OVERARCHING THEMES:

**Sic utere**: use your own as not to injure others. Premise of tort liability is that we prioritize security over liberty in interpersonal interactions. Why? **Autonomy**. Liberty requires security before it can be exercised. “Life, liberty, pursuit of happiness.” Also: **Equality.** You cannot violate the norm of equality by prioritizing your liberty interest over another’s security interest. So what do we get? **Misalignment of the elements.**  The standard of care required is a primary obligation, and compensatory damages are secondary, because we would rather prevent injuries than be monetarily compensated for them. Why? **Irreparable injury**: money and physical injury not fungible, so we place higher value on the primary obligation to prevent injury in the first instance. If you don’t, then punitive damages because you are a **bad actor.** Equality also gives us the **objective standard of care**: one person cannot unilaterally determine the rights and duties of another. The standard of care must be determined according to the risks encompassed by the duty—otherwise, the standard of care is indefinite. Thus, **duty is inherently relational, and causation provides the right-duty nexus required for liability.** Duty is categorical determinations of what risks should be considered at the point of the safety decision, and the standard of care is determined in relation to those risks.

* But not every interaction should be treated as interpersonal because sometimes the burden of the duty is born by the right-holder: **contractual** and **reciprocal interactions.** Here, B < PL is appropriate standard of care because **intrapersonal** calculations prioritize neither security nor liberty. This is why we have **negligence** for such intrapersonal interactions. It allows us to be **compensated by the exercise of liberty** and does not deter **socially useful activities** from which we all benefit.
* But sometimes we have **strict liability to supplement negligence** for deterrence purposes because burden of proof for P too hard to overcome—often involves **asymmetries of information.** So we get strict liability for evidentiary reasons to reduce risk more than negligence could. This can be supplemented by punitive damages, as well.
* **Equality and autonomy** means we value the autonomy of both the duty-holder and the right-holder. We do not **shift the loss** unless there is a normative reason to do so. This is why the right-holder must prove each element (except damages) by a **preponderance of the evidence.**
* Respecting autonomy requires putting responsibility for the results of a choice on the person who made that choice voluntarily and with full knowledge. This is why **assumption of risk** by the right-holder will negate duty. But it is also why we are very concerned about **information costs** when right-holders are making decisions to face risks such product purchases. This is why **custom** cannot be the standard of reasonable care and why we have **strict products liability** for malfunctions—**negligence** too hard to prove. But reciprocity means that that for design and defect we determine the standard of care according to a reasonable consumer will perfect information—the **risk-utility test.**
* The priority of **autonomy** and in the security interest sometimes leads to **limitations of duty**. Limitations on resources for compensation lead to duty limitations so that those with the worst limitations on their autonomy—physical injuries—are prioritized for compensation.
* We are also concerned about **institutional competence.** Judges and juries have different competencies across cases or in a single case—judges are good at categorical rules, and juries are good at case-by-case factual determinations that rely on the wisdom of the community. Also, legislatures and agencies are better at **resource allocation and policy decision** in the public interest, which they incentivized to serve, so we have **sovereign immunity.** Also, we limit affirmative duties to discrete categories of **special relationships** where the duty-holder has **comparative advantage for protection** because it is too hard to draw the line about duty to rescue. We leave this to the institution of criminal law and prosecutorial discretion.

Functional conception of torts: compensation, deterrence, retribution.

1. Compensation: if we just cared about compensation, we would not require a predicate unreasonable act or proof of causation. We could manage such a system more effectively through private or national insurance—tort is a very expensive form of compensation.
2. Deterrence: would not require predicate harm. We would want to deter unreasonable actors regardless of whether they cause harm so we could set up a system of fines and administrateive enforcement.
3. Restribution: this depends on the right-duty nexus, but does not explain why punitive damages are rare or why tort law, with rare exceptions, does not take into account state of mind or motive.

* These functions can be decoupled and work in opposite directions. If judges can pick from any in any given case, then there is no check on their discretion. Instead, we need a principled way of choosing among them. **This is why we base torts on autonomy through prioritization of the security interest.** This enables us to choose among the functions in a principled manner.

Intentional torts:

1. Physical and dignitary harms

* Preventing violence was the central concern of the early government; needed to maintain the king’s peace. Needed to channel disputes into legal system and prevent self-help.
  1. **Battery**: intent to cause a harmful or offensive contact, and the contact occurs
     1. Single intent: intent to cause the contact, regardless of intent to cause harm/offense
        1. But see drug manufacturers: just because you intend the contact and harm results (eg, drug side effects) doesn’t mean you committed a battery
     2. Dual intent: both intent to cause the contact and intent to cause the harm/offense
        1. But what about Garratt—no intent to cause harm, but still liable
     3. GEISTFELD: these are the same if we define intent as intent to cause a contact that the actor has reason to know will be offensive/harmful
        1. This is an objective test, can create strict liability for people who don’t intend harm (see Vosburg). D cannot unilaterally determine what is offensive.
        2. But can also create immunity because P cannot unilaterally determine what is offensive, either.
        3. Hard question: what if D knows of P’s subjective sensitivity?
        4. Why strict liability for non-culpable actor?
           1. EVIDENCE: hard to know when D is telling the truth about their intent to cause harm
           2. RECIPROCITY: any time you intentionally create significant risk you are creating a non-reciprocal risk
     4. Battery can occur with contact to or by objects or instrumentalities attached to a person.
     5. Insanity not a defense when purpose is to cause harm—we don’t look to motive in torts (we don’t want the government telling us how to think—same reason G says we don’t compensate for mental illness in negligence)
     6. What about mass manufacturing, where producer knows that there will be some kind of defect despite reasonable care? Look to the right-duty nexus with individuals: manufacturer does not know that defect will cause harm with substantial certainty with each individual when they don’t know of the specific defect but just the chance. But if they know of the specific defect and send it out anyway, they are violating the rights of whoever ends up with it—don’t need to have knowledge of specific victim to have right-duty nexus.
        1. RS3 requirement that the victim be a specific person or class of persons in a geographic area would not get at this kind of battery
  2. **Assault**: apprehension of an imminent battery.
     1. Does not require fear, just apprehension of the battery
     2. Has to be imminent—not a conditional or future threat
        1. The point is to channel self-help into the legal system. So ifyou have time to get the authorities, that’s what you should do.
  3. **False Imprisonment:** D must restrict P to a limited area where P has no knowledge of reasonable means of escape, and must know of confinement,
     1. Can use force as well as threats
     2. Must be against P’s will
     3. Must be no reasonable means of escape
        1. Just because there is a choice does not mean it is reasonable. D cannot force P to choose to remain confined or face a risk (eg, jump out a window)
     4. Comes out of problems with kidnappings. Protects freedom of movement.
  4. **Intentional infliction of emotional distress**: must be extreme and outrageous
     1. Standard of extreme and outrageous means that there is no concern about fraud
     2. This is a protection of dignity: because assault require imminence, cannot effectively protect dignity. So this developed in 20th C.

