Epstein, Fall 2011 Outline

1. **INTENTIONAL TORTS**
   1. **BATTERY**
      1. *Prima facie* case
         1. Intent – Battery is the intentional
         2. Contact – Infliction of harmful or offensive bodily contact
      2. Contact
         1. Contact need not produce injury
      3. Intent – RST §1: A person acts with intent if:
         1. The person acts with the purpose of producing the contact (consequence)
            1. Vosburgh v. Putney – Δ kicked Π 🡪 injury was not intentional, but kicking was intentional
         2. The person acts knowing the consequence is substantially certain to occur
            1. Garrat v. Dailey – Δ pulled chair from under Π 🡪 knew with certainty that Π would sit where the chair had been & would fall
      4. Transferred intent – intention to do a harm transfers to whomever received the damage
         1. Talmage v. Smith – Δ throws a stick, misses intended target and hits a 3rd party
      5. Analysis
         1. Intent – Δ kicks Π
            1. Strict liability in the stranger case – no implied authorization
         2. Assumption of risk – Π assumes the risk of injury due to accidental contact
            1. License of the playground – What is the scope of consent?
         3. Malice – Δ intended to do harm
            1. Intent to do harm that goes beyond the implied license
            2. Wantoness – reckless indifference
   2. **Defenses to Physical Harms**
      1. Implied License – Consent – there is no *pfc* where Π consented to Δ’s conduct because that conduct was no longer wrongful
         1. Stranger case (scope of consent) – Mohr v. Williams – Consent to right ear operation, instead operated on left

Recovery depends on extent of the injury

* + - 1. Consent Form – Hoofnel v. Segal – Took uterus against verbal but with signed consent form
      2. Implied Consent – Schloendorff v. Soc. Of NY Hospital – treated unconscious person to save her life
      3. Appoint an Agent – court will almost always go with the will of the guardian
         1. Lausier v. Pescinski – no kidney transplant to save brother
         2. Strunk v. Strunk – yes kidney transplant (with guardian)
    1. Insanity
       1. McGuire v. Almy – Insanity is not a defense to liability in tort. If Δ intended to strike Π, they are liable
    2. Self-Defense – Use of reasonable force to prevent a threatened battery
       1. Δ needs to show – reasonable belief of assault and used reasonable force to repel
       2. Courvoisier v. Raymond – Guy shoots cop mistaken for member of mob
          1. RAE: Did Π contribute to the mistake – assault Δ – no liability – otherwise strict liability
          2. Were the circumstances such that a reasonable man in the same position would believe his life was in danger? – no liability
       3. Duty to retreat – split as to whether Δ must retreat. Trending toward need to retreat.
    3. Defense of Others – RST §76 – a person can defend a 3rd party if that person had a right to self-defense and intervention was necessary
  1. **POLICY**
     1. The Trolley Problem – When do you choose to redirect a course of action to put the expense of one person’s life over the lives of several others?
        1. Turns on sudden-ness
        2. Weigh incentives – does the application of liability create the incentive to minimize damage **and** help to prevent the situation from arising again?
        3. Relate to organ farming – do we kill one person to save 3?
     2. Incentives to the best cost avoider
     3. When the loss is borne by 1 of 2 innocent parties, it should be borne by the one who occasioned the loss
     4. Single owner to optimize losses
  2. **TRESPASS TO LAND**
     1. *Prima facie* case
        1. Enter someone’s land without permission by the owner
     2. Brown v. Dellinger – Kids burn Π’s house when playing w/ BBQ
        1. After trespass, you are liable for the consequences – strict liability
     3. Doughtery v. Stepp – trespass to try title
        1. Entry constitutes trespass with or without damage – intent controlling is to enter
     4. Cleveland Park Club v. Perry – Kid puts ball in pool drain
        1. Step 2 – granting access did not entitle putting ball in drain
        2. Intent to put ball in drain not intent to damage is controlling.
  3. **TRESPASS TO CHATTELS**
     1. Self-Help Remedy – remove my chattel from you; RAE: injunctive relief when inadequate
        1. No self-help allowed = no injunctive relief
     2. Blondell v. Consolidated Gas – Injunction against putting a regulator on CG’s line even without harm 🡪 great potential for harm
     3. Public Service Co of Colorado v. Van Wyk – Intangible intrusion (EM waves) – only trespass with physical damages, no injunctive relief without self-help
     4. Intel v. Hamidi – Sought injunctive relief based on trespass to computers
        1. Must show either that the chattel is harmed or that Π’s use was limited (RST §218)
        2. RAE: What constitutes a burden/damage to the system? What limit of detectability?
        3. Court declined to treat the computers as real property
     5. Damages
        1. Usually reduction in value to the chattel
  4. **CONVERSION**
     1. *Prima facie* case
        1. Treating someone else’s property as your own (RST §223)
        2. General strict liability holds: people should not profit from their mistakes
     2. Poggi v. Scott – Intent to treat wine barrels as his own, liable when stolen
     3. Moore v. Regents of UC – Conversion for taking tissue samples
        1. For there to be conversion, it must be your property and you must retain ownership interest in it 🡪 abandonment
        2. Action for breach of fiduciary duty stuck – how to calculate damages?
        3. Major sticking point on imbalance of info – doc knew the value of the cells
     4. Damages
        1. If returned undamaged – rental
        2. If damaged – forced sale @ market value
  5. **DEFENSES TO TRESPASS TO PROPERTY**
     1. Analysis – in absence of force against the person, the government must intervene
        1. Ask to leave 🡪 give notice
        2. Person remains 🡪 defend without wounding force
        3. If person attacks 🡪 proceed with escalated force
        4. Necessity may result in temporary suspension of property rights
     2. Defense of property
        1. Bird v. Holbrook – spring gun – Δ cannot do by proxy what he cannot do in person – trespasser assumes the risk of accidental injury not willful force
     3. Necessity
        1. Created by act of God – owner must allow and will get either damages or rental
        2. Ploof v. Putnam – servant unties pirate’s boat from masters dock during storm
           1. No duty to help, but cannot impede Δ in time of need
        3. Vincent v. Lake Erie – Contracted boat damages dock in storm – result of willful act – retying boat when ropes broke
           1. Sacrificing the dock to save the boat is OK, but must pay damages
        4. Analysis – RAE
           1. Strict liability for Δ will put Δ in the position of a single owner – Π cannot interfere.
           2. Turns on outputs, Δ will act to minimize the **total** loss.

