**Torts Attack Outline**

**Battery**

Step 1: Intentional or Unintentional Tort?

Step 2: Contact Results

Step 3: Reasonable or Unreasonable?

Step 4: Contact is Harmful / Offensive

Step 5: Intent: Single/Double Intent Jurisdiction

R2 13: Harm is foreseeable/expected harm (which determines if it is reasonable)

R2 18: Offensive Contact

R2 19: Offensive is what offends a reasonable sense of dignity (which determines if it is reasonable)

* **Single-intent jurisdiction** would interpret “acts intending to cause a harmful or offensive contact” to mean acts intending to cause a contact that **turn out to be harmful or offensive**
	+ Achieves liability in rib-kick illustration but struggles to avoid liability in shoulder-tap situation.
* **Single-intent jurisdictions** limit liability to contact that is objectively harmful or that offends a reasonable sense of dignity. See, e.g. R2 19 (designed for the rib-kicking case; but in the shoulder-tapping case, courts will argue that it doesn’t offend a reasonable sense of dignity)
* A **Double-intent jurisdiction** would interpret “acts intending to cause a harmful or offensive contact” to mean acts intending to **cause contact** and **intending to harm or offend**
	+ Achieves no-liability in shoulder-tap illustration but struggles to impose liability in rib-kick situation
* **Double-intent jurisdictions** impose liability (at least as a practical matter) whenever it would be unreasonable for an actor to believe an intentional contact would cause no harm or offense (knowledge that it would cause harm or offense is sufficient and the defendant usually won’t be believed that they genuinely believed someone enjoyed being kicked in the ribs) (excludes the possibility that someone might honestly believe that it won’t cause harm in certain cases) (designed for the shoulder-tapping case; but in the rib-kicking case, courts will argue that it is true in theory that the rib-kicking might not have intended the harm, but it won’t believe that someone thought that)

Contact

* Direct
* Remote
* Indirect

**Intent**

* **Keel v**. **Hainline (Okla. 1958)** – Boys Throwing Erasers **L**
	+ **Transferred Intent** – intent to harm others transfers to the girl who was hit; consent by other boys come in the defense, not the prima facie case, so the intent transfers, but the defense does not (under R2 18(1)(a)))
	+ **Aiding and Abetting Liability** – other boys are liable by encouraging the behavior; mere provocation probably would not be considered encouragement
* **Polmatier v. Russ (Conn. 1988) –**There is a general rule not to allow insanity as a defense for measuring a plaintiff’s intent upon public policy grounds to ensure that the estate of those who may be insane are incentivized to take better care of them. **L**
* **Laidlaw v**. **Sage** **(N.Y. 1896) –** Banker shields himself behind clerk from explosion; The law presumes that an act or omission done or neglected under the influence of pressing danger was done or neglected involuntarily. **NL**
* **Manning v. Grimsley (1st Cir. 1981):** Cites R2 13 for as long as there is an intention to cause a third person to have an imminent apprehension of a harmful bodily contact, if the actor causes the other to suffer a harmful contact, there is liability for the battery. To intentionally cause someone to have imminent apprehension of being hit is an assault, not a battery. Since Grimsley did have a sufficient intent to commit an intentional tort that intent was enough to support liability for battery. **L**
* **Karate Demonstration: Miller v. Couvillion (La. App. 1996)**: Co-worker was hurt by informal demonstration of karate upon a cinder block. He sued for intentional tort – a battery for which the store was vicariously responsible for. Kick was intended for pad, not for person, so not an intentional tort. **No L**

**Minimum Requirements**

* **Leichtman v. WLW Jacor Communications (Ohio App. 1994):**  Smoke particulates count **L**
* Light doesn’t constitute contact according to E&E
* **Morgan v. Loyacomo (Miss. 1941):** Mississippi court affirmed that knocking or snatching anything from a plaintiff’s hand or touching anything connected with his person, when done in a rude or insolent manner, is sufficient” even if the body is not touched. **L**
* **Wallace v. Rosen (Ind. App. 2002):** Teacher moved parent’s shoulders during fire drill; Found for defendant. Ordinary contacts which are customary and reasonably necessary to the common intercourse of life have assumed consent. The test is what would be “offensive to an ordinary person not unduly sensitive as to personal dignity.” **NL**
* R2 18 Comment C: Bodily contact is not necessary – **anything connected to his/her person counts**. Throwing a substance or object upon a person also counts.
* R2 18 Comment D: It is **not required that the person know that the contact is offensive** at the time of contact – e.g. a non-consensual kiss when someone is asleep

**Trespass**

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he **intentionally**

a) enters land in the possession of the other, or causes a thing or a **third person to do so** (if you tell someone to trespass with the intent that they trespass, this counts), or

b) remains on the land, or

c) fails to remove from the land a thing which he is under a duty to remove

Comment I: This includes throwing items on the land, such as trash, or violated the air space of another, such as through a kite.

* **Strict liability tort: No intent is required to invade interest (essentially similar to single intent jurisdiction in battery)**
* Trespass also has no harm requirement: trespass may be basis for injunction; there could be punitive damages for the trespass for intentionally causing harm
* Invasion can be by person or property
* **At some point, likelihood of an occurrence becomes substantially certain enough to constitute intent cf. Madden (though no battery liability for bus fumes, lack of intent was not the reason). Indifferent to occurrence may also suffice. See Pegg (hunting dogs). In Malouf (golf balls), factfinder apparently deemed evidence of certainty insufficient.**
* Liability even for mistake; no liability for accidental intrusions
* **Van Alstyne v. Rochester Telephone Corp** represents complicated case: Telephone company’s cables in an easement leak lead and kill two prized dogs. The defendant lacked a right to leave articles or substances upon the premise. Even if it was unintentional – even if the damages are consequentialist as opposed to direct. Conflicts with R2 166 unless leakage was virtually certain. (exceeding mandate for permission on land) **L**
* You might sue for small trespass to avoid creating an easement or adverse possession.
* If someone is renting the land, that person gets trespass; the owner will only get trespass damages if damages happens to things that the owner has an interest in

**Consent**

**Types of Consent**

1) Express

2) Conditional Consent (ambiguity about accidentally exceeding authority)

3) Implied in Fact

4) Implied-in-Law consent, which is more “fictitious” – a contact that is neither foreseeably harmful nor offensive to a reasonable sense of dignity

**Variations on Consent**

* **Mohr v. Williams –** no consent for different surgery **L**
* **Grabowski v. Quigley­** – no consent for different doctor **L**
* **Brzoska v. Olson** – objective medical standards, not easily offended sensibility (HIV) **NL**
* **Cohen v. Smith –** patients have right to refuse medical care if clashes with beliefs **L**
* **Werth v Taylor –** consent implied in law based on circumstances (JW – life or death) **NL**
* Consent to Illegal Acts –**McNeil v. Mullin** (consent to act is not a defense) (**Majority** Rule); **Hart v. Geysel** (consent to act is defense) – R2 892C; R2 892A agrees as long as the terms of the fight do not change
* Drunken Consent: **Hollerud v. Malamis** – jury determination if consent was impaired **L**

**Consent by Fraud**

**R2 892B Consent under Mistake, Misrepresentation, or Duress**

1) except as stated in subsection 2, consent to conduct of another is effective for all consequences of the conduct and for the invasion of any interests resulting from it.

2) If the person consenting to the conduct of another is induced to consent by a substantial mistake **concerning the nature of the invasion of his interests or the extent of the harm to be expected from it** and the mistake is known to the other or is **induced by the other’s misrepresentation**, the consent is not effective for the unexpected invasion or harm.

Step 1: Is the behavior socially desirable or minimally invasive?

Step 2: If yes, the behavior is labeled collateral under §57 and not a substantial mistake as to the nature of the invasion or the extent of the harm under §892B.

Step 3: If no, the behavior is labeled a substantial mistake as to the nature of the invasion or the extent of the harm under §892B.

**Perhaps the best way to reconcile them is a general social policy approach. A court is less likely to find battery (or trespass) after a fraudulently obtained consent if the deception serves some socially desirable purpose (e.g. test renters) or where the invasion is minimal (e.g.a faith healer’s non-intimate grasp)**

* **Neal v. Neal** – husband misrepresented infidelity – potential invasion of STDs **L**
* **Desnick v. ABC** – investigative reporting on doctor’s office socially useful and minimally invasive (office, not home) **NL**

**Trespass to Chattel / Conversion**

**Description**: In a conversion action, the plaintiff seeks damages, not the return of the property. A plaintiff who instead wants the property returned brings a suit for replevin (which can include also both replevying the property and award damage for the time of dispossession). Acts that are outrageous, greatly damaging, in bad faith are conversions; more innocent invasions that cause minimal harm are trespass to chattel – there is overlap between the two.

Reason for labeling trespass even though there is no liability is to give defense against battery (privileged battery) to reclaim the chattel.

Trespass is a strict liability tort; innocent mistake can create a trespass to chattel but liability is only created for the harm

**R2 217 Ways of Committing Trespass to Chattel**

A trespass to a chattel may be committed by **intentionally**

a) dispossessing another of the chattel, or

b) using or intermeddling with a chattel in the possession of another

**R2 218 Liability to Person in Possession – Limits to Liability (different from Trespass)**

One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if,

a) he **dispossesses** the other of the chattel, or

b) the chattel is **impaired** as to its condition, quality, or value, or

c) the possessor is **deprived** of the use of the chattel for a **substantial time,** or

d) **bodily harm** is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.

**Conversion**

**R2 222A What Constitutes Conversion (more complete invasion of property)**

1) Conversion is an **intentional** exercise of dominion or control over a chattel **which so seriously interferes** with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel. (but remember *Vaughn-Ford* could be a less serious one that still qualifies)

2) In determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important:

a) the extent and duration of the actor’s exercise of dominion or control

b) the actor’s intent to assert a right in fact inconsistent with the other’s right of control

c) the actor’s good faith

d) the extent and duration of the resulting interference with the other’s right of control;

e) the harm done to the chattel;

f) the inconvenience and expense caused to the other

**Conversion and Replevin**

* **Russell-Vaughn Ford, Inc. v. Rouse (Ala. 1968)** –Liability was found because it **deprived the owner of his right to the property** (even though just for a few moments). Punitive damages can occur in really bad faith. **L**
* You can get both remedies

**Exceeding Authority and Mistake**

* **Palmer v. Mayo (Conn. 1907**) (horse used for pub crawl) **L**
	+ Conversion and strict liability (i.e. despite care taken with invaded property) **if defendant’s action was intentional and exceeded authority** (single-intent approach); reason to require double-intent if you did not want to impose conversion liability for what was a good faith action that exceeded authority; the fact of taking proper care when exceeding authority is not a defense;
* **Wiseman v. Schaffer (Idaho 1989)** (accidentally towed truck) and **Kremen v. Cohen (9th Cir. 2003)** (released domain name): conversion and strict liability despite unintentionally exceeded authority **L**
	+ See **Restatement § 244**
	+ Kremen: **Intangible property is capable of conversion**.
	+ Makes sense to put the burden on the person who is most easily able to avoid the mistake and incentivize due diligence on the part of the companies (despite the good faith factor)
* **Spooner v. Manchester****(Mass. 1882)**(no conversion for horse severely injured on unintended detour) **No L**
	+ Businesses are better situated to protect the owners of property than a private citizen on a personal matter

**Innocent Customers**

Generally true that a thief cannot pass to title to a property – we want to incentive people to avoiding harm and doing due diligence before purchasing – although the person who is protecting the item could have also prevented the loss (usually for replevin)

Exception to ordinary rule that even a good-faith purchaser directly or indirectly from a thief is subject to conversion liability

* **O’Keefe v. Snyder (N.J. 1980**) – thief cannot pass title even though defendant bought them not knowing they were stolen - nemo dat. **L**
* **Phelps v. McQuade (N.Y. 1917) -** When a sale happens because of fraud, the title is voidable but unless actually voided by the victim, the title passes to the imposter and it can be passed on to an innocent purchaser. Then, the purchaser is immune from a claim of conversion. **No L**
* **Stolen Money Purchases: Kelly Kar Company v. Maryland Casualty Co (Cal. App. 1956**): California Supreme Court found that while stolen title cannot be passed, money can be. Moreover, title of car purchased with money while voidable, did pass to him. **No L**
* **Relative Title: Anderson v. Gouldberg (Minn. 1892):** Thieves get relative title over other thieves.

**Trespass to Chattels: Frontiers of Liability**

* **Moore v. California (Cal. 1990):** No conversion against good-faith purchasers of plaintiff’s cells so medical research isn’t impaired. **NL**
* **Compuserve v. Cyber Promotions (S.D. Ohio 1997):** Trespass on chattels for consuming computing resources. Trespass comes when the right to possess has not been interfered with **but damage has been caused**. **L**
* **Glidden v. Szybiak (N.H. 1949)**: An action for trespass to chattels could not be maintained in the absence of some form of damage (in this case, grabbing the dog’s ears produced no damage to the ears). **No L**

**False Imprisonment**

§ 35 False Imprisonment

1) An actor is subject to liability to another for false imprisonment if

a) he acts **intending** to confine the other or a third person **without boundaries fixed by the actor**, and

b) his act directly or indirectly results in such a confinement of the other, and

c) the other is conscious of the confinement or is harmed by it

* See also R2 36 defining confinement as “**complete**” and R2 38 which includes “**apparent” barriers**
* False belief that you have the right to imprison someone is not a defense.
* Locking someone outside of your home is not false imprisonment
* Arrests for felonies allowed (if you are right); misdemeanors are more unclear)
	+ Re: Drunk Driving: **State v. McAteer (S.C. 2000)** – not a legal arrest **L**; **People v. Ciesler (Ill. App. 1999)** – legal arrest **No L**
* **Shoplifters**: Shopkeepers at common law do not have the right to detain suspected shoplifters because it is a misdemeanor. **They have a limited right to use reasonable force to recover stolen chattels but if they are wrong, the actor is liable for damages no matter how reasonable the mistake.** Many states have passed shopkeeper laws that allow limited detention in a reasonable manner for a reasonable amount of time.
	+ **Atlantic & Pacific Tea Co. v. Paul (Md. App. 1970)** – store employee charged with false imprisonment **L**; **Gortarez v. Smitty’s Super Valu (Ariz. 1984)** – reversed directed verdict for store and security guard who used a chokehold to detain shopper falsely accused of shoplifting **L**
* **Police Arrest: Baggett v. National Bank & Trust Co –** false arrest allowed because it was done by police and based on accurate information **No L**
* **Persuading Police:** **Melton v. LaCalamito –** convincing police w/ false information **L**
* **§ 45 Instigating or Participating in False Imprisonment: Comment c:** If the confinement is unprivileged, **the one who instigates it is subject to liability to the person confined for the false imprisonment.** Instigation consists of word or acts which direct, request, invite, or encourage the false imprisonment itself. It is not enough for instigation that the actor has given information to the police about the commission of a crime, or has accused the other of committing it, **so long as he leaves to the police the decision as to what shall be done about any arrest, without persuading or influencing them**. Likewise, it is not an instigation of a false arrest where the actor has requested the authorities **to make a proper and lawful arrest**
* **Malicious Prosecution:** If an arrest is made with a warrant, there can be no false imprisonment claims but could still be liable for malicious prosecution. **False imprisonment claims arise when the arrest is made without a warrant**

**Assault**

§ 21 Assault

1) An actor is subject to liability to another for assault if:

a) he acts **intending** to cause a harmful or offensive contact with the person of the other (attempting a battery) or a third person, or an **imminent** apprehension of such a contact (an unreasonable apprehension of harm), **and**

b) the other is thereby put in such imminent apprehension

* **To make the actor liable for an assault, the actor must have intended to inflict a harmful or offensive contact upon the other or to have put the other in apprehension of such contact.**
* **Brower v. Ackerley (Wash. App. 1997)** Threatening phone calls are not enough; Restatement affirms threat must be of an imminent nature. Near future is not enough – must be the **imminent** future. **NL**
* **Bennight v. Western Auto Supply Co. (Tex. App. 1984)**: The court found that the intentionally placing Cathy in fear of being attacked by the bats was an assault and so he is responsible for the consequences of that action, **even if he did not intend the specific harm. L**
* **Langford v. Shu (N.C. 1962):** Pranks count as intended apprehension. **L**
* **The Restrained Swordsman**: **Tuberville v. Savage (K.B. 1669):** Putting on hand on sword is not enough, especially if someone says they are not going to fight. **NL**
* **Newell v. Whitcher (Vt. 1880)** – man in blind woman’s room asking for sexual favors; insinuation of harm is sufficient for assault **L**
* Knowledge of assault is required (or else you do not have the apprehension)

**Outrage**

**§ 46 Outrageous Conduct Causing Severe Emotional Distress** (does not include mean or offensive comments)

1) One who by extreme and outrageous conduct **intentionally or recklessly** causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

a) to a member of such person’s immediate family who is present at the time, whether or not such distress results in bodily harm, or

b) to any person who is present at the time, if such distress results in bodily harm.

* **Roberts v. Saylor (Kan. 1981)** Doctor angry at lawsuit tells patient he doesn’t like her: court affirmed **right to insult and hurt someone’s feelings**. **NL**
* **Greer v. Medders (Ga. App. 1985)**: Mean doctor disproportionate response **can be outrageous**. L
* **Muratore v. M/S Scotia Prince (1st Cir. 1988):** Victim made clear photos were causing emotional distress – once emotional distress known, tortfeasor is on notice. Court also found that “severe emotional distress” can be found from the defendant’s outrageous conduct alone. **L**
* **Pemberton v. Bethlehem Steel Corp (Md. App. 1986):** If defendant has thick skin and isn’t actually distressed, no outrage. **No L**
* **Figueiredo-Torres v. Nickel (Md. App. 1991)**: Psychiatrist (sleeping with wife) knows that victim had low self-esteem. **L**
* However, courts can sometimes make a distinction between loss of affection from a plaintiff’s spouse and loss due to intentionally inflicted severe emotional distress **where the adultery was the means by which he inflicted this emotional distress**. **Spiess v. Johnson (Oregon 1988).** Claims of finding out that someone is not the father can sometimes be **IIED (G.A.W., ILL v. D.M.W. (Minn. App. 1999**)) and sometimes they do not **(Doe. V Doe) (Md. App. 2000)**). **Mixed L**
* **Hustler Magazine v. Falwell (1988)** – Public figures require false statement with actual malice **NL**
* **Van Duyn v. Smith (Ill. App. 1988) –** Private figures get protection from public-affecting decisions; posters can be seen as part of outrage. **L**
* **Walko v. Kean College (N.J. Sup. 1988)**:College admin. parody – can be **limited-purpose public figures**. **NL**

**Defense of Person and Property**

R2 63 Self-Defense by Force not Threatening Death or Serious Bodily Harm

(1) An actor is privileged to use **reasonable** force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he **reasonably believes** that another is about to inflict intentionally upon him.

(2) Self-defense is privileged under the conditions stated in Subsection (1), although the actor correctly or reasonably believes that he can avoid the necessity of so defending himself, (a) by retreating or otherwise giving up a right or privilege, or (b) by complying with a command with which the actor is under no duty to comply or which the other is not privileged to enforce by the means threatened.

Comment l. **Actor’s Duty to Avoid Force**: The actor cannot reasonably believe that the use of force is necessary until he has exhausted all other reasonably safe means of preventing the other from inflicting bodily harm upon him.

Comment m: **Actor’s Duty to Retreat**: The actor, if he reasonably believes that he is threatened with the intentional imposition of bodily harm, or even of an offensive contact, may stand his ground and repel the attack by the use of reasonable force, which does not threaten serious harm or death, even though he might with absolute certainty of safety avoid the threatened bodily harm or offensive contact by retreating.

R2 65 Self-Defense by Force Threatening Death or Serious Bodily Harm

1) Subject to the statement in Subsection (3), an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he **reasonably believes** that(a) the other is about to inflict upon him an intentional contact or other bodily harm, and that(b) he is thereby put in peril of death or serious bodily harm or ravishment, which can safely be prevented only by the immediate use of such force.

(2) The privilege stated in Subsection (1) exists although the actor correctly or reasonably believes that he can safely avoid the necessity of so defending himself by(a) retreating if he is attacked within his dwelling place, which is not also the dwelling place of the other, or(b) permitting the other to intrude upon or dispossess him of his dwelling place, or(c) abandoning an attempt to effect a lawful arrest.

(3) The privilege stated in Subsection (1) does not exist if the actor correctly or reasonably believes that he can with complete safety avoid the necessity of so defending himself by (a) retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling of the other, or (b) relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest.

**Adler Rule:** Defense of Person or Property: one who commits what would otherwise be a battery or conversion against another may have an affirmative defense that the invasion, while intentional, was justified to repel a threat

* In public, you don’t have privilege if you can retreat for both demand and threat. In house, you have to comply with demand, but don’t have to retreat for threat.
* § 65, comment i - One attacked in his dwelling place may await his assailant and use deadly force to repel him though he could prevent the assailant from attacking him by closing the door and so excluding the assailant from the premises. But the mere fact that a man is threatened with an attack while he is within his own dwelling place does not justify him in using deadly weapons if he can avoid the necessity of so doing by any alternative other than flight or standing a siege. A man can no more justify using deadly weapons when he is in his own home than he can when he is upon a public highway, if he can avoid the necessity of doing so by complying with a demand, other than a demand that he shall retreat, give up the possession of his dwelling or permit an intrusion into it, or abandon an attempt to make a lawful arrest.
* **Katko v. Briney** (trap gun): Not reasonable to inflict serious bodily harm in defense of property. **L**
* **Wright v. Hafke** (armed robbery – shot in back): Court argues that for more serious felonies, such as robbery, the use of a firearm may be justified. The court argued that since an assault and robbery was committed in an instantaneous moment, firearm was justified. **NL**
* **Crabtree v. Dawson** (mistaken identity): If the defendant believed that it was necessary, in the exercise of **reasonable** judgment in order to defend himself and he used no more force than was necessary, then he is excused on grounds of self-defense **NL**
* **Woodbridge v. Marks** (watchdogs): dogs provide more notice and are a reasonable way to defend property and less likely to cause harm **NL**
* **Hull v. Scruggs** (egg-sucking dog): can destroy more valuable property against future property **NL**
* **Kershaw v. McKown** (dog v. goat): cannot destroy more valuable property **L**

**Private Necessity**

* The combined rule of **Ploof-Vincent** is that the property owner in private necessity has the privilege of trespassing as long as it is higher value, but it is responsible for any damages as long as the property is not attacking the privileged trespass property; if owner repels privileged trespasser, liable for the damages.
	+ One could argue that a reasonable decision to protect property is itself privileged (e.g. repelling someone from docking because you reasonably think they lack a necessity privilege). (In some circumstances, acting claiming a privilege – you act at your own peril; sometimes your privileged as long as it is reasonable, even if you are wrong)

**Public Necessity**

* Life or property beyond that belonging to the defendant
* R2 196: One is privileged to enter land in the possession of another if it is, or if the actor **reasonably believes** it to be, necessary for the purpose of averting an imminent public disaster.
* R2 262: One is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if the act or is **reasonably believed** to be necessary for the purpose of avoiding a public disaster.
* Split jurisdiction about whether reasonable mistake of public necessity qualifies (196, 262 allow reasonable mistake; **Struve v. Doge** (believed fire in apartment) does not allow reasonable mistake) **L**
* Mouse’s Case: No damages for private actors (incentivize public necessity by private actors)
* Surocco v. Geary: No damages, even for property that wouldn’t have been destroyed
* Hole in Law: Not incentivized to blow up your own house, no damages to you
* Split on damages if the government acts
* **Wegner v. Milwaukee Mut. Ins. Co. (Minn. 1992):** municipality owes damages under “takings” from eminent domain **L**; **Customer Company v. City of Sacramento (Cal. 1995)** a municipality is not liable for damages under exercises of the state’s police power **NL**

**Discipline**

* An effective modern-day discipline defense, if any, may otherwise be explained such as where a football coach lightly slaps a player’s helmet after a missed tackle to get his attention: arguably an objectively **inoffensive** contact (inoffensive might be doing the work) – football is a violent sport and the custom may be such type of contact

**Overall Negligence Standard Framework**

* Generalized or individualized standard
	+ Characteristics of reasonable person
* Precaution needed to adhere to standard
	+ *De Novo* determination of Reasonable Person’s Precaution under relevant circumstances (emphasis on cost-benefit analysis, driven perhaps by the Golden Rule)
	+ Customary Precaution of Reasonable Person (typically follows generalized standard); or
	+ Negligence Per Se (did the actor deviate from a statute or regulation)
	+ Res Ipsa Loquitur

**Negligence – Individual Characteristics**

Elements of Negligent Tort

* Defendant’s **duty** to take reasonable (i.e. non-negligent) precaution at least in part for benefit of plaintiff
* **Breach** of that duty both factually and proximately **causes** plaintiff’s **injury**

**Different Approaches to Reasonable Person Standard**

Courts will differ – some will adopt R2, some will adopt R3, and under both, courts will have different appetites for individualized vs. generalized reasonableness

R3’s individual approach to reasonableness seems morally and economically acceptable under three conditions

* Impropriety of strict liability
* Confidence in activity-level determination
* Evidentiary transparency

R2’s generalized standard will be explained by a perceived failure of one or more of these conditions.

Accident Illustrations: Possible Bases for Liability

* Normal driver: Reasonableness has the same incentives as strict liability without some of the downsides
	+ Strict liability is only really used when people don’t trust the administration of the negligence standard
	+ General case is that we do not have strict liability to most activities (some exceptions where there is a negligence standard but it is really applied as strict liability)
* Blind driver, acting reasonable
	+ Unreasonable decision to engage in activity: “Infirmities [present] a reason why defendant should refrain from operating an automobile.” *Roberts v. Ring*
	+ Negligent for deciding to operate the vehicle
	+ Economists refer to such decisions as an **unreasonable “activity level”**
* Physically Able Driver falls into (what he claims is an) unexpected emotional trance
	+ Non-diagnosed mental incapacity will rarely be a basis for claiming that behavior was reasonable
		- Concern about proof: diagnosed medical standard might be proof that someone behaved reasonably
		- Possible that “trance” might be too easily fabricated and unrebuttably unreliable
	+ Also, sliding scale standard may be so malleable as to be “no standard at all” *Roberts* – problem with individualizing mental states
* **Evidentiary Transparency is the risk of fraud or difficulty discerning and distinguishing individualized standard as a general concern**

**Test Cases**

**Williams v. Hays**

* Captain fights valiantly to save ship from storm, then becomes exhausted and irrationally allows the ship to be wrecked.
* 1st Holding: Even one who lacks mental competence must meet **general standard** of care, here out of fairness to the plaintiff (pocket of strict liability) and to prevent fraud (lack of evidentiary transparency). **L**
* 2nd Holding: Not necessarily negligent to be driven insane (implicitly embraces all three conditions for individualized standard). **NL**
	+ Doesn’t want to impose SL on a brave captain
	+ Not worried that jury can determine concerns over activity level (should someone be at the helm for 48 hours)
	+ Jury can determine if he had a mental break (evidentiary transparency)

**Cases**

* **Intelligence: Vaughan v. Menlove (C.P. 1837)** – Defendant built a haystack near the edge of his property. Defendant built a chimney through the haystack – the stack burst into flames. Court rejects including intelligence as an individualized circumstance **given evidentiary difficulty of proving intelligence**. **L**
* **Mental Disability: Lynch v. Rosenthal (Mo. App. 1965)** Mentally disabled plaintiff wasn’t warned about husk roller danger; **Court of appeals argued** **plaintiff was not contributorily negligent as a matter of law** because he could have understood a warning but not the significance of the machinery. **NL for plaintiff; L**
* **R2 289 Comment N: Inferior Qualities:** If the actor is a child, allowance is made for his inferior qualities of mind and body, and the standard becomes that of a reasonable man with such qualities. If the actor is ill or otherwise physically disabled, allowance is made for such a disability. Except in such cases, the actor is held to the standard of a reasonable man as to his attention, perception, memory, knowledge of other pertinent matters, intelligence, and judgment, even though he does not in fact have the qualities of a reasonable man.

**Individualized Characteristics**

* **Language: Weirs v. Jones County (Iowa 1892)** Plaintiff who couldn’t read English; court found that precautions taken by the town were reasonably sufficient to notify persons exercising ordinary and reasonable care that bridge was condemned. **NL**
* **Religion: Friedman v. State (N.Y. Cl. 1967)** Plaintiff, stuck on chair lift, dropped to the ground b/c of religious convictions to not be alone with man overnight – no contributory negligence. **NL for plaintiff; L**

**Superior Qualities**

* **Fredericks v. Castora (Pa. App. 1976)** Truck Driver’s experience in accident not a relevant factor – too difficult to prove experience. **NL**
* Why do you suppose Rest. 289, comment n, endorses Vaughn (liability despite incompetence) while illustration 12 (doctor fails to diagnose fever) and 298, comment d (“**superior qualities and facilities**) apply higher standard despite Fredericks?
	+ Evidence: regarding Illustration 12, **medical license provides evidentiary standard** (no evidence for lower intelligence)
	+ Liability: discomfort with error that favors defendant, i.e. **preference for mistaken liability** (and thus a pocket of strict liability) than mistaken no-liability (and perhaps in Fredericks, there is **just not enough proof of higher ability** from driving experience, but in cases where you can get some proof, the courts will seize on this to break ties)

**Physical Infirmities – Reasonable Effort**

* **Deafness: Kerr v. Connecticut Co. (Conn. 1928):** Deaf man didn’t look back before crossing tracks, didn’t hear horn, run over by trolley. Plaintiff was contributorily negligent. Found that Kerr, as a deaf man, needed to exercise more reasonable care near a trolley line and did not look back to see what was coming **NL. -** Negligent despite **individual standard**, applied given **evidentiary transparency of demonstrable infirmity**
* **Blindness: Davis v. Feinstein (Pa. 1952):** Plaintiff, a blind man, was using cane but fell through an open cellar door in front of the defendant’s furniture store. Plaintiff sued for negligence and won a jury verdict; trial court rejected defendant’s claim that the plaintiff should he held contributorily negligent as a matter of law. Court believed that the blind man made a **reasonable effort**. **NL for plaintiff**; **L; individualized standard, not unreasonable to walk outdoors – no concern about activity level or evidentiary transparency**

**Age**

* **Purtle v. Shelton (Ark. 1971)** Holding: A defendant’s age should only be taken into account if the activity is dangerous and normally carried out by adults. Hunting is reasonable for children.
	+ Child hunting is split along lines about whether a generalized standard should be applied
	+ Majority: Activity was appropriate even for a child unable to exercise level of care expected of an adult, so court applies **individualized standard** for what it sees as a demonstrable, assessible condition (age): i.e. **no desire for strict liability** or concern over activity level (**it’s reasonable for a child to be hunting**) or evidentiary transparency (**age cannot be faked and feels confident in measuring ability at age**)
	+ Dissent disagrees and would impose a generalized standard: 1) **presumably out of desire for strict liability** (if there is a failure to meet adult standard) 2) out of belief that it is **negligent to hunt unless able to meet standard of average adult** (activity level) 3) **might apply a generalized standard if we’re afraid that a judge/jury will forget to question reasonableness of child hunting when applying individual standard** (theoretically could have endorsed an individualized standard – if it believed that child would not be found negligent only if it had exceptional abilities)
	+ Generalized standard and individualized standard that contemplates activity level concerns can achieve the same outcome – courts usually favor a generalized standard when it doesn’t trust fact finder to be able to address activity level concerns

**Four Reasons to Use a Generalized Standard with Age**

* Pocket of Strict Liability (you believe the activity is reasonable but kids (even if acting reasonably for their age) should be held accountable if they cannot meet the adult reasonable standard)
	+ You also believe that very few children can meet this standard and so want to disincentivize the behavior
	+ (Could also be because you need to break a tie between two blameless actors)
* Activity-Level: Engaging in activity is negligent if cannot meet adult standard (only children who can meet adult standard can reasonably hunt – to hunt otherwise is unreasonable)
* Difficult for fact-finder to determine if the activity should be engaged in or Jury/Judge will forget to question reasonableness of activity when applying individual standard (they will forget to ask whether it is reasonable for a child to hunt in the first place)
* Difficult to determine with evidentiary transparency if the person is behaving reasonably with an individualized determination
* **Roberts v. Ring (Minn. 1919)** 77-year old hit 5-year old – no individual standard for 77-year old but individualized standard for 5-year old. **L**
* **Dellwo v. Pearson (Minn. 1961).** Minor drove powerboat over fishing line. When children do child-like activities (riding a bike), they should be held to that standard, **whereas when operating a motor vehicle, airplane, or powerboat**, a minor is held to the same standard of care. When a party can anticipate that the other party might use a less reasonable standard of care (such as children on bikes), they can change their actions. Much more difficult when reasonable person cannot anticipate whether the other person can fulfill a reasonable standard of care. **L**
	+ Generalized standard where activity itself is **inappropriate for one who is too old** **or too young** to attain an average adult standard; here equivalent to an individualized standard where **incompetent actor** is deemed negligent **for failure to refrain from activity**
	+ It might be that it is an activity is appropriate for children, and that the child behaved reasonably under its circumstances, **but you want to impose strict liability** because the causer bears the loss between two blameless actors

**Dunn v. Teti (Pa. App. 1979**): Defendant swung a stick negligently, causing injuries to plaintiff. Both parties were six years old. **Cavanaugh Dissent**: Reasonable person test of that person’s age already accomplishes this goal rather than presumption. **Most courts take the Cavanaugh dissent approach, such as in Standard v. Shine (S.C. 1982), but most courts will say that very young children (usually under 5) are incapable of negligence.** Majority in this case finds that below 7 is incapable; 7-14 presumed incapable of negligent; above 14 presumed negligent.

