Immunities

Federal Governmental Immunity

1. **Discretionary Function Exception**

2. **Intentional Tort Exception: Cannot Sue US for IT**

3. **US cannot be liable in accordance with state law imposing SL**

4. **Cannot be liable for Punitive Damages**

State Governmental Immunity

Local Governmental Immunity

A. Rule: Generally liable for torts of their employees up to limit of their insurance policy.

Intra-family immunity

B. Husband and wife

0. Majority Rule: Immunity substantially eroded, today it is possible for spouses to sue one another for INTENTIONAL TORTS. (spousal rape)

1. Almost all states that haven't abolished the immunity nonetheless permit a husband or wife to sue one who is vicariously liable for the other spouse's torts, even if the spouse himself could not be sued. Thus if a husband and wife work for same employer and H negligently injures W in a car crash while on joint business trip, W could sue employer under respondeat superior even though the inter-spousal immunity might bar her from suing her husband directly.

C. Parent and child

0. Rule: Children are now allowed to sue their parents for intentional torts, but majority of J's preclude mere negligence suits.

III. Policy matter: Courts determine that it is fair and just to impose obligation on others. The claim against the 3rd party is not that they committed the tort, but that they are LEGALLY RESPONSIBLE FOR THE TORTS OF ANOTHER.

IV. Categories of VL D's are fixed

A. Employer employee (Most important) (Respondeat Superior)

0. Employers are vicariously liable for the torts of their employees committed in the scope of employment.

) Exceptions: Most important—employers generally not liable for employees IT unless the employment involves committing such torts (bouncer in bar or involves a position of trust (taxi driver/day care provider)

a) Most commonly litigated issue: whether the tort was committed in the scope of the employment?

b) BUT NOT INDEPENDENT CONTRACTORS

(0) Do they use their own supplies?

(1) As Closely managed?

(2) Do they direct or manage their own work?

V. UPS Driver/Truck

A. Caused accident; court found VL bc he was working, but if he takes a frolic to visit his GF, then he is not within the scope of his employment and VL does not attach.

VI. Outside of Employment

A. VL if Joint Enterprises: Agreement between on of parties to enterprise together to achieve common goal (starting a law firm; developing residential complex; going on trip together or each pays AND EQUAL SHARE OR EQUAL SAY IN HOW ENTERPRISE IS CONDUCTED)

VII. STATUTORY SCHEMES EXIST THAT PROVIDE SL THAT DID NOT EXIST AT CL

A. Columbine: Statute imposes capped VL for parents of children who commit torts.

A. AT CL, parents are not liable for the TORTS of their children—not just negligence

0. RS 316: But Liable for Negligent Supervision

VIII. Indemnity

A. An employer who has to pay for his employees negligence can recover from his employee

Intentional Torts

1. Battery
2. Assault
3. False Imprisonment
4. Intentional Infliction of Emotional Distress
5. Trespass to Land
6. Trespass to Chattels
7. Conversion

Prima Facie Case

I. Act, Intent, Causation, Injury (AICI)

1. Intentional torts all follow the same element pattern, but what distinguishes the different torts are the elements of intent and injury.
2. Act
   [Maj.] Restatement §2: "External manifestation of the actor's will and does not include any of its results, even the most direct, immediate, and intended."
) Ex: If A faints or has epileptic seizure, other reflexive motions, and falls on B, A did not act voluntary.
   a) Ex: If A pushes B into C, B did not act for the purposes of intentional torts because his act was not voluntary.
3. Intent
   - Intent takes on a special meaning in the context of intentional torts. Varies by IT.
     - **[Maj.] Restatement §8A: "Actor (1) desires to cause consequences of his act, or (2) believes that the consequences are substantially certain to result from it."**
   - Policy

        - Confine intentional torts to a level of culpability that is more than mere carelessness.
    - Motive
        - Does not matter if you did not have ill motive. As long as you desired the outcome, intend exists.
    - Substantially Certain
        - **[Maj.] "Substantially certain" has been construed by courts to be inevitable, or something just short of inevitable, see Batiste, (Believing someone may, or even probably will get hurt in workplace does not rise to level of intentional act)**
    - If less than substantially certain, then no IT, but reckless or negligent
    - Not due to repetitions (every time you do it you must be certain to happen)
- Transferred Intent
    - There are three axis of transferred intent. The main one revolves around transferring intent to a third person. However, you can "transfer" liability from one tort against another, i.e. a intended assault becomes a battery, or vice versa. Furthermore, you can try to commit an offensive contact, but end up committing a harmful contact.
        - **As long as D held the necessary intent with respect to one person, he will be held to have committed the tort against any other person who happens to be injured. 3 Types:**
        - **Third Party**
        - **Battery<-->Assault**
        - **Harmful<-->Offensive**
- **Insane People and Children**: Everyone is liable for intentional torts, even insane people and children, see Weisbart (Ruling that even if not guilty of technical negligence, children can be held liable for battery if intent is present (even if eventual harm not intended)
- Does not need specific target, can have intent to batter "someone" (throwing shoe at stands)
- Dual v. Single Intent Jurisdictions
    - If single intent, all you need is conduct that RP would find H/O, do not need to intend it. Much easier to battery if single intent
        - "Happens to be H/O"

Causation

- Actual Causation
- Legal (Proximate) Causation

Injury

- [**Maj.] Restatement: Invasion of any legally protected interest of another.**
    - Cf. "Harm": Existence of loss or detriment in fact of any kind to a person resulting from any cause (can be physical, emotional, but can also include nominal damages
    - Injury v. Harm
        - A harm can but does not have to be injury [legally protected interest]. You can have trespass, which can result in no harm, but P can still maintain action against D. Same thing for assault—P expects to be touched but is not (he can sue)
    - Physical Harm: impairment of
        - Human body
        - Tangible property (land or chattels)

Battery

Restatement §13: Battery is the an (1) act (2) intending to cause (3) harmful or offensive (4) contact with the person of the plaintiff AND a harmful contact with the person of the other (5) directly or indirectly happens.

Types of Batteries

- Regular

- Medical
- Sexual

(1) Act

[Maj.] Restatement §2: "External manifestation of the actor's will."

- actor is liable for battery. [P did make it known]

(2) Intending to cause

Battery requires more than just a deliberate act; it must be a deliberate act that is (1) desired or (2) substantially certain to occur. Without the desire or substantial certainty requirements, A's act can only be something less than battery, i.e. negligence.

Two Types of Intent (Restatement §16 [1])

- D intended to cause a harmful or offensive contact OR
- D intended to cause an imminent apprehension of such contact [Assault],
  - Harm: Need not intend to harm
  - Did not need to know extent of harm
- Substantially Certain

Single v. Dual Intent**: Majority Rule is Dual Intent**

Majority Dual Intent Rule: You need (1) an intent to act and (2) an intent to cause H/O

- See White v. Munoz
  - old woman with Alzheimer's struck π in jaw, not liable bc there's
  - no dual intent i.e. the punch + "get out" ≠ enough to prove that ∆ intended to hurt nurse.
- Must (1) intend the contact and (2) intend for it to be HO
- An act without both intents will not make a P liable even if the act involves a reasonable risk of inflicting harmful contact.

Minority Rule: Single Intent

- Just require intent to contact.
- If single intent, all you need is conduct that RP would find H/O, do not need for D to intend it; essentially S/L [RS 3rd suggests single intent+ consent]

Children

- Weisbart v. Flohr: 7 year-old ∆ guilty of battery when he shot a bow & arrow in π'seye after telling π "if you don't get off the lawn, I'll shoot."
- Whether child was playing (no parental liability) or mean spirited (parental liability) makes a difference
- **Child can be liable for IT, but not negligence acts b/c no requisite mental state capacity for negligent conduct.**
- Parental Liability
- **Rule: At CL parents aren't vicariously liable ("let kids be kids") unless they're aware of the kid's violent propensities.**

Intent of Legally Insane People (Applies to other IT torts but talked about here)

- **Majority: legally insane persons can be liable for their intentional torts b/c they can still act volitionally (not purely reflexive action w/o mind)**
- Law still maintains mind/body distinction; reflexive acts do not go to mind
- Polmatier v. Russ : Rational choice is not needed--even if choice is irrational, sufficient b/c it is still a choice
- Liability: Want to prevent people from faking insanity to get out of IT liability; victims need to be compensated
- Restatement §283B: Unless actor is a child, his insanity or other mental deficiency does not relieve actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.

(3)Harmful or Offensive Contact
- Harmful
- Act that causes pain or bodily harm
- Restatement §15: Bodily Harm: "Any physical impairment of the condition of another's body, or physical pain or illness."
  - Ask yourself: How bad is the harm? If minor, can be limited to nominal damages.
    - Offensive: **Contact is offensive if a "reasonable person" in the circumstances would find the particular contact offensive.**
    - OBJECTIVE STANDARD: DO NOT CARE WHAT P THOUGHT, BUT WHAT REASONABLE PERSON WOULD THINK
      - Minority Rule: Egg-shell plaintiffs must make it known
        - Wishnatsky: "Rude and abrupt", "harsh words", "ranting" is too sensitive unless you make it know. [P did not make it know]

      Versus Cohen: If female patient makes it known that she does not want male seeing and touching her while she is naked in operating room, and the hospital agrees, the male nurse knows, and still touches and sees the female patient, the

(4) Contact with the person of the plaintiff
- Does not need to physically touch or even be present
- Consent: If A exceeds scope of consent, contact becomes offensive.
- Indirect Contact: Need not be imminent, can be indirect
  - Lacing poison in drink for B to drink later that night.
- Policy/Rationale for Battery
  - Bodily integrity and decisional autonomy
- Medical Batteries
  - Courts more willing to find more conduct offensive because law recognizes the importance of personal space and integrity.
  - EXCEPTION: Emergency cases
  - Ask: Was patient conscious? Was a recognized proxy there (parent, guardian, spouse) there to provide consent?
  - DIFFERENCE: When medical professionals treat P w/o consent—>battery. When they treat P with consent but P they exceed consent (operate on both ears instead of one) or if they do not sufficiently inform P then usually—>negligent medical malpractice

Assault

I. Restatement §21: An actor is subject to liability to another for assault if (1) Acted (2) with intent (3) to place the victim in apprehension of (4) imminent harmful or offensive contact or to make such a contact and (5) the victim must reasonably be placed in apprehension of such a contact.

(1)Acted

Same as Battery

(2) with intent

Same as Battery (need desire/purpose or substantial certainty to cause H/O apprehension)

(3) to place the victim in apprehension of

NOT FEAR, but APPREHENSION

Apprehension: anticipating a blow, not fright

(4) Imminent H/O

Restatement §29: **Does not mean immediate, but there will be no significant delay**. A does not have to be right next to B, but needs to be close enough to he can reach B at once.

Context-Specific
- Fear of future contact will not support assault

Pranks/**No need to cause actual harm**

RS 19: D is liable for not only contacts that cause physical harm, but also those that are insulting.

- If A knows B's gun is fake, then no assault. But if A does not know, it does not matter than B's gun is fake, it is still assault.

"Words Alone" Restatement §31: **Words do not make the actor liable for assault unless together with other circumstances** they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person.

Dickens: Threats of castration, coupled with P's being chained and battered before is enough to cause an assault [but was not because of SOL]

Comment § 46: Any remedy for words which are abusive or insulting or which create emotion distress by threats for the future are founder under §46&47

- **Children can be liable for assault**
  - 316: A parent is under a duty to exercise reasonable care so as to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent:
  - (a) knows or has reason to know that he has the ability to control his child, and
  - (b) knows or should know of the necessity and opportunity for exercising such control.
- Insanity or mental def=can be liable for Assault.

IIED

Restatement §46 IIED: One who has by (1) extreme or outrageous conduct (2) intentionally or recklessly (3) caused severe emotional distress to another is subject to liability for such emotion distress, and if bodily harm result from it, for such bodily harm.

1) [Acted] Extreme or outrageous conduct

Was the act "odious, but not outrageous?" (via Jones)

- Intolerable in civilized society

Was it criminal act? If so, then you can make argument that it is outrageous

- Period of time that emotional distress took place (Isolated?)
- Relationship of P and D
  - If close relationship, boss/worker, then might be more likely
  - D's knowledge of P's sensitivity

(2) Intentionally or Recklessly

- Intentional (Desire/Purpose/substantially certain) or Reckless (willful and wanton)

KEY DIFFERENCE—Lower standard of fault: In most jurisdictions, can make out claim of IIED through "recklessness": The tortfeasor may be genuinely unaware that his or her conduct is outrageous and could cause emotional distress.

- Policy: IIED is such a bad tort we can to prevent it as much as possible.

(3) caused severe emotional distress (actual and proximatE)

- Reality: Courts do not like IIED and will only give it under strict circumstances (if act is really outrageous)
- Must be truly severe so that no reasonable person could expect to endure it
- Did P make it know? Cohen?
- Requires Actual Evidence of Emotional Distress on P
- Can show by physical symptoms (heart attack, stroke, etc)
- If emotional, need concrete evidence that its not made up
- Show psychiatric help, missed work (did P keep working?)
  - Crying and shaking not enough without concrete evidence like doctor, see Jones v. Clinton
- Common Situations
- Practical jokes are enough for IIED

- Tricking P into searching for fake gold and then humiliating her enough for IIED, Nickerson
- Suits involving the D's handling of **dead body** are enough for IID
- Newspaper listened in as P talked to dead son's body then printed statements in paper, Green v. Chicago Tribune
- Overly aggressive debt collectors
- Abusive phone-calls and language, Rugg v. McCarty
- By-standers can be plaintiffs
- **But usually tort is Negligent Infliction of Emotional Distress**

Limitations

- 1st Amendment
  - Freedom of speech: Strong barrier to liability when it touches on matters of public concern

False Imprisonment

I. **Maj.—Restatement §35: A person is liable for false imprisonment if he acts intending to confine the other or a third person within boundaries fixed by the actor.**

Intent

- Purpose/Desire or SC to confine

Motive irrelevant; D may think he has right, does not matter

Injury

Confinement must result directly or indirectly result from the act and the other must be "conscious of the confinement or harmed by it"

Boundaries: Need not be physical; person just has to feel as if they can't leave

- Indirect confinement

Consent/Privilege Ambiguity—Many J's Consent require D to plead Consent and Privilege as AD.
NO CONSENT
[Maj.] Usually consent and privilege are affirmative defenses and place burden on D. However, because of ambiguity, some jurisdictions place consent burden on P.

Standards: Merchant/Cop v. Private Citizen

- If D is merchant who suspected P of shoplifting, or law enforcement officer who suspected the P of having committed a crime, the lawfulness of the confinement turns on its reasonableness, see Niskansen
- If D is a private citizen, as opposed to merchant or cop, lawfulness depends first on whether (1) the D was correct that P needed to be apprehended, and then on (2) reasonableness.

. Not perpetual

Trespass

Voluntary unauthorized entry on another's land

I. Classified as an IT but treated like a Strict liability tort to allow for both nominal and punitive damages which are generally unavailable under SL

.

Act: Volitional/voluntary unauthorized entry on another's land

0. Need not be person (throwing rock onto land)
1. No intent to trespass needed
2. Mistaken/good faith trespass still liable (didn't know it was someone else's land)
3. NOT Trespass: stumble and fall on someone else's land (not voluntary)

Intent: Intent to enter land, not intent to harm the D or land in any way.

Injury: Physical invasion on someone's possession of land

4. CL: Surface and airspace, but not any more because of easements
5. No actual damages necessary; can be nominal
6. If actual damages: liability unless act was not volitional

Causation

Affirmative Defenses

7. Necessity
) Public Necessity: Generally, actor does not pay for damage, but some states have statutes that force D (usually govt) to pay, while others have special funds to pay in these situations, see Wegner v. Milwaukee Mutual
   a) Private Necessity: Actor must pay for damage [limited privilege], see Vincent Lake
8. Consent/Invitation (can be implied or revoked)

Policy: Property rights are absolute; allows people to receive nominal damages even if no actual damages.

Trespass to Chattels & Conversion

I. Trespass to Chattel: Interference with property right.

. Act: Volitional/voluntary physical interference (damages included) or destruction of chattel
   0. Does not matter if you thought the chattel was yours

A. Intent: BUT interference must be intentional, or else can bring claim under ordinary negligence
   0. Mistake of Ownership: Do not need intent to cause harm, just intent for act to occur
) A takes B's book thinking it is A's. A draws and highlights book; liable for trespass to chattels

B. Injury: Generally court requires some actual harm, (compare to Trespass to Land)
   0. Taking possession away is enough to constitute actual harm

C. Recourse: Can return chattel (compare to conversion, where you keep chattel put pay full value)

II. Conversion: D so substantially interferes with P's possession or ownership of property that it is fair to require the D to pay the full value of the property, RS 222

III. Big Differences Between T/C and C

. Extent of D's possession (longer=C)

A. D's good or bad faith
B. Degree of Harm to property
C. Inconvenience and expense
D. Damages: TC P gets back chattel; In C D keeps chattel but pays full price to P for it

Affirmative Defenses to Intentional Torts

Affirmative Defenses

1. Discipline
2. Consent
3. Self-Defense
4. Necessity

Discipline

I. Majority Three Prong Test: (1) Was action disciplinary, (2) was corporal punishment appropriate form of punishment, and (3) was it reasonable?

