Policy

**Functions** of Tort Law

* 1. Establishing **standards of behavior** (signaling)
  + A. **Deterrence** – both direct (THIS actor) and indirect (all actors)
  + B. Stops people from engaging in **self-help** (physical altercations and social retributions)
  + Intentional torts v. negligence
    - Want to label bad behavior as really bad (intentional torts, punitive damages)
* 2. **Compensating** victims (also provides accountability)
* 3. Spurs **innovation by internalizing the cost** of wrongdoing onto wrongdoers
  + Reduces *societal burdens* by putting the costs with wrongdoers?
* 4. **Democratic** function-- provides another outlet through which people can raise issues
  + But what when no jury? Removing democratic aspect of tort law?
* 5. Corrective **justice** (assigning and proportioning blame)

Is tort law really the **Best Way** to meet goals?

* 1. Deter conduct?
  + Statutes better? (more publicized than cases)
  + Govt regulation, market, media
* 2. Compensate victims?
  + Lawyer costs, administrative costs, etc – get less than ½ $ spent on lawsuits.
* 3. Internalize costs for wrongdoer?
  + **Government regulation** (legislation, admin agencies), **market**, **media** = easier/more efficient?
* Distribute wealth?
  + See *Adams v. Bullock*-- *child with 8 foot wire and trolley* – Court says NO!
  + Tort law does not distribute wealth (except in products liability)

**ALTERNATIVES** TO TORT:

* Administrative agencies
  + Centralizing responsibility, minimize transaction costs, “expert,” money goes to compensate victims
* Statutes, Regulations
  + Usually sparked by tort – problematic; “expert,” more democratic?
* Reliance on market forces and/or media
  + Holds wrongdoers liable/deters, but no compensation for individual victims
* First party insurance w/ regulating terms of insurance (no fault regime ensuring compensation)

**Deterrence**:

* For deterrence to work:
  + Volume of litigation must be relatively high (must actually be *likely* that could be sued for wrongful action)
  + Attorneys must be available (must be big enough reward to be worth time)
  + Compensation must be severe and predictable enough for Ds to fear it
  + Need *rational* actors (NOT children, mentally ill)
* Can deter mentally ill, children? *Wagner v. State* (*mental health attacker*), *Williams v. Hays* (*goes crazy on a boat*!), *Appelhans* (kids)
  + Voluntariness for mentally ill (assumed based on result)
* *Laidlaw v Sage*- *human shield case*
  + Does not deter when D is not able to control/consider his actions
* Do not want to deter self-help (esp. in emergency situations)
  + Private necessity (*Ploof v. Putnam*) and Self-defense
* Transferred intent legal fiction
* Punitive damages
  + Some acts so egregious that we *signal to society* and wrongdoer the horribleness of them AND we want to *reward the P* for bringing suit AND ensure that *attorneys* will take these cases (get paid)
  + Economically: punitive damages, makes it disadvantageous for Ds to do behavior (where otherwise wouldn’t be), so deter behavior not otherwise deterred
  + If not to victim, to whom?
    - If state were to receive punitive damages instead of P, judge still neutral?
    - All punitive damages go to a overall tort fund to help with compensation.
  + *Littlefield v. McDuffy* -- *racist landlord*
  + *Jacques v. Steenberg Homes*-- *trespass of mobile home over land w/no physical damage*

**Compensation**:

* Balance deterrence and compensation when it comes to mentally ill and children
* Transferred intent legal fiction

**Autonomy**

* Self defense-- protecting self and personal integrity
* Torts violate autonomy and personal integrity (in place to help protect against violation)
  + Extended personality (protected zone)
* Must be acting voluntarily (to be held liable) - (*Laidlaw – human shield*, BUT mentally ill)
* Trespass (right to exclude)
* Consent as a defense
* Express assumption of risk as a defense

**Fairness**:

* Don’t want victim to have to pay for damages.
  + Eggshell skull rule (*Vosburg*)
* Causation limits: Proximate? BUT societal/cultural fault (Matsuda)?
* Excuses for emergencies:
  + *Laidlaw v. Sage* (*human shield case*) -- do NOT want to hold responsible for trying to save own life
  + *Vincent v. Lake Eerie* (private necessity)
* Non-reciprocal risk imposition (strict liability, private necessity as incomplete privilege): want to impose liability when one party is imposing a risk on another party (non-reciprocal)
  + Restitution: ensure that one party does not gain at expense of other
* BUT people who can’t meet the reasonable standard? Isn’t neg law unfair to them?
  + Bias against mentally ill
  + Bias for children-- *unjust* to hold them to the same standard; *because of their very nature*, they cannot be as rationale/educated/socialized
    - Don’t want to inhibit actions by kids-- want them to explore
* Who can most cheaply avoid the damages (**Lowest Cost Avoider)**
  + Hand Formula, eggshell skull rule
* Corrective Justice
  + Get victim back to position was in before wronged
  + Transferred intent legal fiction (accomplishes this)
* BUT NOT about punishment (exception: Punitive damages)

**Distributive** Function of Tort Law

* Usually doesn’t take into account D’s wealth when determining *liability*, but does for punitive damages
* Government is better equipped for redistribution of wealth (taxes, social security, unemployment)

C**ustom** in tort law:

* How do you identify custom?
  + *Vosburg* (*kids kicking in classroom*)-- what is a proper or improper touch?
    - Context: Classroom or playground; Public sphere or private sphere? (*Paul v. Holbrook* - sexual harassment at work)
* Whose custom? (Multicultural society)
  + Custom of the P? D? Majority? Minority?
  + Holding Ds accountable to a custom they may or may not hold:
    - *Weirs v. Jones* (*English language case*)
      * How much research should manufacturer to have to do?
        + Need to know lang area selling in?
        + Already doing this research?
      * How many speakers in an area are enough to make it so need warnings in that language?
      * Isn’t it reasonable to put some burden on the outsider to know local language (knowingly taking the risks of not knowing it)?
* If tort law is to deter *bad* behavior what if *customary* behavior is NOT good enough?
  + *TJ Hooper* (*radio on boats*) – custom not up to times.
  + *Brzoska v. Olson* (*Dentist with HIV*) – custom behind times, prejudice.
  + Arbitrariness of custom = lack of uniformity & inefficient deterrence
  + Externalization of costs: when custom not setting standard of behavior.
* Professional customs
  + Who’s a professional? (*Myers v. Heritage Enterprises*- *nursing assistants*)
  + Policy shift from *localized* professional customs to *national* customs (med mal)
* Sports customs
  + Breach of customs are punished within the sport?
  + Look at rules (penalties).
    - What is basis of rule? (Just interior to game play? No hands on ball in soccer. OR too many fouls = out of game; not point docking, etc.)
    - Severity of punishment? (Out of game/games; just 5min out?)
* Neg per se
  + Statutes come from custom generally
* IIED - what is OUTRAGEOUS?
* Reasonable person standard forces everyone to adhere to the same custom
  + goes against traditional American thought
  + the more customs/beliefs/etc you take into account the less of a standard of behavior that is created

**Bias** in Tort Law

* Against the **Old**
  + History of rational thought, so should know when no longer are capable of rational thought and thereby prevent selves from committing torts
    - Unlike children, they have had the *opportunity to learn* what the reasonable standard of care is
  + Too much variation in capabilities between old people
  + We are reflecting how we want to be treated as old people-- we don’t want to *believe* we will be on a downward trajectory
    - Old people feel that way too, even if incapacitated
* Against the **Mentally Ill** (Are they *victims*, themselves?) (Autonomy issues)
  + - The more exceptions, the more the benefits of the standard are lost.
    - Want to *encourage families*/state to care for their mentally ill dependents
      * BUT presupposing family actually has control of mentally ill
    - *Deinstitutionalization* of the mentally ill occurred because we assumed they could live within society, and thus they *should* live within society’s norms.
    - Less unfair to have the mentally ill D pay than the victim (*compensation*)
    - Avoid *fraud/perjury* - simulation of insanity (difficulty of proof)
    - Difficult to create a *reasonable mentally ill standard*
      * What would a schizophrenic “normally” do?
    - More difficult to find a *direct link* between disability and they injury D causes.
    - BUT we allow mental illness to play a role in *criminal* law and *probate* law
* **Minority Religions** 
  + *Jehovah’s Witness cases* (*Werth v. Taylor*)
  + Favoring certain religious beliefs over others (majority v. minority)
  + Should be taken into account b/c don’t want to be analyzing the importance of people’s religious beliefs
  + BUT when other’s religious beliefs interfere with one’s own autonomy?
* **Court v. jury?**
  + *Brzoska* (*AIDS dentist* - shouldn’t more people be less biased than 1 judge?)
* **Feminist** views
  + Should there be a *reasonable woman standard* towards sexual harassment?
  + We are *enforcing the white male majority* view of women.

**Checks and Balances** between 3 Branches

* Legislature = democratically elected; usually not in case of judges
* Legislature & admin agencies = “expert” rather than common-man driven views
  + *Victor v. Hedges*-- *car on sidewalk*
  + *Baynes v. Todds Shipyard*- *employee on loading dock*
* Negligence per se
* *Wagner v. State* -- court did not want to read around sovereign immunity statute
  + *K-mart and mental health patient*
  + Don’t want to subject the state to limitless liability
* Interest of the state (*Werth v. Taylor* – *Jehovah’s Witness case*-- don’t want state to be responsible for taking care of kid)
* Admin costs of tort law v. statutes (take longer to pass, need cases first to spur along)
  + Admin costs of reasonable person standard v. intent (subjective intent hard to assess) – criminal law?
* **Regulations** v. tort law
  + Regulation is better
    - Regulations are able to pre-empt rather than react to problems
    - Too many suits in tort system
    - Inadequate litigation on small claims
    - Cost of litigation (high)
    - Publicized clear standards
    - Expert-driven
  + Regulation is worse
    - Tort law is better able to react to harms to *minority groups* (don’t need large scale advocacy)
    - *Faster* to change because *decentralized*
    - Individual driven (justice for individuals)
    - Dirty politics getting in way of justice

**Other Things** to Consider

* Relationship between D and P
* Situational context
* Holmes considerations: torts=moral shortcoming (personal) v. man acts at his peril (public), balancing = man of ordinary prudence test

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| --- | --- | --- |
|  | Holmes | Matsuda |
| purpose of tort law |  deterring individual wrongdoers   reduce “police state” through use of civil (personal) enforcement |  shaping society (distributive function) and compensating victims   who can best avoid/prevent the harm (not just cheapest cost avoider) |
| who is D |  most directly responsible  (ex: rapist) |  go down the line of proximate liability and hold all liable   (ex: garage owners who did not fix lights, bystanders, rapist, everyone else) |
| What’s our test for responsibility |  were you directly responsible   did you breach the man of ordinary prudence standard |  are you anywhere in the chain of events and do you have money/power to prevent harms |
| the role of insurance |  personal responsibility, everyone should have their own insurance (even Ps) (anti-compensation as basis for tort law) |  community liability is insurance; welfare state |
| the theory they use |  economic theory |  critical race theorist   instead of focusing on aggregate best interest of society, we need to focus on what groups take the brunt |
| problems of tort law |  inefficient way of compensating accident victims; we should incentivize insurance over tort law   strict liability: it does not cause deterrence, stops innovation |  we are asking the weakest members of society (poorest) to be responsible for one another and creating a cycle and leaving the wealthy alone   doctrine of proximate cause should not matter |
|  |  against the welfare state |  for the welfare state |
| role of the P |  p should have their own insurance, compensation should not replace insurance |  highlight issues in society, P should be compensated and is a victim |

Intentional Torts

**Battery**: a purposeful touching or striking of another that causes injury or offense

* + Elements: 1) D acts **voluntarily** 2) **intending** to cause 3) **harmful** OR **offensive** contact 4) D’s act **causes** such contact
* **Intent** in Battery
  + Intend to cause *contact* only (not harm)
    - Motive is irrelevant: “If the intended act is unlawful, the intention to commit it must necessarily be unlawful.” – *Vosburg*
  + **Eggshell skull rule** (*Vosburg v. Putney*): D liable for even unforeseeable/ unintended *physical* outcomes of contact
    - Take your victim as you find them
    - Causes *over-deterrence* when the victim is unusually weak and *under-deterrence* when the victim is unusually strong, so *evens out* in the end.
    - Damages question, not about liability
    - *Vosburg (1891): kid kicked another kid under his knee which aggravated an old injury eventually causing the kid’s leg to be crippled; this kicking occurred in a classroom setting where this type of contact was not expected (as opposed to in play)*
      * Context influences characterization of touch
      * Not assault here because NO imminent apprehension
    - *White v. University of Idaho (1989): piano teacher, back injury;* intended contact need not be intended to harm, just needs to be unpermitted (“transgression”)
  + **Transferred intent** (legal fiction)
    - Intent can transfer from *one tort to another*:
      * *Nelson v. Carrol (1999): Carroll hit Nelson on the head with a gun, he went to hit Nelson again and the gun went off and shot him*
      * D does not need to intend the *specific* harm that occurs, but must intend to *make contact* ONLY.
    - Intent can transfer from *one victim to another*:
      * *In Re White (1982): D tries to shoot 3rd party and ends up shooting P; bankruptcy action (can’t discharge debt for battery)*
      * D had no intent to make contact with P, but a legal fiction is created and according to the law he has the requisite intent
  + **Mental capacity** to *intend to make contact*
    - *Wagner v. State: a mentally handicapped man attacked a woman in K-mart while with his caretakers (state)*
    - Mentally ill can have the requisite intent to make contact, w/out necessarily understanding the consequences of their contact (but is it voluntary?)
* **Voluntary** Act
  + *Laidlaw v. Sage (1899) - 3rd party enters building and threatens to blow himself up; as he is doing so D pulls at P (human shield), BOOM, P ends up injured* 
    - Under the influence of a “pressing danger,” there is NO voluntary act!
      * Self-preservation is excusable.
    - Threat must be *immediate* and pressing; D must have NO other options OR no *time* to consider other options.
* **Offensive OR Harmful Contact** 
  + Offensive
    - Offensive contact = **objective standard**:
      * 1. Would a reasonable “**not unduly sensitive**” person find the contact offensive? OR
      * 2. **Was D** **aware** that P would find contact offensive (*known* to be unduly sensitive P)?
    - Context matters (public/private)
    - *Paul v. Holbrook (1997) - D (coworker) massaged P (employee) at the office and sexually harassed her*
    - *Leichtman v. WLW Jacor Communications, Inc (1994): radio show hosts well-known anti-smoking advocate, host blows smoke in his face repeatedly during show* 
      * Smoke (particulate matter) CAN make offensive contact.
      * Offensive contact to *known unduly sensitive P.*
      * Does NOT create a **smoker’s battery** b/c not harmful contact, only offensive contact due to P’s *known sensitivity*.
    - *Madden v. D.C. Transit System (1973): P was standing on a traffic island and a bus went  by spewing “oily substance” and fumes at P*
      * Not harmful contact, but was it offensive?
        + NOT by a reasonable objective standard.
      * Also, NO intent to make contact by the bus system.
      * Policy considerations for need of public transport.
  + P**rotective zone** around person: extension of personality (e.g.-hit plate out of hand)
* Other things to think about:
  + Children CAN be liable for intentional torts (*Vosberg*)
  + Sovereign immunity
  + Can NOT discharge debt of intentional torts in bankruptcy (*In Re White*)
  + Liability =/= deep pockets/insurance