**Negligence – Relevant Circumstances**

Remember to consider lower Bs in Hand Formula Analysis

Can always argue **risk aversion** despite Hand Formula

Takeaway

* While economic analysis may be relevant to a determination of reasonableness, and while a cost-benefit analysis of an untaken precaution is an inherent part of such economic analysis, the Hand formula is insufficiently precise in its simple comparison of B to PL for a single level of precaution
* Moreover, even well-designed real-life calculations can be too uncertain to be useful
* Courts often do more sophisticated analysis of other possibilities (especially in product liability cases) thought not always
* As a heuristic, there is little doubt that the Hand formula and the economic analysis it reflects remain an active part of the law. As provided by **R3 3 Negligence**:
	+ Formula is B < PL
	+ Primary factors to consider in ascertaining whether a person’s conduct lacks reasonable care are the foreseeable likelihood that the person’s conduct will resulted in harm [P], the foreseeable severity of any harm that may ensure [L], and the **cost of the** burden of precautions to eliminate or reduce the risk of harm [B]
* *Adams* (trolley wire) - because B is so high and the P is so low, it was not negligent on the part of the trolley
* *Bolton* (cricket fence) – extraordinary precautions are not necessary where L is not high
	+ The system does not hold people liable for injury that they didn’t cause even if they were negligent – fear of over-incentivizing caution
	+ For product liability, every possible option is considered; in the real world, marketplace might only offer a couple of different options (where it would be prohibitively more expensive to build a custom version)
* *Grimshaw* – companies will be punished if they use the Hand formula to only account for the cost to them, not the total cost
* *The Margherita* – suffering might not be as high an L as permanent injuries or damage
* Machines with percentages will provide better defense than “good habits” defense because of evidentiary transparency

**Hand Formula**

1) Some courts use the Hand formula in appeal sua sponte. (Michigan and Louisiana)

2) Some use it if the appeal is couched in cost-benefit claims.

3) Some ignore it and dispose of it using the reasonable person standard.

* **United States v. Carroll Towing Co. (2d Cir. 1947):** Question of who was to blame: company for improperly tying the boat or the company for not having its watchmen aboard.

Three variables to determine if an owner is liable for its own runaway boat: 1) probability that it will break away 2) the gravity of the resulting injury 3) burden of adequate precautions. P is probability, L is injury, burden is B. Formula is B < PL. Probability depends on weather and how crowded the area is. Bargee had no excuse for his absence in the court’s opinion and was away for 21 hours. Given that it was a bustling port during war-time, it should have had someone aboard during the day time.

* + L includes not just the accident that occurred, but other accidents that could have occurred – there could be lots of PLs which should be compared against the single B
	+ PL represents Expected value (weighted average value)

**Hand Formula and Risk Aversion**

* Railway forgoes a spark guard that would have cost $11 and would have eliminated a 10% chance of burning down neighbor’s $100 field.
	+ No negligence on Hand Formula because would deemed reasonable to forgo a precaution where B is greater than (0.1)($100)
	+ But when risk aversion is accounted for, forgoing the precaution could well be unreasonable
	+ That said, at least for convenience, **risk aversion is typically ignored. But it still should be argued since the Hand Formula is not followed rigidly.** Can usually use for arguments where the defendant engaged in a behavior that the plaintiff would be risk averse to.
* **Adams v. Bullock (N.Y. 1919):** Boy electrocuted on trolley wires when playing on bridge above it. Trolley company took reasonable precautions to prevent accidents and this accident was not foreseeable, complicated by the inability to insulate trolley wires. **NL**
	+ Use hand formula without using an algebraic formula
	+ The court went to great length to explain **how unlikely it was** for someone to come into contact with the wire (P)
	+ The court also notes that it would have **been very expensive** (doesn’t use the word expensive) to prevent this accident – that the trolley service probably would not be able to be offered (B)
	+ The court doesn’t mention the L because it’s not in dispute (it’s quite high)
	+ But because B is so high and the P is so low, it was not negligent on the part of the trolley
	+ Also, not that B is impossible – they could have stopped using the trolleys
* **Bolton v. Stone [K.B. 1951]**: A cricket ground need only take reasonable precautions – it does not need to take extraordinary precautions for an injury that is not serious. 7-foot fence was sufficient under the Hand formula. **NL**
	+ One must analyze the marginality of a precaution relative to costs within the Hand Formula
	+ The system does not hold people liable for injury that they didn’t cause even if they were negligent – fear of over-incentivizing caution
	+ For product liability, every possible option is considered; in the real world, marketplace might only offer a couple of different options (where it would be prohibitively more expensive to build a custom version)
* **Eckert v. Long Island R. Co. (1871)** Plaintiff pushed child out of way of train, dying. Defendant argued contributory negligence. Saving another life’s does not constitute contributory negligence, **whereas only putting one’s self in a position for ordinary reasons or for defense of property or for rash reasons will constitute contributory negligence**. **L**
	+ Under the Hand Formula, the risk was reasonable because the value of the collateral object and the great utility and necessity of the risk counterbalanced the magnitude of the risk and the principal value of the object.
* **The Margharita (5th Cir. 1905)** – Seaman suffered because it took longer to find a port to operate for surgery. Holding: If no permanent disabilities and injuries result from the failure to put into port, then a master is not obligated to put in at port even if suffering will be prolonged. **NL**
* **Davis v. Consolidated Rail Corp**. (7th Cir. 1986): Train inspector didn’t put up warning, but crew didn’t check train nor blow horn/ Train severed both legs. Jury found for train inspector, but also found 1/3 contributory negligence. **L**
* Companies have been punished when using the Hand formula incorrectly to decide whether to make products safer. **Grimshaw v. Ford Motor Co. (Ct. App. 1981)**
	+ We are more okay with a company offering a suite of products that a consumer can choose from – and all companies could build safer cars than they do – but they are responding to the market
	+ Company was not calculating cost vs. benefit – **it was comparing cost vs. damages would have to pay**
	+ **Damages might be undercompensatory; some people might not sue**
	+ So they are negligent for not weighing the cost/benefit properly (undervaluing human life or the probability)
	+ And a proper cost benefit analysis takes all potential injuries into account explains why punitive damages were appropriate (they only weighed the cost to them, not the true cost – trying to get out of the full cost)
	+ It’s okay when the costs of the precaution are weighed against the probability of possible injury and harm (e.g. a driver choosing to drive 55 mph instead of 40 mph)

Economic Analysis of **Durable Precaution** Habit

* Given that perfection is prohibitively costly (infinite B), why, do you suppose, an errant surgeon is unlikely to prevail with a “good habits” defense while the manufacturer of a well-designed but fallible sponge-counting machine will escape liability?
	+ **A lack of evidentiary transparency** for surgeon’s claim (like a defendant’s claim of low intelligence); more evidence, perhaps in manufacturer’s defense

**Negligence – Custom and Medical Malpractice**

* In general, while a defendant’s failure to follow applicable custom serves as a plaintiff’s sword, the defendant’s adherence to applicable custom does not serve symmetrically as a defendant’s shield, and thus invites de novo analysis.
* Custom isn’t defense because **whole industry might be negligent** (*T.J. Hooper, MacDougall*); but see *Ellis* where custom has never produced injury
* Custom may be defense in **contract** situations (sufficient incentives exist), but if market failure (b/c features is not salient feature), then contract might not be a defense (*Rodi*)
* Custom can be a viable defense in professional (medical) malpractice cases b/c incentive not to skimp on care (customers will pay more for this), there’s evidentiary transparency, and we don’t trust courts to make reasonableness determination; but where features are less robust (informed consent), courts will be more skeptical of custom
	+ Most courts require **national standard of care** (*Brune*) even where national training might be not be available (concern about activity level – a doctor without that training should not practice); But see *Johnson* (fear of not providing services at all) and *Gambill* (similar community rule - minority)
	+ Even where states have announced national/state-wide standard of care, will make exceptions when local custom makes more sense (*Cook*)

Sword vs. Shield

* Why the asymmetry?
* **T.J. Hooper** – possible that the entire industry is negligent and lags in adopting necessary precaution;
* **Rodi** – because the plaintiff is a customer and has a contractual relationship, there might be an agreement about what the custom is and there is market incentive for the company to take the best precautions (unless there is a market failure) (e.g it may not be transparent to the customer what precautions are being taken) – if contract defeated negligence claim, then there would be no medical malpractice
* Straightforward rule for strangers (don’t trust the market to produce innovation and precaution since no incentive for customers), but when the defendant is in contractual privity with the plaintiff, the fear of lag – indeed, tort liability itself – presupposes a market failure

Exceptional Use of Custom

* In **Rodi**, Posner observes that industry custom cannot be trusted to determine minimum reasonable care for the benefit of strangers but relies on such custom to allocate responsibility between defendant market-participants.
* He expects customers to implicitly demand of the industry (and thus the two defendants) an **efficient combination of the two services.**
* If the **market for a service is sufficiently robust**, where that features is transparently known (e.g. radios on tugboats) defense of adherence to custom could prevail.
* Ordinarily though, as **TJ Hooper**, suggests, defendants cannot use adherence to custom as an absolute shield even against plaintiffs who are customers (if we’re concerned about a market failure due to transparency or inability of customer to discern risks).

**Custom as no defense**

* **The T.J. Hooper (2d Cir. 1932):** Tugboats lost coal barges because it didn’t have radios to hear weather. Holding: It is reasonable to expect a tugboat to be equipped with a radio. In most cases, custom is a reasonable guide for reasonableness. Believes that having this information is imperative for a tugboat pulling coal barges to have this information before going out to sea. **L**
* **MacDougall v. Pennsylvania Power and Light Co. (Pa. 1933)**: Electrician electrocuted after repairing roof by electrical outlet box. Court finds that power company was negligent for either not trying to place box somewhere where it won’t come into contact with people or providing adequate warning.

**Holding**: Custom is just one factor to be considered but the ultimate test is the reasonable person test (especially if a practice is clearly dangerous to a reasonable person). **L**

**Custom as a defense**

* **Ellis v. Louisville and Nashville Ry.** (Ky. App. 1952): Plaintiff sued for disease caused by dust inhalation, sued for defendant not providing a mask. Court finds that no company does this and that no injury has been found for doing this. Large public behavior cannot be found negligent.

Holding: One cannot be found negligent for a custom that **has produced no injury over the years**. **NL (Adler doesn’t discuss at all – minority position)**

**Custom between Contracted Parties**

* **Rodi Yachts, Inc. v. National Marine, Inc. (and TDI) (7th Cir. 1993):** Barge slipped out and damaged other boats. Plaintiffs sued National Marine, who impleaded TDI. Court of appeals reversed and remanded, maintaining that custom should control the sharing of responsibility because National Marine and TDI were in a contractual relationship.

**Holding**: When determining the extent of negligence between multiple parties, the court must take into account whether co-parties had a contractual relationship, in which custom is the assumed responsibility, unless contracted otherwise. **Mixed L**

**Medical Malpractice and Custom**

* Professional (particularly medical) malpractice cases are exceptional in that **adherence to applicable custom is usually treated as a complete defense to a negligent claim.**
* Why is a custom-compliant doctor in better position than a custom-compliant rail carrier?
	+ We **don’t trust the courts to be able to determine what constitutes sufficient care**
	+ The standards are **more clear and reliable from an evidentiary transparency standpoint**
	+ Professions more trustworthy than industry
	+ Traditionally, **little profession-wide incentive to skimp on care**, particularly in medicine where care itself is the service sold (so selling precaution is profitable – more likely to use a service and can sell even more precautions) (query whether this actually is true)
	+ That said, exceptionalism of medicine may be questioned (**as in cases of disclosure for informed consent**) – cases where doctors can’t easily sell this aspect. Sometimes de novo review of failure to disclose rather than adhering to custom. (Whereas we don’t expect them to skimp on prescribing drugs or asking for another visit because those are profitable actions.)

**Determining Applicable Custom in Medical Malpractice**

* **Brune** adopts (more demanding) national standard on customary dosage. Why?
	+ Belief that a reasonable doctor even in a small town would access and adhere to national custom (**as long as information is diffused and accessible**)
* Were national training unavailable here or in similar cases, a court might, nonetheless, adopt a national standard. Why?
	+ Concern that a factfinder will ignore the possibility that a reasonable doctor without the ability to meet a national standard **should not treat patients at all** (activity level)
* Observe this language from **Brune**
	+ “In applying this general standard it is permissible to consider the medical resources available to the physician as one circumstance in determining the skill and care required.”
	+ The court adopts here a local exemplar on physical resources presumably because it’s not skeptical about activity level despite a lack of resources – i.e. the court believes that it is **reasonable** for relatively unsupported local doctors to treat patients anyway (here is where activity level concern can be tricky – because the court doesn’t want to eliminate care completely for rural towns – court believes there should be a national standard around dosage and that should be held strictly accountable, but resources are different and that will put local hospitals out of business) (example: a hospital not having a neonatal unit but treating a patient anyway because another hospital is too far away)
	+ See also Johnson v. Wills Memorial Hospital (patient evades confinement) (**court’s statement about services being different is less influential according to Adler**)
* Determination of applicable custom is fluid across jurisdictions, adjusting to circumstances, whether a jurisdiction is nominally national-standard or local-standard
	+ An example of such fluidity, beyond medicine, is use of statewide or local custom for legal malpractice cases
	+ Laws are not universal
	+ See, e.g., Cook v. Irion (local strategy applicable)
	+ Dosage case tried to make argument that obstetricians are rougher on women in that locality and so higher dosage of anesthetics makes more sense given that local custom (argument failed, but it’s a plausible argument)
	+ E.g. even if Court of Appeals of New York announces that it applies a state-wide standard of custom to legal professions, even courts that nominally do this when presented with a case **where local custom makes sense** will deviate from their general rule

**National Standard Rule**

* **Brune v. Belinkoff (Mass. 1968):** Pregnant plaintiff sued defendant anesthesiologist from New Bedford for not providing adequate standard of care of Boston. Court reverses locality rule, choosing instead to follow custom of national practitioner rather than locality, with allowances made for areas with inadequate resources.

**Holding**: For medical malpractice, a practitioner must follow the customary standard of care of a **general, national practitioner**, with allowances made for areas with inadequate resources. **L**

* **Johnson v. Wills Memorial Hospital and Nursing Home (Ga. App. 1986):** Plaintiff’s decedent escaped and died from exposure to cold. Court affirmed that medical facilities should receive locality rule since they are providing services as opposed to medical care.

**Holding**: A medical facility is subject to a locality rule given that its services will be limited by its location and resources. **Adler believes it’s more about not wanting to limit services for local communities and that it is reasonable to provide them even with fewer services.** **NL**

**Similar Community Rule**

* **Gambill v. Stroud (Ark. 1976):** Plaintiff suffered complications and husband alleged doctor’s negligence. Court does not believe access to medical education is available to be distributed as nationally as ideal suggests. A community with a large number of small towns is not the same as doctors close to big cities. Doctors here should be held to a standard of doctors of a similar community and this similarity should be based on similar access to facilities, practices, and advantages.

**Holding**: The nationwide standard of care that a doctor must follow must be **similar to those doctors who belong to similar communities with access to facilities, practices, and advantages.** **NL**

**Legal Malpractice**

* **Cook v. Irion (Tex. App. 1966)**: Plaintiff sued lawyer for only suing one of three defendants, letting SOL lapse. Plaintiff used expert from different locality in Texas. Court emphasized that local practice might be very different and jury considerations might guide opinion.

**Relevant Dicta**: An expert witness from a different locality might not be able to speak to the efficacy of a lawyer from a very different community due to the local lawyer’s knowledge of jury composition. **NL**

**Negligence Per Se**

Adler Rule: The essence of negligence per se (in the absence of directive) is that when a legislature or regulator **has implicitly made a judgment on what reasonable precaution is required in a circumstance**, neither a judge nor a jury should be entitled to make a different judgment (based on either a de novo analysis or custom).

**Negligence Per Se Analysis**

**Judge decides whether statute is negligent per se; If defendant offers an excuse to negligence per se, it may go to jury to decide whether it is excuses negligence per se.**

* **Negligent Per Se (unless judge decides statute doesn’t find reasonable standard of care)**
* **Negligent presumption with excuse (jury can decide that excuse is reasonable)**
* **Negligence per se as evidence (considers it as evidence but is not required to find negligence even if defendant offers no excuse)**

**Step 1**: Is ordinance/ law strict liability implicitly or explicitly? (Courts might call this negligence per se even though it is not) Could there be a judge-made rule (*Goodman*)?

**Step 2**: If not, does the court find that the promulgator/legislator made a negligence determination in the law of reasonable care? Was it for that purpose (injury/victim) (*Vesely -* victim, *Gorris, Ross* - injury)? (still need to prove causation from that violation later on)

* A denial of negligence per se for a statutory or regulatory violation would question a legislative or regulatory determination that reasonable care necessarily includes the precaution required by the statute or regulation; and (Legislature hadn’t foreseen that particular determination *Tedla*)
* The injury caused by the statutory or regulatory violation was a sort of injury the legislature or regulator sought to prevent, and an injury to a sort of victim the legislature or regulator sought to protect.

**Step 3**: If not, plaintiff must move to cost/benefit analysis and/or custom arguments.

* Is law relevant to injury, if not, not per se (*Tingle*); but see *White* where inquiry is irrelevant
* Also see if law is confusing and so reasonable is a fact-finding determination (*Sparkman*)
* License is not always a reasonableness determination (*Brown*)

Finding of negligence per se forces 100% of the liability on defendant (no comparative negligence)

**Note on Purpose Prong in Step 2**

* Courts sometimes get around the precedent and question the wisdom of considering the legislative or regulatory purpose (or find a different purpose) to take into account the summed risk of an additional risk the precaution encompasses (even if not conceived of by the legislature), especially since even if a legislature had one purpose in mind and underestimated other possible purposes, it doesn’t make sense to disregard reasonableness determination given additional risks (i.e. if it was negligent to not lock b/c of rollaways, it is even more negligent to not lock b/c of stolen cars)
* The reasons that this 2nd prong exists despite it not making sense because courts sometimes are worried that if they find negligence per se, courts will just assume liability, when courts really **want an independent inquiry afterward about whether the defendant owed a duty** to the plaintiff, so they do this purpose inquiry b/c they are worried courts will not do this inquiry
* Sometimes there are legislative and judicial limitations on duties – the defendant didn’t owe the plaintiff a reasonable duty of care (could be under label of proximate cause)

**Legislative Intent**

* Legislation or regulation **may expressly or implicitly displace duty of reasonable care** (so the question of reasonableness isn’t even asked)
	+ Prohibition on civil liability, perhaps even despite violation of statute, see, e.g. Cal. Bus & Prof. Code 25602
	+ Establishment of civil liability for violation of statute or regulation. See, e.g. other state dram-shop laws (opposite of California law)
		- Sometimes the courts might read it implicitly in the statute as opposed to explicitly
* Legislation or regulation may expressly or implicitly decline to set a reasonable care standard and **leave it to a common-law determination**
	+ See, e.g. **Selger** (slip on hazardous sidewalk) – violation not to keep sidewalk clean but the legislation is silent explicitly or implicitly
* Purpose of legislation or regulation matters (even if the statute has established a reasonable level of care)
	+ See, e.g. Rest 288B, Illus. 2 (violation probative, but not negligence per se, where injury caused by hog on road that escaped fencing insufficient under interbreeding statute)
	+ If the harm caused was interbreeding – person can’t argue cost-benefit analysis of fence thickness – the legislature already did an analysis and determined the reasonable amount of fencing
	+ This rule is strange - If it was negligent to build a thin fence given the risk alone of interbreeding, doesn’t it also necessarily also have to be negligent (perhaps even more) once you take into account not only the first risk but the additional risk (of accident)

**R2 286 Negligence Per Se in the Absence of Legislative or Regulatory Directive**

The court may adopt as the standard of a conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

* 1. to protect a class of persons which includes the one whose interest is invaded, and
	2. to protect the particular interest which is invaded, and
	3. to protect that interest against the kind of harm which has resulted, and
	4. to protect that interest against the particular hazard from which the harm results

**R2 288A Ignorance as an Excuse Comment f.** Knowledge Where the actor neither knows nor should know of any occasion or necessity for action in compliance with the legislation or regulation, his violation of it will ordinarily be excused.

Illustration 3: A statute provides that no vehicle shall be driven on the public highway at night without front and rear lights. While A is driving on the highway at night his rear light goes out because of an electric bulb failure. A has used all reasonable diligence and care in the inspection of his car, and is unaware that the light has gone out. Before he has had any reasonable opportunity to discover it, the absence of the light causes a collision with B’s car, approaching from the rear, in which B is injured. A is not liable to B on the basis of the violation of the statute.

* **Martin v. Herzog (N.Y. 1920):** Defendant ran over center divider and hit plaintiff on a curve. Plaintiff didn’t have lights on. There was a lamp and moonlight but otherwise it was at night.

**Holding**: Violating a criminal law (not having lights on) whose purpose is related to the injury is negligence per se. Jury can decide on causation but not the weight of violating the law. **L**

* **Tedla v. Ellman (N.Y. 1939):** Ellman hit pedestrians walking along the wrong side of the road by statute. Court did not find negligence per se of the pedestrians because their deviation was reasonable given that there was far less traffic on the side they were walking on.

1) The court might just be saying that the statute itself has exceptions and so the defendants didn’t violate the statute – thus, it’s not a negligence per se case or 2) the court may have found that there was no flexibility in the statute perhaps because that the legislature hadn’t established a reasonable standard of care **because it was strict liability and didn’t take into account circumstances**.

**Holding**: Limitations and exceptions to a common-law duty are retained even when there is a statutory law codifying the duty unless it is meant to apply in all circumstances and the legislator made a reasonable standard of care determination. **NL**

**Causation**

* **Tingle v. Chicago (Iowa 1882):** Defendant’s train ran over plaintiff’s cow. Plaintiff sued, alleging no specific negligence but pointing out that state law prohibited operation of trains on Sundays. Injury lacks causation.

**Holding**: Statutory duty must have a causal relationship to the accident. **NL**

* **White v. Levarn (Vt. 1918):** Plaintiff wore gray squirrel hat while hunting. Defendant shot plaintiff. Plaintiff sued on grounds that defendant was hunting on a Sunday.

**Holding**: State law does not need a causal relationship to the accident. **L**

**Legislation silent on directive**

* **Selger v. Steven Brothers, Inc. (Cal. App. 1990):** Business failed to clear dog poop, plaintiff slipped and fell, sued on LA Municipal Ordinance.

**Holding**: Violation of a municipal ordinance to keep area clear or clean only creates duty to city, not common pedestrian. Legislation is silent explicitly or implicitly if this creates strict liability. **NL**

**Confusing Laws**

* **Sparkman v. Maxwell (Tex. 1975):** Plaintiff drove through an intersection with a green light; defendant, Sparkman, attempted to make a left turn and hit Maxwell. Defendant was confused by red arrow as opposed to red circle. Supreme Court found defendant not liable as a matter of law given it is a question of fact what was reasonable in that situation.

**Holding**: In a confusing traffic signal, actions may go the trier of fact to see what was reasonable. **Maybe L**

**Meta-Provisions like California’s Evidence Code 669** if someone a) violates a statue, b) causes death or injury c) the death or injury resulted from an occurrence of the nature which the statute, regulation was designed to prevent **and** d) the person was one of the classes for which the statute the statute was adopted but this may be rebutted by proof that someone acted reasonably who desired to comply with the law or that a child acted reasonably (unless it is an activity normally engaged in my adults).

**Protected Class of Statute**

* **Vesely v. Sager (Cal. 1971):** Plaintiff sued defendant owner who furnished alcohol to tortfeasor. Court held that plaintiff was in class of persons protected by Cal Evidence Code 669 creating liability for those who violate a statute. Legislature later overruled this by statute.

**Holding**: Meta-provisions of Cal. Evid. Code 669 hold tortfeasors who violate statutes liable if the plaintiff was in protected class of defendants and injury resulted from occurrence that statute was designed to prevent. **L**

**Liability Determination**

* **Brown v. Shyne** (N.Y. 1926): Plaintiff used chiropractor for paralysis when operating without a license.

**Holding**: Lack of license does not create a negligence determination; action itself must be negligent. And failure to have a license is not, of itself, a failure to take the precautions that licensed practice requires. **NL**

**Statute Matching Injury**

* **Gorris v. Scott (U.K. 1874):** Defendant transported plaintiffs’ sheep to England. Sheep were swept overboard and drowned. They were supposed to be kept in pens to prevent diseases from spreading.

**Holding**: Negligence per se can only be found when it corresponds to the purpose for which it was passed. **NL**

* **Ross v. Hartman (D.C. 1943):** Defendant left a truck unlocked with key and thief stole it. Plaintiff sued for negligence per se, violating a traffic ordinance about leaving it in unlocked gear position. Plaintiff sued from thief’s crash injury. Court found defendant liable because ordinance was passed to prevent this purpose.

**Holding**: Negligence per se can only be found when it corresponds to the purpose for which it was passed even if a third person is the proximate cause. **L**

**Judge-Made Rules**

Negligence by Judicial Directive

* As may be clear, judges, not juries, decide whether violation of a statute or regulation renders a violation negligent per se, though it is typically for the jury to decide whether the violation occurred.
* Similarly, as we’ve seen, judges typically instruct juries on categories of standards (e.g. general or individualized) or customs (e.g. national or local), with juries ordinarily left to determine both what a standard or custom specifically requires and whether it was satisfied (e.g. what is the required national dose)
* In exceptional cases, a judge may decide that no reasonable juror can disagree with the determination of specific requirement.
* A judge might unilaterally decide that voluntarily closing one’s eyes while driving is negligent; a jury would be asked only whether the driver closed her eyes (and the jury would be asked nothing at all in the absence of disputed evidence on this question) (judge applied generalized standard – pure legal question, what is the generalized standard – judge can determine this mix of fact/legal question, if the driver closed his/her eyes – pure fact question)
* Holmes predicted that eventually the tort system would cover every circumstance that judges would not only determine the categorical standard but also what behavior satisfies such standard where juries would only determinate what was true when evidence was disputed
	+ Baltimore & Ohio R.R. (stop, look, and listen)
	+ Pokora – challenged stop, look, and listen’s reasonableness in certain circumstances
* Very rare for judicial directive to set reasonable standard

1. **Baltimore & Ohio R.R. v. Goodman (1927)**: Goodman was killed when his truck was hit by a train coming through a crossing at 60 MPH. Truck approached at 10-12, slowing to 6 but his vision of the railroad was limited. Jury verdict for plaintiff. Supreme Court reversed, directed verdict for defendant, failure to stop by plaintiff was negligent per se.

**Holding**: A person is negligent per se if they do not stop and look before a train. **NL**

2. **Pokora v. Wabash (1934)**: Train struck Pokora and his truck when crossing railway. Pokora stopped and looked but boxcar’s blocked view. Supreme Court found that Pokora was not contributorily negligent per se. **Limits Goodman to negligence per se cases**.

**Holding**: A person who stops and looks is not negligent per se; it is for the trier of fact to determine whether it was safe for them to look again closer to the tracks. **NL for plaintiff**

3**. Thiesen v. Milawaukee Automobile Mut. Ins. Co. (Wis. 1963)**: Defendant fell asleep and veered off road and crashed car, injuring plaintiff.

**Holding**: A driver falling asleep is negligent per se. **L**

4. **Blaak v. Davidson (Wash. 1975):** Defendant caught in dust storm, drove more slowly - struck plaintiff who was driving even more slowly. Supreme Court reversed judgment n.o.v., declaring that judge-made fixed rules for negligence do not work given the myriad nuances of each fact-based situation which should be made by triers of fact.

**Holding:** A driver’s negligence in a dust storm should be left to trier of fact to determine negligence. **NL**

5. **Swajian v. General Motors Corp. (R.I. 1989):** Popular position that plaintiff is not negligent per se for not wearing seatbelt in age when contributory negligence resulted in no damages.

**Holding:** No duty exists to wear a seatbelt in ordinary traffic. **NL for plaintiff**

**Res Ipsa Loquitur**

Doctrine of Res Ipsa

* A traditional formulation (from Ybarra quoting Prosser):
* 1) the accident must be of a kind which ordinarily **does not occur** in the absence of someone’s negligence [and]
* 2) it must be caused by an agency or instrumentality within the exclusive control of the defendant
* Courts will be reluctant to apply the doctrine if the plaintiff has equal or better access to evidence (because non-disclosure by defendant could be exonerating evidence)
* Two purposes for imposing res ipsa
	+ Imposing liability on a defendant where it is appropriate to do so despite the absence of specific evidence – **it seems likely that negligence was the reason**.
	+ **Inducing an innocent defendant to disclose specific exculpatory evidence** – court might want to flip the burden from the plaintiff to the defendant. If none exists, the defendant might have to offer testimony subject to credibility test. (information asymmetry) – the less likely it was negligence, the less likely the court would impose res ipsa under this second principle
* Consider whether other reasons were possible for the incident that do not involve negligence (*Larson*, *Wilson*) or whether the event could easily happen despite precautions (*Combustion Engineering*, *Brauner*); but unsupported speculative reasons could be disallowed out (*Archibeque*)
* Consider whether it is an equal knowledge case or an equal ignorance case where the cause was more likely than not negligence (*Judson*, *Haasman*); equal ignorance will usually apply res ipsa (basically creates strict liability so that incentives remain for precautions)
* Also note the more safety features, the more likely it is a compliance error (airplanes) relative to other causes (seafaring has many more variables)
* *Ybarra* – relaxes “complete control” component where negligence occurred but it is unclear who caused it and court wants to incentivize defendants bringing forth exculpatory evidence; see also *Bond* where joint control but see *Wolf* where the negligence is less likely and it is less likely defendants saw each other; but see *Samson* where courts cannot establish exclusive control
* Does NOT create presumption of negligence – merely allows case to go to the jury to make determination
* Contributory negligence doesn’t bar res ipsa in comparative negligence jurisdictions – it just factors in afterwards in response to the initial negligence
* R3 Torts 17: The factfinder may infer that the defendant has been negligent when the accident causing the plaintiff’s harm is a type of accident **that ordinarily happens** as a result of the negligence of a class of actors of which the defendant is the relevant member
* This provision is a clarification of the traditional formula designed to address the inverse fallacy

**Structure of Res Ipsa Loquitur Claim**

* Evidence in Support of Res Ipsa Loquitur:
	+ Plaintiff shows that defendant was in control of barrel that fell and injured a plaintiff.
	+ You might present evidence on how often a barrel falls when there is negligence in general.
	+ *If* judge applies res ipsa, the jury is (at least) permitted to conclude that the likely cause of the injury was failure by the defendant to take reasonable care in handling the barrel (we don’t know what precaution was omitted, however)

**Varieties of Res Ipsa**

Res ipsa comes in three basic forms, depending on jurisdiction and case

* Jury is permitted to conclude that the defendant is negligent (defendant will fail on motion to dismiss).
* Jury is required to conclude that the defendant is negligent unless the jury is presented with credible exculpatory evidence.
* Verdict for plaintiff is directed.

“Ordinarily” and the Inverse Fallacy

* A surgical patient suffers from sepsis, an event that occurs 80% of the time when a doctor fails to sterilize equipment. The patient dies shortly thereafter and no specific evidence of the surgery survives (no need to force information). Is res ipsa appropriate?
	+ We cannot answer the question of whether negligence is the likely cause simply by knowing that negligent doctors cause sepsis.
	+ The likelihood of negligent cause depends on 1) the **general incidence of negligence** and 2) **how common sepsis is when the equipment *is* sterilized**. If sepsis is extraordinarily rare when sterilized and negligence is not common, then one can conclude res ipsa.
	+ This is a standard probability assessment; cf. Grady on technology “paradox.”

Additional Elements in Doctrinal Formulations

* Some courts, at times, add nuance to standard formulations.
* Some versions of doctrine, e.g. recite **refusal to apply res ipsa** where there **is relevant specific evidence** to which the plaintiff has equal or better access. Why?
	+ Where there is specific evidence and where the plaintiff has access to it, why not just provide specific evidence? The nondisclosure on the defendant’s part could favor that there is no negligence.
* Heed the Ybarra warning and be mindful of common sense as we analyze the cases – not a wooden, doctrinal formulation – sometimes the plaintiff might have better access to specific evidence – must return to underlying purpose for res ipsa.

Standard Cases

* **Byrne v. Boadle (Exch. 1863):** Barrel from defendant’s machinery fell on plaintiff while passing along the road. Court finds that certain acts are res ipsa loquitur negligent and the defendant is presumed negligent unless other facts are presented. **L**
	+ Res ipsa loquitur applied to falling barrel within control of defendant.
	+ “If there are facts inconsistent with negligence it is for the defendant to prove them.”
	+ **Exclusive access** by defendant is not enough on its own; court believed that it is **more likely than not** that the barrel fell because of negligence.
* **Combustion Engineering Co. v. Hunsberger (Md. App. 1936):** Worker was trying to hammer a metal wedge between two plates 30 feet in the air. Metal wedge slipped through and fell on plaintiff. Falling of a tool inside a building is not presumed to be negligence. While proper precautions should be taken for highways and scaffolds for walkways underneath, it is different inside a building. Believes that there was unexpected resistance on the metal plate that caused its fall and that such a possibility could not be removed entirely even by an expert craftsman. **NL**
	+ No res ipsa where falling wedge may, e.g. have resulted from “unexpected and unusual resistance.”
	+ Falling objects at a construction site **have more often than not come from nonnegligent behavior**
	+ Might have been appropriate to apply res ipsa given information asymmetry and the plaintiff cannot know if the wedge was unusually tight; but decision ignores discovery purpose of doctrine – courts are uncomfortable **using this unless there is some evidence that someone is negligent**
* **Larson v. St. Francis Hotel (Cal. App. 1948):** Armchair felt onto plaintiff. No one saw where the armchair came from, but the most logical place was the St. Francis Hotel, as the plaintiff had just passed the marquee. Cites Gerhart v. Southern California as test for res ipsa loquitur – 1) that there was an accident; 2) that the thing or instrumentality was under the exclusive control and management of the defendant 3) that the accident was such that in the ordinary course of events, the defendant using ordinary care, the accident would not have happened. Court found that it doesn’t apply to case **where there was multiple possible causes** because it could have been a guest’s fault, which would have happened despite reasonable care. **NL**
* **Connolly v. Nicollet Hotel (Minn. 1959):** Defendant struck by mud. The only place it could have come was from the hotel. **Court argued that circumstantial evidence alone can find negligence if it is a legitimate interest from established facts.** Dissent argued that since this happened because of guest’s rowdy behavior at convention, this could not be negligence unless it were found that the hotel must station a guard in every room. **L**
* **Brauner v. Peterson (Wash. 1976):** Plaintiff drove car into defendant’s cow on the highway. Plaintiff produced no evidence as to how the cow escaped. Court found for defendant because it believed that **cows could easily escape despite proper precautions**. **NL**
* **Guthrie v. Powell (Kan. 1955):** Plaintiff was on first floor of building. Farm animals were on second floor. Steer fell and hit plaintiff. Court found this was a case of res ipsa loquitur. **L**
* **Wilson v. Stillwill (Mich. 1981)**: Plaintiff got infection from arm operation. Plaintiff sued on theory that since the hospital had low rate of post-surgery infections, the only way it could have happened was through the staff’s negligence. Court found that mere occurrence of post-operative infection does not give rise to inference of negligence **since there could be several reasons.** **NL**

**R3 17 Res Ipsa Loquitur**

The factfinder may infer that the defendant has been negligent when the accident causing the plaintiff’s physical harm is a type of accident that ordinarily happens as a result of the negligence of a class of actions of which the defendant is the relevant member. (Avoid inverse fallacy – just because something will result if someone is negligent, it doesn’t mean that the someone was negligent if the evidence happened: one must compare the probability of an event given negligence against the probability that an event happening not as a result of negligence and see which is higher).