1. Property harms
   1. **Trespass to land**. Protects the interest in exclusive possession of land. Three ways to do it, no intent to trespass required:
      * 1. Enter the land without permission
        2. Send object onto land without permission
        3. Remain or keep object on land without permission
2. No harm required for recovery, so if you can prove trespass to land you can get punitive damages and injunction
3. Protecting against repeat trespassors very important for the exclusive possessory interest because if they could develop prescriptive easements
   * 1. Important: can have trespasses on fixed locations in cyberspace. Inquiry is whether it interferes with FUNCTION of trespass: exclusive possession.
   1. **Intangible trespass:** Same as trespass to land, protecting the interest in exclusive possession, but harm required.
      1. If harm weren’t required, trespass would swallow private nuisance, which mediates competing uses of land. Trespass allows injunctive and punitive remedies, so ask whether this is an activity we want everyone to be able to burden for everyone else with injunctions
      2. If email spam, etc., think about whether it’s actually harming the possessory interest
   2. **Trespass to chattels**: Requires harm, unlike trespass to land, because you can move chattels or reclaim them, but you can’t move land to protect your exclusive possession.
      1. **Black letter rule**: dispossession or intermeddling with chattel of another (can be by physically contacting)
      2. Harm includes loss of use as well as physical harm
   3. **Conversion:** interference with possessory interest of owner so great that it is appropriate to require actor to compensate for full value. This came from concern about theft of chattels.
      1. Old common law rule: cannot have conversion of intangible property like reputation. As intangible property developed, new reasoning about “merger” of it with tangible property like stock certificates and printed emails
      2. But now conversion recognized for intangible property because the value is the information (eg, emails and personal data) not its physical form
      3. Conversion is strict liability for downstream possessors, so sometimes we will want to limit the application of conversion for public policy reasons
         1. Eg, medical researchers using stolen cell line unknowingly are helping safety, so we limit liability to informed consent claim
   4. **Public nuisance:** unreasonable interference with a right held by the public, intereference in control of D at time of harm. G says this could swallow all of tort if formulated in a broad way.
      1. RI lead paint case: did not find public nuisance because it was really an aggregation of individual claims, not harm to a common public resource.
      2. How P argues public nuisance: Each individual has a security interest that is protected because they are a member of a foreseeable class of victims who are all similarly threatened by D’s conduct. Duty is not to A, B, C, etc. but to the class (see Palsgraf). Each person’s security is enhanced because of group membership—the more members in the group, the higher the PL and the more care required.
      3. How D argues: Public rights are to resources like air, water, etc. that are shared in a collective and a non-excludable way. These are best regulated by government rather than private actors.
      4. When can P bring public nuisance claims? When they have suffered a harm above that general in the public. Eg, Anderson v. WR Grace. This enables recovery based on right-duty nexus as required in tort law
         1. ALB: but can get punitive damages that account for the level of care D should have taken given the amount of harm caused. This is still based on the right-duty nexus between D and P (as SCOTUS has constitutionalized as a matter of due process), but forces D tot ake the perspective required by the right in the first place.
      5. How G would argue the lead paint case: products liability. Like DES cases, we know that they all were negligent, and we can’t join all of them. So we join them to get substantial portion of the market.
         1. Problem: fungibility. Many courts require this, but it’s not necessary. Market share is just a rule of thumb for determining the amount of risk D caused in relation to the group, not a requirement of the theory of grouping to meet burden to prove causation.
            1. G: fungibility required only for the risk that D might have caused Ps injury. Eg, you can get alternative liability against sexual partner and blood supplier for giving you HIV even if you don’t know which one did and the method of risk not fungible. But the risk is fungible. Still have to join group representing 50% or more of the risk.

Defenses to intentional torts: defense shows that there is no priority to theinterests (self-defense) or the D’s interest has priority (private necessity)

1. **Consent.** Consent to an intentional tort is the same as primary assumption of risk. Someone tackling you in a hallway is a battery, not so on the football field. This privileges autonomy and enables beneficial social activities like sports.
   1. Consent is objective: if actor reasonably believed there was consent to the touching (eg, the vaccination on the boat case), then no liability.
   2. Consent can be rendered ineffective if:
      1. Based on fraud
      2. Emotion involved (eg, agreeing to fight in anger)
      3. Prohibited by statute (eg, statutory rape)
         1. Boxing case of Geysel: statute prohibited prizefighting, and court said recovery barred because that would reward wrongdoers. But G says this doesn’t make sense because if you could recover for injuries in boxing, then winners would have to pay out more than losers, and you don’t go into a fight unless you think you’ll win, so we’ll be disincentivizing the illegal activity if we allow recover. ALB: or incentivizing boxers to kill each other once they think they’ll win
      4. Also, always think of other people who might have battered: here, the promoter used the boxers as instruments, intended contacts, etc. So could be liable.
2. **Self-defense and defense of others**: we allow self-defense to protect the security interest.
   1. Must be proportional to harm threatened—equality of each person’s security interest
   2. Based on objectively reasonable belief that one is threatened—Courvoisier case where D was mistaken about being under threat from P, D not liable because was reasonable
      1. When Ds harm third parties when acting in self defense, no liable if they were acting reasonably. Between reasonable D and reasonable P, we don’t shift the loss unless strict liability
   3. Duty to retreat? Must consider dignitary harm involved. ALB: this is sexist and violates the value of equality. Also puts men in more danger than they need to be. Gives them immunity from acting unreasonably.
3. **Defense of property**: Must not use deadly force to defend property—life valued over property. Must be proportional, just like self-defense. See spring-gun case.
   1. But G says what if property is your life’s work and fundamental to your identity?
   2. Will result in intentional tort for property-defender AND punitive damages to ensure proper deterrence.
4. **Private necessity:** Can use another’s property to protect yourself or your more valuable property in an emergent situation.
   1. The nature of the emergency suspends the usual laws of property and gives the person in need the possessory interest in the others’ property to the extent necessary to protect themselves/their property.
      1. When you use your own property you are stuck with the resulting dmages, so when it passes back to another person you have to compensate them for that.
      2. This is reflected in RS3 comment on abnormally dangerous activities.
   2. Sic utere principle of strict liability: if you take an action for your benefit you are responsible for the resulting harms. This is the same as for vicarious liability for employers.

DAMAGES

* + - 1. Black letter rule: as much certainty as the nature of the tort and circumstances permit. We put the uncertainty on defendants.
      2. **Compensatory**:
         1. Includes economic losses of wages, medical bills, et.c, as well as pain and suffering
         2. Pain and suffering NOT the value of the injury to P; jury instructions very vague and you can get a lot of variation across juries for similar injuries
      3. Judicial discretion: can do remitter requiring P to take reduced damages award to face a new trial.
      4. **Pain and suffering:** How pain and suffering should be calculated: according to the amount of safety expenditure required by the duty. It has to be monetized to allow enforcement, and this is the best way to do it:
         1. Contractual cases (eg, products): Determine what P would have paid to avoid the risk in question. Then multiply.
         2. Non-contractual: ask what P would have paid to assume the risk.
         3. This is not asking what they would pay to face a CERTAIN risk—that could be much higher or even infinite. This is about getting D to take the perspective they should have had in complying with the duty
         4. Tort reform efforts that limit P&S damages mean that the those who suffer the most serious harms will be undercompensated while those who suffer smaller harms are often overcompensated
         5. Also means that because of dependence on contingency fees, fewer cases will be brought and less enforcement will be had.
         6. **Misalignment**: Torts are about the right-duty nexus, are inherently compensatory. But compensation for repair purposes is not sufficient to protect the security interest because of irreparable injuries.
  + Would prefer to have safety instead of money, so negligence misaligns the elements so that the standard of reasonable care can value the security interest higher than it is valued in the compensatory phase
  + R is determined across the category, while damages are determined on a case-specific basis
  + Under ideal compensatory conditions where harm and money were fungible, we could have fully aligned rule (like we have for SL right now). But we don’t, so we have to use punitive damages and criminal liability to ensure the right amount of deterrence above merely the cost-effective level.
    - If damages not perfectly compensatory because of irreparability of the harm, D is getting a windfall
    - Also gets a windfall when there is imperfect enforcement
  + Duty contains primary obligation to exercise reasonable care, and secondary duty to compensate for tortuously caused harms. This allows us to demand a higher level of care for prevention of wrongful death or prevention of harm to poor plaintiffs than is reflected in the compensatory damage remedy. R treats PL as social loss, whereas damages are loss to the individual.
  + Economic efficiency would be characterized by misalignment throughout tort law: you would have standard of reasonable care that reflects all risks, foreseeable and unforeseeable, and then you would limit liability in proximate cause. But that’s not what courts do—they limit with duty, which create inefficiencies. Allocative efficiency would require B < PL where PL includes all loses, then we limit in proximate cause.
  + BUT ECON DAMAGES: not irreparable. Fungibility.

1. **Wrongful death**: cannot compensate someone for loss of life’s pleasures; in old days tort right died with the plaintiff. This created perverse incentive that it is better to kill someone than to injure them. All states have now changed this by statute.
   1. Survivor statutes: Estate gets anything that P could have gotten if they had lived. Damages can be high if P knew of impending death.
   2. Wrongful death statutes. Two kinds  
      i. Estate can collect the value that P would have provided estate at end of life. Can be 0. All defenses d could have brought against P could be brought against this suit.

ii. Designated beneficiaries can recover for lost financial support, loss of consortium

* 1. Wrongful death is best example of misalignment: can’t recover for loss of life’s pleasures, so recoveries relatively low, can be 0. But this doesn’t match up with reasonable care required for prevention of wrongful death.