- 14th Amendment: Fundamental right to to child rearing, see Society of Sisters v. Pierce; State has compelling interest ing protecting welfare of child

Restatement §147: Parent has privilege of using reasonable physical force or confinement to discipline their child.

. **Force must be for disciplinary reasons and the must be reasonable in degree**
Factors to Consider:
Discipline: Must believe that physical force is reasonably necessary for proper control and education of child
1. Is person parent/someone parent has delegated right to?
2. Location + Tool
3. Child's age, sex, physical condition, history
4. What child did
5. Child's influence on other children
6. Community matters (Blacks v. Whites)

a) Degree: of force must be reasonable (**objective)**
Is there alternative means ??? If so, must use.
1. Proportionality of force to child's offense?
2. Degrading to child?
3. Spanking usually ok, but there were bruises, Willis

II. Cases

. Willis: Mom hits child with belt after stealing clothes. Beating left bruises, state found out and sued Mom.
R: Mom had right to

Consent

I. Restatement §892: Consent is the willingness in fact for conduct to occur. The consent can be (1) express, implied and can be actual or apparent (can overlap with either express or implied) and if so is (2) effective unless there is lack of capacity or if the consent exceeds scope.

II. (1) Willingness/Voluntariness (2) Scope of Consent (3) Capacity

. Start with Express/Implied then move to Actual/Apparent

A. Four Types: Express, Implied, Actual, Apparent
1. Express —Explicit words
2. Implied—Can be manifested by words/actions, look to circumstances and context
3. **Apparent—Objective standard; BY ALL APPEARANCES if words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are effective**, Restatement §892 & Slominiski
4. Actual—P actually did consent

B. Ineffective Consent
1. **Majority Rule Burden: Is on P to show D must know/have reason to know of the incapacity to consent, not necessarily the cause of the incapacity, Reevis**
2. Lack of Capacity: Will be invalidated if P is legally incapable of giving consent
   - Legal Capacity
     - Age (Minority--Policy is that parents have to consent for minor child, even if child has relevant decision making ability--"Protect child from his own immaturity".
   - Employment: Worker agrees to violate safety rules in order to work for employer
   - Unconscious
   - Coercion; duress, mistake, fraud—compelled to give consent when actor is unwilling

C. Exceeding Scope of Consent
1. NOT EXCEEDING CONSENT: If reasonable person can see that an act could result in some invasion, assenting to the act is equal to assenting to the invasion.
Hellriegel: Consent to being thrown in lake can constitute consent to being injured.
- Assent to an act is assent to substantially certain consequences of act.
2. EXCEEDING CONSENT: Cohen: Cohen consented to being operated on, but under certain conditions, which were violated.

D. Legal Trend (Policy)
1. Society has found medical and sexual batteries to be much more intrusive, if not more injurious. Argue that against D in medical and sexual context. **In medical context, courts prefer ACTUAL EXPRESS CONSENT**

E. Consent in Medical Settings
1. Express written consent—very general catch-all consent is frowned upon by courts
2. Person has right to withhold consent, even if it results in death
- But parent does not have right to withhold life for child
- In some jurisdictions, even adults cannot withhold consent if they are responsible for defendants

Self-Defense

Self Defense—Defense against a battery

. **Standard: Force must be reasonable, i.e. must be (1) justified (reasonable) and (2) proportional**

Justified: Must be justified—D must have reasonable belief that he is being threatened with a battery AND

Must prove that there is a threat: Factors (Brown)
1. What was the character/reputation of attacker?
2. How aggressive was the attacker?
3. Relative size/strength of parties
4. Attackers overt acts or verbal threats
5. Possibility of peaceful retreat—>MUST RETREAT IF POSSIBLE (UNLESS HOME/BUSINESS)
6. Did self-defender provoke the attack? (Lane--If provoked, only punitive damages from the attack can be mitigated)

a) Reasonableness of belief is key—>reasonableness based on facts/social norms

1. Proportional: Force must be proportional to the threat under circumstances.

Breaking an old, infirm man's face for punching you in the shoulder is not proportional, Lane
- Can't shoot if he yells at you
- Threat must be credible, D must reasonably foresee a danger to himself or his person
- If you are in an unlawful fight, you cannot claim SD, but no one is liable in tort unless the act is unproportional

Use of Deadly Force

A. Use of deadly force (calculated to cause death/SBH) in self defense

1. Must be justified – reasonable belief that you're being threatened with death/SBH (or to prevent felony of violence or capital felony) AND

Reasonableness of belief is key to reasonableness based on the facts/social norms

Ex: Brown – security guard justified in using deadly force when drunken shirtless belligerent person points a gun at him and says he'll kill him

2. Force must be proportional to deadly force always proportional if threatened with death/SBH
Guns always deadly force

But: can never use deadly force to protect property on its own, even if person was trespassing

Can only use reasonable force in protecting property b/c deadly force never proportional/reasonable à includes guns, death traps, guard dogs

(0) Katko: spring-loaded shotguns to deter trespassers after "no trespass" signs fail is not okay
(1) Policy: human life is always more important than value of property

a) Exception: if you're at home, can use deadly force; no retreat needed
(0) Policy: law lets you presume that anyone who enters home without permission is threatening you with deadly force

b) Exception: some legislatures have abrogated this rule to allow deadly force in defense of property in certain circumstances (like trespass)
(0) Rossi statute – SL for injury by guard dog; but if person was trespassing, no SL (unless necessity)

Necessity

Public Necessity

I. Majority Rule: D is privileged to harm the property interest of P where it is necessary to do so in order to prevent great harm to third persons or to the D herself. If public necessity, then D usually does not have to pay the innocent party unless there is a compensation fund (Wegner) or if the innocent party can argue for that a taking occurred. At CL, if the damage was not a taking, there was no duty to compensate.

Compensation

Rule: The person who injures the P's property and successfully claims the privilege of public necessity, will never herself be required to reimburse the P for the damages suffered. And generally, the community as a whole (i.e. state, town) has not as a matter of CL usually been required to compensate the victim.

Exception to Rule: However, several states have enacted statutes for providing compensation to the victim in a case of public necessity. Thus, the takings issue will never arise, see *Wegne*r.

Property Damage (Takings v. Public/Private Necessity)

A. Minority Wegner Rule: In situations where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, is for the municipality to compensate the innocent party for the resulting damages, Wegner (FBI destroyed P's house to capture convict; P wants compensation even though FBI was reasonably doing a public good)

Private Necessity

I. Majority Rule: D is privileged to harm the property interest (ie can damage property or trespass) of P where it is necessary or appears to be reasonably necessary to do so in order to prevent great harm to third persons or to the D herself, but if P causes actual damage, D must pay for the damages D caused, see Vincent; D also has duty to exercise reasonable care.

. If D is only protecting her own interests, or those of a few private citizens, the privilege is private.

II. Apparent Necessity

. The privilege will exist as long as the necessity was reasonably apparent, whether or not it in fact existed. (True for both public and private).

III. Reasonable

. **Rule: If P can show another person in her shoes would have thought it was reasonable, then her trespass is privileged for that moment. "In her shoes"--try to get jury to think about it as if they are an 8-yr-old girl, but it's up to the judge and jury to decide how specific to make their reasonable person assessment. Here, she was privileged by necessity. Rossi**

IV. Personal Injury

. The privilege of public necessity is usually used to justify injury to P's land or chattels. However, in a sufficiently compelling case, it could also justify the infliction of injury to the person. But this only applies where there is no other less-damaging way of combatting the danger.

Negligence—Duty

1. Main Channels to Establish Duty
    1. Affirmative
    2. Exceptions to No Duty Rule
    3. Premises Liability
    4. When Judge Creates a Policy Based Duty
        1. Multi Factor Test

Majority Barker Rule—Duty to Guard Against "Some Injury" Reasonably Foreseeable Risk of Injury (NEED KIND but not manner & extent need not be)

Multi Factor Duty Analysis When Judge Wants to Create a New Duty Or Do Not Want Duty to Apply or They Want to Change It (Related to Strauss Below)

Exception to Default Duty—Strauss—Even When there is a default duty, court refuses to impose it as policy matter.

. Rule: Even if a D should have a duty, courts have the power to not impose the duty when it makes sense—as a public policy matter—to limit liability to a controllable degree and protect the D against crushing exposure to liability because imposing liability would do more social harm than social good.

A. Traditional No Duty Rule: An actor who has not created a risk of physical or emotional harm to another owes no duty to another unless an affirmative duty applies.

Exceptions to NDRAW

Exception #1: Statutory Obligations Imposing DRAW

RS §38: When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and to determine the scope of the duty.

Exception #2: D's Prior Conduct Imposing DRAW

B. Majority Rule: When an actor's (1) prior conduct is (2) not tortious (3) creates a continuing risk of harm of a type (4) characteristic of the conduct, D has duty to exercise (5) reasonable care to prevent or minimize the harm.

Exception #3: Duty Imposed on Basis of **Special Relationships**

Rule: As a general rule, at CL one person owed no duty to control the conduct of another. However, if there is a special relationship with either (1) the person whose conduct needs to be controlled or (2) in a relationship to a foreseeable victim, courts will carve out exceptions to the no duty rule by recognizing an affirmative duty where it would normally not exist because of the special relationship between the actors.

C. SR #1: By statute or rule or contractual relationship

D. SR #2: Inherent Nature

E. SR #3: Dependence & Ceding Self Control SR

F. SR Rule: Duty to Control Others [LAC v. Ward Parkway]: Duty to Protect Against Criminal Acts of Third Parties

Rule [Applied to Business Owners]: In this context, a special relationship arises when

KNOWN PERP: (1) a person, known to be violent, is present on the D's premises or the person conducted himself in a dangerous manner;

UNKNOWN PERP: (2) P shows sufficient evidence that would reasonable person should have anticipated danger and taken precautionary actions to protect invitees from criminal attacks of UNKNOWN third parties. The D only has to foresee the TYPE of injury, see LAC (finding that rape was sufficiently similar to prior crimes in regards to location, time, and type of crime to make the rape foreseeable)

G. SR Rule: DRAW in Governmental Context—Public Duty Doctrine

Rule: Under the public duty doctrine, the government defendant has no duty to provide public services to any particular citizen unless there is a special relationship between emergency personnel--police officers, firefighters, EMTs--and an individual. A general duty owed to the public may become a specific duty owed to an individual if the emergency personnel and individual are in special relationship different from that existing between the gov't actor and the citizen generally. The Government must act outside of the normal scope of services it gives to the public generally, see Parvi.

A special relationship in PDD is determined if (1) there is direct contact/specific undertaking between victim and emergency personnel so that victim becomes reasonably foreseeable AND (2) specific assurances create justifiable reliance by the victim

H. SR Rule: Duty to Third Parties [Victims] Based on SR with PERSON POSING THE RISK

Exception #4: Promises and Reliance Imposing a DRAW

II. Jurisdictional Option #1: CL trichotomy (entrance onto land in 3 categories):

III. Jurisdictional Option #2: ("Modern")

IV. Jurisdictional Option # 3: (California/Rowland)

V. Premises Liability includes Landlord-Tenant Law

VI. DV Law:

VII. Bystander Recovery

MAJORITY TEST "Dillon": An alternative to the zone of danger rule for bystanders was developed by the CA SCT in Dillon v. Legg.

Majority: CL Traditional rule does not allow for pure economic loss. P may not recover anything for his economic losses, since he has not suffered any personal injury or property damage or there is no contractual relationship or other special relationship.

Minority rule: Can bring stand-alone economic harm if there is a specifically foreseeable P with particular, foreseeable damage.

I. DO NOT USE AT DUTY: Cardozo's Foreseeability Rule—While Cardozo's foreseeable P/zone of apprehension rule is fact specific and thus better placed at causation, courts have applied it to duty analysis.

II. DO NOT USE AT DUTY: Andrews Foreseeability Rule—Even if P is outside zone of danger, D still owes a duty to (1) those P's reasonably expected to be injury and (2) those P's actually injured.
. Thus, foreseeability is not a matter of establishing duty (RS approach).

III. Duty v. Scope of Liability (Prox Cause)
- Because duty is a question of law, it is a preferable means for addressing limits on liability when those limits are clear, based on bright lines, and are of general application, and when they implicate policy concerns, and when resolving liability is particular desirable.

- Exception to Default Duty—Strauss—Even When there is a default duty, court refuses to impose it as policy matter.
    - Ask Yourself: Is the D a corporation, utility, or important company? If so, there argue that there should be no duty and thus no lawsuit.

Rationale/Argument for D: Strauss--Would impose crushing liability onto the D and possibly onto society.
- If the duty is imposed, would it only exist as to the single P or could extend to many others?
- Counter-Arguments P: If court allows an exception based on public policy, it is essentially giving a D immunity from negligence.
- Argument P: Even though P is third party, D still knew he was benefitting from the P so they are in zone of apprehension; thus court should to extend duty to P, even though they lack privity.
- Argument P: That is what insurance is for (D should have bought it); D is better loss spreader.
- Counter-Arguments for D: if D has to buy insurance, this means higher cost to consumers

BREACH

I. Proving Breach [ALWAYS CONDUCT BPL THEN MOVE TO CUSTOM]: BPL— Evidence About the Calculus of Risk: Foreseeability, Gravity of Loss, and Burden of Alternative Precautions

II. Proving Breach: [Custom Evidence]

III. Proving Breach: Res Ipsa Loquitor "The thing speaks for itself"

Causation

I. But For Test

II. Substantial Factor Test

III. Causal Set (RS 3rd) (Encompasses But For; Substantial; Multiple Sufficient; Multiple Insufficient)

IV. How to Prove Actual Cause (Weighing of Inferences)

V. Argument: D was a cause, but he was a de minimus cause of the accident.

. While D was a cause, his cause was superseded or overwhelmed by other more important causes.

VI. Analysis: Were there multiple actual causes, satisfying either of the tests above?

VII. Analysis: CONCURRENT CAUSES (As opposed to superseding causes)—Were there multiple sufficient causes, each which would have been the factual cause of the injury if the other had not stepped in to cause the injury?

VIII. Analysis: Did two (or maybe more) defendants commit substantially similar negligent acts, one of which caused that P's injury? Shifting Burden of Proof

IX. **Majority Rule: How P collects his money Joint and Several Liability** (from Summers v. Tice)

Harm must be indivisible

X. Analysis: MedMAL—If P comes in with a 51%+ survival and it drops below 50% the P will be made whole (more probable than not) REGULAR MEDMAL AND/OR WRONGFUL

XI. Analysis: Loss of Chance Medical Context (At 51% or Below)—Did D's negligence reduce a plaintiff's chances of survival?

. THE DICKHOFF ARGUMENT

IF THE P HAD A GREATER THAN 50% CHANCE TO SURVIVE AND BC OF D IS UNDER 50%, THE

XII. Arguments: Where courts have limited Loss of Chance—Restatement §26: Limits Loss of Chance to Medmal. Why?

XIII. Analysis: DES—Was there a negligent product that was mass-produced, such as medication, and P cannot find out exactly who made the defective product?

I) MAJORITY: LIPTZIN (PROX CAUSE IN NC)—Not merely possible, but reasonably foreseeable; not too attenuated; chain of events too long; too remote in time; unforeseeable

A. NC defines proximate cause as: A cause which in

0. (1) natural and continuous sequence,

1. (2) unbroken by any new and independent cause, produced the Ps injuries, and without which the injuries would not have occurred, and one

2. (3) 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.

D had to have foreseen a harm that occurred. What must be foreseeable? Liptzin

The element of foreseeability is required to establish proximate cause. To prove foreseeability, the P is required to prove that in exercising reasonable care, the D might have foreseen that some injury would result from his act or omission or the consequences generally injurious might have been expected.

(0) THUS, the P DOES HAVE TO PROVE THAT D FORESAW THE INJURY IN ITS PRECISE FORM.

(1) Foreseeability

3. - foreseeability is necessary

4. - law does not require you to foresee events which are merely possible, just those that are reasonable foreseeable

5. - see p 446 for other elements of foreseeability

6. - this injury was unforeseeable, injuries too remote in time, and chain of events leading to it was too attenuated for proximate cause.

II. Two Tests (Direct Causation & Foreseeability)

. Direct Causation: Polemis

A. Foreseeability Tests

0. Cardozo (Palsgraf) Reasonable Foreseeable P Standard AKA Zone of Danger Test

(0) KEY: No HINDSIGHT FORESEEABILITY!

Affirmative Defenses

III. Two Types: Pure and Modified

IV. How % is determined (instructing jury)? p274

V. Stare Decisis & Modifications (Coleman)

VI. Express

VII. Primary Implied AoR

. Primary Implied—USUALLY SPORTS CASES--MATTER OF LAW FOR JUDGE

A. Secondary Tertiary Land

B. Secondary/Tertiary, see Blackburn

C. Effect on Burdens

I.COMPARATIVE FAULT

II.COMPARATIVE RESPONSIBILITY

Strict Liability

The ONLY DEFENSE TO SL IS AOR; NOT CONTRIB.

