**Intentional Torts**

1. An act is **intentional** if…
   1. It is taken with a purpose to cause the result
   2. Or if the actor knew or should have known to a substantial certainty that the result would occur
   3. Transferred intent if intend an intentional tort to one person and cause to another, save IIED
2. Personal harms
   1. Policy: Discourage acts of retaliation
   2. **Battery:** Act intending to cause a harmful or offensive contact or imminent apprehension of such a contact and harmful or offensive contact results
      1. *White*: Piano instructor touches White’s shoulders, causing serious back injury

D should have known touching offensive, liable for physical harm even though only intent offensive

* + 1. ***Vosburg***: Putney kicks Vosburg in class; Vosburg had a prior injury and experiences great harm

D liable for full damages. Offensive because in class, out of order; different result on playground

* + 1. *Garrett*: Dailey, a 5-year-old child, pulls a chair out from under Garrett, who falls and is badly injured

D should have known would cause P to hit the ground, indirect contact still battery

* + 1. *Alcorn*: Mitchell spat in Alcorn’s face during a trial on an unrelated matter

D liable for dignity damages and punitive damages totaling $1000 for malicious act in a courtroom

* 1. **Assault:** Act intending to cause a harmful or offensive contact or imminent apprehension and apprehension of such a contact results
     1. *I. de S.*: D threw an axe at the door of the tavern owned by I. de S. while his wife was at the window

An implied threat or a desire to cause fear or intimidation of a shortly forthcoming battery sufficed

* + 1. *Tuberville*: Tuberville said that he would assault Savage if it were not assize-time

Since Tuberville specifically ruled out a contact at the moment, it was not an assault

* + 1. *Allen*: Hannaford waved an unloaded gun at P, reasonable apprehension though could not shoot
    2. *Brower*: Ackerly and his sons made threatening phone calls to Brower’s house, no immediate threat
  1. **False imprisonment:** Act intending to confine, confinement results, P aware of or harmed by confinement
     1. *Bird*: Jones barred from continuing on highway by policemen as highway used to watch a boat race

“Three walls do not a prison make”, P was free to go, so no false imprisonment

Dissent: any unlawful obstruction of the way should suffice for false imprisonment

* + 1. *Whittaker*: Whittaker held on a yacht against her will, but allowed to come to shore to meet with family

Technically false imprisonment, allowed recovery, damages limited by wide area she could roam

* + 1. *Coblyn*: Coblyn, an old man, intimidated into remaining in store by security guard though not a thief

Intimidation alone can be false imprisonment, store needed objectively reasonable grounds

* + 1. *Sindle*: Students held in bus by bus driver because they were rowdy while he drove to a police station

Generally, guardianship of children is a defense to false imprisonment, no liability here

* + 1. *Peterson*: Parents seize adult daughter to “deprogram” her from a cult

Parental privilege holds even over adults, but probably would not outside of this circumstance

* 1. **IIED:** Intentionally or recklessly causing severe emotional distress through extreme & outrageous conduct
     1. *Wilkinson*: Practical joker tells Wilkinson that her husband is injured and in the hospital

Willing to impute intent, later became recklessness standard

* + 1. *Bouillon*: Threatening statements while trying to force into P’s apt., she is pregnant and suffers injury

Physical injuries as well as mental injuries can be recovered

* + 1. *Hustler Magazine*: Cartoon of Jerry Falwell that was highly inappropriate

Not liable due to First Amendment concerns regardless of other issues

1. **Property harms**
   1. **Trespass to lands:** Acting intending to enter another’s land; need intent to enter, not intent to trespass
      1. *Dougherty*: D entered to survey but caused no damages, still can recover for dignitary harm
      2. *Neiswonger*: Airplane flying 500 feet above the ground a trespass
      3. *Brown*: Children enter and start fire in garage, liable when burned down because they were trespassers
      4. *Cleveland Park*: Boy in social club’s pool, puts ball on an intake tube and it gets in, causes damage

Liable though had consent to be on property in general because did not have consent for action

* + 1. *Public Service Co.*: Electromagnetic radiation, must show damages to recover for intangible intrusion
  1. **Trespass to chattels:** Intentionally dispossess, intermeddle, deprive for a substantial time, or cause harm by taking chattel, need only intend action taken, not trespass
     1. *Hamidi*: Emails through Intel’s email system, must show physical damage to recover for intermeddling
     2. *Bidder’s Edge*: Online “spiders” search eBay and slow it down, website damaged so recover
  2. **Conversion:** Intentional claim of ownership or control over another’s chattel, depriving owner of possessory right; only need intent to control
     1. *Poggi*: Sell wine belonging to Poggi, selling counted as claiming ownership, liable
     2. *Moore*: Cells collected for medical test, then patented, no claim bc no possessory interest or ownership
     3. *Greenberg*: Canavan’s Disease, patent research, belief that would remain public domain, no conversion
     4. *Maye*: Gold mining, both thought Tappan owned, but Maye actually did, conversion damages to Maye
  3. **Differences between trespass and conversion**
     1. *Fouldes*: Trespass without conversion when remove horses from ferry without claiming possession
     2. *Gordon*: Conversion without trespass (A v. C) when C takes from B, who stole from A
     3. Exception: Joyriding is conversion even though seems like only trespass
     4. Different remedies, traditionally
        1. Conversion: forced sale for full value at time of conversion
        2. Trespass: compensate for damage and deprivation of use