5. **Punitive damages**: when someone is a bad actor such that they deserve retribution or should be forced, with punitive damages, to take the perspective on the appropriate level of expenditures for satisfying the duty

- Two arguments: 1. Deterrence (get them to make the right expenditures), 2. Retribution (this affected by due process)

a. If someone chooses to forgo safety expenditures because they know many people who have rights wont’ sue, this is unacceptable prioritization of their liberty interest over the security interests of others

b. If you reject the duty you can be subject to punitive damages

c. But if you are just careless or even acting with your best efforts and unable to attain objective standard of care, you are not a bad actor.

c. P should get punitive damages that can account for harms to others even though it is based on P’s own claim

d. Efforts to limit punitive damages undermine deterrence

e. SCOTUS: must conform with due process. Look to 1) reprehensibility of the behavior, 2) whether the proportion between compensatory damages and punitive damages is more than 1 digit, and 3) whether disproportionate with civil or criminal penalties. **G: they havenot addressed how to handle punitive damages whencompensatory damages are 0 (eg, wrongful death)**

- INTERDEPENDECY OF TORT RIGHTS: the interdependent nature of a tort right, especially in mass manufacturing, has significantly increased punitive damages. We depend on the enforcement of tort rights by other for our own safety. But this means that a single case decided by a single jury can have national significance.  **This is why clear rules about how to calculate damages are so important for the effectiveness and legitimacy of the system.**

**-** D acts towards class of victims as a group. Deterrence capacity of these damages very important because protecting one person protects the whole group.

- But getting D to take the perspective on duty they should have already had isn’t really punitive—just putting them where they would be if they had acted properly. Would need more for retribution.

PRODUCTS LIABILITY

1. HISTORY: Two strands of products liability development: implied warranty of merchantability/misrepresentation, and negligence.
   1. Winterbottom: privity required for recovery. Don’t want to stifle industry. Also, no mass manufacturing and long distribution chains.
   2. Thomas v. Wincester: no privity required for inherently dangerous products
   3. MacPherson v. Buick: negligence for products liability, no privity required. Not about inherent nature of product but whether it’s dangerous when negligently made.
   4. Escola: Majority says RIL. Traynor points out that they are using defect as proof of negligence and not requiring P to prove more likely than not as required by RIL.
      1. Strictly liabitliy for products (used to be just SL for contaminated food)
         1. Insurance: would spread losses, allow consumers to “pay in” to price of product to get compensation if hurt. G: not a good argument. Consumers prefer to get compensation by other means. Torst is expensive, have to hire a lawyer and prove causation even if insurance through manufacturer, and have to get other insurance anyway.
         2. Evidence: helpless consumers do not have the knowledge or abitlity to acquire the knowledge to make informed choices.
            1. Information costs: better born by manufacturer who has better acess to the information and can share it across cosnumers. Better htan consumers individually investigating
   5. RS 402(a): widely adopted, but has “unreasonably dangerous” language that some courts reject
   6. RS now: 3 kinds of defects (malfunction/construction, design, warning). R-U for design and warning.
      1. Malfunction/construction: product is defective, does not perform intended function because of failure to meet intended design. Just need to prove defect and causation. Can also be for defects that develop in delievery or in store.
         1. Malfuntion theory: if product destroyed in accident so you have no direct evidence of malfunction, can use circumstantial evidence to prove malfunction. Like RIL—circumstantial evidence, and it was within control of D
      2. Design: Product is not designed to perform function with optimal safety. Need to prove alternative design for which B < PL. B includes burden of new risks, lost functionality, and higher cost. Must ID reasonable alternative design.
      3. Warning: Product warning can be improved to reduce risk. Need to be concerned about information costs: if too much information, will reduce safety because consumer will not incur the cost of reading it. But heednig presumption: in determining causation, we determine whether objectively reasonable person would have heeded proposed alternative warning and assume that P would have because we can’t measure their credibility. Heeding presumption just application of liberal rule of but-for causation to prove causation in warning cases!
         1. P should show that their proposed design wouldn’t incrase info costs and that they would have followed it
2. **Consumer expectations.** Comes from implied warranty of merchantability. Consumesr would rely on merchants to provide safe produce and would expect a safe product.
   1. Actual expectations: what consumers actually have enough knowledge to expect. Can have no knowledge about a product’s feature that’s defective at all, or can have unreasonably low expectations.
      1. Open and obvious dangers: Consumers might know of PL (eg, Camacho case), but might not know of B of alternative design. So if consumer did not make the same B < PL decision as D, cannot say they assumed the risk.
      2. When consumer has not expectations or actual expectations are unreasonable, courts will sometimes usplement with R-U. See Soule case.
         1. If consumers had to have expectations about everything to recover, there would be wide swaths of immunities for D
         2. So can use experts to prove R-U
   2. Reasonable expectations: when information costs are low and consumers can make a fully informed choice, there is no duty.
      1. Consumer choice: because we value autonomy and pluralism, we promote consumer choice. If a consumer chooses a convertible knowing the inherent risks of a convertible, they cannot then sue a D for selling them a convertible because they suffered such an inherent risk. Dreisenstock v. Volkswagen.
      2. To say that a product’s inherent nature or the feature for which you chose it makes it unreasonable is to say that, categorically, this product is unreasonable and should be removed from the market.
      3. This will include safety considerations for the consumer AND for any other users or those they expected to be in contact with the product, including their family. They would only use the standard of care that they would set for themselves—so like invitees
3. **Risk-utility**: This comes from negligence, the evidentiary rationale for strict liability. Because we are in a contractual setting, the right-holder will bear the cost of the standard of care required by the duty. So we can treat it as a reciprocal relationship, and consumers would only choose those safety precautions that are cost effective.
   1. So we get risk-utility test
   2. Also use risk-utility test for bystanders, whose interests are not accounted for in consumer expectations and who do not get a chance to inspect the product or make their own safety decision.
      1. Utility to the consumer might not be outweighed by risk to consumer, but PL term will grow when we take into account bystanders.
   3. This shows how design defect and warning defects are really governed by negligence. If care taken is reasonable, then no liability even for product-caused harm
4. **Defenses.** 
   1. Contributory negligence: P has no duty to discover and guard against defects—that would defeat the purpose of strict products liability. But still can reduce recovery for contributory negligence if P’s negligence was but-for cause of harm.
      1. Fairness across consumers: woud be redistributing losses from consumers who misuse product to those who do not
      2. Ds still liable for foreseeable misuse. Crashworthiness doctrine: Ds can foresee that cars will be in accidents, so much make them crashworthy. If P’s injury is indivisible and you cannot tell what comes from car’s defect, D liable for entire extent of damages.
      3. But D still bears burden of factual uncertainty in damages
   2. Preemption: Common law tort duty could be abrogated by statute. Express, implied, and field preemption. When federal law, because of Supremacy Clause it preempts state common law.
      1. Wyeth v. Levine: Whether state common law is a floor rather than preempted depends on whether FDA intended to regulate the entire set of risks encompassed by the state common-law duty. If they did, that means they were using their regulatory discretion to determine an optimal level of safety for this set of risks, so preemption. But if just aimed at a subset, then no preemption.
         1. Have to ask whether they considered the safety problem here
      2. Riegel v. Medtronic: when federal law preempts state requirements, have to determine whether strict products liability is actually a requirement. From compensatory view, no: duty is just to compensate for harms. From deterrence view, yes: trying to change behavior.
         1. GINSBURG: the point of the statute was to increase safety standards, not to preempt higher safety standards
   3. Contract: for pure economic losses in contractual settings, P actually has the most information because they know what pecuniary interests were riding on the product’s effectiveness. East River Steamship.
      1. If we allowed recovery for damage to the product itself, then there would be no room for contract. Would be swallowed by tort. Should be handled by warranties.
      2. Fairness across consumers: we would be redistributing losses from high-value consumers to other consumers
      3. P in the best position to guard against the loss with insurance, backup plans, etcd. This is like Hadley.
      4. EXCEPTION: economic losses related to interest in physical security. PL is not just econ loss but security interest. Abatement of asbestos, medical monitoring, repairs, etc.
   4. Learned intermediary: for drug manufacturers, doctors can be liable for risks of drugs because patients rely on them for the information about the drugs and its side effects. But eroding now that drug manufacturers advertising directly to consumers. State v. Karl.
      1. G: this can create label clutter and increase info costs, decrease safety
      2. Need to incentivize drug manufacturers to tell doctors of dangers
   5. State of the art v. hindsight: use to be rule that drug manufacturers liable for all side effects against which they failed to warn even if those side effects unforseebale. Now, state of the art rule will make them liable only for foreseeable side effects.
      1. But still required to continue testing after on market to detect side effects
      2. But because they have to warn if they discover something, no incentive to test, and hard for Ps to prove they’re not testing, so we have justification for SL. But they provide safety, so we would limite. SO we end up with governance by FDA regulations.
   6. Assumption of risk: if consumer completely informed. See Dresisenstock case. This is why consumer expectations still important.
      1. CONSUMER EXPECTATIONS ESTABLISH DUTY IN THE FIRST INSTANCE
      2. But waivers never enforced. G doesn’tthink there is a difference between this and AOR so why don’t we look at Tunkl factors? No reason.
      3. If you know of risk and decide to face it, may or may not be contributorily negligent. IF B of not using higher than PL of risk, then not because not unreasonable. If B of not using lower than risk, then unreasonable. **Subjective determiniation of assumption of risk—secondary assumption of risk.**

STRICT LIABILITY

Default rule is negligence, but strict liability supplements negligence for both compensatory and deterrence reasons.

