Torts Outline
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I. Intentional Torts

- Intentional torts are under a strict liability system
- Strict liability analysis is four-part: 1) was the act volitional? 2) f it was, there may be no liability if P assumed the risk of the harm, 3) but even if they did, there is liability if D intended to cause harm, 4) unless D had an excuse (necessity, self-defense, consent)

A. Trespass

- ***Vosburg v. Putney*** (pg 4)
- Battery: intended unlawful (offensive) contact or reasonable knowledge that act will result in offensive contact
- Transferred intent exists if intent is directed towards one party but results with another party
- Eggshell rule generally applies with unlawful or offensive touches (battery). You take person as you find them when you make unexpected contact with them. That is, intent to harm is not necessary, only intent to trespass
- Principle of non-interference, autonomy are basis for battery
- Assault requires intention to do harm. Assault is threatening behavior. Battery is actual touching.
- The "intentional" part of battery is the volitional touching of someone else.
- In intentional torts, wrongdoer is responsible for all direct results of his unlawful actions. Foreseeability is not defense. Mistake is usually not a defense either (Perry case with pool, ball, drain)
- *Dougherty v. Stepp* (pg 10)
- All unauthorized entry to land is trespass
- Trespass still applies if incursion is above or below the surface of the ground
- Intent to enter land unlawfully is what matters, not intent to do injurious activities
- Necessity is a defense to trespass claims
- Intangible intrusions to land may be trespasses, but only if able to prove physical damage due to the intrusion (electromagnetic fields case); often, however, the benefits of the trespass outweigh the minor negative aspects
- Trespass to chattels is conversion's little brother; allows recovery for interferences with possession of property that does not make it to conversion; actual injury to the chattel must result
- Electronic communications do not constitute trespass to chattels unless they damage or impair the functioning of another's property (*Intel v. Hamidi* pg 14)
- Injunctive relief is granted in trespass to chattels cases only if D's wrongful actions threaten to cause irreparable injuries
- *Intel* also gives requirements for an injunction: a high likelihood of imminent, irreparable harm that cannot be adequately compensated by damages

B. Conversion

- *Poggi v. Scott* (pg 22)
- Conversion is the unwarranted interference by D with the dominion of the property of P from which injury to the latter results
- Neither intent to commit a wrongful act nor knowledge that property is D's is required for conversion; intent can modify the level of damages
- Conversion does require intent to exercise dominion or control over the property, however
- Unlike liability, damages depend on D's mental state (similar to differences between expectation, reliance, and restitution damages)
- Overlaps with trespass to chattels. Not complete, however. "Conversion alone for A against C when C had taken property from B, who had previously taken it from A" (possession of stolen property, basically). "Only trespass would lie when the defendant had taken possession of the plaintiff's goods without claiming ownership of them.
- *Moore v. Regents of the University of California* (pg 26)
- Conversion requires an actual interference with a person's ownership or right of possession; does not exist in this case which involves use of cells that P would have discarded and thus did not own; ownership interest essential
- Conversion can exist with intangible property (such as domain names)
- Conversion does not exist with voluntary medical donations

C. Defenses
    1. Consensual
        - *Mohr v. Williams* (pg 35)
        - Case with doctor and ear, changed decision mid-surgery w/o permission
        - "Every person has a right to immunity of his person from the physical interference of others, and any unauthorized or unlawful touching of the person of another constitutes an assault and battery."
        - More modern cases take a less stringent view of medical decisions made while person is under, however. Often contracted around.
        - Consent may be inferred from conduct or from words
        - Still, people have a right to refuse medical treatment, except in cases of emergency when patient is unconscious and operation is needed before consciousness will return
        - Substituted consent in the cases of minors, incompetents
        - Substituted judgment is stickier when proposed treatment is for benefit of another (removing kidney of an incompetent's to benefit his brother)
        - Courts have generally been unwilling to impose liability when husband involved in affair gives wife STD without him having any reason to know he has it
    2. Insanity
        - *McGuire v. Almy* (pg 50)
        - Rule that insane person is generally liable for his intentional torts
        - "Where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it."
    3. Self-Defense

- *Courvoisier v. Raymond* (pg 54)
- Man who shot the cop who he thought was an attacker
- Difference with assault and battery in that mistake can be a defense, as it was in this case, if reasonable man would think he was in danger
- Necessary conditions for self-defense defense: situation is so immediate that traditional remedies such as injunction or police action would not suffice, the action must be responding to an ongoing risk, and the action must be proportionate the risk
- In cases of self-defense, even an accidental harming of a third-party is not actionable unless D realizes or should realize that act creates unreasonable risk of causing such harm
- Cases of an actual attack are much easier to win on self-defense grounds
- Self-defense is an affirmative defense; D must overcome any prejudices against it

4. Defense of Property
    - *Bird v. Holbrook* (pg 59)
    - Spring gun protecting garden case
    - No notice of spring gun, intended to harm rather than to deter, therefore liability
    - There has been a strong statutory response to imposing liability in these types of cases (at least there was in early 20th century England around the time of this case
    - Restatement says that the application of force by spring gun type traps is allowable to the same extent that the person would be able to use force if they were actually there
    - Unwarranted entry to land must be met first with a request to leave unless danger is imminent
5. Necessity
    - Applies when a D is driven to trespass because of an act of God, the wrongful act of a third party, etc.
    - ***Ploof v. Putnam*** (pg 68)
    - Island, storm, person tied boat to island to save himself, D unmoors
    - Doctrine of necessity applies especially to preservation of human life
    - In this case, recoverable damages would be damage minus damage that would have occurred if they have not been unmoored
    - Owner of land being trespassed on may not stop person from using land in necessity, but need not assist them either
    - ***Vincent v. Lake Erie Transportation*** (pg 71)
    - Boat tied to dock, stays there because of storm, boat damages dock, liability for boat owner
    - "Public necessity may require the taking of private property for public purposes; but compensation must be made"
    - This is called conditional or incomplete privilege

- Destruction of property to prevent the spread of fire or other cases of "absolute necessity" is allowable by public servants. Usually used in fire cases and to prevent enemy conquest in times of war.

