1. Elements of an Intentional Tort
   * 4 elements to every intentional tort
     + Act:
     + Intent: Intent to commit the act which causes the harm (not necessarily to cause the harm)
     + Cause: Direct
     + Harm: Some legally cognizable harm to body, property, or interest
2. Types of Intentional Torts --- ALWAYS SHOW DIRECT CAUSAL CONNECTION
   * Physical
     + Battery (Trespass to Person)
       - Act
         * Unpermitted Physical Contact
         * Harmful or Offensive Contact
         * Indirect Harmful Contact
       - Intent
         * Intent to make contact (RST says intent to harm)
         * Intent to cause imminent apprehension (Intent to Assault)
         * Substantially Certain of Harm

May not intend to contact -- but understand contact/injury is inevitable if action is taken

* + - * + Transferred Intent
      * Harm
        + Actual Physical Harm -- No technical harms
        + All harm resulting from the act; regardless of foreseeability
        + Harm may not manifest immediately
      * Cases
        + Vosburg v. Putney

(A - Kicking)(I - to kick)(H - unforeseen egg shell leg)

* + - * + White v. Univ. of Idaho

(A- Touching piano players back)(I - make contact but cause no harm) (H - some physical injury)

* + - * + Garratt v. Dailey

(A - Indirect/ pulling chair out) (I - to pull chair) (H - fell and injured self)

* + - * + Talmage v. Smith

(A - Threw stick at #1) (I - To hit #1) (H - Hit person #2 -- transferred intent)

* + - * + Wagner v Utah

(A - Woman beat up my mental patient in Kmart line) (I - make unpermitted contact --not harmful necessarily) (H - That ass beat)

* + - * + Hudson v Craft

(A - unofficial boxing match) (I - Substantial certainty / illegal for a reason) (H - That ass beat)

* + - * + Bird v. Holbrook

(A - spring gun to catch tresspassor) (I - to harm trespasser) (H - to innocent kid/transferred intent)

* + - * + Courvoisier v Raymond

(A - Shot at advancing officer) (I - to stop intruder) (H- transferred intent/ shot officer)(Self-Defense allowed)

* + - Trespass to Land
      * Act
        + Unauthorized entry into land (air space/ground rights too)
        + Unauthorized presence while entry was authorized
        + Intangible Trespass to real property (No intent/ requires physical damage)
      * Intent
        + Intent to enter land

Mistaken authorization is irreverent -- act suffices

Negligent entry = negligence claim

* + - * + Intent to enter unauthorized part/ commit unauthorized act
      * Harm
        + Actual harm
        + Technical harm (No harm but nominal damages for the act)
      * Cases
        + Dougherty v. Stepp

(A - enter land)(I - mistaken belief it was his to survey) (H - technical)

* + - * + Smith v Smith

(A - Side of barn overhung land boundary) (I - the barn was built) (H - Technical)

* + - * + Neiswonger v Goodyear

(Airplane within 500 ft. of ground) (I - not lowered for necessity) (H - Technical)

* + - * + Brown v. Dellinger

(Friend’s children started unauthorized fire) (I - bad ass kids start fires) (H - Duhh -- the fire)

* + - * + Cleveland Park Club v. Perry

(A - swimming legally but stuck ball in pipe) (I - complete the act) (H - Actual damages)

* + - * + Public Service Co. of Colorado v. Van Wyk

(A - noise and radiation from utility system) (I - not necessary) (H - must prove physical damage

* + - Trespass to Chattels (Little brother of conversion)
      * Act
        + Unauthorized use of property
        + Interference with right of possession/ property interest
      * Intent
        + Strict Liability
      * Harm
        + Injury to physical condition/ value/ quality/ legal right
        + Functional Impairment
        + Dispossession for any time (5 minute joy ride)
        + No Technical harms such as trespass to land
      * Cases
        + Intel Corp. v. Hamidi

(A - unauthorized emails by former employee) (H - no physical harm/functional impairment to CPUs so no tort)

* + - * + Ebay v. Bidder’s Edge

(A - Internet spiders checking bids) (H - *capable* of functional impairment and slowing of speeds)

* + - * + Sotelo v. Direct Revenue

(A - Spyware secretly installed) (H - *capable* of corrupting data/tracking movement)

* + - * + RST § 218 Comment E

Requires (1) harm to material interest (2) substantial dispossession (3) harm to legally protected interest

* + - Conversion
      * Act
        + Intentional exercise of control over chattel (nonfeasance ok)
        + Serious interference with right of possession/property interest

Elements of seriousness (Duration of control, good/bad faith, harm committed, π inconvenience)

Also includes Intangible Property

* + - * Intent
        + Strict Liability -- intent to exercise control whether intentional, mistaken, negligent
      * Harm
        + Such substantial interference that damages=full value
      * Cases
        + Poggi v. Scott

(A - selling wine in newly acquired rental property)(H - exercise of control - liable for full value)

* + - * + Maye v. Yappan

(A - good faith mistaken removal of gold from land) (H - exercise of control - liable for value minus labor cost)

* + - * + Moore v. Regents of Univ. of Cali. L.A.

(A - profitable research using patients cells) (H - no possessory interest in excised cells so no tort)

* + - * + Kremen v. Cohen

(A - sex.com domain given away on accident) (H - Δ gave away π’s property w/o asking first, not bad faith but strict liability regardless)

* + Emotional
    - Assault
      * Act
        + Intentionally causing apprehension of offensive contact
        + Battery w/o contact
        + Words alone generally do not suffice (Tuberville)
      * Intent
        + Intent to cause apprehension (make someone think twice)
        + Failed Intent to make contact
      * Harm
        + Imminent apprehension -- may have no relation to actual fear
      * Cases
        + Tuberville v. Savage

(A - verbal threatening to draw sword) ( I - Thing twice when talking to me) (H - no physical act=no harm)

* + - * + I de S and Wife v. W de S

(A - Hit door with hatchet) (I - wake the fuck up) (H - wife put in apprehension of contact)

* + - * + Allen v. Hannaford

(A - pointed unloaded gun and threatened to shoot) (I - create apprehension in evicted tenant)(H-he succeeded)

* + - * + RST § 21

Liability for acts (1) intending to cause imminent apprehension (2) failed battery **IF** apprehension results

* + - * + RST § 24

Not necessary that harmed person be fearful or actor have ability to cause harm (apprehension alone)

* + - Offensive Battery
      * Act
        + Similar to battery -- unpermitted contact resulting in no physical harm
        + Acts highly provocative of retaliation by force (spitting)(unwanted kissing)
      * Intent
        + Intent to make contact
        + Intent to cause harm
      * Harm
        + Emotional / Dignitary Harm -- insult is more than actual harm
      * Cases
        + Alcorn v. Mitchell

(A - spit on Δ after court) (I - to insult) ( H - who likes to be spit on?)

* + - * + Respublica v. De Longchamps

(A - struck cane of ambassador) (I - to hit cane) (H - insult to ambassador’s reputation)

* + - False Imprisonment
      * Act
        + Intentionally confinement within boundaries
        + Threatened harm resulting in confinement
        + False assertion of legal authority resulting in confinement

I.E. seizing the passports of migrant workers

* + - * Intent
        + Intent to commit act which confines
      * Harm
        + Harm is in effective confinement within boundaries -- not just prevention of free movement
        + If harmed is not aware of his confinement, then no tort
      * Cases
        + Bird v. Jones

(A - charging for entry to highway to watch boat race) (I - to restrict free movement inside) (H - no harm -- three walls do not = a prison, only partial obstruction)

* + - * + Coblyn v. Kennedy

(Old man threatened by mall/store security) (I - suspected shoplifter) (H - demonstration of physical power avoidable only by submission)

* + - * + Whittaker v. Sanford

(A - woman imprisoned on yacht by husband) (I - sit yo ass down) (H - confinement -- damages lower for comfy confinement)

* + - * + Sindle v. New York City Transit Authority

(A - bus driver drove to police station to take bad ass kids, made good kids go too) (I - insure safety) (H -no harm/no tort -- done as reasonable safety measure

* + - * + Herd v. Weardale Steel

(A - Miners not happy w/ conditions but not bought up on demand) (H - no harm/ consent cant be retracted if confinement has been agreed to)

* + - * + Peterson v. Sorlien

(Parents take daughter to de-programmer) (I - freedom from cult/ well-being)(H-no harm/ parental supervision)

* + - Intentional Infliction of Emotional Distress
      * Act
        + Intentional or reckless infliction of severe emotional or mental distress through extreme or outrageous conduct

Code words -- humiliation, harassment, criminal acts to third party, debt collectors on the phone

Action “so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency… utterly intolerable in a civilized community

* + - * + Non-Targeted Witnesses

Family members who were present at the time of harm and witnessed can sue under this tort

Non-family members who are present and have physical manifestations of injury can also recover

* + - * Intent
        + Intent imputed from reckless extreme/outrageous conduct
        + Intent to cause such distress
        + Taking actions substantially certain to cause distress
      * Harm
        + Emotional distress requiring medical advice (psychologist)
        + So serious as to cause manifestation of physical defect
      * Cases
        + Wilkinson v. Downton

(A - practical joke that husband was dead) (I - reckless disregard for possible distress) (H - vomiting, incapacity, other physical conditions)

* + - * + Bouillon v. Laclede Gaslight Co.

(A - Meter reader forced way into apartment -- π was pregnant) (I - reckless disregard) (H - cold air and scare cause miscarriage the next day)

* + - * + State Rubbish Collectors Assoc. v. Siliznoff

(A - threatened harm to rubbish collector for not giving money up) (I - extreme/outrageous)(H-mental suffering after serious threats to physical well-being)

Did not count as assault because only future action was threatened -- did count as IIED

* + - * + George v. Jordan Marsh Co.

