

Spring 2014
Mark Geistfeld – Products Liability – Attack Outline

1) **EARLY PRODUCT LIABILITY**

- a) **Concepts** – Privity, fear of unlimited liability
- b) **Winterbottom** – Lack of privity precludes suit
 - i) Π can inspect cart, fear of unlimited liability, higher prices, lower product availability
- c) **Borel v. Fireboard** – Asbestos, rejects privity in requiring duty to warn when reasonable foresight reveals the risk to expert manufacturer
- d) **Hammontree** – Δ car driver with seizure – no strict liability, negligence only
- e) **Strauss** – Privity required against power provider for slip & fall – unlimited liability, presumption that other Π would be able to sue because they had privity

2) **IMPLIED WARRANTY**

- a) **RST § 402A** – (1) One who sells a product in a defective condition unreasonably dangerous to the consumer is subject to liability for harm caused if (a) seller is in the business of selling the product, and (b) it reaches the consumer without substantial change in condition
 - i) (2) applies whether (a) seller exercises all possible care, and (b) no privity
- b) **Consumer Expectations Test** – Defect is a condition **not contemplated** by the consumer which is **unreasonably dangerous**. Unreasonably dangerous is dangerous beyond what the **ordinary consumer with ordinary knowledge common to the community** would expect
- c) **Concepts** – Place liability where hazards will be the most reduced, modern market condition makes inspection by consumers impossible, use of trademarks for brand trust
- d) **Van Bracklin, Jacob E. Decker** – Bad food, implied warranty food is wholesome (ability to inspect), negligence irrelevant, no privity required
- e) **Seixas** – No express/implied warranty when selling wood that turns out to be bad
- f) **Escola, Traynor Concurring** – Arguing that implied warranty should apply to all product defects (majority in *Yuba Power*)
- g) **Henningsen** – Implied warranty applied to car sold

3) **NEGLIGENCE PRINCIPLE**

- a) **Concepts** – Lack of privity, lack of ability to inspect, RIL, internalizing costs by moving B<PL from the court to Δ who has duty (especially when Π can't get info)
- b) **Res ipsa loquitur** – Accident ordinary results from negligence, and Δ had exclusive control of injury-causing instrumentality
- c) **Winchester** – Liability for mislabeled poison – no ability for consumer to inspect
- d) **Macpherson** – Liability for car with defective wheel
- e) **Escola** – RIL – Over-charged or cracked, don't use used bottles if you can't test them

4) CONSUMER EXPECTATIONS

- a) **Product Performance** – Focus on PL – Defect when product is in a condition not contemplated by the consumer and is unreasonably dangerous – open/obvious risks cannot frustrate
 - i) Unreasonably Dangerous – Dangerous beyond expectation by ordinary consumer with ordinary knowledge of the community
 - ii) **Incorrect** because defect is defined entirely by malfunction with no consideration of alternative designs (*see Halliday/Green*)
 - iii) **Halliday** – No COA when child shot himself – Reject safety features, cost irrelevant
 - iv) **Green** – Liability for Π's *unforeseeable* allergic reaction to latex glove
 - v) **Denny** – Liability for Bronco roll
 - (1) Risk-utility – No liability, designed for off-road, not dangerous for that
 - (2) Implied warranty – Marketed every-day diving, risk of roll more than expected
- b) **Product Cost** – Risk-Utility – Consider: Usefulness of product, magnitude of danger, alternative design, cost of alternative, ability to reduce danger without impairing function/cost, feasibility of spreading loss (*Potter*)
 - i) **RTT § 2 cmt. f** – Negative impact on earnings/employment not a factor
 - ii) **Cipollone** – Cannot show collateral benefits of cigarette industry (jobs/taxes)
 - iii) **Potter** – Liability for vibrating tools more than ANSI standard – gives factors
 - iv) Here they reject RTT, but apply the same analysis as suggested in RTT
- c) **Unifying Theory**
 - i) **Duty** – Duty is owed when *actual* (misinformed) consumer expectations are frustrated → if informed re risks and alternatives – *caveat emptor* – no duty
 - (1) Unreasonably dangerous if dangerous beyond expectation of ordinary consumer with ordinary knowledge of the community
 - ii) **Breach** – Frustrate *reasonable* (well-informed) consumer expectations → whether ordinary consumer with knowledge of risks and alternatives would pay the cost of the alternative (B<PL) (*Potter* Factors – usefulness, magnitude/probability of risk, alternative (available, cost, impair function), spreading loss)
 - iii) **Proximate cause, damages**
 - iv) Product Performance only considers Duty, Causation, and Damages
 - (1) *i.e.* you find there is duty, but breach is defined the same way
 - v) **Policy** – Uninformed consumer will not buy safer, more expensive product cause they don't know the risk – demand higher for less safe product → products won't get safer
 - (1) Argument that RTT ignores consumer expectations, but this is the only reasonable justification of the risk-utility approach

