Torts Outline

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Grade: A-

1. **Theories of Tort Law**
2. **Corrective Justice [NOT = COMPENSATION]**
3. If you transgress someone’s rights you treat them as a moral inferior and should be liable to restore them to their previous position since they are not your moral inferior.
	1. Damages make that correction based on a legal fiction
4. Especially applicable to intentional torts.
5. Liability insurance (because tortfeasor doesn’t actually pay) and corporations as defendants (because they aren’t actually people who can be morally bad) make corrective justice less applicable.
6. **Law and Economics/Optimal Deterrence**
7. Concerned about societal outcomes and whether tort outcomes give parties the appropriate incentives to take the right level of care going forward.
8. Want to minimize the total cost of accidents. Doesn’t mean optimal deterrence is 0 (aka no accidents), instead it is the efficient level where investments in safety produce the greatest marginal benefits.
9. **Residual risk** - risk that injury will occur even when the other party is acting reasonably, goes uncompensated under negligence - ok because it would dramatically reduce productivity if you tried to eliminate all accidents. Instead have to invest in safety where you get the greatest payout and not in other places.
10. Lends itself to situations where there isn’t necessarily a right and a wrong, just two socially productive activities that are incompatible - goal is to get the most efficient outcome.
11. Subsidiary Rationales
12. **Loss spreading** - Some defendants (e.g. products manufacturers, anyone with insurance) have ways to spread the cost of accidents among lots of people instead of making the victim bear it all
13. **Compensation** - This is more of a function than a goal. Could just use a no-fault compensation system.
14. Redress of social grievances
15. **Libertarian, autonomy-based MCJ**: “As between two innocents, put liability on the one who acted”
16. **Procedural Characteristics of the Tort System**
17. Jury trial
18. **Contingency fee** - Lawyer takes plaintiff’s case for free and then gets about 1/3 of the award if they win. Means that you don’t have to be rich to bring a suit but lawyers screen people out who they don’t think have good cases.
19. American rule is that each side pays their own costs - doesn’t disincentivize suits
20. Insurance
21. First party - You pay in and then can recover if something happens to you
22. Third party - Liability insurance that covers you if someone comes to your house and gets injured
23. People don’t usually sue if they can’t get recovery from insurance. One of the main things you figure out in discovery.
24. Could see the entire tort system as serving a cost-spreading/insurance function (e.g. product liability).
25. **Interests Protected by Tort Law**
26. Physical bodily integrity
27. Property
28. Emotional integrity
29. **Intentional Torts**
30. Don’t come up very often because usually they are covered by criminal law or plaintiffs (e.g. DV victims are afraid to sue), no insurance because all liability insurance has an exception for intentional acts.
31. **Elements**
32. Intent (to act or to harm, depending)
33. Act
34. Causation
35. Damages
36. **Physical Harms**
37. **Battery 🡪 the debate over “intent”**
38. **Vosburg v. Putney (1891)** - Boy was liable for battery for the major damages caused to other boy, even though he didn’t intend to harm him.
39. Court held that intent to do an unlawful act (i.e. kick in an orderly classroom as opposed to the playground) was enough even if did not intend to cause extent of harm.
	1. Find me an unlawful act and from that act infer unlawful intent
	2. Does not matter if he could not have foreseen the extent of harm
40. Paradigmatic intentional tort has **dual intent** (intent to act and intent to harm). Here they only required **single intent** (intent to harm).
41. **Eggshell skull rule** - you take your victim as you find him and are responsible for the full consequences of your act. Foreseeability not a limitation. Defendant internalizes all the benefits, so has to internalize the costs also - no ability to work them out ex ante.
42. **Garrett v. Dailey (1955)** - Little boy was liable for pulling chair out from under a woman and causing her to fall and break her hip.
43. **Substantial certainty** **test for intent** - he knew with substantial certainty that she would fall if he moved the chair.
44. Somewhere in between requiring the defendant to intend the exact harm and just requiring intent to act - influenced the RST and RTT.
45. **RST 13** - Battery: Harmful Contact requires
46. Intent to cause a harmful or offensive contact with another person, or an imminent apprehension of such a contact, and
47. A harmful contact with the person of another directly or indirectly results.
48. **RTT** definition of intent includes
49. The person acts with the purpose of producing that consequence, or
50. The person acts knowing that the consequence is substantially certain to result.
51. **White v. University of Idaho (1990)** - Music professor was liable for touching student’s back even though he didn’t intend to harm.
52. Court declined to adopt the RST in favor of single intent (he intended the touch and she did not consent)
53. Why incentivize such extreme care?
	1. Touching was nonconsensual – protection of bodily integrity/autonomy
54. **Chamallas & Wriggins** - DV is mostly kept out of the tort system even though it fits under battery.
55. Historically it was pushed into family law, and there was interspousal immunity to preserve “family harmony”
56. That doesn’t exist anymore, but there are still family member exclusions and intentional act exclusions for liability insurance that pretty much guarantee people won’t sue because they won’t get money.
57. Argument is that people won’t be deterred from doing intentional harms if they are insured, but people used to say the same thing about negligence. Also the actuarial difficulty isn’t that bad considering that we have terrorism insurance.
58. Statute of limitations is shorter usually for intentional torts than negligent torts - there is a strong argument why this is backwards especially for DV.
59. **Defenses to Battery**
	1. **Consent**
		1. **Mohr v. Williams (1905)** - Court found doctor liable for battery for performing surgery on the ear that patient hadn’t consented to. Even though there was no intent to harm, **there was no consent**.
			* 1. Unlawful act🡪 unlawful intent
		2. Consent is a strong defense. That is why now doctors always have patients sign **consent forms** in advance to surgery that they can do any related necessary procedures.
		3. In an **emergency**, the consent requirement is waived. Jury found no emergency.
	2. **Insanity**
		1. **McGuire v. Almy (1937)** - Insane woman attacked her nurse. Court held that insanity is not a defense to an intentional tort as long as you are capable of having the required intent and actually had it. Basically just has to be a volitional act - not sleepwalking or a seizure.
		2. Corrective justice arguments for holding: Can’t really justify based on moral wrongdoing, but potentially on **Libertarian corrective justice** - as between two innocents, put liability on the one who acts. That also serves compensatory interest.
		3. Law and economics arguments for holding: Since this is not a stranger context, risk of being attacked was factored into the cost of care for the insane person. ?? Incentivizes estate to ensure insane person is controlled.
		4. Arguments against liability for the insane: Can’t really deter, not clear that the family could take any more care than institutionalizing her. Don’t want to incentivize too much locking up of insane people.
	3. **Self Defense and Defense of Others (a Complete Privilege)**
		1. **Courvoisier v. Raymond (1896)** - Court held that man who shot police officer during mob attack on his home and shop could be excused for self defense if he reasonably believed his life was in danger. Reversed objective test in jury instructions in favor of subjective test.
		2. Legal rule is that self-defense is a defense not only when someone is actually committing or threatening a battery against you but when you perceive it that way.
		3. **RST 76 on defense of a third party**: A person is privileged to defend a third party under the same conditions and by the same means as those under and by which he is privileged to defend himself if the actor correctly or reasonably believes that the third party is entitled to use force in self-defense and that his own intervention is necessary to protect that party.
60. **Trespass to Land**
61. **Dougherty v. Stepp (1835)** – God don’t make no more land. Court held defendant liable just for entering plaintiff’s land. No damage required. Trespass to land is a boundary-crossing tort. Mistake of ownership is not a defense.
	1. The title enclosed the property to the landowner’s ownership
62. **Use of Force in Protection of Property**
63. **Bird v. Holbrook (1825)** - Court held that defendant was liable for deadly mantrap set to protect tulip garden that ended up shooting kid chasing his peacock. Use of force would only be justifiable if it would have been justified in person. Posner view: best accommodation of two entitlements (tulips and peacocks) would be to require mantrap guy to post notice.
64. Use of force has to be proportional to the force used to enter the land (∆ was trying to catch a thief, not a peacock chaser). Have to be present in order to calibrate effectively. Land isn’t as important as bodily integrity.
65. **Defense of Necessity (an Incomplete Privilege)**
66. **Ploof v. Putnam (1908)** - Court held that sloop docking on someone else’s dock was not trespass to property, because in circumstances of necessity (e.g. to protect life or property) there is a privilege to enter someone else’s property.
67. Dock owner was liable for preventing the sloop from docking there because this is an exception to the absolute property right to exclude others.
68. The owner might hold out in an emergency situation and distort the price if they tried to contract for the privilege ex ante - that is one justification for the exception to the privacy right.
69. The privilege only last so longs as the conditions that engender necessity.
70. Privilege applies even if the person invoking it negligently caused the situation.
71. Necessity is a limited defense. Once the circumstances creating the necessity are gone the privilege is gone too.
	* + 1. Doesn’t matter if the conditions were poor when the sloop was taken out.
72. When the privilege exists, if the property owner responds with force to keep the person out, the person can use proportional force to get in.
73. **Vincent v. Lake Erie (1910)** - Court held that while ship was justified by necessity in remaining at a dock where it was unloading cargo during a storm, it still was liable for damage caused to the dock. Involved a valuation of its property as more valuable than ∆’s property.
74. Necessity is an **incomplete privilege**. Unlike (calibrated) self-defense, which is a complete privilege under which you are not liable for any collateral damage.
75. Dissent thinks this case should have been dealt with in contract (figure out how they would allocate these risks) because the two parties had a contractual relationship, i.e. not strangers.
76. Arguments for holding: The ship captain deliberately used a stronger rope to keep the ship on the dock, so they chose to trade benefit to themselves for harm to someone else. This act puts you in the realm of torts, justifies liability on the theory of unjust enrichment. Court gives example that hiker who is fed when he is starving should pay the person back later.
	* 1. “Having thus preserved the ship at the expense of the dock”
77. What if necessity was a complete privilege? Incentive consequences:
	* 1. Dock owner might put spikes up to make dock less accessible.
		2. Ship owner might be more aggressive about taking advantage of privilege, dock owner might get more insurance. Maybe it is good for people to internalize all the costs when making a decision about how much necessity there really is. But, if life is at stake don’t want people to not save themselves because of concern about future liability.
78. **Emotional and Dignitary Harms**
	* + 1. **Assault**
	1. **I de S v. W. de S. (1348)** - Man was liable for emotional harm caused when he tried to hit woman with hatchet and hit the wall of the house instead. Involves an ***immediate threat*** to use force.
	2. Assault can be attempted battery that is unsuccessful or just a *threat*.
		1. He could have just been trying to frighten her or been trying to hit her, both suffice under assault
		2. Protection of the emotional interest rather than physical dignity.
	3. **RST 21**: An actor is subject to liability for assault if
79. He acts intending to cause a harmful or offensive contact with another person, or an imminentapprehension of such contact, and
80. The other is thereby put in such imminent apprehension.
81. Comment distinguishes between apprehension and fright - you can still feel apprehension even if you know you can repel the attack.
	* + 1. **Offensive Battery**
	1. **Alcorn v. Mitchell (1872)** - Defendant was liable for spitting on the plaintiff because of the ***dignitary harm***. Court focuses on malicious intent.
	2. **RST 18**: An actor is liable for Battery - Offensive Contact if
82. He acts intending to cause a harmful or offensive contact with another person, and
83. An offensive contact with the person directly or indirectly results.
84. Negligence or recklessness is not sufficient, have to intend harmful or offensive contact.
85. Physical damages are not necessary, but some contact is required.
	* + 1. **Intentional Infliction of Emotional Distress [IIED]**
	1. **Wilkinson v. Downton (1897)** - Court upheld liability for emotional harms caused by defendant who lied to woman about husband getting in accident. Court infers the unlawful intent from the circumstances.
	2. Traditional rule was that emotional damages could only be parasitic [“damages for which there is no basis of action by itself” to some kind of physical contact (e.g. spitting), but the Wilkinson court rejected that idea.
86. Reasons for requiring contact - evidentiary help proving something actually happened, combats concern with fraud.
87. **Chamallas** critique - Court always has to determine credibility of damages and figure things out that are hard to measure. Tort law marginalizes a category of damages that were traditionally associated with women.
	1. **RST 71:** An actor is liable for IIED if by ***extreme and outrageous*** conduct they intentionally or recklessly cause severe emotional distress to another. There can also be liability for distress caused to a third person if that person is an immediate family member of the victim who was present at the time, whether or not physical harm resulted, or to anyone else who was present at the time, only if physical harm resulted.

Standard for IIED is very high - there has to be general societal consensus that the defendant’s behavior was outrageous. Reflects respect for the First Amendment.

Argument for: incentivizing people to “buck up” lest everyone sue everyone

* 1. **Snyder v. Phelps (2011)** – SCOTUS upheld a defense based on the First Amendment against a Father of dead soldier who had won an IIED claim against Westboro Baptist Church for protesting at son’s funeral at trial court. The Supreme Court overturned the verdict because the outrageousness standard was too malleable, too “inherently subjective”, allowing the jury to potentially decide based on their distaste for a particular view expressed. Many jurisdictions had already narrowed anyway.