1. Non-reciprocal risks: Non reciprocal risks are subject to strict liability for compensation purposes unless there is a policy reason not to (eg, we want kids ot be able to ride bikes, or we want blind people to be able to walk down the street).
   1. When activity is common in the community and its benefits are shared in by most in the community, then we do not subject it to strict liability because people are compensated by the freedom to partake in it and its benefits (Loesse)
   2. But when an activity is not common in the community and the benefits are mostly private, then there is a compensation problem, so we make the actors strictly liable for the harms caused by their activity.
      1. Paradigmatic case: blasting. Rylands case: when non-natural use of land creates non-reciprocal risk, then actor liable regardless of fault. In US, this has been taken to mean activities not common in community (TX water case). Not just property but bodily harm (Sullivan)
   3. Liability for abnormally dangerous activities usually justified this way, and it’s the approach in the restatement: SL for activities not common in the community whose risk cannot be control by exercise of reasonable care. But G thinks there’s still arole for evidentiary rational.
2. Evidentiary rationale: if the activity were governed by negligence, difficulties proving negligence would lead to underenforcement, insufficient deterrence. Strict liability removes the burden of P to prove breach and creates a higher level of enforcemtn

* Makes D consider whether to enter activity in first instance. Will result in B < PL as standard of care, where the actor makes the safety decision rather than the court specifying the necessary precautions
  1. Products liability, common carriers, workers compensation all justified by evidentiary rationale.
  2. Abnormally dangerous activities: Evidentiary rational still plays a role when we can’t be sure that activity’s risk can’t be reduce just with negligence liability
     1. Courts often assume that reasonable care is taken, so to impose SL you have to show that risks could not be eliminated by reasoanbel care. But this is naïve and contrary to what we know about human behavior and the entire evidentiary rationale—see enabling torts.
     2. American Cyanamid: Posner says that SL should not apply because it would not reduce risk, and then identifies the precautions that would be taken (eg, moving train tracks). Focuses on factor c: would SL decrease risk more that acting with reasonable care. But he’s identifying the untaken precaution and making the determination of whether it would be followed, which is contrary to the basis of the evidentiary rationale for SL. ‘
     3. Courts now using evidentiary rationale only for products. For handgun cases, eg, saying that exercise of reasonable care will prevent gun deaths, so strict liability not appropriate.
     4. If you assume perfect compliance with negligence standard, then you eliminate evidentiary purpose for SL, which assumes that people are not complying and you can’t prove it
        1. Very important for proft-seeking industries that have incentive to forgo safety precautions

1. Vicarious liability/private necessity: sic utere principle. Pay for the damages you cause when acting for your own benefit. This is in RS comment on strict liabiitly for abnormally dangerous activities. It just says priority of P’s security interest over D’s liberty interest. Thisis the general forumulation of the right.
   1. Scope of employment: same question as whether its within the employer’s duty to control the risk they have created. Black letter rule is whether time/place of employement, purpose for which employee hired, whether employer got benefit from it.
      1. But you arent’ liable just because you benefit from something. Question is whether the beneficial activity you undertook foreseeably encompasses the risk of the harm that occurred. See Bushy case. Also, guard case—employer encouraged her to rush.
   2. To be liable for the risk, you have to be in control of it. So question is whether D was in control may turn on whether it was employee or independent contractor. If IC, presumptively less control.
      1. But if IC and D represent IC as employee and victim (usually patient) has no reason to know that they are not IC, then apparent authority means that there can be vicarious liability.
      2. Sometimes if an activity is dangerous enough, non-delegable duty and employer vicariously liable even for clear IC.
         1. Often in hospital settings where lots of danger
         2. Also provides certinaty about responsibilities and compensation. Roessler case.
   3. Other explanations for vicarious liability, which G does not fnid persuasive:
      * 1. Deep pockets. But this doesn’t explain why we limit it to negligence in stead of having enterprise liability.
        2. Deterrence. But this doesn’t explain why we don’t just sue for employer negligence since employee already liable and already deterred. In fact, can undermine deterrence because employee might not have to indemnify or pay the legal bills.

DEFENSES TO NEGLIENCE

Old days: under writs, everything was about causation, and everything had to have just one cause (Newtonian physics, didn’t want to give power to judges to engage in redistribution through tort system. This also led to no liability for harms by 3rd parties). So if P and D were both but-for causes, then P could not recover.

* Butterfield case: both P and D would argue that but for the other’s negligence, accident wouldn’t have happened. No way to apportion causation and no way to prioritize the interests (both unreasonable), so loss had to lie where it fell. Contributory negligence barred recover.
* Last clear chance: even when P negligent, if D knows of P’s negligence and acts negligently anyway, they had the last clear chance to prevent the harm. This is causal reasoning. So P not barred from recovery.
  + Today, only relevant in medical malpractice where we don’t’ want doctors treating people according to the reason they arrived at the hospital. See Fritts v. McKinne. But G sees no reason why it shouldn’t apply in other cases.
* Avoidable consequences: When P knows of D’s risk and acts anyway, barred from recovery.
* Under last clear chance and avoidable consequences, neither P nor D can make Butterfield argument that they could assume the other was acting reasonably.
  + But when negligence simultaneous such that causal reasoning won’t clarify responsibility, then no reason to shift loss.
  + Also, P has a responsibility not to enhance the injuries, must seek appropriate medical treatment, etc. If they do, they will be liable for the proportion of enhancement.

But then we developed apportionment. Quantum physics and better understanding of causation. This led many courts to abandon last clear chance and assumption of risk and just apportion, but the causal reasoning remains powerful enough to justify their use. Moreover, they respect autonomy by having people take responsibility for their own choices.

* But reasons for contributory negligence not as strong: no deterrence issues because Ps take precautions assuming others are behaving reasonably. Also, no reason as a matter of fairness: P caused harm and so did D. So why is P completely barred? **Best understood in causal terms.**
* If degree of culpability different, then we can distinguish even when can’t distinguish by causal reasoning.
  + No contributory negligence defense for intentional torts
  + Between reckless D and unreasonable P, no contributory negligence

1. Assumption of risk: If P assumes the risk with full knowledge and in a fully voluntary way, then no duty.
   1. Express: waivers allowed for some service contracts, but not for prodcuts contracts. We are concerned about VOLUNTARINESS and KNOWLEDGE. The Tunkle factors for service contracts get at these two concerns.
      1. The existence of a choice does not mean that P assumed the risk. Choice must be fully voluntary, fully informed, and the same choice that P says D should have made
         1. If all we need is choice, then choice to drive on NYE means you assumed the risk of getting hit by drunk driver.
         2. See Axe case: worker faced choice of losing job or facing the risk, which is not the same as choosing the old rack or the new rack faced by D. So should have been able to recover.
      2. Hanks v. Power Ridge: P cannot waive negligence rights, only inherent risk of snowtubing (which is primary assumption of risk anyway). P is not fully informed about the risks while ski resort is. Does not have to be an essential service for waiver not to apply. Here, voluntariness satisfied but knowledge not.
   2. Primary: objectively reasonable person partaking in this activity would assume the risk, so no duty for risks inherent in the activity.
      1. Duty-holder has to make decision regarding the public generally and cannot accommodate everyone subjective consent. Objective standard creates an immunity for D for someone who subjectively did not consent. See Davidoff baseball case: did not need to put netting on baseline because for reasonable person B (netting) > PL (risk of fly ball).
         1. G: P’s best argument is failure to have a warning on the tickets. Low B.
      2. Same test as for objective consent in intentional torts. You can assume the inherent risk of football, but that doesn’t including intentionally getting punched in the face.
      3. Same as reasonable consumer expectations: if P informed, then no duty.
      4. Flopper: P made the decision to take the risk of flopping, decided B(lost fun) > PL (flopping). Cannot then sue for having flopped.
         1. This respects people’s autonomy.
      5. Public policy problem: market won’t force seller to make the appropriate safety decisiosn because lack of consumer knowledge will mean that the precaution is not built into the contract price
   3. Secondary/Implied AOR: when P knows of D’s negligence and decides to face the risk anyway
      1. Whether this bars recovery depends on whether the choice was reasonable. If B(not using product) > PL (using product) even when product is defective, then no secondary AOR. But if choice was objectively unreasonable, then you get secondary AOR
         1. You could make the argument that this should completely bar recovery. But the hard question is was the choice truly informed? People can over estimate their abilities, luck. Etc.
         2. But most courts treat it as comparative negligence and just reduce recovery.
         3. Not assumption of risk if it’s not the same decision made by D.
2. Comparative negligence: G thinks this is most appropriate when causal reasoning doesn’t give us a reason to shift the loss. Jury decides apportionment based on culpability and strength of causal role. See WTC case, where port authority found 68% responsible for 1993 bombing.