1. **NEGLIGENCE –** Duty, Breach, Causation, Damages
   1. **General** – Was Δ negligent?
      1. Thorns – Cut thorns, trample crop retrieving – if the act is lawful and the consequence is against your will, you may still be liable
      2. Tithes – Δ liable for failed rescue of Π’s goods in time of necessity
         1. What was Δ?
            1. Officious intermeddler? – Helps when unnecessary
            2. Virtuous intermeddler? – Δ helps Π at his own expense
            3. Incentives?
      3. Gibbons v. Pepper – Guy riding horse, spurred by 3rd party
         1. Immediate actor – I spur, I am liable
         2. Remote actor – Hyper-transitive – 3rd person spurs, Δ and 3rd are liable, can sue up the chain
         3. Inevitable accident – Horse bolts – vicarious liability of Δ, antecedent dangerous condition?
      4. Scott v. Shepard – Δ throws firecracker, people throw it on, injures Π
         1. When did the firecracker come to rest?
      5. Guille v. Swan – Balloonist lands on Π’s land, damage when crowd surges to help
         1. Antecedent negligence
      6. Brown v. Kendal – Δ beating dog, hits Π with stick
         1. Act is lawful – must use reasonable care
            1. Was there contributory negligence of Π?
         2. Act is not lawful – Strict liability
      7. Rylands v. Fletcher – bring, keep collect and accumulate something on your land that is potentially dangerous, liability when it escapes
         1. Defenses
            1. Act of God

Nichols v. Marshland – Ornamental pools flood

* + - * 1. Act of Π

Contributory negligence

* + 1. Bolton v. Stone – Cricket pitch – sue batsman? Vicarious liability of the team? Contracted indemnity of the field?
    2. Hammondtree v. Jenner – Sudden, unexpected epileptic seizure 🡪 no liability assuming seizure was not the fault of Δ and Δ had no forewarning
  1. **DUTY**
     1. What would a reasonable person do under the same circumstances?
  2. **BREACH – RST §282 –** Conduct which falls below the standard set by law for protection of others against unreasonable risk of harm
     1. Analysis – Negligence generally
        1. Show Δ did not meet that standard of care
           1. What was the standard? Reasonable person

Any supporting evidence? Custom/Statute

* + - * 1. Cost/probability/severity 🡪 B<PL – Hand Formula

If the requirement is increased, would there be a difference?

