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- a. Mere words do not amount to an assault
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 - g. **No Fault Insurance for Medical/Products Injuries**
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 - a. Can Provide Evidence of “Negligence Per Se”
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- c. But Consider Customary (or Common Law) Exceptions
 - d. When do you know a statute has a private cause of action?
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- B. **Causation**
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- a. The Harm May Have Occurred Anyway (*Grimstad*)
 - b. Burden Shifting and “but for” Causation *Haft v. Lone Palm Hotel*
 - c. Burden Shift, “but for” causation, and Med. Malpractice (*Zuchowicz*)
 - d. Expert Testimony For Causation (*GE v. Joiner*)
2. **Proximate Cause**
- a. Remotely Caused Damages Non-Recoverable (*Ryan v. R.R.* (1866))
 - b. Plaintiff's Response to Emergencies (*Tuttle v. Atlantic R.R.*)
 - c. Directness Test: *In re Polemis*
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 - f. Restatement: Harm Within the Risk (Cardozo's View)
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 - b. Zone of Danger
 - c. *Dillon* Rule
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- a. Basic Doctrine (*Butterfield v. Forester*)
 - b. A protection to corporations and industry?
 - c. Contributory Negligence and Hand Formula
 - d. Plaintiff's (n)egligence Must Also Be a Cause
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- a. Property Rights and Contributory Negligence (*LeRoy Fibre*)
 - b. The Seatbelt Defense (*Derheim v. N. Fiorito Co.*)
 - c. Last Clear Chance (*Fuller v. Illinois R.R.*)
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- a. Early Doctrine: Industrial Accidents and Fellow Servants
 - b. Birth of the Doctrine: *Lamson v. American Axe Co.* (Mass. 1900)
 - c. The “Flopper”: *Murphy v. Steeplechase* (N.Y. 1929)
 - d. Secondary Assumption of Risk: *Meistrich v. Casino Arena* (N.J. 1959)
 - e. Assumption of Risk and Contract (*Ob.-Gyn. v. Pepper*)
4. **Comparative Negligence**



- a. *Li v. Yellow Cab* (Ca. 1975)
- b. Mostly eliminates last clear chance doctrine
- c. Primary Assumption of risk still a complete defense (*Knight v. Jewett*)
- d. Secondary Assumption of Risk Folded into Comparative Negligence

D. Multiple Defendants

1. Joint Tortfeasors

- a. Joint Liability
- b. Joint Liability and Burden Shifting: *Kingston v. R.R.* (Wis. 1927)
- c. Traditional Rule: No Contribution/Indemnity with Joint Tortfeasors
- d. Several Liability
- e. Joint and Severally Liable
- f. Partial Indemnity on a Comparative Fault Basis (*AMA v. Sup. Ct.*)
- g. Settling with Defendants

2. Vicarious Liability

- a. Vicarious Liability
- b. Rationale
- c. Tests
- d. Motive Test: The Nelson Rule
- e. Foresight Test: *Ira S. Busbey v. United States* (2nd Cir. 1968)
- f. “Location of the Wrong” Test
- g. Vicarious Liability for Indep. Contractors (*Petrovich v. Health Plan*)

E. Tort Law Under Uncertainty

1. Res Ipsa Loquitur (RIL)

- a. The Occurrence of the Event Itself is Evidence of Negligence (*Byrne*)
- b. Elements
- c. A Permissive Inference (*Morejon v. Rais Construction*)
- d. Control Need Not Literally Be “Exclusive” (*Colmenares*)
- e. Exclusive Control Not Needed: Third Parties and Chains of Custody
- f. RIL as an Information Forcing Rule: Medical Malpractice (*Ybarra*)

2. Collective Liability

- a. Concert of Action (*Kingston*)
- b. Alternative Liability (*Summers v. Tice* (Cal. 1948))
- c. Market Share Liability (*Sindell v. Abbott Labs.*)
Preconditions for Adopting Market Share Liability
- d. Variations on Market Share Liability
- e. “Risk Contribution Theory” (*Collins v. Lilly* - Wisc.)
- f. “Market Share Alternative Liability” (*Martin v. Abbot Labs* – Wash.)
- g. Market Share Liability Rejected (*Skipworth v. Lead Industries*) (Pa. 1997)
- h. Risk Contribution Theory Returns (*Gramling v. Mallett*) (Wisc. 2005)
- i. Proportional Share Liability

3. Scientific Uncertainty

- a. Burden Shifting of Causation to the Defendant (*Zuchowicz*)
- b. Lost Chance Doctrine

4. Medical Monitoring (MM)

- a. Recovery for Future Medical Expenses: MM (*Bower v. Westinghouse*)
- b. Medical Monitoring Rationale
- c. Rationale against Medical Monitoring
- d. No Damages for “Enhanced Risk” of Disease (But MM is OK)



- e. **No Lump-Sum Damages for M.M (R.R. v. Buckley (U.S. 1997))**
- f. Medical Monitoring and Class Actions

IV. ECONOMIC ANALYSIS OF TORT LAW

A. Coase Theorem

- 1. **Zero Transaction Costs**
- 2. **Positive Transaction Costs (a.k.a. “Reality”)**
 - a. Problems
- 3. **Applications**
 - a. Nuisance Law: Incompatible Land Use
 - b. Little girls getting hit with busses (and other “stranger situations where bargaining is not possible)
- 4. **Cheapest Cost Avoider**

B. Accident Cost Reduction

V. STRICT LIABILITY

A. Traditional Strict Liability

- 1. **Strict Liability and Property Rights**
 - a. Yes, Recovery (*Fletcher v. Rylands*).
 - b. No! We Have a right to (natural) non-Negligent Use of Private Prop.
 - c. 30 States Now Accept the Rylands Principle, 7 Reject It.
- 2. **Ultrahazardous or Abnormally Dangerous Activities**
 - a. Restatements
 - b. Abnormally Dangerous Activity
 - c. Don't Use Strict Liability when Negligence will Do
- 3. **Trespass and Assault, without Intent**

B. Trespass to Chattels/Conversion

- 1. **Trespass to Chattels: “The Little Brother to Conversion”**
 - a. Elements
 - b. Showing (Physical) Damage is Important
- 2. **Conversion**
 - a. Elements
 - b. Knowledge/Intent, Good/Bad Faith, Care/Negl. = Not Necessary
 - c. Conversion of Intangible Property
 - d. Expanding “Conversion” and Relevant Policy Considerations

C. Nuisance

- 1. **Definitions**
 - a. A Reasonableness Standard: What is an “unreasonable” interference?
 - b. Absolute Property Rights v. “Live and Let Live”
 - c. Aesthetic Blight is Normally not a Nuisance
- 2. **Solar Easements**
 - a. Majority Rule – No Easement: *Fontainebleu*
 - b. Minority Rule – Yes Easement: *Prab v. Maretti*
 - c. Spite Fences
- 3. **Uses Normal Person, Not Egg-Shell-Skull, Extra-Sensitive Standard**
- 4. **“Coming to the Nuisance” is Generally No Defense**
 - a. Minority View: Assumption of Risk
- 5. **Injunction versus Damages**
 - a. The Right to Clean Air (*Boomer v. Atlantic Cement Co.*)
 - b. Purchased Injunctions: *Spur Industries v. Webb Development Co.*



VI. PRODUCTS LIABILITY

A. Doctrinal Development

1. **The Fall of Privity (*MacPherson v. Buick*)**
2. **“Our Old Friend” Res Ipsa Loquitur and Products Liability**
 - a. Justifications for Products Liability (Mostly Traynor’s Concurrence)
 - b. Justifications for Privity Limitations (Limits on Product Liability)
3. **Implied Warranty... WITH A VENGEANCE!!!!**
4. **Restatements**
 - a. Second
 - b. Third Restatement (of Products Liability)
5. **Elements**
6. **No Recovery for Purely Economic Loss (*Casa Clara*) (Fla. 1993)**

B. Defects

1. **Manufacturing Defect**
2. **Design Defect**
 - a. Focus on Product not Manufacturer Conduct (*Barker v. Lull Eng.*)
 - b. No Design Defect when Consumer Negligence will do (*Halliday v. Sturm, Ruger*)
 - c. Consumer Expectations Test (*Potter v. Chicago Pneumatic Tool*)
 - d. Risk-Utility Test
 - e. “Dual Purpose” Test (*Castro v. QVC*)
 - f. Product Modification
3. **Failure to Warn**
 - a. Strict Liability
 - b. Negligence
 - c. *McDonald v. Ortho* (Mass. 1985)
 - (1) Warning the Learned Intermediary
 - d. Pharmacists Duty to Warn
 - e. Mass Vaccination Cases
 - f. Danger of Overwarning
 - g. *Hood v. Ryobi*
 - h. *Liriano v. Hobart Corp.*
 - i. Common Knowledge Defense and Harmful Substances
 - j. Good warnings should not excuse bad designs

C. Plaintiff’s Conduct

1. **Comparative Negligence and Strict Products Liability**
 - a. The Two Are Compatible
 - b. Assumption of Risk Reduces But Does not Defeat Recovery
 - c. Dissent
 - d. Adopted in Third Restatement
2. **Contributory Negligence and Product Misuse**
3. **Contractual Defenses**

D. Regulatory Compliance/Preemption

1. **Express Preemption**
2. **Implied Preemption**
 - a. Field Preemption
 - b. Conflict Preemption (Impossibility or “Frustration of Purpose”)
 - c. Regulatory Agencies Interpretation of Statute Entitled to Deference



3. **As Evidence of Per Se Negligence**
 4. **As A Defense**
 5. ***Colacicco v. Apotex* (E.D.Pa. 2006)**
- E. **Defenses**
- VII. **DAMAGES**
- A. **Compensatory**
1. **Damages and Function Within the Tort System**
 - a. Corrective Justice
 - b. Economic/Deterrence Function
 - c. Compensation Function
 2. **Economic (Pecuniary/Special)**
 - a. Calculating Wages
 - b. Imputed Income
 - c. Mitigating damages
 - d. Chamallas
 - e. Tort reform: Giving schedules or capping non-economic damages
 - f. Structured Settlements
 3. **Non-Pecuniary (General)**
 - a. *McDougald v. Garber* (N.Y. 1989)
 - b. Per Diem Rule
 - c. Scheduled Damages
 - d. Increased Risk of Future Injury
 - e. Pain and suffering in the moments before death
 4. **Appellate Review of Damages**
 - a. “Shocks the Conscience” (or “Materially Deviates”) Standard
 - b. Remittitur and Additur
 5. **Collateral Benefits**
 - a. Generally not allowed to reduce awards
 - b. Exception for government benefits when government is tortfeasor.
 - c. Insurance
 6. **Wrongful Death and Loss of Consortium**
 - a. Wrongful Death
 - b. Loss of Consortium
- B. **Punitive Damages**
1. **Pros and Cons of Punitive Damages**
 2. **Guidelines for Setting Punitive Damages (*Gore v. BMW*)**
 - a. Standard of Appellate Review
 - b. Reprehensibility of Defendant’s Misconduct
 - c. Ratio with Compensatory Damages
 - d. Comparable Civil Penalties
 - e. Other Concerns
 3. **Considering Wealth of Defendant**
 4. **Bedbugs Drive Posner Crazy!**
 5. **Unresolved Issues: *Williams v. Philip Morris***
 6. **Use Punitive Damages for Societal Good**
 7. **Other Statutory Reforms**
 8. **Who Should Get Punitive Damages?**
 - a. Certified Punitive Damages Class?





I. INTRODUCTION

A. Intellectual Approaches to Tort Law

1. Corrective Justice

Correcting a moral wrong that has been done; injured is entitled to relief from their injurer as a matter of fairness. “Bipolarity.” Torts serves as a compliment to criminal law because it civilizes disputes between people.

2. Economic Approach/Deterrence Approach

Torts should set proper incentives for people’s behavior by showing them the consequences of their actions. Less of a justification for intentional torts. Punitive damages?