I. Wild Animals

II. Domestic Animals

I. There are three main tests, commanding NO majority, that can be applied in determining S/L for dangerous activities: Rylands Rule, RS 2nd, RS 3rd

II. Rylands Rule—Traditional SL: (1) Non-natural use and (2) Natural Consequences

III. Restatement 2nd—6 Factor Test:

IV. Restatement 3rd—Narrows SL:

V. D's Argument: Social Utility Outweighs Imposing SL, see (Branch [Gas company vital to West] see also Bennett [socially useful to spray crops)

VI. Nuisance

Damages

I. Wrongful Death

II. Survival Claim

III. Unborn Fetuses and Wrongful Death

IV. Punitive Damages are usually not available for SL; but if u can rise to gross then yes

Can use reasonable force to exclude from property once you are there

At Contrib=ALL AOR

In comparative=AOR is treated just as if AOR

Establishing Duty—No Duty Rules

I. Traditional No Duty Rule

Traditional No Duty Rule: **An actor who has not created a risk of physical or emotional harm to another owes no duty to another unless an affirmative duty applies.**

Ask yourself: Was D really an active participant, and not just a mere bystander?

1. Theobald: Duty to rescue does not exist if there is no active participation. If you're not involved in it somehow ie if you are just a bystander, there's no duty. Where there's no duty, there's no liability.
2. Arguments
   a) P if there is criminal statute that makes D's liable, we should follow it
   b) D would argue that they are mere bystanders, not active participants
   c) P would argue that D's that fired gun before P "induced" P to participate and therefore created risk which triggered the duty may not be enough

b) Ask yourself: Did D know of a foreseeable risk of danger to P, but did not protect P?
Government Specific Claim Aimed to Protect Fisc.

1. Galanti Rule: **Mere foreseeability of injury to another person does not in itself create a duty to act; knowledge of foreseeable danger to P does not create duty.**
   a) Exceptions (Apply in GA):
   If D created the danger; If D failed in controlling a dangerous instrument; if D voluntarily assumed or incurred duty to a specific individual.
   b) Galanti: FBI Case; they knew of deadly killer but did not warn P. Under Federal Torts Claim Act

c) Arguments
P will argue that he was third party beneficiary to D
1. But D will argue that duty extended only to Underhill
2. P: Thevis was missile and FBI failed to control him
3. D will argue that the fisc must be protected

II. Exceptions to NDRAW

Exception #1: Statutory Obligations Imposing DRAW

a) Ask Yourself: Is there a statute in the fact pattern? If so, can you use is to make argument on behalf of P that should create new duty not found in CL?
b) RS §38: When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and to determine the scope of the duty.
1. Includes statute, regulations, and ordinances
2. **Using a Statute to Create Rule: When (1) the legislature has not provided a remedy, (2) but the interest protected is physical or emotional harm, (3) courts may consider the legislative purpose and values reflected in the statute to decide that a (4) DUTY (not a breach) should be imposed that the CL did not recognized.**
3. **Compare to Neg Per Se: Neg Per Se allows a court to abandon the RP standard for different one in deciding BREACH**. Even w/o reliance on the statute, D is subject to duty of reasonable care. Here, the court is using a statute to CREATE A DUTY and THUS impose liability where tort law never imposed liability before.

i) JS v RTH—Clashing Policy Concerns; Spousal Immunity v. Welfare of Children; Borrowing Statute Purpose to Create New non-CL Duty
1. JS RTH R**: If D (spouse) has actual knowledge or special reason to know of the likelihood of his or her spouse engaging in sexually abusive behavior against a particular person, the D must take reasonable steps to prevent that abuse.**
2. Ask yourself: There is an established policy protecting [in this case spousal immunity] but P wants to impose a new duty that contradicts with it?
3. **Multi-factor Analysis in deciding whether to impose new duty**:

Exception #2: D's Prior Conduct Imposing DRAW

Ask yourself: Did the D through a non-tortious act, create a continuing risk of harm of a type characteristic of the conduct?

Majority Rule: When an actor's (1) prior conduct is (2) not tortious (3) creates a continuing risk of harm of a type (4) characteristic of the conduct, D has duty to exercise (5) reasonable care to prevent or minimize the harm.

2. Ponder: Truck driver
3. Arguments:
a) D will argue that the P's injury is not characteristic of the conduct, even though he is the factual cause of P's injury.
b) D will argue that he was reasonable bc BPL was better to stay in truck and turn it around than to get out and warn
c) P will argue that D's conduct was tortious, and if it was not he had duty to act reasonably but failed to do so

Exception #3: Duty Imposed on Basis of Special Relationships

Ask Yourself: Can the P argue for a special relationship such as LLT; patient/doctor, etc?

Special Relationship: Matter of Law for Court to Decide, RS §40

4. **Rule: As a general rule, at CL one person owed no duty to control the conduct of another. However, if there is a special relationship with either (1) the person whose conduct needs to be controlled or (2) in a relationship to a foreseeable victim, courts will carve out exceptions to the no duty rule by recognizing an affirmative duty where it would normally not exist because of the special relationship between the actors.**

B. Special Relationships Definition: Can establish by (1) statute or rule or contractual relationship; (2) inherent nature of the relationship between the parties and (3) by one party undertaking to protect or assist the other party, thus inducing dependence and ceding self control on part of the injured party, see Patton.

C. SR #1: By statute or rule or contractual relationship

D. SR #2: Inherent Nature

1. **RS §40 Rule: An actor in a (1) special relationship with another owes duty of reasonable care (2) with regard to risks that arise within the scope of the relationship**
   a) Common Carrier WITH PASSENGERS (Not with other Car/vehicle)
   b) Innkeeper with guests
   c) Business or other possessor of land that holds premises open to public with those who are lawfully on the premises
      1. Extension: Business to Business Invitees against criminal acts from others, Ward
   d) Employee/employee WHILE AT WORK are in (1) imminent danger or (2) injured or ill and thereby rendered helpless
   e) A school with its students (Lancaster)
   f) LL with Tenant
   g) Custodian with those in custody if (1) custodian is required b law to take custody or voluntarily takes custody of the other or (2) custodian has superior ability to protect the other
      1. Applies to institutional relationship
   h) CANDIDATE FOR SR: Family Members
      1. Family Members: Strong argument to have special relationship for family members, especially ones residing in the same household.
      2. Argument Against: Family exclusions in liability insurance is reason doctrinal development in the area.
      3. Also: State is effectively regulating family affairs, which is arguably unCX.
      4. Sports/Weather and Special Relationships—Policy
         a) Rule: At CL, even if there was a duty to rescue, it was not so when danger was obvious.
            Held: Not a special relationship bc for policy reasons the court doesn't want to discourage specific types of behavior, like rugby. Here, there is an insufficient element of dependence, so no duty. Refer to R2d § 314A.

E. SR #3: Dependence & Ceding Self Control SR

A SR can also exist if there is (1) dependence and (2)ceding of self-control

Arguing for New SR/Duty: If reliance and ceding of self control that allows for creation of new SR. Factors in creating a new duty:

5. Foreseeability of Harm
6. Degree of Certainty
7. Closeness of connection between D's conduct and injury suffered
8. Moral Blame attached to D's conduct
9. Policy of preventing future harm
10. Extent of the burden to the D and consequences to community of imposing duty
11. Insurance risks

SR Rule: Duty to Control Others [LAC v. Ward Parkway]: Duty to Protect Against Criminal Acts of Third Parties

1. Ask yourself: Was there a (1) criminal act on the premises of a business owner, or some other special relationship exists, and (2) that harm was arguably foreseeable?
2. LAC v. Ward Parkway Rule [Applied Broadly]: Generally, a duty to protect against the criminal acts of third parties is not recognized because such activities are rarely foreseeable. However, in situations where a special relationship exists between business owner and invitee, and injury is foreseeable from recognizable third parties, a duty reasonable care will be imposed.
3. **Rule [Applied to Business Owners]: In this context, a special relationship arises when**
   a) **KNOWN PERP: (1) a person, known to be violent, is present on the D's premises or the person conducted himself in a dangerous manner;**
   b) **UNKNOWN PERP: (2) P shows sufficient evidence that would reasonable person should have anticipated danger and taken precautionary actions to protect invitees from criminal attacks of UNKNOWN third parties. The D only has to foresee the TYPE of injury, see LAC (finding that rape was sufficiently similar to prior crimes in regards to location, time, and type of crime to make the rape foreseeable)**

   Other Factors/Arguments:
   a) Location of the crimes: Parking Lot/ in the mall
   b) Time: Day/Night? Busy/Empty?
   c) Are the types of crimes sufficiently similar?
      i. Majority: Need not be identical
      ii. Dissent: No significantly; thus crimes are not foreseeable
   2. Policy: Mall/small business: Malls are larger, harder to know of offender

H. <u>SR Rule: DRAW in Governmental Context—Public Duty Doctrine</u>

Ask Yourself: Is an actor in the fact pattern a government entity, either local, state, federal? Is there some type of government service, such as EMT, firefighter, dispatcher?

1. Rule: **Under the public duty doctrine, the government defendant has no duty to provide public services to any particular citizen unless there is a special relationship between emergency personnel--police officers, firefighters, EMTs--and an individual. A general duty owed to the public may become a specific duty owed to an individual if the emergency personnel and individual are in special relationship different from that existing between the govt actor and the citizen generally. The Government must act outside of the normal scope of services it gives to the public generally,** see Parvi.
   a) A special relationship in PDD is determined if (1) there is <u>direct contact/specific undertaking</u> between victim and emergency personnel so that victim becomes reasonably <u>foreseeable</u> <u>AND</u> (2) specific assurances create <u>justifiable reliance</u> by the victim
      a) Woods: Woods calls ambulances; they negligently misdiagnosed her making her condition worse (she has stroke).
      b) Element 1: Direct Contact/Specific Undertaking
         i. Personnel's reaction with Ms. Woods is enough for direct contact
      c) Element 2: Justifiable Reliance
         i. JR can be shown by affirmative acts by District employees that directly worsen the P's condition. However, this does not mean every situation where P's condition worsens is sufficient to establish liability because the PDD is defined narrowly to limit the government's liability, Majority in Woods. **Thus, to have reliance in PDD cases the EMTs response to the private party must in some way EXCEED the response given to the public in general.**
         ii. <u>Under PDD in DC,</u> there can be no reliance even if the P's condition is made worse because the EMTS offered the same type of emergency services they would have provided to any member of the general public (Note: Even though that service was negligent).

Realist: DC is poor and allowing for liability here would crush the public service system.

d) Rationale For PDD:
   i. Jurisdictions developed public duty doctrine to continue to protect local governments.
   ii. Separation of Powers: Judiciary would be deciding liability of executive, legislature of fed (same for state govts)
   iii. Fear of Excessive Governmental Liability: If everyone can sue the government, it cannot carry out its duties properly and tax $ will not be efficiently spent.
   iv. Counter: Conventional Tort Principles create burdens and hurdles, such as foreseeability, proximate cause, that will weed out improper threats more justly than the "artificial distinctions engendered by the PDD", Dissent in Woods
   v. Fiscal Concerns: Potential to drain the public coffers.
      • Counter: This argument is misguided; the same argument was made for states when they decided to waive sovereign immunity, and they are still standing.

e) Coleman:
   i. Think of PDD as paying for rescue services and not getting rescue.
   ii. D: DC is poor and allowing this type of lawsuit would not only destroy the solvency of DC's public services but would also allow the gov't to delve too deeply into everyday gov't functions. Also D, can't respond to everyone and needs to know how to respond, what to do, and how to allocate

f) Relation to FTCA or State Immunity
   i. The Government cannot be sued without its consent. However, the FTCA or state equivalent waives immunity in certain situations for negligence on behalf of government workers while acting in the scope of employment. Thus, the FTCA OPENS the door for the P to sue. The PDD is a CL doctrine that is exists to CLOSE the door for the P to sue. Thus, in the Woods case, the Govt WAIVED their immunity, allowing Woods to sue, but the PDD was utilized as a measure to narrow the scope of liability and barred Woods from completing her suit.

I. SR Rule: Duty to Third Parties [Victims] Based on SR with PERSON POSING THE RISK

1. Rule: RS §40: **An actor in a SR with another owes a duty of reasonable care to THIRD PARTIES with regard to risks posed by the other that arise within the SCOPE OF THE RELATIONSHIP.**

a) Examples (Not exhaustive)
   1. Parent with dependent child (Controversial--not accepted in most J's but the parents can be liable for negligent SUPERVISION of D, but not for the tort of D)
   2. Custodian with those in custody
   3. An employer with employees when the employment facilities causing harm to third parties
   4. Mental health professional and patients (*Tarasoff*)

2. Example #1 of A Duty to Third Party—Parent/Child Supervision—*Neuwiendorp*

a) Rule: At CL, parents are not liable for the torts of their children. However, they may be liable for negligent SUPERVISION because a parent is under a duty to exercise reasonable care to control his minor child so as to prevent it from intentionally harming others or from so conducting himself as to create unreasonable risk of bodily harm to them if the parent
   1. (1) KNOWS OR SHOULD KNOW that he has ability to control child AND
   2. (2) KNOWS OR SHOULD KNOW of the necessity and opportunity for exercising such control.
   3. Furthermore, some states have enacted STATUTES that impose LIMITED LIABILITY upon the parent for the torts of their children. Some parents have also purchased "good neighbor" insurance that covers some of their childrens torts.

a) Thus, if D's son commits a tort, parent will be liable to a limit.

b) Neiwendorp—Owing a Duty to School and Professors Based on Son's Act

1. Effect: Parent becomes joint tortfeasor.

Example #2 of A Duty to Third Party—Mental Health Prof/Patient

c) Ask yourself: Are we dealing with any medical professional that arguably is treating a patient with mental health issues? If so, they may have a duty of reasonable care to a third party

d) Tarasoff Rule: **A psychiatrist's relationship to a dangerous patient gives rise to a duty to warn the patient's intended victim that the patient threatened to kill her; but he must do so as to preserve the utmost confidentially possible.**

e) Rationale:

1. Not really a breach of trust: The Ethics Principle of AMA expressly allow: "Physician may not reveal confidence entrusted to him...unless he is required to do so by law or unless it is necessary to protect the welfare of the individual or community.

f) Other Physicians

1. Rule: **Traditionally, physicians had a duty only to the patient, but jurisdictions have expanded the physicians duties to warn third parties in situations involving public health or community at large.** Examples:

a) Physicians, as well as therapists, now have a duty to warn when they know or should know that a patient's dangerous behaviors pose an unreasonable risk to a **specific third party.**

g) Situations Involving Escape of Violent Prisoners to DRAW

1. Claims against government for paroling repeat criminals or in allowing escape of violent prisons also fall into the third party exception of the NDRAW. Here's how: The government knows the offender is dangerous, but fails to warn the victim. Factors that play:
2. Courts apply both SR Test and multi-factor duty analysis
3. Victim must be readily identifiable (Thompson v. Alamaeda found no duty)
4. Arguably the offender or escapee must be violent

a) Johnson: Found that state did have duty to warn foster mother of child that state knew to be violent before placing the child in her care

Exception #4: Promises and Reliance Imposing a DRAW

J. Summary of Rule: **If a D voluntarily begins to give assistance to P (even if he was under no obligation to do so), he must proceed with reasonable care. Thus, the P must make reasonable efforts to keep the P safe while he is in the D's care, and the D cannot discontinue her aid to P if doing so would leave the P in a worse position than he was in when the D began assisting him.**

K. RS §42: An actor who undertakes to render services to another and who knows or should that the services will reduce the risk of physical harm to the other has a duty of reasonable care if

1. the failure to exercise care will INCREASED THE RISK OF HARM BEYOND THAT WHICH EXISTED BEFORE THE UNDERTAKING (made D worse) OR

2. If the victim RELIES on the actor's exercising reasonable care in the undertaking.

3. Parvi: Placing a P in a position of equal peril does not fulfill the duty of reasonable care if D removed the P from peril and then placed him back into the old position of peril or into a new one.

L. Voluntary Rescue v. Undertaking

1. There is no substantial difference between a voluntary rescue and undertaking: a voluntary rescue is more immediate; an undertaking is more in advance and takes the form of a promise.

M. Issue/Argument: What constitutes an undertaking under 42(a)?

1. Very little affirmative action is needed to trigger an undertaking. Factors to Argue:

a) Past custom is enough to constitute undertaking if the P is aware of the custom

b) Promise to Assist is traditionally not enough:

c) Traditionally: Mere promise to give assistance was insufficient.

d) Minority/Restatement 3d say a mere promise without any action in furtherance of it is nonetheless an undertaking subject to the rule imposing a duty of due care

N. Ask yourself: Is there a Good Samaritan statute on point requiring aid?
   1. Good Samaritan laws serve two purposes:
      a) Some leave CL rule intact, so if D volunteers to help P, he is insulated from neg liability, only allow for gross or above.
      b) Others, like VT, require a D to assist, but limit his liability if he does so.
      c) Further, if you violate the statute, you might be fined a small amount.

