TABLE OF CONTENTS

ATTACK OUTLINE

I. Traditional Strict Liability: dvpmt agst bkgd no liability relational harms (negl → stranger cases)
- A. Historical baseline no liability: CL writs/exceptions → industrial-era nuisance
  1. Tension w/ other CL: Contracts (eg privity, express risk), Property (licens/invitee)
- B. Justifications: (moral → econ today)
  1. Moral: btwn innocents, cause pays; Δ impose non-reciprocal risks (blasting)
     a. Pot'l defense: no choice: Chavez gvt bombs expl on Δ com carrier
  2. Econ: safety (force mfgs internalize accident costs); enterprise liability
  3. But implications: enterprise liability > price on poor, may incentivize dang subs
- C. **Rylands** mill-owner SL escaped water flood π mine – differing reasoning:
  1. (1) **Blackburn** (trial): SL any dang thing brought onto land
  2. App: (2) **Cairns**: any non-natural use – (3) **Cranworth**: brings or accumulates
  3. But Losee steam boiler rocket ≠ SL b/c antithetical to crowded econ dvpmt
  4. But Turner "nat'l use" circ-dep: arid W TX nat'l store water tanks, ponds
- D. Abnormally Dang/Ultrazardous Activities
  1. **Blasting**: Sullivan blaster liable kill π 400ft hwy – safety prop > land use
     a. Debris (SL) vs. concussion (negl) (Booth) – Rabin: dubious distinction
        i. NY Elim: Spano Q ≠ propriety blasting, = allocation of loss
  2. §520: risk, harm, due care ineff'v, uncommon, wrong place, public value?
  3. **Am Cyanamid** La. mfg ≠ SL chem spill π Chicago Ry switch
     a. Posner: due care < risk; §520 = activities ≠ prods; hub-spoke RR sys
     b. Guille hot-air balloon land NYC = §520 SL (bad eg: negl locale)

II. Negligence
- A. Goals: deterrence; compensation; (corrective justice?)
- B. Justifications: libertarian foreseeability; comm'l interdep; econ efficiency; nation-building?
- C. Hammontree (CA1971): ≠ liability epileptic's crash; ≠ moral fault, so let losses lie
- D. **Duty** (baseline ≠ duty to stranger baby on RR tracks)
  1. **Affirmative** Obligations to Act
     a. Special Relationships §314: com carrier, innkeeper, pub landowner, caregiver
        i. Harper ≠ duty social guest diver (Epstein liberty) – but easy rescue?
     b. **Undertakings** §324: Farwell brawl; Mixon preg promise
        i. But ≠ Ronald M restrain drunk driver; gen'ly ≠ ins inspects/physicals
     c. Randi W school dist abusive VP recs §311 **False Info foreseeable phys harm**
        i. But Passmore reject b/c worry < free-flow info, despite lims, immunity
     d. **Tarasoff** therapist foresee'l victim §315 warn if sp-rel w/ victim or 3d party
        i. Concur: fully subj std b/c unreliable preds – Dissent: confidentiality
        ii. **Rowland factors**: foreseeability harm, causal, moral blame, policy prevent future harm, burden on Δ/cmty, insurance
        iii. Limits: Bellah ≠ suicide; Thompson ≠ gen'l public; CA immunities
     e. Statutory violation only if private RoA (Uhr scoliosis): beneficiary class, private RoA promote leg'v purpose, consistent w/ reg scheme
  2. Policy Bases for Evoking **No Duty**
     a. **Privity**: Strauss v. Bell Realty ≠ duty blackout stairs → crushing liability
        i. Dissent: no evid crushing liability; perverse immunity greater harm
        ii. Renssalaer muni water ≠ duty fire water: mis/non-feas, or ins cvg?
        iii. Take-home asbestos: NY ≠ duty (floodgates) vs. NJ = duty (foresee'l)

b. **Social host**: Reynolds ≠ 3d p duty drunk nephew wedding (≠ comm'l)
   i. Concur: leg'r should extend – Dissent: focus on crime, not crim's class
   ii. But Marcum = 3d p duty if know'ly serve (Delta req knowl driving)
   iii. Split re social host direct duty to guest
c. **Negligent entrustment** §390: Vince v. Wilson any conveyance (outer limits)
   i. West even gas station, but ≠ financing, self-injury, sobriety investig
   ii. Keys in the ignition? Palma factors: area, length, vehicle type/ease use

3. **Landowners** & Occupiers
   a. Carter bible study ice ≠ duty to licensee/social guest (≈ family) §342
      i. Trespasser §§333-9 no duty unless exception eg known
         a) §339 Child trespassers if knowl, child ign, cost-ben
      ii. Invitee §343 duty to discover danger (McIntosh curb open/obv?)
      iii. Activities trad'ly ≠ duty (Britt sales), but Bowers flaming Irish §341
   b. Heins dad hosp fall collapsed licensee/invitee all reas'l care (½ states)
      i. Factors: foresee'y, purp entry, circs, premises use, reas'lness & opp'y of precautions, burden or protection
      ii. Dissent: socializing liability (eg YMCA outdoor court?)
      iii. Rowland friend sink collapsed trespassers too b/c CA ltd booby traps
         a) CA leg/R3T: immunity enumerated felonies (crim → civ)
      iv. Galindo ≠ duty neighbor's tree fell Δ's land – Dissent: if aware, warn
   c. **Landlord-tenant**: trad'ly known hidden dang, public-use, com area, negl repair
      i. Putnam promise repair = duty (K consid, rel; Prop reversion; Policy)
      ii. Sargent gen'l duty all LLs – child fell/d stairs too steep
      iii. Kline duty reas'l precautions crime/asslt (enterprise liab, but ≠ insurer)
   d. Posecai parking rob = gen'l duty **foresee'l 3d p crimes** (≠ breach, now Q law)
      i. Sharron 1st assault 10yr ≠ foreseeable (but ≠ "1 free pass")
      ii. KFC "never" duty cashier comply robber – Dissent: Q of fact
4. Foreseeability: Cabral trucker gen'l duty hwy 10% fault = jury Q (Rowland factors)
5. **Intra-family Duties** (lawsuits when ins policies ≠ intrafam)
   a. Reas'l Parent Test: Gibson CA, Broadbent AZ pool – parental discretion ltd
      i. Concurrence: better = discretion unless "palpably unreas'l" (drill sgt?)
   b. Immunity Parental Auth: Goller WI (but ambig duty to child alone or world?)
   c. Immunity Supervision: Holodook NY playground, Zikely hot bath
   d. Fetus? Bonte NH duty negl driving, but Remy MA ≠ duty collateral conseqs
   e. Insurance: Broadbend ignore cvg, but Ard cap, Reuko bar (floodgates, bias)
      i. Ins cos response: drop intrafam cvg, but some states req comp auto
6. **Government Immunity**: Kwananakoa Holmes sovereign immune b/c makes law
   a. Riss crazy love ≠ NYPD duty threatening ex (police > duty, so > discretion)
      i. Dissent ≠ crushing liab, so force internalization negl serv costs
      ii. Cuffy police duties: assumption, knowledge, direct contact, reliance
      iii. But Florence crossing gd = duty (≠ worry Q discretion, already done)
      iv. Hoyem duty runaway student, but Pratt ≠ duty beyond bus stop (4-3s)
      v. Peter W ≠ duty ed'l malpractice b/c unreliable metrics
   b. Lauer med exam'r ≠ duty 3d p emo distress – Dissent: duty fix known mistake
      i. Falls pros ~ jud'l absolute immunity, incl witness protection prog
      ii. Friedman NDOT bridge median duty only ≠ arbitrary cost-ben
   c. Fed Tort Claims Act: Dalehite fertilizer shipping expl US immune discretion
      i. Cope DC Park immune road maint (discr), duty signage (undertaking)
      ii. Assume state/muni immunity

7. **Emotional** Harm
   a. Direct Claims
      i. Falzone zone of danger & phys result; near-miss, struck husband
         a) Cars vs. airplanes illogical distinction (ideology?)
         b) Doomed-victim survival actions: Mc-Douglas fact-specific
      ii. Buckley asymp toxic exposure ≠ physical impact (floodgates)
         a) But Ayers if asbestosis, then cancer fear recoverable
         b) Potter toxic dumping exposure recoverable only if >50%
         c) Williamson mid-grd "reas'l well-inf'd citizen" test HIV fear
         d) Recover false+ distress during latency window (HIV, preg)
      iii. Gammon bloody leg = modified foreseeability test ≠ phys impact req'd
         a) Grisly circs? False death telegram, mishandle corpse
         b) Physical manifs? §436 ≠ req'd b/c only artful pleading
   b. Bystander Claims (floodgates concerns)
      i. Portee NJ mom saw son d elev = constrained foreseeability duty
         a) Test: death/inj, family rel, observation at scen, severe distr
         b) Dillon CA: near scene, contemp observ, close rel
            1. CA narrowed: nucl fam, see accident, normal reaction
         c) Lims: ≠ TV, ≠ mistaken victim, ≠ unmarried unless statute
      ii. NY conserv: ≠ late circum, = fam zone dgr (≠ baby kidnap)
      iii. HI expanded: see scene; foreseeable π; learn abuse of child
      iv. **Consortium**: derivative claim ltd by direct victim's fault, cooperation
         a) Diaz MA Kaplan rec'z marital interest; Barnes nonphys inj
         b) States split re parent/child suits
8. **Economic Harm** (requires more than foreseeability alone)
   a. Nycal v. KPMG ≠ duty unknown/ble 3d party §552 detr'l reliance on misinfo
   b. Finlandia ≠ pure econ harm street closures bldg. collapse (crushing liability)
      i. Koch v. ConEd duty looting/vandal but ≠ duty emerg overtime pay

E. Breach

1. Vicarious (Agency) Liability
   a. **Resp Sup**: Christensen guard factors: duties, time/space, serve employer's ints
   b. **Indep K's** §§409-29: Roessler radiologist fact Q: represent, detrim'l reliance
      i. Maloney car owner liable despite mech's brake job (free choice)
2. Standard of Care
   a. Brown v. Kendall MA dogfight Shaw's sleight hand add due care to causal Q
   b. Adams v. Bullock Cardozo bridge wire ≠ breach (≠ sp dgr, priors, custom)
      i. Braun elec insul fact Q: foreseeability dvp empty lot 15yr later?
      ii. Sibley Cardozo kneeling mech at cashier ≠ breach b/c reas'l repairs
   c. Carroll Towing LHand B<PL (imprecise) tugboat lines req bargee daytime
      i. McCarty hotel intruder unlocked; Posner defer jury rough judgment
      ii. Grady compliance error high-rep activities
      iii. Bolton v. Stone cricket balls fence – consider PL, ≠ B (law > econ)
3. The Reasonable Person: obj conduct (≠ subj state of mind)
   a. Bethel **common carriers** reas'l care, too – handicap bus seat collapse ≠ breach
      i. But Groh "highest duty" std gun storage; breach gun, ammo same safe
   b. Bashi ≠ subj std **psych blackout** §283B line-draw, faking, compens, caretakers
      i. Menlove idiot still liable for hay fire, but §289 if smarter must use
4. The Roles of Judge & Jury
   a. Goodman Holmes get out, look (rule) vs. Pakora Cardozo jury Q (std)

b. Tech: Andrews overhead bin nets Kozinski jury Q (legacy: no chg b/c B>PL)
c. **Custom**: Trimarco outdated shower glass = breach; custom probative
   i. Δ's adv, too: LaValee ≠ custom emerg lights in rooms, prob reas'l care
   ii. Admit safer alts (non-slip brewery) to show Δ aware, but ≠ req'd alt
d. **Statutes**: §286 π protected class, interest; same kind of harm; target particular risk
   i. Herzog headlights Cardozo per se negl b/c safety statute
      a) Sweet ct discretion to ≠ use statute as std of care (eg vague)
   ii. Tedla junk-collectors agst traffic ≠ per se negl b/c safer alt
      a) Excuse: Bassey car stall hwy, driver step out ≠ per se negl
      b) Purpose: Gorriss ship ≠ pens drowned sheep ≠ per se negl; DiPonzio idling gas station rolled π ≠ per se negl (fire/expl)
      c) License: Shyne chiro ≠ license ≠ per se negl b/c ≠ safety reg
   iii. Compliance reluctant abs def: floor conduct, latent harms, federalism

5. Proof of Negligence
a. **Constr'v notice dang cond**: Negri slip aisle mess, but ≠ Gordon waxy paper
   i. Farcelli black banana peel insuff, Moody clean track record inadm'l
   ii. Business Practice Rule: continuous, foreseeable risk, presume notice

b. **Res Ipsa** Loquitor (negl-type event, Δ's control, negl was Δ's)
   i. Byrne v. Boadle barrel "article calc'd cause dmg put wrong place"
      a) But Lasson ≠ chair thrown hotel window VJ Day
      b) Connolly hotel rowdy convention actually notice issue
   ii. McDougald spare tire – **rules: NY may infer; CA rebut'l presum**
      a) Leonard dismiss 1/3 docs b/c other 2 testify diff clamps
      b) Abbot jury infer plane crash negl either evid or res ipsa
      c) Spoliation evid: indep action vs. trial sanctions, but ≠ 3d p
   iii. Jury inferences:
      a) **Permissive presumption**: Δ's choice whether present evid
      b) **Rebuttable presumption**: burden-shift to Δ
   iv. **Ybarra** expand res ipsa team surgery (lead surgeon), shift burden
      a) Wigmore access info > Prosser more likely than not negl
      b) But Inouye surg wire dismissed b/c < all pot'l Δs at trial
      c) But Knobbe dismissed b/c ≠ prove which smoking Δ fire
         1. (Traynor "unfair dist liability" – Rabin: "not T's day")
      d) Dead witnesses presumption: plant explosion; plane crash
      e) Barnett OR reject b/c modern disc, alt resp sup liability