(A - extreme debt harassment when no debt was owed) (I - Fuck the police) (H - two heart attacks)

* + - * + Hustler Mag. v. Falwell

(A - harsh political satire) (I - reckless disregard) (H - although harm -- liability with regard to public officials would chill first amendment rights/protections)

1. Defenses to Intentional Torts --- [A = Act; D = Defense]
   * Defenses
     + Consent
       - Express Consent
         * Consent expressed in words or writing (signing a consent form)
         * Must be consent to the act itself, cannot be extended to other acts
       - Implied Consent
         * In-Fact

Consent expressed through conduct (holding arm out for shot)

* + - * + In- Law

Assumption π would have consented, but was precluded somehow

Emergency Rule

Implied from the circumstances when medical emergency requires immediate action to preserve life/limb

Protects π’s by encouraging assistance

Consent implied to any attempted remedy in the area of the original assent -- cant operate on leg w/ consent for arm

* + - * Vitiated Consent -- Where assent ≠ consent
        + Fraud/Nondisclosure

If consent is based on mis-information or a purposeful nondisclosure of risk than assent ≠ consent (Not telling wife you have AIDs)

* + - * + Assent to Illegal/Criminal Acts

Assent ≠ consent when the law is designed to protect the interest of a group who cannot fully appreciate the risk of the act (Statutory Rape to an extent, unlicensed prize fighting case)

* + - * + Incapacity (Substituted Consent)

If you are a child, or mentally ill to the point that you cannot appreciate the risk of the act -- similar to above

Consent must come from parent/guardian

* + - * Athletics (Form of implied consent)
        + Consent is a defense to sport/recreational related activities unless the injury results from a violation of the rules or is in some way willful/reckless harm
        + True for organized sports and informal recreation
      * Cases
        + Mohr v. Williams

(A - Consent to operate on right ear -- fixes right eat) (D - consent not given because operation exceeded the original scope of consent)

* + - * + Hudson v. Craft

(A - Consent to enter illegal boxing match) (D - law designed to protect idiots, assent ≠ consent)

* + - * + Kennedy v. Parrott

(A - Doc fixes diseased cysts in operation for appendicitis)(D - emergency + within scope of express consent = implied consent)

* + - * + Barton v. Beeline

(A - 16 yr/old sex - statutory rape) (D - consent upheld because girl old enough to understand actions) (Not upheld if too young to understand)

* + - * + O’Brien v. Cunard

(A - immunize immigrant off ship) (D - consent implied in fact-- girl held out her arm and could not enter country w/o shot)

* + - * + Ybarra v. Spangard

(A - back surgery w/o full disclosure of risk of paralysis) (D - assent ≠ consent w/o full disclosure - Remanded/ jury decide whether to imply)

* + - Insanity
      * Insanity is not a defense to liability -- insane people are liable in the same sense normal people would be
        + Only used to vitiate a necessary element (intent) or applicable in torts requiring malice which insane is incapable of (defamation / malicious acts)
        + Reasons and motives may be entirely irrational -- all that is needed is the intent to commit the act regardless of motive
      * Policy
        + Where a loss must be borne by one of two innocent people, it shall be borne by him who occasioned it (Gould)
        + Gives reasons for those interested in insane’s estate to protect (Gould)
      * Cases
        + McGuire v. Almy

(A - insane injured caregivers to head) (D - damage was caused intentionally so liability upheld)

* + - * + Gould v. American Family Mutual Insurance Co.

(A - Head nurse is injured attempting to restrain known combative patient) (D - nurse not innocent of the risk because it was reasonably foreseeable unlike *McGuire*)

* + - * + Polmatier v. Russ

(Schizophrenic injured person) (D - insanity not defense; motives may be irrational but Δ knew what he was doing)

* + - Self-Defense / Defense of Others
      * Self defense is the reasonable use of force (1) during a direct assault or (2) when a reasonable person would believe they are in danger of death or seriously bodily injury
        + Even if that belief is mistaken
        + Limited to proportional force -- shoot at burglar but not random tresspassor
        + Limited to defense -- not actions taken in retaliation
      * Defense of Others
        + if Δ correctly believes 3rd party would be entitled to use force in self-defense **and** his own intervention is necessary to protect that party = acceptable
      * Innocent Bystander
        + If force would be justified under self-defense; there is no liability for injuring an innocent bystander **unless** there is unreasonable risk (grenade)
      * Cases
        + Courvoisier v. Raymond

(A - Officer approaching guy just robbed; guy shot officer) (D - reasonable to believe life still in danger; self-defense allowed)

* + - * + RST § 76

Allows defense of third parties under standard above

* + - * + Morris v. Platt

(A - innocent bystander injured by self-defense action) (D - harm to an innocent bystander by reasonable force intended in self-defense is not actionable unless unreasonable risk of harm is created)

* + - * + Brown v. Robinshaw

(A - new boyfriend pushes ex-husband off steps when ex came to house) (D - reactions unreasonable under the circumstances creates liability for negligence and precludes self-defense) (Not proportional)

* + - Defense of Property
      * In person
        + When present, Δ may use force to oppose a forceful entry (proportional)
        + If entry is not forceful, you must verbally ask tresspassor to leave before resulting to physical violence (or give warning of possible trap)
        + Deadly force only acceptance when (1) non-deadly force will not suffice or (2) reasonable belief that w/o deadly force death or serious harm will occur
      * Through Instrumentality
        + Δ may protect his property through an instrumentality (spring gun)
        + Force used must mirror the force that would be acceptable if Δ was present
        + I.e. it is never rational to use a spring gun because chances are you wouldn’t shot the intruder in real life -- instruments aimed at deterrence over harm
        + No man can do indirectly that which he cannot do directly (Bird)
      * Cases
        + Bird v. Holbrook

(A - spring gun to stop tulip robbers, injures innocent teen) (D - DOP would not have allowed this force in person, not allowed through instrumentality)

* + - * + Katko v. Briney

(A - boarded up house being robbed; spring gun used) (D - force used was not proportional to items protected; life was not in danger)

* + - Recapture of Chattels (Land)
      * Δ entitled to use reasonable force to reclaim property wrongfully taken
        + Must involve (1) possession by the owner and (2) purely wrongful taking or conversion without a claim of right (car possession = claim of right)
        + Must be in hot pursuit (right exercised promptly after taking)
      * Δ may use peacefully evict someone from their land -- liable for damages if there is forcibly eviction
      * Cases
        + Kirby v. Foster

(A - Manager kept petty cash claiming it was owed to him from docked pay -- owner beat that ass) ( D- no defense because manager had claim to money -- there is a right of defense but not redress)

* + - * + Berg v. Wiley

(Landlord changed locks to evict) (D - liable because although not physical this was a forceful eviction)

* + - Necessity
      * Generally
        + Δ is allowed to trespass on property or chattel in conditions of necessity -- the inability to control movements which result from the proper exercise of a strict right (right to life/ property)
      * Private Necessity (Conditional or Incomplete privilege)
        + RST § 197 -- private property may be taken/used/damaged in necessity, but Δ is liable for the extent of the damage caused or a reasonable rental rate

No nominal damages for technical trespass

* + - * + Private necessity has a ***complete privile***ge only if the resulting damage would have occurred absent some intentional action i.e. not adding stronger ties --

Considered “passive necessity” -- as opposed to “active necessity”

* + - * Public Necessity (Complete privilege)
        + Assuming the loss of property was inevitable; private property may be taken/used/or destroyed for the relief, protection, or safety of the masses
        + No compensation for damage -- unless done to provide “justice”

Ship captain can throw luggage overboard, but loss must be split by all passengers because unjust to require few to suffer harm for all

* + - * Cases
        + Ploof v. Putnam

(A - attached boat to dock during storm - owner removed) (D - trespass may not be prevented in active cases of necessity -- owner liable for damages since untied boat)

* + - * + Vincent v. Lake Erie Transportation Co

(A - Owner refused to leave dock during storm -- added stronger ties to keep boat in place) (D - trespass acceptable, but liable for additional damage because storm would have broke ties and intentional act of adding stronger ties is what caused damage)

* + - * + NY Mayor v. Lord

(A - mayor ordered houses destroyed to stop fire from spreading that would have destroyed immediate

* + - * + Scheuer v. Rhodes

(Kent state student shot by Nat’l guard during riot) (D - cannot claim necessity and complete privilege -- action reasonable in light of the circumstances)

* + - * + Trolley Hypo

Do nothing and kill 5 -- switch tracks and kill 1?

Omission/nonfeasance is not punishable in tort law

Switching the track could create liability for intentional tort -- generally no privilege to kill someone -- necessity would not work

* + As Applied to Defend against Intentional Torts
    - Battery
      * Applicable: Consent, Self-Defense; Defense of Property; Recapture of Chattels
      * Not Applicable: Insanity, Recapture of land, Necessity?
    - Trespass to land
      * Applicable: Consent, Necessity, Recapture of Chattels
      * Not Applicable: Self-Defense, Defense of Property, Insanity
    - Trespass to Chattels (Strict Liability)
      * Applicable: Consent, Necessity
      * Not Applicable: Self- Defense, Defense of Property; Insanity, Recapture of Chattel
    - Conversion (Strict Liability)
      * Applicable:
      * Not Applicable
    - Assault
      * Applicable: Consent (parental control), Self-Defense, Recapture of Chattel, Defense of Property
      * Not Applicable: Necessity, Insanity,
    - Offensive Battery
      * Applicable: None really…
      * Not Applicable: Consent, Insanity, DOP, SD, ROC, Necessity
    - False Imprisonment
      * Applicable: Consent (mine worker), DOP (shoplifter), Self-Defense (maybe)
      * Not Applicable: Insanity, Recapture of Chattel, Necessity
    - Intentional Infliction of Emotional Distress
      * Applicable: None really…
      * Not Applicable Consent, Insanity, DOP, SD, ROC, Necessity

1. Elements of Negligence -- purpose to incentive due care/efficient deterrence in living
   * Duty
     + Was Δ obligated to act in a certain manner toward π?
       - Legal duty requiring Δ to conduct himself according to a certain standard to avoid unreasonable risk to others
     + Did Δ expose π to an unreasonable risk? -- There is a duty to everyone to mitigate risk
     + (Don’t ask if there was a duty first, it is usually conclusory and sometimes circular that invents Δ’s duty toward π
   * Breach
     + Did Δ’s level of care fall below the reasonably prudent person’s level?
     + Did Δ expose π to an unreasonable risk?
   * Cause
     + Is Δ’s breach casually connected to π’s harm?
       - Cause-in-fact (Direct Cause)
         * “but-for” causation -- π would not have suffered harm but-for Δ’s actions
       - Proximate Cause
         * Cause implied in law -- is π’s harm related to Δ’s actions such that it is reasonable to hold Δ liable for the harm?

No proximate cause (Summary Judgment for Δ)

Independent Intentional Intervention a superseding cause?

Too remote a possibility (random/unpredictable injury)

Mere coincidence

Separate cause of harm

Jury Question

What the harm generally within the foreseeable risk?

Is there a natural and continuous sequence of events? (Implied foreseeability)

Length of chain/remoteness (If unsure, jury)

Was there substantial contribution to the chance of harm?

Juries may use (1) reasonable person standard (2) Calculus of risk or (3) custom to help make negligence determinations

Clear Proximate Cause (Summary Judgment for π)

Injury that occurred was not only reasonably foreseeable, but predictable and sure to happen?