3. Compensation Approach

Compensate the injured for their loss. Restore the injured, as best as possible, to the position they would have occupied before the harm was done to them.

B. Holmes: Two theories of common-law liability:

1. Criminalist (Negligence)

Liability based only on personal fault.

2. “A man acts at his own peril” (strict liability)

This would lead to liability without limits. And the general rule is to avoid state interference. Loss must lie where it falls.

3. Judge People by an Objective not a Subjective Standard of Care

Holmes: “the question is not whether the defendant thought his conduct was that of a prudent man, but whether you think it was” (but it should be reasonable conduct for a blind person, old person, infant, tall person, law student, etc.).

C. Judge v. Jury in Torts

	Pro	Con
Judge	Concept of negligence does not fit well into law/fact dichotomy Over time sees similar cases/fact patterns emerging and is able to build experience about how these cases should go (what is reasonable care, etc.)	<i>Goodman</i> (Stop, look, listen) <i>v. Pokora</i> (No Stop, Look, and Listen)
Jury	Jurors have varied experiences/backgrounds (airline passengers, etc.)	Hindsight Bias (but same with judge) Generally won’t be making “Hand Formula” type calculations Costly and erratic Tend to rule against π , but tend to award greater damages depending on status of Δ .



II. INTENTIONAL TORTS

A. Elements

1. Intent
2. Act
3. Causation
4. Damages

B. Physical Harms

1. Battery



a. Eggshell Skull Rule (Vosburg v. Putney)

You take your plaintiff as you see him. The wrong-doer is liable for all injuries resulting directly from the wrongful act, whether foreseeable or not.

b. Intent to Act v. Intent to Harm

Intent to harm is not necessary. If the intended act is unlawful, the intent to do it must be unlawful

c. “Substantial Certainty” Test (Garratt v. Dailey)¹

d. “Playing Piano” (White v. University of Idaho)

Nonconsensual intentional touching creates valid claim for battery even when there is no intent to harm. (Rejects restatement view that actor must know or believe with substantial certainty that consequences will follow from his act)

e. “Transferred” Intent²

2. Defenses to Battery: Consent



a. Consent

Mohr v. Williams Plaintiff consented to operation on right ear; defendant operated on the left ear. No negligence (med. malpractice) or wrongful intent from defendant but consent defense will not work, if it was unauthorized then it was unlawful, (unlike a criminal prosecution where unlawful intent must be shown.)

- (1) Implied consent (e.g. emergencies)
- (2) General consent (e.g. medical services standard consent forms)
- (3) Substituted consent (e.g. “yes, you can remove my son’s kidney.”)
- (4) Informed consent (*Canterbury v. Spence*, med. malpractice, supra)

¹ Kid knew with substantial certainty that the arthritic old lady would try and sit where the chair had been

² *Talmage v. Smith* (man threw a stick at trespassers, but it hit π in the eye instead, whom Δ claims he did not see).





Some people could raise both consent and insanity defenses.

b. Consent: Implied License³

Hudson v. Craft (Plaintiff brings claim against defendant promoters of the illegal boxing match he voluntarily entered and was injured in. The other boxer is entitled to consent defense, the promoter of the unlicensed fight is not.)⁴

(1) Athletic injuries: no recovery for injuries sustained in the course of the game, but yes recovery when the blows are reckless or deliberately illegal.

c. Consent to Illegal Acts

Minority view (*Hart v. Geysel*): No recovery when all parties are in violation of a criminal statute.⁵

3. **Defenses to Battery: Insanity**

McGuire v. Almy (An insane person is capable of an intentional act, so she is held liable at the same level as a sane person for harm resulting from that act.)⁶

4. **Defenses to Battery: Self-Defense and Defense of Others**

Courvoisier v. Raymond (Colo. 1896) (The court reversed the decision based on erroneous instructions given to the jury at trial that eliminated the conduct of those who started the fracas from their consideration).⁷

a. Can be used as a defense when innocent bystanders harmed⁸

b. Can be used in defense of third-parties⁹

c. Must be proportional force¹⁰

5. **Defenses to Battery: Necessity**

³ A time for latin: *violenti non fit injura*: the volunteer suffers no wrong.

⁴ A statutory negligence argument arises here because the laws were designed to protect this class of people (boxers).

⁵ The minority view knows latin too: *ex turpi causa non oritur action*: no action shall arise out of an improper or immoral cause.

⁶ Consider how satisfactory this result is to a corrective justice vs. an economic incentive view of tort law.

⁷ An action was brought against the appellant who, in the course of defending himself from assailants trying to break into his jewelry store at night, shot plaintiff Raymond, a police officer approaching him at night. Plaintiff argued that he was discharging his duties as a duly authorized officer and the defendant, knowing he was an officer, recklessly fired the shot in question. Defendant claims that plaintiff was approaching him in a threatening way and the circumstances were such to cause a reasonable man to believe that his life was in danger so it was necessary to shoot in self-defense.

⁸ *Morris v. Platt*, 32 Conn. 75 (1864) (The accidental harming of an innocent bystander by force reasonably intended in self-defense to repel an attack by a third party is not actionable).

⁹ Restatement: Defense of third parties – under the same conditions and by the same means as those under and by which he is privileged to defend himself, he is privileged to defend a third party if he correctly and reasonably believes that the third party is entitled to use force in self-defense and that his intervention is necessary.

¹⁰ Cite spring gun cases, perhaps.



C. Trespass to Land

1. **No Damage is Required, Unauthorized Entry on Land is Enough**¹¹

Dougherty v. Stepp, (N.C. 1835) ('every unauthorized, and therefore unlawful entry... is a trespass' for which 'the law infers some damage' depending on the degree.)

a. An unfounded claim of right does not make a willful entry innocent.

b. Quarum Clausum Fregit¹²

2. **Use of Deadly Force in Protection of Property**

a. Posner: We Must Create Incentives to Protect Tulips and Peacocks.

Bird v. Holbrook (England 1825)¹³ (Don't be malicious. Don't go overboard. Be a reasonable person.) Posner thinks this case solves the problem of how to properly accommodate parties who are both protecting legitimate economic interests and need to co-exist with an "ingenious accommodation": the need to give notice. It rocked my world.

b. Use Reasonable Force: *Katko v. Briney* (Iowa 1971)

But not force that would take human life or inflict great bodily injury, reasonable force generally means proportionate.¹⁴

3. **Defense of Privilege**

a. Privilege of Necessity¹⁵

*Ploof v. Putnam*¹⁶ (Vt. 1908) The court upheld the principle that necessity under some circumstances will justify entries upon land and interferences with personal property that would otherwise have been trespasses. This case restricts people's exclusive private property right. It was wrong for the defendant to protect his own property (though he was not obligated to actively help and could have fortified his property beforehand).

¹¹ Damage is a requirement in battery, but not in trespass.

¹² "Why does the defendant enter the plaintiff's property?"

¹³ The defendant set up a wire/spring gun system to protect his property (and tulips) from thieves at night and the plaintiff was shot and injured while trespassing in the garden to catch his peacock in the afternoon. The court noted that setting the guns without giving notice was an 'inhuman act' and the fact that they were set for the express purpose of doing injury was even worse. A statute had recently been enacted by parliament expressly prohibiting the use of spring guns in that way, except when set at night to protect your house.

¹⁴ Defendant had set up a shotgun booby trap which permanently crippled a burglar.

¹⁵ A complete privilege.

¹⁶ Plaintiff moored boat on private dock of Δ in time of storm, Δ's servant unmoored it, and chaos ensued.



- b. “General Average Contribution”
In times of emergency all are treated as joint owners of all the property in question.¹⁷
- c. Conditional (Incomplete) Privilege *Vincent v. Lake Erie*¹⁸ (Minn. 1910)
You can do it to protect your property, but if you cause damage to other property, you will have to compensate for it. This gives the proper incentives for people to protect and save the most valuable property.
- d. The privilege exists only so long as the necessity does.
- e. Public Necessity¹⁹
Destroy houses to save houses.

4. Miscellaneous

- a. Any intrusion above or below the property is a trespass²⁰
- b. Airplane overflights, violating air traffic rules treated as trespass²¹
- c. Exception: Intangible Trespass
An aggrieved party should be able to prove physical damage caused by the intangible intrusion.

D. Emotional Torts

1. Assault

Intending to cause offensive harm or imminent apprehension of that harm.

- a. Mere words do not amount to an assault
(But “mere words” plus circumstances might)²²

¹⁷ *Mouse's Case* (1609) (throwing stuff overboard).

¹⁸ The defendant's vessel was moored to the plaintiff's dock during an especially severe storm, resulting in the ship being saved but the dock sustaining damage from the waves continually throwing it into the dock. Plaintiff's experts testified that there would have been a better way to protect both the ship and the dock, but the court ruled that all that was necessary was that ordinary prudence and care be exercised in the emergency, not the highest human intelligence. A dissenting judge raised the notion that perhaps the dock owners should have borne the risk entailed in having the ship at the dock because of the nature of their contractual relation.

¹⁹ It is 'well settled' that the privilege is absolute¹⁹ in the cases of potential public calamity for the private property of an individual to be taken and used or destroyed.

²⁰ *Smith v. Smith*, (Mass. 1872) such as the eaves of a barn overhanging the plaintiff's land.

²¹ *Neiswonger v. Goodyear Tire* (N.D.OH 1929)

²² *Brower v. Ackerly* (words plus creepy stalking behavior still did not quite qualify)



- b. The threat must be immediate – imminent apprehension
- c. Qualify Your Threats and You Should Be OK
“If the judges weren’t in town, I would kick your ass back to Camelot!” (*Tuberville v. Savage* 1669)

2. **Offensive Battery**²³

Alcorn v. Mitchell (1872) (Spitting in somebody’s face is an offensive battery)

- a. Requires malice
As opposed to ordinary battery which just requires intent (so, friendly spitting is OK)

3. **False Imprisonment**

- a. Four Walls Not Required (But Some Restraint on your Movement Is)
Coblyn v. Kennedy’s, Inc. (Mass. 1971) (old frail man detained at department store under suspicion of shop-lifting).

- b. Defense
Reasonable grounds for restraint (by a reasonable method for reasonable amount of time)

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

- a. Precursor of Modern IIED (*Wilkinson v. Downton*, [1897])
(Be careful with your practical jokes).
- b. A Parasitic Tort
- c. Conduct should generally be “Outrageous” and “Extreme”²⁴
The “eggshell skull” rule may not apply here and there is a question as to whether subjective knowledge/experience should make a difference.

III. NEGLIGENCE²⁵

A. Duty/Breach: How Do We Establish Little-“n”-negligence?



Roberts v. Ring

1. **“Reasonable Person” Test of Negligence**

- a. Kids will be Kids; Adults should know Better (*Roberts v. Ring*)
(Minn. 1919)²⁶

... is an emotional tort – what if there were an actual battery but no real physical damage/harm?

²⁴ Something so outside the realms of common decency that it would make somebody stand up and shout: “OUTRAGEOUS.”

²⁵ Welcome to the “Sea of Negligence”



The minor was held to a subjective standard in assessing his contributory negligence (that of an ordinary boy of his age and maturity) while the man was held to the objective standard of an “ordinary prudent normal man.”

b. Beginners and Experts

Using a lower standard would encourage people to undertake new activities, but at the expense of people they hurt (rather than the public at large)



Daniels v. Evans

c. Children Engaged in Adult Activities

Daniels v. Evans (N.H. 1966)²⁷ (Minor riding a motorcycle is held to a higher standard. If you can't ride with the big boys, don't saddle up. Or as Spiderman learned: with great power comes great responsibility).

d. Other Adult and Child Activities

1. Seventeen-year old skier held to youth standard (no license required).²⁸
2. 12 yr old held to adult standard in operating boat (no license either).²⁹
3. 15 year old operating motorcycle held to adult standard.³⁰
4. 13 year old held to adult standard in operating tractor.³¹
5. 17 year old **not** held to adult standard in using dangerous firearms because deer hunting was not exclusively an adult activity.³²



Breunig v. American Family Insurance Co.

e. The “God is My Copilot” Driving Defense

Breunig v. American Family Insurance Co. (Wis. 1970) (Sudden mental incapacity while driving can be equivalent to certain sudden physical incapacities (heart attack, seizure, etc.), but the jury could have considered whether she had foresight of these types of conditions. A sleeping driver should be held negligent because they would be aware of their drowsy condition in time to take reasonable care).