6. Medical Malpractice
a. Robbins OB **nat'l std** of care, esp b/c Bd-cert (holding self out)
   i. Arpin 2yr res same std as exp'd doc
b. Sheeley allow OB expert agst GP episiotomy, **overrule same/sim locality rule**
   i. Expert testimony unnec'y if w/in lay com kn, eg leave tools inside
   ii. Some req active clinical pract w/in 1yr; prohibit prof experts
      a) Henning rev'l error to disallow calling expert "doc for hire"
   iii. Gala allow unpub'd anesthesia practice if "reputable school though"
c. **Res Ipsa**: Sides unconscious π, E coli surgery site – §328D allow expert
   i. Prima Facie: uncertain cause; Δ all pot'l causes; Δ > info; expert testim

d. **Informed Consent**: Mastromonaco 81yo bed rest? Jury Q explain all alts
   i. No longer **battery** (invasive), rather **pers'l inviolability** (non-inv too)
   ii. Reas'lness stds: **NY: reas'l doctor** vs. **NJ: reas'l patient** would want
   iii. McKinney even 1/1000 risk testicular atrophy risk jury Q reas'l info
   iv. Moore GA only req info gen'ly recognized alts, not experimental
   v. ≠ duty disclose credentials, experience, drug use
   vi. Twerski & Cohen dignity dmg (avoid mitig issue); how measure?
   vii. Challenges: ignore mitig/avoided costs, cred Q, no way to judge what π would've done (obj unintell variance, subj hindsight bias)
e. Wrongful Birth: reluctance to award emo distress
   i. Negl (ineff'v) sterilization: childbirth $, raising (liberal cts)
   ii. Birth of unhealthy child: econ losses through adulthood

F. **Cause-in-Fact**: Stubbs muni water toxicity "reas'l certainty" → jury Q
1. Probabalistic Recovery (must be legally compensable harm, eg ≠ benign)
   a. 2-Disease Rule: avoid depleting coffers for present sufferers
      i. SoL: maj discovery rule, b/c exposure rule req inconsistent
   b. Full Future Dmg if >50% avoid stale evid later, allow deterrence now
   c. Pure Proportional
2. Multiple Sufficient Causes
   a. Subst'l Factor Test: Anderson 2 simul, negl fires; Blasko 1 of 2 drugs (= mfg)
   b. **Zuchowicz "res ipsa" causation** Danochrine Rx > FDA dosage
      i. But Williams SJΔ b/c dorm sex'l assault unclear if intruder
   c. Expert testimony
      i. Frye gen'ly reliable techniques (many states)
      ii. Daubert Gatekeep: sci method? Peer review? Error rate? Gen'ly acc'd?
         a) Fed R Evid (states free) – std of review = abuse of discretion
         b) Kumho tire blow Breyer expand Daubert all tech knowl; flex
            1. Scalia concur, but = rule ≠ std

3. **Lost of Chance** (= 20 , ≠ 10 states): Matsuyama fail diag gastric cancer
   a. >50% likely but-for causation of π's lost opp'y survival already < 50%
      i. If >50% chance survival, trad'l negl action, but log'l exten: 60→40%
   b. Ltd to medmal: reliable experts, doc-patient, common < 50%, pwr asymmetry
   c. Dmg: proportional econ (survival med$, WD lost income); full P&S

4. Joint & Severable Liability
   a. Ensure full π recov any Δ; Δs' contrib claims (chall'g: insolvency)
   b. "Alt (indep) Liability" Summers v. Tice quail hunters J&S liable (shift BoP)
      i. Loui rough causal apportionmt inj by Δ vs. other accids (if not, =)
         a) Restatement causal apportionment
         b) But Gross 3mo sep accidents rejected apptmt unless Δ prove
         c) π's BoP inj above/beyond pre-existing condition
      ii. Orser "concerted action" for encouraging others reckl shoot
   c. Nat'l Mkt Share: Hymozitz DES miscarriage 20yr latent cancer in kids
      i. Several liability; Total dmg capped %Δs at trial; Nat'l mkt; No exculp
      ii. Dissent: jt liab, burden shift, exculp suff – no need for jud'l legislating

G. Proximate Cause

1. Unexpected Harm
   a. **Eggshell** §461: Benn crash heart attack; Steinhauser, Bartolone crash → schiz
      i. Trend → liability suicide: Fuller even if other factors, windfall
   b. **2d'y conseqs**: Pridham liable ambulance crash b/c arose out of special risks
      i. Eg chem exposure despite negl med advice, fall during recovery
      ii. But time/attenuation limit, reintegration normal life
   c. **Type**: Polemis (benzene fire) all direct → Wagon Mound foreseeable conseqs
2. **Superseding Causes**: Doe overgrown bushes, rape ≠ §442B scope of risk
   a. Pena Δ store underage beer ≠ liable drunk gang-initiation rape, murder
   b. But liable: Hines RR negl drop rape, Addis arson hotel ≠ light/escape
   c. Artful pleading Morrow peg leg: gen'l → foreseeable, specific → unfors'l
   d. Comp fault → intent'l intervenors irrel if w/in scope risk (R3T)
3. **Unexpected Victim**: Palsgraf Cardozo duty issue, LIRR ≠ duty to unforeseeable π
   a. Andrews dissent: gen'l duty, direct conseq analysis
   b. Rescues: Wagner RR liable vol'y rescuer – but ≠ Moore kidney, malpractice

H. Defenses

1. **Contributory Negligence**: CL abs't bar – prevailed 1800s–1960s, now minority
   a. // elems negl claim (duty → self), BoP org on π but today Δ's aff'v def
   b. **Exceptions**: §500 reckless Δ; Δ's last clear chance; ≠ imputing to π
      i. Last clear chance: Davies tied donkey mid road, Δ should've noticed
         a) Variations: helpless π, Δ can avoid; inattentive π, Δ aware
      ii. Imputation high 19th C (driver → pass'r, parent → child)
         a) Today only ltd areas: consortium, WD, bystander emo (split)
      iii. Jury soften all/nothing CL in close cases, but Alibrandi formalism

2. Comparative Fault

   a. **Pure** Uniform Act: J&S, pro-rated reallocation insolv, no setoffs, etc.
   b. **Modified** π < 50%, ≤ 50%: several liability ≠ reallocation
   c. Fritts π drinking irrelevant/prej'l Δ surgeon negl tracheostomy
      i. Even conscious creation risk irrelevant: horse allergy; robbery
      ii. Wolfgang Δ racetrack owner liable add'l injury late extinguish π's negl
   d. Avoidable conseqs **duty mitigate**: balance tension π's autonomy, idiosyncracy
      i. Smoking exacerb asbestosis, fail doc's order lose weight
         a) Religious refuse med: eggshell π? Reas'l believer? Choice?
      ii. Even anticipatory (pre-inj) mitigation duty: helmet, seat belt

3. Express **Assumed Risk** (paternalism)
   a. Tunkl factors: reg industry, pub serv, open pub, essential, form K, Δ control
   b. Powder Ridge clear but invalid snowtube K: rec essential, $$, Δ's care, asym
      i. Dissent: Tunkl dispositive: 4 factors for Δ, 2 for π
4. Implied Assumed Risk (> paternalism)
   a. Primary: The Flopper π got what he sought ≠ trap for unwary "timorous stay home"
      i. Davidoff baseball fans assume obj risk inj; leg'v carve out net, reckl
   b. Secondary: Davenport π negl use known dark stairs (2 alts), bar if π > Δ fault
      i. Fire/police bar if prof duties – circular reasons: double tax, job

5. **Preemption** (minor issue: 4 SCOTUS cases in 2000)
   a. Express: Cipollone Tobacco Warn Act preempt even state tort suits
      i. Rabin mid grd: allow suits latent risks, new evid, fraud
      ii. But Lohr ≠ preempt subst'l equiv pacemaker ≠ premkt appr'l
      iii. Reigel catheter rupture improp use, FDA premkt appr'l preempt
         a) Ginsburg: federalism presume < preempt, FDA persuasive
         b) PLIVA preemption generic labeling despite piggyback brand
   b. Implied: Wyeth anti-naus improp IV-push ≠ implied preempt (statute silent)
      i. But Buckman FDA-process fraud preempted FDA policing power
6. Statutes of Limitations: 2-3yr, run from "accrual"/inj, toll/pause minority, fraud
   a. Some toxic exposure claims may run upon discovery/symptom

III. Products Liability

A. **Mfg Defects** (flawed unit, unchanged from assembly line)
1. Historical dvpmt: CL mfr duty only to party in privity
   a. Tort N ≠ privity: MacPherson Cardozo wood wheel mfr
   b. K SL warranty: Ryan CA pin bread loaf (only customer, family)
   c. Tort res ipsa: Escola CA coke bottle mfr (Traynor concur: SL better)
   d. K SL ≠ discl: Henningsen NJ steering implied warranty unwaivable
   e. Tort SL: Greenman CA lathe (supply chain, extend duty bystanders)
2. R3T §2 disting mfg (SL), design, warn > R2T §402A SL unreas'ly dang cond
3. Non-sellers SL = comm'l lessors, franchisors, free samples, but ≠ financing
4. Causation: sep&div inj π's BoP enhancement – eg tire blowout ≠ cause rape
   a. Indivisible injuries? Majority shift burden to Δ; minority: bar
5. Emo: reluctant unless also user = Bray coworking trash compactor
   a. But logically Falzone near-miss due to def'v prod → bystander emo

B. **Design Defects** (every unit dangerous by design)
1. Consumer-Expectation Test (SL) Cronin bakery truck drawers (blur w/ mfg?)
   a. Campbell bus grab bars (rare consumer-exp in pure design)
   b. Only reas'ly foreseeable use: Barker CA high-lift loader on slope
2. R3T Risk-Util Test: foreseeable risk, RAD, omission unreas'ly unsafe
   a. Appl if ≠ com exp: Soule wheel collapse floorboard; Pruitt air bags fail
   b. Camacho crash bar factors: prod util, risk, harm, RAD, mfr's elim risk < $, user's avoid by due care, user's aware, enetrprise liability
      i. Essentially same prod (moto) w/ RAD
      ii. But ≠ VW minibus b/c unique features compare w/ like prods
   c. RAD: π's BoP: risk/magn'd harm, warnings, cons'r exps (mktg)
   d. Ultrahaz prods, eg exploding cigs (but R3T ≠ above-grd pools!)
   e. Critique: case-by-case design chgs endanger other types accidents
3. Industry stds admissible: interlocks, helmets (but outdated)
4. Food prods tests: (1) foreign/natural (chk bone); (2) reas'l consumer
5. Mktg influence expectations/use: turkey fry pan, 4x4 ≠ street legal
6. Infering defect: malfct theory: eg airbag malfct but repair before trial
7. Anticipate reas'l misuse = cartoon toy; = carjack; but ≠ draino blinding

C. **Warnings** (~Negl)
   1. Threshold: ≠ duty open&obv, com knowl: sharp knife, tequila, ride truck bed
      a. But marshmallow choking hzd → jury Q whether com knowl
   2. Reas'l care under circs: Ryobi Δ's SJ b/c π's aff'v ignorance saw blade gds
      a. Factors: scope dgr, extent harm, underst'l, conseqs > dir'v, medium
         i. Content: flammable cologne; conseqs mixing perm
         ii. Adequacy: fail read roach fog ≠ disp'v; pics for migrants
         iii. Cost-ben analysis incl info costs
      b. Causation & Heeding Presumtpion: Δ's BoP show π ignore anyway
      c. Addressee: gen'ly → end user, but kids prods → parents; cig lighters?
         i. Sophisticated users doctrine: Boy Scouts zip-line rope blind
      d. Warning & Design interplay: warn ≠ immunize design def, but aff'v ignorance clear warnings = defense: mower hole; overfill tire expl
   3. Learned Intermediary Doctrine (Rx) Karl WV 1st reject: heartburn → attack
      a. Pro: mfr-user gap, patient reliance, doc expert/gatekeeper, trust
         i. Exceptions: vaccines, contraceptives, direct-ad, withdrawn
            a) Extend to all well patients/lifestyle drugs?
      b. Con: direct ads, informed consent, mgd care (time), enterprise
   4. Post-Sale Risks §402A Vassallo: (maj) ex ante know'l risks; duty disc, warn
      a. Impossible distinction ex ante SL (state of art?) vs. Negl
      b. Minority ex post/hidsight SL
      c. Post-Sale Discovery: R3T risk-util duty warn, but ≠ duty retrofit