* + Harm
    - There must be actual harm/damage -- there is no such thing as technical negligence

1. The Reasonable Person Standard
   * Generally
     + Would a reasonable person of ordinary prudence act as Δ did, under the circumstances?
       - Completely objective and not subjective standard for reasonableness
   * Age/Youth
     + Old. Standard of care of a reasonably prudent person with same physical conditions
       - Known handicaps count against Δ -- should be taken into the calculus of risk
     + Youth. Reasonable person of that age, experience, and intelligence, under the circumstances
       - Youth in adult activities or dangerous activities are held to the adult standard or the expert standard of care (because you suck at skiing doesn’t mean you injure others)
       - If the activity requires a license or training -- good indication it is adult / dangerous
       - No negligence for children under 5 -- harder to impose contributory negligence claim
     + Beginner/Expert
       - Skill level is generally ignored, held to a standard of those who are reasonably skilled and practiced
       - Expert. If held out as an expert, there may be a higher standard of care
   * Mental/Physical Disorder (Insanity)
     + Mental disorder/ insanity
       - No allowance for mental defects -- held to the ordinary standard of care
       - Holmes: No doubt his congenital defects will be allowed for in the court of heaven, but he is no less troublesome to his neighbors now”
     + Physical Disorder
       - Standard of care a reasonable person with the handicap would be expected to exercise under the circumstances (I.e. if you are blind then don’t drive)
     + In Practice
       - Mental/Physical disorder is a valid defense when (1) it affects the persons ability to understand the duty which rest upon him or (2) affects his ability to act in a reasonably prudent manner AND there is an absence of forewarning or notice that Δ may be subject to such a mental/physical disorder
       - Courts tend to give more leniency with physical disorders (Δ had a heart attack while driving, even if 2nd heart attack) then mental ones (Ol girl thought her car could fly)
     + Intoxication
       - Not an excuse -- held to a reasonable (sober) person standard of care
       - Intoxication not dispositive -- being drunk doesn’t create a presumption of negligence
   * Cases
     + Vaughan v. Menlove
       - (A - hayrick burned down neighbors cottages -- prior warning or the probability of fire) (D - must enjoy your property as not to injure that of another) (N - yes, you were warned of the risk and decided to “risk it”)
     + Roberts v. Ring
       - (A - old man driving car hit child when child ran from behind a buggy) (D - drive car in a reasonably prudent manner) (N - yes, infirmities of age are reasons Δ should have avoided driving in crowded places)
     + Daniels v. Evans
       - (A - π kid driving motorcycle collides with Δ’s car and died; mom sued Δ) (D - drive car in a reasonable safe manner) (N - Contributory negligence bars -- π as a minor in adult activity forfeits right to lower standard of care)
     + Breunig v. American Family Insurance Co.
       - (A - Δ thought her car could fly and hit π while attempting to reach flying speeds/ mental disorder) (D - duty to drive reasonably safe)(N - yes, insanity does not vacate liability, Δ had forewarning and took unreasonable risk of driving)
     + Fletcher v. City of Aberdeen
       - (A - blind man falls in hole in sidewalk; Δ forgot to erect barricades/warning) (D - maintain reasonably safe commons) (N - yes, streets used by blind and not-blind; city must minimize risk to both -- no cont. neg. -- standard of care of blind person)
     + Denver, Rio Grande RR v. Peterson
       - (A - warehouse accident -- Δ sought evidence of wealth) (D - Not important)(N - no, no higher duty for the wealthy, wealth inadmissible for purposes of negligence)
     + Poyner v. Loftus
       - (A - blind man diverted attention and fell into hole) (D - to have reasonably safe conditions) (N - reasonable person would not have diverted attention and would have saw the hole -- contributory negligence bars)
     + Robinson v. Pioche
       - (A - drunk man hit by driver; claimed π being drunk was cont. neg.) (D - drive car reasonably safe) (Con. N - no -- drunk entitled to a safe street just like a sober man -- gross negligence > simple negligence)
2. Calculus of Risk
   * Generally
     + π must show that Δ’s conduct imposed an unreasonable risk of harm to π or a class of people which π is a member of
   * Factors
     + Foreseeability of the risk
     + Magnitude of the risk
     + Value of the thing bring risked w/o precautions or saved by precautions
     + Probability that harm will occur or the probability precautions will prevent
     + The benefits to taking the risk
     + Necessity (Was the risk taken to save a life? Property?)
   * Hand Formula
     + Requires weighing of three things for an efficiency rule of negligence
       - (1) Probability of occurrence
       - (2) Benefit from employing safeguards (ex ante potential loss)
       - (3) Cost of employing safeguards (Cost of prevention)
     + Considered the “primary factors” by RTT § 3
     + Intended to prevent accidents that are foreseeable and result from undue risk -- but precludes compensation if the safety investment was not efficient/best use of resources
     + Intended to influence ex ante prevention and risk calculation
   * Exceptions to common calculus
     + Common Carriers
     + Exclusive Control
   * Cases
     + U.S. v. Carroll Towing Co.
       - (A - moving barge tied to others; line broke; bargee had been MIA and could have prevented collision) (D - Unreasonable risk in unattended barge?) (N - yes, calculus of risk requires bargee be on board atleast during peek hours [day])
     + Osborne v. Montgomery
       - (A - Bike carrier injured when car stops in front of him) (D - unreasonable risk by opening car door w/o looking?) (N - no, the potential for harm may exist in actions that are not negligent -- what would ordinarily prudent man do)
     + Cooley v. Public Service Co.
       - (A - During a storm, power and telephone lines collided causing a noise in P’s phone which injured) (D - unreasonable risk in not insulating lines from each other or providing some type of net?) (N - no, Δ conformed to the standard accepted business practice; employing netting may have caused risk to those on street -- balancing)
     + Andrews v. United Airlines
       - (A - briefcase fell from overhead storage upon opening) (d - should Δ employ safeguards to protect?) (N - yes, common carrier = heightened duty; even a small risk of serious injury may form the basis for liability)
     + Blyth v. Birmingham Water Works
       - (A - pipes bust due to ice/expansion of water) (D - should Δ have protected against this risk? )(N - no, reasonable person would not expect such cold weather; therefore ice is a foreseeable risk)
     + Eckert v. Long Island RR
       - (A - π jumps in front of speeding train to save childs life and is killed) (D - was there contributory negligence? π put themselves in harms way) (N - no, act was one of necessity; high value on life; fault only for rash decisions under the circumstances)
     + Breunig v. American Family Ins
       - (A - delusions that car could fly) (D - negligent for driving w/ known mental disorder?) (N - yes, prior knowledge effects calculus; safeguards would have prevented although she may have to give up driving)
3. Custom
   * As absolute evidence
     + Epstein -- Non-Stranger Relations -- Efficiency
       - Policy argument that custom should be the standard of care in non-stranger cases
       - Assume the parties know the risk and level of care expected; in that was there has been a joint assumption or risk (Employee/Employer generally) (Titus)
       - In this way, the market will set the standard of care which will represent an equilibrium between cost and benefits of safeguards
     + Injury from Routine Employment Risk
       - Reasonably safe business settings which conform to the usages, habits, and ordinary risk assumption preclude negligence -- i.e. injury from a unpreventable risk
   * As evidence of the standard of care
     + Failure to meet industry custom
       - Proof that the industry employs safeguards which D did not is highly suggestive of negligence, but not considered conclusive evidence
     + Custom may be used as evidence of the reasonable standard of care; but it is not the brightline \*\*\*\*\* Operative Black Letter Law in Custom arena\*\*\*\*
       - Much easier to show failure to meet custom = negligence then it is to show adherence to custom = no negligence
   * When custom is irrelevant
     + There are precautions so imperative that even their universal disregard will not excuse their omission (TJ Hopper)
     + Custom has nothing to do with due care -- custom does not excuse gross negligence or lack of ordinary care (cutting a hole in miners platform w/o telling him)
   * Cases
     + Titus v. Bradford
       - (A - RR Switcher injured atop wide-body car adapted for narrow-body tracks) (D - was there unreasonable risk?) (N - no, π had full knowledge of the risk involved with job -- doesn’t require the newest/best safeguards only those reasonable)
     + Mayhew v. Sullivan Mining Co.
       - (A - Δ cut hole in mining platform w/o telling π; π sued claiming hole needed barriers, lighting, etc. -- Δ claimed it was not industry practice to use such) (D - was there unreasonable risk created) (N - yes, universal carelessness is no excuse -- grossly negligent to cut hole mid-shift without warning the miner)
     + The TJ Hooper Case
       - (Tug boats caught in storm w/o radios -- tugs crashed -- four tugs with radios were warned and saved) (D - did lack of radios create unreasonable risk out of normal event?) (N - yes, radios may not have been full industry custom, but the industry can never set its own line -- precautions so imperative their disregard is not excused)
     + US Fidelity v. Jadranska Slobodna
       - (A - Longshoreman fell through open hatch door -- custom to leave doors open upon arrival) (D - does leaving doors open create unreasonable risk?) (N - No, Posner applies hand formula and decides risk was reasonable given the small probability of occurrence and the benefit [in form of saved time] of taking the risk)
       - Posner -- situations where parties have a relationship and understand the custom/risk -- there is a efficient and natural equilibrium (Hand test = efficiency)
       - Note -- π’s conduct created the risk; it was not thrust upon him
4. Medical Malpractice (Professional Negligence in general)
   * Generally
     + Custom occupies a privileged position in medical malpractice -- shield against liability
       - Why? Heightened risk to doctor guilty of malpractice -- (Epstein) A few negligent doctors may escape liability but grossly negligent doctors will not
     + Custom can still be rejected if the negligence is clear (Failure to disclose, glaucoma case)
   * Custom in Medical Malpractice
     + National Standard of Care
       - Doctors are held to the national standard of care; no longer prevailing community standards -- standards are adjusted to the level of specialty doctor claims to have
       - Why? Think Jack-of-all-trades country doctor vs. modern high-powered specialist
     + Alternative Schools of Thought
       - No negligence can arise from following a minority/secondary approach to care
       - Must be accepted by a considerable number (more than small minority) of doctors
     + Informed Consent
       - Regardless of custom to leave certain risk out -- duty of doctor to disclose any risk that would be material to the patients decision --
       - Ended paternalist non-disclosure but lets doctors tailor disclosure to patient’s needs
     + Error of Judgment
       - Mere error in judgment does not automatically constitute negligence -- however -- the error in judgment could be negligent if signs were missed
   * Medical Malpractice 3-Part Test
     + (1) π must show the basic norms of medical care applicable (2) proof that medical personnel failed to follow these basic norms and (3) causal relation between the act/omission and the injury suffered
       - Expert Testimony usually required to establish a standard of care unless the negligence is plain/clear (Leaving a scalpel in the body)
       - Negligence can be inferred from the circumstances
   * Cases
     + Lama v. Borras
       - (A - Back surgery 🡪 infection 🡪 paralysis )(D - did Δ fail to meet standard by proscribing bed rest?)(N - yes, if 2 weeks bed rest is the accepted custom then failing to meet that standard= malpractice) ( Question of fact -- close call)
     + Canterbury v. Spence
       - (A - Doc failed to disclose 1% risk of paralysis-- first surgery was fine but π fell out of bed and had second surgery -- π was paralyzed) (D - Custom was to not communicate small risk that would have major impact on decision -- paternalistic disclosure) (N - full disclosure required for informed consent regardless of custom)
     + Helling v. Carey
       - (A - Glaucoma testing) (D - was custom not to provide test to those under 40) (N - yes, hand test outrides custom in gross negligence) (Overruled by some statutes)
     + Burne v. Belinkoff
       - (A - ???) (Established national standard of care)
5. Statutes and Regulations
   * Negligence Per Se / Contributory Negligence Per Se (Common law and RTT § 14)
     + Statutes provided a proscribed standard of care -- violation may result in negligence per se
       - (1) Statute designed to prevent a certain harm to a certain class of people
       - (2) That harm happened to a person in that class
       - (3) The violation is casual connected to the harm (adherence = prevention)
       - Burden Shifts to Δ to rebut causal connection if above elements are met
       - Defenses
         * Necessity, Emergency, and incapacity