II. Strict Liability and Negligence: History and Analytic Foundations

A. Formative Cases
- Thorns case (*Hull v. Orange*) pg 102
- Early case, arguably establishes strict liability as standard
- *Tithe case* (pg 106)
- Example of perverse incentives created by public necessity cases and asymmetrical incentives
- *Weaver v. Ward* (pg 108)
- Relevance of this case on modern tort law questionable
- Dealt with "inevitable accidents," but modern courts have refused to give inevitable instructions when they have been requested

B. Forms of Action
- Trespass and Case
- Trespass: harm caused by D's direct and immediate application of force against P's person or property
- Case: indirect harms, not involving the use of force
- *Scott v. Shepard* (pg115)
- Lighted squib getting tossed around between people
- Demonstrates difficulties with trespass v. case distinction
- These forms of action became less popular towards the middle of the nineteenth century

C. Last Half of Nineteenth Century
- *Brown v. Kendall* (pg 123)
- Stick in the eye as backs away from dog
- Transitional case from strict liability to negligence standard in the US
- ***Fletcher v. Rylands*** (pg 127)
- Water in reservoir, broke out
- Strict liability for D's who maintain dangerous things on their property if they escape
- Ties into abnormally dangerous strict liability system today
- Acts of God are excepted, as are the escape of substances used for the benefit of the D
- *Brown v. Collins* (pg 139)
- American court system rejecting *Rylands*' strict liability system
- Frightened horses
- Still, *Rylands* made substantial inroads in the first half of the twentieth century
- *Powell v. Fall* (pg 143)
- Rick of hay, sparks from train
- Strict liability even though train was following all applicable statutes when hay ignited
- Case led to traction-engines and steam-rollers being liable, though driven with due care, for scaring horses, crushing water-mains, and started fires

- Could not introduce strict liability to ordinary highway accidents, however

D. Modern Times
- *Stone v. Bolton* (pg 154)
- Cricket case; English law
- Case discusses reasonable expectations that a certain event would happen, foreseeability
- "Because it could be reasonably foreseen, the D were under a duty to prevent"
- But highest court overturns
- "Test to be applied is whether risk of damage was so small that a reasonable man in the position of D, from a safety point of view, would have thought it right to refrain from taking steps to prevent the danger"
- Since risk was very small, no liability
- *Hammontree v. Jenner* (pg 163)
- Epileptic car crash
- Unconscious drivers cases are negligence, not strict liability
- No liability for Dr either for failing to warn driver of risk

III. Negligence Overview
- Remember: Duty, Breach, Causal connecting Breach to Damages, Damages

A. Reasonableness
- *Vaughan v. Menlove* (pg 171)
- The standard of a reasonable man applies to negligence, not the standard of the actor's best judgment
- *Roberts v. Ring* (pg 178)
- Case of beginners v. experts and whether there are different standards; child hit by car
- Children aren't held to same standard of conduct as adults in contributory negligence questions
- But for harm causers, normal prudent man is the standard, even if they are old as in this case, or young
- Exception is harmed party assumes the risk (for example, teaching a kid how to drive would hold kid to lower standard for instructor, but not for pedestrian who had not assumed risk)
- Third restatement hedges a bit, saying standard of care is that of a reasonable person of the same age, intelligence, and experience
- This does not apply if they are engaged in an activity that is not age appropriate (driving)
- *Daniels v. Evans* (pg 180)
- Same standard for children if they are driving a car (because it is licensed?)
- In stranger cases, classes are less important bc there is no assumption of risk; the infirm, young, old, insane, or epileptic must take care to be the reasonable person that other drivers assume them to be
- For highway cases, standard is totally uniform
- *Breunig v. American Family Insurance* (pg 185)
- Woman crashes car after momentary insanity
- Not a foreseeable event in this case, but can insanity be a defense in neg cases?

- Court ruled that insanity can be a defense to negligence
- Effect of insanity must be such as to affect ability to understand duty which rests upon him to drive car with ordinary care, or must affect his ability to control car in prudent manner, and must be absence of notice that this could happen
- Holding has been narrowed in custodial settings, as institutionalized individuals' craziness should be foreseeable to caretakers

B. Calculus of Risk
- Calculating risk has enjoyed an uneasy relationship with standard negligence
- *Blythe v. Birmingham Water Works* (pg 195)
- Pipes explode due to unusual cold
- In determining negligence of putting pipes at that depth underground, must consider how often they would break, how much it would cost to put them at other depths
- *Eckert v. Long Island R.R.* (pg 196)
- Man tried to save child from oncoming train, turned out child wasn't on dangerous track, man died
- D pleaded contributory negligence, court refused to so find
- "Law will not impute negligence in an effort to save life, unless make under such circumstances as to constitute rashness in the judgment of prudent persons"
- *Osborne v. Montgomery* (pg 201)
- Car door opens, biker hits it, sues
- Court is skeptical
- Liability is premised on a balancing of societal interests
- Even if certain conduct may foreseeably result in harm, the risk may be justified by the circumstances
- *Cooley v. Public Service Co.* (pg 203)
- Telephone company and power company had lines on street, storm knocked down, person was hurt
- Decision balances the safety of those using telephone on street (such as victim in this case) and those in their homes, whose safety might be endangered by the alternative system proposed, and says that on balance this system is better since we can't have both
- In other words, court balanced interests
- ***United States v. Carroll Towing Co***. (pg 206)
- Creation of "Hand formula"
- Probability multiplied by Injury is either more or less than the Burden of preventing the harm. If B is less than PI, and B is not met, liability exists. If B is more than PI, no liability as burden of preventing the injury is greater than the possibility of the injury itself
- Formula has been criticized as being difficult to apply, particularly due to the common difficulty of quantifying the three elements
- Epstein argues that strict liability with contributory negligence and negligence without contributory negligence should create identically optimal behavior (pg 213)
- Of course, according to this, since all people are rational (heh), no one can ever be negligent, yet people are negligent all the time
- *Lyons v. Midnight Sun Transportation Services* (pg 215)

- Traffic accident, assertion that D has been speeding and driving negligently
- Person confronted with a sudden emergency, not resulting from their own negligence, has more leeway in exercising judgment and care, but this falls under a standard duty of care analysis and should not get its own instruction

C. Custom (besides medical malpractice)
- Custom exists uneasily with calculus of risk; is idea that behavior which does not deviate from customary care-levels is prima facie evidence of reasonable care
- *Titus v. Bradford* (pg 221)
- Railroad cars didn't quite fit what they were carrying, fell, killed a guy
- Since this was common practice, and was not done in an especially dangerous or unusual fashion, no liability
- "Reasonably safe means safe according to the usages, habits, and ordinary risks of the business"
- *Mayhew v. Sullican Mining Co.* (pg 223)
- Case going the opposite way, saying that a jury can determine if something is unreasonably dangerous, even if it may be customary
- Case has gained little following
- ***The T.J. Hooper*** (pg 224)
- Lack of radios on tugs, two barges and their tugs were lost bc of weather
- Trial court says since having radios was near universal practice, it was a duty
- Judge Learned Hand of the CoA says even if a custom is followed there may be negligence because "a whole calling may have unduly lagged in the adoption of new and available devices"
- Hand formula is generally favored over custom-deference, but Epstein disagrees with this idea (even though it is customary in legal profession)
- Epstein complains that this ruling opens every custom up to court-analysis and that custom should create a strong presumption in favor of defendant