**Assault**

* Elements: (1) **intentional** infliction of (2) **reasonable** **apprehension** of (3) **imminent battery** through (4) **voluntary action by D**
* **Intent**
  + D must intend to cause an apprehension of imminent harm or physical contact
  + **Objective intent test**: *even* if D claims NOT to have intended the apprehension, it is enough that the apprehension was *reasonably foreseeable*.
* **Imminence** of threat
  + *Brooker v. Silverthorne (1919): D gets angry at phone operator P and says, “If I were there, I’d break your neck!” - hypothetical threat*
  + Words alone can NOT constitute an assault, but **context** matters.
  + “Threat” was not imminent (over the phone, far away, ability to even find P) so her apprehension was NOT reasonable.
* **Reasonable apprehension**
  + *Vetter v. Morgan: woman in car is threatened by D in other car at night; she is alone, he is with friends.*
  + Reasonable apprehension is **subjective:** \*\*Gender, time of day, size differentials, age, mental capacity, relationship\*\*
  + **Alternate possibilities** (escape, help from others, etc.) does NOT preclude P from apprehension, but is taken into account
    - P could have driven away, but possibility of escape doesn’t negate assault.
* Practical jokes can be assault
  + Ex: family places mongoose in a box at top of stairs, P opens the box gets scared and falls down the stairs, family is liable for assault

**Standard Defenses to Battery and Assault**

* **Consent** 
  + *Brzoska v. Olson (1995): Dentist with AIDS does not inform his patients, he dies, they find out and sue his estate though none exposed to HIV* (offensive contact battery case)
    - Likelihood of exposure extremely low = as a *matter of law*, no *reasonable* person would find the contact offensive. (Ps lose)
    - Court was *establishing* social norms rather than reflecting them (reasonable person is a rational, *informed* person).
    - Consent is NOT about the characteristics of a doctor but rather about the specific procedure being performed; BUT *Grabowski*.
  + *Grabowski v. Quigley (1996)- P consented to doctor A performing a surgery and doctor B actually performed it* (battery – unauthorized contact)
    - P only consented to a specific surgery by a specific doctor.
    - Lack of informed consent (didn’t know “et al,” no chance to ask questions)
  + *Werth v. Taylor (1991): Jehovah’s witness P specifically withdrew consent to blood transfusions multiple times (birth); doctor gave her a transfusion while she was unconscious to save her life* (court found for doctor)
    - Judge’s religious prejudice.
    - Waiver of consent must be *contemporaneous and informed* for it to be effective.
    - Public policy: don’t want to disincentivize doctors to save lives; interest of the state in not having to provide for child.
  + Consent is objectively based on the situation at the time (consent can come from a person’s words or actions).
    - In emergency situations, what a reasonable person would have consented to at the time if conscious.
  + Consent in sports context: rough play is expected but limited (diff than rules)
    - *Koffman v. Garnett (2003)-- coach slams 13 yr old student into the ground in football practice*
    - Norms of sport relevant as well as *who the rules were designed to protect*.
* **Self defense**: *reasonable* force used to protect *self or someone else* in the face of *imminent* harm.
  + Elements: (1) **reasonable and actual** fear of **imminent** injury; (2) response must be **proportional** (reasonable, do only what HAVE to do; usually NOT lethal harm).
  + **Why** do we allow self-defense?
    - The easiest way to prevent greater harm is to allow people to protect themselves. (Least cost avoider.)
  + Defensive action does NOT need to be *the most reasonable* option, but a reasonable option.
    - *Nature* of threat matters in determining a reasonable defensive action.
  + If D *unreasonably* reacts (disproportionate harm in return) to a threat, S is liable for *the difference* between a reasonable reaction and the actual unreasonable one; BUT P is still liable to D for their threat against D.
  + *Haeussler v. De Loretto (1952): P threatened D and refused to leave D’s porch, D punched P and slammed door*; NOT battery b/c self defense.

**Intentional Infliction of Emotional Distress (IIED)**

* Elements:
  + 1) D’s conduct is **extreme and outrageous** (a **reasonable** **person** would perceive it as such, exceeds “all bounds of decent behavior”)
  + 2) D **intends** to cause emotional distress or there is a **high probability** that D’s actions would cause IIED (reckless)
  + 3) victim must **experience** **severe** emotional distress (physical manifestation of distress can be important)
    - \*\*ONLY intentional tort which requires ACTUAL damages.\*\*
    - **NO imminence required**
  + 4) Conduct must be **cause** of the severe emotional distress
* *Roberts v. Saylor (1981): doctor tells former patient he does not like her right before she goes into surgery with a different doctor, no physical manifestation of emotional distress*
  + Reasonable person would NOT see doctor’s conduct as extreme or outrageous.
  + Relationship between doctor and patient had ended.
* *Greer v. Medders (1985)*: *attending doctor verbally harasses patient and his wife while patient is recovering from surgery, patient and wife have physical manifestations of emotional distress*
  + D is liable for IIED: takes into account doctor-patient relationship and physical manifestations of emotional distress
* *Littlefield v. McDuffy (1992):* landlord harasses tenant for having a boyfriend of a different race; landlord threatens tenant, her boyfriend, her daughter, her sister and kicks her out of apartment
  + No contact and no imminent threat = no battery/assault
  + Statutes protecting against racism help prove that D’s actions = outrageous.
  + **Punitive damages** = D’s actions must be wanton and rise to level of malice.
* *Nickerson v. Hodges (1920):* *P w/history of mental health issues believes there is buried treasure in her yard; Ds play prank and bury box in the yard that says get family together before opening it, P calls her entire family to see the box and open the treasure together; there is NO treasure and she is humiliated*; P awarded damages for IIED

**Trespass**

* Elements:
  + 1) D must have **intent to enter (or invade)** upon land that is NOT own
    - D does NOT need to know that the land is not his (mistake still intent to enter)
    - Intent is **objective**: even if do not actually intend to enter the land of another, if there is a high likelihood you will enter someone else’s land there is intent.
  + 2) **Tangible entry** onto the land of another
  + 3) **P owns/possesses** land in question
* **Policy reasons** to protect property rights:
  + Promotes labor (societal benefits; productivity)
  + Promotes investment
  + Induce trade (must OWN to trade)
  + Promote peace and non-violence (*avoid self-help*)
  + Property rights as *extension of self and personal well-being*
  + Uphold economic status quo (Marxist)
* *Jacque v. Steenberg Homes, Inc.*: *mobile home company crossed P’s land without his consent; no damage to the* land; high punitive damages awarded because policy dictates protecting **right to exclude.**
* **Private Necessity**: an *incomplete privilege* to trespass-- must still pay for *damages* caused, but are allowed to trespass on another’s property in emergency situation.
  + Promotes the right of self-preservation.
  + Necessity-- **objective** test: what would a reasonable person do?
  + It is NOT required that there are NO other options, just that this was a reasonable option in an emergency situation.
  + *Ploof v. Putnam (1908)*- *D owns dock; there is a storm, P tries to dock the boat but D will not let him; boat is destroyed and P’s family is injured***;** P is allowed to sue D b/c in cases of private necessity P should have been allowed to dock his boat.
  + *Vincent v. Lake Eerie: P is dock-owner, D leaves boat at dock during storm, P’s dock is ruined but D’s boat is safe;* D liable for the damages caused to the dock
    - Restitution or benefit basis of imposing liability-- D benefited at expense of P.
      * Can’t save own property at the expense of another’s property.
    - Incentive effects-- incentivize least damage overall (if potential damage to boat is less than potential damage to dock, boat should not dock)
    - **Non-reciprocal risk imposition**-- boat owner imposed a risk on dock-owner, dock-owner imposed no risk on boat; so want to impose liability on the party imposing the risk.

Negligence

Elements of Negligence:

* 1. **Breach of Standard of Care** (Q. of Fact)-
  + Hand Formula: Burden on def = (Probability of Injury; P) x (gravity of injury; L); B<PxL means liable because less costly to prevent than suffer
* 2. **Duty** (Q. of Law)
  + Factors considered under *Tarasoff*, *Rowland*, and *Dillon* (if NEW duty case):
    - 1.  Foreseeability of harm to P
    - 2.  Degree of certainty that P suffered injury
    - 3.  Closeness of the connection between the D's conduct and the injury suffered
    - 4.  Moral blame attached to D's conduct
    - 5.  Policy of preventing future harm
    - 6.  Extent of the burden to D and consequences to the community of imposing a duty to exercise care (Includes crushing/unlimited liability)
    - 7.  Availability, cost and prevalence of insurance for the risk
* 3. **Actual** Cause (Q. of Fact)
* 4. **Proximate** Cause (Q. of Fact)
* 5. Legally cognizable **injury** (Q. of Fact)
  + NOT pure economic or emotional damage

**Breach**

* Why it’s good to use a **reasonable person standard**:
  + Can’t read minds so it’s *easier* to make everyone live up to one standard (more accurate, less admin *costs*).
  + Encourages *societal baseline* (no societies of idiots).
  + *Deters fraud* in avoidance of negligence (just didn’t know, etc.).
  + *Incentivizes* better judgment.
* **FACTORS**: when looking at *whether* should impose ***lower* standard of care** (kids):
  + 1) “Notice” to victims (car/plane/boat = victims assume is adult)
    - “Adult activity” = no notice to victim to avoid.
  + 2) Relationship between P and D (another type of “notice”)
  + 3) Whether the person in question is D or P (more lenient on P)
  + 4) Is there comparative fault or contributory negligence regime (more lenient on P)
  + *Vaughan v. Menlove (1837):* *D improperly stacked haystack (no vents, spontaneously combusted) near neighbor’s (P) buildings, the haystack lit on fire and fire spread to P’s property, D was not concerned because he had insurance.*
    - D found liable b/c everyone owes duty to others to act with “ordinary prudence” and D breached this standard of care.
  + **Children**-- taken into account for Ps *and* Ds (context):
    - **Restatement** (majority):
      * Child negligent if conduct does NOT conform to that of a “reasonably careful person of the same, age, intelligence and experience” UNLESS:
        + Under 5 yrs old = not capable of negligence
        + Engaging in a “dangerous activity that is characteristically undertaken by adults”
    - **Illinois rule** (NOT majority):
      * Under 7 = *incapable* of negligence (NOT *capable of understanding* risk and thus not held liable; no deterrence)
      * 7-14yrs = rebuttable presumption that child can not commit neg
      * Over 14 rebuttable presumption that child can commit neg
    - **Massachusetts Rule**: child “capable of...negligence if child failed to exercise a degree of care that is reasonable for similarly situated children”
    - **POLICY reasons** for holding young child liable:
      * Parents should pay b/c least cost avoider (but then why not hold directly liable?)
      * Old enough to start learning morals (deterrence)
      * Compensation for victim (STRONGEST rationale)
        + Encourage parents to buy insurance
        + BUT compensating one victim through money of another innocent (like strict liability for parents; don’t even have to be negligent parents)
    - Is only being held to standard of like-aged kid, so only found liable if truly extreme behavior (BUT how determine what is normal?)
    - BUT really young children CANNOT understand deterrence (though indirect deterrence through parents educating children on what not to do)
    - BUT don’t want to restrict kids’ lives to the point that they can do nothing; should explore; is part of childhood.
    - *Applehans v. McFall (Ill 2002): 5 year old hits an old woman w/bike; breaks her hip; sues parents for vicarious liability and child for negligence* 
      * Parents cannot be found vicariously liable BUT can be found *directly liable* if parents are “on notice” of child’s behavior and had opportunity to control the child in this specific instance
      * Illinois Rule (below)
      * ***NY:*** *Menagh v. Breitman* (2010-pending)- *four year old cyclist being sued for hitting old lady and breaking her hip;* motion to dismiss denied
        + Child may not be able to testify (won’t understand perjury) but may be held liable for negligence!
    - Children involved in **adult activities**:
      * *Purtle v. Shelton (1971): 2 kids hunting, D accidentally shot P*
        + Kids held to a reasonable **child** standard; under societal norms, hunting considered NOT only an adult activity (unlike driving a car)
        + Relationship: friends hunting together (notice)
        + Dissent: law should *change* norms, kids should not use hig-powered rifles. Majority thought law should *reflect* norms.
      * *Dellwo v. Pearson (1961): 12 year old drives motor boat negligently and catches fishing line injuring P*
        + Lack of notice to P to expect danger (adult activity)
        + D held to **adult** standard of reasonable care
        + Relationship between the people: strangers (no notice)
  + **Old** age-- may be taken into account for Ps, NOT taken into account for Ds
    - Restatement: old age is **not** taken into account in assessing liability unless the old age causes a *physical disability* that may be taken into account
    - *Roberts v. Ring (1919)*--*old man driving w/bad eyes runs over kid*
  + **Mentally ill**-- preexisting mental disability taken into account for Ps only
    - *Williams v. Hayes (1894)*: *ongoing storm, captain of ship had been up for 3 days, took medicine; first mate put in charge of boat, captain is awakened and 2 different tug boats come to save ship; he sends them away, ship sinks; insurance company sues captain;* he argues temporary insanity DUE to insanity arising from attempt to maintain due care for ship and wins!
    - **Restatement**: mental disability is **not** taken into account when determining standard of care.
    - Some states consider mental disability in considering/apportioning *contributory negligence* (allows mentally ill P to avoid being barred recovery)
    - **Why** same standard for mentally ill?
    - The more exceptions, the more the benefits of the standard are lost.
    - Want to *encourage families*/state to care for their mentally ill dependents
      * BUT presupposing family actually has control of mentally ill
    - *Deinstitutionalization* of the mentally ill occurred because we assumed they could live within society, and thus they *should* live within society’s norms.
    - Less unfair to have the mentally ill D pay than the victim (*compensation*)
    - Avoid *fraud/perjury* - simulation of insanity (difficulty of proof)
    - Difficult to create a *reasonable mentally ill standard*
      * What would a schizophrenic “normally” do?
    - More difficult to find a *direct link* between disability and they injury D causes.
  + **Physical Disability**-- taken into account for P and D
    - Restatement: someone with a physical disability is held to the standard of care of *reasonably careful person with the same disability*
  + **Religion, Gender**-- sometimes taken into account for P to avoid contrib. neg
    - *Friedman v. State (1967):   Jewish teenager alone with a man, gets stuck on chair life, she chooses to jump off lift rather than spend night alone w/ man* 
      * “Peril invites escape”
      * P was not found contrib neg. because of her religion/age/gender
        + Now that contrib neg. has shifted to comparative fault it is NOT likely would be such a P-friendly p case
    - What about a *reasonable woman standard* for sexual harassment?
  + **English Language**
    - *Weirs v. Jones (1892): dangerous bridge, warning signs in English, wires blocking off bridge removed, P’s horses killed when bridge collapsed,* D wins
    - Factors to consider: is P’s language widely spoken? Cost of additional warnings? Risk/probability of injury?
      * Was a minority lang group/area w/prominent minority lang group targeted as a user/consumer?
* **Cost-Benefit Analysis** and Reasonableness
  + *US v. Carroll Towing: tug causes barge to hit tanker and sink, accident could have been prevented by having 24-hour a day bargee, but bargee was not present at time of accident*
    - **Hand formula: B = P x L**
      * B = burden on D to take the precaution
      * P = probability of injury
        + BUT probability that the precaution won’t prevent the injury? (Would people really use helmets if you put them in every car?)
      * L = gravity/severity of injury
      * If B > P x L then should NOT take the precaution; D is NOT liable
      * If B < P x L then *should* take the precaution; D is liable.
    - Policy considerations of Hand formula:
      * Advantages
        + Predictability, maximize social utility, simplicity
      * Disadvantages
        + Promotes societal inequalities (better to speed in a poor neighborhood than in a rich one)
        + Not widely used b/c juries normally determine reasonable standard of care
        + Information intensive-- must monetize everything

