

Torts Outline - Wyman - Fall 2008

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Intentional Torts

I. Battery

A. Elements of Battery

1. X acts
2. Intending to cause
3. Harmful or offensive contact
4. X's acts cause such contact

B. Intent qualifications

1. Only need to intent contact, not the harm [R2T §20]
2. Alt: acting with substantial certainty to cause contact can satisfy (more than 75%)
3. Transferred Intent: if A throws rock at B and hits C, intent is transferred and a battery occurred.
4. Offensive is "a reasonable sense of personal dignity." [R2T §19]

C. Intent Cases

1. *Vosberg v. Putney* (): One child kicked another in a schoolroom in a way that unexpectedly resulted in the plaintiff's leg being rendered lame, possibly due to the exacerbation of a prior injury. Battery, you don't need to intend the type of harm caused.
2. *Nelson v. Carroll* (): D walks into a nightclub with a drawn pistol and approaches P, who owes him money. He says 'give me my money' and hits P on the left side of his head. P didn't respond. D repeated the motion and the gun went off. Battery, it was enough that D set "a force in motion which ultimately produces the result."
3. *Wagner v. State* (UT S. Ct., 2005): P was in a customer service line at K-Mart when she was attacked from behind, allegedly by Sam Giese, a mentally disabled patient of the Utah State Development Center (USDC). Personnel from the USDC had accompanied Giese to K-Mart but the episode of violence was sudden. Battery, b/c "insane are liable for their torts."

4. *White v. U of ID* (Ct. App. ID, 1989): Prof. Neher was a social guest at P's home. He came up behind her and touched her back like a pianist. P had to have surgery. Battery, he need not have intended the harm, just the contact.
5. *Laidlaw v. Sage* (Ct. App. NY, 1899): Anarchist came to D's office with a bomb demanding money. P alleges that D maneuvered P to use him as a shield before the bomb exploded. No battery, can't intend contact if in immediate peril.
6. *Keel v. Hainline* (S. Ct. OK, 1958): Several boys, including D, threw erasers, chalk, coke bottles etc. at each other without intent to cause injury. P, sitting in the middle of the room and studying quietly, was hit by an eraser, which shattered her glasses blinding her in one eye. Battery, transferred intent doctrine.
7. *In Re White* (VA, 1982): D and shot at one person, but hit P instead. Battery, transferred intent.

D. Contact Cases

1. *Paul v. Hollbrook* (FL Ct. App., 1997): Working alone together, D harassed P verbally. Twice he came up behind her and massaged her shoulders; P immediately pulled away each time and told D to leave, which he did. Battery, not casual touching but offensive contact.
2. *Leichtman v. WLW Communications* (Ct. App. OH, 1994): When appearing on their program during the Great American Smokeout, the defendants repeatedly blew smoke in Leichtman's face "for the purpose of causing physical discomfort, humiliation and distress." Battery (survives motion to dismiss), offensive contact.
3. *Madden v. DC Transit* (DC Ct. App, 1973): Fumes from bus case. No intent to contact, so no battery.

II. Assault

A. Elements [R2T §21]

1. D acts
2. Intending to cause: imminent harmful/offensive contact
3. P reasonably Apprehends imminent harmful or offensive contact.
 - a) Contact will happen unless self-defense or flight.
 - b) Apprehension: P "must believe that the act may result in imminent contact unless prevented from so resulting by the other's self-defensive action or by his flight or by the intervention of some outside force." [R2T § 24]

B. Cases

1. *Beach v. Hancock* (NH, 1853): In the midst of an argument, Beach went into his office and brought out an unloaded gun. From about 50- 65 feet away, Beach pointed the gun and "snapped" the gun twice. Assault, textbook case.
2. *Brooker v. Silverthorne* (SC Ct. App. 1919): Booker spoke harshly to Silverthorne when he called the phone exchange and she didn't respond as promptly as he'd like. "If I were there, I would break your God damned neck." Not assault, b/c there was no apprehension of 'imminent' contact.
3. *Langford v. Shu* (NC Ct. App. 1961): D played a nasty practical joke on P by pretending that a springloaded box in the back yard contained a snake-eating mongoose. At one point, the children caused the box to spring open and hurl a fox tail out. P tore cartilage in her knee as she tried to jump out of the way. Assault.
4. *Vetter v. Morgan* (KS Ct. App, 1995): P was stopped at a stoplight, D pulled up, began screaming at P and revving the engine. P, terrified, wrote down the license plate number. When the light turned green D veered to the right – unclear how sharply – and P veered sharply to the right in response, hitting the curb and crashing the van. Assault.

III. Defenses to Battery and Assault

A. Consent

1. **Basic Rule:** consent defeats liability

- a) Can be express or implied
- b) D must actually and reasonably believe there is consent
- c) Courts will sometimes void for public policy

2. Cases!

- a) *Koffmann v. Garnett* (VA Ct. App. 2003): D used 13 y/o P (144 lbs, first time playing org. football) as a tackling dummy. He instructed P to stand “upright and motionless” and lifted him two feet or more off the ground before slamming him down, breaking D’s arm. Battery, only consented to like age and experience.
- b) *Grabowski v. Quigley* (Sup. Ct. PA, 1996): D1 was supposed operate on P’s back. The surgery went awry and, upon examining the records, P discovered that D2 had performed most of the operation instead. D1, wasn’t at the hospital, and after being paged multiple times, D2 performed most of the surgery; D1 finished up. Battery, P didn’t consent to D2’s touching, just D1s.
- c) *Brzoska v. Olson* (S. Ct. DE, 1995): D, a dentist, contracted HIV. D continued to practice for two years. The Delaware Division of Public Health then notified his former patients that they may have been exposed to HIV. None of the plaintiffs alleged *exposure* to HIV, but sued because of the “mental pain and anguish” that was caused. No battery, you can’t recover for irrational fear.
- d) *Werth v. Taylor* (Ct. App. MI, 1991): Ps are Jehovah’s Witnesses, whose religion does not allow blood transfusions. P1, pregnant, filled out forms at the hospital including a “Refusal to Permit Blood Transfusion” form. When she went into labor, her husband filled out the form again while she was being admitted. There were post-delivery complications and while P was unconscious and being operated on, a blood transfusion was deemed medically necessary and performed. No battery, only “fully informed, contemporaneous decision” overcomes “evidence of medical necessity.”

B. Self-Defense

1. Basic Policy

- a) Actual and reasonable belief that you must injury another to avoid injury self.
- b) Can only use proportional force.

2. Cases!

- a) *Haeussler v. de Loretto* (CA Ct. App., 1952): P became rowdy on D’s porch upon finding that P’s dog had been hanging out in D’s house. He started talking loudly and waving his hands. D ordered P to leave the premises, but the P advanced, so D hit him once, hard enough to loosen teeth, then slammed the door. No battery, self-defense.

IV. IIED

A. **Basic Policy:** → liability [R2T §46(1)]

1. Conduct must be outrageous
2. Undertaken for the purpose of causing the victim emotional distress such that it could adversely affect physical health
3. Causes such distress (physical harm or no.)