D. Medical Malpractice
- *Lama v. Borras* (pg 231)
- To establish medical malpractice case, must show that basic norms of knowledge and medical care were not followed, and that this failure caused the injury suffered
- When no single custom governs a given issue, the practitioner must follow a school of thought but it can be any of the major ones
- Not negligent to pick a course of treatment than ex post was the wrong one, unless he should have known it was erroneous ex ante
- Custom is not necessarily established by the Physician's Desk Reference or even warning labels
- The *T.J. Hooper* standard (Hand formula) has been briefly tried and rejected in medical malpractice cases.
- Slight variations in care are allowed for less sophisticated local hospitals and clinics, but regional disparities are no longer permitted
- In other words, difference in resources—but not differences in local customary practices—are permitted
- Interns and residents are generally held to the same standard as "real" doctors (stranger case principle)

- If they are doing care, they should be qualified, basically
- Courts have expressed skepticism about enforcing a doctor's claim that a procedure will lead to a certain result if it does not
- *Canterbury v. Spence* (pg 244)
- Duty to disclose is reliant on giving patient ability to direct their care: all risks potentially affecting the decision must be unmasked
- Exceptions to this rule are if the patient is unconscious or when disclosure poses such a threat to patient as to become unfeasible from a medical point of view
- Must be a causal relationship between failure to disclose and damage to P in order to be actionable
- Resolve causality issue by deciding what a prudent person in the patient's position would have decided if suitably informed of all perils
- Recently, courts have resisted demands for disclosure of the full range of treatment alternatives in complex cases
- Courts are undecided if a doctor must explain routine diagnostic tests to patients (case of cervical cancer death and doc not suggesting a pap smear which might have detected it early)

E. Statutes and Regulations
- Failure to comply with a statute that results in a harm is negligence *per se*
- Statutes and regulations passed after an action don't govern the case but are evidence that the action is negligent
- *Osborne v. McMasters* (pg 265)
- Example of case of statutory breach meaning negligence
- "It is immaterial whether the duty is one imposed by common law or by a statute. In either case the failure to perform the duty constitutes negligence"
- P must show that they are part of the protected class in the statute in order for its violation to count, however
- Injuries must also be of the character which the statute was designed to prevent
- More restrictive view towards availability of federal relief
- SCOTUS has created four-part test to check for availability of federal relief due to breach of federal statute lacking explicit private right of action. (1) P one of class for whose benefit the statute was enacted; (2) Is there any legislative intent one way or the other; (3) Consistent with underlying purpose of the legislative scheme; (4) Is area one traditionally handled by state law, in an area of concern primarily to the states
- *Martin v. Herzog* (pg 270)
- Person hit by a buggy without lights on it, in violation of state law
- No liability for lack of lights unless their absence is at least a contributing cause of the harm
- If compliance with law would create greater risk, not following it is not evidence of negligence
- *Brown v. Shyne* (pg 273)
- P got back injury from practitioner who lacked license (illegal by statute)
- Court ruled that violation of licensing statute was not the cause of P's injuries
- Thus, lack of license no evidence of negligence
- Similar analysis to unlicensed drivers who get in crashes

- Two conflicting cases on leaving unlocked car, which gets stolen and hits somebody, whether owner of car's failure to comply with statutory duty to lock car is evidence of negligence
- Most courts hold bartenders liable for serving booze to peeps who go on to drive drunk if that is foreseeable
- Rejected by some courts and overruled by statute in many states

F. Judge and Jury
- Judicial control exists in determining what jury instructions to give, the ability to keep certain questions of fact from the jury, directed and special verdicts
- Directed verdicts are when court rules without even sending question to jury; special verdict is when they give a multiple-part question to the jury in complex cases or cases where they are concerned the jury will f it up
- *Baltimore and Ohio RR v. Goodman* (pg 290)
- Directed verdict was requested and rejected, decision appealed, reversed
- When at a track and sightline to check for train is blocked, getting out of your car to check it reasonable
- *Pokora v. Wabash RR* (pg 291)
- Getting out a vehicle to look for train is uncommon, probably futile, and possibly dangerous
- Criticizes *Goodman* for creating a rule of law where there should not have been one; it should have been a question of fact for the jury as the trail court originally had it

G. Res Ipsa Loquitur
- Doctrine meaning "the thing speaks for itself"
- Invoked to establish D's negligence in absence of any concrete evidence; circumstantial evidence is all that is required
- *Byrne v. Boadle* (pg 299)
- If a person passing along a road has a barrel of flour fall upon him, there is prima facie evidence of negligence
- Since building where he was passing at the time was a flour distributor, it is apparent that the barrel was in the owner of the building's control
- If there are facts inconsistent with negligence, the D must prove them
- If nature of harm is that it does not occur in the absence of negligence, there is potential for res ipsa loquitur
- Two other conditions: must be caused by an agency or instrumentality within the exclusive control of D, and must not have been due to any voluntary action or contribution on the part of the P or third persons
- Acts of God are a defense
- In some cases the circumstantial evidence is so overwhelming the judge can direct a verdict for the P on res ipsa grounds
- *Colmenares Vivas v. Sun Alliance Insurance Co.* (pg 307)
- Escalator accident, in which it stopped suddenly knocking old lady over
- Court allowed res ipsa loquitur, though whether D had excusive control over escalator was controversial since they contracted out their escalator maintenance to another company

- Res ipsa can still be found if it is an object that the P is using while he is injured if he has done nothing abnormal and is using the object in the intended manner
- Controversial requirement of "exclusive control" bc of hypo with D's brakes giving out the day after he gets them replaced being a likely manufacturing defect but him being responsible under res ipsa doctrine
- The "ordinarily does not occur in the absence of negligence" requirement is also problematic linguistically
- *Ybarra v. Spangard* (pg 316)
- P woke up from operation with severe pain below neck, likely caused by trauma applied between shoulder and neck
- D claimed that bc there were multiple parties who touched him during that time and several instrumentalities working on him during that time
- Court rules for P, saying it is a perfect res ipsa case since without the doctrine there would be no recovery bc all evidence is circumstantial and damage came to healthy, not operated on, part of his body
- Still, courts are generally hesitant to apply res ipsa in medical malpractice cases
- Conditional res ipsa loquitur is if there is a factual question to the jury and if they decide one way then they can implement res ipsa doctrine
- Res ipsa decisions can be decided against multiple D's, with the D's splitting the costs, but some courts do not allow this
- One D can escape liability in a case like this if they point the finger at another
- Expert evidence has somewhat negated the usefulness of res ipsa loquitur in medical cases
- Strategically, res ipsa makes it easier to get to a jury but more difficult to survive appeal