5) **MANUFACTURING DEFECTS**

- a) **RTT § 2(a)** – Manufacturing defect when product departs from intended design even though all possible care is taken
- b) **Malfunction Theory** – Circumstantial; Incident normally doesn't happen without defect, defect existed when Δ had product, no other cause not attributable to Δ (*Deere/Shafer*)
 - i) Consider: History of *this* product, manner of malfunction, similar malfunctions in other products, age of product compared to life expectancy, most likely cause
 - ii) Δ can show **lack of prior accidents** with foundation that same product is used under the same conditions as Π when injured (*McKenzie*)
 - iii) If Π doesn't preserve evidence, SJ for Δ , else no SJ if evidence not preserved
- c) **Policy** – SL doesn't consider Δ -conduct (irrelevant, unlike negligence), defect can't be defined by reference to process of production (Δ argues reasonable care in production), consumer expectations fill in gaps in product design specification
- d) *McKenzie* – Ratchet broke causing fall – departs from design tolerances → liability
- e) *Deere* – Evidence fire started by tractor, but not present when it left Δ 's hands
 - i) 4y no incident, proximate in time to servicing tractor's electrical
- f) *Allen* – Big shell shard in fried oyster is reasonably expected (maybe not tiny ones)
- g) *Shafer* – Reach jury for pumpkin seed in muffin by circumstantial evidence

6) **DESIGN DEFECTS**

- a) **RTT § 2(b)** – Design defect if foreseeable risks could have been reduced/avoided by adopting reasonable alternative design & omission makes product not reasonably safe
- b) **Consumer Expectations (Majority/CA Approach)**
 - i) Design is defective if it fails to perform as an ordinary consumer expects when used in a foreseeable manner – within contemplation of ordinary consumer – no risk-utility
 - ii) If outside normal consumer contemplation – risk-utility (burden on Δ)
 - (1) Requires experts, analyze similar factors as *Potter (Barker/Soule)*
 - iii) *Cronin* – Design doesn't perform its intended purpose (poor welding – manufacturing defect; shoddy metal chosen – design defect); safety hasp breaks releasing bread trays
 - iv) *Luque* – Knowledge of risk \neq knowledge of defect (no patent danger rule) which includes any low cost means to avoid danger (lawn mower with opening)
 - v) *Barker* – Loader rolls when novice tries complex lift (Π argues risk-utility, Δ argues consumer expectations)
 - vi) *Soule* – Car toe pan collapsed back into vehicle (Π/Δ argue opposite of *Barker*)
- c) **Risk-Utility Test**
 - i) **RTT cmt. f** – Sometimes shown within understanding of lay persons, or through reference to similar products on market – usually need expert to prove reasonable alternative
 - (1) Π can show malfunction, categorically unreasonable, or reasonable alternative
 - ii) *Cepeda* – Hand mangled in pelletizing machine w/ guard removable and no interlock – Risk-utility factors for design defect – usefulness, probability of injury (PL), availability/cost/feasibility of alternative, loss spreading, user's ability to avoid danger
 - iii) *Brooke Group* – Cigarettes, adopts RTT §§ 1-2 – Π shows risk-utility