B. IF directed at third person: liable to member of immediate family or other present at the time. [R2T §46(2)]

C. Cases!

1. *Roberts v. Saylor* (S. Ct. KS, 1981): P had previously sued D for refusing to assist in a malpractice lawsuit she filed, which D believed was without cause. In a chance encounter at a hospital, as P was waiting for surgery, D told P that he didn’t like her and wanted her to know that before the surgery. Not IIED, not “extreme and outrageous.”
 - a) 6 part test for IIED

- (1) To establish cause of action
 - (a) Conduct must be intentional, or in reckless disregard of plaintiff
 - (b) Conduct must be extreme and outrageous
 - (c) Must be a causal connection between defendant's conduct and plaintiff's mental distress
 - (d) Plaintiff's mental distress must be extreme and severe
- (2) Two threshold requirements for damages
 - (a) So extreme and outrageous as to permit recovery
 - (b) Emotional distress so severe that the law must intervene because the distress inflicted is so severe that no reasonable person should be expected to endure it

2. *Greer v. Medders* (Ct. App. GA, 1985): P was in the hospital recovering from heel surgery. His doctor was on vacation, and D agreed to fill in. When D hadn't visited for a couple of days, P called him. When D appeared, D yelled at P and his wife. The wife began to cry and P experienced uncontrollable shaking, for which he received psychiatric treatment. IIED.

3. *Littlefield v. McGuffey* (7th Circ., 1992): P rented an apartment from D. When D found out that her boyfriend was black D threw P out of the apartment and proceeded to harass her and her family. At one point, D went so far as to tape a death threat to the door of her new apartment. IIED.

V. Trespass

A. Two Part Test

- 1. Did actor set out to make contact with the land?
- 2. Did actor in fact make the contact?

B. Defenses

- 1. Private Necessity
 - a) P can't evict
 - b) D must pay for any damage
- 2. Consent

C. Cases!

1. *Jacque v. Steenberg Homes* (WI S. Ct., 1997): D requested permission to drive across property in mobile home, was denied, and did so anyway. Trespass.

2. *Ploof v. Putnam* (S. Ct. Vt, 1908): D was sailing sloop on Lake Champlain when a sudden storm came up. Fearing destruction of the craft, P moored at D's dock. The D's servant unmoored the craft, which immediately crashed upon the rocks and was destroyed. Not trespass, private necessity.

3. *Vincent v. Lake Erie* (S. Ct. MN, 1910): A major storm came up and D was moored at a dock and remained throughout the evening. When a line frayed, the crew replaced it with a larger one. At the end of the night the dock had suffered \$500 in damages (as found by the jury). D must pay, private necessity doctrine.

Negligence

VI. Basic Doctrine

A. Four Elements

- 1. Injury
- 2. Duty

3. Breach
4. Cause (Actual and Proximate)

VII. Injury -- not really a focus

A. Physical harms

1. Bodily harms

- a) Fatal and non-fatal contusions, lacerations, broken bones, etc.

2. Damage to or destruction of property

B. Loss of wealth

C. Emotional Distress

Duty

VIII. Duty

A. Basic Duty

1. Basic Doctrine

- a) **Basic rule:** Conduct creating risk of physical harm → **DUTY OF REASONABLE CARE!**[R3T § 7]

(1) Exception: courts can decide to eliminate or modify when supported by “an articulated countervailing principle or policy

- b) Requires P to establish that D owed an obligation to take care not to cause the type of injury suffered.

(1) Distinct from breach b/c breach *assumes* a duty.

- c) Question of LAW → goes to the judge

2. Policy

- a) Duty protects those who have not exercised reasonable care
- b) Allows judges to limit liability

3. Cases

- a) *Heaven v. Pender*

b) *Winterbottom v. Wright* (King’s Bench, 1842): Wright contracts to make carriages for Postmaster, which in turn contracts with Winterbottom’s employer to find drivers.

Winterbottom is injured when one of Wright’s carriages malfunctions and tips over. No duty, b/c no privity.

c) *Thomas v. Winchester* (NY Ct. App, 1852): D mislabeled poison as an innocuous herb, and then sold the mislabeled poison to a dealer who would be expected to resell it. Yes duty, which “arose out of the nature of his business and the danger to others incident to its mismanagement.”

(1) Exception to contractual privity based on “great bodily harm exception”

d) *Devlin v. Smith* (NY Ct. App., 1882): Per *Thomas*, scaffolding builders owe a duty to third parties who are injured under it because a poorly constructed scaffold is dangerous to human life.

e) *Torgesen v. Schultz* (NY Ct. App., 1908): Reversed dismissal when a woman was injured by an exploding bottle of carbonated water, which was ruled an inherently dangerous instrument. Yes duty.

f) *Macpherson v. Buick* (NY Ct. App, 1916, Cardozo): Plaintiffs were driving a car along at eight miles per hour when a wheel crumpled and the car overturned. There was no contractual privity between the parties. Yes duty, even though no privity.

(1) Duty exists when there's foreseeable danger and knows product will be used by someone other than the purchaser.

(2) 3 part test

(a) Nature of the thing is dangerous when neg made

(b) Foreseeable consequences

(c) Knowledge that used by "someone other than purchaser"

g) *Mussivand v. David* (OH S. Ct. 1989): Mussivand contracted venereal warts from his wife after she picked it up from David. Yes duty owed by lover to cuckolded husband, b/c he was a reasonably foreseeable victim.

(1) If told the wife, he erases liability

(2) Not liable

B. Limited Duty

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a) Affirmative Duties to Rescue/Protect

b) Rescuer Doctrine

c) Premises Liability

d) Emotional Distress

e) Pure Economic Loss

f) Public Duty Rule

2. Affirmative Duties to Rescue/Protect

a) Basic Doctrine

(1) **Basic Rule:** Common law does not impose a duty to protect

(a) Exception:

(i) "Special relationship" (incl. parent dependent kids, custodian, employer, mental health pro.) owes reasonable care to third persons that arise out of the special relationship. [R3T § 41]

(a) D helped create risk of peril

(b) Content of duty: reasonable steps to rescue, not succeed in rescuing

(2) In Affirm. Duty cases, negligence took the form of nonfeasance, not misfeasance

(3) Presumption: absence of duty of care, so P must affirmatively prove a duty existed

b) Cases!

(1) *Osterlind v. Hill* (MA S. Ct., 1928): Ps were visibly drunk but rented a canoe from D. In the middle of the lake, Ps capsized. Despite spending 30 minutes calling for help D did not come to their aid and P1 drowned. No duty, b/c the Ps could have taken steps to aid themselves.

(a) NOT GOOD LAW.

(2) *Baker v. Fenneman & Brown* (IN App. Ct., 2003): Baker had a seizure in Taco Bell, told employee he was fine, then had another seizure. D's employees didn't help him. Yes duty, on precedent, doctrine and policy grounds.

(3) *Tarasoff v. U. of Calf.* (CA S. Ct. 1976): Man was in psychiatric care of a U of C psychiatrist, when he confessed to a desire to kill P. The D requested police detention, but police released Poddar. Yes duty to warn, reasonable therapist would warn b/c special relationship creates duty to third party vic.

(4) *Ewing v. Goldstein* (CA Ct. App., 2004): Therapist's 'duty to inform' still applies when the "threatened violent behavior" is reported by a family member.

(a) After *Tarasoff* legislature limited liability to “serious threat of violence” limits to making the determination, wipes out “should have determined”

(5) *Kelly v. Gwinell* (NJ S. Ct., 1984): D drove Mr. Zak home and then stayed for what turned out to be thirteen drinks worth of scotch on the rocks. On the way home, D collided head on with Marie Kelly. Zak’s owed a duty to Kelly, b/c of their ‘social host’ special relationship.

(a) **OUTLIER CASE!!!!**

3. Rescuers

a) Basic Doctrine

(1) **Basic Rule:** Someone injured in the course of a rescue can recover from the negligent party who created the need for a rescue, absent rash or reckless conduct on the part of the rescuer.

