**Torts Outline**

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* **Introduction/Background**
  + Basic problem: we are free but individuals often exercise liberty in a way that causes harm to another person.
    - We must balance security and liberty interests
  + Holmes’s original view: Tort law is not a proper field of substantive law—it is remedial only. He changes his mind in the wake of the industrial revolution. (xxiv)
  + To accommodate desirable forms of risky behavior, tort law limits liability to unreasonable conduct which causes injury to another. (xxv)
  + Tort law is designed to expand/contract as a matter of policy. (xxvi)
* **Historical Development of Tort Law**
  + Early History
    - Government and law develop to prevent self-help violence of a clan-based society (3).
    - The motives for revenge did not take fault into account (4).
    - Medieval English government established permanent courts to institute the *common law* of the nation, under which victims could initiate criminal or tort actions (5).
    - King’s most important goal: preserve public order. Private initiation saved valuable resources (5).
    - Writs could be purchased. E.g. writ of trespass *vi et armis* alleged that defendant injured the plaintiff with force and arms (6).
    - Trespass, which originally meant “wrong,” covered assault, trespass to property, conversion and false imprisonment (7).
    - Two major tort ideas: affronts to honor and causation of loss (7).
    - By the 1700s, *trespass on the case* allows plaintiffs to recover for harms caused indirectly by the defendant (7).
    - Beginning with New York’s Field Code in 1848, states abolish the writ system, replacing it with *civil action* (9).
      * Included contingency attorney’s fees.
  + Industrialization
    - It was difficult to identify the bounds of tort law. It was viewed as whatever did not fall into contract, property or criminal law (10).
    - Holmes’s organization of tort law around the principle of liability for negligence gave torts a doctrinal center (11).
    - Negligence was conceptualized as violation of a public standard of reasonable conduct that causes harm to another (12).
    - This covers many, but not all, tort cases. Two extremes are *immunity* and *strict liability* (12).
    - Key center to a tort rule: how it balances liberty interests with security interests (13). Negligence stands at the center.
    - Intentional torts—actor is subjectively culpable by virtue of his knowledge of public morals (15).
    - Strict liability— we find liability regardless of state of mind (15).
    - Negligence involves *objective* culpability: tort liability is incurred when a legal standard of reasonable care is violated.
      * Accidental harms get an objective test of what the average community member would do (17)
    - 19th century courts served as the administrative apparatus that did not exist at the time (18). Focus on commercial activity.
  + Twentieth Century
    - *Legal Science* approach focused on deriving an internally consistent body of laws from the mass of common-law cases (21).
    - *Legal Science* attempted to establish a universal duty of care and rid tort law of doctrines inconsistent with the fault principle (such as strict liability) (22).
    - Many common-law rules were based on immunity (23).
    - Statistics emerges in the 20th C. and we realize that the rate of accidents exhibits a degree of regularity (no fault!) (24).
    - Public Policy in the late 20th C. shifts to making businesses strictly liable for their injuries (24-25).
    - *Legal Realism* emerges as a school of thought that focused on evaluating legal rules in terms of their social consequences (25).
    - Individuals and businesses purchase liability insurance, leading to more litigation (26).
    - *Enterprise liability* suggests that businesses are in a good position to provide compensation through the purchase of liability insurance (26).
    - Today, manufacturers are strictly liable for the injuries caused by their products (27).
      * 1840s—manufacturers not liable to noncustomers.
      * “Inherently dangerous” products subjected to strict liability. Why just those (28)?
      * Cardozo: reasonably certain to place life and limb in peril = thing of danger, subject to tort duty (28). *MacPherson v. Buick Motor Company.*
      * Evidentiary Rationale from Traynor: negligence rule would involve insurmountable proof problems for injured party (29). Incentivizes safety precautions (30).
      * Today most of tort claims come from inadequate warning or design, not malfunctions (32). Raises the question: what makes a design or warning defective? Answer is based on unreasonably high risk.
  + Tort Reform
    - Claims of crisis in the insurance markets in 1986 (33).
    - Pres. Bush supported legislation to limit tort liability for manufacturers to help save the Big Three (34).
    - Today’s crisis is medical malpractice (35).
    - Limits on a plaintiff’s recovery effectively limit certain types of lawsuits due to the impact on contingency fees (35).
    - Empirical studies have found that tort damages are often too low (37).
* **Function and Principle of Tort Law**
  + Functional Analysis fueled growth of tort liability based on its focus on desirable social outcomes (41).
  + Purposes of Tort Liability
    - Compensation
      * Tort liability compels the defendant to compensate the plaintiff’s injuries (42).
      * This shifts the injury cost to the defendant.
      * Tort liability must involve *loss sharing,* which spreads liability over shareholders/customers so that no individual suffers a significant loss.
      * Most compensation is based on insurance coverage (43).
    - Deterrence or Prevention of Injury
      * Deterring risky behavior protects individuals from injury (43).
      * It does so by clarifying the behavior required by tort law (since you can’t deter something that is already happened, these standards govern future behavior) (44).
      * As long as the liability cost is high, it will outweigh the personal benefit of certain actions (44).
    - Redress of Wrongs
      * The appropriate form of redress might involve retribution for wrongful conduct (45).
      * This means punitive damages—this is rare (45).
  + Functional Disunity
    - Functions of tort liability do not always work in a unified manner (45).
    - Nothing justifies limiting compensation to deterrable harms.
    - If tort liability only serves to compensate, we should switch to a system with better insurance arrangements (46).
    - This would create inadequate deterrence.
    - Compensation and deterrence are connected but do not always work in a unified manner (47).
    - Functional analysis alone would create an incoherent mess; there must be something more to the system.
    - Common-law adjudication based on past cases eliminates the arbitrariness of the functional analysis.
* **Chapter 3: Negligence or Strict Liability?**
  + Limiting the inquiry to negligence will result in an inability to justify tort law’s concern with behavior that does not violate criminal principles. If we look solely to personal fault, we can just think about criminal law (50).
  + We know that liability *does* attach to noncriminal harms. The imposition of no-fault or strict liability distinguishes torts from criminal law.
  + Negligence v. Strict Liability
    - We can divide accidents into fault-based and not-fault-based categories (51).
    - In the no-fault region, the victim bears the cost. In the fault region, the causer bears the cost.
    - Strict Liability only requires proof that the defendant caused the accident, not that he/she was at fault.
      * We change the definition of the fault region to include injuries occurring when defendant didn’t eliminate *all risk* (52).
    - In this sense, the rules of S.L. are central to the specification of fault which is central to negligence liability (53).
  + Deterrence and the Choice of Liability Rules
    - Negligence specifies the precautions a duty holder must take (53).
    - Reasonable care is defined by whether the risk outweighs the value which the law attaches to the conduct. B<PL
    - A defendant is only induced to behave in the required way when there is proof which can be used by the plaintiff to prove liability (55).
    - We create the desired incentive with strict liability (56).
    - The actor can alter the PL (expected costs) by adopting safety precautions. This is a good incentive.