Marginal cost – does $1 investment = $1+ in savings?

* + 1. Reasonable person – What is the standard of care?
       1. Intelligence – Vaughn v. Menlove – spontaneous combusting hay rick – held to normal person standard
       2. Age – kids are held to standard of a reasonable person the same age, adults are reasonable adults irrespective of age
          1. Daniels v. Evans – Kid riding motorcycle 🡪 Kids doing adult activities are held to adult standard
          2. Roberts v. Ring – old man runs over 7y/o – held to normal adult standard
       3. Beginner/Expert – RTT §12 – Beginners held to standard of care for profession. Experts held to the standard of skill for the profession *unless* a representation of greater skill has been made
          1. NOTE – Beginners are expected to know their limits and call for help (McBride)
       4. Insanity – Breunig v. American Family Insurance Co – Woman has psychotic break on highway – No excuse unless infirmity strikes suddenly with no warning
       5. Physical disabilities – Fletcher v. City of Aberdeen – Blind man falls in pit – cannot be held to standard of sighted. Duty of city to give notice.
       6. Common carriers – “utmost care” rather than ordinary care
       7. Emergency – Eckert v. Long Island RR – RST §296(1) – Emergency is considered when deciding whether an actor performed rashly
    2. Custom
       1. Generally – Violation or adherence to custom is evidence of negligence or lack of negligence but does not necessarily create rebuttable presumption
       2. TJ Hooper – No radio on tug, didn’t receive storm warning
          1. RST §295A cmt c – No industry can be permitted to adopt shitty methods/standards to save time/money at the expense of the community
       3. Titus v. Bradford – Nypano car falls off small gauge truck
          1. No requirement to use latest and greatest tech
       4. Mayhew v. Sullivan Mining Co – Ladder-hole in mineshaft
          1. Industry custom doesn’t excuse not providing notice
    3. Malpractice
       1. Generally: Everyone is held to the industry standard unless they have put forward the idea that they have knowledge higher than the standard
          1. Lama v. Borras – Back surgery, doc didn’t use customary bed rest

Prima Facie Medmal

Identify applicable custom

No locality rule, use national standard, or widely accepted method

Prove Δ failed to follow it

Causal link between injury and failure to follow custom

Cause in fact AND proximate cause

* + - 1. Informed Consent
         1. Canterbury v. Spence – Back surgery, inadequate information about risks

Would a reasonable person in patient’s position be likely to attach significance to the risk in deciding whether or not to forego or postpone therapy?

Exception – Emergency and when disclosure poses threat of detriment that outweighs informing

* + - * 1. Analysis

Show condition was so horrible, surgery was inevitable

Start from beginning of pain through surgery and indict Π’s claim that he couldn’t have consented

Analyze all elements – Did doc make it worse? Was there a better alternative?

Was the information material?

No duty to disclose obvious

No duty to disclose rare conditions – Kozup v. Gtown Uni (HIV in blood)

Duty to disclose everything in between

Burden of proof is expert testimony from Π – Bly v. Rhoads

RAE – standardized consent forms and information solves this problem

* + 1. Statute and *Negligence per se*
       1. Statutory situation trumps Hand Formula
       2. Analysis – RTT:LPH §14
          1. Violation of statute

Violation was the cause of the injury

Brown v. Shyne – Chiropractor without license

Rebuttable Presumption – is Δ just as good as a licensed professional?

But-for causation – was this a latent defect which would have happened either way?