**Procedural Consequences of Res Ipsa Loquitur**

Plaintiffs usually have to choose between a theory of specific negligence (particular things the defendant should have done differently) and res ipsa loquitur. With res ipsa loquitur, the defendant does not need to prove that the defendant should have done something differently. The defendant must respond by rebutting the presumption. Some courts will then let a jury decide between these two (thus, this can be a technique to avoid summary judgment). Others will give a directed verdict in favor of the defendant if the plaintiff cannot provide evidence to rebut the rebuttal. Some courts have found circumstantial evidence so strong that they have required a directed verdict for the plaintiff.

* **Judson v. Giant Powder Co. (Cal. 1895):** Nitroglycerine exploded at a dynamite facility, destroying plaintiff’s factory. Defendants argued that explosions are inevitable and that plaintiff knew this was a possibility from previous explosion. Court rejects and finds that a negligence inquiry is worthwhile. Cites Kearney v. Railway for when a brick fell on a plaintiff under a railroad bridge under construction and Byrne v. Boadle. Also cites The Rose case and notes that the explosion of a boiler of a steamboat is also prima facie evidence. Also a rule that in fire from railroads, there’s a presumption of negligence. Finds that absent other evidence**, a dynamite explosion has the presumption of negligence**. **L**
	+ Explosion at the defendant’s premises destroys plaintiff’s property and all evidence of any negligence (assuming that the defendant’s configuration of the explosive material was not itself negligent)
	+ Res Ipsa Loquitur applied even though neither party had access to specific evidence, fulfilling liability purpose of doctrine (more likely than not this happened because of defendant’s negligence). See also *Archibeque* (sleeping hitchhiker).
* **Haasman v. Pacific Alaska Air Express (Alaska 1951):** Plane disappeared during flight without storm or icing conditions. Notes that usually the courts do not employ the doctrine when knowledge of the event is equally available to the plaintiff – not where they are equally ignorant. Purpose of rule is to protect plaintiffs who do not have access to knowledge – where there is an equality, plaintiffs have the opportunity to evaluate the facts, so in equal knowledge cases, res ipsa loquitur is barred. In a **case of equal ignorance**, it is not barred. **L**
* **Walston v. Lambertsen (9th Cir. 1965):** Crewmember died aboard crab boat that sank with all members on a calm day. Plaintiff’s decedent argued that a live crab tank created instability and thus not seaworthy. Court did not find it unseaworthy. Court reviews that if ship is found unseaworthy, that can be the proximate cause. But if unseaworthiness cannot be established, res ipsa loquitur cannot be used **because the sea has many hazards**. **NL**
* **Archibeque v. Homrich (N.M. 1975):** Plaintiff died in car crash with hitchhiker driving. There were marks showing that the driver veered from the right to the left before going off a gully. Supreme Court ruled that res ipsa loquitur instruction was appropriate and that **unsubstantiated speculative theories** cannot be introduced. **L**

**Mark Grady – Res Ipsa Loquitur and Compliance Error**

**The more safety features, the more likely it is that an accident is a result of a compliance error.** Grady suggests that while air travel has many precautions, sea travel does not. A strong res ipsa case is one in which the expected rate of compliance error is high relative to the normal rate of unavoidable accident. It makes sense that tort claims go up as technology increases, but notes that the magnitude changes (e.g. antiseptics lower the damages from hunting accidents).

Limited Reach of Caselaw

* Consider whether cases such as *Judson* go far enough. Specifically, imagine that in most cases of massive explosions, or lost planes or ships, the cause is *innocent*. Might res ipsa might make sense anyway?
* If you’re in an industry where accident will destroy all evidence, you then have no incentive to take additional care if res ipsa is not applied b/c there will be no evidence to prove your negligence
* It might not make sense because the application of res ipsa would convert a negligence standard into one of strict liability even where we believe the cause is innocent, not negligent
* But **strict liability may be necessary to induce adequate incentives** where the expected elimination of evidence implies no liability despite a negligent accident. Cf. dictum in Ybarra. So courts will sometimes use res ipsa to create strict liability.
* Ybarra rejected strict liability because **it thought it had enough evidence to use res ipsa.**

**Multiple Defendant Cases**

* **Ybarra v. Spangard (Cal. 1944):** Plaintiff’s shoulder hurt him after an operation for appendicitis, eventually becoming paralyzed. Defendants argue that res ipsa loquitur cannot apply where there are several defendants controlling an instrumentality and it is not clear which one caused it and several instrumentalities and it being unclear which one caused it and which defendant was not in control of it. Court reminds that the principal use of the doctrine is to protect a plaintiff without information form a defendant with information. Notes that without this doctrine, patients with serious medical injuries would have no means of recourse short of absolute liability. Rejects that the number or the relationship of defendants alone defeats res ipsa loquitur. Notes that it is sufficient for a patient to note an injury in a hospital after having been unconscious – no other knowledge of the instrumentality is required. Court notes that in this case, where the injury is to an area that has not been operated upon, and thus with little reason to occur without negligence, the presumption is one of negligence to all those involved. **L**
* Ybarra: where injury is likely caused by negligence of one or some of multiple actors, and evidence is unavailable to the plaintiff, any defendant who might have caused the injury and can be expected to know the true cause is subject to a res ipsa loquitur presumption
	+ Court thought it was overwhelmingly likely a result of someone’s negligence – but it does not know which person
	+ Doctrine would say no because instrumentality was not under control of any one person; but in this case, court wants to induce exculpatory evidence from each defendant
	+ Burden thus on each defendant to provide exculpatory evidence
	+ **Result relaxes “the exclusive control” component of the traditional res ipsa formulation**; seems sensible (though note the conundrum of the result on remand – court believed their exculpatory testimony but still they were found liable)
	+ Ultimately, doctors are in a better position to avoid the harm and res ipsa is used as strict liability for its incentive effects even if it’s less likely than not that they were negligent
	+ Ybarra is more in vogue now, but is not applied everywhere
* In light of Ybarra, can Wolf (falling brick) be explained?
	+ In Ybarra, the information disclosure incentive was strong given the proximity of those working together having seen the negligent act; **in Wolf, these people were not working together** and so would not necessarily have seen each other
	+ In Wolf, there is **no reliable evidence that the defendants were either themselves negligent or knowledgeable about the accident’s true cause**
	+ Dissent notes that there would have been liability if there was one central employer – so the result seems incongruous just because of the dispersed work – the dissent favors strict liability given the lack of available evidence and the worry about the incentives of taking sufficient care – would expand beyond the traditional limits of res ipsa
* **Wolf v. American Tract Society (N.Y. 1900):** Contractors were working on 23-story building with 19 other contractors; brick fell. Plaintiff wasn’t sure which one and sued two of the contractors. Court found that even though it could be narrowed to two, unless the “author of the wrong” can be identified, in an area where there are multiple entities with no one in central control, it is better not to accuse a potentially innocent person. Dissent believes that res ipsa loquitur was precisely designed for this occasion given that plaintiff has no ability to know whence the brick came. **NL**
* **Bond v. Otis Elevator Co. (Tex. 1965):** Plaintiff sued after elevator went into free fall. In contract, manufacturer said that owner had exclusive control. Court found res ipsa loquitur for both since manu**facturer is responsible for intricate knowledge of maintenance – finds that this is a joint ownership** and thus both are jointly liable, rejecting that a single entity is required. **L**
* **Actiesselskabet Ingrid v. Central R. Co. of New Jersey (2d. Cir. 1914):** Dynamite explosion as rail car transferred onto ship. Dynamite was from DuPont, Healing was the crew chief, and Central R. Co was the railroad company. Explosion destroyed another ship nearby, the Ingrid. Court argues that **cause of explosion cannot be accounted for** and so no res ipsa loquitur. **NL**
* **Samson v. Riesing (Wis. 1974):** Plaintiff got salmonella poisoning from turkey salad. Group made the turkey salad from nine different turkeys cooked independently. Court found that there was **no control** by any one defendant sufficient for a claim for res ipsa loquitur. **NL**

**Physical-Harm Duty Synthesis (person or tangible property)**

**Duty is a question of law**

Rescue refers to any peril that the actor did not create

* One has a duty to take reasonable care in the conduct of activity that imposes on another a risk of physical harm (when behaving unreasonably and imposing a risk)
* One has a duty to take reasonable care towards the mitigation of risk of physical harm that one has imposed on another by one’s actions (even though those actions are not negligent)
	+ Car on highway, all reasonable behavior, child comes out, instead of using brakes, just take foot off pedal – taking foot off pedal is reasonable but still had duty to mitigate and not hit child.
* One (perhaps) has a duty to take reasonable care toward the mitigation of risk of physical harm to another if one has undertaken to mitigate that risk. (full-fledged duty of care)
	+ Rescuing a child, pulling her closer to shore, then abandoning – you have helped, but not fully. Courts are split – some say this creates a special relationship, others say you only can’t make things worse.
* One has a duty to take reasonable care toward the mitigation of risk of physical harm to another with whom one (directly or indirectly) has a special relationship (the definition of which is vague)
	+ Some courts find duty in a social relationship, especially if you’re doing something dangerous (like rock climbing) where the duty is foreseeable
	+ Indirectly refers to a third person
* One has a duty to take reasonable care towards the mitigation of risk of physical harm to an entrant on one’s land – though traditional rules often substitute specific-care duties
	+ Some courts just treat owning land as creating a type of special relationship

Duty – Affirmative Undertakings

Rescue Duty Synthesis

1) One has a duty to take reasonable care toward the mitigation of physical risk that one’s actions have imposed on another (example, driving car reasonably, car is disabled – no unreasonable behavior up to that point, but disabled car creates duty to take reasonable actions subsequent)

2) One has a duty to take reasonable care in the conduct of activity that affirmatively imperils the physical wellbeing of another. (rescue is included: action taken to help someone must be reasonable)

* This is, of course, just the standard duty of care for acts that create risk of physical harm
* For example, save from drowning, carry to hospital, but drop in middle of road, run over by car – even though arguably better off, person still created a peril with an unreasonable care

3) Precedent is inconsistent on the question of whether one who undertakes a rescue becomes obligated beyond a duty to not unreasonably imperil another. (e.g. not to make things worse)

* Imagine an EMT who experiments during a rescue, doing one procedure instead of another that is the medical standard – if I help only a little, but competent care would have helped you more – my failure to follow medical standards is negligence (323 suggests no liability, but courts are split whether this creates liability)

4) “One of the vexing issues in undertaking issues is the extent to which the plaintiff must show damaging reliance on the defendant’s efforts.”

* Arguably you’ve created a special relationship by undertaking the care and are then responsible for reasonable care

5) Comment e to R3 323 – leaves open the question of liability when conduct has induced no detrimental reliance and not increased the risk

* So we should treat as an **open question** whether one who undertakes a rescue has a full-fledged duty of reasonable care (as opposed to just not making things worse)
* This is **particularly** so in cases where a victim has **accepted the help of a rescuer** (definitely the case if it **displaces better care**; courts sometimes just assume if plaintiff accepts that you are displacing better case but others respect autonomy of not having a duty) (although courts do not say this explicitly), because, in these situations, even if the plaintiff cannot prove it, there is at least a chance that, but for the incompetent assistance (courts are reluctant to assume that there is no detrimental reliance), the victim might have better helped herself or been assisted by someone more capable. (How does the court really know that you couldn’t have found someone else to find better help? – so where courts cross the line, it tends to be in cases where the person to be rescued accepted the help and agreed to come under the control of the rescuer)

**R3 7 Duty**

a) An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct **creates a risk of physical harm.** (affirmative physical act – “conduct” – creates the duty as opposed to not acting) (emotional and economic harm are different and much narrower)

b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification. (no consistent principle – limit on how the doctrine can be fleshed out, but sometimes courts just deviate in principle as courts are worried about opening the floodgates of liability)

* The conduct referred to typically is an affirmative action, not an omission to act; thus, there is no general duty to rescue
* Nonfeasance does not create liability even if misfeasance does.

**R2 314 Special Relations Giving Rise to Duty to Aid or Protect**

The Fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.

Illustration 4: A, a strong swimmer, sees B, against whom he entertains an unreasonable hatred, floundering in deep water and obviously unable to swim. Knowing B’s identity, he turns away. A is not liable to B.

* No duty to lift a baby from railroad tracks even though such neglect would be unreasonable.
* Note possibility of statutory override though rare in United States, e.g. Vermont

What is the policy behind the general no-duty to rescue rule?

* Autonomy, or as Soldano, puts it “self-determination”
* Liability might not induce behavior as much as morality
* People might not behave reasonably in evaluating whether they should help or not
* No bright line – so much more liability might exist (helping homeless people at all times – but then there is no limit to the help – if giving money, why not provide medical care) – however, in extraordinary cases, the law might impose a duty (Soldano – owner of restaurant letting someone use phone)
	+ Arguably unreasonable for me to have two pairs of shoes when children are hungry
* Might disincentivize people entering spaces where a duty might pop up
* There can be a line-drawing problem and cabining problem (no way to establish rules to draw line and the rules are unclear) – Soldano has a line-drawing problem but not a cabining problem – no principle to distinguish Soldano from other duties to help, but it’s clear the limit in Soldano (arbitrary, but clear lines)

**R2 321 Duty to Act When Prior Conduct Is Found To Be Dangerous**

1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.

2) The Rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.

Illustration 3; A, carefully driving his truck, skids on an icy road, and his truck comes to rest in a position across the highway where he is unable to move it. A fails to take any steps to warn approaching vehicles of the blocked highway. B, driving his automobile with reasonable care, does not see the truck, skids on the ice and collides with it, and is injured. A is subject to liability to B.

* Even if the initial behavior was reasonable, a subsequent unreasonable risk emerging requires a duty to act reasonably in response
* Why does this exception exist and that in R2 322 regarding a helpless victim despite the general rule that there is no duty to rescue?
	+ When a hazard is created by even a reasonable act, given the decision to act, concerns about autonomy are perhaps reduced?
	+ **Asymmetric information** – you have a duty to share that information
	+ And liability for hazards caused establishes a ***confinable* carveout** from general no-duty-to-rescue rule (easy to cabin even if there isn’t a principle difference)

**R2 322 Duty To Aid Another Harmed by Actor’s Conduct**

If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another **as to make him helpless and in danger of further harm**, the actor is under a duty to exercise reasonable care to prevent such further harm.

**Induced Conduct**

* **Yania v. Bigan (Pa. 1959)** (Goading an adult does not create duty): Bigan goads Yania into jumping into strip-mining cut full of water; Yania drowns. Court finds that Yania had voluntary choice as capable adult. Court finds Bigan had no duty towards Yania to save him. **NL**
	+ Even though Bigan’s goading of Yania seems to incur liability under R3 7, A perhaps better basis for the holding in this case would be a conclusion **that the goading of a competent adult represents an exceptional case, where “an articulated countervailing principle or policy” – here, perhaps freedom to persuade** – “warrants denying or limiting liability in a particular class of cases” (See R3 7)
* **Weirum v. RKO Radio General, Inc. (Cal. 1975):** Two contestants following a DJ in a chase-the-car contest with KHJ drove someone off the road, killing the driver. Court found that radio station created an unreasonable risk of harm through affirmative act. **L**

**Duty in Emergency**

* **Globe Malleable Iron & Steel Co. v. New York Cent. & H.R.R. Co. (N.Y. 1919):** Train refused to stop to let emergency carts pass to put out factory fire. Notes that usually, railway has right of way, **but in an emergency, a train should stop** so as not to increase the public hazard. **L**

**Public Establishments – Imminent Physical Harm vs. General Crime**

* **Soldano v. O’Daniels (Cal. 1983):** Owner owned bar and restaurant. Patron from bar went to restaurant and asked to use phone to call police; bartender refused, and man was killed. Court ruled that a homeowner doesn’t have to open up his/her home for an outsider to use a phone, but in a public establishment, open to the public, there is a **duty to let outsiders use the phone for imminent danger of physical harm**. **L**
* **Stangle v. Fireman’s Fund Insurance (Cal. 1988):** Plaintiff wanted to sell ring, asked Britt to sell it. Britt met with buyer and buyer absconded with ring. Britt asked hotel receptionist to use phone to call police as buyer was leaving, **but receptionist refused**. Plaintiff’s suit against defendant building owner – no liability because no duty. **NL**

**Affirmative Acts and Undertakings**

* Just as even innocently causing a risk of harm may give rise to a duty-to-rescue, undertaking a rescue even without a duty to do so can subject an actor to a duty of care.
* The contours of such duty are not always easy to discern.

**R2 323 Negligent Performance of Undertaking To Render Services**

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if

a) his failure to exercise such care increases the risk of such harm, or

b) the harm is suffered because of the other’s reliance upon the undertaking (detrimental reliance is a form that increases the risk)

**R2 324 Duty Of One Who Takes Charge Of Another Who Is Helpless**

One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by

(a) the failure of the actor to **exercise reasonable care** to secure the safety of the other while within the actor’s charge, or

(b) the actor’s discontinuing his aid or protection, if by so doing he **leaves the other in a worse position** than when the actor took charge of him.

Comment a: There rule state is merely an application of R2 3232 – feature of plaintiff is in in a helpless position, which is an important factor in determining whether the actor may discontinue or aid protection.

Comment d: Where the other’s only ground of complaint is that he has failed to receive benefit from a gratuitous actor’s assistance….the actor is not required to conform to a high standard of diligence and competence, to possess any special skill, or [fully] to subordinate his own interests. (After saving someone from drowning, you injure the person in the process, but then go to a spa appointment, no liability, as you have not made someone worse off)

**Rescues Hypotheticals**

Botched Rescue with Exacerbation

* Imagine I find you in winter sleeping by the side of a sparsely traveled road wearing a black wool overcoat and rather than wake you, to make you more visible to traffic, I remove your overcoat revealing a brightly colored t-shirt
* If you freeze to death, I am liable to you even though I initially owed you no duty

Botched Rescue with **Reliance**

* Imagine I found you on a park bench suffering chest pains, and you are about to call an ambulance until I tell you that I am a trained EMT. I perform my own version of CPR, which is helpful but not as good as the customary procedure.
* If you are injured as a result of my unreasonable care, I will be liable to you, even though I initially owed you no duty (and in some courts, I would be liable even if you cannot show detrimental reliance)

Incomplete Rescue

* Imagine that I find you unconscious in a lake from which I drag you to the shore but, because I’m late for a haircut appointment, do not take you to a nearby hospital
	+ Even if it is unreasonable for me to discontinue my rescue, it is possible that I am not liable for any injuries you suffer as a result (so long as you were safer on the shore than in the lake) (but some courts will find liability under the idea of rescue entailing a **full-fledged duty**) (but if you expose someone to a new risk, even if it is a lower risk than if you had done nothing, you will be held liable)

Incomplete and Botched Rescue

* Imagine that I find you unconscious in a lake form which I drag you to the shore and halfway across the street toward a hospital, at which point I remember my haircut appointment and leave you in the road
	+ If you would have been safer at the shore and are struck by a car, I am liable for unreasonably dragging you into the road (even if you were safer there than in the lake) – you have **introduced a new peril** that you are responsible for; harder case if the court can’t tell **when there is a clear point where you have introduced a new peril** (e.g. you hit someone in the head thinking it will help them in rescuing them in which case there is a new peril but it is coterminous with the rescue, but courts will probably find liability under a full-fledged reasonable duty standard)

**The Rescue Cases**

* **Hurley v. Eddingfield (Ind. 1901)** (family doctor): Physician, at home, did not respond to patient’s call for help for illness after treating patient for many years. Physician was only one who could provide assistance in reasonable time. Court finds that medical license does not create duty to respond to all medical. **NL**
	+ Simple no-duty-to-rescue case with status as family doctor not considered a special relationship (though it could have come out another way)
* **O’Neill v. Montefiore Hospital (N.Y. App. 1960)** (emergency room): Doctor and nurse told man with heart attack to go home and come back later when a doctor affiliated with his insurance plan was there. Man died when returning. Court found doctor had undertaken examining or treating a patient then abandoned him. **L**
	+ Advice to go home was an undertaking relied on by victim, though advice may not have made things worse (though it might have – the patient might have acted differently if they did not think it was safe) – this also might have been a case where the court didn’t care whether it made things worse – by telling them to go home, it might have just triggered a full-fledged duty of care as **detrimental reliance** (another court might have found no liability because it didn’t introduce a peril)
		- Even if undertaking did not worsen the patient’s plight, this is a confinable carveout from no-duty
* **United States v. Lawter (5th Cir. 1955)** (botched helicopter rescue): Coast Guard tried to rescue family in the middle of bay (4 feet deep, but in tempestuous circumstances), lifted her up to helicopter, but not all the way, then she dropped and fell. Court found that CG was negligent, allowing least experienced member to operate the cable, placing deceased in a worse position after undertaking rescue. **L**
	+ Essentially O’Neill but on the water and with clear finding that rescuer **made things worse**
	+ Rescuers created the peril
* **Frank v. United States (3d. Cir. 1957)** (tragic tow accident): CG tried to rescue disable boat and dragged it along with a lifeboat that was less suitable for the task (others were occupied). Plaintiff’s decedent tried to walk along the deck along handrail – boat turned and handrail broke; decedent drowned. Plaintiff argued that CG used inferior boat, defective reverse gear, and life rings were too secured so that they could not immediately be thrown. Court found not liable – rescue cannot create liability for lack of adequate equipment, preparation, or personnel. **NL**
	+ CG does not have a limitless duty to provide **competent rescue equipment or staff**
	+ Just as a passerby who encounters a victim in distress has no duty to have medical training
	+ Tort system does not question government resource allocation
	+ No other breach of duty alleged (people on boat acted reasonably on their use of the boat, no additional peril created by rescuers actions, Frank was not safer on the sinking boat)
	+ One could have raised the point that it **displaced better help** (but this allegation was not made)
* **Ocotillo West Joint Venture v. Superior Court (Ariz. 1993):** Golf club wouldn’t give keys to plaintiff’s decedent after day of drinking. Easley, his friend, lied and said he would drive him home, but then gave keys to decedent. Decedent died – Gold Club wanted to bring Easley into case after being sued – permitted because of R2 323 and R2 324. Easley assumed a duty of reasonable care and **put decedent in worse position** than when Gold Club employees had keys. **L**

**R2 315 Third Person**

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or b) a special relation exists between the actor and the other which gives to the other a right to protection.

Comment b

“In the absence of either one of the kinds of special relations described in this Section, the actor is not subject to liability if he fails, either intentionally or through inadvertence, to exercise his ability **so to control the actions of third persons as to protect another from even the most serious harm.** This is true although the actor realizes that he has the ability to control the conduct of a third person, and could do so with only the most trivial of efforts and without any inconvenience to himself. Thus if the actor is riding in a third person’s car merely as a guest, he is not subject to liability to another run over by the car even though he knows of the other’s danger and knows that the driver is not aware of it, and knows that by a mere word, recalling the driver’s attention to the road, he would give the driver an opportunity to stop the car before the other is run over.”

* **Cuppy v. Bunch (S.D. 1974):** Bunch and White were drinking. White drove Bunch back to his car – White told Bunch to follow him back. Bunch was swerving dangerously as he followed White and eventually crossed the center divider, crashing into car. Courts found that White was not liable, citing R2 315, since Bunch was not even in White’s control and White had no special relationship. **NL**

**Detrimental Reliance on Promise to Act**

* **Marsalis v. La Salle (La. App. 1957):** Plaintiffs were in defendant’s store when scratched by defendant’s cat. Plaintiffs asked defendant to watch cat for 14 days and plaintiff agreed – cat escaped. Plaintiff suffered ill effects from precautionary rabies treatment. Court found since defendant undertook voluntary assistance but then was negligent, defendant is liable. **L**
* **Bloomberg v. Interinsurance Exchange of the Automobile Club of Southern California (Cal. App. 1984)**: Plaintiff’s son pulled over b/c of car trouble and called highway patrol. Patrol called Auto Club to tow truck. Auto club couldn’t find car. Drunk driver crashed into car, killing plaintiff’s son while he was waiting. Court found that defendant had undertaken duty and was negligent in that duty. **L**
* Marsalis (cat scratch); Bloomberg (auto club)
	+ Undertaking relied on – scratch victim might have captured cat; son might have sought other help – so liability consistent with Torts 323(b)
	+ Ultimate liability in each case turns on detrimental reliance; courts are relatively consistent in **requiring such reliance** for a full-fledged duty of care where only basis for duty is an undertaking that is a **mere gratuitous *promise* to ac**t (as opposed to the promised **action** itself)
	+ Though, in Bloomberg, a defendant’s special relationship with caller might have sufficed
* Hypothetical: When the EMT happens upon the suffering stranger in the isolated field, the stranger is conscious and asks the EMT for help. The EMT replies: "Don't worry, friend, I'm a trained EMT and I'll save you." But then the EMT does nothing; she does not attempt even her experimental treatment and instead just watches the stranger die.
	+ Here, mere promise does not create duty – **only if there had been detrimental reliance**

**Duty – Special Relationships**

* **Finding of duty does not necessarily mean negligence – there could be a duty but it was reasonable not to tell when balancing confidentiality or other concerns (but a court might find no duty b/c it is worried that a jury won’t consider this question)**

Limited Duty of Government Protection

* In sum, under the common law, a government is deemed to have taken on a reasonable-protection obligation to an individual only when it has **waived sovereign immunity** and has **voluntary established a special relationship** that implies resource-allocation decision in favor of individual claimant
* As is generally true of special-relationship duty, lines are hard to draw and **vary by jurisdiction**

**Special Relationship**

* An **express contractual obligation** waives the promisor’s autonomy to withhold reasonable care and imposes a duty of such care based on the contractual relationship – e.g. such as a **doctor’s obligation to treat a patient for a specified condition**
* Although contractual obligation is not always described as a special relationship, some categories of relationship are described as special, by which it is meant that one party in the relationship owes a duty of reasonable care to protect the other

**Undertakings and Special Relationships**

* As we’ve learned, under some circumstances undertakings create an otherwise absent duty to rescue, one that goes beyond the ordinary duty not to unreasonably exacerbate a risk of physical harm
* Undertakings can also be said to establish special relationships that carry with them an otherwise absent duty to rescue, and courts frequently mix the categories of undertaking and special relationship – this is not a problem of course, as labels seldom matter much

**R3 LPEH 40 Special Relationships**

a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship

b) Special relationships giving rise to the duty provided in Subsection (a) include

1. A common carrier with its passengers
2. An innkeeper with its guests
3. A business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises
4. An employer with its employees (under specified circumstances)
5. A school with its students
6. A landlord with its tenants
7. A custodian with those in its custody (under specified circumstances)

**Spouses**

* No duty of spouse to prevent action of other spouse
* Minority ruling: J.S. v. R.T.H (N.J. 1998) – spouse owed duty to take reasonable steps to prevent child abuse or to warn of the risk if the spouse “has actual knowledge or special reason to know of the likelihood of his or her spouse engaging in sexually abusive behavior against a particular person or persons”
* Sacci v. Metaxas (N.J. Super. App. Div. 2002) refused to extend duty to wife who know husband with violent propensities might kill someone

**Duty Cases**

* **Petition of Trans-Pacific Fishing & Packing Co. (W.D. Wash. 1957):** Three men washed overboard on fishing boat. Boat didn’t attempt rescue due to dangerous conditions. Captain held negligent for not attempting to rescue. **L**
* **Brosnahan v. Western Air Lines (8th Cir. 1989):** Bag fell on plaintiff when customer was loading bag in overhead compartment. Plaintiff sued that airline has responsibility to assist passengers load their bags. Court found airline had duty of assistance. **L**
* **Boyette v. Trans World Airlines (Mo. App. 1997):** Plaintiff’s decedent got drunk, after arriving at airport, stole golf cart. After being chased, hid in a trash chute, but then fell into trash compactor. Before decedent could be helped, he was compacted. Court gave summary judgment to airline because airline owes no duty **once client has safely reached destination**. **NL**

**Drunk Guests**

* **Charles v. Siegfried (Ill. 1995):** Underage drinker died after adult served her alcohol at a party. Court found that drinking the alcohol was a proximate cause, not furnishing the alcohol. But court is concerned with **unlimited liability of duties of any adult towards underage drinker** and believes legislature should weigh liability. **NL**
* **Kelly v. Gwinnell (N.J. 1984):** Court finds it more important that society spread the loss incurred by drunk driving and emphasizes importance of incentives for all of society to take more precautions. Court finds liability to owner for guest who injured third party. **L**
	+ **Some courts impose liability on hosts when their guests become intoxicated, drive, and injure third parties, but not when they injure themselves**. Do guests and hosts have a special relationship, does the host take an undertaking, did a duty arise from guest’s presence on the property?

**R2 315 General Principle**

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

a) a **special relation exists between the actor and the third person** which imposes a duty upon the actor to control the third person’s conduct, or

b) a special relation exists between the actor and the other which gives to the other a right to protection

**Duties to Protect Others from Third Persons**

**Discernible 3rd Person Warning**

**Note: Can make more limited duty argument that doctor must inform people that they can endanger other people (e.g. HIV transmission)**

* **Tarasoff v. Regents of the University of California (Cal. 1976):** Psychiatric patient told therapist he was going to kill plaintiff’s decedent and then did so. Therapists committed him initially, but then let him go and never warned patient, also destroying notes and refusing to try to commit him again. Therapists alleged they owed no duty of care to the family. Court finds that therapists have a special relationship with their patients to exercise reasonable care to control their behavior if they might endanger other people. **Court finds that policy of compelling therapists to reveal danger outweighs confidential character of communications.** **No liability for policemen** who released him from care since they did not have a special relationship. **L**
	+ How does this affect a physician who has a patient with HIV? Some statutes have addressed this issue.
	+ One could imagine if the psychiatrist treated the patient incompetently, then the ordinary duty not to imperil others would control here
	+ Special relationship between therapist and patient **creates a duty** to warn a **discernable** third party **where reasonable care requires such warning** (it might not)
	+ One could imagine a doctor arguing, based on this narrow holding, that he acted reasonably by not warning the patient, **balanced against the need for confidentiality**
* **Thompson v. County of Alameda (Cal. 1980):** Juvenile offender was released into custody, killing young child neighbor. Plaintiff’s decedent alleged that since police knew that it was likely that plaintiff would want to kill or assault a young child, a warning should have been given to the neighborhood. Court finds that while a threat to a specific person should be disclosed, general threats would stigmatize rehabilitative efforts and make parole officers less likely to release from prison. **NL**
	+ **No duty** to warn where warning would **have to be so broad** as to have little practical effect and where liability for failure to warn “might jeopardize rehabilitative efforts both by stigmatizing released offenders and by inhibiting their release”
	+ Decided on general principles though role of government could have further supported result (i.e. b/c it was a government defendant, it might have found it less liable b/c of separation of powers concern about executive defining reasonable care)
* **Kline v. 1500 Massachusetts Avenue Corp. (D.C. Cir. 1970):** Tenant in apartment building sued landlord for assault, as landlord had taken away protective measures from when tenant first arrived. Court found that in the past, there has been a reluctance to apply landlord liability because of traditional notion of landlord-tenant relationship, superseding cause of third party, difficulty of foreseeability of criminal acts, vague standards for landlord, economic consequences, and holding government rather than private individuals to account for. Court imposes finds **that landlord of multi-dwelling complex where previous incidents of criminal assaults must take reasonable measures to ensure tenants’ safety as the landlord possesses some control over tenant.** **L**
* **Bradshaw v. Daniel (Tenn. 1993):** Plaintiff’s decedent died of Rocky Mountain Spotted Fever. Decedent’s husband had earlier died of same disease. Disease is not contagious and is spread through ticks. Nonetheless, court found duty on physician to warn as there was a **foreseeable risk of harm to an identifiable third party**. **L**
* **Minority caselaw of no duty to family members –** Lemon v. Stewart (Md. Ct. Spec. App. 1996) – no duty to inform family members about HIV diagnosis
* **Hawkins v. Pizarro (Fla. App. 1998):** Doctor incorrectly diagnosed plaintiff as not having Hep-C. Plaintiff later transmitted disease to new husband. Plaintiff sued alleging that she could have taken preventative steps. Doctor successfully argued that **since third party was not known to him at the time**, he had no duty of care. **NL**

Is the logic flawed?