Critique: the jury determination actually sheds light on the meaning of the standard

* 1. Sometimes plaintiffs get IIED damages in addition to Title VII harassment damages. Chamallas argues that tort law should actually get out ahead of Civil Rights statutes because of its universal character. It should embrace equality norms. Argument against is that legislatures have set aside certain categories for civil damages, which avoids the need for subjective application of broad categories like “outrageous.” Many arguments have limited tort recovery because they see it as an end run around statutory limitations on recovery.
1. **Negligence [Fault Liability]**- Big N is the cause of action (all four elements), small n is just breach of a duty of care
	* + 1. **Elements**
				1. Duty
				2. Breach
				3. Causation
				4. Damages
			2. **Holmes** argues for negligence - situates it as the golden mean between liability for intentional torts and strict liability. Emphasizes foreseeability and reasonableness. Argues for objective standard of care.
			3. **Duty/Breach**
				1. Backdrop **duty of care** that exists all the time is duty to avoid unreasonable harm. Sometimes there are also specialized affirmative duties.
				2. **Reasonable person test** - Holmes’s objective standard of care based on what reasonable person under the circumstances would do. Makes the most sense in a stranger context, where no one would know the subject standard of care and therefore could no act accordingly. Want to incentivize an achievable and optimal level of care. No assumption of the risk for other party’s internal (unforeseeable) eccentricities.
	1. Holmes thinks physical characteristics should be taken into account like blindness, infancy. Foreseeable eccentricities should lead the reasonable person to adjust their level of care.
2. Argument that it wouldn’t be fair to hold someone disabled to a higher standard (but isn’t that true of anything?). Also if you can see someone is physically disabled you can take extra care around them.
3. Major benefits of objective standard are that it is easily administrable and avoids faking. Neither of these are major concerns when the characteristic is physical.
4. Incentive based argument that you can’t incentivize someone to meet a standard that they are physically incapable of. But, why should others bear the cost of that?
5. Criticizes strict liability as a normative rule – “Nay, why need the defendant have acted at all, and why is it not enough that his existence has been at the expense of the plaintiff?”
	1. **Roberts v. Ring (1919)** - Old man who hit child with buggy was liable despite being kind of slow and blind, but child’s age was taken into account to determine standard of care for contributory negligence. Court takes a broader view of negligence - old man should not have driven in the first place if he wasn’t capable.
	2. **Daniels v. Evans (1966)** - Court held that a minor who was in a motorcycle accident should be held to an adult standard of care because he was engaged in a dangerous adult activity. Otherwise you ask the rest of society to subsidize teenage drivers.
	3. **RTT**: Child should be held to the standard of care of a reasonably careful person of the same age, intelligence and experience. There is an exception for children who are engaged in dangerous, adult-like activities. There is a blanket exemption from liability for children under 5.
	4. **Breunig v. American Family Insurance (1970)** - Court held that woman who hallucinated while driving was liable because there was forewarning that she was mentally ill, which should have lead her to not drive. Want incentivize her in lucid moments and her caretakers to take care about letting her get behind the wheel. Insanity can only be a defense to liability if you are suddenly and temporarily insane, because then there is no way to incentivize preventing the situation from happening.
		1. Concern about faking insanity as a defense - would probably be easier for temporary than permanent insanity.
		2. Epstinian corrective justice - put liability on the one who acts.
		3. Most courts follow the **RTT** - no excuse of liability for mental disability, even if it is sudden. You can escape liability for a sudden physical disability.
		4. **Gould** - declined to apply Breunig when plaintiff was caretaker. Risk was allocated, etc. - same arguments as in intentional torts.
	5. **Denver & Rio Grande R.R. v. Peterson (1902)** - Wealth of the defendant doesn’t get taken into account at all.
		1. Arguments for - Taxes are more effective way to redistribute wealth. Deterrence happens at the margin so doesn’t matter how wealthy you are.
		2. Arguments against - The wealthy might have higher opportunity costs because their activities produce more wealth and therefore need more deterrence. Because of diminishing marginal utility of money same award would deter wealthy less.
			* 1. **Hand Formula**
	6. The goal is to optimize the level of accidents, which is not the same as the complete deterrence goal in Intentional Torts.
		1. Law and economics gives Hand a lot of weight, corrective justice not as much because it doesn’t focus on relational nature of duties.
	7. **United States v. Carroll Towing (1947)** - Ship got hit by another ship while it was moored in a harbor and eventually sunk. Question of whether the boat that was hit was liable for some of the damages to the cargo because there was nobody on board who could have stopped it from sinking.
6. Hand lays out **B<PL** as formula to determine the level of care the bargee should have taken as a way to balance the fact that he can’t be trapped on the barge forever but also probably shouldn’t have been gone for a whole day.
7. Reasonable care means you take **Burdens** that are less costly than the **Probabilit**y **of loss** times the **magnitude of the Loss**.
	1. **RTT** on negligence reflects Hand formula type balancing: Primary factors to consider in ascertaining whether a person’s conduct lacked reasonable care are the foreseeable likelihood that the conduct would result in harm, the foreseeable severity of any harm that might ensue, and the burden of precautions to eliminate or reduce the risk of harm.
	2. Emphasis for Hand Formula is on objective probabilities vs. emphasis on foreseeability in reasonable person test.
	3. **Andrews v. United Airlines (1994)** - 9th Circuit reversed District Court’s dismissal of plaintiff’s claim for injury caused by falling baggage from overhead compartment. Court puts a lot of weight on heightened duty of care for common carriers, but also discusses Hand Formula factors.
8. Question of whether the number of accidents reflected a high or low P. Number seemed high but compared to volume of United’s business looked low.
9. Plaintiff’s safety expert testified about *additional precautions* that could have been taken e.g. nets.
	* + 1. 🡪 how to argue for “n” under hand formula
	1. Critiques of Hand Formula
10. Hard to measure L when you are talking about physical injuries - no market to base it off of. L need to capture the complete harm or else under-deterrence.
11. What happens when P and L are vastly different in scale? Is it ok to risk loss of life if the probability is very small?
12. Makes sense for societal planning but not individual negligence determinations because nobody goes through that kind of thought process.
13. Hindsight bias for P - probability of accident looks a lot higher now that it actually happened.
14. Assumes risk neutrality when actually people have different tolerances for risk.
15. Will induce too much care - there is a **liability cliff** and if you fail to exercise reasonable care you go from 0 damages to full damages (as opposed to more gradual, continuous strict liability scale). Therefore people will overshoot the mark and exercise extra care to avoid getting too close to the cliff.
16. Will induce too little care - ex ante you know that there is a good chance someone who is harmed won’t sue, so you will make probability calculation based on that and exercise too little care. Does not account for probability of detection calculations.
	1. Calculus has to be from an ex ante perspective. Court has to go back ex post and figure out if defendant failed to take a cost-justified precaution. Has to be applied on the margin.
	2. **Cooter and Porat** argue that judges aren’t taking into account the risk to the actor himself when applying the Hand formula. While that might make sense from a corrective justice standpoint, it fails to take into account the full costs and benefits of the situation and therefore will lead to systematic under-deterrence. Certain risks to self reduce risks to others.
		* + 1. **Custom**
	3. Appeals to a standard outside tort law, which reduces uncertainty.
	4. **Titus v. Bradford (1890)** – Train beds case. Court held the defendant railroad not negligent because they complied with industry standard. Don’t want jury to force defendant to reconstruct their mode of business. Court doesn’t allow hand formula inquiry into possible additional cost-justified precautions.
	5. **Mayhew v. Sullivan (1884)** – The fall in the mine case. Court directed verdict for the plaintiff in another workplace injury case, saying that custom has no place in the definition of ordinary care. Applies ex ante B<PL analysis—should have had a sign, light or fence.
	6. Makes sense for custom to be stronger in **consensual context** than **stranger context** - if both parties are engaged in the same industry there is an argument that plaintiff knew the custom and assumed any residual risk once defendant takes the customary level of care.
	7. **Pros of Custom**
		1. Arguably benefits everyone in the industry not just employer
		2. More determinate measure
		3. Probably represents the efficient Hand Formula standard of care since it has been adopted over time by repeat players
			1. Assumes no collusion among industry players, assumes competitive markets
		4. External standard that limits the jury’s discretion
	8. **Cons of Custom**
17. Whole callings can lag (See TJ Hooper)
18. Might disincentivize innovation by making sure that people are safe if they adopt old precautions
19. Inequality of bargaining power in employment situation - easy for all employers to adopt a low standard of care and force employees to bear the risk
20. Assumes that employee have a choice in where they work and are consciously choosing to assume the residual risk
	1. **T.J. Hooper (1932)** - District Court held that since almost every boat had a radio the defendant boat operator was liable for not supplying one. Judge Hand affirmed on Hand formula rationale but said that custom shouldn’t be taken into account because a whole industry could lag behind in taking cost justified precautions. Custom can inform the standard of care but is not dispositive. This is the general rule on custom.
	2. **RTT** custom does not immunize the activity: can be used by plaintiff or defendant (sword/shield) but neither requires liability in the first case or precludes liability in the second case.
	3. **Lucy Webb Hayes v. Perotti (1969)** - Court held that the fact that mental hospital violated its own internal regulations was evidence supporting liability but didn’t require finding of liability. On the one hand you don’t want to punish businesses that adopt high safety standards, but if people choose you because of those high standards it seems fair that you should be held to them.
	4. **Trimarco v. Klein (1982)** - Court allowed jury to determine whether custom from when shower glass was put it or from the time when the accident happened was most persuasive.
	5. Custom is the conclusive standard in **MEDICAL MALPRACTICE** cases, unlike other types of cases. Medical malpractice is the exception to the TJ Hooper rule.
		1. **Lama v. Borras (1994)** – Back injury case that went to surgery without fully needing to. Surgery caused injury. Court held that since conservative treatment was standard practice and doctor didn’t follow it, he was liable for ensuing injuries. Prima facie case of med mal requires plaintiff to
			1. Show norms
			2. Show failure to follow norms
			3. Show that failure to follow norms caused the injury
		2. Idea is that lay juries are less competent at determining standard of care in complex medical situations.
		3. Usually there is a war of the experts. It isn’t enough to show that a minority of doctors agrees with you - your way has to be what a substantial proportion of the medical community does - enough to constitute a “school of thought.” Could punish innovation, but also avoids exposing patients to lots of risk.
		4. Used to be a **locality rule** - you were only held to the custom in the area that you practiced. Now doctors are certified by national boards so they are held to a **national** standard of care. You can still consider the resources available to the doctor.
		5. **Informed consent** - is a separate duty that gives rise to its own tort beyond medical malpractice. Custom does not play a dominant role in informed consent like it does in negligent performance of a surgery. Based on the right to control what happens to your body.
			1. **Canterbury v. Spence (1972)** - Back injury/surgery case. Duty to disclose does not depend on industry custom. While departure from custom can create liability, it is afforded less weight than in med mal cases because of importance of autonomy and need to bring the industry up to the appropriate standard that respects plaintiff’s right to choose.
				1. Scope of disclosure required is how much information the reasonably prudent patient would need to make an informed decision. **Objective standard.**
				2. Causation - have to show that reasonable person would not have undergone the procedure if there had been full disclosure of all perils. *Hindsight bias.*
			2. Informed consent standard dictates what the doctor has to say, not what the patient has to understand. But, patient doesn’t have to ask.
			3. Concerns about disclosure of very small but scary risks will prevent patients from making good decisions vs. interest in patient autonomy. U.S. law has moved toward patient autonomy, but still a reasonableness balancing inquiry of how much the patient needs to know to make decision.
			4. Argument that even with informed consent tort doctors won’t fully internalize the risks of not disclosing information, because not everyone will sue and many won’t even be injured, but there is still harm in not having the opportunity to make the decision yourself. But, if doctors are worried about liability they might end up giving too much info.
		6. **Hyman and Silver** - informed consent liability increases ex ante communication by doctor to patient, even if med mal liability decreases some ex post communication to patient about mistakes. Med mal liability incentivizes safer care and forces bad providers out of the field.
		7. **Mello and Brennan** - tort liability’s incentive effects work best on a systems level.
			1. **Experience rating** is important to make liability a deterrent even with insurance. Right now it exists for hospitals but not individual doctors. Could work better if doctors were linked to healthcare systems. When not experienced based, there is a disconnect between the deterrence signal and the doctor.
				1. Anesthesia example
			2. **Mismatch Problem** - People who aren’t injured do sue and people you are injured don’t. Depends a lot on relationship to doctor. Another reason that liability is not as clearly linked to deterrence.
			3. **Defensive medicine** - Concern that doctors are performing lots of extra tests to avoid liability. Form of over-deterrence. Not clear if this is actually happening that much.
			4. Concern about doctors leaving certain higher-risk fields. But, that might be a good thing if they are making patient care safer overall.
				1. **Statutes and Regulations**
	6. (1) Is there an express right of action?
		1. If a statute or regulation clearly says that it furnishes a private right of action then that is easy - plaintiff can sue that way and doesn’t need a tort cause of action.
	7. (2) If not, is an implied cause of action?
	8. (3) If not, does the statute or regulation affect your common law tort cause of action?
		1. In most jurisdictions you can import the statutory standard of care to your common law tort claim, if it tracks a CL duty of reasonable care. Have to ask:
21. Is the plaintiff within the *class of persons* protected by the statute?
22. Is the injury within the *class of risks* protected against by the statute?
23. **Osborne v. McMasters (1889)** – Drugstore clerk sold poison without label. The statute requiring labeling fixed a standard of negligence, which confers a right of action to the relevant class of persons for the relevant class of risks. Negligence *per se*.
	* + 1. “All the statute does is to establish a fixed standard by which the fact negligence may be determined”
			2. Negligence is a breach of a legal duty and the statute spells out that legal duty
24. **Stimpson v. Wellington Service Corp (1969)** - Court found liability for damage to plaintiff’s pipes caused by a truck that violated a statute limiting weight w/o permit. They found that the statute had a dual purpose, not just to protect the streets but also to allow city authorities to weigh costs and benefits of truck going through.
25. **Gorris v. Scott (1874)** - Defendant wasn’t liable for damage to chickens caused by failure to comply with Contagious Disease Act’s penning requirements, because Title made it clear that the class of risks was disease.
	* 1. Evaluated by the statute’s name, preamble, legislative history
26. **Porat** argues that once you have a statutory duty it makes economic sense to read it more broadly because then you just get more benefits from a fixed cost of taking precaution and make it more cost-justified.
27. Even if the statute doesn’t pass the test for negligence per se (e.g. Gorris v. Scott) you could still sue for negligence and prove it the regular way, using the statute for evidence if you wanted.
	1. **Martin v. Herzog (1920)** - Court held that buggy that violated statute requiring lights and then got into an accident was liable for **negligence per se** - no room for jury to find not liable.
		1. Since this was within the class of persons, class of risks test, there is automatic negligence (small n). Can’t let jury override legislative determination of a legal duty.
		2. Still have to prove causation.
		3. Can’t rebut with Hand/reasonableness evidence, but there could be an excuse like necessity or emergency.
		4. **Tedla v. Ellman (1939)** - Plaintiff’s brother was hit by a car when they were walking on the right side of the road and statute said you should walk on the left. Before the statute there was a common law *custom* that you should do that except if the flow of traffic made it safer to do the opposite. Question of statutory construction: whether statute meant to codify the full custom or purposely left the exception out. The court held that the exception still applied.
	2. **Uhr v. East Greenbush (1999)** - Court held that statute requiring schools to check students for scoliosis did not create an **implied private right of action**. Test:
28. Is the plaintiff within the class of people for whose benefit the statute was enacted?
29. Would recognition of a private right of action promote the purpose of the statute?
30. ***Would recognition of such a right be consistent with the legislative scheme?***
31. The first two prongs are basically the class of persons/class of risks test, but the third one is new. This is where the Uhr cause of action fails because they decide it wouldn’t make sense with the whole scheme given the public enforcement mechanism, lack of amendments, cost intentions and immunity provision.
	* 1. The inquiry doesn’t end if you detect an enforcement mechanism since that mechanism may not provide immediate redress for one student with scoliosis.
		2. Court read a quid pro quo here—low cost program in exchange for no liability arising out of it.
32. Common law negligence action fails because there is no duty of care without the statute—duty to check for scoliosis only there because of statute.
	1. **Abraham** says that unbounded negligence standards (reasonable person and Hand) let juries make the decisions whereas bounded standards (custom, statutes) let external decision makers do it.
		1. Advantages of jury are that they are the conscience of the community, are especially well suited to reflect changing norms.
		2. Disadvantages are less predictability, accountability and the effect on optimal deterrence.
			1. Juries aren’t really applying fact to law but deciding law/norm of reasonable care.
		3. Judges are biased too but are exposed to more cases. Holmes argued that over time judges should just apply rules that emerged from jury deliberations to achieve greater consistency.
		4. It is hard for juries to calculate Hand outcomes, especially with *hindsight bias*. Generally they tend to reject economic analysis. Swayed by sympathy/empathy. Also they punish defendants who use a high value of life in their own calculations - reflects anchoring.
		5. How does jury instruction play into this?
		6. Reforms: specialized juries/panels of experts, combined with laypeople
			* 1. **Res Ipsa Loquitur**
	2. RIL is a doctrine of circumstantial evidence that helps plaintiffs establish prima facie breach of a duty of care by inferring it rather than showing it directly. “The thing speaks for itself.”
	3. Test for small “n” negligence, so you still have to establish causation after.
	4. **Byrne v. Boadle (1863)** - The fact that a barrel fell out of the defendant’s store window is enough to infer that the defendant’s servants acted negligently. “The barrel was in the custody of the defendant” and it fell out the window.
		1. Distinguish from lady with pet tigers example, wherein the very having of the tigers is negligent itself. Having the barrel isn’t negligent—letting it fall out a window while in your custody is.
	5. **Prosser test**
33. The event must be of the kind that ordinarily does not occur in the absence of someone’s negligence
34. The event must be caused by an object or instrumentality within the exclusive control of the defendant
35. The event must not have been caused by any voluntary action or contribution on the part of the plaintiff
36. Used by majority of jurisdictions
	1. **Second Restatement Test**
37. The event must be of the kind that ordinarily does not occur in the absence of someone’s negligence
38. Other responsible causes, including the conduct of the plaintiff and other third parties, are sufficiently eliminated by the evidence
39. The indicated negligence is within the scope of the defendant’s duty to the plaintiff
40. Court determines whether the inference can reasonably be drawn by the jury; jury decides whether to actually draw the inference.
	1. **Third Restatement**: The harm must be a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is a relevant member.
	2. **Colemenares v. Sun Alliance (1986)** - Court held that escalator handrail malfunction met the requirements of RIL and the jury could decide whether to infer negligence.
		1. Puerto Rican law follows the Prosser test. The second “exclusive control” prong is supposed to eliminate other causes. Here it is an issue because the Port Authority operates the airport but Westinghouse maintains the escalator.
		2. However, the court holds that maintenance of the escalator was a ***non-delegable duty*** of the Port Authority, so they are essentially responsible for Westinghouse’s actions.
			1. “Effectively has exclusive control”
			2. Could argue that PA is the least cost avoider because they are closest to the escalator, or that making the duty non-delegable incentivizes choosing a good management company and keeping close tabs on them.
			3. Court says that the importance of the duty to the public safety is a big part of whether it is delegable.
	3. Distinguish from *Saks* elevator case in which the elevator rail and steps stopped, causing plaintiff to fall backward. No RIL, because the elevators were equipped with emergency stop buttons—fails first prong since elevator stopping could ordinarily occur in the absence of negligence
	4. RST replaces the exclusive control requirement with an elimination of other causes requirement. RTT doesn’t have either - it is an attempt to simplify. Also broadens liability that can be proved under RIL. Many jurisdictions still prefer RST because it is easier for juries to apply.
	5. Can defeat RIL by showing that the instrumentality was not in the defendant’s exclusive control (e.g. hotel guests throwing chairs out the window) or there were potential causes of the injury that were not negligent (e.g. stop button on escalator available to patrons for emergencies).
	6. **Ybarra v. Spangard (1944)** - Court allowed plaintiff who suffered unusual injuries while unconscious during a medical procedure to use RIL to bring in all potential defendants and make them explain their conduct. Otherwise, π may not be able to bring a prima facie case.
		1. This isn’t pure RIL because there are expert witnesses testifying that the injury could have been caused by them positioning him wrong on the operating table.
		2. Broadening the doctrine so it can be employed as an **information-forcing** tool - designed to correct information asymmetry that is inherent in situation of unconscious plaintiff, deterring a *conspiracy of silence* between multiple defendants. Drawing out evidence the plaintiff has no access to.
		3. Defendants argue that plaintiff is attempting to fix liability en masse without any evidence about who actually was negligent. But is not that the defendants are negligent until proven innocent - defendants just have to come forward with an explanation of their conduct.
			1. Imposing a **burden of explanation**. *Plaintiff still bears the burden of proof but burden of production shifts to the defendant.*
		4. Very important to make sure all the potential defendants are named, otherwise it might not work.
		5. Discovery and expert testimony are alternatives to RIL. Some jurisdictions require expert testimony in med mal cases because otherwise it is hard to infer that something wouldn’t have happened without negligence. But experts are expensive, so RIL is one way to shift costs away from plaintiff.
	7. Statutory limits on contexts in which RIL can be used.
	8. **Conditional RIL**: Pushes the factors found under the RIL tests to the jury with the instruction that if they find the factors, they can find liability?
		* 1. Policy gloss on how different jurisdictions apply different versions of RIL
				1. **Special Duty Issues**
41. **Affirmative Duties**
42. There is **no duty to rescue**, even though there are strong corrective justice and deterrence arguments for a duty to rescue.
	* 1. Justifications: individualism, a moral duty ≠ legal duty, slippery slope
		2. Buch: “A broad gulf between causing and preventing an injury”