- d) **Consumer Expectations**
- i) *Grimshaw* – Cost-benefit balancing human life/limb against corporate profit demonstrates callous indifference to public safety
 - ii) Shwartz argues that Δ should
 - (1) Argue design is not improper because alternative will impair functionality
 - (2) “State of the art” is limiting idea
 - (3) Accident caused by misuse/3rd party conduct
 - (4) Π assumed the risk
 - (5) *NEVER* argue design was excluded due to high cost
- e) **Risk Trade-Offs**
- i) *Dawson* – ($PL_1 < PL_2$) – Argument car should have continuous steel frame with cross-members for side impacts – Liability though car was within safety standards, and alternative would make the car 300lbs/\$300 more
 - ii) Argument case-by-case adjudication is bad for product safety → design requirement from one case might result in liability in another → *ad hoc* designs
 - iii) Hindsight bias – Accident convinces jury *ex ante* risk is higher than it was
 - iv) Instruct jury that ordinary consumer reasonably expects design to incorporate precautions where cost to consumer < safety benefit for consumer
 - (1) NOT consumer interests vs. corporate interests because profits are irrelevant
- f) **Consumer Choice**
- i) **Foreseeable Product Use** (*Salazar/The Club* under seat) – § 402A applies when product is not in use/being stored
 - ii) **Categorical Liability** – When consumer makes a well-informed risk-utility decision between two products, liability disrespects the role of consumer choice (*Linegar*)
 - (1) RTT § 2(b) cmt. e – Some products are so unreasonable that there is liability without alternative design (exploding cigar)
 - (2) *Wolkswagenwerk* – Mini-vans not inherently dangerous from head-on when consumer makes choice between mini-van and safer alternative
 - (3) *Jumpking* – Trampolines are widely used and 0.05% of users are injured (*See RTT § 2(b) cmt. d* – alcohol/guns)
 - (4) *Linegar* – Bullet-proof vests with/without side-panels
 - iii) **Optional Equipment** (*Thomas Build Buses* – backup beeper not on bus)
 - (1) Product not defective when (1) buyer is fully informed of the safety feature/product use, (2) normally, product is not unreasonably dangerous without the feature, (3) buyer can balance risk-utility factors
 - (2) Seller makes feature optional when value is different for different consumers
- g) **State of the Art**
- i) **RTT § 2 cmt. f** – Δ can introduce evidence re industry practice *that bears on practicality of design, but custom is not a defense* – Can still have liability even if custom is to not have a safety device
 - ii) SOTA is *technological, not economic* → Economic is risk-utility
 - iii) *Boatland* – No kill switch, incorrect/but successful defense that a kill switch was not *commercially* available → shown race boats had home-made ones at the time

7) **WARNING DEFECT**

- a) **RTT § 10** – Warning required to protect those reasonably foreseeable users who would decline to consume the product when warned (even if most would still consume)
 - i) *Watkins* – Have to warn of Bronco roll-over even though it would help consumer that used the car anyways
- b) **RTT § 2(c)** – Warning defect when adequate instruction/warning would reduce/avoid foreseeable risks to the consumer and they are omitted
 - i) **Cmt. m** – Seller charged with knowledge that reasonable testing would reveal
 - ii) *Anderson* – Δ can present evidence of state of the art to show what was knowable
 - iii) *Vassallo* – Analyzed at time of sale not time of trial
- c) **Limitations**
 - i) **Sophisticated User** – No duty to warn when user is expected to be well trained/informed
 - (1) *Johnson* – No duty to warn beyond MSDS for HVAC tech who brazed AC w/ refrigerant still in the line
 - (2) **RST § 388** – Supplier liable if they know/should know item is dangerous, and fails to warn if they have no reason to believe user will realize the danger
 - (a) (b) No duty to warn if user will know/should know of the risk
 - ii) **Obvious Danger** – No duty to warn of obvious dangers (information costs)
 - iii) **Learned Intermediary**
 - (1) No duty to warn when (1) intermediary knows dangers or (2) supplier provides adequate warning/instruction to intermediary and has *reasonable* facts to show intermediary will communicate the warning (*see RST § 388 cmt. n*)
 - (2) *American Cyanamid* – Evidence that Naval base didn't pass on warning – required visual/dramatic warning on tank against welding
 - iv) **Bulk Supplier** – Product delivered in bulk to intermediary who repackages
 - (1) Factors: risk of product, use of product, form of warning given, reliability of intermediary, burden on supplier to provide direct warning
- d) **Allergies**
 - i) **RTT § 2 cmt. k** – Must warn when substantial # are allergic and presence of allergen is not generally known to consumers
 - ii) *Livingston* – “Fresh vegetable soup” and waitress claims no MSG → had MSG
- e) **Foreign Language**
 - i) *Medina* – No duty to include Spanish instruction though 20% of market speaks Spanish, store has bilingual signs, and company has bilingual warning outside US
- f) **Content of Adequate Warning**
 - i) Enable ordinary consumer to make informed risk-utility estimate – no duty to warn of well-known risks, but duty to inform re risk and safer alternatives
 - (1) Common knowledge must be *beyond dispute* (*Grinnel*)
 - ii) *Grinnel* – Well-known cigarettes are bad, not well-known they were addictive
 - iii) *Liriano* – Hand in meat grinder, duty to warn user not to operate without safety guard because guard was removed and II didn't know it was available
 - iv) *Faberge* – Cologne on candle – Duty to warn of foreseeable misuse even though precise sequence of events is not foreseeable

