
 - More of a policy-motivated question and less about cause. How fair is it to hold D liable? Policy implications? (Andrews dissent in Palsgraf)
 - Generally arg over proximate cause occur when outcome different from what expected from breach
 - Originally: Proximate cause of an event must be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred.
 - Distinction between proximate and remote is not logical one but purely practical.
 - Modern courts focus seeking to establish proximate cause mostly focus on foreseeability of P and injuries and losses (foreseeability of P is in duty, foreseeability of type of harm is harm within risk test)
 - Old rule: directness test (closeness in time and space)
 - R3 shifts definition of proximate cause from legal cause to scope of liability
- **Polemis** – Boat carrying cargo of petrol. Dropped plank (negligent act), causing boat to catch on fire, completely destroyed. Act was wrongful, doer was liable for its proximate results. Held that fire was a foreseeable consequence of negligence, so actors liable for fire. Exact way in which damage or injury results need not be foreseen for liability to attach, the fact that the negligent act caused the result is enough.
- **Palsgraf Part II:**
 - **Cardozo (Duty):** Duty owed must be determined from the risk that can reasonably be foreseen under the circumstances. Act can be tortious if no one around but tortious if in populated area, so define duty according to reasonably foreseeable risks and relations. D owes duty of care only to those who are in reasonably foreseeable zone of danger to ordinarily prudent eye. Ex ante analysis
 - **Matter of Law**
 - **Dissent, Andrews (Scope of Liability):** In determining proximate cause, court must ask whether damage would have occurred but for this cause, whether there was a natural and continuous sequence between the cause and effect.
 - It does not matter whether damages were unusual, unexpected, unforeseen and unforeseeable so long as damages were connected with the negligence so that negligence is proximate cause

- Proximate is term for convenience, public policy, rough sense of justice.
 - Courts have to use common sense and draw line somewhere, instead of making hard line, courts should consider totality of circumstances
 - Proximate cause is ex-post analysis. Is damage connected to tortious act?
 - Act itself important, not the INTENT of the actor
 - **Matter of Fact**
 - Tension between Judges and Jury's Roles
 - Led to abandonment of "direct cause" test in favor of "foreseeability" test
 - Question is what needs to be foreseeable? The harm or the plaintiff?
- **R3 § 29 Limitations on Liability for Tortious Conduct:** An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.
 - Central is the idea that an actor should be held liable only for harm that was among the potential harms—the risks—that made the actor's conduct tortious.
 - Operative question is "what were the particular risks that made an actor's conduct negligent?" If the injury suffered is not among those risks, there can be no recovery.
 - Jury should be told that, in deciding if P's harm is within scope of liability, it should go back to reasons for finding D engaged in negligent or other tortious conduct. If the harms risked by that conduct include the general sort of harm suffered by P, D is liable
 - No rule can be provided about the appropriate level of generality or specificity to employ in characterizing the type of harm for this Section.
 - Many cases will be straightforward but others require drawing an evaluative and somewhat arbitrary line. Left to community judgment, common sense by jury.
 - Many jurisdictions employ a "foreseeability" test for proximate cause, essentially consistent with the standard in this Section. Properly understood, both the risk standard and a foreseeability test exclude liability for harms that were sufficiently unforeseeable at the time of the actor's tortious conduct that they were not among the risks—potential harms—that made the actor negligent.
 - Risk standard provides greater clarity and facilitates analysis because it focuses attention on the particular circumstances that existed at the time of the actor's conduct and the risks that were posed by that conduct. Risk standard would adapt the scope of liability for a child who is not expected to anticipate the same scope of harms as an adult.
 - Foreseeability test for negligence cases risks being misunderstood because of uncertainty about what must be foreseen, by whom, and at what time.
- **Williamson v. Liptzin** – P shot and killed 2 people in downtown Chapel Hill, suing D psychiatrist at Student Psychological Services UNC who treated P, on grounds that he was damaged by negligence of D.
 - NC defines proximate cause as cause which in natural and continuous sequence, unbroken by independent cause, produced P's injuries, and w/o which injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.
 - Held: Proximate cause is to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent (Palsgraf dissent rule of rough justice)
 - We conclude that given specific and novel scenario, D's negligence was not proximate cause of P's injuries

- NC reluctant to hold liable where chain of events which led to injuries is unforeseeable, remote, and attenuated, even though “some” injury to P was “possible.” Events must be “reasonably foreseeable” – not just merely possible
- P functioned well under less-restrictive outpatient care, despite having a very serious mental illness. Passed all law school courses, took medication on regular basis, improved behavior. No need for involuntary commitment.
- Public Policy: Goal of treatment, recovery and rehabilitation of those afflicted with a mental disease, defect or disorder

21. Intervening Causes

- Proper doctrinal home of superseding cause rule is unclear and controversial. Can be aspect of actual cause doctrine, provides that overwhelming cause can render a de minimis cause legally insignificant. Can be part of proximate cause doctrine, particularly appealing in modern context where foreseeability test is mostly determinative of both proximate and superseding cause analyses. Beskind thinks it belongs in proximate cause.
- Some acts are superseding as a matter of law (suicide, intoxication, act of God or nature)
- **(Not used in textbook) R3 § 34 Intervening Acts and Superseding Causes:** When a force of nature or an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.
- **R2 § 440 Superseding Cause Defined:** A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.
- **R2 § 441 Intervening Force Defined:** (1) An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed. (2) Whether the active operation of an intervening force prevents the actor's antecedent negligence from being a legal cause in bringing about harm to another is determined by the rules stated in §§442 to 453.
- **R2 § 442 Considerations Important in Determining Whether an Intervening Force is a Superseding Cause:** The following considerations are of importance:
 - (a) Fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
 - (b) Fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
 - (c) Fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is an act done as a normal response to such a situation;
 - (d) Fact that operation of intervening force due to third person/ his failure to act
 - (e) Fact that intervening force is due to an act of a third person which is wrongful towards the other and as such subjects third person to liability to him;
 - (f) Degree of culpability of a wrongful act of a third person which sets the intervening force in motion.
- **University of Texas MD. Anderson Cancer Center v. Baker** – Baker family suing injuries to children. D aware OSHA regs, machinists such as Baker Sr potentially exposed to lead, D aware of safety precautions. D had legal duty to eliminate or reduce lead exposures to employees, but allegedly failed. D argue superseding/intervening cause