²⁶ Kid playing in street got hit by car driven by old blind man

²⁷ 19 year old killed when his motorcycle collided with defendant's car, the court ruled that though the boy was technically a minor, his contributory negligence should be assessed based on the standard of care which the reasonable and prudent adult would use, since he was undertaking an adult activity

²⁸ *Goss v. Allen*, 360 A.2d 388 (N.J. 1976).

²⁹ *Dellvo v. Pearson*, 107 N.W.2d 859 (Minn. 1961).

³⁰ *Harrelson v. Whitehead*, 365 S.W.2d 868 (Ark. 1963).

³¹ *Jackson v. McCuiston*, 448 S.W.2d 33 (Ark. 1969).

³² *Purtle v. Shelton*, 474 S.W.2d 123 (Ark. 1971) (In dissent: “A bullet fired from the gun by a minor is just as deadly as a bullet fired by an adult.”).



- f. Policy basis for holding the permanently insane liable for their torts
- 1) Where two innocent must suffer a loss, it should be borne by the one who caused it
 - 2) To induce those interested in the estate of the insane person to restrain and control him
 - 3) The fear an insanity defense would lead to false claims of insanity to avoid liability

g. The Reasonably Insane Person

Gould v. American Family Mutual Insurance (Wis. 1996) (A caretaker of the mentally impaired Alzheimer's patient can reasonably foresee danger involved and is aware of the risk. An institutionalized person unable to control themselves can't be liable for injuries caused to caretakers employed for financial compensation).

Jankee v. Clark County (No liability to institution for unrestrained mental patient injuring himself in escape attempt, insane person held to objective standard, because it would otherwise put perverse incentive on institution to overdo security).

h. Reasonable Blind Person

Fletcher v. City of Aberdeen (Wash. 1959)³³ (City should maintain streets knowing that the physically disabled will be using them). Those with physical disabilities are obliged to use the care which a reasonable person under similar disabilities would exercise.



Be Reasonable, Squirrel!
Drink Responsibly.

i. Reasonable Drunk?

No contributory negligence: "a drunken man is as much entitled to a safe street as a sober one, and much more in need of it."³⁴

j. Wealth is Irrelevant

The level of care required by a defendant is constant, regardless of wealth.

(1) But should it be?

Irrelevant to compensation and corrective justice aims, but could be relevant to economic/deterrence goals.

k. Reasonable Woman Standard

The Old:

³³ City was found negligent because a safety barricade in front of a ditch was out of place, causing harm to a blind piano tuner. Those with physical disabilities are obliged to use the care which a reasonable person under similar disabilities would exercise.

³⁴ Defendants are at fault in leaving hole in sidewalk uncovered, and drunkenness of plaintiff cannot excuse gross negligence. (*Robinson v. Pioche* 1855)



Daniels v. Clegg (Court adopts a “Reasonable Woman” standard, assuming they are less competent to drive, and we don’t want to deter women from driving. But deterring them could motivate men knowing the roads would be safer).

The New:

Ocbeltree v Scollon Productions (Court adopts “Reasonable Woman” standard in evaluating sexual harassment in the workplace; against a dissent that it is paternalistic and defeats the whole purpose of equality).

2. The Hand Formula³⁵

- a. *US v. Carroll Towing Co.* (2d Cir. 1947)³⁶

Liability comes when: $B < PL$.³⁷ But an easier way to say it might be: $Cost < Benefit$.



Be Careful! Account for
foreseeable risks!

- b. The Foreseeable Unreasonable Risk Approach

Stone v. Bolton (1950): Any reasonably foreseeable risk should be accounted for. “P” is irrelevant.³⁸

Bolton v. Stone (1951): The risk of damage is so extremely small, that it can be disregarded. “B” is irrelevant.

The Moral of the Story: Cricket is still boring.

- c. Hand Formula from a Moral or Corrective Justice Perspective

Well, it’s supposed to be used at the level of societal values (costs and benefits), but in practice it is easier to use individual values

- d. Special Duties May Alter Hand Formula

Like the duty of a “common carrier.”³⁹

³⁵ Law and econ folks would say this is really no different from the reasonable person test.

³⁶ Justice Hand articulates his famous formula in determining whether the bargee was contributively negligent in the incident where the towing of the barge led to an accident where it sank.

³⁷ Where P is the probability of the thing happening, L is the resulting injury/loss, and B is the burden of taking adequate precautions to prevent the injury. But Hand still insists this must be circumstance specific.

³⁸ A far hit cricket ball hits Mrs. Stone on a road outside the field; she sues the entire home team that runs the field. This court found that since this was a reasonably foreseeable risk it could have been prevented. The fact that it has happened before is enough to know that it could happen again.

³⁹ *Andrens v. United Airlines* (9th Cir. 1994) (A briefcase fell from an airplanes overhead compartment on the plaintiff, injuring her: “harried travelers try to... hand-carry more and larger items – computers, musical instruments, an occasional deceased relative.”)



3. Custom

- a. Ordinary Usage of Business: Unbending Test for Negligence (*Titus*)
Titus v. Bradford (Pa. 1890) (Plaintiff-employee dies while riding on rail cars with standard bodies being transported on narrow-gauge lines, dangerous, but as per custom)⁴⁰ (An oft attacked view)⁴¹
- b. Universal, Customary, Carelessness Does Not Excuse Negligence
Mayhew v. Sullivan Mining Co. (1884)⁴²
- c. Some Precautions So Essential that Universal Disregard is no Excuse
*The T.J. Hooper*⁴³ (2d Cir. 1932) (Custom should not necessarily be a measure for negligence – an entire industry could be lagging in the use of new, essential technologies and should never be able to set its own tests)
- d. Third Restatement View
“Compliance with custom is evidence that the actor’s conduct is not negligence, but does not preclude a finding of negligence” and vice versa
- e. Custom and Economic Incentive
Does reliance on customary rules for finding negligence create a perverse incentive for employers to not set a high standard of conduct in their internal rules? *Lucy Webb Hayes National Training School v. Perotti*, (D.C. Cir 1969) (Plaintiff allowed to introduce hospitals internal rules to establish their negligence in death of decedent mental patient. It was important that Hospital marketed themselves based on this high standard).



The T.J. Hooker

⁴⁰ The court noted that the “unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business” and the plaintiff’s evidence did not pass this test. And the decedent accepted his employment with full knowledge of its risks.

⁴¹ Attacked by Supreme Court in *Wabash Railway v. McDaniels*, 107 U.S. 454 (1883).

⁴² The plaintiff, an independent contractor, fell through a recently dug, unlighted ladder hole in a mine with no rails around it. At trial, the court refused to allow questions to the hole digger dealing with whether putting rails around such a hole was customary, and the plaintiff prevailed. In its appeal the defendant contended that such questions would have shown that they had exercised “average ordinary care.” The court denied the appeal, noting that “custom” and “average” are words with no place in the definition of what constitutes “ordinary care.” It is “no excuse for a want of ordinary care that carelessness was universal about the matter involved”

⁴³ Two tugboats, including the *Hooper*, were sued for negligence, when two barges and their cargo were lost in a storm because the tugs were not equipped with reliable radios to hear the storm warnings, unlike four other tugs that managed to make it to safety. The court affirmed the decision of the lower court, but took issue with the treatment of custom in such cases. It did not agree that the use of radios in boats had reached the level of customary. Many captains, rather than the tug owners, supplied their own personal radios. But custom should not necessarily be a measure for negligence – an entire industry could be lagging in the use of new, essential technologies and should never be able to set its own tests. Some precautions are so imperative that universal disregard cannot be an excuse.



4. Medical Malpractice (Custom-ish)

Can be an intentional or negligence based tort.

Pro	Con
We have massive underdeterrence and massive medical error, so we need the civil liability system to fix these problems (e.g. anesthesiologists)	Overdeterrence (keeping doctors from practicing in certain geographic areas or high risk specialties)
	Many injured people who are not coming forward and getting compensated
Information forcing (it forces the information out)	Information deficit (sealed settlements, doctors hiding errors)
	Why not just make it all contracts based (Epstein)
	Informed consent good, but to what extent? Patients do not have the expertise of doctors...
Other thoughts or proposals that cut both ways:	
Make it all contracts based (Epstein)	
A very low percent of plaintiffs are winning their cases	
Capping non-Economic damages (pain and suffering, etc.)	
No-fault schemes: cover more people but limit awards (also creates perverse incentive effects)	
Looking to a national standard of care could drive people in certain geographic areas, etc. out of business	

Trust Me!
I'm an expert!



- a. Typical Standard: Custom (T.J. Hooper not welcome here)
Doctor must use the degree of skill and learning typically used by good doctors in similar practice in similar communities under similar circumstances.⁴⁴
- b. “Two Schools of Thought” Doctrine: An Absolute Defense
When the prescribed treatment or procedure is agreed among experts as acceptable alternative practice. A small minority in agreement is not enough.
- c. Rejection of the Customary Standard
Helling v. Carey (Wash. 1974) (The T.J. Hooper of Medical Malpractice, adopting nearly a strict liability rule. But this case has been largely rejected).⁴⁵
- d. Locality Rule and Specialist Testimony
Debatable issues.
- e. *Lama v. Borrás* (1st Cir. 1994)
Medical negligence cases distinguished from typical negligence cases: must establish (national) standard of care via expert testimony, rather than reasonable person standard.

⁴⁴ Judges and juries would not be in any position to reasonably assess otherwise. And Doctors are not driven by the same market motives that may keep custom lagging behind (though HMOs might be).

⁴⁵ Failure to test patient for glaucoma (leading to permanent vision impairment) because national standard would not have tested for it in such cases.



(1) Expert Testimony also Necessary to Establish Causation

f. Informed Consent: *Canterbury v. Spence* (D.C. Cir. 1972)⁴⁶

Every adult has a right to decide what is to be done with his own body and physician-patient relationship may contain a heightened duty to inform (except in extreme circumstances). A “reasonableness” standard is used.⁴⁷

g. No Fault Insurance for Medical/Products Injuries

5. **Statutes and Regulations**

a. Can Provide Evidence of “Negligence Per Se”

Martin v. Herzog, (N.Y. 1920) (Plaintiff was driving his buggy without lights on, in violation of statute, and was involved in an accident with the defendant for which he was seeking recovery, with a question of his contributory negligence).⁴⁸

b. But Regulatory Compliance is Not an Absolute Defense

c. Customary (or Common Law) Exceptions

Tedla v. Ellman (N.Y. 1939) (Plaintiff and her brother were walking on the wrong side of the highway when they were struck by the defendant, brother was killed. Statute says that when walking along a highway, you should walk into the traffic. However, the custom under common law is that under certain circumstances, like when the traffic is much lighter on the other side you should walk in the direction of traffic. This statute codified the common law custom that you should walk on a highway to face oncoming traffic, but it did not codify the exception. The court implied that the legislative intent was to use the exception).



Gorris v. Scott

d. When do you know a statute has a private cause of action?

(1) Express

(2) Implied

i. Class of Persons

Who is the law designed to protect?

Simpson v. Wellington Service Corp (Mass 1969).⁴⁹

⁴⁶ No evidence of doctor negligence or causation but the Dr. did not inform patient of slight risk in operation (which materialized) because Dr. thought it was best for the patient.

⁴⁷ Which of course makes it a hard standard to uphold and may lead to “hindsight bias.” The legislature has intervened in some cases and radical contract solutions have been considered.