(2) To prove

(a) Negligence from D to rescued party w/o negligence towards rescuer

(b) Low ‘contributory negligence’ standard

(3) Exceptions

(a) **“Firefighter rule”:** if your occupation is to rescue, you can’t recover under rescuer doctrine in the line of duty

b) Cases!

(1) *Wagner v. Internaitonal Railway* (NY Ct. App. 1921): Man fell near bridge while looking for his cousin who was thrown from a moving tramcar, where the doors were left open. Danger invites rescue; this was the invention of rescuer doctrine.

(2) *Solgaard v. Guy Atkinson* (CA S. Ct. 1971): Doctor at mine site slipped and fell down a wet shale face while attempting to aid two injured workers. Rescue doctrine applies, b/c is not, however, a doctor’s business to cope with steep, slippery embankments.”

4. Premises Liability

a) **Basic Rule:** Duty owed based on relationship between P and P’s status on the land.

b) **Key Question:** did the premises cause the injury

(1) Trespasser (no permission to enter/use): **no willful or wanton injury**

(a) Exception 1: if possessor knows of a regular trespasser, s/he has duty to warn.

(b) Exception 2: possessor has a duty to warn children not old enough to appreciate the danger. Reasonably foresee that kids will come on your land

(i) OLD RULE: don’t maintain an attractive nuisance

(ii) NEW RULE: dangerous condition need not have drawn child to property

(2) Licensee (permission to enter/use for own benefit): **duty to warn**

(3) Invitee (open to the public OR permission to enter/use for possessor’s benefit):

reasonable care

(a) Business visitor: invited/permitted on/allowed to remain on premises for purpose (in)directly related to possessor’s business

c) Trap doctrine: When the occupier of land is aware of a concealed condition involving an unreasonable risk of harm to those coming in contact with it and is aware that a person on premises is about to come into contact with it. Duty to warn.

d) Cases!

(1) *Oettinger v. Stewart* (CA S. Ct., 1944): P was leaving D's office leasing office when D had a fainting spell or tripped, falling on P and injuring her. Business visitor, even though leaving premises.

(a) Wyman: when active conduct injures D, duty of care is higher than when premises injures D.

(2) *Leffler v. Sharp* (MS S. Ct., 2005): Drunk P climbed out a small window onto a second floor roof of a bar, ignoring the locked glass door with "NOT AN EXIT" stenciled on it. The roof was never part of the leased premises. It collapsed and P was injured.

Trespasser.

(3) *Rowland v. Christian* (CA S. Ct., 1968): P was aware of a potentially dangerous crack in her faucet. D, a guest, was injured when faucet broke. Common law distinctions are not determinative, proper test is reasonable property manager.

(a) Outlier case. 8 states have adopted *Rowland's* abolition; 2 have repealed. CA limited decision by statute.

(b) 20 states have collapsed invitee/licensee

(4) *Carter v. Kinney* (MO S. Ct., 1995): P didn't know D socially, but slipped in his driveway as P was coming to attend a bible study meeting for which he'd signed up at church. Licensee b/c there for own benefit; won't adopt *Rowland's* rejection of common law distinctions.

5. Emotional Distress

a) **Basic Rule:** courts are reluctant to impose a duty for 'pure' emotional distress; for a long time P had to demonstrate a physical impact, but that burden has been lightened.

b) Two types

(1) Parasitic ('pain and suffering'): claims for pain and suffering that come along with a physical injury claim

(2) Pure: emotional distress *causes* some sort of physical injury

c) Exceptions to non-recovery

(1) Pass the zone of danger test

(a) Within zone of danger

(b) Physical manifestation

(c) Must be caused of fear of own physical injury

(i) At risk of physical danger

(ii) Afraid of physical danger

(iii) Fear → emotional distress

(2) Bystander liability

(a) Reasonably foreseeable that accident would cause distress

(b) Proximity

(i) Spatial

(ii) Temporal

(iii) Relational

(c) Severity of emotional distress

d) Three tests

(1) Physical Impact Test: Plaintiff "must have contemporaneously sustained a physical impact (no matter how slight) or injury due to the defendant's conduct"

(2) Zone of Danger Test: "limits recover for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct."

(3) Carelessness test: Relatives of victim who are traumatized by observing victim's injury may recover.

e) Cases!

(1) *Dillon v. Legg* (CA S. Ct., 1968): P's young daughter was run over by a car right in front of her. P's sister was likewise present at the scene and within the zone of physical danger. Duty expanded to parties not in the immediate zone of danger.

(2) *Thing v. La Chusa* (CA S. Ct. 1989): Mother arrived at the scene moments after an injury to her child and thought he was dead. No duty, policy necessitates limitation of bystander recovery.

(3) *Consolidated Rail Corp. v. Gottshall* (SCOTUS, 1994, Thomas): Man who was forced to work in presence of dead coworker developed depression and PTSD. Duty, under Zone of Danger test.

(a) Ginsberg dissent: "genuineness and gravity of worker's injury" not to whether it was physical in nature

(4) *Johnson v. Douglas* (NY S. Ct., 2001): Driver zooms around curve, forcing dog walkers to dive out of the way and runs down the family dog. No Duty, as dog is property and you can't recover for NIED of property.

6. Pure Economic Loss

a) **Basic Rule**: No recovery for pure economic loss.

(1) Rare Exceptions:

(a) Natural resource damage for which a party lacks a cause of action

(b) Tied to reasonableness of a different physical risk that caused the loss

(c) Special relationships

(i) Fiduciary relationship such business rely on the professional opinion

(a) E.g. auditors, lawyers, debtor/creditor

(ii) Proximity that creates special relationship

b) Policy

(1) Liability could be enormous and difficult to predict, therefore difficult to insure against.

(2) Defendants in these cases are already faced with liability for the physical action that caused the harm

(3) Availability of business interruption insurance

c) Cases

(1) *Aikins v. Debow* (WV S. Ct. 2000): Truck ran into overpass that cut off traffic to the Martinsburg Econo-Lodge. No duty b/c of lack of damage to physical property, contractual privity, or some other relationship.

(2) *People Express Airlines v. Consolidated Rail Corp.* (NJ S. Ct. 1985): A leak of toxic chemicals forced a 12 hour evacuation of an office building. D had evacuation plans for the office building. Yes duty, b/c D had "knowledge or special reason to know of the consequences of tortious conduct..."

7. Public Duty Rule

a) **Basic Rule**: a governmental entity cannot be held liable for an individual plaintiff's injury resulting from an employee's breach of a duty owed to the general public.

b) Federal Torts Claims Act: you can sue governmental employees for torts committed acting within the scope of their employment

(1) Exception: no liability when claim is based on an employees exercise or performance of a discretionary function or duty

c) Cases!

(1) *Riss v. City of New York* (NY Ct. App. 1968): P reported a stalker ex-boyfriend to the cops who didn't protect her. She had lye thrown in her face. No duty, public duty rule.

(2) *Strauss v. Belle Realty* (NY Ct. App. 1985): P fell down stairs during 1977 blackout while going to the basement to fetch water. He sued Con Edison. No duty, as liability is limited to those in contractual privity as a matter of public policy.

Breach

IX. Breach

A. Basic Reasonable Person Standard

1. **Key Question:** What duty was owed that would have been breached?