IV. Plaintiff's Conduct

A. Contributory Negligence
- Established when P has not taken reasonable care, and in consequence has suffered injury; bars any recovery by P when successful
- Burden of proof is on D to prove Ps negligence
- *Butterfield v. Forrester* (pg 328)
- Established basic contributory negligence idea
- "One person being in fault will not dispense with another's using ordinary care for himself"
- *Beems v. Chicago, Rock Island & Peoria RR* (pg 329)
- Case lacking in contributory negligence as a contrast to previous case
- P had signaled to his coworkers to perform an act that he would have reasonably expected them to perform, when they didn't was injured, but he wasn't contributory negligent bc he could expect them to perform their duties
- *Gyerman v. United States Lines Co.* (pg 333)
- Fishmeal sacks were stacked dangerously, P did not notify supervisor who was out, took them down anyway, they fell on him
- Burden of proving P's negligence is on D

- Since P's only negligence was failing to report, and reporting might not have fixed the situation since there was no safe way to fix it, he was not contributorily negligent
- If P does not modify behavior to protect themselves where an ordinary person would, they may be contributorily negligent
- Some courts have refused to impose contributory negligence when the P is protected by a statute (such as a workplace safety law)
- In medical cases, contributory negligence is difficult to prove given the knowledge disparity between doctor and patient
- Actions done under an irresistible impulse do not sever causal connection, and are thus not contributorily negligent (if person is institutionalized) (yummy ditto-tang)
- Person faced with an emergency who acts without time for deliberation may not be charged with contributory negligence if he acts as a reasonably prudent person would even if ex post his actions were suboptimal; necessity is a defense as well (running across the street to avoid gang violence causing auto accident)
- Causation issues are the same in contributory negligence as in standard negligence
- *LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul RR* (pg 342)
- Controversial case of flax catching fire next to railroad
- Flax was 100 feet away, court found there was no contributory negligence because it was on P's property and no need to guard own property against actions of D
- Other courts have said that there are reciprocal duties in situations such as this
- Unfortunately contributory negligence is an all or nothing doctrine, so there is little room for gray
- Last clear chance idea is that parties have the responsibility to mitigate damages if possible even if the hazard is caused by another party's negligence

B. Assumption of Risk
- Asks whether P has deliberately and voluntarily encountered a known risk created by D's negligence and, if she has, it holds that she should not be able to recover for the consequent harm
- *Lamson v. American Axe & Tool* (pg 360)
- Hatchet fell from rack at P's work, they had been put on old racks, P complained to superintendent, he said too bad work or leave
- Court ruled that P had assumed the risk
- Differs from a contributory negligence case because he complained and was told that he would have to do it anyway, so he didn't negligently fail to complain, rather he assumed the risk of doing it
- Another way to think of it: CN is two people acting mostly independently of each other without direct arrangement between them. AoR generally deals with arrangements between people even if not a formal contract
- Case is part of the "fellow servant" rule which held that workers assumed the risks of their jobs, popular during the early 20th century, then fell out of style
- Doctrine evolved to encompass employees continued willingness to work in the face of known risks, often after complaints had been voiced and rejected
- Ability to claim assumption of risk in industrial accidents was abolished by statute in 1939
- The defense continues to operate in actions not covered by statute, however

- *Murphy v. Steeplechase Amusement Co.* (pg 365)
- Case of the Coney Island amusement "The Flopper"
- Fall on the ride was foreseeable as a risk, P count not recover for his injuries
- If dangers are obvious and necessary, use assumes risk
- If accidents were so many as to show that the game was too dangerous to be continued without change
- In more recent times, the duty to warn has increased, however, limiting these types of defenses
- Assumption of risk is a common defense to suits from injured observers of sporting events
- Weakened when Ps are distracted due to something D does, such as sell refreshments, and in high risk areas that are not fenced
- Assumption of risk went to jury in ice-skating case where ice was too slick but P knew that and skated on it anyway
- Primary assumption of risk: alternative expression of the idea that D was not negligent
- Secondary assumption of risk: affirmative defense to an established breach of duty
- Secondary type raises issues of implicit coercion (leave house and risk being bitten by boar or stay inside all day, deliver package up icy driveway or fail to deliver it and whatever consequences will come of that)
- Courts have had mixed responses to this implicit coercion argument
- When a public officer (cop, fire) responds to a fire alarm or request for assistance brought by negligent or criminal conduct of D, their recovery is barred for injuries incurred in fighting the fire or apprehending the suspect (they assumed the risk)
- The "firefighter's rule" has been eroded by statute

C. Comparative Negligence
- Rather than the binary distributions of blame that result from assumption of risk and contributory negligence, comparative negligence allows for proportionate recovery
- Dominant system for assessing damages based on plaintiff's behavior
- ***Li v. Yellow Cab Co. of California*** (pg 384)
- Case overturning use of contributory negligence in California
- Also consumes assumption of risk
- Pure comparative negligence: apportions liability directly in proportion to fault
- 50% comparative negligence: apportions in proportion to fault up until P is 50% or more at fault, in which cases recovery from D is barred
- California adopts pure system
- Four states and DC still do not have comparative negligence
- Adoption of comparative negligence systems have forced courts to revisit things like last clear chance doctrine, intentional torts, strict liability, assumption of risk, etc. to decide how they should mesh with the system
- In trying to mesh comparative negligence and strict liability, at least one court has looked to comparative causation
- Special verdicts play an important role in a comparative negligence system because in their absence it is impossible to know the juries thought process; is it $15k bc that is

all the damages and P is fully liable, or because D is 85% liable but damages were $100k?
- Epstein likes a pro rata system for dividing damages

V. Multiple Defendants

A. Joint and Several Liability
- Joint liability: any person who bears an obligation can be responsible for a loss if others are unable to pay
- Several liability: each person has an obligation to pay their share, and the default of others does not increase the non-defaulters' share
- Joint-and-several liability: Obligors are joint to the obligee, but bear several liability amongst themselves
- *Merrywheather v. Nixan* was the first case to endorse joint and several liability
- *Union Stock Yards Co. of Omaha v. Chicago, Burlington, & Quincy* (pg 405)
- At this time, a wrongdoer could not bring a claim against a codefendant even if the P had sued the original wrongdoer for a harm for which the codefendant was partially responsible but had to pay it all
- In other words, a wrongdoer cannot collect indemnity from another wrongdoer
- Traditional common law held that releasing one tortfeasor of a joint tortfeasor released them all
- California law is highlighted in case book
- This law includes pro rata liability that allows each defendant to recover from his codefendants any amount above his own share
- *American Motorcycle Association v. Superior Court* (pg 409)
- California decision ruling that *Li*, discussed above for its holding related to comparative negligence, does not negate joint and several liability
- "Under the proposed abolition, a faultless P rather than a wrongdoing D would have to bear the portion of the loss if any one of the concurrent tortfeasors should prove financially unable to satisfy his proportioned share of the damages"
- Case allows for partial indemnity from other concurrent tortfeasors on a comparative fault basis
- Apportionment between P and D and among codefendants has also been allowed when a plaintiff sues on a strict liability theory
- While *American Motorcycle* seems to indicate that insolvent Ds share shall be paid by other Ds, another California case says that insolvent Ds share is split in proportion to the percentage of comparative responsibility originally assigned between remaining Ds and P
- Third restatement endorses this approach, with exceptions for intentional tortfeasors, persons acting in concert, vicarious liability, and persons who fail to protect P from the specific risk of an intentional tort
- Joint and several liability rules have been reformed legislatively in many states, often to protect marginal Ds from paying large amounts of damages
- Problem of settlement is that different systems can create a strong incentive to settle/not settle