- **R2 § 442** Foreseeability exists if actor, as a person of ordinary intelligence, should have anticipated dangers his negligent act creates for others
- TX Specific: True superseding cause is one that "alters the natural sequence of events, produces results that would not otherwise have occurred, is an act or omission not brought into operation by original wrongful act of D, and operates entirely independently of D's act (and not foreseeable)
 - If superseding cause should have been anticipated at time of D's negligence, then no superseding cause but "concurrent" cause
 - "Intervening" cause that is foreseeable does not break the causal chain.
- D argue (1) Baker was intervening cause as he carried lead home; (2) dust is not inherently harmful without an additional action, (3) actions that caused contact between the children and lead outside PTC was not result of any intended and ordinary use of lead dust by UTS/MDA; (4) exposure occurred outside the PTC, and UTS/MDA cannot control activities taking place somewhere other than the PTC, e.g., the Baker home; and (5) Baker is the but for cause
- Counter: Take-home exposure to lead was foreseeable to D (cite OSHA regulations) and actually *foreseen* by D.
- Reasonably foreseeable that Baker would go home after work. If anything, it was entirely expected and purpose of OSHA regs. Did not alter natural sequence
- Harm suffered by children same type of harm created by use of the milling.
- **Barry v. Quality Steel Products, Inc.** – Ps worked on planks suspended by roof brackets by def. Planking suddenly fell and they fell. Found bracket in distorted condition on ground where they fell. Pl product liability action alleging that def designed and manufactured a defective product (roof brackets) to hang shingles.
 - D's evidence: (1) P did not use 16penny nails by 8-12 penny nails (2) Pl violated OSHA regs by not providing fall protection while working on roof (pl countered OSHA did not find any violations with roofing standard at project site)
 - Roof bracket thinner than required by even the def's own specification, jury found product defective and proximate cause of pl's accident.
 - Proximate cause results from sequence of events unbroken by a superseding cause, so that its causal viability continued until moment of injury or at least until the advent of the immediate injurious force. Test of proximate cause whether def's conduct substantial factor bringing about pl's injuries
 - Concurrent cause is one that is contemporaneous and coexistent with def's wrongful conduct and actively cooperates with def's conduct to bring about injury. Superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about
 - **Holding:** Superseding cause as applied here, no longer plays a useful role. Now the definition essentially describes fully concept of proximate cause. Purpose of supervening was to shift entire burden from first D to intervening D. Inconsistent to conclude all negligent parties liable and must pay, but one party does not have to pay its share bc its negligence was superseded by subsequent act
 - Question for jury now is whether actors' conduct was a cause in fact and a proximate cause of injury in light of all relevant circumstances. If found to be both, each actor will be liable for proportionate share P's damages.

Negligence – Affirmative Defenses

22. Contributory Negligence

- Term used in two way: to state the argument or fact that a P's own negligence has contributed to injuries or damages, and to describe the rule still existing in a few jurisdictions that states when a P's negligence contributes to the injuries or damages
- **(Not in Text) R2 § 463 Contributory Negligence Defined:** Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm.
- **Coleman v. Soccer Association of Columbia** - Pl volunteer soccer coach. Jumped, grabbed upper crossbar, not realizing it wasn't anchored, injuries, surgery, plates in face. Jury found that D was negligent and negligence caused injuries, but P negligent and negligence contributed to his own injuries. Pl barred from recovery.
 - Contributory Negligence Exceptions: (1) last clear chance doctrine which allows pl to recover if def might by the exercise of care on its part have avoided the consequences or the neglect or carelessness of the plaintiff. and (2) where pl is under 5 years old (3) strict liability and (4) intentional torts
- **Holding:** To change long-standing law against stare decisis, need pub pol reason. Legislature's repeated failure to pass legislation of contributory negligence is very strong evidence that legislative policy is to retain the principle contributory negligence.
- **Dissent (Writing for Future Court):** Should disregard contributory negligence & institute pure comparative fault = damages apportioned so each contributes to injury
 - Contributory negligence common law of judicial origin so w/in juris of court.
 - Society diff. No need to protect industry at expense of injured
 - Only four states who have kept doctrine
 - Little to no evidence of increased litigation, insurance rates, and taxes
 - Counter to principles of tort law – compensate injured, deterrence
 - Inherently unjust 49% at fault vs 51%
- **Bradley v. Appalachian Power Company** – No Facts. Pl sought to utilize comparative negligence in jury instructions. Instructions used contributory negligence though, jury found for D. Issue whether WV should replace contributory with comparative.
 - WV has authority to and is replacing contributory negligence with modified comparative negligence: Claimant's action barred if his negligence equals or exceeds the combined negligence of all other parties to occurrence. Otherwise, the claimant's recovery is diminished in proportion to his degree of negligence
 - Reqs of proximate cause not been altered by new rule. Must show negligence of D proximate cause of injuries. For Pl, must be proximate cause of injuries
 - Comparative negligence rule has no effect on P's right to sue only one of several joint tortfeasors. Joint tortfeasor so sued may implead other joint tortfeasors as third-party defendants. Original defendant may have to respond only to P for latter's damages, D in third-party action can have damages apportioned among third-party defendants.
 - Have not completely abolished doctrine of contributory negligence, recognize that doctrine of last clear chance is still available.
 - New rule of comparative negligence is fully retroactive.