* Duty does not equate with liability, and duty would not require a warning unless reasonable care – considering cost and benefit – required one
* No duty at all suggests opposite of Tarasoff
* More likely that the **court worried about improper negligence determinations or service-provider risk aversion to such determinations**, so decided to cut off at duty level rather than admit duty and risk juries finding unreasonable care when there was reasonable care (and many courts wouldn’t have found duty in the case of Tarasoff to avoid this as well)
* Court could have found a duty and left to fact finder to determine whether these actions were reasonable; Court could have also said that there is a duty but no reasonable juror could have found liability in this situation (a non-identifiable person)
* Downside is that it might get rid of liability where a custodian has behaved unreasonably

**Prophylactic Duty Limitations**

* Where there is distrust of accuracy in negligence determination, an otherwise applicable duty may be curtailed as a prophylactic (may cut off some meritorious cases – but courts are more concerned about frivolous cases than meritorious ones)
	+ Such distrust prevailed in Thompson
	+ But concern for fairness to victims or over weakened incentives for proper care overcame such distrust in Tarasoff (though not followed in every jurisdiction) (court concerned about meritorious cases / incentives over frivolous cases)

**Doctrinal Confusion**

* One of the things that makes duty cases difficult to interpret is a frequent doctrinal confusion – suggested e.g. in Thompson – between lack of duty and lack of evidence to support breach of duty.
* Courts confuse a duty with the reasonable requirements of that duty
* The question of individual threat vs. broad threat is a question about what constitutes reasonable care, not duty, but courts confuse this (where courts would weigh benefit of individual warning is much higher than broad warning and so is worth doing vs. breaching confidentiality)
* Whether there is a duty is a question about principles of autonomy; what is reasonable care are consequentialist questions
* Note for instance, the court’s struggle in **Kline** to determine (as it ultimately did) that a landlord owes a duty of care to protect tenants from intruders. One might have thought this is an obvious special relationship, based on contract. Why the struggle to hold this?
	+ The landlord didn’t create the peril
	+ Court was concerned if duty was created, there would be factual mistakes where it found that the landlord was liable for negligence when the landlord was not negligent
	+ Court might also be concerned about disincentivizing low-rent apartments where there is less security
	+ Perhaps the possibility of a tenant’s contractual *choice* to pay less for less security should be factored in, which could imply no negligence, and the court is worrying that a landlord would be found negligent, disregarding this contractual choice

**Limited Duty of Government Protection**

* **Riss v. City of New York (N.Y. 1968)** (woman asked for protection from police): Woman informed police multiple times that ex-boyfriend was threatening her. Police refused to provide protection, and ex threw lye in her face. Court declined to find liability for failing to provide protection for fear of forcing public entities like police forces how to allocate their resources without limits, and the unlimited liability for areas with frequent crime problems. Keating Dissent emphasized that damages are an important way to signal mistakes by law enforcement as was in this case. **NL**
* **Schuster v. City of New York (N.Y. 1958):** Informant was threatened; police did not provide protection, and informant was murdered. Court found that police have special duty to provide reasonable care for those who have collaborated with it in the arrest or prosecution of criminals and that police inaction causes an injury as a result. **L**
* **Wanzer v. District of Columbia (D.C. App. 1990)**: Dispatcher told a stroke victim to taken an aspirin (not knowing they had a stroke). Court found that **one-time call to 911 does not create a special relationship** and **in dicta that a series of contact between a public agency and an endangered person does not create a special relationship**, fearing the amount of liability for emergency services for every blunder. **NL**
	+ “Protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed”
	+ Just as a legislature can supplant common law reasonable care determinations, **government can decide what constitutes a reasonable allocation of resources** and, thus, whether it is liable for alleged breach of care
	+ Court won’t let jury decide if their allocation was reasonable because someone is always going to be left unprotected – it is up to the government to decide who to protect and who not to – so courts find no duty
	+ However, **where sovereign immunity is waived**, common law courts do impose on government a duty of reasonable protection **when a member of the community relies on a governmental agent’s express or implicit promise** – e.g. DeLong (promise of ambulance on its way)
	+ Other circumstances, such as “active use of a private citizen”, Schuster, may also impose a duty – such as when asking a private citizen to help

Limited Duty of Government Protection

* In sum, under the common law, a government is deemed to have taken on a reasonable-protection obligation to an individual only when it has **waived sovereign immunity** and has **voluntary established a special relationship** that implies resource-allocation decision in favor of individual claimant
* As is generally true of special-relationship duty, lines are hard to draw and **vary by jurisdiction**

**Duty – Arising from Land**

**Licensees**

* Possessor of land has an ordinary duty of reasonable care in the **conduct of activities** on the land and a duty to warn of dangerous, hidden conditions **of which the possessor is aware**
	+ Note that there is **NOT duty to inspect premises for safety**, of which a licensee it entitled to no more than the possessor
	+ Licensee is voluntarily coming on and expresses a **willingness to share in the risks while on the premises**
	+ **Presumption that an owner will take reasonable care for her own protection**

**Invitees**

**R2 343 Dangerous Conditions Known to or Discoverable by Possessor**

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

1. **knows or by the exercise of reasonable care would discover the condition**, and should realize that it involves an unreasonable risk of harm to such invitees, and
2. **should expect that they will not discover or realize the danger**, or will fail to protect themselves against it, and
3. **fails to exercise reasonable care to protect them against the danger**

**(lack of knowledge is not a requirement as it is with licensees)**

**Remember to analyze both through traditional approach and unified approach**

* The traditional common law to duties owed by possessors of land is needless confusing because it reflects an amalgam of duty and determinations of whether that duty is breached
* Adding to this confusion is an unstated recognition that what constitutes reasonable care is interdependent among actors involved

Depending on the circumstances, different actors might have different responsibilities towards each other

Traditional duties owed by occupants or owners of land to entrants vary based on the status of the entrant.

* A trespasser enters land without permission.
* A licensee enters land with permission for her own purposes.
* An invitee (such as a business customer) enters land with permission and for a purpose of the landowner

**Trespassers**

* Possessor of land has a duty to a trespasser **not to willfully or wantonly injure** as well as a **duty to act reasonably** in presence of, or to **warn, known or expected trespassers**.
* Note that there is no duty to investigate the possible presence of trespassers or to inspect the land for hazards
* Example: Hunting on your own land, if you shoot a trespasser accidentally, you are not liable – there is no duty to investigate if a trespasser is present – you have the right to assume that there is no trespasser barring a warning/notice because trespassers are usually there
	+ There is a duty, but no breach of duty because the duty is defined narrowly; or it could be characterized that he behaved reasonably b/c it is not unreasonable to not inspect his own land given that it is reasonable to expect others not to wander onto another’s land during hunting season
* Example: Hunting on own land, during hunting season, having invited no one on to the land, thinks it would be fun to shoot in all directions
	+ Traditional Rule: Duty to not behave willfully or wantonly – this is wanton behavior – how does this change if he is drunk? If he is tired? The “willfully or wantonly” part is going to do a lot of work for what we consider reckless
	+ Reasonable Care Standard: It is negligent to hunt in this manner given that one has not inspected the land – reasonable care standard is a lot more flexible
	+ **Traditional Duties remain in jurisdictions because judges are afraid that juries will be overly zealous in finding liability even when the actor has behaved reasonably** – so it is structured so that factfinders are not invited to find liability based on reasonable care

**R2 333 General Rule – Obligation to Trespassers**

Except as stated in §§334-339, a possessor land is not liable to trespassers for physical harm caused his failure to exercise reasonable care a) to put the land in a condition reasonably safe for their reception, or b) to carry on his activities so as not to endanger them.

* **Haskins v. Grybko (Mass. 1938)**: Defendant shoots plaintiff’s intestate trespassing on property (mistaking it for a gopher). Court ruled that defendant has obligation to avoid intentional injury but does not have duty to trespasser to avoid negligent conduct. **NL**
	+ Hunter on own land not liable to unexpected, injured trespasser whom hunter owned no duty
	+ Likely same result under unified duty
* **Herrick v. Wixom (Mich. 1899):** Plaintiff snuck into circus and was injured by piece of firecracker. Court found that if the defendant **knows of trespasser’s presence** (since plaintiff was known as an audience member), then there is a duty to avoid negligence. **L**

**Highly Dangerous Activities**

**R2 334 Activities Highly Dangerous to Constant Trespassers On Limited Area**

A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to **carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.**

**R2 337 Artificial Conditions Highly Dangerous to Known Trespassers**

A possessor of land who maintains on the land an artificial condition which involves a risk of death or serious bodily harm to persons coming in contact with it, is subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care to warn them of the condition if a) the possessor knows or has reason to know of their presence in dangerous proximity to the condition, and b) the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk involved.

* **Cleveland Electric Illuminating Co. v. Van Benshoten (Ohio 1929):** Trespasser used outhouse for workers when gas company was fixing an underground conduit. Trespasser lit match and gas exploded. Trespasser argued that gas company owed him warning. Court agreed that company **still owes warning** if exists reasonable cause to believe injury might result if plaintiff were warned. Found that it was not reasonable to believe that plaintiff would have used building for this purpose nor lit match. **NL**
* **Ehret v. Village of Scarsdale (N.Y. 1935):** Westchester County Small Estates Corporation laid a pipe to drain water under houses it had recently built in Scarsdale. The Corporation encased part of an existing gas main inside the drainpipe but a leak opened in the gas main and the gas entered the drainpipe and went into the vacant houses, asphyxiating a trespasser who had entered the house and was sleeping there. **Court found that construction of a pipe in a public street and the corporation owed a reasonable standard of care to those in the area**, regardless **if someone was trespassing** while he/she was there. **L**

**Trespassing Children**

**R2 339 Artificial Conditions Highly Dangerous to Trespassing Children**

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

1. the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
2. the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
3. the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
4. the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
5. the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.
* **Keffee v. Milwaukee & St. Paul R. Co. (Minn. 1875) Majority Rule’:** Yong child caught his leg in railroad turntable. Turntable was **left unfenced and unfastened**. Court ruled that **since railroad knew that children were in the habit of playing with it**, they had a duty of reasonable care to protect children from this danger. **L**
* **Ryan v. Towar (Mich. 1901) Minority Rule:** Children entered pumphouse (owned by bankrupt company) through hole in the wall and played with wheel. Child was injured and sued. Court found that corporation was not liable for preventing children from entering, especially **since it was not lured onto the property** (since children made the hole in the wall). **NL**

**Licensees**

**R2 330 Licensee Defined**

A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor’s consent.

**R2 341 Activities Dangerous to Licensees**

A possessor of land is subject to liability to his licensees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, a) he should expect that they will not discover or realize the danger, and b) they do not know or have reason to know of the possessor’s activities and of the risk involved.

**R2 342 Dangerous Conditions Known to Possessor**

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

1. the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
2. he fails to exercise reasonable are to make the condition safe, or to warn the licensees of the condition and the risk involve, and
3. the licensees do not know or have reason to know of the condition and the risk involved
* Possessor of land has an ordinary duty of reasonable care in the **conduct of activities** on the land and a duty to warn of dangerous, hidden conditions **of which the possessor is aware**
	+ Note that there is **NOT duty to inspect premises for safety**, of which a licensee it entitled to no more than the possessor
	+ Licensee is voluntarily coming on and expresses a **willingness to share in the risks while on the premises**
	+ **Presumption that an owner will take reasonable care for her own protection**
* Example: Owner wants to keep house dangerous b/c death wish but isn’t aware of particular danger
	+ Traditional duty – owner was not aware of that particular danger could be argued; could also argue that the owner did know that there was general neglect even if they didn’t know about this specific danger and so was aware in that sense (but the gymnastics to shoehorn it in are more tenuous) and should have warned that the house had dangers
	+ Unified Approach – a court would say that although there is a **presumption that the owner has taken reasonable care**, that is just a **rebuttable presumption** and didn’t take care in protecting herself
* **Davies v. McDowell National Bank (Pa. 1962):** Mr. and Mrs. Davies visited Mr. Thomas, Mrs. Davies’s stepfather, and found him unconscious. After going to the doctor, they stayed with him in his office, where Mrs. Davies and Mr. Thomas died of carbon monoxide poisoning. Court found they were social guests, not business visitors, and thus the owner is liable for bodily harm caused by a latent dangerous condition **only if he has knowledge of the condition and fails to give warning thereof**, since it is an unreasonable risk and they are not likely to discover the existence of the condition. **NL**
* **Lordi v. Spiotta (N.J. 1946):** Defendant’s son had failed to turn off gas for water heater. Plaintiff’s son went to light match to heat water at request of plaintiff and died in explosion. Court found that plaintiff represented the place to be free from peril and was negligent in keeping it free from peril for the guest. **L**
	+ Based on determination of “active negligence,” homeowner liable to social guest who died in explosion after he lit furnace at homeowner’s request **b/c he asked person to light the fire** (but this requires some gymnastics because usually a licensee normally takes the property as he finds it)
	+ Unified theory offers broader justification for liability in this case: **a merely *rebuttable* presumption that premises held by possessor are fit for social guest**

**Invitees**

**R2 332 Invitee Defined**

1. An invitee is either a public invitee or a business visitor.
2. A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
3. A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

Illustration 1: A hires a hall and gives a free public lecture on a religious topic. B, as a member of the public, attends the lecture. B is an invitee.

Illustration 2: The city of X maintains a free public library, for the use of anyone in the community. A comes to the library to read a book. A is an invitee. But if A enters to meet a friend, or merely to get out of the rain, he is not an invitee.

Comment L: If the invitee **goes outside of the area of his invitation**, he becomes a trespasser or a licensee, depending upon whether he goes there without the consent of the possessor, or with such consent. Thus one who goes into a shop which occupies part of a building, the rest of which is used as the possessor’s residence, is a trespasser if he goes into the residential part of the premises without the shopkeeper’s consent; but he is a licensee if the shopkeeper permits him to go to the bathroom, or invites him to pay a social call.

**R2 341A Activities Dangerous to Invitees**

A possessor of land is subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, he should expect that they will not discover or realize the danger, **or** will fail to protect themselves against it. (lack of knowledge is not a requirement as it is with licensees)

**R2 343 Dangerous Conditions Known to or Discoverable by Possessor**

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

1. **knows or by the exercise of reasonable care would discover the condition**, and should realize that it involves an unreasonable risk of harm to such invitees, and
2. **should expect that they will not discover or realize the danger**, or will fail to protect themselves against it, and
3. **fails to exercise reasonable care to protect them against the danger**

**(lack of knowledge is not a requirement as it is with licensees)**

* Possessor owes full duty of reasonable care in activities and, for hazards from condition of land, a full duty of reasonable care, which **includes an obligation to inspect the land for the invitees’ benefit**
	+ Duty to warn for hazards
	+ **No defense for unknown hazards that could have been reasonably discovered**
	+ Breadth of duty here includes obligation is analogous to a duty to rescue based on a special relationship
	+ Sort of “special relationship” where when going to a business or public offering, there is an expectation that **those trying to attract the public**, you would ensure it is a safe place
	+ **Duty here does not preclude full-fledged special relationship duty** reasonably to rescue from any hazard
	+ So if someone suffers heart attack on your property, no duty to rescue under landowners to invitees; but, a court could say being a business operator owes a special relationship to customers and to act reasonably towards customers
	+ **Unified Approach**: While it may be reasonable for a landowner to fail to inspect land for the benefit of a licensee, **it is not reasonable for a business owner to fail to inspect land** – invitees expect greater care than licensees

Rejection of the Traditional Approach / Unified Approach

* **Rowland v. Christian (Cal. 1968):** Rejects classifications of trespassers, licensees, and invitees and finds that while this status might bear on the question of liability, the ultimate question is whether there was reasonable care in view of the probability of the injury to others.
	+ Court finds that defendant knew about broken faucet and failed to warn plaintiff and thus is liable. **L**
* **Carter v. Kinney (Mo. 1995):** Refused to abolish distinction. Plaintiff was a member of Bible Study Group – went in driveway of defendant’s house and slipped on ice and broke leg. Court found that plaintiff was a licensee and not an invitee and so defendants had no duty to protect him from unknown dangerous conditions. **NL**
* **Rhodes v. Illinois Central Gulf Railroad (Ill. 1996):** Intoxicated man found lying facedown with blood in railroad. Operators called police several times and police didn’t come until too late and man died. Court found that it was a question of fact whether the intoxicated man had the status of a trespasser or an invitee and thus whether a duty of care was owed to the man. **L**
* **Boyd v. Racine Currency Exchange (Ill. 1973)**: Plaintiff’s decedent entered currency exchange. Robber threatened to kill decedent if the teller didn’t hand over money. Teller refused and robber killed decedent. Court found that even though plaintiff was invitee, defendant’s business did not owe **duty of care to comply with criminal**. **NL**
* Some courts that reject the unified approach really want to limit duty – they use unified approach between invitees/licensees but use traditional approach to trespassers

**Duty – Privity, Economic Loss, Emotional Distress**

**Privity**

* Roughly follows the principles of third-party-beneficiary contract doctrine – e.g. *Glanzer* (weighed beans); *Biakanja* (botched will) – but with the application of those principles limited by concern over the imposition of a flood of liability *H.R. Moch* (contract between water and city but water company was not liable for fire; also under no duty to rescue principle; plaintiffs ask for a special relationship)
* Cases follow policy and doctrine of pure economic harm or proximate cause
* Lack of privity defeated *Moch*, but not *Glanzer* where there was a contract between a party and another **that affected the plaintiff**
* Slightly perverse incentive structure – the more liability you create, the more the liability is limited
* Regarding the concern over crushing liability
	+ “orbit of duty” based on public policy may result in the exclusion of some who might have recovered for losses if traditional tort principles had been applied – *Einhorn* (locksmith owes no duty to tenant)

**Privity**

* **H.R. Moch Co. v. Rensselaer Water Co. (N.Y. 1928):** Water company had contract with the city to supply water to hydrants. Hydrant failed to supply needed pressure to put out fire at plaintiff’s warehouse. Court finds that one does not have an action for breach of contract to a third party that depends on that contract; nor is there an action for tort for those who are in privity to the contract. **NL**
* **Glanzer v. Shepard (N.Y. 1922):** Seller of beans hired defendants, professionally weighers, to certify the weight of bags of beans. The plaintiffs paid the seller according to the weight certified by the defendants. When trying to resell the beans, the plaintiff found out that the weight was less and sued defendant weighers to recover amount. Court found liability on the weighers behalf **because “the plaintiffs’ use of the certificates was not an indirect or collateral consequence of the action of the weighters**. It was a consequence which, to the weighers’ knowledge, was the **end and aim** of the transaction.” **L**
* **Food Pageant v. Consolidated Edison (N.Y. 1981):** Power company liable to grocery store for spoiled food and lost business because company acted negligently in causing power outage. **L**
* **Lilpan Food Corp. v. Consolidated Edison (N.Y. 1985):** Power company not liable for looting of store as a result of power outages in the street. **NL**
* **Conboy v. Mogeloff (App. Div. 1991):** Doctor prescribed drug to patient – the drug causes drowsiness, but doctor said that she could drive car. Plaintiff crashed car, injuring children. **Court found that doctor owed no duty to the plaintiff’s children since the children did not rely on doctor’s conduct nor did he have awareness of their reliance**. **NL**
* **Biakanja v. Irving (Cal. 1958):** Notary prepared will but forgot to have witnesses. Will was found invalid. Sister was supposed to get all of will – sister received judgment for difference between what she did receive and what she should have received. Court found notary liable despite lack of privity – court endorsed balancing test that factored in the extent to which the transaction was intended to affect 3rd person, the foreseeability of harm to 3rd person, the degree of certainty that injury would be suffered by 3rd person, the moral blame attached to the defendant’s conduct, and the policy of preventing future harm. **L**
* **Ultramares Corp. v. Touche (N.Y. 1931):** Accounting firm certified balance sheet for company. Company had cooked books. Plaintiff creditors who had loaned money to company sued accountants. Court found that accountants are not liable unless there was a reckless misstatement or insincere profession, not an honest blunder. **NL**

 Now, three-element test:

* + Credit Alliance Corp. v. Arthur Anderson & Co. (N.Y. 1985) **NL**
	+ European American Bank & Trust v. Strauhs & Kaye **L**
	1. accountants must have been aware that the financial reports were to be used for a particular purpose or purposes;
	2. in the furtherance of which a known party or parties was intended to rely; and
	3. there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants’ understanding of that party or parties’ reliance
* **Einhorn v. Seeley (N.Y. App. 1988):** Plaintiff raped in apartment building, claimed assailant came in because of faulty door, and sued locksmith. Court denied that **locksmith owed duty to assailant, as only had contract with owner**. **NL**

**Economic Loss Rule**

**Traditional Approach vs. People’s Express Approach**

* **One generally has no liability for economic loss, but there are carve-outs**
* A duty reasonably to protect the economic wellbeing of others is recognized for special relationships – e.g. *Glanzer*, *Biakanja* – **cases in which actors understood who the true beneficiary was of the act – or in some jurisdictions – even generally traditional jurisdictions – for especially foreseeable class of injury, such as to fishermen** (despite lack of foreseeability in some cases) – see R3 LEH 6
* Otherwise in traditional jurisdictions, a duty to exercise reasonable care towards the economic wellbeing of another is recognized only when the other’s economic loss is accompanied by physical injury (to person or property) (even if it is not the cause of the economic loss) – this can create perverse results where two entities have suffered the same economic loss, but only the one who has accompanying physical damage can collect
	+ This is a **method to cabin liability**
	+ See, e.g. *532 Madison Ave*.; see also *Robins,* R3 Torts LEH 7
* *People Express*
	+ A negligently-caused fire leads to an evacuation that forces a neighboring business to lose revenues (including airliner)
	+ Holding: A defendant owes a duty of care to take reasonable measures to avoid the risk of causing economic damages to particular plaintiffs or plaintiffs compromising an identifiable class with respect to whom defendant knows or has reason to know are likely to suffer damages
	+ People Express solves the arbitrariness for liability for economic harm when **mushrooms spoil** from loss of power (Newlin) but no liability for economic harm when a plant loses power to operate (Byrde)
	+ Also avoided by People Express approach is arbitrariness of allowing **only “parasitic” economic loss claim** (e.g. flight of a pebble – very little physical damage)
	+ But does People Express truly solve the arbitrariness problem?
		- Is foreseeability arbitrary?
		- Members of the general public, or invitees such as sales and service persons at a particular plaintiff’s business premises would not comprise a class sufficiently ascertainable for liability
		- **An identifiable class of plaintiffs must be particularly foreseeable** – the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic expectations disrupted
	+ Under either the **economic-loss rule** or the **People’s Express approach**, courts struggle to permit liability for unreasonable conduct without opening floodgates of such liability – a concern seen elsewhere as well, in Moch (fire), Einhorn (locksmith) – the traditional approach is simply more rigid in its line-drawing, at least until exceptions are drawn
		- Using duty instead of proximate cause, People’s Express will cut off liability if the foreseeability is too remote
		- Consider whether the floodgates are worth closing

**Seamen and Fisherman**

* **Robins Dry Dock & Repair Co. v. Flint (1927) – Influential admiralty case:** Plaintiffs chartered steamboat. Defendants damaged propeller, delaying plaintiffs from using steamboat for two weeks, resulting in economic loss. Court found that a plaintiff who suffers **no physical injury** cannot recover for pure economic loss caused by defendant’s negligence. **NL**
* **Carbone v. Ursich (9th Cir. 1953):** Fisherman chartered boat – another boat damaged it. Fisherman sued other boat for damages. Court found that **fisherman should be an exception to the Robins rule**. **L**
* **Henderson v. Arundel Corp. (D. Md. 1966, aff’d without opinion 4th Cir. 1967):** Dredging boat was damaged for six weeks by collision with another boat; workers who lost pay for six weeks sued colliding boat. Court, citing Casado v. Schooner Pilgrim, Inc. (D. Mass. 1959), **declines to expand fisherman exception to seamen in general**. **NL**
* **Yarmouth Sea Products Ltd. v. Scully (4th Cir. 1997):** Boat damaged fishing boat, where fishermen were to be paid under a lay agreement. Argued that Henderson did not control the case of fishermen and followed Robins / Carbone precedent. Noted that with the lay agreement, it is like a joint venture, and so harm to fisherman is foreseeable in a way it is not for dredge workers, who are paid hourly. **Majority Rule: Fisherman can collect lost income when their boats are negligent disabled. L**

**Physical Damage Requirement**

* **532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc. (N.Y. 2001):** Wall of skyscraper collapsed. Delicatessen had to close for more than a month and sued for lost profits. Appeals court found building company liable for economic loss given that they knew danger of collapse. Court of Appeals reversed, fearing huge claims of economic loss whose veracity would be doubtful, limiting economic loss to personal injury or property damage. **NL**
* **Newlin v. New England Telephone & Telegraph Co. (Mass. 1944);** Defendant telephone company knocked over unrelated power company’s line, cutting off power to an indoor mushroom grower, ruining his crop. Court held that this was a valid cause of action. **L**
* **Phoenix Professional Hockey Club, Inc. v. Hirmer (Ariz. 1972):** Owner of hockey team sued defendant for negligent crash which injured goalie, suing for replacement costs. Court held that this was not a valid cause of action. **NL**
* **Byrd v. English (Ga. 1903):** Defendant was excavating home, dug underground, and disrupted power lines to a printing press. Plaintiff sued for lost profit while power was out. **NL**

**People Express Airlines, Inc. v. Consolidated Rail Corp. (N.J. 1985) – Minority Position**

Fire at a rail yard led to evacuation of hangar at Newark Airport, resulting in the cancellation of flights. Court finds liability because railyard knew it there was an accident, Newark Airport was in the zone of evacuation, and business would be affected. **L**

Court begins by attacking per se prohibition on economic loss, noting that it has been under attack for several years.

* Court notes two strands allowing for exceptions. One is the **foreseeability of the damage** and two is the extent to which a defendant **should have known or knew about the particular consequences of their/his/her negligence** including the economic loss of a particularly foreseeable plaintiff.
* Notes that when the plaintiffs are reasonably foreseeable, the injury is directly and proximately caused by defendant’s negligence, and liability can be limited fairly, courts have endeavored to create exceptions.
* Holding: A defendant owes a duty of care to take reasonable measures to avoid the risk of causing economic damages, aside from physical injury, to particular plaintiffs or plaintiffs comprising an identifiable class with respect to whom the defendant knows or has reason to know are likely to suffer damages from its conduct. A defendant failing to adhere to this duty of care may be found liable for such economic damages proximately caused by its breach of duty.
* **Notes that a class of people cannot just be foreseeable, such as traveling passersby who are delayed.** An identifiable class of plaintiffs must be particularly foreseeable in terms of the type of persons or entities comprising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic expectations disrupted.
* Actual economic loss is not required, just foreseeability of loss.

**Rejection of People’s Express Rationale**

* **Barber Lines A/S v. M/V Donau Maru (1st Cir. 1985):** Oil spill in harbor. Boat had to dock elsewhere and sued for additional docking and labor costs. Court **rejects changing rule because of high cost to increasing tort liability, because sophisticated parties are usually insured, and because it can usually work its way through a chain of contracts** (e.g. boat owner sues dock who was directly affected by oil who sues ship who spilled). Also because such liability would be disproportionate to fault and would create preserve incentives, such as impossibly expensive car insurance premiums. Also notes lack of empirical information to weigh the considerations of administrability and disproportionality to allow for balancing test. Finds that exceptions are cases in which “administrative” and “disproportionality” problems seem insignificant or where there is some strong countervailing consideration. **NL**

**Emotional Distress**

R3 LPEH 46 – Direction Infliction

R3 LPEH 47 – Indirect Infliction - Bystanders

**Negligent Infliction of Emotional Distress**

* Jurisdictions consistently hold that emotional distress claims, if sufficiently demonstrated, can accompany **claims that a defendant directly caused a plaintiff’s physical injury**
* Limits duty in the general case, to those **who are in the zone of danger** who, in any case, **suffer “serious” emotional harm**
* Jurisdictions differ on what evidence of harm counts as sufficient to trigger liability with some (but not all) courts, e.g. Robb, **requiring “physical consequences”** of an emotional disturbance (headaches, ulcer); even courts that don’t require physical consequences will usually **require something verifiable – e.g. diagnosis**
* Even jurisdictions that don’t accept the limits of the impact test may not in all cases allow liability where the plaintiff is in the zone-of-danger (restatement notwithstanding)
* **Some courts require neither causing of physical injury nor in zone of actual danger but based it on foreseeable result of defendant’s conduct and that distress was serious.**

**Negligent Indirect Infliction of Emotional Distress**

* No-impact (to plaintiff) bystanders cases can be divided by type
	+ The plaintiff is herself in the zone of danger and witnesses injury to another
	+ The plaintiff is not herself in the zone of danger but nevertheless witnesses injury to another
	+ Liability in the latter category has been the more controversial and slower to be adopted
* There are two policy reasons for limiting duty for emotional-distress claims:
	+ Floodgate concerns (just as with economic loss)
	+ Fraud concerns – evidentiary transparency
* There is no single set of rules or even cleanly-drawn competing approaches, just factors that are balanced differently among jurisdictions
* Jurisdictions consistently hold that emotional distress claims, if sufficiently demonstrated, can accompany **claims that a defendant directly caused a plaintiff’s physical injury**
* But where a defendant’s conduct causes plaintiff no physical bodily injury other than that induced by emotional distress, **courts vary widely on how to limit the duty**
* **R3 LPEH 46 – Direction Infliction**
	+ “An actor whose negligent conduct causes **serious emotional harm** to another is subject to liability to the other if the conduct:
	+ A) places the **other in danger of immediate bodily harm** and the emotional harm results from the danger; or (Near miss cases)
	+ B) occurs in the course of specified categories, activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm (relationships or particular conduct gives rise to emotional harm)
	+ Rejects limitations of “impact test,” (just with accompanying physical harm) limits duty in the general case, to those **who are in the zone of danger** who, in any case, **suffer “serious” emotional harm**
	+ Jurisdictions differ on what evidence of harm counts as sufficient to trigger liability with some (but not all) courts, e.g. Robb, **requiring “physical consequences”** of an emotional disturbance (headaches, ulcer); even courts that don’t require physical consequences will usually **require something verifiable – e.g. diagnosis**
* Even jurisdictions that don’t accept the limits of the impact test may not in all cases allow liability where the plaintiff is in the zone-of-danger (restatement notwithstanding)
* **Lawson v. Management Activities (Cal. App. 1999)** – Employees at a car dealership feared that a crashing plane was going to crash into them. **NL**
* **Quill v. Trans World Airlines (Minn. 1985)** – man was in tailspin that narrowly avoided crash and suffered anxiety going on other plans for his business travels (which were frequent) afterward. Court awarded liability under “zone of danger” rule. **L**
	+ In Lawson, the court held that an airline **owed no duty to those on the ground nearly hit by a plane crash** (floodgate concern); contrast Quill case, **liability to passengers on plane**

**Robb v. Pennsylvania Railroad Co. (Del. 1965)**

Plaintiff’s car got stuck in rut that RR was negligent in fixing, almost got hit by car, experienced physical systems of shock for two weeks afterwards. Court holds that where negligence proximately caused fright, in one within the immediate area of physical danger from that negligence, which in turn produced physical consequences such as would be elements of damage if a bodily injured had been suffered, the injured party is entitled to recover under. **L**

**Impact Rule** – from Mitchell v. Rochester R. Co. (N.Y. 1896) / Spade v. Lynn & Boston R. Co. (Mass. 1897)

1. Fright alone does not give rise to action, so its consequences will not give rise. / Objects since there is damage.
2. The physical consequences are impossible to trace to the fright / stated in Orlo v. Connecticut Co. (Conn. 1941) – medical science can trace physical consequences to fright
3. Difficult to prove since state of mind is easy to fake / Orlo notes that emotional distress claims are still permitted when accompanied by a physical injury and are no less provable

Notes policy reasons for including harm even though it is hard to measure – the problems of evidence and spurious claims are present in other areas of the law and the court believes the law and science can meet the task.

Notes other cases **where a very small physical impact has been used to ground a larger emotional distress claim and where very clear emotional distress claims were denied**

* Christy Bros. Circus v. Turnage (Ga. App. 1928) – dancing horse poops on lady **L**
* Mitchell v. Rochester Ry. Co. (N.Y. 1896) – team of horses almost hit woman, causing miscarriage, but woman could not recover **NL**
* **Richardson v. J.C. Penny (Okla. App. 1982)** – couple wins emotional distress claim for husband’s ulcer caused by brakes giving out while driving 24-foot trailer down mountain road. **L**
* **Some courts require neither causing of physical injury nor in zone of actual danger but based it on foreseeable result of defendant’s conduct and that distress was serious.**

**Direct Negligent Infliction of Emotional Distress – Specified Categories of Activities**

* Turning to cases of the sort reflected in 47(b), why did the parents prevail in Perry-Rogers (in vitro fertilization gone wrong) but not in Johnson v. Jamaica Hospital (kidnapped baby)?
	+ Doctrinally, the court notes a **direct (contractual) duty** to the parents only in the former case
	+ Where there would be no remedy for anyone for negligent behavior, the court will recognize a duty where there would ordinarily would not be
	+ The bigger picture reveals a different tradeoff in the two cases between justly imposing liability and opening floodgates: in Perry-Rogers and similar cases, **absent liability to the merely emotionally distressed there would be no liability to anyone**; whereas someone is more likely to **suffer physical harm and/or emotional harm** in kidnapping claims – and the kidnapped person can make a claim (just not the parents) – also maybe b/c kidnapper can be sued
* **Johnson v. Jamaica Hospital (N.Y. 1984)** – girl was abducted from hospital for four months. Parents sued for emotional distress. Court found that direct injury was sustained by girl, not towards parents and that parents’ distress was not foreseeable. Worried about opening up emotional distress liability for every negligent treatment. Also believes that no duty was established through contract nor that the hospital was in loco parentis because it was only a temporary moment of care. Meyer dissent notes that this is an arbitrary, unjust line to draw. **NL**
* **Perry-Rogers v. Obasaju (N.Y. App. Div. 2001):** Fertility clinic implanted the wrong embryo in a person who gave birth to the child. The child-bearer refused to hand over the child for our months. The court found that clinic owed a duty to the parents and that it was foreseeable that harm would come to parents from being denied the opportunity to give birth and to the separation for four months. Distinguished from *Johnson v. Jamaica Hospital* by saying that hospital owed no duty to parents of newborn. **L**
* **Potter v. Firestone Tire and Rubber Co. (Cal. 1993):** Firestone dumped toxic waste which seeped into plaintiff’s well who sued for fear of cancer. Court rejected lower standard of reasonable fear of cancer to a higher standard of “probable.” Court found this for three reasons. 1) To ensure that insurance was not so high that insurance as not purchased 2) fear for opening up liability to experimental drugs for cancer claims and 3) To open up claims for reasonable cancer fears would take away money from those who actually develop cancer. **L**

**Negligent Indirect Infliction of Emotional Distress**

* No-impact (to plaintiff) bystanders cases can be divided by type
	+ The plaintiff is herself in the zone of danger and witnesses injury to another
	+ The plaintiff is not herself in the zone of danger but nevertheless witnesses injury to another
	+ Liability in the latter category has been the more controversial and slower to be adopted

**Dillon v. Legg (Cal. 1968) – Majority position**

Mother saw child hit by car. Court found emotional distress based on proximity of bystander, actually seeing the accident occur, and the closeness of the relationship. **L**

Other states declined to hold that one must be in the zone of danger.