⁴⁸ Cardozo says that the statutory signals should be considered as negligence in itself, because “the omission of these lights was a wrong” and being unexcused made it a negligent wrong. But that doesn’t necessarily make it contributory negligence – it is still necessary to show that negligence was a cause.

⁴⁹ Defendant drove a 137-ton truck over city streets w/o necessary permits, law shown to have dual intent of protecting streets and protecting property, so recovery is ok.



ii. Class of Risks

What is the law designed to protect them from?

Gorris v. Scott (1874).⁵⁰

e. Complex Administrative Schemes (Implied rights of Action)

Uhr v. School District (N.Y. 1999)⁵¹

Court looks for private right of action based on:

- (1) ‘class of persons’ – is the plaintiff included?,
- (2) “promotion” of the legislative purpose (class of risks),
- (3) Consistency: statute regulates a complex administrative scheme, is creation of a private right of action consistent with that scheme?

Supreme Court has generally denied or severely limited such rights under Federal statutes.⁵²

f. Can also provide evidence of a suggested standard of care

- (1) Defective statutes⁵³
- (2) Subsequently enacted statutes⁵⁴

g. Proximate Cause (Third Party Intervention) May Not Save You

Ross v. Hartman (Thief steals car and hits somebody, Δ still liable because he left his car unlocked contrary to statute). *Vesely v. Sager* (Dram shop statutes – selling booze to somebody who causes injury).

h. Safe harbors for Statutory Violations

Necessity and Emergency

Incapacity, Infancy

Other Defenses for Common-Law Negligence

⁵⁰ (Defendant did not have sheep properly penned on boat, in violation of Contagious Diseases Act, consequently they were washed overboard. Plaintiff was denied recovery under the statute because the purpose of the statute was to keep animals from exposure to disease during transport, not from being washed overboard). Also *Mutual Insurance Co. v. Matlock* (Cal. Ct. App. 1997) (Defendant sold cigarettes to minors in violation of statute could not be held liable for the fire they started because the purpose of the law had nothing to do with fire suppression). *But see Kernan v. American Dredging Co.*, 355 U.S. 426 (1958) (Though a Coast Guard regulation regarding placement of lamps seemed aimed at preventing collisions, not fires, the Court permitted recovery for a fire on the grounds that the statutory purpose limitation in tort doctrine did not apply in the special context of Federal Employers’ Liability Act and the Jones Act).

⁵¹ Statutory duty imposed on school district to check students for scoliosis. No express private right of action. Plaintiff brings suit saying school breached its duty to test this girl for scoliosis and now since she was not tested in a timely manner, extreme damage was caused. The court concluded that a private right would not be consistent with point 3 – the administrative scheme and that the statutory language implicitly denies this right. Also, the school has created the scheme as a benefit, and you want to incentivize that.

⁵² See *Cort v. Ash*, 422 U.S. 66 (1975); et. al (Asking (1) Does the statute create a federal right? (2) Is there leg. intent to create or deny a remedy? (3) Is it consistent with the purposes to imply such a remedy? and (4) Is it an area meant for state law?).

⁵³ *Clinkscates v. Carver*, 136 P.2d 777 (Cal. 1943) (held that while state could not criminally enforce a stop sign law because of a defective statute, disregarding such a stop sign would still be “negligence as a matter of law.”

⁵⁴ *Hammond v. International Harvester Co.*, 691 F.2d 646 (3d Cir. 1982) (Where OSHA standards, effective after the manufacture of a tractor were used to provide strong evidence of negligence, especially when defendant had knowledge of pending regs).



6. Affirmative Duties

a. Defining Duties

- 1) What is the source of the duty?
- 2) What is the content of that duty?

b. Generally No Duty to Rescue

Buch v. Amory Manufacturing Co. (N.H. 1897) (“There is a wide difference – a broad gulf – both in reason and in law, between causing and preventing an injury.”)⁵⁵

c. Gratuitous Promises

(1) New York Rule

Moch Co. v. Rensselaer Water Co. (N.Y. 1928) (The denial of a (contractual) benefit is not the commission of a wrong)⁵⁶

(2) Elsewhere (generally)

If its foreseeable that a breach of your contractual duties will cause injuries, you owe a duty

d. Owners and Occupiers of Land

Robert Addie v. Dumbreck, (1929)

Sets up historical categories of people visiting premises:

- 1) Invitee (joint benefit): take reasonable care that premises are safe.
- 2) Licensee (social guest): ensure there’s no trap or concealed danger.
- 3) Trespassers. No duty, with two exceptions:
 - a) Willful and wanton acts (e.g. *Gould v. DeBeve*⁵⁷; spring gun)
 - b) Attractive Nuisance Doctrine (especially infants)

Rowland v. Christian, (Cal. 1968)

Abandons those distinctions in favor of balancing a number of considerations on a case by case basis (foreseeability, connection between injury and defendant’s conduct, moral blame, policy of preventing future harm, cost-benefit stuff, insurance for the risk involved).

e. Other Special Relationships

Tarasoff v. Regents of University of California (Cal. 1976) (Protective doctor-patient privilege ends where public peril begins. Uses balancing test of *Rowland*.)⁵⁸

⁵⁵ Only 3 of 50 states have statutory duties to rescue and research suggests these don’t make a difference anyway (Non-risky, non-rescues are pretty rare). And we may not want people incompetently trying to rescue people and just getting themselves hurt. Some other states have Good Samaritan laws designed to provide immunities for those who try to rescue (some protect only licensed health professionals). Epstein asks where we would draw the line? What about starving kids in Africa?

⁵⁶ Waterworks company not providing enough water to save π building from fire.

⁵⁷ Two year old staying at apartment w/o landlords knowledge knocks out a loose screen and falls to the ground.



B. Causation

1. Cause in Fact

“But for” the negligent act, the harm would not have occurred. Was the negligent act or omission a necessary link in causing the damage. Was it a substantial factor?

a. The Harm May Have Occurred Anyway (*Grimstad*)

New York Central R.R. v. Grimstad (2d Cir. 1920) (Plaintiff suit alleged failure to equip R.R.’s barge with proper life-preservers and other necessary equipment caused the drowning death of her husband when he fell into the water. Defendant was found negligent in not properly equipping the boat but there was nothing to prove beyond pure conjecture that such equipment would have saved the decedent from drowning).

b. Burden Shifting and “but for” Causation (*Haft v. Lone Palm Hotel*)

The Δ ’s negligent act in not having a lifeguard on duty created the lack of evidence on “but for” causation in the pool drowning deaths, so it was their burden to show that their negligence was not the cause.⁵⁹

c. Burden Shift, “but for” causation, and Med. Malpractice (*Zuchowicz*)

Zuchowicz v. U.S. (Martin v. Herzog type rationale in prescribing overdose of Danocrine – burden is on defendant to show that negligence was not the cause of the harm).

d. Expert Testimony For Causation (*GE v. Joiner*)

(U.S. 1997)⁶⁰ (Court adopted the more relaxed *Daubert* (1993) standard of looking at a variety of factors and criteria including whether the results were replicable, had been published in a reputable journal, solid connection between data and opinion, etc. rather than the more stringent *Frye* test (D.C. Cir. 1923) which admitted expert testimony based on what was “generally accepted” as reliable by the scientific community. Though some states will still follow *Frye*).

2. Proximate Cause

Legal causation. Even though there is a factual cause, is the harm caused so remote that we should stop the chain of causation at some point?

⁵⁸ But does this damage the doctor-patient privilege? Problem over whether you can predict a patient will act on violent urges. Imposition of duty may lead to greater violence because patients might not seek treatment. And is imposing a duty to act here consistent with not imposing a duty to rescue?

⁵⁹ Court ruled for plaintiffs, despite no evidence on causation, in drowning death of father and son in a pool that had neither a lifeguard nor a sign indicating there was no lifeguard (in violation of statute).

⁶⁰ In the case, the expert testimony in controversy would have suggested that Joiner’s exposure to PCBs while working for defendant GE “promoted” his cancer. The Court held that the trial court did not abuse its discretion in excluding the evidence since there was too great of an analytical gap between the data and the opinion proffered.



- a. Remotely Caused Damages Non-Recoverable (*Ryan v. R.R.* (1866))
(Defendants woodshed caught fire through their negligence and the flames spread to several houses, including the plaintiff's, 130 feet away, which was destroyed. The damages were seen as remote because the result could not have been anticipated the moment the woodshed caught fire but was dependant on a variety of other factors.)⁶¹
- (1) Is the harm the "ordinary and natural result of Δ 's negligence"
- b. Plaintiff's Response to Emergencies (*Tuttle v. Atlantic R.R.*)
The plaintiff who injures himself while responding to harm created by Δ 's negligence, can recover for such an injury even if by doing nothing he would not have actually suffered any harm (*Tuttle v. Atlantic City R.R.*)
- c. Directness Test: *In re Polemis*⁶²
Was the harm the direct result of the defendant's negligence (whether or not it was foreseeable)?⁶³
- d. Foresight Test: *Wagon Mound*
Rejects the *Polemis* directness test to ask: was the harm caused a reasonably foreseeable result of the defendant's negligence?⁶⁴
Applying such a test in *Wagon Mounds 1 & 2* allowed recovery for the destroyed ship, but not for the dock.
- e. *Palsgraf*: Foresight plus Duty
Unforeseeable plaintiff's can be dropped at the duty stage of analysis.
- (1) *Palsgraf* Dissent: Substantial Factor Test
This is a case about causation. Acting in the world, we all have a duty not to cause negligent harm to anyone else.
- f. Restatement: Harm Within the Risk (Cardozo's View)
Liability only for harm caused to the recognizable class of people at risk of harm.
- g. Statutory Duty can help define the "Harm within the Risk"
As in *Gorris v. Scott*, which denied recovery.

⁶¹ The Court noted that this is part of the hazard of living in society, each man runs the hazard of his neighbor's conduct, and can buy insurance to obtain reasonable security against such hazards.

⁶² (K.B. 1921)(A heavy plank fell into the hold where the fuel was stowed, causing a spark which triggered an explosion, which set fire to the vessel and destroyed her. The court held that once it is determined there is evidence of negligence, the negligent party is equally liable for damages whether he could have foreseen the consequences or not).

⁶³ **Foreseeability comes in to determine the breach of the duty of care, but not in the causation of damages.**

⁶⁴ Perhaps a preferable test because it allows the courts to do away with the technical, insolvable conundrums of causation.



3. Causation and NIED

a. Old Standard: Physical Impact

There is no action for emotional distress unless it arises out of some sort of physical impact from the negligence. This standard is not really used anymore.

b. Zone of Danger⁶⁵

Was plaintiff close enough to the event that they could actually have been in physical danger?

c. Dillon Rule⁶⁶

Three part test:

- (1) Location near the scene of the accident
- (2) Did the shock result from a direct emotional impact from the sensory and contemporaneous observance of the accident?
- (3) Close relationship with the victim.

C. Plaintiff's Conduct and Defenses

1. Contributory Negligence

a. Basic Doctrine (*Butterfield v. Forester*)

(K.B. 1809) (Plaintiff can't recover from being thrown off his horse after running into a negligently placed obstruction in the road because it could have been avoided if the plaintiff had used ordinary care and not been riding so fast. The accident could have been avoided regardless of the defendant's fault)

b. A protection to corporations and industry?

Schwartz argues that doctrine of contributory negligence was used to protect industries from liability – “the rule of railroad and industrial immunity.”⁶⁷

c. Contributory Negligence and Hand Formula

We live in an uncertain, risk filled world, a defendant can't be ready for every little stupid thing that a person might do.

d. Plaintiff's (n)egligence Must Also Be a Cause

Geyerman v. United States Lines Co. (Cal. 1972)⁶⁸ (Plaintiff was negligent but the defendant could not show that plaintiff's negligence was a substantial factor in causing the plaintiff's harm).

⁶⁵ Jurisdictions are divided between Dillon Rule and Zone of Danger tests.

⁶⁶ Mother and sister witness girl being struck by a car and killed, mother denied recovery by trial court using “zone of danger test” but allowed her action by the Cal. SC.

