How to attack problems

1. first, do preemption
2. second, determine intentional or negligence
    1. Intentional Analysis
        1. Restatement
            1. intends consequence
            2. knows it will occur
        2. Epstein
            1. did x act? (intention to make contact)
            2. was there assumption of the risk?
            3. did the defendant override assumption?
            4. defenses (consent, necessity, self defense)(insanity is usually not a defense)
    1. Accidents/Negligence Analysis
            1. prima facie case
            2. duty
                1. in stranger cases, there is a duty to reasonable care
                2. modified:
                    1. by contract (bailment)
                    2. premises liability (duty to trespasser, etc.)
                    3. special relationship
            3. breach
                1. four ways to show negligence
                    1. custom (TJ Hooper)(RAE likes this)
                    2. negligence per se (statute, esp. licensing)
                    3. cost benefit (calc of risk)(comes up when you want to show that D didn't take enough precaution)
                        1. can occasionally clash with custom
                        2. if it does, cite that TJ Hooper line "a whole calling may lag behind"
                    4. Res ipsa
            4. causation
                1. cause in fact: "but for" cause
                2. proximate cause: limit on cause in fact
                    1. directness test: you look at the injury and work your way back; see if anything severed chain of causation
                        1. acts of third parties, freakish events, NOT natural things like gravity
                        2. Polemis case
                    2. foreseeability test: liability limited to 1. consequences the foreseeability of which made D's actions negligent in the first place, and 2. persons within that foreseeable zone of danger
                        1. wagon mound
                3. special cases
                    1. emotional distress: use these special cases, not foreseeable or whatever
            5. damages
                1. was x hurt?
    2. in strict liability

1. duty: duty not to hurt anyone
2. breach: if you hurt anyone, you've breached

1. Intentionally Inflicted Harm: the Prima Facie Case and Defenses
    1. Trespass to Land, Person, and Chattels
        1. analysis (four part)
            1. was act volitional (intentional)?
            2. Did P assume risk?
            3. even if yes, there may still be tort if D intended to cause harm
            4. is there some defense? (necessity, self-defense)
        2. Vosburg v. Putney (person)
            1. Batterey is an intentional, unconsented-to touching
            2. Damages are all injuries resulting from wrongful act
            3. eggshell skull rule: intent to harm is not necessary, only intent to trespass; you take the victim as you find him
            4. mistake and unforeseeability are usually not defenses
        3. Dougherty v. Stepp (land)
            1. all unauthorized entry onto another's land is trespass
            2. intent to enter land is what matters, not intent to do damage to land
            3. intangible entry may be trespass, but must show damage to land (electromagnetic waves, etc.)
        4. Intel v. Hamidi (Chattels)
            1. electronic communications do not constitute trespass unless they damage or impair the functioning of another's property
            2. injunctive relief only where there is threat of irreparable harm
                1. high likelihood of imminent, irreparable harm
                2. cannot be adequately compensated by damages
    2. Conversion
        1. Poggi v. Scott
            1. conversion: unwanted interference by D with the property of P from which injury to P results
            2. neither intent to commit wrongful act nor knowledge of true ownership of property is required
            3. it is required that D have intent to exercise dominion or control over the property
            4. Some overlap with trespass to chattels. Conversion alone for A against C when C had taken property from B, who had previously taken it from A (possession of stolen property, basically). Only trespass would lie when the defendant had taken possession of the plaintiff's goods without claiming ownership of them.
        2. Moore v. Regents of University of California
            1. ownership interest is essential
            2. conversion cannot exist in a situation where P would have thrown away anyways
    3. Defenses to Intentional Torts
        1. Consensual Defenses
            1. Mohr v. Williams
                1. Operations which are not consented to are battery; operations which are consented to are not; originally, very strictly applied
                2. Modern position is less stringent
                    1. usually, this is contracted around

            2. there is an emergency exception, and a quasi-emergency exception for issues which come up during surgery
            3. patients still have a right to refuse any treatment
        3. more difficult with substituted consent (minors, etc.)
            1. sub consent for minors, incompetents
            2. sub consent can be more difficult when treatment is for the benefit of another (x chooses to have y undergo an operation for the benefit of z)