- Last Clear Chance – ameliorative doctrine designed to reduce harshness of contributory negligence rule. If P in peril and D had ample time to know of peril and act to avoid injury to P, P’s own negligence was not a bar to P’s recovery
- More common comparative negligence statute: Contributory negligence shall not bar recovery in any action by any person to recover damages for negligence resulting in death or injury to person or property if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made. Negligence of each Plaintiff shall be compared to total negligence of all persons against whom recovery is sought. Combined total of P’s negligence taken together with all of the negligence of all defendants shall equal one hundred percent

23. Assumption of the Risk

- **LaFrenz v. Lake County Fair Board** – Woman killed at demolition derby in special pit area. To gain access to area, signed release containing clear and conspicuous language. She had attended demolition derby before, knew risks she was entering into.
 - Appellant asserts decedent may have been misinformed re: nature of agreement.
 - Generally representations made by appellees to persons other than decedent does not establish such representations were made to decedent
 - **Holding:** 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.
 - Decedent (1) knew risks from previous visits to derby (2) educated (3) worked at ticketbooth (4) signed clear and conspicuous language release (5) no unequal bargaining power between parties. under no compulsion, economic to be in pit area (6) activity did not exhibit characteristics of public policy interest (against public policy to invalidate K so need competing interest importance to public (utilities, carriers, innkeepers))
 - Exculpatory agreements are not construed to cover the more extreme forms of negligence or any conduct that constitutes an intentional tort.
 - The party seeking to enforce such a K has burden of showing that provisions were explained to other party and executed “knowingly and willingly” and was in fact a real and voluntary meeting of the minds.
 - **Primary implied assumption of the risk** arises when P impliedly assumes risks that are inherent in a particular activity. Not a true affirmative defense bc no cause of action for negligence ever established
 - **Secondary implied assumption of the risk** - Risk of harm assumed by P is created by the D’s negligence. It is a fault-based concept and dealt with under comparative fault. It is a true defense as it is asserted only after P establishes a prima facie case of negligence.
 - Elements of defense of assumption of risk generally:
 - Knowledge on part of injured party of a condition inconsistent w/ safety;
 - Appreciation by the injured party of the danger in the condition; and
 - 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
- **Nalwa v. Cedar Fair, L.P.**- Pl, Dr. Nalwa, amusement park w/children- on Rue le Dodge bumper car ride. Pl's car bumped, braced hand, wrist fracture. Others configured so cars travel in one direction to prevent head-on. Rue le Dodge not configured this way 55 injuries on or around Rue le Dodge in 2004, 2005.
 - Risk of injuries from bumping inherent in ride, so D had no duty of ordinary care to prevent injuries from such an inherent risk of activity.
 - Amusement parks do not have heightened duty of care as common carriers.
 - **Primary assumption of risk doctrine to bumper cars vs. Sports - APPLIES**
 - **Rule:** Persons generally owe duty of due care not to cause unreasonable risk of harm to others but some activities, sports, inherently dangerous
 - **Primary assumption of risk doctrine:** rule of limited duty operators, instructors and participants in the activity owe other participants **ONLY** the duty not to act so as to **INCREASE** the risk of injury over that **INHERENT** in the activity
 - Applying doctrine to non-sport recreational activities follows policy foundation: avoiding a chilling effect on recreational activities.
 - **Dissent:** Thinks assumption of risk defense should not have been replaced with the primary assumption of risk doctrine (no-duty-for-sports rule).
 - Earlier defense was to be asserted by D in trial, whereas the later doctrine is a question of law to be determined by the court before trial. She objected to expansion from sports participants to those who trained and supervised sports, objects to further expansion from sports to recreational activities in the case at hand
- **Herod v. Grant** – Pl Grant D Herod hunting predatory wild animals at night in D truck. Grant in bed of truck, when saw deer, Herod driving, Grant shot at it and failed, Herod turned and tried to run over deer, throwing Grant from truck
 - Reverse award of damages. Grant assumed risk. No relation of master or servant, Grant mature, reasonable man.
 - In Mississippi, elements of defense of assumption of risk generally as:
 - Knowledge on part of injured party of condition inconsistent w/ safety
 - Appreciation by the injured party of the danger in the condition
 - Deliberate and voluntary choice on part of injured party to expose his person to that danger in such a manner as to register assent
 - Assumption of risk is **subjective** standard for JURY but can still be ruled as matter of law when risks so obvious (awareness of general/specific danger?)
 - Contributory negligence measured by **objective** standard of a reasonable man
- **Primary AoR:** Risk inherent in activity, so D owes only duty not to act to **INCREASE** the risk of injury
- **Secondary AoR:** Landlord permitted apt become highly flammable, fire ensues. Tenant returns blazing with infant inside, runs in to save child and is injured
- **Tertiary AoR:** Same but tenant rushes into building to retrieve favorite fedora
- **Other Doctrines:**

- **Comparative Fault:** Broadens comparison beyond negligence to all fault-based actions—including negligence, gross negligence, willful and wanton misconduct, recklessness, and intentional conduct (all but strict liability)
- **Comparative Responsibility:** Causation-based, rather than fault-based, approach to comparison which focuses both on parties’ relative levels of fault (carelessness to intentionality) and their relative causal contributions to the damages. No jurisdiction has adopted this rule in full. See below:
- **R3 § 8 Factors for Assigning Shares of Responsibility**
 - (a) the nature of the person's risk-creating conduct, including any awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct; and
 - (b) the strength of the causal connection between the person's risk-creating conduct and the harm.
 - “Responsibility” is a general and neutral term. Assigning shares of “fault” or “negligence” can be misleading because some causes of action are not based on negligence or fault. Assigning shares of “causation” wrongly suggests that indivisible injuries jointly caused by two or more actors can be divided on the basis of causation.
 - Nature of conduct includes how unreasonable conduct was under circumstances, extent to which conduct failed to meet applicable legal standard, circumstances surrounding conduct, each person's abilities and disabilities, each person's awareness, intent, or indifference with respect to the risks.
 - Causal connection depends on how attenuated connection is, timing of each person's conduct, risks created by conduct and the actual harm suffered by P.