    - Evidentiary rationale for strict liability—when there is a limit to the amount of inquiry, throw the risk upon the person who decides what precautions shall be taken (57).
    - Why not apply a general rule of strict liability (58)?
    - We apply more weight to safety (PL) than to money (B).
    - Conduct which reduces precautions due to the financial incentive to forego them is subject to punitive damages (59).
    - We reject liability where defendants exercised required care. This leaves some plaintiffs without damages. Rationale is that deterrence requires this outcome. Why does tort law choose deterrence over compensation (59)?
    - The negligence inquiry forces auto drivers to take specific safety precautions to prove they were not negligent. Strict liability would not (60).
    - Strict Liability would not reduce the amount of driving and might increase risk, deterrence considerations favor negligence (60).
    - Negligence employs a standard of reasonable care and so it requires actors to exercise greater care (61).
    - Strict liability can reduce or discourage a risky activity (61).
  + Compensation and the Choice of Liability Rules
    - What about cases in which the choice of liability rules does not have an impact on risk reduction (61)?
    - Compensation seems to give strict liability an advantage. This assumes compensation depends on the damages remedy (62).
    - Negligence is sufficiently compensatory when there are *reciprocal risks* (62); in other words when the activities are common within the community (64).
    - Unreasonable risk is not reciprocal and should be compensated according to strict liability (63-64). *Rylands v. Fletcher*
* **Negligence, Strict Liability, Rationales for Liability**
  + Neither efficiency nor rights-based rationales fully explain.
  + Efficiency
    - Assumes the objective of tort liability is to minimize social cost of accidents (68).
    - Balance between cost of injuries, precautions, and administration. Decrease one, you increase the others.
    - Not a wealth distribution instrument—does not affect total social wealth and poor might be required to pay the rich (69).
    - Not a good form of insurance (costly and noncomprehensive).
    - S.L. would force the risky actor to internalize the costs (70) but also increase administrative costs (many more cases) (71).
    - The actor should find it cheaper to implement B than pay the costs of PL when negligence would be enforced.
    - Negligence would not work well for trying to prove that complex forms of safety precautions are necessary.
    - Formulate rules in terms of the self-interested actor to get the efficient result from those who would not always follow the law (72).
    - Efficiency cannot be measured so it does not provide an explanation for the adoption of the rule (73).
    - Efficiency does not explain purely compensatory tort rules.
  + Corrective justice and redress of rights violations
    - Corrective Justice imposes a duty to repair a right which was violated by the tortfeasor (74).
    - While efficiency is focused on distributive justice, corrective justice attempts to correct inequalities (75).
    - Wrongs create an inequality that must be corrected between the two parties (75).
    - Rights-based system limits the ability of government to pursue redistribution at the expense of the individual (75).
    - Backward-looking view of the rights violated. Redress creates financial incentive for future actors to avoid that type of behavior (76).
    - Corrective justice requires compensation to redress the injury, not to provide deterrence (like efficiency).
    - Rights-based have a hard time explaining strict liability that functions only as a form of compensation.
    - The tort suit is still structured to redress rights violations, providing decisive support for a rights-based interpretation (79).
* **Compensation as a Unified Rationale for Tort Liability**
  + Sometimes tort law uses negligence, sometimes S.L.
  + The compensation of injury provides redress for rights violation but also extends beyond the damages remedy.
  + A broad conception of compensation can account for deterrence.
  + “General good” and right to engage in risky activity is compensation by negligence.
  + The characteristic aspect of tort law involves injury compensation.
  + The Nature of a Compensatory Tort Right
    - A right is an individual interest which we protect from any form of invasion (84).
    - Tort law’s regulation of interests will necessarily result in the burdening of at least one party’s interest. This is a question of fairness (85).
    - An absolute right would require wholesale elimination of risk (86).
    - Rights-based tort rules prioritize physical security over liberty.
    - Security right must be relative to liberty (87).
    - This means tort liability’s primary purpose is to give compensation for harms. If exercise of liberty causes harm, a compensatory liability rule would burden the duty holder’s subordinate liberty interest by an obligation to compensate the harms on the prioritized security interest (87).
    - A compensatory system will usually use negligence over strict liability due to the inherent limitations of the damages remedy.
  + Negligence and the Limitations of Damages
    - Tort rights cannot be protected by compensatory damages (wrongful death) (88).
    - A strictly liable defendant in wrongful death has no duty to pay for loss of life’s pleasures so it does not compensate enough (89).
    - Negligence liability does give the duty holder an obligation to reduce risk (89).
    - If a defendant reject’s another’s right to be protected by reasonable care, we say he has a “bad state of mind” which will subject him to punitive damages.
  + Strict Liability and Immunity from Liability
    - Negligence can best protect a compensatory tort right because it specifies requirements of reasonable care (91).
    - When problems of proof exist, strict liability does more to reduce risk (91) and provide compensation (92).
    - The only potential compensatory role for strict liability is in a reasonable, nonreciprocal risk.
    - What about for plaintiffs who do not drive? Allowing them to trigger a strict-liability rule would favor the plaintiff’s autonomous choices over the defendant’s autonomy. No (94).
    - Drivers are given immunity from strict liability even though they subject others to nonreciprocal risk. In doing so, tort law gives the driver’s liberty interest the same weight as the pedestrian’s security interest (95). In these cases, the loss must lie where it fell.
    - Tort law creates pockets of immunity within negligence to protect the duty holder from being subject to strict liability when interacting with a right holder who does not participate in the risky activity (96).
    - Defendant’s failure to comply with an objective standard subjects him to negligence liability, even if he was born that way (97).
  + A Unified Rationale?
    - Compensatory tort right can explain the doctrines of tort law.
    - Compensation makes each function important for protecting the individual right (98).
    - Economic analysis is key, especially in safety decisions governed by cost-benefit analysis (99).
* **The Social Construction of Tort Law**
  + If tort law were governed solely by efficiency and cost/benefit, there would not be disagreements about cultural or social values.
  + Tort law can prioritize the individual interest in physical security over the liberty interest of another, recognizing that one is useless without the other (102).
  + This will always be contestable and changeable in light of social situation (102).
  + The idea of workplace compensation was deemed unnecessary when labor was able to make a free choice about where to work. This was a byproduct of abolition (103).
  + When overwhelming numbers of Americans began to use streetcars and railroads, the courts decided to place liability on the carrier when they did not apply a woman’s dress getting caught in liability because of their gender (104). This led to safety precautions, other changes by the industry.
  + Part of the cost of tort liability is passed on to consumers. A liability rule that made it unduly burdensome to operate would destroy business. As time goes on, there is more wealth and so people begin to spend more money on discretionary matters, meaning that judges could rely on physical security over economic development (105).
  + The purpose of law is to enable man to realize his goals through social organization. Given this goal, tort law should be highly dependent on societal standards. It should change as we go along (106).