1. Insanity
    1. McGuire v. Almy
        1. insane people are liable or their torts; we want to create incentives for controlling their behavior
            1. incentive on insane person
            2. incentive on caretakers; they don't want their paycheck to disappear
        2. in a sense, loss has to be born by one of two "innocent" people, and thus should fall on the person who created it
        3. there is intention because insane person intended to strike
2. Self-Defense
    1. Courvoisier v. Raymond
        1. different from assault and battery in that mistake can be a defense in self-defense
            1. even accidental harming of third-person is not actionable unless D realizes or should have realized that the act creates an unreasonable risk of causing such harm
            2. This is different from Roman Law
        2. necessary elements
            1. situation is so immediate that traditional remedies such as injunction or police action are not an option
            2. action must be responding to an ongoing risk
            3. action must be proportionate to the risk
        3. No liability for defense if the reasonable man would believe that his life was in danger
3. Defense of Property
    1. Bird v. Holbrook
        1. May not catch a man by means which may maim him or endanger his life; key here is that there was intention to catch and harm, not prevent
4. Necessity
    1. this defense applies when X is driven to trespass due to an act of God, the wrongful act of a third party, etc.
    2. Ploof v. Putnam
        1. actions of servant are, legally, the actions of the master (vicarious liability)
        2. necessity permits trespass

3. owner of land may not prevent trespass out of necessity, but need not assist, either
3. Vincent v. Lake Erie Transportation. Co.
    1. although trespass due to necessity is allowed, defendant must still compensate plaintiff for the damage done due to the entry
4. public necessity
    1. destruction or seizure of private property by public servants may be ok, but compensation is still necessary
    2. the difficulty is that the burden is concentrated, but the benefits are distributed among many others
    3. so, we give official immunity, but usually don't specifically surcharge those benefited, as finding out who they are can be difficult

1. Strict Liability and Negligence: Historic and Analytic Foundations
    1. Formative Cases
        1. The thorns case
            1. arguably establishes strict liability
            2. Littleton: must compensate those you injure
            3. Choke: falling was not lawful, therefore taking away was not lawful
        2. Tithe case
            1. example of perverse incentives created by public necessity cases and asymmetrical incentives
        3. Weaver v. Ward
            1. Defendant committed no negligence; not intentional so no battery
    2. The Forms of Action
        1. Trespass and Case
            1. trespass: harm caused by D's Direct and immediate application of force against P's person
            2. case: indirect harms, not involving direct use of force
            3. Scott v. Shepherd
                1. demonstrates difficulty in separating trespass and case
    3. Strict Liability and Negligence in the Last Half or the Nineteenth Century
        1. Brown v. Kendall
            1. if defendant was exercising due care, he was not liable for striking
            2. transition away from strict liability to negligence standard in the US
        2. Fletcher v. Rylands (etc.)
            1. strict liability standard for D's who maintain dangerous things on their property when those things escape
            2. ties to abnormally dangerous activities
        3. Brown v. Collins
            1. Principles of Rylands should not be extended; should be a negligence standard
        4. Powell v. Fall
            1. strict liability even though train was following safety statutes
    4. Strict Liability and Negligence in Modern Times
        1. Stone v. Bolton
            1. small possibility of injury, but still foreseeable

        2. Bolton v. Stone
            1. careful man must take reasonable care to avoid injuries; because it could be reasonably foreseen, the D were under a duty to prevent.
            2. there was nothing that a careful man would have done differently in this case, so no liability; the risk was very small
        3. Hammontree v. Jenner
            1. doctrine of strict liability does not apply to drivers
            2. there was no reason to anticipate seizure/illness, so not negligent
2. The Negligence Issue
    1. The Reasonable Person
        1. Vaughan v. Menlove
            1. subjective v. objective standard for reasonableness
            2. objective standard is better; what reasonable man of ordinary prudence would have done
        2. Roberts v. Ring
            1. all adults are treated equally under negligence standard
            2. infirmities don't relieve a person of negligence
            3. exception when harmed party assumes the risk (teaching kid to drive)
        3. Daniels v. Evans
            1. minors must exercise same standard of behavior as adults when engaged in adult activities
            2. stranger cases: everyone has to live up to the standard of the reasonable person that everyone else believes them to be
        4. Breunig v. American Family Insurance Co.
            1. insanity can be a defense to negligence, but the circumstances are narrow
                1. effect of insanity ms affect ability to understand duty to drive car with ordinary care
                2. there must be an absence of notice that insanity would occur
    2. Calculus of Risk
        1. Blyth v. Birmingham Water Works
            1. not negligent in basing construction on previous history
        2. Eckert v. Long Island RR
            1. when exposure to risk is or the purpose of saving a life, it is not negligent unless rash or reckless
        3. Terry, Negligence
        4. Seavy, Negligence
        5. Osborne v. Montgomery
            1. liability is premised on a balancing of social risk
            2. even if certain conduct may foreseeably result in harm, the risk may be justified by the circustances
        6. Cooley v. Public Service Co.
            1. "reasonable alternative standard"; not required to take a precaution which will create a new danger for someone else
        7. US v. Caroll Towing Co.
            1. Learned Hand formula: "If the probability be called P; the injury, L; and the burden, B; liability depends on whether B is less than L multiplied by P: i.e., where B is less than PL."