O. Taking Charge of Another
   1. RS §44: An actor who has no duty takes charge of another who appears to be (1) imperiled AND (2) helpless or unable to protect himself or herself has a duty of reasonable care while the actor is within the actor's charge.
      a) Cannot discontinue if D puts a person in worse position

Premises Liability

I. Premises Liability: (special duty situation) addresses the duty owed by owners/occupiers to entrants injured on the land.

II. Misfeasance/Nonfeasance distinction is generally irrelevant in this context.

Majority Rule: Duty of reasonable care for licensees and invitees, but not trespassers.

III. Jurisdictional Option #1: **CL trichotomy** (entrance onto land in 3 categories):

IV. Jurisdictional Option #2: ("Modern")

. Invitees and licensees (open to the public) -- determine by mutual economic benefit test or invitation test
   1. Negligence duty to (1) fix known or knowable dangers or (2) warn of non-obvious dangers

A. Licensees (social guests) and trespassers (known/constant)
   1. Duty to not injure willfully, wantonly, or recklessly
   2. No duty for negligence--enter at your own risk, take land as you find it
   3. Discovered Tresspassers Rule: A unknown trespass may become known as a tresspasser: if D knows that trespasser is on the land, he must use reasonable care for the trespasser's safety.

B. Trespassers (unknown)
   1. Duty to refrain from willful/wanton infliction of injury
   2. No duty for negligence
   3. CHILD TRESPASSER Exception: child lured by attractive nuisance on your land, you can be liable for negligence when:

      R2d § 339: liable for physical harm to children trespassing on your land caused by artificial condition on land if:

      1. Place where condition exists is one where possessor knows/has reason to know that children are likely to trespass
      "Children around"

      2. Condition is one where possessor knows/has reason to know and realizes/should realize will involve unreasonable risk of death/serious bodily harm to children
      "Dangerous hazard; artificial condition on land"

      3. Children, because of their youth, do not discover condition or realize risk involved in intermeddling/coming within area made dangerous by condition
      "Unknowing of risk"

      4. Utility of maintaining the condition and burden of eliminating danger < risk to children
      "Would be easy to do something"

1. 5. Fail to exercise reasonable care to eliminate the danger/otherwise protect the children "Don't do anything"
2. Policy: Life or limb of trespassers is possibly more important than property rights
3. **Majority Rule: Duty of reasonable care for licensees and invitees, but not trespassers.**

V. Jurisdictional Option # 3: (California/Rowland)

. Collapses Trichotomy: Duty to act reasonably and prudently under the circumstances

A. No variation in duty based on status of entrant, traditional status of entrant may influence the determination of what reasonable is.
   1. Exam: NOT VERY COMMON

VI. Premises Liability includes Landlord-Tenant Law

. Tends to be jurisdiction-specific, mostly now codified in local ordinances and/or state statutes.

A. Largely dictated by contract otherwise (P and D can contract for different obligations), with local ordinances and statutes sometimes dictating the contract terms, which may or may not be consistent with public policy.

Establishing Duty: Stand-Alone Emotional Distress (NIED)

I. Special Situation for stand-alone emotional distress, as opposed to claims for ED that are appended (as "pain and suffering") to physical injury and property damage claims.

II. **Majority Rule: Where there is not only no impact, but no physical symptoms of emotional distress at all, the vast majority of courts have denied recovery.**

III. **DV Law**:

The earliest rule was the so-called "impact rule" (ED stems from or is simultaneous with/to the physical impact) – often the impact was minimal, it didn't have to be harmful, a touch would do. This was thought to legitimize the claim and deter frivolous ones.

Then courts adopted the "zone of danger" or "physical danger rule"--(1) D's actions caused the P to be in the zone of physical danger, (2) the P feared for her own safety, (3) and the ED was serious and verifiable. This was also liability limiting.

Most recent rule (Only speaks to Duty?): **Courts have allowed Ps to recover who were not in the zone of physical danger in circumstances (1) where (special) relationship or undertaking make it (2) especially foreseeable that a P could be (3) seriously emotionally distressed (e.g. therapist/patient; doctor/patient (HIV claims--mistaken diagnosis? divorce, etc.). SERIOUS MENTAL DISTRESS IS ANALYZED UNDER RP STANDARD BELOW.**

1. Restatement 3d presents the zone of danger + special relationship/undertaking as the two ways a DV might establish a duty in a stand-alone NIED case.
2. Regardless of the rule, **all courts require P to prove that she suffered "serious" emotional distress, which is often defined as (from the HI SCT): "Serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."**
   EXCEPTION to this definition may be acceptable where, bc of the nature of the relationship, e.g. therapeutic, D knows or should know that P is susceptible--analogy from IIED: "acts which are not generally considered outrageous may become so when the actor knows that the other person is peculiarly susceptible to emotional distress."
3. A common way for P to prove s/he has suffered the requisite "serious" ED is to provide evidence that the emotional distress was followed by physical manifestations, e.g., a heart attack.

IV. Bystander Recovery

. **MAJORITY TEST "Dillon": An alternative to the zone of danger rule for bystanders was developed by the CA SCT in Dillon v. Legg.**
   1. **Dillon: CA SCT considered a claim by mother for ED following from witnessing her daughter be hit by car. Ct held P had a cause of action, bc "the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma." The Ct stated 3 factors that should guide the determination whether alleged ED was "reasonably foreseeable" in such circumstances:**
      1. **proximity of P to the incident**
      2. **whether the mental distress was contemporaneous with the P's observation of the incident**
      3. **the blood relationship b/w P and victim**
   2. The CA SCT then decided Thing after, making clear that P HAD TO BE closely related to the primary victim, present at the scene, and suffer serious emotional distress.
      1. Consensus is building here.
   3. The policy analyses in all of the cases extending the original "no duty" rule continue to balance the significance of the interest in protection from serious emotional distress against the downsides of extending liability.

Stand-Alone Economic Loss

I. Majority: CL Traditional rule does not allow for pure economic loss. P may not recover anything for his economic losses, since he has not suffered any personal injury or property damage or there is no contractual relationship or other special relationship.

. THREE Exceptions [Best case for allowing SEL=Argue that P was PARTICULARLY FORESEEABLE and/ SR and NJ Rule Below]:
   1. privity of contract: you can have a special relationship from contract
   2. Other special relationships also may create a duty
   3. People Express Airlines Case: Allow SEL: (1) Risk of economic damages (2) identifiable class of plaintiffs (3) the D knows or should know their conduct presents a risk of economic damage.

II. Minority rule: Can bring stand-alone economic harm if there is a specifically foreseeable P with particular, foreseeable damage.

. If a court does decide to relax the no-liability rule, it is most likely to award recovery where: (1) the injury to P was particularly foreseeable; (2) relatively few Ps would be permitted to sue if liability were found for pure economic loss; and (3) D's conduct is relatively blameworthy

BREACH

I. The standard of care in negligence is reasonable prudence in the circumstances. Proof that D violated this standard is proof of breach.

II. ALWAYS ASK: WHAT IS YOUR THEORY OF BREACH?

. The D owed a duty of care bc X and breached his duty because he failed to exercise the [Standard of Care, RP, child, etc] would have done under the circumstances and should have done [suggest alternate conduct]

A. Multiple Breaches: D was breach RP when he texted while driving and also while he changed the CD while driving.

Part 1: Defining the Standard of Care

I. Adults

. TEST: **For adults, the test is whether the D behaved as a reasonable person under the circumstances that confronted the D. These "circumstances" include external circumstances (traffic conditions, speed limits) but also include some limited internal circumstances such as physical disabilities (blindness, deafness) but do not generally include mental disease. Circumstances also include taking into account peoples special skills and expertise.**

A. RP Standard Has both Objective and Quasi-Subjective Aspects
   1. Dobbs: **Reasonable person standard is largely, but not entirely objective. The circumstances element brings flexibility and common sense to the standard.**
   2. These are not different RP standards, but are considerations that take in consideration what the RP would do under the circumstances. Thus, a race car driver who crashes in the street is compared against the RP, but not to other race car drivers. Thus, the court will consider that D was a race driver, but he will not be held to a higher standard.
   3. Rationale: We do not want people to not increase their skill bc of fear of a heightened standard, but in reality it is impossible to ignore what knowledge the person actually has. The Q boils down to whether D, with his knowledge/skill, knew or should have known of a danger.

B. Quasi-Subjective Aspect of RPP: Mental Attributes—NOT taken into consideration (Including Insanity)
   1. The RP is not generally deemed to have the particular mental characteristics of the D. Thus, that fact that the D is more stupid, hot-tempered, or careless or lacks good judgment does not absolve him of being in breach.
   2. Menlove: While an allowance is made for physical disabilities, no allowance exists for the circumstances that a D lacks good judgment, or is hasty or awkward.
   3. Insanity: RS 283: Polamtier v. Russ:—Insanity or other mental deficieny does not relieve the actor from liability ofr conduct that does not conform to the reasonable SOC under the circumstances.

C. Quasi-Subjective Aspect of RPP: Physical Attributes—Usually taken into consideration
   1. Ask yourself: Did the D have a physical disability? If so, WAS THIS PHYSICAL DISABILITY THE REASON HE DID NOT EXERCISE REASONABLE CARE (BREACHED) UNDER THE CIRCUMSTANCES?
      Circumstances include the physical disability of the defendant himself. Thus the STANDARD is what a reasonable person with that disability would have done.
      1. Blindness/Deaf/Lostllimb/etc?
         Test: **How would a reasonable blind person in the circumstances act? Usually opens up COMPARATIVE NEG. arguments that blind person should act with great precaution; but not always.**
         i. Blind person crossing street does does not use cane or ask for assistance--COMP. NEG
         ii. Blind person falls into random hole in street--Not COMP. Neg
      2. Sudden Disability (Heart Attack, Seizure) see below
         ( ) McCall Rule**: If the D suddenly has a heart attack or stroke, etc., the issue will be whether he knew of his propensity to suffer from the heart attack. If he genuinely did not know or have reason to know (ie it was his first time, he cannot be neg; but if he knew then he is in breach.**
         (a) **Key is FORESEEABILITY**. **A sudden loss of consciousness or physical capacity experienced while driving is not reasonably foreseeable is a defense to negligence.**
      3. Insanity or Other Mental Deficiency?
         Generally, an insane person or someone with mental deficiency who is not a child is not relieved of obligation to act like a RP in circumstances.

D. Quasi-Subjective Aspect of RPP: Special Knowledge/Skill
   1. Does the D have special skills or knowledge?
      a) Does D have above average skills?
      b) Pre-Existing Relationship with Party?
      c) Is D a limit number of parties that pose significant danger? Ie a utility?

E. Quasi-Subjective Aspect of RPP: Sudden Emergency Doctrine
   1. Was there an emergency?

a) **Rule: A person confronted with a sudden or unexpected emergency which calls for immediate action is not expected to exercise the same accuracy of judgment as one acting under circumstances who has time for reflection and thought before acting.**
   1. In TN, not a defense, but goes to issue of comparative fault analysis.
   2. Can't use if D himself caused the emergency.

F. Anticipating Conduct of Others (CONNECTING BREACH AND DUTY)
   1. Sometimes D has to anticipate the conduct of another person.
      a) Driver cannot assume other drivers will act non-negligently.
      b) D is not entitled to assume that CHILDREN will act non-negligently, see *Barker*
      c) Parent has duty to supervise child and should not expect child to be non-negligent, see *Neiuwendorp*.
         1. No vicariously liable, but DIRECTLY negligent
      d) Crimes and intentional torts: While RP is entitled to assume that 3rd persons will not commit crimes, see LAC (finding that if a SR exists, there is a duty of reasonable care)
         1. See also *Tarasoff*

II. Children

. Rule: Both minors and adults are required to be reasonable, BUT, while the RULE of reasonable conduct remains constant, the reasonably ascertainable defects of the actor must be circumstances taken into account when we evaluate reasonableness.

A. RS §10: (a) A child's conduct is negligent if it does not conform to that of a reasonably careful person of the same age, intelligence, and experience, except as provided in Subsection (b) or (c).

B. **(b) A child less than five years of age is incapable of negligence**.

C. (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.

D. Subjective Element:
   1. If child is not as intelligent, he is held to a lower standard than the other children. This is different from the adult standard

E. Rationale:
   1. Children need to learn not to be negligent; little adults in training.

F. ALL American jurisdictions accept the idea that a person's childhood is a relevant circumstance in negligence determinations. But jurisdictions divide on the best way to take it into account.

G. Minority Approach: the alternative standard is the old rule of sevens. Under 7: incapable of negligence; 7-14: presumption of incapacity; 14+: rebuttable presumption of capacity.

H. Dangerous Adult Activities Exception
   1. When children choose to engage in dangerous activities usually engaged by adults, no account is taken of their childhood.
      a) If activity is usually undertaking by children and adults, then standard will depend on how dangerous it is.

Part 2 (SOME WAYS TO PROVE BREACH): The Role the Legislature, the Judge, and Jury in Deciding The Matter of Reasonableness in the Circumstances

I. Legislatures Role—Negligence Per Se

. Three Part Test:

Courts borrow standard of care from statute when:

(1) it specifies particular conduct beyond merely providing that reasonable care is required [NOT JUST GENERAL REASONABLE CARE STD];

(2) the plaintiff is a member of the class of individuals the legislative body had in mind to protect when it acted;

(3) the harm that occurred was the kind the legislative body intended to address.

A. Excused violations of statute (Reasonability almost always trumps):

1. **If D acted during an emergency**
2. **If following statute would be more unreasonable than not following it**
   a) Tedla v. Ellman: P walking with traffic, violated highway safety statute requiring to walked against traffic, but excused bc walking against traffic was more dangerous)
3. Violation of statute is irrelevant unless it can be tied to the actual injury.

B. Procedural Issues

1. **If P can establish negligence per se, he is not done**. Depending on the jurisdiction, he may have to prove more or less:
   a) Majority: Per Se Evidence (Classic Situation) [most favorable to P]: Negligence Per Se is Dispositive—Automatically establishes negligent conduct (D+B) as MOL, all D can argue is C+D, P has to show nothing for D+B, but has to prove C+D.
   b) In Effect This is Majority: Prima Facie Evidence: P establishes PF (presumptive evidence) case for negligent conduct (D+B), but D can rebut. P has put on enough evidence to win on duty and breach, but jury can still find for D even though he violated statute as long as his violation was reasonable and/or if P cannot make out C+D.
   c) Some Evidence [least favorable to P]: jurors give whatever weight they want.

C. Statute, Regulation, Ordinance?

1. **Generally, statutes are borrowed, not regulations/ordinances.** But some J's borrow them as well.
2. If Reg/Ord. usually helpful but not dispositive

II. Judge's Role in Deciding Reasonableness: Taking away Judgement from Jury as MOL

. Normally reasonableness is a matter for the jury. But the judge has the power as MOL to decide reasonableness under certain circumstances. Three general circumstances where court will take reasonableness away from jury:

1. Circumstance 1: (reasonable minds could not differ as a matter of fact)
2. Circumstance 2: When over time juries have repeatedly addressed the same reasonableness question and resolved it similarly (waste of judicial resources)
3. Circumstance 3: When, as normative matter, the court believes that there is only one way the reasonableness question should be decided

A. Akins: Normally, the question of reasonableness is a matter for the jury. But Judge's Role to Decide Reasonableness as MOL that baseball is special as a normative, policy matter (circumstance 3).

1. Baseball hits P in eye while at game. There were no screening devices along the baselines of its field, see
   a) Majority: Owner must screen the most dangerous sections of field--behind home plate--and screening must be sufficient for those spectators who may reasonably be anticipated to desire protected seats on an ordinary occasion. If he does this, he fulfilled SOC.
   b) Minority: Screen as many seats as should reasonable be applied for an ordinary person desiring such protection.

REASONABLENESS IS A MATTER OF LAW AND FACT (MIXED); THUS THE COURT HAS AUTHORITY TO ANSWER IT.

Part 3: Proving Breach

Write This: To demonstrate that the D's conduct failed to act reasonably under the circumstances, the P must show that the D's conduct imposed unreasonable risk of harm on the P. P has to show that at the time the accident occurred, the injury to P was foreseeable.

I. TOOLS COURTS USE TO ESTABLISH REASONABLENESS/FORESEEABILITY:

. Statistics/Data (Haley: 1/500 people are blind in the city, √ foreseeable on street).
A. Common sense
B. Common knowledge (Haley)
C. BPL and Risk/Utility assessment: (Hooper BPL)
D. Custom: (Note: Hooper [whole industry lacked behind] and Dempsey [industry custom is not better than the alternative] go against this).
E. Alternative Options (Haley)
   1. Haley v. London Electricity Board (ENG): utility company liable for blind π falling into their excavated hole bc it's reasonably foreseeable that a blind person would walk down a city street.
      a) Theory of alternative options: in Haley, ∆'s could've put up a fence, have one worker guard the hole—both would've been cheap and easy to provide & would've prevented risk.
F. Statutory violation: law is aimed at type of harm, π is in class).
G. RIL: (Byrne [flour falling]- accident = one of neg, π has control of instrumentality).
H. Morality
I. Note: foreseeability is a fact-based inquiry. The law decides if its reasonably foreseeable.