⁶⁷ E.g. *Beems v. Chicago R.R.* (“you shouldn't have gotten your foot stuck in the tracks, it's not our fault the train ran you down”).



2. Exceptions to Contributory Negligence

- a. Property Rights and Contributory Negligence (*LeRoy Fibre*)
(U.S. 1914)⁶⁹ (Plaintiff should not be limited in how he uses his own property by the defendant's negligence, of course if the defendant was not negligent, then the plaintiff assumed the risk).
- b. The Seatbelt Defense (*Derheim v. N. Fiorito Co.*)
(Wash. 1972) (Unfair to apply contributory negligence in seatbelt cases when that conduct cannot be causally linked to causing the accident).
 - (1) Most states restrict/prohibit seatbelt or helmet defenses
 - (2) Though some may allow it to mitigate damages (*Spier v. Barker*).⁷⁰
- c. Last Clear Chance (*Fuller v. Illinois R.R.*)
Softens the doctrine of contributory negligence by setting up negligence in a sequential fashion. *Fuller v. Illinois Central R.R.* (Miss. 1911)⁷¹ (If defendant could have avoided the consequence of the plaintiff's negligence, plaintiff may still recover).
 - (1) This may excuse the helpless plaintiff or the inattentive plaintiff.⁷²
- d. Willful, Wanton, or Reckless Conduct of Defendant
May excuse contributory negligence.

3. Assumption of Risk

- a. Early Doctrine: Industrial Accidents and Fellow Servants
- b. Birth of the Doctrine: *Lamson v. American Axe Co.* (Mass. 1900)
The plaintiff-axe-painter knew that the axes were hung in a way that they could fall on him, he told his boss, and assumed the risk of continuing to work there anyway.
 - (1) The Fellow Servant Rule
A stranger could hold the R.R. liable for the employee's negligence but not a fellow worker, who assumed the risk of working there.

Aren't you just asking society to subsidize people that are socially incompetent?
- A wise law student

⁶⁸ (A longshoreman, whose job was unloading fishmeal sacks, noted that the sacks he had been assigned to break down were not arranged in a safe manner. And while he complained, he was told nothing could be done about it. Then he got hurt)

⁶⁹ The railroad shooting sparks and setting the flax on fire.

⁷⁰ *Spier v. Barker* (NY 1974).

⁷¹ Old man with his horse-cart on the railroad tracks. He doesn't stop, look, and listen; but the RR could have stopped.

⁷² RST §479 and §480, respectively.



(2) A Wage Premium was Given For Risky Jobs

Ex-ante Compensation for their harm, since they could not recover from work injuries ex-post.

(3) Worker's comp largely eliminates these early manifestations of the doctrine

c. The "Flopper": *Murphy v. Steeplechase* (N.Y. 1929)

"The plaintiff was not seeking a retreat for meditation."⁷³

d. Secondary Assumption of Risk: *Meistrich v. Casino Arena* (N.J. 1959)

Defendant negligently maintained the ice, but the plaintiff knowingly encountered that risk. An aspect of contributory negligence.

e. Assumption of Risk and Contract (*Ob.-Gyn. v. Pepper*)

(Nev. 1985) (People can give up rights and assume risk by contracts if they want, but this one was probably not freely entered into by plaintiff – an adhesion contract and no informed consent).

4. Comparative Negligence

a. *Li v. Yellow Cab* (Ca. 1975)

California adopts the doctrine in its "pure form"⁷⁴ for among the following reasons:

(1) Where liability is based on fault, the extent of fault should govern the extent of liability.

(2) Juries are allowing recovery in cont. negl. cases on their own anyway

(3) It'll be tough to calculate, but fairness demands it.

(4) Defendant's will take greater care.

b. Mostly eliminates last clear chance doctrine

c. Primary Assumption of risk still a complete defense (*Knight v. Jewett*)

(Cal. 1992) Girl gets hurt playing football after telling them not to play so rough, but continuing to play anyway.

d. Secondary Assumption of Risk Folded into Comparative Negligence

⁷³ Though some risks may be considered even too unreasonable even with assumption...

⁷⁴ As opposed to the "50% threshold" or "up to the point" type systems.



D. Multiple Defendants

1. Joint Tortfeasors

a. Joint Liability

Each of several respondents is responsible for the entire loss that they all caused in part, where there is a “concert of action” or indivisible harm.

b. Joint Liability and Burden Shifting: *Kingston v. R.R.* (Wis. 1927)⁷⁵

Multiple wrongdoers/tortfeasors are each individually responsible for the entire damage caused by their joint or concurring acts of negligence. The burden is on the defendant to show that because his fire united with another fire, his fire was not the proximate cause of the damage.

c. Traditional Rule: No Contribution/Indemnity with Joint Tortfeasors

Union Stock Yards of Omaha v. R.R. (U.S. 1905)⁷⁶

General principle that one of several wrongdoers cannot recover from another wrongdoer even if he had to pay for all the damages of the wrong done.

Exception: Where the act of the first wrongdoer was the principle cause and exposed the second wrongdoer to liability

No Exception: Where the negligence of the parties is of the same character, as in this case, recovery of indemnity or contribution is not possible.

d. Several Liability

Each defendant is responsible only for his proportionate share of the loss. A defendant can still be held liable for the entirety of the loss but he can then recover from another defendant.

e. Joint and Severally Liable

We could divide the harm and proportion the losses, but the plaintiff can go after just one defendant for the entirety of the loss (then that defendant can then go after other defendants for contribution)

f. Partial Indemnity on a Comparative Fault Basis (*AMA v. Sup. Ct.*) (Cal. 1978)⁷⁷ Rationale:

⁷⁵ A fire from the northeast, originated by sparks from the defendant’s locomotive merged with a fire from the northwest of unknown origin, 940 feet north of the plaintiff’s property and the united fire came and destroyed the property. Both fires were found to be proximate causes.

⁷⁶ Both the plaintiff and defendant were negligent in failing to inspect the defective nut on the railroad car that led to the employees injury, so after paying damages to the employee the plaintiff terminal company sought to recover from the defendant railroad.



- (1) the *Li* decision establishing comparative negligence did not abolish the doctrine of joint and several liability against multiple defendants – negligence by a plaintiff is of a different nature than a defendant's negligence,
- (2) a new doctrine allowing partial equitable indemnity for codefendants to apportion their losses should be established,
- (3) the California statute does not preclude a common law doctrine of comparative indemnity, and
- (4) under this new system any defendant may maintain an action against any party, joined or not, to recover an equitable contribution.

g. Settling with Defendants

McDermott. v. AmClyde & River Don Castings, Inc. (p. 368) (U.S. 1994)⁷⁸

1. Pro-Tanto (or "Setoff") Rule⁷⁹
Settlement amount is "set-off" from the total damages.
 - a) With contribution
Non-settling defendants can go back after settling defendants to contribute their portion of liability
 - b) W/o contribution (or 'contrib. w/ settlement bar')⁸⁰
2. Proportionate Share (or "Carve-Out") Rule
Each Δ will only pay his portion of the fault.

2. Vicarious Liability

a. Vicarious Liability

Liability of one person (such as an employer) who bears responsibility solely for what another party (e.g. employee) has done, because of his relationship to that party.

i. Respondeat Superior. "Let the superior answer"

ii. Criticism

This doctrine faces a lot of criticism; Holmes criticized it on the belief that one man should not be held responsible for another man's harms.

⁷⁷ The plaintiff was injured in a motorcycle race negligently organized by the two defendants, one of whom (AMA) filed a cross complaint against the plaintiff's parents alleging their negligence and improper supervision of their minor son.

⁷⁸ An admiralty case brought against multiple defendants where three parties settled and two parties were found liable by a jury for a certain proportion of the responsibility, and court had to figure out how to apportion liability.

⁷⁹ Plaintiff always gets full amount, but could screw Δs who don't settle.

⁸⁰ This approach could also entail "good faith" settlement hearings to ensure that the settling party is paying what is a fair forecast of its equitable share of the judgment.



- b. Rationale
 - i. Economic Incentive/Deterrence Rationale: Risk Prevention
 - ii. Cheapest cost avoider rationale
 - iii. “Deep-Pockets”/Loss-Spreading (Risk-Distribution)
 - iv. Employer is the *Superior Risk Bearer* (greater access to insurance markets)

- c. Tests

Does the liability arise from under the scope of employment?

- d. Motive Test: The Nelson Rule⁸¹

Were the actions conceivably being done for the benefit of the employer?

- e. Foresight Test: *Ira S. Bushey v. United States* (2nd Cir. 1968)⁸²

The U.S. should be held liable because it was foreseeable that crew members crossing the drydock could do damage negligently or intentionally.

- f. “Location of the Wrong” Test

- g. Vicarious Liability for Indep. Contractors (*Petrovich v. Health Plan*)⁸³

A principal will be bound by

 - 1) the *apparent authority* it appears to give to another which can be established by showing a “holding out” by the hospital and a “justifiable reliance” by the plaintiff or
 - 2) *Implied authority* (whether the alleged agent retains the right to control the manner of doing the work).

E. Tort Law Under Uncertainty

1. **Res Ipsa Loquitur (RIL)**

Another test to establish an inference of negligence or causation.

- a. The Occurrence of the Event Itself is Evidence of Negligence (*Byrne*)

Byrne v. Boadle (1863) (Barrel of flour falls from Δ 's premises, presumption is that the Δ 's negligence caused it to fall unless they establish otherwise).

⁸¹ According to *Bushey*, Comes in part from “Restatement of Agency 2d” and *Nelson v. American-West Airlines* (where the drunken sailor punched the plaintiff to get him out of bed for work and then continued to fight with him, he was conceivably acting in the interest of the ship).

⁸² Coast Guard boat being overhauled, when a drunken sailor returning late at night turned some wheels on the drydock wall – opening valves and partially sinking both the dock and the ship.

⁸³ Medical malpractice action against her doctor and health plan for their failure to diagnose her oral cancer in a timely manner. Considered whether an HMO can be held vicariously liable for the negligence of its independent-contractor physicians.



b. Elements

- (1) Event is a kind that *ordinarily does not occur without negligence*.
- (2) The event was caused by something (within the *exclusive control*)⁸⁴ of the defendant.
- (3) *Other responsible causes are sufficiently eliminated* (and not due to any voluntary action or contribution of the plaintiff)
- (4) Negligence is *within the scope of defendant's duty* to plaintiff

c. A Permissive Inference (*Morejon v. Rais Construction*)

The doctrine gets the case to the jury, allowing it to consider circumstantial evidence, but it is not a presumption that would necessarily allow for summary judgment or a directed verdict.

d. Control Need Not Literally Be "Exclusive" (*Colmenares*)

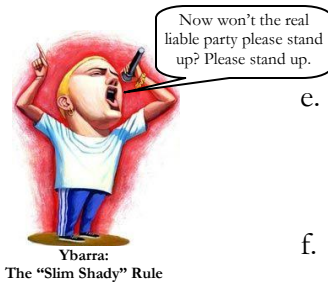
Colmenares (1st Cir. 1986) (Those charged with a nondelegable duty of care to maintain an escalator safely have exclusive control over that item, and it cannot be delegated away even if responsibility is shared).

e. Exclusive Control Not Needed: Third Parties and Chains of Custody

Benedict v. Eppley Hotel (Neb. 1954)⁸⁵ (Suggests RILs beginning expansion into area of strict products liability⁸⁶)

f. RIL as an Information Forcing Rule: Medical Malpractice (*Ybarra*)

Something happens to the plaintiff while unconscious during surgery. Liability fixed en masse on all those who handled plaintiff, and burden is on them to exculpate themselves



2. Collective Liability

a. Concert of Action (*Kingston*)

A and B are liable.

b. Alternative Liability (*Summers v. Tice* (Cal. 1948))⁸⁷

Burden of proof on causation shifts to the individual defendants to show that their wrong did not cause the damages. All possible wrongdoers must be before the court.

⁸⁴ Eliminated from Third Restatement version.