2. formula criticized as difficult to apply, partially because elements are difficult to quantify

3. Custom
    1. Custom does not fit well with calculus of risk; the idea is that if behavior doesn't deviate from the customary level of care, this is prima facie evidence of reasonable care
    2. Titus v. Bradford
        1. Common practice of a business controls; jurors should not set those standards; "reasonably safe means safe according to the usages, habits, and ordinary risks of the business"
    3. Mayhew v. Sullivan Mining Co.
        1. even if a gross lack of care is universal custom, we don't allow it to control
        2. case gained little following
    4. The TJ Hooper
        1. even if a custom is followed, there may be negligence; A whole calling may lag behind in the adoption of new safety devices
        2. when this is the case, court should drive custom
        3. RAE: this ruling opens up every custom to court-analysis; custom should create a strong presumption in favor of defendant
    5. Medical Malpractice
        1. Lama v. Borras
            1. to establish medical malpractice case, must show that the basic norms of knowledge and medical care were not followed, and that this failure caused the injury suffered
            2. when there is no single custom governing the issue, the practitioner must follow a school of thought, though it can be any of the major ones
            3. it is not negligent to pick a course of treatment that ex post turns out to be the wrong one, unless doc should have known it was the wrong one ex ante
            4. slight variations in care are allowed for less sophisticated hospitals and clinics, but large regional disparities are not permitted; differences in resources are unavoidable, but differences in practices are not permitted
            5. interns, residents are held to the same standard as full doctors (stranger principle)
        1. Canterbury v. Spence
            1. right of patient to direct their care is basis for duty to disclose; all risks potentially affecting decision must be disclosed
            2. exceptions
                1. when patient is unconscious
                2. when disclosure poses such a great threat to patient welfare as to become unfeasible
            3. in order for liability, there must be a causal relationship between the failure to disclose and damage to P

4. the courts are resistant to demands to require doctors to disclose full range of possible treatment alternatives in complex cases

4. Statutes and Regulations
    1. Osborn v. McMasters
        1. it is immaterial whether the duty is one imposed by common law or by a statute. In either case the failure to perform the duty constitutes negligence.
            1. injury must be of the kind which the statute was designed to prevent
        2. for federal relief due to breach of federal statute with no explicit private right of action, there is a four part test
            1. P one of class for whose benefit the statute was enacted
            2. is there any legislative intent one way or the other?
            3. private right of action is consistent with the underlying purpose of the legislative scheme
            4. is the area one traditionally handled by state law, in an area of concern primarily to the states?
    2. R2d sec. 286
    3. R1st sec. 14
    4. CA evidence Code
    5. Martin v. Herzog
        1. Violation of statute was direct negligence, but there still must be a causal link between the violation and the injury
    6. Brown v. Shyne
        1. for a statute to be evidence of negligence, it must be something the statute was designed to protect against
    7. areas of disagreement
        1. some courts have ruled that leaving one's care unlocked, if it subsequently gets stolen and is used to injure some third party, is negligence; other courts have ruled the other way
        2. most courts hold that bartenders are liable or serving booze to customers who then go on to drive drunk, though this is rejected by some courts and overruled by state law in some areas
5. Judge and Jury
    1. Holmes, The Common Law
    2. Baltimore and Ohio RR v. Goodman
        1. when at a track and sightline for train is blocked, getting out of your car to check is reasonable
    3. Pokora v. Wabash RR
        1. getting out of your char to check for a train is uncommon, probably futile, and possibly dangerous
        2. Goodman created a rule of law where there should not have been one; it should have been a fact question for the jury
6. Proof of Negligence
    1. Problems
    2. Res Ipsa
        1. really, this is about burden shifting
            1. Res Ipsa burden to D,
            2. D can shift it back
        2. Byrne v. Boadle