Strict Liability

24. Strict Liability, Animals

- **R3 § 22 Wild Animals:** (a) Owner of wild animal subject to strict liability for physical harm caused by wild animal. (b) Wild animal is an animal that belongs to a category of animals that have not been generally domesticated and that are likely, unless restrained, to cause personal injury.
 - Focus not on attributes of the particular animal but attributes of category of animals it belongs. P not required to prove D knows of dangerous qualities of that category. D may believe animal (monkey/chimpanzee) tame, but if category is wild, there is an ongoing risk that, though tamed, will revert
 - Two elements to satisfy: category is not generally domesticated (in the US) and that the category if unrestrained is likely to cause physical injury.
 - Strict liability gives the owner or possessor of the wild animal an incentive to consider whether removing the wild animal might be the wiser strategy.
- **R2 § 507 Liability of Possessor of Wild Animal:** (1) A possessor of a wild animal is subject to liability to another though possessor has exercised utmost care to confine animal, prevent it from doing harm. (2) Limited to harm that results from a dangerous propensity that is characteristic of wild animals of the particular class, or of which the possessor knows or has reason to know
- **R2 § 506 Wild Animal and Domestic Animal Defined:** (1) Wild animal not by custom devoted to the service of mankind at the time and in the place in which it is kept.

- **Nash v. Herold** – Pl mauled by def’s chimpanzee Travis. P asserts strict liability, negligence, recklessness by allowing him to roam with knowledge of violent and dangerous propensities
 - To prove strict liability, pl would have to prove by preponderance of evidence that D knew of chimp’s dangerous propensities, that she was injured by chimp, and that actions of the chimp were proximate cause of her injuries
 - Wild animal is that which is not by custom devoted to the service of mankind at the time and in the place in which it is kept. Test is whether animal is of a class recognized by custom as devoted to the service of mankind. Also defined as abnormal risk to community where kept, owner liable for injury if results from a dangerous propensity characteristic of wild animals of that class. No member of such a species can ever be regarded as safe, and liability does not rest upon any experience with the particular animal.
 - Strict liability should be imposed on party best able to protect persons from hazardous condition brought about by ownership of such an animal
- **R2 § 509 Harm Done by Abnormally Dangerous Domestic Animals:** (1) A possessor of a domestic animal he k/sk has dangerous propensities abnormal to its class, is subject to liability for harm done though he has exercised the utmost care to prevent it from doing the harm. (2) This liability is limited to harm that results from the abnormally dangerous propensity of which the possessor knows or has reason to know.
- **R2 § 518 Liability for Harm Done by Domestic Animals That Are Not Abnormally Dangerous:** Except for animal trespass, one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability if, but only if (a) he intentionally causes the animal to do the harm, or (b) he is negligent in failing to prevent the harm.
- **Sinclair v. Okata-** Child bit by dog. Dog let out not on leash. 5 prior biting incidents. Dispute over whether children approached dog/ chased them and they in self-defense
 - D Arg 1: Biting result of natural instincts, over stimulation, protective instincts and chase instinct, NOT dangerous tendencies.
 - **Rule:** Owner of a domestic animal becomes liable, regardless of fault, for injuries caused by the animal which stem from a vicious propensity, known to the owner
 - **Elements:** 1. The animal's owner knew or should have known of the animal's "dangerous tendency", and 2. That dangerous tendency resulted in injury
 - RS of Torts: If Anchor did have a dangerous propensity, then it is immaterial whether this propensity was driven by anger, playfulness, affection, curiosity.
 - D’s Arg 2: Possessor of a domestic animal is not subjected to liability for harm solely bc it resulted from dangerous propensity of domestic animal.
 - **Rule:** To be strictly liable, possessor must have k/sk dangerous propensity or trait not characteristic (abnormal) of domestic animal of kind.
 - **Df Expert Testimony:** Defendants' expert reviewed each of the four admitted biting incidents, and as to each one she concluded that Anchor's responses were "natural" or instinctive.
 - Pl screwed up- Did not challenge, offer evidence to refute
 - It may indeed be true that Anchor's reactions in the four or five incidents were abnormal in the sense that they were not reactions typical of domesticated dogs, but P have not established that point beyond any reasonable dispute.

25. Strict Liability, Abnormally Dangerous Activities

- **R3 § 20 Abnormally Dangerous Activities:** (a) An actor 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 one of common usage
- **R2 § 520 Abnormally Dangerous Activities:** Factors to consider:
 - (a) existence of high degree of risk of some harm to person, land or chattels;
 - (b) likelihood that the harm that results from it will be great;
 - (c) inability to eliminate the risk by the exercise of reasonable care;
 - (d) extent to which the activity is not a matter of common usage;
 - (e) inappropriateness of the activity to the place where it is carried on; and
 - (f) extent to which its value to community outweighed by dangerous attributes.
- **Rylands Rule:** Person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if 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. He can only excuse himself by showing P fault, act of God
 - Owner must keep them in at his peril, or he will be answerable for natural consequences of their escape. He is the but for cause of harm to P
 - Can be beasts, water, filth, stench
 - Use of land typically for “non-natural” use
 - Doctrine transforms into “ultrahazardous” activities to “abnormally dangerous” (like blasting, containment and transportation of fuels)
- **Branch v. Western Petroleum, Inc.** – Water contamination caused by percolation of toxic chemicals into ground water from pond used for wastewater from oil wells.
 - D strictly liable for pollution of Ps wells caused by Ds disposal of wastewater. Punitive damages and damages for mental suffering are proper.
 - Ponding of wastewater adjacent to Ps wells is an abnormally dangerous and inappropriate use of land. Pollution of ground-water is a nuisance per se (another word for strict liability) and such polluters are strictly liable.
 - Though Ps wells had natural contamination, D liable for total injury bc but for def, contamination would be below dangerous levels
 - D actions reckless indifference of rights of others, punitive damages proper
- **Bennett v. Larsen Co.** – D sprayed pesticides repeatedly on land, honeybees died. First w/o warning, second D gave warning to honeybee owners
 - Landowner has obligation to make reasonable use of property so no unreasonable harm caused to others in vicinity, so landowner must take reasonable care to ensure pesticides not sprayed on/drift on others’ property.
 - R2d, 520: Balancing test of factors, BPL, totality of circumstances test.
 - Court did not err in not giving instruction, because pesticide spraying should not be considered an ultrahazardous activity
 - Pesticide spraying does not meet
 - C (risk can be reduced through exercise of reasonable care in spraying),
 - D (common activity which is necessary to ensure healthy crop growth)
 - E (necessary and beneficial activity to ensure production of adequate and healthy food- value to people outweighs potential for harm)