* Must prove all elements of negligence re P’s conduct, including but-for and proximate cause.
* Tort reform has led to adopt of comparative negligence. Two kinds.
  + Pure: P and D pay according to the proportion of their responsibility
  + Impure: D has to be at least or more culpable than P for P to recover at all, and then after that it’s proportional. One-sided for D, G does not like.
    - But you could argue that in impure system where we find P more responsible than D, jury has found a way to distinguish between the two so there’s a basis for determing who should bear the loss
* Strict liability: can’t measure culpability because no duty of reasonable care, so do causal balancing

1. Avoidable consequences: P has to mitigate against damages—must take a job, must seek medical attention.
   1. Because of this requirement, Ps can be required to pay for medical monitoring, which should be compensable economic harmbecause it involves the security interest
   2. If P does not mitigate, can be liable for extent of increased damages caused by their failure to get medical attention, etc.
   3. When jury apportions 80% to D and 20% to P, P only responsible for 20% of exacerbated harm
      1. Hard question: religious prohibitions on medical attention
      2. Also, P not required to undergo risky surgery or more dangerous medical options

PROXIMATE CAUSE

Proximate cause is the determination that the harm in question falls within the duty. For those who limit liability as proximate cause, it’s a policy determination. For G, it’s the jury making the decision about whether the harm was within the duty. Causation is always a jury question.

1. Directness test: if was directly caused by D’s negligence, even if it’s unforeseeable D is liable (Polemis) unless there was an intervening/superseding force that cut of the chain of causation
   1. This test was reject in Wagon Mound
   2. This test is contrary to G’s theory of duty, which limits the scope of duty to harms forseeable at the time of the safety decision. Why? To make the power to prevent the harm a condition of liability (OWH). R becomes indefinite if all risks, foreseeable and unforeseeable, tortious and collateral, are in duty.
   3. Superseding cause has to be significant and unforeseeable.
   4. Directness is accepted by courts when supplemented by the “risk rule”: only proximate cause if the harm is within those risked by the action. Berry v. Sugar Notch Borough: speeding was a but-for cause of tree fallilng on train, but not within the risks of speeding.
2. Foreseeability test: functionally equivalent to directness test+risk rule, but it is forward-looking from the point of the safety decision instead of backward looking
   1. Advantage: don’t need to worry about when a superseding force actually began (it’s impossible to know—always a prior cause of everything), just what was foreseeable to someone in D’s position at the time of the safety decision
3. Eggshell P: once liability is established, damages are measured by the directness test—not foreseeability. It would give Ds a one-sided windfall and would undermine deterrence if they had to only pay foreseeable damages for eggshell Ps and actual, below-foreseeable damages for steel skull Ps.
   1. If an underlying medical condition is triggered by the negligence, then D liable for full extent of the injuries—including psychological conditions and suicide. See Benn v. Thomas
   2. P has to prove extent of damages with “as much certainty as the circumstances and the nature of the tort permit”. This is relaxing P’s burden of proof, but if we had preponderance of evidence standard for Ps they would be badly undercompensated
   3. Once you establish that the typo of risk (eg, death from inability to escape from fire) was within the risk contemplated by the duty (have fire evacuation procedures), then regardless of the cause of the risk (terrorists) the extent of damages is covered by eggshell P rule
4. PALSGRAF: this is two theories of torts standing in opposition.
   1. Cardozo: Duty is relational; liability requires a right-duty nexus. Duty not to anyone but to specific Ps or classes of foreseeable Ps. Therefore, duty is limited by foreseeable, and proximate cause is the determination of whether or not a particular P was foreseeable at the time of the safety decision. G says Cardozo then makes the jury decision re Mrs. Palsgraf not being foreseeable. This is the rights-based, fairness conception of tort law. Its focus is the connection (causation) between an particular D’s duty and a particular P’s right.
      1. Need to make sure judge isn’t doing duty limitation and calling it proximate cause. Eg, Manheimer case: said bush-trimming not prox cause of rape, but what they are really saying is that crime generally is not within the scope of the duty. This is a categorical determination.
   2. Andrews: Duty is to the whole world, not to A, B, C. Duty not limited by foreseeability; you have a duty to everyone to exercise reasonable care in everything you do. We limit liability with policy decisions re proximate cause. G: this is the allocative efficiency approach: you take all PLs into account at duty phase because you want to minimize all costs, foreseeable and unforeseeable. But G thinks this means R is in determinate. If you are an efficiency person, then you will do anything to get around causation that ties duty to an actual harm to an individual P because you want deterrence, and from a deterrence perspective there’s no need for negligence to result in harm for you to deter it. See Calabresi in Hymowitz, Zuchowitz—getting around causastion.

MULTIPLE TORTFEASORS

1. Joint tortfeasors: conspiracy, concert of action. Each vicariously liable for the actions of the others because it was a joint undertaking, so each liable for the whole harm
2. Joint & several: each tortfeasor liable for whole harm to P, but can get contribution from each other. In old days, just indemnity because we didn’t apportion among multiple causes
   1. This puts risk of insolvency on Ds. But in states that have abolished it, P has to collect from each their proportion and puts risk of insolvency on P
3. **Alternative liability:** We know each D negligently created risk of the type that caused the harm, but we don’t know which D was the factual cause of the harm. To get full recovery, P must join all Ds because each can only be liable according to their relation to the group. Each D has pro-rata liability. NOT concert of action; acted independently.
   1. Summers v. Tice reasoning: truth will come out (same as Ybarra), between innocent P and negligent Ds, put the risk of factual uncertainty on Ds.
   2. But G doesn’t buy this because (1) truth doesn’t come out, or all people who know the truth are dead, or they really don’t know the cause. Also, if we just put the burden of uncertainty on Ds, then that just shifts the burden of proving causation to Ds or even a single D when we know they are negligent.
      1. If we don’t shift this burden and there are more than two Ds, each can say that more likely than not they were not the cause of the harm.
      2. We could also see this as a rule of compensation for tortious risk exposure: each D exposed P to their pro-rata share of the harm. But we limit recovery those who actually suffered a harm (so there aren’t suits from everyone exposed—we are prioritizing security interests of those with physical injuries), and then we get the right amount of deterrence. **This is how we can move from alternative liability to market share liability: if it’s proportional risk.**
4. **Market share liability**: Each D responsible according to the proportion of the market they represent because that is their proportional share of the risk to which they exposed P. Problem here is that unlike alternative liability, P cannot join all the Ds, so they only recovery proportionally.
   1. Sindell: CA says you have to join a substantial proportion of the market. This indicates they aren’t just using risk-exposure, but still requiring that P prove causation of actual harm by the Ds. They do this by allowing P to group the defendants, who we all know exposed P to some harm, and then say more likely than not as a group they caused the harm
      1. Can’t recover 10% from one D representing 10% of the market
      2. This shows alternative liability being extended to market share
   2. Hymowitz: NY accepts market share but on deterrence rational: won’t let D get out of responsibility even if they can disprove but-for causation because they still exposed someone to a risk
      1. If we do the grouping rationale, you would let people out of liability if they can disprove but-for causation because we are concerned about the right-duty nexus.
      2. But this is fundamentally changing the nature of the tort right—essentially the same thing as loss of a chance. You could sue anyone for exposing you to risk regardless of whether you experience physical harm.
         1. We can limit to those who experience physical harm or the need for medical monitoring because of exposure to prioritize them.
   3. Fungibility: most courts require fungibility of products, but there is no reason to do this if we know that the risk D exposed them to was fungible. Eg, someone gets HIV from either blood transfusion or partner, but doesn’t know which. Can jointly sue them because the RISK is fungible.
      1. But if one gets knocked out from blood shield statutes and the other is only 40% likely to have caused the harm, then P cannot recover under traditional causation.

FACTUAL CAUSATION

Have to show that breach (failure to take precaution) was a factual cause of the injury.