            1. a barrel rolling out of a warehouse couldn't happen without negligence
            2. duty of determining whose barrel it is, who was cause, rests on defendant because he was in the best position to know
            3. if there are facts inconsistent with negligence, then it is up to the D to prove them
        3. hotel cases; in one, res ipsa applies, but not the other
            1. in one case, the hotel knew about hooliganism; had reason to expect that there would be hooliganism
            2. in the other case, the hotel didn't know about the party; they had no reason to expect
            3. so, Res Ipsa doesn't apply in the latter because there is no reason for the hotel to know and thus no negligence
        4. Colmenares Vivas v. Sun Alliance Insurance Co.
            1. three part test
                1. accident must be of the kind which does not occur without negligence
                2. cause by an agency within the exclusive control of the defendant
                3. not due to any voluntary action on the part of the plaintiff
            2. There are some instances of responsibility which cannot be passed on to another party
        5. Ybarra v. Spangard
            1. multiple defendants does not preclude application of res ipsa
            2. res ipsa is important to overcome conspiracy of silence
3. Plaintiff's Conduct
    1. Contributory Negligence
        1. established when P has not taken reasonable care, and as a result, has suffered injury; bars any recovery at all when successful
        2. burden of proof is on D to prove P's negligence
        3. Basic Doctrine
            1. Butterfield v. Forrester
                1. if you hit an obstruction you reasonably could have avoided, your action is blocked
            2. Beems v. Chicago, Rock Island & Peoria RR
                1. act of not checking whether cars were stopped was not contributory negligence
                    1. he could expect them to perform their duties
                    2. he was depending on other employees
            3. Schwartz, Tort Law and the Economy
            4. Gyerman v. US Lines Co.
                1. plaintiff's negligent actions are proximate cause only if they are a substantial factor in bringing about the harm
                2. if P does not modify their behavior to protect themselves as a reasonable person would, they may be cont neg
                3. some courts have refused to impose contributory negligence where P is protected by a statute

4. actions done under irresistible impulse do not sever causal connection, and are thus not cont neg (ditto-tang)
5. necessity is a defense; if cont neg is done in an emergency, without time to think, so long as x acts like a reasonably prudent person would

5. LeRoy Fibre Co. v. Chicago, Milwaukee, & St. Paul Ry.
    1. Controversial case of flax catching fire next to railroad; Flax was 100 feet away, court found there was no contributory negligence because it was on P's property and no need to guard own property against actions of D

2. Assumption of Risk
    1. asks whether P has deliberately and voluntarily encountered a known risk created by D's negligence and, if so, it it holds that she should not be able to recover for the consequent harm
    2. Lamson v. American Axe and Tool Co
        1. not quitting is an assumption of risk
        2. assumption of risk in industrial accident abolished by satute in 1939
    3. Murphy v. Steeplechase Amusement Co.
        1. plaintiff knew he was getting onto a ride; one who takes part in sport accepts the dangers inherent in it
        2. more modern assumption of risk has an increased duty to warn
    4. two types
        1. primary assumption of risk: where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury
        2. secondary assumption of risk: where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty
            1. usually merged with comparative/contributory negligence
    5. Last Clear Chance Rule
        1. eliminates P negligence when D negligence is last
        2. doesn't matter how P's predicament arose
        3. eliminates comp net because you're looking sequentially
            1. of course, if comp neg was statutorily imposed, then you couldn't argue LCC

3. Comparative Negligence
    1. At Common Law
        1. Lombard Laws
        2. Beach
        3. Prosser
        4. Li v. Yellow Cab Co. of CA
            1. CA court moves to comparative negligence
            2. Pure comparative negligence: apportions liability directly in proportion to fault
            3. 50% comparative negligence: apportions in proportion to fault up until P is 50% or more at fault, in which cases recovery from D is barred

4. Special verdicts play an important role in a comparative negligence system because in their absence it is impossible to know the juries thought process; is it $15k bc that is all the damages and P is fully liable, or because D is 85% liable but damages were $100k?