1. **Affirmative defenses**
   1. **Consent:** If P gave consent, tort vitiated; consent can be implied from the circumstances
      1. *Mohr*: Problem in left ear while operating on right, operates, battery bc no consent and not emergency
      2. *O’Brien*: Immigrant given smallpox vaccine, did not object and stood in line, implication of consent
      3. *Allore*: Medical emergency, imply that patient would have consented, immediate threat to health
   2. **Defense:** Reasonable force in defense of self, others or property
      1. *Courvoisier*: Home invaders, police come to stop, Courvoisier thinks police are invaders, shot one, reasonable belief that his life and property were in danger, no obligation to retreat from home
      2. *Bird*: Spring guns to defend property, must have notice posted so as to be reasonable
      3. *Katko*: Malicious use of spring guns forbidden, must not have desire to harm
   3. **Necessity:** Protect self/others/prop., prevent disaster
      1. *Ploof*: Anchor boat to another dock during storm, avoid injury to self and others
      2. *Vincent*: Anchor to dock and cause damage during storm, not allowed necessity defense, maybe justify by who better to bear insurance costs, still motivation to remain at dock because damages if leave greater than to dock, court justified on grounds of reattaching to dock (dissent agrees this is shaky)
   4. **Recapture of chattels:** Only in hot pursuit, if lost by force or fraud or without any claim of right
      1. *Kirby*: Kirby given money as part of business, claims as his own, Foster assaults, not allowed recapture defense because Kirby did not take by force or fraud and claimed a right, must go to court to regain
2. **Capacity:** Insanity, infancy, intoxication not defenses
   1. But can eliminate consent, creating tort
   2. *McGuire*: Insane woman in asylum, had threatened harm if P entered, P entered anyway, liable
   3. Must still have some ability to manifest intent, would not be liable if thought P was a cloud, e.g.
   4. Policy: prevent proliferation of insanity claims, encourage families/guardians of insane to care for them

**Duty**

1. **Reasonable person** standard: General duty to act as a reasonable person
   1. Objective: Consider the reasonable person, not D personally (*Vaughan* *v. Menlove* - haystack)
      1. *Vaughan*: burning haystack, not whether he should have fixed, whether reasonable person would
      2. *Blyth*: water pipe bursts in extreme freeze, need only take precautions for foreseeable circumstances
   2. Exceptions
      1. Infancy
         1. Reasonable person of the same age and development
            1. *Roberts*: boy runs in front of car, not contributorily negligent because reasonable for child of age
            2. Later extended beyond contributory negligence
         2. Except for “dangerous adult activities”
            1. *Daniels*: riding a motorcycle counts as a dangerous adult activity
         3. Also except for those under 4, who have no duty to anyone
      2. Emergency, but only unforeseen emergencies
         1. *Hamontree*: sudden seizure, knew had epilepsy but routinely examined, seizure ruled unforeseeable
         2. *Breunig*: Batman delusions, question of whether she should have known would have delusions
      3. Physical ability
         1. *Poyner*: legally blind, did not pay attention to surrounding noises, act as reasonable blind person
   3. Non-exceptions
      1. Old age, mental ability, insanity (*Roberts* – boy in street)
         1. Hard to coordinate around these factors
         2. Would be overrun by claims of insanity or stupidity
      2. Wealth, despite the lower utility loss from taking greater care
2. **Statutory duty**: General duty to obey the law
   1. However, there is only a duty to P if the following criteria are met
      1. P is within the range of persons to be protected by statute
         1. *Osborne*: poison sold without a label, buyer dies, statute designed to protect consumers
      2. Harm is within the range of harms to be prevented by statute
         1. *Gorris*: sheep not kept in pens on boat, swept overboard, statute was to prevent disease
      3. Statute creates a right of action, three-part test from *Uhr* – child has multiple sclerosis
         1. P among the range of persons to be protected by statute
         2. Recognition of private right of action promotes statute
         3. Creation of a private right of action consistent with legislative intent
   2. Can apply to third parties, as in stolen car, dram shop cases (Ross – stolen car, Vesely – drunk driver)
3. **Affirmative duties**: Duty to act to prevent an outside harm
   1. Duty to protect: Sometimes, the nature of a relationship creates a duty to prevent third-party harms
      1. Note: Stewart says this looks at people with an ability to prevent harm cost effectively, not relationship
         1. *Weirum*: create race to win a prize, bystander injured, liable for inciting unreasonable risks
      2. **R2. §315(b)**: D has a special relationship to P
         1. Landlords
            1. *Kline*: security provisions reduced at building, assault, landlord owes a duty to protect
            2. *Burgos*: tenant beaten, landlords duty to secure entrance but jury if q. whether doors secured
            3. *Frances T*.*:* not allowed to install lights by condo board, raped, condo board liable
            4. *Waters*: No duty to those on the street dragged into the building, only tenants
         2. Hotels
            1. *Shadday*: guest raped by other guest, hotels have duty but not against unforeseeable harms
            2. *Wassell*: guest opens door to midnight knock, raped, not liable due to contributory negligence
         3. Businesses
            1. *Nivens*: business owners have duty to invitees but does not extend to hiring security guards
            2. *Ann M*.: employee raped while working in mall, mall not liable, no duty to provide extra security
            3. *Delgado, Morris*: Restaurant patrons attacked when leaving, duty when on premises or leaving
            4. *Drew*: Man chokes in restaurant, duty to call 911 but not to assist
            5. *Atcovitz*: Heart attack at country club, duty to call 911 but not to assist
         4. Other
            1. *Peterson*: student assaulted in daylight on college campus, college duty to provide protection
            2. *Lopez*: common carriers have duty to passengers
            3. *Mastriano*: Cab driver drops off drunk, who gets into his car, duty only to see safely out of cab
         5. Separate case, *Weirum*: inciting dangerous activities, creating the hazard, like the landlord not maintaining a safe building, more serious than the landlord because inciting, not just facilitating
      3. **R2. §315(a)**: D has custody of third person who caused harm
         1. *Tarasoff*: psychologist knows murdered person threatened, duty to warn person and family
         2. *Beauchene*: rehab center owes no duty to the public at large to protect against violent residents
         3. *Thompson*: threaten to kill “a kid”, psychologist has no duty to warn if the threat is vague
         4. *Lundgren*: psychologist gets guns back for patient, liable for facilitating harm
         5. *Estates of Morgan*: doctor in charge of schizophrenic who kills parents, duty to exercise reas. control
         6. *Long*: Agree with wife to tell when released, do not, she is killed, duty to aver harm when easy
   2. Duty to rescue: Sometimes, Ds may have a duty to prevent harm to another
      1. *Yania:* Drown in quarry pool on dare, no general duty to rescue
      2. *Buch*: Injured when visiting brother working in factory, no duty to rescue trespassers
      3. *Hurley*: Physician did not treat patient, no duty to treat patients if no desire to do so
      4. *Erie RR*: Railroad normally has person at crossings to warn, duty to rescue if create reasonable reliance
      5. Note: Rescuers get benefit of the doubt on negligence (Eckert – rescue baby)
4. Zones of **no duty**: Harms outside the scope of duty because obscure/unlikely/unforeseeable/against policy
   1. Policy arguments for restrictions on duty (Holmes’s arguments against strict liability)
      1. Cannot take precautions to avoid unforeseeable harm
      2. People will be over-deterred from acting out of fear of excessive liability
   2. Wrongdoers, e.g. trespassers, traditionally no duty, modern law is less rigid (Buch – boy in factory)
   3. **R.3rd §29** – Liable only for “physical harms that result from risks that made the actor’s conduct tortious”
   4. **Unusual victim**: Person or property distant from source of harm
      1. “Is this the risk should take precaution against?” (Cardozo in Palsgraf – explosion knocks down scales)
      2. Negligent infliction of emotional distress, special case, four different tests:
         1. Physical harm only, common law
         2. Zone of danger, have reasonable fear for safety
         3. Dillon rule, three factors (Dillon - daughter struck by car in full view of mother)
            1. Proximity to accident
            2. Witness accident or immediate aftermath (Kelley - grandfather hears about death by phone)
            3. Closeness of relationship, sibling/parent/child only
         4. Broader than *Dillon* rule, fewer limitations
      3. Economic losses, no duty unless personal or property harm (532 Madison – collapsed building)