D. **Defenses**: Contrib Negl, Comp Resp, Assumed Risk, Misuse
   1. Sanchez: 50% reduction for fail secure truck (manual) roll back, pin to fence
      a. R2T §402A either ≠ duty to discover or assumed risk complete bar
      b. R3T §17 add middle-gd conduct: duty reas'l care; only comp'v fault
         i. Negl π can still win if negl ≠ causal (speeding; def tires expl)
   2. Enhanced Injuries: approach may depend on liability scheme (jt&sev vs. sev)
      a. R3T < recovery by apportioning liability to comp'ly resp π, 3d parties
      b. Other cts Δ mfr fully liable no matter what
   3. Disclaimers (split) bar negl only b/c deter, or bar both b/c SL culp < negl?
   4. Statute of Repose: triggered by prod release/distribution, eg fed aviation 18yr
   5. Preemption (see Negl–Defenses, above)
   6. Gvt K'ors: Boyle helicopter hatch

E. Work-Related Injuries: **3d-party suits outside workers comp**
   1. Foreseeable (minority: any) mods: Jones v. Ryobi printing press gds unfors'l
      a. Rejected trial ct's cons-exps open/obv appl (unease w assumed risk?)
      b. Prox cause argument? employer fault > mfr, but counter WC regime
      c. Dissent: Δ's maintenance, knowledge of mod, common → flaw, RAD
   2. Post-sale fail warn foresee'l mods: Liriano immigrant grocer meat grinder
      a. Especially purposefully removable safety: Lopez forklift top
         i. Plus inevitable safety hzd: Nissei bottle crusher drool doors

F. Tort & Contract: econ liability waivable, ltd to K/warranty (unlike per'l inj) Transamerica def'v charter K assumed losses, so ≠ tort recov lost profits, repairs
   1. But allow property dmg in tort for bystander recovery despite ≠ privity

IV. **Damages** (gen'ly single judgment, past and future harms)

A. Concerns:
   1. Floodgates of similar claims (docket clearing)
   2. Crushing Liability
   3. Ripple Effects, attenuated causal relationship, harms

B. Compensatory Damages
   1. Excessiveness: Seffert (CA) P&S bus dragging defer jury unless shock conscience
      a. Traynor dissent: consistency w previous awards, ratio econ losses
      b. Jaffe concern punishing motive for P&S, but only negl conduct
         i. But Posner econ measure of pain: how much would pay to avoid?
         ii. Rabin: "Money can buy quite a bit of happiness"
      c. Jud'l controls: remitter (< excessive award); additur (> inadeq award)
      d. Permission arguments re monetary guides? Gen'ly yes, may lim ≠ numbers
      e. Comparable awards?
         i. Blumstein et al: presume validity Q2/3, burden to explain Q1/4
         ii. Inquire at fact-finding vs. dispositional vs. appeal
         iii. Kahneman & Spitzer ex ante (avoid) > ex post (make whole) persp'v
      f. Statutory caps, but jud'l trend const'l invalid (+ inevitable reduction anyway)
         i. Conting-fee-K sys (access poor) must be balanced alongside P&S caps
   2. **Loss of enjoyment life**: McDougald medmal → coma
      a. Maj: must be aware to enjoy; enjoyment incl in P&S calc (slippery slope)
         i. Victims adjust better than observers expect
      b. Dissent: enjoyment (lost benefit) ≠ P&S (acquired harm)
      c. Ark (+3-4 add'l) loss enjoyment action even if π dies
   3. Death damages
      a. **Survivial** by estate (non/econ): 3min skid marks → 1yr terminal cancer
      b. **WD** by beneficiaries: derivative claim (comp fault)
         i. Trad'ly (NY) ltd to econ losses – paradox retirees, children, disabled
         ii. Majority now permit nonecon, eg companionship statutes
         iii. Children: trad'ly ≠ recov b/c net savings (but now = companionship, although difficult valuation)

C. Punitive Damages
   1. **Malice** sufficient: Taylor v. Stille alcoholic liquor distributor
      a. Rationales: deterrence, incentive to sue, public safety, criminal gaps
      b. Concurrence: limit to clear recklessness cases (no punitive for negl)
      c. Dissent: ≠ pun dmg b/c unjust enrichmt, double pun tort/crim, ≠ deterrence
         i. But ignores crim gaps, bifurcation of pun dmg phase
      d. Misdirected social outrage: Ford Pintos: B<PL ok in ct, but not boardroom?
         i. Reas'l cost-ben calcs should be defenses to punitive dmg liability
      e. Consistency awards over time, despite some high-profile outliers
      f. Vicarious liability punitive dmg? Either automatic or §909
         i. §909: authorization, reckl hiring, mgr scope of duty, approval
      g. Death of tortfeasor: majority deny punitive; minority allow
         i. Victim's death? Same issue as post mortem P&S recovery
   2. Unconst'l **ratios**: State Farm reckl driving, bad-faith insurer 50x punitive award
      a. Kennedy > Gore guideposts: reprehensibility, comparable cases, ratio (≤ 10x)
         i. Scalia/Thomas: due process only procedural, not subst'v
         ii. Ginsburg: federalism – state-tort issue
      b. Control punitive dmg: states > SCOTUS

c. Δ's wealth: π ≠ duty to describe Δ's insolvency; Δ's wealth may > reas'lness
d. ≠ 3d p harm evid: Philip Morris splitting hairs: harm to others OK in reprehensibility, ratio, but not final punishment (Stevens: "eludes me")
e. 1:1 ratio fed CL Exxon Shipping
f. Repetititve awards = fed solution: WR Grace asbestos ≠ handicap FLs

3. Alts: abolish pun dmg; 20 states > BoP (clear/conv); 12 $$ caps; state funds

D. Insurance, Collateral Sources & Subrogation

1. Collateral Source Rule: ignore collateral sources
   a. Justification: trad'l avoid π windfall → modern internalize accident costs
   b. Issue: discrepancy consumer > insurer medical costs?
2. Subrogation: reimburse insurer/collateral source
   a. CSR – sub: π double recovery
   b. CSR + sub: formal reimbursement or implead insurer
   c. ≠ CSR: reduce dmg award by ins amt, but externalize acc cost to ins industry
   d. Real world: WC/homeowners subrogate, health ins don't (too complex)
3. Experience Rating: avoid cross-subsidizing, maintain deterrence
   a. Practical limits: small firms, same-specialist docs, new prods

V. **Alternatives to Tort** (track social mvmts)

A. Incremental Reforms: 1970s medmal, 1980s gen'l, 1990s class actions etc
   1. Damage caps
   2. Modify J&S liability: cond'l >50% fault; limit to econ losses (CA, Rabin)
      a. Goals in tension: full compensation, liability proportional to fault
   3. Atty-fee schedules
   4. Modify/elim Collateral Source Rule: allow recoupment?

B. No-Fault Schemes
   1. Workers Comp (1910s Progressive Era – orig for phys injuries only)
      a. 3d party scheme: employer buys, employee receives med + 2/3 wage
         i. Allow 3d p mfr prods liab suits outside WC sys
      b. Efficiency: tort 50/50 – WC 66/33 – SSDI 90/10
      c. Challenging areas: occupational diseases, mental stresses
   2. Auto No-Fault (1960s welfare mvmt, Nader)
      a. Only adopted in ½ states – mvt ran out of steam before culture shift to right
      b. Blended 1st party sys – car owner buys, covers all passengers
      c. Good system b/c most cases undeterrable in tort: young/reckl, old, drunks
   3. Selective No Fault (Black Lung, vaccines, nuclear)
      a. Bigger areas (medmal, prods) more complicated b/c latency, design event?
   4. National Tragedy Gvt Funds
      a. Ex ante, ongoing funds: Israel, N Ireland (N/A USA < freq, < military)
      b. Ex post ad hoc funds: 9/11
         i. Mistake to be all things to all claimants – best to = payouts
         ii. Exclusive recovery better, w/ Fund reimbursement agst wrongdoers
         iii. < legacy b/c difficult boundary terrosit-attack vs. other victims

NEGLIGENCE: HAMMONTREE V. JENNER

- Goals of tort law:
  - Deterrence (primary)
  - Compensation (secondary)
  - Corrective justice (…)
- Justifications for fault principle:
  - Libertarian: only liable for foreseeable risks (Holmes)
  - Social contract: live up to communal standards, given crowded, interdep't society (Holmes)
  - Economic efficiency (Posner, L. Hand's B < PL)
  - Nation-building, economic growth by protecting US industry
- Hammontree v. Jenner (CA 1971)
  - Epileptic taking medical precautions had seizure, crashed into πs' shop
    - πs both injured wife and uninjured husband (property damage, loss of consortium)
  - Aff'd Δ's verdict, refusing to override CA negligence instructions into SL scheme
    - Distinguish auto liability (negl) from mfg products liability (SL)
      - Capacity to spread risk across enterprise
      - Asymmetries in mfg: info, ability to avoid harm
    - Too much disruption w/o wholesale legislative liability regime change
    - Proposed change would include even unforeseeable illnesses
  - Holmes (1881): default = losses lay where they fall, to avoid causal confusion
    - Action = choice = power to avoid = foreseeable
  - Posner (1972): "negligence" = moral disapproval of actor's social inefficiency

A. Duty

1. Affirmative Obligations to Act

- Trad'ly: duties only in specific contexts (e.g. privity doctrine: mfg→retailer ≠ buyers)
  - No duty to save proverbial baby on RR tracks
- Modern mvmt → gen'l duty due care (decline privity Macpherson v. Buick (1916))

a) Harper v. Herman (MN 1993) – No duty; §314 Relationships

- π Harper, 20, 1 of 4 guests on Δ Herman's, 64, boat
- Δ knew location, anchored in shallows; π dove in w/o warning, paralyzed
- Rev'd app ct, reinstated Δ's SJ b/c social host ≠ special relationship
  - R2T §314 special relationships: common carriers, innkeepers, landowners open to public, custodians of vuln persons
  - Superior knowl, w/o duty of care, insuf for liability
  - Advance warning of π's dive ≠ determinative
- Hypos:
  - 10yr-old π? Maybe, if custodial relationship, but "even children know dangers of water"
  - If Δ had invited π onto boat? No b/c still social host
  - If π had asked about safety? Depends on Δ's response (mis- vs. nonfeasance, bystander vs. participant)
- Epstein (1973): utilitarian calculus (B<PL) ≠ permit action based on assumption of special weight of own welfare; liberty → no-duty rule

- True valuing of liberty must acknowledge costs to social welfare
- "Easy-rescue" option? Middle ground btwn utilitarianism, libertarianism
  - Would req adjusted definition of "reasonableness"
- Exceptions to no-duty-to-rescue rule:
  - Special relationships (§314)
    - Bjerk (MN 2007): liability for bf's sex abuse of minor in care b/c vol'y "parental" custody
  - Undertakings (§324, Farwell, infra)
    - Promise protection → reliance (Mixon, infra)
  - Non-negligent injury
    - Trad'l: no duty, e.g. Union P. R. v. Cappier (KA 1903)
    - Modern: R2T §322 duty to prevent further harm, e.g. Maldonado v. S. P. Trans. (AZ 1981): leaving π on tracks after knocking him off train, running over
  - Non-negligent creation of risk
    - Simonsen (NE 1931): duty to remove/warn other drivers after knocking down utility pole
    - Menu (CO 1987): ≠ duty by cab driver to stay/remove/warn others of passenger π's disabled car
    - Tresemer (CA 1978): doc duty to inform patient of new IUD danger 2yr after insertion
  - Statutes (Uhr)
- Acts of commission vs. omission
  - When is re-characterization of act-omission legit? (e.g. failing to brake, or running the red light?)
  - Adams v. N. Ill. Gas Co. (IL 2004): overturned precedent to req gas utility to warn cust of known dangers, even if caused by home fittings out of utility's control

b) Farwell v. Keaton (MI 1976) – Sp rel, §324 Undertakings

- Δ Siegrist and decedent π Farwell chasing girls – π beaten (Δs incl Keaton)
- Δ ice to π head, drove around 2hr, allowed π sleep, left at grandparents' home
- Holding: π duty of care b/c common undertaking ("co-adventurers")
  - Siegrist's duty imposed upon undertaking, not observing injury, so liable even if had never returned
  - "Outer limits of special relationship status"
- Hypos:
  - Stranger picks up injured man, drives toward hosp, abandons
    - #1: liable b/c worse off delay/preclusion fr others' help (sp rel)
    - #2: liable b/c initial undertaking
  - Stranger only observer of drowning man, begins swim, abandons
    - If duty, when would it begin? Breach? Why abandon?
- Ronald M. v. White (CA 1980): sober teens ≠ duty to restrain drunk/drugged friends while driving – distinction: ex ante prevention vs. aid after injury
- Restatement:
  - Q of law: whether any relationship sufficient to impose duty
  - Q of fact: whether such relationship existed