2. By Legislation
    1. FELA
    2. NY
    3. PE
    4. WI
    5. R3d sec7

1. Multiple Defendants: Joint, Several, and Vicarious Liability
    1. Join and Several Liability
        1. Joint liability: any person who bears an obligation can be responsible for a loss if others are unable to pay
        2. Several liability: each person has an obligation to pay their share, and the default of others does not increase the non-defaulters' share
        3. Joint-and-several liability: Obligors are joint to the obligee, but bear several liability amongst themselves
        4. Union Stock Yards Co. of Omaha v. Chicago, Burlington, and Quincy RR
            1. joint liability means either can be sued without indemnity against the other
        5. CA Civil Code of Procedure, sec 875
        6. American Motorcycle Association v. Superior Court
            1. Li, discussed above for its holding related to comparative negligence, does not negate joint and several liability
            2. Case allows for partial indemnity from other concurrent tortfeasors on a comparative fault basis
            3. American Motorcycle seems to indicate that insolvent Ds share shall be paid by other Ds, another California case says that insolvent Ds share is split in proportion to the percentage of comparative responsibility originally assigned between remaining Ds and P; Third restatement endorses this approach, with exceptions for intentional tortfeasors, persons acting in concert, vicarious liability, and persons who fail to protect P from the specific risk of an intentional tort
        7. settlement rules for one may affect incentives to settle
            1. Credit rule: if you settle the other D can still potentially owe the rest of the original suit (could be way more than they originally would have owed if settlement is small), creates incentive to settle
            2. Carve-out rule: P gives up everything they don't get from 1st D in multi-party suits with a settlement. If its 80/20, settling with 80 guy means only 20 is left, regardless of settlement size
    2. Vicarious Liability
        1. Ira S. Bushey & Sons, Inc. v. US
            1. Vicarious liability covers actions taken by employees in the course of their duties as an employee; Also covers small deviations from course of duties

2. Intentional torts may be considered within the course of employment if they are intended to serve the employer's interest, but this standard is difficult to meet
3. incident was related to seafaring life; sailor's employment
4. actions were not so unforeseeable as to make it unfair to charge employer with liability

2. Petrovich v. Share Health Plan of IL, Inc.
    1. vicarious liability may exist for independent contractors when an agency relationship is established
        1. apparent authority
        2. implied authority

2. Causation
    1. Cause in Fact
        1. a necessary condition for the harm taking place; "but for x, y would not have happened"
        2. NY Central RR. v. Grimstad
            1. proximate cause was decedent falling into water; belief that buoy would have saved him was pure speculation
            2. nothing to show that "but for" the lack of life preserver, he would have survived
        3. Zuchowicz v. US
            1. fact finder could have concluded that danocrine was the cause of injury, but it must be the negligent overdose that caused injury
            2. If (a) a negligent act was deemed wrongful because that act increased the chances that a particular type of accident would occur, and (b) a mishap of that very sort did happen, this was enough to support a finding by the trier of fact that the negligent behavior caused the harm
                1. in strict liability cases, there is usually more stringent standard; P must show push/pull type of causal connection
        4. GE v. Joiner
            1. court is evidentiary gatekeeper; can decide what expert testimony, etc. goes in
            2. studies were not enough to prove causal link
        5. Herskovits v. Group Health Cooperative
            1. drop in survival rate was enough to go to jury
            2. no total recovery, only recovery for premature death
            3. courts are split on whether P can bring suit if there was less than 50% survival chance initially
        6. Kingston v. Chicago & NY Ry
            1. 2 fires case
            2. If Ds fire was small and might not have destroyed property and was swallowed up by other fire, it would be an intervening cause, but not the case
            3. Any one of two or more joint tortfeasors whose concurring acts of negligence result in injury are each individually responsible for the entire damage resulting from their joint or concurrent acts; where there are two causes, each negligent, injury attributable to either, either is basis for suit
        7. Summers v. Tice
            1. both defendants were negligent, but cannot tell which of two was cause, so burden shifts to defendants

        2. Epstein argues that cases such as this should be several liability so that in cases of an insolvent D the expected value for the other is not more than if we had perfect knowledge
    8. Skipworth v. Lead Industries Association
        1. use of market share liability not appropriate here: time too great, paints not fungible, not all parties joined
2. Proximate Cause (Herein of Duty)
    1. Basics
        1. assumes cause in fact
        2. key question is whether D's conduct was a substantial factor in pringing about P's harm
        3. two perspectives
            1. foreseeability: forward looking from time of action; was it foreseeable?
            2. directness: backward from harm; was there an intervening cause that severed causal connection?
    2. Physical Injury
        1. Bacon
        2. Street
        3. Ryan v. NY Central RR
            1. D's responsible for proximate, but not remote damages; destruction by fire of second, third buildings is not a "natural result" of the first fire
            2. if D puts P in a position where he reasonably fears for his safety, an injury received during a reasonable escape has a right to action
            3. if P acts in good faith to minimize risks from a dangerous situation of D's making, those actions do not sever causal chain
        4. Berry v. Sugar Notch Borough
            1. negligent speeding was not the cause of the accident; mere chance that trolley was there at time of accident
            2. P's conduct is not causally connected with his injuries if it does not increase the risk of being injured
            3. if each of two successive acts is sufficient to harm P, but the second only occurs because of the negligence of the first, the second is dependent on the first so that the second is normally responsible only for the incremental damages, if any
            4. dynamite cap case; negligent to leave a cap on the ground, but parents being aware is an intervening cause, so no liability
        5. Brower v. NY Central & HRR
            1. under old theories, only the last wrongdoer was responsible, so criminal conduct severed the causal connection
            2. current test: if the likelihood that a third party may act in a certain was is one of the factors that made a party negligent, such an act does not prevent the actor from being liable for harm caused thereby
        6. Wagner v. International RY
            1. rescue case