* + - * 1. Statute was intended to protect against the harm for which Π seeks recovery

Gorris v. Scott – Sheep overboard

* + - * 1. Victim is in the class of persons the statute is designed to protect

Martin v. Herzog – Driving without lights, hits pedestrians

* + - * 1. Excused – When compliance involves greater risk, or reasonable effort has been made (RTT§15a/b)
    1. *Res ipsa loquitur*
       1. Byrne v. Boadle – Guy hit by barrel of flower
          1. Either vicarious liability (employee) or supervisory negligence (thief)
       2. Analysis
          1. Does not ordinarily occur without negligence
          2. Caused by instrumentality in the exclusive control of Δ

Consider chain of custody (Benedict v. Eppley Hotel – chair w/o screws)

* + - * 1. Must not be due to any voluntary action or contribution by Π (McGonigal – milking the grenade)

Rule out act of 3rd party outside Δ’s control or duty

Rule out act of God

* + - * 1. Burden shifts to Δ to exonerate – rebuttable presumption
      1. Ybarra v. Spangard – Brachial plexus injury during surgery
         1. Smoke out correct Δ from a group – information asymmetry
         2. Is the mistake obvious? 🡪 common knowledge is ok evidence (Bardessono)
         3. Permissive inference vs. Rebuttable presumption
  1. **CAUSE IN FACT**
     1. Generally: Π must show Δ’s act was the cause of Π’s injury
        1. Direct – push/pull; Indirect – latent defect
        2. Harm would not have occurred had the actor not been negligent (but-for)
     2. Analysis
        1. Increased risk of harm relative to background risk creates liability
           1. What happened? (Zuchowicz – 2x drug dose, then change back to single 🡪 dies of complications)
           2. What would have happened had Δ acted with due care?

What was the untaken precaution? (Grimstad – husband drowns before wife gets rope)

Would it have changed the outcome?

* + - * 1. RUN THE COUNTER FACTUAL
    1. Exposure to harmful substance (Gen Elec v. Joiner – PCB)
       1. Substance – substance that Δ is responsible for
       2. Source – Δ is the source
       3. Exposure – Π was exposed and it caused the condition
       4. Mechanism – usually “signature” wrong (find a group exposed to high levels)
       5. Admissibility of scientific evidence
          1. Frye – only “generally accepted” scientific data
          2. Daubert – district court discerns when scientific evidence is adequate to establish a causal chain
    2. Lost chance
       1. Herskovits v. Group Health Cooperative – misdiagnosed lung cancer
          1. Proportional below 50% (*ex ante*), full if above 50%
          2. Fennel – 0/1 with discontinuity at 50%
          3. Calculation:
    3. Joint Causation – Multiple Sufficient Causes
       1. Summers v. Tice – Guy shot by one of two Δ
       2. Fire Cases
          1. RTT §27 – if multiple acts exist, each of which would have been a factual cause under §26, each is regarded as the factual cause of the harm
          2. RST §433a – Apportionment of harm to causes – damages are apportioned when there is a reasonable basis for determining the contributions. No apportionment for other harms.
          3. Temporal distinction – most courts will only hit the first cause

RAE – hit the first cause for rent according to the time delay before the second

* + - 1. Market share liability
         1. Sindell/DES

Name most or all of tortfeasors as Δ (substantially all manufacturers at the time)

Products must be identical and share the same defect (fungible)

Π is unable to ID which Δ through no fault of her own

*Pro rata* apportionment unless a Δ can show their market share

* + - * 1. Skipworth – Lead is not a fungible good
  1. **PROXIMATE CAUSE**
     1. Generally – cause which, in natural and continuous sequence, produces injury without which the injury would not have occurred
     2. Substantial Factor Test – showing Δ’s negligent conduct was a substantial factor in bringing about Π’s harm
        1. Run counter-factual and excuse Δ if the outcome is the same
     3. Coincidence (Harm-Within-the-Risk)
        1. Harm not within the risk
           1. Barry v. Sugar Notch Borough – speeding train has tree fall on it
           2. Georgia Ry v. Price – train didn’t stop, woman burned by lamp at hotel
        2. Harm within the risk
           1. Hines v. Garrett – train didn’t stop, woman raped in bad neighborhood on way home
           2. RST §448 – Antecedent wrong that persists til 3rd person committed tortious act is liable until person reaches safety
     4. Directness vs. Foresight
        1. Foresight (*ex ante*)
           1. Beginning with Δ’s negligence, was Π’s harm a foreseeable consequence when Δ acted?
        2. Directness (*ex post*)
           1. Start with harm and work back to Δ’s negligence – is there a superseding cause that severs causation?
           2. Δ’s negligence increased the risk of harm which remains til risk returns to pre-negligence levels
        3. General
           1. Wagon Mound #1 – Δ not liable when spilled oil into harbor that burned down a wharf when servants of Π were welding with knowledge that oil was there
           2. Palsgraf – innocent trigger (unforeseeable), fails negation, harm-within-the-risk
           3. In re Polemis – was it foreseeable a board falling into a hold of benzene would explode?