- **Christie, An Essay on Discretion (1986)**
 - First Restatement required activity to not be “of common usage” but case law started to make exceptions and focused on whether ultrahazardous
 - Second Restatement changed to abnormally dangerous, changed two-pronged test to factor analysis with interest balancing.
 - But Who is to make the determination of what is an abnormally dangerous activity and How is the required factor analysis and interest balancing to be done? Restatement says judge to decide bc might destroy an entire industry.
 - How is court to weigh factors? Unclear and hard to determine. Essayist prefers first Restatement, because easier to predict.
 - Benefits of R2: Wrote out things judges already considered, allows states to determine what is right for their own state
 - Christie’s opinion wins in the end with Third Restatement
 - Still a matter of law for court to apply factors.

26. Damages, Allocation and Ending the Case

- **Beginning a Case:**
 - **For Plaintiff:** Likelihood of success on liability issue drives decision at very outset for the P lawyer’s decision. Damages aren’t necessarily first consideration but second. Quantum of damages at trial if win on liability
 - Easier to represent someone with visible injuries
 - Lost one eye. Can see, but lost redundancy → you very high risk
 - Peril of overcompensation and under-compensation
 - Most pl worry not about recovering as much as they need. Almost all plaintiffs are in economic need. They have bills, lost wages, left unmet can lead to catastrophic events (foreclosure, bankruptcy)
 - Need to consider what is realistic (risk v. damages), how play out in trial
 - **For Defense:** What is our exposure? Risk? Worse Scenario? Damages?
- **Purpose of Torts:** Deterrence, Social utility of recognizing a harm has been done to stop private retribution, Corrective justice (compensation) drive damages question
 - Deterrence – always a question. Does a large verdict in a case that requires a large verdict cause people to be more careful?
 - Compensation- major function of the Torts system, and damages important
- **Notion of full compensation is a moral right**
 - Against physical retaliation
 - Transfers the cost from the innocent to the culpable. And allows the culpable person, for the company, to price the product accordingly, or for the individual, adjust the conduct in the future.
 - Against an economic boycott. We don’t want uncompensated people to picket. So better to compensate and hope manufacturer make better product
- **First Principle of Damages:**
 - Proven by **preponderance**, greater weight, of evidence (more likely than not)
 - Cannot be unsupported speculation, unrealistic assumptions, clearly contradicted
- **Principle of the single recovery** – Unlike a case of nuisance with an ongoing harm (odor still coming over every day), the tort event happened once. Damages persist (may need medical bills/lost wages), but for rule for a single negligence event, there is but one single trial, settlement, and recovery

- Negatives of Principle:
 - At time of trial, person may only be finished with first stage of surgery/recovery, unclear whether harm will heal/get worse → so difficult w/ single recovery and certainty principles (more likely than not)
 - Potential for substantial inaccuracies (child born birth trauma, so severely injured, child will be very expensive child to take care of, on other hand, children typically do not live a full life expectancy so when a jury makes a decision, operating on a tables on how long child will likely live)
- Advantages of Principle:
 - Efficiency for the system
- **Present Value:** All future damages must be reduced to their present value, because they will be paid now. True you can settle case with annuity that can payout over time, a verdict is always paid in cash (unless post-verdict settlement during appeal process).
- **Nominal damages**
 - No real economic loss, may not be emotional harm, but a dignitary right has been invaded, so there needs to be damages for that
 - Some jurisdictions allow nominal damages for negligence (others: some say \$0)
- **Compensatory damages**
 - Function to put harmed party back to the place where they were before the tort occurred insofar as money can do that
- **Punitive damages**
 - Sting of the shilling
- **Property Loss**
 - Value of destroyed item- FMV at time **taken**
 - Value of broken item- lesser of its FMV or the cost of repairs
 - Temporary loss of an item- cost of suitable replacement would cost to rent for the period of the temporary loss
- **Aberrant Jury Verdict**
 - Verdict was substantially larger than suspected → was generally not the jury's doing. Generally the failure of one side's case to be what they thought it would be or the selection of a theory that was a mistake or something of that ilk.
 - Probably a reasonable verdict, but based on other factor

27. Compensatory Damages

28. Economic Losses

- **R2 § 903 Compensatory Damages—Definition:** Damages awarded to a person as compensation, indemnity or restitution for harm sustained by him.
- **LOST EARNINGS**
 - Categories: Past lost wages, Future lost wages, Lost/diminished earning capacity
 - Lost/diminished earning capacity: Not working at time of injury but could've been working
 - History of wage increases in profession
 - Taken into account, all have economic value, consider all factors affecting earnings
- **North Carolina P.I. Civil 106.06 – Loss of Earnings**