II. P has three burdens of proof: burden of pleading breach of SOC, burden of producing evidence to support the allegation, burden of persuasion. Here we focus on the production and persuasion, and how P meets those burdens and how D responds.

III. Proving Breach [ALWAYS CONDUCT BPL THEN MOVE TO CUSTOM]: BPL— Evidence About the Calculus of Risk: Foreseeability, Gravity of Loss, and Burden of Alternative Precautions

. The owner's DUTY to provide against resulting injuries is a function of 3 variables:
   1. The PROBABILITY of the accident occurring
      Consider obviousness of risks here
   2. The BURDEN of taking precautions
      Would society be better off if all D's in the position of D were permitted to act as D did?
   3. The magnitude/seriousness of LOSS (OR INJURY)
      The gravity of the resulting injury (actual loss)

A. If PL (probability*loss) is less than the Burden there is no negligence—> B>PL (no liability)
B. If PL is more than the burden, there is negligence—> B<PL (liability)
C. Argument: Was the threat of injury serious?
   1. If a reasonable person would realize that a potential injury, if it came to pass, would be extremely grave, there may be liability even though it was relatively unlikely that the accident would occur.
D. Argument: Did D give a warning?
   1. One way to reduce the Probability variable of BPL is to give a warning of danger.
      But this does not immunize D if he acted unreasonably.

IV. Proving Breach: **[Custom Evidence]**

Custom encompasses the generally prevailing and unwritten practices in a community or industry; also includes trade rules or standards that have been explicitly adopted by a particular profession/industry.

. BUT while custom [USUALLY BUSINESS] evidence is RELEVANT, and perhaps persuasive in most instances, it will never be DISPOSITIVE AS A MATTER OF LAW.

A. Rule**: What is usually done in a particular industry (custom) cannot be regarded as what ought to be done unless the conduct and the test (reasonable prudence) are in harmony**.
   1. TJ Hooper: Sometimes an entire industry/profession lacks behind in the adoption of new devices. Facts: Tug boat does not have radio, thus did not receive a warning, thus was negligent.
   2. Hooper tells us custom is considered but not dispositive.
B. MALPRACTICE [Professional Custom] p 111 Emmanuels

Med Mal

1.To establish a PV case for malprac: P must prove, with (1) medical expert testimony (2) the SOC recognized by the medical community as applicable to the particular D's conduct (3) that the D in fact departed from that standard (4) that departure was a direct cause of the P's injuries.

1. Rule *Penderson*: **D must exercise degree of care and skills which is expected of the (1) average member in the class which he belongs to (2) acting in the same or similar circumstances. When a practitioner is near a larger metropolitan area, the SOC is established in an area, the medical neighborhood, which extends with the medical and professional means available to those centers that are readily accessible. If the practitioner is in a isolated area, the locality rule will still apply.**
   - **Medical Neighborhood trumps similar locality for general practitioners. If you are general practioner and are not in a medical neighborhood, then you are held to similar locality rule. Rationale for this is to get people to practice in smaller towns.**

   Specialist or Hospital?

   Most if not all J's have adopted a national standard of care for specialists and hospitals, on the basis that their accrediting an re-accrediting organization are themselves national.
2. Setting the SOC—Majority—Medical Evidence is dispositive: **Unlike other areas, the law does not say what is reasonable, but gives the power to the medical community,** BUT SEE Helling (Physicians can set the industry SOC, but court always has right to check--Rejected by most)

   Medical Custom evidence is treated differently than business custom evidence: the medical profession, not the jury, dictates the degree of care and skill which his expected of the average practitioner in the class to which the D belongs, acting the same or similar circumstances.
   a) Good results not required: Do just has to exercise care of average prof
   b) Rookie Doctor? Does not matter, still held to same standard as more experienced one.
      1. BUT D can argue assumption of the risk if he told P he was rookie (you knew but still went ahead)
   c) Objective Standard: D's own experiences and training should be irrelevant in determining whether she behaved with due care.
   d) Was there informed consent?
      1. If emergency and not consent available, disclosure will not be necessary
3. **Experts Required: Because medical knowledge is outside the common understanding of the jury, experts are almost always required.**
   a) Medical professional custom rule requires the P in an ordinary medical malpractice case to proffer medical expert who will testify that the D was negligence in according to the standards of the profession.
   b) Jury must accept one of the expert's opinions
   c) Problem: Law's approach to establishing reasonableness in MM cases risk adoption of a standard that is beneath that which the medical profession expects of itself.
   d) If Negligence is obvious to a lay person, then expert testimony might not be needed, see *Ybarra*.
4. Did D comply with SOC? Not out of woods yet [Helling Rule--Rejected by most]:
   a) Facts: Glaucoma test. simple, inexpensive, harmless, definite results, but irreversible
   b) Minority Rule: It is the duty of the courts to protect patients and protecting patients [from glaucoma] is so imperative that even though the D did not fall below the SOC, he is nonetheless in breach.
      1. Rationale:

      Simple, cheap, no judgment involved
      2. Lawyer?

SOC for legal professionals: Lawyer must exercise that degree of reasonable care and skill expected of lawyers acting under reasonable circumstances. Morrison v. Macnamara.

V. Proving Breach: Res Ipsa Loquitor "The thing speaks for itself"

. Happens when P cannot explain how D committed a breach. It only helps P get a bye and establish Breach, still must establish DUTY.

A. Allows a P to point to the fact of the accident and create an inference that, even without precisely showing how the D acted negligently that the D probably was negligent.
B. RIL is a form of circumstantial evidence that extends traditional principles of circumstantial evidence and allows inference of facts from other facts.
C. Plaintiffs Goal: Tip the scales past 51%; there could be other possibilities for the accident, but if NEG can be inferred as more probably than not that it was due to negligence.
D. The inference may not be perfect, but is enough to tip the scales past equipoise.
E. Modern RIL [Mayer] 2 PRONG TEST IN COMP J; 3 PRONG TEST in CONTRIB J:
   1. Common sense appraisal of the probative value of circumstantial evidence
   2. RIL allows for an inference of the D's lack of reasonable care if
      a) Prong 1:The occurrence itself ordinarily bespeaks of negligence
      b) Prong 2: The instrumentality causing the injury was within the D's EXCLUSIVE (possession, custody, or control) control
         1. RS 3rd abandoned this require (§17) bc it is a bad proxy for D's neg. see p. 130 for explanation.
      c) Potential Third Prong (Consideration): There is no indication in the circumstances that the injury was the result of the P's own voluntary act or neglect. MOST COURTS DO NOT REQUIRE CLEAN HANDS.
         1. If in contrib state, this third prong matters, bc contrib is a total bar. But if in comparative J, then this question does not apply except to determine damages, but not part of RIL Test.
F. GENERALLY EXPERTS ARE NOT REQUIRED
G. MULTIPLE DEFENDANTS (From Emmanuel but talks about the Ybarra on p.402)?
   1. Medical Context: In Ybarra, there were multiple D's (hospital, nurse, surgeon) and P could establish some negligence, but could not point at any of the D's directly, the court allowed RIL to be applied against ALL.
      a) BUT: D was unconscious (different result?) and the D's were all in an integrated relationship.
      b)

Causation

Checklist

I. Cause in Fact (Actual Case)
   . But-for Test
   A. Substantial Factor Test
   B. Causal Set
   C. Concurrent Cause
   D. Summers v. Tice
   E. Joint and Several
   F. Medmal
II. Prox
   . Direct Cause
   A. Palsgraf
      0. Cardozo
) Andrews Proxies
   B. Liptzin Foreseeability Test
III. Superceding Cause
   .

Introduction to Causation

I. Write This: In addition to proving duty and breach, a plaintiff must establish that the defendant's breach caused the injury or damage, or at the very least that the breach was an important contributing cause. To assure that liability will be imposed only where D's conduct is attributable to P's injuries, courts required two subelements, (1) cause in fact and (2) proximate cause, the first of which must be established before the court will even consider the second.

Actual Cause

I. Write This
   . Actual cause is a factual inquiry; the D must provide a reasonable basis for conclusion that it was more likely than not (preponderance of evidence standard) that the negligent act was in fact the cause of the injury. Thus, negligence in the air i.e., negligence irrelevant to the injury that P suffered, will not suffice. Courts vary in the tests they use, but in application they are the same. The three main ones are (1) But For; (2) Substantial (minority,increasingly less used, and rejected by RS3); (3) Causal Set Model (championed by RS 3rd). Applying these either of these tests to our case...

II. But For Test
   . The traditional test used by courts is the "But-For" test used in Fedorczyk: Would the P not have suffered the harm "but for" D's negligence? The jury looks to what did happen at point of breach and compare it to what would have happened if the D had not been negligent. Would the accident still have happened?

III. Substantial Factor Test
   . When more than one act or omission could have caused an event, the negligent conduct must be shown to have been a substantial factor in causing the harm, see RS 2nd §432.
      1) Some J's developed this test to address more complicated circumstances where two or more forces either combined or were sufficient standing along to produce the plaintiffs injuries or damage.

IV. Causal Set (RS 3rd) (Encompasses But For; Substantial; Multiple Sufficient; Multiple Insufficient)
   . Fact-finder conceives a set made up of each of the necessary conditions for the plaintiffs harm. Absent any one of the elements in the set, the P's harm would not have occurred. This test helps weed out the vast majority of acts or omissions that play no concrete role in causing the event.
      1) Under the causal set test, there is no focus on time:
) A gas valve negligently constructed might not fails for years
            1) Toxic substance sold won't have effect for decades
      2) There can be two causal sets (P says the vaccine caused the seizure; D claims it was P's pre-existing traumatic injury); if there are, it is for the finder of fact to decide which causal set is better supported by the evidence.
) A gets infection and gets vaccine to fight infection; he dies. Had A not gotten either the vaccine nor the infection, his death would not have happened. Both are elements in the causal set.
         a) D introduces evidence that the vaccine and infection work independently; the fact finder now has to decide what is the cause.

V. How to Prove Actual Cause (Weighing of Inferences)
   . Burden of Proof
      1) Preponderance of Evidence (more likely than not that it was element of causal set); CONTRAST to medical community, which sets a high standard for causation, see Prof. Coleman's article in Pediatrics.

   A. Circumstantial Evidence
      1) P can use direct or circumstantial evidence, but the mere speculation or a possibility of causation is not enough. However, inferences based on ordinary human experiences are permissible, see Fedorcyzk.
      2) OFTEN, the P will lose because his circumstantial evidence is not enough.

VI. Argument: D was a cause, but he was a de minimis cause of the accident.
   . While D was a cause, his cause was superseded or overwhelmed by other more important causes.
      1) Deminimis Cause: An act that a court finds legally insignificant.
) Helpful for both D's whose causal contributions join with others to produce harm and for { who are charged with contributory negligence in similar circumstances.

VII. Analysis: Were there multiple actual causes, satisfying either of the tests above?

. Write This: It is no defense for one negligent actor that someone else's negligence also contributed to the accident. Thus, there is no requirement that the D's act be the SOLE actual cause of the injury only that it is an actual cause.

A. Arguments: Argue that D1 will assert that he should not be liable because his negligence alone was not enough to cause P's injury. But this is wrong, he just needs to be a cause of the harm.

VIII. Analysis: CONCURRENT CAUSES (As opposed to superseding causes)—Were there multiple sufficient causes, each which would have been the factual cause of the injury if the other had not stepped in to cause the injury?

. Write This: If D's conduct, while not necessary for the outcome (P's injury) would have been a factual cause if the other competing cause had not stepped in, the D is nonetheless the factual cause of P's injury; the D's conduct is one of multiple sufficient causes.

1) But argue for de minimis (superseding cause?)

A. Example: I set a fire that would burn B's house. While my fire is spreading to B's house, C's fire comes in and actually burns the house.

B. Restatement §27 calls these types of causes "multiple sufficient causes"

C. D will argue that his cause was not sufficient to cause the injury, but that the other cause was the only sufficient one.

IX. Analysis: Did two (or maybe more) defendants commit substantially similar negligent acts, one of which caused that P's injury? Shifting Burden of Proof

. Write This: In situations where two or more defendants commit substantially similar negligent acts, only one of which cause the P's injury, the courts have carved out a policy based rule—illustrated in *Summers v. Tice*—that places the assumption of liability, and therefore the burden of proof, onto the defendants as opposed to the P.

1) Occurs in scenarios where D can't prove who caused the injury because he does not have the evidence to "bring the injury home to D."
2) Narrow Rule: The D's must be doing the same/similar thing negligently so as to make it likely that either caused the harm. Also, as more D's, the less fair it is to apply the rule.
   Argument: P can argue that for policy reasons the courts should permit the P to proceed notwithstanding the lack of evidence on actual cause. See *Summers*
   Summers v. Tice Case
3) F: 3 men went hunting, all used the same rifles wit the same bird short. P walked ahead of the other 2--they shot him accidentally--but no one knows who fired the actual shot that hit P.
4) 2 Theories of Recovery (Court uses its own Rule):
) Acting in Concert Rule: If a D1 knows that D2's conduct constitutes breach of duty and gives substantial assistance to D2 in carry out the conduct, he is liable as to the P.
      1) Example: A and B are members of hunting party. Each negligently shoots at road where they see a deer. A's shot hits the deer; B's shot hits C. A is liable to C.
   a) Joint Action (Summer Rule): When two or more persons by by their acts are possibly the sole cause of harm to P, or when two or more acts of the same person are possibly the sole cause and the P has introduced evidence that one of the two persons or one of the same person's two acts is culpable, then the burden shifts to the D.
      *Analysis: Were there more than 2 D's?
         If there are more than two D's, shifting the burden in order to figure out % of breach feels increasingly unfair/less efficient.

X. Majority Rule: How P collects his money when there are more than 2Ds: Joint and Several Liability (from Summers v. Tice)

. At CL, if (1) more than one person is proximate cause of P's harm, (2) and the harm is divisible, then under the traditional common law rule, EACH D is liable for the entire harm.

1) Thus, P can collect from either or BOTH of them.
2) Harm must be indivisible

a) If there is some way of saying that some of the harm is due to D1's act, and the remainder of the act on the other D, then each will be responsible for the harm attributable to him.
b) EVEN IF HARM IS DIVISIBLE, if D's are ACTING IN CONCERT, then each is liable for each others harm
i. Ex: If two D's are drag racing and only one hits D, both are liable for the harm.

2) Problem with this approach: Under the traditional rule, if one of the D's becomes insolvent, the risk of that insolvency is put on the remaining defendant.
3) Traditionally, Joint and several liability applies to Acting in Concert and Concurrent Tortfeasors
a) Acting in concert
b) Independent Action (Those whose independent acts concurred to proximately cause the injury)

XI. Modern Trend: Sharp trend to CUT BACK or completely eliminate JS Liability, and move to **SEVERAL LIABILITY (a different rule)**

Several liability: D1 is only liable for her share total liability, ie her pro-rata share.
a) Thus, P cannot get all $ from a D, even if one D has more money than another.

2) **If harm is divisible**, then each pays according to his share of responsibility.

A. SOME STATES HAVE SWITCHED TO SEVERAL LIABILITY

Med Mal

Lost Chance

When you start below 50% and you drop further below.

Step 1: Measure the chance lost through expert testimony and evidence
a) Example: From 40% to 10%= 30% loss of survival

Step 2: Value the lost chance
i. These jurisdictions have adopted the proportional recovery approach to assessing damages, which is the that damages "recoverable is equal to the percentage chance of survival or cure lost, multiplied by the total amount of damages allowable for the death or injury.", see Dickhoff
- Example: If total death damages are $100K, and the D reduced the damages by 30% then his liability is $30K.

ii. If P is still alive, then the measure is value of the reduction of the P's life expectancy from her pre-negligence life expectancy.
- Example: Because of D's negligence, P's chance of survival reduces from 40% to 10%. Thus, same analysis as above ($30K damages).

iii. BUT IF P, THROUGH EXPERT TESTIMONY, CAN PROVE THEY WERE PART OF THE 30% OF PEOPLE WHO WILL SURVIVE, AS OPPOSED TO THE 70% WHO WILL DIE, THEY GET FULL RECOVERY.

iv. IF YOU ESTABLISHED LOST CHANCES, ASSESS OTHER DAMAGES

B. **Expert Testimony Required**: As with all medmal, the parties must bring in experts to establish percentages.

C. THE DICKHOFF ARGUMENT
1) IF THE P HAD A GREATER THAN 50% CHANCE TO SURVIVE AND BC OF D IS UNDER 50%, THEN SHOULD BE A REG MED MAL W/CHANCE FOR FULL RECOVERY.

XII. Analysis: MedMAL—If P comes in with a 51%+ survival and it drops below 50% the P will be made whole (more probable than not) REGULAR MEDMAL AND/OR WRONGFUL

XIII. Analysis: Loss of Chance Medical Context (At 50% or Below)—Did D's negligence reduce a plaintiff's chances of survival?

. Write This: In the medical context, when a defendant's negligence reduced the P's chance of survival, the D can be liable for negligence under the "Loss of Chance" doctrine, which permits P's to recover damages when a defendant's negligence causes the P to lose a chance of recovery or survival.