**Breach**

1. **Reasonable person**, see above in duty
2. Learned Hand Rule: **BPL**
   1. ***Carroll Towing***: no bargee aboard barge, measure negligence as burden against probability times loss
   2. *Cooley*: wire falling on telephone wire, wire cage, do not create even higher risk from preventive measures
   3. *Eckert*: rescue baby from train, compares PLs if action and if no action where relevant
   4. Inquiry should be ex ante, what the reasonably perceived risks were
3. **Custom**: What is ordinarily done is the situation, by convention or by internal rules
   1. Older cases, generally consider custom controlling
      1. *Titus*: rail cars changing gauges, don’t fit, custom controlling for employees, wage differential
      2. *Mayhew*: ladder hole in mine not fenced off, custom irrelevant, gross negligence
   2. Modern cases, custom not controlling although still indicative
      1. *TJ Hooper*: no radio on boat, update lagging custom, custom indicative but not dispositive
      2. *Bimberg*: wrongful death suit under FELA, custom is no excuse
   3. Internal standards, generally not controlling but can be if create reliance, consider *Erie RR*
      1. *Fonda*: higher standard than customary in house rules, not met, no negligence as P did not rely
      2. *Perotti*: psychiatric hospital does not meet internal standards, negligence as relied on quality of care
   4. **Medical malpractice**
      1. Standard of ordinary physician in similar circumstances
         1. *Lama*: no conservative treatment before surgery, did not meet basic norms of medical care
         2. *Hirahara*: do not tell jury not to consider “errors in judgment”, just make clear custom standard
         3. *Morlino*: antibiotics while pregnant though manual says not to, manual does not establish custom
         4. *Helling*: P thought had glaucoma for years, D did not administer test as P young, custom would have been to test, negligent, concurrence recommends strict liability on doctors to avoid moral issues
         5. *Brune*: too much spinal anesthetic, modernity requires national standard, local standard discarded
         6. *Clark*: residents held to same standard as doctors, standard applies as soon as you begin treating
         7. *Clevenger*: pregnancy after tubes tied, having children not an injury
      2. Question whether applies to particular field of medicine
         1. Applies to chiropractors, even those not actually licensed (Brown v. Shyne - chiro)
         2. Consider whether applies to those w/o medical training, treating in emergency
      3. Policy: avoid incentives for higher profits from more care, ex post regrets
      4. Exception: **Informed consent**
         1. *Canterbury*: laminectomy, fall out of bed, disclose what reasonable patient would want to know
         2. *Hanneman*: chiropractors subject to same rule of disclosure as doctors
         3. *Sidaway*: English case, reject *Canterbury*, no need to disclose small risks
         4. *Truman*: cervical cancer at age 30, doctor did not inform of importance of pap smear, liable
         5. *Bly*: burden on P to show with medical testimony that doctor should have informed of risks
         6. Exceptions to informed consent rules
            1. *Burke*: not tell parents chemo could be postponed, this sort of information doctor’s discretion
            2. *Kozup*: AIDS in 1983 from transfusion, risk not yet known material so no need to get consent
            3. *Valles*: catheter through chest, where to put catheter did not need consent, medical judgment
            4. If knowledge would cause injury, or if waived
4. **Statutory violation**: Possible interpretations
   1. Negligence per se: Controlling w/o affirmative defense
      1. *Martin*: speeding car, speeding is negligent per se, need affirmative defense
      2. *Osborne*: no label on poison negligent per se
   2. Presumption of negligence: controlling if unrebutted
      1. *Tedla*: walked on wrong side of road, showed other side of the road more dangerous
   3. Prima facie showing: pass motion to dismiss, not controlling
   4. Mere evidence of negligence
   5. Exception for licenses: Not negligent to act without a license, may be indicative
      1. *Brown v. Shyne*: Unlicensed chiro, standard of customary behavior among chiros, license irrelevant
      2. Overturned by New York statute saying no license prima facie negligence
      3. Usually mere evidence for lack of license, can you refuse to allow evidence?
   6. Additional exceptions: legislative intent
      1. *Uhr*: Intent was to have low cost to school district, do not imply private right of action
      2. *Cort*: Might imply private right of action for statutory violations
5. **Res ipsa loquitur** (Byrne – barrel of flour, Colmenares – escalator handrail)
   1. R.2nd §368D test
      1. Event would not normally happen without negligence
         1. Consider the odds of happening with negligence against odds of happening without negligence
         2. Theory: mathematical; Practice: high chance of negligence or common sense
      2. Evidence eliminates other causes
      3. Within scope of D’s duty to P
         1. “Acts of God”: natural explanations
            1. Walston: Ship lost at sea, many reasons that would not point to negligence of owner
            2. Bauer: Wind blows over truck, wind the explanation even though truck crossed the yellow line
         2. Predictability of harm
            1. Larson: Sudden exuberance of hotel guests on V-J Day results in chair thrown from window
            2. Connolly: Planned convention results in hooliganism and chair thrown from window
         3. Assumption of the risk
            1. Galbraith: Accident, passenger injured, assumed risk of vehicle defect under statute
            2. Pfaffenbach: Truck crosses the yellow line, passenger in other car injured, no assumption of risk
   2. Can result in a directed verdict if evidence overwhelming (Newing – drunken pilot, plane crash)