Therefore, actually less predictable.

Administrative costs

* + - * + Subjective = how to value the benefits/costs
  + *Rhode Island Hosp v. Zapata-- D steals checks from bank, bank did not inspect all checks, inspected one out of every 100; inspecting all checks was high cost but no benefit, bank was not held liable for not inspecting all checks - perfect* use of Hand formula
  + *Adams v. Bullock-- young boy swinging 8ft wire, wire hits trolley line and he gets electrocuted*
    - Hand Formula = AGAINST liability of D: to avoid danger, all above ground trolleys would have to be removed/fully overhauled despite system being govt approved (= high cost for precaution to be taken)
      * Likelihood of injury is very low, public utility of trolleys high
      * Don’t want strict liability (discouraging trolley activity) = bad for society.
    - BUT if trolley line was found negligent, could have spurred innovation
  + *Bolton v. Stone-- cricket field near a neighborhood, cricket ball flies over low fence and hits woman on street; street is normally empty; balls rarely fly over the fence*
    - Substantial risk approach-- is D creating a substantial risk?
      * Ignores the burden on D (B of Hand formula)
      * More rights-protective approach-- don’t trade off safety against cost of safety.
    - ENGLAND ONLY!!!
* **Industry and Professional Custom** 
  + What if a *whole industry* is lagging behind?
    - Meeting custom can be helpful to D’s case, but court can say it’s not enough; NOT meeting custom is usually BAD = liability.
    - Unreasonable customs will NOT be upheld by court because it will *externalize* costs (**lowest cost avoider** should just do it)
      * Ex: NYU students jaywalk, W Village drivers pay costs
    - Tort law creating standards
  + *TJ Hooper (1932)- 2 barges sink that would not have if they had had radios on them; it is not a custom at this time to have a radio on board;* no excuse because the cost is low and the benefit is great
  + *Rodi Yachts v. National Marine (1993)-- custom is determinative of reasonable care for contractual relationships; bailee is normally responsible for barge once it docks but here the bailee did not know industry custom and took 5 days to unload barge, ropes broke and barge went loose causing damage to nearby barges*
  + Meeting industry custom is NOT enough to avoid liability:
    - Asymmetric info - Ps don’t know as much as Ds
    - 3rd parties pay the price-- externalize costs instead of internalizing
    - Transactional costs of being the first to break industry custom
    - Inertia-- should not continue to do something just because it’s always been done that way
  + **Medical Malpractice** 
    - **Professional standard of care**
      * *Johnson v. Riverdale Anesthesia--* *patient died from anesthesia because she was not pre-oxygenated, P tries to impeach D’s expert witness by asking what he would personally do in similar situation, though he stated industry custom agreed with D;* court found that professional standard is not about what an individual doctor would do, but rather what the society of doctors would do
      * *Myers v. Heritage Enterprises (2004)*: *retirement home lifts old lady with Hoya lift improperly causing her to break her legs*
        + NOT held to professional standard because nursing assistants are NOT considered professionals

NO specialized training; duties are personal care not medical care.

* + - **Minority rule**- if a *respectable* minority of doctors are following a rule then that’s enough for custom
    - **Custom as standard of care** in med mal (*also below* for Lack of Informed Consent – Professional Standard):
      * **Pros**
        + Consensual relationship between doctor and patient
        + Reduces litigation cost
        + Predictability ex ante
        + Doctors are held accountable *by their peers* and their own society, as well as tort law
        + Juries cannot create standards of care for medical malpractice cases—its *too technical*
      * **Cons**
        + Insurance companies are stepping between doctor patient relationship and disincentivizing doctors from doing everything to save patient
        + Doctors are protecting their own
        + Costs get externalized to 3rd party insurer making standard of care too high or too low
        + Does patient have equal bargaining power?
        + Is there actually a custom?

doctors take into account non-medical factors (psychological factors etc)

* + - **Alternatives** to current med mal model**:**
      * Shift standard of care to prudent patient
      * Allow patients and doctors to contract for level of care
      * Strict liability (no longer have to prove fault)
        + 3rd party recovery: P recovers from doctor’s insurer
        + 1st party recovery: P recovers from own insurer
        + BUT greater # of claims. BUT maybe more caps on damages.
      * Shift who’s actually liable:
        + Put onus on hospitals, not doctors (hospital in best position to avoid negligence: hiring, policies, #s on floor AND hospital has more means to pay insurance/self-insure)
    - **Causation** as issue in med mal (establish that breach of care was actual cause of injuries): people show up sick, pre-existing conditions, etc.
    - **Lack of informed consent** 
      * **Prudent patient standard** (*Largey* - below)-- a physician should disclose material risks that a *prudent/reasonable patient would want to know* (patient’s rights of self determination - autonomy)
      * **Professional standard** -- doctor should inform patients of what a doctor would generally have said (doctor in the community v. comparable communities v. national networks)
      * Elements of a lack of informed consent case (duty assumed):
        + 1) Standard of care **breached** (one of the following):

Prudent patient standard

Professional standard

* + - * + 2) Proof **injury** occurred at all
        + 3) **Causation--** injury was *caused by the risks that were not disclosed* to P by doctor

**Objective** approach-NO *reasonable* patient would have accepted the treatment if informed

**Subjective** approach-- the patient *personally* would NOT have accepted the treatment if informed

* + - Should we switch to *prudent patient* standard?
      * Pros:
        + Autonomy theory (avoid paternalism)
        + Difficulty of patient getting experts (doctors protect own)
      * Cons
        + Juries will still resort back to professional custom even if instructed on prudent patient custom
        + Competition amongst doctors could cause high costs
        + Not always in patients best interest (don’t want to terrify them)
        + Incentivizes over-treating patient
    - *Largey v. Rothman-* *P had mass in her breast and had to have a biopsy, which led to arm problems that were rare but foreseeable by the doctor; doctor had not warned of this potential risk; P says would not have had procedure if had known*
* **Negligence Per Se**: statute creates a standard of care/behavior
  + If D breaches statute, P must prove:
    - 1) P is within the *category of person* that statute was *meant to protect*
    - 2) P’s *injury is the type* that the statute was meant to protect against
  + **Why have negligence per se?**
    - Statutes come from democratically-elected legislatures
      * BUT ordinary neg would be determined by jury of lay people (BUT legislature prob more representative than small jury)
    - Statutes as forward-looking (technology-forcing) – informed, expert view
      * Jurors feel more comfortable using “expert” views.
    - Statutes are more predictable/transparent than decisions from judiciary (juries) – published, widely available
    - Reduces litigation costs (juries don’t have to establish standard for every case, less experts to pay for), but in reality….
    - Reduces enforcement costs for govt (“private attorney generals”)
    - Institutional comity: want laws between legislature and judiciary to be consistent
      * BUT juries can set higher standards than statutes (unless legislation says otherwise)
  + *Dalal v. City of New York (1999)-- driver meant to wear glasses according to license (required by statute); she did not and she hit P*
    - Breach of licensing requirement is NOT enough for neg per se usually because has a *record-keeping purpose* BUT here it is enough because licensing requirement for glasses has a *safety* purpose as well
    - Not having a license does NOT mean that D was driving unsafely, per se, but NOT having a glasses on when required DOES mean driving unsafely, per se
  + *Victor v. Hedges* - *D parks on sidewalk and hangs out with P, P gets hit by 3rd party car because of construction on the road (tire blows out)*
    - NOT neg per se because statute not allowing cars on sidewalk is meant to protect this type of P but NOT from this type of injury (statute meant to prevent injuries FROM parked cars, not 3rd party cars hitting sidewalk)
  + *Bayne v. Todds Shipyard Corp. -- P (non-employee) unloading goods from D’s loading platform (no guardrails); P fell and got injured*
    - P recovered because this was neg per se: P was in the class of Ps (statute *broadly* protected workers, did not exclude 3rd party contractors like P) that was meant to be protected from this type of injury.
    - It does NOT matter that it was an ***administrative regulation*** instead of a statutory one b/c:
      * “Expertly” created (probably even more than statutes)
      * Like statutes: community input, power from Legislature
      * Predictable, transparent
      * Reduces litigation and enforcement costs
      * Institutional comity
    - BUT (dissent in *Bayne v. Todd Shipyards Corp)*:
      * Too many regulations (overwhelming), not always necessary/important
      * Should just be evidence, not “per se” standard!
      * Not actually democratically created (BIG diff from statutes)
      * Issues figuring out intent of regulators (unlike legislature), unless fed level (have to publish reasons)
    - NOT all states make regs “per se” (NY, for example)
* **Res Ipsa Loquitur** 
  + Elements
    - 1) Injury must be a kind that ***ordinarily does not result******absent carelessness*** on someone's part
    - 2) ***Instrumentality*** causing the injury must have been in **D's *exclusive control***
    - 3) Injury must NOT have arisen from **acts or carelessness on the part of the P**
  + *Byrne v. Boadle (1863)-- flour barrel rolls out of shop window and hits P’s head*
  + *Combustion Engineering v. Hunsberger (1936)-- construction site piece falls through boiler work, hits worker;* court does not apply RIL b/c this type of fall is “normal” and “not always due to carelessness” (negligence)
    - Hand formula: benefit of avoiding accident much higher than the cost
  + *Kambat v. St. Francis Hospital (1997): patient got a hysterectomy; doctors left a pad in her* 
    - P does NOT have to eliminate *all* other possible causes of injury to use RIL; P simply must show that it is *more likely than not* that D’s negligence caused injury.
    - DON’T need an expert in RIL med mal cases b/c so obvious (though most med mal cases usually use experts - tension)
  + *Ybarra v. Spangard (1949): P gets appendectomy which leads to arm atrophy that he blames on all medical personnel (doctors, nurses, etc.); doesn’t know specifically whodunit; under anesthesia;* RIL granted.
    - Doctors all work in teams; nature of anesthesia = can’t say who did it and with what instrumentality.
    - If no liability, then BAD incentives for medical personnel.
    - Group held liable for one person’s negligence but makes sure victim gets compensated (forces Ds to tell who responsible D actually is, if known)
      * Group all under umbrella insurance of hospital, working together.
  + *Wolf v American Tract Society (1900): Building under construction, 19 subcontractors, brick falls and injures P; no one knows whose brick it was;* p sued only 2/19 subcontractors; no way to know if either was really liable.
    - NO RIL because it is unknown who is liable; too many possible Ds; NO umbrella policy (very likely holding parties liable for non-party’s negligence)

**Duty** (Issue of Law - look at this P or class of Ps; policy considerations – desirability of compensating victim, costs/benefits, deterring wrongful conduct)