**Thing v. La Chusa (Cal. 1989)**

Plaintiff must be 1) closely related to the victim 2) present at the scene of injury-occurring event and is aware that the victim is being injured and 3) serious emotional distress – beyond that of disinterested witness and which is not an abnormal response to the circumstances.

**R3 LPEH 47 – Indirect Infliction - Bystanders**

An actor who negligently causes sudden serious bodily injury to a third person is subject to liability for serious emotional harm caused thereby to a person who

* A) perceives the event contemporaneously, and
* B) is a close family member of the person suffering the bodily injury
* For other formulations of the rule, e.g *Thing*

Despite any stated rule – whether from Restatement or e.g. Thing – courts seek to establish duty where the claim is of a sort that tends to be genuine but even then limits to liability can be established (closing the floodgates).

* Marzolf (duty to father who personally observes aftermath of deadly accident)
* Gain (no duty to father who saw on television evidence of deadly accident) (potentially too many people witnessing)
* Barnhill (duty to son who witnessed severe accident that turned out not to have caused serious injury)
* Barnes (no duty to mother who feared her child was the one skilled in an accident she witnessed) (**too many parents/relatives might have claim**)
* In such balancing, line-drawing can appear arbitrary

**Variations on Witnessing Accident**

* **Marzolf v. Stone (Wash. 1998):** Father came after son had been injured in motorcycle accident but witnessed his son die. Court found emotional distress claim even though he had not witnessed the accident. **L**
* **Gain v. Carroll Mill Co. (Wash. 1990):** Father saw his son crushed to death in car by bus on the 11 o’clock news, recognizing the license plate of his son’s trooper car. Court did not find it foreseeable from injury that someone would view it on the news. **NL**
* **Barnhill v. Davis (Iowa 1981):** Plaintiff, in the car ahead, saw his mother get hit by a car. She has slight injuries and no ill effects within six weeks. Plaintiff claimed emotional distress in worrying about his mother. Court found it a genuine issue of fact that plaintiff could be suffering distress from worrying about mother. **L**

**Believed to Have Been Hurt**

* **Barnes v. Geiger (Mass. App. 1983):** Woman saw person get flung 60 feet in the air by accident, believed it was her son. She died of cerebral vascular hemorrhage the next day. Husband sued because her blood pressure had been elevated witnessing the accident. Court declined to extend liability to distress based on a fleeting mistake of circumstances because it would expand liability too far. **NL**

**No Emotional Distress Liability for Animals Being Killed**

* **Johnson v. Douglas (N.Y. Sup. Ct. 2001):** Plaintiff narrowly escaped being run over by racing car and car ran over dog. Court dismissed, as animal is personal property and emotional distress as a bystander can only apply to family members. **NL**

**But-For Causation**

Causation: Had the defendant taken the precaution, would the injury have been prevented?

**Tortious act is the but-for cause, not just conduct**

**Issue #1: Burden shifts to defendant when lack of precaution increases likelihood and plaintiff lacks information – not always followed**

**Issue #2: Loss of Chance Doctrine – defining injury as loss of chance**

**Issue #3: Informed Consent (Objective Standard except for cosmetic surgery)**

* **Grimstad** – no reasonable jury could have concluded the buoy would have saved Angell – buoy wouldn’t have helped because husband was already gone
* **Haft v. Lone Palm Hotel** – statute required hotel to post either a lifeguard or a no-life-guard-on duty sign; hotel did neither and father and son drowned
	+ Absolutely, negligent per se. The question at issue is causation.
	+ Lack of a lifeguard in a small pool was obvious and so lack of a sign did not cause deaths – and sign would have had no effect on decedent’s decision
	+ Sign would have implicitly warned of danger
	+ Holding: **Shift of burden to defendant here**, where plaintiff has no information on causation (which will probably result in liability)
* Can Haft be reconciled with Grimstad?
	+ The court in Grimstad believed that **available information, including to plaintiff, was sufficient** to reach a reliable determination
	+ In Haft, the court concluded that **“because of the uncertainty surrounding the probably effectiveness of a sign,…substantial eradication of the statutory requirement would be the practical result”** if the plaintiff bore the more-likely-than-not burden of proof

**New York Central R.R. v. Grimstad (2d Cir. 1920)**

Plaintiff’s decedent was knocked overboard a barge, couldn’t swim, and disappeared. Boat had no life preservers and sued the owner of the barge for not providing any. Court found it speculative that lifejacket would have saved him. **NL**

**Gardner v. National Bulk Carriers (4th Cir. 1962)**

Seaman fell overboard; no one on board realized for six hours. Boat went forward instead of turning back. Trial court found the chance of success too remote. **Court found that since seaman often stay alive for hours in the water**, boat had duty to rescue and neglect of that duty is a contributing cause of the death. **L**

**Stacy v. Knickerbocker Ice Co (Wis. 1893)**

Ice company uses horses to collect ice. Horses were startled, ran to thin ice portion despite employees’ efforts, and fell in ice and drown. Plaintiff alleged negligence for not marking off the thin ice area as required, by failing to notify employees of the ice, and by failing to provide ropes to pull horses out. Court found that horses were uncontrollable and that **none of these steps would have prevented their death.** **NL**

**Haft v. Lone Palm Hotel (Cal. 1970)**

Father and son drowned in pool with no lifeguard or sign warning of hazards. Court found that as a matter of law, failing to put up a sign places the burden of proof on defendants to prove that sign would not have stopped decedents from swimming in order to avoid the burden of proof being on the plaintiff to prove that a sign would have stopped them from swimming. **L**

**Untaken precautions** must be carefully pleaded by plaintiffs – if plaintiffs argue that untaken precautions should have taken because defendant had a duty, the plaintiff might run into trouble when trying to prove but-for causation.

**Zuchovicz v. U.S. (2nd Cir. 2008)**

All that has changed, however. And, as is so frequently the case in tort law, Chief Judge Cardozo in New York and Chief Justice Traynor in California led the way. In various opinions, they stated that: 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. Where such a strong causal link exists, **it is up to the negligent party to bring in evidence denying but-for cause**.

**Shifting Burden to Defendant Based on Increase in Risk**

* + **Haft** and **Zuchowicz** (prescribed overdose) shift the causation burden to the defendant where the plaintiff can demonstrate a breach of duty **that increases the risk of the very injury** that the plaintiff suffered (otherwise there would be no liability nor deterrence because liability would never be found)
	+ Beware that Haft was interpreting a statute and that Zuchowicz is not uniformly followed (even by the 2nd Cir. interpreting the same state’s laws) – it is a tool that courts sometimes use **where there is a concern that plaintiff cannot show causation even if causation was the case, but not always followed**

**Medical Malpractice**

* + Liability based on a probabilistic threshold such as more-likely-than-not is imprecise
		- With a 50% probability, an award of $1 million is about $500,000 too much, just as an award of $0 is $500,000 too little
		- The law generally accepts this imprecision – which is not cured by burden shifting – perhaps in the hope of balancing overall
	+ As illustrated by Herkovits and Matsuyama, medical malpractice cases sometimes present a particularly troubling pattern: one where doctors treat a condition that they are unlikely to cure even with proper care
	+ These cases present a possibility of systemic undercompensation, which may be unfair and insufficient deterrence of negligence
	+ In medical malpractice cases, such as Herkovits and Matsuyama, some courts, but not all, have adopted a loss-of-chance doctrine as a means to reduce the incidence of insufficient liability

**Loss of Chance Illustration**

* Minority of courts would allow loss of chance for future risk (Cudone v. Gebret (D. Del. 1993)
* Doctor treats patient who would have died with 60% chance
* Doctor is negligent, probability goes up to 80%
* No other evidence other than that
* What is the probability that doctor’s negligence caused patient’s death?
* 25% (20/80)
* Per the Herkovits concurrence or Matsuyama, if patient’s life is valued at $1 million, what is patient’s recovery?
* Court doesn’t want to define the injury as death, **they want to define the injury as loss of chance** because they don’t want to change the more probably than not standard
* Doctor deprived patient of a 20% chance of survival – reduction from 40% to a 20% chance – and so damages would be $200,000
* Does this solve the insufficient-liability problem?
	+ No – if 20 die unnecessarily (loss of chance), loss would be $20 million
	+ But among the 80 who die (total probability), they are all awarded $200,000, so the total liability would only be $16 million, so $4 million shortfall – potentially bearing only a percentage of injury caused, more likely to risk being negligent because of cost of precaution
* There are, in principle, two ways to solve the loss-of-chance insufficient-liability problem – but why is there is still undercompensation?
	+ Award $200,000 to each (100) negligently treated patient, including those who survive; however, since death is evidence of negligence, survivors might not have evidence that they were treated negligently / not know they were treated negligently; courts would also be reluctant to give compensation where a survivor has not suffered an injury
	+ Award $250,000 to each (80) negligently treated patient who dies – i.e. award damages based on the ¼ chance that any death had a negligent cause; courts are reluctantly to openly base an award on a less-than-likely chance that the defendant’s negligence caused an injury
* **Fennell**, which rejects the loss-of-chance doctrine, argues (sensibly) that a true loss-of-chance approach would reduce awards to plaintiffs who can meet the more-likely-than-not standard, a reduction that, according to the court, would violate survivor-benefit statutes
* More generally, loss-of-chance is rarely (if ever) extended beyond medical malpractice cases (and at least in one jurisdiction, legislature banned it in the medical malpractice context)

**Herskovits v. Group Health Cooperative of Puget Sound (Wash. 1983)**

Plaintiff’s decedent died of lung cancer. Original doctor failed to diagnose it; second doctor diagnosed it later. No expert could testify that decedent would have survived probably or more than likely if it had been diagnosed earlier. 2nd doctor speculated that chance dropped from 39% to 25%.

Court found that decreased chance of survival as a result of medical error is a but-for cause. Court worries that it would let doctors off the hook for negligence for patients who had a less then 50% chance of survival. Courts found that award should be awarded based on damages caused by premature death, such as lost earnings and additional medical expenses. Court is not worried about jury speculation because survival tables are based in data. **L**

**Matsuyama v. Birnbaum (Mass. 2008)**

Deriving the damages for which the physician is liable [in a loss-of-chance case] will require the fact finder to undertake the following calculations:

1. The fact finder must first calculate the total amount of damages allowable for the death … or, in the case of medical malpractice not resulting in death, the full amount of damages allowable for the injury. This is the amount to which the decedent would be entitled if the case were *not* a loss of chance case: the full amount of compensation for the decedent's death or injury.

2. The fact finder must next calculate the patient's chance of survival or cure immediately preceding (“but for”) the medical malpractice.

3. The fact finder must then calculate the chance of survival or cure that the patient had as a result of the medical malpractice.

4. The fact finder must then subtract the amount derived in step 3 from the amount derived in step 2.

5. The fact finder must then multiply the amount determined in step 1 by the percentage calculated in step 4 to derive the proportional damages award for loss of chance.

To illustrate, suppose in a wrongful death case that a jury found, based on expert testimony and the facts of the case, that full wrongful death damages would be $600,000 (step 1), that the patient had a 45% chance of survival prior to the medical malpractice (step 2), and that the physician's tortious acts reduced the chances of survival to 15% (step 3). The patient's chances of survival were reduced 30% (i.e., 45% minus 15%) due to the physician's malpractice (step 4), and the patient's loss of chance damages would be $600,000 multiplied by 30%, for a total of $180,000 (step 5).

**Pearson Concurrence – Majority Position**

Reasons for “loss of a less than even chance” liability – should be proportionate to total if it were whole causation

1. Arbitrary
2. Subverts deterrence objectives of tort law
3. Creates pressure to manipulate and distort other rules affecting causation and damages to correct for injustices
4. Defendants benefit from uncertainty which, if not for their tortious conduct, would not exist
5. Loss of less than even chance is a loss worthy of redress

**Rejections of Lost Chance Theory**

**Cooper v. Sisters of Charity of Cincinnati, Inc. (Ohio 1971)**

If a plaintiff establishes that but for the defendant’s negligence, the decedent had a 51% chance of survival, the plaintiff can recover. If it is a 49% chance, the plaintiff cannot recover.

**Dumas v. Cooney (Cal. App. 1991) – Rejection of Lost Chance Theory**

Plaintiff sued doctor for failed lung cancer diagnosis, where his chance decreased from 67% to 15-20%. Court argues that loss of chance rule undercompensates those who did suffer from negligence and overcompensates those for whom negligence was not the actual cause. Argues that tort liability is not designed to compensate for lost chance but for actual cause. **NL**

**Fennell v. Southern Maryland Hospital Center (Md. 1990)**

If lost chance is to be adopted, then plaintiff should not be able to recover 100% of the damages when the doctor’s negligence only caused a 51% of the loss, or be able to recover 49% when the doctor’s negligence caused 49% of the loss.

**Two Separate Events**

**Wendland v. Sparks (Iowa 1998)**

Doctor didn’t resuscitate cancer patient in cardiac arrest. Court found that under lost-chance theory, there are two probabilistic losses: a victim who suffers from a pre-exiting adverse condition and is then subjected to another source of injury may have a claim for the second event. If it were not for the second event, the decedent might have survived the first. This loss of chance is to be treated and evaluated independently from the preexisting condition. **L**

**Expert Testimony**

Frye v. United States (D.C. Cir. 1923) – expert testimony is admissible only if based on principles found by the trial judge to be generally accepted in the scientific community. In Daubert v. Merrell Dow Pharmaceuticals (1993), SCOTUS concluded that Frye had been displaced by federal rules of evidence.

**Federal Rules of Evidence**

Whether the expert is proposing to testify 1) scientific knowledge that 2) will assist the trier of fact to understand and determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Judges can still consider whether the views are scientifically accepted, but judges can also ask whether the methods have been subject to peer review/publication, tested in various ways, and what are the error rates; the Court emphasized the standard is flexible. Daubert was extended to all experts in Kumho Tire Co. v. Carmichael (1999). This is not binding on state courts.

**Dillon v. Twin Gas & Electric Co. (N.H. 1932)**

Falling off of a girder, a boy grabbed an electrical wire and was electrocuted to death. Court found it was a question of fact of the probability of the boy dying or being maimed by falling into the river instead of dying from electrocution and that damages would have to be given accordingly. If the jury found that he would have become disabled, **the earning potential must be taken into account** in the damages. **L**

**Daugert v. Pappas (Wash. 1985)**

Plaintiff sued defendant lawyer for failing to file appeal to state supreme court in time. Jury found that there was a 20% chance supreme court would have reversed appeal, so awarded 20% of the total damages. Court found that these determinations are questions of law for cause-in-fact and **should be done by court**, not jury. **NL**

Further Difficulties of Proof **– Failure of Informed Consent**

* **Objective standard of causation**, typically saves defendant doctors from plaintiffs’ self-serving ex post claim that consent would have been denied if information had been provided; e.g. Bernard (tooth extraction) – (objective standard). But see Scott, which worries about loss of patient autonomy. (subjective standard)
* Reliable evidence of idiosyncrasy – i.e. ex ante evidence – may be permitted even under objective standard; See e.g. Bernard

**Bernhard v. Char (Haw. 1995) – Majority Position**

Char, a dentist, asked Bernhard if he wanted him to extract a tooth to deal with a condition. Bernhard consented but later sued after Char removed two teeth and part of a bone as part of the operation, claiming he wouldn’t have consented had he knew the risks. Char contested verdict on grounds that Bernhard failed to testify that he would not have had the procedure if he had not known of the risks. Court found that causation in informed consent is to be judged by an objective standard – whether a reasonable person would have consented to the treatment if properly informed of the risk of injury. **L**

* + **Scott v. Bradford (Okla. 1979) – Minority Position -** Endorsement of subjective position of causation in informed consent to protect patient right of self-determination.

**Zalazar v. Bercimak (Ill. App. 1993)** (Rejection of objective test for cosmetic surgery)

Plaintiff got plastic surgery to fix bags under eyes but ended up with droopy eyes; she argued that she wouldn’t have gotten the surgery if she had been informed of these risks. Court rejects objective test for cosmetic surgery because the cost-benefit is highly subjective, and no expert could testify. Where no expert could testify, a subjective standard should be used. **L**

**Alternative Liability & Apportionment**

* **Evidence of negligence but unclear who caused it: shift burden to defendants and find severally liable based on market share; some reject and leave to legislature; Hymowitz would not allow market share to exonerate themselves**
* **Multiple Sufficient Causes – substantial factor test**
* **“Substantial factor” test exonerated by a “sufficient innocent cause”**

There are situations where courts are willing to relax but-for causation.

**Liability without Determination of Cause**

**Summers v. Tice (Cal. 1948)**

Plaintiff went quail hunting with defendants. Defendants shot in direction of plaintiff; plaintiff was hit, but it is unclear which one hit the defendant. Court held both defendants liable, placing burden of proof on defendant to determine which one is truly liable. **L**

**433A Apportionment of Harm to Causes**

Illustration 3: Five dogs owned by A and B enter C’s farm and kill ten of C’s sheep. There is evidence that three of the dogs are owned by A and two by B, and that all of the dogs are of the same general size and ferocity. On the basis of this evidence, A may be held liable for the death of six of the sheep, and B liable for death of the four.

**433B Burden of Proof**

Illustration 10: Over a period of three years A successively stores his furniture in warehouses operated by B, C, and D. At the end of that time A finds that his piano has been damaged by a large dent in one corner. The nature of the dent indicates that it was caused by careless handling on a single occasion**. A has the burden of proving whether the dent** was caused by the negligence of B, C, or D.

Illustration 11: While A’s automobile is stopped at an intersection, it is struck in the rear by B’s negligently driven car. Immediately afterward C’s negligent driven car strikes the rear of B’s car, causing a second impact upon A’s car. In one collision or the other, A sustains an injury to his neck and shoulder. In A’s action against B and C, **each defendant has the burden of proving that his conduct did not cause the injury.**

* *Summers v. Tice*; Two hunters in the woods negligently fire toward, and one injures, a third
* Citing *Ybarra*, court shifts burden of proof on cause to defendants resulting in joint liability
* See also R2 Torts 433B
* As noted in *Sindell*, the court was aware that defendants lacked the ability to identify true cause and **shifted burden to create liability**, so *Summers* **can be applied even it is believed that defendant won’t be able to produce such evidence**
* Under the doctrine of res ipsa loquitur, courts ordinarily do not shift the burden unless there is reason to believe that an innocent defendant can exculpate herself. Why, then, the shift in Summers?
	+ Court has **direct evidence that both hunters were negligent** – the question is only if it caused the negligence; in res ipsa, there is insufficient direct evidence of the negligence, so they are more cautious to apply res ipsa (both of the individual defendant or multiple defendants)

**Kingston v. Chicago & N.W. Ry. Co. (Wis. 1927)**

Plaintiff’s lumber was destroyed by joint fire, one from the defendant’s railroad sparks, another independently. Court holds defendant liable unless defendant can prove that the other fire was of natural origin or was much greater. **L**

* Courts generally would not excuse defendant because other fire was greater as long as defendant’s fire was a substantial factor.

**Litzman v. Humboldt County (Cal. App. 1954)**

Boy injured himself playing with abandoned firework. Courts found both firework companies liable when it could not be determined which one of them was responsible. **L**

**Economics of Multiple Defendant Liability:**

* Deterrence requires that a negligent actor expect to pay for the injury caused by failure to exercise care
* If the injury in *Summers* is say, $1 million, each shooter probabilistically caused an injury of 50% = $500,000, which is also the expected liability for each when both are responsible
* If there is joint and several liability, there is a chance that only one of them will actually make the bulk of the payment, but there’s an expectation that both will pay their fair share

**Multiple Sufficient Cause**

* Courts generally would not excuse defendant because other fire was greater as long as defendant’s fire was a **substantial factor**.
* Drew and Doris are adjacent but independent timber harvester, each of whom unreasonably and in violation of duty to Potterville fails to build a firebreak on her land
* A wildfire spreads through the timberland and destroys Potterville, an injury that would have been prevented only if *both* Drew and Doris had built firebreaks in their camps
* In the Potterville illustration, has the negligence of either Drew or Doris (actually) caused Town’s injury – No, in isolation, neither of them could have stopped the fire on its own
* Will each be held liable
	+ Yes, because the causation element will be deemed satisfied; otherwise no one would be liable for the negligently caused injury – *Kingston*; R3 Torts 27; R2 Torts 431
* Will liability in the Potterville illustration induce efficient deterrence?
	+ Yes, because where it is efficient for both to build a firebreak, each will have a private incentive to build one regardless of what the other does
	+ In the absence of anticipated liability, neither will have incentive to build a firebreak, which is why they are both held liable even if they do not “cause” the injury individually
* Now imagine that Drew and Doris negligently fail to build firebreaks, after which a fire of innocent cause passes simultaneously through their camps **and through an undeveloped portion of the woods**, destroying Potterville
	+ Odd here to hold Drew or Doris liable as their negligence – individually or collectively – was not a cause of the damage, which had a sufficient innocent cause
	+ Some courts will hold the defendants here liable under a “**substantial-factor**” doctrine, but this might create overdeterrence
	+ Among courts that impose no liability if there is a sufficient innocent cause, in some, e.g. Kingston, once the plaintiff shows that a defendant’s negligence **is a sufficient cause**, the burden shifts to the defendant to show that there is a **sufficient innocent cause**

**Apportionment of Harm to Cause – Market Share Liability**

* Sindell v. Abbott Laboratories:
	+ Absent proof of cause, where a plaintiff joins in the action manufacturers responsible for a “substantial share of the DES her mother might have taken,” defendant manufacturers are held to be liable based on market share
* Why did Sindell decline to apply Summers?
	+ Because not all manufacturers were defendants in the suit, there would be the possibility that none of the “defendants in this case produced the offending substance and that the responsible manufacturers” would escape liability
	+ Later, in Brown, applied **only several liability to these cases**, rendering this concern largely insignificant
* Market-share liability achieves the deterrence goal that each negligent defendant expects to pay for the injury caused
	+ See also R2 Torts 433A (five dogs, ten sheep, harm apportioned per dog)
* The purest form of market-share liability would be (at least) national in scope and not permit defendants to exonerate themselves; See, e.g. *Hymowitz*
* **Jurisdictions are not consistent, though, on whether they adopt the market-share liability in fungible product cases, with some courts – Mulcahy and Goldman – declining to innovate, leaving matter to legislature** – keeping to traditional approach (plaintiffs would lose every suit (except maybe manufacturer had above 50% market share) because plaintiff could not prove “more probable than not”

**Acceptance of Market-Share Liability**

**Smith v. Cutter Biological, Inc. (Haw. 1991)**

Hemophiliac contracted HIV through one of four blood products from Army hospital. Court found liability based on market share apportionment. **L**

**Rejection of Market Share Liability**

**Sindell v. Abbott Laboratories (Cal. 1980)**

Woman developed cancers and other medical problems from drug DES taken by mother. Woman sued multiple manufacturers of the drug, not knowing which drug caused the injury. While court rejected finding alternative liability under *Summers* b/c chance of causation is so remote for so many defendants, court recommended apportioned damages based on market share of drug unless it could be proven by defendant that drug taken by plaintiff could not have been from the manufacturer. **L**

Richardson Dissent emphasizes that this will disproportionately fall on manufacturers amenable to suit in California. It also emphasizes that in usual tort actions, plaintiff must take risk of defendant not being financially capable of responding.

Many states followed in DES cases, but not in asbestos or lead paint cases.

Unresolved Questions

* Should market share be based nationally or on region where drug was taken?
* Should defendant be excused from individual cases?
* Should defendants joined only be required to pay their market share if other defendants are not joined?

Mulcahy v. Eli Lilly & Co. (Iowa 1987), Goldman v. Johns-Manville Sales Corp. (Ohio 1987) rejected apportioned approach **as a question for a legislature**.

**Sanderson v. International Flavors (C.D. Cal. 1996)**

Court rejected woman’s attempt to use *Sindell* liability against seven perfumes on the grounds that it had not joined a substantial share of the market and because perfume is not a fungible product. **NL**

**Apportionment**

Courts in the states today are more likely to hold defendants responsible only for a portion of the damages that reflects their share of the responsibility for an accident, and defendants also are able to ensure that outcome through suits for contribution.

Joint and several liability means that each defendant is liable for all of the plaintiff’s damages. Even where contribution is allowed, if the other defendant is insolvent, the other defendant must pay all the damages. Most states abolished joint and several liability at least with respect to some cases and instead established several liability.

About a dozen states abolished joint and several and replaced with several liability. About another dozen abolished the doctrine for those with less than 50% liability. Some allow for joint and several only if the plaintiff is not at all responsible. Some have retained it with certain torts but not with others, or only with economic losses, or only with respect to certain types of defendants (e.g. injurers and their employers). 16 states have retained pure joint and several liablity.

**Gehres v. City of Phoenix (Ariz. App. 1987) (joint and several)**

Drunk driver killed another in high speed chase. Court found drunk driver 95% responsible, the nightclub 3% responsible, and the city 2 percent responsible. Drunk driver’s estate was insolvent, so entire award was collected from nightclub and the city of Phoenix. **Legislature responded by establishing several liability.**

**Larsen v. Nissan Motor Corp. (Ariz. App. 1999) (several)**

Passenger in roll over couldn’t sue driver because he was her employer, so immune from suit under Arizona law, so sued car manufacturer. Jury found manufacturer 8% responsible. The plaintiff collected 8% of damages from car manufacturer.

**Contribution**

Original common law basis worried about defendants scheming to share liability. All states now have contribution rules where if a defendant is found liable for the entire award, can sue defendants for reimbursement for the portion of their contribution.

**Complications where defendants are joint and severally liable**

Hard to tell what to do if other defendants are immune from suit or cannot be joined. Courts divide on whether to make defendants joined wholly liable or only to their proportion.

Settlements: Originally, settlement did not absolve defendant from contribution costs. Now, to encourage settling, defendants who settle are usually immune from contribution.

Some have taken a pro tanto credit, whereby plaintiffs damages are reduced by amount other defendants have already settled for. Some have taken a pro rata approach where defendants are only responsible for their proportion of total damage award; settlement amount is unaffected.

These problems go away with several liability.

**Proximate Cause**

* **Among the risks – R3 and Kinsman Transit; increase in risk, foreseeability**
* **3rd Person Aid that is proper or negligent is not an intervening cause**
* **Three types of remoteness – extent does not limit liability**
* **Intervening Causation – Grady’s 5 Factors**
* **Proximate Cause normally question for jury but judge can find no reasonable jury would find proximate cause**
* **Jury question unless judge takes from jury (sometimes in unprincipled manner)**

Catchall for Liability Limitation

* When a court limits liability based on lack of duty, it is a judge’s decision; **when a court limits liability through proximate cause, it’s a jury’s decision**
* Proximate cause limits liability for negligent behavior that is but-for-cause of a cognizable injury

**Berry and the Hand Formula**

**Berry v. Borough of Sugar Notch (Pa. 1899)**

Trolley hit by falling tree during high winds, injuring plaintiff. Plaintiff claimed borough was negligent in managing tree. Borough claimed that trolley operator was traveling too fast. Court found that speed was not a cause of the tree falling and thus no contributory negligence. **L**

* Speeding – negligence; duty; negligence is the but-for cause (if it hadn’t been speeding, it wouldn’t have arrived at that point);
* Is there proximate cause? No – the operator’s negligence did not increase the risk of this particular injury – the tree was no more likely to hit the track when the train was speed or going more slowly

Berry and the Hand Formula

* Let’s compare B, the cost of slowing down, to potential benefits of such precaution in reduced expected cost of injury
* P1L1 (collision with another trolley)
* P2L2 (collision with a car)
* P3L3 (collision with a pedestrian)
* P4L4 (proximity to a falling tree) – probability stays the same regardless of speeding
* Comparing the cost of slowing down (B) to P4L4; the consideration of speeding does not affect the analysis, suggesting that a reasonable person would not take the risk of such injury into account when selecting a level of precaution

**Doughty and the Hand Formula**

**Doughty v. Turner (Q.B. 1964)**

Defendant’s factor used cauldrons of boiling cyanide. A worker knocked a lid into the cauldron, causing a chemical reaction that exploded, injuring plaintiff. Court found that defendant would have been negligent if plaintiff had been injured by lid displacing liquid but that this particular reaction was not known by defendants and thus not foreseeable. **NL**

* Let’s compare B, the cost of precaution in handing cauldron cover to potential benefits of such precaution in reduced expected cost of injury:
* P1L1 (splash of molten cyanide)
* P2L2 (chemical reaction of molten cyanide) – this probability is affected by the precaution ex ante and a reasonable person would taken into account the risk of that injury; but this is only if the L2 is foreseeable – it might be unforeseeable
* If L2 is unforeseeable to a reasonable, such person would not take the risk of such injuryinto account when selecting a level of precaution and so the injury like the tree-fall in Berry, would be deemed outside the scope of liability per R3 Torts 29

**Among-the-risks approach**

**R3 29 Limitations on Liability for Tortious Conduct**

An actor’s liability is limited to those physical harms that result **from the risks** that made the actor’s conduct tortious.

Comment J. Connection with reasonable foreseeability as a limit on liability. Many jurisdictions employ a “foreseeability” test for proximate cause, and in negligence actions such a rule is essentially consistent with the stand set forth in this Section**. Properly understood, both the risk standard and a foreseeability test exclude liability for harms that were sufficiently unforeseeable at the time of the actor’s tortious conduct that they were not among the risks – potential harms – that made the actor negligent.** Negligence limits the requirement of reasonable care to those risks that are foreseeable. Thus, when scope of liability arises in a negligence case, the risks that make an actor negligent are limited to foreseeable ones, and the factfinder must determine whether the type of harm that occurred is among those reasonably foreseeable potential harms that made the actor’s conduct negligent.

* Reflects language from *Kinsman Transit*
* Liability in either Berry or Price would serve as a penalty – liability despite a sufficient innocent cause – and could overdeter
* There might be an overinvestment in caution to avoid liability or could exit the dangerous activity all together
* Observe that although Berry cases are not about foreseeability, proximate cause largely is; the falling tree might have been seen foreseen, but that doesn’t matter in this case
* Proximate cause – however labeled – largely is, as described by Comment j

Properly understood, both the risk standard and a foreseeability test exclude liability for harms that were sufficiently unforeseeable at the time of the actor’s tortious conduct that **they were not among the risks – potential harms – that made the actor negligent**. Negligence limits the requirement of reasonable care to those risks that are foreseeable. Thus, when scope of liability arises in a negligence case**, the risks that make an actor negligent are limited to foreseeable ones, and the factfinder must determine whether the type of harm that occurred is among those reasonably foreseeable potential harms that made the actor’s conduct negligent.**

**Petition of Kinsman Transit Co. (2d Cir. 1964)**

Ice knocked the Shiras loose from its mooring and it knocked into the Tewksbury, causing it to become unmoored as well. The Tewksbury drifted into a drawbridge, knocking down one of its towers. The Shiras entered as well, knocked down the other tower and created a damn that led to flooding for several miles. When the damages result from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable, unforeseeability of the exact developments and of the extent of the loss will not limit liability. **L**

**Overseas Tankship (U.K) Ltd. v. Morts Dock & Engineering Co., Ltd [The Wagon Mound (No. 1)] (Privy Council 1961)**

Wagon Mound spilled oil in the boy. Plaintiff’s wharf caught on fire when molten metal fell from plaintiff’s wharf and made contact with oil two days later. Privy Council rejects in re Polemis and finds that a man must be considered to be responsible for the probable consequences of his act. Trial court found that defendants did not believe oil would burn on water. **NL**

**Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. (Wagon Mound No. 2) (Privy Council 1967)**

In this case, trial court found that Wagon Mound owners believed there was a chance that oil could catch on fire. In this case, Wagon Mound was found liable as the effects of their negligence was foreseeable. **L**

* **The among-the-risks approach of the R3 and Kinsman Transit arguably makes sense even in mere foreseeability**
* Like unavoidable risk, liability for unforeseeable risk is a punishment for failure to meet a standard of care and may similarly overdeter
* **The problem is that almost no harms are literally unforeseeable, and so the question becomes one of when a harm is so unlikely that one would not expect a reasonable person to account for it in her behavior**

**Colonial Inn Motor Lodge v. Gay (Ill. App. 1997)**

Driver backed up slowly into hotel building, denting heating unit, causing explosion. Defendant believed that he had just run into a brick wall. Hotel sued driver. **Court found that driving a large car that creates a bang makes it possibly reasonably foreseeable that this could cause greater damage to the building.** Notes that it is not necessary that the extent of the harm or the exact manner in which it occurred could reasonably have been foreseen. **L**

**DiPonzio v. Riordan (N.Y. 1997)**

Plaintiff was injured by rolling car, whose motor had been left on, at gas station. Plaintiff blamed defendant for not enforcing policy of turning off engines while filling. Court found that explosions from filling while engine is on were foreseeable **but leaving an engine running is different from a parking gear failing**. **NL**

**United Novelty Co. v. Daniels (Miss. 1949)**

Plaintiff’s decedent was instructed to clean a coin-operated machine with gasoline. A rat, soaked with gasoline, was lighted by a lighted gas heater, which then caused the machine to explode. **Unsafe conditions** created the foreseeability that such an explosion could happen. **L**

**Steinhauser v. Hertz Corp. (2d Cir. 1970)**

Minor car accident caused plaintiff to begin experience schizophrenia. Court found that if car accident caused the schizophrenia **then this was foreseeable**. **L**

**Central of Georgia Ry. v. Price (Ga. 1898)**

Plaintiff missed stop on railroad due to conductor not warning her. Plaintiff then stayed at hotel. Kerosene lamp exploded, lighting mosquito net and burning plaintiff’s hands. Court found that railroad was not liable though hotel might have been because **there was an interposition of a separate, independent agency**. **NL**

**Pridham v. Cash and Carry Building Center (N.H. 1976)**

Pridham injured his back after a clerk negligently untied a rope securing some vinyl panels. Ambulance picked up Pridham, and then ambulance driver had a heart attack, crashed into a tree, killing Pridham. Court found that defendant clerk was liable for all injuries**, even harm resulting from normal efforts resulting from third persons in rendering aid whether acts are done properly or negligently**. **L**

**R2 457 Additional Harm Resulting from Efforts to Mitigate Harm Caused by Negligence**

If the negligent actor is liable for another’s bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other’s injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.