  - §324 voluntary assumption of duty → liability, if: (a) fail reas'l care for safety, or (b) discontinue aid, leave in worse position
    - Silence re leaving in equal position
    - Proposed: reas'l care in discontinuing aid if imminent peril
- Broken Promises: Mixon v. Dobbs Houses (GA 1979): duty of rest mgr, who promised to relay pregnant wife's call to dining husband, to do so—liable for wife's fear, pain fr home birth alone, after failure to deliv 3 messages
- Prof inspection/reporting:
  - Jansen v. Fidelity & Casualty Co. (NY 1992): insurer ≠ duty of careful inspection b/c purpose was policy underwriting/risk analysis
  - Reed v. Bojarski (NJ 2001): (minority position) doc's duty to warn of med issues during non-patient, employee physicals
  - Draper v. Westerfield (TN 2005): duty of state-K'or radiologist to warn Child Welfare of evid of abuse

c) Randi W. v. Muroc Sch. Dist. (CA 1997) – Foreseeability

- 4 school dist former employers gave unqualified, positive recs
- R2T §311 (1) negl'y giving false info → liability for phys harm caused by action taken in reas'l reliance (b) to 3d party reas'ly expected to put in peril
  - §310 conscious misrepresentation: duty disclose material facts
- Absence of aff'v duty ≠ right to lie
  - Garcia (CA 1990): PO's duty of care to directly inform victim of parolee (distinguishable b/c Randi W misrep through school dist)
    - §311 ltd to phys harm, so no duty re thieving housekeeper, lazy employee
  - Silence/non-rec OK, but ½ truths → duty (foreseeability upon action)
    - Alternatives: full disclosure or no rec
    - Closer call if minimal letter re admin, no character ref
  - Foreseeability of particular kind of harm (Ballard (CA 1986))
- Jackson v. State (MT 1998): adoption agencies' duty to disclose bio parents' psych evals b/c vol'y disclosure child's health records
- But Passmore v. Multi Mgmt Servs. (IN 2004): rejected §311 b/c worried < free-flow honest recs btwn businesses
  - Despite limimt to phys harm, defamation protection qual immunity

d) Tarasoff v. Regents UC (CA 1976) – 3d party control

- Δ therapists detained, released murderous patient who killed π
- Upheld Δs' duty to warn foreseeable victim of patient's intent to kill her
  - Police ≠ duty b/c ≠ sp rel w either patient, victim
- Rowland v. Christian (CA 1968): aff'v-duty exceptions to gen'l duty of care: a) foreseeability of harm to π; b) causal connection; c) Δ's moral blame; d) policy of preventing future harm; e) burden on Δ/cmty; f) insurance options
  - R2T §315 no duty to control 3d persons unless special rel (a) Δ-3d person, or (b) Δ-victim
- Prof stds foreseeability: once predicted → duty to warn foreseeable victims
  - Confidentiality < public safety
- Concur: should be fully subjective std, b/c even APA: prof stds unreliable

- Dissent: confidentiality critical to effective therapy/treatment
  - Consequences: excessive warnings or over-commitment
- Hypos:
  - Patient couldn't find π, so killed best friend instead? Prob'ly ≠ liability unless friend reas'ly ID'd as victim
  - Patient threat on class of persons? Prob'ly ≠ liability under Thompson
  - Duty to inform companion of HIV+ patient's companion? Prob'ly under Tarasoff, but see CA statutory override in HIV
- Splitting hairs based on courts' relative activism:
  - Reisner (CA 1995): doc hid from patient, 12, tainted transfusion for 5yrs – liability for π's harm HIV transmission
  - Pate v. Threlkel (FL 1995): surgeon's duty to tell patient's kids of genetic nature of carcinoma b/c kids' ID, risk known at time
    - Hawkins v. Pizarro (FL 1998): denied π husb's suit v. wife's former doc for false-neg Hep-C b/c ID unknown at time
  - Safer (NJ 1996): allowed 3d party π's case agst doc but rec'd conflict btwn doc's duties to foreseeable victims & patient confidentiality
  - Lester v. Hall (NM 1998): no duty of doc to 3d party motorist to warn patient of danger of driving 5d after lithium treatment
    - Hardee (SC 2006): duty to warn patient of treatment's known effects on capacities/abilities to prevent 3d-party harm
  - McNulty v. NY (NY 2003) no duty of doc to warn patient's friend of meningitis risk b/c ≠ sp rel or patient's family
  - Albala v. NYC (NY 1981): no duty to future child (1975 brain dmg) for botched 1971 abortion – worry ext liab, def medicine
  - Tenuto v. Lederle Labs (NY 1997): doc duty to warn father of polio risk fr immunized baby's poop (triang sp rel: pediatr-baby-parents)
- Subsequent limitations on Tarasoff:
  - Bellah v. Greenson (CA 1978): ltd to harming others – psych ≠ duty to warn family of patient's suicide risk (only remedy in malpractice)
  - Thompson v. Alameda (CA 1980): county ≠ duty to gen'ly warn public of released offender w/o specific target/victim
  - Hedlund (CA 1983): psych duty to prev/warn of impending assault of mother, which injured π child (foreseeable that would be together)
- CA statutory response: therapist immunity unless "serious threat phys violence agst reas'ly ID'l victim"
- States accepting/extending Tarasoff:
  - Peck (VT 1985): doc duty to patient's parents for barn she burned
  - Cole (IA 1981): doc ≠ duty to patient herself for committing murder
- Rejection: Tedrick (IL 2009): avoid dividing psych loyalties
- CA statutory AIDS disclosure:
  - No duty to notify, but also no liability for disclosure
  - Must discuss disclosure w patient, vol'y consent
- How far to extend in real life? Bartender? Dentist?
  - One hand, ≠ confidentiality concerns
  - More likely, ≠ duty b/c ≠ prof expertise assessing risk

e) Uhr v. E. Greenbush C. Sch. Dist. (NY 1999) – Statutory violation

- Δ s.d. violated statutory oblig annual scoliosis test → π avoidable surgery
- Aff'd Δ's SJ b/c statute ≠ private RoA, Δ ≠ CL negl by sp rel
- Sheehy (NY 1989) test for private right of action if statutory silence
  - π among class of statutory beneficiaries? Yes
  - Private RoA promote leg'v purpose? Yes
    - Purpose: public health, s.d. solvency by < costs via early det
    - Promote > compliance
  - Private RoA consistent w leg'v/reg'y scheme? No
    - Admin duty, power of enforcement by control funding
    - Avoid counterproductive nonfeasance > misfeasance liab (based on statutory language if "make test" = "give test")
- Unlike Herzog (lights), ≠ per se negl (CL duty, statutory breach def)
  - Here, Q = whether statute created antecedent duty nonexistent at CL
- No duty created by violation of voluntary safety policy
  - Morgan v. Scott (KY 2009): salesman ≠ duty failing to ride-along
  - Everrit v. G.E. (NH 2009): co. ≠ duty drunk empl to drive home
  - Worry that liability would < incentive to maintain such policies
- Child abuse reporting
  - Cuyler v. US (Posner, 7th 2004): reporting duty ≠ tort – naval hosp ≠ liable for failing rep susp abuse by babysitter who killed other child
  - Statutes may or may not expressly impose civ liability
    - Ct may impose priv RoA despite statutory silence
  - Distinctions fr (no) duty to rescue:
    - Reporting more pressing prob b/c abuse hidden danger
    - Vuln victims ≠ self help
    - < liberty concerns than rescue b/c report < burden than help
    - Slow, cumulative harm measurable due to delay
- Duty to report crime
  - Responses to 1997 L.V. murder 7yo Sherrice Iverson while murderer's friend ≠ intervene
  - Enumerated crimes: murder, rape, sex crimes < 14
  - Phone reporting suff; failure = misdemeanor < $1500, 6mo
  - Exceptions: relative of victim/offender, mistake of fact, reas'l fear safety self/fam
- Statutory limitations on liability (carrots)
  - Overrule "officious intermeddler" CL doctrine of liability
  - CA immunity emerg responders if good faith, ≠ $
    - Good Sam statutes adopted in most states

2. Policy Bases for Evoking No-Duty

- Even when Δ role in creating the risk
- Restatement: OK if "categ, bright-line rules of law applicable to gen'l class cases"

a) Strauss v. Bell Realty (NY 1985) – Privity

- 1977 NYC blackout 25hr fr Δ ConEd's negl
- 77yo π, day 2 w/o water, slip/fall common basement stairs (Δ K w/ l.l.)

- Dismissed b/c Δ's duty ltd by K privity
  - Fear of "crushing exposure" to liability
    - Renssalaer applied to both negl and gross negl
    - Often invoked in low-risk, high-magnitude occurences, difficult-to-insure "disaster scenarios"
      - But tort liab might encourage policy compliance through tech advancement
  - Preserve utility's solvency, service (too big to fail?)
    - Not a liberty/indiv autonomy theory of immunity
  - Protect agst illegit claims by adding privity lim to gross negl lim
  - Δ duty if π had fallen in own home if util K w/ Δ
  - Foreseeability (Randi W) important, but alone ≠ dispositive
- Dissent: correct policy, but no evid that liab exposure so high to outweigh ability to pay, social effects
  - Perverse effect of ruling: more victims, less liability
  - But util ins costs all passed to consumers
  - Would blur bright-line rule
- Hypo: duty to allow neighbor use of water pump? No b/c indiv autonomy, ≠ duty to act/aid
- "Take home" asbestos cases (via laundry)
  - In re NYC Asbestos Litigation (NY 2005): unanimous: employer ≠ duty to π spouses b/c floodgates limitless liability concern
  - Olivo v. Owens-Ill. (NJ 2006): employer = duty b/c foreseeability > crushing liability concern
  - Martin v. Cincinnati G&E (6th 2009): employer ≠ duty b/c 3d party harm studies later than exposure, so ≠ foreseeable
- Moch v. Renssalaer Water Co. (NY 1928): Δ municipal water K'or; insuff water to putout π's bldg. fire
  - Cardozo opinion dismissed compl b/c inadeq water = denial of benefit but ≠ comm'n of wrong – Relevant Q: whether Δ advanced so far as to have "launched a force for harm" or has just "refused to become an instrument for good"
    - But unclear distinction in mis/non-feasance hypos:
      - Voluntary surgeon liable for failure to sterilize
      - Engineer liable for failure to shut off steam
      - Auto mfg liable to 3d party buyer fro ≠ inspection
    - Alt econ explanation: given prevalence of insurers, allow losses to lie to avoid add'l transaction costs of inter-insurer suits once π compensated for injury/loss
      - But n/a to Strauss b/c old man insuff'ly insured, pers injury > prop dmg
  - Irony b/c Cardozo elim privity immunity in products liability
  - Libby v. Hampton W.W. (NH 1978): water co ≠ liability for inadeq water b/c social benefit of low prices even in high-risk areas
  - But Clay Elec. Co-Op v. Johnson (FL 2003): streetlight K'or = duty to maintain for pedestrian safety
    - Decline of Moch rule in modern cases

b) Reynolds v. Hicks (WA 1998) – Social hosts

- Δs' 300-guest wedding; nephew drunk, drove sister's car into π
- After settlement w children, sued Δs for social host liability 3d party injury
- Dismissed for Δ, limiting statutory social host liability to minor's own injuries
  - Distinguish social hosts fr commercial distributors
    - Profit motive, org, finances, ltd scope/mkt
- Concur: should impose statutory liability on 3d party injuries too
- Dissent: Criminal act, not actor's class, should trigger duty
- Hanson v. Friend: limiting statutory liab to minor's own injuries
  - Dissent: judiciary ill-equipped to impose any social host or comm'l vendor liability w/o leg'v mandate – defensible only if crim penalty distinct fr civil liab (if drinking age public health, morals, then ≠ public safety)
- Parental exception? Est of Templeton (WA 2000): hosts ≠ liability for seeing minor drink own beer at their party, drive off and die
- Marcum v. Bowden (SC 2007): hosts = duty to ≠ know/int'ly serve minor, w liability for anyone injured
  - Kelly v. Guinnel (NJ): hosts liable for serving w/in home, ltd by subseq legislation to know/intent'ly, reckless, +BAC req
- Gilger v. Hernandez (UT 2000): host ≠ duty to protect guests fr belligerent guest b/c 1) dram shop act sole duty re alcohol, 2) ≠ sp rel by hosting
  - Luoni (MA 2000): host ≠ duty when guests injured others w fireworks
- White v. Sabatino (D. HI 2006): design driver = duty to 3d parties once perf begins – when does duty vest? Upon promise?
- Dram Shop Acts: liability for serving intox patrons
  - CA leg'v response: no liability for either social or comm'l hosts
  - Delta Air v. Townshend (GA 2005): qualified – only liable if Δ knows patron will be driving – airline could've assumed pick-up, taxi, bus
  - Sports stadiums? $110M suit for opposing fan's beating; retrial for prejudicial "culture of drunkenness" evid; $25M settlement

c) Vince v. Wilson (VT 1989) – Negligent entrustment

- Δ grandaunt paid for reckless boy's (≠ license, drugs) car – injured π
- Upheld jury submissions for negl entrustment, adjusting std
  - Trad'l: required control/ownership of instrumentality
  - Broadened: conveyance suff
    - R2T §390: supply chattel, direct or 3d party, to one known too young, inexp to use in manner involv unreas'l risk phys harm
    - Key factor: knew/should've known that entrustment foolish
  - "Outer limits" of negl entrustment doctrine
- Hypo: if nephew's written promise not to drive until licensed? Then Q of breach at trial, but duty still exists
- Peterson v. Halsted (CO 1992): unwilling to go so far; co-signing parent ≠ duty for adult daughter's car, drunk driving
  - Suppliers of credit ≠ suppliers of chattels
  - Time delay: accident 3yr after co-signing