**Causation**

1. **But-for cause**, cause in fact
2. **More likely than not** standard (Grimstad – fall from boat)
   1. i.e., it must be more likely than not that, without negligence, no harm would have resulted
   2. Usually a question for the jury (Kirincich – carried away by tide; Reyes – drunken swimmer)
   3. P should show counterfactual situation of no negligence
3. What if multiple counterfactuals? (Haft – statute says lifeguard or sign, but there was neither)
4. Risk of harm caused by negligence, difficulties in proof
   1. Negligent action increases risk of a harm, and that harm results (Zuchowicz – Danocrine overdose)
5. Sufficient to reach jury even though cannot prove but-for causation
6. Consider problems with incremental risk, e.g., if increased the risk only slightly
   1. Lost chance (Herskovits – negligent lack of diagnosis)
7. Consider the lost chance the injury, not the actual death/other injury
8. Divide the award for the actual injury by the lost chance
9. Get around the more-likely-than-not standard, not widely accepted outside of medicine
10. Policy: deterrence to encourage non-negligent treatment of patients likely to die
11. Can expand to the toxic tort cases
12. Slight increase in background chase for cancer
13. Each cancer patient recovers proportional to own portion of the increased risk
14. ex. 4/100 normal, 5/100 w/ toxins, loss $5M, 20% toxin caused each cancer, $1M recovery
    1. Admissible evidence, expert testimony (Joiner – PCBs and smoker)
15. Two different standards of evidence
16. Frye standard: Only evidence with general acceptance in scientific community
17. Daubert standard: Allow minority scientific opinions
18. Emphasize peer review and scientific rigor
19. Judges as gatekeepers, keep out ipse dixit testimony
20. Signature diseases: Nearly always result from one source, show disease to show causation
21. Scrotal cancer in chimney sweeps
22. Some types of liver cancer from acrylonitrile
23. **Multiple tortfeasors** – determining liability, R.2nd §433A
    1. Independent acts and harms – several liability
    2. Joint causes of single harm
       1. Grouping of Ds
       2. Burden of apportioning liability shifted
24. Divisible – several liablility
25. Reasonable estimates may be allowed (Bell Petr. – chromium; Smith – burning coat)
26. But not when different roles, in toxic tort cases (Burlington N. – chemical contamination)
27. Consider also Eagle-Picher, tracing asbestos the original manufacturer
28. Indivisible – joint and several liability
29. *Ybarra*: res ipsa on medical malpractice, all doctors and nurses jointly and severally liable
    1. Concurrent causes of single harm – joint and several (Kingston – fires)
       1. Unless Ds can apportion liability somehow amongst themselves
       2. Consider how close temporal proximity you need
    2. Alternative causes of single harm – joint and several (Summers – three hunters)
    3. Acting in concert – joint and several
30. **“Proximate” cause**, also “legal” cause: A question for the jury
31. Consider: Is the injury of the sort the risk of which made the action tortious?
    1. Policy: Could the D have taken the harm into account?
32. There are two formulations of this test, each of which should reach the same result when fully considered
    1. **Directness test**, limited to direct harms within the scope of the risk
       1. *Ryan*: Any intervening cause at all, like light wind, eliminates causation (now disfavored)
       2. *Polemis*: No intervening cause, direct cause of the damages, causation
33. *Polemis* is now analyzed as an eggshell skull case; some damages caused, liable for all
34. *Steinhauser*: Car accident triggered schizophrenia, eggshell skull rule applies, proximate cause only applies to establishing the p.f. case, not the measure of damages
    * 1. *Mitchell*: Now analyzed as a substantial factor test, drowned child, R.2 §431
      2. Special cases, P’s intervening behavior
35. Response to emergency
36. *City of Lincoln*: Ships collide, one disabled, attempts to return to port, sinks - liability
37. *Jones*: P leaps from an out-of-control coach – liability
38. *Tuttle*: Train jumps tracks at P, P tries to run, falls – liability
39. *Mauney*: Truck about to explode, P trips in own shop – no liability, unforeseeable
40. Attempt at rescue
41. *Eckert*: Rescue child from train – liability
42. *Wagner*: Cousin on train trestle – liability despite time to reason
43. *Fuller*: distress from car accident injury, held could be liable for subsequent suicide
    * 1. Negligent third party’s secondary behavior, always liable for whole scope of the injury
44. *Atherton*: car accident, injured again in ambulance accident – liability
45. *Lama*: negligent operation, further injured by hospital’s poor recordkeeping – liability
46. *Barry*: installation of roof brackets, comparative negligence the best way to apportion liability
    * 1. Criminal or negligent third party, ask if created risk of the crime or tort, if so, proximate cause
47. *Brower*: Collision, goods stolen, created risk by causing collision
48. *Watson*: Gasoline spill, arsonist, only if could reasonably foresee arson
    * 1. *Horton*: dynamite cap, third party in a better position to stop? Stewart says irrelevant
49. **Foreseeability test**, consider all risks that were the foreseeable result of negligent actions
    1. This sounds like the general test, injuries within the scope of the risk, but eggshell skull problems
    2. *Berry*: Train speeds under tree, it falls, not proximate cause of harm bc not foreseeable
    3. *Virden*: Fall while fixing ceiling, not the sort of harm negligent installation should be foreseen to cause
    4. *Lynch*: accident, rescuer gives husband gun, husband temporarily deranged, shoots the rescuer, trucker who caused accident not liable because the sequence of events was so absurd and unforeseeable
    5. *Hebert*: electrocuted by water leaking into garden from toilet, too unforeseeable
    6. Degree of foreseeability comparison pairs, put in a condition of apparent safety, not within the risk, category of risks with respect to which there is a duty, liable for heightened risks exposed as a result
       1. *Central of Georgia* – miss stop, burn hand on lamp; *Hines* - Miss stop, dangerous area, raped twice
       2. *Doughty* – asbestos in cyanide; *Hughes*, paraffin lamp dropped into mine
       3. *Wagon Mound I* – did not know oil on water would burn; *Wagon Mound II*: did know would burn
    7. “Normal conditions”, remoteness of harm
       1. *Marshall*: Passenger in car struck, gets out to warn oncoming cars of accident, struck by car, liable
       2. *Union Pipe Co*.: Fire, later walks over pipe rack, injured, normal conditions had resumed, no liability