Direct and probably foreseeable

* + - 1. Unforeseeable unbroken causal chain
         1. Hebert v. Enos – guy gets shocked gardening at Π’s house

Not foreseeable, but direct

* + - 1. Risk not dissipated
         1. Marshall v. Nugent – Truck cuts corner, forces Π off road, Δ swerves to miss stalled car, hits Π 🡪 Truck liable
      2. Intervening/subsequent cause – still liable for foreseeable intervening causes
         1. Brower v. NY central & HRR – train destroys Π’s cart, barrels stolen by thieves 🡪 train liable
    1. Compulsion/Duress
       1. Danger invites rescue (Wagner v. International Ry – guy falls rescuing dead cousin)
       2. City of Lincoln – Π jumps from Δ’s coach when it was out of control. Doesn’t sever causation if he wouldn’t have been injured had he stayed put
       3. Tuttle Rule – if Δ’s negligence puts Π under apprehension of injury and Π sustains injury during good faith effort to minimize loss, doesn’t sever causation
    2. Thin Skull Π – Take Π as Π is
    3. NIED
       1. Dillon Test
          1. How close was Π to accident? – no need to be in “zone of danger”
          2. Did the shock result from direct emotional impact from watching the accident? – can’t hear about it
          3. Was there a close relationship between Π and the injured party? – no gay people
          4. Thing factor – emotional distress must be beyond that of a disinterested witness
          5. RAE factor – allows recovery for physical harms but not mental problems
       2. Distribution
          1. 2 states use “impact test”
          2. 10 states use “zone of danger”
          3. 29 states use Dillon
          4. 3 states go beyond Dillon/Thing

1. **AFFIRMATIVE DUTIES**
   1. Analysis
      1. Statutory duty – is there a COA built into statute creating affirmative duty?
      2. Common law – misfeasance vs. nonfeasance
      3. Malice – always a duty against willful misconduct
   2. Misfeasance vs. Nonfeasance – Δ has duty to harm others, but no affirmative duty to help Π
   3. Duty to Rescue
      1. Generally – There is no duty to rescue
         1. Hurley v. Eddingfield – Doc refuses to help patient
         2. Some states have affirmative duty statutes when risk/cost is minor to Δ
      2. Duty based on prior conduct (Tort Exception)
         1. There is a duty on Δ who has created a risk and is in a position to mitigate through reasonable care
         2. Montgomery v. Nat Convoy and Tucking Co – trucks stall blocking icy road, don’t set flares
      3. Δ cannot interfere with Π’s ability to receive assistance – cannot begin rescue and then discontinue aid leaving Π in worse condition
   4. Special Relationships – duty to control acts of 3rd parties
      1. Generally: RST §315 – no duty to control 3rd party unless (1) special relation exists between actor and 3rd person imposing a duty to control 3rd’s conduct or (2) special relation exists between 3rd and Π which gives Π a right to protection
         1. Weirum v. RKO General Inc – DJ encourages idiots to race to location
      2. Landlord/tenant – Consider totality of circumstances (Kline v. 1500 Mass Ave)
         1. Duty – precautions are proportionate to risk
            1. Did precautions lapse over time?
            2. Common area vs. Private area
         2. Causation
            1. In fact – do we know identity of intruder/mode of attack? Would precautions have mitigated the harm? COUNTER-FACTUAL
            2. Proximate – Foresight 🡪 was this a foreseeable harm?
         3. Did Π’s conduct contribute to the harm?
      3. Nut jobs – Doc/Patient
         1. Analysis
            1. Potential target has been ID’d (Tarasoff)
            2. Psychiatrist facilitates the commission of the crime (Lundgren)
            3. Psychiatrist has breached an explicit promise to future victim (Long)
            4. RAE – Always consider efficacy of warning over involuntary confinement
   5. Water-works – No duty for public service suppliers to general rate payers
      1. No privity and no insurance would cover losses that can affordably be built into the rate structure (Moch Co. v. Rensselaer)
   6. Gratuitous Undertakings – Promises create duty to act with reasonable care
      1. Bailment – Coggs v. Bernard – brandy barrels split while being moved
         1. Gratuitous bailment for safekeeping (depositum) – “Good Faith” standard
         2. Bailee manages with no fee (mandatum) – “Good faith”
         3. Bailment for bailee’s use (commodatum) – Strict liability
         4. Pawning (vadium) – Ordinary care
         5. Bailment for hire (location rei) – Ordinary care
         6. Bailee manages for a fee – Ordinary care
      2. Erie Railroad Co. v. Stewart – Π can rely on Δ knowing that Δ always has a watchman at an intersection. Liability when Δ lapses.
      3. Marsalis v. LaSalle – Δ liable when negligently allowed cat to escape (against promise to keep cat quarantined) after it bit Π, Π had to go through rabies treatment because animal escaped quarantine
2. **OWNER/OCCUPIER LIABILITY**
   1. General: Duty is to take ordinary care, not heroic measures, once a defect is discovered. Duties to correct are confined to obvious cases
   2. Common law categories
      1. Trespasser – No deliberate harm/wanton misconduct
         1. Known/habitual trespassers are treated like licensees
         2. Children
            1. Attractive Nuisance – RST §339