- Lydia v. Hroton (SC 2003): ≠ liability for lending car to drunk friend who injures self b/c drunk friend > negl (comparative negl jx)
- Osborn v. Hertz Corp. (CA 1988): rental co ≠ duty to investing record of sober customer w valid license, despite prior d.d. history
    - Change today w database access? Privacy right?
- West v. E. Tenn. Pioneer Oil (TN 2005): gas station = liable for assisting gas purchase by drunk driver, under §390
- Keys in the ignition
    - Duty? Some by violation of statute
    - No duty? Interpret statute as = police cost control, but ≠ safety
    - Palma (CA 1984): factors consid to impose duty: 1) safety of area; 2) length of intended stay; 3) size, dangerousness of vehicle; 4) common knowl of safe operation of vehicle
    - Enabling/encouraging
        - Weirum v. RKO Gen'l (CA 1975): activist ct like 1970s NJ: Δ teen radio station = liable for 3d-party inj chase-the-DJ contest
        - Rice v. Paladin Enterprises (4th 1997): author = liable for hit-man manual's use by hit man (> than 1st Am protection)
- Negl entrustment vs. social host liab?
    - Crowd-control issues: ID, monitoring drinks
    - Awareness of risk/intoxication: eg NJ's statutory BAC limits

3. Landowners and Occupiers

a) Carter v. Kinney (MO 1995) – Bible study ice

- Δ shoveled snow night before Bible study; π slip/fall on ice in morning
- Aff'd SJ for Δ b/c π = social guest = licensee
    - Duty/std of care = Q of law
    - Classes of persons in premises liability
        - Trespasser: no duty, except §§334 – 339
        - Licensee: permission
            - Ltd duty to make safe known dangers
            - Social guest = sub-class of licensee
                - Same care as landowner/occupier, family
                - Rabin's Redwood in the driveway
        - Invitee: permission & material benefit or public access
            - Duty to make safe known & knowable dangers
- Stitt v. Holland Abund Life F'shp (MI 2000): even though church mbr = invitee b/c church open to public, ct unwilling to extend liability to non-prof org: "pecuniary gain is a quid pro quo for > care"
- R2T §333 Trespassers: gen'ly no duty of care, except by §§334-339, eg duty to warn if land constantly trespassed upon, or known trespasser
    - Bennett v. Napolitano (RI 2000): Δ city ≠ duty to π dog walker for falling limbs in park after closure b/c trespasser

R2T §342 Licensee liability if	R2T §343 Invitee liability if
(a) knows or reason to know of condition and should realize unreas'l	(a) knows or reas'l care would discover condition, should realize

risk, and should expect that they will not discover or realize the danger (b) fails reas'l care make safe, warn (c) licensees do not know or have reason to know condition and risk	unreas'l risk (b) should expect invitees won't discover, or won't protect (c) fails reas'l care to protect

- Open and Obvious Dangers: divided courts
  - Some: no duty b/c apparent to invitee
  - Recently → whether such notice suff to make reas'ly safe
  - Ky. River Med. Ctr. v. McIntosh (KY 2010): EMT tripped over curb w/ ramp cut while transporting stretcher – given shift fr contrib → compar negl, Δ landowner's duty depends on foreseeability of danger
- Activities
  - Trad'ly ≠ recovery for active negl while on premises
    - Britt v. Allen City Comm. Coll. (KA 1982): π sales rep using Δ's auditorium for demos; ≠ recovery for custodian's dropping piano on π's foot
  - Overruled in Bowers v. Ottenad (KA 1986): π social guest burned fr flaming Irish coffees; Δ = duty reas'l care to avoid harm fr aff'v acts
  - R2T §341: due care in activities re licensees, but only if owner should expect guests ≠ realize danger & licensees ≠ know risks involved
- R2T §339 Child trespassers
  - Holland v. B&O RR Co. (DC 1981): N/A b/c moving train obvious danger to any 9yo
  - Req'mts: a) know children likely to trespass; b) know condition, should realize risk serious harm; c) children ≠ realize b/c youth; d) utility < risk; e) failure reas'l care elim risk
- Recreational use of land
  - Almost all states statutory limits on liability for rec land
  - Goal: prevent suits fr natural dangers or req warning signs
  - Liability gen'ly only for willful misconduct

b) Heins v. Webster County (NE 1996)

- π visiting daughter dean of Δ hospital – slip/fall
  - Licensee b/c social visit, no benefit to hosp unless visiting patient, buying food, playing Santa
- Rev'd Δ's SJ; prospective combining licensee/invitee classes
  - Single reas'l care std for permitted visitors
    - ½ states have adopted – rules vs. stds tension – blurred non/misfeasance distinction
  - Precedent: 1957 England, 1959 SCOTUS in admiralty, 1968 CA (Rowland, although combined trespassers too), 1973 MA
  - Balancing factors: 1) foreseeability harm; 2) purpose of entry; 3) circumstances; 4) premises' use; 5) reas'lness of precautions; 6) opp'y of precautions; 7) burden of protection on owner/cmty
  - Omit Rowland trespasser liability b/c unlawful presence

        - Rowland Δ offered π ride to SFO – π cut hand on Δ's sink – CA licensee ltd to booby traps – changed std w/o parties bring up issue in briefs
        - CA leg'v response: liab bar for 25 enumerated felonies (if convicted) – R3T follows same approach, delaying civ until after crim – flagrant vs. regular trespassers
    - Dissent: socializing liability for use of private property (eg YMCA liable for uninvited players on private outdoor court)
    - 1990s resurgence of single std after backlash agst Rowland-style simplification, consolidation of jud'l power
        - Prosser & Keeton: reticence aband jurisprud for "beguiling panacea"
        - Koenig v. Koenig (IA 2009): tipped maj states into single-std approach
            - But only 10 states incl trespassers in std
            - R3T: reas'l care to all but flagrant trespassers
    - Louis v. Louis (MN 2001): landowner = duty to brother injured on pool slide b/c ≠ sp rel nec'y on own land
    - Galindo v. Clarkestown (NY 2004): Δ homeowner ≠ duty for tree, rooted on neighbor's land, that fell onto Δ's driveway, killing Δ's housekeeper's husb
        - Dissent: duty to warn anyone on his property once aware of risk

c) Landlord & Tenant

- Trad'ly liability only if:
    - Hidden danger known to landlord but not tenant;
    - Lease for public use;
    - Landlord control, eg common stairs; or
    - Negl repair by landlord
- Putnam v. Stout (NY 1976) overturned immunity fr broken promise to repair
    - Consideration for landlord's promise
    - Reliance by lessee to forego repair efforts
    - Landlord's reversionary interest
    - Social policy factors: financial ability of tenants; ltd term of possession; $ benefit → landlord's responsibility
- Sargent v. Ross (NH 1973): eliminated landlord distinction, imposed gen'l duty of care (foreseeability, unreas'lness of risk harm)
    - Visiting child fell/death tenant's stairway Δ bldg.
    - CoA/theory: stairs too steep, railing inadequate
    - Similar expansions in ~20 states by regulation, housing codes (eg lead-free apts) → per se negl if violated
- Criminal Activity: Kline (DC Cir 1970): π tenant assaulted common hallway
    - Landlord duty b/c best position to take protective measures
    - Limit: landlord ≠ insurer, but duty reas'l precautions esp in areas beyond police patrol
    - OK w/ > costs passes to tenants
    - Deterrence incentive of tort liability b/c ≠ crim liability, = $ sensitivity

d) Posecai v. Wal-Mart (LA 1999) – 3d party crimes

- π robbed in daylight in Sam's Club parking lot

- Rev'd for Δ, recognizing gen'l duty but deciding ≠ breach as matter of law
  - Balancing test (cost-benefit):
    - Duty protect foreseeable crim acts, but ≠ insurer
    - Care proportional to foreseeability, gravity of harm
      - Freq'y, sim'y prior incidents
      - Location, nature, condition of property
    - Rationale: econ/socio impact of duty vs. bus owners best position to weight crime risks
  - Rejected alt foreseeability rules:
    - Specific harm rule: too restrictive
    - Prior similar incidents test: arbitrary results
    - Totality of circs test: too broad (foreseeability alone)
- Concur: totality of circs test better b/c more comprehensive, tailored to facts
- Under guise of duty, court took breach issue out of jury's hands
- Sharron P. v. Arman Ltd. (CA 1999): 6-1 Δ's judgment in commercial parking garage attack b/c 1st assault in 10yrs, but concurring judge: "landlord ≠ entitled to one free assault before duty imposed"
- Williams v. Cunningham Drug Stores (MI 1988): store ≠ liable to π customer hurt during robbery – when "overriding pub policy concerns," judge ≠ jury can decide duty, to set analysis std for future cases
- KFC v. CA (1997): Δ cashier resisted robber's $$ demands, causing π hostage to fear for life – 4-3 Δ's SJ b/c "never" a duty to comply (rule) w/ robber to avoid harm to customer; would encourage hostage taking w/o assured benefit
  - Dissent: robbers don't read cases; should be jury Q (std): 1) circumst'l variety; 2) jury Qs can evolve over time; 3) jurors' practical exp

4. Duty & Foreseeability: Cabral v. Ralph's Groc. (CA 2011)

- Δ trucker stopped semi for lunch on emerg-only shoulder; π swerved into him
- Jury found Δ 10% fault → $475k dmg (incl non-econ, unavail at CL)
  - App rev'd for Δ b/c unforeseeable risk, so no duty
- Reinstated π's award b/c drivers duty of care when stopping, jury Q if reas'l
  - Rowland balancing test for exceptions to CL duty of care
    - Broad, gen'l analysis to class of cases (≠ fact-specific)
      - Categorical foreseeability
      - Clear public policy
    - Foreseeability of harm (heaviest among Rowland factors)
      - Duty = p(harm) of category, eg side-fwy parking
      - Breach = p(harm) under circumstances
    - Factors: foreseeability harm to π; certainty of π's injury; causal connection; Δ's moral blame; policy prevent future harm; burden of duty; insurance
  - Duty vs. breach
    - Duty: Q of law for ct; must be broad or else risk usurping jury function
    - Breach: Q of fact for jury (unless matter of law by judge) – Δ didn't challenge breach at trial b/c little likely change fr 10% fault
  - Similar to Martin v. Herzog reg'y violation, but comparative negl jx
  - Hypo: π intoxicated? Still duty of care on Δ, but likely < 10% fault

5. Intrafamily Duties

- History:
  - Spousal suits:
    - Trad'l CL: marriage legal unity, so suits illogical, impossible
    - 19th C: married women's acts: right to own/sue over prop, contract
      - Gradual dissolution legal unity, spousal immunity in tort
    - Initially only intentional torts allowed b/c feared spousal collusion agst insurers in negl suits
    - Today ≠ any spousal tort immunity
  - Parent-child suits:
    - 19th C parental immunity dvpmt, wide adoption of doctrine
    - Today, intentional torts allowed ~ universally, but negl major battle

a) Broadbent (AZ 1995) – reas'l parent test

- Mom left 2.5yo son near pool to answer phone; fell in, brain dmg
- π dad sued Δ mom to get to umbrella ins policy (her homeowner's ≠ intrafam)
- Ct overturned parental immunity in Negl, replaced w/ "reas'l parent" std
  - Noted idiosyncratic US dvpmt parental immunity
    - Hewellette (1891) est doctrine "fr whole cloth"
    - McKelvey (1903) ≠ even abuse by stepmom
    - Roller (1905) ≠ even rape by dad
    - Responses: some (eg MS) abolished; many exceptions: outside parental role & w/in employment, willful/wanton/reckless, emancipated child, death of child/parent, 3d party, in loco par
  - Goller (WI): immunity only if 1) acting under parental auth, or 2) ordinary parental discretion
    - Ambigous appl, eg Sandoval: duty to child alone, or world?
      - 2 dog bite cases went both ways dep on duty frame
  - Policy reasons: 1) domestic tranquility? 2) fraud? 3) fam resources? 4) inheritance? ***5) interference w parenting
  - Followed Gibson (CA) reas'l parent std b/c discretion ≠ unfettered
    - Overrule Sandoval duty to child/world distinction
    - Parental duty always Q of breach, causation
    - Test: reas'l, prudent parent in similar situation
- Concur: caution – parents require discretion w children, to make decisions: negl should be "palpably unreas'l"
- "Reas'l parent" vs. "palpably unreas'l" tests
  - Hypo: parents former drill sgts: 9yo phys tests → aneurysm
    - Reas'l parent wouldn't do that, but ≠ palpably unreas'l

b) CA (Gibson) – reas'l parent test

- informed AZ rejection of immunity: reject Goller implication parental carte blanche re child – parental prerogative w/in reas'l limits
- Allow for some NY-style diversity, but submit to jury to assess breach

c) WI (Goller) – parental authority immunity

- Immunity only if 1) acting under parental auth, or 2) ord'y parental discretion

- Ambigous appl, eg Sandoval: duty to child alone, or world?
  - 2 dog bite cases went both ways dep on duty frame

d) NY (Holodook) – "supervision" immunity

- Parental immunity if "supervision" b/c diversity parenting styles
- Holodook bringing child to playground
- Zikely (App Div 1983): preparing hot bath, left room; child fell in, burns – held immune even fr created household dangers (eg stove, iron)
  - Kronengold (App Div 1993): parent immune fr suit for crossing agst light w baby in arms
- Hypo: smoking in adjacent hotel on vacation? Prob'ly not, since ≠ supervision

e) Harm to fetus:

- Bonte (NH 1992): live-born fetus allowed to sue mother for negl crossing street b/c prenatal 3d-party suits allowed and b/c abolished parental immunity
- But Remy v. MacDonald (MA 2004): rejected Bonte in case of preg mother's negl driving harm to fetus b/c ≠ duty to fetus (unique woman-fetus relationship, collateral policy effects of legal duty)

- Insurance (homeowner's, auto, umbrella)
  - Broadbend: ct acknowl ins dispute, but refused to tie dmg award to coverage
  - Ard (FL 1982): cap intrafam suits to ins limit
  - Reuko v. McLean (MD 1997): total immunity if insured b/c fear of opening door "to every conceivable parent-child suit"
    - Insurer's bad position of defending party who wants to lose
    - Jury's bias to > dmg awards proportional to coverage
    - Concern for judgments > ins coverage: effect on fam tranquility
  - Ins cos response: drop intrafamily tort coverage
    - Some states allow non-auto exclusion but force auto comprehensive

6. Immunity; Governmental Entities

- CL tradition sovereign immunity: "King can do no wrong"
  - Kwananakoa (1907, Holmes): ≠ legal right agst authority that makes law on which right depends
    - Circular reasoning ~ charitable immunity fr respondeat superior
  - Post-WW2 jud'l abrogation & leg'v refinement
    - Immunity → exception, not rule
    - Themes:
      - Gvt officials policy choices balance costs, gains
      - Gvt acts a lot in aff'v duty/protection sphere

a) Riss v. NYC (NY 1968): "crazy love"

- π Riss repeatedly denied police protection fr threatening ex – assault, injury
- Aff'd dismissal for NYC
  - No police duty to π
  - Distinguishable gvt services
    - Social services (hosp, transp) & public use = liability

        - Police ≠ liability b/c unpredictable, > $ burden
    - Mis/non-feasance distinction particular to police context
        - Special deference re discretion, but ≠ bystander liberty
        - Duty Q:
            - Financial burden/resource allocation
                - Prioritize which of many requests to respond to
            - Second-guessing professional discretion
- Dissent:
    - Fear of $ disaster a myth (0.2% annual budget → tort)
    - Predictability issue existed for other services too but no disaster
    - Jud'l interference already indirect reality, but ≠ policy
        - Impose legal liability
        - Force internalization of cost of negl service provision
- Cultural expectations? Fire Dept gen'ly expected duty to respond
- Other NYPD cases:
    - Schuster (1958): police duty to killed FBI informant b/c active participation/undertaking via wanted posters
    - Sorichetti (1985): police duty to abused child b/c protective order, known history, assurance of safety
    - Cuffy (1987): exceptions to gen'l rule police tort immunity
        - Assumption duty via promise/action
        - Knowledge that inaction → harm
        - Direct contact w/ injured
        - Injured's justifiable reliance on undertaking
        - Despite above "good criteria," dismissed injured boy's suit b/c police contact only w relatives & reliance on protection "expired" that morning
    - Mastroianni (1997): police duty to killed wife b/c protective order, direct contact, open promise to "do whatever we can"
- Other custodial relationships
    - Florence v. Goldberg (NY 1978): police undertook to provide school crossing guard, so duty to children crossing there.
        - < worry about 2d-guessing resource allocation b/c already done
        - Mother's diligence in prior accompaniment, reliance on substitute gd probably ≠ conclusive, so even < diligent recover
        - PD would have to argue ≠ negl on breach issue
    - Hoyem v. Manhattan Beach SD (4-3 CA 1978): 10yr old left school midday, run over – school duty reas'l supervision
        - Dissent: limit liability to on school premises
    - Pratt v. Robinson (4-3 NY 1976): 7yr old run over near bus stop 5 blocks from home – dismissed for ≠ duty after drop off
- Educational malpractice: Peter W. v. SFUSD (CA 1976):
    - HS student sued for reading < 5th-gr level
    - SD ≠ gvt immunity, but ≠ tort liab for educational malpractice
        - ≠ readily acceptable std care, cause, injury
        - Scapegoat statuts → floodgates, crushing burden

b) Lauer v. NYC (NY 2000): Medical Examiner's duty

- Facts:
  - Π's 3yr old son died of brain aneurism, but Med Examiner: homicide
  - Examiner retested 2mo later but failed to correct, notify NYPD
  - Newspaper broke story 17mo later – Examiner resigned
- Aff'd dismissal negl emo distress
  - Gvt acts: 1) Discretionary = immunity
    - 2) Ministerial (rules) ≠ immunity, but still Negl analysis
  - Here, Examiner's direct duty → DA, ≠ π
  - ≠ Cuffy factors: undertaking, promise/ass'nce, pers'l contact, knowledge of suspicions, "special duty"
- Dissent: duty emerged upon failure to correct mistake once discovered
  - Unilateral poss'n exclusive knowledge, & singular power to fix
  - Carve conscious concealment out of Cuffy sp rel req'mts
  - Distinstion from Riss: ≠ resource-allocation Q, sep of powers
  - Maj rewards liars & protects wrongdoers w/ immunity
- Public-duty rejection of Lauer sp-rel req'mt: Jean W. v. Comm'th (MA1993): parole authority's error released life inmate who raped π → duty
- Official immunities
  - Trad'ly special immunities for judges, prosecutors
  - Falls v. Sup. Ct. (CA 1996)
    - Witness to gang murder killed after testimony despite prosecutor's reassurance
    - Prosecution ~ jud'l "absolute immunity" fr tort
      - When acting in official capacity (incl legislators, execs)
      - Witness-protection prog immune by extension
    - ≠ police qualified immunity (good faith defense)
- Friedman v. State of NY (NY 1986): NDOT's failure bridge median barrier
  - 1 case: NDOT had balanced crossover & bounce-back risks
  - 2 cases: NDOT had decided to build but hadn't yet started
  - Held ltd duty to act ≠ arbitrarily, but ≠ duty reas'l care

c) Federal Tort Claims Act (1946)

- US waived gen'l tort immunity
- Exclusive jx to Dist Cts, bench trials
- ≠ $ interest prior to judgment, ≠ punitive damages
- Contingent-fee attys < 25%
- Preclusion other claims/actions on same subject
- N/A (still immune):
  - Due-care execution of statute
  - Negl discretionary function
  - Intentional torts
  - Postal service
  - Fiscal/monetary regulation
  - Military combat (Feres doctrine: all injuries in military service)
  - Arising in foreign country

- Dalehite v. US (1953): US ≠ liable for dmg fr explosion while loading fertilizer for shipping – discretion = planning decision ≠ oper'l decision
  - Unclear distinction

d) Cope v. Scott (DC Cir 1995)

- Facts:
  - DC nat'l park rd curvy, designed for pleasure driving
  - Commuters used as thoroughfare, 2-3x capacity
  - π hit by oncoming car under rainy conditions
- Aff'd SJ surface maintenance, but rev'd for π on insuff signage claim
  - Discretionary function carve-out:
    - Sep pwr: avoid 2d-guessing leg
    - Jx'l Q of law
    - 2-step test (Ganbert, Berkovitz)
      - Specific directive (statute, reg, policy)?
      - Abstract nature of decision: social, econ, pub policy?
  - Application: ≠ specific directives, so look at nature
    - Maintenance: discr'y b/c balancing priorities, repair types
    - Signage: ~Florence undertaking → duty ensure effective
- When are discretionary actions protected?
  - Social, econ, policy grounding
  - Abstract nature
- Whisnant v. US (9th 2005): denied military immunity fr toxic mold at commissary b/c $$ discretion insuff unless grounded in policy
- Abstract analysis: Hinsley v. Standing Rock Child Prot. Servs. (8th 2008): BIA immune fr failure to warn foster family of foster child's history sex'l abuse (later abused foster sister) b/c agent could have decided based on privacy concern (actual reasoning irrelevant)

7. Emotional Harm

a) Summary

- Direct claims
  - No recovery (very few)
  - Zone of danger (Falzone)
  - 50+% chance negl→injury (Potter)
  - Modified foreseeability (Gammon)
  - (Plus exceptions/carve-outs for grisly circumstances)
- Bystander claims
  - No recovery
  - Zone of danger (Borsun (NY))
  - Multifactor tests (Dillon (CA), Portee (NJ))
  - Foreseeability (HI)
  - (Non-intuitive, but stronger case for emo recovery than direct claims, b/c "get over it" – but > allowance by cts b/c concerns re fraud, floodgates, intangible valuation)

b) Falzone v. Busch (NJ 1965): Zone of Danger

- Δ driver nearly missed π (in car), struck her husband (standing)
- Rev'd SJ, overturned Ward (NJ 1900) phys impact req'mt
  - Elements of negl causation emotional harm claim:
    - Fright from reas'l fear of immediate injury (zone of danger)
    - Resulting physical injury (~substitute?)
  - > med knowledge on fright → phys injury
  - Lack of precedent no reason to shy away in CL system
  - ~ causation problem across tort law – jury Q of fact
    - Mitchell (NY 1896): out control horses stopped around pregnant π → miscarriage
    - Battalla (NY 1961): failure to secure π ski lift → fright
  - Scholarly consensus (incl Prosser) < phys impact req'mt
- Lingering issue: Δ's forewarning of suit; preserve evidence
  - Solution: weigh undue delay agst π – likely dismissal
- Today, very few cts req phys impact to recover
  - Rare example: Humana (FL 1995): false HIV+ diagnosis claim dismissed unless evid phys harm from treatment/injections
- Eyewitness emo distress unrecognized at time of Falzone
- Cars vs. airplanes:
  - Wooden (CA 1998): allowed recov for nearly hit by car despite ≠ prior relationship or outrageous behavior
  - Lawson (CA 1999): denied recov for nearly hit by falling private plane
    - Dissent: irreconcilable; maj merely disdain for weak people
- Airplane passengers: Quill (MN 1985): recovery for tailspin → anxiety
- Doomed victims → "survival" statutes
  - Very fact-specific, e.g. same airline crash
    - Shatkin v. McDonnell-Douglas (2d 1984) ≠ R-side
    - Shu-Tao v. McDonnell-Douglas (2d 1984) = L-side over wing
  - Beynon (MD 1998): 70ft skid marks → fear (Dissent: 1-2s only)
  - Some states (CA) bar intangible recovery if π dead at final judgment
    - Sensible? Same logic as allowing if π had survived
    - But reality: over-compensating π's survivors (+ wrong'l death)

c) Metro-N. Comm. R. Co. v. Buckley (US 1997): toxic exposure, cancer-phobia

- π Buckley RR pipe-fitter, asbestos exp 1hr/d 1985-88; fear cancer but ≠ symp
- Suit under Federal Employers Liability Act
  - Dist Ct dismissed b/c ≠ physical impact
  - 2d Cir rev'd for π b/c exposure = impact under Gottshal
- Breyer rev'd for Δ b/c exposure/contact ≠ phys impact
  - CL gen'l rule ≠ emo distress unless impact or zone danger:
    - Categorical rule
    - Gottshall (1994): zone of danger test (~Falzone)
      - Immediate risk traumatic harm
      - Fright of near miss ~ direct hit
      - CL ≠ recovery w/o symptoms (or 50+% disease)
      - Policy reasons:

    - Separate trivial claims
    - Carcinogen exposure common
    - Floodgates: unlim & unpredictable liability
- Ginsburg concur: even under case-by-case std, even accepting contact = impact, π ≠ evid severe emo distress
    - Counterarg: crushing liability → bkrpts → ≠ $$ long-latent phys injs
        - Blurred line phys/non-phys consequences
- Norfolk & W. R. v. Ayers (5-4, US 2003):
    - Maj: recovery for asbestosis-suffering workers' fear of dvping cancer
    - Dissent: ≠ causation b/c fear fr future harm ≠ due to disease
        - Uniqueness asbestos litigation: 90 bkrpt, 30M affected
- Potter v. Firestone Tire (CA 1993): recovery for toxic dumping only if 1) exposure + 2) fear from knowledge 50+% cancer risk
    - Δ's recklessness could < importance of 2
    - "Giving w/ one hand but taking away with the other": impossible bar
- HIV: Williamson v. Waldman (NJ 1997): π trash collector stuck by needle neg'ly discarded by Δ doc – middle ground "reas'l, well-informed citizen" test
    - ≠ purely subj b/c avoid promoting ignorant, sensationalist beliefs
        - 1/100 needles infected, 5/100 infected → transmission
    - ≠ purely obj b/c acknowl reality of fear/distress
- Latency windows: exposure → neg test result (Faya (MD 1993))
    - Chizmar v. Mackie (AK 1995): allowed recovery for false HIV+ diag, extended beyond window
    - Jones v. Howard Univ. (DC 1991): allowed recov for negl Xray while pregnant – distress radiation harm fetus
    - Harris v. Kissling (OR 1996): allowed recovery for negl failure Rh blood test on pregnant woman

d) Gammon v. Osteoporosis Hosp. (ME 1987): bloody leg

- π's dad died in Δ hosp
- Δ funeral home sent bloody leg specimen instead of dad's personal effects
    - π nightmares, < family life, but ≠ psych help or med evid
- Rev'd Δ's DV – negl inflict severe emo distress ≠ phsy impact req
    - Trial process to sort out fraud
        - = difficulty eval impact as other intangible injuries
    - Objective test: ordinarily sensitive person in π's position
    - Exceptional vuln'y of family of recent decedents
    - Limited to severe emo distress: reas'l person, normally constituted, unable to adequately cope
- Limited to death suits? Dobran v. Franciscan Med. Ctr. (OH 2004): π's cancer tissue thawed en route to testing for adv stage, no retest poss'l – 4-3 ct rejected claim b/c ≠ phys peril by Δ's inaction
    - Dobran: > liberality emo distress, > culp conduct req'd
- Baker v. Dorfman (2d 2000): NY law = recovery false HIV+, based on
    - Narrow carve-outs to broad test:
        - Johnson (NY 1975): recovery false telegram mom dead
        - Negl mishandling corpse (but Gammon on foreseeability)