**Apportioning Liability**

1. Respondeat superior
   1. *Bushey*: Activities “of the enterprise”, including drunken sailor returning to dock, liable
   2. *Petrovich*: HMOs liable for their doctors under implied authority and apparent authority
      1. Implied authority: control exercised over the doctors’ behavior
      2. Apparent authority: image of control projected to others, reliance on quality
   3. *Sanford*: Independent contractors have “independence in the manner and method of performing work”
      1. Unless risk is inherent, similar to s.l. standard, then respondeat superior, *Law*
   4. Wandering from path
      1. *Riley*: Wandering from path, small deviations but not large ones
      2. *Broadway*: Going from home to church, later to work, jury question
   5. Other issues
      1. *Lisa M*.: Intentional torts, here sexual assault, less considered under respondeat superior
      2. *Schechter*: Negligent hiring, liable even for activities outside employment
      3. *Morgan*: Two employers, both jointly liable
      4. *Fireman’s Fund*: Can indemnify negligent employees, but often unable to pay
      5. Owner consent: some statutes say car owners liable for others’ permitted use of their cars
   6. Policy
      1. Deep pocket of “master” as in *River Wear*
      2. Efficiency, person is best position to prevent loss
         1. Might be reasonable to have different rules for different sized employers
2. Joint and several liability
   1. Contribution
      1. Releases from liability considered under contract principles (*Hess*, *White*)
      2. Apportionment of fault not relevant to whether there is joint and several liability at all, *Ravo*
      3. With contributory negligence
         1. *Union Stock Yards*: Traditionally no contribution, do not provide recompense to tortfeasors
      4. With comparative negligence
         1. *American Motorcycle*: one party fully liable, then seek “partial indemnification” (contribution) from others
         2. *Dole*: D sued by employee can seek contribution from employer for negligence
         3. Then statute to limit to “grave injuries”, *Castro* holds lost fingers not “grave”
         4. *Safeway*: Can apportion when one or both are held strictly liable, one here (manufacturer strictly liable, store negligent)
         5. *Evangelatos*: apportion liability of insolvent Ds among Ds and Ps according to their own fault
         6. *Kharmah*: Exposure for non-economic damages limited to proportion of fault, no redistribution as in *Evangelatos* and *American Motorcycle*
      5. Settlement
         1. *McDermott*
            1. Pro tanto with contribution from settling party
            2. Nonsettling party pays for the rest, if settlement is low, or for less, if the settlement is high
            3. Settling party’s share is removed, this is the universal strategy
   2. Indemnity: full compensation, very rare
3. Market-share liability
   1. Join a substantial share of the market, products are fungible and carry similar risk
   2. *Sindell*: DES, products easily interchangeable, limited period
      1. Should the risk be indexed like this in the *Summers* cases? Effectively the same as *Summers*
      2. *McCormack*, *Brown*: Liable for proportionate share, Ds must establish, some might be left over
      3. *Murphy*: Cannot sue only one D, substantial share of market needed
      4. *Hymowitz*: No exculpation in individual cases to preserve the theory of full payout and full recovery
   3. Lead paint cases
      1. *Skipworth*: Too long a period, types of lead paint have different bioavailability
      2. *Thomas*: Lead paints effectively the same, showing courts can go either way on this
   4. Asbestos: universally rejected due to non-fungibility, per *Abex*
   5. Must have similar risk, *Shackil*, *Spencer*, *Hamilton*
   6. Policy
      1. Mass incident, each D will pay out overall what it owes, each P will receive what owed
      2. Market share a reliable measure of proportionate risk to Ps, ensure meritorious Ps recover
4. **Contributory negligence**, an affirmative defense
   1. Burden is on D to show, originally dead Ps presumed innocent, now all are
   2. Policy justification
      1. Welfarist
         1. Transaction costs lower, people won’t bring suits, fewer suits than without
         2. But suits brought more expensive
         3. First-party loss insurance cheaper than third-party liability insurance, efficient
      2. Deontological
         1. Do not want to reward the negligent, old proximate cause analysis
         2. But do want those who are negligent to pay, violated duty of care, difference in kind between lack of care for self and lack of care for others
   3. **Coordination**, strangers cannot coordinate, maybe some others can
      1. *Butterfield*: Riding too fast, hit pole in the road, no coordination issues
      2. *Beems*: signaling to train drivers to reduce speed, did not, coordination, no contributory negligence
   4. **Causation**, contributory negligence must be but-for and proximate cause of the injury
      1. *Gyerman*: fishmeal stacking, no evidence that alerting employer would prevent injury, must prove contributory negligence a but-for and proximate cause of the injury
      2. *Smithwick*: On wrong side of platform, could slip on ice, platform collapses, not proximate cause
      3. *Mahoney*: Speeding, other car on the wrong side of the road, go off the road to avoid, speeding not proximate cause
   5. **Exceptions**
      1. Interaction with statutory protections for P’s class
         1. *Koenig*: No contributory negligence when a statute exists to protect the class, scaffolding
         2. *Weininger*: Unless the P is the “sole cause” of the accident (casebook says this is ambiguous)
      2. Medical malpractice
         1. *Dunphy*: Expert knowledge means D held to a higher standard, P has to be really negligent
      3. Those without capacity, *Padula*, ditto fluid, cannot be contributorily negligent
      4. **Last clear chance**, R.2 §479-80
         1. From the proximate cause analysis of contributory negligence
            1. *Davies*: leave the donkey on the road, hit by D’s wagon
            2. *Fuller*: negligent to go onto train track, but train had opportunity to avoid, last act
            3. *Kumkumian*: P on subway tracks, safety switch tripped, ample opportunity to avoid harm
         2. Policy
            1. Actors in the best position to act to prevent harm held responsible, law and economics
            2. Or else is a mitigation of the harshness of contributory negligence
         3. Totally defunct, abandoned when comparative negligence adopted, *Spahn*
      5. Emergency, *Raimondo*, no contributory negligence when acting in an emergency
      6. Use of land, *LeRoy Fibre*: Reasonable use of land cannot be contributory negligence
         1. Holmes concurrence, can be contributory negligence if so close to railroad that would burn even with ordinary care by railroad, no incentives to reduce potential for damages otherwise
   6. Policy
      1. Welfarist, fewer cases, more complicated litigation, overall better?
      2. Deontological, each a tortfeasor, should not be able to invoke courts’ power to benefit
5. **Assumption of the risk**
   1. *Lamson*: Work in axe shop, assume risks
   2. *Murphy*: The Flopper, danger was open and obvious, part of the fun
   3. *Marshall*: mad boar, had to shoot to be safe, no defense for D if create Hobson’s choice for P
   4. *Meistrich*: ice rink, bad ice, knew it, really contributory negligence
   5. Expert attempts something dangerous, may not be negligent but assumes risk
   6. Sometimes still upheld with comparative negligence, *Knight*, but rare
6. **Waiver of tort rights**
   1. *Dalury*: Hostility towards waivers, invalid if meets some or all factors:
      1. Business thought suitable for public regulation
      2. Service of great importance to the public, can be a practical necessity
      3. Holds self out as willing to perform service for all
      4. Bargaining power disparity
      5. Adhesion contract
      6. Person or property placed under control of D
7. **Comparative negligence**, R.3 §7
   1. Pure comparative negligence: can recover even if less than 50% negligent
      1. *Li*: car accident, both parties negligent, allowed to apportion fault
      2. PA code, apportion by causal responsibility, not fault, degree of negligence v. amount caused injury
      3. Hummer and the Mini, look at the note
      4. *Reliable Transfer*: Established pure comparative negligence in admiralty
   2. Impure, only if 50% or less, or maybe just less, deontological argument
      1. *Bradley*: should not be allowed to recover for damages contributed to
   3. *Amend*: Refuse to extend to seat belts, like *LeRoy Fibre*, autonomy
   4. *Jess*: Both negligent, both suffer injuries, not offset, insurance companies both pay out
      1. Insurance function poorly served otherwise