Corrective justice: If you witness something happening and don’t intervene, that is morally wrong. If the risk was too much to you, then it wouldn’t be morally wrong anymore because your life is worth just as much as the other person’s.

L&E: Should only have a duty to rescue when it is cost-justified.

Would an affirmative duty rule incentivize a defendant to avoid situations where he might have to help someone?

**Hyman**: Empirical study shows that are actually too many rescues, not too few, because people underestimate the risks of intervening.

Epstein argument - shouldn’t be a duty to rescue because of autonomy. Extending the logic of an affirmative duty would create a duty to give money to a charity to save a life. Easier to just draw a clear line and say no duty.

Problem of who you pin the duty on when there are lots of bystanders. Could be difficult to administer and cause people to avoid places where accidents might happen to avoid liability.

Beach example

Posner view: implicit contract—ex ante, what would individuals agree to? We would agree that there should be an implicit restriction on our autonomy because it would benefit us if we needed to be rescued – reciprocal duty.

Could argue that you don’t want to codify people’s natural good instincts, people will be good Samaritans anyway. On the other hand, don’t want to give license to the officious intermeddler.

 If you assume an affirmative duty, **you are obligated to carry it out sans negligence**.

Many jurisdictions have laws to protect Good Samaritans from liability. But if not you could be liable for negligent rescue that makes things worse.

If you created the situation, then you do have a duty to rescue.

VT statute: incentivized affirmative obligations but only penalizes with a low, symbolic fine

1. **Affirmative Duties** arising out of **special relationships**
	* + 1. **Tarasoff v. Regents of University of California (1976)** - Court held that therapist who reasonably believed her patient posed a threat to someone else had a duty to warn her or exercise reasonable care to prevent patient from causing harm.
				1. Source of the duty is the therapist/patient relationship, but the duty is owed to a third party.
				2. Therapist did take some actions like requesting the police to initiate an involuntary detainment.
				3. Argument against duty - erodes confidentiality of the relationship. Could lead to increased violence because people will be deterred from getting meaningful help. Don’t want people over warning. Response is that interest in confidentiality has to yield to public safety.

Dissent: majority rule “certain to result in an increase in violence”

1. **Duties of Owners and Occupiers of Land**
	* 1. **Addie v. Dumbreck (1929)** - Landowner was not liable for injury to child incurred while playing on haulage system, because child was a trespasser. Court laid out traditional categories of duties of landowners.
			1. **Business invitees** - on the property for a purpose in which he and the proprietor have a joint interest - owner owes a duty of reasonable care to make sure premises are safe
			2. **Licensee** - no shared business interest with the proprietor, but proprietor has either given express permission or knows he is there and doesn’t try to stop him (social guest) - owner owes a duty protect against concealed dangers that are known or reasonably should have been known by the occupier
			3. **Trespasser** - presence is either unknown to or objected to by the proprietor – no duty of care, only a duty not to intentionally harm
2. Benefit of categories is predictability. But, they don’t really reflect a modern way we interact with people.
3. **Rowland v. Christian (1968)** - Court allowed plaintiff who was injured on cracked sink handle while a social guest at the defendant’s apartment to recover. They went out of their way to reject the old tripartite categories and replace them with a multi-factor balancing test.
	* + 1. Foreseeability of harm
			2. Probability of harm
			3. Closeness of connection between defendant’s conduct and plaintiff’s injury
			4. Moral blame
			5. Policy of preventing future harm
			6. Burden on the defendant
			7. Consequences to the community of imposing a duty
			8. Availability of insurance
4. Some states have totally gotten rid of the tripartite categories in favor of balancing test to figure out whether there is a duty. Others have kept the trespasser category but gotten rid of the other two.
	* + 1. **Plaintiff’s Conduct and Defenses to Negligence -** Defendant can either respond to plaintiff’s prima facie case with a general denial (I had nothing to do with it) or specific *affirmative defenses*.
				1. Under negligence as opposed to strict liability, “residual risk” occurs when the plaintiff gets hurt but the defendant took the optimal level of care and is therefore not liable. Negligence thus incentivizes the plaintiff to take care to account for the residual risk.