⁸⁵ Guest at a hotel sits in a chair where the bolts and screws on one side were completely missing.

⁸⁶ Like a car whose brakes fail after the initial purchase, though the car is in the plaintiff's exclusive control, there is good reason to fix blame on the manufacturer

⁸⁷ Plaintiff brought an action against his two hunting buddies when he was hit with bird shot in the lip and eye when both defendants *simultaneously* and negligently fired their shotguns at a quail in the plaintiff's direction. While the defendant argued that they could not be held jointly liable because there was not enough evidence to show whose negligence caused the injuries, the court held that both were liable since they were acting in concert and the



c. Market Share Liability (*Sindell v. Abbott Labs.*)⁸⁸

Plaintiff can hold the manufacturer of a drug based on an identical formula proportionally liable for its share of the drug market upon a showing that the manufacturers brought before the court produced a substantial percentage of the market.⁸⁹ The liability was limited to being several only in *Brown v. Superior Ct.*⁹⁰

Preconditions for Adopting Market Share Liability

- a. All defendants are tortfeasors.
- b. Fungibility.
- c. Plaintiff cannot identify who caused their injury, through no fault of their own.
- d. Substantial percentage of manufacturers before the court.

d. Variations on Market Share Liability

Hymowitz v. Eli Lilly & Co. (NY 1989)⁹¹

- 1) No exculpation.⁹²
- 2) Liability will be several only.

Justice Mollen's Dissent

A Δ should be allowed to exculpate himself and the liability of those not exculpated should be joint and several to allow for full recovery.⁹³

e. "Risk Contribution Theory" (*Collins v. Lilly - Wis.*)⁹⁴

Each defendant is liable in proportion to the amount of risk it created that the plaintiff would be injured by DES, a question of fact in each case, determined in part by market share. Rationale:

1. Each Δ contributed to a risk to the public, and thus to the individual plaintiff.
2. The Δ s are in a better position to absorb the cost of injury.

⁸⁸ (Plaintiffs brought class action suits against manufacturers of DES, a drug once prescribed at pregnancy to prevent miscarriage which was later found to cause cancer to many children exposed to the drug. The plaintiffs could not identify the specific DES manufacturer that produced the drug which caused their injuries.

⁸⁹ Based on belief that limiting liability to their market share would overtime limit their overall liability to the amount of injuries the defendant actually caused.

⁹⁰ Meaning that a plaintiff still may not recover 100%, based on the number of defendants he brought before the court.

⁹¹ More DES actions brought before courts in New York, after considering variations to the *Sindell* approach, the court ultimately held that a market share theory based on a national market for determining liability was the appropriate approach.

⁹² for a defendant who manufactured and marketed DES for pregnancy use even if he proves that he could not have possibly caused plaintiff's injuries (because liability is based on the overall risk, not causation in a single case

⁹³ No exculpation violates fundamental tort principle that a plaintiff cannot recover for injuries from a defendant who could not have caused those injuries (especially from corrective justice perspective, deterrence perspective may embrace it more). The majority really just adopted a modified concerted action approach and the dissent went on to advocate what "would not be too dissimilar from... *res ipsa loquitur*."

⁹⁴ Closest to pure economic deterrence, except for the fact that it allows exculpatory evidence.



3. The cost of damage awards would serve as an incentive for drug companies to adequately test their drugs before putting them out.

f. “Market Share Alternative Liability” (*Martin v. Abbot Labs* – Wash.)
Exculpation allowed and the liabilities of the remaining defendants who could not prove their actual market share are inflated so the plaintiff can still recover 100%.

g. Market Share Liability Rejected (*Skipworth v. Lead Industries*) (Pa. 1997)
Attempt to use market share liability on lead paint cases, held to be too dissimilar to DES cases because:

1) Time period far more extensive. Entities that could not have produced the paint would be held liable.

2) Lead paint not a fungible product – lead pigments differ in their chemical formulations and potential toxicity (bioavailability of the lead).

h. Risk Contribution Theory Returns (*Gramling v. Mallett*) (Wisc. 2005)
The Court extended risk contribution theory to a lead pigmentation claim.⁹⁵ The court found that the three policy considerations (mentioned above) in DES cases were similar enough to extend the theory. **Fungibility** does not require chemical identity and the argument about the **extensive time period** should be rejected because a defendant should not be able to escape liability simply because he benefited from manufacturing a dangerous product over a long period of time.

i. Proportional Share Liability⁹⁶

3. Scientific Uncertainty

a. Burden Shifting of Causation to the Defendant (*Zuchowicz*)

Where:

(1) A negligent act is deemed wrongful because it increased chances of a particular harm occurring and

(2) That harm occurred.

The burden on causation shifts to the defendant to show that their conduct was not a substantial factor in that harm.

b. Lost Chance Doctrine

A majority rule that plaintiff should be allowed to recover when the damage caused by the negligence (such as a missed diagnosis) is a reduced chance of survival. *Herskovits*.⁹⁷

⁹⁵ Initially rejected because the plaintiff had a remedy against the landlord for their negligence.

⁹⁶ Purely theoretical.



4. Medical Monitoring (MM)

a. Recovery for Future Medical Expenses: MM (*Bower v. Westinghouse*)⁹⁸

Elements of a Claim for Medical Monitoring:

- (1) Plaintiff was significantly exposed (relative to rest of population);
- (2) to a proven hazardous substance;
- (3) through the tortious conduct of the defendant;
- (4) as a result, plaintiff has suffered an increased risk relative to the general population of contracting a serious latent disease;
- (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and
- (6) monitoring procedures exist that make the early detection possible.

b. Medical Monitoring Rationale

- 1) Public health interest,
- 2) Deterrence effect,
- 3) the potential of mitigating more serious future damages,
- 4) “societal notions of fairness and elemental justice”
- 5) an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury

c. Rationale against Medical Monitoring

- 1) Potentially limitless π 's.
- 2) Health Insurance (are these the types of damages we want tort law to protect against or should we leave it to insurance?)

d. No Damages for “Enhanced Risk” of Disease (But MM is OK)

Ayers v. Jackson (N.J. 1987) (Through a court supervised fund).⁹⁹

e. No Lump-Sum Damages for M.M (*R.R. v. Buckley* (U.S. 1997))

As a pipefitter for employer railroad, the employee was daily exposed to asbestos while removing insulation from pipes, often covering himself with insulation dust containing asbestos. The employee attended an "asbestos awareness" class and feared that he would develop cancer. Periodic medical check-ups revealed no evidence of

⁹⁷ *v. Group Health Cooperative* (Wash. 1983) A lung cancer patient with less than a 50 percent chance of survival had a cause of action against defendant, whose negligent diagnosis reduced his chances of survival by 14 percent.

⁹⁸ Court had long allowed the recovery of future medical expenses where a plaintiff could prove with reasonable certainty that such costs would be incurred as a proximate consequence of a defendant's tortious conduct.

⁹⁹ Reasoned that the speculative nature of an unquantified enhanced risk claim, the difficulties inherent in adjudicating such claims, and the policies underlying a state tort act argued against the recognition of this cause of action. However, cost of medical surveillance is a compensable item of damages where the proofs demonstrated that surveillance to monitor the effect of exposure to toxic chemicals was reasonable and necessary.



cancer or any other asbestos-related disease. The employee sued for damages for emotional distress and the cost of future medical check-ups. The employer conceded negligence, but argued that FEOLA did not permit damages in the absence of physical harm. The Court concluded that the employee could not recover damages including additional medical monitoring costs unless or until he manifested symptoms of a disease.

f. Medical Monitoring and Class Actions

Tort claims are traditionally difficult to bring as class actions because the damages caused to individuals are so varied. But a medical monitoring claim has become a way in toxic tort cases to bring class actions because the damage is pretty universal.

IV. ECONOMIC ANALYSIS OF TORT LAW

A. Coase Theorem

1. **Zero Transaction Costs**

The efficient outcome will occur regardless of the choice of legal rule.

2. **Positive Transaction Costs (a.k.a. "Reality")**

The efficient outcome may not occur under every legal rule. In these circumstances, the preferred legal rule is the rule that minimizes the effects of transaction costs.

a. Problems

- (1) Negotiating
- (2) Freeloaders
- (3) Imperfect Information

3. **Applications**



a. Nuisance Law: Incompatible Land Use

Who gets the entitlement to clean air and how do we protect it?

b. Little girls getting hit with busses (and other "stranger situations where bargaining is not possible")

4. **Cheapest Cost Avoider**

B. Accident Cost Reduction



V. STRICT LIABILITY

A. Traditional Strict Liability

1. Strict Liability and Property Rights

a. Yes, Recovery (*Fletcher v. Rylands*).¹⁰⁰

A person is answerable for all the damage which is the natural consequence of the escape of something he brings onto his land, even if harmless while it remains there (unless it escaped by an act of God).

b. No! We Have a right to (natural) non-Negligent Use of Private Prop. *Brown v. Collins*¹⁰¹ (Everything that a man can bring on his land is capable of escaping against his will and without his fault, and doing damage after its escape).

c. 30 States Now Accept the Rylands Principle, 7 Reject It.

2. Ultrahazardous or Abnormally Dangerous Activities

a. Restatements

A person carrying on an abnormally dangerous activity is strictly liable for any damage caused by that activity of the type that makes that activity dangerous.

b. Abnormally Dangerous Activity

An uncommon activity with a high degree of risk of some significant harm to people or property and there is an inability to eliminate the risk by the exercise of reasonable care. Second Restatement also considers whether the dangerousness outweighs its' social utility.

c. Don't Use Strict Liability when Negligence will Do

Indiana R.R. v. Am. Cyanide Co. (7th Cir. 1990) (The leak and subsequent damage was not caused by the inherently dangerous properties of the chemical, it was caused by human negligence).

3. Trespass and Assault, without Intent

Scott v. Shepherd (K.B. 1773) (A hot-potato story with a lighted squib that started with a trespassory throw of the Δ and ended in the plaintiff's eye. Plaintiff's act is maintainable.)

¹⁰⁰ Water from defendant's reservoir escaped through ancient coal mine shaft and flooded plaintiff's mine.

¹⁰¹ Δ 's horses got startled, ran off, and did damage to plaintiff's land. No recovery.



B. Trespass to Chattels/Conversion

1. **Trespass to Chattels: “The Little Brother to Conversion”**



a. Elements

- (1) Interfering with a possessor’s interest in their property
- (2) Damage to that property or interest.¹⁰²

b. Showing (Physical) Damage is Important

Intel Corp. v. Hamidi (Cal. 2003)¹⁰³ (Intel attempted to draw analogy of their interest in employee productivity to successful “spam” and “web spider” cases, but the court distinguished *Hamidi* because it was the content that was disruptive, not the trespass itself. The court compared it to saying that a person who makes a distressing phone call causes an injury to that person’s phone).

Epstein, et al.: Creating a real property rule for server inviolability would create the right social result.

Hamidi, et al.: Creating a property rule would radically hinder internet communication and usage, practically defeating its’ purpose. There is a social good that results from open and free access.

2. **Conversion**

a. Elements

1. Ownership/Right of Possession¹⁰⁴
2. Defendant asserted domain or control over it.
3. Damages



b. Knowledge/Intent, Good/Bad Faith, Care/Negl. = Not Necessary

Poggi v. Scott (Cal. 1914) (Defendant sold plaintiff’s barrels of wine, thinking they were empty. The important thing is he sold what didn’t belong to him. He asserted a legal right he did not have. Mistake is not a defense).

c. Conversion of Intangible Property

Kremen v. Cohen (9th Cir. 2003)¹⁰⁵ Registrants do have property rights over their domain names, much like people have property rights over

¹⁰² This distinguishes it from a normal trespass where showing nominal damages is normally enough. But here some damage could be depriving that person of use of that property for a certain time, affecting the quality or value of it.