* **But-for case**: Rinaldo case. Ask counterfactual about whether harm would have occurred absent D’s negligence. Even if D had yelled “fore,” accident still would have happened. This shows importance of choice of untaken precaution for recovery—consider how it will affect causation burden.
  + Can prove with circumstantial evidence: see Stubbs case. As long as the jury has a basis for making a determination that more likely than not D’s negligence was a cause, then it can get to the jury. But the jury cannot just guess.
* **Substantial factor:** Two fires cases: even if D was negligent, the harm would have happened anyway because of other D’s negligence. Both Ds make this argument and P would not recover even though we know their house burnt down from negligence. So courts ask whether the negligence was “Substantial factor” in causing the harm. Some courts have applied this standard where there is a single defendant, which reduces Ps burden of proof because might not be 50.1%.
* **Liberal rule of but-for causation.** If D’s conduct wrongful because of the kinds of harms risked by it, and a harm of that type occurred, there is a reasonable basis for the jury to make a decision that D’s negligence was a substantial factor.
  + Not reducing Ps burden of proof, but allowing them to use the content of the duty in the counterfactual to be a basis for determining factual causation. If the counterfactual involves a lot of human behavior, even more appropriate because we’re not just asking about chemical interactions but whether we can rpesume that people would act reasonably according tot heir duties in the counterfactual. The reason we have the duty is because a significant number of the harms of this type could be prevented by conformity with the duty, so we allow the duty itself to be the basis for determining the counterfactual.
    - This allows effective duty enforcement in rescue cases where P more likely than not would have died anyway given statistics, etc.
    - Heeding presumption also an example of this
  + Calabresi says this is just using circumstantial evidence to prove causation, like RIL for negligence
* **Loss of a chance:** Allowed in medical malpractice cases. Without it, we would immunize doctors from malpractice when treating the sickest patients (same reasoning as rescue cases).
  + Allows P to recover for the proportion of the chance of survival or recovery they would have had without the malpractice, times the damages for the harm
  + Like lilberal rule of but-for causation: lots of human behavior in the counterfactual, people think of themselves as individuals who can beat the odds. Fairness may require that we treat people as individuals and not as statistics.
  + But loss of a chance is just like increased exposure to risk, so we limit recovery to those who actually suffer the harm
  + G: this can also be understood as applying the evidentiary rationale for strict liability to causation: P has problems of proof that leads to under enforcement of the duty. This is also an explanation for proportional liability
  + Why only in medmal cases? CONSUMER EXPECTATIONS: this is a contractual situation, so we award consumers their expectation damages.

LIMITATIONS OF DUTY

Limitations of duty areinherently inefficient because they don’t take into account full scope of harms risked by D’s action. Therefore, allocative efficiency cannot describe the way courts are doing this. This comes from Palsgraf Cardozo reasoning about how we limit liability.

* Scope of duty is determined categorically. Whether a particular harm to a particular P was within the duty is a proximate cause question for the jury. If we want to limit tort liability, G says we should do it through duty rather than through capping damages, etc., because that creates compensation and deterrence problems.
* Judges determine legislative facts across cases (eg, PL encompassed by duty). These decisions are reviewed over time. But jury decisions are about adjudicatd facts—case specific, not precdential.
* Need to be careful about judges deciding adjudicative facts like standard of care or whether a P was foreseeable and calling it duty. Usurping role of jury.
* We don’t define the scope of liability for individual defendants based on their own wealth, we look to ordinary wealth in the community when we are concerned about bankruptcy. Redistribution better handled by other institutions
* We also don’t limit duty for proportionality purposes: that would prioritizes D’s unreasonable liberty interests over Ps’ security interest and need for compensation. If we did this, we would eviscerate ESR because we could get mitigation of damages. We also don’t look to motive because we don’t want the government making decision about our motives.

1. **Special relationships.** Ordinarily duty requires feasance: you when you undertake an action you have a duty to control the risks created by that action. This means no affirmative duty to rescue unless you created the risk. Sometimes justified by autonomy concerns: we cant require people to be constantly rescuing each other because that would infring on autonomy. But all tort law infringes on autonomy, so better explanation is the institutional competence at line-drawing. Courts aren’t good at drawing the lines about when rescue required, better handled by criminal law where prosecutors can use discretion and criminal fines, rather thancompensatory damages, are available.
   1. Exceptions: special relationship. Whether because of (1) nature of the relationship or (2) actions by D that induced reliance, there can be a duty to protect from risk.
      1. Custodial relationships: Ps entirely dependent on D for protection because they are institutionalized or because D has comparative advantage in providing protection—eg, university, landlord, innkeeper.
         1. Could argue feasance, as well: landlord has created conditions that invite burglary if they don’t take safety precautions.
         2. Duty to warn on products or have recall if defect identified after put on the market. **Duty to warn of risks created, even if non-negligently.**
      2. Inducing reliance: when D’s actions foreseeably induce reliance by Ps, etc., railroad company posting guard at tracks to indicate when train is coming.
         1. Florence vg. Goldberg: police promised crossing guard so P’s mom relied and P hit by car
         2. Cuffy factors: police generally don’t have special relationship to protect someone above level for general public (public duty rule), but when police induce reliance by P by making promises or having them serve as witness, they have duty to protect
         3. Voluntary undertakings: Farwell v. Keaton: do friends have duty to rescue each other when they go out together? G thinks not, but this case found that they do.
            1. When you go mountainclimbing, understanding is that you will take care of each other.
            2. When you undertake to rescue someone, you have to at least not make them worse off than when you found them. Passage of time can make someone worse off!
            3. Recommendations letters: Randi W case. Once you have said something in recommendation letter, you have induced relianc eon it and can be responsible for harms stemming from misrepresentation, even to third parties.
         4. You have duty to control the risk, so even if you harm someone by acting reasonably you have a duty to not make the harm worse. RS: if D has reason tknow that conduct (innocent or tortious) cause harm to another and P is helpless, then duty to take care not to increase the harm
      3. Protection from third-party harms: can have a duty to protect people from third-party harms if you are landlord, store owners, etc., if the harms are foreseeable (even if criminal)
         1. Posecai v. Walmart: totality of the circumstances test to determine whether or not crime was foreseeable in the parking lot such that D needed to take precautions like having a security guard. G says this is an example of the court determining the standard of reasonable care and calling it duty.
         2. Enabling torts: negligent entrustment. You can be responsible for harms caused by someone else with your property or property you have entrusted if it is foreseeable that they will use in an unreasonably dangerous manner. You have created the risk by giving them the chattel.
            1. Car case: if you entrust a car to someone knowing that they are likely to misuse it because of youth, indiscretion, substance abuse, etc., you can be liable for the harms they case.

But sometimes we limit this if we think the activity is socially valuable, like parents buying cars for their children or people lending cars to beginning drivers

We also limit the duty when the burden of LITIGATION would be too high and would deter socially valuable activity. The burden of a duty is not just a safety precaution but also the expected litigation: Ds will not only get sued for meritorious claims, time and money cannot be recouped from litigation. Categorical considerations about the burden is when we can look at burden of litigation.

* + - * 1. Enabling torts show we don’t always assume people are acting with reasonable care—negligence not always enough to deter because we know people commit crimes and act negligently. See evidentiary rationale for SL for abmornally dangerous activities.
      1. Custodial relationship: Custodian can be responsible for harms by person in custody to third parties. Tarasoff case: duty of therapist to decedent to protect her from dangerous patient when you know of specific threat.
         1. But this isn’t the same reasoning, haven’t induced reliance by decednet.
         2. Strongest argument by P in Tarasoff: legislature has already solved this policy decision in rules about breaking confidentiality to provide evidence in court re crime by patient

Line-drawing problem solved if you limit the duty to warn to specific, real harms in therapist’s professional opinion

* + - * 1. Strongest argument by D: this is a self-defeating safety rule because it will discourage mentally ill people from seeking help if they don’t think it will be confidential.

Definition of objective professional standards is too hard for therapists to follow, will lead to overwarning and maybe defamation suits.

* + - * 1. Other doctor patient cases: what about duty to warn foreseeable sexual partners of patient with HIV? Can doctor be liable to third parties for failure to notify own patient of HIV status?

Others in harms way are foreseeable. Ask is there a line-drawing problem? Will there be categorically? Is the violation of confidentiality a problem? Without the liability, will there be underenforcement of the duty to the patient? How are we prioritizing interests? Will doctor be able to meet the burden without collateral costs to safety?

* + - * 1. Ds should always argue that even if the duty might make sense in these cases, it won’t make sense across the category. Line-drawing. Also can argue autonomy.

Eg, if we create duty to warn others if you have special knowledge of someone’s hostile behavior, where does it end?