Comment d: Actor is liable from any injuries which result from risks normally recognized as inherent in the necessity of submitting to medical, surgical, or hospital treatment. Not answerable for harm caused by misconduct which is extraordinary and therefore outside of such risks.

**R2 460 Subsequent Accidents Due to Impaired Physical Condition Caused by Negligence**

If the negligent actor is liable for an injury which impairs the physical condition of another’s body, the actor is also liable for harm sustained in a subsequent accident **which would not have occurred had the other’s condition not been impaired**, and which is a normal consequence of such impairment.

Illustration 1: B’s leg is fractured through A’s negligence. After two months of hospitalization, he is permitted to walk on crutches. With all reasonable care, he falls and suffers a fracture of his left arm. A’s negligence is a legal cause. But if B had gone down a steep ladder in the basement, A’s negligence would not be the legal cause.

**Three Sorts of Remoteness**

* Type of injury
	+ In Riordan – crush injury at gas station was an unforeseeable type of injury and thus outside scope of liability (See also Wagon Mound reversal of Polemis)
* Manner of injury
	+ In Doughty, burn injury, though of a foreseeable type, occurred in an unforeseeable manner and is deemed outside the scope of liability. Contrast Hines (leg caught in hole)
	+ **Depends on the level of generality** since every injury is exactly unique
* Extent of Injury (still liability – extent of injury doesn’t limit proximate cause) – including unforeseeable string of events
	+ In Kinsman Transit, damage caused by a free-floating boat was (deemed) of a foreseeable type and (general) manner and is, thus, held to be within the scope of liability even *if* extent of damage was unforeseeable (Eggshell Skull Doctrine)

**Intervening Causation**

* Intervening causation presents a recurring pattern of inquiry into whether the type or manner of an injury is foreseeable
* R2 457, 460; Pridham (ambulance crash, L); Roman Prince (barge stumble, NL); White (clown car, L)
* Determinations in these cases are ordinarily case-specific, though **intervention of an intentionally harmful act is particularly unlikely to be deemed foreseeable**
* R2 448, 449; see, e.g. Watson (lit gas spill); but see Brauer (foreseeable criminal)

**Intervening Causes Cases**

**Brauer v. N.Y. Central & H.R.R. Co. (N.J. App. 1918) (left vulnerable)**

Defendant train collided with plaintiff’s wagon. Plaintiff was stunned in a fit, and thieves made off with property within wagon. Court found this is case of joint liability rather than intervening actor since collision **rendered him unable to guard his property**, which was foreseeable. Garrison dissent emphasizes that intervening actor destroys proximate cause. **L**

**Watson v. Kentucky & Indiana Bridge & R.R. (Ky. 1910) (intervening tort)**

Defendant train’s railroad car derailed, spilling oil. Someone lit a match and caused explosion. Court remanded to determine if match was lit inadvertently or deliberately. If lit **inadvertently**, this explosion was foreseeable and railroad is liable. If lit **maliciously**, not foreseeable and railroad is not liable. **Mixed L**

**Village of Carterville v. Cook (Ill. 1889) (left vulnerable)**

Village had a sidewalk that was raised without railing. Plaintiff fell after a pedestrian jostled him, and he fell and was injured. Court found liability for village for not putting up railings. **L**

**Alexander v. Town of New Castle (Ind. 1888) (intervening tort)**

Plaintiff arrested criminal. Criminal then flung plaintiff in pit in ground and escaped. Plaintiff sued town for not filling pit. Court found that **criminal was an intervening actor**. **NL**

**R2 448 Intentionally Tortious or Criminal Acts done Under Opportunity Afforded by Actor’s Negligence**

The act of a third person in **committing an intentional tort or crime is a superseding cause of harm to another resulting** therefore, although the actor’s negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime**, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.**

**R22 449 Tortious or Criminal Acts the Probability of which makes Actor’s Conduct Negligent (creating situation)**

If the **likelihood that a third person may act in a particular manner is the hazard** or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

**Scott v. Shepherd (K.B. 1773) (involuntary actors – foreseeable from harm)**

Shepherd tossed a firecracker into a crowded market. It was tossed from person to person until it blew up in plaintiff’s face. Court found that **other members were not voluntary intervening actors** and that Shepherd was still the direct cause, not an indirect cause. **L**

**The Roman Prince (S.D.N.Y. 1921) (no corrective precaution by plaintiff – intervening actor)**

Plaintiff was in cabin of barge. Another ship negligent struck the barge. Plaintiff noticed leaking but did not think it was sinking. Left 25 minutes later and injured knee when going onto other barge. Court found that **she had time to think and deliberate and so barge was no longer the proximate cause**. **NL**

**Thompson v. White (Ala. 1963) (intervening tort)**

Plaintiff was distracted by clowns by at a gas station and then was rear-ended. Plaintiff sued both gas station and rear-ender. Court dismissed claim against gas station. Supreme Court reversed and remanded, claiming that **if clowns distracted plaintiff**, it must be found if they distracted rear-ender, making him **no longer an independent actor**. **L**

**Johnson v. Kosmos Portland Cement Co. (6th Cir. 1933) (left vulnerable)**

Defendant owned a barge that had carried oil. Negligently failed to remove gases. Workers came on to do torch work – died in an explosion, but the explosion was caused by lightning strike. The court held that the barge owner's failure to vent the hold of gases was a **substantial factor** in causing the explosion and that it was reasonably foreseeable that such failure would result in the ignition of the gases by some force. **L**

**Henry v. Houston Lighting & Power Co. (Tex. App. 1996) (involuntary actor – foreseeable risk)**

Defendants struck gas line. Plaintiff came in to fix. Fellow employee saw smoke (was actually fog) – plaintiff ran out and injured his shoulder running away. Court reversed summary judgment finding it a question of fact whether gas line was proximate cause. **L**

**Clark v. E.I. DuPont de Nemours Powder Co. (Kan. 1915) (no tort)**

DuPont drilled on farm, left solidified glycerin. McDowell found it, recognized harm, and hid it in a crevice of a nearby graveyard. One of Clark’s sons was injured after it exploded when he found it. Court found that it was foreseeable that harm would result, **McDowell was not an intervening human actor,** and DuPont was liable. **L**

**Richardson v. Ham (Cal. 1955) (encouraged free radical)**

Construction company left bulldozer on mesa unlocked. Drunk men rode it around and let it fall off corner of mesa. Bulldozer fell and damaged property. Court found that drunk men are not an intervening cause. **L**

**Farmilant v. Singapore Airlines (N.D. Ill. 1983) (intervening tort)**

Defendant airline negligently did not have spot on airplane for customer going from Singapore to Madras. Plaintiff took train from Bombay to Madras and got ill from food and had to fly back and was hospitalized. Court found that defendant was liable for expenses in re-arranging travel but not for medical expenses. **Mixed L**

**Bell v. Campbell (Tex. 1968) (intervening tort)**

Campbell pulled on highway, failing to yield the right of way. Marshall rear-ended Campbell, knocking over trailer. Some people stopped to help trailer and signaled people to avoid collision. **Fore, drunk, run into trailer, killing two people**. Decedents sued Campbell and Marshall, but Court found **Fore as intervening actor**. **NL**

**Grady’s Categories of Intervening Conduct**

* **NIT (No Intervening Tort) –** Liability if no tort by anyone else intervened
* **DCE (Dependent Compliance Error)** – Liability if defendant negligent made plaintiff specially vulnerable to someone else’s ordinary liability or emergency response (e.g. a plaintiff is hurt trying to rescue a third party injured by defendant’s original act of negligence)
* **EFR (Encouraged Free Radicals) –** Liability if defendant created an unusually tempting opportunity for irresponsible third parties to do harm, especially where defendant was knowing or deliberate.
* **NCP (No Corrective Precaution) –** No liability if responsible **third party failed to take a corrective precaution** to prevent the defendant’s negligence from causing harm (owed a duty or is plaintiff itself) – saw dangerous situation but did nothing to address risk, also where intervenor’s act is **gross negligence** rather than ordinary negligence, and **especially if intervenor owed duty to plaintiff.**
* **IIT (Independent Intervening Tort) –** No liability if third party committed an intervening wrong that was independent of the defendant’s negligence.

**Judge and Jury**

* **Proximate cause is ordinarily a jury question**, see Colonial Inn (car bumps gas feed) – though as you’ve seen, judges frequently decide the questions on their own
* Sometimes, judicial edict is by the invocation of limited duty, as in Palsgraf; other times, **judges expressly or implicitly hold that no reasonable juror could disagree**
* When judges take these questions from the jury, it is often expressly or implicitly to control floodgates, sometimes without a principled manner
* **So a court might “arbitrarily” find (or allow a jury to do so) that even a foreseeable indirect injury is not proximately caused, the logic of the Restatement’s among-the-risks approach not withstanding**

**Strict Liability**

**Abnormally Dangerous Activities**

**Respondeat Superior**

**Negligence Standard Still Available for Independent Contractor**

**One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken**, is subject to liability for physical harm

**R3 20 Strict Liability**

1. An actor who carries on abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.
2. An activity is abnormally dangerous if
3. the activity creates a **foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors**, and [there will always be some risk, but it depends on your understanding of highly significant risk – or the underlying policies of what should be strict liability]
* Policy: You also might find strict liability under R3 20 (b)(1) if you think the **negligence standard will not induce standard of reasonable care** (even if reasonable care will mitigate significant risk) or you think **actor should bear the risk b/c the risks are not reciprocal**
1. the activity is **not a matter of common usage**
* Policy: You also might find strict liability under R3 20 (b)(1) but the activity being common gives you an escape valve as a judge/jury – you trust the negligence standard to incentivize reasonable care and you think the activity is significantly reciprocal, you are okay with harms imposed on one another as long as they behave reasonably
* You might adjust as an activity **becomes more common in usage** (to establish that the risk are reciprocal now)
	+ (but remember American Cynamid – if incentives are sufficient (e.g. relocation is not ideal) and risks are generally controllable – dangerous activities vs. dangerous materials; but see Siegler)
	+ Proximate cause generally uses among-the-risks-approach (but see R2 522 – which does not endorse for SL)

Strict Liability

Elements of Strict Liability

Defendant’s **duty** not to **cause** plaintiff’s injury through conduct of an activity

**Breach** of that duty **proximately causes** plaintiff’s injury

* In negligence, duty of reasonable care; here the duty is not to cause the injury

Objectives of **Tort Law (more generally)**

* Corrective Justice
	+ Fairness may dictate that when one’s actions harm another, the injurer should compensate the victim
* Efficient allocation of resources
	+ Liability may be required to induce efficient levels of activity and precaution

**Why Not Always Strict Liability?**

* **Strict liability, it seems, well serves both objectives. Why is it not ubiquitous?**
	+ Costly administration if every accident were subject of litigation
	+ Activity level concern – people won’t engage in necessary activities
	+ Might be unfair to make nonnegligent people bear the loss
	+ Ordinary activities of life **will be reciprocal** and cancel each other out (everyone is sometimes imperiled and something imperiling others)
	+ Uncertain whether strict liability is superior to negligence standard in efficiency incentives (negligence might involve more errors of determining reasonableness standards)

**Strict Liability over Negligence**

* Negligence is the default liability standard, leaving strict liability to apply in limited circumstances, where
	+ Risk imposed is significantly non-reciprocal; or
	+ Negligence standard produces unreliable outcomes and (thus) inadequate incentives (inefficiency)

Compared to Doctrine of **Generalized** Negligence Standard (creating pockets of strict liability)

* Recall that a generalized standard, as opposed to individualized, negligence standard is justified – though a pocket of strict liability – where:
	+ Strict liability is preferred. (Lack of reciprocity – usually dangerous)
	+ Concern over activity level. (Unreliable outcomes & inefficiency)
	+ Lack of evidentiary transparency. (Unreliable outcomes & inefficiency)

Abnormally Dangerous Activity

* An early instance of strict liability was for the loss of control of a dangerous undomesticated animal (e.g. Behrens)
* Rule evolved to include strict liability for the **loss of control of anything unnaturally stored** (e.g. Rylands – water reservoir) (maybe concern over activity level or lack of reciprocity)
* Doctrine has since evolved to general case of **abnormally dangerous activity**
	+ See e.g R2 Torts 519, 520; R3 Torts 20

**R2 519 General Principle**

1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

**R2 520 Abnormally Dangerous Activities**

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

1. existence of a **high degree of risk of some harm** to the person, land or chattels of others;
2. **likelihood that the harm** that results from it will be great;
3. **inability to eliminate the risk** by the exercise of reasonable care;
4. extent to which the activity is not a **matter of common usage**;
5. inappropriateness of the activity **to the place** where it is carried on; and
6. extent to which its **value to the community** is outweighed by its dangerous attributes (this just is a negligence determination given the Hand formula)

Comment e. Not limited to the defendant’s land

In most of the cases to which the rule of strict liability is applicable the abnormally dangerous activity is conducted on land in the possession of the defendant. This, again, is not necessary to the existence of such an activity. **It may be carried on in a public highway or other public place** or upon the land of another.

Comment f. “Abnormally dangerous”

For an activity to be abnormally dangerous, not only must it create a danger of physical harm to others but the danger must be an abnormal one. In general, abnormal dangers arise from activities that are in themselves unusual, or from unusual risks created by more usual activities under particular circumstances. In determining whether the danger is abnormal, the factors listed in **Clauses (a) to (f) of this Section are all to be considered, and are all of importance**. Any of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care. **In other words, are its dangers and inappropriateness for the locality** so great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence.

Comment i Common Usage

An activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community. It does not cease to be so because it is carried on for a purpose peculiar to the individual who engages in it. Certain activities, notwithstanding their recognizable danger, are so generally carried on as to be regarded as customary. **Thus automobiles have come into such general use that their operation is a matter of common usage.** This, notwithstanding the residue of unavoidable risk of serious harm that may result even from their careful operation, is sufficient to prevent their use from being regarded as an abnormally dangerous activity. **On the other hand, the operation of a tank or any other motor vehicle of such size and weight as to be unusually difficult to control safely**, or to be likely to damage the ground over which it is driven, is not yet a usual activity for many people, and therefore the operation of such a vehicle may be abnormally dangerous.

Although **blasting** is recognized as proper means of excavation for building purposes or clearing woodland for cultivation, it **is not carried on by any large percentage of the population**, and therefore it is not a matter of common usage. Likewise, the **manufacture, storage, transportation, and use of high explosives**, although necessary to the construction of many public and private works, are carried on by only a comparatively small number of persons and therefore are not matters of common usage. So likewise, **the very nature of oil lands and the essential interest of the public in the production of oil requires that oil wells be drilled**, but the dangers incident to the operation are characteristic of oil lands not of lands in general, and relatively few persons are engaged in the activity.

The usual dangers resulting from an activity that is one of common usage are not regarded as abnormal, even though a serious risk of harm cannot be eliminated by all reasonable care. The difference is sometimes not so much one of the activity itself as of the manner in which it is carried on. **Water collected in large quantity in a hillside reservoir in the midst of a city or in coal mining country is not the activity of any considerable portion of the population, and may therefore be regarded as abnormally dangerous, while water in a cistern or in household pipes or in a barnyard tank supplying cattle, although it may involve much the same danger of escape, differing only in degree if at all, still is a matter of common usage and therefore not abnormal**. The same is true of **gas and electricity in household pipes and wires**, as contrasted with **large storage tanks or high tension power lines**. Fire in a fireplace or in an ordinary railway engine is a matter of common usage, while a **traction engine shooting out sparks in its passage along the public highway** is an abnormal danger. (Construction neither)

**R3 20 Strict Liability**

1. An actor who carries on abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.
2. An activity is abnormally dangerous if
3. the activity creates a fo**reseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors**, and [there will always be some risk, but it depends on your understanding of highly significant risk – or the underlying policies of what should be strict liability]
* Policy: You also might find strict liability under R3 20 (b)(1) if you think the **negligence standard will not induce standard of reasonable care** (even if reasonable care will mitigate significant risk) or you think **actor should bear the risk b/c the risks are not reciprocal**
1. the activity is **not a matter of common usage**
* Policy: You also might find strict liability under R3 20 (b)(1) but the activity being common gives you an escape valve as a judge/jury – you trust the negligence standard to incentivize reasonable care and you think the activity is significantly reciprocal, you are okay with harms imposed on one another as long as they behave reasonably
* You might adjust as an activity **becomes more common in usage** (to establish that the risk are reciprocal now)

**Difference from R2 520 is the omission of social value of an activity as criteria.**

Koos v. Roth (Or. 1982) (criticism of R2 520’s emphasis on social value)

* Too subjective as a matter of judicial discretion
* If high risk has market value, does this count as strict liability? Unclear why high market value should be a value to remove strict liability from high risk activities
* In other cases, courts agreed that it provided value and should not be discontinued but just assigned who should bear the loss. Doesn’t make sense that the greater the economic value, the more others should bear the loss. Believes industry has other ways to make profits balance out liabilities.

**Indiana Harbor Belt Ry. Co. v. American Cyanamid Co. (7th Cir. 1990)**

American Cynamid put 20,000 gallons of liquid acrylonitrile into a railroad tank car. Indiana Harbor Belt was the switching company along its route. Fluid leaked, evacuation and decontamination measures were taken that cost around $1 million. Parties agreed that under Illinois law, R2 520 was controlling given shipping dangerous chemical in metropolitan area. The greater the risk of the accident even when handled carefully, the more we want the actor to consider the possibility of making accident-reducing changes and the case for strict liability. **Notes that this chemical doesn’t destroy evidence in the way that dynamite does** and that its spill was caused by carelessness. Rerouting all these chemicals would be cost-prohibitive. Notes that re-routing could even cause an increase in accidents. Distinguishes between **ultra-dangerous activities and ultra-dangerous materials and that abnormal dangerousness is judged by the activity**. Argues plaintiff has not shown that the transportation of acrylonitrile in bulk by rail through populated areas is so hazardous an activity, even when due care is exercised, that the law should seek to create incentives to **relocate the activity** to nonpopulated areas. **NL**

* Judge Posner characterizes **as trivial the residual risk after reasonable care of shipping acrylonitrile.**
* Perhaps as dictum, he also found no reason to believe that Cyanamid should “switch to making some less hazardous chemical” or that its shipment should be “rerouted.”
	+ The decision to ship and the decision to manufacture and the decision of what routes to take as a carrier are not subject to strict liability
	+ In all cases, reasonable care limits risk to activity
* Held: “When negligence is a workable regime…there is no need to switch to strict liability.”
	+ That is the court is **unconcerned about activity level is inappropriate,** so unconcerned about negligence standard’s propensity to disregard activity level
	+ No one is claiming that the product shouldn’t be made or that there is an alternative route to take, so no concern about activity level and so negligence is a workable regime
	+ Posner acknowledges that there is a residual risk but is not going to label it “highly significant” because **he believes negligence is workable**
* How might one question the court’s conclusion, however?
	+ It might be difficult for a judge or jury to determine the reasonable level of acrylonitrile production or the reasonable carrier routes for its transport – **i.e. there may well be concerns over both activity level and evidentiary transparency;** but courts are assigned this question to make this determination – what grounds does Judge Posner have to determine that this is not a highly dangerous activity with reasonable care
	+ Court simply ignores **possible lack of reciprocity** (even in non-reciprocal risk that so long as there is a non-zero risk of significant harm despite reasonable care, where that risk is imposed in a circumstance that is unusual or particularly great, that imperils to an uncommon extent, we might want to decide that even though reasonable care reduces risk significantly, it doesn’t do it enough; dangerous chemicals might be treated as non-reciprocal – could argue that “creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised” – your concern is not that the defendant behaves unreasonably, but if they are behaving reasonably, the risk might not be reciprocal)
		- Court could have argued that there is reciprocal risk because **the benefits that people receive from the production, shipment, and carriage of acrylonitrile is broad enough to create reciprocal risk** (common every-day activity)
		- Court also argued that getting the product spilled on you is non-reciprocal (as opposed to car-driving, where you engage in the activity yourself)
		- However, there might never be non-reciprocity at a broad level
	+ The fact that there might be an explosion does not mean strict liability should be imposed – res ipsa loquitur could be implied instead to shift the burden to the defendant

**Siegler v. Kuhlman (Wash. 1973)**

Defendant transported gasoline; despite all safety checks, trailer came loose, spilled gasoline, car drove over and caught on fire, killing decedent. Court applied strict liability because its bulk and weight along transport make it especially dangerous, reasonable care can’t prevent its being spilled, and gasoline spill might make evidence lost in explosion. **L**

* About the transport of gasoline, what motivated the court to characterize the residual risk after reasonable care as significant and the activity as uncommon?
	+ Siegler comes to same conclusion about the product in American Cyanamid that there is no activity level concern (agrees that gasoline can only be transported this way)
	+ That is, the concern is not activity level or evidentiary transparency, but seems to be lack of reciprocity (despite broad benefits of gasoline) in the risk imposed by **transport as cargo of great “bulk or quantity” – this is the sort of risk not ordinarily imposed by one another – irreconcilable with American Cyanamid – different attitudes about what counts as a reciprocal activity**
	+ Isn’t gasoline more generally reciprocal than acrylonitrile (under American Cyanamid’s logic)

**Paradigmatic Cases**

* Demolition by blasting is the paradigmatic case for strict liability – see Sullivan – presumably both because activity-level would be hard to assess (negligence standard might miss that even though it does encompass that) under a negligence standard and because the risk imposed is significantly non-reciprocal
* Operation of an automobile is the paradigmatic case of a highly dangerous activity *not* subject to strict liability, presumably because none of activity level, evidentiary transparency, or lack of reciprocity is a significant concern; Miller (guns at range); R3 20
* After we discuss assumption of a risk, reconsider *Pyrodyne* (SL for fireworks display)

**Klein v. Pyrodyne Corp. (Wash. 1991)**

Court found strict liability for **fireworks** since reasonable care cannot eliminate high risk. **L**

* R3 20, comment j and some courts reject strict liability for fireworks because of its common usage.

**Miller v. Civil Constructors, Inc. (Ill. App. 1995)**

Plaintiff was struck by ricocheting bullet near firing range. Court rejects strict liability for firearms given that reasonable care can be exercised, **firearm usage is so common** and harm comes from misuse, and was carried on a remote firing range facility. Court also found social utility for police officers practicing their marksmanship. **NL**

**Sullivan v. Dunham (N.Y. 1900)**

Defendants used **blast** to remove tree. Part of tree flew into highway, killing decedent. Court accepted use of strict liability. **L**

**Crosby v. Cox Aircraft Co. (Wash. 1987)**

**Airplane** ran out of fuel and crashed into plaintiff’s garage. Court found that negligence standard applies. **NL**

**Lutheringer v. Moore (Cal. 1948)**

Extermination through **hydrocyanic gas** leaked next door. Trial court found that gas could leak even despite precautions. Court found strict liability appropriate as an ultradangerous activity. **L**

**Proximate Cause**

* Proximate cause is an ordinary element of a strict liability tort – see e.g. Madsen (blasted minks) – blasting did not produce foreseeable risk of minks killing young
* And even though it is the activity, not failure of precaution, that is the cause to be assessed as proximate or not, **the among-the-risks approach to scope of liability remains sensible**, and for the same reasons (since without taking into account, not going to deter in the first place from engaging in activity)

**Madsen v. East Jordan Irrigation Co. (Utah 1942)**

Irrigation canal used explosive; plaintiff’s minks killed their kittens in response. Court found that **mother minks broke the chain of causation**. **NL**

**Contributory Negligence in Strict Liability**

* R3 LPH 35 – plaintiff’s negligence is damage-reducing
* R2 524 – plaintiff’s negligence is damage-reducing only when knowingly and unreasonably subjecting herself to the risk of harm from the abnormally dangerous activity

**Respondeat Superior**

* Generally, an employer is strictly liable for tortious injury caused by an employee within the scope of her employment duties
* Employees are generally those under the direction of a boss, while independent contractors, by contrast, are hired by a customer to provide a service in the manner the contractor chooses
* The doctrine perhaps rests not so much on policy grounds in tort law so much as sentiment **that a business enterprise cannot justly disclaim responsibility for activities which may fairly be said to be characteristic of its activities**
* This sentiment – and the fact that vicarious liability is well cabined by the negligence of the employee– eliminates reciprocity as a basis to forgo strict liability
* Regarding efficiency – a broad definition of employment – as used in Bushey & Sons – **imposes supervision and activity-level incentives that would be difficult properly to create through a negligence standard** (should employee have been sent out in the first place)
* Although both lack of reciprocity and efficiency could be said similarly to favor vicarious liability for independent contractors, outside the case of “peculiar risk” R2 416 – the line is ordinarily drawn at employees (who may frequently be judgment proof)
* If you think supervision is something that the negligence cannot handle very well – it would make sense to impose on independent contractors as well as employees; **but there would be difficulty cabining vicarious liability** for negligence of independent contractors; employees have a narrower scope for potential of creating vicarious liability because independent contractors have more discretion
* **Someone hiring a company to deliver them something could then be held vicariously liable**; and there is less concern for vendor or carrier insolvency than employee insolvency (whereas employee and employer are liable)

**Negligence Standard Still Available for Independent Contractor**

* A plaintiff could prove that the employer was **negligent** in hiring the independent contractor

**Ira S. Bushey & Sons v. United States (2d Cir. 1968)**

Coast Guard seaman drunkenly flooded a ship and drydocks and caused them to sink. Under respondeat superior, employers are liable for the risks “out of and in the course of” his employment of labor. Finds that it was **foreseeable that crew members crossing the drydock might do damage**, negligently or even intentionally. Finds that drunk seamen are foreseeable. **L**

**Miller v. Reiman-Wuerth Co. (Wyo. 1979)**

Employee on construction site cashed paycheck during work hours and then was involved in car crash. Court rejected the theory **that anything that contributes to an employee’s happiness is within scope of employment** or else anything that employees do would fall under respondeat superior. **NL**

**Joel v. Morison (Q.B. 1834)**

The master is only liable where the servant is acting in the course of his employment. **If he was going out of his way, against his masters implied commands, when driving on his master’s business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master’s business, the master will not be liable.**

**Konradi v. United States (7th Cir. 1990)**

A mailman killed decedent in a car crash while driving to work. Plaintiff sued federal government under Federal Tort Claims Act. Court found summary judgment premature. In economic analysis, strict liability here is meant to affect not the level of care employees provide but that type of activities they engage in. Factual inquiry whether driving to or from work should be included. Notes in this case, that postal service required rural carriers to have their own car to do their rounds and so this would lead to an increase in driving. **Court notes that since post office requires its employees to take the most direct route, even if it is not the safest**, the Service should be liable for the accidents that result from this directive. **L**

**Roth v. First Natl. State Bank of New Jersey (N.J. App. 1979)**

Plaintiff frequently deposited checks for check-cashing business. Teller tipped off her boyfriend to rob him**. Court found bank not liable because it was not in service of the business and the tip didn’t occur during the scope of her employment**. **NL**

**Angry Bus Drivers**

**Forster v. Red Top Sedan Service (Fla. App. 1972)**

**Bus driver tried to run couple off highway**, then pulled his car in front of them, and assaulted them. Court found that bus driver’s company was liable. **L**

**Reina v. Metropolitan Dade County (Fla. App. 1973)**

Bus driver, after dispute with plaintiff on bus, and after plaintiff made an obscene gesture, left bus, chased down the plaintiff, and beat him. Court found it was distinguishable from Forster b/c **plaintiff was no longer obstructing passage of bus and found the company not liable**. **NL**

**R2 Agency 265 General Rule**

1) A master of other principal is subject to liability for torts which result from reliance upon, or belief in, statements or other conduct within an agent’s apparent authority.

2) Unless there has been **reliance**, the principal is not liable in tort for conduct of a servant or other agent merely because it is within his apparent authority or apparent scope of employment.

**Miami Herald Publishing Co. v. Kendall (Fla. 1956)**

Defendant ran over plaintiff with motorcycle when delivering papers. Court found respondeat superior didn’t apply because it was an **independent contractor** and was intended to be so since defendant controlled the means by which outcome was achieved. **NL**

**R2 Agency 220 Definition of Servant**

1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.

2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others are considered:

a) the extent of control which, by the agreement, the master may exercise over the details of the work;

b) whether or not the one employed is engaged in a distant occupation or business

c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision

d) the skill required in a particular occupation

e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work

f) the length of time for which the person is employed

g) the method of payment, whether by the time or by the job

h) whether or not the work is part of the regular business of the employer

i) whether or not the parties believe they are creating the relation of master and servant; and

j) whether the principal is or is not in business

**Independent Contractors of Abnormally Dangerous Activities**

* **Generally strict liable**
* **Some courts relieve if independent contractor is negligent**

**Yazoo & Mississippi Valley Railroad co. v. Gordon (Miss. 1939)**

Cattle were being shipped, Yazoo RR hired an agent to hold cattle while they awaited transfer. A bull escaped and gored plaintiff. Bull is considered domestic, so it was judged under a negligence standard. **Court ruled that independent contractor does not relieve company of liability under respondeat superior as it cannot delegate a duty it owed the public**. **L**

**R2 Torts 416**

**One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken**, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employers has provided for such precautions in the contract or otherwise.

Comment D

This applies to “peculiar risks” where if certain precautions are not taken, special hazards will be created.

**Wilton v. City of Spokane (Wash. 1913)**

Defendant city hired company to install street as independent contractors; company left behind unexploded dynamite. Wilton’s company was drilling later and were injured as a result of this unexploded dynamite. Court held city not liable because employer is not liable where the **obstruction or defect in the street causing the injury is collateral to the contract work, and entirely the result of the negligence or wrongful acts of the contractor**. **NL**

**R2 Torts 429**

One who employs an independent contractor to perform services for another **which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants**, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the extent as though the employer were supplying them himself or by his servants.

**Dangerous Animal Cases**

A. Liability for Animals

* Generally strict liability
* Mixed requirement of defendant’s knowledge of animal’s dangerous propensity
* Mixed about assumption of risk

**Behrens v. Betram Mills Circus, Ltd. (QB 1957)**

Plaintiffs were injured when their manager’s dog caused an elephant stampede. Ferae naturae are held strictly liable. Mansueate naturae or domitae naturae (domesticated, tame) are presumed harmless unless they have manifested a savage propensity, in which they move into the ferae naturae class. Court judges animal by habits of species in general, not by type of particular animal. Rejects a more nuanced rule of deciphering different types and different mens rea of animals as unmanageable. Holds that **damages from ferae naturae are strict liability**. **L**

**Earl v. Van Alstine (N.Y. 1850)**

Bees are ferae naturae but are so necessary to the existence of man and so studied in their nature that **bee attacks do not require strict liability**. **NL**

**Candler v. Smith (Ga. App. 1935)**

Owners of baboons are held strictly liable for their actions no matter how they escaped. **L**

**Smith v. Pelah (UK)**

Dog is entitled to one bite before held strictly liable.

**Docherty v. Sadler (Ill. App. 1997)**

Most states hold owners of dogs strictly liable for any bites.

**Banks v. Maxwell (N.C. 1933)**

Court found that plaintiff wasn’t liable for bull’s goring of a person because **knowledge of vicious propensity** was required. **NL**

**Vaugh v. Miller Bros. (W. Va. 1930) (minority view)**

Ape ate plaintiff’s finger. Court found negligence was required, not strict liability. **NL**

**R3 Torts 24**

Strict liability under §§20-23 does not apply

a) if the person suffers physical harm as a result of making contact with **coming into proximity to the defendant’s anima**l or abnormally dangerous activity **for the purpose of securing some benefit from that contact** or that proximity; or

b) if the defendant maintains ownership or possession of the animal or carries on the abnormally dangerous activity **in pursuance of an obligation imposed by law**

**Bostock-Ferari Amusements v. Brocksmith (Ind. App. 1905)**

Horse frightened by chained bear; horse causes injury. Court notes that **horses can be frightened by many things.** **NL**

**Negligent Care by Third Party**

**Baker v. Snell (K.B. 1908)**

Defendant kept savage dog but employed someone to take care of it. Employee was negligent in care and bit barmaid of defendant’s inn. Court found defendant **strictly liable despite intervening third party**. **L**

**Opelt v. Al G. Barnes Co. (Cal. App. 1919)**

Boy went under ropes to touch leopard – leopard scratched him. Court found that **defendant willfully placed himself within reach of the wild animal**. **NL**

**Gomes v. Byrne (Cal. 1959)**

Under §3342(a) of California Civil Code, plaintiff sued after entering property (where there was barking dog) to sell something and being bitten. Court found that plaintiff **assumed the risk** when he entered. **NL**

**Rylands Cases – brining a thing of mischief not naturally there**

**Natural vs. unnatural uses**

**Rylands v. Fletcher (House of Lords 1868)**

Independent contractors built reservoir on defendants’ property but ignored pipes underneath and flooded coal mine. Defendant was held responsible for **bringing a thing of mischief not naturally there** and its natural consequences unless the plaintiff were at fault or there was an act of God. Rejects distinction between negligence in ordinary collisions, where plaintiff takes on risk of injury, whereas here, the plaintiff took on no risk of injury. **L**

**Crowhurst v. The Burial Board of the Parish of Amersham (Exchequer 1878)**

Defendants planted **a yew tree**. Horse next door ate it and died; plaintiffs did not know about the yew. Court found defendants liable under Rylands’s rationale. **L**

**Rickards v. Lothian (Austrl. 1913)**

Trespasser clogged and flooded building. Plaintiff’s stock was damaged. Court found that it was not within Rylands rationale because it must be a **special use of the land** that is dangerous, not ordinary use and water system is ordinary use. **NL**

**Musgrove v. Pandelis (K.B. 1919)**

Plaintiff lived above garage where defendant stored automobile. Chauffeur caused explosion, burning down apartment. **Car with gas found to be a dangerous thing** and within Rylands rationale. **L**

**Balfour v. Barty-King (Q.B. 1956)**

Balfour and Barty-Kings lived in dwellings that were part of the same mansion. Barty-Kings had contractor unfreeze pipes with a blow-torch, fire spread to Balfour. Rylands rationale applied since **blow-torch is dangerous**. **L**

**Losee v. Buchanan (N.Y. 1873)**

Saratoga Paper Company’s steam boiler exploded and pieces flew onto plaintiffs’ premises and caused damage. Finds that civilized society, as gaining benefits from factories, **cannot have strict liability against them**. **Rejects Rylands**.