**Doctrinal Analysis**

1. **Basics**
   1. Plaintiffs must generally prove each *element* of the tort in a *prima facie* case for liability. p.109
   2. Defendants can rely on an *affirmative defense* to avoid liability.
   3. When the facts are in enough dispute, a jury must be instructed by the judge.
   4. Mistakes are inevitable in the world of preponderance but a false positive is equally as likely to occur as a false negative.
2. Intentional Torts
   1. The Prima Facie Case
      1. Intent
         1. Two elements:
            1. The person acts with the purpose of producing the consequence
            2. The person acts knowing that the consequence is substantially liable to result.
         2. Does not distinguish good and bad motives (114).
         3. Affirmative defense avoids liability. In this way, tort law determines the value of certain conduct (you get out of liability for certain things) (115).
         4. Second definition (no purpose) is justified because the actor has created a nonreciprocal risk.
         5. Rule is limited to knowledge that the action will cause harm to a *specific person* (116).
   2. Battery
      1. Definition: actor intends to cause a harmful or offensive contact with the plaintiff and such conduct directly or indirectly results.
      2. Hard cases: no blameworthy intent.
      3. Intent is satisfied when defendant has any desire to cause harmful *or offensive* contact with the plaintiff (118)
         1. This includes insane people
         2. This is the creation of a nonreciprocal risk so the plaintiff deserves to be compensated.
      4. Intent is also satisfied when the defendant know the conduct was substantially certain to cause harmful or offensive contact (see *Garratt v. Dailey*) (119).
      5. *Vosburg* case, defendant acted with “unlawful” intent (120), adopting Single Intent rule
         1. Single intent: defendant intended a contact, it just turned out to be offensive.
            1. Defendant must intend contact
            2. Contact must be unlawful (intends harm or offense or is prohibited by tort law)
         2. Dual intent: first to make contact, second to cause offense.
            1. Defendant must intend contact
            2. Defendant intended contact to be harmful or offensive
         3. All cases satisfy single AND dual intent
      6. Offensive contact opens the door to other injuries. (122)
         1. In STD cases, the offense is not the sex, it’s that the plaintiff could not have consented fully if not informed of the STD risk.
         2. Defendant becomes liable for injuries caused by this tortious contact.
      7. Liability is based on the offensive nature of the contact.
      8. Damages compensate for physical harms from that contact.
      9. Battery seeks to redress offensive contact infringing on autonomy, not so much honor (123).
         1. Example: doctor who performs unwanted surgery is liable for battery
      10. Offensive contact is one that “offends a reasonable sense of personal dignity.” (124)
   3. Assault
      1. Elements:
         1. (a) intending to cause harmful or offensive contact or (b) intending to put another in imminent apprehension of such contact
         2. The other is thereby put in such imminent apprehension
      2. The apprehension is the harm.
      3. If battery is completed, the injuries merge into those recoverable for battery.
      4. Purpose is to protect from dignitary harm closely associated with physical violence.
   4. False Imprisonment
      1. Elements
         1. Intentionally confines the plaintiff
         2. Against plaintiff’s will
         3. Plaintiff is aware of the confinement (in most jurisdictions)
      2. Plaintiff must be completely confined.
      3. May help to address modern human rights problems
   5. Trespass and Conversion
      1. Trespass on Land
         1. Elements:
            1. Enters land in the possession of another, or causes a thing or third person to do so, or
            2. Remains on the land, or
            3. Fails to remove from the land a thing which he is under a duty to remove.
         2. Serves to protect individual interest in the exclusive possession of land.
         3. No need to prove actual harm.
         4. Compensatory damages are required for injunctive relief of punitive damages so there is usually a nominal compensatory award for trespass.
      2. Trespass to Chattels
         1. Elements:
            1. Dispossessing another of the chattel, or
            2. Using or intermeddling by bringing about physical contact with a chattel in another’s possession
         2. Trespass and Trespass to Chattels are virtually identical.
         3. Plaintiff must prove actual harm (actual dispossession, damage to condition, loss of use for a significant period, or physical harm to the plaintiff’s person or chattels or person in whom the plaintiff has a legal interest.
         4. While land is more important, violation of chattel rights is intolerable, too.
      3. Conversion
         1. Elements
            1. Intentional exercise of dominion over a chattel which so seriously interferes with the right of another to control that it is just to require compensation for the full value.
         2. Keeping your hat for three months is conversion and is analogous to stealing it.
   6. Intentional Infliction of Emotional Distress (IIED)
      1. Elements
         1. Severe emotional distress
         2. Extreme and Outrageous conduct
   7. Absence of Consent
      1. Plaintiff’s consent to an invasion of a legally protected interest generally bars recovery.
      2. Consent “turns trespass into a dinner party, battery into a handshake,"”etc.
      3. One cannot prove a negative, so plaintiffs must allege an absence of consent and the defendant has the burden of proving consent.
      4. Consent requires an informed choice.
         1. Cannot be made by children or those without capacity
         2. Does not extend beyond its limited scope
         3. Ineffective under duress or coercion
      5. If a reasonable person would have believed the plaintiff had consented, there is no liability.
      6. Community norms may grant immunity via consent (community standard that walking on wild lands is not trespass)
   8. Affirmative Defenses: Self-Defense and Defense of Property
      1. Someone facing imminent attack is not protected by compensatory damages.
      2. Self-defense entitles the individual to use reasonable force when he or she reasonably believes that another is about to commit battery.
      3. Only reasonable (proportional) force may be used.
         1. Some jurisdictions require retreat if it is possible.
         2. In the West and South, this would represent a loss of dignity so it is not required.
      4. Individuals may also protect their property from imminent harm.
         1. Must first ask the intruder to stop, when practical.
         2. Reasonable force can be used to prevent damage when there is an implied threat to the individual (e.g. a burglar)
   9. Necessity
      1. *Private necessity* gives actors the privilege to interfere with someone else’s property right to avoid greater harm threatened by natural forces or some independent cause.
      2. Owner cannot lawfully prevent a plaintiff to continue to use the property if he has started.
      3. May still be liable for damages caused (this is strict liability)
         1. He whose interests are furthered should bear the costs
         2. This and all other explanations are unpersuasive, yielding a “failure of tort theory”
         3. Evidentiary Rationale for Strict Liability? No, these are discrete safety decisions which can be governed effectively by negligence liability.
         4. Fairness Rationale for Nonreciprocal risks? No, these are not nonreciprocal
         5. Best rationale: actor has control over the property; he is responsible for exercise of that control!
      4. *Public necessity* is an act which is reasonable under the circumstances to avoid imminent public disaster (e.g. dynamiting a house to avoid spreading a fire or shooting a mad dog in the street)
3. **Negligence Liability (Ch 8)**
   1. Four elements: duty, breach, causation, and damages.
   2. Duty
      1. Duty defines the types of harms for which the defendant is responsible as a matter of tort law.
      2. Duty is defined categorically, specifying the requirement of reasonable care to all similarly situated actors.
      3. Requirement of Feasance or Action
         1. Duty is usually limited to risks created by some affirmative action, known as *feasance*.
         2. If you create a risk, you are required to control it.
         3. There is no duty to rescue, generally, if you didn’t create the risk.
            1. This might make you a “moral monster,” though.
         4. This is due to the fact that it would be difficult to limit a duty to rescue.
            1. Should it apply to wealthy individuals who can help to pay for others’ food and medical costs?
         5. We allow criminal law to go after failure to rescue because prosecutors *can* draw that line between easy and hard rescue.
      4. Foreseeability
         1. It is necessary that the actor realize the risk. If the actor knows or should have known about the risk, it is *foreseeable*.
         2. This is based on the fact that the actor could avoid the occurrence.
         3. Unforeseeable outcomes may not be attributed to individual autonomy so we should not hold them liable.
         4. Foreseeable risks are those which would be calculated by the reasonable person at the time of the safety decision.
         5. The risk must be created to the plaintiff individually (*Palsgraf*), not to society at large.
            1. Duty is limited to foreseeable victims (categorical)
            2. Jury question: whether the plaintiff in question was in fact within the category of foreseeable victims.