1. **Emotional harms.** Emotional harms traditionally compensable only if there was a predicate physical harm, but as emotional harms have been taken more seriously and as society’s wealth has expanded, compensation for emotional harms has expanded.
   1. Emotional harms are foreseeable, but we limit the duty to exclude them in order to prioritize the security interest of the person who suffered physical injury.
      1. Another reason: fraud concerns. But G says we can solve this with higher evidentiary standard—see intentional infliction of emotional distress.
      2. Another reason: hard to estimate compensation. But G says we do this for those who have suffered phsycial harm, so this can’t be the reason
      3. It’s about prioritizing a more important interest: security. See Jamaica hospital case: there was a physical harm to the baby of kidnapping, so we don’t allow recovery.
         1. Would be “too much liability” because any family member would be abel to recover when there is melmal and that would undermine provision of safety (hospitals) and ability of physically harmed patients to recover
         2. Dissent tries to limit categorically to custodial relationships, but majority points out that this would apply to day care centers, etc. Would be very broad.
   2. Expansions: use to be physical impact rule, but that would be arbitrary between someone who was nicked and someone who was not.
      1. Zone of danger: Falzone. Said that if someone was in zone of danger and suffered emotional harm, can recover for that (if they manifested physical symptoms—this was to prevent fraud)
      2. Dillon test: CA test that says if you are a close family member, were close to the accident, saw it directly, even if you weren’t in the zone of danger you can recover. See Portee v. Jaffee elevator case.
      3. Gammon case: can recover for standalone emotional harm from severed leg in bag because the extreme emotional harm was highly foreseeable and there is no physically injured person whose interests we need to prioritize.
2. **Economic harms**. Also not usually compensable on their own but compensable when predicate physical harm (lost wages, etc.). But downstream economic effects not compensable—ripple effects of market would create even more liability than for emotional harms. We limit it to prioritize physical harms or, when no physical harms, more important economic interests.
   1. 532 Madison case: no recovery for pure economic harms from wall collapse. Line-drawing around neighborhood would be arbitrary, and this is the kind of accident where there are likely to be physically injured victims who need compensation.
      1. Also, from an economic efficiency perspective, there may not be social loss in this case because customers would just go to other stores. Would create inefficiencies to compensate for economic loss when it’s just shifted.
   2. We do allow recovery for pure economic harms for “special relationships” like between attorney/accountant and client. But we prioritize the economic interests of the client and foreseeable third parties who foreseeably rely, not just anyone who suffers economic harm.
      1. Will cases: decedent can’t recover, but we often let will beneficiaries recover for attorney malpractice in notarizied will, etc. Some jxs limit to privity. See Lucas v. Hamm: third party beneficiaries must be able to sue for deterrence purposes re wills.
      2. KPMG case: rule for accountant negligence is that liability limited to direct clients and foreseeable third parties to specific deals that accountant knows will rely on their work
         1. Cannot just have anyone in the public who would foreseeably rely recover, beucase that would drive up the cost of accountant fees. Would unfairly shift third-party losses to those in privity with accountant and who pay for services,
            1. Would reduce willingness of accountants to provide information to clients more likely to fail (like startups), which are the ones we care most about having info on
            2. But we also allow third parties who accountant knows and will intend to rely on their work to recover because otherwise the third parties will have to get duplicative audits, driving up the cost of deals and of information
            3. Don’t want to discourage information provision in markets
      3. Medical monitoring/repair: Can get pure econ losses when they protect the security interest. But see Buckley: we can limit even for medical monitoring or emotional harm when there IS physical impact if it prioritizes the interests of those who have actually manifested the physical harm
         1. Had to do this in asbestos because of bankruptcies
         2. Doing worst-go-first encourages Ds to file for bankruptcies earlier, reducing recover for everyone because secured creditors get first dibs
3. **Sovereign immunity:** waived only with a statute. But courts can also get around it if they find that the conduct should not be protected for the reasons we have sovereign immunity. Two reasons we have it: (1) Govt acting in public interests, and (2) institutional compentence/democratic decisionmaking. If govt not acting in public interest (eg, taking shortcuts), then no basis for sov imm.
   1. Ask: (1) is this ministerial in that it is required by a law or regulation? Then exemption. But if discretionary, as (2) is it bound up in policy considerations such that the decision should be immune from tort liability?
   2. Government already has incentive to protect the public, so we don’t hold them to the same standards as private actors (unless they are engaging in services usually provided by private actors like hospitals)
      1. Police and rescue: public duty rule says that you can only recover if they had a duty to you greater than to general public (special relationship). In limited resources, need to be able to make decisions about allocation of police officers, etc.
      2. But could see government as analogous to landlord: has comparative advantage in providing protection, so special relationship. But that would be special relationship to everyone in the jurisdiction, so govt could be liable (and even if not, they could be sued) for any crime that happens.
         1. So we have public duty rule: must have duty to P greater than that to the public. Solves line-drawing problem.
   3. Institutional competence: agencies and legislature better at making resource-allocation decisions to maximize safety than courts. Also, more democratically legitimate—if the people don’t like the decision they can vote to fix it.
      1. But when government has made a decision that a safety precaution is required and then does not take the precaution, that is negligence according to the government’s own standard. See highway median cases.
         1. Counterargument: don’t want safety studies to be used against govt in litigation because that could discourage them from conducting safety studies or making them public
      2. When decision is within institutional discretion, courts will respect it. Especially if bound up with social, economic and political cosniderations of public policy (Cope v. Scott).
         1. But if not bound up in those, then the basis for sovereign immunity isn’t as strong. Can find violation of duty.
4. **Contractual privity.** Courts will sometimes limit duty to those in contractual privity if the more expansive duty would not be preferred by the class of right-holders.
   1. Utilities: We all pay for utilities, so any safety precaution will be passed on to the consumers in form of higher prices. Consumers prefer not to insure through tort, so will just want enough liability to provide deterrence, but not more. Strauss v. Bell.
   2. Any time you are in a contractual relationship, right-holder wants to use duty for deterrence NOT compensation. Contract makes it an intrapersonal decision.
5. **Socially beneficial activities.** Sometimes courts will limit duty if they don’t want to discourage the activity. This is also a basis for limiting strict liability.
   1. Social host cases: Unless you’re in NJ, we don’t put liability on social hosts to third parties injured by their drunk guests because we think the burden of monitoring guests would be too high and would discourage parties.
   2. Nonreciprocal risks: sometimes we limit strict liability to negligence for nonreciprocal risks when we don’t want to discourage the activity for autonomy purposes: eg, kids on bikes, blind people.
6. **Landowners.**  Landowners have different standards of care to different people on their property depending on the foreseeability of the person and the person’s expectations of safety. G says there is logic to these categories, not just feudal leftovers.
   1. Trespassers: generally not duty of care to trespasser exception you can’t intentionally injure them. Anyone on the land without permission.
      1. But known trespasser and child trespassers get higher standard of care because the PL is higher—foreseeability of the person, and for children the probability of the risk is high. So you can have a duty to make things reasonably safe for them. Don’t have to eliminate dangers, but need to put a long on your railroad turntable, for example, if it’s foreseeable that children will play on it.
      2. Sometimes we limit duty to trespassers for policy reasons: we don’t want people fencing off their land if we want it to be ablet o be used for recreational purposes.
   2. Licensees: social guests. They shouldn’t expect you to take more care for them than you take for yourself and your own family, so you don’t have a duty to make everything safe for them, but you do have a duty to warn them of unforeseeable dangers if those dangers are known to you and your family.
   3. Invitees: strangers and business guests. They can reasonably expect that you have made the premises safe for them from dangers that could be discovered by inspection.
      1. G says the business purpose rule is really arbitrary: two people can be injured by same patch of ice outside the door and recovery will depend on the purpose of their visit.
      2. You don’t have the same incentive to exercise reasonable care for strangers as you do your family and friends, so we create incentive with different classification
   4. Hospital case: P arguing they were there for business visit, D arguing they were there for social visit. G says standard of cares should be based on the expected use of the premises, not the identity of the person who is harmed. It’s about setting an objective standard of reasonable care,
      1. There is logic to the categories, but it’s about how much safety you need to provide on the premises, not the subjective purposes of the people there.

PROOF OF NEGLIGENCE/STANDARD OF CARE

Negligence requires P to show failure to take a precaution required by the standard of reasonable care. The standard of care is determined with reference to the risks within the scope of the duty. P must prove each of the elements (except damages) by preponderance of the evidence between we treat the interests of an innocent D equally with harmed P. Only shift the loss of there is a normative difference between the two, so only if each element 50.1% do we shift the loss.