Must be in the extreme or extraordinary to overcome per se -- mere reasonableness of the violation not excuse -- not admitted as evidence

* + - * + Traditional exception to custom codified in law (Tedla)
        + Δ exercises reasonable care in trying to comply w/ statute, but was prevented by some external force (RTT § 14(b))
  + Evidence of Negligence
    - Violation of a statute may show Δ breached a standard of care if negligence per se is not applicable for some reason
    - Defective statutes could also be used to set a standard of care (Ruled unconstitutional put standard included)
    - Later-enacted statutes can be introduced as evidence as negligence -- but not per se
  + Private Right of Action
    - Statutes may give private “rights of action” or the right to sue for breach of the statute (Employment discrimination)
  + License
    - Licenses usually do not set standard of care -- violation does not constitute negligence per se
    - Immediate reason for lack of license is often unrelated to the state’s general safety purpose
  + Cases
    - Osborne v. McMasters
      * (A - pharmacy sold drugs w/o poison warning, π died) (N - yes, negligence per se)
    - Martin v. Herzog
      * (A - π in buggy with no lights -- hit by negligent driver) (N - no contributory negligence for statutory violation -- violation not causally connected to harm)
    - Schmitz v. Canadian Pacific Railroad
      * (A - Reinforced the opinion that courts should regard an actor’s statutory violation as determining the actor’s negligence )
    - Gorris v Scott
      * (A-Sheep washed overboard during storm - statute required penning to prevent spread of disease) (N - No per se, statute not designed to protect against that specific harm, designed to prevent spread of disease not from being washed overboard during storm)
    - Brown v. Shyne
      * (A -Unlicensed Chiropractor performed surgery causing paralysis) (N - no negligence per se -- must prove he violated substantive medical standards behind licensing)
    - Tedla v. Ellman
      * (A - Walking on left side of highway instead of against traffic) (N - no cont. neg. per se -- prior exception under custom to walk with traffic if it is much lighter than walking against) (RST §228(a))
    - Talley v. Danek Med.
      * (A - Δ failed to receive FDA approval on product) (N - no, where statute does not articulate a standard of care but regulatory approval, violation is not a breach of a standard of care)
    - Ross v. Hartman
      * (A - Δ liable for leaving keys in car -- car being stolen -- 3rd party ran over by car)(N - yes, statute designed in part to keep innocents from harm during theft)

1. Circumstantial Evidence / Res Ipsa Loquitor
   * Generally
     + Latin for “The thing speaks for itself” -- instead of requiring π prove Δ’s misfeasance; RIL allows the misfeasance to be inferred from circumstantial evidence/circumstances
   * Requirements (RST§328D)
     + (1) The event is the kind of thing that does not occur in the absence of negligence
       - Better to ask if it is more probable than not that accidence occurred w/o negligence -- an objects functioning may create risk w/o negligence (train)
     + (2) There is an absence of contributory negligence
     + (3) Instrumentality is in exclusive control of the Δ
       - Not literal exclusive control; only ultimate responsibility for the object (non-delegable duty)
       - *BEST DEFENSE* to RIL is to attack exclusive control
     + RTT§17 -- “when the accident causing P’s injury is the type of accident that ordinarily happens because of the negligence of a class of actors which Δ is a relevant member)
   * Burden-Shifting / Prima Facie Case
     + Generally
       - π’s prima facie case has been met when there are facts strong enough for the jury
       - It is the Court’s decision whether the inference must be necessarily drawn (Directed Verdict) or an inference that the jury may make to determine negligence under the circumstances (Question of Fact)
         * Often used in conjunction with expert testimony, necessary to draw the inference in some cases
       - Directed Verdict is the rarest of all cases -- the circumstantial case must be so convincing and Δ’s response so weak that negligence is inescapable
       - Things attributable to “Acts of God” are exempted from RIL (Boat lost at sea)
     + Majority View
       - The majority view is to treat IRL as a permissive inference that a jury is entitled to make -- in light of all the evidence
     + Minority View
       - Few treat RIL as a rebuttal presumption which requires Δ to disprove the causal connection by a preponderance of evidence or lose as a matter of law
   * Cases
     + Bryne v. Boadle
       - (A - Barrel of flour fell from overhead flour shop) (RIL= Summary Judgment; the accident could not happen w/o negligence; exclusive control of Δ; π just walking)
     + Colmenares v. Sun Alliance Insurance Co.
       - (A - Escalator stops at PR airport)(RIL = Summary Judgment (on reversal); literal exclusive control is not required, only ultimate responsibility)
     + Ybarra v. Spangard
       - (A - Patient’s shoulder injured upon waking from surgery for appendicitis) (RIL = Rebuttal presumption; although all Δs could not have committed the act, all those charged with the duty of care must explain their conduct to break causal chain)
     + Newing v. Cheatham
       - (A - Plane crashed; no gas; beers in pilot seat) (RIL = directed verdict; π was seated in back an Δ had exclusive control -- planes don’t just crash when protocol followed)
     + Holzhauer v. Saks
       - (A - similar escalator situation) (RIL = No; because both stairs and handrail stopped; stop button could have been pressed; therefore alternative possibilities)
     + Wakelin v. London
2. Proof of Negligence
   * π has generally exhausted possible evidence if they show:
     + What Δ or did not do specifically
     + How danger it was
     + Δ’s opportunity to discern danger
     + Availability of safer alternatives
     + Δ’s opportunity to know of safer alternatives
     + An established proper standard of care
3. Contributory Negligence
   * Generally
     + Contributory negligence is established when π has not taken reasonable care and in consequence of her default has suffered or contributed to her injury
   * Requirements
     + Δ has the burden of showing (1) π’s negligence and (2) Casual connection
       - (2) Negligence must be a substantial factor in bringing about harm (RST§465)
   * Exceptions
     + Negligence Per Se
       - Negligence per se precludes the defense of contributory negligence (Koenig) (Ross)
     + Seat Belt Defense
       - Generally
         * Failing to wear a seat belt is not a defense to negligence
         * Failing to wear a seat belt in no way contributes to the accident
       - Mitigation of Damages
         * (New York Rule) Jury may consider the lack of seatbelt in determining damages but not liability -- must show injury enhanced because of not having a seatbelt on (Spier)
         * (Washington Rule) Most states do not allow a seat belt defense for liability or for damages -- is a pre-accident condition that doesn’t contribute to cause

Washington Rule is the most dominant rule -- mitigation of damages used more/less in comparative negligence schemes

* + - Last Clear Chance
      * Generally
        + The party who has the last clear opportunity to avoid the accident, despite the negligence of the other party, is considered solely responsible
        + Must be actual opportunity -- not opportunity that “would have existed” has Δ not been negligent
      * Helpless π (RST § 479)
        + Lower bar than inattentive π
        + If π has subjected himself to risk and is immediately unable to avoid it, LCC can be used if Δ had reason to know π was helpless **or** would have discovered the situation in the absence of his own negligence
      * Inattentive π (RST § 480)
        + If π is inattentive through negligence, then LCC applies only if Δ has reason to know π is not paying attention (carelessly crossing street w/ speeding car -- Negligent in speeding but no reason to suspect π will walk out)
      * Reckless π
        + A π whose conduct shows reckless disregard for their own safety is barred from recovery against a reckless/negligent Δ (RST § 503(3))
    - Willful/ Wanton/ Gross Negligence
      * If Δ conduct is intentional, reckless, or willful and wanton the defense of contributory negligence is generally not allowed -- purposeful disregard of risk causing injury
    - Private Necessity
      * Emergency situations provide π a defense for Δ’s contributory negligence claim -- π must act as a reasonably prudent person would under the emergency circumstances (Rainmondo)
    - Committed people in Institutions
      * If π cannot control their actions; they cannot be contributorily negligent
  + Cases
    - Butterfield v. Forrester
      * (A - Δ laid pole across the street with area to pass on one side) (PC - π was speeding on his horse and hit the pole) (CN - yes, pole was discernable from 100ft away, π would not have been injured if he used ordinary care)
    - Beem v. Chicago RR
      * (A - π brakeman goes between negligently speeding trains; jury found for π)(PC - π should not have went down) (CN - no, π had a right to expect the trains would be slowed upon his signaling -- that his foot got stuck doesn’t excuse gross negligence)
    - Gyerman v. United State Lines Co.
      * (A - Fishmill not stacked according to protocol; π had duty to report and chose to keep working) (PC - negligent in failure to report) (CN - no; failing to report does is not a substantial factor in bringing about the actual fall -- no proof Δ would improve if he had been notified -- evidence that nothing would had happened)
    - Koenig v. Patrick Construction
      * (A - violation of safety statute in construction work) (PC - who knows) (CN - no, negligence per se precludes contributory negligence defense)
    - Rainmondo v. Harding
      * (CN - No, necessity provides a rebuttal defense to an assertion of Cont. Neg.)
    - Ross v. Hartman
      * (A - Δ left keys in car against statute; car stolen and π hit) (PC - didn’t move out of the way of the speeding car) (CN - No, statute = negligence per se
    - Derheim v. N. Fiorito Co.
      * (π injured in highway evidence -- Δ denied evidence on seatbelt defense) (PC - failed to wear seal belt) (CN - no, conduct that occurs before Δ’s negligence cannot contribute to causing the accident)
    - Spier v. Barker
      * (CN - allowed seal belt defense to be used in mitigation of damages)
    - Fuller v. Illinois Central RR
      * (A - buggy hit by train; train saw buggy @ 600ft; could have stopped in 200ft) (PC - who stays on a RR track with a train coming?)(CN - no, person with last clear opportunity to avoid the accident is liable)