In strict liability schemes, you need comparative/contributory negligence in order to force the plaintiff to take care

* + - * 1. **Contributory Negligence** - basic idea is that plaintiff fell below the standard of reasonable care and caused her own injury. Same rules for standard of care and causation as for defendants.
	1. Contributory negligence rule was that if plaintiff was negligent at all he was completely barred from recovery: “unclean hands”. Was ultimately seen as an unfair way for railroads to avoid liability for workers’ injuries.
	2. **Beems v. Chicago R.R. (1882)** - Court allowed plaintiff’s claim to go to the jury because they could reasonably find that even though his foot got caught between the railroad cars leading to his injury he was still not contributorily negligent. This is an example of a more moderate application, less pro-defendant application of the traditional doctrine.
	3. **Butterfield v. Forester (1809)** - English Court found that plaintiff was barred from recovery because even though the defendant negligently left something in the road the plaintiff was riding his horse too fast and could have otherwise avoided it.
	4. Under negligence, the plaintiff has an incentive to exercise reasonable care even without contributory negligence, because she bears the residual risk that exists when defendant takes reasonable care. Under strict liability you need contributory negligence to incentivize reasonable care on the part of the plaintiff.
	5. But, contributory negligence still developed with negligence. Could be because enforcement of negligence isn’t perfect, or because due to cliff-like nature of negligence liability defendants take too much care and reduce incentives for plaintiffs. Also, because of expressive value of the law to get people to behave the way you want them to and idea of “unclean hands.”
	6. **Gyerman v. United States Lines Co. (1971)** - Court held that plaintiff was negligent in not reporting a dangerous situation with the stacking of fishmeal. But, the defendant had not met its burden of showing that the plaintiff’s contributory negligence caused the accident because the supervisor might not have done anything about it anyway.
		1. Court rejected relying on custom as conclusive but decides the contract did establish a duty to report.
		2. Didn’t give much weight to testimony of the supervisor that they would have done something if he had reported the situation, shows that courts were reluctant to deny recovery to injured workers.
	7. **LeRoy Fibre v. Chicago Ry. (1914)** - Court held that landowner who stacked straw on his land next to a railroad was not contributorily negligent when it caught fire from sparks from train.
		1. Court took a strong property rights approach and said that someone’s legitimate use of his own property shouldn’t be limited by the “wrongs of another”, i.e. the sparks coming from the train.
		2. This approach focuses on boundaries rather than right/wrong approach of breach of a duty of care. That is easy to apply but doesn’t really go with negligence.
		3. Holmes: the landowner might be the cheapest cost avoider in which case he should have to move his straw back.
	8. Alternative is **reciprocal causation** view - nobody is wrong, both parties have entitlements that conflict. You would figure out liability by figuring out who is the cheapest cost avoider and then letting the parties bargain to an efficient result.
	9. **Fuller v. Illinois Central R.R. (1911)** - Court held that train that saw defendant negligently crossing tracks and hit him anyway was liable despite his contributory negligence. This is the **last clear chance doctrine** - since they had the last opportunity to prevent the accident while the plaintiff was helpless/inattentive they are liable. Softening of tough contributory negligence.
		+ 1. With the adoption of comparative negligence, need for this is less. Last clear chance would just be used to help apportion liability among the two parties.
				1. **Assumption of the Risk**
1. **Lamson v. American Axe & Tool Co. (1900)** - Plaintiff was an axe painter who complained that new drying racks were dangerous because axe could fall. Employer said too bad you can leave if you want, plaintiff didn’t leave, and then axe fell and injured him. Court held that he couldn’t recover because he knew about the risk and stayed anyway - he assumed the risk.
	* 1. Could argue that people in dangerous jobs are paid a risk premium and therefore are compensated ex ante for the possibility of an injury. Also in theory allows a choice to decide the level of risk you want to assume.
			1. Assumes that there is choice and other options available both for jobs and type of risks involved in alternative jobs
2. **Murphy v. Steeplechase Amusement Co. (1929)** - Court held that plaintiff injured on the Flopper assumed the risk and could not recover, because when he saw and accepted the obvious *risks inherent in that activity*.
3. Cardozo emphasizes foreseeability - the plaintiff saw other people falling down and could imagine that someone could hurt themselves doing that.
4. This isn’t contributory negligence because going on the ride might have been totally reasonable. But the plaintiff assumes all the residual risk - complete defense for the defendant.
	* + - 1. **Comparative Negligence** - most jurisdictions switched from contributory to comparative between 1969 and 1975.
5. **Li v. Yellow Cab (1975)** - California decided to switch to a pure comparative negligence rule for apportioning fault between parties across the v. Dissent: leave this to the legislature.
	* 1. **Fairness/fault** - Comparative negligence mitigates all or nothing nature of contributory negligence and reflects real fault. Doesn’t let an at-all defendant get away free. Response would be that last clear chance doctrine and compromises within juries already mitigated. Plus, most cases settle so parties make their own compromises where there is uncertainty.
		2. **Legitimacy** - If juries are doing this anyway through compromise, legal doctrine should reflect that to make process more legitimate. Response is that it puts a strain on the jury to come up with precise mathematical calculations, especially with a **50% rule**, the results of which may not actually be legitimate or consistent
		3. **Administrability** - Problem of high costs of appeals in comparative negligence, especially over the line between 49 and 50%. Also a problem when special verdicts are internally inconsistent. Response is that juries were circumventing and awarding plaintiffs who were contributorily negligent regardless.
		4. **Deterrence** - Under contributory negligence ideally people will take optimal care. Not clear how this will work under comparative.
6. **50% rule** - recovery is barred if plaintiff was more than 50% liable.
7. Moral reason - not fair to give damages to the more liable person.
8. Insurance companies like this rule because it helps them predict risk by removing outlier cases. They don’t want to drive liability to zero, just want to be able to price risks on an actuarial level.
9. Some people just think it is a fair compromise.
10. **Last clear chance** is no longer necessary under comparative negligence because it just gets folded into analysis of comparative fault. Sequence still matters when in establishing negligence.
11. Assumption of the risk’s role in comparative negligence depends on two different types. This is confused by jurisdictions but there is a conceptual difference.
	* 1. **Primary assumption of the risk** - Defendant didn’t owe a duty of care or didn’t breach duty of care.

This is the kind in the Flopper case and sports cases. There is no duty of care to avoid risks that are inherent to the activity, just risks that go beyond those inherent risks.

*This* ***still exists*** *under comparative negligence because it doesn’t have anything to do with plaintiff’s negligence*.

**Knight v. Jewett** - plaintiff was barred from recovery for injury in football game under comparative negligence scheme because she assumed the risk by participating. Not an individualized determination - if game is inherently dangerous and you participated that is enough.

* + 1. **Secondary assumption of the risk** - Plaintiff makes out prima facie case of negligence but defendant asserts as a defense that plaintiff unreasonably chose to go forward in the face of defendant’s negligence.

This is the **Meistrich** skating case - the plaintiff realized that the ice was messed up (i.e. recognized defendant’s negligence) but kept skating anyway and then couldn’t recover for injury that resulted.

This **doesn’t survive** after the adoption comparative negligence because it is absorbed by it. Just another way to think about allocating fault between two negligent parties.

1. **Causation** - both cause in fact and proximate cause are necessary to establish causation!
	* + 1. **Cause in fact** is the **factual cause** is the **but for cause**.
2. **New York Central R.R. v. Grimstad (1920)** - Court held that defendant’s negligence in not having lifesaving equipment on their boat was not the but for cause of decedent’s drowning death.
3. Have to ask counterfactual of what would have happened if the defendant had not been negligent and there had been lifesaving equipment. His wife might not have been able to throw it far enough, he couldn’t swim - all leads to doubt about whether it would have made a difference.
4. Burden of proof is **preponderance of the evidence** - have to show that there is a 51% chance he would have been saved. The defendant’s negligence must have “more likely than not” caused the injury.
5. Necessary individuation of circumstances in the causal inquiry. Unlike duty/breach analysis which is general (reasonable person, was the relevant precaution cost-justified/reasonable given the random array of people who might benefit, etc.) - causation is specific: would it have saved the plaintiff in this situation.
6. **Evidentiary & Scientific Uncertainty**
	* 1. **Zuchowicz v. United States (1998)** - The court allowed burden to show factual causation shift to the negligent defendant when there was a “strong causal link”.
			1. The breach of the duty of reasonable care was prescribing an overdose of Danocrine. The plaintiff soon after developed PPH. The threshold causation question was: Does the drug cause the PPH? The important causal question was: Does an overdose cause PPH?
				1. All drugs can have side effects so just simply prescribing Danocrine could not be negligent. Have to show that the *overdose* was the cause of the injury to have liability.
			2. The court says that since the FDA limits the quantity you can prescribe precisely because exceeding that quantity makes the risks outweigh the benefits, the defendant’s conduct was negligent because the risk regulated against actually did ultimately occur. This is a **strong causal link**. Expert testimony contributes to establishing the link.
			3. Once the plaintiff establishes a strong causal link, the **burden shifts** to the defendant to prove they were not the factual cause of the injury.
			4. This was the 2nd Circuit, not clear if other jurisdictions will do this also.
		2. **Haft v. Lone Palm Hotel (1970)** - Court shifted burden of proof for factual causation where defendant’s negligence caused the **evidential loss** that made it difficult to determine exactly what caused the deaths.
7. The defendant hotel failed to meet the statutory requirement of having either a lifeguard or a sign at the pool. The court holds that since the fact that there was no lifeguard directly contributed to the lack of evidence about how decedents drowned in the pool, they should have the burden of proving there was no factual causation.
8. This doesn’t really deal with the sign option - seems like that if they had had the sign it wouldn’t have helped much.
	* 1. **Levmore** - **recurring miss problem**
			+ 1. Lone Palm is an example because it is unlikely that you would ever be able to prove that there is a greater than 50% chance that having the sign would have prevented the accident.
				2. Therefore, the preponderance of the evidence standard causes systematic under deterrence.
				3. Another example is informed consent - very difficult to prove that the patient would have chosen something different that would have prevented injury, since often there isn’t an injury at all. This means defendant rarely is liable and won’t be deterred from negligent behavior.
				4. One solution is the burden shifting the Lone Palm court adopts.
				5. Another option is the probabilistic rule - In certain types of cases, if negligence was 10% likely to have caused the injury, you could award 10% of the damages.
				6. Another option is restitution.
9. **Joint and Several Liability**
10. **Joint** = Each defendant is liable for the whole harm which he was partially responsible for causing
	* 1. Early common law treated harms as indivisible
11. **Several** = Each defendant only liable for his share
12. **J&S** =The same as joint except that “with contribution”, the defendant found liable can implead or bring suit for contribution. **J&S with contribution** is the common law default if jurisdiction hasn’t made different rules. Difference between J&S and several is who bears the risk of insolvency of one defendant.
	* 1. Less burdensome to the plaintiff and more likelihood of recovery
		2. “No contribution” J&S schemes are literally just joint liability, the theoretical distinction being that the J&S court recognizes that more than one defendant may have caused the harm (but doesn’t care)
13. Old way was joint and several liability with **no contribution**. The plaintiff would sue just D1 and get full damages and D1 wouldn’t be able to get anything from D2.
14. The only exception was indemnity. You could get D2 to pay you back if you could show they were the one who was principally responsible.
15. **Union Stockyards v. Chicago R.R. (1905)** - Court held that original defendant couldn’t indemnify another party because both were equally responsible. The reason for this is the “clean hands” rule - the idea that the law should never aid a wrongdoer.
16. Indemnity was allowed only when there was one party who actively did the wrongdoing, and the other party only passively allowed it to happen. Then if the passive party got sued they could indemnify the active party.
17. Shift to allow **contribution**
	* + 1. **California Civil Procedure Code 875-877** allows for contribution, once the damages have been paid to the plaintiff, of each party’s pro rata share, i.e. dividing the entire judgment by the number of tortfeasors. This is not proportional to fault. Intentional tortfeasors don’t get contribution, and employers who are vicariously liable and their employees only count for one share.
			2. **American Motorcycle Association v. Superior Court (Cal. 1978)** - Court held that where there is a determination of comparative negligence the damages can be apportioned between defendants accordingly.
				1. Defendants’ argument is that joint and several liability is inconsistent with comparative negligence. How can you apportion fault across the “v” but not among the defendants under J&S?
				2. The counter argument is that with pure several liability that plaintiff might not get fully paid if some of the defendants are insolvent.
				3. AMA Court compromises with **comparative partial indemnity** aka joint and several liability with ***contribution of proportionate shares***. Basically repeals the CA code.
18. **Multiple Causes**
	* 1. **Kingston v. Chicago Rwy. (1927)** – Two fires coming together and burning a house. Court held that where there are **multiple sufficient causes** each tortfeasor is liable as long as both causes were the result of human negligence. If one is an act of god then the other person is not liable.
19. This varies by jurisdiction. If there are two simultaneous sufficient negligent causes, both people can be liable. If one is not a negligent cause, then it depends by jurisdiction whether the tortfeasor can be liable.
20. If there are **sequential causes**, only the first tortfeasor is liable, because the second one is not the factual cause.
21. **Joint causation/concert of action** - if two parties are working together to cause the harm they are both liable.
22. **RTT??**
23. **Alternative Liability**
	* 1. **Summers v. Tice (1948)** - Court held that two defendants who were both negligent and either could have caused the injury could both be liable.
24. The **burden is shifted** to the defendants to each show that he didn’t cause the harm, because they have more information, and it is morally unfair to put the burden on the plaintiff who has less.
25. Don’t want two negligent actors to escape liability by pointing the finger at each other.
26. This only works if all possible defendants are joined.
27. RIL would not work here because there is real scientific uncertainty. RIL’s information-forcing burden shift wouldn’t be useful. n
	* 1. **RST 433(B) and RTT 28(B)** have embraced this rule. Have to prove that two or more actors were negligent and one of them caused the harm. Then the burden is shifted to the defendant to show who actually caused the harm. If they can’t, both are jointly and severally liable.
28. **Market Share Liability**
	* 1. **Sindell v. Abbott Laboratories (1980)** - Court held that even though plaintiff couldn’t prove which manufacturer made the DES her mother took, each manufacturer could be liable for a portion of the judgment proportional to their market share at the relevant time. Vital preconditions to establish market share liability:
	1. All named defendants are (n)egligent
	2. Product has to be **fungible** - totally interchangeable so there is no chance that different versions have different risks.
	3. Has to be a situation where the plaintiff through no fault of her own can’t identify which defendant caused the harm. DES is a pretty unique situation where lots of manufacturers were making it and pharmacists just filled the prescription with whichever kind they had.
	4. Substantially all the manufacturers who made up the market at the time the injury happened have to be included. It isn’t exactly clear how much substantially all is.
29. Justification for market share liability is that if everyone sued theoretically each manufacturer would be liable relative for their market share. Could also say it is relative to the amount of ill-gotten profits.
30. There are lots of fact-based questions about how you determine market share, what you do when some defendants can’t be joined, how you determine the relevant geographic scope.
31. Sindell allowed **exculpation evidence**. Defendant could prove that they couldn’t possibly have sold DES to that particular plaintiff’s mother and escape liability. **Hymowitz (NY 1989)** **did not allow exculpation evidence**, based on the idea that many plaintiffs will come forward nationwide and all manufacturers should be equally liable for their market share. Even if not the cause of present plaintiff’s harm, will be liable in anothers because the harm was done. *Liability based on overall risk caused*. Not fair to give some defendants a windfall just because their pills were more easily identifiable or they only sold to certain stores.
32. **Skipworth (PA 1997)** declined to adopt market share liability for lead paint because paint was **not perfectly fungible** and different compositions could have led to greater amounts of risk. Also, the relevant time period was much longer so it is more likely that the real tortfeasor would not be joined as a defendant.
33. **Thomas v. Mallet (2005)** allowed risk contribution theory in a lead paint case. The issues that precluded market share liability in Skipmore became questions for the jury in Thomas. The judge held that the ingredient in the lead paint that made it defective was fungible.
34. **Loss of Chance**
	* 1. In medical malpractice mortality tables allow us to calculate increased risk/decreased chance of survival resulting from negligent actions. This makes it possible to do **probabilistic recovery**.
		2. **Herskovitz v. Group Health Cooperative (1983)** - Plaintiff could recover for percentage of reduction in chance to survive even if he would have had less than 50% chance of survival prior to defendant’s negligence.
	1. Burden is shifted to the defendant to show that the plaintiff definitely would have died anyway
	2. Otherwise, there would be a recurring miss problem and negligence would be under-deterred any time a patient came in with less than 50% chance of survival.
	3. The defendant’s percentage of the damages that he is liable for is the difference between the initial chance of survival and the resulting chance of survival - the loss of chance.
		* 1. Reconceptualization of the harm
			2. **Proximate Cause**
				1. **Ryan v. New York Central R.R. (1866)** - Court held that railroad that negligently set house on fire was not the proximate cause of house next door catching on fire because that was not **the ordinary and natural result** of their negligence.
35. Court highlights intervening “accidental circumstances” such as the wind, etc. and expresses concern about crushing and endless liability.
36. Has since been replaced by the **directness test** and the **foresight test**.
	* + - 1. **In re Polemis (1921)** – Plank negligently falling as cause of a fire. Court applies **directness test** to establish causation and hold the defendant liable.
		1. The court rejects the argument that the *extent of* *the harm* was not foreseeable or too remote. They say *foresight is only relevant to determine breach of the duty* - was it foreseeable that the conduct would cause harm.
37. This is a backward looking test - did something else break the causal chain between the negligent action and the harm?
	* + - 1. **Wagon Mound I (1961)** - Court held that although defendant was negligent for spilling oil into the water, they weren’t liable for damages for the dock burning down caused by rag floating under water catching on fire because they were not **foreseeable**. Proximate cause could have been satisfied under the directness test, but the court rejected it.
				2. **Wagon Mound 2** - Court held that ship destroyed by the fire in WM 1 was a foreseeable consequence of the defendant’s negligence. This is strange, makes more sense under directness test than foreseeability test, but that is not what they said they were doing.
				3. **Palsgraf v. Long Island R.R. (1928)** - Court held that plaintiff was so remote that defendant did not owe her a **duty** of care.
		1. Railroad employees were helping a man onto a train and knocked down a package of fireworks that he was carrying (remember the train employees had no notion that it contained explosives). It exploded and caused some scales to fall and injure the plaintiff who was waiting on the other end of the platform.
		2. Cardozo sees this as an issue of duty. Duties are relational, and Mrs. Palsgraf was an unforeseeable plaintiff, so the RR didn’t owe her a duty [*which is a question of law not fact*].
			+ 1. Duty is defined by risk to another within the reasonable range of apprehension