g) **Information Cost of Warnings**

- i) Duty to warn breached by (1) inadequate *communication* of warning, or (2) inadequate *content* of warning
 - (1) Π must read the warning to allege inadequate *content*
- ii) Adequate warning – catches user’s attention, is comprehensible/clear, has intensity in proportion to the magnitude of the risk
- iii) Information cost is *polycentric* – More warning increases information but undermines effectiveness of the warning by deemphasizing each individual warning (*Hood*)
- iv) *Jones* – Drain cleaner spill – Dense ¶ warning in small print inadequate
- v) *Ortho* – “abnormal clotting condition” inadequate – must say “stroke”
- vi) *Broussard* – Electric drill in gas environment – adequate in manual, crowding on drill

h) **Post-Sale Duty to Warn**

- i) **RTT § 10(b)** – Reasonable seller would provide post-sale warning if they know/should know substantial risk of harm, users can be identified and are unaware of harm, warning can be effectively communicated, and risk is sufficiently great
- ii) $B < PL$ where P includes percentage of people that will get warning, B includes cost of tracking them down
- iii) *Lovick* – Question whether Δ was on notice about flaw in cultivator wing where it would fall on users if standing below it removing the safety pin

8) **WARNING VS. DESIGN DEFECTS**

- a) **RST § 402a cmt. j** – Where warning is given, seller may reasonably assume it is read/heeded, and product bearing warning, which is safe for use if followed, is not defective or unreasonably dangerous
- b) *Klein* – Argument warning for radial saw w/ no guard was too vague to help
 - i) Material fact whether Π complied with warning and was injured anyways
 - ii) $B_{Design} < B_{Warning} < PL_{Warned} \rightarrow$ Redesign when following warning has greater risk than burden of redesign
- c) *Knopp* – Must warn of reasonably foreseeable negligence of user walking through metal detector distracted
- d) *Martines* – 16” tire on 16.5” rim explodes – lots of warnings about Π ’s conduct
 - i) Dissent – Redesign if warning leaves a significant residuum of risk because users don’t understand, are inattentive, or not motivated to heed the warning (info cost)
 - ii) E.g. “Don’t put your foot in garbage truck when blade is in motion”
 - (1) adequate to keep public from putting limbs in, not adequate to prevent worker from slipping and falling in
 - iii) Thus: Cost of redesign (B_D) saves cost of complying w/ warning (B_W) – $B_D - B_W < PL_W$
- e) *Hood* – Removed blade/guard, blade flew off after reassembly – no liability after adequate warnings against this specific behavior
 - i) Argue: This is a different outcome than Π reasonably expects from removing the guard \rightarrow assumed risk of cut, not of blade flying off
 - ii) $B_D - B_W + PL_{Misuse} < PL_W$ – If design modified to facilitate ignoring the warning

9) **MEDICAL PRODUCTS – UNAVOIDABLY UNSAFE EXEMPTION**

- a) **RST § 402A cmt. k** – Producer of properly prepared drug liable for injuries only if it wasn't accompanied with warning of dangers Δ knew/should have known about
 - i) **Rule** – Cmt. k doesn't bar SL when product is not *properly prepared* due to adulterant that *could have been detected* (& product is essential to health/human safety)
 - ii) *Compare Rogers* (HIV in clotting factor) *with Transue* (defect in boob implant)
 - iii) SL doesn't improve products that are unavoidably unsafe
- b) **RTT § 6**
 - i) (c) If foreseeable risk >> foreseeable therapeutic benefit such that a reasonable healthcare provider, adequately warned, wouldn't prescribe to anyone → defective
 - (1) Same result as RST if using learned intermediary reasoning
 - (2) Π then has remedy against doctor for malpractice
 - ii) (d) Inadequate warning if foreseeable risk not given to doctors, or patient (if Δ knows/should know doctor isn't in position to reduce risk of harm)
 - (1) *Ortho* – Warn patients directly for BC – only see doctor yearly
 - (2) *Perez* – Warn consumers if you market directly to them
- c) Consider: Risk-utility would kill lots of drugs – doctor eliminates much of the risk by only prescribing to patients that have better therapeutic effect/lower risk
 - i) *See also* National Childhood Vaccine Injury Act
- d) ***Brown*** – CA case – DES to prevent miscarriage – held no SL for design defect, but SL for warning/manufacturing defect (nonsensical because design already is risk-utility)
- e) ***Freeman*** – Accutane – Analyze case-by-case – Π pleads consumer expectations, Δ argued cmt. k defense – show properly manufactured/adequate warning/risk-utility
- f) ***Rogers*** – Clotting factor HIV – Negligence – Essential to human health/safety, HIV was undetectable at the time (but note: Manufacturing defect – *compare Brown*)
- g) ***Transue*** – Ruptured breast implant – SL because of manufacturing defect