1. **Res ipsa loquiter**: Proof of negligence by circumstantial evidence. **Black letter rule: proof of negligence when accident does not normally occur without negligence by a class of people of which D is relevant member, and D in control of the instrumentality.** Can be used to prove specific or general negligence, but ususally general. Does not lower P’s burden of proof, but does not require P to specify the untaken precaution. Just requires that P present enough circumstantial evidence that jury can conclude the accident was more likely than not caused by negligence.

1. Good when (1) activity requires high number of safety precautions, and (2) not taking a precaution is like to result in accident. Instrumentality needs to be in control of D (see Natural History Museum case—weak case because wrapper not necessarily in D’s control)
2. Jury can use general knowledge to determine whether accident more likely than not caused by negligence (see Byrne v. Boadle—barrels don’t fall from the sky), but have to be careful that this isn’t relieving P of burden. Eg, just because there is a product defect doesn’t mean there is negligence.
3. Sometimes justified by the fact that the knowledge of specific negligence/untaken precaution is with the defendants, so hard for P to prove this. Direct evidence is unreliable because with Ds.

* For this reason, RIL can reduce the role of strictly liability. Can satisfy evidentiary burden even when knowledge of specific negligence with Ds.

1. Circumstantial evidence can prove constructive notice of a hazard—see Stop & Shop cases. Can use circumstantial evidence to show that the hazard was there long enough that Ds should have known about it and performed duty to fix it.

2. **Precedent.** The standard of care usually should be determined on a case-by-case basis by juries. Hoewver, when similar cases happen frequently, judges might make a categorical determination of the standard of care, especially if it conserves judicial resources, gives notice to Ds of how to comply, and reduces the occurrence of inconsistent jury verdicts on similar facts.

* 1. OWH endorsed this in Goodman: so many rr xing cases that we can determine as a matter of law that someone xing rr tracks has to stop, look, and listen before doing so, or be contributorily negligent.
  2. But when this happens, there will often be pressure on the rule because the cases that will get litigated are the ones where the rule doesn’t’ give an obvious outcome, or where the rule wouldn’t be appropriate.
  3. Pokora: Cardozo found Goodman rule not appropriate when it would create a bigger safety problem than it would solve. Warned against judges defining reasonable care, said juries are good at it and can take into account changing social conditions.
     1. G: not that judges should never set rules of care in categories of cases where it would be appropriate, but that the safety prupose can make it inapplicable in a particular case

i. Another example: business practice ruel that requires a standard of care to constantly monitor salad bars and other customer self-held stations.

1. **Custom**. Custom used to be an appropriate standard of reasonable care when we were in small communities and engaged in reciprocally risky activities. But now because of non-reciprocal relationships and increase iformation asymmetries between right-holders and duty-holders, and because duty-holders are self-interest in minimizing their B when possible, cannot rely on custom as a definitive standard of care.
   1. TJ Hooper: tried to argue that compliance with custom showed compliance with reasonable care. No, custom is a floor and not definite standard. But it can be evidence of what is feasible, cost-effective, and known to Ds.
   2. Trimarco v. Klein: custom can be an effective sword if you can show that D did not comply because there is a presumption that its cost-effective, feasible, D knew about it.
      1. But D can rebut by saying that the custom doesn’t apply to them, or that they take alternative equally reasonable safety precautiosn.
   3. Exception to custom as floor: industries that are incentivized to oversupply care, usually doctors.
      1. Alternative explanations for why doctors set own standard of care: too complicated to explain to jury (G; but we do this in other cases), we already hold them to expert standard (G: we do this in other industries)
      2. Best explanation: market incentivizes oversupply of care because doctors paid more for more care, and patients not covering the cost themselves beacause of insurance
         1. But this is changed with care decisions being made more and more by managed care organizations
         2. Also, does NOT apply when doctors incentivized to undersupply care because it would save time. Eg, informed consent: doctors don’t’ set own standard for informed consent.
      3. Informed consent: respects the autonomy of the patient to make their own decisions; not just about preventing battery claims. Doctors required to explain all medically reasonable alternatives and all the material information, cannot unilaterally decide course of treatment for patient. **Patient needs to show that but for the lack of informed consent, would not have undergone treatment that cause harm—this is higher standard than the heeding presumption of warning cases.** 
         1. But could also recover for dignitary harm
      4. Tort reform: concern about defensive medicine because making medmal negligence-based and tied to doctor and duty-holder creates great reputational harms for doctors who are sued. So will over-use tests (not efficient) and underreport mistakes (jeopardizes safety). So G thinks we should move to SL/enterprise liability for hospitals so cost of mistakes will be internalized and safety decisiosn put on hospital.
2. **Cost-effectiveness.** Allocative efficiency calls for the use of the Hand formula in all cases, but that is not always what we use. BRPL is how juries are actually instructed, and reasonable care can be HIGHER that cost-effective care when interpersonal, noncontractual settings.
   1. B < PL created in Carroll Towing, which was about contributory negligence and therefore the standard of care that a P would use for themselves. Treats B equally with security interest, which is why is it appropriate in contractrual/reciprocal relationships. **But you can’t do this in non-reciprocal relationships because that’s prioritizing your interests over the security interests of another, so that’s subject to punitive damages.**
   2. In reciprocal and contractual settings, we use cost-effective care because right-holder bears the cost of care, so that’s what they would prefer. The do not privilege their own liberty or security.
   3. But in interpersonal interactions—nonreciprocal—we use BRPL. This allows a standard of care higher than cost-effectiveness, which privileges the security interest over the liberty interest. We would rather not suffer the injury in the first place than receive compensation afterwards.
   4. We are always concerned about the B—don’t need to eliminate all risks. See Adams v. Bullock: even if harm foreseeable, the chance of it so low that PL very low compare to burden of covering all the wires. Look at BRPL at the point of the safety decision.
3. **Statute**. A statute can create a cause of action for enforcement of a safety precaution, in which case you sue on the statute itself. But if a statute doesn’t create a right of action but instead establishes a standard of care without a private right of action, can use violation of statute to prove negligence per se.
   1. **NPS black**-letter rule:Must be (a) a safety statute, (b) intended to protect a class of people of which P is a member (c) from a set of harms into which P’s harm falls, and (d) D has no excuse.
      1. Here, the court is deferring to the policy decision by the legislature regarding the standard of care required. This protects instuttioanl comity and respects the legislature as reflecting the common wisdom of the community.
      2. Court has discretion not to apply it, though. Especially when it would defeat the safety purpose of the statute. See Tedla case: was safer to violate traffic rule than to comply.
      3. D also can have an excuse—eg, I was speeding to get heart attack victim to hospital.
      4. See Martin v. Herzog case: violation of requirement to have headlights driving at night is NPS.
   2. If you are using the statutory standard and the statute created the duty, then risks and victims outside the duty don’t get recovery. But if the duty was preexisting in the common law, then you can extend the policy decision to other PLs on the basis that legislature has solved the safety question even if they didn’t consider all the risks.
      1. See dram shop acts. If jx thinks there is a preexisting common law duty for tavern owner to protect customer from own drinking, then will apply the safety determination of the statute to that situation even if outside the scope of the statute.
      2. This is not really negligence per se.

OBJECTIVE STANDARD OF CARE

The standard of reasonable care is determined categorically and objectively with reference to the risks within the scope of the duty. It is objective because (a) administration reasons, though there are times when we know with certainty the subjective traits of the actor so this can’t be all of it, and (b) because of the value of equality—one person cannot unilaterally determine the standard of care for another.

* This will create pockets of strict liability and immunity within negligence because some people will be unable to comply with the standard of care, or some people will intend not to but comply objectively.
  + Eg, children in adult activities, beginners held to standard of average experienced person. This is strict liability for non-reciprocal risk—abnormally dangerous activities.
  + But experts held to a standard of expert care—see Bethel case. Also, abandonment of similar locality rule: this hold rural doctor to national standard because the safety reason for giving them immunity (don’t want them to send patients to cities when travel dangerous) not relevant anymore
* Vaughn v. Menlove: even if P used best efforts, if because of low intelligence they can’t attain reasonable care they are still liable for exercising their autonomy in a way that unreasonably injured another. D cannot unilaterally determine standard of care for another.
* Mental illness: we don’t allow different standard of care for those with mental illness because
  + Hard to administer, easy to fake.
  + We don’t want government to look into motivations of people
  + If you are institutionalized, we’ve determined that you can’t exercise autonomy so we are not going to hold you liable
* Immunities: we create immunities for the purposes of protecting autonomy or socially valuable activity
  + Eg, we want blind people to be able to live autonomously in the world, so we hold them to standard of reasonable prudent blind person
  + Children we hold to standard of child of their age, intelligence,a dn experience
  + Children in some adult activities if common in the community and we don’t want to inhibit them (Eg, hunting, riding bikes)