1. Assumption of Risk
   * Primary Assumption of the Risk -- Generally (Implied Assumption of the Risk)
     + Ask whether π has deliberately and voluntarily encounters a known risk created by Δ’s negligence -- considered by some a modern variation on contributory negligence
     + Does not apply to nondelegable duties (safe workspace, common areas, etc.)
     + Δ has no duty because π forgave any possible breach by assuming the risk
     + Harder to argue -- usually involves a waiver or ***plainly obvious risk*** (the flopper)
   * Requirements
     + (1) Full knowledge of potential risk
       - Risk cannot be assumed for obscure, unobserved risk
       - Subjective Component -- π must have a full appreciation of the risk
     + (2) Voluntary undertaking
       - If Δ’s actions leave π with no choice than to assume the risk -- then defense barred
       - If π has no choice but to assume the risk for reasons outside of Δ’s control; defense is allowed
   * Secondary Assumption of Risk (most commonly used)
     + Δ had a duty to π; but that duty dissipates once π assumes the risk -- something like not knowing the risk up front but assuming the risk once aware
     + Cannot be used against a π who is exercising an ordinary right (cant assume risk for being in your yard when you know your neighbors dog is crazy)
   * Risk Premium
     + In cases of risk employment -- there is a concept that higher wages are paid to compensate for the risky employment and could be used a defense to liability and favor AOR
       - Firefighters and policeman are generally barred from sing the instigator of the accident to which they respond to and are injured -- but changing slowly
   * Assumption Through Contract (Express Assumption of the Risk)
     + Some actions require π to sign a contract assuming the risk in the activity (skiing)
     + Such agreements may be void as contrary to public policy in situations of:
       - (1) Business generally suitable for public regulation
       - (2) Service of importance or practical necessity for some members of the public
       - (3) Willing to perform to anyone in the public writ large
       - (4) unequal bargaining power
       - (5) Use of form contract with no opportunity for additional protection
       - (6) Person/property is placed under the control of party w/ contract
   * Cases
     + Lamson v. American Axe
       - (A - π complained of shitty axe shelf and told to suck it up) (PC - continued to work knowing the conditions) (AR - yes, π knew the risk and was free to leave)
     + Murphy v. Steeplechase Amusement
       - (A - π rides “the flopper” at amusement park) (PC - π got on ride) (AR - yes, the risk is inherent in the name of the ride -- case would be different in the case or obscure or unobserved danger -- “the timorous may stay at home”
     + Dilury v. SKI
       - (A - π required to expressly assume risk to ski on Δ mountain) (PC - injured by unforeseen risk) (AR - no, π not in the position to gage hidden risk so could not have assumed -- public policy/not fair to require π to bargain away right to sue)
     + Meistrich v. Casino Arena Attraction
       - (A - Δ made ice too hard -- π great skater notice the ice was hard to grip but continued to skate anyway) (PC - continuing to skate) (AR - Secondary assumption; Δ had continuing duty but π still encountered the risk)
       - Introduced distinction between primary & secondary assumption
     + Marshall v. Raane
       - (Δ’s mad boar bit π while walking to car) (PC - exercising ordinary right) (AR - No -- assumption was not voluntary because assumption = surrender property rights)
2. Comparative Negligence
   * Generally
     + A system where liability is allocated in direct proportion to the parties casual responsibility
     + Idea that contributory negligence = strict liability seems asymmetrical when both parties started with the same duty -- comparative negligence evolved from AOR and CN
   * Types
     + Pure
       - Damages based on % of liability determined by jury -- deduct π’s % from the damages or settlement no matter how high/low the %
     + Impure/Threshold
       - If π > 50% -- no recovery /// If π < 50% -- recovery mitigated
       - Leads to lots of litigation around the 50% line
   * Inclusion of Exceptions
     + Last Clear chance is generally discarded under comparative negligence
     + Secondary Assumption of Risk becomes a % -- Primary assumption of risk is complete bar
     + Seat belt defense generally not allowed still
   * Cases
     + Li v. Yellow Cab
       - (Car collision; Δ negligently speeding and ran red light) (PC - ran across 3 lanes of traffic) (CN - first time court applied comparative negligence)
3. Generally
   * Generally, there is no liability for nonfeasance or failing to act
   * There is no duty to give aid -- i.e. no good Samaritan rule
4. Property Owners
   * Duty to Rescue
     + Generally
       - If an actor creates a situation where he could cause harm to another and the other is unable to help himself -- there is a duty to rescue/warn (RST § 322) (RTT § 39)
     + Trespassers
       - In the past, owners have do not have a duty to warn trespassers against hidden or secret dangers arising from the conditions of the premises
       - Not applicable to Children known to trespass in an area (RST § 339)(Attractive Nuisance Doctrine)
         * Subject to liability for children trespassers when: 1) Owner has reason to know children trespass at such place 2) reason to realize unreasonable risk of death or injury 3) children cannot appreciate the risk 4) burden of prevention is slight when compared to risk of harm 5) owner fails to exercise reasonable care in prevention
       - Not all jurisdictions have done away with the distinction between trespasser/invitee/Licensee -- business invitee gets highest protection
     + Emergency Situations
       - Once you start rescuing; you could be liable for failing to use reasonable care in the rescue -- or -- for discontinuing aid and leaving injured in a worst state than you found him (RST § 324)
       - If you know or have reason to know that a 3rd party is attempting to aid another in the prevention of harm -- liable if you prevent that harm (RST § 327)
   * Duty to Warn / Protect
     + Generally
       - There is a duty to warn invitees of hidden dangers, not open and obvious ones
   * Cases
     + Buch v. Amory Manufacturing Co.
       - (A - Boy trespassing in factory) (AD - no, no duty to warn trespassers against secret or hidden dangers) (Changed with respect to attractive nuisance doctrine)
     + Hurley v. Eddingfield
       - (A - Doctor refused to travel to help sick stranger) (AD - No, no requirement that doctor must accept employment contract -- Moral duty only)
     + Yania v. Bigan
       - (A - π strip mine operator drowned in Δ’s strip mine when dared to jump in water) (AD - no, adults in full possession of mental faculties cannot claim deprivation of freedom of choice -- Δ not responsible for π’s actions even though instigated them)
     + Rowland v. Christian
       - (A - invitee hurt hand on broken water faucet) AD - yes, when owner is aware of hidden danger a duty to warn those he invites may be determined by jury)
       - “Has the owner acted as a reasonable man would in view of the probability of injury to others and the seriousness of said injury”
     + Weirum v. RKO General
       - (A - teen killed while racing to get radio promotion) (AD - yes, Δ contributed to the situation by creating urgency that injured)(Line between misfeasance/nonfeasance)
     + Montgomery v. National Hwy
       - (A - Truck stopped at bottom of icy hill -- π came down and could not stop) (AD - yes, Δ was partially responsible for dangerous conditions although he did not create the ice -- therefore there is a duty to warn / take reasonable precautions
   * Policy
     + Bohlen -- Attitude of extreme individualism precludes duty to rescue
     + Ames -- Law is utilitarian -- therefore impose duty to maximize benefit
     + Epstein -- Freedom has cost exposed in accepting no duty to rescue
     + Posner -- If social contract could be formed imposing a duty to rescue, it would (pro-duty)
     + Bender --Interconnected view of human nature -- no regard for others safety = tort (pro-duty)
5. Special Relationships
   * Generally
     + (RST § 315) There is no duty to prevent physical harm stemming from the conduct of a third party unless there is a special relationship (Duty to protect/control)
       - (a) a special relationship exist between the actor and third party which imposes a duty upon the actor to control the actions of the third party
       - (b) a special relationship exist between the actor and the harmed which gives the harm a right to protection
   * Examples
     + Landlord/Tenant
       - (1) Notice of harm (2) expectation of reoccurrence (3) exclusive control (4) Exclusive power to take action = duty to minimize risk
     + Common Carriers
       - Not strict liability -- but “upmost care”
     + University/ Student or Business/Invitee
     + Public Gathering Areas (Shopping Mall)
       - Extension of *Kline* focus on common areas to public areas of common gathering
     + Doctor/Patient
       - Higher duty to warn when harm is known and potential victims are definite
       - Lower duty when potentially victims could be numerous and harm unspecific
   * Cases
     + Kline v. 1500 Massachusetts Avenue Apartment Corp.
       - (A - π robbed in hallway; original security measures nonexistent) (AD - yes, duty to keep common areas reasonably safe -- foreseeable = probable and predictable)
     + Nivens v. Hoagy’s Corner
       - (AD - Court endorsed using RST §315 to protect business invitees from imminent criminal harm or foreseeable criminal conduct by 3rd persons)
     + Francis T v. Village Green Owners Association
       - (A - π raped by trespasser at night after Δ refused to allow installation of lights) (AD - yes, exclusive power to take action and denied that right to π) (Extension of *Kline*)
     + Shadday v. Omni Hotels Management Corp
       - (A - π raped by fellow hotel guest) (AD - no, both were invited guest -- Δ not liable similar to business employer not liable to employee for injury caused by co-worker)
     + Tarasoff v. Regents of University of California LA
       - (A - π killed by Δ patient -- intention to harm expressed and no action taken) (AD - Δ’s relationship with killer requires duty to control action or protect third party from harm caused by actor)
     + Morgan v. Fairfield Family Counseling Center
       - (A - mental ill expresses intention to harm) (AD - liability imposed for threat that manifested itself 9 months after the intention was expressed)
6. **Generally** 
   * Activities considered so dangerous that harm is not preventable even through the use of reasonable care/prudence
   * Designed to incentive Relocation, Reduction, or ending the activity (Posner / *Indiana Harbor Belt*)
     + Unlike negligence which incentivizes reasonable care-- reasonable care cannot prevent harm in abnormally dangerous activities
     + Therefore in strict liability would not create the right incentives -- no need to impose it
7. **Abnormally Dangerous Activity**
   * **RST § 519 Strict Liability --** There is strict liability for abnormally dangerous activities
     + Strict liability limited to the type of harm that makes the activity ultrahazardous
     + “Matter of law” if activity is abnormally dangerous according to RST § 520
   * **RST § 520 Abnormally Dangerous Activity** -- In determining whether an activity is abnormally dangerous, the following factors are to be considered:
     + (a) existence of a high degree of risk of some harm to the person, land, or property of others
     + (b) high likelihood of that risk
     + (c) inability to eliminate the risk through reasonable care
     + (d) extend to which the activity is not a matter of common usage
     + (e) inappropriateness of the activity to the place where it is carried on and
     + (f) extent to which its value to the community is outweighed by its dangerous attributes
   * **Affirmative Defenses to Abnormally Dangerous Activity** 
     + **RST § 522 Contributing Actions of Third Persons, Animals and Forces of Nature** -- One carrying on an abnormally dangerous activity is subject to strict liability for resulting harm, even if caused by the unexpected (1) innocent, reckless, negligent acts of a third party (2) animal or (3) act of nature
     + **RST § 523 Assumption of Risk** -- π assumption of the risk for ADA bars recovery for harm
     + **RST § 524 Contributory Negligence** -- (2) Unless knowingly and unreasonably subjecting himself to harm; (1) contributory negligence of a π is not a defense to strict liability for ADA