10) **NEGLIGENCE PER SE**

- a) **Analysis**
 - i) Violation of statute was the cause of the injury
 - ii) Statute intended to protect against this harm
 - iii) Π is in the class of persons the statute is designed to protect
 - iv) Reasonable excuse – Δ incapacity caused violation, Δ doesn't know about requirement, Δ can't comply after reasonable diligence, emergency not caused by Δ , compliance causes greater risk
- b) **Note** – RTT focuses on *statutory purpose*, note CL duty to *foreseeable Π 's*, thus if legislature didn't contemplate the specific duty here, tort can expand the scope
- c) ***Harned*** – Law sets standard for compressed air tanks in “places of public assembly”
 - i) Held: Violation of the standard is negligence *per se* even in private areas

11) REGULATORY COMPLIANCE

- a) Analysis
 - i) Evidence shows *no unusual circumstances* – only situation contemplated by the rule
 - ii) Then minimum prescribed standard is sufficient
- b) Consider – Was legislature/agency decision exhaustive?
 - i) *i.e.* considered both PL_{Warning} and PL_{Spanish Warning} > B_{English Only}
- c) *Ramirez* – No liability for warning label in English only given legislation contemplated Spanish requirement in Puerto Rico, used to require elsewhere, but not anymore

12) PREEMPTION

- a) *Geier* – Preempted when purpose was to give manufacturers choices & to create variety of secondary safety products to determine best approach
- b) *Williamson* – Not preempted when concern was cost of lap-only vs. shoulder belts in internal rear seats and contemplated it would be cheaper at a later time
- c) *Wyeth* – Not preempted w/out proof FDA wouldn't allow label change under CBE

13) CAUSE-IN-FACT

- a) Analysis (*Crossley*)
 - i) ID Injury & Δ's wrongful conduct
 - ii) Run counterfactual
 - iii) Determine if injury/accident still occurs
- b) “Liberal But-For Causation (*Liriano*)”
 - i) Δ's act was wrong because it increased the chance a particular accident would occur
 - ii) Mishap of that sort happened → burden shifts to Δ to rebut causation
 - iii) **Human Behavior NOT in Counterfactual → NO Liberal But-For Causation**
 - (1) *Crossley* – Π runs out of talent in his poorly maintained car w/defective axle
 - (a) Held: No liability based on battle of experts whether axle caused accident
 - (2) *Daubert* – Π claims birth defect due to Bendectin relying on statistical data
 - (a) Held: Must show Bendectin *more likely than not* caused Π's injury → RR>2
 - (i) *i.e.* greater than 50% chance this defect is not background
 - (ii) Note: Warning kicks in @ 30%, but this isn't warning, this is biochem.
 - iv) **Human Behavior is in Counterfactual → Liberal But-For Causation**
 - (1) *Liriano* – Hand in meat grinder, employer removed guard, no warning
 - (a) Held: Liability when Δ's negligence was wrong because it would cause the type of injury that resulted to Π
 - (2) *Coffman* – Rebuttable presumption Π would see/follow warning if given (asbestos warning case)
- c) Warranty Cases – Δ's duty is defined by Δ's representations
 - i) When injury materializes that is posed by the risk that Δ didn't meet representations
 - ii) *Baxter* – Representation re “shatter proof” glass which shattered into Π's face
 - (1) Held: Marketing materials were express warranty, *does not matter* that actual shatter-proof glass was completely unavailable (*i.e.* no causation) because Π cannot inspect this feature and Δ's representation is part of the bargain