2. **Basic Standard:** Would a reasonable person of ordinary prudence in D's position have conducted themselves as D did?

a) R2T: "Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person under like circumstances." [R2T §283]

b) Primary factors to consider [R3T §3]

(1) Foreseeable likelihood that the person's conduct will result in harm

(2) Foreseeable severity of harm

(3) Burden of precautions to eliminate or reduce the risk of harm

c) Exceptions

(1) Physical disability. → reasonable person w/ that disability [R3T §11]

(2) Children → "reasonable child of like age and experience" [R3T §10]

(3) Special skills → taken into account [R3T §12]

d) Non-Exceptions

(1) Dumb or rash people [*Vaughn v. Menlove*]

(2) Mentally Ill

3. Cases!

a) *Vaughan v. Menlove* (QB, 1837): Ps were living in cottages owned and insured by D, who kept a haystack next to the cottages. D was repeatedly warned that the haystack could burst into flames, but he said that he "would chance it." Resulting fire consumed the cottages. Standard of ordinary prudence invented.

b) *Williams v. Hays* (Ct. App. NY, 1899): D chartered the vessel to transport ice from Maine to Maryland. D captained the ship himself for 48 hours straight during a major storm, then went to his cabin, took some quinine and went to sleep. He was awoken by his mate who informed him that the ship was in trouble. After D made a series of questionable decisions, the ship was wrecked. Hays claims he doesn't remember any of the decisions he made. D became incompetent in making every effort to save the ship → acted as reasonable person.

c) *Weirs v. Jones* (S. Ct. IA, 1892): Signs reading 'bridge unsafe' were conspicuously placed at either end of a condemned bridge. P, who couldn't read English tried to cross the bridge, but fell through, killing his horses and severely damaging his wagon. Not reasonable person, b/c didn't heed signs.

(1) Lack of English not an excuse.

d) *Friedman v. State* (NY Ct. Claims, 1967): P, a "100% orthodox" Jew camp spent an afternoon picnicking with a male friend, buying a round-trip chairlift ticket. When they decided to head back down, they found the chairlift running, but deserted. They boarded anyway, and the

chairlift stopped. Hysterical about spending the night lightly dressed on a mountain lift with a man, Friedman jumped, breaking her nose. Contributory negligence alleged. Reasonable person would have jumped → not contributorily negligent.

(1) Court explicitly takes religion into account.

B. Reasonable Child Standard

1. **Basic Rule:** Children are held to “a reasonable person of like age, intelligence and experience under the circumstances” [R2T §283A]

a) Tender Years Doctrine: Child under five is incapable of negligence [R3T §10]

b) Negligent Parenting: Liable IF: [R2T § 316]

(1) Parents aware of specific instances of prior conduct sufficient to put them on notice the act was likely

(2) Parents had the opportunity to control the child

2. Cases!

a) *Purtle v. Shelton* (S. Ct. AK, 1972): P and D were 16 and 17 and hunting with D’s father at daybreak. P was walking back towards D’s deer stand without identifying himself and D shot at him using a high power rifle, which hit a tree. The fragments blinded P. P held to minor standard, b/c not engaging in adult activity.

(1) 2 part test → adult standard:

(a) Activity is dangerous to others and

(b) normally engaged in only by adults

b) *Roberts v. Ring* (S. Ct. MN, 1919): D was driving on busy street. P, a seven year old boy ran across the street and was hit by D, who claims that he saw the boy several feet away and was only traveling five mph. P’s age should be considered, not D’s.

c) *Dellwo v. Pearson* (S. Ct. MN, 1961): Ps were cruising along on “one of Minnesota’s numerous and beautiful lakes” trailing fishing line. D, a young boy, drove a boat over the line, pulling the rod up and injuring P. Child operating motor vehicle → same standard as other operators.

d) *Appelhans v. McFall* (Il. Ct. App. 2001): P was walking down an empty street on a clear day with no other traffic around. P was struck from behind by a five-year-old child on a bicycle and fell, fracturing a hip.

C. Balancing and Cost-Benefit Analysis

1. Two tests to flesh out reasonable person standard:

a) Hand Formula

(1) $B > (P_2 * L - P_1 * L)$ → no breach

(a) B = cost of prevention attempt

(b) P = probability of bad event

(c) L = cost of bad event happening

b) Substantial Risk Test: Did conduct present substantial risk of harm?

2. Cases!

a) *US v. Carroll Towing* (2nd Circ., 1947): Barge without bargee on it was struck and sank. Learned Hand invents the hand formula.

b) *Adams v. Bullock* (Ct. App. NY, 1919, Cardozo): D runs a trolley company with aboveground wires, that runs under a railroad bridge on which neighborhood children play. P, a 12 year old boy, was swinging an 8 foot wire as he walked along the bridge. It caught on the trolley’s electricity line and burned him. No reasonable person would’ve foreseen.

c) *Rhode Island Hospital Bank v. Zapata* (1st Circ., 1988, Breyer): An employee stole a number of blank checks from P and cashed \$110K before it was discovered. D did not realize that a fraud had been committed for several months. P alleged that D's system for check examination is fraudulent. A different system wouldn't have been any more accurate. Reasonable person wouldn't change.

d) *Bolton v. Stone* (H. Lords, 1951): D was hit by an unusually well batted cricket ball that flew over a fence around a cricket pitch. The ball had travelled approximately 100 yards and those who had been with the club for more than 20 years argued that the hit was "altogether exceptional in comparison with anything previously seen on that ground." No substantial risk → no negligence.

(1) NOT WIDELY USED!!!

e) *Martin v. Evans* (PA Ct. App., 1998): D stopped at a highway rest-stop, parking his tractor trailer in the last spot in the row. When he returned to back out, he checked to see if anyone was behind the truck, but accidentally hit P, who claimed that he didn't hear the breaks and engine or see the flashing lights. Jury verdict for truck driver upheld; judge was wrong to throw it out.

D. Industry and Professional Custom - Basic

1. **Basic Rule:** Compliance with custom is evidence of non-negligence, but does not preclude a finding of negligence. [R3T §13]

a) Ditto in converse.

b) Prof. Kenneth Abraham: May be used as sword or shield, but is not dispositive.

c) Policy reasons

(1) Allows for the prodding of industry, especially if an industry custom is ruled to have been negligent.

2. *The TJ Hooper* (2nd Circuit, 1932): Two tugs hauling coal from Norfolk to New York without radios lost barges in a storm. Other tugs, equipped with the radios, heard storm warnings and pulled into harbor. Negligence, even though TJ Hooper was in compliance with professional custom.

3. *Rodi Yachts v. National Marine* (7th Circuit, 1993, Posner): National Marine docked a barge at TDI's dock on an inland seaway. It sat there for five days, before breaking free and damaging some yachts. Evidence needed about prof. custom, which should be determinative.

a) "these customs appear to reflect an undistorted market determination of the best way to minimize runaway-barge accidents..."

E. Industry and Professional Custom – (Professional Malpractice)

1. **Basic Rule:** Industry and professional custom is determinative in professional malpractice cases.

a) E.g.: doctors, attorneys, accountants

b) Respectable minority rule: non-compliance with a standard is not negligent as long as D complied with a school of thought or practice followed by a respectable minority of practitioners.

c) Old rule: strict locality – testimony only from physician licensed to practice in local area.

2. Informed consent!!!

a) Two Part Test:

(1) Treatment resulted in bodily injury

(2) Plaintiff would have decided not to consent to even properly provided treatment if s/he had been adequately informed.

b) Two standards:

(1) Prudent patient standard -- Majority

(a) physician must disclose what a reasonable patient in the patient's situation would want to know.

(2) Reasonable physician standard -- Minority

(a) Physician deviated from industry custom

(b) Basically a standard malpractice case

c) No need to show non-accordance with medical standards; can be brought even if procedure went perfectly well.

3. Policy

a) Tough for juries to figure out whether doctor is negligent on its own.