Hallmark for MCJ crowd

* + - * 1. Using foresight to restrict the duty
				2. If there were a duty, they would be liable for all the consequences of breach, so that is kind of like a directness test.
		1. Cardozo applies a directness test when he does get to question.
		2. Andrews dissent said that duty is not relational, it is a general duty to the society at large.
			- 1. He thinks this case is about proximate cause.
				2. Considers various factors to determine proximate cause including whether the negligence was a **substantial factor** in causing the harm. The RST latched onto this test but the RTT doesn’t like it.
				3. He says there was no intervening cause to break the chain and that it was foreseeable that someone on the platform would get hurt
		3. Difference between duty analysis and causation analysis is that causation is more likely to go to the jury, whereas duty could be decided earlier by the judge.
		4. **RST §281** comment c follows Cardozo’s view: plaintiff has to be within the class of people for whom the defendant’s conduct negligently created a risk.
		5. **RTT §29** says that “An actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious.” They wanted to get rid of the term proximate cause but that hasn’t really worked.
			- 1. **Negligent Infliction of Emotional Distress** - could argue that the issues related to this tort are about duty or causation (like Cardozo/Andrews debate in Palsgraf). Liability expanded gradual over time.
1. **Physical Impact Rule** (**Mitchell v. Rochester Railway**) - You can only get recovery for emotional distress and any physical injury caused by emotional distress if there is some physical impact. Plaintiff who had miscarriage when horses got too close couldn’t recover because they didn’t touch her.
2. Justification: feigned injury, the difficulty of showing proximate cause, flood of litigation, speculative damages.
3. But, this is a formalist distinction because courts were allowing recovery for emotional injury when physical impact was very small.
4. **Zone of Danger Rule** – The rule that the Trial Court in Dillon initially employed. Witness of an accident involving a loved one can only recover for emotional damages if she was close to actually have feared for her own life. This seems particularly artificial because the victim’s sister was within the zone of danger but mother wasn’t even though they were all together.
5. **Dillon v. Legg (1968)** - plaintiff can recover for emotional harms as long as they were **reasonably foreseeable**. Judge Tobriner.
	* + 1. Plaintiff had to have been close to the scene of the accident
			2. Had to witness the accident directly
			3. Had to be closely related to the victim
			4. Relaxed by RTT?
		1. Dillon rule puts special limitations on liability for NIED - could say that the court is importing policy concerns into proximate cause or limiting where there are duties.
			1. The limitations are mostly foreseeability based. They also enforce traditional notions of close family relationships.
			2. The rule that you take a victim as you find her still applies, but limits on scope of duty and proximate cause limit its practical effect.
		2. **Chamallas and Kerber** critique tort law for undervaluing emotional interests. The claim is gendered because historically it was linked to women and devalued. The harms assessed against women characterized as emotional and vice versa. Courts are more likely to award damages if there are physical consequences but the miscarriages were not treated that way. Those cases focused on the causal instrument—the emotional shock.
		3. **Chamalls’ Implicit Hierarchy in Tort Law**
			1. Physical and property harm (which share the same legal rules)
			2. Emotional interests
			3. Relational harms—injury caused by the destruction of a meaningful relationship
			4. The hierarchy often works against certain classes of people
6. **Strict Liability**
	* + - 1. **Strict Liability vs. Negligence**
			1. Strict liability is the idea that defendants should be liable for harm regardless of whether they breach a duty of care. Elements are
				1. Act
				2. Causation
				3. Damages
			2. Modern tort law is a sea of negligence with pockets of strict liability e.g. ultrahazardous activities, conversion, trespass to chattel, etc.
			3. ***Unilateral accident - only defendant’s behavior affects outcome.***
7. Negligence incentivizes the efficient level of care as long as you know the court will set the standard of care correctly under the Hand Formula.
8. Strict liability incentivizes the efficient level of care as long as you have correct information about the magnitude of the loss such that actor can internalize the full costs and benefits of his behavior.
	* + 1. ***Bilateral accident - both parties’ behavior affects outcome.***
			2. Under negligence, you don’t need contributory/comparative negligence to incentivize efficient behavior by both parties, because plaintiff bears the residual risk and therefore is incentivized to take reasonable care.
			3. Under strict liability, you need contributory or comparative negligence to incentivize the plaintiff to take the efficient level of care.
			4. These are short-term decisions about the level of care to take in the moment. But ***activity levels*** also affect risk and can be impacted by liability rules.

Strict liability will affect activity levels, negligence won’t. This is why we use it for stuff like ultrahazardous activities that we don’t mind affecting activity level.

Alternative explanation is that it is more about reciprocity of risk - the point is to impose strict liability where it is unlikely that the plaintiff would be a defendant in another situation (keeping dangerous animals but not car accidents).

* + - 1. **Coase Theorem**: if there were zero transaction costs, the efficient outcome would occur regardless of whether the legal rule was negligence or strict liability
				1. **In the presence of transaction costs, the preferred legal rule is the one that will minimize their effects**
			2. **Calabresi** - impose liability on the cheapest cost avoider
			3. Who is the moral wrongdoer doesn’t matter.
			4. Need contributory negligence with strict liability otherwise plaintiff not incentivized to take care
			5. Coasean perspective is that it doesn’t matter who you impose liability on because parties will always bargain to the efficient outcome. But, in the read world there are high TCs, so the cheapest cost avoider should bear the accident costs initially.
			6. Guidelines
1. Who can better evaluate the risk?
2. Who can insure against the risk most cheaply?
3. How can we best avoid externalization by transfer? If society can’t live with a party bearing the risk and therefore will have to find some other way to compensate them, they are probably not the cheapest cost avoider.
	* + - 1. **Traditional Strict Liability** - **Ultrahazardous Activities**

**Restatements**

1. **First Restatement**: Two prong framework of dangerousness and uncommonness.
2. **RST § 519**: One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm. This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.
3. **RST § 520**: Factors to determine whether an activity is abnormally dangerous:
4. Existence of a high degree of risk of harm to other people or their property
5. Likelihood that the harm that results from it will be great
6. Inability to eliminate the risk by the exercise of reasonable care
7. Extent to which the activity is not a matter of common usage
8. Inappropriateness of the activity to the place where it is carried on
9. Extent to which its value to the community is outweighed by its dangerous authorities.
10. Under the RST whether an activity is abnormally dangerous should be determined by the court, not the jury.
11. **RTT §20**: An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity. An activity is abnormally dangerous if:
12. The activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors, and
13. The activity is not one of common usage.
14. The RTT is a simplification of the RTT, but also a rejection of the social utility factor.

**Indiana Harbor Belt R.R. v. American Cyanamid (1990)** - Court (Posner) held that strict liability did not apply to a company shipping a dangerous chemical.

1. Posner is a strong proponent of negligence - opinion suggests courts should only impose strict liability if negligence is insufficient.
2. He thinks this harm could have been prevented if the parties had exercised reasonable care, so no need to impose strict liability.
3. There are lots of dangerous chemicals, and few alternatives to shipping them by rail. This is not the type of thing where we want to lower activity levels.
4. It is possible that it is a bad place for there to be a residential community, not a bad place for there to be a railroad hub.
5. SL and activity level monitoring analysis

Two arguments - Posner thinks strict liability has shrunk because negligence is better. Could also say that the world is just safer because of greater technology and there are fewer activities where we need to impose SL.

* + - * 1. **Conversion**

Conversion is a wrongful exercise of dominion over someone else’s property that denies that person’s ownership of the property.

1. Plaintiff owns the property
2. Defendant dispossesses plaintiff of property
3. Plaintiff suffers damages

**Poggi v. Scott (1914)** - Court held that defendant who sold barrels of wine thinking they were junk was liable for conversion. Conversion requires intentional act but not knowledge or intent that you are exercising dominion over someone else’s property.

**Moore v. Regents of the University of California (1990)** - Court held that doctors who used patients cells for research were liable for lack of informed consent but not conversion.

1. The plaintiff claims that the doctor, the drug company who got the patent, the university, everyone in the chain exploited his personal property for financial gain.
2. The court has to decide whether to extend the traditional tort of conversion to a new kind of property.
3. They decline to extend the tort.

Fairness argument - they don’t want to impose strict liability on innocent parties like researchers who get cells and don’t know where they came from. Legislature should make decision whether to extend liability, need for it isn’t as pressing because there is an informed consent tort to protect the plaintiff.

L&E argument - medical research is socially useful, don’t want to dampen activity levels by imposing strict liability. Could also deter the wrong people who didn’t do anything wrong.

**Kremen v. Cohen (2003)** - The court extended conversion liability to apply to intangible property like domain names.

1. Originally the jury awarded damages against Cohen for swindling Network Solutions into giving him the sex.com domain name that was owned by Kremen. But he fled the country and Kremen couldn’t recover, so he sued Network Solutions also.
2. If the court applies conversion liability, Network Solutions would be liable regardless of whether they were negligent or not.
3. RST has a **merger requirement** - can only recognize conversion for intangible property if it has been merged into a document. The 9th Circuit has to figure out if CA has embraced this requirement,
4. They decide no, you can have conversion of intangible property regardless of merger.
5. Fairness argument - There is nothing unfair about holding a company that gives someone else’s property away liable. As between two innocents, put liability on the one who acts.
	* 1. Court not being overtly activist: “We have not created new tort duties”, citing Moore
6. L&E argument - Looks like this is an area where more legal controls would not be so bad, not as worried about stifling the system. Would force Network Solutions to either help chase Cohen down or put new safeguards in place to prevent this from happening.
	* + - 1. **Trespass to Chattels**

Trespass to chattels is the little brother of conversion. It is when you dispossess someone of property that they have a possessory interest in. Elements:

1. Possession
2. Carrying away
3. Damage to the property or the possessor’s interest in it (decline in value or deprivation of use for a substantial period of time)

Difference between conversion and trespass to chattels is that plaintiff doesn’t have to actually own the property in trespass to chattels, just has to have possession of it at the time.