- d) **Enhanced Injury** – 2 phases of causation: (1) defect results in injury (uncertainty is to the fact of whether Δ caused damages), (2) damages (uncertainty as to extent of damages)
- i) *Trull* – Head-on collision, kid in back w/ lap-belt injured – Held: Π shows defect is a substantial factor in Π 's injury then burden shifts to Δ (minority does not shift)
 - ii) *Story Parchment* – Antitrust conspiracy case, treble damages reversed due to uncertainty as to *extent* (but not the *fact*) of damages
 - (1) Reasoning – Δ cannot rely on uncertainty to avoid liability
 - iii) *May* – Jeep roll bar collapses after flip – Held: Sufficient evidence to conclude enhanced injury, question is one of apportionment
- e) **Scientific Uncertainty**
- i) **Spot** – Toxic torts, or low level risks with unknown causes
 - ii) **Analysis**
 - (1) *Daubert* – (1) Whether theory can/has been tested, (2) whether peer reviewed, (3) known/expected error rate, (4) whether methodology/theory is generally accepted in the relevant community
 - (2) *Joiner* – Must have fit between data and expert conclusion
 - (3) *Kumho Tire* – Conclusion must originate from reliable discipline/sound principles
 - (4) RTT § 28 mt. c(4) – Biological mechanism, differential etiology ruling out other causes, reasonable explanation for lack of general causation evidence, short latency/acute response, appropriate challenge/de-challenge data
 - iii) *Rider* – Drug to suppress lactation contains bromocriptine (ergot alkaloid)
 - (1) Held: Insufficient causation data – Epidemiological study showed no correlation, anecdotal case reports were unconvincing, ambiguous challenge/de-challenge data
 - (a) Ergot alkaloids as a class can cause ischemic stroke, but this was hemorrhagic and this drug has reported side-effects of vasodilation & hypotension
 - (b) FDA withdrew approval – but they use a lot risk-utility standard
 - iv) *Stevens* – Claim that transverse myelitis caused by Hep. B vaccine
 - (1) No liability, but does not rule out that some drugs/treatments may leave Π with unique markers showing causation. Court is unconvinced by doctors arguments that Π 's condition could be caused by the vaccine (timing, frequency, etc.)
 - v) **Geistfeld** – Enhanced damages concept applied to scientific uncertainty
 - (1) Π provides reasonably available evidence to conclude a product may cause a class of injuries (causation) – then Δ bears the cost of uncertainty by having to invest in data to support the lack of causation (damages)
 - (2) Defect is failure to warn consumers of *scientific uncertainty*

f) **Uncertainty Regarding Δ's Identity – Market Share Liability**

i) **Elements (Sindell)**

- (1) Π IDs substantial % of likely Δs (~50%) and proves liability against the group
- (2) Each Δ is liable for the proportion of judgment represented by its market share
 - (a) Δ may demonstrate they could not have made the product that injured Π
 - (b) *Brown* – Liability is several (only liable for your share)
- ii) *Sindell* – DES case, Π gets Δs that manufactured 90% of the DES when Π's mother took it – Held: Liability, Δ bears the risk of uncertainty
- iii) *Summers v. Tive* – Alternative liability when Π shot by one of 2 Δs (J&S liability)
- iv) *Smith* – Rejecting market share liability because it ignores the fact that creation of risk/breach of duty alone does not show individual causation (“innocent” Δ)
- v) **Geistfeld** – Market share liability and uncertainty/individual causation
 - (1) Evidential grouping – Π shows the group of Δ more likely than not harmed Π
 - (a) Δ must rebut *the evidence* to avoid liability
 - (2) Π shows (1) Δ belonged to the group, and (2) the group caused Π's harm
 - (a) Several liability addresses concern about excessive liability/apportionment
 - (b) Δ can always rebut Π's *prima facie* case
 - (3) **Rule** – Δ cannot rely on more-likely-than-not standard to rule out liability if that argument *will always* exculpate Δ from liability
 - (a) Geistfeld argues that this can apply to scientific uncertainty in cases where there is significant correlation, but $RR < 2$

14) **PROXIMATE CAUSE**

- a) **Foreseeability** – (1) Determine “zone of risk” (categorical safety risk) created by defect, (2) Determine whether *this case* falls within that category (proximate cause)
 - i) **Policy** – Proximate cause mirrors the risk-utility safety decision made by Δ
 - ii) *Sazenski* – Liability when Π falls from platform and strikes sharp, non-functional edge of Δ's machine – exact sequence of events does not need to be foreseeable
 - iii) *In re Sept. 11* – Liability when Δ did not prevent foreseeable unauthorized entry into cockpit of airplane – risks that resulted (crash) were foreseeable
 - iv) *Port Authority of NY* – Holding that fertilizer manufacturers didn't have to anticipate criminals would use their ingredients to make bombs
 - v) *In re Korean Air Lines* – Holding that Boeing couldn't foresee the Soviets would destroy an intruding aircraft in violation of international law
- b) **Directness** – Damages – Δ is liable for damages that result from direct harms and indirect, but foreseeable harms (egg shell skull rule)
 - i) *Union Pump* – Gas pump fire, Π injured climbing over pipe rack after fire was over – route was a shortcut – held: no liability because shortcut was intervening force once the risk caused by Δ's conduct had come to rest
 - (1) Coryn Concurring – Π's injury was unforeseeable (like car accident later)
- c) **Duty**
 - i) *Jeld-Wen* – Π-infant leaned on screen which popped out allowing him to fall – foreseeability of screen coming out ≠ foreseeability of using screen to prevent a fall
 - ii) Duty is determined by the class of risks (screen falls and hits someone), proximate cause asks if *this* is in the class (kid falling) – *Jeld-Wen* is wrong to decide as a matter of law when it was rightly a jury question