* GENERAL RULE: An actor ordinarily has a **duty** to exercise **reasonable care** when the actor’s conduct creates a **risk of physical harm**.
  + Overlap between standard of care (under breach) and duty.
  + Type of injury: risk is one of *physical harm*, NOT pure emotional or economic loss.
  + Generally NO active duty to *rescue* if D did not cause danger AND NO relationship between P and D.
  + Question of duty if there is NO direct relationship between D and P (blood, contract).
* Exceptions occur when principles/policies warrant denying/limiting liability, letting court decide that D has no duty or duty must be modified (e.g. – *Strauss*).
* No more **Privity**:
* *Macpherson v. Buick Motor Co. (1916)*: *Manufacturer sells a defective car to Dealer who sells to P;* prior to this, *privity* excluded liability beyond direct salesperson-buyer relationship.
  + No privity if manufacturer (1) has knowledge of probable *danger* of product and (2) knows that no further tests will be done down the line.
  + *Winterbottom v. Wright (1842)* privity rule where D only owes duty to those w/whom a contractual relationship has been established (British case)
    - Cardozo could have overruled using *Heaven v. Pender* (1883) (British case establishing broad duty rule, whomever is reasonably foreseeable to be injured), but didn’t.
  + Decision based on *Thomas v. Winchester (1852)* where *falsely labeled poison* became exception to privity rule => cars are also “inherently dangerous to life and limb” causing duty to disparate consumer
* **Foreseeable victims** of conduct:
* *Mussivand v. David (1989)*: *Dr. Mussivand has VD, has sex with Dr. Wife of Dr. David, giving her VD directly and indirectly to Dr. David.* Duty? Yes, foreseeable victim.
* **Reasonably foreseeable** that husband and wife will have sex, persons with VD has duty to warn and not to spread own disease to partners
  + Restrictions:
    - * No duty to further lovers beyond husband (not foreseeable).
      * No duty once Dr. Wife becomes aware of contraction of disease because duty transfers (cheapest cost avoider now = wife).
* **Duty to Rescue**
* General principle is **NO duty to rescue**.
* *Exceptions*:
  + 1) Where **D participated in creation of risk**
  + 2) Where **D volunteered to rescue** and either *did not* OR *stopped* rescuing midway
  + 3) Special **relationship**; Ex: Baker (Taco Bell invitee, public space)
* Misfeasance (acting improperly) v. nonfeasance (failing to act)
* **WHY not have a duty to *easy* rescue?**
  + Cons
    - Don’t want to *force* individuals to act: free will (libertarian bias, anti-communism)
    - Difficulty of sorting out WHO responsible (multiple bystanders, distances, etc.), though law could figure out a rule
    - May reduce incentives for person BEST able to prevent from doing do (parents, friends, etc.) – societal befliefs
    - May reduce altruism b/c now legal duty instead of heroism
    - May reduce social welfare by encouraging harmful/dangerous rescues (hurt victim, injure selves, etc.)
    - Difficult to draw line between difficult and easy rescue (don’t want to force people to endanger selves to rescue others) – better to leave to society at large
    - Already have reputational repercussions & own guilt for failing to help another (don’t need law)
    - Protect the autonomy of the “victim” (maybe not actually an emergency! just invaded someone’s life in trying to “save”)
    - Difficult to prove if D who failed to save was even *aware* of or should have known of victim’s danger (though could craft law for only actual knowledge)
    - How far would this extend? Duty of risk countries to help poor countries?
  + Pros
    - Encourage caring society (can’t just walk away from victim)
    - Low cost to rescuer preventing large cost to potential victim (maximizes social welfare)
    - Seems moral (“Good Samaritan”)
    - Any of us would want to be rescued if we were victim
    - Ensures that *someone* will act (not all just think someone else will do it)
    - We would rescue anyway, so why not make it law?
* *Osterlind v. Hill (1928)*: *Drunk rents canoe and drowns after yelling for 30 minutes to canoe renter within earshot*; no duty to rescue.
  + Decided incorrectly?? Renter had relationship with P; modern precedent (exception categories 1 & 3)
* *Baker v. Fenneman & Brown Properties (2003)* – *P collapses at Taco Bell, uncertain if employees aided, P gets up and collapses again, no aid given, P stumbles out to get help from friends*; D owed duty to P to show reasonable care (not onerous)
  + Reasoning: (1) store owners invited person on land (Restatement states duty to *invitees*; special relationship), (2) cost benefit analysis (duty is low, cost (pain!) is high); (3) businesses should be doing this anyway, for own good (bad publicity/image, what if food was cause of injury?)
* *Tarasoff v. Regents of University of California (CA 1976)*--*Psychiatrist D treats patient who said he was going to kill decedent P; psychiatrist tells police to restrain patient which they do but they promptly release him, and no one ever tells P or her family; she is killed upon her return from abroad.*
  + Duty to warn or take *reasonable* steps, particularly based on professional standards, since doctor *knew or should have known* of *credible* threat to 3rd party.
  + Factors considered under *Tarasoff*, *Rowland*, and *Dillon* (if NEW duty case):
    - 1.  Foreseeability of harm to P
    - 2.  Degree of certainty that P suffered injury
    - 3.  Closeness of the connection between the D's conduct and the injury suffered
    - 4.  Moral blame attached to D's conduct
    - 5.  Policy of preventing future harm
    - 6.  Extent of the burden to D and consequences to the community of imposing a duty to exercise care (Includes crushing/unlimited liability)
    - 7.  Availability, cost and prevalence of insurance for the risk
  + Policy reasons for duty: benefits outweigh costs (burden on therapist manageable, standard w/in profession, BUT profession says unable to make accurate assessments); unnecessary warnings not bad; sacrifice of confidentiality/liberty of mental patient worth it for safety
  + Decision has been LIMITED now: therapist must have ACTUAL knowledge of serious threat of physical violence against identifiable victim; must take *reasonable efforts* to warn victim and tell police.
* *Kelly v. Gwinnell (1984)*--*Social host serves alcohol to guest who drives home and gets into an accident with P who sues social host.  BAC= 13 drinks!*
  + Duty imposed on social host; outlier case - usually no liability of social hosts to third party victims; why different?
    - (1) Host *directly* served guest (as opposed to self-service or other servers)
    - (2) Host must be *aware of guest’s intoxication* AND *that guest is likely to drive*
  + Policy:
    - Good: compensates victim; deter wrongful conduct; save lives
    - Bad (though seen as minimal): intrude upon social norms (though will help reduce drunk driving); responsibility away from drunk driver, so less deterrence for actual drunk driver (but both will be held liable, so still deterring), homeowner’s insurance policies may go up (but is good b/s spreads risk)
* *Wagner v. International Railway Co. (1921)*--*Man falls off train while on bridge; P comes to look for him in the dark and also falls off tracks; P sues on breach of duty of care to victim and piggybacks his own case*; “Danger invites rescue”
  + Rescuers CAN sue based on breach of standard of care to victim attempted to be rescued; wrong to victim is also wrong to rescuer.
* **Premises Liability**
  + Different standards of premises liability recognized by different jurisdictions:
* (1) **Unitary Approach**: **general duty** of *reasonable care* (highest standard of care: NY, CA - *Rowland*)
* (2) General duty of reasonable care *except* to trespassers (middle road)
* (3) Duty of care making *distinctions* between invitees, licensees, and trespassers (“**special status**” rules b/c value right to exclude)
  + **Trespasser**: anyone on land without permission (duty owed to ***avoid willful/wanton injury*** to trespasser)
    - Landowner has right to EXCLUDE.
    - Exceptions where trespassers receive more duty:
      * **Frequent trespassers** (commonly used shortcut; landowner must *warn* of artificial conditions along that shortcut)
      * **Children trespassers** (“attractive nuisances” = old formulation; new formulation is broader and protects children if it is *foreseeable* that they will show up and be endangered by something) – duty to *warn or protect* from artificial conditions involving a risk of *serious harm or death*.
  + **Invitees:** express/implied consent of landowners for financial benefit of landowner (business guests, not necessarily for mutual benefit) OR if landowner has opened up land for public use (public guests)
    - Duty of *reasonable care to* ***investigate, fix, and warn*** (liable for unknown dangers)
  + **Licensee:** social guest (no duty)
    - Majority: *duty to* ***warn of or remedy*** *known (or should have known)* ***concealed/hidden*** *dangers*, often depends on jurisdiction
    - Minority: *no willful or wanton injury* (same as trespassers)
* **Cost-Benefit Policy Reasons for Status-Based Distinctions:**
  + Trespassers:
    - P = low, trespassing infrequent (thus, benefits low)
    - B = high (building fences, society of signs and fences, etc.)
    - Trespasser is the cheapest cost avoider = just don’t trespass
  + Licensees
    - P = higher than trespassers, will have on land
    - L = higher, social injury (victims less likely to trust future landowners, less invitations accepted)
    - B = low (only have to warn about what know or should have known; don’t have to affirmatively look for issues w/property and fix them)
  + Invitees
    - P = highest; thus, B is highest
* **Status-based v. Unitary Approach (which is best?)**
  + Effect of homeowners’ insurance?
    - Raise prices under unitary (but homeowners should just raise their standard of care, so don’t have higher prices)
    - But, in general, insurance reduces incentives to proper action (insurance will just pay for it – *Vaughan*)
  + Maybe no big difference: same people recover as usual (trespassers still usually don’t)
    - BUT more cases go to trial under unitary, so more settlement power passed to Ps (status-based can throw out case early)
  + Pros of status-based:
    - Clarity of rules
    - Discourages litigation against homeowners / more protective of property rights
    - Reflects distinctions society is already making (stores fix broken items b/c of reputational effects; much less an issue w/social guests)
  + Cons of status-based (reasons for unitary):
    - No substantive reason for distinction between invitees and licensees (just luck of the draw)
* **Policy Reasons for Property Rights** (GENERAL **right to exclude**)
  + Why do we enforce property rights
    - Induce people to labor (societal benefits; productivity)
    - Induce investment
    - Induce trade (must OWN to trade)
    - Promote peace and non-violence (*avoid self-help*)
    - Property rights are sometimes *integral to self well-being* (land, wedding ring)
  + Utilitarian approach: property exists to maximize the happiness of all citizens
  + Integral to capitalist system
  + BUT still want to *protect people over property* (privilege of private necessity)
    - *Ploof v. Putnam*, *Vincent v. Lake Erie Transp. Co.*
    - Value of human life: ensuring the law does not stop people from saving life
  + Economic rationale for private necessity:
    - Avoid undue exploitation of victims in emergency situations
    - Minimize overall losses of property and lives
  + Autonomy theory for property (it’s mine!)
  + *Carter v. Kinney (1995)--Bible studiers slip on ice in front of D’s private home where Bible Study is hosted*
    - Phrases duty to licensees differently.
    - Court finds studiers are licensees, not invitees, because house was not made open to public therefore no liability (D had shown some reasonable care in shoveling snow but driveway froze over anyway and D didn’t know); Court doesn’t want to impose liability for people who open their homes for this sort of purpose.
  + *Rowland v. Christian (1968)--Rowland was licensee who went to the bathroom and had glass knob break in hand*
    - Licensee status but it didn’t matter because a *unitary approach* was taken to do away with distinctions.
    - Dissent: legislature should make the change!
  + *Leffler v. Sharp (2005)*--*patron of bar/hotel climbs onto roof through window despite sign on door to roof stating “NOT AN EXIT”; is injured on roof & sues*
    - Court says patron was transformed from invitee to trespasser when emerged onto roof; no liability because of status based standards.
* **Pure Economic Loss** (no physical injury or personal property damage)
* Can recover for economic loss when attached to any claims of property damages or injury
  + Ex: when an explosion causes economic loss in an area, businesses hit with debris can recover for damages and economic loss; businesses not hit can recover for NOTHING
* Generally cannot recover for **pure economic loss**, BUT 3 exceptions:
  + Special relationship: **accountant** doing audit which *knew would be relied upon*; (also sometimes **attorneys** considered special relationship)
    - (1) Knew WHO would affect (*exact identity* of creditor known, quasi-privity relationship between creditor and auditor)
    - (2) Knew HOW would affect (know that work is being relied upon by a *specialized group*, just don’t know the identities of the members of the group); OR
    - (3) Generally foreseeable (most liberal, least popular...just know that is *likely to be used by SOME party*)
  + **Fishermen**: within 3 miles of shore, “public trust” of all citizens of state; fishermen ONLY have a *quasi-property right* to state waters, so may be able to recover for pure economic loss due to pollution.
* There can be a step[s] between property damage and loss of income, but there must be *a chain of causation* proving *actual* loss.
* **Policy** - can’t recover for pure economic loss b/c:
  + There’s no net loss for society, just a transfer of where money is spent.
  + Indeterminate and potentially limitless liability
  + Businesses should buy own business interruption insurance (cheaper for society overall, no litigation costs, least cost avoider); encouraging this
  + Law doesn’t protect people’s wealth or right to generate income, alone (no property right to have a business and no liability of other party for putting company out of business)
  + Proof issue: maybe it was something other than this wrong that caused economic loss (economy dropping, etc…like in BP)
  + How know that company won’t/didn’t regain sales upon re-opening?
* BUT
  + Under-deterring wrongdoer?
  + Justice! Innocents shouldn’t have to pay!
  + Fortuitousness of businesses that suffer property damage too (arbitrary)
  + If law doesn’t protect businesses, then why not let business doing the harm suffer the consequences?!
* *Aikens v. Debow (2000)*--*Truck driver damages highway forcing closure impeding business of P motel owner; hotel sues trucker for pure economic loss*
  + P cannot recover because trucker had no special relationship or knowledge leading to foreseeability of economic loss; despite highway’s proximity to motel and existence as main entry (other ways to get to motel)
  + *People Express* (1985) cited: *toxic chemical leak next to airport forces evacuation of P airline office*; P wins pure economic damages; court establishes test of liability where if D has “special reason” and can reasonably foresee damages =>liable (subjectively foreseeable – part of evacuation plan, permanent physical proximity, argument for property damage = evacuation, chemical gases infiltrated building)
* **Emotional Distress** (NIED: Negligent Infliction of Emotional Distress; not accompanied by any physical injury)
* Certain Intentional Torts (*assault, offensive contact battery, and IIED*) allow for recovery of emotional distress as standalone damages; *usually* though, recover for emotional distress *parasitic* to your claim.
* Two categories of claim:
  + (1) **Direct action**
    - Based on a tort committed *against P, personally* (for example, car near miss; victims before death for *pain/suffering*)
      * Wrongful death claim
    - Some states require *some level of impact* even if resulting in no real injury; now there’s “*near miss*” in states also: **zone of danger (physical)**
    - Emotional distress must be sufficiently *severe* to cause recovery
  + (2) **Bystander action** (*derivative* actions - suing based on victim’s successful claim; most states allow)
    - Suing for emotional harm arising out of [often viewing] *injury of* *another party*
      * In comparative fault regime, each claim will be reduced accordingly
    - **Factors** to consider if **“foreseeable” NIED victim** **(as bystander)** : (1) relational proximity (parent, etc.), (2) spatial proximity, (3) temporal proximity, and (4) actual *severe* emotional distress beyond that expected of a disinterested witness (some states require *physical manifestations*)
    - Diff standards for diff states:
      * Sometimes have to ALSO personally be within “zone of harm”/ “zone of danger”
  + **Exceptions:** 
    - Family of deceased can sue for **negligent handling of** **body** regardless of presence because family’s distress is expected.
    - Family being **erroneously notified of family member’s death**
    - **Fear of future harm developing if extreme** (actual exposure to extremely toxic, harmful, or contagious substance, ex: carcinogen/HIV)
  + **Policy reasons for *restrictions*** on recovery for pure emotional distress:
    - Imposing disproportionate liability on Ds (“limitless” liability)
    - Fear of fraudulent claims & skepticism about it being legitimate injury
      * Gender-bias (women more likely to recover)
    - Even if is injury, is the type of thing that can be recompensable through $?
    - Other avenues in law for compensation of family members (survival action, wrongful death action)
    - Imposing social costs: higher insurance premiums, so less people can buy insurance = less coverage AND less recovery in end
    - Not clear to what extent people value emotional contentment (tort law should mimic value in marketplace, shown through buying insurance)
    - Over-deterrence
  + **Policy reasons for *expansion*** of NIED:
    - Under-deterrence without it; wrongdoer should internalize full costs
    - Under-compensating victims w/out NIED.
* *Dillon v. Legg (1968)--Car hits girl in view of her sister who is in the zone of danger and mother who is not. Both mother and sister showed physical manifestations of severe emotional distress*
  + Rule requiring zone of danger for recovery overturned; allowing mother to recover
* *Thing v. La Chusa (1989)*--*Automobile strikes child, mother arrives after being told that child was struck, sees mangled child and believes him to be dead*; sues for NIED.
  + Ct. finds temporal and spatial proximities to moment of injury NOT met; narrows Dillon holding by turning *4 guidelines* for consideration into *requirements*.
* **Public Duty**: Government entity cannot be held liable for injuries to individual when their duty is actually to the public as a whole and NOT to its individual members.
* Three major immunities that **government** retains :
  + (1) **Discretionary function** (policy): ex. - allocation issue - don’t want to legislate allocation of state funds through courts
  + (2) Most states have kept the **intentional torts** element of sovereign immunity
  + (3) **Public duty** (police, fire dept, etc.), analogue to sovereign immunity
  + **Exceptions:** 
    - (1) Police ***undertake*** special duty to protect individual, then duty to that individual
    - (2) Usually liable for **proprietary activities** - historically carried on by private sector (no public duty exception)
  + **Policy reasons** for city and local govt immunities:
    - Want to protect the public treasury
    - Allocation of public money determined by legislature, not judiciary’s role
    - Alternative means of redress available (go to legislature, get them to pass private bills)
    - BUT govt not internalizing consequences of actions (more in dissent in *Riss*)
* *Riss v. City of New York (1968)--P complains to police that she’s being harassed and threatened by her ex, calls police to ask for help, who blow her off; ex gets thug to throw lye in her face, P sues city*
  + City NOT liable because of Public Duty rule - their duty is actually to the public as a whole and NOT to its individual members.
  + *BUT SEE*: mid-1980s - mother sues police b/c abusive father mutilates child during visitation when she called for help and they wouldn’t (she also had order of protection against father); police held liable b/c gave mother assurance that they would take action.
    - In NY, judicial flexibility allowing P to sue police for failure to protect (4 factors):
      * (1) Municipality assumed duty to act through promise
      * (2) Agents knew failure to act would lead to harm
      * (3) Contact between agency and person
      * (4) Justifiable reliance by injured party on municipality
* *Strauss v. Belle Realty Co. (1985)--Citywide blackout; P falls down stairs in darkness attempting to get water*
  + Not a public duty case technically -  ConEd is private utility company.
  + P had contractual relationship with ConEd, but was in public area of building covered by landlord’s relationship with ConEd.
  + On policy grounds, NO DUTY because of “crushing/unlimited liability” to ConEd despite ConEd’s gross negligence; duty limited to damages arising out of contractual relationships with ConEd (privity all over again?).