4. Cases!

a) *Johnson v. Riverdale Anesthesia* (GA Ct. App., 2002): D didn't preoxygenate P, which might have helped save her when she had a severe reaction to anesthesia. Evidence about whether D's expert would personally have preoxygenated was rightly excluded, b/c relevant standard is industry custom, not personal expert choice.

b) *Cook v. Irion* (TX Ct. Civ. App., 1966): P tripped on a television wire at shopping mall opening. There were three potential defendants: the center, the tv station and the center's merchants association. D1 initially filed suit against the Center, but D2 recommended a switch to the Merchant's association. P lost the case. No malpractice, b/c decisions were made in good faith.

(1) BAD LAW! SHOULD'VE BEEN INDUSTRY CUSTOM!

c) *Largely v. Rothman* (NJ Ct. App. 1988): D performed a biopsy on P, taking samples from her breast and lymph node, though he hadn't mentioned the lymph node at all with her previously. D didn't warn her of a rare complication that occasionally followed the procedure, which she then developed. Reasonable patient standard, b/c this is an informed consent case.

d) *Myers v. Heritage Enterprises* (IL Ct. App., 2006): P's, two nursing assistants were operating a lift to move D from her wheelchair to her bed. D and fractured legs. Ordinary negligence standard b/c workers weren't professionals.

F. Negligence Per Se

1. **Definition:** negligence where standard of care is established by statute.

2. **Basic Test:** → negligence [R3T § 14]

a) D violates statute

b) Statute is designed to protect against the type of accident the actor's conduct causes

c) Victim is within the class of persons the statute is designed to protect

d) No "excuse" [R3T §15]

(1) Violation is reasonable in light of childhood, physical disability, physical incapacitation

(2) Actor exercises reasonable care in attempting to comply w/ statute

(3) Actor doesn't/shouldn't know factual circumstances that make statute applicable

(4) Actor's violation of statute is due to confusing way in which the requirements are presented to the public

(5) Compliance would result in greater risk of harm than non compliance.

3. Cases!

a) *Dalal v. New York* (NY App. Div, 1999): D hit P's car, after trying to swerve to avoid it. D didn't have her license with her at the time and wasn't wearing the corrective lenses that the license required. Negligence per se, b/c "an unexcused violation of a statutory standard of care."

b) *Bayne v. Todd Shipyards Corp.* (WA S. Ct. 1977): P fell from loading platform, which violated a state ordinance b/c it lacked a guardrail. Negligence per se, even though P wasn't employee of D.

c) *Victor v. Hedges* (CA Ct. App. 1999): D parked his minivan on the sidewalk next to his apartment building in violation of statute and was standing behind the car showing P his CD player when D's van was hit by an errant motorist. Not negligence per se, b/c statute "was not designed to prevent the type of occurrence that resulted in the plaintiff's injury ..."

G. Res Ipsa Loquitur

1. **Basic Rule:** Negligence can be inferred when "accident causing the plaintiff's physical harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member."

2. Plaintiff must establish 2 things: → establish breach

a) Injury that arose is the kind of injury that only arises from negligence

b) Instrumentality was in defendant's exclusive control

3. Cases!

a) *Byrne v. Boadle* (Ct. of Exchequer, 1863): P was walking along the street in front of D, a flour dealer, when he was severely injured by a barrel of flour falling on his shoulder. Witnesses saw the barrel fall from the window above the plaintiff, but we don't know who pushed it. Res Ipsa Loquitur.

(1) Paradigmatic case!

b) *Combustion Engineering v. Hunsberger* (MD S. Ct., 1936): Exercising a normal duty of care while working inside a preheater, D's workman accidentally knocked a plate loose. The plate fell through the heater, injuring P below. Before D showed up there were boards under P's workmen, but those had to be removed so D could work. D's foreman was supposed to watch the men above to keep his men from working under them. No breach.

c) *Ybarra v. Spangard* (CA S. Ct., 1945): Prior to operation, P was wedged onto the operating table. He awoke damaged by the wedging. Res ipsa.

(1) 3 part test

(a) Accident must be of a kind which ordinarily does not occur in the absence of someone else's negligence

(b) Must be caused by an agency or instrumentality within the exclusive control of the defendant

(c) Must not have been due to any voluntary action or contribution on the part of the plaintiff

d) *Kambat v. St. Francis Hospital* (NY Ct. App., 1997): P had hysterectomy at D's hospital and was recovering well until she began to complain of severe stomach pain. An X-ray discovered a surgical pad either in or partly in her bowel that was causing an infection. It was removed, but she died of the infection and her family sued. Res ipsa.

(1) Same 3 part test as in Ybarra.

e) *Wolf v. American Tract Society*, (NY S. Ct., 1900): Wolf was hit and severely injured by a falling brick. There were 19 independent contractors working on the building, and it was entirely unclear who dislodged the brick. No res ipsa, there must be a good case for affixing blame.

(1) Distinguishable from *Ybarra* b/c contractors weren't acting as a team.

Factual Cause

X. Factual Cause

A. But-for Causation

1. **Basic Test:** Would the plaintiff have been injured if the defendant had acted with the requisite care?
 - a) 'Counterfactual test': "Conduct is a factual cause of harm when the harm would not have occurred absent the conduct." [R3T §26]
 - b) Standard: preponderance of the evidence, e.g. more likely than not.
 - (1) This is a cliff-like approach. If D is responsible for more than 50% of the *increase* in injury likelihood, D's negligence is a but-for cause of the injury. [CHECK THIS!!!]
 - c) Probability in but-for causation is a percentage of negligence.
 - (1) If negligence raised chance of death from 40-60%, no recovery, b/c 20% raise over 60% total risk = $1/3 < 50\%$.
 - (2) If negligence raised chance of death from 20-60%, yes recovery, b/c 40% raise over 60% total risk = $2/3 > 50\%$.
2. Funky tests:
 - a) Loss of chance doctrine: But for D's negligence, the loss of chance of living wouldn't have been destroyed. Only applies when P dies. (E.g. Falcon).
 - (1) Only applies in some jurisdictions
3. Cases
 - a) *Grimstad v. Central Railway Co.* (2nd Circ. 1920): P, a bargee, fell off a barge when bumped by a tug. P drowned before his wife could find the husband in the water as there were no life preservers on the barge. Not but-for cause, as there were too many other factors than the life buoy.
 - b) *Zuchowicz v. U.S.* (2nd circ, 1998): P developed hypertension from wrong dosage of drug. On the transplant list, she became preggers, which exacerbated the condition and made her ineligible for transplant. Yes but-for cause, as the overdose was a substantial factor in the death.
 - (1) Inappropriate application of substantial factor test
 - c) *Skinner v. Square D* (MI S. Ct. 1994): P built electric tumbler w/ on/off switch that had 'phantom zone' where it was impossible to tell whether it was on or off. P electrocuted himself. Not but-for cause, because all the evidence was hypothetical.
 - d) *Falcon v. Memorial Hospital* (MI S. Ct. 1990): P died in childbirth. If IV had been connected, she would have had a 37.5% chance of survival. Yes but for cause, 37.5% wrongful death damages

B. Multiple Necessary/Sufficient Causes

1. Key Question: are there multiple potential tortfeasors?
 - a) **Multiple Necessary Causes** → joint and several liability
 - (1) joint and several liability: Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion.
 - (2) EX: two negligent drivers crash and hit third person [McDonald]
 - b) **Multiple Sufficient Causes** → substantial factor test
 - (1) Substantial Factor test: Was D's negligence a substantial factor in the harm caused?
 - (a) Still good law: Only use when two factors, neither but-for cause, each sufficient
 - (i) Either one could have caused the injury, but
 - (2) EX: Two negligently set fires each burn a building down. Neither is but-for cause, each is a sufficient cause. Liability, since each is a substantial factor!
2. **Daubert Test:** Judge must use "gatekeeper function" to subject expert testimony to two part test
 - a) Is the testimony reliable?
 - b) Is the testimony grounded in scientific evidence?