- Two Theories to Loss of Chance:

  Causation Theory Loss of Chance [Minority]: Court reduces the P's burden persuasion on causation.

  - Result: D caused P a loss of chance of survival, so D should pay 100% of damages.

  Distinct Damages Theory: The loss of chance of survival is a distinct injury in and of itself. In Dickhoff, the court applied a two approach to measuring loss of chance under the damages theory

  1) Threshold: If P comes in at 60% and drops to 55%, reg medmal
  2) Threshold Q: If P comes in at 51% or more and drops below, full recovery.

XIV. Arguments: Where courts have limited Loss of Chance—Restatement §26: Limits Loss of Chance to Medmal. Why?

. Worried about expanding liability in areas where factual cause is very uncertain (how much were P's chances of survival diminished?). Thus, courts have limited the lost opportunity doctrine to medical malpractice cases. The features of these cases

1) a contractual relationship existed between physician and patient
) Thus, emergency situations less likely?
2) reasonable good empirical evidence is often available about the general statistical probability of the lost opportunity
) Thus, if new uncheck drug therapy, then less likely?
3) Frequently the consequences of the Doctor's negligence will deprive the P to a less than 50% chance of recovery.

XV. Analysis: DES—Was there a negligent product that was mass produced, such as medication, and P cannot find out exactly who made the defective product?

. Write This: When a group of Ds negligently created a product that caused mass injury to a P and others, courts have fashioned a number of tests to allocate damages across the relevant defendants. The problem with many of these approaches is that they end up holding a plaintiff liable who did not actually cause the specific P any harm. Nonetheless, courts uphold the various allocations of damages on the basis that the D's benefitted economically and that if all of the P's effected sued together, damages would be fairly allocated.

A. DES Cases: A number of pharma cos. make DES, which causes birth defects. P knows what caused it, but does not know WHO did it.
B. Tests
   1) Market Share Test: Allows P to sue a number of D's and assuming they are at fault hold each liable for part of D's damages.
   2) Compensation Fund
   3) Impleading: P sues one D, who impleads other D's and they have a pro-rate share of damages unless one of the D's can establish concretely its market share.
   4) Shifting Burden on D: If D can prove that his product did not cause the injury, they are not L. If they cannot, they are jointly and severally liable to the P or Ps.
   5) Sales: analyze by sales in the area where P purchased the products

Proximate Cause

I) MAJORITY: LIPTZIN (PROX CAUSE IN NC)—Not merely possible, but reasonable foreseeable; not too attenuated; chain of events too long; too remote in time; unforeseeable

A. NC defines proximate cause as: A cause which in

0. **(1) natural and continuous sequence,**
1. **(2) unbroken by any new and independent cause, produced the Ps injuries, and without which the injuries would not have occurred, and one**
2. **(3) 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.**

) D had to have foreseen a harm that occurred. What must be foreseeable? Liptzin

(0) The element of foreseeability is required to establish proximate cause. To prove foreseeability, the P is required to prove that in exercising reasonable care, the D might have foreseen that some injury would result from his act or omission or the consequences generally injurious might have been expected.

(1) THUS, the P DOES HAVE TO PROVE THAT D FORESAW THE INJURY IN ITS PRECISE FORM.

(2) Foreseeability

( ) The kind of injury is relevant

(a) The manner of the injury is not relevant

(b) The extent is not relevant

3. - foreseeability is necessary
4. - law does not require you to foresee events which are merely possible, just those that are reasonable foreseeable
5. - see p 446 for other elements of foreseeability
6. - this injury was unforeseeable, injuries too remote in time, and chian of events leading to it was too attenuated for prox cause.
7. - public policy concerns - we can't be locking people up all the time

II. Proximate cause, the second causation element that must be proven in negligence, is a judicial policy determination creating a proxy for fairness and justice. Proximate cause is the second primary legal doctrine for limiting liability after duty. The idea is that there should be some limit to D's liability for far reaching and bizarre consequences. The P has established D+B, is there something in the fact pattern that makes us not want to impose liability?

III. Write This: P's conduct will be deemed to be a proximate cause of harm if the harm was a foreseeable result of the conduct, and if the harm was not brought about by an extraordinary or unforeseeable sequence of events.

IV. WHEN PROXIMATE CAUSE IS USED COMPARED TO DUTY?

. RS 29 COMMENT F:

0. When to use Duty: Because duty is a matter of law for the court to decide, it is a preferable means for addressing limits on liability when those limitations are clear, based on bright lines, are of general application, and when they are not based on intense facts, AND when they IMPLICATE POLICY concerns.
1. Courts often use the duty concept to deny liability for consequences that are foreseeable for policy reasons whereas PC is usually used to impose liability for unforeseen consequences.
2. When to use Proximate Cause: When using prox cause (or scope of liability) when limits imposed require careful attention to specific facts of a case and involve difficult factual evaluative judgments. This approach is more flexible and preferable device for limiting liability.

V. If P's injury is truly beyond the type of harm to be expected from D's conduct, the P will virtually always go uncompensated.

VI. Where a particular type of injury to P is foreseeable, the D is liable for the injury sustained, even though it is more serious than might have been anticipated.

. Take your P as you find her

A. If D could foresee personal injury to P, D is liable for the actual injury caused

VII. The cases distinguish unforeseeable consequences of a negligent act from consequences that are foreseeable but take place in an unusual manner.

. Even if manner in which the accident took place was unusual, if it was the type of accident to be anticipated, D is liable.

A. However, if the general nature of the risk to be expected is far afield from the injury that actually occurs, it is less likely that D will be liable.

VIII. An injury does not have to be likely or probable in order to be foreseeable in PC analysis. Many acts are culpable even though they pose a relatively small risk of injury. Foreseeability includes whatever is likely enough in the setting of modern life that reasonably thoughtful person would take account of it in guiding practical conduct.

II. Two Tests (Direct Causation & Foreseeability)

. Direct Causation: Polemis

) Fallen out of favor (Foreseeability is the main test now)

a) TEST: Any consequence that flows directly (not natural and probable) from the breach, D is liable for. If you plot the canine of causation and it's on the direct chain—>fair
(0) not if there's a superseding cause?
(1) does NOT include foreseeability

b) The Problem: Can end up with limitless liability. Rejected by foreseeability test.

A. Foreseeability Tests

0. Cardozo (Palsgraf) Reasonable Foreseeable P Standard AKA Zone of Danger Test

) Rule: There is no duty to an unforeseeable plaintiff, that is, there is no duty to a person with respect to whom the defendant could not foresee harm.

a) Test: Start at the moment before breach—imagine Ordinary prudent of a reasonable man foreseen the risk at the time of the incident from the point of view of the actor? NO HINDSIGHT!? What is the range of reasonable apprehension in foresight?
(0) The means of the harm are not important: JUST LOOK AT WHETHER THE HARM ITSELF OR THE END RESULT WAS FORESEEABLE.
(1) If you are within the zone you are covered and will get proximate cause element.
(2) No such thing as "negligence in the air"; you have to be within the zone and you have to be exposed to the general type of harm.
(3) KEY: No HINDSIGHT FORESEEABILITY!

1. RS 3rd

) Rule: There should not be liability for unexpected harms.

2. Situations where courts do not follow Palsgraf no liability rule

) Extent: Extensive results from physical injuries
(0) One the P suffers any foreseeable injury, even if minor, the D is liable for any additional unforeseen physical consequences (as long as they do not stem from intervening causes)

a) Foreseeable but unlikely
(0) If the actual harm to the P was remotely foreseeable, there is liability even though these consequences were unlikely.

b) Manner: General class of harm but not the same manner:
(0) As long as the harm suffered by P was of the same general sort that made the D's conduct negligent, it is irrelevant that this harm occurred in an unusual manner.
(1) Ex: C hands child a gun, the gun falls and breaks X's toe; no prox cause
(2) Ex: C hands child a gun, child drops the gun accidentally shooting X: yes to prox cause.

c) P is part of foreseeable class
(0) Rule: Even if injury to P was not especially foreseeable is irrelevant so long as P is a member of a class as to which there was a general foreseeability of harm.

Intervening Cause

Intervening Cause & Superseding Cause

B. Texas v. Baker

0. Rule: Sometimes a D's conduct is not a proximate cause of P's injuries because the subsequent conduct of a third party interrupts or supersedes the D's negligence, thereby breaking the chain of causation between D's negligence and the injury complained of.

) MUST BE UNFORESEEABLE: BUT, if the alleged "superseding act' should have been foreseeable at the time of D's breach, then there is not superseding cause, but instead there is a CONCURRENT CAUSE, which does not break the causal nexus.

a) A true superseding cause is one that
(0) (1) "alters that natural sequence of events and produces results that otherwise would not have occured
(1) (2) Is an act or omission not brought into operation by the original act of the defendent
(2) (3) Operates entirely independently of the D's allegedly negligent act or omission

1. Restatement Factors in Deterring Superseding Cause
) intervening force brings about harm diff in kind from that which would otherwise have resulted
a) its operation/consequences appear afterwards to be extraordinary rather than normal
b) force is operating independently /isn't normal result created by the actor's negligence
c) due to a 3rd person's act or to his failure to act
d) act of a 3rd person which is wrongful/subjects them to liability (to P)
e) degree of culpability of a wrongful act of a 3rd party which sets the intervening force in motion

C. Barry
0. Rule: If P can prove superceding cause, D will not be liabile at all; if P can prove concurrent causes, then both D's may be liabile.
) Three Types of Causes
(0) "Proximate cause results from a sequence of events unbroken by a superseding cause, so that its causal viability continued until the moment of injury or at least until the advent of the immediate injurious force."
( ) [T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries.
(1) A concurrent cause is one that is "contemporaneous and coexistent with the defendant's wrongful conduct and actively cooperates with the defendant's conduct to bring about the injury.
(2) Finally, "[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."

1. Superseding Cause Shift Liability Entirely
) "The function of the doctrine of superseding cause is not to serve as an independent basis of liability, regardless of the conduct of a third party whose negligent conduct may have contributed to the plaintiff's loss.
(0) The function of the doctrine is to define the circumstances under which responsibility may be shifted entirely from the shoulders of one person, who is determined to be negligent, to the shoulders of another person, who may also be determined to be negligent, or to some other force."
( ) Rule: Thus, the doctrine of superseding cause serves as a device by which one admittedly negligent party can, by identifying another's superseding conduct, exonerate himself from liability by shifting the causation element entirely elsewhere."
) If a third person's negligence is found to be the superseding cause of the plaintiff's injuries, that negligence, rather than the negligence of the party attempting to invoke the doctrine of superseding cause, is said to be the sole proximate cause of the injury.

LIST THINGS THAT ARE PROBABLY SUPERSEDING CAUSES

I. Acts of God
. If natural act is really extraordinary, D is not liable = Superseding
A. But if an act of God produces the same result that was threatened in other ways by D's neg, D may still be liable.
B. General rule: D is liable in cases of "unforeseen intervening causes but foreseeable result"

II. When intervening causes are more than merely negligence they will usually supersede the D's negligence

III. Unforeseeable Criminal Acts
. But if at the time of negligence, the criminal act might reasonably have been foreseen, the causal chain is not broken by the intervention of such act.

IV. Others have traditionally been considered superseding as a matter of law. Those include:

. Intentional Torts of Third Parties

A. Voluntary intoxication
   0. But dramshop liability
   1. But social host liability
   2. DRAM SHOP/SOCIAL LIABILITY: ∆1 (host) ≠/ liable for drunken guest (∆2) bc voluntary intoxication = superseding cause. Common law
      State statutes can abrogate CL rule i.e. if ∆1 serves a last drink with a sense that it'll push ∆2 over the line, ∆1 can be held liable.

B. suicide
   0. Usually superseding as a matter of law
   1. bc it used to be a crime
   2. UNLESS π can show that deceased was a happy, normal person before the breach, and they can methodically trace the devolution of the deceased to the ∆'s breach.

C. acts of God/nature

INTERVENING ACTS THAT DON'T EXCUSE LIABILITY

I. AGGRAVATION OF INJURIES: a ∆ who neg injuries another is also responsible for any aggravation of injuries suffered by the π during the course of medical treatment, even if such injuries are due to the neg of attending physicians or π's own stupidity.
   In the latter (i.e. π's own stupidity), there's also needs to be contrib. analysis.

II. RESCUERS: rescuers are foreseeable, so ∆s are liable for any injuries suffered by a rescuer.

III. AMBULANCES: if you hit an ambulance, it's foreseeable that you'd injure anyone inside, so you're liable for their injuries.

Affirmative Defenses

I. Defenses
   . AT CL, only Contributory and Assumption of Risk.
   A. Today, depending on J, Cont/Comp, AoR, SOL, Immunities
      0. SOL & immunity does not rebut PV case but are defensive strategies

Contributory Neg

I. Not Majority Rule Anymore: A P who is negligent and whose negligence contributes proximately to this injuries is totally barred from recovery. Thus, Contrib. is a complete defense, in which the D's contrib cases takes on the mirror image of P's case.
II. Diminished importance
   . 5 states still have it (MD, VA, DC, NC, ALA)
      0. States close by persuaded more easily.
III. Rationale
   . Encourages P to make sure they are not neg--deterrence
   A. Clean hands idea--come into court with clean hands if you are going to sue
   B. P's are their own best cost avoiders
   C. Avg person in these states believes in the idea of bearing his own risk
IV. Burden of Proof: On D
V. Exceptions:
   . Last Clear Chance Doctrine
      0. Rule: If, just before the accident, the D had an opportunity to prevent the harm but chooses not to, then P's Contrib is wiped out and P is not absolutely barred.
   A. Children under 5 cannot be Contrib
   B. Not Exceptions: Claims against which D is not usable
      0. IT, gross neg, SL, Neg per se (might or might not)
   C. Apples & Oranges Rule:
      0. If P can prove she was merely neg, but D committed IT, then P is not absolutely barred.
) Rationale: Can't compare apples (neg) to oranges (IT)
         a) D will argue that P's act was not only neg, but was also Gross/IT
   D. Usually unsuccessful argument:
      0. P: My act was a CONDITION not a cause
      1. D: P's act was a cause
      2. RS: Condition & Cause the same thing
   E. Jury Nullification
      0. Jury usually has ability to nullify if P was very low % contrib.
VI. Rationale Against Contrib
   . Perceived unfairness in barring a minimally neg P from highly neg D.
      0. Ex: P is 1% neg; D is 99% neg, but D gets out)
) We don't want windfall for neg D.

Comparative Neg

I. Def: Comparative Neg. divides liability between P and D in proportion to relative degrees of fault.
   . Statute or Judicial Decision: Most states have statute but Court can establish it as well because of stare decisis and common law
II. Two Types: Pure and Modified
   . Pure: P is allow to recover at a reduced level EVEN IF HIS FAULT IS GREATER THAN THE D.
      0. EX: P is 90% neg and D is 10% neg. P sues for $100K= he takes home $10K.
      1. Loved by scholars but rejected by most J's
   A. Modified (Most common approach)
      0. One approach: P's claim will be barred if his negligence is as great as the D's (If P's neg is 51%)
      1. Other approach: P's barred if neg if greater than D's.
   B. Multiple Parties?
      0. If all parties are before the court, and pure approach, just allocate.
      1. If Modified: for Joint and several liability.

) A is injured when B and C collide in accident. C is hit and run driver who is never found. Court finds A to be 20% neg, B to be 30% neg, and C to be 50% neg. A can recover 80% from B and B can try to collect that from C.
a) Rationale:

III. How % is determined (instructing jury)? p274
. Some courts: relative degree of deviation from SOC (blameworthiness)
0. Ex: Can take into account the nature of the risk creating behavior, including any awareness or indifference with respec to risk.
A. Other approach: Causal view
0. Relative directness of the causal link between negligence and damage may also be considered in assigning %.

IV. Stare Decisis & Modifications (Coleman)
. Arises when one party asks court to change CL
0. Court has power to change CL bc it is the parent of the rule, even though leg. has concurrent authority.
1. In terms of authority, courts have authority to make law.
2. Debate
) Pros: Leg might not ever pass it bc of politics (legal realist); courts are uniquely situation to understand how laws work and are applied.
a) Con: Defer to legislature, more democratic

ASSUMPTION OF RISK

I. A P is said to have assumed the risk of certain harm if she voluntary consented to take her chances that harm will occur. There are two main types of AoR: (1) express and (2) implied
II. Burden of Proof: On D, as with Comp.
III. Express
. ABSOLUTE BAR AT COMPARATIVE AND CONTRIB. P CANNOT RECOVER.
A. TEST: If P explicitly knowingly, willingly or voluntarily agrees with D, through a statement, in advance of any harm, that P will not be liable for certain harm, P has expressly assumed the risk of that risk. Generally, these waivers are enforceable and not against public policy, with exceptions.
0. Can be written or oral BUT MUST
B. Exceptions (3 Situations) AOR DOES NOT WAIVE D's RESPONSIBILITY:
0. If D intentionally or recklessly or grossly negligently causes the harm
1. If the bargaining power of the party protected by the clause is grossly greater than that of the other party, see LaFrenz
) Necessity: Argue that the good/service was a necessary so should not enforce exculpatory clause bc this is service everyone needs and uses.
2. If void for PP (Overriding public interest)
) There is some overriding public interest which demands that the court refuse to enforce the exculpatory clause.
a) Children (PP also) Capacity
(0) Exculpatory clauses against children are void against PP and are thus ineffective.
( ) Come in three forms:
) Parents asked to sign
i) Child is asked to waive
ii) Child and Parent both waive
(a) But all of these are void as against PP because kids signature is not valid and parents cannot be neg in waiving kids rights.
b) Argument: Potential Workers doing Ultrahazardous activities who are required to sign exculpatory clause probably are void
3. Trend: Recreational Acts
) Today: Exculpatory clauses are not enforceable for recreational acts, but there is a push by rec. lobby to enforce them.