In *Palsgraf*, neither side contended that she was a foreseeable victim, so it could be decided as a matter of law.

* + 1. The Ordinary Duty of Care
       1. Balance of the overall level of foreseeable risk created by the actor’s conduct with the burden of the precautions.
       2. B ® P \* (Lphysical + Lemotional + Leconomic)
       3. This shows why duty must come first; we can’t know whether the burdens will outweigh the risks before we can know what the burdens are!
       4. Reasonable care is assumed to always exist in cases involving physical harm.
    2. Emotional Harms
       1. Most jurisdictions allow recovery for negligent infliction of emotional distress under limited conditions.
       2. Typically available only when plaintiff is within the “zone of danger,” but this is arbitrary and so it’s not followed by all jurisdictions.
          1. Proximity
          2. Close relationship
          3. Direct emotional impact
          4. Portee: injury must be severe.
       3. Courts typical problems with emotional harms are unsatisfactory. If you’re afraid of fraud, require more proof. If you’re afraid of the difficult computation, it’s not any easier for physical harm. The “opening the floodgates” begs the question.
          1. Allowing the negligent actor’s interest to justify limitation of duty gives unreasonable liberty interest of the negligent actor priority over the emotional interest of the victim, devaluing the emotional interests.
          2. Since physical harms are prioritized over emotional ones, this explains why a duty of negligent defendant excludes most stand-alone emotional harms.
          3. If all stand-alone emotional harms are allowed, then the PL terms are enormously long!

Would predictably lead to bankruptcy and nobody would ever recover the amount they should be compensated.

* + - * 1. For *that reason*, it is defensible to limit liability with tests such as the “zone of danger,” even if that is arbitrary.
    1. Economic Loss
       1. A business owner can recover for lost profits if he cannot operate his business after a car crash.
       2. But employees cannot recover similarly.
       3. Physical harms are of greater interest. Due to the problem of bankruptcy, this means that economic losses **must be limited**.
       4. Most evident in medical monitoring cases
          1. The economic cost of medical monitoring is equated with the plaintiff’s interest in physical security.
    2. Special Relationships and the Enabling Torts
       1. Can a defendant be liable for a crime committed by a third party?
       2. Generally no duty to control the conduct of the third party, unless:
          1. A special relation exists between the actor and the third party which imposes a duty to control the third party’s conduct, or
          2. A special relation exists between the actor and the other which gives the other a right to protection.
       3. Generally comes up when the duty holder is in the best position to protect the right holder from attack
    3. Policy Based Limitation
       1. Conduct will be regulated by another body of law or remain unregulated altogether
       2. Contractual relationship (*Strauss v. Belle*): duty limited to those with a contractual relationship to avoid excessive liability
          1. Bankruptcy would affect the right holders so significantly that we must make sure we can avoid it.
       3. Duty to trespassers: no duty of reasonable care (just to not cause intentional injury through a trap)
       4. Limitation forecloses an entire class of claims
       5. But a duty that results in too many lawsuits relative to meritorious claims is too burdensome
       6. Recreational-use statutes limit the landowner’s liability without curtailing socially valuable activity
       7. Judges sometimes abuse duty by limiting it in a single case (duty must be categorical)—these questions should go to the jury
       8. Social Host
          1. Chilling Effect!

Also applies to duty to finish rescuing or leave in same condition

Also Montana: we want to limit liability in order to encourage public use of the lands.

* + - * 1. Duty must be tailored to reflect the extent to which its social benefit outweighs its costs.
  1. The Standard of Reasonable Care
     + 1. Two components: measurement of precautionary burden, *B*, and the associated risk, *PL*.
       2. These are determined with reference to the hypothetical reasonable person
     1. The Reasonable person
        1. Objective qualities include ordinary or average traits within the community.
        2. Subjective qualities include the actor’s personal trait
        3. The standard can mix objective and subjective.
        4. Children are judged with respect to a reasonably prudent child of the same age, intelligence, and experience.
        5. Does take into account physical disability and sudden unforeseeable physical illness
           1. These things make it impossible for the actor to act voluntarily.
        6. Does not take into account mental illness.
           1. This is because tort law is indifferent to motivations
           2. Doing otherwise would allow the duty holder to define the duty based on her “best judgment.”

Plaintiff would never be able to disprove that except by reference to an external standard of behavior.