3. Cases

- a) *McDonald v. Robinson* (IA S. Ct. 1929): Ds' negligently driven cars attached during a collision and jointly ran down a bystander. Both liable, because their joint negligence was a but-for cause.
- b) *Aldridge v. Goodyear* (D. MD, 1999): Goodyear supplied 3 of 28 chemicals in an allegedly toxic brew. No liability, because no one chemical was sufficient under the 'substantial factor' test.
 - (1) OUTLIER, b/c of substantial factor.
 - (2) Find daubert standards in opinion.

C. Alternative Liability

1. **Basic Rule:** Multiple potential tortfeasors, can't say who caused harm → Alternative liability

- a) 4 part test → D now has burden of proof for factual causation
 - (1) P sues multiple actors
 - (2) P proves each actor exposed P to risk of physical harm
 - (3) P proves that one (or more) D's conduct caused P's harm
 - (4) P cannot reasonably be expected to prove which specific D caused harm
 - (a) [R3T § 28(b)]

b) Joint and several liability: P entitled to damages as if there's one tortfeasor but can apportion damages however s/he pleases. (All from one; 30-70, 40-40-20, etc.)

- (1) By state statute, most states require contribution from other Ds to targeted D, based on comparative negligence apportionment.

2. Policy

a) Market Share Liability: most appropriate where there are multiple Ds who put the same toxic product on the market, but P can't prove which one specifically hurt them.

- (1) E.g.: DES cases; not appropriate for *Aldridge*

b) Causation element: case for getting rid of it, for tort law to serve as deterrent/distributive justice. BUT, tort law is about repairing harm/corrective justice.

c) Joint and Several Liability: shifts risk that on D is insolvent from P to other Ds

3. Cases

a) *Summers v. Tice* (CA S. Ct. 1948): Two hunting Ds discharged shotguns at same time, hitting third member of the part with two pellets. Joint liability, even though P can't ID which D shot him.

b) *Sindell v. Abbot Labs* (CA S. Ct. 1980): P's mother took toxic anti-miscarriage drug, while P was in utero, but P cannot ID which of 11 drug companies manufactured the drug - using identical processes – that was given to her mother. Market share liability.

c) *Hymowitz v. Eli Lilly & Co* (NY Ct. App. 1989): Same facts as Sindell. Market share liability, with no ability for companies to exculpate themselves from proving P's mom couldn't have ingested *their pill*.

- (1) Dissent: allow exculpation, then use market share liability

d) *Skipworth v. Lead Industries Assn.* (PA S. Ct. 1997): P lived in an old house with lead paint, impossible to figure out which painting (bet. 1890-1977) produced paint chip that hurt him. No market share b/c lead paints all diff (not 'fungible'), no alt. liability, b/c not all paintmakers joined.

Proximate Cause

XI. Proximate Cause

A. **Basic Policy:** Injury was reasonably foreseeable @ time of breach → proximate cause

- 1. Proximate cause assumes the existence of cause-in-fact.
- 2. As an issue of fact, it is for a jury to decide.

B. Four Tests (Best first)

1. Foreseeability Test: Was injury one of the injuries that could have been reasonably foreseen to occur at the time of the breach?

a) Basically turns proximate cause into a policy question.

b) Andrews dissent in *Palsgraf*

c) What must be foreseeable?

(1) Plaintiff, but not always

(2) Type of harm

(3) NOT extent of harm

2. Directness Test:

a) How close in time/space are breach and injury?

b) Are there intervening acts/events?

3. Risk Rule:

a) An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious. [R3T § 29]

b) Wyman: Injury that arises must be within the field of risks that make D's conduct a breach of standard of care in the first place.

4. Grab-bag approach:

a) Proximate cause isn't really doctrinal, but a vehicle for limiting liability based on policy

C. Cases!

1. *Union Pump v. Allbritton* (TX S. Ct. 1995): Fire at a Texaco plant and a supervisor and P were assigned to close off the valve in a particular pipe. Fire went out. The pipe was slick with firefighting foam, but going over it was a shortcut. Allbritton slipped, fell and sued Union Pump, which made the pump that caught fire. Fire not proximate cause, as the "forces generated by the fire had come to rest when she fell."

2. *Jolley v. Sutton London Borough Council* (QB 2000): A rotten boat abandoned in a lot owned by the defendant. P, a 14 year old boy was 'working' on it and had jacked it up to get at the hull. While as underneath it, the boat fell on P. Boat was proximate cause, b/c playing on it was foreseeable.

a) Specific type of play need not have been foreseeable.

3. *Palsgraf v. Long Island Rail Road* (Ct. App. NY, 1928): D's employees push a running man onto a train, jostling loose his package, which explodes, tipping over scales at the other end of the platform and injuring P.

a) Cardozo (majority): Duty, no negligence, harm not within the "eye of ordinary vigilance." Even if within the eye, which restricts duty, no negligence, b/c no breach of standard of care. A

(1) Not modern way of thinking about duty.

b) Andrews (dissent):

(1) Duty: Everyone owes the world at large a duty to refrain from acts that unreasonably threaten the safety of others

(2) Breach: package was negligently knocked loose

(3) Proximate Cause: law draws line for causation based on "practical politics."

4. *Petitions of the Kinsman Transit Co.* (2nd Circ., 1964): P's ship came unmoored b/c of crew's negligence. It struck another ship and together they hit a drawbridge that should have been raised by the city. The accident flooded the river, causing property damage. Crew, city, dock, all liable.

a) "damages resulted from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable..."

XII. Superseding Causes

A. Basic Policy: Unforeseeable event → different risk than D should have anticipated

1. Typical Scenario
 - a) D is negligent
 - b) Another act happens after D's negligence
 - c) The two acts together lead to P's injury

B. Case!

1. *Pollard v. OK City RR Co* (S. Ct. OK, 1912): D railway's workmen left cans with small amounts of blasting powder around. P's friend collected powder over the course of a month. P was injured while the two were playing w/ the powder. Not proximate cause, too many intervening causes.
2. *Clark v. E.I. DuPont* (S. Ct. KS, 1915): Third party saw dynamite lying around and hid it near his house, fearing worksite injury. Two years later, P's children found it and injured selves. Yes proximate cause, b/c "power of doing mischief was inherent in the" dynamite.
3. *Derdiarian v. Felix Contracting* (Ct. App. NY, 1980): D, a contractor, working in roadway failed to erect barrier to protect workers from traffic. Un-medicated epileptic has seizure, loses control of car, crashed into site. P was thrown into air where his body was ignited by hot enamel for use in road repairs. Seizure which led to crash is supervening cause.

XIII. Statutory Proximate Cause

A. Sometimes, statutes can create torts.

1. E.g.: §9 of the Endangered Species Act

B. Cases

1. *Babbitt v. Sweet Home* (SCOTUS, 1995): Statute makes it unlawful to "take" certain species; will altering a habitat to cause harm count as "taking?". Wide scope of harm, including habitat damage, is reasonable as a proximate cause.
 - a) *O'Connor (concur)*: ruling it only penalizes actual, and not hypothetical, harm that results from actions.
 - b) *Scalia (dissent)*: quibbles about hypothetical populations and asserts that this is essentially strict liability.
2. *Strahan v. Cox* (MA S. Ct., 1997): P challenges the ability of the state to grant licenses for activities that could have the effect of injuring whales. Ds argue that the statute in question was not intended to prohibit the actual licensing because that activity cannot be a proximate cause of injury. Court holds that while the licensing argument is slightly indirect, but can be a proximate cause.