**Strict Liability**

1. Animals
   1. Wild animals
      1. R.3 §22: Strict liability for wild animals owned or possessed, including ones not usually dangerous
      2. *Kennedy*: Exception for zoos, negligence standard, do not want to overburden zoos
      3. *Rubinstein*: Same for national parks, query why the animal was considered owned or possessed at all
   2. Domesticated animals
      1. *Gehrts*: Strict liability only for domesticated animals known to be dangerous, need legislative action
      2. *Harper*: P must show evidence of dangerous propensities or wild status (dog with “wolf-like qualities”)
      3. *Collier*: Must have knowledge or reason to know of dangerous tendencies beforehand
      4. R.3 §23: Strict liability for dangerous animals only if harm results from the dangerous tendencies
   3. Cattle trespass
      1. R.3 §21: Strict liability for harm caused by animals on lands of another, save dogs and cats
      2. *Williams*: Includes physical harm to persons on the land, even if not related to evicting animal
      3. *Marshall*: damage distress feasant, can hold cattle damaging land until owner comes and claims them
      4. *Gibbs*: No liability for animals on the public way, horse on road struck by car, destroys it
      5. Fencing in v. fencing out
         1. *Garcia*: fencing in, but maybe no trespass unless willfully direct cattle towards others’ land, *Lazarus*
         2. Open range and closed range conflicts, who bears the duty to build fences, fencing in today
2. Abnormally dangerous activities
   1. *Spano*: Strict liability for blasting for neighboring property owners
   2. *Indiana Harbor*: Consider context of the risk, here shipping hazardous waste, futile to create incentives to reroute the waste, shipping itself probably not abnormally dangerous to begin with, sued only shipper
   3. *Siegler*: Gasoline shipping subject to s.l., considered abnormally dangerous
   4. R.2 §519: Strict liability for abnormally dangerous activities provided injury comes from risk that makes abnormally dangerous
   5. Factors in abnormal danger
      1. R.3 §20
         1. Creates a foreseeable and highly significant risk even when care is taken
         2. Not common usage (e.g., car)
            1. Norm of reciprocity
            2. Many parties take part in the activity or could, distinguishes blasting
      2. R.2 §520 had additional factors
         1. Inappropriateness of the activity to the location (subsumed into other factors)
         2. Value to the community outweighed by other attributes (industrialist argument, defunct)
            1. *Cadena*: fireworks inherently valuable, in 1998
            2. *Koos*: but utility defense very limited, fires
   6. Some activities change categories over time, e.g. airplanes in *Boyd* went from s.l. to negligence
   7. Consider the earlier cases, Rylands, Powell, Losee, Bolton, etc.
   8. Returning to negligence
      1. *Foster*: Digging around gas line not abnormally dangerous
      2. *In re Chicago Flood*: Pile driving not abnormally dangerous, P bears burden to show
      3. *Marmo*: If risk of harm can be eliminated with due care, no s.l.
   9. Restrictions
      1. R.2 §522: Intervening acts do not cut off liability
      2. R.2 §523: Assumption of the risk holds
      3. R.2 §524: Contributory negligence not defense unless knowingly and unreasonably subject self to risk
         1. *Bohan*: Do sometimes apply comparative negligence, based on causation
      4. R.2 §524A: Sensitive Ps cannot recover for damages only incurred because they are sensitive (the *Madsen* mink, probably wrongly decided)
   10. Policy
       1. Welfarist
          1. More cases, cheaper resolutions
          2. Distribute losses, insurance might do this better
          3. Activity level, location hard to regulate
          4. Innovation encouraged, hard to propose innovations in negligence
       2. Deontological
          1. Create reciprocity, avoid problems of negative consequences attaching to innocent parties