     + **RST § 524A π’s Sensitivity --** Strict Liability apply to π’s egg-shell skull
   * **RTT§30 --** An activity is abnormally dangerous if
     + The activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors
     + The activity is not a matter of common usage/benefit
8. **Cases** ----- *Indiana Harbor Belt RR v. American Cyanamid Co*. (Toxic chemical spill; strict liability not imposed because of importance to industry)
   * RTT has not been adopted by most districts and RST still controls for the most part -- be aware of both and prepared to argue both ways ------- RTT doesn’t take into account the appropriateness of the activity to the area
9. Cause in Fact
   * Generally
     + RTT § 26 Factual Cause -- “Conduct is the factual cause of harm when the harm would not have occurred absent the conduct -- “But-for” causation
   * Burden
     + Causation is all of nothing -- no % causation measures
     + π must prove more likely than not (50%) Δ’s actions were the cause of the harm or lose as a matter of law -- if 50% is found than π receives 100% damages (Grimstad)
       - Subject to the exception of late diagnosis cases (If cancer diagnosed day 1 then 40% chance of survival -- found day 300 and π dies soon after -- 40% damages)(Minority of states)
     + Speculation is not enough to meet 50% -- if there are too many intervening circumstances that could differ then there is not causation (Wind, water speed, speed of retrieval)
       - A very small number of courts will award damages if a π can prove 30% causation (or any other number) (
     + Cases
       - New York Central RR v. Grimstad
         * (A - π fell off boat and died; wife sued for lack of life preserver to throw overboard)(C - no, proximate cause of death was falling into the water; too many intervening circumstances to say life preserver on board would have saved life -- must prove more likely than not)
       - Kirincich v. Standard
         * (A - similar man overboard; boat contained rope that was thrown within two feet of π but had no buoy) (C - maybe, Not the same indefinite intervening circumstances -- if reasonable men would differ whether π would have been saved then it is a question for the jury) (Remanded from dismissal)
   * Causation Inference
     + Inference
       - ***Negligence per se*** creates an inference of negligence that must be rebutted (Haft)
       - ***Reasonable conclusions*** may be drawn if an inference not rebutted (Engberg)
       - ***Increased likelihood*** -- (1) If an act increases the likelihood harm will occur and (2) that harm occurred, an inference of negligence may be made by the jury (Zuchowicz)
         * Mere possibility harm could have happened w/o negligence not enough to stop inference
     + Burden-Shifting
       - Anytime an inference of negligence is created; the burden shifts to Δ to destroy the causal connection by offering an alternative cause of the harm (on preponderance of the evidence) -- possibility of alternative cause not enough
     + Cases
       - Zuchowicz v. United States
         * (A - over prescription by Δ was attributed to cause fatal lung condition) (C - although not possible to eliminate all possibilities; a reasonable jury could infer that overdose was more likely than not the cause -- wont be disturbed)
       - Haft v. Lone Palm Hotel
         * (Hotel guest drowned in unsupervised pool - negligence per se) (C - Δ must destroy the causal connection or be held liable -- Δ does not get to benefit from the lack of direct proof of causation; inference is created by negligence)
       - Reynolds v. Texas RR
         * (A - Fat woman Slip and fall on dark steps) (C - Δ’s negligence increases the likelihood of harm -- possibility that it could have happened w/o negligence is not enough -- Δ must break causal chain by preponderance of evidence)
       - Engberg v. Ford Motor Co
         * (π died in car crash -- seat belt found broken but buttoned) (C - reasonable inferences may be drawn if Δ fails to introduce any evidence to counter the speculation)
   * Expert Testimony
     + **Frye Rule** -- Content based rule on expert testimony which required the testimony to be *generally accepted* to be admitted in court
     + **Daubert Rule** -- More liberal rule -- focuses on the expert’s reputation and judicial analysis of expert qualifications -- Court = gatekeeper to screen unreliable methodology
       - Check credentials, peer reviews, etc. -- generally accepted irrelevant
     + Appellate Review of Expert Testimony -- since the rule is more liberal; appellate courts may review exclusion/inclusion of evidence on a *abuse of discretion standard*
     + Cases
       - GE v. Joiner
         * Court clarified the Abuse of Discretion standard -- District court was right to exclude evidence which made conclusions from research
       - Daubert v. Merrell Dow
         * Case where SCOTUS provided the more-lenient expert standard
   * Multiple/Concurrent Causes
     + Generally
       - When two distinct causes combine to create a harm; there are said to be multiple or concurrent causes -- actors are liable for the full extent of the combined harm -- even if the combined harm is greater than the separate harms
     + Divisible Harm
       - Where two causes lead to distinct, separable harms, each is responsible for the respective harms (RST § 433A)(RTT § 50)
       - In cases where harm is theoretically divisible, but hard to determine -- Everyone is jointly and severally liable (Car pile-up)
     + Indivisible Harm
       - If two causes combine to create indivisible harm, then they are both *joint and severally liable*
       - Each is liable for the whole and can recover against each other if possible (Contribution)
     + Superseding/ Overwhelming Cause
       - Δ can opt to present evidence that the other cause is predominately responsible to avoid liability -- i.e. second fire was bigger than my fire; my fire couldn’t have caused harm
       - Δ could also opt to show the second cause is one of natural origin -- therefore the harm would have been an act of God and escape liability -- Δ’s burden of proof
     + Cases
       - Kingston v. Chicago RR
         * (A - Two fires combine to burn down π house; first fire by Δ and second fire of unknown origin) (L - Joint and several; Court assumes negligence of unknown origin is human negligence therefore both are liable for the full extend of damages -- Δ must find source of second fire to recover half)
       - Smith v. JC Penny
         * (Flammable coat from Δ combined with negligent gas pumper to burn π) ( L - Joint ad several; harm is indivisible because the combination of the two provides the greatest harm, neither would cause such harm alone
   * Alternative Liability
     + Generally
       - Alternative liability occurs when A or B is responsible for the harm caused -- but not both of them
       - Burden shifts to both Δ’s to prove they did not cause the harm
     + Liability
       - Until one side proves he is not the cause -- they are both joint and severally liable to the π
       - (Intentional torts = joint liability not joint and several)
     + Requirements
       - π must be negligently harmed by one of a set of Δs -- and that harm must occur at the same time and same place -- ***so that 100% of possible liability is present***
     + Cases
       - Summers v. Tice
         * (A - Hunting accident where one Δ shot π in face but not both Δs) (L - Joint and several; burden is on Δs to prove which shot caused the injury or they are both responsible -- Δ doesn’t benefit from lack of evidence)
       - Ybarra v. Spangard
         * (A - π injured while unconscious for surgery) (L - Joint and several; each Δ had duty to protect and one of them caused the harm -- Δ burden to show that they did not cause the harm -- no Δ benefit from lack of evidence)
   * Market Share Liability
     + Generally
       - When 100% of liability cannot be established -- the court has imposed a Market-share liability scheme where Δ’s are all theoretically responsible for the harm
       - Creates an incentive to discover and guard against defects in industry-wide products
     + Liability
       - Liability is imposed according to Δ’s proven market share -- Δ’s burden to show market share
       - If Δ fails to establish its market share, then the remaining percentage is divided evenly among all who also fail to establish their market share
       - Max liability is the max amount of the market-share present -- therefore if π joins 75% of the market than she can only recover 75% of her awarded damages
     + Requirements
       - (1) Impossible to join all parties // establish 100% of liability
       - (2) π unable to establish who actually caused harm at no fault of his own
       - (3) π joins a substantial share of liability or the market (max needed 75%, lower possible)
       - (4) Δ’s have an identical or nearly identical product (Fungible/interchangeable) (No difference between the two bullets in alternative liability)
     + Cases
       - Sindell v. Abbott Laboratories
         * (A - DES drug caused birth defects; no way to establish which manufacturer actually produced the drug because of market) (L - products are interchangeable/ use same chemical formula so market share liability can be imposed to create incentive
       - McCormack v. Abbott Laboratories
         * Further clarified how the liability would be split
       - Skipworth v. Lead Industries Association
         * (A - Harm to child due to lead paint) (L - cannot impose market share liability; the products are not interchangeable -- different companies make different paint with different levels of lead exposure)
10. Proximate Cause
    * Generally
      + Is the negligent aspect of Δ’s conduct close enough to π’s harm that is can properly be considered [ or, should wisely be considered to be] a legally responsible cause
    * Two main Factors
      + Foreseeability (ex ante)
        - Was the risk foreseeable? Was the risk a “ordinary and natural” result of Δ’s actions?
        - When the accident is the result of accidental and varying causes (heat, wind, etc.)
        - Foreseeability of risk may speak to the culpability of negligence (Palsgraf)
          * Used the foreseeable π test to establish whether or not there was a duty
          * Did a foreseeable harm occur to a π in a foreseeable class of πs?
      + Directness (ex post)
        - Did the harm flow directly from the conduct of Δ? Was the harm within the operation of the risk or within the realm of the “forces” unleashed?
        - In relation to foreseeability -- how foreseeable were the causes ex ante?
    * Superseding Causes
      + Superseding Causes
        - When harm is the result of intervening and varying circumstances which Δ has no control over -- it could be said to be a superseding cause and absolve liability
          * Note on Fire Liability -- generally liable for immediately adjacent houses not all houses which burn from the same fire
      + Coincidence
        - Proximate cause may be ruled out if an act is merely coincidental to the harm -- The harm was unforeseeable in a way that π’s negligence could not have contributed
          * Similar to the seat-belt defense -- merely coincidental to the harm
      + Cases
        - Berry v. Sugar Notch Borough
          * (A - π train operator speeding when tree fell on train -- negligence attributed to letting it grow so big so close to tracks) (L - yes, π’s negligence per se is merely coincidental that his speed brought him put him there at that second, there is no causation link -- different from *Butterfield* )
        - Ryan v. New York Central RR
          * (A - Δ railroad set fire third party woodshed, fire spread 130 ft. away and burned π’s house) (L - no, this result depends not upon communication with the fire but on a concurrence of accidental circumstances such as wind, dryness -- such intervening and varying circumstances supersede the cause)
        - Albatross v. City of Lincoln
          * (A - Δ’s boat hit π’s boat disabling it -- π’s boat suffered harm trying to make it make to shore) (L - yes, π’s actions not superseding cause because it is natural and reasonable to attempt to get back -- harm foreseeable)
    * Third Party Intervention
      + Third Party Action
        - Third party intentional tort or crime is a superseding cause and breaks the chain of causation unless the actor had reason to know such event was likely to occur (RST § 448)
        - If Δ had reason to know an intentional tort or criminal activity could happen and is found negligent based on exposure to such an event -- the causal chain remains and Δ is liable (RST § 449) (Hines)
      + Third Party Harmed