- Damages for personal injury also include fair compensation for past and future lost wages and the reduced capacity to earn money experienced by the plaintiff
- In determining this amount, you should consider the evidence as to the effect of the plaintiff's disability or disfigurement on his earning capacity...
- The fact that the person was not working at the time of his injury had not yet begun work at the time he was injured does not, in and of itself, prevent a person from recovering fair compensation for loss of true earning capacity
- **Davis v. Foremost Dairies**- P on way to first day of work as teaching, struck by truck which ran stop sign. Vehicle damaged. Filed suit a year later. Sometime after impact, had headache and pain in neck and shoulder, multiple hospital visits for next 4yrs, prescription drug use. Discovered nerve impingement and facet joint problems. Got treatment. After treatment, completed college, got permanent job, lost child?, worked part-time to full-time throughout next few years. Trial 4yr after accident. Won \$2.6mil!
 - Judges make decisions as much as jury. Davis was judge decision (no jury)
 - Main Point: You have to prove your damages, and you have to prove by preponderance of the evidence
 - When she said she couldn't do work, that should've been enough on appeal, bc judge at trial believed her. Appellate court did not think so and concerned re: judge's analysis of damages
 - To recover actual wage loss, P must prove that she would have been earning wages but for accident. P's burden to prove lost earnings, length of time
 - Here, court held expert testimony sufficient proof of Davis's entitlement to past lost wages or reduction in wages.
 - Did not deduct money she DID make during those years though
 - Also did not provide evidence of social security contributions, projections of income, fringe benefits, etc.
 - Re: past household services, only evidence given was testimony and report. She said she had to work 6-7hr more a week on cleaning and she also had family members do it for her, so need to reduce that as well
 - If you are going to be able to work, it is part of the jury's job to calculate how much she can make in the future and deduct that.
 - To recover lost earning capacity, court should consider whether and how much P's current condition disadvantages her in work force (physical condition before and after, age, life expectancy, work life expectancy, inflation, past work record.
 - Life and Work Life Expectancy Table (artifact of women forced into layoffs, primary care-takers- changing)
 - Pl must provide medical evidence which indicates reasonable certainty that there exists a residual disability related to the accident.
 - Pl offered no evidence to support this, so reduced.
 - Same for household work.
 - Recovery for past and future household services have historically limited to cases where person totally incapacitated. Only in one court did future damages get awarded where no maid to be hired but replaced by substitutes (family)
 - Judgment reduced from \$2.6m to \$871,301.99.
- **Cole v. Esquibel** – Victim of car accident suing for damages for soft tissue injuries and fractured neck. Jury verdict for P economic damages of \$40,000, non-economic damages \$125,000, denied D motion for new trial or remittitur

- **Holding:** 1. Evidence did not support award of damages of future medical expenses, based on Ps past medical expenses; 2. Modify economic damages award by reducing it to amount supported by past medical expenses and future x-rays and CAT scan; 3. Appellate attorney fees were not warranted bc P defense of award was not frivolous.

29. Taxation

- IRS Code Section 104(a)(2)
 - (a) In general... gross income does not include (2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness;
- Suggests that emotional distress damages are taxable
- In settlement, be very careful how you describe
- IRS reads your settlement agreement and your complaint
- At least initially, don't put those things in the complaint. Leave out things that'll be taxable. If the case doesn't settle, can amend later. Can be explicit in settlement saying that even though punitive damages were plead, no punitive damages were recovered via this settlement
- Punitive damages are not deductible as a business expense for defendants
- There is not uniformity amongst states. Most states do not allow taxes to be taken into account.

30. Loss of Household Services

- If person cannot do work around house, and they cannot do those anymore, can they recover for loss to themselves and household unit? (dishes, cleaning → paid service or other members of family now)
- Pay rate to hire someone to do your household work
- Even if someone in household does it for you, you should still get paid
- Louisiana has a rule that you can only recover if you weren't having someone else do it for you previously

31. Medical and Related Expenses

- Without insurance – rack rate
- Government reimbursement rate
- With insurance, depends on the bargaining power of insurer, so rate changes
- So what amount should a defendant pay a pl who has incurred a medical bill?
- North Carolina – defendant paid rack rate, because that was the official charged rate, the bill rate.
- Most common rule = what you paid, or what was paid on your behalf- NOT what was billed.
- Why should you get paid for money you didn't pay out?
- Collateral source rule: If you had the good wisdom to have insurance, those were your prudence, so the defendant's payments should not be reduced
- In era of tort reform:
 - Increasing use of subrogation – either in statute by govt benefits or contract (private insurance/disability insurance) there were provisions that required you to repay the benefits you had received (that would keep the premiums for everyone down, and it

didn't do you harm, bc you were double-collecting and didn't need the money anyways)

→ why you get to collect what was paid on your behalf, because you

- Some payers want everything back despite the fact that a third was taken for attorney fees. Others allow cost of collection to be deducted (cost of witnesses, attorney fees, copying, etc.)
 - Medicare and Medicaid treat it differently
 - Medicaid want 100%
 - Medicare want cost of collection
 - Some jurisdictions have abolished the collateral source rule for private and public benefits – problematic
 - Pl can argue: I only collected this amount for my own bills, and that's all you can have, bc your K says for recovery for this and not my own out-of-pocket expenses
 - Life insurance and accident insurance
 - Do I have an argument if no
 - If you're getting the benefit of my insurance, should I be reimbursed for payments I paid for coverage? Haven't been litigated
 - Should it apply to future medical bills? Unclear.
 - Medicaid takes the view that if you're on Medicaid because of your injury, that out of a recovery, you have to set up a trust to pay future medical bills. Then Medicaid will pay once trust depleted. Relatively well accepted as something reasonable.
 - ADA requires appropriate education for special needs children, so do you need to pay for tutoring if child becomes disabled?
 - You get paid so you don't need government benefits, but there is no trust imposed for ADA
 - Hodpodge- We don't give tax advice, we do not give advice on post-settlement matters, we will direct you to counsel, but we cannot do it
- **Future Medical Bills**
 - Generally what gets created is a Life Care Plan (Projected Therapeutic Modalities)
 - Specialists who create comprehensive plan for people- talk to doctors and get opinion on what is more likely than not, research cost, and calculations on life expectancies → hand it to economist and creates economic analysis for plan and how it should be valued in present value terms
 - Present value: What a safe investment can earn and inflation
 - Interest rate for discount rate on present value estimates has BIG effect
 - Argue for increase for medical costs, because medical costs skyrocketing in comparison to interest rates

32. Considerations

- **Interest**

- Some jurisdictions allow for pre-judgment interest in tort cases
 - Interest clock starts running the day the lawsuit gets filed
 - North Carolina statutory interest rate is 8%
 - Important to get case filed as soon as possible.
 - If case takes 4 years, 32% tacked on