* + - 1. Departure from an objective standard of conduct creates a nonreciprocal risk. It is fair to subject a person creating nonreciprocal risk to liability
      2. Everyone was a child so the fact of being a child does not in itself create a nonreciprocal risk.
         1. Strict liability would result in children engaging in the activity less frequently
      3. But anyone engaging in an adult activity is held to an adult standard of care.
         1. Adult activity is defined by community standard
      4. When the actor is required to injure another as a matter of autonomy, we will grant immunity
         1. Disability is an example of this: the risks are nonreciprocal but they are incorporated into reasonable care.
         2. It is justified by policy outcomes (the disabled would never be able to leave their porch)
      5. What do we do about elderly drivers?
         1. They are essentially strictly liable for injuries that occur as a result of their old age.
         2. This is a deterrent rationale: we want to encourage them not to drive without prohibiting them
         3. The same standard applies to the mentally ill – we only want them to act insofar as they are able to do so reasonably.
      6. Tort liability can require individuals to exercise above-average skills if they have it, because individual choices are based on personal skill
    1. The Requirements of Reasonable Care
       1. Defined by conduct of a reasonable person in the circumstances confronted by the actor at the time of the safety decision.
          1. Mixed question of law and fact: judge determines scope of duty and reasonable person, jury determines the standard of conduct of a reasonable person.
          2. Others’ interests get equal consideration of self’s interests (193).
       2. Reasonable person should forego safety precaution when it is more expensive than the risk faced. (B<PL)
          1. This is especially true for strict liability.
          2. This gives rise to a problem when the injured party doesn’t benefit from the activity (pedestrian, for example)
       3. Reciprocal Risk
          1. In perfect reciprocity, the interpersonal conflict becomes an intrapersonal conflict of liberty v. security in oneself.
          2. Reciprocity makes us equalize the right/duty of ourselves and others because that is in our best interest.
       4. Contractual Relationships
          1. A consumer benefits and pays for the tort duty of a product seller.
          2. Consumer will not prioritize security or liberty, so she will prefer the benefit of risk reduction only if it exceeds the cost of safety investment.
       5. Risk-Risk Trade-offs
          1. In order to reduce or eliminate one risk, if the plaintiff puts himself at risk, he can recover. Tort law does not value one life over another.
       6. Nonreciprocal risks
          1. In the real world, an injured person is not fully compensated. To make up for this windfall (p.202), we add safety expenditures to reduce the amount of risk even further.
          2. This reduces the risk of injury and directly protects the security interest.
       7. Reasonable care in the courtroom
          1. Attorney who emphasizes bilateral nature of auto accidents will be more effective—establishes equality
          2. Attorneys should distinguish cases of nonreciprocal risk.

Juries will then reject the cost–benefit analysis

* + - * 1. Defendants respond by saying that the consumers benefit from the low cost and only want to pay the higher amount when it is beneficial to do so
  1. Proof of Negligence
     1. The Untaken Precaution
        1. Plaintiff shows the defendant failed to take a specific safety precaution.
        2. PL contains the risks that would be eliminated by the untaken precaution.
        3. Plaintiff must show that the injury occurred as a result of an accident that would not have occurred if the defendant was not failing to take the precaution (to satisfy Palsgraf categorical duty requirement).
     2. Custom
        1. At Common Law, no one was held to a higher standard than the average of the trade in which he is engaged.
        2. Today, we recognize that there are some precautions which may not be ignored regardless of their universal disregard.
        3. Custom as a Shield
           1. Actor’s compliance with custom does *not* prevent a finding of negligence.
           2. Customary practice can omit reasonable safety precautions.
           3. However, this evidence can be used as part of the solution to whether reasonable care was breached.
           4. In medical malpractice, failure to establish nonconformity is fatal to the plaintiff. Defendants who do establish conformity will win. **Custom is dispositive**.

Why different? Custom is *market equilibrium*. When the market produces the proper amount of safety, custom does establish reasonable care.

* + - 1. Custom as a Sword
         1. Evidence of sub-conformity behavior is dispositive of negligence.
         2. Rationale: if every other member of the trade is doing it, it must be practical.
         3. Defendant can argue that its operation poses different risks than those occasioned by others.
    1. Safety Statutes
       1. Proof that an actor has violated a statute can establish *negligence per se*. The elements are:
          1. Statute has a safety purpose
          2. Plaintiff is within the class of persons protected by the statute.
          3. Plaintiff was injured by the type of accident the statute seeks to avert.
          4. Defendant has no excuse for breaking the statute (there is a legitimate safety reason).
       2. Rationale: legislative determination has been made as to what behavior is reasonable to prevent certain harms.
       3. Custom is not an excuse to be unreasonable (jaywalkers!!).
       4. Statutes that provide for general safety are not used for negligence per se (licensing for doctors, for example)
       5. When the safety rationale is different from the one claimed under negligence, there are three possible reasons for varying outcomes:
          1. The defendant did not owe any duty of care to the plaintiff.

Plaintiff must show the harm is within the duty.

* + - * 1. When a statute is not the source of duty, it does not define the scope of the duty.

Common-law duty can include the foreseeable risk.

* + - 1. Statute can preempt tort duty, can create a new tort duty, supplement it, etc.
    1. Precedent
       1. Precedent can define the requirements of reasonable care (only if established by a judge).
       2. Holmes: judicially-adopted ruled will eventually govern reasonable conduct in any given category of cases.
       3. Jury still determines the precise outcomes in each case; there can be exceptions to every rule.
    2. Res Ipsa Loquitur
       1. Circumstantial evidence creates a reasonable inference of negligence when it satisfies the doctrine of *res ispa loquitur*.
          1. Used when harm is a type of accident that ordinarily happens as a result of the negligence of a class of actions of which the defendant is member.

i.e. most accidents of that category involve legal fault.