15) **DAMAGES**

- a) **Rule** – When product causes physical harm to Π or Π 's “other property,” Δ is liable for damages including economic and non-economic harms
 - i) $WTP = B < P \bullet (L_{Economic|Physical} + L_{Noneconomic|Physical})$ where WTP is amount jury would be willing to pay to eliminate the risk (assume P is same for (non)economic harms)
- b) **Economic Loss Rule (ELR)**
 - i) *East River Steamship* – SCUSA holds remedy is breach of warranty/K when Δ 's turbines fail due to manufacturing defect resulting in loss profits
 - (1) Consequential damages in K must be foreseeable (*Hadley v. Baxendale*)
 - (2) Rejects intermediate position
 - ii) **Policy** – No end-run around risk allocation in K, encourage best situated party to allocate the risk (note: this **relies** on assumption that $P_{economic} \approx P_{noneconomic}$)
 - iii) *Pfizer* – Holding that ELR blocks Π 's claim against heart valve manufacturer that fails resulting in death 50% of the time (Π 's is ok right now), evidence showed Δ was aware of the defect before Π got his transplant (rejects intermediate position)
 - iv) **Intermediate ELR**
 - (1) ELR blocks COA for “disappointed” consumer (*East River*), but ELR **does not** block COA for “endangered” consumer (*Pfizer*)
 - (2) Consider: Courts regularly allow damages for asbestos removal in contravention to the component part rule (*see Casa Clara*)
 - v) **Medical Monitoring**
 - (1) *Donovan* – Smokers allowed to collect for low-dose CT monitoring
 - (a) Π must show Δ 's negligence caused Π to be exposed
 - (b) Resulted in subcellular changes increasing risk of harm
 - (c) For which there is reliable test w/in standard of care
 - (d) And early detection will help
 - vi) **Emotional Distress**
 - (1) **Elements** – Π must show Π was exposed to the agent and there is a rational basis for Π 's fear of contracting a disease (*e.g.*, demonstrable presence of toxin)
 - (2) *In re MTBE* – Holding Π can collect for ED due to MTBE contaminated ground water on expert testimony that MTBE causes subcellular damage (DNA adducts)
 - vii) **Punitive Damages**
 - (1) *Owens-Illinois* – Π has asbestosis, trial allowed punitive damages for “implied” malice – Held: No punitive damages without actual common law malice
 - (2) **Policy** – Deterrence – Deter when Δ doesn't expect to be sued by all injured Π s
 - (3) *Williams* – DPC forbids punitive damages to punish Δ for injury inflicted on non-parties – harm to other admissible only to show reprehensible conduct
 - (4) **Policy Post-Williams** – Damages must (1) disgorge Δ 's expected wrongful gain and (2) be increased to reject Δ 's wrongful perspective to force Δ to adopt the perspective required by Π 's rights

16) **DEFENSES**

a) **Contractual Disclaimers** – Unenforceable because Π lacks bargaining power/info

b) **Assumption of Risk**

i) **Elements** – Π makes a *voluntary choice* and has *knowledge of the risk*

(1) Δ’s risk-utility: $B_{\text{Safety}} < PL_{\text{Risk}}$, Π’s choice: $B_{\text{Forego}} < PL_{\text{Risk}}$

(2) Since $B_{\text{Safety}} \neq B_{\text{Forego}} \rightarrow$ no AofR (must have complete knowledge)

ii) *Cremeans* – Π injured by loader purchased w/out protective cage by Π’s employer

(1) Held: Δ’s decision not to quit his job is not a voluntary choice

iii) *Wangness* – Π got hand caught in cable/shaft mechanism for sliding door

(1) Held: AofR \rightarrow This case is wrong – $B_{\text{Caution}} > PL_{\text{Exposed}} > B_{\text{Guard}}$ – arguing Π assumed the risk is like saying the moron intentionally put his hand in the machine when, in reality, he simply wasn’t careful enough

iv) **Knowledge of the Risk**

(1) *Traylow* – Attempt to remove axe from wood by striking one axe onto the other against warning – Π proved axe was defective (more prone to chipping than usual) \rightarrow no AofR: $PL_{\text{Defective Chip}} > B_{\text{Stop Using Axe}} > PL_{\text{Non-Defective-Chip}}$

c) **Distinguishing Primary and Secondary Assumption of Risk**

i) *Ford v. Polaris* – Π falls off back of jet ski due to lack of handles, severely injured