**Causation**

* **Factual/Actual causation** - the person who has wronged P is liable to P, but ONLY if they caused P’s injury (3 speeders, 1 hits = ONLY 1 liable)
* Moving away from but-for causation (including multiple necessary causes (*Mcdonnell*)) to multiple sufficient causes (*Anderson*), alternative liability (*Summers*), market share liability (*Sindell*), and loss of chance (*Falcon*)
* **Policy** (why P must prove **actual causation**):
  + Corrective justice: ONLY wrongdoers should have to pay for harms
  + NOT about deterrence (if this were point, why not have all speeders pay for accidents, even if didn’t cause)
  + NOT really about compensating accident victims (many can’t clearly prove who did wrong/how it happened, so never compensated)
* **But-for causation (TEST)**
  + 1) identify the **injury**
  + 2) identify the **untaken precaution or the wrongful action** by D
  + 3) **what would have happened** if D had taken the precaution/not done the wrongful conduct---> if the injury would still have resulted, D is not the “but-for” cause; if the injury would have been avoided, D is the “but-for cause”
  + There can be *many* but-for causes (for example, birth)
  + Looking at problem *ex post*, not ex ante: what is the chance P would have died had D taken the precaution?
    - **Formula**: (# that would die w/out precaution) - (# that would die w/precaution) / (total # that would have died w/out precaution)
      * If over 50% = “but for” cause
      * “Yes-no” test: either have a but-for cause OR you don’t
    - Don’t need to eliminate all other possible causes, but P’s theory of causation must the most likely (more than 50% likely) to win. If not, no “but for” cause.
  + *New York RR v. Grimstad (1920): decedent falls off boat, decedent’s wife attempts to rescue but is unable due to lack of life buoys, decedent can’t swim and drowns;* NO actual causation (judge overrules jury) b/c there is too high a probability he would have died anyway (since he can’t swim)
  + *Skinner v. Square D Co (1994): P built a home-made engine that uses an on-off switch that was made by D; switch has a phantom zone, P’s machine requires manual disconnect and switching of wires; while doing so P dies because he thought switch was off and it was on and he was electrocuted*
    - 4 theories of causation in this case, ONLY *one* of which made D a but-for cause; all of the theories are *equally* likely
    - P is unable to show more than a 50% chance that D is a but-for cause.
    - *Reasonable inferences of causation* required, NOT just mere causation.
* **Loss of chance doctrine**: only applied in med mal cases in certain states; redefining the injury examined from \*death\* to the \*loss of chance to survive/loss of opportunity to avoid harm\*; *departing from but-for test* for “doomed Ps”.
  + Adopted in 20 states and DC; usually if P dies, but even for injury in some
  + **Public policy** motivations:
    - (1) Want to ensure doctors do *everything they can* to save people; otherwise, no incentive to save patients with less than 50% chance of living.
    - (2) Contractual relationship between doctors and patients leads to *greater expectations* of what doctors will do (come b/c sick, supposed to FIX)
    - BUT over-deterrence AND increase in insurance premiums for society
  + Diff ways that loss of chance can apply to **damages** (through substantial factor test):
    - 1. Allow full recovery for P
    - 2. Allow recovery for the %age of damages that was the loss of chance caused by D doctor’s negligence
    - 3. Allow recovery for the %age chance that D doctor actually CAUSED death (not used yet)
      * Ex. 50% chance of injury w/treatment went to 75% w/out = 25% loss of chance and 1/3 chance that D *caused* injury (25/75)
  + Should we move to **percentage damages** for *all* actual cause determinations?
    - Maybe actual cause should not be an all-or-nothing determination, but rather a percentage determination; otherwise = over-deterrence (but for = 100% PLUS %ages of loss of chance which would fail under but for); though system under-deters in other instances, so balances out
    - BUT higher admin costs for proportionate liability in general
  + Diff ways **Substantial Factor Test** is used in law (confusing, try NOT to use, R3d is trying to purge from law):
    - More than 50.1% chance
    - Equivalent of “but for” test
    - Cases of multiple sufficient causes
  + *Falcon v. Memorial Hospital (1990): P had amniotic fluid embolism, if doctors given her an intravenous line she would have had a 37.5% chance of survival* 
    - Would have failed but-for causation test because there was less than a 51% chance that the doctor’s lack of action caused her death (there was a 62.5% chance she would have died anyways)
    - **Substantial Factor Test**: if there was any **“substantial” possibility of survival** AND D has destroyed it, D is liable.
* **Multiple Necessary Causes** (*type* of But-for Cause)
  + *McDonald v. Robinson (1929): 2 Ds were driving and they get into a collision; P was a bystander and got injured*
    - Both Ds are liable because, w/out either, the injury to P would not have occurred (joint and several liability)
      * P can recover up to 100% of the damages from either or both Ds
* **Multiple Sufficient Causes**: cases of over-determined/duplicative causes
  + *Anderson v. Minneapolis (1920): fire A merged with fire B of unknown origin and caused a house to burn down;* ***either fire alone*** *could have caused the house to burn down*
    - *Both* fires should be deemed the *actual cause* of the injury, so joint and several liability for D (but since no other D, then fully liable, alone)
    - Don’t want D to benefit from fortuitous situation, deterrence.
  + *Aldridge v. Goodyear (1999): workers at Aldridge were exposed to a “toxic soup” of chemicals, Ps are experiencing diseases/injuries; Goodyear supplied 10% of the harmful chemicals; diseases in Ps were caused by interaction of chemicals; could not disprove lifestyle causes* 
    - “**Toxic tort case**” - NO common accident, *long-term exposure* and growth of diseases
    - Cannot establish but-for cause; cannot prove any Goodyear chemical was *necessary*
      * Cannot prove *substantial factor test*-- cannot show any *individual* chemical would cause injury
      * **Daubert test**--(expert testimony) judges must establish expert/scientific evidence is reliable (peer reviewed) and relevant
    - Court could not find D liable because (1) *toxic soup*, (2) only suing a small percentage of chemical providers, not substantial enough, (3) dealing with soup of *various* chemicals of which did NOT have **specific and obviously connected “signature** **diseases”** (possible lifestyle choice related diseases, unlike asbestos, DES, etc.)
    - Not suing employer because of worker’s comp
* **Alternative Liability**
  + *Summers v. Tice (1948): 3 men hunting quail together, they triangulate, and 2 Ds shot at P by accident; one injured P (not sure which)*
    - NOT:
      * (1) But-for cause b/c each D could blame the other D (one of the Ds was clear cause, but specific D was uncertain)
      * (2) Multiple necessary causes b/c only 1 D was necessary for the injury
      * (3) Multiple sufficient causes b/c can’t tell which D’s shot was sufficient for the injury (and only one did it)
    - Court *shifts the burden of proof to Ds to* *show* that NOT liable for the injury, rather than forcing P to prove which D is liable
      * Ds are better able to prove they are not liable than P (legal fiction)
    - Joint and several liability
    - **Key facts**: (1) ONLY 2 D’s (limited uncertainty because *all possible wrongdoers* joined), (2) acted simultaneously, (3) both D’s breached standard of care, (4) indeterminate but-for cause
    - Policy: only way for P to get compensated
* **Market Share Liability**
  + ONLY imposed in DES context
  + **Key Factors:**
    - (1) *ALL identified Ds* are potential tortfeasors
    - (2) Product must be **fungible**
      * Each D had the *same likelihood of causing the same amount of harm* through each pill (generic drug, same dosages)
      * *Market share becomes a good proxy for overall harm* by each manufacturer.
    - (3) P must have sued a **substantial share of the market**
    - (4) P must **not be able to identify** which D is responsible through **no fault of P’s own**
  + **Policy** arguments **FOR** market share liability:
    - Not joint and several liability
    - Each manufacturer is liable for **damages equal to their share of the market**
    - Allows for compensation and deterrence
      * BUT turning Tort law into social welfare mechanism (taxes better)
    - Burden-shifting (burden shifted to D) b/c too burdensome for Ps (would get away w/out paying otherwise)
    - Efficiently distributes losses that arise from negligently manufactured products (manufacturers can get insurance, increase price of goods)
      * BUT also leads to deep-pocket searching
    - Manufacturers are the cheapest cost avoiders of the injury (efficient deterrence)
    - Alls Ds responsible for injuring some people (just not necessarily these people)
  + **AGAINST**:
    - Impractical/costly to administer
    - Allows victims to recover from Ds who may not have harmed them
    - Not uniformly the case that toxic substances cause signature diseases (why not used more)
    - Task better suited to legislature or executive branches (social insurance scheme), BUT class actions do same thing and aren’t viewed as negatively
    - Tort law is now about reducing tort liability (v. when *Sindell* decided)
  + *Sindell v. Abbott Labs (1980): women are suing DES manufactures because their mothers took the drug during pregnancy and now they have many health issues; limited time frame when drug was produced, class action, Ds represent 99% of drug manufacturers, drug was identical between Ds and women cannot tell which D they got the drug from (impossible to tell)*
    - **NOT**:
      * Alternative liability b/c not all possible wrongdoers were joined (the 1% that was not represented could have manufactured the drug that P’s mom took) AND no simultaneous activity (like *Summers*) AND no EQUAL chance that each D did it (like 50% in *Summers*)
      * Concert of action liability (ex: drag race - everyone understands they negligently acted together);
      * Industry-wide liability (*Halls* case: blasting cap manufacturers held liable for the standards they set up; oligopoly, with safety standards board for all)
    - In some states, Ds can avoid liability by showing they could NOT have caused the injury to the P (due to not selling at the time, in the state, etc)
    - Key question: what is the market that liability is being measured against? National? State? Community?
  + *Skipworth v. Lead Industries (1997): kid eats lead paint and gets sick, mother sues all manufacturers of lead paint over a 100 year period* 
    - NOT market share liability b/c they can’t specify *when* lead paint was manufactured and thus *cannot narrow down who was liable*, also lead paint was *not fungible*
      * Many types of lead paint, some with much more lead content and thus much more harmful than others.
      * 100 year time frame means many companies that could be liable are not longer around and many that could NOT be actually liable are being held as Ds (too unfair, uncertain)
* **Proximate Causation:**
  + In most cases proximate cause is evident, but in “*freak cases*” in which P’s injuries are remote from D’s actions; proximate cause can be used to limit liability for a **specific set of facts** (rather than a general policy); usually a jury determination.
  + Policy: don’t want to hold Ds strictly liable (would deter socially desirable conduct); imposing disproportionate liability on wrongdoer
  + Fact patterns that give rise to contentious proximate cause arguments:
    - (1) Unforeseen P/manner/result: *Palsgraf*
    - (2) Superseding/intervening cause: *Pollard*, *Clark*, *Jolley*?
    - (3) Unforeseeable harm: *Jolley*, *Kinsman*
* 4 Tests:
  + (1) Natural and ordinary consequences (ex: fire - “one leap rule”)
    - No longer used
  + (2) Directness tests- P’s injuries had to flow directly from D’s negligence
    - No longer used
    - *Polemis*  (1921) -- workers dropped plank into ship causing explosion (liability found, though not foreseeable, because direct result)
  + (3) **Foreseeability test** (*dominant* test)- P’s injures must be seen as *reasonably foreseeable ex ante* at the time D acted; D *should have foreseen* those injuries
    - *Wagon Mound I*- owner of neighboring dock sues a ship that pours oil into harbor; it was seen as unforeseeable and no liability found
    - *Wagon Mound II*-- another ship owner sues the ship that poured the oil; the ship-owner had foreseen the fire (though assured by dock owner it wouldn’t catch fire); it was found foreseeable and liability was found
  + (4) **Risk-rule test** (3rd restatement test) - was the injury to P within the scope of risk(s) that *made* D's action negligence *in the first place*
    - A lot like neg per se
* *Union Pump v. Allbritton (1995): defective pump catches fire, it is put out causing everything to be wet; P is sent to turn off a switch, crosses wet pipes on short-cut for speed; the fire is put out; P crosses pipe again on way back (short-cut), slips and is injured*
  + NOT a foreseeable consequence of defective pipe b/c state of emergency is over and P chose to take short cut, NOT out of urgency.
  + Majority and dissent disagree over whether the “state of emergency” was over or continuing when P slipped
* *Jolley v. Sutton London Borough Council (2000): 2 teenage boys are playing/working on abandoned rotting boat on property, boat falls on boy, breaking back*
  + How broad is the foreseeable risk: is it foreseeable that children will come play and be injured or that children will come meddle with the boat in general?
  + P wins: it is foreseeable that children will interact w/boat in general; type of injury was foreseeable even if not the specific manner in which the injury occurred.
  + THIS IS ENGLAND
* **Intervening and Superseding Causes** 
  + Does an intervening force absolve D from liability?
    - Could be nature/contributory negligence…
  + NO “last act” rule (last person to act neg is liable)
  + **Superseding causes** are those *intervening causes* which remove liability from D
  + *Pollard v. OK City Railway (1912): P’s friend collects blasting powder improperly disposed of at site (but not in dangerous quantities until gathered), friend’s parents know it is being gathered and tell friend to get rid of it, but do nothing else; P and friend light the blasting powder and P gets injured; P sues blasting company for negligent disposal*
    - D wins because there were intervening superseding factors: friend’s gathering powder, supervisory negligence by the parents, contributory negligence of P
  + *Clark v. DuPont (1915): D negligently leaves explosives at site, McDowell finds the explosives and moves them to an old no longer used burial ground for safety, 2 years later P (children) find it and play with it; P gets injured* *(did not know what it was)*
    - D is liable-- McDowell is not deemed a superseding intervening cause
      * “No new power of doing mischief” added to glycerin
      * Inherent danger of the explosives
      * Intention of intervening party was not bad
  + *Palsgraf v. Long Island Railroad (1928): man running to catch train with package, 2 railway men help him make the train; package is dropped; causes explosion; woman on other end of rail station is injured when scale falls on her* (*package did not appear dangerous)*
    - Cardozo (majority): No liability due to no duty (actually no proximate cause because she was an *unforeseeable victim*)
      * “proof of neg in the air is not enough”
    - Andrews (dissent): there *is* duty, and it’s a *proximate cause* question (AND in the end there is liability here)
      * Duty owed due to common carrier and public space
      * Wyman agrees with Andrews analysis BUT finds no proximate cause and no breach
      * Foreseeability test of proximate cause
  + *Kinsman Transit Co (1965): boat 1 gets loose due to poor tying to dock and poor dock construction, boat fails to anchor and hits boat 2, boat 2 and 1 flow down the river, bridge does not go up in time despite due warning, boats cause a dam which causes a flood, damaging surround property*
    - Foreseeability test to hold boat 1 and city negligent.
    - Public policy, foreseeability and *directness* to hold dock-owners negligent
    - Risk-rule- we want boats properly moored to avoid property damage, thus this was the type of damage that was supposed to be avoided.