2. reasonable attempts at rescue do not break the chain of causation
3. unreasonable efforts at rescue should be covered by comparative negligence, not superceding cause

7. In re Ploemis & Furness, Withy & Co.
    1. directness test: D is responsible for all acts stemming directly from his negligent act, even if not foreseeable
8. Palsgraf v Long Island RR
    1. no negligence in the abstract
    2. liability must be linked to foreseeability
9. Marshall v. Nugent
    1. if disturbed waters are not yet placid, D may be liable for forthcoming injuries even if not specifically predictable
    2. liability of negligent actor confined to those harmful consequences which result from the operation of the risk, or of a risk, the foreseeabilty of which rendered the defendant's conduct negligent
10. Overseas Tankship (UK) Ltd. v. Morts Dock & Engineering Co. Ltd. (Wagon Mound 1)
    1. foreseeability test: foresight of the reasonable man determines responsibility
    2. American courts seem, generally, to agree with Polemis
11. Virden v. Betts and Beer Construction Co.
    1. defendant's breach of their duty of care is only actionable if it is also the proximate cause of the injury
12. Herbert v. Enos
    1. injury was not of a type that would be foreseeably caused by the negligence and D is thus not liable

3. Emotional Distress
    1. question is which cases should be dismissed by per se rule and which should go to the jury
    2. Mitchell v. Rochester Ry.
        1. no recovery; there is worry that emotional distress is too easy to fake
        2. subsequently adopted tests
            1. impact rule: there must be contact for recovery
            2. zone of danger rule: impact or P being in the zone of danger means recovery is possible
    3. Dillon v. Legg
        1. replaced zone of danger rule with close relationship or direct observation
        2. fear suits must generally show that fear is rational

3. Affirmative Duties
    1. The Duty to Rescue
        1. Luke
        2. Buch v. Amorv Manufacturing Co.
            1. no duty to a trespasser
            2. no increased duty to a child trespasser
        3. Hurley v. Eddingfield

        1. no affirmative duty for doctors to perform
    4. Bohlen
    5. Ames
        1. rule that one who fails to save another, if he can with little or no inconvenience, should be punished
    6. Epstein
        1. argues against Ames; it would be difficult to enforce properly and violates principle of autonomy
    7. Posner
    8. Bender
    9. Montgomery v. National Convoy and Trucking Co.
        1. if D's conduct, though not tortious, creates risk/dangerous situation the actor has a duty to exercise reasonable care to prevent or minimize the harm
        2. if D undertakes a rescue, even if under no obligation to do so, and actually harms P, there is liability if reasonable care or care is discontinued
2. Duties of Owners and Occupiers
    1. Robert v. Addie & Sons (Colieries), Ltd. v. Dumbreck
        1. three categories of visitors
            1. invitees: highest level of duty; to take reasonable care to ensure premises are safe
            2. licensees: second highest level; duty not to create a trap or allow a concealed danger
            3. trespassers: no duty
                1. exception for wanton or willful conduct
        2. attractive nuisance
            1. child trespassers can recover if lured onto land by tempting condition created, maintained by D
            2. elements
                1. D knows or should know that children are likely to trespass
                2. knows or should know that it would be unreasonably dangerous
                3. burden of eliminating the risk is slight compared to the risk
                4. fails to exercise reasonable care to protect children
    2. Rowland v. Christian
        1. CA court tosses out three-type distinction
        2. institutes a reasonableness test: has landowner acted as a reasonable person would in light of the probability of injury to others
        3. other states have abandoned invitee/licensee distinction, but kept trespasser
        4. RAE: best system keeps three designations
            1. they are imperfect
            2. this moves difficulty to establishing the class to which x belongs; once established, case is easy
3. Gratuitous Undertakings
    1. Coggs v. Bernard
        1. owner trusting x with goods is consideration
        2. breach of trust results in liability (reliance)
    2. Moch Co. v. Rensselaer Water Co.