        - If Δ puts π in a position to need rescuing -- and a third party is injured during that rescue -- Δ is liable for the harm of both
        - Since it is natural to help others -- possible rescue attempts are considered foreseeable
      + Cases
        - Hines v. Garrett
          * (A - Train conductor passed young girl’s stop; makers her walk a mile back to the stop; girl is raped along the way) (L - yes, Δ had reason to know of possible criminal conduct in the area -- thus exposure to the risk = negligence
        - Brower v. New York Central RR
          * (A - π was hit by Δ’s negligent train -- third party stole π goods while he is in shock) (L - yes, thieves stealing goods were a foreseeable consequence of hitting π and knocking him out)
          * (Dissent argued Δ’s actions only created the opportunity to be exposed to the risk -- negligence was in speeding and not in exposure to the risk) (RST§448)
        - Central of Georgia RR (Δ) v. Price(π)
          * (A - Δ let π off at wrong stop -- escorted her to hotel to catch train back in the morning -- hotel lamp explodes leading to injuries) (L - no, harm was not foreseeable -- the hotel’s acts are an superseding cause under directness)
        - Wagner v. International RR
          * (π’s cousin was thrown from the train due to negligence of Δ -- π went looking for cousin who was thought to have fell in the river) (L - yes, Δ is responsible for the harm since it is foreseeable that someone will attempt to rescue so the causation chain remains in tact)
    * Imposing Liability (Finding Proximate Cause) [Foreseeability v Directness]
      + Directness Test of Liability (Polemis)
        - Once negligence is established -- Δ is liable for the full extent of damages that are the direct consequence of the act(directness) whether foreseeable or not (Polemis)
          * Egg-Shell Skull rule fits here
        - Foreseeability may be used to determine if there was negligence in failing to exercise reasonable care -- if not foreseeable than no duty and no liability
          * Unforeseeable π rule (Palsgraf) \*\*Fox likes Andrews in Palsgraf\*\*
      + Tight Foreseeability test of liability (Wagon Mound #1) (Polemis Dissent)
        - ***Kinsman*** *notes this is unlikely to be applied in the United States because it limited to foreseeable consequences only and US courts award damages for all damages caused*
          * Still run through the test -- but note Kinsman does say this is not good law
        - Actor is responsible for the probably consequences of his act only -- one is not responsible for damage that was unforeseeable
        - Foreseeability is used to determine negligence and extent of liability
          * Cannot be responsible for types of harm that were not foreseeable (WM)
          * Most jurisdictions do not use Tight Foreseeability -- NY has foreseeable π shield which limits liability but once foreseeable ∆ liable for all damages
        - Rationale: It is not fair to hold one responsible for what they cannot control -- you cannot control what you can not foresee
      + [Kinsman] Operation of Risk/ Loose Foreseeability / Friendly Test ---- (Adopted by most Modern Law//same as Andrews dissent in Palsgrad)
        - Actor is responsible for any harm caused by a foreseeable risk put in motion by Δ’s negligence (Kinsman)\*\*\*
        - Focuses on foreseeable risk instead of foreseeable harm -- if the harm is caused by the foreseeable risk than Δ is liable -- even if the actual damage is bizarre (Nugent)
        - Once the risk or harmful situation stabilizes, the risk is said to be “at rest” -- one the risk is at rest the casual chain is severed
          * If a new independent actor takes charge of the risk -- the first actor’s liability is at rest and the second Δ is liable for any risk caused thereafter
      + Cases
        - Polemis
          * (A - Ship set on fire by plank falling into cargo hole with flammable material) (L - yes, Directness Test -- fire caused by negligent falling plank)
        - Wagon Mound #1
          * (A - Δ spilled oil into water that spread to under π’s dock; caught fire two days later and damaged property) (L - no, tight foreseeability -- A man is not responsible for damage he could not foresee and thus prevent)
        - Palsgraf v. Long Island RR
          * (A - Δ employee helps man falling from train -- fireworks explode from package and falling scales cause harm to π on opposite side of platform) (L - no, directness test -- advocated for directness test, but since π not a foreseeable π then there is no duty -- where there is no duty then no tort)
        - Pittsburg Reduction v. Horton
          * (A - Δ let blasting caps near school -- child picked up and brought home -- mother handles caps and returns to child -- son gave them to π who was injured) (L - no, operation of risk -- once a new independent actor takes control of risk and sets it in motion again -- original Δ absolved from liability)
        - Marshall v. Nugent
          * (Principal -- Confine the liability of negligent actor to those harmful consequences which result from the operation of the risk -- the foreseeability of which makes Δ’s conduct negligent
        - Kinsman Transit
          * (Principal -- While consequences may not be foreseeable, the cause/risk was foreseeable -- therefore Δ liable for all direct harm when the damage is “the same general sort that was risked” )
    * Continuum
      + Directed Verdict for Δ <-----------------> Jury Question <---------------> Directed verdict for π
        - ΔDV -- Screens out cases where the quality of the negligent act had nothing to do with the harm ------------- (Gorris v. Scott, Georgia Pacific v. Price)
        - πDV -- Harm was exactly what Δ should have foreseen ------(Ross v. Hartman)
        - Jury -- How foreseeable or how direct was the harm?
          * Ex-post foreseeability inquiry helps determine directness
    * Negligent Infliction of Emotional Distress (Emotional Harm from negligent Act)
      + Generally
        - Provides recovery for shock -- as a general rule
      + Requirements (RST § 47)
        - Close Relationship / Family Member of harmed
        - Physical proximity and contemporaneous observance of harm
        - Extraordinary emotional distress -- more than the unrelated bystander
      + Cases
        - Dillon v. Legg
          * (Mother recovers when she watches child get hit by negligent driver -- physical manifestations and emotional harm)
        - Molien v. Kaiser Foundation Hospital
          * (Husband recovers when hospital falsely told wife she had syphilis which led to divorce -- emotional injury only)
11. Background/Overview
    * Three types of product’s liability
      + Manufacturing Defects
      + Design Defects
      + Failure to Warn
    * Methods of Proof
      + Barker Rule (Consumer Expectations / Risk Utility)
      + RTT (Alternative-Design Method)
      + Under both, the injury must have arisen during the normal or foreseeable use of the product
    * Pleading
      + When dealing with products liability -- π would want to plead 1) strict products liability 2) negligence (is it negligent to put the product on the market at all?) 3) Warranty claim
12. Historical Developments
    * Generally
      + Products liability governs the activities of the full panoply of manufactures, distributors, and sellers who have placed a product into the stream of commerce and are no longer in possession at the time it causes damage
      + Product liability claims can be brought through Tort (strict liability or negligence) or through contract (implied/express warranties) -- most jurisdictions favor through Tort
    * RTT reflects the transformation of product liability law after 1965 -- it keeps the original strict liability for manufacturing defects but imposes a negligence-like regime for design defects --limits duty to making products reasonably safe or w/o excessive preventable danger
      + RTT has not displaced RST completely -- so make mention of both
      + Problem with RST was having one rule governing an endless diversity of products
    * Cases
      + Winterbottom v Wright
        - Beginning stages of product liability -- no recovery unless there is privity of contract
      + Escola v. Coca Cola (Traynor, J. in Concurrence)
        - Introduces the idea of strict liability for products defects -- those injured suffer needless misfortune when risk of injury can be insured by the manufacturer and spread among the public as a cost of doing business
      + Greenman v. Yuba Power Products’ Inc.
        - Proscribed strict liability into California call for the first time anywhere -- Traynor, J. in the majority this time
      + MacPherson v. Buick
        - First cause of action allowed without privity of contract -- based on idea that the car dealer (who is in privity with the two parties) is the only person never actually using the product -- calls for more rigid research and development
13. Standards of Proof
    * **RTT § 3 Circumstantial Evidence Supporting Inference of Product Defect** (Res Ipsa)
      + It may be inferred that the harm sustained by π was caused by a product defect, without proof of a specific defect, when the incident (a) was the kind that ordinarily occurs as result of a product defect and (b) the injury, in the particular case, was not solely the result of causes other than product defects
    * Consumer Expectations
      + There is a design defect when the product has failed to perform as safely as an ordinary consumer would expect when used in an intent or reasonably foreseeable manner -- analogous to the UCC’s warranties of fitness/merchantability in which product liability is rooted (Barker)
    * Risk-Utility (Cost-benefit analysis)
      + When a product embodies excessive preventable danger -- factors include 1) gravity of danger 2) likelihood of that danger 3) feasibility of alterative 4) cost of improved design 5) adverse consequences susceptible (Cost/functionality)(Barker)
      + When a product is unreasonably dangerous -- factors including 1) utility to public as whole 2) likelihood of injury 3) availability of alternative 4)ease of precaution 5) anticipated awareness of danger (Obvious nature/suitable warnings) 6) feasibility of spreading loss
    * Alternative Design Test (See RTT § 2 below)
      + Alternative design test is a variation of the risk-utility test which places the burden on π to bring evidence of another design; usually through expert testimony
14. Restatements
    * **RST § 402A Special Liability of Seller of Product for Physical Harm to User or Consumer**
      + (1) One who sales any unreasonably dangerous to the user/consumer/property is strict liable if 1) not casual seller 2) expected and reaches the consumer w/o substantial modification
      + (2) The rule above applies although the seller has exercised reasonable care in the sale and manufacture of the product and there is no contractual privity
        - Comment K - Unavoidably dangerous products are not the same as unreasonably dangerous -- be aware of difference (Think rabies vaccine)
        - Comment N - Contributory negligence not a defense; assumption of risk is
    * **RTT § 1 Liability of Commercial Seller for Harm Caused by Defective Products**
      + One engaged in selling/distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect
    * **RTT § 2 Categories of Product Defects** (For purposes of determining liability under §2)
      + A product is defective is at the time of sale it contains a manufacturing defect, design defect, or inadequate instructions/warning
      + (a) ***Manufacturing defect*** is when product causes harm during everyday use, regardless of reasonable care exercised in manufacture or distribution
      + (b) ***Design defect*** is when foreseeable risk of harm could have been reduced or avoided by the adoption of a reasonable alternative -- the omission of which makes the product not reasonably safe (think GM ignition switch)
      + (c) ***Inadequate warning*** when a foreseeable risk of harm c/h/b/ reduced/avoided by reasonable instruction/warning -- the omission of which makes the product not reasonably safe
15. Manufacturing Defects
    * Generally
      + Manufacturing Defects are generally the easiest to spot because products do not injure people in their normal everyday use -- RTT retains strict liability for any injury
    * Cases
      + Escola v. Coca Cola
        - (glass bottle explodes) It follows from Res Ipsa that a coke bottle would not explode and injure unless excessively charged -- this is an inference Δ did not rebut
      + Speller v. Sears
        - (fridge burns down house) Reversing summary judgment; π presented expert evidence excluding all other causes of the fire with detailed non-conclusory expert depositions and other submissions -- such is evidence for the jury