**Turner v. Big Lake Oil Co. (Tex. 1936)**

Saltwater overflowed from artificial pond of defendants’ oil wells, causing damage to plaintiff’s pasture. Notes that in England, no artificial reservoir is needed so not a natural use, whereas water storage is necessary and natural in Texas. Moreover, to extract oil, **saltwater reservoirs are necessary (thus, natural use)**. Notes that state, in granting oil licensees, contemplate this very usage. **NL**

**Lubin v. Iowa City (Iowa 1964)**

Iowa City **left pipes in place until they broke**. City was held strictly liable for resulting damage. Court notes that as USA has become less frontier-like, necessity of dangerous risks is lower and so companies engaged in hazardous activities are more capable of bearing the loss. **L**

**Walker Shoe Store v. Howard’s Hobby Shop (Iowa 1982)**

Plaintiff owned a shoe store. Defendant’s oil heater leaked and caught on fire, damaging shoe store. Court rejected summary judgment for plaintiff as pointed out that company in Lubin could bear the loss and the **oil heater was capable of being repaired and inspected**. **NL**

**Products Liability - History**

History of Doctrine

* Products liability against a seller for injury caused by a defective product has and does exist under ordinary principles of negligence liability, which is supplemented, not displaced by strict products liability (e.g. you can always sue under negligence, but cases will be rare where negligence can be established but product liability cannot be)
* In **MacPherson**, a defective car wheel disintegrated and injured the car’s ultimate purchases, who sued the auto manufacturer. There was evidence that the manufacturer was negligent in failing to inspect the wheel before selling the car to a retailer who sold it to plaintiff
* Held: Manufacturer is liable despite the manufacturer’s lack of privity with the plaintiff and the consequently attenuated path of events between manufacture and injury
* Escola invoked res ipsa loquitur and thereby extended MacPherson to a case where a defective soda bottle broke in a consumer’s hand but where the plaintiff had no direct evidence of manufacturer’s negligence
* Yuba Power Products, where a defective lathe injured its purchaser, extended Escola by replacing res ipsa with a seller’s strict liability to those injured by the defect, even downstream in the distribution chain
* “Strict liability in tort for defectively manufactured products merges the concept of implied warranty, in which negligence is not required, with the tort concept of negligence, in which contractual privity is not required.’ Comment a to R3 PL 2
* According to Comment a of R3 PL 1 where products liability is truly strict, the reasons are these
* Fault-based liability may allow sellers to “escape their appropriate share of liability.” Although res ipsa would be a less drastic response to this concern, strict liability “reduces the transactions cost” of litigation and **provides an insurance function** served through “increases in prices.” Moreover strict liability for downstream sellers incentivizes them to discipline upstream sellers or to deal only with those “reputable”
* Both efficiency and lack-of-reciprocity reasons for SL in this limited (and thus admin. manageable) extension of liability beyond the negligence standard (negligence standard won’t work – the manufacturers will be negligent but not found to be negligent) – also concern that victim shouldn’t bear loss (lack of reciprocity – narrowly defined)

**MacPherson v. Buick Motor Co. (N.Y. 1916)**

Plaintiff’s car fell apart. Defendant manufacturer bought tire from different company. Court finds that if the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Manufacturer owes duty to make thing of danger carefully. Knowledge of a probable danger. Bartlett dissent would keep privity of contract for manufacturers except for imminently dangerous activities – based on previous holding in Winterbottom. **L**

**Escola v. Coca Cola Bottling Co. (Cal. 1944)**

Coke bottle broke in plaintiff’s hand. Found liability under res ipsa loquitur as defect occurred most probably as a result of negligence. Traynor concurrence makes case for absolute liability because manufacturers can absorb cost and pass on to consumers. Notes that in manufacturing cases, since it is not easy for plaintiff to dispel duty of care, it essentially functions like strict liability. Notes public interest in avoiding danger. Notes manufacturer advertising and warranting fitness.

**Greenman v. Yuba Power Products, Inc. (Cal. 1963)**

Plaintiff injured using a saw. Defendant manufacturer sought defense in breach of implied warranty notice. Traynor rejected contract law as governing – rather strict liability for tort.

**Products Liability – Summary**

* Some states have enacted statutes, as in NJ, limit products liability to single products liability claim (thus preventing a bringing of a negligence claim)
* Some states have enacted statutes limited liability to downstream sellers
* In product misuse, R2 402a comment h talks about “normal handling and consumption” instead of misuse but caselaw has generally recognized duty to warn for foreseeable misuse (though there could be contributory negligence); sometimes it is recognized as a failure of the prima facie case (including reasonability), sometimes as affirmative defense; sometimes a product can be found to have a defect but plaintiff’s misuse is so unforeseeable that it destroys proximate causation
* R3 PL 1- RAD – Courts have found liability if the **product causes injury while being put to a reasonably foreseeable use**

**R2 402a Special Liability of Seller of Product for Physical Harm to User or Consumer**

1) 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 (usually not the product itself) if

1. The seller is engaged in the business of selling such a product, and
2. It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold

2) The rule states in subsection (1) applies though

1. The seller has exercised all possible care in the preparation and sale of his product, and
2. The user or consumer has not bought the product from or entered into any contractual relation with the seller.

**R3 PL 1 Liability of Commercial Seller or Distributor for Harm Caused by Defective Products**

**One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product** is subject to liability for harm to persons or property caused by the defect.

* If someone in the chain of sale is **providing a service rather than functioning as a seller**, they function as an employee and because of respondeat superior, only the seller who contracted with them would be liable

**R3 PL 2 Categories of Product 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. A product:

1. Contains a manufacturing defect when the product **departs from its intended design** even though all possible care was exercised in the preparation and marketing of the product
2. Is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a **reasonable alternative design** by the seller or other distributor, or a predecessor in the commercial change of distribution, and the omission of the alterative design renders the product not reasonably safe;
3. Is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided **by the provision of reasonable instructions or warnings** by the seller or other distributor, or a predecessor in the commercial chain of distribution

Comment c: It is not necessary that a commercial seller or distributor be engaged exclusively or even primarily in selling or otherwise distributing the type of product that injured the plaintiff, so long as the sale of the product is other than occasional or casual.

Comment e: Statutes generally only immunize nonmanufacturing retailers or wholesalers when 1) the manufacturer is subject to the jurisdiction of the court of the plaintiff’s domicile; 2) the manufacturer is not, nor is likely to become, insolvent; and 3) a court determines that it is highly probable that the plaintiff will be able to enforce a judgment against the manufacturer.

Current Doctrine

* R2 402A – strict liability for physical injury to a person or property of an “ultimate **user** or consumer” if that injury is caused by “a defective condition unreasonably dangerous”
* Since then (even in R2 jurisdictions), such liability has been extended to protect third parties who are not “users or consumers” as reflected in R3 PL 1, provides simply
* “One engaged in the **business of selling or otherwise distributing products** who sells or distributes a defective product is subject to liability for harm **to persons or property** caused by the defect.”

Definition of “selling or distributing”

* Magrine v. Krasnica – use of defective hypodermic needle by medical care provider is not a sale or distribution of the needle by the provider, though dissent cites applicability of ordinary rationales for strict product liability (or implied warranty)
* Newmark v. Gimbel’s Inc – strict liability (based on implied warranty but grounded in tort principles)- is applied to hair salon’s application of hair product
	+ Newmark makes a distinction between medical care as a profession and hair styling as a commercial enterprise
	+ This seems unprincipled, as does Magrine’s concern over the expense of insurance for a profession, as opposed to a commercial enterprise
	+ The hypodermic needle would never be sold to a consumer while the hair product could have been, but this distinction too many seem arbitrary
	+ The outcome of these cases, are, in general, hard to predict from their facts – sometimes the insurance fact bears weight, sometimes it has to do with the respect of the profession (medical care more important than hair styling)
	+ If not ordinary seller/distributor, can make argument that they aren’t “selling or distributing”

**Magrine v. Krasnica (N.J. 1967)**

Plaintiff was injured when dentist broke off hypodermic needle in plaintiff’s mouth. Court found dentist not liable because he was in no better position than plaintiff. Court acknowledge that dentist could spread risk through insurance but argued that it was the large scale enterprise that put the product in the stream of commerce that should be held liable. Malpractice insurance also does not cover implied warranty. Also worried about increased healthcare costs. Also worries about spread of liability to any user of a good. Botter dissent argued dentist is in better position and should have incentive to analyze quality and reliability of instrument. **NL**

**Newmark v. Gimbel’s Inc. (N.J. 1969)**

Plaintiff suffered damage to hair from product from hair salon. Beauty salon found liable under products liability due to it being a commercial sale for aesthetic purposes as opposed to a professional service which is an inexact science. Nature of professional services outweighs policy scale of imposition of liability. **L**

**Keen v. Dominick’s Finer Foods, Inc. (Ill. App. 1977)**

Defective cart injured plaintiff in grocery store. Court found grocery store to not be a seller of carts. **NL**

**Peterson v. Lou Bachrodt Chevrolet Co. (Ill. 1975)**

Plaintiff’s decedent was killed when run over by defective car from used car dealership. Rejected strict product liability because decedent was outside of chain of sale. Feared strict liability after product was out of control of defendant. **NL**

**Nutting v. Ford Motor Co. (N.Y. 1992)**

Plaintiff bought car from HP (computer company) auction and sued HP under strict products liability. HP liable since they regularly sold these cars after employees were done using them. **L**

**Rivera-Emerling v. Fortunoffs of Westbury Corp. (N.Y. App. Div. 2001)**

Rejected dismissal of liability because someone was injured test driving car instead of buying car. **L**

**Peanut Butter Jar Illustration – applies to design defects, manufacturing defects, and failure to warn cases**

* Customer, through no fault of his own, cuts his hand on the bottle
* Customer sues some or all the bottler, peanut butter company, and grocery store arguing that they all had a duty towards the customer
* Observe that the Customer’s goal here is to have it determine that the jar itself is defective and that such defect caused his injuries
* Manufacturing defect encompasses anyone selling the defective product even if someone is just a seller
* If customer succeeds in establishing a causative defect, from and beyond the point in the distribution chain where the jar becomes defective, each seller of the jar will be liable to Customer for his injury (though he cannot collect more than the total amount of his injuries)
* Burden shifts from plaintiff to defendant (similar to res ipsa) to exonerate themselves
* If someone in the chain of sale is **providing a service rather than functioning as a seller**, they function as an employee and because of respondeat superior, only the seller who contracted with them would be liable

Problems of Proof

* Keep in mind that although strict liability for the sale or distribution of a defective product my travel down the entirety of a distribution chain, **such liability begins only with the first link of the chain at which the defect is introduced**
* As Welge well illustrates proof of a defect’s introduction in the chain can be difficult and is subject to ordinary doctrines on interpretation of evidence, including burden shifting (as the reference to Ybarra attests)

**Products Liability – Manufacturing Defects**

**R2 402B Misrepresentation**

**R3 PL 2**

**R2 402A**

Manufacturing Defect

**R2 CET Test& R3 departs from intended design**

* As provided, e.g. in R3 PL 2, a product is defective when at the time of sale or distribution it contains
	+ A manufacturing defect (strict liability)
	+ Is defective in design, or (negligence)
	+ Is defective because of inadequate instructions or warnings (negligence)
		- Design/warning defects are interrelated
* As defined in R3 PL 3a, a product contains a manufacturing defect when it “departs from its intended design even though all possible care was exercised.”
* Some jurisdictions still use R2 402A – “a defective condition unreasonably dangerous” to define manufacturing defect (as well as a design defect and a defect for failure to instruct or warn). Comment i provides that a product is defective if it is:

“**Dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it**, with the ordinary knowledge common to the community as to its characteristics”

* **The Consumer Expectation Test (CET) in the R2 Torts is consistent with the R3 Torts in its determination of manufacturing defects**
* This is so because a **dangerous departure** from intended design is **not something that would be contemplated by the ordinary consumer** who purchases a product
* It is in the application to design defect and information defect where the trouble begins

**Manufacturing Defects**

**R3 PL 2**

Comment a: Quality control efforts are irrelevant for manufacturing defects; encourages investment in quality control; reduces transaction costs; discourages consumption of defective products because of increased cost of consumption (factoring in price of defective products); difficult of proof for plaintiffs; forces cost-benefit analysis about company’s investment in quality control (given quantitative analysis of likely defect rate); reciprocal burden shared by consumers; retailers and wholesalers can pass liability up chain to manufacturer; creates incentives for retailers to only deal with trusted manufacturers.

**Welge v. Planters Lifesavers Co. (7th Cir. 1994)**

Plaintiff cut hand when replacing cap on peanut jar. Defense argued contributory negligence because friend of plaintiff cut out label. Court found that defense have invited this because cutting out label was used for promotion. Posner found that plaintiff is not required to exclude every possibility, however fantastic or remote, that the defect which led to the accident was caused by someone other than one of the defendants. Summary judgment reversed. **L**

**Winter v. G.P. Putnam & Sons (9th Cir. 1991)**

Plaintiffs sued book company after plaintiffs ate dangerous mushrooms based on book. Denied that liability should expand beyond physical, tangible products to ideas or expression. Worries about incentives for writers to ever approach a dangerous topic. **NL**

**Saloomey v. Jeppesen (2d Cir. 1983)**

Plaintiff’s decedent was flying for Braniff airlines using maps, made by Jeppesen, purchased by Braniff and crashed based on misinformation from map. Court held Jeppesen strictly liable under R2 402A given the mass-produced nature of maps. **L**

**Mexicali Rose v. Superior Court (Cal. 1992)**

Plaintiff injured by bone in enchilada. Court made distinction between foreign and natural objects. Found that plaintiff can use on negligence theory but not strict liability or implied warranty. Limited to bones and other substances natural to the product. **NL**

**SL for foreign substances in food; for natural substances – strict liability if the diner reasonably should have expected to find the substance in the food.**

**Doyle v. Pillsbury Co. (Fla. 1985)**

Plaintiff saw insect in can and fell over. Court found ingestion was required for products liability case. **NL**

**Klages v. General Ordnance Equipment Corp. (Pa. Sup. 1976)**

Plaintiff’s mace pen didn’t work when defending motel and was shot in head. Sued on theory of R2 402 B. Court found it was a jury question. **L**

**R2 402B Misrepresentation**

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though a) it is not made fraudulently or negligently, and b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

**Products Liability – Design Defects**

**R3 PL 2b**

**R2 Torts 402A**

R3 RAD Test & R2 CET Test

* R2 CET more amenable to unforeseen risks
* R3 RAD more amenable when clear RAD but CET fails because it was clear to consumer
* R3 RAD argument about transparently dangerous products and whether R3 inhibits their very creation
* (could use Dawson factors to evaluate the balancing of RAD)
* Many states preempt by statute

**A plaintiff could sue under an ordinary negligence theory, but then only the manufacturer could be sued, not the retailer –**

Design defect

* R3 – Reasonable Alternative Design – different products have different danger levels and as long as there are reasons that it is more dangerous – it is not unreasonable to choose this design; but it’s a risk-utility test – it is unreasonable not to do so even if the consumer would expect it if there is no reason not to include it
	+ For unavoidably dangerous product, it would be easy for a factfinder to say that it is defective if the harm outweighs the benefit (**risk-utility test**) but the RAD language makes it a little more difficult (there may be no RAD for an unavoidably dangerous product even if it’s unreasonable to manufacture this product); Calabresi argues that whenever there is unreasonably designed product, we can say that the product is defective by saying that the RAD is to not have the product at all (minority) – which then gets you to an ordinary negligence test
* R2 uses Consumer Expectation Test – more dangerous than an ordinary consumer would expect
	+ For unavoidably dangerous product, consumer would expect these products to be particularly dangerous and so no liability (you can only sue those who use it improperly)
* **A plaintiff could sue under an ordinary negligence theory, but then only the manufacturer could be sued, not the retailer –** it is only when you claim the product is defective under products liability that you can sue the retailer as well
* Dawson – if leg. doesn’t take this away from the courts – courts will be providing insurance to victims of accidents, paid by the sellers even if the sellers didn’t do anything unreasonable – it will be unclear if companies can bear this cost – question of how companies can spread their risk

R3 PL 2b

* A product is “defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided **by the adoption of a reasonable alternative design by the seller or other distributor**, or a predecessor in the commercial chain of distribution, and the omission of the alternative design **renders the product not reasonably safe”**
* Comment a: “In contrast to manufacturing defects, design defects and defects based on inadequate instructions or warnings…achieve the same general objectives as does liability predicated on negligence.”
* Easy to define a manufacturing defect and cabin liability; with design defects, we need some standard in order to know when a design is defective (or else there would be liability for creating any product at all times) and so negligence serves this function
* The Reasonable Alternative Design (RAD) test is often referred to as a “risk-utility” test, i.e. **a negligence standard**
* **And although some courts – Green (latex gloves) for instance – consider the RAD element an additional hurdle for a plaintiff who has demonstrated negligence, there is rarely any practical effect of such additional burden because ordinarily the absence of a RAD dooms a plaintiff’s negligence case anyway**
* Foregoing a RAD is usually the measure of negligence

R3 PL 1

Comment A

* Intended design or sale without adequate instruction or warnings, renders the product not reasonably safe
* Sections 2b and 2c rely on a reasonableness test even though courts speak of the liability as strict **– strict liability holds all manufacturers to an expert standard of knowledge available to the relevant manufacturing community at time the product was manufactured**
	+ Courts have found liability if the **product causes injury while being put to a reasonably foreseeable use**
	+ Courts have called it strict liability to avoid comparative or contributory negligence
	+ Courts are worried that negligence might be too forgiving of small manufacturer who might be excused for its ignorance or risk or for failing to take adequate precautions to avoid risk
	+ Liability of nonmanufacturing sellers in the distributive chain is strict

R3 PL 2

Comment A

* Some sort of independent assessment of advantages and disadvantages to which some attach the label “risk-utility balancing” is necessary
* Goal is to **create incentives for manufacturers to achieve optimal levels of safety** in designing and marketing products
* Society needs some products that are dangerous and doesn’t benefit from all safety measures
* Wants balance so that careless consumers aren’t subsidized by careful consumers through higher prices
* Much easier to designated levels of quality control in manufacturing than design defects

R2 Torts 402A

* “One who sells an 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 this property, if the seller is engaged in the business of selling such a product”
* As noted, this provision applies to manufacturing or design defect, and has been interpreted to impose a consumer-expectation test (CET) in either case
* It does cabin design defect to those products that are more dangerous than a consumer would expect
* **Although R3 differs from R2 and will sometimes yield different results, the CET is incorporated into the RAD test because what a reasonable consumer expects of a product informs the reasonableness of a product’s design**
* For instance, if ordinary consumers understand that it is unduly dangerous to take a motor scooter on a highway, it is unlikely that a scooter unsafe at highway speed is unreasonably designed, compared to one, say that is safe at such speed.
* **Consumer is ordinary consumer, not one who specifically would buy the product**

Illustration #1

* While idling at a stop light, a car’s engine catches fire, injuring the driver. Evidence suggests that fire would not have occurred if manufacturer had used safer, no more costly, standard carburetor design.
* Under R3, there is a design defect because there is a RAD that would have made the product safer with no higher cost – Dawson
* Likely defect under R2 as car unusually likely to burn while idling seems “dangerous to an extent beyond that which would be contemplated by the ordinary user or consumer.” *Green*.
	+ Problem with the CET is that a consumer is not an engineer and so it would be hard for such a consumer to accurately know whether this was a reasonable expectation
	+ Ordinary consumer is defined by those who would purchase it ‘

Foreseeable Risks (R2 CET more amenable to unforeseen risks)

* R3 refers to a design defect “when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a RAD”
* **So, where is unforeseeable as in the sudden latex allergy of *Green*, the CET can yield true strict liability (without a proximate-cause limitation) where R3 would not**
* But risks sufficiently remote not to be deemed foreseeable under R3 will be rare (e.g. a carburetor fire seems foreseeable) and for these rare cases **jurisdictions are trending towards the R3 approach**

Motorcycle Leg Guard Illustration 1

* Manufacturer sells motorcycles without leg guards, though competitors include such guards. Customer falls while on bike and suffers an injury a leg guard would have prevented. Evidence shows that leg guards would have significantly limited the motorcycle’s maneuverability.
	+ Absence of reasonable alternative design for an aggressive bike likely allows manufacturer to escape liability under a R3 approach – e.g. Dreisonstok (VW microbus)
	+ Obvious absence of guards likely allows manufacturer to escape liability as well under CET given that customer knew that guards weren’t present and presumably chose product with that in mind

Motorcycle Leg-Guard Illustration 2

* Manufacturer sells motorcycles without leg guards, though competitors include such guards. Customer falls while on bike and suffers an injury a leg guard would have prevented. Evidence shows that leg guards could have been designed that would not have cost much or limit the bike’s maneuverability.
	+ R3 – RAD that would have prevented injury, not more costly, and would not affect performance. (liability)
	+ R2 – CET – obvious absence of guards likely allows manufacturer to escape liability under a CET – this is presumably easy for a consumer to tell (no liability)
	+ Problem with CET – a consumer might not focus on feature in question when purchasing product; a consumer might also not have engineering knowledge that a protection exists that could protect them from a hazard (regulatory)
	+ Libertarian argument that CET respect autonomy and incentivizes informed choice

Unavoidably Dangerous Products

* In McCarthy (Black Talon bullets) what separates the majority and the Calabresi dissent
* Majority says that under R3, there is no RAD, if the purpose is to maim and kill and accepts purpose of massively destructive bullets
* Calabresi tried to say that RAD is not to have the bullet at all – wants to finesse R3 into a negligence standard
* R3 wanted wiggle room for fact-finders to find a product so dangerous it shouldn’t exist at all
* R2 – CET – consumers know how dangerous it is

**Dawson v. Chrysler Corp. (3d Cir. 1980)**

Dawson, on police duty, drove on rain-soaked highway and lost control of his car. Plaintiffs allege patrol car was defective because it didn’t have a full, continuous steel frame extending through the door panels, and a cross-member running through the floor board between the posts located between the front and rear doors of the vehicle. Plaintiffs allege with this design, the pole would not have penetrated the car except slightly. Chrysler emphasizes that for most crashes, malleability is good to absorb the impact and that the suggested design would be worse in most crashes and that suggested design would have added price to the car.

NJ Court in Suter v. San Angelo Foundry & Machine Co. (N.J. 1979) rejected R2 402A requirement that the product be abnormally dangerous – standard instead is “reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes.”

In Cepeda v. Cumberland Engineering Co. (N.J. 1978), a product is defective if “a reasonable person would conclude that the magnitude of the scientifically perceivable danger as it is proved to be at the time of trial outweighed the benefits of the way the product was so designed and marketed.

7 Factors:

The court suggested that the trial judge first determine whether a balancing of these factors precludes liability as a matter of law. If it does not, then the judge is to incorporate into the instructions any factor for which there was presented specific proof and which might be deemed relevant to the jury’s consideration of the matter.

1) The usefulness and desirability of the product, its utility to the user, and to the public as a whole

2) the safety aspects of the product, the likelihood that it will cause injury, and the probable seriousness of the injury

3) the availability of a substitute product which would meet the same need and not be as unsafe

4) the manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility

5) the user’s ability to avoid danger by the exercise of care in the use of the product

6) the user’s anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions

7) the feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance

Court finds that jury does not need to ascertain that all of these factors weigh in favor of the plaintiff just as long as, after balancing these factors, the jury finds that the car is “not reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes.” Court rejects that compliance with National Traffic and Motor Vehicle Safety Act relieves Chrysler of liability.

Court is concerned that individual juries are setting out different guidelines weighing different considerations and believes the law imposes on the industry the responsibility of insuring vast numbers of persons involved in automobile accidents.

Notes

* Question of whether federal law pre-empts common-law rights – in Wyeth v. Levine (2009), SCOUTS found no evidence that FDA drug labeling requirements for an intravenous anti-nausea drug that caused gangrene were meant by Congress to displace state law

**Green v. Smith & Nephew (Wis. 2001)** **(minority approach)**

Plaintiff at hospital alleged powdered latex gloves created a new allergy. Court found for plaintiff even though company did not know its product could cause this allergy. Court rejected R3 PL 2’s provision in 2(b) that required foreseeability of risk, noting that this was an element of negligence, not strict products liability. Also noted that R3 PL 2(b) requires an alternative design available and court found it troubling that burden for proving strict product liability is higher than ordinary negligence case. **L**

**Notes**

* In many jurisdictions, liability for defective products is now regulated by statute.
* Some other factors considered: if the design was state of the art, the danger created was open and obvious

**Dreisonstok v. Volkswagenwerk A.G. (4th Cir. 1974)**

Plaintiff injured in car crash. Trial judge found liable b/c it lacked sufficient crush space for the passenger compartment. Court found that this van was a type of a particular design that sacrificed driver’s front space with more cargo/passenger space and it was obvious to anyone using it. **NL**

**McCarthy v. Olin Corp. (2d Cir. 1997)**

Colin Ferguson boarded a LIRR train and killed six people using “Black Talon” bullets, which had been pulled from the market earlier, because its bullets upon impact, increase wounding power. Court found that since purpose of gun is to kill/injure, the usually risk/utility analysis is unnecessary. Calabresi dissent notes that where the purpose is to injure, a court could conclude that liability should attach without proof of a reasonable design because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible utility that no rational adult, fully aware of the relevant facts, would choose to use or consume the product. **NL**

**Price v. Blaine Kern Artista, Inc. (Nev. 1995)**

Manufacturer of oversized masks that bore caricatures of celebrities was found liable for injury when user was pushed and fell and the force of the mask hurt neck. Court found it was foreseeable that users would be attacked and so manufacturer should be required to put in a safety harness. **L**

**Rodriguez v. Glock, Inc. (N.D. Ill. 1998)**

Bouncer struggled with off-duty police officer with gun; third person pulled bouncer away. Gun discharged. Plaintiff’s decedent sued gun manufacturer on theory that it lacked a safety and had an extremely short trigger-pull. Court said that **scuffle was not foreseeabl**e and thus a third party actor was an independent superseding cause. **NL**

**Products Liability – Failure to Warn**

**R2 402A Comment k**

**R3 PL 6 Defective Design for Prescription Drugs**

**R3 is more of a negligence test; R2 is CET**

**R2 literally excuses based on warning, but not actually in practice**

**Warnings cannot be an escape for dangerous product (Uloth/Freeman)**

**Rebuttable Presumption**

**Directions can’t be long (Bunn O Matic)**

**Learned Intermediary Doctrine**

* One engaged in the business of selling or distributing a product and who sells or distributes a defective product is liable for harm caused by the defect. R3 PL 1
* Both R3 and R2 have chain of distribution liability
* As provided in R3 PL 2, a product is defective when at the time of sale or distribution it contains inadequate instructions or warnings
	+ A product is defective because of inadequate instructions or warnings when the **foreseeable risks of harm** posed by the product could have been reduced or avoided by the **provision of reasonable instructions or warnings** by the seller or other distributor, or a predecessor in the commercial chain of distribution, **and the omission in the instructions or warnings renders the product not reasonably safe**
	+ Comment a: “In contrast to manufacturing defects, design defects and defects based on inadequate instructions or warnings achieve the same general objectives as does liability predicated on negligence.”
* R2 402A
	+ “unreasonably dangerous to the user or consumer” – to the user or consumer or 3rd parties
	+ **Consumer Expectation Test (not a negligence test)**
	+ Applies to manufacturing, design, or failure to warn

**Foreseeable Risk under R2**

* **American Tobacco Co. v. Grinnell (Tex. 1997)**
* Grinnell smoked from an early age starting in 1952 – alleges that tobacco companies represented that cigarettes were not dangerous. Cites comment i and j to R2 402A that there is no duty to warn if ordinary knowledge presents those dangers. Strict standard for common knowledge – facts so well known to the community to be beyond dispute. Finds that general dangers were common knowledge but that addictive quality was not general knowledge in 1952. A manufacturer is required to give an adequate warning if it knows or should know that potential harm may result from use of the product. In the absence of a warning, a rebuttable presumption arises that the user would have read and heeded such warnings and instructions. **L**
* Hecht dissent emphasizes nicotine addiction as one of the dangers already known; argues addiction itself didn’t increase lung cancer – believes recovery, if allowed, should be limited to increased risk to addiction, not lung cancer.
	+ Smoker claims to have become addicted because they were marketed with warnings
	+ Uses R2 – good tobacco is not merely because the effects are harmful – no design defect – (also no RAD b/c smokers want these harmful things in their tobacco, unless we take Calabresi view that cigarettes are so dangerous that they shouldn’t be made)
	+ In order to prevent a product from being unreasonably dangerous, the seller may be required to give directions or warnings…but a seller is not required to direct or warn where danger is generally known comment i from R2 402A
	+ However, we cannot conclude that the specific danger of nicotine addiction was common knowledge when Grinnell began smoking
	+ In the absence of a warning or instruction, **a rebuttable presumption arises that the user would have read and heeded such warning or instruction**
* Grinnell Dissent
	+ The average consumer knew it was hard to quit even if there was no a clinical explanation

**Brown v. McDonald’s Corp. (Ohio App. 1995)**

Plaintiff purchased McLean Deluxe, which contained seaweed. Plaintiff had allergic reaction. McDonald’s defended that it had fliers that contained this information. Court of appeals found that Ohio statute asks whether a manufacturer exercised reasonable care would warn of that risk in light of both the likelihood and seriousness of the potential harm. Also cited comment j to R2 402A that there is a duty to warn where the **product wouldn’t be expected by the consumer** in the product and it is a common allergy. Thus, a jury should decide if McDonald’s fliers were adequate warning. **L (survives summary judgment)**

* Sometimes statutes adopt R3 or R2 (and usually when they adopt R3, they leave out RAD and just ask for reasonableness)
	+ Statute asks whether a manufacturer exercising reasonable care would warn of a risk in light of both the *likelihood* and the seriousness of potential harm
	+ Seller’s anticipation of consumer self-help, or lack thereof, is a relevant factor (question of whether the consumer is going to take a lot of precaution or a little precaution)
	+ Summary judgment for defendant was reversed because it was uncertain whether flier alone was sufficient warning
	+ Result would be similarly uncertain under R2 – would an ordinary consumer check a flier
	+ Criteria is whether the ordinary consumer would be aware that there is an allergy (arguably overinclusive since if it were judged by a consumer who had an allergy, there might be less warning required)

**Rebuttable Heeding Presumption**

**Graves v. Church & Dwight (N.J. App. 1993)**

Graves consumed baking soda, and there was a rupture in his stomach. Court found that baking soda was defective but not proximate cause of Graves’s actions. Court found that such a defect created a rebuttable presumption that Graves would have heeded the warning had it been there, but his testimony that he smoked cigarettes despite warnings **rebutted the presumption**. **NL**

**Balance of Design and Warnings**

* **Uloth v. City Tank Corp. (Mass. 1978)**

Court commented upon comment j of R2 402A – warning does not absolve of liability. It should be one factor in the analysis but **if a RAD could have reduced the danger**. R3 cites Uloth approvingly.

* **Liriano v. Hobart Corp. (2d Cir. 1999)**

Worker’s hand was severed from arm by meat grinder. Hobart company had put warning not to remove guards but supermarket removed guard. Jury found Liriano 1/3 liable and the other defendants 2/3, with the majority to the supermarket. Court found that while meat grinders are obviously dangerous, there is a duty to warn of a safer way to use it (with a guard) that users might demand. Newman concurrence says there might be a disincentive to install guards in the first place (since then there would be no failure to warn liability), but argues that this will probably not be the case. **L**

* **R2 402A Comment k:** Notes that some products are unavoidably unsafe, such as drugs. Rejects strict liability for dangerous and experimental drugs as long as they are properly prepared, marketed, and warning is given.