**Products Liability**

1. History
   1. Privity
      1. *Winterbottom*: Can only recover when in “privity”, i.e., contracted with or some other relationship
      2. *Huset*: Recovery limited to those with whom contracted, with three exceptions
         1. Negligence of manufacturer or vendor imminently dangerous to life or health of mankind
         2. Owner’s negligence when inviting outsider to use defective item on his property
         3. One who sells or delivers an object he knows to be imminently dangerous without notice of danger liable to any person whose injuries might be reasonably anticipated
            1. *Kuelling*: Defective wagon part painted over and resold, liability
            2. *MacPherson*: Extended to any object that could be dangerous with negligent manufacture

*Thomas* defined imminent dangers as poisons, explosives, inherently dangerous substances

Cases in favor of this extension

*Devlin*: Know scaffold is dangerous, know there will be workers on it, liable to them

*Statler*: Exploding coffee urn injured restaurant customers, danger to many w/ negligence

Cases distinguished

*Losee*: Purchaser tests boiler himself, boiler later explodes, no liability to lessee

*Loop*: Defect in balance wheel, informed purchaser, lasted five years, no liability to lessee

* + - * 1. *Peerless Glass*: *MacPherson* rule upheld
  1. Strict products liability
     1. *Escola* majority
        1. Coke bottle explodes while waitress removing it from a refrigerator
        2. Allowed to proceed on res ipsa argument, more probably than not explosion resulted from negligence
     2. Traynor concurrence in *Escola*
        1. There should be strict liability for product defects
        2. The court is really imposing strict liability with their broad conception of res ipsa anyway
        3. Policy
           1. Manufacturers more informed, better position to exercise care, consumers cannot easily distinguish product manufactured with care and without care

Normally, negligence would cause the same result, if cost-efficient precaution, would take

But, since have to proceed on res ipsa, unreliable, negligence doesn’t create proper incentives

* + - * 1. Manufacturers can loss-spread, effectively selling insurance with the product
        2. Creates incentives to innovate and create new, safer products
        3. Transaction costs lowered, although maybe more cases brought
        4. Deontological considerations, risks not unilaterally imposed, unlike abnormally dangerous activities, but still making a profit, not strangers, related through market

But third parties may have risks unilaterally imposed on them, at the least

* + 1. *Greenman*, lathe, supposed to be safe in horizontal position, causes injury when wood flies out
       1. Screws too short to hold the wood in, this sounds like negligence
       2. Still, Traynor says strictly liable for defects, show a counterfactual for when no defect
       3. How to determine what a defect is… BPL! So it really is like negligence

1. The three types of defects and the nature of liability, R.3, Products Liability, §2
   1. **Manufacturing defects**: Product departs from intended design even if all possible care was taken
      1. *Speller*: Fire, refrigerator might be cause, just need to show that something must have gone wrong, not the precise defect, evidence destroyed by the accident, after all
      2. *Schafer*: P choked on something in a pumpkin muffin, meet consumers’ reasonable expectations
      3. Policy: proof problems, also manufacturers prefer because allows them to set their own standards
   2. **Design defects**: Foreseeable risks of harm could have been reduced by adoption of an alternative design
      1. BPL analysis or fail consumer expectation - *Barker*
         1. *Volkswagen*: Accident, seat detaches, liable for design defect?
            1. *Evans*: No duty to anticipate accidents as not “reasonable use”
            2. *Larsen*: Duty to anticipate accident, in a good position to reduce potential for harm
            3. BPL analysis to determine whether the design was defective, cost to include a different seat
         2. *Dawson*: Police officer gets into car accident, argues for continuous steel frame
            1. Cost is high, not the ideal model in many situations
            2. But jury might find for P anyway, judge needs to police jury to ensure rational standards

Leads to irrational safety measures, maybe contradictory jury requirements otherwise

FAA standards and other legislative and executive standards work well to control jury as well

Not the market, though, consumers no better informed than the jury, make bad decisions