* + - 1. Elements
         1. Normally caused by negligence
         2. Exclusive Control
         3. Plaintiff not responsible
      2. For *general negligence*, the plaintiff does not have to identify the specific manner in which the defendant acted unreasonably.
      3. Can also be used to show *specific negligence*. Any form of circumstantial evidence used to prove unreasonable care will satisfy res ipsa.
      4. Generally easier to use when there is a large number of precautions.
  1. Landowner Liability
     1. Trespassers: no duty to unknown trespassers
     2. Licensees: social guests
     3. Invitees:

1. Causation
   1. Factual Cause
      1. The But-For Test
         1. Plaintiff must show that but for the defendant’s tortious conduct, the injury would not have occurred.
            1. Identify the injuries
            2. Identify the wrongful conduct. Plaintiff must show that the injuries probably would not have occurred if the defendant hadn’t engaged in the *particular* conduct.
            3. Create a counterfactual world without the defendant’s conduct.
            4. Would the injuries probably still have occurred?
         2. Distinguish between the defendant being a but-for cause and the defendant’s negligence being such a cause.
         3. Liberal Rule of But-For causation
            1. The negligent act was deemed wrongful because it increased the chances of a particular type of accident
            2. A mishap of that type did occur.
         4. Defendant’s misconduct must have, more likely than not, caused the specific harms (if 2/3 come from background risk, the defendant would have to double the risk of disease).
         5. Factual causation is only satisfied if plaintiff shows that most accidents of this type are caused by the tortious risk in question.
         6. A judge who allows a jury to determine whether a case is distinguishable from other cases by finding causation is using this rule (page 246-7).
         7. This rule is only to be used when the only way to prove causation is through human behaviorial inferences.
         8. This rule explains loss of a chance
            1. The element of cause would normally foreclose plaintiffs from recovery when they were not harmed by misdiagnosis since they probably would have died anyway.
            2. If the malpractice reduced the patient’s chance of recovery, the liability rule provides recovery for the lost chance.
            3. Only applies in med mal but it’s unclear why (it could apply to all cases where the tortfeasor creates a risk of harm and is uncertain whether the harm has already occurred or will occur in the future).

It would radically alter tort doctrine because every risk of harm can be recharacterized as a lost chance of avoiding injury

* + - * 1. A court could incorporate a behavioral component into the doctor’s duty (assuming patients can survive despite the odds and that the physician will help the patient do so).

Courts will probably rely on statistics and reject this.

* + 1. Multiple Tortious causes
       1. Courts do not use the but-for test when there are multiple tortious causes.
          1. Doing so would allow two fire-starters to claim that the house would have burnt down anyway.
       2. We do not allow defendants to avoid liability merely because the injury was more likely caused by one of the other defendants.
          1. Instead, courts used to ask whether the actor’s negligent conduct was a “substantial factor in bringing about the harm.”
          2. This test is not well-defined and is subject to error.
          3. Instead, restatement uses the NESS test

Necessary Element of a Sufficient Causal Set

Absent any one of the elements, the plaintiff’s harm would not have occurred.

* + - 1. New Restatement test:
         1. If multiple acts exist, each of which would have been a factual cause in the absence of the other, each act is regarded as a factual cause of the harm.
         2. This applies even if the actor’s conduct requires other conduct to be sufficient to cause the harm.
  1. Proximate Cause and Scope of Liability
     + 1. We have to make a policy judgment to determine the limited scope of liability and end the causal chain somewhere.
       2. While duty defines whether a defined class of actors should be legally responsible for accidents caused by certain types of risk, proximate cause asks whether the particular injury is encompassed in the duty.
     1. Directness Test
        1. A direct cause is always proximate. An indirect cause is proximate only when it foreseeably brings about the harm.
        2. *Polemis* test: if the act would probably cause damage, the fact that the damage is not of the exact kind is immaterial, as long as it is traceable to the negligent act.
           1. Problem: train was going too fast so a tree happened to fall on it.
        3. *Risk Rule*: liability is excluded where the injury sprang from a hazard different from that which was improperly risked.
        4. When a force intervenes between the defendant’s conduct and the harm, and the defendant is still liable.
        5. An unforeseeable intervening force is a superseding cause that eliminates the defendant’s negligence.
     2. Foreseeability Test
        1. Dissatisfaction about the distinction between direct and intervening causes resulted in courts developing a new test.
        2. *Wagon Mound I*: defendants are liable for harms that were foreseeable to the reasonable man.
        3. *Eggshell Skull Rule*: even if the defendant could not foresee that the plaintiff had some pre-existing susceptibility to physical harm, the defendant incurs responsibility for the full extent of the physical harm caused by the negligent conduct.
     3. Combining Foreseeability and Directness
        1. Directness and Foreseeability tests are equivalent in the end.
        2. Proximate Cause only matters if the plaintiff can establish a prima facie case and to satisfy factual causation the plaintiff must have been injured by the tortious risk.
        3. Both tests limit liability to accidents caused by tortious risk.
        4. *Risk Standard*: an actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious.
        5. Tort law reduces the plaintiff’s burden of proof regarding causal questions in the damages phase.
           1. Just because the plaintiff can’t prove damages doesn’t mean she cannot recover.
           2. Uncertainty concerning the extent of damages must be borne by the defendant (this is why we reject foreseeability)
        6. Directness test must be limited to causal questions in the damages phase. Cannot use foreseeability because the uncertainty about foreseeability should lie with the tortfeasor.
     4. Characterization of Tortious Risk
        1. Plaintiff wants tortious risk to be defined broadly, defendant wants a narrow definition.
        2. There can be no specific rule about the appropriate level of generality or specificity in characterizing harm for proximate cause.
        3. Defendant can only make safety choices based on what is foreseeable.
        4. Plaintiff must be within the class of potential victims (*Palsgraf*).
        5. Conditioning liability on foreseeability would include all events (they are all foreseeable in some way).
        6. WTC case
           1. By selecting untaken precautions, the plaintiffs satisfied the requirement of foreseeability.
           2. Arson is one foreseeable criminal attack which should motivate the adoption of reasonably safe procedures for evacuation.
           3. The extent of damages does not have to be foreseeable
           4. Therefore, only victims killed by the fire satisfy factual causation.