Unlike trespass to land, this is not just a boundary-crossing tort. You have to prove actual damages. While a person does have a similar interest in the inviolability of their personal property, less legal possession is needed because of the possessor’s ability to exercise self help and snatch the property back into his possession versus the force required to ensure no one be on your 5 acre plot.

**Intel v. Hamidi (2003)** - Court held that defendant wasn’t liable for trespass to chattels for sending mass emails to intel employees received on their intranet.

1. There was no damage to the property (the server) because of Hamidi’s emails. Didn’t slow down or anything. Harm to productivity of employees has nothing to do with the property.
2. Epstein advocated for real property analogy on the internet but the court didn’t buy that.
3. Intel can exercise self-help but not sue for an injunction. Paradox is that if their system was less sophisticated and slowed down more easily they would be able to get injunction—by making this situation be harm-based (as opposed to Epstein’s approach which would be boundary-crossing only) incentivizes Intel to have a bad system..
	* + - 1. **Private Nuisance**

A non-trespassory invasion on another’s private use and enjoyment of land.

Remedy can be either an injunction (property rule) or damages (liability rule)

Basis of Liability: “intentional and unreasonable infringement on use/enjoyment of land”

1. Under **RST** (Hand-inflected formulation), an invasion is unreasonable if
	* 1. The **gravity of the harm outweighs the utility of the actor’s conduct [cost/benefit analysis]**, or
2. The harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.
3. Negligence-inflected: hand/unreasonableness
4. Intent also an issue
5. Another way you could look at it is that there is a **threshold** level of harm, below which is “live and let live” (because everyone inflicts some nuisance on everyone else), and above which is liability for nuisance. This is strict liability inflected but also resembles negligence cliff. The threshold measure is determined by a person’s ordinary use of their land and involves a reciprocal relationship. “Live and let live” implies ordinary usage.
	1. “Live and let live” can be viewed as an exception for things that arise out of the ordinary usage and there is a reciprocal relationship between the parties

The question: Who has the entitlement? How do we protect that entitlement [damages v. injunction]?

Reciprocal causation, two incompatible but equally socially valuable entitlements 🡪 particularly ripe for L&E analysis (no right v. wrong)

Law and Economics view

1. Want to get the efficient amount of output where the benefits outweigh the costs. If TCs = 0 then it doesn’t matter who gets the entitlement or what the remedy is.
2. Since TCs are often high, Calabresi/Malamed framework lays out four options (factory pollution example):
	* 1. Injunctive relief (property rule)/Entitlement to clean air - Factory can’t pollute unless homeowner allows it. Protects subjective value of clean air to the homeowner, but they get to determine how much factory will have to pay for them to relinquish entitlement.
		2. Injunctive relief (property rule)/Entitlement to pollute - Factory can pollute at will and will only stop if the homeowners pay them off
		3. Damages (liability rule)/Entitlement to clean air - Factory can pollute but has to pay money to homeowners.
		4. Damages (liability rule)/Entitlement to pollute - Purchased injunction. Homeowners can stop them from polluting but must pay damages to compensate for cost of moving. The **Spur** case fit in this model
3. The idea is that to overcome strategic behavior/high TCs, courts should choose the entitlement that corresponds with the efficient outcome. Giving injunctive relief creates too large of a bargaining range, should do damages instead. But have to get them right or else damages will be inefficient also.
4. If you are using the negligence-inflected test, this won’t matter as much because the test itself chooses the efficient outcome (you have already done the harm/utility calculus). For strict liability it is important to put the entitlement in the right place.

**Fontainebleau Hotel v. Forty Five Twenty Five (1959)** - Court held that the Eden Roc didn’t have any legal right to sun or air, so Fontainebleau building up next to it and casting a shadow was not actionable nuisance.

1. This is Category 3 property rights + no actionable nuisance
2. **Prah v. Maretti (1982)** took a different approach and held that unreasonable obstruction of sunlight impairing a solar energy system could constitute a private nuisance.

**Rogers v. Elliott (1888)** - Court held that nuisance liability could not be imposed because of an **especially sensitive** plaintiff.

1. That would be too unpredictable.
2. If the defendant’s action was actually targeted at that individual it probably wouldn’t be protected - e.g. **spite fences**.
	1. “Erected maliciously with no other purpose than to shut out the light and air from a neighbor’s window”🡪 other useful purpose 🡪 nuisance

**Ensign v. Walls (1948)** - Court held that dog breeding business was nuisance even though it had been there longer than most of the neighbors.

1. **Coming to the nuisance** can be a defense, if the defendant was there first and the plaintiff moved in next door - like assumption of the risk. Counter argument is that you allow the defendant to encroach on property they don’t own by default.
2. Here the court did not find it dispositive because it was socially valuable for the city to expand and because the number of people going to be affected was going to increase as more people moves in.
	1. Don’t want to incentivize people to run off and stake out unpopulated land and then use their property rights to control use of surrounding land

**Boomer v. Atlantic Cement Co. (1979)** - Court awarded longterm permanent damages for pollution from cement factory rather than an injunction.

1. The court wants to avoid granting an injunction because the benefits from the factory are greater than the harms. They are concerned that strategic behavior will mean the efficient outcome won’t be reached.
2. The dissent points out that the factory isn’t operating for the public welfare - is this really a societal benefit, or just societal costs?

Empirical studies have shown that in nuisance cases that do get litigated there is virtually no bargaining after the fact. TCs are very high at that point so whatever court says generally sticks.

* + - * 1. **Vicarious Liability/Respondeat Superior**

Imposes liability on someone for the acts of someone else - specifically institutional employer is liable for acts of the employee. At odds with traditional notions of culpability.

Employee can’t ever sue employer or co-worker - there is no fault worker’s comp for that!

**Ira Bushey v. United States (1968)** - Court held that United States was responsible for harm caused by a drunken Coast Guard seaman to the dock where his ship was.

1. There is only vicarious liability for acts committed by employees **within the scope of their employment.**
2. The court (Friendly) dismisses the **motive test** where you look at whether the employee meant to benefit the employer with the act.
3. Instead, he adopts a **foresight test**. He says the conduct was foreseeable because sailors always get drunk.
4. **Location of the wrong test** also seems to play a role because he says if the sailor had gotten into a fight on the street that wouldn’t count. The fact that he had access to the dock because his job plays a big part.

**Rationales for Vicarious Liability**

1. L&E: Incentivize employer to exercise control over employees in way that will prevent accidents.
2. This only makes sense if you think the employer could have actually prevented the accident (e.g. not in Ira Bushey).
3. **Sykes** - if employee doesn’t have sufficient assets/deterrence and won’t ever be able to pay, they might be under-deterred. Idea is to force employers to internalize costs and do what they can to prevent harm. Otherwise there might be a perverse incentive to have insolvent employees do risky stuff.
4. **Sykes** criticizes **frolic and detour** and says it should be less focused on the time and space distance between the employee and work and more focused on whether the employer in some sense caused the accident.
5. Corrective Justice: Could argue that the employer indirectly causes the harm (this supports the motive test) or that the risk is inherent in their business and it would be unjust enrichment for them to benefit without paying the costs.
	* 1. Interest in compensation is not corrective justice, but could say that if employee can’t pay, employer is more responsible than innocent plaintiff.
6. Responsibility could come from the way that the institution puts people in a position to commit torts e.g. sexual harassment.
7. **Loss Spreading**: Employers are better positioned to get insurance and spread the losses of the accident. This isn’t really enough alone to justify, but bolsters other rationales.

There is vicarious liability for the actions of employees but not **independent contractors**. However, law won’t just accept what people call themselves.

1. Exceptions to the rule - **apparent authority** or **implied authority**
2. **Petrovich v. Share Health Plan** - The court held that HMO could be vicariously liable for negligence of independent contractor doctors under apparent and implied authority.
	* 1. There was apparent authority because the plaintiff thought the doctors were employees of the HMO based on their literature.
3. They held themselves out as healthcare providers
4. There was justifiable reliance on the idea that they were in charge of providing the healthcare
5. There was implied authority because of the HMO’s control over what services they would pay for and utilization review procedures. This is a big issue in the medical field.
6. **Arlen** thinks that vicarious liability incentivizes employers to hire judgment proof independent contractors. One way to deal with this problem would be the broadening of liability in Petrovich - make employers liable to the extent they actually exercise control, because they might then be the cheapest cost avoider.