(0) Necessaries Arguemnt/Rationale for making them void against PP: very important for society to be healthy, so considered necessaries and thus void against PP. Thus, they are a matter of public interest, even if the rec. org is private.

4. So why do D's still make exculpatory clauses that will be unenforceable? (1) in terrorem clause and (2) hope law will change

C. EFFECT ON COMPARATIVE NEG J: Express AoR defense in COMP J's is treated the same as in Contrib: If not void for PP, it serves as a COMPLETE BAR TO RECOVERY.

IV. Primary Implied AoR

. Two types: primary implied AOR and secondary/tertiary AOR

A. Primary Implied—USUALLY SPORTS CASES--MATTER OF LAW FOR JUDGE

) SERVE AS ABSOLUTE BAR: Baseball

a) Def: Even if P never makes an actual agreement with the D whereby risk is assumed, she may be held to have assumed certain risks by her conduct.

b) TEST [FOR SPORTS CASES ONLY]: For D to establish primary implied assumption of risk, he must show that (1) the risk was inherent and could not be eliminated without altering the fundamental nature of the activity. If Primary, then D has complete bar to recovery. But see 2nd and 3rd below, which are subsumed into comparative negligence principles.

(0) Coleman: MAJORITY RULE: You do not need to know of the risk if in a sports; in CA it extends to recreational activities, but for other J's IS JUST SPORTS

c) IF P knowingly and voluntary assumed a risk, but did not expressly agree to it (if Lafrenz knew of the risk but went ahead anyway, WE analyze it under tertiary (if unreasonable) or secondary (if reasonable land) not primary implied land

d) If Danger from Other Participants—D is said to have ASSUMED THE RISK (Does not need to know; bring an Indian to baseball game)

(0) In sports and recreation cases, where D injured P, if the injury is found to be inherent in the sport or activity, then even in comparative negligence state the P cannot recover against the D on the theory that the D owes no duty to avoid that sort of risk. But if not inherent, D cannot use AOR as defense.

( ) Argue ordinarily careless inherent to the game (covered by primary assumption of risk) and intentional or reckless as to be outside of the range of ordinary activity in the sport or recreational activity.

(1) Nalwa: Rule

( ) Operators sponsors and instructors of recreational activities posing inherent risk of injury have no duty to eliminate those risks, but do owe P the duty not to unreasonably increase the risks of injury.

e) D's Main Arg: Activity has Inherent Risks

(0) Sports: Certain dangers are so inherent in some sports that they cannot be D has no duty to protect P

(1) Other Recreational Activities: Bumper cars , NALWA

(2) Outside of Recreational Activities: Firefighters rule—precludes suits by workers for negligence creation of hazards inherent in their work.

f) P's Argument: D's activity went beyond the inherent risk.

g) Rationale

(0) Don't allow AOR to prevent the chilling effect of participating and sponsoring recreational activities

( ) If you cannot be negligent in football, no one will play

(a) Bumper cars: the point of the bumper cars is to bump.

B. Secondary Tertiary Land

) If the P's actions demonstrate that she knew of the risk in question and voluntarily consented to bear that risk herself BUT DID NOT EXPRESSLY AGREE TO IT THROUGH WRITTEN OR ORAL K, we are in 2ndary or tertiary land. Primary is only for sports. If P knew of the risk and voluntarily assumed it and it was reasonable, then secondary; if unreasonable then tertiary.

a) Element: Knowledge

b) Element: Voluntary Assumption
(0) If P was under duress, then no AOR defense
(1) If P had reasonable alternative, then no AOR defense

C. Secondary/Tertiary, see Blackburn
(0) If D had a duty, D breached the duty, P assumed the risk but it was reasonable, we are in Primary AOR Land bc D has no duty of care.
( ) AKA If D owes a duty of care to P but P knowingly encounters a risk posed by D's breach of that duty, we are in 2nd/3rd land
(1) Secondary—CHILD
( ) For secondary, P assumes risk through his conduct, but it is reasonable to do so, thus her recovery WILL NOT BE REDUCED AS MUCH AS TERTIARY (will be viewed solely from perspective of comparative fault)
) P running in to save child in burning building negligently set on fire by D.
i) IF CONTRIB, EVEN THOUGH P WAS REASONABLE HE IS NONETHELESS BARRED BEAUSE AT CL AOR WAS A COMPLETE DEFENSE! CRAZY!
(2) Tertiary—HAT
( ) P assumes risk through his conduct, but is unreasonable to do so
) Bc this was unreasonable (went to get his hat, not his child), then P's recovery will be reduced in relation to his fault. See Blackburn
i) But if Contrib. D can use AOR as defense.—ABSOLUTE BAR
(a) EFFECT ON COMP NEG J: 2/3RD PRIMARY MERGES WITH COMPARATIVE NEG AND IS THUS REPLACED, WITH THE EFFECT THAT D'S NEGLIGENCE IS REDUCED, BUT NOT ELIMINATED.
(b) TERTIARY IS A BAR IN CONTRIB.
(c) 3 Part Herod Test for Tertiary
) Knowledge on the part of the injured party inconsistent with his safety
i) Appreciation of the injured party of the danger or condition
ii) Deliberate or voluntary choice of the part of the injured party to expose his person of that danger

D. Effect on Burdens
0. By allowing AoR in a situation, courts are effectively creating a no duty rule. If judge frames it as AD (AOR) burden is on D; if he places it as no duty rule, then burden is on P.
) Rationale for putting it on D: We want people to litigate to AD.

V. I. COMPARATIVE FAULT
A. Broadens comparison beyond parties relative negligence to all fault-based actions—including negligence, gross negligence, willful and wanton misconduct, recklessness, and intentional conduct.
B. CF compares fault-based actions, so actions that qualify as STRICT LIABILITY are not included.
C. Example: LL & Repair
1. LL fails to repair gas leak he was substantially certain (IT) would cause an explosion and T, despite smelling something odd, lit a match to light a decorative candle.
a. Under Cont. Neg, since the D's conduct was an intentional tort and P was ordinary negligence, these actions would not be compared.
b. Under COMP neg, both the IT and vanilla neg would considered by the jury in determining how responsibility for the damages would be allocated.
(1) RS 3d §1 (Minority Approach not accepted by most J's)

VI. II. COMPARATIVE RESPONSIBILITY
A. This is a causation based comparison, as opposed to fault based that FOCUSES BOTH ON THE PARTIES RELATIVE LEVELS OF FAULT (CARELESS TO INTENTIONALITY) and ON THEIR CAUSAL CONTRIBUTIONS TO THE DAMAGES. NOT SL
1. Example: Shooting
a. D1 shoots the P but the bullet barely grazes his leg. P is further injured when D2's truck, transporting gas on the highway, explodes in the next lane as P is being transported to the emergency room. Finally P who was in remarkably good shape when arrived in the ER die in the ER room as result of the gross negligence of D3, a surgeon. D1 committed an intentional tort

(the worst along the fault continuum) but his causal contribution was minal compared to the other D's. D2 committed a SL offense, but his causes to the P's injury were not likely not negligible (no injury). D3 was grossly negligent--less at fault in terms of his mental state as D1 and more at fault than D2, but his causal contribution to P's injury is greater than either.

(1) The RS 3d suggests that the judge instruct the jury to consider BOTH fault and relative causal contributions.

B. RS §8 Factors for Assigning Responsibility

1. Factors include

a. (a) the nature of the peerson's risk creating conduct, including any awareness of the indifference with respect to the risks created by the conduct and ing intent with respect to the harm created by the conduct AND

b. (b) the strength of the causal connection between the person's risk creating conduct and the harm.

VII. If Contrib

. P is Neg, D is GN+=Cannot use Contrib Defense

A. P is Neg, D is Neg=Can use Contrib Defense

B. P is GN+, D is GN+= Can use Contrib Defense

C. P is GN+, D is Neg= Cannot use Contrib

VIII. If Comparative

Strict Liability

I. SL creates liability regardless of D's intent and regardless of whether D was negligent, on the basis that those who engage in certain kinds of activities do so at their own peril and must pay for any damage that foreseeably results, even if the activity is carried out with the utmost possible care.

II. ONLY DEFENSE TO SL IS AOR
   . Wild Animals?
   A. Abnormally dangerous activities?
   B. Product Liability?

III. SL 3 Part Case
   . Establish that S/L fact pattern falls into SL category (Done by Ct as MOL)
   A. Causation (Actual and Proximate)
   B. Injury/Prop that makes things SL

IV. Rationales (Two big ones)
   . There are things society wants to eliminate or discourage and does so by making D's SL in this context. In effect, it dissuades D's to do the act bc it is too expensive (insurance to high), too risky (even if I am perfect careful still liable).
      0. This is opposite of rationale for negligence, which is that P is not an assurer of P's safety--P must make out fault before D has to pay.
   A. Category we want to encourage, buy SL is loss spreading device
      0. Best Example: Products liability
) Biggest tension: SL for socially useful but abnormally dangerous activities

V. The ONLY DEFENSE TO SL IS AOR; NOT CONTRIB.

Animals

I. Wild Animals
   . RS/Nash Rule:
      0. (1) A possessor of wild animals is subject to liability to another for harm done by the animal to the other, his person, land or chattels, although the possessor has exercised the utmost care to confine the animal, or otherwise prevent the animal from doing harm.
      1. (2) This liability is limited to harm that (1) results from a dangerous propensity that is (B) characteristic of wild animals of the (C) particular class, or (2) which the possessor knows or has reason to know."
      2. What is a wild animal?
) Test: Are the animals AS A CLASS recognized by custom as DEVOTED to the service of mankind?
            (0) Does not matter that the PARTICULAR animal serves a socially useful purpose.
               ( ) BUT CUSTOM OF LOCALITY MATTERS: An elephant in CT is not a domestic animal, but ask Hannibal if his elephant was not under the service of mankind.
               (a) ALSO, as mentioned above, the fact that this particular animal has been domesticated, once its wild instincts "relapses" back into old form, the D will be SL.
      3. Dangerous Propensity
) Anything tending to cause harm to person or property of another
         a) Animal does not need to actually attack the P; if the P fears the animal and has a heart attack and dies, P is liable (as long as he can make out causation)
            (0) Thus, the fact that the average person fears animals of that species would be part of what makes the animal dangerous.
         b) BUT the injury must be derived from the DANGEROUS PROPENSITIES OF THE ANIMAL
            (0) Thus, if the P trips over a tiger's chain, there is no SL.
            (1) If the tiger licks the P and P has a rash from it, not dangerous propensity.
      4. Wild but no dangerous propensity?
) If the animals are wild but do not have inherently dangerous propensity, then no SL; but you always have negligence.
      5. Characteristic of the Wild Animal
)
   A. Compare to RS 3

0. RS 3 wants to channel SL back into liability. Because of this, it has allowed for return of negligence principles into SL
) Rule:
      (0) An owner of possessor of wild animal is subject to strict liability for physical harm caused by the wild animal.
      (1) A 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.

II. Domestic Animals
. Rule: Possessor of a domestic animal that (1) he knows or has reason to know has (2) dangerous propensities (3) abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm.
   0. Dangerous Propensities
) Anything tending to cause harm to person or property of another
      a) A dog does not have to show a tendency to inflict grievous injury for it to be dangerous. Plaintiffs note that "[a]ny knowledge of the animal's propensity to bite or attack, whether in anger or play, is sufficient [knowledge]."
   1. Abnormal to Its Class
) The propensities must be abnormal to the animals class. This is KEY. You can always get to neg, but for SL the bar is higher.
         (0) Class as a dog? or as a Presa De Canario? Or as a mastiff?
   2. QoF that goes to jury

A. Sinclair
   0. F: Dog bites kid; history of bites.
) D's Arg: Animal acted in instinctual, excited, overstimulated way, not in abnormally dangerous way.
         (0) Dog is not ABNORMALLY dangerous for a german shepard.
      a) P's Args: Previous bites are evidence that dog is dangerous.
      b) D's Arg: Animal should be considered domestic bc socially useful.

B. Argument: Scientific Advances
   0. Scientific advances can make a once dangerous animal that was domesticated (such as bull) unuseful

C. Last bite Rule
   0. Idea behind Rule: If dog has biten once, then owner is put on notice and is free of SL, P must go to negligence.
) After that D is on notice.
         (0) BUT SOMETIMES D IS L ANYWAY BC DOG HAS OTHER DANGEROUS CHARACTERISTICS
      a) Problem: Misguided rule because a dog bite does not mean it is abnormally dangerous--circumstances matter.

III. Defenses to SL
. For a P to recover, must be kind of risk that made activity abnormally dangerous

A. Unlike negligence, if the harm occurs in an unforeseeable manner, the D will generally be relieved of liability for the unforeseen cause, even though the damage is of the same nature as that which made the activitvty abnormally dangerous.
   0. Act of God (storm in unprecedented way)
   1. Restatement 2nd: Rejects this view, as well as any excuse for harm caused by the "i, n or r" of 3rd parties.

B. P's Contributory neg no Defense
   0. Generally contrib will not bar P from SL recovery.
) Assumption of Risk: But if P knowingly, voluntarily and unreasonably subjects herself to the danger, D will have a AOR defense.
      a) Even if reasonable, still probably not $$ for P.

C. Comparative Neg
   0. Will reduce P's recovery even in SL to the degree of P's fault.

Abnormally Dangerous Activities

I. There are three main tests, commanding NO majority, that can be applied in determining S/L for dangerous activities: Rylands Rule, RS 2nd, RS 3rd
   . Write This: One who carries out abnormally dangerous activities is strictly liable for damage resulting from the dangerousness of the activity. Remember, Animals/Dangerousness is MOL for court to decide.

II. Rylands Rule—Traditional SL: (1) Non-natural use and (2) Natural Consequences

   . A person who for his own purposes brings on his land and collects and keeps there anything likely that is (1) non-natural and 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 (2) natural consequence of its escape.
      0. Facts of Ryland: D's hired an independent contractor to construct a mill pond (thus they were not negligent). When the mill pond filled up, water broke through it into some abandoned mine shafts on the property, and then flooded into adjacent mine shafts owned by P. The D's themselves were not aware of the abandoned shaft and were therefore not negligent.
      1. Idea Behind: Strict SL approach recognizes that a man's home is his castle and that he should not be interfered there.
) Compare: If he went out into highway (into society) the strict SL approach would not happen.

III. Restatement 2nd—6 Factor Test:
   . §519 imposes liability for "abnormally dangerous" activities. §520 lists six factors to be considered in determining whether an activity is abnormally dangerous, usually requiring at least 2 out of (a)--(c)
      0. High Degree of Risk: Existence of a (1) high degree of risk of (2) some harm to person, land or chattels of others.
      1. Risk of serious harm: Likelihood that the harm that would result would be great.
      2. INABILITY TO ELIMINATE THE RISK BY THE EXERCISE OF REASONABLE CARE.
) Possner Used (c) to send most SL cases out and force P's to sue for negligence.
      3. Not a matter of common usage: Extent to which the activity is not a matter of common usage, ie how many people in area did it did (RS 3rd focuses on the social utility of the activity)
      4. Appropriateness: In appropriateness of the activity to the place where it carried on
      5. Value: Extent to which its value to the community is outweighed by its dangerous attributes.
   A. This list of factors is a MENU; the court has discretion to apply them when they see fit (compare to Rs 3d)
   B. Idea Behind: Same as Ryland "man is his castle" approach.

IV. Restatement 3rd—Narrows SL:
      0. Reduces the number of factors for determining whether an activity is abnormally dangerous and thus worthy of SL. You need two conditions
) The activity (1) CREATES A FORESEEABLE and (2) HIGHLY SIGNIFICANT RISK of PHYSICAL HARM even when (3) REASONABLE CARE IS EXERCISED by all actors" AND
         a) the activity is not one of common usage
            (0) If social utility, common usage under RS 3rd, but not under RS2nd
            (1) No SL for fireworks on 4th of July
            (2) No SL for Gas tanker driving down the road bc it is sufficiently common.
         b) Differences between 2nd RS
            (0) Elements, not factors (higher burden)
            (1) The last two factors are taken out (e and f). RS comment points out that SL is relevant only when the D DOES NOT HAVE NEGLIGENCE LIABILITY. THIS IS WHAT POSNER WANTED.
            (2) Collapses the first two factors into a single "foreseeable and highly significant risk of physical harm".
            (3) In maintaining the (c) factor of RS 2nd, RS 3 requires that reasonable care is exercised BY ALL ACTORS, not merely the D. This effectively NARROWS the scope of SL--if reasonable

precautions by the P's could make the activity not abnormally dangerous, there will be no amount of care by the D alone could nullify the highly significant risk.