1. **Multiple Tortfeasors**
   1. Joint and Several Liability
      1. Tort law groups together individuals who are responsible for one another.
      2. Each is liable for the injuries tortuously caused by any other in furtherance of the illegal objective.
      3. Joint tort: where two or more tortfeasors behave in a way that makes it proper to treat the conduct of each as the conduct of others as well.
         1. This requires the existence of a concert of action or breach of a joint duty.
      4. Each defendant is liable for the entirety of the plaintiff’s damages.
      5. Plaintiff need not sue every tortfeasor.
      6. Also applies where independent tortious acts concurred in causing the plaintiff’s damage (multiple independent fires, asbestos).
      7. Each tortfeasor is individually liable for causing the plaintiff’s harm when the harm cannot be apportioned among the causes.
         1. When plaintiff cannot show which portions of the (indivisible) harm were caused by which tortfeasors, they must be jointly and severally liable.
         2. Tort law places the burden of inherent factual uncertainty in damages on the defendant.
      8. Today, a jointly and severally liable defendant can seek contribution from another tortfeasor in an action that seeks to recover only a portion of the damages paid or owed to the plaintiff.
      9. The plaintiff’s right to compensation does not depend on the defendant’s ability to recover from another tortfeasor.
   2. Vicarious Liability
      1. Ordinarily based on *respondeat superior* (an employer is vicariously liable for torts committed by an employee acting within the scope of employment).
      2. Vicarious liability is justified by the fact that the employer has control over the creation of the risks inherent in the employer–employee relationship.
      3. To apply, the employment relationship must create risks additional to those that would otherwise exist in the community.
         1. The risk of drunken sailor misconduct is foreseeably high in port areas, so it is a risk characteristic of the business.
         2. VL also necessarily requires a degree of control over the employee (so it does not apply to independent contractors).
            1. Exception for nondelegable duties: vicarious liability applies even without meaningful control over the employee.
   3. Alternative and Market-Share Liability
      1. Summers v. Tice: burden of proof is shifted to defendants
         1. Rule: where two actors are tortfeasors and the plaintiff proves that harm has occurred by only one of them, but there is uncertainty as to which one, the burden is upon the actor to prove he has not caused the harm.
         2. The risk of error is preferably placed on the defendants
         3. Not applied as a form of risk-based liability.
         4. Courts insist that all persons whose tortious acts exposed the plaintiff to harm be joined in order to get alternative liability.
      2. DES cases
         1. A DES plaintiff cannot recover under alternative liability due to the large number of manufacturers, the fluid nature of the market and the passage of time.
         2. California requires that if a group comprises a substantial share of the market, they can be liable based on their share of that market.
            1. Justified by risk-based conception of tort liability. Tort law can treat each actor equally by making each responsible for his or her own behavior.
            2. This changes the tort right; based on risk, not harm. Controversial!
         3. Disagreement is over whether alternative liability extends to market-share liability
      3. Summers gets preponderance by proving that the *group*, considered together, more likely than not caused the harm.
         1. The combined conduct is a but-for cause of the event.
         2. Defendants cannot deny that the plaintiff was harmed by *one of them*.
            1. Allowing individual blaming would amount to allowing a group claim that none of them caused the harm.
            2. Instead, we ask the defendants to prove that they did not individually case the harm.
         3. Proportion of liability = extent of responsibility for group’s conduct. This is why some courts have a 100% joinder requirement.
      4. Alternative liability would result in making defendants jointly and severally liable, resulting in unfairly excessive amount of liability for each defendant.
      5. Plaintiff’s recovery in market-share cases is limited by the rule of several liability, which makes the individual manufacturer responsible only for the defective products it actually sold.
      6. Courts require that the conduct be fungible or substantially similar.
         1. Fungible in the sense that the risk might have actually caused the plaintiff’s injury.
2. Defenses Based on the Plaintiff’s Conduct
   1. Assumption of Risk
      1. Express Assumption of Risk
         1. Definition: agreeing to an enforceable oral or written contract that exculpates the defendant from negligence liability.
            1. Such agreements are only enforceable when they are freely and fairly made between parties in an equal bargaining position and does not interfere with important social interests.
         2. Tunkl factors for exemption (form a logical inquiry, not a required test):
            1. Concerns a type of business generally suitable for regulation
            2. Party seeking exculpation is performing a service of necessity to the public
            3. Party holds self out as willing to perform for any member of the public
            4. The party has a bargaining advantage
            5. Contract of adhesion with no provision for additional fees to obtain protection against negligence.
            6. Person or property is placed under control of the seller, subject to the risk of carelessness by the seller.
         3. The absence of meaningful choice negates the assumption of risk.
         4. The plaintiff must have been fully informed to assume risk.
         5. Exculpatory agreements do not bar or reduce otherwise valid products-liability claims
            1. Consumers do not adequately understand the magnitude of product risk fully.
      2. Primary Assumption of Risk
         1. When the participant knows of the risks and chooses to participate, she assumes the risk.
         2. These risks cannot be eliminated without fundamentally altering the activity itself
         3. The ordinary baseball fan is okay with netting behind home plate because it has a heightened risk but not in other places.
      3. Implied or Secondary Assumption of Risk
         1. Cases in which the risk is encompassed in the defendant’s duty to exercise reasonable care.
            1. If the defendant breaches that duty and exposes the plaintiff to an unreasonable risk, a plaintiff who knows of the risk and still chooses to face it is subject to this defense.
         2. Only applies in cases where the plaintiff assumed a risk after making the same safety decision involved in the allegation of negligence.
            1. If the B that the plaintiff considers is different from the B he wants the defendant to consider, there is no assumption of risk.
         3. Does not simply apply when the plaintiff choses to face a known risk.
         4. This defense can be (is) thrown away.
            1. Can be reformulated in terms of objective consent (which falls under primary assumption of risk).
   2. Contributory Negligence and Last Clear Chance
      * 1. Plaintiffs who fail to exercise reasonable care can be legally at fault for an accident under contributory negligence.
        2. Exception: when defendant knew about the plaintiff’s negligence and proceeded to negligently cause the plaintiff’s injury, the defendant is liable under the doctrine of *last clear chance*.
        3. Each party acts on the assumption that other parties are exercising due care. When the interests of the parties is normative, there is no justification for shifting the loss (let it lie where it fell).
   3. Comparative Responsibility
      1. 20th century saw a decline in the use of the idea of objective causation (in science as well as in law).
      2. Determination of Comparative Responsibility
         1. Factors for assigning percentages (jury):
            1. Nature of the person’s risk-creating conduct, including awareness or indifference to the risk and any intent, and
            2. The strength of the causal connection between the risk-creating conduct and the harm.
      3. Apportionment of liability
         1. Majority rule: *impure comparative responsibility*: plaintiff can recover only if the defendant’s comparative responsibility is equal to or greater than the plaintiff’s.
            1. Gives defendants an advantage because they are liable only up to their percentage of harm.
      4. Comparative Responsibility and Last Clear Chance
         1. Last clear chance is mostly abolished because it was only around to lessen the harshness of the total recovery bar for Comp. Resp.