- Limitation: Bryan R. v. Watchtower Bible (ME 1999): denied π's claim of negl failure protect abuse by congregant b/c ≠ sp relationship church → π (foreseeable victims)
- Different tests:
  - Falzone: reas'l fear immediate injury (zone of danger)
  - Gammon: ord'ly sensitive person, unable to cope
- Physical manifestations?
  - Chizmar: serious emo distress = neurosis, psychosis, chronic depression, phobia, shock; but ≠ temp fright, disappt, regret
  - ≠ need med diagnosis – jury Q of fact
  - Sullivan v. Boston Gas (MA 1993): πs watched house burn down, both allowed to recover:
    - π1: PTSD, insomnia, depression, etc
    - π2: headaches, nausea, insomnia, depression
    - R2T §436 rejecting phsy manifestations sufficiency req'mt
      - Phys manifs req → artful pleading
- Do courts have it backward?
  - Arguably toxic exposure (long, sustained) best cases for emo distress
  - Zone of danger? "Get over it."
  - Main impediment to imposing duty = floodgates, crushing liability

e) Portee v. Jaffee (NJ 1980): bystanders, constrained foreseeability

- π's son trapped in elev in Δ's bldg – π watched 4hr failed rescue – suicidal
- Rev'd Δ's SJ, overturning Falzone – new CoA: negl infliction emo distress
  - Dillon v. Legg (CA 1968): foreseeable: 1) near scene, 2) contemp observance, 3) close relation
  - Modified NJ rule: constrained foreseeability
    - Death/serious inj caused by Δ's negl
    - Marital/familial relationship injured – π
    - Observation of death/inj at scene (satisfies proximity)
    - Resulting severe emo distress
  - But floodgates concerns across factors:
    - Relation: Rabin's babysitter's friend killed in front of her
    - Observation vs. description/told
- Limits
  - Scherr v. Hilton Hotels (CA 1985): denied recovery to woman who watched burning bldg. on TV, feared husb hurt in fire (true) b/c insuff sensory perception under Dillon
  - Barnes v. Geiger (MA 1983): denied recovery to mom who mistakenly believed child injured (wrong) in accident she witnessed: "distress based on mistake…ephemeral", too variable
  - Elden v. Sheldon (CA 1988): 6-1 ct denied recovery by unmarried bf for gf's death b/c admin difficulties determining qualification for committed relationship – 2001 leg'v overturn: domestic partner criteria
- CA changes/narrowing:
  - Ochoa v. Sup Ct (CA 1985): recov for mom watching child in juvenile hall deteriorate fr illness, later die, despite ≠ watching inj/death

  - Thing v. La Chusa (CA 1989): denied recov for mom who rushed to accident scene, saw dead child b/c ≠ observe accident
    - 1) nuclear fam, 2) observe accident ≠ conseqs, 3) normal reaction of close relative
- NY more conservative movement (NY/NJ divergence; CA→NJ activism)
  - Kalina (NY 1963): denied Jewish parents' bystander distress claim for child's late ritual circumcision
  - Tobin v. Grossman (NY 1969): rejected Dillon as impossible line-drawing
  - Bovsun v. Sanperi (NY 1984): overruled Tobin to allow recov immediate fam in phys zone of danger
    - ≠ logical/theoretical sense b/c theory = bystander ≠ pot'l victim
    - Only policy rationale: floodgates, crushing liability
  - Johnson v. Jamaica Hosp (NY 1984): baby kidnapped fr negl hosp, recovered 4-5mo later – blurring bystander/direct harm claims – under bystander analysis, denied recov b/c ≠ zone danger (likely same result under direct harm tort, so ct out of way to define bystander limit)
- Even broader app:
  - Marzolf v. Stone (WA 1998): upheld duty if distress caused by observing injured relative at scene shortly after accident and before subst'l change to victim's condition/location
  - Wages v. Fist Nat'l Ins (MT 2003): duty if foreseeable π
  - Doe Parents No. 1 v. State Dept Ed (HI 2002): broadest foreseeability std: recovery parents sex'ly abused child w/o observe or proof phys inj

f) Loss of Consortium

- Derivative claim, so ltd by direct victim's inj suit, comparative fault
  - Wrongful death also derivative
  - Negl infliction emo distress? Jx'l split on whether derivative
- Diaz v. Eli Lilly & Co (MA 1973, J. Kaplan)
  - Trad'ly consortium ~ master's loss of servant's servs
  - Gradually loss of wife's society, sex'l partnership
  - 19th C married women's acts → legal rights of action
  - 1950 wife's right to action consortium → 1973 adopted by ½ states
  - Adopted in MA b/c marital interest recognizable, impairment may be definite, serious, enduring, > emo distress – valuation hard but doable
- Charron v. Amaral (MA 2008): denied consortium right to gay couples
  - Before state recognition gay marriage
- Awards
  - Ossenfort (MN 1977): $500k for husb → spastic quadriplegic b/c marriage of harmony & happiness, yrs of joy
  - Spaur (IA 1994): $800k husb 34 yrs, 3 grown kids, died after suit filed (16yr life expectancy)
- Barnes v. Outlaw (AZ 1998): allowed recov for lost consortium due to spouse's nonphys inj – minister revealed confid'l secrets
  - No longer deprivation of services theory
- Injured parents and children (states split)
  - Alt recovery under wrongful death, but ½ states ≠ nonecon recovery

- Roberts v. Williamson (TX 2003): 6-3 denial recov for injured child by parents, siblings
  - Dissent: no good reason distinguish spouse, child
- Borer v. Am Airlines (CA 1977): dismissed children's suit for injured mom b/c losses recoverable by mom as direct π
- Ferriter (MA 1980): allowed children's suit after parent's paralysis

- Uncooperative spouse:
  - Jacoby v. Brinkerhoff (CT 1999): denied husb's claim agst psych b/c wife uncooperative (b/c derive action based on direct victim's suit)
  - JAH v. Waddle & Ass (IA 1999): π minor child denied recovery agst psych b/c mom refused to cooperate

8. Economic Harm

a) Nycal Corp. v. KPMG (MA 1998): §552 misinformation

- Facts:
  - 1990 Δ KPMG auditors annual rep for Gulf Res & Chem Corp
  - 1991 π closed stock purchase (controlling share) w/ Gulf
    - Δ became aware of transaction only few days before
  - 1993 Gulf went bankrupt
- Aff'd SJ for Δ:
  - R2T §552 test: 3d party/class intended or actually known by Δ
    - @ time of representation
    - Negl false info + reliance to detriment
    - Examples
      - No duty if client chg purchasers w/o telling
      - Duty if client told Δ unidientified purchaser b/c known, ltd group of banks
      - No duty if client chg amount from Δ's planning
    - Other professionals?
      - Lawyer negl drafting will
      - School counselor re grad req'mts/NCAA scholarship
      - State K'or drug testing → split courts re employee recovery for false +
  - Middle ground between Foreseeability, Near Privity
    - Foreseeability: ~ Palsgraf – gen'ly disfavored b/c client primary control of auditing process, indeterminate liability
    - Near Privity: Ultramares, Arthur Anderson – req linking action between Δ accountant & 3d party π

b) 532 Madison Ave. v. Finlandia Ctr. (NY 2001): ≠ standalone econ recovery

- 3 consolidated cases for 2 bldg collapses → 15+ block closures
- Aff'd dismissal all claims unless personal inj or prop dmg
  - Foreseeability alone ≠ define duty
    - Belle Realty, Milliken: sp relationship, privity
    - Eg plant explosion → adjoining premises
      - Beck v. FMC: dismissed employees' lost wages

- Dunlop Tire v. FMC: upheld prop dmg, lost profits
- Reject People Express (NJ 1985): liab based on foreseeability
- Policy: liability limited to phys injury, prop dmg (all lines arbitrary)
  - Pro: avoid crushing liability in low-risk, high-$$$ events
  - Con: urban area density, avail insurance (1st party easier than broad 3dparty)
  - Unique NY approach

- Koch v. ConEd (NY 1984): ConEd liable to NYC for looting, vandalism after blackout, but ≠ emerg salaries, overtimg
- Oil spills: comm'l fishers' exception – allow recovery lost wages
  - Oil Pollution Act 1990: SL certain losses
  - Government intervention > tort recovery when low-risk, high-$$$

B. Breach

1. Vicarious Liability (Agency)

- Plaintiff classes
  - Injured adults
  - Guardians on behalf of injured minors ($ for medical fees; trust perm harms)
  - Guardians on behalf of infants injured pre-natal
  - Dead victims' interests:
    - Survival suits, by estates for harm suffered between injury and death
      - Administrator/trix by apt, if no will
      - Executor/trix, if will
    - Wrongful death suits, by dependents, for continued support
      - ½ states allow both economic and loss of consortium damages

a) Respondeat Superior: Christensen v. Swenson (UT 1994)

- Security guard rushing 15min lunch nearby crashed on return
- Majority: stds, case-by-case inquiry
  - Dissent: clear rules to avoid arbitrary differences
- Employer's VL depends on factors:
  - Conduct w/in duties of the job
  - Conduct w/in hours, spatial boundaries of job
  - Conduct motivated by serving employer's interests
- Justifications for VL/policy goals:
  - Prevent future injuries
  - Assure compensation to victims
  - Equitably spread enterprise's losses
- Schwartz (1996): economic incentives
  - Employee selection, supervision
  - Employee discipline by demotion, discharge
  - Alternatives: mechanization, downsizing
- The Loft: employer directly liable for negl failing to screen tortfeasor bartender w/ history of violence
- Hypos:
  - Accidental spill hot soup while rushing out door? Maybe

- Intentional pour hot soup re insult at counter? No

b) Independent Contractors: Roessler v. Novak (FL 2003)

- Complications from misread X-ray by indep radiologist
- Independent contractor = defense to employer liability
- Overcome defense with estoppel by "apparent agency"
  - Representation by principal
  - Detrimental reliance by 3d party
- Restatement §409: independent contractor defense; exceptions §§410-429
  - §416: VL if peculiar risk of work to be done
  - §429: VL if "reas'l belief that services rendered by employer"
- Plaintiff-friendliness: Restatement > Roessler
  - Loophole to both: full disclosure of contractor status (signs, Ks)
  - Difference: one-shot (roofer) vs. ongoing (outsourced pros)?
- Maloney v. Rath: car owner liable for mechanic's faulty brake job b/c freedom to choose mechanic, seek one able to indemnify

2. Standard of Care

- Negligence history:
  - Semantics: Negligence theory of tort vs. negligent conduct
  - Writ system
    - Trespass: direct harms (throw log that hits π)
    - Trespass on the case: indirect harms (throw log into road; π trips)
  - Industrial Revolution:
    - Expanded negligence theory
    - Ltd recovery by doctrines: assumed risk, contrib negl, fellow servant
      - Most effective in "hwy cases" – stranger parties
  - Progressive Era state-level mvmt of no-fault schemes (workers' comp)
    - Carve-outs remaining in tort: 3d party suits (e.g. product liability)
  - Assumptions: either SL or fault scheme
    - BUT Rabin (1981): "no liability" alt based on "ct-imposed immunities, ltd duties"
    - BUT Gilles (1994): intermediary regime btwn SL, negl: "whether Δ could have avoided injury w/ greater care"

a) Brown v. Kendall (Shaw, MA 1850)

- π separating fighting dogs blinded Δ w/ stick – Δ's judgment on SL scheme
- Court applied negl threshold for both trespass, case claims; π's burden proof
  - Shaw's "sleight of hand" to add due care req to trad'l causation
- Harvey v. Dunlop (NY 1843): child blinded friend throwing stones, but no liability w/o fault (foreseeability req'd for prevention)
- Gregory (1951): speculated Shaw's motive: lessen risk to burgeoning US enterprise by decreasing liability exposure via negl std, fellow servant doctrine (≠ vicarious liability for co-workers' negl injury)
  - Rabin: extensive disagreements re Shaw's motives b/c omitted underlying rationale

b) Adams v. Bullock (NY 1919 – Cardozo)

- Boy swinging wire on rail bridge, electrocuted by trolley wires below
- Reversed for Δ b/c no reas'l jury could've found Δ liable under circs
- No liability for unforeseeable injury resulting from lawful conduct
  - No special danger, prior like accidents, or custom disregarded
- Grady (1989): π defines negligence analysis by proposing alternative precautions
  - Adams: failure to protect, bury wires
  - What if: failure to post warning signs? Maybe, as Cardozo alluded to cost-ben
- Braun (1911): liability for failure to maintain insulation on 25ft high electric wiring turned on foreseeability of construction on empty lot 15 years after electric work
  - Reversed for instructions error, but remanded b/c reas'l Q of fact
  - Distinctions from Adams: possibility of insulation elec vs. trolley wires, inspection/maintenance, spatial lims lot vs. railway, expectation of human activity around wires
- California negligence instructions:
  - Negligence = act/omission ≠ reas'l person under similar circs
  - Negligence = failure to use ordinary/reas'l care
  - Ord/reas'l care = care by ord'ly prudent person to avoid injury to self/others in similar circumstances
- Green v. Sibley (Cardozo): cust trip/fall over kneeling mechanic at register – reversed for Δ b/c no reas'l jury liability for failing to inform every instance of repair

c) U.S. v. Carroll Towing (Learned Hand, 2d 1947)