**Defenses**

* **P Fault - how do we deal with it?**
  + 1) **Ignore** P fault-- ex: intentional torts
  + 2) Make P fault a complete **bar to recovery** (contributory negligence)
  + 3) **Divide damages** between P and D *equally* -- old admiralty law
  + 4) **Comparative responsibility**-- *proportionate* liability
  + 5) Allocate responsibility in ***inverse ratio* to party's cost of avoiding** the injury
* **Policy**: WHY take P fault into account?
  + Cheapest cost avoider should pay the most (reduce accidents overall; even if joint care needed)
  + Simple fairness
* **Safety statute exception**: NOT applied often nor interpreted broadly
  + If D's neg consisted of breaching a *safety statute* intended to protect a group of persons who were regarded as *not being able to protect themselves*, then for those Ps that were part of the group that was not able to protect selves, contrib neg is NOT a bar to recovery (e.g. – kids on school bus)
  + Applies to *comparative fault* AND *contrib neg*
* **Contributory Negligence:** complete bar to recovery **(**still in place in DC)
  + Exception: **last clear chance doctrine**-- if D acted negligently last, P could still recover
  + P’s negligence is determined in the same way as D’s negligence
    - More likely to take into account age, race, religion, gender, etc in contributory negligence of P
  + Willful, wanton, or reckless conduct exception: if D is liable for an intentional tort, P’s contributory negligence is ignored.
* **Comparative Responsibility/Fault**
  + Degree of *culpability*, not % causal contribution of their behavior
    - Jury looks at:
      * (1) How *unreasonable* was the conduct of the parties?
      * (2) What was the *extent* to which parties' conduct *failed to meet standards*?
      * (3) Each person's *abilities*/*disabilities*
      * (4) *Intent* of each party
      * (5) *Circumstances* surrounding the conduct
  + P’s fault is assessed using **objective standard** where D must prove that P’s acts were *actual/proximate cause* of P’s injuries
* **Policy** reasons for switching to comparative fault regime:
  + Fairness/compensatory rationale (strongest), BUT tort law is not efficient
  + Economic: reduce # of accidents and costs (contributory negligence under-deters, especially when Ds can predict when Ps aren’t taking care)
    - BUT could reduce the incentives of Ps to take care (though still usually have a bar of more than 50%, so still have to be careful)
  + BUT costs more to administer (have to allocate costs every time)
* SIDE NOTE: where comparative negligence, should stop taking subjective characteristics of P into account (mental impairedness, religion, etc.) – R3d takes this stance
  + Different forms exist:
    - **Pure comparative responsibility**: P can recover even if up to 99% liable for own injuries (recovering 1%)
    - **Modified comparative responsibility**: There is a *threshold of fault* above which P is barred from recovery:
      * If P is 50% or more responsible, cannot recover
      * If P is more than 50% responsible, cannot recover
      * If P is slightly responsible they cannot recover
        + Almost contrib neg.
      * In cases in which there are multiple Ds, aggregate D’s fault and P would have to be less liable than combined Ds
  + *Hunt v. Ohio (1997): P is inmate who was instructed in use of snow blower but not danger of sticking her hand in it; P puts her hand in snow blower to clean it and loses fingers*
    - P wins, but P 40% comparatively responsible for failing to use *common sense*
* **Assumption of Risk**
* **Express** -  a contracted waiver (“**exculpatory clause**”) of D’s liability to P: often in *writing*, when not in writing can be *assumed through acts/statements*
  + Complete bar to recovery
  + P must *know* about the risk and *magnitude* of it to expressly assume it, P must *knowingly and voluntarily* assume the risk
    - Posted signs are insufficient unless brought to P’s attention)
  + **Tunkl Test**: things to consider when deciding whether or not *express assumption of risk clause* (“waiver” clause) is void as a matter of public policy
    - a) Is this business *suitable for regulation*? (e.g. - utility)
    - b) Is it performing an *essential service*?
    - c) Is D holding self out as somebody *willing to serve anybody* (implies *public interest*)?
    - d) Does D have a decisive *bargaining advantage* over P (perhaps b/c of the essential service it provides)?
    - e) Is this an *adhesion contract*? (no bargaining ability, essential service)
    - f) Is purchaser putting self *under control of* D?
    - Overall: is there some sort of *decisive bargaining advantage* and is there is a *public interest reason* for not enforcing the waiver?
  + **Policy** considerations:
    - Ds have more control
    - Ps don’t understand risks
    - When individual Ps contract for lower standard of care from Ds, aggregates to affect all other customers (D will lower standard of care for all, wrong incentives)
  + *Jones v. Dressel (1981): P signs waiver (and has opportunity to pay more not to sign waiver) to use D’s facilities for skydiving, there is an accident while P is in the plane and P gets injured when plane crashes*
    - P’s waiver was enforced
    - No adhesion contract (no essential public service, private contract)
  + *Dalury v. S-K-I (Vt 1995): P skis into metal pole on D’s land; D invited public onto his land to ski.*
    - D liable; waiver unenforceable (*void as a matter of public policy*)
    - Premises liability (lowest cost avoider); far more private transactions leads to a public interest; distribute considerations (ski resort can spread cost)
    - Tunkl test (ABOVE)
* **Implied** – non-contracted waiver of liability, D must show that P’s actions and behavior indicate P implicitly assumed risk
  + D must show that:
    - (1) P **knew** about risk (cannot be implied)
      * *Actual knowledge*: **subjectively knew** and **appreciate magnitude/implications**
    - (2) P **voluntarily assumed** risk
      * Negated by *force, fraud or necessity* (no reasonable altrnative)
    - (3) P **actually encountered** the **exact risk** which assumed liability for
  + Implied assumption states:
    - 1) Complete bar to recovery (contributory negligence regime)
    - 2) Reasonable v. unreasonable (comparative negligence regime)
      * **Reasonable** - *complete bar*
      * **Unreasonable**- *comparative negligence*
    - 3) Nonexistent in some states (only can do comparative negligence)
    - 4) NY “Hybrid” Statute: implied assumption of risk as *distinct* from comparative, BUT only reduces award by %age (partial defense)
  + Other states: primary and secondary *implied assumption of risk*
  + **Primary**-- actually NOT assumption of risk, but rather NO duty (risks inherent in activity, doesn’t matter whether P *actually* understood risks)
    - * Ex: recreational sports
      * P knew risk because it’s *open and obvious*-- the more obvious the risk; the less likely a breach will be found
      * *Murphy v.  Steeplechase Amusement Co (NY 1929): p gets on a ride where he runs on a conveyor belt and then falls; he breaks his kneecaps; he had been watching the ride and knew what it was/did,* “Flopper” case
        + P had assumed the risk (open/obvious), no breach
    - **Secondary** - there is an actual implied assumption of risk (but isn’t this just comparative fault?); can be broken into reasonable and unreasonable
      * ex: Smollett case (skating rink, BELOW)
  + *Smollet v. Skayting Dev Corp (3rd Cir 1986): p goes to skating rink, no guardrails, raised rink, p almost runs over a child and to avoid him she turns and skates off the rink onto carpet, falls and breaks wrist; signs posted in rink “skate at your own risk”*
    - P had a reasonable awareness of risks and still assumed of risks--> she was barred from recovery
    - Virgin Islands (*reasonable* assumption of risk = complete bar on recovery)