         2. Patients deserve full medical care and compensation for injuries of malpractice. This effectively reinstates last clear chance.
      5. Comparative Responsibility and Assumption of Risk
         1. Primary Assumption of Risk: no duty to plaintiff, s there is no basis for any liability on the defendant.
         2. Implied Assumption of Risk
            1. Allow a plaintiff who has assumed such a risk to recover under comparative responsibility.
            2. Treat plaintiff’s assumption of risk as an implied-in-fact contract, which would eliminate the duty while allowing the court to closely scrutinize the nature of the plaintiff’s decision.
3. Strict liability for Abnormally Dangerous Activities
   * 1. Strict Liability claims do not require proof that the defendant breached a duty of care.
     2. Liability rule in *Rylands v. Fletcher*: strict liability should be used in cases of abnormally dangerous activities.
     3. Factors for determining what activities are abnormally dangerous:
        1. Existence of a high degree of risk of harm to person, land or chattels;
        2. Likelihood that the harm that results will be great
        3. Inability to eliminate risk by reasonable care
        4. Extent to which it is not a common activity
        5. Inappropriateness of the activity to the place where it is done
        6. Extent to which its value to the community is outweighed by its dangerous attributes.
   1. Compensation of Physical Harms Caused by Nonreciprocal Risks
      1. SL applies in cases of great risk but not so great that the act itself could be called negligent.
      2. Abnormally dangerous activity creates nonreciprocal risk. In such cases, the defendant fairly incurs compensatory duty for the ensuing injuries. This doesn’t account for the “inappropriate location” factor.
      3. Restatement Third factors:
         1. Activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors
         2. The activity is not a matter of common usage.
      4. This is reliant on nonreciprocity because negligence usually protects the tort right best, except for reasonable, nonreciprocal risks.
   2. Reduction of Risks Inadequately Regulated by Negligence
      1. Negligence Liability does not always reduce risks to the desired extent. When there is no credible threat of negligence liability, there is no financial incentive to incur the costs of reasonable care.
      2. Restatement Third test rejects the evidentiary rationale for SL
      3. The deterrence rationale is most strongly supported.
         1. But deterrence is not desirable for socially valuable activities, so we can make an exception.
4. Strict Products Liability
   1. Origins of Strict Products Liability
      1. 19th century: seller’s duty was limited to parties in privity.
      2. This was abolished in favor of full-blown negligence.
      3. Problem: even exercise of reasonable care cannot eliminate all defects.
      4. Plaintiffs regularly invoked res ipsa.
      5. Courts eventually realize that they should just adopt the evidentiary rationale for strict liability.
      6. Restatement § 402A
         1. One who sells a product in defective condition unreasonably dangerous is subject to liability for that harm if:
            1. the seller is engaged in business of selling the product and
            2. it is expected to and does reach the product without a change in condition.
   2. Different Types of Defect
      1. Construction or Manufacturing Defects
         1. Defect is defined by the self-defeating product malfunction
         2. Product must depart from its intended design.
      2. Design Defect
         1. Plaintiff must show that a design or warning is unreasonably dangerous
         2. Foreseeable risks of harm of the product could have been reduced or avoided by the adoption of a reasonable alternative design
      3. Warning Defect
         1. Inadequate instructions or warnings when the foreseeable risks of harm would have been reduced by reasonable instructions or warnings
   3. The Risk–Utility Test
      1. A design is reasonable when it passes the risk–utility test (Hand formula)
      2. Airbag example
         1. Risk: increased risk of injury due to lack of airbag
         2. Utility: cost-savings
         3. Car is defective if the utility of the existing design is less than the increased risk posed by the design.
      3. Adding instructions can also reduce the risks.
         1. We must consider the cost of disclosure. While usually low, we have to be afraid of information overload
   4. The Consumer Expectations Test
      1. Design or Warning is defective when it is “unreasonable dangerous.” That is, when it is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with ordinary amount of knowledge to the community.”
         1. Origin in ancient tort of implied warranty
   5. Controversy over the Standard of Liability
      1. Tort duty is predicated on the lack of knowledge of the consumer
      2. The element of defect is a separate requirement when defined in terms of the reasonable safety expectations.
      3. The full set of interests of the consumer is best protected by satisfying a cost-benefit analysis.
      4. Ordinary consumer’s well-informed preference will be for the risk-utility test.
      5. The risk-utility test depends on and is complemented by consumer expectations.
   6. Learned intermediary
      * 1. MG: Should be extended to ski instructors (?problematic?)
   7. Heeding presumption: assume they would have heeded the warning.
   8. Causation
      1. Plaintiff must prove the defect was the factual and proximate cause of the injury.
   9. Defenses based on the Plaintiff’s Conduct
      1. Courts do not enforce contractual disclaimers of products liability.
      2. They use the same inquiry of whether the seller can establish primary assumption of risk: if the consumer has enough info to make a safety decision and still faces the risk, the seller is relieved of responsibility.
   10. Damages
       1. Plaintiff must also prove the amount of damages in the same manner as in other tort cases.
5. Damages
   1. Compensatory Damages
      1. Plaintiff is required to establish damages with the greatest degree of certainty possible for the circumstances.
      2. Designed to put the plaintiff in a place he would have been in if there had been no tort (through a pecuniary way).
      3. Judges frequently reduce jury awards through remittitur. There are also arbitrary caps to limit pain-and-suffering.
   2. Survival and Wrongful Death Actions
      1. Survival statute: allows estate to recover any tort damages that the decedent would have been able to recover up until the moment of death.
      2. Wrongful death statute: creates a cause of action allowing specified beneficiaries to recover certain types of losses caused by the wrongful death. Two types:
         1. Estate is the beneficiary. Damages=amount decedent would have contributed to the estate over the course of a lifetime less living expenses(can be zero).
         2. Damages to spouse/children: loss of financial support, pain and suffering, loss of consortium.
         3. Vast majority of jurisdictions exclude *hedonic* *damages* (loss of life’s pleasures)
   3. The measure of compensation
      1. Prevention is far more valuable than damages, but the appropriate B is not infinity.
      2. Use the risk-utility test: consumers reasonably expect product safety decisions to be governed by a cost–benefit calculus. Without some monetary amount on losses, it would be impossible to determine the amount of burden.
      3. The value of the injury is not relevant to the safety issue; the amount consumers would be willing to pay in return for the safety is the relevant figure.
      4. The damages award is fully compensatory from the perspective of the plaintiff at the time of the risk exposure.
   4. Punitive Damages
      1. Typically awarded only when a tortfeasor has committed serious misconduct with bad intent. Compensatory damages no longer redress the violation of the plaintiff’s tort right.
      2. When the seller expects few of the consumers to actually be able to sue, he can get away with lowering the burden at a cheaper liability cost.
      3. We fix that problem with punitive damages that multiply the individually successful claims by the proportion of nonsuccessful claims.
         1. Ex: if 1 out of every 10 meritorious claims will be brought, punitive damages should be 10 times the individual award.
      4. SCOTUS has held that the due process clause imposes procedural and substantive limitations and should depend on:
         1. The reprehensibility of the defendant’s conduct
         2. Whether the ratio between the punitive award and actual harm is a multiplier greater than 9
         3. The disparity between punitive award and any criminal or civil penalties for the misconduct.
      5. First, disgorge gains wrongfully gotten by the defendant PLUS punish the defendant for having adopted the wrongful perspective in the first place.