- Post-judgment interest (includes appeals)
 - In NC, 8%
 - Disincentive for def to do unnecessary appeals
 - When judgment entered through pendency of appeal and until judgment paid
 - Depends on jurisdiction
- **Pre-existing conditions**
 - May have exacerbated existing condition or irritated latent existing condition
 - When def activates previously dormant condition, universal law is the **thin-skull plaintiff**: the defendant takes their victim as they find them
 - If what you do is aggravate already active condition, result is different.
 - Already has 30% impairment of leg, they have to have their leg amputated because of your fault because of your fault, then you pay 70% of loss
 - “normally healthy” plaintiff
- **Mitigation**
 - Injured party has to take reasonable steps not to make their situation worse and reasonable steps to improve their condition
 - Whether a plaintiff appropriately mitigated his or her situation is in the law an objective standard (reasonable), but in reality, juries give great deference to the choices of individual plaintiffs if those choices make sense
 - Injured, but individual has fear of surgery, to some extent, that fear is going to be accepted by most juries
 - Plaintiffs who avoid noninvasive physical therapy appointments, in that situation, why was the person a no-show? If they're a no-show because time not available to them because having to care for children, spouse had left them (reasonable basis), then excused. If no good reason and physical therapy would've improved condition, then likely to recover only for what improved condition would've been.
 - Car accident, told to rest shoulder, goes out bicycling, lands on shoulder, is risking recovery, because it'll be hard to figure out whether injury from first or second injury and failed to mitigate harm or listen to doctor's orders
 - When treatment recommended but pl cannot afford it. General, rule is that you don't have to spend money you don't have or need for some essential purpose. In treatment, engendered by the defendant's negligence, not a failure to mitigate.
 - If you are allowed to make an argument in circumstances, you may very well by making an argument, have opened the door to otherwise inadmissible that becomes admissible because you opened the door
 - Fighting fire with fire

33. Non-Economic Losses

34. Pain and Suffering

- Means something different in every jurisdiction
- Strict pain and suffering to also loss of enjoyment of life, happiness, all non-economic damages (other than obvious physical results like disability or scarring)
- Measure of change in the quality in someone's life that is not quantifiable
- Life is about relationships, enjoyment, so taking part of life away
- Without this, you have less than full compensation, so less than full deterrence → loss that defendant caused and should be recognized

- This is money that doesn't have a place that it has to go. Other money generally for medical bills, etc. Some of this money can pay for the attorney fee who handled the case
- Over/Undercompensate here
- Per diem argument = to break down the amount you're asking for to a daily amount, which is easier for a juror to think
- One that is NOT permitted = golden rule argument (what you would want if you would have others treat you as you would do to them)
- Legal issue here: when a party or court believes a verdict is too high or too low is the *Meals v. Ford* – Remittitur or Additur
- Proffer to the court by the party and to the defendant that is to say that if you will agree to this amount, we will enter this judgment. If you do not agree, we will retry damages.
 - **Remittitur:** Designed to cure an award of damages that is grossly excessive w/o new trial or appeal. In some cases, an award by a jury is so completely out of line with the damages proven in the case that it is Unconscionable.
 - **Additur-** Damages assessed by a jury may be set aside when the amount is shocking to the judicial conscience—so grossly inadequate that it constitutes a miscarriage of justice—or when it appears that the jury was influenced by prejudice, corruption, passion, or mistake. An additur is not justified solely because the amount of damages is low. For example, damages of \$10,000 certainly will not compensate the family of a forty-four-year-old man who had been steadily employed as a plumber until he was permanently disabled in an auto accident. In such a case, however, the jury could have found that the plaintiff's Negligence contributed to the cause of the accident and reduced the damages proportionately, as is permitted in most states. An award of additur is not permitted in every state, nor is it allowed in the federal courts. Under the rules that govern procedure in the federal courts, a trial judge has the power to set aside a verdict for a plaintiff on the ground that the damages awarded are clearly inadequate, but then the judge's only recourse is to grant a new **trial**.
- **Meals v. Ford-** Mother of paralyze 6yo suing Ford for failure to install integrated child restraint in its car. P sought \$60m in compensatory and additional punitive damages. Ford argued true fault rested with driver of the at-fault vehicle and parents who failed to properly restrain child. After trial, jury found total compensatory \$43.8mil (15% to Ford, 15% to father, 70% at-fault driver). No punitive damages. Ford appealed.
 - **In Casebook:** Pain and suffering includes physical and mental discomfort, wide array of mental and emotional responses that accompany the pain, characterized as suffering such as anguish, distress, fear, humiliation, grief, shame worry. Generally not permanent injury (disfigurement)
 - Ct of Appeals, divided opinion, ruled verdict excessive, remanded with suggestion of remittitur to \$12.9 mil, so Ford's share \$1.935mil. Ford did not request remittitur, but in this case, interest of sound administration of justice. Out of proportion with other similar cases.
 - **Update:** Sup Ct says App Ct erred. Having taken strongest legitimate view of all material evidence in favor of verdict, assuming the truth, allowing all reasonable inferences, discarding ny contrary, jury verdict was supported by evidence and was within range of reasonableness. Jury verdict reinstated.
- **Caps (part of Tort reform)**
 - \$250K-500K and the unusual state connects with inflation

- One-size fits all remedy
- Many state supreme courts have found caps to be unconstitutional. NC rule has yet to be tested.

35. Wrongful Death

- **Statutory remedy in derogation of common law**
 - Legislature created remedy, also created pathway by which the damages flow.
 - Ordinarily, person who dies leaves a will and their estate dictates via the will
 - In wrongful death cases, is that the legislature says that the money recovered in the wrongful death case is outside the will and passes by intestate succession (the way the legislature orders that money will pass without a will).
 - Intestate succession created to protect widows and children.
 - Why? State wants money from statutory remedy to go to the people to be protected
- **3 kinds of wrongful death statutes:**
 - **As If Decedent Alive** - Just because you died, doesn't mean you don't recover. So you get what you would've been able to recover only that money is recovered by your estate or your heirs
 - Medical bills, pain and suffering, lost wages up until you die
 - **Survivorship** – claim that your heirs typically have for what you would've provided to them had you lived. The benefit of your advice, kindly offices, etc. This recognizes that when you die, other people suffer a loss.
 - Cannot recover medical bills.
 - Limitations on how broadly this extends (NC limits to those who would inherit via intestate succession, other states allow to certain degree of kinship)
 - **Hybrid** (NC example)- allows recovery for wrongful death up until time of death and the survivorship claim
- Shorter Statute of Limitations than ordinarily allowed in personal injury statute
 - In NC, 2 years while personal injury 3 year
 - We want these things resolved sooner. We want estates to get opened and closed in a reasonable period of time.
- Under a wrongful death action, defendant has all the defenses (factual and affirmative) if def had in any other tort action (contributory negligence, assumption of the risk, factual arguments)
- Most jurisdictions have a unitary cause of action. Only one lawsuit from wrongful death. NC arranges that the only plaintiff is the estate of the person who died. Individual people may recover, but they must all join in one action to recovery. In TX allows separate causes of actions for separate heirs.
- **DiDonato v. Wortman** – NC Supreme Ct held that viable fetus is a “person” within purview of wrongful death statute. As a result, P can successfully maintain case for wrongful death of stillborn child. Barred from recovery for pecuniary loss, loss of society and companionship, damages expressly available under wrongful death statute.
 - In most states, actions for wrongful death exist solely by virtue of statute
 - Damages recoverable for death by wrongful act include:
 - (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
 - (2) Compensation for pain and suffering of the decedent;
 - (3) The reasonable funeral expenses of the decedent;