4. Special Relationships
    1. R2d sec315
    2. Kline v. 1500 MA Ave. Apartment Corp.
        1. Landlords have a duty to take steps to protect tenants from crime when notice of previous crimes in areas under his control has been given
        2. Special relationship duties have been expanded to colleges for their students, common carriers and their passengers, condo associations, and for off-premises liability, but courts have generally hesitated to expand duty much
    3. Tarasoff v. Regents of University of California
        1. No negligence in getting prediction of danger wrong, but if psychiatrist believes that someone presents a serious danger to a specific person or persons there is a duty to exercise reasonable care to protect the foreseeable victim of that danger
        2. no duty to protect against generalized danger; must be a preventable danger
        3. Future promises can also be the basis for liability; "we will call you when we release him"
4. Traditional Strict Liability
    1. Ultrahazardous or Abnormally Dangerous Activities
        1. R2d sec 519
            1. *One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.*
            2. *This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.*
        2. R2d sec 520
            1. *In determining whether an activity is abnormally dangerous, the following factors are to be considered:*
                1. *(a) existence of a high degree of risk of some harm to the person, land or chattels of others;*
                2. *(b) likelihood that the harm that results from it will be great;*
                3. *(c) inability to eliminate the risk by the exercise of reasonable care;*
                4. *(d) extent to which the activity is not a matter of common usage;*
                5. *(e) inappropriateness of the activity to the place where it is carried on; and*
                6. *(f) extent to which its value to the community is outweighed by its dangerous attributes.*
        3. R3d sec 20
            1. *(a) A defendant who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.*
            2. *(b) An activity is abnormally dangerous if:*
                1. *(1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and*
                2. *(2) the activity is not a matter of common usage.*

4. RAE: ultrahazardous should probably be governed by standard negligence

9. Products Liability
    1. Four stages (roughly)
        1. First period ran from mid-nineteenth century to early twentieth, when major debate was whether to allow any suits at all against product manufacturers or sellers; Last half of nineteenth century witnessed a steady but limited erosion of —privity limitation which stopped consumers from suing anyone other than whoever directly sold them the product
        2. Second period began with MacPherson, allowing for negligence against a manufacturer with whom the buyer had no contractual relationship
        3. Third stage began with Escola, applying strict liability principles to products liability cases
        4. Fourth and final stage dealt with defective design and duty to warn cases
    2. Exposition
        1. Winterbottom v. Wright
            1. example of a court refusing to allow products liability case because of
               privity of contract
        2. MacPherson v. Buick Motor Co.
            1. If there is knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then the manufacturer is under a duty to make it carefully, irrespective of contract
            2. There must be knowledge of danger, not merely possible, but probable
        3. Escola v. CocaCola Bottling Co. of Fresno
            1. Even if there is no negligence, public policy requires that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market; Imposed strict liability for products liability
            2. Must be normal and proper use
                1. RAE is very interested in actions of down stream user
                2. thinks that many product liability cases hang on actions of DSU
            3. "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being"
            4. rationales
                1. manufacturer is in the best position to prevent or minimize losses arising out of the use of its product
                2. strict liability spreads out the costs of the loss
                3. eliminates proof complications
                4. corrective justice (party which created the risk should face the loss)
            5. Modern cases occasionally allow a jury to find liability under an implied warranty theory while denying recovery under a tort theory; Implied warranty cases are governed by

consumer expectations, contrasting with the strict liability risk-utility standard for design defects

3. The Restatements
    1. Two Texts
        1. R2d Torts
            1. *One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if*
                1. *a) the seller is engaged in the business of selling such a product and,*
                2. *b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.*
            2. *This rule applies even if the seller has exercised all possible care in the preparation and sale and the user or consumer has not bought the product from or entered into any contractual relation with the seller*
            3. rule does not apply to occasional sellers
            4. no distinction between container and object
            5. rule only applies when product is dangerous to an extent beyond that which would be contemplated by the ordinary consumer
            6. directions or warnings may be required
            7. some products (drugs, chemicals) cannot be made safe; no strict liability for producer if product is properly prepared, marketed, and warning is given
        2. R3d
            1. *A seller or distributor of products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect; a product is defective when at the time of sale or distribution it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings*
    2. Casa Clara Condominium Association, Inc. v. Charley Toppino & Sons, Inc.
        1. economic loss rule: cannot recover in tort from mere economic loss; must have injury
4. Product Defects
    1. Manufacturing Defects
        1. product has a manufacturing defect when it departs from its intended design even though all possible care was exercised
        2. proof of specific defect is not required; can use res ipsa for manufacturing defect
        3. Speller v. Sears, Roebuck and Co.
            1. In order to proceed in the absence of evidence identifying a specific flaw, P must prove that the product did not perform as intended and exclude all other causes for the product‘s failure that are not attributable to D