(1) Primary – Π assumes risks inherent in use of product (falling into the water)

(2) Secondary – Δ owes duty, but Π knowingly encounters risk

(3) Risk of falling into water is different from ass blasting Π into two

Ordinary Consumer	Π	Outcome
Consent	Consent	No Duty
Consent	No Consent	No Duty – Primary AofR
No Consent (<i>Polaris</i>)	No Consent	Duty/No Affirmative Defense
No Consent	Consent	Duty/Contributory Negligence/Secondary AofR

d) **Contributory Negligence**

i) *Bexiga* – Π injured by punch when hand is inside and accidentally hits foot pedal

(1) Alternative would not allow hand to be in the machine while operating

(2) Held: No contributory negligence – *Compare Wangness*

(3) User – $B_{\text{Careful}} < PL_{\text{Punch-Press}}$; $\Delta - B_{\text{Guard}} < PL_{\text{Punch-Press}}$

ii) *Daly* – Π’s car hits guardrail, thrown/killed when door opens, expert testimony that Π’s injuries would be minor without door opening – Δ claims Π didn’t lock/wear belt

(1) Held: Adopting pure contributory negligence, remand to exclude Π was drunk

iii) *Cigna Insurance* – Contributory negligence when sauna heater sets towel on fire

(1) Π had notice this sauna heater was defective (caught fire before), but did nothing about it (note: unforeseeable misuse would bar recovery – sauna to grill steak, but that’s not this)

iv) *States v. R.D. Werner* – Held defective rivets in ladder spreader bars were not cause-in-fact when Π had ladder legs on uneven ground and stood backwards

v) *Andren* – Π lights cigarette in gas-filled basement w/ defective heater

(1) Right result is CN – Π was acting out of habit despite knowing/understanding the risk of his actions

17) **DISTRIBUTOR LIABILITY**

- a) SL applies to nonmanufacturing wholesale/retail dealer/distributors of defective products
 - i) **RST § 402A cmt. f; RTT § 1 cmt. e**
 - ii) *Abamaster* – Indemnity up to the highest part in the distribution chain
- b) **RTT § 20 cmt. f**
 - i) When Δ sells the same product as the bailment, bailor is subject to SL
 - (1) *Delaney* – “Demonstration model” provided to customer
 - ii) When sale is not contemplated, commercial bailor is subject to SL if charge is imposed as a condition of bailment
 - iii) When products are made available as a convenience to customers who are on Δ 's premises for different purposes, and no separate charge is made → no SL
- c) *New TX Auto Auction* – **Non-manufacturing sellers of used goods** (auctioneers) are not subject to SL
- d) **Product/Service**
 - i) *Atkins* – Diet system in book is a service/idea, not a product subject to SL
 - (1) **Policy** – Free speech, diet system is not a “product”
 - ii) *Compare* electricity distribution, computer software – intangible goods which are more analogous to traditional products → SL
 - iii) *Cafazzo* – No SL against doctor/hospital for defective surgical implant
 - (1) Reasons that Δ is providing a service not a product → **WRONG!**
 - (2) *Geistfeld* argues cmt. k – unavoidably unsafe product → Negligence

18) **BYSTANDER LIABILITY**

- a) When bystander interests = consumer interests, ordinary consumer expectations account for bystander expectations (*Horst* – Riding lawnmower cuts of kid's feet)
- b) When bystander and consumer interests diverge – Π is alleging that consumers are making choices that are unreasonably dangerous to bystanders
 - i) *Gaines-Tabb* – Fertilizer bomb – No duty to warn against product misuse if it doesn't affect the ordinary consumer
 - ii) *McCarthy* – Opening bullets – Calabresi dissenting argues unreasonably dangerous
 - iii) *Passwaters* (**RTT § 2 cmt. e**) – Hub cap flanges – Manifestly unreasonable design, low social utility, high degree of danger → Categorical liability when reasonably foreseeable bystander is injured (note: this arises from negligence theory)
- c) **Policy**
 - i) Bystanders should be protected when injury from defect is reasonably foreseeable
 - ii) Consumers can inspect, make purchase decisions, get benefit from product
 - (1) Bystanders do not get any of these