- Credit rule: if you settle the other D can still potentially owe the rest of the original suit (could be way more than they originally would have owed if settlement is small), creates incentive to settle
- Carve-out rule: P gives up everything they don't get from 1st D in multi-party suits with a settlement. If its 80/20, settling with 80 guy means only 20 is left, regardless of settlement size

B. Vicarious Liability
- *Ira S. Bushey & Sons v. United States* (pg 429)
- Seaman who twisted thing while returning from the shore late at night, ship slid off blocks
- Expands vicarious liability to foreseeable damage that an employee may do
- Vicarious liability covers actions taken by employees in the course of their duties as an employee
- Also covers small deviations from course of duties
- Intentional torts may be considered within the course of employment if they are intended to serve the employer's interest, but this standard is difficult to meet
- Cases go to the jury unless they are really obvious
- Employers also may be held liable for negligent hiring, even for intentional wrongs that fall outside the scope of employment
- Usually applies to criminal histories
- Sexual harassment is generally not a vicarious liability tort unless the employer created a hostile environment
- If an employee works at multiple jobs, often both employers are liable if they both have the right to control the employee (example of construction worker contracted out by a subcontractor but under direct command of supervisor at site)
- Employers may sometimes indemnify their employees, but employees are often unable to answer for the loss or the employer has taken out insurance for such losses, so such indemnification is rare
- Even when D does not employ wrongdoer, may be liable under owner-consent statutes allowing suit of driver of the vehicle and its owner even if driver is not engaged in owners business (example: rental car)
- For commercial partnerships, vicarious liability can exist for each partner for the wrongs of another partner
- Employers generally not responsible for the conduct of independent contractors
- Exception if the independent contractor works on the employers premises and if independent contractor does work involving a "special danger to others" for the contractors failure to take reasonable precautions against such danger
- *Petrovich v. Share Health Plan of Illinois* (pg 440) demonstrates difficulty of classifying between employee and independent contractor
- Involved question of how much autonomy physicians in the HMO had; could HMO control them? Who was making medical decisions?
- Court ruled that HMO exerted sufficient control over physician to be vicarious liable

VI. Causation

A. Cause in Fact

- Defined as a necessary condition for the harm taking place
- "But for" action x, harm y would not have happened
- *New York Central RR v. Grimstad* (pg 451)
- Lack of life preservers on boat, guy drowned
- Nothing to show that "but for" the lack of a life preserver, he would have survived, so no cause in fact, so no liability
- More modern cases confer upon the jury broad powers of decision in cases of rescue at sea
- *Zuchowicz v. United States* (pg 455)
- Death from (alleged) overdose on prescribed drug due to too high prescription
- Trier of fact needed to find not only that drug had caused death, but that the negligent over-prescription of it had (in other words, that absent the negligent over-prescription i.e. a regular dose she would not have suffered the harm)
- Proof is not required, however
- "If (a) a negligent act was deemed wrongful because that act increased the chances that a particular type of accident would occur, and (b) a mishap of that very sort did happen, this was enough to support a finding by the trier of fact that the negligent behavior caused the harm"
- In strict liability cases there is typically a more stringent standard and the P must show some push/pull type of causal connection between Ds actions and Ps harm
- Similarly, in slip-and-falls where Ds actions greatly increase chances of something happening the chance that it might happen anyway is not sufficient to break the chain of causation between the negligence and the injury
- *General Electric Co. v. Joiner* (pg 462)
- Court is gatekeeper in allowing/not allowing expert testimony; abuse of discretion standard for appellate review
- Agent Orange litigation shows the three levels of causation relevant to toxic torts cases: substance, source, and exposure causation
- Substance for which the D is responsible can cause his injury, that D not someone else was the source of the substance, and that he was in fact exposed to the substance in a way that has caused his disease
- *Herskovits v. Group Health Cooperative* (pg 470)
- Lung cancer death, diagnosed late, lawsuit
- Courts are split over whether a P can bring a suit if they die if they had a less than 50% chance of survival anyway
- This case says that the issue can go to the jury even if the chances of survival absent negligence are under 50%
- Third Restatement endorses this approach for missed diagnosis and tardy treatment
- Most courts have avoided allowing awards for tortious risk if the bad possibility does not come to be
- *Kingston v. Chicago & NW RR* (pg 477)
- Two fires came together and destroyed property; proximate cause of one was D, other is unknown
- Either fire would have accomplished the same result on its own

- If Ds fire was small and might not have destroyed property and was swallowed up by other fire, it would be an intervening cause, but not the case
- Any one of two or more joint tortfeasors whose concurring acts of negligence result in injury are each individually responsible for the entire damage resulting from their joint or concurrent acts
- Over-determined harm is the same way (three men push car over cliff when any one could have done it on their own)
- Apportionment of harm is allowable when there is a reasonable basis to do so
- Persons who receive successive injuries in unrelated incidents are treated the same if the injuries resulting from them are indivisible
- *Summers v. Tice* (pg 485)
- Man shot by shotgun; each P shot separately and only one was actually responsible but impossible to determine who
- Court found both negligent even though one was clearly not responsible for Ps injury
- "If Ds are independent tortfeasors and thus each liable for the damage caused by him alone, and where apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress"
- Epstein argues that cases such as this should be several liability so that in cases of an insolvent D the expected value for the other is not more than if we had perfect knowledge
- *Skipworth v. Lead Industries Association* (pg 488)
- Lead case
- Impossible to determine which lead paint manufacturer is responsible for harm
- Court declines to apply market share liability
- Requires following factors to be applied: all named D are potential tortfeasors, products are identical and share same defective qualities (fungible), lack of ability to identify which D caused injuries is not fault of P, and all manufacturers which created the defective products during the relevant time are named
- Lead paints were not fungible, had different lead content
- Courts have generally held that liability in these cases is several so that small manufacturers aren't held responsible for insolvent big manufacturers