VII. **Products Liability**

1. **Doctrinal Development**
2. **Winterbottom v. Wright (1842)** - Court held that defendant could not be liable for selling a defective coach to the plaintiff’s employer because he was not in a direct contractual relationship with the plaintiff. This is the **rule of privity**.
3. **MacPherson v. Buick Motor Co. (1916)** - Court rejected the rule of privity and held car manufacturer liable to the plaintiff. Since the nature of a car is such that it is reasonably certain to endanger people if negligently made, and the manufacturer knew that it would be used by people other than the dealer, they could be liable for injuries caused to those foreseeable users. Expands the scope of the manufacturer’s duty. Negligence based duty to inspect.
4. Limited to when “life and limb are in peril”
5. Reasons for privity limitation
	* 1. In the old days people mostly bought things directly from the maker
		2. Manufacturer can’t control who will end up using the product. Good users will end up subsidizing bad users through the price.
6. Reasons for decline of privity
7. Step by step indemnity actions where there are lots of middlemen are inefficient
8. People buy products because of brand reliance, shouldn’t be able to reap benefits of advertising directly to the consumer without paying the costs
9. Foreseeability replaces idea of personal relational duties.
10. Exception for inherently dangerous instrumentalities got broadened until it was so vague that it made more sense to just change the rule
11. Too many plaintiffs were being left without remedies
12. **Escola v. Coca Cola (1944)** - Court inferred negligence of manufacturer through RIL. Traynor concurrence argued for strict liability for manufacturers of products.
	* + 1. MacPherson is about scope of duty, Escola is about the content of the duty.
			2. Arguments for strict liability
		1. MacPherson paved the way for making the manufacturer the guarantor of the safety of the product. BUT: sticking with negligence standard could have avoid some cross-subsidization problems.
13. Already had strict liability in food cases by using legal fictions to extend implied warranty principles in contract. Should come from tort law instead.
14. Policy arguments for strict liability in **manufacturing defects**
	* + - 1. Deterrence - Manufacturer is in the best position to avoid problems. Has more information and ability to invest in quality control.
				2. Ability to insure against/spread the risk through the price of the product.
15. RIL has been used to fudge negligence requirements, if we are essentially imposing strict liability then we should just call it what it is
	* + 1. Traynor’s limitations on strict liability
		1. Plaintiff has to prove product had defect when it left the manufacturer’s hands
		2. Only applies when the plaintiff used the product in the normal way
16. **Casa Clara Condo Association v. Charley Toppino & Sons (1993)** - Court held that manufacturer of defective concrete could not be liable because it only damages the home it was built with.
17. This is the **economic loss rule** - no tort recovery when a product damages itself but not any person or other property. This is just a disappointed economic expectation that should be handled under Contract law. Don’t want tort bleeding into contract.
18. Court said that the whole house is one finished product, the component parts aren’t separate products so that the concrete could be said to have harmed the rest of the house.
19. Court also rejected the idea of an exception for a product that presents a risk of physical injury. They say liability is imposed based on damages, not risks.
20. Economic loss rule is a new way to limit products liability after privity rule is gone. Also expresses deference to contract law - want people to bargain over rights and responsibilities and only have tort step in where there is serious harm.
21. When you force manufacturers to adopt more safety mechanisms, there is a risk that you will price some people out of the market when the cost goes up. But, we want a certain baseline level of safety to protect the societal interests. That is why there is a more compelling case for tort intervention in cases with physical harms than economic losses.
22. **RST § 402A**
23. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer if
24. The seller is engaged in the business of selling such a product (NOT a casual/occasional seller)
25. The product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold
26. This rule applies even if the manufacturer has exercised all possible care, or if the user hasn’t entered into any contractual relationship with the manufacturer.
27. Not clear if there is bystander liability.
28. There is a debate about the RST was meant to reach beyond manufacturing defects to design defects and failure to warn as well. That is what ended up happening.
29. “Unreasonably dangerous” has been interpreted to mean in a condition not contemplated by the consumer (Comment g).
30. The seller is not liable for injuries that result from abnormal handling of the product.
31. If strict liability doesn’t apply (e.g. it is a casual/occasional seller) you could still sue for regular negligence.
32. **RTT: Products Liability**
	1. Reflected strong normative desire to limit liability, hasn’t been adopted in many jurisdictions
	2. Manufacturers are strictly liable for defects
		1. A **manufacturing defect** is when a product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.
		2. A **design defect** is when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a **reasonable alternative design** by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe
		3. **Failure to warn** is when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor and the omission of the instructions or warnings renders the product not reasonably safe.
			1. **P. 800**
	3. Design defect and failure to warn categories both have a negligence element.
33. Differences between strict liability for products liability and ultrahazardous activities
34. Consensual context vs. stranger context - good users end up subsidizing bad users
35. We don’t care as much about dampening activity levels of hazardous activities
36. With abnormally dangerous activities the defendant is usually in control of the instrumentality the whole time, unlike product liability.
37. **Product Defects** - Elements are **defect, causation, damages**
	* + 1. **Manufacturing Defects** - Something went wrong when making the product and it doesn’t match the design. Everyone is pretty much agreed these are strict liability.
			2. **Design Defect** - The blueprint was unreasonably dangerous in the first place.
38. There is a question of whether you will price people out of the market by requiring expensive safety upgrades.
39. **Castro v. QVC Network (1998)** - Court held that the jury should have been instructed on both the **risk/utility test** (“strict liability”) and the **consumer expectations test** (“breach of implied warranty”) for design defect.
40. Consumer expectations test (RST is based on this) - product has to meet reasonable expectation of safety for ordinary use. For design defect this can be tricky because consumer might not know how safe product can be. There was concern that this led to too much liability.
41. Risk/utility test - Negligence inflected test that asks whether the benefits of the design outweigh its costs. Unlike Hand formula, this test takes into account all relevant information, not just what the defendant knew at the time that it acted.
42. **Dual purpose** test: Court says you need both in cases like this where the overall R/U test is positive but the test for use in certain situations (aka cooking a giant turkey) that the manufacturer *marketed it* as fit for isn’t positive. In that situation the product failed to meet consumer expectations and there should be liability.
	* 1. Indication of a dual purpose: marketed as having more than one purpose.
43. **Barker v. Lull (1974)** - Court held that jury should apply both consumer expectation and risk/utility test.
	* 1. **R/U test factors**
			+ 1. Gravity of the danger
				2. Likelihood that danger will occur
				3. Mechanical feasibility of a safer alternative design
				4. Financial cost of an improved design
				5. Adverse consequences to the product and the consumer that would result from the alternative design
44. Reasons why R/U is necessary to supplement consumer expectations
	* + 1. Information asymmetry—consumer doesn’t know other benefits of the design or what the reasonable safety is compared to feasible alternatives
45. Barker court said that once plaintiff made out prima facie case that the injury was proximately caused by the product’s design, **burden shifted** to the defendant to prove that it was not defective. Not all jdxns do that.
46. The RTT embraces the R/U test and requires a **reasonable alternative design**.
	* 1. This puts the burden of getting expert witnesses on the plaintiff. Many jurisdictions don’t impose this requirement.
		2. RTT moved away from consumer expectations test because they thought it was imposing too much liability due to hindsight bias.
47. There is an **open and obvious defense** for inherently dangerous products.
48. There was also traditionally a **subsequent modification defense**, but liability has been extended to cover cases where the modification was foreseeable in many jurisdictions. Also there is an exception if the product is made to be used without a safety device.
49. **Comment K**
	* + 1. **Failure to warn**
50. **RTT § 10**: A seller is liable for failure to warn if a reasonable person in the seller’s position would provide such a warning. A reasonable person would provide a warning if:
	* 1. the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property, and
		2. those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm, and
		3. a warning can be effectively communicated to and acted on by those to whom a warning might be provided, and
		4. the risk of harm is sufficiently great to justify the burden of providing a warning.
51. **Hood v. Ryobi (1999)** - Court held that saw manufacturer was not required to warn consumers of the specific consequences of taking blade guards off, just a general warning not to do it was good enough.
	* 1. **Subsequent modification** of the product by the user bars liability for design defect and failure to warn.
		2. Don’t have to have a laundry list of everything that could possibly happen. Court points out that there are costs of too many warnings - nobody ends up reading them.
52. **Liriano v. Hobart (1999)** - Court held that there was liability for failure to warn even though product has been bought 40 years earlier and modified by the plaintiff’s employer.
	* 1. **Subsequent modification** bars liability for design defect but not failure to warn.
		2. 2nd Circuit espouses a broad theory of the purpose of warnings - not just to tell you something is dangerous but let you know that there is a safer way. Have to warn that foreseeable uses are likely dangerous.
		3. That is why the **open and obvious** defense doesn’t apply in this case (although it does apply to FTW as well as design defect).
		4. It is cheaper to have more warning than to redesign the product - makes sense to require them rather than impose design defect liability.
		5. This kind of liability could be dangerous to manufacturers because plaintiffs who can’t sue their employers will go after them instead. In many states manufacturers can’t even implead employer.
		6. There is a **continuing duty to warn** in NY - if manufacturer found out after selling the product that a lot of people were removing the safety guards, they had a duty to communicate to buyers that they shouldn’t do that.
		7. The court infers causation from the fact that the result that made the defendant’s action unlawful ended up happening (citing Zuchowicz – strong causal link) and shifts the burden of proof to the defendant.
53. **MacDonald v. Ortho (1985)** - Court held that there is a duty for manufacturers of oral contraceptives to directly warn users of the attendant risks - exception to the **learned intermediary rule**.
54. Normally the learned intermediary rule says that the manufacturer only has to warn the doctor who prescribes the drug about the attendant risks, and then they have to warn the patient. Intermediary is more learned medically and knows more about the patient.
55. This court held that there is a direct duty to warn in the birth control context because of the more passive role of the doctor, the doctor’s limited contact with the user, and the marketing directly to the users. DTCA= direct to consumer advertising.
56. Counter argument is that this is a bad situation, doctor should have more involved role in helping patient understand risks, don’t leave them on their own to figure it out.
57. Question of what other drugs should qualify for this carve out from the rule. Most courts haven’t extended to all drugs that are directly advertised to consumers.
58. The **RTT** just says the duty should run either to the doctor or the patient, if the manufacturer knows that the health-care provider will not be in a position to reduce the risks of harm.
59. Second question is **adequacy of warning**. If manufacturer had warned about possibility of stroke, would that have made a difference? Court employs a heeding presumption - presumes it would have helped unless defendant can prove otherwise.
60. **Regulatory Compliance Defense** - Regulatory compliance is evidence but not dispositive for defendant
	1. Is the regulatory standard the optimal level or the minimum?
	2. If the minimum, then breach could be dispositive but compliance could not be
61. **Federal Preemption**
62. Congress has passed federal statutes that overlap within certain areas of state common law tort liability. Courts have to decide to what extent the federal statute preempts the state law claim, looking at Congressional intent, the view of the agency implementing the statute, views on federalism.
63. Supreme Court has heard a lot of cases on this recently but hasn’t developed a consistent analytic framework.
64. Not clear if the agency’s view should get any deference.
65. There is disagreement over whether there should be an overarching framework or whether it is a pure question of statutory interpretation so it is ok to decide each question separately. Sharkey doesn’t think that will work because Congress is purposely not clear.
66. **Cipollone v. Liggett (1992)** - Court held that statute that said it should displace state law “**requirements**” preempted state common law tort claims as well as positive law.
67. **Riegel (2008)** - Court said that from then on they would always interpret requirements to mean state tort law. Trying to send a clear message to Congress. But, not clear what to do with all the past statutes that say that in preemption clauses.
68. Preemption is a powerful defense because it comes in at the motion to dismiss stage.
69. Even though FDCA, e.g., doesn’t create a private right of action, showing a violation strengthens a state tort claim.
70. **Categories of Preemption**
71. **Express** - Congress has included an explicit preemption provision, and the court will interpret the language and scope of the provision to figure out what it preempts
72. **Implied** - There is no express preemption provision but the entire statutory scheme implies an intent to preempt.
	* 1. **Field** - the regulatory scheme is so pervasive in an area that there is no room for any state law, even if it doesn’t conflict. Preempts the entire field. This doesn’t really happen in products liability because tort is a traditional area of state control. Not a widely accepted doctrine.
73. **Conflict** - narrower form of preemption where there has to be some tension between the federal and state law.
	* + - 1. **Impossibility** - the laws are irreconcilable so that the actor can’t comply with both. This is the narrower form.
				2. **Obstacle** - you could comply with both, but the state law creates an obstacle to compliance with federal standard.
74. **Geier v. American Honda (2000)** - Court held that design defect claim for car not having airbags was preempted by Standard 208, which didn’t require an airbag at the time.
75. Court says that there is no express preemption, because even though there is a preemption clause there is also a **savings clause** that preserves tort liability. Savings clause would be meaningless if the express preemption provision preempted all design defect suits.
76. Holding 1: Even if there is a preemption clause that doesn’t expressly preempt the claim, implied preemption rules still apply.
77. Holding 2: There is implied conflict obstacle preemption in this case.
	* 1. Usually the question is whether the federal law is just a floor or a floor and ceiling. But the MVSA said that it just established safety minimums.
		2. But, Justice Breyer held that Standard 208 reflected a deliberate decision to give manufacturers options rather than require airbags. If state law forces manufacturers to choose a particular option that is conflict with intent to provide a range.
		3. Dissent (Stevens) says there is nothing wrong with there being a range of federal options and a state deciding that only one of them meets that state’s tort requirements for a safe product.
78. **Williamson v. Mazda (2011)** - In a similar case where the regulation gave manufacturers the choice to put a shoulder belt or not in the back seat, the court held that a design defect claim was not preempted.
	1. Justice Breyer was persuaded by NHTSA’s views on the reg during rulemaking and litigation and decided that providing a choice was not the principle motive of the reg.
	2. Most of the time when the government intervenes in these cases the court aligns with the relevant agency’s position.
	3. Regs still get preemptive authority even though Congress never delegates it explicitly.
79. Touchstones of preemption jurisprudence
80. The intention of Congress
81. The **presumption against preemption**
82. **Wyeth v. Levine (2009)** - Court held that plaintiff’s failure to warn claim was not preempted by FDA’s approval of the drug’s label.
83. Court held that there was no obstacle preemption because even though FDA had approved original label, there is a CBE (change being effected) rule that manufacturer can add more stringent warnings without waiting for FDA approval, just have to notify. Idea is that new info might come in and they shouldn’t be deterred from adding it. Manufacturer is cheapest cost avoider when new risks come up.
	1. Could comply with both
	2. CBE allows for unilateral strengthening when new risks come to light while simultaneously submitted revision to FDA
84. Court also rejected obstacle preemption that FDA approval established a floor and a ceiling.
	* 1. The court didn’t give deference to FDA’s view that there should be preemption because it said the opposite in the NPRM and then changed its position in the preamble to a rule that came out. Irregularity made the court wary.
85. **Shavell** - benefits of tort liability vs. regulation in the state law context
86. Factors that favor liability: differential knowledge, administrative costs
87. Private individuals that are actually involved in a situation will usually know more about costs and benefits than a distant regulator
	* 1. The knowledge is day to day and to have an administrator gather it would be invasive/impractical
88. Administrative costs of enforcement only come up when someone is harmed, instead of having to apply across the board (ex post)
89. Factors that favor regulation: Lack of ability to pay, escape from suit
	* 1. If people won’t be able to pay tort judgments that they might not internalize full costs of actions
90. If people are systematically escaping liability, hand calculation will also break down
	* 1. When harms take a while to manifest, when harms are spread out 🡪 Hand formula dependent on any individual who is harmed coming forward and bringing suit (although doctrinal shifts like market share liability address this)

c. Doesn’t account for when new risks come to light and determining who is best to recognize these.

1. Independent policy question about institutional competence - do prefer having juries or regulators make decisions? Also has to do with whether you want a uniform national standard or different state laws. Is it ok for state with high standards to mandate that on other states?
2. Alito’s dissent in Wyeth questions allowing juries to override the judgments of the FDA.
3. Juries suffer from hindsight bias, they see downsides of the drug very vividly but not the upsides that come from the FDA’s big picture view.
4. **PLIVA v. Mensing (2011)** - Court held that there was impossibility preemption for generic manufacturers, because their labels have to match the brand name drug. So you can sue if you are injured by a brand name drug but not a generic - this is an anomalous result since most states have generic substitution laws.
5. **Bartlett** is a follow up case this term to see if generic manufacturers have immunity in design defect claims as well.
	* + 1. **Damages**
				1. **Compensatory Damages**

 **Purposes of damages**

1. Deterrence perspective - damages essentially function as the price of your conduct. Need to be equal to loss (PL) for Hand formula calculation to work. Otherwise you might over or under deter.
2. Corrective justice - defendant has the responsibility to right the wrong that resulted when he treated the plaintiff as a moral inferior. Money damages are a proxy for putting the plaintiff back in the position she was in before the tort.

**Economic (Pecuniary)** - lost wages, medical expenses - quantifiable damages

1. *The controversy lies in how you project these*. Most courts use gendered/racial tables to calculate work-life expectancy for lost wages, when there is not enough evidence of the person’s actual career path. This is a way to discounted expected wages earned by the probability the person would be in the workforce that year.
2. Women and racial minorities have lower work-life expectancies - subject of **Chamallas** critique.
3. **Migdal v. Rim Abu Hanna (2005)** - Israeli Supreme Court decided to use national average rather than historical tables to calculate injured child’s expected future earnings on civil/human rights grounds - every child should have the opportunity to exceed expectations, don’t want to entrench historical realities. Don’t want to incentivize harm against poor females, etc.
4. Ken Feinberg had a lot of discretion in giving out money from 9/11 fund but had to approximate tort damages to get people to opt in. He compressed the range of recovery for lost wages and used male work-life expectancy tables for everyone - issue of how much each person’s life is worth.
5. **McMillan v. City of New York (2008)** - Judge refused to use race-based table for quadriplegic black plaintiff who was injured in Staten Island ferry accident. Not only are there constitutional overtones, the point of damages is to provide the best medical care and extend life expectancy beyond the average. Approach: best possible vs. average in Migdal.
6. Concern about deterrence - don’t want defendants who do have some control over their actions to target poor or otherwise marginalized communities.
7. Regulatory agencies factor in the value of life to their CBAs at around $7 million - should we factor this standard value into our tort system rather than making individualized determinations?
8. **Wrongful death** - courts can either do loss to survivor (what the victim would have actually given their family, etc.) or loss to estate (calculating the full ins and outs of the person’s finances over life).
	* + 1. Statutory
			2. Weird incentives—you pay more damages if you maim someone
9. Expected damages play a big role in which cases plaintiff’s attorneys choose to take on, because of the contingency fee system. This can hurt women and elderly people with lower economic damages, especially if non-economic damages are capped.