        2. more difficult with long-lived products that receive intensive, protracted use
        3. in food cases, reasonable expectations test is used
2. Design Defects
    1. product is defective in design when foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design and the omission of the alternative design renders the product unreasonably unsafe
    2. Campo v. Scofield
        1. old view: "If a manufacturer does everything necessary to make the machine function properly for the purpose for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law‘s demands"
        2. now disfavored; customer expectations test is used instead
    3. Harper and James
    4. Wade
    5. Volkswagen of America v. Young
        1. automobile manufacturer is liable for a defect in design which the manufacturer could have reasonably foreseen would cause or enhance injuries on impact, which is not patent or obvious to the user, and which in fact leads to or enhances the injuries in an automobile collision
        2. NOT strict liability
    6. Barker v. Lull Engineering Co.
        1. product is defective in design either
            1. if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or
            2. if, in light of relevant factors, the benefits of the challenged design do not outweigh the risk of danger inherent in such a design
        2. "A manufacturer who seeks to escape liability for an injury proximately caused by its product‘s design on a risk-benefit theory should bear the burden of persuading the trier of fact that its product should not be judged defective, the Ds burden is one affecting the burden of proof, rather than simply the burden of producing evidence"
        3. evidence of subsequent design changes cannot be introduced; we don't want to discourage improvements in design
        4. alterations by consumers can defeat or diminish D's responsibility for subsequent injuries
    7. Linegar v. Armor of America
        1. A manufacturer is not obliged to market only one version of a product,that being the very safest design possible

2. Return of "open and obvious" defense, but not as a bar to recovery
8. Modern view
    1. If prod is dangerous, and D could have used a better design, can go to the jury for negligence
    2. analyzed by weighing benefits of design, costs assessed with risk
    3. Open and obvious defense via Linegar
3. The Duty to Warn
    1. usually applied to drugs, chemicals which cannot be made safe
    2. Product is defective due to inadequate instructions when the foreseeable risks of harm posed by the product could have been reduced/avoided by the provision of reasonable instructions or warnings
    3. MacDonald v. Ortho Pharmaceutical Corp.
        1. D must warn all persons who will foreseeably come into contact with, and be endangered by their product
        2. doctor is knowledgeable intermediary; usually, warnings only need to be provided to him
        3. BUT, where product marketed to consumer or used in a situation where little contact/consultation with doctor, warning should be provided to consumer
4. Plaintiff's Conduct
    1. Daly v. GM Corp.
        1. principle of comparative negligence applied to products liability
        2. "Ps recovery of damages for harm caused by a product defect may be reduced if the conduct of P combines with the product defect to cause the harm and Ps conduct fails to conform to generally applicable rules establishing appropriate standards of care"
5. Federal Preemption
    1. for RAE, specific statutes aren't that important; keep in mind, though, that some can alter standards
        1. FELA, Workers Comp
        2. some drugs, chemical standards preempted
    2. US Const.
    3. Geier v. American Honda Motor Co.
        1. comprehensive federal scheme which is frustrated by state tort claim
    4. Applies in three situations
        1. when the state law is inconsistent with the federal statute,
        2. when the federal statute is sufficiently comprehensive to occupy the field,
        3. when the enforcement of the state law frustrates the federal scheme

10. Damages
    1. Recoverable Elements of Damages
        1. Pain and Suffering
            1. McDougald v. Garber

1. Nonpecuniary damages: compensate for the physical and emotional consequences of the injury such as pain and suffering and loss of ability to engage in certain activities
2. Pecuniary damages: compensate for the economic consequences of the injury, such as medical expenses, lost earnings, and the cost of custodial care
3. Damages are intended to compensate the victim by putting them in the position they would have been in had the accident never happened
4. Not intended to punish the wrongdoer (punitive damages) unless the harmful conduct was intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence

2. Economic Losses
    1. O'Shea v. Riverway Towing Co.
        1. Economic losses are taken looking forward not back
        2. Punitive damages are taxed, other are not
        3. Inflation is usually taken into account
        4. There is a duty to minimize the loss by the P