B. Proximate Cause
- Assumes cause in fact
- Key question is whether D's conduct could be regarded as a "substantial factor" in bringing about P's harm
- Can look at as forward looking from time of action: was harm foreseeable (foresight perspective)
- Can also look at as backward from harm: was there an intervening cause that severed causal connection (directness perspective)
    1. Physical
        - Medical malpractice occurring after negligent conduct has put P in hospital is not an intervening cause breaking the chain of causation; original D is still liable
        - *Ryan v. NY Central RR* (pg 497)
        - D set accidental fire to their own woodshed, spread to house 130 ft away

- Ds are responsible for proximate but not remote damages
- In this case damages were remote (case is from 1866)
- If a D puts P in a position where they reasonably fear for their safety, an injury received during reasonable escape has a right to action
- If P acts in good faith to minimize risks from a dangerous situation of Ds making, those actions do not sever causal chain
- *Berry v. Sugar Notch Borough* (pg 502)
- Ps conduct is not casually connected to his injuries if they do not increase the risk of being injured (case of but for speeding down street chestnut tree would not have fallen on him)
- When a carrier has reason to anticipate an assault upon one of its passengers it rests under the duty of protecting such passenger"
- If each of two successive acts is sufficient to harm P, but second situation only happens because of the prior negligence of the first, the second is dependent on the first so that the second is normally responsible only for the incremental damages, if any
- Dynamite cap case, negligent to leave cap on ground but parents being aware of it was an intervening cause so no liability
- *Brower v. NY Central & HRR* (pg 507)
- Theft from train after it crashed
- Under early theories of proximate cause, only the last wrongdoer was responsible so criminal conduct severed causal connection
- Current test is that if the likelihood that a third party may act in a certain way is one of the factors that made a party negligent, such an act does not prevent the actor from being liable for harm caused thereby
- In other words, third party intervention that a party realizes or should realize would be created by the situation does not sever causation
- *Wagner v. International RR* (pg 512)
- Rescue case
- Reasonable attempts at rescue do not break chain of causation
- Unreasonable efforts at rescue should be covered by comparative negligence and not superceding cause
- ***In re Polemis & Furness, Withy & Co.*** (pg 515)
- Ship with exploding cargo case
- Established rule that a D is responsible for all acts stemming from a negligent act, even if not foreseeable
- Has been followed in a good number of jurisdictions
- *Palsgraf v. Long Island RR* (pg 519)
- Famous exploding package case
- Since explosion was not a reasonably probable result of Ds negligence, no liability
- The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation
- Actor's liability is limited to harms that result from the conduct that made the conduct tortious

- *Marshall v. Nugent* (pg 532)
- Collision on highway in NH
- If disturbed waters are not yet placid, D may be liable for forthcoming injuries even if not specifically predictable
- "The consequences of past negligence were in the bosom of time, as yet unrevealed"
- *Overseas Tankship v. Morts Dock & Engineering* (pg 536)
- Ships that released oil into harbor, which caused fire days later
- Takes opposite position of *Polemis*, saying foreseeability is more important than directness
- D takes P as he finds him
- American courts seem to generally agree with *Polemis* that foreseeability is not a necessary condition for liability
- *Virden v. Betts and Beer Construction Company* (pg 545)
- Ceiling iron falling from ceiling
- Seems to go the opposite way, saying that damages for harms outside context of those negligence would naturally cause are not recoverable
- *Herbert v. Enos* (pg 547)
- Shock from garden faucet
- Another case going the other way, saying that the injury was not of a type that would be foreseeably caused by the negligence and D is thus not liable

2. Emotional
    - Question is which cases should be dismissed by per se rule and which should go to jury
    - *Mitchell v. Rochester RR* (pg 549)
    - Fright from horses, miscarriage
    - No recovery from fright in this case, nor consequences of the fright
    - Courts later adopted the "impact rule" that there must be contact and then recovery for emotional damages were acceptable
    - Other courts adopted the "zone of danger rule" which held that impact or the P being in the zone of danger meant recovery was possible
    - *Dillon v. Legg* (pg 553)
    - California case arguing that even zone of danger rule is too restrictive, required close relationship and direct observation instead
    - Majority of states follow this test, but have limited it to immediate family etc
    - Fear suits must generally show that the fear is rational to be permissible
    - Courts have also imposed liability for undertakings or relationships that are especially likely to cause emotional distress if done incorrectly, such as hospitals and funeral homes for negligently handling a corpse, telegraph companies for erroneously sending telegrams saying someone died, etc

VII. Affirmative Duties

A. Duty to Rescue

- *Buch v. Amory Manufacturing Co.* (pg 565)
- Trespass in mill, hand is crushed
- Owners are not bound to warn trespassers against hidden or secret dangers or to protect them against any injury arising from their actions or those of others
- *Hurley v. Eddingfield* (pg 568)
- P sent for doctor but doctor did not come, death ensued
- No affirmative duty to perform
- Ames proposes a rule that one who fails to save another from impending death or great harm when he can with little or no inconvenience can be punished
- Epstein argues against this because it would be difficult to enforce properly and goes against principle of autonomy
- There have been some legislative responses to induce rescue or to insulate a well-intentioned rescuer from liability if they end up harming
- Still many more die or are injured from attempted rescues than from obvious failures to rescue
- Affirmative duties are rarely imposed on public entities as well
- *Montgomery v. National Convoy & Trucking Co.* (pg 579)
- Truck stalled w/o Ps fault, but P failed to put marker out, truck was hit by other car, liability
- "One may be negligent by acts of omission of a duty owed another if the act is a direct, proximate cause of the injury"
- Restatement: "When actor's prior conduct, though not tortious, creates a continuing risk pf physical harm of a type characteristic of the conduct, actor has a duty to exercise reasonable care to prevent or minimize the harm"
- If D undertakes a rescue, even if under no obligation to do so, and actually harms P, there is liability if there is a lack of reasonable care or care is discontinued
- Liability also exists if a person negligently prevents another from giving aid

B. Duties of Owners and Occupiers
- *Robert Addie & Sons v. Dumbreck* (pg 584)
- Dangerous stuff in field, used as shortcut, kid was injured
- Highest duty extends to invitees; duty to take reasonable care that premises are safe
- Second extends to licensees; duty not to create a trap or allow a concealed danger
- To trespassers, however, no duty; come on property at own risk
- Exception for willful and wanton conduct
- A breach of a statutory duty can count as willful and wanton (baby falling from window case)
- Attractive nuisance allows infant trespassers to recover when lured onto land by a tempting condition created and maintained by D
- D "knows or should know" that children are likely to trespass, "knows or should know" that would be unreasonably dangerous, utility of maintaining condition and burden of eliminating it are slight compared to risk, and fails to exercise reasonable care to protect kids; these are needed for finding of attractive nuisance
- What is relevant is the nuisance itself, not what attracts child
- Natural parts of land do not qualify