Landowner must know it is a place children are likely to trespass

Condition can cause death/serious harm

Child will not discover or recognize the risk

Utility of maintaining and burden of remedying danger are slight

Landowner fails to exercise reasonable care to protect the child

* + 1. Licensee – Duty to warn of known dangerous conditions – no info asymmetry
       1. Roland v. Christian – guy hurts himself on bathroom sink, no warning
       2. Recreational use statute – people may enter but cannot recover w/o willful/wanton negligence
       3. Fireman’s rule – Firemen must be warned of latent defects – only for negligent fires, arson = strict liability
    2. Invitee – Duty to investigate and correct latent dangers
    3. Roughly 25 states use the categories
  1. CA – no tripartite distinction, everyone is an invitee
     1. 1/3 of states have done away with licensee/invitee but keep trespasser

1. **Π’S RESPONSIBILITY**
   1. Contributory Negligence
      1. RST §463 – Π’s negligence contributes proximately to his injuries 🡪 Complete bar to recovery
      2. Last Clear Chance – duty to mitigate (Butterfield v. Forrester – riding fast, hits pole across the road)
      3. Δ must show cause in fact and proximate cause – i.e. speeding in car does not contribute to someone running a red light and broadsiding you
   2. Assumption of Risk
      1. Primary
         1. Express – via K or waiver
            1. Both parties must be on equal footing, no willful or wanton misconduct
         2. Implied – Can be presumed under the circumstances
            1. Δ owes no duty to Π under the circumstances

The flopper – non-latent hazard

Lamson – Employee complains then continues to work

RAE – the less safe axe rack is faster for a skilled worker

* + 1. Secondary
       1. Akin to contributory negligence 🡪 Π sees Δ’s negligence and chooses to continue
  1. Comparative Negligence
     1. Pure – 13 states – apportion according to relative fault
        1. Li v. Yellow Cab – also established joint liability to multiple Δ (one settles, everyone else is on the hook for the whole remainder)
     2. Modified “Threshold”
        1. 21 states – Π must be ≤ 50% at fault
        2. 9 states – Π must be < 50% at fault
        3. NOTE – large discontinuity at the point where many cases end up
           1. HIGH ERROR COST WITH NORMALLY DISTRIBUTED DATA
     3. Admiralty – *pro rata*
        1. NOT IN USE BUT RAE LIKES IT
        2. Equal apportionment to everyone irrespective of blame
        3. LOW ERROR COST WITH NORMALLY DISTRIBUTED DATA