However, some courts held that drug companies could not be liable for design defects if they presented the warnings. **Some courts have only applied comment k on a case-by-case basis.**

* **Freeman v. Hoffman-LaRoche (Neb. 2000) rejected R3 Torts 6 (too broad – allows escape of liability)**

Argues that the reasonable physician standard makes it likely **that it would likely be useful for some class of patients** and so most drugs would escape design defect liability. **Finds instead that RAD test allows for more flexibility in allowing liability.**

* **R3 PL 6:** A prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health-care providers, knowing of such foreseeable risks and therapeutic benefits, **would not prescribe the drug or medical device for any class of patients.**
	+ Uloth v. City Tank / Freeman (**warning is no safe harbor** for design of pharmaceuticals) – doesn’t want manufacturers to be able to discharge liability by warning about the dangers of the product
	+ In R3, product will still be defective if there is a non-prohibitively expensive RAD – decision to design/warn are part of the same question – risk-utility approach
	+ In R2, CET **– manufacturer could argue that the warning satisfies CET literally, but others are not likely to take it literally and that an ordinary consumer would not expect this design problem** (particularly if there are other products for which this is not the case) especially since **warnings have limited effectiveness** (does the combination of the design/marketing make the product as safe as an ordinary consumer would understand)

**Problem of Extensive, Detailed Warnings**

* **McMahon v. Bunn-O-Matic Corp. (7th Cir. 1998):** Plaintiff suffered burns from coffee cup. Alleged that Bunn-O-Matic kept coffee too hot and failed to warn consumers of the danger. Court noted that it was served at industry-standard temperature. Notes difficult of giving detailed warnings since it makes them less likely to be read. Notes that the temperature claim is based on negligence and says it is unclear that the costs of a higher likelihood of burns outweighs the benefits. **NL**
	+ Plaintiff suffers serious burns from spilled coffee sold without any warning. Directed verdict for defendant.
	+ No evidence that coffee was unreasonably hot or that coffee was unusually hot.
	+ **Coffee’s ordinary temperature is common knowledge.**
	+ Warning on severity of burn if coffee spilled could not be “pithy and bold” and “might obscure the principal point” that spills should be avoided
	+ Easterbrook might be wrong – **warning can be pithy and it might actually make people more careful** (if people can know that it will cause burns) – and maybe they won’t be aware that it can cause burns
	+ A warning might alert a consumer **to a known danger** (and might cause consumer to rethink situation)
	+ **If a reasonable consumer would understand it was as dangerous as it was, it was not unreasonable under R3 and passes the CET under R2**
* **Learned Intermediary Doctrine**
	+ In anticipation of an intermediary such as a prescribing doctor, the learned intermediary doctrine requires only those warnings or instructions that the intermediary would require
	+ This doctrine though may not be applied even to prescription drugs where the seller engages in direct marketing to consumers who, it is thought, may be influencing whether intermediaries prescribe

**Brooks v. Medtronic, Inc. (4th Cir. 1984)**

Patient’s pacemaker malfunctioned. Medtronic informed physician but not patient. Court found manufacturer, as in prescription drugs, to inform physician, but not patient, as physician was in better position to manage information. **NL**

**Perez v. Wyeth Laboratories (N.J. 1999)**

FDA created a comprehensive regulatory scheme for direct-to-consumer marketing of pharmaceutical products. There is a presumptive defense to pharmaceutical companies that comply with FDA requirements. But in direct-to-consumer marketing cases, patients deprived of reliable medical information can establish that misinformation was a substantial factor contributing to their use of a defective pharmaceutical product. **L**

**Defenses**

Background

* Traditionally, where a d’s negligence and p’s negligence are each the factual and proximate cause of a p’s injury, the p generally could not recover
	+ See, e.g. Harris v. Meadows (left turn collision)
* Exceptions: last clear chance
	+ See, e.g. Davies v. Mann (donkey), R2 479, 480

Negligence Doctrine in Practice

* To avoid harshness under traditional contributory-negligence rule, even in the absence of doctrinal exception, judges or juries have, as a practical matter:
	+ Applied a more lenient standard of reasonable care to plaintiffs than to defendants
	+ Readily found the defendant’s negligence, but not the plaintiff’s, the proximate cause of the injury

Comparative Responsibility

* Adopted by statute in most jurisdictions and by courts in others
	+ Only a handful of jxs retain traditional contributory negligence rules
* Comparative Responsibility comes in two flavors
	+ Pure and Modified (split among tie-break rule when responsibility is evenly split)

**Comparative Negligence**

* Usually measured by percentage of negligence, not causation (although in products liability, causation is determined, where there is a strict liability determination)
* Some states include causation among other facts.
* Eaton v. McLain (Tenn. 1994)
1. The relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff
2. The reasonableness of the party’s conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it;
3. The extent to which the defendant failed to reasonably utilize an existing opportunity to avoid the injury to the plaintiff
4. The existence of a sudden emergency requiring a hasty decision
5. The significance of what the party was attempting to accomplish by the conduct, such as an attempt to save another’s life; and
6. The party’s particular capacities, such as age, maturity, training, education, and so forth

**McIntyre v. Balentine (Tenn. 1992)**

Balentine drove his tractor, while intoxicated, into McIntyre’s pickup truck, who had been speeding. In pure comparative negligence jurisdictions, damages are given in proportion to fault. In modified jurisdictions, 50% (not greater than) jurisdictions require the plaintiff’s negligence not to exceed 50% and in 49% jurisdictions, the plaintiff’s negligence must be less than the defendant’s.

**Danculovich v. Brown (Wyo. 1987)**

Court allowed reduction in damages on account of ordinary negligence despite defendant’s gross negligence but would not allow reduction incases of willful and wanton behavior. Intentional torts do not allow contributory negligence as a defense.

**Manning v. Brown (N.Y. 1997)**

Manning and Amidon took a friend’s car without permission (and without licenses). Amidon crashed the car when Manning suggested she adjust the radio. Manning sued Amidon and the owner of the car. Court found that plaintiffs cannot recover if plaintiff was engaged in serious violation of the law and the injuries for which the plaintiff seeks recovery are the direct result of that violation. **NL – Con. Neg.**

An Illustration

* A has suffered injury of $100,000. The negligence of A, B, C, and D is each a factual and proximate cause of A’s injury (and such negligence of B, C, and D violated a duty to A). The relative shares of responsibility are determined to be: A: **50**%; B: 25%; C: 15%; D: 10%.
* In a **pure jxs (under UCFA)** or in a modified jx **(not greater than),** A could collect up to $50,000 from the defendants (assuming such jx sums defendant responsibility)
* In a modified **(not as great as)** jurisdiction, A could not recover

Comparative Responsibility

* Jurisdictions vary on whether defendants are jointly and severally liable
* So, e.g., joint-and-several liabile may apply only to a defendant who bears over a threshold of responsibility
* Observe the incentives of plaintiffs and defendants to join other defendants
* In a several liability jx, A would have to sue separately and attempt to recover separately to B, C, and D

Another Illustration

* $40,000 Accident; Negligence of A, B, C, and D is each a factual and proximate cause of A’s injury
* A: 40%; B: 30% C: 10% D: 20%
* Under the UCFA (or a typical Not-Greater-Than-Jurisdiction)
	+ A bears $16,000
	+ B bears $12,000
	+ C bears $4,000
	+ D bears $8,000
* Joint and several liability under UCFA section 2c but not so in jurisdiction that imposes several liability on a defendant less than half responsible
* If D is insolvent; under UCFA 2d
	+ A bears $16,000 + 4/8($8,000) = $20,000
	+ B is liable for $12,000 + 3/8($8,000) = $15,000
	+ C is liable for $4,000 + 1/8 ($8,000) = $5,000
* In a jurisdiction that does not impose joint-and-several liability here, A loses the chance to recover $8,000

Comparative Responsibility

* Comparative responsibility because comparisons account not only for degree of fault – factoring in the extent to which each actor deviated from reasonable behavior – but other factors as well, such as e.g.
* Proximity of Cause (but see, e.g. Sanford, rejecting this factor and noting that the comparison is among “causes that had to coincide”)
	+ Whether there was a Last Clear Chance (cf., e.g. Fritts)
	+ See, e.g. Eaton v. McLain (listing factors)
* No precise way to come up with number (could compare probabilities of accident happening given conduct; could compare expenditures to ideal expenditures)

Intentional Torts

* It is easy enough to conclude that a plaintiff will bear no responsibility for her own negligence in the face of the defendant’s intentional (or “willful and wanton”) infliction of an injury
	+ See, e.g. Danculovich v. Brown
* But consider what a jx without joint-and-several liability should do when comparing defendant responsibility between, say, a drunk driver who caused a wreck and an automaker who lagged in the adoption of industry standard safety features, or between a negligent landlord and a violent intruder
	+ You might not want to allocate responsibility to the drunk driver (even though more at fault) because you might forego a deterrent effect on the automaker and so you may want to allocate a higher loss to the automaker
	+ You might want to allocate responsibility to the landlord (even though the intruder is more at fault) for policy reasons – deterrent effect
* In a joint-and-several liability, the landlord/automaker will probably end up bearing the loss since the other members will probably be insolvent

**Double Responsibility at the Margin (no contributory negligence for medical malpractice)**

**Fritts v. McKinne (Okla. 1997)**

Plaintiff’s decedent injured in accident as a result of driving 70 MPH while drunk into a tree. Defendant surgeon negligent cut open artery during tracheostomy. Court ruled that doctor could not use contributory negligence to defeat claim for negligence. **L**

* In *Fritts*, doctor negligently performed tracheostomy – the doctor’s comparative responsibility defense was rejected (essentially an application of last clear chance doctrine) (doctor argued that plaintiff negligently caused crash)
* Where parties simultaneously decide on precaution, there can be an equilibrium incentive for each party to take reasonable precaution (if you don’t take care, you will be liable)
* Where precaution decisions are made sequentially, however, if the first actor is negligent, the second actor – the doctor in Fritts – has an insufficient incentive for care unless she must pay in full for damages caused by her negligence
* The second actor’s full liability constitutes her half of “double responsibility at the margin” – where a defendant pays the plaintiff, however, the plaintiff avoids responsibility and courts are more concerned about the doctor’s incentives than the patient’s

**Express Assumption of Risk**

Three Types

1) Plaintiff expressly assumed risk by formal agreement

2) Defendant had no duty to protect the plaintiff from harm suffered because the risk was inherent in the activity the plaintiff chose to undertake

3) Plaintiff chose to encounter a risk negligently created by the defendant

**Assumption of Risk**

* **Not a defense – however, these are really waiver of duty cases and so there is no prima facie case**
* There are (trivial) cases of risk assumption that don’t get litigated because there is no plausible reason to challenge the waiver of duty
	+ For example, imagine that a homeowner negligently allows his tub to overflow weakening the floor and so hires a contractor who, fully informed of the dangers, agrees to make repairs for a fee – defendant owes contractor no duty because the duty was waived for compensation
* There are, however, circumstances where it is less certain that a waiver of duty should be honored

Express Waiver Illustration

* Plaintiff rides old-fashioned roller coaster after signing waiver exculpating liability and is injured on negligently maintained roller coaster
* Typically waiver of duty is ineffective where there is no express disclaimer of duty to take reasonable care (absent in this illustration):
* Otherwise, the disclaimer may be read simply as a warning of residual danger (and not the danger of lack of reasonable care)
* **Van Tuyn v. Zurich American Ins. Co. (Fla. App. 1984):** Plaintiff rode mechanical bull after seeing others do it – asked the operator to make it go slowly. Plaintiff signed waiver. Court found that an exculpatory clause must clearly state a release of liability for its own negligence. **L**
* Interpretation aside, enforcement of a waiver turns on contracts principles of public policy and conscionability, including whether there is: an activity suitable for regulation (favors plaintiff here) (large numbers of people in dangerous situation), bargaining power disparity (favors defendant here); surrender of control (favors plaintiff here)
* See e.g. R2 496B. See also Tunkl (hospital); Manning (skydive operator)
* In understanding express-waiver cases, an alternative to formal factor balancing is to answer to this question: **is it conscionable for a defendant to provide the plaintiff no protection after clearly declining to offer any?**
	+ Does customer truly understand the risks involved? The answer to this question may be “yes” where the defendant merely accommodates the plaintiff’s desire to engage in an activity the plaintiff easily forgo, such as in *Manning*.
	+ But the answer may be no when e.g. the defendant: is engaged in an activity suitable for regulation; exercises bargaining power over the plaintiff; or takes control over the plaintiff’s safety
	+ But if you overregulate, then you create incentives to avoid liability (not engaging in certain activities for fear of liability)

**Manning v. Brannon (Okla. App. 1997)**

Skydiver signed waiver releasing claims of negligence. Skydiver sued after parachute malfunctioned. Court found that bargaining power was equal since skydiver didn’t need to do this for physical or economic well-being and so claim is exculpatory. Dissent argued that entities engage in dangerous behaviors should not be allowed to be free from liability. N**L – RA**

**Anderson v. Erie Ry. Co. (N.Y. 1918)**

Clergyman bought reduced price railroad ticket that disclaimed liability for negligence. Clergyman died in train derailing and court barred recovery arguing equal bargaining power. Usual common law rule finds that release for ordinary compensation to a common carrier does not release liability. **NL – RA**

**Tunkl v. Regents of the University of California (Cal. 1963) – Tunkl Test**

Tunkl went to UCLA Medical Center and signed waiver that reduced service fees in exchange for released liability. Court found such a release unenforceable and listed factors for when such exculpatory provisions are unenforceable (balancing test): a business suitable for public regulation, performing a service of great importance to the public, the party holds himself out to any member of the public to perform it; the party invoking such exculpation has decisive advantage of strength in bargaining power, makes no provision to pay additional reasonable fees and obtain protection against negligence, and as a result of the transaction, the person or property is placed under the control of the seller. Hospital-patient contract clearly falls within the category of agreements affecting the public interest. (other situations could include monopolistic situations, public utilities, and common carriers, and to agreements which attempt to exculpate one from liability for the violation of a statute or regulation designed to protect human life). **L**

**R2 496 B Express Assumption of Risk**

A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant’s negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy.

* Comment b – where agreements are freely and fairly made, defendants can be held harmless
* Comment c – where defendant drafts the agreement, it must be clear that plaintiff assent to agreement
* Comment d – contract must clearly speak to cases of intentional, negligent, or reckless conduct – terms must also apply to the particular conduct of the defendant which caused the harm
* Comment j – contract won’t apply when there is unequal bargaining power that arises from monopoly of defendant, assumption of risk by all members of field, or plaintiff’s particular circumstances

**Shorter v. Drury (Wash. 1985)**

Decedent needed a D and C procedure but did not want transfusion because she was a JW, so signed release. Procedure went badly and she refused transfusion, dying. Plaintiff sued, claiming that negligent operation caused death and release does not hold. Court ruled that plaintiff’s assumed risk of bleeding to death even if they did not assume risk of negligence. **NL – AR**

**Vodopest v. MacGregor (Wash. 1996)**

Hiker engaged in research study about breathing techniques at high altitudes, signing release beforehand. Hiker suffered permanent brain damage and sued trip organizer for negligently promoting the use of her breathing technique. Court found that such exculpation is unenforceable against public policy, citing the Tunkl Test and that finding of fact of negligence should go to jury (despite finding no unequal bargaining power). **L**

Doubts About the Concept

* Beyond the trivially enforceable assumption-of-risk case (contract for hire) e.g. and cases in which enforcement might (or might not) be unconscionable – there are contested cases that invoke assumption-of-risk doctrine but are not about waivers of duty at all
* These cases are ordinary negligence-standard cases in assumption-of-risk clothing

Secondary Assumption of Risk Illustration

* Fire in apartment due to landlord’s negligence – plaintiff runs in to grab baseball tickets and suffers injuries
* The plaintiff here is contributorily negligent, which in the past barred – and in some jurisdictions still bars – a plaintiff from any recovery, and so it did not matter whether one labeled her conduct as contributorily negligent or as an assumption of risk negligently imposed on her by the defendant
* Labels shouldn’t matter under comparative responsibility either, and in enlightened comp. resp. jxs – so-called secondary assumption of risk is not a complete bar to recovery; but beware the possibility of laggard jurisdictions rigidly wed to outdated precedent
	+ And note that such rigid adherence could lead to the absurd result of no liability to a plaintiff **who reasonably encounters a risk**, such as the hog victim in Ranne or Paulina had she attempted to rescue not baseball tickets but, say, scarce, lifesaving medicine in a pandemic

**Secondary Assumption of the Risk and Rise of Comparative Fault**

* **Plaintiff is aware of defendant’s negligent behavior** – in most jurisdictions, treated as a factor under comparative fault

**R2 496E**

1. A plaintiff does not assume a risk of harm unless the voluntarily accepts the risk.
2. The plaintiff’s acceptance of a risk is not voluntary if the defendant’s tortious conduct has left him no reasonable alternative course of conduct in order to
3. avert harm to himself or another, or
4. exercise or protect a right or privilege of which the defendant has no right to deprive him

**Marshall v. Ranne (Tex. 1974)**

Boar escaped from defendant’s farm. Plaintiff saw boar and knew its danger (being a hog farmer himself) but went outside to car. Court found that plaintiff, under R2 496E, didn’t assume this risk but had it forced upon him. **L – No AR**

**Kennedy v. Providence Hockey Club (R.I. 1977)**

Plaintiff was hit with hockey puck in stands. Plaintiff had been to previous hockey games and had seen pucks go into the stands. Court found that plaintiff knew about risks and so assumed the risks. **NL – AR**

**Hennessey v. Pyne (R.I. 1997)**

Plaintiff who lived next to golf course was hit by golf ball. Golf balls hit her house about ten times a day during playing season. Court found it was an issue of triable fact whether plaintiff assumed risk of injury when looking at her flower garden outside of her house.

**Fagan v. Atnalta (Ga. App. 1988)**

Plaintiff saw female employees of bar trying to eject rowdy customers becoming intricated into the dispute and went to help but was severely beaten. Plaintiff argued that owner of bar should have hired better security. Court found that plaintiff knew the risk when he entered the situation and so the owner of the bar is not negligent. **NL - AR**

Primary-Assumption Illustration I **(defendant is not negligent at all – so assumption of risk makes defendant’s actions reasonable)**

* Paulina attends baseball game with tickets – close to the batter’s box while outside of protective netting – Paulina is struck by a foul ball
* This illustration is essentially the Tumbler in *Murphy* – as opposed to the human kite in *Woodall* – and can be described as a case in which a presumably fully informed plaintiff assumes a risk in a “primary” sense meaning simply that she voluntarily became exposed to the risk imposed by the defendant’s conduct
	+ No danger on Paulina until she chooses to encounter that risk
* But keep in mind the reason the seats are prized by fans who choose to expose themselves to this risk
	+ Overall, the fans earn a net benefit from the exposure, which in turn suggests that the **defendant is reasonable** (no negligence) in declining to eliminate or reduce the risk so long as the fans are provided an adequate warning, and one can argue that warning is needed here – **no need for assumption of risk defense**
* This analysis also summarizes reasoning of *Murphy* where the court focuses on the ride’s inherent attraction and obviousness of the dangers, *not* on the plaintiff’s subjective knowledge
* Note in *Murphy*, the court’s observation that the outcome could have been different were there evidence that the ride was “a trap for the unwary, too perilous to be endured” in which case we would not trust the market’s judgment as evidence of reasonable behavior or would conclude that reasonable care required a warning at least
* And note the analogous concern over incomplete purchaser information **that leads R3 jurisdictions generally to reject assumption-of-risk defenses in design-defect cases (plaintiffs might not know there is an available alternative)**
* With the foregoing in mind, some jurisdictions have done away with the assumption rhetoric (at least in many cases)
* McGrath (1963) also describing the term assumption of risk as a “mist” that obscures clear reasoning

Primary Assumption

* The law is not everywhere free from outdated, wooden doctrine. Consider *Fagan*, in which the plaintiff was injured reasonably rescuing workers from a bar fight the plaintiff claimed occurred because of the defendant bar’s negligence
* Held that the plaintiff was entirely barred from recovery because he “had a clear choice of alternative actions” including walking away unharmed, and so assumed the risk
* This senseless holding – other cases impose liability in favor of voluntary rescuers – seems aberrant and woodenly applies the doctrine

Primary Assumption Illustration II **(defendant is still negligent, but plaintiff assumed full risk) – waiver of duty**

* Paulina goes scuba diving – doesn’t dive with partners, knows the risks and wants to go alone; Paulina sues Dodo, seeking compensation for her injuries
* The point of this illustration is to suggest that, despite the reasoning of McGrath, there may remain some space for true, implicit assumption of risk
* Here, the defendant is negligent in its lone-diver policy – would be liable to other divers as a result – and the plaintiff who has not behaved as would a reasonable person, could be deemed contributorily negligent
* **The plaintiff fairly can be deemed to have waived the defendant’s duty of care** and to have thus, fully assumed the risk of lone diving (e.g. plaintiff wasn’t merely negligent); defendant is **still negligent** in having this policy (imposing greater risk than saved by avoiding the cost of precaution); but you could argue that plaintiff isn’t just contributorily negligent, but fully assumed the risk

**Primary Assumption of the Risk**

* Prevents prima facie case of liability rather than it being a defense because defendant owed no duty to plaintiff

**Murphy v. Steeplechase Amusement Co. (N.Y. 1929)**

Plaintiff was injured on Coney Island amusement ride where an escalator jerked. It would be different if risks were unclear or unobserved. It would also be different if accidents happened all the time. But plaintiff assumed risks by knowing how dangerous it could be. **NL – AR**

**Woodall v. Wayne Steffner Productions (Cal. App. 1962)**

Plaintiff was flying in human kite stunt. Production company supplied driver, claiming it was a stunt driver. Driver went too fast and was not a stunt driver. Company argued that plaintiff had assumed the risk. Court found that while plaintiff had assumed risks for other aspects of performance, he had not assumed risk for what has been assured him. **L**

**Cohen v. McIntyre (Cal. 1993)**

Defendant’s dog had bitten people in the past and went to get him neutered. Dog bit at veterinarian, and he asked to have the dog muzzled. Vet performed operation, and then owner took muzzle off dog and bit vet. Vet argued that he was not given warning that the dog was a biter. Court found that defendant owned no duty of care unless she engaged in intentional concealment or misrepresentation or her conduct was so reckless as to fall outside normal conduct. **NL – AR**

**Neighbarger v. Irwin Industries (Cal. 1994)**

Employees at defendant refinery negligently tried to unplug a valve, resulting in petroleum leak. Plaintiffs were fire brigade at refinery and approach the valve to control a fire leak and tried to close it, but the petroleum ignited. Notes firefighter/police rule in duty of care to negligent behavior and argues in that context, the public has paid to hire those agents to deal with dangerous condition. **But with a privately-employed safety employee, a third party has not supplied these services and paid to be relieved of the duty of care towards such a private employee**. Thus, not having contracted for its services, the third party has a duty of care towards the private safety employee. **L**

**Hendricks v. Broderick (Iowa 1979)**

One turkey hunter shot another who knew he was hunting a turkey. Trial court instructed the jury should rule for defendant if they found that plaintiff assumed the risk by hunting in the forest and being the proximate cause. Iowa Supreme Court remanded because jury should have considered whether the other hunter acted as an ordinarily prudent person would have acted knowing that someone was hunting a turkey.

**Lowe v. California League of Professional Baseball (Cal. App. 1997)**

Plaintiff was distracted by team mascot at baseball game and then hit with foul ball. Court reversed summary judgment and found it issue of triable fact whether mascot increased risks.

**Hackbart v. Cincinnati Bengals (10th Cir. 1979)**

Player was injured in angry attack after play had ended. Trial court ruled assumption of risk for savagery of NFL. Appeals court reversed, maintain that tort principles should apply in football. **L**

Last Clear Chance (in Contributory Negligence jxs)

**Harris v. Meadows (Ala. 1985)**

Defendant made a left turn, hitting plaintiff. Plaintiff had blown horn and slow down but had not slammed on brakes and was found contributorily negligent. **NL – Con. Neg.**

**Davis v. Mann (Exch. 1842) – “Last Clear Chance”**

Plaintiff’s donkey was tried to road and killed when defendant’s horses ran over it. Defendant was found liable even though plaintiff was negligent in leaving donkey on road. Defendant had “last clear chance” to avoid the accident.

Some jurisdiction has wrinkles:

* Plaintiff must have been helpless or inattentive
* Defendant had to be guilty of worse than negligence
* Whether defendant perceived the plaintiff / should have known the plaintiff was there
* Whether peril was created by defendant or failed to avoid peril created by plaintiff

R2 479 Last Clear Chance: Helpless Plaintiff

A plaintiff who has negligently subject himself to a risk or harm from the defendant’s subsequent negligence may recover for harm caused thereby if, immediately preceding the harm,

1. the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and
2. the defendant is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm, when he
3. knows of the plaintiff’s situation and realizes or has reason to realize the peril involved in it or
4. would discover the situation and thus have reason to realize the peril, if he were to exercise the vigilance which it is then his duty to the plaintiff to exercise

R2 480 Last Clear Chance: Inattentive Plaintiff

A plaintiff who, by the exercise of reasonable vigilance, could discover the danger created by the defendant’s negligence in time to avoid the harm to him, can recover if, but only if, the defendant

1. knows of the plaintiff’s situation, and
2. realizes or has reason to realize that the plaintiff is inattentive and therefore unlikely to discover his peril in time to avoid the harm, and

thereafter is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm

**Lack of Comparative Negligence Cases**

**Ouellette v. Carde (R.I. 1992)**

Carde jacked up car to repair it; car fell on him. Carde called Ouellette to help him but passed out. Ouellette came over and revive him. They decided to leave garage – they opened garage door and caused explosion from gasoline that earlier had spilled on garage. Ouellette sued Carde, alleging that his negligence in creating the situation was the proximate cause of her damages. Carde anted to argue that Ouellette had been negligent in her rescue of him but the trial court refused to consider if Ouellette had been negligent. Court found that comparative negligence principles apply only if a defendant establishes that the rescuer’s actions were rash or reckless. **L – No Comp. Neg.**

**Alami v. Volkswagen, Inc. (N.Y. 2002)**

Plaintiff’s decedent crashed car with BAC above level limit and died. Plaintiff sued that Volkwagen was negligent in its design because the floorboard buckled upward during the crash. Court found that Volkswagen still owed duty despite contributory negligence as matter of policy since plaintiff was not complaining Volkwagen caused the crash, but the extent of the injuries. **L – No Con. Neg.**

**Van Vacter v. Hierholzer (Mo. App. 1993)**

Plaintiff’s decedent had known of heart problems and ignored doctor’s instructions to change lifestyle and take medication. Decedent went to doctor several years later complaining of chest pains – doctor found that condition had stabilized and sent decedent home, where decedent die. Defendant asked decedent’s ignoring of his condition to count for contributory negligence. Court disallowed this as it was not proximate cause of his death. **L – No Con. Neg.**

**Nuisance**

* Strict Liability, Unreasonable Activity, R2 826 Mixed Approach
* Damages favored over injunction
* Coming to the Nuisance
* Objective Nuisance Standard
* Spite okay as long as useful purpose (in most jxs)
* Mixed on irrational fears and property values

**Bamford v. Turnley (Ex. Ch. 1862)**

Defendant used his land to make bricks.

Pollack opinion makes definition of nuisance if the act complained of be done in a convenient manner, so as to give no unnecessary annoyance, and be a reasonable exercise of some apparent right, or a reasonable use of the land, house, or property of the party under all the circumstances, in which I include the degree of the inconvenience it will produce, then I think no action can be sustained, if the jury find that it was reasonable.

Bramwell argues that those acts necessary for common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action. Finds the burning of bricks an action of exceptional character. If the gains do not outweigh the costs of the action, then it is not a public benefit. If it is a public benefit, then there should be compensation. **L**

Trespass vs. Nuisance

* Although there is overlap between the two doctrine – such as where dust particles befoul a neighbor’s house – trespass creates liability for the intentional invasion of land while nuisance creates liability for the intentional interference with use and enjoyment of land (sound could be viewed as both nuisance and trespass given sound waves) (though some rigid courts that limit nuisance might not treat it as a trespass)
* There are two basic nuisance approaches
	+ **Strict liability** for substantial interference, with **reasonableness of the defendant’s activity a factor only in choice of remedy**: damages versus injunction. See *Jost*
	+ Liability only for **unreasonable defendant activity** – Carpenter

**Jost v. Dairyland Power Cooperative (Wis. 1970)**

Coal plant damaged farmer’s crops. Coal plant argued that its economic utility outweighed costs imposed by plaintiffs. Court rejected this and said that it constitutes a taking if no compensation is granted. Negligence is not a consideration – strict liability. **L**

**Carpenter v. Double R Cattle Company (Idaho 1985)**

Defendant’s cattle feedlot created swarms of insects, noxious odors, and water pollution. Court affirmed use of harm caused by defendant against economic utility of their conduct to the general public good and the social value of the conduct. Bistline dissent argued that individuals who live next to certain industries should not have to bear the cost of the industry but rather, the offender who can pass the cost on to the consumer. Negligence is a consideration – reasonable based on economic utility (better to call it reasonableness). **NL**

Epstein believes strict liability works except in the following four circumstances

1. High administrative costs for claim resolution
2. High transaction costs for voluntary reassignment of rights
3. Low value to the interested parties of the ownership rights whose rearrangement is mandated by the public rule
4. Presence of implicit in-kind compensation from all to all that precludes any systematic redistribution of wealth among interested parties

Coase believes that when transactions are too high to reach an efficient bargain, courts should allocate the rights to those who can put their rights to most efficient use.

**R2 Torts 826 Unreasonableness of Intentional Invasion (Mixed Approach)**

An intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if

1. the gravity of the harm outweighs the utility of the actor’s conduct, or
2. the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible
* creates presumptive obligation to compensate unless compensation would make it infeasible
* Although R2 826(b) generally applies strict liability for serious harm, liability is called off when liability would destroy a socially desirable activity
* In this instance, then, the drafters express a preference for efficiency over corrective justice even in the context of serious (and perhaps uninsurable) harm
* In well-functioning financial markets, an efficient activity can be maintained despite liability (although in practice, transaction costs might be too high), nuisance liability can have negative efficiency consequences even in the absence of transactions costs that can impair markets
* An injunction to stop the business may destroy the business although they could contract despite injunction

Illustration

* Mixed-used neighborhood, Dairy’s business blocks light to Potter’s basement apartment
* If unabated, the traffic will reduce the apartment’s value from $300,000 to $100,000. Relocating the business would cost Dairy $500,000. What remedy does Potter seek from Dairy? What remedy should a court grant, if any?
* Potter could profit through hold-out if there is an injunction to bargain for more than its deserved award
* Injunction disincentivizes investment in companies that have a nuisance – you lose either way
* A court may grant damages to protect investment even if it finds a nuisance because it worries about hold-out problems – **when courts face an efficient, reasonable business, they will award damages rather than an injunction, e.g. Martin dissent in Bamford**

**Coming to the Nuisance**

* The phrase “coming to the nuisance” is well known but misleading in that the plaintiff’s *land* didn’t come to the nuisance
* Some courts reject the entire notion as irrelevant and misleading
* That said, a court or jury might not look kindly on a plaintiff who *changes* the use of land that, as a result, becomes burdened by a defendant’s longstanding and locally appropriate activity – in such a case a court is likely to find the defendant’s activity reasonable and deny nuisance liability
* In some jurisdictions, e.g. Indiana, this matter is controlled by statute, which, of course,

**Coming to the Nuisance**

**Oehler v. Levy (Ill. 1908)**

Residents next to stable complained of manure smell and foul language, but stable came before residents. Court found that when the **character of a neighborhood changes** such that this use now becomes a nuisance, it should be found. However, if someone moves into an area whose most economically productive use is for trade or commercial activity, then the residential use might not get the nuisance claim. **L**

**United States v. Luce (D. Del.)**

Points out that **nuisance-behavior around unoccupied land should not be allowed to continue** just because no one is there because the surrounding land’s value will decrease, disapproving of coming to the nuisance law.

**Powell v. Superior Portland Cement, Inc. (Wash. 1942)**

Defendant manufactured cement from limestone, starting in a barely occupied town. Plaintiff’s property was doused with dust in area that had built up. To eliminate dust, defendant would have to install expensive machine that would also limit use. Court found that value of industrial use and **known quality of nuisance to plaintiff** when purchasing property bars recovery. Also note the value of the property is in part in relation to the plant. **NL**

**St. Helen’s Smelting Co. v. Tipping (UK 1865)**

Plaintiff’s estate was 1.5 miles from defendant’s copper smelting works. Plaintiff complained that gases damaged property and cattle. Court distinguished between **damage done to property** and disruption of personal enjoyment when calculating the reasonable nature of nuisance. **L**

**Erbrich Products v. Wills (Ind. App. 1987)**

Chlorine gas escaped from the defendant’s bleach factory and caused injuries. Under Indiana statute allowing for nuisance **if it was not a nuisance when industrial operation was constructed**, the bleach factory was found not liable. **NL**

**Irrational Fears**

**Rockenbach v. Apostle (Mich. 1951)**

Defendants wanted to open up funeral home in residential area. Plaintiffs sued because they said it would spread disease and depression, **reduce property values**, and cause excess traffic. Defendants had been approved through city ordinance. Court rejected this as controlling and said that mental pain and suffering here caused a nuisance, upholding an injunction. **L**

**Adkins v. Thomas Solvent Co. (Mich. 1992)**

Defendant’s manufacturing plant contaminated wells of plaintiffs with toxic chemicals and industrial chemicals. After discovery, it was found that subterranean geological barrier prevented chemicals from reaching groundwater. Plaintiffs argued there was still diminution of value from fears of contamination – court said this wasn’t a significant interference with the use and enjoyment. **Also, diminished property value is not a substantial interference in it of itself.** Levin dissent argued that if unfounded fears disturb someone’s enjoyment, it can be treated as a nuisance. **NL**

**Sensitivity – Objective Standard**

**Rogers v. Elliott (Mass. 1888)**

Pastor refused to stop ringing bell that affected health of neighbor. Court found that nuisance should not be judged by **peculiar sensibility**. **NL**

**Amphitheaters, Inc. v. Portland Meadows (Or. 1948)**

Two property owners – one built a race track, one built a drive-in movie theatre; the lights from the race track disrupted the movie theatre. Court found that someone carrying on a business that is particularly affected by the nuisance – **but that the general person would not be** – cannot recover. **NL**

**Poole v. Lowell Dunn Co. (Fla. App. 1991)**

Defendant blasting his quarry disrupted plaintiff’s home, causing house to crack and emotional distress. Trial court asked the utility of the defendant’s activities to be weighed against the harm to an ordinary person. Appeals court reversed jury instruction that said that **plaintiffs’ hypersensitivity could not be taken into account**, saying that plaintiffs should be taken as they are found. **L**

**Spite – Useful Purpose along with Spite (though some jxs reject motive)**

**Christie v. Davey (UK 1893)**

Defendant was annoyed by plaintiff’s musical instruction and so started making noise in revenge. Both sued each other. Court found defendant’s **vengeful noises** a nuisance but not the musical instruction done for plaintiff’s livelihood. **L**

**Mayor of Bradford v. Pickles (UK 1895)**

Defendant dug shafts that disrupted color and flow of plaintiff’s waterworks. Plaintiffs claim that he was just trying to force them to buy him out. Court found behavior opportunistic but not malicious and said that defendant **was within reasonable rights to dig to find stone** even if the purpose was to extort money. **NL**

**Barger v. Barringer (N.C. 1909)**

Defendant was forced to remove stable because of plaintiff’s complaint. Then, defendant built spite fence. **Court found that fence served no useful purpose.** Hoke dissent argued that this opened a slippery slope to other restrictions on property. **L**

**Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc. (Fla. App. 1959)**

Spite hotel allowed as it served a useful purpose. **NL**

**Rideout v. Knox (Mass. 1889)**

**Spite fence statute** allowed only because it is small abridgement of property right – spite houses or spite stores would be perfectly permissible under property rights. **L**

**Koblegard v. Hale (W. Va. 1906)**

Hale built a spite fence as revenge for church taking sunshine. Court found that **motive had no role** in adjudicating property rights of defendant. **NL**

**Metzger v. Hochrein (Wis. 1900)**

Just because someone obtains more pleasure through spite fences does not mean their property rights should be abridged. **NL**