- Distinguishing between invitees (usually business-related guests) and licensees (other guests) can be tough
- Restatement distinguishes based on type of location; businesses for invitees, homes for licensees
- Courts tend to classify public officials visiting private property as invitees
- *Rowland v. Christian* (pg 593)
- Bathroom fixtures
- California court threw out the three-type distinctions of previous cases
- Institutes reasonableness test: has owner acted as a reasonable person would in view of the probability of injury to others
- Other states have abandoned the invitee/licensee distinction but kept the trespasser one
- Epstein theorizes that best system keeps the three designations despite the fact that they are imperfect; says people will modify their behavior to reduce borderline cases; wants difficulty to be in deciding which class people are in, but once established the rule will be applied easily rather than doing a case-by-case analysis of reasonableness in each situation and creating infinite variations in level of care required
- California courts briefly used strict liability against landlords, but then retreated after it turned out to be a terrible idea
- Many states have also passed laws relaxing the liability of owners of large recreational or rural lands
- Most courts refuse to impose liability for natural conditions to people who have not entered their land, although this rule has weakened recently (duty to prevent mudslide when the risk is obvious and would destroy downhill house)

C. Gratuitous Undertakings
- *Coggs v. Bernard* (pg 606)
- Brandy moving case
- If somebody is carrying something for somebody else they are liable if they negligently destroy it, even if there was not an enforceable contract for them to carry it
- Could not have made them move the brandy under contract or tort, but once they did they were liable for its destruction under tort
- *Moch v. Rensselaer Water Co.* (pg 615)
- Water works company failed to supply sufficient water pressure to stop spread of fire; no liability
- No action under contract because individual doesn't have contract with water company
- No action under tort because neither city nor water works company had duty to individuals to supply adequate water pressure, it is a negligent omission, a denial of a benefit, not a commission of a wrong, nonfeasance rather than misfeasance
- Court ruled that water was gratuitously provided
- Other courts have been uneasy about this decision, and some have gone the other direction

- "Where it is foreseeable that a breach in duty will cause injury to some third person not a party to the contract, contracting party owes a duty to all those falling within the foreseeable orbit of risk of harm"
- Parties can contract around this with a tariff (I think it was a cell phone case)

D. Special Relationships
- No duty to control conduct of third parties unless special relation between actor and the third person which imposes a duty to control the third party's conduct or special relation between actor and the other which gives the other a right to protection
- Disc jockey case with "spread the bread" contest shows that this rule is meant to apply to nonfeasance, not misfeasance
- *Kline v. 1500 Massachusetts Avenue Apartment Corp.* (pg 624)
- Landlord's duty to protect residents
- Landlords have a duty to take steps to protect tenants from crime when notice of previous crimes in areas under his control has been given
- Injured plaintiffs can be contributorily negligent if they fail to exercise reasonable caution
- Special relationship duties have been expanded to colleges for their students, common carriers and their passengers, condo associations, and for off-premises liability, but courts have generally hesitated to expand duty much
- *Tarasoff v. Regents of University of California* (pg 634)
- Guy confiding to psychiatrist his desire to kill P, then he does it, psychiatrist('s employer) is liable
- No negligence in getting prediction of danger wrong, but if psychiatrist believes that someone presents a serious danger to a specific person or persons there is a duty to exercise reasonable care to protect the foreseeable victim of that danger
- This has been widely accepted
- If there just seems to be a generalized danger, there can be no duty because it is impossible to stop
- Liability can also exist for Ds whose steps facilitate attacks by persons within their care
- Future promises can also be the basis for liability; "we will call you when we release him"
- Many states have codified this duty to "soften its edges"
- Courts have been cautious about imposing duty on persons who are not in custody

VIII. Ultrahazardous or Abnormally Dangerous Activities
- Strict liability for harms caused by inherently dangerous animals and animals from non-inherently-dangerous classes who have acted dangerously in the past
- Restatements give long list of factors to consider in determining if an activity is abnormally dangerous and to thus impose strict liability rather than negligence regime
- Third restatement is a little clearer: activity is abnormally dangerous if it creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors and it is not one of common usage
- Courts split over airplane liability

- Restatements (Second) willingness to take social value of an activity into account has been criticized as overly subjective
- Epstein argues that "ultrahazardous" activities should just be governed by normal standards of negligence

IX. Products Liability

- First period ran from mid-nineteenth century to early twentieth, when major debate was whether to allow any suits at all against product manufacturers or sellers
- Last half of nineteenth century witnessed a steady but limited erosion of "privity" limitation which stopped consumers from suing anyone other than whoever directly sold them the product
- Second period began with ***MacPherson***, allowing for negligence against a manufacturer with whom the buyer had no contractual relationship
- Third stage began with *Escola*, applying strict liability principles to products liability cases
- Fourth and final stage dealt with defective design and duty to warn cases

A. Exposition

- *Winterbottom v. Wright* (pg 728)
- 1842 case is an example of a court refusing to allow products liability case because of privity of contract
- ***MacPherson v. Buick Motor Company*** (pg 731)
- Collapsing wheel on car
- Product need not have as their primary function injury or destruction in order to be part of a products liability case
- If there is knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then the manufacturer is under a duty to make it carefully, irrespective of contract
- There must be knowledge of danger, not merely possible, but probable
- One who invites another to make use of an appliance is bound to exercise reasonable care
- In the wake of this case, one jurisdiction after another abandoned privity of contract limitations in cases involving physical injuries caused by defective products
- *Escola v. Coca Cola Bottling Co. of Fresco* (pg 739)
- Exploding Coca-Cola bottle
- Even if there is no negligence, public policy requires that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market
- Imposed strict liability for products liability
- Implied warranties exist for sales of products
- "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being"
- Rationales include that the manufacturer is in the best position to minimize the losses arising out of the use of its product, that strict liability effectively spreads out the

costs of the loss, that it eliminates proof complications, and corrective justice (the party who created the condition should face the loss, not the party that suffered it)
- Modern cases occasionally allow a jury to find liability under an implied warranty theory while denying recovery under a tort theory
- Implied warranty cases are governed by consumer expectations, contrasting with the strict liability risk-utility standard for design defects