¹⁰³ Plaintiff Intel Corporation brought suit on grounds of trespass to chattels for injunctive relief against Hamidi, a former employee who on six occasions over two years sent emails (sometimes up to 35,000) criticizing Intel, utilizing Intel’s e-mail servers, to current Intel employees. The Cal. Supreme Court ultimately held that California tort law would not encompass this charge because the emails never caused any physical damage or functional disruption to Intel’s computers.

¹⁰⁴ As opposed to trespass to chattels, where the owner must actually have possession of the goods and not just an immediate right to possession.



many intangible properties – music recordings, customer lists, regulatory filings, etc. Holding Network Solutions strictly liable creates the right incentive to protecting internet investment.

Meets the three part test to show the existence of a property right:

- 1) An interest capable of precise definition,
- 2) Capable of exclusive possession or control, and
- 3) The putative owner must have established a legitimate claim to exclusivity.

(CA had no merger requirement for intangible property).

d. Expanding “Conversion” and Relevant Policy Considerations

Moore v. Regents of the UC (Cal. 1990)¹⁰⁶ (Court would not expand to include π 's cells: could lead to chilling effect on research and liability without end – a decision that should be left to the legislature)

C. Nuisance

Another area that straddles both strict liability and negligence.

1. **Definitions**

“A nontrespassory invasion of another’s interest in the private use and enjoyment of land.” (2nd Restatement)

- 1) Usually must be created by some act of the defendant
- 2) Negative publicity resulting in unfounded fear is not a nuisance

a. A Reasonableness Standard: What is an “unreasonable” interference?

May imports negligent standards into law of nuisance – cost/benefit analyses, etc.

b. Absolute Property Rights v. “Live and Let Live”

Relaxed rhetoric of property rights in nuisance law. Not as strong and absolute as with trespass cases.

c. Aesthetic Blight is Normally not a Nuisance¹⁰⁷

¹⁰⁵ Kremen registered the name sex.com with domain registrar Network Solutions. Cohen tricked Network Solutions into giving Kremen’s domain name to him and became a porn king and eventually a fugitive. Kremen brought a claim for conversion against Cohen and Network Solutions. Network Solutions is liable, confirming common law stance that there is nothing unfair about holding a party liable for giving away someone else’s property, even without fault.

¹⁰⁶ Defendant’s used plaintiff’s cells in potentially lucrative medical research without informing him. Torts for conversion and lack of informed consent.

¹⁰⁷ Case where defendants ordered to remove pigs because of their stench, but not the junk in their front yard.



2. Solar Easements

a. Majority Rule – No Easement: *Fontainebleu*

Defendants built extension to their hotel, blocking out the sun that made it to their plaintiff-neighbor's beachfront hotel. Court denied plaintiff's injunction because there is no legal right to the free flow of light and air.

b. Minority Rule – Yes Easement: *Prah v. Maretyi*

Found that blocking access to light might be a private nuisance and factored in societal value of preventing the nuisance (in this case, value of solar heat/energy).

c. Spite Fences

Though they are inherently hilarious, they are considered a nuisance.

3. Uses Normal Person, Not Egg-Shell-Skull, Extra-Sensitive Standard

Rogers v. Elliot (Defendant ringing church bell, a little maliciously, caused convulsions and other severe harms to plaintiff. Wussy plaintiff can't recover against bastard bell ringer).

4. "Coming to the Nuisance" is Generally No Defense

Ensign v. Walls (The Dog Farmer. You can't erect a nuisance and thereby prescribe how neighboring private lands may be able to be used in the future.)

a. Minority View: Assumption of Risk

5. Injunction versus Damages

a. The Right to Clean Air¹⁰⁸ (*Boomer v. Atlantic Cement Co.*)

The court weighed the economic consequences of the nuisance and the injunction. The economic consequences of the injunction seemed to far outweigh the damage to the plaintiff. But since the damage to plaintiff was still substantial and continuing, they granted the injunction, to be vacated upon the company paying permanent damages as fixed by the court.

Dissent: The court is licensing a continuing wrong. Once damages are paid, the incentive to alleviate the wrong is eliminated.

b. Purchased Injunctions: *Spur Industries v. Webb Development Co.*

Plaintiff may enjoin defendant but only if plaintiff is prepared to compensate defendant for losses incurred. Webb was entitled to the injunctive relief, but they are also liable to Spur by taking advantage



¹⁰⁸ One of our many "old friends," according to Sharkey.



of the lesser land values, bringing residents in and forcing Spur to leave.

VI. PRODUCTS LIABILITY

A. Doctrinal Development

1. **The Fall of Privity¹⁰⁹ (*MacPherson v. Buick*)¹¹⁰**

Should legal duties be relational or based on foreseeability of harm? One who invites another to make use of an appliance is bound to the exercise of reasonable care. If a danger is foreseen, then there is a duty to avoid the injury.

2. **“Our Old Friend” Res Ipsa Loquitur and Products Liability**

Escola v. Coca Cola (Cal. 1944) (When a harm results from a product that would not ordinarily happen without the defendant’s negligence, and defendant had the duty of inspection, under RIL, an inference of negligence would arise).



a. Justifications for Products Liability (Mostly Traynor’s Concurrence)

- (1) Loss minimization
- (2) Loss spreading
- (3) Elimination of Proof Complications
- (4) The foodstuffs analogy¹¹¹
- (5) Corrective justice
- (6) Manufactures obligation to consumer must keep pace with changing times and relationships.

b. Justifications for Privity Limitations (Limits on Product Liability)

- (1) Remoteness of dangers (“Liability without end”)
- (2) Foreseeability Problems – No limit to the stupid ways people could use products
- (3) Responsible people have to subsidize reckless behavior of foolish people

3. **Implied Warranty... WITH A VENGEANCE!!!!**

Henningsen v. Bloomfield (N.J. 1960) (Implied warranty of merchantability is extended to people not party to the original sale, even when expressly disclaimed in the original sale).

4. **Restatements**

Not all states have embraced the 3rd Restatement. Many who use the 2nd though will allow for “bystander recovery.”

¹⁰⁹ Privity limitation said that the duty from contract only extended to contracting parties.

¹¹⁰ Wooden wheel on car breaks. Manufacturer is negligent in inspection. He is liable.

¹¹¹ There was manufacturer liability for sealed foodstuffs, but only retailer liability for unsealed foodstuffs.



a. Second

Someone who sells a product in a defective condition¹¹² unreasonably dangerous to the consumer is liable for physical harm caused if: 1) the seller is in the business of selling such a product¹¹³ and 2) it is expected to reach the consumer without substantial change in condition.

b. Third Restatement (of Products Liability)

Considers defects of three kinds:

- 1) Manufacturing Defects (strict liability)
- 2) Design Defects (negligence-ish)
- 3) Warning Defects (negligence)

5. **Elements**

- a) Standard of Liability (Negligence v. Strict Liability)
- b) Breach (depending on standard of liability)
- c) Causation
- d) Damages

6. **No Recovery for Purely Economic Loss¹¹⁴ (*Casa Clara*) (Fla. 1993)**

Concrete supplied for a house with too much salt cracked and broke off, no other property or persons were harmed. Such “disappointed economic expectations” are protected by contract law, not tort law. There is no tort recovery when a product damages itself.

B. Defects

1. **Manufacturing Defect**

When the product manufactured does not comport with the design.

2. **Design Defect**

a. Focus on Product not Manufacturer Conduct (*Barker v. Lull Eng.*)

(CA 1978)¹¹⁵ A product is defectively designed if it fails either the Consumer Expectation or Risk-Utility Tests. Once plaintiff shows that injury was proximately caused by product design, burden shifts to defendant to show that product design is not defective.¹¹⁶

b. No Design Defect when Consumer Negligence will do (*Halliday v. Sturn, Ruger*)

(Md. 2002) (3 yr. old shoots himself with dad’s gun. Normally gun makers only held liable when product malfunctions. In this case the

¹¹² A condition not contemplated by the ultimate consumer. Burden of proof is on the consumer.

¹¹³ Thus it would not apply to the occasional seller of food/product

¹¹⁴ Only in rare situations.

¹¹⁵ It was an error to instruct the jury that a product was “unreasonably dangerous” for its intended use.

¹¹⁶ They are in a better position, being experts in the field, etc.



Δ did enough, it passes the consumer-expectation test, it was the dad who was negligent).

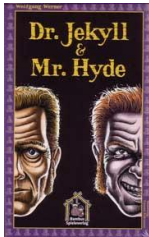
c. Consumer Expectations Test (*Potter v. Chicago Pneumatic Tool*)

Whether a reasonable consumer would consider the product design unreasonably dangerous or whether the product failed to perform as safely as an ordinary consumer would expect.

(Conn. 1997) (Court uses C-E test in examining excess vibration of tools and says that a plaintiff need not prove a **feasible alternate design**, though it is a factor that may be considered).

d. Risk-Utility Test

Reminiscent of the Hand formula, but involves a hindsight analysis. Do the benefits of a product's design outweigh its dangers?



e. "Dual Purpose" Test (*Castro v. QVC*)

The fact that a product's overall benefits might outweigh its overall risks does not preclude the possibility that consumers may have been misled into using it for a purpose that was dangerously unsafe.

f. Product Modification

3. **Failure to Warn**

Sometimes a warning is more adequate than a design change because a change would make it difficult or impossible to use the product for its intended purposes.

More pronounced theoretical division than with design defect.

a. Strict Liability

This places the failure to warn as the equivalent of a design defect.

b. Negligence

c. McDonald v. Ortho (Mass. 1985)

(1) Warning the Learned Intermediary

Learned intermediary defense was not adequate here because of the nature of the drug. And if you directly market to consumers, you lose the learned intermediary defense (but must show that π relied on that marketing).¹¹⁷

(2) Federal Preemption Defense

¹¹⁷ Although the dissent argued that the learned intermediary defense should be enough, because the physician is in the best position to warn his patient.



Federal compliance was evidence, but not dispositive. FDA had explicitly said they did not intend to preempt applicable state tort law.

(3) Heeding Presumption

If the plaintiff had the warning, she would have acted differently (but this has a huge hindsight bias).

d. Pharmacists Duty to Warn

Holding them liable for failure to warn would improperly interject them into doctor/patient relationship and may create harmful interference. But they could be held liable if they have personal knowledge about plaintiff's condition relevant to the drugs.¹¹⁸

e. Mass Vaccination Cases

Prescription drugs distributed en masse, the manufacturer needs to ensure that the warnings reach the consumers.

(1) Tort Problems

Overwarning may mean that the publicly beneficial vaccine is not widely administered and mass tort liability may act as a disincentive to produce the vaccine.

f. Danger of Overwarning

- (1) Warning Dilution Problem
- (2) "Risk/Risk" Analysis (e.g. Vaccines)
- (3) Substance vs. Style

g. Hood v. Ryobi

Π alters product (a miter saw) by removing safety features and then cuts off his thumb and complains that the warnings not to remove the blade guards were not specific enough in the types of harms that would be caused. Court ruled that an encyclopedic warning could do more harm than good, a warning dilution that would undermine the effectiveness of the existing warnings.

h. Liriano v. Hobart Corp.

(1) Full Awareness (Common Knowledge) Defense

Full awareness of danger (through general knowledge, common sense, participation in the removal of an obvious safety device) may obviate the failure to warn as a legal cause of injury. A variation on the "open and obvious danger" defense (but there may still be a duty – 1) to warn of a danger and 2) to suggest alternate or proper uses).

¹¹⁸ *McKee v. American Home (Wash. 1989)*



(2) Burden Shifting and Causation

Causation burden is shifted (based on our old friend *Martin v. Herzog*), since the negligent act is deemed wrongful because it tends to produce exactly the type of injury that ensued. But is this fair when most of the causation evidence is with plaintiff?