1. **MULTIPLE & JOINT TORTFEASORS**
   1. Joint and Several
      1. Merryweather v. Nixan
         1. Π collects one compensation for injury
         2. Π sues Δ1, that amount is deducted from what can come from Δ2
         3. Π release of one releases all, BUT covenant to not sue Δ1 (settlement) reduces damages by settled amount, not proportion of loss caused by settling Δ
   2. Several
      1. Π has separate action against each Δ, each Δ is only responsible for his share of the loss
         1. CA statute – several liability for non-economic (pain and suffering) damages
   3. Indemnity vs Contribution
      1. RST §886 – if Π settles with Δ1, Δ1 can go after Δ2 for contribution IF Π has no claim (or released claim) against Δ2
      2. *Pro rata* – even division of loss apportionment
         1. Δ’s left are only responsible for their portion
      3. *Pro tanto* – Δ’s pay proportion to their amount of negligence
         1. Non-settling Δ’s are responsible for all damages left
         2. Incentive for Δ1 to settle fast and cheap, leaves Δ2 with the bag
   4. Vicarious Liability – *Respondeat Superior*
      1. Analysis
         1. Tortfeasor is an employee of Δ
            1. Uniform – applies even if servant is expressly forbidden to engage in the behavior
         2. Does not occur during frolic or detour
            1. Ira S Bushey and Sons Inc. v. US – Drunk sailor damages dry dock

Use facts to determine if servant was on the job

* + - 1. Special Case: Independent contractors
         1. Independent Contractor – Ends set by employer, means set by IC
         2. Δ is liable for an IC when working on Δ’s premises (Rylands)
         3. Petrovich v. Share Health Plan – Doctrine of apparent (made out to be employee) and implied (employer puts limitations on the contractor) authority

Apparent and implied authority eliminates IC defense

1. **STRICT LIABILITY**
   1. First Restatement §519
      1. One who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.
      2. Activity is ultrahazardous if it
         1. Necessarily involves a risk of serious harm to the person land or chattels of others which cannot be eliminated by the exercise of the utmost care, and
         2. It is not a matter of common usage
   2. Second Restatement §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. §520 – factors to determine an abnormally dangerous activity
         1. Existence of a high degree of risk of some harm to the person, land or chattels of others
         2. Likelihood that the harm that results from it will be great
         3. Inability to eliminate the risk by the exercise of reasonable care
         4. Extent to which the activity is not a matter of common usage
         5. Inappropriateness of the activity to the place where it is carried on and
         6. Extent to which its value to the community is outweighed by its dangerous attributes
   3. Third Restatement RTT §20
      1. Liability without fault when
         1. Activity creates a foreseeable risk
         2. Activity is not one of common usage
   4. Defenses
      1. Scope – activity is not the cause-in-fact
      2. Act of God
      3. Unforeseeable 3rd party intervention
      4. Assumption of risk
2. **PRODUCTS LIABILITY**
   1. Analysis
      1. RST or RTT?
         1. RST §402A – Seller in business of selling unreasonably dangerous product is subject to liability for physical harm if it reaches Π without substantial changes, even if seller exercises all possible care
            1. No occasional sellers, no mishandling of product, only if dangerous beyond expectation, Π can assume the risk
         2. RTT – (§1) one who sells a defective product is liable for the harm caused, (§2) a product is defective when it has a manufacturing, design, or warning defect at time of sale, and (§3) circumstantial evidence is admissible (doesn’t normally occur, & not the fault of Π)
      2. Follow chain of custody 🡪 Manufacture, Transit, Use
      3. Is the defect the proximate cause of the injury?
         1. Manufacture – Failed either way? Failure cause harm?
         2. Design – Π redesign feasible/affordable? 🡪 Wade Factors
         3. Warning – Would more info change Π’s behavior?
      4. Π’s conduct – Π assume the risk? Comparative negligence?
      5. Foreseeable misuse –misuse foreseeable such that it should be considered in design?
      6. Waiver – No waiver for personal injury
      7. Is this preempted by Federal Law?
      8. Economic Loss Rule – Casa Clara – Only damage to “other” property or injury to persons result in product liability?
   2. RST §402A – A seller in the business of selling an unreasonably dangerous product is subject to liability for physical harm caused if it is expected to reach Π without substantial changes, and even if seller has exercised all possible care
      1. No occasional sellers
      2. No mishandling of product
      3. Only where defect makes it dangerous beyond Π’s reasonable expectation
      4. Π can assume the risk
   3. RTT:PL §1 – one who sells a defective product is subject to liability for harms it causes
   4. RTT:PL §2 – Product is defective when it has a manufacturing, design or warning defect at the time of sale
   5. RTT:PL §3 – Circumstantial evidence (Speller v. Sears and Roebuck – Refrigerator fire)
      1. Can be inferred that harm sustained by Π was caused by the product without proof of the specific defect if the harm was of a kind that ordinarily results from a defect and it was not the result of causes other than the product defect existing at sale
   6. Manufacturing defects – product that doesn’t conform to its design even when all possible care is taken (RTT §2)
      1. Circumstantial Evidence (RTT §3) – inference of product liability when
         1. Harm doesn’t ordinarily occur without a defective product and
         2. Harm was not the result of causes other than a product defect
      2. Escola v. Coca Cola Bottling – Bottle explodes in lady’s hand
         1. RAE – Manufacture, stream of commerce, usage analysis
   7. Design defects – foreseeable risk of harm from a product that could be avoided using an alternate deign
      1. Reasonable Alternative Design – Π, through expert testimony, must propose an alternate design
         1. Wade Factors
            1. Usefulness/desirability of the product
            2. Safety aspect of the product
            3. Availability of a substitute
            4. Manufacturer’s ability to eliminate the unsafe characteristic without impairing its usefulness or making it too expensive