**Strict Liability**

* LOOK AT SIX FACTOR TEST **AND** POLICY CONSIDERATIONS FOR OUTCOME
  + ***6 Factor test for Strict Liability - 2d Restatement of Torts §520:***
    - a. Existence of *high degree of risk* (P)
      * Abnormally dangerous/ultra hazardous activities
    - b. *Likelihood that harm* resulting from risk will be *great* (L)
    - **c.** *Inability* to eliminate risk by exercise of *reasonable care*
      * (Negligence simply will NOT do)
    - **d.** Extent to which activity is *not a matter of common usage*
      * Uncommon usage means *nonreciprocal risk*: P unlikely to know how to avoid risks D imposes, or even to be aware of such risks
    - e. *Inappropriateness* of activity to *place* where carried on
    - f. *Value to community* of activity is *outweighed by its dangerous attributes*
      * C and D end up being the most important in case law; don’t need ALL factors necessarily.
* **Strict liability** = legal responsibility for damages or injury even if the D not at fault or negligent
  + ACTUAL/PROXIMATE CAUSATION is still an important factor (but NO need to prove breach).
    - Ex: Blasting noise causes frightened mink mom kills babies *see* ***Foster v. Preston Mill Co.*** (WA 1954).
* **Areas** of Strict Liability
  + 1. Abnormally dangerous activities: blasting, large reservoirs, gas/tanker trucks, “gathering/keeping things which are a *nuisance if unleashed*”
  + 2. Damages caused by wild animals
  + 3. Some products liability
  + 4. Respondeat superior
  + RES IPSA LOQUITUR can be a way to basically impose strict liability.
* **Defenses** to strict liability:
  + Comparative negligence
  + Assumption of risk (Ex: ***Indiana Harbor***)
* **Justifications for strict liability**
  + - Economic rationale: reduce/change *activity levels*, for example WHERE done (encouraging D to revisit how much they do activities, since courts are generally reluctant to assess activity levels)
      * BUT strict liability doesn’t encourage increased safety any more than negligence
      * Reduces transaction costs by not requiring proof of fault
      * HOWEVER, activity levels should NOT be reduced when *no readily available substitutes* AND activity does a *public good* (***Adams v. Bullock***, above-ground trolleys) OR when D is not in the best position to make things safer/lowest cost avoider (***Indiana Harbor*** - homeowners should move)
      * *Lowest cost avoider*
      * *Internalize costs of activity* (society shouldn’t have to pay); *non-reciprocal risks*
* Distributional consideration - Want to impose costs on party who can spread them most efficiently (deep pockets? But see ***Indiana Harbor***)
  + - * BUT what about NON-TORT remedies like real INSURANCE?
      * Traynor in *Escola* - this SHOULD be strict liability
* Compensatory rationale
  + - * Ps will generally be compensated more than negligence, but may get less (jury lacks moral blame, smaller pie)
    - BUT administrative compensation scheme may be more efficient
    - Justice/fairness
      * Problems of proof: P may not have evidence (often b/c it explodes)
      * High probability that accidents of this type caused by negligence
        + Under-deterrence if evidence unclear/doesn’t necessarily lead to negligence verdict in court.
      * Parties imposing nonreciprocal risks upon others; should have to internalize
      * Autonomy theory - should be compensated when autonomy is interfered with
* **Against (Holmes)**
  + If about deterrence, *why* have strict liability?
    - D has not necessarily been negligent and thus is NOT being deterred from any wrongful behavior
  + Strict liability *deters innovation*
    - Makes companies not want to be *first* in anything (new liability)
  + Goes *against* autonomy theory (restricting actions without good reason)
* ***Rylands v. Fletcher*** (Eng. 1868) - *D builds reservoir on own property, ignores mine shaft; floods neighbor/P’s mine*
  + HIGH RISK OF DANGER/ESCAPE and leading to danger/mischief
  + Property rights!
  + Not negligence, not nuisance, not trespass
* ***Indiana Harbor Belt Railroad v. American Cyanmid Co.*** (7th Cir., 1990) - *hazardous* *chemical spill loaded/shipped by D leaks in rail yard forcing land decontamination ($1M) and causing evacuation of surrounding property. P sues D, claiming shipping chemical through dense urban area should be subject to strict liability*
  + HELD: No strict liability, chemical shipper subject to negligence standard.
    - Lowest cost avoider, shipping chemicals not abnormally dangerous, no absence of evidence (leak, not explosion); not an issue between neighbors, contractual relationship
  + ***Siegler*** - transportation of gasoline on highway; truck blows up - could have been res ipsa, but used strict liability
* ***Klein v. Pyrodyne Corp.*** (Wash 1991) - *4th of July fireworks display goes awry and injures person in crowd. Strict liability for fireworks?*
  + Uses 2d Restatement test ABOVE
    - a, b, c: explosions
      * c: reasonable care possible?
    - d: common usage to watch, but NOT common usage to set off
    - e: fairgrounds are OK, actually (against imposing strict liability)
    - f: 4th of July is an important community activity, but SAFETY first
  + Policy issues
    - Fairness: who should pay for damages? cheapest cost avoider? Pyrodyne acted, P viewed (autonomy theory); all evidence is blown up.
* **Worker’s Compensation**: no fault; workers gave up right to sue employers and fellow employees (except for egregious torts); got around Holy Trinity of Defense (Fellow Servant Rule, Contributory Negligence, Assumption of Risk)
  + Still have to prove illness or injury arose through work (occupational diseases problem)
  + Risk-adjusted premiums for insurance that employers have to buy (reflects deterrence; make workplace safer = cheaper premiums)
  + Benefits cover: med care, loss in income, vocational rehabilitation, benefits for survivors, funerals… (NOT pain and suffering)
  + Established though legislation (not individualized like Torts)
  + Categories of workers (which is better: torts or worker’s comp?)
    - At fault: better in worker’s comp
    - Mildly injured: about the same
    - Severely injured: MUCH better in Tort Law, BUT only if company had assets/insurance to pay
  + Exten no fault regime to other areas? (Med Mal, Accidents/Illnesses)
    - Rationale: why do some get compensated and not others? (like lottery) AND inefficient (lots of transaction costs to get compensation)
    - Would create one big fund for each type: doctors pay into one, drivers pay into another, etc.

**Products Liability**

* PRIMA FACIE CASE:
  + 1) P suffered a **legally cognizable *injury***
  + 2) A ***sold* a product**
    - NOT a gift or a service (and no body parts, intangibles, animals, and texts (except maps))
  + 3) A is a ***commercial seller*** of such products
    - Manufacturers, distributors, retailers
  + 4) **At the *time it was sold*** by A, the product was in a ***defective* condition**
    - (Here, you break off into the three branches BELOW)
  + 5) The **defect** functioned as an ***actual and proximate cause***of P’s injuries
* THREE BRANCHES of Products Liability
  + 1. **Manufacturing defect** - STRICTLY LIABLE
    - When product diverges from *manufacturer’s own internal guidelines* for product *(INTERNAL STANDARD)*
  + 2. **Design defect** (2 tests) - when there is a flaw in the *plans or specifications* for an *entire line of products* (EXTERNAL STANDARD; like negligence)
    - A. **Consumer Expectations Test**: product more dangerous than ordinary consumer would expect (eg. Wisconsin, Connecticut)
      * Criticisms: if consumer expectation is that product is unsafe, manufacturer will not be held liable for unsafe products (*low expectations*); also consumers who *lack technical knowledge* may not be aware of *burdens* of adding additional safety measures
      * Too much jury discretion, too ambiguous; too narrow focus on specific defect in the broader scope of business choices made (*multifaceted decisions* are not weighed by jury) => risk-utility/cost-benefit test more *reflective of business decisions*
    - B. **Risk Utility Test**:  product defective if risks outweigh utility
      * But who has the burden? According to *Barker* (CA), it shifts to D once P has established defect caused harm, BUT 3d Restatement of Torts claims burden is on the P to bring in a ***REASONABLE ALTERNATIVE DESIGN***
      * Criticisms (see ***Cepeda*!!!**)
      * *Cepeda* factor test!
    - C. **Hybrid approach** (California) – *Barker* factor test! (w/*Soule* modification)
  + 3. **Inadequate Warning** (Negligence standard)
* **Defenses** against Products Liability
  + **Comparative negligence**
  + **Assumption of risk**
  + **Misuse of product**
    - Actual cause of injury = misuse of product, generally not allowed as a defense
    - Misuse negated proximate cause because unforeseeable use of product (intervening superseding cause)
    - Misuse = comparative negligence/assumption of risk (example, *Cepeda*)
  + Explicit **disclaimer** of particular injury risk - almost NEVER enforced and generally not binding
  + **Regulatory compliance** (depending on jurisdiction):
    - 1) may help *bolster case*, but will not allow D to avoid liability
    - 2) compliance presents *rebuttable presumption* that there is no defect in product
    - 3) compliance as *full defense*
  + Under products liability in **NJ**, implied assumption of risk => contributory negligence
  + Under products liability in **CA**, comparative negligence is recognized as a defense
    - Product alterations by companies = narrower defense; employees cannot be held comparatively negligent for being ordered to use such products by their employer.
* **POLICY ISSUES** w/ PRODUCTS LIABILITY
  + LIBERTARIAN CRITIQUE: drag on innovation, on US international competitiveness (economically costly/wasteful), interfering w/autonomy of businesses w/out reason (market will handle issues)
  + ECONOMIC CRITIQUE: drag on innovation, on US international competitiveness (economically costly/wasteful)
  + ***POLINSKY & SHAVELL critique of products liability:***
    - Leads to more product safety?
      * Statistics say no.
      * Market forces, media and regulation outcry appear to work better than products liability to incentivize safety (at least for widely used products)
    - Price signaling not as effective as we think (prices up too far b/c of excessive litigation costs and nonmonetary losses; chills purchasing)
    - Compensation goal not met well:
      * Not met as well in products liability as by insurance (public and private) which is usually already in pitcure;
      * Awards $ for non-monetary losses force consumers to insure against something that they don’t desire enough to purchase insurance for in the first place: pain and suffering
      * Total legal expenses > total compensation of Ps (economically inefficient)
    - Proposed action:
      * Factors to consider in products liability cases (to limit liability): are consumers likely to know of the risk, is product already subject to significant safety regulation, what is likelihood that P has sufficient insurance coverage to compensate for *monetary* losses
      * Legislation to limit or eliminate products liability in certain industries and/or for certain widely used products (where market forces and/or regulation are particularly strong)
    - IN RESPONSE: Justice (individual)! Responsibility/fairness (the responsible company should pay, not victim or victim’s insurance)! Distributive function (crushing losses for individual). Pain and suffering may not be monetary, but not valueless; company took something intangible away from P; should have to compensate somehow! Are market forces and media outcry enough alone? Minority products, less widely used products ignored by system. Tort law encourages regulation and media outcry (chicken before the egg).
* History: early cases worked to establish products liability as *strict liability* (Escola dissent), but more recently there’s been a move toward more *negligence standards* (risk utility test)
  + *Hindsight approach* (strict liability) vs. *foresight approach* (negligence and increasingly risk-utility)
  + TREND: *restricting* products liability
    - move *away* from joint/several liability
    - move to *partially immunize* retailers
    - making *regulatory compliance a complete defense*
  + EXPRESS/IMPLIED WARRANTIES? (marketing materials, contracts)
* ***Escola v. Coca Cola Bottling Co.*** (CA 1944) - P is holding glass coke bottle; it explodes
  + Holding: Liable under RES IPSA.
    - However, Traynor points out bottles HAD been out of control of Bottling Co. before accident, and D DID show Due Care
  + Concurrence (Traynor) - use of Res Ipsa disingenuous; we’re imposing strict liability for products here and should just say it
    - Company is cheapest cost avoider
    - Manufacturer acted; put out product
    - Loss spreading
    - Judicial efficiency (as a reason for removing privity, so don’t have 2 or more suits every time)
    - HUGE burden to find evidence for P (exclusive control of D)
* ***Greenman v. Yuba Power Prods*** (CA 1963) - *P bought power tool which could be used in various ways, in using in one of its proper functions, small screws fail to hold piece of wood properly and shoot it into P’s face. P sues under negligence and breach of warranty*
  + HELD: D is liable under strict products liability
    - Ds are putting products on the market knowing they will be used without FURTHER inspection for defect.
    - NOT design defect; decided before distinctions for products liability were in effect
* ***Cronin v. J.B.E. Olson Corp.*** (CA 1972) - *man driving bread truck with bread racks secured with metal hasps, gets into an accident; hasps break and bread racks hurt man.* 
  + HELD: P only has to prove defect in the product (design OR manufacturing) and that defect caused harm, NOT that defect made product *unreasonably dangerous*; defect requirement on its own is sufficient to strike balance - sellers must insure products.
  + Court refuses to categorize case as either manufacturing or design defect.
  + P has been compensated for injury through workers compensation - collateral source rule issue?
  + “Last gasp” of products liability as strict liability, here forward negligence is reintroduced (Cronin overturned)
    - OUTLIER: Refusal to deviate from strict products liability
* ***Cepeda v. Cumberland Eng’g Co***. (**NJ** 1978) - *P works in a factory using a pelletizing machine which has a removable safety guard (for cleaning) but machine still operable while guard is off, guard is difficult to remove/replace; P arrived at work and guard was off but worked anyway, 3 hours of work later P is severely injured. Installing an interlock mechanism which would have prevented machine operation without safety guard was relatively easy/inexpensive.*
  + CEPEDA **FACTORS** (for design defect):
    - 1) U*sefulness/utility/desirability* of product (benefits): implicitly draws attention to burden of not having the product or having of alternative products
    - 2) *Safety aspects* of the product (P and L)
    - 3) Availability of *safer substitutes* that meet same need (B)
    - 4) Manufacturer’s ability to *eliminate unsafe* character of product without *impairing usefulness/making more expensive* than its utility (B)
      * *(3 and 4 are related to the burden)*
    - 5) User’s ability to *avoid danger by exercising care* in use of products
      * *(cheapest cost avoider)*
    - 6) *User’s anticipated awareness* of dangers inherent in product and their avoidability (because of general public knowledge of *obvious condition* of product or existence of suitable *warnings/instructions*)
      * *(cheapest cost avoider)*
    - 7) Feasibility, on manufacturer’s part, of *spreading less* by setting price of product/carrying liability insurance
      * *(distributive consideration)*
  + PROBLEMS WITH THIS TEST:  SEVEN FACTORS!!! also: because a standard and not a bright-line rule, problems of lack of consistency; factors given to juries for consideration (issues of bias/dumb juries?); either incentivizes manufacturers to be too cautious or turns products liability into a lottery; asks juries to analyze technical/complex decisions made by companies
    - Epstein critique: obvious defects should limit P’s recovery, big emphasis on factor 6, strict bright-line rule stating no liability for obvious defects, strict liability for non-obvious defects (but incentivizes putting obviously defective items on the market?)
  + Even *w/out reasonable alternative design*, manufacturer can still be held liable if only *minimal social value* (eg: above ground swimming pools, but overturned in legislature)
  + Cepeda takes issue with Cronin: “How can you say a product is defective if you don’t find defect unreasonable? ‘Unreasonable’ is part of definition of defect.”
  + MISUSE: Since misuse was *reasonably foreseeable*, D is still liable
* ***Barker v, Lull Eng’g Co.*** (**CA** 1978) - *P injured while using high lift loader on precarious slope, loader falls over, P jumps out b/c no seatbelt/bar, P injured by falling lumber.* 
  + HELD (**BARKER TEST**): In order for P to succeed in a *design defect* case, P must prove that:
    - 1) product does not meet expectations of ordinary consumers (ordinary adults in the community), OR
    - 2) If P fails to meet 1, or chooses not to do so, P can show defect in design AND defect caused injury; then D must prove that benefits of design outweigh risks (BURDEN SHIFTS to D - RARE! Worried about informational disadvantage of P)
      * **Factors** for jury consideration (risk rule - everything is HAND!):
        + 1. Gravity of danger of challenged design (L);
        + 2. Likelihood of such danger (P);
        + 3. Mechanical feasibility of safer alternative designs (B);
        + 4. Financial costs of improved design (B);
        + 5. Adverse consequences to the product and to the consumers with the alternative design (B)
      * P will bring up all the evidence it can anyway, so does this really change that much by shifting the burden?
  + Implicitly *overrules Cronin* despite giving a lot of lip service to the problem of telling jury a product must be found “unreasonably dangerous or ultrahazardous”
* ***Soule v. General Motors Corp.*** (CA 1994) - *P gets into car accident and wheel crushes ankles, claims wheel design and manufacture is defective; jury is given consumer expectations test for consideration, finds for P; D appeals because it claims consumer expectations test should NOT have been given to jury*
  + HELD: **consumer expectations test use *limited*** to when **common experience of users** enables judgment of defect; HOWEVER, when you need **sophisticated (expert) knowledge,** juries should be instructed to use **risk-utility test!!**
    - However, court here says that since jury took expert testimony into account, clearly risk-utility test was used, so no harm, no foul.