(3) Substantial Modification Defense

Can the “warning defect” still exist under the substantial modification defense?

i. Common Knowledge Defense and Harmful Substances

Decisive for the defendant in a case of a lifetime of vodka consumption causing physical and mental harm¹¹⁹, but not for the defendant in a case where prolonged but moderate beer consumption caused pancreatic cancer.¹²⁰

(1) Baby Oil is not for Babies.... to Drink

Plaintiff's won for infants injuries on argument that they knew baby oil was dangerous to drink, but did not know it was highly dangerous, or they would have been more careful.¹²¹



j. Good warnings should not excuse bad designs

A rejection of the “risk calculator model” adopted by some courts and 3rd RST. Even cautious actors are subject to lapses in judgment and attention.

C. Plaintiff's Conduct

1. Comparative Negligence and Strict Products Liability

Daly v. General Motors (Cal. 1978) (Defectively designed door lock caused plaintiff's injuries, but his injuries would have been reduced had he worn his seat belt, locked his door, or not been three-sheets-to-the wind).

a. The Two Are Compatible

Strict Products Liability evolved to protect the consumer of manufactured goods, relieve the injured from problems of proof and place burden of loss on manufacturers. Adopting comparative principles is compatible with these purposes and will not reduce manufacturer care because they cannot assume the user of a defective product will be blameworthy or that recovery would be reduced.

¹¹⁹ *Garrison* (7th Cir. 1982)

¹²⁰ *Stroh Brewery* (3d. Cir. 1987)

¹²¹ *Ayers v. J&J* (Wash. 1991)



- b. Assumption of Risk Reduces But Does not Defeat Recovery
Assumption of Risk is merged with comparative principles, as with ordinary negligence. Otherwise, manufacturers may be motivated to make products so defective that their open and obvious danger would defeat recovery based on traditional assumption of risk.
- c. Dissent
This kills the whole point of products liability. Manufacturers will do everything they can now to try to prove an injured plaintiff's lack of care. "The defective product is comparable to a time bomb ready to explode; it maims its victims indiscriminately, the righteous and the evil, the careful and the careless.... the conduct of the ultimate consumer-victim ... is wholly irrelevant."
- d. Adopted in Third Restatement

2. Contributory Negligence and Product Misuse

3. Contractual Defenses

Disclaimers and limitations of liability could serve as a complete defense in certain situations, but you'd have to look at the whole situation.

D. Regulatory Compliance/Preemption

1. Express Preemption

Based on statutory interpretation of preemption and savings clauses.

2. Implied Preemption

Application of the Supremacy Clause always starts with the assumption that Congress did not intend to displace state law.

a. Field Preemption

Based on Congressional intent to occupy the entire "field."

b. Conflict Preemption (Impossibility or "Frustration of Purpose")

(1) Compliance with both state and federal law would be impossible;
or

(2) State law stands as an obstacle to the full execution of Congressional purposes

c. Regulatory Agencies Interpretation of Statute Entitled to Deference

And according to the Supreme Court, absent Congressional intent or a change in that intent, their authority on their preemptive scope is dispositive.



3. **As Evidence of Per Se Negligence**

4. **As A Defense**

But should the standard be considered a floor or is it a ceiling? (FDCA is both a floor and a ceiling)

Some states statutorily enshrine the federal preemption defense

Geier v. Honda (U.S. 2000) (While the federal standards were not held to expressly preempt the action based on design defect for no airbags, ordinary preemption principles – frustration of purpose preemption – were applied since applying the state tort standard of requiring airbags would have conflicted with federal standard of allowing a range of choices for passive restraint devices).

5. ***Colacicco v. Apotex* (E.D.Pa. 2006)**

Suit for failure to warn of link between taking Paxil and suicide, FDCA/FDA law was held to implicitly preempt (via frustration of purpose) the state tort action.

Plaintiff argued against preemption because 1) FDCA establishes only minimum standards and permits manufacturers to strengthen warning labels and 2) Deference to FDA is not suitable because their policy has been inconsistent. But FDA's position was that there was inadequate evidence about the link between suicide and Paxil; a false and misleading label would be harmful; and a manufacturer cannot add a warning without FDA approval.

E. Defenses

1. Alteration/Modification/Misuse
2. Open and Obvious Danger
3. Comparative Negligence
4. Assumption of Risk
5. Learned Intermediary
6. Regulatory Compliance

VII. DAMAGES

A. Compensatory

Does allowing collateral benefits make compensatory damages punitive? Well, it can still be an “incentive”...

1. **Damages and Function Within the Tort System**

a. Corrective Justice

Ideally they will put the plaintiff back in his original position that he would have enjoyed had the injury not occurred.



- b. Economic/Deterrence Function
Puts an exact price on the defendant's wrongful behavior
- c. Compensation Function
Well, they compensate.

2. Economic (Pecuniary/Special)

- a. Calculating Wages
O'Shea v. Riverway (7th Cir. 1982)
(1) How do you speculate about lost future wages when there is no significant prior employment history?
Normally you can look at life expectancy tables and historic wage tables. With children, you can speculate based on their family situations, etc. And with housewives just entering the workforce it requires more speculation.

(2) How do you calculate those amounts?
First you must account for inflation and raises and then you must discount to present value (so Δ can pay it to π all at once)
- b. Imputed Income
Calculating the value of lost services for those not involved in ordinary market activities.
- c. Mitigating damages
Must act in good faith, but courts will usually give plaintiff benefit of the doubt (e.g. with employment you may consider probability of getting another similar job; with medical injuries a plaintiff may refuse a risky surgery that would have lessened damages).
- d. Chamallas
Argues for using blended tables in assessing economic damages to reflect society's social ideals rather than its realities. She also notes the perverse incentive effects in giving socio-economic graded damages based on the Hand formula (using lead paint in poorer neighborhoods, etc.)
- e. Tort reform: Giving schedules or capping non-economic damages
In a contingent fee system, this could give plaintiff's attorneys an incentive to not take certain clients (the elderly, housewives, etc.)
- f. Structured Settlements
Required by some states to reduce pressure of large verdicts based on uncertain speculation, by paying damages in (either contingent or absolute) installments



3. Non-Pecuniary (General)

a. McDougald v. Garber (N.Y. 1989)

(1) You cannot recover for pain and suffering unless you are conscious of the pain or for “loss of enjoyment of life” unless you are aware of the loss.

(2) Our “legal fiction” that money damages can compensate for a plaintiff’s non-pecuniary injuries ends when that money ceases to serve the compensatory goals. Anything beyond that would just serve society’s desire to punish the wrongdoer.

(3) “Pain and suffering” and “loss of enjoyment of life” should not be considered as different categories because the vague, distorted calculations would only be amplified by repetition and be more punitive.

b. Per Diem Rule

Assess pain and suffering over a single day and then multiply it over a lifetime. This argument is allowed in some jurisdictions but it is simply argument, and not evidence.

c. Scheduled Damages

Control against jury excesses and wild variations by 1) classifying injuries in a matrix by severity and age, 2) giving juries a range of awards based on past similar cases, or 3) establishing floors and ceilings to constrain awards.

d. Increased Risk of Future Injury

Not always allowed.

e. Pain and suffering in the moments before death

4. Appellate Review of Damages

a. “Shocks the Conscience” (or “Materially Deviates”) Standard

Duncan v. Railway (La. 2000)

Vast discretion is given to the trier of fact in calculating general damages, but the court found the excessive general award in this case an abuse of discretion and reduced it. Court also reduced the economic award for future medical care because it was based on life expectancy of a healthy girl, not a tetraplegic.



b. Remittitur and Additur

5. **Collateral Benefits**

a. Generally not allowed to reduce awards

Such as insurance payments, salary pursuant to an employment contract, welfare payments, etc. are generally not allowed to mitigate damages because the law thinks the claimant should benefit from the collateral recovery, not the tortfeasor, since the claimant has usually paid a price to get those benefits.

b. Exception for government benefits when government is tortfeasor.

c. Insurance

Avoiding double payments by entering the procedures for subrogation or reimbursement.

6. **Wrongful Death and Loss of Consortium**



a. Wrongful Death

Generally set by statute in each state. Creating the profound irony that if you are going to maim someone for life, it may be cheaper to finish them off. Unless you are worried about that “jail” thing.

b. Loss of Consortium

In American system, rights for recovery are vested in wife and husband, but not always children for parents.

B. Punitive Damages

While compensatory damages focus on the losses of the plaintiff, punitive damages focus on the conduct of the defendant.

1. **Pros and Cons of Punitive Damages**

Pro	Con
Deterrence (Makes up for concealment and underdetection)	Overdeterrence (too much can discourage socially beneficial activities)
Overdeterrence should not be a concern if conduct had no redeeming social value	
Moral Outrage/Societal Disdain	May unnecessarily punish people for doing cost/benefit analyses, safety tests, etc. ¹²²
Could be an important check on Hand formula from a moral outrage perspective	
Disgorging the undue profits of tortfeasors	May prevent future plaintiffs from recovering full compensatory damages
Added incentive for π as private AG, enforcing things for society's benefit	Constitutional Concerns (Due Process and Excessive Fines ¹²³)

¹²² Like withdrawing Vioxx from the market or cost/benefit analyses on safety features for Pintos and Fords

¹²³ SCt has rejected challenges that punitive damages amount to violation of 8th Amendment prohibition of “excessive fines.”



Relieves burden on criminal justice system	Awards that are too high may overincentivize private litigants
Judicial remedy in lieu of violent self help	Violent self help can be fun!
Compensatory damages don't always compensate fully since courts insist they have some objective basis in evidence	"philosophical void between the reasons we award punitive damages and how the damages are distributed" ¹²⁴

2. Guidelines for Setting Punitive Damages (*Gore v. BMW*)

a. Standard of Appellate Review

De novo review of punitive damage awards.

b. Reprehensibility of Defendant's Misconduct

It should be assumed π is compensated fully by compensatory damages, so punitive damages should only be awarded if defendant's conduct is so reprehensible as to warrant further punishment/deterrence. And it should be punishment for the conduct that harmed the plaintiff, not just for being an unlikable person or business in general.¹²⁵

c. Ratio with Compensatory Damages

Courts refuse to set a bright-line ratio, but suggest that single digits are usually pretty good.

d. Comparable Civil Penalties

e. Other Concerns

(1) Federalism: don't punish a corporation's conduct outside your state.¹²⁶

3. Considering Wealth of Defendant

Evidence can be presented about a defendant's wealth for assessing punitive damages, but it does not have to be. *Kemezy v. Peters* (7th Cir. 1996)

4. Bedbugs Drive Posner Crazy!

Matthias v. Economy Lodge (Posner awards punitive damages in ratio of 37:1. 1) Factors Δ 's wealth against them because they are using it to be overly aggressive with their litigation; 2) They are probably escaping detection half the time; 3) The compensatory damages are very small to begin with, that would barely compensate cost of litigation and barely punish).

5. Unresolved Issues: *Williams v. Philip Morris*

a) Can the degree of reprehensibility sometimes overcome the ratio problem?



Matthias Finds This Reprehensible

¹²⁴ *Dardinger*

¹²⁵ *State Farm v. Campbell* (evidence trotted out about State Farm's questionable employment practices was irrelevant to reprehensibility regarding how they treated the plaintiff-claimant)

¹²⁶ That may also be punishing them for conduct that was lawful where it occurred, ala *State Farm v. Campbell*



b) Is it appropriate to punish plaintiff for harms done to non-parties?

6. Use Punitive Damages for Societal Good

Dardinger v. Blue Cross (Ohio 2002)

(Judge reduced jury's punitive damage award against a health plan that refused to pay for experimental treatment for the decedent and then on his own initiative sent \$10M of the award to a Cancer Research Center. Judge noted the "philosophical void between the reasons we award punitive damages and how the damages are distributed")

Do plaintiff's have an entitlement to punitive damages?

7. Other Statutory Reforms

Some states forbid punitive damages all together unless expressly authorized (N.H.); others have capped them; others bifurcate liability and damage phases of the trial; and some have portions of punitive payments going to the state since it is quasi-criminal conduct.

8. Who Should Get Punitive Damages?

a. Certified Punitive Damages Class?

Defeats defendant's argument that we are being punished for harms done to non-parties that might collect (and punish us again) later.