      + Mix v. Ingersoll Candy Co
        - (Bone in chicken) Introduced foreign/natural substances distinction for manufacturing defects in food -- replaced by consumer expectations in *Schafer*
      + Schafer v. JCL Food Systems
        - Consumer expectations standard -- a bone may be just as unreasonable as a shard of glass -- more equitable results when there are no arbitrary distinctions
16. Design Defects
    * Design Defect Proof
      + Barker Test - Consumer Expectation/Risk Utility
        - Barker puts the burden of proof on Δ to show alternative design not possible because of access to design information -- Must not “embody excessive preventable danger”
      + RTT - Alternative Design
    * Open and Obvious Defense
      + Courts used to hold that an open and obvious defect would bar liability (Campo) -- but courts have shifted since to say a machine can be unreasonably dangerous even when the condition was open and obvious -- open and obvious can play into assumption of risk however
    * State of the Art
      + State of the art defense is not conclusive in Δ’s favor, but it could be a relevant factor to consider in terms of reasonable alternatives
    * Subsequent Improvement
      + A majority of courts refuse to admit evidence dealing with subsequent improvement in a product design as evidence of the defective nature of the original design -- such would disincentive improvement [CA has allowed evidence and 3rd party improvements are generally allowable]
    * Product Modification
      + Courts have expanded from the view that product modification was a superseding cause of any product defect -- liability not includes products with foreseeable uses
      + Foreseeable misuse/abnormal use = foreseeable use of product
    * RST v. RTT
      + RTT rejected the consumer expectations test as an attempt to rein in a perception of excessive liability coming out of the Barker dual Pronged standard
      + RTT has met mixed reception --practically requires use of expert testimony by π (*Unrein*)
    * Note
      + Drugs are considered unavoidably dangerous products--as such a drug only has a drug defect if it provides no net benefit to any class of patients--but experts say a drug should be allowed if it provides benefit to SOMEONE even if a large group of people are harmed (RST)
      + Most drug liability comes under inadequate warnings
    * Cases
      + Campo v. Scofield
        - (Opinion topping machine) Manufacturers of products with known dangers have right to expect users will avoid such contact -- for the very nature of the article gives notice and warning of the consequence to be expected
      + Barker v. Lull Engineering Co
        - (Substitute driver of construction machinery) Rather than applying a deviation-from-the-norm test π can use consumer expectations or risk utility -- burden of proof on Δ once prima facie case made because of access to design information
      + Azzarello v. Black Bros Co
        - Set lower standard than unreasonably dangerous -- design defect = lacking any element necessary to make product safe for its intended use or possessing any feature that renders it unsafe for its intended use
      + Wilson v. Piper
        - Articulated the alternative design test -- π must prove suggested alternative are not only technically feasible but also practicable in terms of cost, overall design, and product operation ----- more restrictive approach than Barker
      + O’Brien v. Muskin
        - (Swimming pool) There can be no liability unless there is a feasible alternative design
      + Soler v. Castmaster
        - Foreseeable misuse or abnormal use is considered a foreseeable use of the product
      + Unrein v. Timesavers, Inc
        - Importance of experts to alternative design -- any expert proposing modifications must demonstrate by some means (demo/drawing) tat they would work to protect the machine operator but not interfere with the machine’s utility
17. Inadequate Warnings
    * Generally
      + Implicit in many design decisions is that it is cheaper to design out certain dangers than it is to warn of their dangers -- but where small changes can negate the effectiveness of the product for its intended use or would require a new round of approvals (meds) -- the use of product warnings instead of design alternations provides middle ground
      + Higher standard when potential harms are not apparent to a product user from the appearance or potential danger is not common knowledge
      + Duty to is to warn the customer/consumer directly of the harm posed
      + The test of design defects/ inadequate warnings is similar to a negligence standard but w/ respect to the product and not the actor
    * Exception -- Learned Intermediary
      + Courts have went back and forth on physicans as learned intermediaries -- most now base the distinction on a manufacturers efforts to reach consumers directly v. the doctor’s role in prescribing the medicine ----- the smaller role of doctor the higher the duty to warn
      + **RTT § 6 (d)** -- A prescription drug is not reasonably safe due to inadequate warnings if reasonable warnings of foreseeable risk are not provided to (1) prescribing health-care providers in a position to reduct the risk in accordance or (2) the patient when the manufacturer has reason to know health-care providers will not be in a position to reduce the risk in accordance with the warning
    * Pharmacist Duty to Warn
      + A number of standard duties are imposed including 1) duty to fill a prescription correctly 2) duty to remedy inadequacies on the face of the prescription and 3) duty to take reasonable care in preparing/dispensing the medicine
    * Post-Sale Warnings
      + **RTT § 10 Liability of Commercial Product Seller or Distributor for Harm Caused by Post-sale failure to warn** 
        - A seller must provide post-sale warning or face liability if 1) seller has reason to know the product poses a substantial risk of harm 2) those who need warning can be identified and are reasonably assumed to be unaware of the risk 3) warning can be communicated and acted on to reduce the risk and 4) the risk of harm is sufficiently great to justify the burden of warning
    * Cases
      + Macdonald v. Ortho Pharmaceutical Corp
        - (Birth control) Rejected learned intermediary when doctor not active in proscribing process -- duty = warning comprehensible to the average user conveying reasonable notice of the nature, gravity, and likelihood of known/knowable side effects
      + McKee v. American Home Product’s Corp
        - Court refused to apply duty to warn to pharmacist --unneeded burden on pharmacist and would effect relationship between doctor/patient
      + Hayes v. Ariens Co.
        - Hindsight approach which imposed liability for harm learned about ex post as something that should have been known ex ante
      + Vassallo v. Baxter Healthcare
        - Moved away from hindsight approach -- imposed liability for foreseeable risk of harm [while still affirming for π]
      + Hood v. Ryobi America Corp
        - (guards/circular saw) No duty to explain and warn of the specific consequences when the warning is clear and reasonable under the circumstances (DO NOT REMOVE)
18. Plaintiff’s Conduct
    * \*\*Fox says use RTT as default for π’s conduct in product’s liability\*\* (*Be able to run both*)
    * Generally
    * RST § 402A Comment N
      + Contributory negligence is not a defense when such negligence consist merely of π’s failure to discover the defect or guard against the possibility of its existence
      + However… Voluntary and unreasonably proceeding to encounter a known danger (i.e. secondary assumption of the risk) is a defense
    * RTT § 17 Comparative Fault (Adoption of Daly standard)
      + (a) π’s recovery may be reduced if the conduct of π combines with the product defect to cause the harm and π’s conduct fails to conform to generally applicable rules establishing appropriate standards of care (negligence)
        - Another way -- π’s award may be reduced if negligent conduct combines with the product defect to cause the harm
      + (b) The manner and extent of the reduction under (a) and the apportionment of π’s recovery among multiple ∆s are governed by the State’s generally applicable rules
      + Notes
        - Misuse, alternation, and assumption of the risk all folded in together in an analysis of comparative negligence (Under Daly too)
        - “Combines with” must be very literal -- i.e. the locked doors in Daly
    * Cases
      + **Daly v. General Motors** (Drunk π gets in accident and is thrown from door -- sues giving reasonable alternative to manual push button lock -- Δ argued π didn’t wear seatbelt, could have locked manually, and was drunk) -- Drunkenness is irrelevant as contributory negligence because it relates to the accident and not the lock -- Court adopts a comparative negligence scheme; gets rid of assumption of the risk as a complete bar to recovery but allows it to be subsumed into a comparative negligence regime
        - Reduces incentive for manufactures to reduce harm -- π is generally always negligent a little bit and thus will always result in reduction (Concurrence/Dissent)
        - Product’s Liability requires “***Unreasonable assumption of the risk***” -- 1) knowing 2) willful 3) unreasonable
      + **Lebouef v. Goodyear** (Foreseeable Misuse)(Car cold go 100MPH but tires explode at 80MPH and didn’t warn) -- Ford is liable because speeding is a foreseeable misuse and Ford did not warn of the discrepancy
      + **Melia v. Ford Motor** (π ran red light with unlocked door; was thrown from door during collision) -- Court would not consider π’s contributory negligence (running the red light) but will consider π’s conduct in not locking the door because it is related to the door flying open
19. Preemption
20. Recoverable Damages in Tort
    * Non-pecuniary damages are those damages awarded for physical and emotional consequences such as pain and suffering, loss of ability to engage in certain activities -- Pecuniary compensate for economic consequences like medical, lost earnings
    * Award of damages is to compensate, not to punish. Punitive damages are prohibited UNLESS it harmful conduct was intentional, malicious, outrageous, beyond mere negligence
    * Non pecuniary damages can be awarded to victims but stand on less certain ground b/c we have created a legal fiction that money can compensate for certain injuries🡪 as close as the law can come to right the wrong.
    * Liability and pecuniary awards are UNCHALLENGED (McDougald v Garber)
      + Pain and Suffering
        - Loss of enjoyment of life included -- courts have traditionally given a broad meaning to pain and suffering (McDougald v. Garber)
        - Posner’s policy argument -- No one likes pain and suffering and we would PAY to avoid it. If they were not recoverable, cost of negligence would be too low for tortfeesors and there would be more negligence and therefore higher social costs
      + Increased Risk of Future Injury (Part of Pain and Suffering)
        - DePass v. United States (7th Cir. 1983) 🡪 rejected the argument with evidence of future losses because findings were inconclusive or no settled law if future loss is compensable.
          * **POSNER DISSENTED** PASSIONATELY BY SAYING: rejection of this evidence would lead to systematic underestimation of damages and hence under deterrence.
          * Fox agrees with Posner: should not be called too speculative by a matter of course, must look at the evidence, the court should be able to put a value on it if it proven that there is a high probable evidence -- given incentive structure
        - Cudone v. Gehret admitted the statistical evidence because it was more compelling. So is there a cut off point? -- make arguments w/ regard to certainty
      + Economic Loss
        - Lost Earnings
          * O’Shea v. Riverway Towing Co. (7th Cir. 1982) -- POSNER CONCLUDES that b/c D never contested that P would have worked until she was 70, nor that she would have been a boat cook, the reward was correct. Lost earnings must be a analytical, not intuitive finding and judges need to state the methodology they use In the future.
          * Introduces bias into system -- educated/rich get more than lower class because they would make more throughout their lives then less educated
        - Medical Expenses -- self-explanatory
      + Punitive Damages -- must show reckless and malicious intent
        - * Goal of Punitive damages is PUNISHMENT AND DETERRENCE
          * Few cases with huge punitive damages eg some cases have reached SC to consider huge disparity between compensatory/punitive as a violation of DPC