Defenses To Negligence

XIV. Contributory Negligence/Comparative Responsibility

A. Contributory Negligence (old rule)

1. **Basic Rule:** If P is negligent → no recovery.
 - a) Elements of contributory negligence are the same as regular negligence.
 - b) Not in force in most states.

B. Comparative Responsibility/Comparative Fault

1. Two types
 - a) **Pure Comparative Fault:** Negligent P's recovery is reduced to reflect degree to which she's at fault.
 - (1) Ex: P is 99% at fault, D is 1% at fault. P can recover 1% of injury.
 - b) **Modified Comparative Fault:** Negligent P's recovery is reduced to reflect degree to which she's at fault, *provided D makes it over a certain threshold of negligence*.

2. Issues

- a) What is compared under comparative responsibility?
 - (1) P and D's degree of fault?
 - (2) Extent to which each contributed to P's injuries?
 - (3) Sometimes both.
- b) To whom is P's fault compared?
 - (1) 1D → just that D
 - (2) Multiple Ds → sometimes each D, sometimes combined Ds
 - (a) Mostly combined fault Ds
 - (b) Hypo: P 45% at fault; D1: 30%, D2: 25%.
 - (i) Each D state → no recovery
 - (ii) Total D state → recovery

C. Cases!

1. *US v. Reliable Transfer* (SCOTUS, 1975): D's tanker wound up on sandbar. D sued US for not maintaining a flashing light that would've helped vessel avoid bar. US/RTC damage split: 25/75. Court adopts proportionate fault in admiralty cases.
 - a) Abolishes divided damages rule, which split damages 50/50.
2. *Hunt v. Ohio Dept of Correction* (OH Ct. Cl. 1997): P, an inmate, had fingers severed when she reached down the gullet of a snowblower. P/D split: 40-60. \$18K damages → \$10.8K

XV. Assumption of risk

A. **Basic Rule:** assumption of risk → No recovery (complete bar)

1. Two types

a) **Express Assumption of Risk:** P assumes the risk through release (oral or writing) or through conduct

(1) Tunkl test (5 factor): policy invalidates release → some/all conditions met

- (a) Is the business suitable for regulation?
- (b) Performing a service that is of great importance to the public?
- (c) D serve any member of the public? Any member meeting standards?
- (d) D have bargaining advantage b/c service is essential?
- (e) Standard adherence K, w/o option for additional protection?

b) **Implied Assumption of Risk**

(1) **Primary Implied Assumption of Risk:** risks inherent in activity → no recovery

- (a) Ex: soccer player kicked in shins.
- (b) Usually possible to invoke other grounds, like no duty or lack of breach of the standard of care.

(2) **Secondary Implied Assumption of Risk:** P knowingly assumed risk → no recovery

(a) Paradox: running across wet floor to save old lady.

(i) Know floor's wet → no recovery (SIAR)

(ii) Don't know floor's wet → no implied assumption, non-negligent

B. Cases!

1. *Jones v. Dressel* (CO S. Ct, 1981): P killed when skydiving plane crashed, but had signed an exemption of liability form. P chose not to pay \$50 to have exemption provisions struck from the K. Assumption of risk defense is valid. K fails Tunkl test.

a) 4 part Tunkl Test applied

(1) Existence of duty to the public

- (2) Nature of the service performed
 - (3) Whether the K was fairly entered into
 - (4) Intention of the parties expressed in clear and unambiguous language.
2. *Dalury v. S-K-I* (Vt. S. Ct., 1995): P injured on the ski slopes at Killington when he collided with a metal pole that formed part of the control maze for a ski lift line. P owned a season pass to Killington. He had signed a release from liability wherein he “freely and voluntarily” assumed the risks of injury. No assumption of risk, on public interest grounds.
- a) 3 pt. test for upholding well drafted exculpatory agreements (R2T § 469b, cmt. e)
 - (1) Freely and fairly made
 - (2) Between parties who are in an equal bargaining position
 - (3) And there is no social interest with which it interferes
3. *Smollett v. Skayting* (3rd Circ, 1986): P, an experienced skater, was injured when she swerved off the rink and onto the rinkside carpet to avoid a small skating child. There were several “skate at your own risk” signs. P had asked the rink owner about the lack of guardrails and decided to skate anyway.

Strict Liability/Ultra-hazardous Activities

XVI. Strict Liability Basic Doctrine

- A. Strict Liability: D is liable without showing of fault. (D ‘acts at his own peril’)
 - 1. Actual/Proximate cause must still be shown
 - 2. Defenses still apply
- B. Common policy justifications
 - 1. Deterrence: Greater deterrence, if responsible beyond reasonable care
 - 2. Compensation: Greater compensation for accident victims
 - 3. Fairness: highly dangerous activities impose non-reciprocal risks
 - 4. Loss-Spreading: D can spread costs to consumers
 - 5. Proof: Accident may have destroyed evidence

XVII. Ultrahazardous Activities

- A. **Basic Policy**: Ultrahazardous activities → strict liability (no need to show fault, just actual/proximate cause)
 - 1. Six Factor Test [R2T]
 - a) High degree of risk to person, land, chattel of others
 - b) Likelihood of great harm
 - c) Inability to eliminate risk by reasonable care
 - d) Activity isn’t a matter of common usage
 - e) Imappropriateness of activity to place where carried on
 - f) Value to community outweighed by dangerousness?
 - 2. Two Criteria Test [R3T § 20]
 - a) “foreseeably and highly significant risk of physical harm even when reasonable care is exercised by all actors”
 - b) Activity “not one of common usage”
 - (1) NOTE: basically the six factor test, minus value to the community

B. Cases!

1. *Rylands v. Fletcher* (Q.B. 1868): D used independent contractors to build a reservoir on land he was renting to supply water to his mill. P operated mines on nearby land and had tunnelled up to old disused mines which were under the land where D's reservoir was located. Water from the reservoir flooded into P's mines at the partial completion of the reservoir. Non-natural use is at your own peril.
2. *Losee v. Buchanan* (NY Ct. App., 1872): Steam boiler explodes, landing on P's premises and destroying property. Court rejects the Ryland ruling, holding that one cannot be liable without negligence; thus, as D had a right to put the boiler on his premises, he is not liable without a showing of negligence.
3. *Turner v. Big Lake Oil Co* (Tex. S. Ct. 1936): Salt water escapes from D's ponds and injures P's land. Seizing upon the "natural use" portion of Rylands, the court emphasizes that storing water (especially for oil) is a natural/desirable use in Texas; thus, D is not liable without negligence.
4. *Lubin v. Iowa* (Iowa, 1965): A city water main breaks and floods the basement of P's store. Court holds that strict liability should be followed, as the town should not be able to leave a water main underground without inspection and escape liability when it eventually breaks. SL is applied here to incentivize the city on a deterrence rationale.
5. *Indiana Harbor v. Cyanamid* (7th circ., 1990, *Posner*): D is a chemical manufacturer, ships chemicals, they escape. P asserts that that the transportation of chemicals through Chicago is an abnormally dangerous activity. No strict liability, Posner notes that if proper care is taken, risk of a spill is negligible.
6. *Siegler v. Kuhlman* (Wash. 1973): Guy is driving a gasoline truck (non-negligently, by his claims) when the tank trailer disengages, falls, and spills gasoline which is ignited by a passing car. Strict liability applies b/c problems of proof in other tort implementations and the dangerous nature of the transportation of gasoline in ruling that.
7. **Klein v. Pyrodyne Corp* (Wash. 1991): P injured at a fireworks display. Court holds D strictly liable, citing the abnormally dangerous nature of detonating fireworks (and also bringing in public-policy considerations).
8. **Miller v. Civil Constructors* (Ill 1995): P avers that discharging firearms is an ultrahazardous activity. Court sez: no!
- 9.