Highlights need of Π to show alternate design

* + - * 1. User’s ability to avoid danger by the exercise of care
        2. User’s anticipated awareness of danger
        3. Feasibility for manufacturer in spreading the loss
    1. Consumer Expectation – article is dangerous beyond that which would be contemplated by the ordinary consumer who buys it
    2. Open and Obvious/Statutory Standards – Alternate methods for detection of design defect
  1. Inadequate Warning – foreseeable risk of harm could have been reduced/avoided by adding reasonable instructions/warning
     1. No duty to warn for generally known risks
     2. Learned Intermediaries – Duty to warn doc/pharmacist rather than patient
        1. Exception – Direct advertising – Ortho Pharmaceutical (Birth Control stroke warning)
  2. Defenses to product liability
     1. Π’s conduct – Assumption of the risk/Comparative Negligence
     2. Foreseeable misuse – Generally not a defense unless misuse is not reasonably foreseeable (Barker v. Lull Engineering, Lebouef v. Goodyear Tire)
     3. Causation
        1. Manufacture defect must be cause in fact – Π can use circumstantial evidence (RTT §3)
           1. Would it have failed either way? Did failure actually cause injury?
           2. Would it normally occur without defect? Caused by something downstream?
        2. Design defect – Π must establish proper alternate design
           1. Does the alternate create greater or different problems?
        3. Warning defect – Would more info have changed Π’s conduct?
     4. Waiver – No waivers for personal injury
     5. Federal Preemption – Supremacy clause
        1. Is there a federal law on point? Do we allow a private right of action based on a regulatory statute? Has there been industry capture pertaining to this law?
        2. Geier v. American Honda Motor – Airbag – can’t sue when gov says its fine
        3. Wyeth v. Levine – Drug injected against warning, lady loses arm, SC-USA allows insufficient warning action
  3. Economic vs. Non-economic losses (Casa Clara Condo v. Toppino and Sons)
     1. Economic Loss Rule – Damaged sustained to the product are not actionable under product liability; only damage to “other” property and injury to persons result in product liability

1. **DAMAGES**
   1. Akin to expectation damages
   2. Damage elements
      1. Pain and suffering
         1. Worry, anguish, and grief
         2. Medical expenses
         3. Lost earnings attributable to the accident – Economic
   3. Calculation
      1. *Per Diem* – quantify some small unit of time that can be estimated then multiply out
      2. Look to past decisions in jury reports
   4. McDougald v. Garber – Botched C-Section – Lady in a vegetative state
      1. No pain and suffering/future enjoyment 🡪 must be able to experience the loss
      2. RAE – Make 2 separate inquiries, P&S must be experienced, FE maybe not