* + 1. “Open and obvious” and foreseeable misuse
       1. *Campo*: If risk “open and obvious”, not liable for injuries, overruled and disfavored
       2. *Micallef*: chasing “hickies” across printing press, liable bc foreseeable need to reach into press
       3. *Linegar*: Bullet-proof vest, shot in the underarm where it doesn’t cover, manifest that not intended to cover, don’t eliminate useful designs, creates a high burden to demand single safest design only
       4. *Halliday*: kid shoots self with gun, alternative design seems cheap, avoid legislating as legislature has considered and not implemented child gun safety laws, also point out that this was the expected result, no consumer expectations test
    2. Burden of showing BPL: *Barker*, burden-shifting framework, show alternative design, then manufacturer bears the duty to show BPL fails, unique to California, idea is that manufacturer has the expert knowledge
    3. Eliminating a product
       1. *O’Brien*: jump into pool and slip, manufacturer says only design, courts says don’t manufacture
       2. These days, courts are very reluctant to do this, see *Linegar*, e.g.
    4. Policy
       1. Welfarist
          1. Economics will lead to rational behavior with a BPL analysis
          2. Foreseeable that there will be misuse, may be reasonable to anticipate misuse in production
          3. But careful consumers footing the bill for careless consumers
          4. Hard to know standard beforehand, and standards can be illogical or contradictory
       2. Deontological
          1. Torts create a signaling function for appropriate behavior
          2. Enforce societal norms through moral responsibility for liability and nonliability
          3. Nonreciprocal risk may trump considerations of ease of reducing the risk in typical Type II case
  1. **Warning defects**: Risk of harm reduced by reasonable warnings, and omission makes products unsafe
     1. *Ortho*: Would reasonable person choose not to take the product, *Canterbury* objective standard
        1. *Reyes, Davis:* Polio vaccine cases, reasonable person would take, implied subjective standard
     2. Show that read warning and made serious attempt to comprehend but information was not imparted
     3. Show that did not know of the risk independently, open and obvious defense
     4. *Vassallo*: Silicone breast implants, risks warned against must have been foreseeable at the time of sale
     5. DPT vaccines, silicone breast implants: Products wrongly taken off market because of excessive liability
     6. Strict liability?
        1. *Brody*: hepatitis, great reward, slight risk of large loss
        2. Should there be s.l. to distribute costs from beneficiaries to sufferers?
        3. Encourage new methods of testing, scientific development
        4. But high lawsuit awards might drive the manufacturers to bankruptcy first, no scientific advancement
     7. Foreseeable misuse
        1. *Hood*: remove the guards despite warnings not to, injured
        2. Must be foreseeable that would remove the guards
        3. Yes, probably foreseeable, but BPL for additional precaution, welding bad want to take off the guards (cleaning, replacing blades), and warnings made amply clear that removing guards was dangerous
     8. Presumption in favor of heeding warning, *Liriano, Pavlik*, burden on D to show would not have heeded further warning, this seems like bad policy and RBS says is obscure

1. Exceptions to liability
   1. Damage to the product itself, economic loss
      1. *Casa Clara*: defective concrete in house, house was a single product, no recovery on products liability
   2. Who can be sued?
      1. Manufacturer and any intervening retailer
      2. But not casual sellers (bakesale) or used products (selling used car back to dealership)
      3. Query whether applies to rebuilt products, such as a car taken apart and reassembled, or a computer
   3. Comparative negligence
      1. Used in products liability cases despite rhetoric of strict liability
      2. *Daly*: Base on fault, consider negligence in design or warning, or maybe on causal contribution in manufacturing defect
         1. Mosk dissent: **Dark day**, abandoning s.l., no intellectual consistency
         2. Other argument, weird incentives about foreseeable misuse
            1. But want weaker incentives to combat foreseeable misuse because Ps partly responsible
            2. Creates a nice sliding scale where liability decreases as more and more negligent/obscure

**Damages**

1. Compensatory damages
   1. Economic damages
      1. Medical expenses
      2. Lost wages
   2. Non-economic damages
      1. Pain and suffering/loss of enjoyment of life
         1. *McDougald*: Considered together
         2. Jaffe article: How can quantify pain and suffering? What would pay to eliminate the pain?
         3. Bagenstos article: Do the disabled really lose enjoyment of life? Are their lives really less happy?
      2. Loss of consortium (family members only)
   3. Contingency fees
      1. In favor
         1. Allow claims to be brought for which there otherwise would be no funds
         2. Do not multiply false claims because lawyers have incentive to press strong claims, no pay if lose
      2. Opposed
         1. Stir up needless litigation, probably a baseless claim
         2. Reduce compensation to P, create windfall to lawyers (NJ rules on medical malpractice restrict this)
      3. *Kirchoff*: Hourly fees create extra work, fixed fees reduce work, contingent fees align P and P’s lawyer
2. Punitive damages
   1. Legal expenses as motivation
   2. “Deterrence and retribution”
   3. Alternative theory, recompense for all awards given to all other injuried parties, quasi-class action
   4. *Kemezy*
      1. Compensatory damages do not always fully compensate
      2. Punitive damages prevent underdeterrence
      3. Discourage defendants from forcing lawsuits when they are clearly in the wrong
      4. Concealment or low chance of claims brought, make up for claims not brought
      5. Express community’s abhorrence
      6. Greater incentive to enforce through civil system and avoid criminal system
      7. Reduce self-help
   5. *Owens-Corning:* Actual knowledge of defect and deliberate disregard of the consequences
   6. *Gordon*, Florida statute: 35% of punitive damages go to the state, allowed
   7. *State Farm*: Awards in excess of 4:1, and especially in excess of 9:1, are likely unconstitutional under the due process clause (citing *Gore*, which cited the 4:1 limit)
      1. Scalia and Thomas dissents, due process does not limit punitive damages
      2. Especially at issue, as in *Gore* and here, when the harm is economic and not physical
         1. And also when legal in other states
         2. And also when only nondisclosure, not as severe as fraud
   8. *Exxon-Mobil*: 1:1 ratio in maritime cases