B. The Restatements
- "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if a) the seller is engaged in the business of selling such a product and, b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. This rule applies even if the seller has exercised all possible care in the preparation and sale and the user or consumer has not bought the product from or entered into any contractual relation with the seller" - Second Restatement
- Restatement takes no position on whether this applies to harms to persons other than users or consumers (although in this case case law has moved beyond the Second Restatement), to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer, or to the seller of a component part of a product to be assembled
- Rule does not apply to occasional sellers; negligence standard
- No distinguishing between the container and the object
- Rule only applies when a product is unreasonably dangerous, to an extent beyond that which would be contemplated by the ordinary consumer
- In order to prevent unreasonable danger, directions or warnings may be required
- Some products cannot be made safe, especially drugs; seller of such products is not held to strict liability if the product is properly prepared and marketed and proper warning is given
- Rule does not require any reliance on the reputation or judgment of the seller by the consumer
- Assumption of risk is a defense if the risk is voluntarily and unreasonably taken by the user
- "A seller or distributor of products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect; a product is defective when at the time of sale or distribution it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings" – Third Restatement
- Matters of economic loss are usually left to voluntary agreements between parties
- *Casa Clara Condo Assoc. v. Charley Toppino & Sons* (pg 755)
- Concrete in house was faulty but redo would cost exorbitant sum
- Economic losses can only be recovered by a contract claim
- Tort law is limited to harms to persons or property, not including the product itself, others are contractual

C. Product Defects
    1. Manufacturing Defects

- Product has manufacturing defect when it departs from its intended design even though all possible care was exercised
- Proof of specific defect is not required if the incident that harmed P is of the kind that ordinarily occurs as a result of product defect and was not solely the result of causes other than the defect existing at the time of sale or distribution
- *Speller v. Sears, Roebuck and Co.* (pg 773)
- Fire, was it fridge or stove
- P asserted that fire was caused by faulty wiring without proof of the specific defect
- "In order to proceed in the absence of evidence identifying a specific flaw, P must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to D"
- These cases become more difficult with long-lived products that receive intensive and protracted use
- In food cases a "reasonable expectations" test is used

2. Design Defects
    - Product is defective in design when foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design and the omission of the alternative design renders the product unreasonably unsafe
    - *Campo v. Scofield* (pg 777)
    - Epstein loves this case; can't get enough
    - "If a manufacturer does everything necessary to make the machine function properly for the purpose for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law's demands"
    - This view used to dominate the law but it is now disfavored and the consumer expectations test is used in its place
    - *Volkswagen of America v. Young* (pg 779)
    - "Traditional rules of negligence lead to the conclusion that an automobile manufacturer is liable for a defect in design which the manufacturer could have reasonably foreseen would cause or enhance injuries on impact, which is not patent or obvious to the user, and which in fact leads to or enhances the injuries in an automobile collision"
    - This court refused to apply strict liability system to design defect cases
    - Third Restatement takes the view that D is liable for the full loss "if proof does not support a determination of the harm that would have resulted in the absence of the product defect" even though a D is only liable for the "increased harm" under the theory of proximate causation
    - Design liability for machine tools and other equipment joined automobiles in expanding liability in the 1970s
    - "A manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is

likely to be exposed to the danger when the product is used in the manner for which the product was intended as well as unintended yet reasonably foreseeable use"

- Restatement: "The fact that a danger is open and obvious is relevant to the issue of defectiveness, but does not necessarily preclude P from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented injury to P"
- *Barker v. Lull Engineering Co.* (pg 788)
- "A product is defective in design either 1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or 2) if, in light of relevant factors, the benefits of the challenged design do not outweigh the risk of danger inherent in such a design"
- "A manufacturer who seeks to escape liability for an injury proximately caused by its product's design on a risk-benefit theory should bear the burden of persuading the trier of fact that its product should not be judged defective, the Ds burden is one affecting the burden of proof, rather than simply the burden of producing evidence"
- This two part test is dominate today; consumer expectations and cost/benefit
- Since it is negligence, it focuses on the manufacturer rather than the product, which the focus of strict liability system
- Older products are held to a less stringent test that new products if safety standards and expectations have changed over time
- Evidence of subsequent design changes cannot be introduced so as not to discourage improvements in design, even under strict liability
- Product alteration by the consumer can defeat or diminish Ds responsibility for subsequent injuries
- *Linegar v. Armour of American* (pg 797)
- Bullet-proof vest case
- "A manufacturer is not obliged to market only one version of a product, that being the very safest design possible"
- Fact that bullet-proof vest did not cover sides had advantages over vests that did so cover; lack of side cover was also patent
- Third Restatement requires that P show a reasonable alternative design even though P alleges that the category of product sold by D is so dangerous that it should not be marketed at all"
- But many states reject this as overly burdensome on P

3. The Duty to Warn
    - Product is defective due to inadequate instructions when the foreseeable risks of harm posed by the product could have been reduced/avoided by the provision of reasonable instructions or warnings
    - Applies most often to pharmaceutical and chemical products that cannot be made very safe
    - *MacDonald v Ortho Pharm. Corp.* (pg 807)

- D must warn all persons who it is foreseeable will come into contact with, and consequently be endangered by, their product" although an exception exists if a warning has been given to a responsible intermediary
- Case seems to suggest that in the case of drugs that will be taken for a very extended period of time, the option to give the warnings to a responsible intermediary may not apply; controversial; this can also apply to vaccines
- Congress has passed a statute for no-fault vaccine injury compensation

D. Plaintiff's Conduct
- *Daly v. General Motors Corp.* (pg 832)
- Applied principle of comparative negligence to products liability claims
- "Ps recovery of damages for harm caused by a product defect may be reduced if the conduct of P combines with the product defect to cause the harm and Ps conduct fails to conform to generally applicable rules establishing appropriate standards of care"
- In many settings assumption of risk is a defense to product liability, but sellers generally cannot contract out of liability

E. Federal Preemption
- Applies in three situations: 1) when the state law is inconsistent with the federal statute, 2) when the federal statute is sufficiently comprehensive to occupy the field, and 3) when the enforcement of the state law frustrates the federal scheme
- Applies most often to drug regulation, automobile safety regulation, and the regulation of chemicals such as pesticides

X. Damages

A. Recoverable Elements of Damages

1. Pain and Suffering
   - *McDougald v. Garber* (pg 855)
   - Nonpecuniary damages: compensate for the physical and emotional consequences of the injury such as pain and suffering and loss of ability to engage in certain activities
   - Pecuniary damages: compensate for the economic consequences of the injury, such as medical expenses, lost earnings, and the cost of custodial care
   - Damages are intended to compensate the victim by putting them in the position they would have been in had the accident never happened
   - Not intended to punish the wrongdoer (punitive damages) unless the harmful conduct was intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence
2. Economic Losses
   - Economic losses are taken looking forward not back
   - Punitive damages are taxes, other are not
   - Inflation is usually taken into account
   - There is a duty to minimize the loss by the P