Products Liability

XVIII. Basic Doctrine

A. Elements → establish A's liability to P [R2T § 402A]

1. P has suffered injury
2. A sold product
3. A is a commercial seller of such products
4. Product was defective at time of sale
5. Defect was actual and proximate cause of injury

B. Defenses

1. Comparative responsibility
2. Assumption of risk
3. Product misuse

C. Cases! – DEVELOPMENT

1. *Escola v. Coca Cola* (CA S. Ct., 1944, Gibson, Traynor): Coke bottle exploded in P's hand. P had not handled the bottle at all abnormally, but the coke driver testified that he had seen other bottles explode. The bottle wasn't damaged by any extraneous force after delivery to the restaurant. Coke bottles were subjected to industry standard testing that was "almost infallible." Res ipsa.
 - a) Traynor concur: "a manufacturer incurs an absolute liability when an article that he has placed on the market ... proves to have a defect that causes injury to human beings."

2. *Greenman v. Yuba* (CA S. Ct., 1963, Traynor): P was using a power tool when a wood block flew out of the machine and injured him. P had seen the machine demonstrated by the retailer and studied the manufacturer's brochure. Court found that a design defect allowed the wood block to fly free. Strict liability.

a) ALI codified this in R2T § 402A.

3. *Cronin v. JBE Olson Co.* (CA S. Ct. 1972): P got into an accident which wasn't his fault while driving a D-manufactured bread truck. The impact broke an aluminum safety hasp just behind the driver's seats that held the bread trays in place. Strict liability, not consumer expectations test.

XIX. Manufacturing Defect

A. **Definition:** Product is defective because it did not meet the manufacturer's own specifications for the product.

B. **Test:** → strict liability

1. Defect existed

a) Did the product meet the company's own specifications? No → strict liability

2. Defect made product unreasonably dangerous

3. Defect caused injury

XX. Design Defect

A. **Definition:** product's design makes it unnecessarily dangerous to the user

B. Two Tests:

1. Consumer Expectations Test: Dangerous beyond contemplation of ordinary consumer?

a) A product is "unreasonably dangerous" if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." [R2T §402(a) cmt. i]

2. Risk/Utility Test: Factfinder decides whether design represents a fair balance between

a) cost of design to prevent injury risk,

b) effect of redesign on product's utility

c) extent of risk product poses

d) existence of reasonable alternative design [R3T, Products Liability §2(b)]

C. Cases!

1. *Cepeda v. Cumberland* (NJ S. Ct., 1978): P injured hand in a machine that had the bolted guard taken off. He did not know the purpose of the guard and wasn't instructed not to use it with the guard off. A safety feature that would have prevented the accident could easily have been installed. Unreasonably dangerous standard adopted; contributory negligence is a defense.

a) Contrast w/ *Cronin*.

2. *Barker v. Lull Eng. Co* (CA S. Ct. 1978): P injured while operating a loader. Court holds that P's can prove design defect under either R/U, or CE tests.

a) Barker Balancing Test: If P proves prima facie case, D can argue for following factors under R/U:

(1) Gravity of danger posed by design

(2) Likelihood of danger occurring

(3) Mechanical feasibility of a safer alt. design

(4) Cost of redesign

(5) Potential adverse consequences of new design

3. *Soule v. GM* (CA S. Ct., 1994): P's ankles were badly injured when her GM car collided with another vehicle. D said that the force of the collision was the sole cause of the injuries. At trial the court instructed the jury on the consumer expectation test. R/U test should have been used.

- a) Product commonly understood → consumer expectations test.
- b) Complex product → R/U test
 - (1) Probably preferred!

XXI. Failure To Warn Or Instruct

A. Two element test → defective for lack of adequate warning

- 1. Safety requires that the product be sold with a warning
- 2. Product is sold without warning

Damages

XXII. Basic Doctrine

A. Compensatory Damages: goal is to “make the plaintiff whole” by “restoring the *status quo ante*.”

1. Two Types

a) Economic Damages

- (1) Past/future loss of income
- (2) Past/future medical expenses
- (3) Past/future homemaking assistance

b) Non-Economic Damages ('pain and suffering')

- (1) Compensate for “intangible harms of injury”

2. Eggshell Skull Rule: D is liable for full extent of damages, even if the extent is unforeseeable.

3. Collateral Source Rule: D cannot argue that P has already received compensation from another source, such as health insurance.

- a) many states have modified or abolished

4. Wrongful Death -- STATUE BASED!

a) Survival Claims: brought by estate administrator for claims victim might have brought had s/he lived.

- (1) Compensate for all harm up to moment of death

- (a) Medical expenses
- (b) Pain and suffering

b) Wrongful Death Claims: Beneficiaries sue for harms they suffer from wrongful killing of decedent

c) CASE!!!!

- (1) *Nelson v. Dolan* (Neb. S. Ct., 1989): D intentionally rammed P's motorcycle with his car, killing him. Next of kin's bereavement/solace isn't recoverable, but pre-death bereavement is.

5. Standard of Review:

a) jury verdict is reviewable IF:

- (1) “shocks the conscience”
- (2) Results from “passion, prejudice or other motive”

6. Cases!

a) *Smith v. Leech Brain* (QB, 1962): P, lowering something into pit of molten metal, struck by metal on lip, develops cancer at that spot and dies. Eggshell skull rule, spatter was foreseeable, so cancer needn't have been.

b) *Kenton v. Hyatt Hotels* (MO S. Ct. 1985): KC skywalk collapse. Court rules that jury can consider intangibles and that there is no one test for finding an award excessive.

B. Punitive Damages

1. Basic Test: "willful or wanton conduct"

2. Cases!

a) *National By-Products v. Searcy* (S. Ct. AR, 1987): Speeding trucker hits back of car, and both plow into a house-on-a-trailer that's driving along the road. Brake lights didn't come on until it was too late. No punis.

(1) Wyman: case is close to the line.

(2) Odd b/c punis considered for negligence.

b) *Mathias v. Accor Economy Lodging* (7th Circ., 2003, Posner): D's ran hotel that was infested with bed-bugs. They knew it, didn't correct it, and lied to their customers about it, claiming the infestation was of 'ticks.' Punis awarded, to deter future conduct, and b/c actual harm was very slight, but conduct should be deterred anyway.

XXIII. Vicarious Liability

A. Basic Doctrine: when one person or entity is held responsible for the tortious acts of another acting on its behalf.

B. *Respondeat Superior*

1. **Basic Rule**: an employer is subject to liability where an "employee undertakes activities within his or her scope of employment" that makes them "an instrumentality of danger to others."

a) Calabresi, citing *Childers v. Shasta* (CA Ct. App., 1987)

2. Case!

a) *Taber v. Maine* (2nd Circ. 1995, Calabresi): Sailor who got drunk on base and killed another sailor in an off-base car crash. Respondeat superior applies, b/c drinking is crucial to navy morale.

C. Joint Liability and Contribution

1. Joint and Several Liability → wronged party can decide who to recover from

a) Two negligent actors cause a single indivisible harm

b) Multiple tortfeasors act in concert

2. Contribution: D who has paid more than share in J&S liability can require another party to contribute, sounding in restitution.