**DAMAGES**

* Practical limitations on damages:
  + Lawyers’ fees
  + Insurance policy limits
  + Reimbursing a first-party insurer
* TWO categories of Damages:
  + **Compensatory**
    - 1) **Economic**: medical bills, loss of income
    - 2) **Non-economic**: pain and suffering
      * Polinsky and Shavell *critique* of pain/suffering damages:
        + Economic loss =/= pain & suffering
        + If we really wanted to compensate pain/suffering, there’d be an insurance market for it

BUT superstition, no market in first place if wanted, speculative/hard to value (maybe insurance industry doesn’t want a part in it, instead of consumers)

* + - * + Too arbitrary/unpredictable

(No precedent given to jury)

* + - * + Distortionary effect of awards
      * *Support*: pain/suffering damages may be necessary to compensate victims because it enables them to purchase items for solace; also goes to payment of lawyers’ fees (good enough reason? can directly award lawyers’ fees...); forces wrongdoers to pay FULL COST of their wrongdoing (internalize costs = more deterrence)
    - *Advantages* of compensatory damages: juries can respond to the particular case before them
    - *Disadvantages*:
      * Jury influenced by racial biases and socioeconomic biases
      * Jury awards can be unpredictable/arbitrary; thus not deterrence.
    - **Survival Claims** (estate) **/ Wrongful Death** (family) (“Working Stiffs”)
      * Not a cause of action in itself like negligence or battery; wrongful death piggybacks off of other torts – **Derivative Claims**, which is limited by result of tort it’s based on.
      * **Survival claims** are brought for harms caused to deceased before dying (pain/suffering before death):
        + Medical expenses, lost income before death, and pain/suffering.
        + NO compensation in survival action for actual death or for loss of income stream post-death.
      * **Wrongful death claims** allow close family members to sue for harms they suffered as a result of the death.
        + **Pecuniary losses**: loss of income
        + **Loss of companionship/society** and **loss of guidance** (can given monetary value, not emotional value, in pecuniary only states)
        + NOT allowed to recover for anguish (but juries probably give anyway).
        + Can’t recover for actual death; some jurisdictions cap wrongful death.
        + CHILDREN AREN’T WORTH MUCH IN WRONGFUL DEATH, just loss of companionship.
    - **Collateral source rule**: D cannot bring in as evidence that other sources have already compensated or may be compensating P.
      * Because Ps ALREADY paid for these sources in some way (ex: taking a lower wage)
      * Critique: Double recovery, HOWEVER, Ps may end up only recovering only *once anyway* because of **indemnification** (reimbursement by P to insurer), or insurance will pay out to P and take over the case under their rights of **subrogation**. Also Ps may be using the “extra” to *pay off their legal fees*.
  + **Non-compensatory/Punitive** 
    - **Purposes:** 
      * Retribution/revenge - more like criminal law
        + Safe outlet for human need for revenge? (avoid self-help)
        + Way to express *public outrage*
      * Deterrence
        + Specific - want to discourage a particular D from repeating a particular wrong
        + General - deterring particular wrongful conduct generally

Easy to avoid detection => punitive damages

Likely to turn a profit

Non-economic in nature (nominal compensatory damages)

* + - **Instances** when to award punitive damages:
      * 1. When compensatory damages are *too low to deter wrongdoing* b/c it is easy for the wrongdoer to avoid detection (*Mathias* bedbug case) - need a *certain quantum of people* suing to have effect OR punitive damages.
      * 2. When D is *likely to turn a profit* from wrongdoing. (*Mathias* again)
      * 3. When violation is *non-economic in nature* and only leading to *nominal compensatory damages*, so not enough deterrence (spitting in face, *Jacques v. Steenberg Homes*)
    - **TEST FOR PUNITIVE DAMAGES (*National Byproducts)***
      * NEED AT LEAST RECKLESSNESS.
        + Gross negligence? Dunno.
        + Regular negligence does not hold up, naturally.
      * Evidence indicates that the D acted WANTONLY in causing the injury or with such CONSCIOUS INDIFFERENCE to the consequences that MALICE may be inferred.
        + Malice = very likely to get punitive damages.

Distinct from intent, malice is a bad motive, acting out of spite/ill will

* + - * + Dissent emphasizes: Malice no longer needed: enough if D acted recklessly or wantonly or with conscious indifference to the safety of others.
      * \*\*\*For reckless, willful, or wanton conduct\*\*\*:
        + 1) Conduct has to create a **high degree of risk of harm** (P) OR **risk of very serious harm** (L) AND
        + 2) D, when acting, must be **conscious of the risk** and must proceed **without concern for the safety of others**. (*Mental element* beyond regular negligence)
      * Gross negligence is a situation with high P or L and no conscious mental element.
      * From Mathias: “Willful”
    - **MATHIAS** **Factors** to take into account when deciding *whether* to allow award punitive damages:
      * 1. *Reprehensibility* of D’s conduct
      * 2. *Ratio* between *harm caused by conduct* (including noneconomic harm) and the *economic losses suffered/granted*
      * 3. *Wealth* of D
      * 4. *Profitability* of tortious conduct
      * 5. P’s *financial cost* in bringing suit
      * 6. *Probability of detection* of tort
    - **BMW v. GORE FACTORS** for use in determining if punitive damages award is excessive
      * 1) Degree of *reprehensibility* of act
      * 2) Disparity/*ratio* between harm suffered (*compensatory damages*) *and punitive damages*
        + Could be **exceptions** where high punitive awards may be justified:

1) *Low compensatory award*;

2) *Injury hard to detect*;

3) Non-economic/*hard-to-monetize harm* (dignity harms, harms to rights, emotional harms)

(*Jacque v. Steinberg Homes* being a classic case of all three)

* + - * + In *Exxon*, court seems to suggest that it is *leery* of situations where the compensatory/punitive damages ratio > 1:1
      * 3) Difference between this remedy and the *civil penalties* by govt authorized or imposed in comparable cases (**guideposts**)
    - **Constitutional limits** to punitive damages
      * Based on **DUE PROCESS** - excessive cases have *NOT provided proper notice* that such conduct will result in so much damages
* Critique of Damages generally - reproduces inequality because of expectation damages different among different demographics (See “Working Stiffs”)
* ***Nelson v. Dolan*** (NE 1989) - *Nelson is riding a motorcycle with his friend, a car starts tailgating them, eventually overtakes them. Car locks onto the back of the motorcycle; Nelson is upright for 5 seconds knowing he’s going to die.  Then goes under car and dies instantly.  Nelson’s mother suffers  severe depression sues in wrongful death and survivor action.* 
  + HELD: P cannot recover in wrongful death because her injuries are grief and *not* monetary.  She can recover for survivor action.  Pain and suffering of the dying boy does not have to occur between injury and death.  *Knowing you’re going to die, and accompanying fear is enough*.
* ***National By-Products Inc v. Searcy House Moving Co.*** (Ark 1987) - *D’s truck driver speeds, overloads his truck, and ignores signs of traffic/warning lights on cars, resulting in an accident which kills two people, hits two bystanders and damages P’s business of moving house in transit.* 
  + HELD: Punitive damages are not rewarded to the moving company in this case because there’s no evidence that the truck driver or the D company acted *consciously* (difference between gross negligence and reckless/willful/wanton)
* ***BMW of North American, Inc. v. Gore*** (US 1996) - *Repainted BMW suit- worth less than new BMW, suing for something like fraud, recovers $4k in compensatory damages, but BMW had sold various cars across the country without disclosing repainting, approx 1000, $4k per car, punitive damages awarded as $4million (rationale being 1000 cars)*
  + HELD: Not permissible for one state court to take into account out-of-state activity when assessing punitive damages (because each state has its own regulatory standards and cannot force its regulations on other states) – *federalism*!
  + COURT SETS OUT 3 GUIDEPOSTS (ABOVE)
* ***Phillip Morris USA v. Williams*** (US 2007) - *Estate of deceased suing cigarette company; challenged on basis of jury instruction because jury took into account all smoking deaths ever to calculate damages.*
  + HELD: Can’t use punitive damages for harm to victims who AREN’T parties to case
    - Supreme Court requiring jury instructions disclaimer that they can’t take into account non-party victims, non-party victims can ONLY be used in determining *degree of reprehensibility*. (Over-deterrence)
* ***Mathias v. Accor Economy Lodging, Inc.*** (7th Cir, 2003) - *bed bugs infest motel. Motel knew about it for a long time, and did nothing about it, and even the few things they did were ignored (renting out rooms labeled “do not rent, has bugs”).*
  + Awarded at trial: $5k compensatory damages, $191k punitive
  + When compensatory damages aren’t enough:
    - Dignity harms
    - Slight harms for which P might decide to take matters into own hands (violently)
    - If damages so slight allows D to commit torts if willing to pay a little (rich could do whatever they want and just pay)
  + *Mathias* happened before *Phillip Morris* - if had happened after, the fact that jury took into account third party victims in formulating punitive damages would be problematic
* **Remittitur** - allows judges to offer lessened damages to Ps in exchange for no new trial.
* **Vicarious liability**: an actor other than the tortfeasor is held liable for the damages that the tortfeasor inflicted:
  + **Respondeat superior**: when holding employers responsible for the actions/wrongs of their employees, when employer has not done anything wrong
    - **Directly liable**: if employer has done something wrong (negligent in hiring/supervision)
    - Vicarious liability on the basis of relationship between employer and employee; employee has to have been acting **within the scope of his employment**
    - Both direct and vicarious liability can be pursued simultaneously (which P should probably do to be on the safe side)
      * *Taber v. Maine* suggests that activity has to be a “**characteristic of employment**” (*ordered/condoned* by employer) or a “**customary incident of employment**” to be within the scope of employment
      * Other jurisdictions hold that action must have *BENEFITED employer*
      * Acting *at worksite* or *during the time* of employment?
    - Respondeat superior **policy** rationales:
      * Promotes *compensation*, deep pockets
      * Incentivizes taking care in *who* hire and *how* supervised
      * *Promote safety* in work environment b/c employer’s in *best position to deter*
      * Fairness rationale: better the employer than the victim
* By statute, **CAR owners** often held vicariously liable for drivers when *loaned* car.
* Usually, **parents** are NOT held vicariously liable the acts of their children.
  + BUT some state statutes (ex: CA) make parents vicariously liable for intentional torts/malicious acts committed by children, but usually capped.
* *Taber v. Maine*(2d Cir. 1995) - *sailors drank on base at recreational place; sailor left and got into a car accident.*
  + HELD: employee is acting within scope of employment if recreational activities on employer’s land resulting in tort committed have grown to be a “**customary incident of employment**” (usually a finding of fact for the jury)
  + Employers generally NOT held liable for *intentional torts* since generally not within the scope of employment
* **Joint and Several Liability**
  + Under **Several liability**, each D is ONLY liable for the share of responsibility which he is allocated
  + Under **Joint and Several liability**, *any* one of the Ds can be made to pay 100% of the damages (if other insolvent, etc.); responsibility for liability is shared
  + Joint & Several occurs
    - 1) when Ds share responsibility due to **vicarious liability** (for example, **respondeat superior**)
    - 2) when Ds **act in concert** - toward a coordinated purpose (drag race)
    - 3) in situation where **injury is “indivisible”** ex: *Ravo v. Rogatnik*
    - Allocation of FAULT ≠ allocation of liability for damages
  + CONCERN/PRACTICALITY: Does this mean one minor tortfeasor will have to shoulder all the burden? NO: Start with allocating share of responsibility to Ds, and P can recover from either, and THEN D can bring an **action for contribution** to get reimbursed for share of damages other D should have paid.
  + State efforts to *cut back* on joint/several liability
    - Some jurisdictions have abolished altogether or for certain cases
    - Concern about use of joint/several to seek out **deep pockets** *only marginally involved* (municipalities, etc.)
* *Ravo v. Rogatnik* (NY 1987) - obstetrician and pediatrician work together to result in brain injury, OB 80% liable, pediatrician 20%, but brain injury is *indivisible*.
  + HELD: tortfeasors need not be acting concurrently or in concert to be held jointly liable; if cause of injury can be easily divided up, it can be several, if not must be joint/several.
* *Bencivenga v. J.J.A.M.M.* (NJ 1992) - *P assaulted by unknown person in nightclub while D’s employee bouncers watched and did nothing.* 
  + NJ court says cannot allocate damages to absent (“fictional”) D.
    - BUT you CAN apportion damages between negligent and intentional tortfeasors…even when negligent takes whole burden b/c of joint and several liability.