V. D's Argument: Social Utility Outweighs Imposing SL, see (Branch [Gas company vital to West] see also Bennett [socially useful to spray crops)

VI. Nuisance

. A nuisance is not a type of tort, but a type of injury which P sustained. It is an unreasonable and substantial interference with P's use and enjoyment of his land.

0. The P must prove that (1) he had an interest in his land and (2) that D behaved negligently or worse manner.

) Example: Western Petroleum interfering with the Branch's well.

Products Liability

I. Defective products

. (design (everyone of these things everywhere is defected),

A. manufacturing defects (this specific one was defective)

B. warning and labeling (poor labeling, D did not tell ppl there were peanuts in his product)

ONLY AFFIRMATIVE DEFENSE FOR SL IS AOR (THINK TRAVIS THE MONKEY ARGUMENT)

II. Coleman: In Nash, the D could have argued the P knowingly volunteered and assumed the risk to handle Travis the monkey.

III. AOR for workers doing ultra hazardous activities: Proboably cannot waive intentional

Damages

Nominal Damages

. Actual Injury Required: In any action based on negligence, the P must suffer an actual injury. Unlike intentional torts, therefore, nominal damages generally may not be awarded.
  0. BUT USEFUL FOR INJUNCTIONS OR CX CASES: The one exception to this rule if for §1983 suits, which allow a P to sue a state or local official in FEDERAL court for a tort that the worker did (to avoid state court bias). The P will file for nominal damages as well as an injunction and/or punitive damages, which works as a vehicle to allow him to obtain the injunctive relief to change government practices (ie police department practices) and/or punitive damage award.
) Serious enough that court will recognize D was wrong.

A. Harm v. Injury: Damages flow from injury, not from harm. The law recognizes only some harms as injuries.
B. Types of Damages
  0. Nominal Damages:
  1. Compensatory Damages
  2. Punitive Damages
C. PHYSICAL DAMAGES REQUIRED
  0. In the usual negligence case, the P must prove that she suffered some type of physical harm. A P will rarely recover were he has sustained only mental harm.

Compensatory Damages

IV. Standard of Review for Damages is the Material Evidence Standard.
V. Damages for Economic Loss
  . Davis
    0. Actual Wage Loss [PAST $]: To recover for actual wage loss, P must prove =that she would have been earning wages "but for" the accident in question.
) Must prove (1) past lost wages and (2) time spent away from work
        (0) Past Lost Wages: Not much discretion for jury, based on mathematical calculation.
          ( ) Calculate by probability AS OPPOSED TO multiplier of amount earned (ie if P earned $20 a day on day of injury, and trial was a week later, past lost damages would be $140).
    1. Earning Capacity [Future $]: Because it is speculative, court has broad discretion, but must be based in fact. Cannot be too speculative. P has to show the approximate amount of damages, which, more likely than not, he will sustain in the future.
) TEST: (1) Must prove with reasonable certainty that you will be impaired in the future; (2) prove damages flowing from that impairment; (3) tab in factors below to calculate the extent of damages flowing from the impairment
        (0) How much is P disadvantaged in workforce?
        (1) Physical condition before and after?
        (2) Her age and life expectancy? (can use actuarial tables)
        (3) Work life expectancy?
        (4) Discount and inflation rates (will award the present value to prevent plaintiff windfall)
        (5) Past work record?
      a) Damages awarded are for a loss of EARNING POWER, not just loss of earnings.
        (0) Ask: What could P have earned over her life v. what she will earn now?
          ( ) Note: Just because a P earns more AFTER HER INJURY than BEFORE does not bar recovery for earning capacity if P can prove she would have earned EVEN MORE $.
        (1) If P is unemployed, a child, student, she can still recover for earning capacity even though she is not making any $ right now. Same factors as above.
      b) Calculating Earning Power by Averaging Past 5 years income:
        (0) Court will find this unreasonable because not indicative of average LIFETIME earnings profile for someone in P's position.
      c) Economist Expert Testimony:
        (0) Given great weight, but because it is speculative his opinion is not dispositive, see Davis.

( ) Inadmissible if based on "unsupported speculation, see Daubert

d) Proving impaired earning capacity
   (0) TEST: P must present medical evidence that indicates with reasonable certainty that P has a disability causally related to the accident. LAY TESTIMONY HELPS BUT IS NOT ENOUGH.
   ( ) if not a functional impairment, must have medical expert testify to the existence of pain.
e) Future Losses Are discounted to present value because a $ can be safely invested.
f) Taxation:
   (0) Compensatory Damages resulting from physical injury are not subject to federal income taxes; punitive damages are.
   ( ) They (punitive damages) are also taxable because they were received as a result from emotional distress or illness where D caused the P no physical injury. REPEAT IN PUNITIVE
g) If economic losses damages are not taxable bc they are received as a result of settlement or verdict to personal injury case, but would have been taxable if they actually been earned, court VARY in whether any adjustment for taxation is appropriate.

2. Medical & Other Out of Pocket Damages
) (1) Prove that you needed them; (2)Proven by hospital bills AND/OR medical testimony; cost of medicine (3) Cannot be paying someone to do it before, Davis
   a) Problematic: Proving future medical costs decades after the injury (operations 20 years in; cost of treatments)--> usually medical expert
   b) Hiring a maid (or parents if you pay them)
3. THERE IS NO CAP FOR ECONOMIC LOSSES BC THEY CAN BE VALUE
) IF YOU HIT BILL GATES YOU TAKE HIM AS YOU FIND HIM
   a) Rationale: Social utility of P such as Gates is high; less persuasive for trust fund baby
4. Reasonable Housekeeping Expenses [Both Past and Present]:
) Cannot be awarded if P had employed housekeeper prior to accident or injury.
      (0) Damages usually allowed if P is TOTALLY INCAPACITATED.
5. Special Damages:
) Term means many things. In Davis, court used it to define harm ordinarily expressed in dollars and does not count non-economic harms.
      (0) BUT, in Avita v. Metro Club of Chicago, court defined special damages as" damages unusual for the type of claim in question."

VI. Damages for Non-Economic Loss
. Meals
0. Challenging Damages
) We start with presumption that jury is honest and conscientious.
      (0) Damages are reviewed under material evidence standard and will be affirmed if supported by material evidence. But if the amount of damage is so great that is demonstrates "passion, prejudice or caprice" on the part of the jury so as to "shock the judicial conscience", the jury's verdict will be overturned.
      ( ) If the award is not in "range of reasonablness" and is excessive, D will argue that it has become punitive in nature.
   a) If Challenging Jury's Award of Damages Based SOLELY on how much they awarded the P, court will
      (0) nature and extent of P's injuries
      (1) pain and suffering P expereinced,
      (2) expenses P incurred as result of injury
      (3) P's loss of capacity
      (4) P loss of enjoyment of life
      (5) P's age and life expectancy.
1. Non Economic Damages
) Difficult to quantify
   a) May include
      (0) Pain and suffering

( ) Includes (1) physical and mental discomfort (2) in addition to mental and emotional responses such as anguish, distress, fear, humiliation, grief, shame, or worry.

(1) Permanent impairment or disfigurement

( ) Permenant Impairment: One that P cannot recover from; prevents a person from "living his or her life in comfort "

(a) Disfigurement: Impairs beauty, symmetry, or appearance

(2) Past and future loss of enjoyment of life

b) In quantifying, courts looks to similar cases

c) If trial court gives remittitur (lowers the award and P can take it or leave and retrial) or additur (trial court ups the award and D can take it or retrial) Appeals court will rarely overturn.

d) Arguments for/against non-economic damage

(0) Courts Bar Golden Rule: During a jury trial, an attempt to persuade the jurors to put themselves in the place of the victim or the injured person and deliver the verdict that they would wish to receive if they were in that person's position.

(1) Often P is allowed to show that P will have pain and suffering or some other non economic harm for every day of his life. Multiply damages per say.

e) Caps in Pain and Suffering Awards—Policy Issue

(0) Sometimes states establish caps on pain and suffering damages.

( ) For Caps:

) They do this to further other state interests, ie to encourage physicians to practice in the state.

i) Unbelievably high insurance costs

(0) Very high cost of business/service fees because of heightened insurance costs

(a) Against Caps:

) $250K and $500K are typical caps for damages; however these are often not adequate, see Meals. They in effect allow P's with small injuries to recover all of their damages, but Ps with the most damage to recover the least.

i) Because these caps sometimes potentially undermine constitutional rights such as due process and equal protection, some of the state legislation imposing caps on pain and suffering may be undone.

(0) However, [Coleman thinks] medmal is the most likely area of law to remain capped in the jurisdictions that maintain a cap. Caps also potentially undermine the potentially sometimes undermine the fundamental principle of tort law, which is to make the plaintiff whole.

Punitive Damages

I. Sometimes awarded to penalize the D, and deter similar wrongdoers, where the D's conduct is particularly outrageous. The purpose is deterrence and retribution.

II. We don't like grossly excessive or arbitrary punishment. At some point the work has been done and punitive damages that go beyond that amount are just excessive and don't serve the intended goals of punitive ds.

III. Negligence Cases

. As opposed to IT cases, In most jurisdictions punitive damages are recoverable in a negligence action, but only if the plaintiff shows that the defendant's conduct was more than ordinary negligence (i.e., wanton and willful or reckless).

0. Constitutional Limits

) "Grossly excessive" standard: An award will violate the due process clause of the federal Constitution's 14 Amendment if it is "grossly excessive." BMW of North America v. Gore

a) Ratio of actual to punitive: One of the most important factors in whether an award of punitive damages violates due process is the ratio of the punitive damages to the compensatory damages. The Court has said that "few awards [significantly] exceeding a single-digit ratio between punitive and compensatory damages...will satisfy due process. State Farm

1. State Farm

) Gore 3-part test (applied de novo):

(0) Degree of responsibility of D's conduct (SCOTUS says this is most important of the 3 factors)
(1) Boil down the ratio between compensatory and punitive damages (not a bright line rule, but says few awards beyond single-digit ratios are likely to satisfy due process.)
(2) Difference between punitive damages awarded by jury and the "civil penalties authorized or imposed in comparable cases.

a) The precise award is based on the facts and the circumstances of D's harm to P.
b) Courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the P and to the general damages recovered.
c) Repeated Misconduct: Cites Gore to say that repeated misconduct is more reprehensible than an individual instance of malfeasance and may be punished more severely than a first time offender, but that in a civil action, courts must ensure the conduct in question replicates the prior transgression.
d) Not a Sub for Crim Law: Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

2. Because tort is state law it is relatively unusual for the United States Supreme Court to address cases arising out of tort claims. Federal Constitution preempts inconsistent state law, where the law and related decisions out of state courts implicate constitutional constraints, it may become a federal issue. See States Farm

A. Punitive Damages are infrequent. Most cases don't go to trial and in punitive ds are awarded in very few cases. In considerably fewer do the awards survive appellate scrutiny.
B. SC Suspicious: SCOTUS doesn't like that the amount of punitive damages varies significantly from case-to-case even when the cases appear to be similar on their facts. They lament their unpredictability.
C. Curtailing the range of punitive damages a jury can award implicates the jury's and ultimately tort law's ability to use punitive damages as a tool to punish especially wealthy corporate Ds. Bc punishment is a way to regulate behavior, this means that tort law's deterrence function is also necessarily limited.

IV.

1. Mitigation
    1. A tort plaintiff, like a contract plaintiff, may not recover any damages which he could reasonably have avoided. "duty to mitigate."
        1. In particular, P cannot recover for any harm which would probably have been avoided had he sought adequate medical care.
        2. Only reasonable care required: P is only required to use reasonable effort and care. Cts are lenient in construing this and the burden is on D to show that P's harm could reasonably have been avoided.
        3. Effect of comparative negligence: The mitigation doctrine is less important today than formerly, because most states that have adopted comparative negligence no longer apply the mitigation rule, and instead merely treat P's failure to mitigate as a form of fault that reduces but does not eliminate her recovery.

Wrongful Death

I. Wrongful Death

A. A lawsuit brought on behalf of a decedent's survivors for their damages resulting from a tortious injury that caused the decedent's death.
1. Parties who can bring suit: Usually limited to spouse, child, parents
2. What is recovered?
) TEST: May recover damages the present monetary value of the decedent to the beneficiary for losses reasonably expected including (1) pecuniary but also other (2) Care and Assistance (3) non monetary income and possibly (4) Punitive damages and (5) nominal damages if jury finds, see DiDonato
(0) Pecuniary Injury (Net Income)
(a) Test: DiDonato: Decedent's Probable Gross Income MINUS his living expenses

i) But must be reasonably expected (how much is reasonably expected depends on circumstances and who beneficiary is: If spouse and living together, most of decedent's income would go to spouse; if parent, then probably only $ that would go to contributing to their well being ie retirement home)

(2) Services Protection, care and assistance of the D, whether voluntary or obligatory

(3) Non Monetary

(a) Pain and Suffering of the Beneficieries

(b) Companionship (loss of decedent's care, protection, assistance, comfort, guidance)

(4) Punitive Damages Are Also Available if Malicious, Willful or Wanton, Gross Negligence

II. Survival Claim

A. A lawsuit brought on behalf of a decedent's estate for injuries or damages incurred by the decedent immediately before dying.

1. Did Decedent Die Instantly?
   a) If so, there is probably not survival action; if his death was long and continuos, then probably lots of SC damages
2. What Damages? From DiDonato
   a) Hospital bills
   b) Pain and Suffering for Decedent
   c) Funeral Expenses

III. Hybrid

A. Some states do a hybrid, like DiDonato (NC), but analysis is same.

IV. If the Jurisdiction Splits WD and Survival Claims, The Allocation of Damages Generally Is

A. Survival is limited to pain and suffering, lost earnings, actual medical expenses, funeral (ie ONLY LOSSES INCURRED PRIOR TO DEATH)

V. At Common Law: No Wrongful Death

A. A person who was injured by D's negligence and died, his claim died with him (Coleman quoting Prosser: "cheaper to kill the P than to injure him."

1. Result: Decedent's own tort action was extinguished
2. Result: Third persons injured by decedents death (spouse, child, etc) lost their right to recover, see Baker v. Bolton

VI. Unborn Fetuses and Wrongful Death

A. DiDonato:

1. Courts allow P's to bring actions for injuries suffered prior to birth.
2. More than 30 states recognize a WD action for infants killed in utero.
3. Rule: Pecuniary damages (loss of income) from stillborn child are TOO SPECULATIVE.
   a) With Stillborn: We know nothing of age, intelligence, interests to make a judgment on monetary on contribution.
4. Rule: Loss of services, companionship, advice are not available for action for WD of fetus.

Wrongful Death

VII. WD
. (1) Death of a person; can be viable fetus in most states (2) caused by a wrongful act, neglect or default of another (if the person would have lived, they would have filed a tort claim for what would have happened to them) PLUS (3) Prima Facie Case of Negligence or Tort

VIII. Types of Damages that can be sought
. doctrinally SC is another parasitic claim, but most J's combine; the difference between survival claim and wrongful death

A. Survival Claim
0. Decedents claim
1. Ex: Korean

B. Wrongful Death Claim
0. Funeral expenses
1. Present monetary value of the decedent to the P's, including the loss of reasonably expected net income from the decedent
) But not available for fetuses
a) Net Income
b) Punitive Damages

IX. (1) Death of a Person
. Viable Fetus (Majority(

X. Caused by a wrongful act, negelect or default of another
. IF the person would have lived act would have been tortious

XI. Injury
. Exprenses for care, treatment, hospitalization before death

A. Pain and suffering of the decedent
0. Available for fetuses if provable

B. Funeral expenses

C. Present monetary value of decedent to plaintiffs
0. loss of reasonably expected"
) net income of decedent
(0) not for viable fetuses
a) services, protection, care assistance (whether voluntary or obligatory)
b) Consortium
(0) not for viable fetuses
( ) mother's anguish separate cause of action
c) Punitive Damages (if GN+)
(0) that Decedent would have gotten AND for causing Decedent's death
d) Nominal Damages
1. Proved to reasonable level of certainty
) Mostly with actuarial tables
(0) Argue for specific deviations up or down
( ) Narrower demographic tables OR personal circumstances
(a)

XII. Punitive Damages are usually not availble for SL; but if u can rise to gross then yes

Can use reasonable force to exclude from property once you are there

At Contrib=ALL AOR

In comparative=AOR is treated just as if AOR

I. Nominal Damages
II. Compensatory Damages
. Damages for Economic Loss
0. Davis
) Actual Wage Loss: To recover for actual wage loss, P must prove that she would have been earning wages “but for” the accident in question.
a) Past Lost Wages: Not much discretion for jury, based on mathematical calculation.
(0) Calculate by probability AS OPPOSED TO multiplier of amount earned (ie if P earned $20 a day on day of injury, and trial was a week later, past lost damages would be $140).
b) Reasonable Housekeeping Expenses: Cannot be awarded if P had employed housekeeper prior to accident or injury
c)