- (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:
 - a. Net income of the decedent,
 - b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
 - c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;
- (5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;
- (6) Nominal damages when the jury so finds
- Tort claims brought by children to recover for fetal injuries are recognized in virtually every state, including North Carolina
- Stillborn can only recover:
 - (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
 - (2) Compensation for pain and suffering of the decedent;
 - (3) The reasonable funeral expenses of the decedent;
 - (5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;
 - (6) Nominal damages when the jury so finds

36. Punitive Damages

- **R2 § 908 Punitive Damages**
- (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future
- (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.
- Juries rarely award punitive damages
- And it is rare that they are over the top. What is more troubling and has always been the issue, is that the jurors can give different amount of punitive amounts in different trials.
- All states that allow punitive damages, require exacerbated negligence or
 - Not allowed for ordinary negligence
 - Prove by preponderance of the evidence or some higher standard like clear and convincing evidence
 - NC: (tort) was accompanied by outrageous or aggravated conduct (actual malice, oppression, a gross and willful wrong, insult, rudeness, indignity or a reckless or wanton disregard of the plaintiff's rights.
 - An act is malicious when the defendant is motivated by personal ill will or spite. An act is willful if the defendant intentionally fails to carry out some duty imposed by law or K which is necessary

- If you commit intentional tort (murder/battery) liable for punitive damages
 - AZ has higher standard: to prove this “highly probable” – clear and convincing
 - Many jurisdictions say that an employer who has an agent who would be responsible for ordinary negligence, will not be responsible for punitive damages unless employer’s conduct was implicated by the circumstances
 - Tort Reform Result: Enhanced standards to prove it. And Caps on Punitive Damages (higher of \$X or 3X compensatory damages). Put an upper bound on it.
 - Does this reduce deterrence?
 - General rule that juries should not consider wealth or property of defendant to render verdict but PUNITIVE damages are an exception to this rule for the defendant only. Once plaintiff makes prima facie case for punitive damages, then jurors can receive information as to wealth of defendant under theory
 - 14th Amendment – due process – argument against punitive damages
 - Pandora’s box for SCOTUS. More troubling, because kept saying what rules are then came **State Farm v. Campbell**
 - Unlikely group of dissenters: Thomas, Scalia, Ginsberg
 - Out of state conduct important consideration
 - Problematic that substituting its judgment for the jury, judge, highest court of the state. Tort law not federal question and saved for the states
 - More than single-digit multipliers were presumptively unconstitutional
 - Very high punitive damage awards are set aside by trial judge or state supreme court. The setting aside of those awards gets attention.
- **Factors of Punitive Damages**
 - Degree of reprehensibility
 - Disparity between punitives and compensatories
 - Sanctions for comparable is conduct
 - Civil penalties
 - Criminal penalties
 - Other punitive damages previous determined

37. Allocating Damages – Who Pays the Plaintiff and How Much?

- **R3 § 26 Apportionment of Liability When Damages Can Be Divided by Causation**
- (a) When damages for an injury can be divided by causation, the factfinder first divides them into their indivisible component parts and separately apportions liability for each indivisible component part under Topics 1 through 4.
- (b) Damages can be divided by causation when the evidence provides a reasonable basis for the factfinder to determine:
 - (1) that any legally culpable conduct of a party or other relevant person to whom the factfinder assigns a percentage of responsibility was a legal cause of less than the entire damages for which the plaintiff seeks recovery and
 - (2) the amount of damages separately caused by that conduct
 - Otherwise, the damages are indivisible and thus the injury is indivisible. Liability for an indivisible injury is apportioned under Topics 1 through 4.
- a. Scope. Dividing damages by causation and apportioning liability by responsibility in the same case has not been widely addressed by statute or case law. Most rules about dividing damages by causation were developed before comparative responsibility.

- No party should be liable for harm it did not cause, and an injury caused by two or more persons should be apportioned according to their respective shares of comparative responsibility.
- A working system must be capable of being understood and applied by courts and juries in a reasonably efficient manner, and available evidence sometimes leaves uncertainty that the legal regime must accommodate.
- c. Employing the two-step process in Subsection (a). Under Subsection (a), the factfinder divides divisible damages into their indivisible component parts. The factfinder then apportions liability for each indivisible component part.

38. Responsibility for Paying Damages

- Defendant should pay but sometimes cannot.
- Joint and several liability for all or some losses (economic v noneconomic losses)

39. Ending the Case

- Typically sign a settlement agreement (contract)
- Can be decided by a jury, entered into by judge, appealed, and so on.

40. FINALE!

- Attempt to use the Tort system to balance one person's need for autonomy against another person's goal of safety
- Society's desire for robust economic activity against safety against individuals
 - Prevent people from being injured and becoming wards of the state
- When you study for your exam:
 - Rules are your starting point.
 - Recognizing where to apply particular rules.
 - Ability to make an argument the virtue of application of a particular rule to a particular fact situation
 - Rule and facts in case to craft argument