**Non-Economic (Non-pecuniary)** - pain and suffering, loss of enjoyment of life (hedonic damages)

1. Lots of tort reform targeted at these. There is a theory that since people don’t generally insure against these types of losses, the tort system shouldn’t award damages for them.
2. Empirical studies show that if loss of enjoyment of life isn’t a separate category, juries award higher pain and suffering damages - expressing their view of what losses should be compensated.
3. Difficult to calculate: individuals react to same amount of pain differently
4. Plateau theory – at some point people just adjust
5. Marvin Belli came up with **per diem strategy** to increase awards - have juries decide how much pain for one hour, day, etc. is worth and then multiply over the course of a lifetime.
6. **Magdougald v. Garber (1989)** - Court held that jury shouldn’t be instructed on loss of enjoyment of life as a separate category of damages from pain and suffering, and must have some awareness to be compensated for loss of enjoyment of life.
	* 1. Since all non-economic damages are estimations, doing two separate estimations will make the error even worse.
		2. Goal of damages is compensation, not punishment, so if the person can’t actually sense the loss then there is no point in compensating for it.
		3. But, for deterrence to work, the full harm done including non-economic damages has to be taken into account so it can be internalized by the defendant.
7. In some jurisdictions there is also **loss of consortium**.
	* + - 1. **Punitive Damages**

**Justifications/Caveats of Punitive Damages**

1. Deterrence
2. Justification: Punitive damages allow us to avoid under-deterrence of concealable/under-enforced torts. Shavell says there should be a PD multiplier of 1/Probability of detection.
3. Caveat: This reasoning should apply to all under-enforced torts, but almost every state requires willful and wanton or at least reckless behavior for the jury to award punitive damages. Also, reputational interest of the defendant might provide sufficient deterrence. If there are additional criminal penalties you could end up with over-deterrence.
4. Expression
5. Justification: Expression of society’s outrage/punishment - the cases where this is appropriate often diverge from cases where deterrence is appropriate.
6. Caveat: Does it make sense to punish corporations when the same decision makers aren’t even there? Could see it as disgorging shareholders of ill-gotten gains.
7. Compensation
8. Justification: Compensatory damages don’t fully compensate plaintiffs, especially when there are large and difficult to quantify non-economic harms. CT’s punitive damages statute specifically allows for them to compensate for contingency fees paid to lawyers.
9. Caveat: Couldn’t we fix this problem within compensatory damages?
10. Incentives
11. Justification: Incentivizes private enforcement through the tort system rather than vigilante justice where the criminal justice system can’t enforce everything.
12. Caveat: Might not make sense for corporations (?)

When plaintiffs and defendants settle they often classify everything as compensatory damages, even after jury verdict for punitive damages has been awarded.

* 1. Plaintiffs don’t pay taxes on compensatory but do on punitive.
	2. Defendants don’t want the reputational harm of saying that had to pay punitive damages.

Most states have defendant’s wealth as a factor juries can consider in awarding punitive damages.

* 1. In **Kemezy** the question is whether the plaintiff has to bring in that evidence - this is a strange thing to ask for, the court says no.
	2. Often there are **bifurcated trials** so that jury doesn’t have that information when deciding liability and awarding compensatory damages.
	3. All the Supreme Court has said is that wealth alone can’t justify an award that would otherwise be excessive. But haven’t struck down using it as a factor.
	4. Economists are split on whether you need to take it into account for deterrence purposes because of diminishing marginal utility of money. Mostly business make decisions on the margins so it shouldn’t really matter.
	5. Arlen says it does matter because wealthy people are less risk averse.

Split recovery statutes

* 1. There is a disconnect between charging the defendant the amount you need to to get optimal deterrence and putting the plaintiff back in her original position.
	2. Some states have statutes (or judges have just decided to do it) where a portion of the punitive damages either go to the state or to some charity or fund.

**Kemezy v. Peters (1996)** – Does the π have a burden to produce evidence as to the ∆’s wealth when asking for punitive damages?

* + 1. No, the purposes of punitive damages are not “critically” dependent on ∆’s wealth exceeding some specified level
			1. A rich person is not indifferent about money, although a jury may think so, which is why π’s often seek to introduce evidence about ∆’s wealth
		2. Purposes of punitive damages
			1. Compensatory damages fail to fully compensate some harms (like dignitary harms)
			2. Related, punitive damages are needed to optimally deter those harms that compensatory damages do not adequately provide for
			3. To ensure people channel transactions through the market (car expropriation example)
			4. To ensure that concealable torts are not under-deterred
			5. A civil fine communicating the community’s abhorrence
			6. Relief for criminal justice system
				1. Provides a monetary incentive for private citizens to shoulder the costs of enforcement
			7. Alternative to violence self-help

**Mathias v. Accor (2003)** - Court (Posner) upheld punitive damages 37 times the compensatory damages in bedbug case.

* 1. Punitive damages will always be arbitrary when there are no guidelines corresponding to the criminal statutory punishments
		1. “The judicial function is to police a range, not a point”
	2. Sufficient evidence under IL law to find ∆ guilty of “willful and wanton conduct”, rendering ∆ liable for punitive damages
	3. In determining amount of punitive damages, Posner notes that SCOTUS in *State Farm* did not lay a specific ratio rule.
	4. Three penal precepts
		1. Punitive damages should be proportional to the wrongfulness of ∆’s actions.
			1. “The punishment should fit the crime”
				1. Proportionality standard
				2. Modified by

Low probability of detection

When crime is potentially lucrative

*∆ here likely profited from the harm by continuing to rent rooms and postponing litigation by lying that the bugs were “ticks”*

* + 1. ∆ should have reasonable notice of the sanction for unlawful acts so that he can make a rational determination of how to act 🡪 need for clear standards in determination of punitive damages
			1. ∆ needs to be able to anticipate the costs in order to tailor his behavior
		2. The sanction should be based on the wrong done not the status of the ∆.
			1. Aristotelian corrective justice
	1. In some cases, like dignitary harms compensatory damages would be insufficient, i.e. when ∆’s conduct is outrageous but the compensable harm is slight (ex: deliberate spitting in the face).
		1. One purpose of punitive damages is to relieve over-burdened criminal justice system
		2. Compensatory damages would be insufficient because
			1. Difficulty in computing dignitary harm
			2. Too slight to incentivize the π to sue, potentially incentivizes π instead to retaliate with violence
			3. Limited to compensatory damages, ∆ would be able to commit the offensive act if with impunity if he was willing to pay
			4. He also notes that in cases with small compensatory damages the plaintiffs might never be able to get a lawyer without high punitive damages.
	2. He thought that the corporate defendants were over-litigating the case to make it expensive for the plaintiffs and deter them from litigating.
		1. *The ∆’s resources do factor when they are used to invest in a reputation intended to deter π’s*
	3. He uses the Shavell under-detection formulation as a reason to increase punitive damages because he thinks tort liability was under-enforced against this defendant.

Supreme Court **excessiveness review** polices the use of punitive damages without the safeguards of the criminal justice system.

1. **Gore** 3 **guideposts** for excessiveness review
	* 1. Reprehensibility of the defendant’s conduct - most important indicium
			1. Physical as opposed to economic harm
			2. Reckless disregard of the health and safety of others
			3. Target had particular financial vulnerability
			4. Repeated conduct
			5. Intentional malice
		2. Ratio to compensatory damages
			1. What if the compensatory damages do not accurately reflect the harm?
		3. Comparable sanctions in criminal/regulatory law
		4. SCOTUS always looks to the state purpose for punitive damages first
			1. Some wiggle room here—solely deterrence based reasons wouldn’t require mal intent and would potentially assuage punishment element that SCOTUS is nervous about
2. **State Farm v. Campbell (2003)** - Court found 145:1 punitive damages were excessive.
3. The plaintiff and the defendant had teamed up against the insurance company - this is something insurance companies are worried about because it happens a lot. Might have been why they didn’t want to settle initially.
4. Application/reiteration of the *Gore* goalposts
	* 1. Reprehensibility
			1. Can’t punish for harms that were OK in other jurisdictions
			2. Can’t punish for harms that “bore no relation to Campbell’s harm”
				1. Limited to the conduct that harmed the π
		2. Harm : Punitive Damages Ratio
			1. No bright-line
			2. Few awards above a single digit ratio will comport with due process
			3. Comparing to amount of compensatory damages (i.e. the monetized value of the harm)
		3. Punitive Damages : Civil/Criminal sanctions
			1. Here there was a 10K sanction
			2. Existence of a criminal sanction bears on the seriousness of how a state regards a harm but remote possibility of a criminal sanction does not automatically sustain a punitive damages award
5. The third guidepost hasn’t gotten much attention, but the idea is that the punitive damages should be comparable to other penalties. Here they said they weren’t.
6. The court says the $1 million damages for IIED already includes a punitive element that is getting doubled.
7. Also said you can’t punish for conduct in other states - federalism idea that each state can choose what punishment to impose. On the other hand, the Supreme Court trumping the state’s tort determination isn’t very federalism-y.
8. **Williams** - harms to others can be taken into account for punitive damages but you can’t punish the defendant for harms done in other states. That is what they tell juries even though nobody knows what it means.

**Exxon Shipping v. Baker (2008)** - Court exercising admiralty jurisdiction reduced punitive damages to 1:1 ratio to compensatory damages in “such maritime cases”

1. Major concern of the court is unpredictability.
	1. No consistency among punitive damages awards in factually similar cases
	2. Concerned also with unnecessary awards
		1. Both for deterrence and measured retribution purposes
2. No issue of intentional harm, economic gain or low detectability
3. All lower courts are bound by excessiveness review jurisprudence because it is a substantive and procedural Due Process issue.
4. In Exxon, the court was sitting as a common law court under admiralty jurisdiction - like a State Supreme Court.
5. Could argue that Exxon would be sufficiently deterred by all the criminal and regulatory liability. Also, this is obviously not an under-detected tort. But, seems like they weren’t deterred enough beforehand.
6. Again, justices were split on how reprehensible the conduct was (under the general label of recklessness).
7. Court noted that median punitive damages award is less than 1:1. The real problem is unpredictability.
8. They look at three approaches, one verbal, two quantitative.
9. They strongly dismiss verbal approach, because they don’t think that any verbal standards will yield more consistency.
10. They reject a hard cap on punitive damages, derived from criminal law, because there is no “standard tort” making it difficult to apply a cap across the board and particular figure dictated by the judiciary would suffer from infrequent re-visitation
11. They decide to do a multiplier cap.
	* + 1. Most states that have it have 3:1 but the court rejects that system because it applies across the board from malice to gross negligence
			2. They don’t go with 2:1 system because they think the purposes are different in those areas.
			3. Instead they pick the median for all cases nationwide and round up to 1:1.
			4. Stevens: let congress enact a maritime statute yet doesn’t deny court’s authority to enact this common policy
			5. Ginsburg: skeptical and worried that Exxon will be read as imposing the 1:1 ratio on constitutional excessiveness standard
			6. Breyer: this is reprehensible more than the majority thinks, the reprehensibility should override the ratio

**Feinberg** – Compensatory Funds

* + - * 1. mercy not justice
				2. still have to satisfy proximate cause
				3. contributory negligence totally irrelevant
				4. But burden is on the claimant to show that the vehicle was the relevant vehicle and that the airbag didn’t deploy
				5. Don’t undercut deterrence –because someone is always going to sue for punitive damages
				6. Efficiency and certainty
				7. Tort model is part of US identity – not going anywhere

**Sunstein** - **Outrage model**

1. Research found lots of consensus about outrage but very little consensus on how to translate to dollar figures for punitive damages. Consistent ratings of moral reprehensibility of acts.
	1. Anchoring effects were very strong.
	2. Translation without a benchmark was chaotic.
2. They question the use of juries, especially if the goal of punitive damages is optimal deterrence.
3. The suggest reforms akin to federal criminal sentencing regime, where the jury decides on the level of blameworthiness and then the judge assigns damages based on guidelines.
	1. Let the jury do what’s its good at – assign moral reprehensibility.
4. On the other hand, if we are going to take punitive damages away from the jury, why not compensatory also? What about giving juries better instructions?

Other reforms

1. Some states have caps on punitive damages or multiplier caps. Not clear how that actually relates to the purpose of PDs other than keeping them low.
	1. Critique: caps etc. are arbitrary themselves (deterrence concerns)
2. Make juries tax aware
3. Concern if defendant is a pharmaceutical company – don’t want to disgorge them so far as to take them out of the game since they confer benefits to society
4. Don’t let punitive damages punish for harms done to others, because that creates a Catch 22 for defendants where they might be paying those plaintiffs elsewhere also, but don’t want to bring that in front of the jury because it will make them look bad.