- Δ tug ops neg'ly adjusted π's lines – π's ship sank w/ US cargo
  - Δ claimed contrib negl by π's bargee's absence from ship
- Bargee must be aboard during day work hours – night too if custom
  - L. Hand: bargee shouldn't be "prisoner" of barge; follow custom
    - Posner: get an alt bargee; inefficient customs irrelevant
- Liability balance: B < PL (applied to both πs and Δs)
  - Negligent if fail to assume burden of precautions < expected injury
  - Test only useful at appellate level b/c jury given broad instructions
    - Most useful re business judgment (≠ personal judgment)

- Posner (1972): economic meaning of negl: when cost(accident) < cost(prevention), rational actors will pay tort victims rather than avoid liability – net social benefits
  - But McCarty v. Pheasant Run (7th 1987): Posner admitted imprecision of L. Hand formula in case of hotel intruder through unlocked door – must honor jury's "rough judgment" of factors
  - But Moisan v. Loftus (2d 1949): L. Hand admitted unquant'l concept'l guide
- Grady (1994): courts ignore "compliance error" in high-rep activities = SL pocket?
  - Cost (consistent perf) > sum cost (all indiv trials)
- Bolton v. Stone (UK 1951): cricket balls into road – consider PL threshold; ignore B

3. The Reasonable Person

- Test:
  - Due care of conduct, not state of mind
    - Admin feasibility; incentivize safety
  - Objective, not subjective standard of care
    - Admin feasibility; community norms (Holmes);
    - Physical disability exceptions?
      - No: Menlove (1837) low intelligence still liable for hay fire
      - No: Ramsbottom (1980) partial stroke still liable for accident
        - Slippery slopes: declining health old age; inexp youth
      - Yes: Hammontree (1971) full seizure not liable for accident

a) Bethel v. NYC Trans. Auth. (NY 1998)

- Wheelchair bus seat collapsed – "utmost care" std for common carriers
- Reversed for Δ - merged common carriers to "reas'l care" std (in NY)
  - Unnecessary medieval vestige: innkeepers/carriage-suppliers
  - Legally inconsistent: Negligence theory presupposes obj'v std
    - "Reas'l person" flexible (perceivable risk; special relationship)
    - But unfair retroactive lawmaking?
- Wood v. Groh (KA 2000): kept "highest duty" std for gun storage – aff'd conviction of Δ: unloaded gun, ammo same safe: son broke in w/ screwdriver

b) Mental ability: Bashi v. Wodarz (CA 1996)

- Denied subj std of psych illness causing blackout
- Justified by comment to Rest §283B: 1) line drawing; 2) faking illness; 3) responsibility to compensate; 4) induce oversight by caretakers
  - But §283C comment: unfamiliarity w/ mental illness
- Some carve-outs for children engaged in children's activities
  - But liability has expanded w/ insurance coverage
- Menlove (1837) low intelligence still liable for hay fire
  - BUT R2T §289(b): actor w/ "superior attributes" must use them

4. The Roles of Judge and Jury

a) Rules: B'more Ohio R. Co. v. Goodman (Holmes, 1927)

- π slowed but ≠ stop at train crossing, killed
- Rev'd π's verdict b/c contrib negl (failure to stop → own risk)
  - High std due care: stop car, get out, look
- Holmes (Common Law, 1870s): standard of conduct/due care
  - Jury Q when unclear, better derived "from daily experience"
  - Judge decide when frequently litigated issue
    - Predictability, foreseeability for litigants
    - Jury discretion → population bias (e.g. company town)
- Akin (p. 64, n.2): no liability foul balls if adeq backstop

b) Standards: Pakora v. Wabash R. Co. (Cardozo, 1934)

- π stopped, listened at obstructed train crossing, injured
- Rev'd Δ's directed verdict (based on Goodman), remanded retrial
  - Flexible – jury Q to determine contrib negl under circs
  - Rabin: "A kick in the pants for Justice Holmes"

c) Andrews v. United Airlines (Kozinski, 9th Cir 1994)

- π injured by falling briefcase from overhead bin – SJ for Δ
- Reversed for π under utmost care duty, remanded for trial
  - CA maintained utmost care by common carriers (cf. Bethel)
  - Δ's warnings indicated signif enough risk
    - Preventive measures (e.g. nets) not unreas'l
  - Carriers should keep pace w/ tech advances
- Legacy: settlement, no change in airline safety procedures
  - Take hit of litigation when B > PL (tort ≠ regulation)
- Brosnahan (8th Cir 1989): pot'l liability for failure to adeq'ly supervise boarding, stowage; USAir (9th Cir 1994): passenger + employer may be liable for negl stowage
- BUT Rouse (GA 2005): airline ≠ req'd to update non-defective equip w/ every new safety feature

d) Custom: Trimarco v. Klein (NY 1982)

- 1976 π tenant fell through outdated (since 1953) glass shower wall
- Δ admitted customary shatterproof glass installation since 1965
- π's verdict rev'd by div'd App Div: duty by specific notice only
- Court rev'd again for π – reas'l to find landlord customary duty to replace
  - Probative value of custom: bears on feasibility; reflects pop judgment
  - Conclusive only if jury finds custom reas'l in light of B, PL, benefits
- Like Carrol Towing: custom should control if bargees expected to stay aboard also at night
- The T.J. Hooper (2d 1932): reas'lness inquiry indep of custom (though influenced by) – whether sinking tugboat should've had radio despite custom
- Custom = persuasive of reas'l conduct, burden of adeq protection
  - Morris (1942): may eliminate jury Q
    - Put onus on π to prove better feasible alt
    - Weigh on reas'lness of Δ's conduct
    - Fixed costs of custom → social impact of adverse verdict
- LaValee v. Vt. Motors Inn (VT 1989): upheld Δ's directed verdict on slip/fall during power outage b/c custom ≠ emerg lights in rooms, despite lights elsewhere, persuasive re reas'l care
- Levine: splintering rope on dumb waiter → infection, amputation; evidence of smooth-rope custom admissible

- Safer, non-customary alternatives?
  - Garthe: unique technique for non-slip brewery floors admissible only to show knowledge of alt, but ≠ to suggest req'd alt
  - Aderson overhead bin netting, above

e) Statutes: Martin v Herzog (Cardozo 1920): per se negl

- Δ Car did not keep to the R of road, hit π buggy ≠ lights
  - Failure to have lights as req by law is per se N
  - Omission was "wholly unexcused" and thus also N.
  - Viol of stat has to be causally related in order for stat to control
- R2T §286: ct may adopt statute as std of care if its purpose is excl'y or in part
  - to protect a class of persons incl π
  - to protect the particular interest which is being invaded
  - to protect that interest against the kind of harm which has resulted
  - to protect that interest against the partic hazrd causing harm
- Sweet v Sisters (AK 1995): even if RST 286 criteria are met, ct retains discretion to refuse to adopt the law as the std of care.
  - E.g. if law is v obscure, unknown, outdated, or arbitrary so as to make it an unfair std.
- Tedla (NY 1939): junk collectors ≠ per se negl
  - Statute: walk facing traffic, but less busy/safer other side ≠ negl per se
  - How does ct dist Martin? Ct (disingenuously?) argues that this is not a "safety" statute, just a rule of the road.
  - Did Cardozo leave any opening in Martin? "unexcused viol" – so maybe an excused viol is not per se N. Here, pl had reason.
- Bassey car stalls mid hwy – driver gets out to investigate, he is standing in front of car on hwy ≠ statute, but there is an excuse.
  - Failure to comply w stat is N per se BUT there are escape hatches – if non-comp can be explained
  - E.g. driver's elec sys fail while on the road: ≠ unreas'l at CL, so why impose, effectively, SL? Driver was not substituting his own jdgmt
  - Q of law – whether stat applic'l to case at hand "stat purpose doctrine"
  - Ct's unwilling to use stat viol when the harm that occurred is diff from that the leg was apparently seeking to prevent.
  - Gorriss: sheep on ship not put in pens, washed overboard. Pens req by Contag Disease Act, but not applic here b/c dmg of this nature not comtempl by Act.
  - DiPonzio: car left idling at gas st rolled into π, but stat viol irrelev bc purp to prevent fires/explosion.
    - Some flex re purpose (e.g. DeHaen radiator fall constr shaft)
- Licensing: Brown v Shyne unlicensed chiropractor ≠ per se negl
  - Licensing ≠ safety purp
  - Rabin thinks this is reas'l (think of driver whose license expired a month ago) but this was overruled by NY leg.
- Compliance – cts reluctant to treat reg compl def as absolute.
  - Regs are often meant to set a floor, rather than an optimal level.
  - Latent danger challenge – Reg'y compliance should not be immunity.
  - Federalism issue – compl w fed reg insulate def from state tort liab?
  - Edwards: mfr's duty to warn consumer not nec satisfied by FDA min reqs – that duty is gov'd by the common law of the st.

5. Proof of Negligence

- π's BoP that Δ's conduct < std of reas'l care
- Evidence:
  - Real: documentary, photographic
  - Direct: witness testimony
  - Circumstantial

a) Sufficient: Negri v. Stop & Shop (NY 1985)

- Δ store floor mess of broken baby food bottles at least 15-20 min
- ≠ cleaning, inspection 1-2hr before accident
- π slip/fall, no evidence of hitting shelves on way down
- Reinstated π's verdict
  - π satisfied prima facie case: inference of dangerous conditions
  - If verdict against evidence, then new trial but ≠ dismiss compl

b) Insufficient: Gordon v. Am. Mus. Nat. Hist. (NY 1986)

- π slip/fall on Δ's museum steps, observed hot-dog-stand paper mid-air
- Rev'd π's verdict, dismissed compl
  - No evid of actual or constructive notice of condition
  - Constructive notice: 1) visible/apparent, 2) length of time
  - Insufficient:
    - Gen'l awareness of pot'l presence of litter
    - Observation of paper elsewhere
- Hypo: indep contractor defense? π alleging direct, not vicarious liability on Δ for duty to keep own steps clean/safe
- How could π have avoided dismissal?
  - Dirtiness of paper, but Faricelli black banana peel insuff
  - Track record, but Moody clean track record inadmissible
  - Would have to > probative value to > prejudice
  - Relevance: 1) subst'ly similar circs, 2) probative > countervailing
- Business Practices Rule: if continuous, foreseeable risk of harm, presumption of constructive/actual notice dangerous conditions
  - Response to self-service restaurants, com knowl "droppage/spillage"
  - Rebuttable presumption of liability → SL-ish

c) Res ipsa loquitor:

- π's case: 1) negl-type event, 2) negl was Δ's
- Δ moves for directed verdict
  - Accepted: case dismissed
  - Rejected: Δ presents rebuttal
    - Majority rule (NY): allowable inference of Δ's negl
    - Minority rule (CA): required presumption of Δ's negl

d) Byrne v. Boadle (Excheq. 1863)

- Flour barrel fell fr Δ's shop, hit π walking – dismissed for ≠ direct evid
- Rev'd for π: 1) negl-type event, 2) instrumentality w/in compl control Δ

- "If an article calculated to cause damage is put in a wrong place, then prima facie case of negl, Δ's burden to rebut presumption"
- Lasson v. St. Francis Hotel (CA 1948): dismissed π hit by chair thrown out of hotel window on VJ day 1945
- Cf. Connolly v. Nicollette Hotel (MN 1959): aff'd Δ liability for 2 days failing to correct rowdy convention guests, thrown object blinded π
    - Theory of case = notice ≠ res ipsa

e) McDougald v. Perry (FL 1998)

- Δ's semi spare (21yr after purchase) came loose, crashed into π's windshield
- Reinstated π's verdict, based on res ipsa
- Hypos:
    - Inference of negl directly proportional to length of ownership
    - Even if driving wheel came loose, still res ipsa case
        - 1) Negligence-type event, 2) Maint in Δ's control
    - Tire blowout harder b/c more common w/o negl by Δ
- R3T Liability for Phys Emo Harm §17: infer negl when accident ord'ly result of class incl Δ (omits exclusive control factor)
- Differing rules:
    - Inference rule (NY): may infer negl
    - Presumption rule (CA): rebuttable presumption
- Leonard v. Watsonville Comm. Hosp. (CA 1956): dismissed med mal case agst 1 of 3 docs b/c other 2 testified that he operated on different portion, used different clamps than kind left inside patient
- Abbott v. Page Airways (NY 1969): jury chg to find negl based on evidence or infer based on pilot's crash (some cts either evid or res ipsa, not both)
- Spoliation of evidence
    - MT: indep action, complex issues re intent'l vs. negl destruction
    - CA: rejected b/c same ends via trial sanctions (eg adverse inference agst spoiler) + fear of endless litigation
        - Breach of K to preserve evid allowed indep'ly
    - Unavailable trial sanctions if 3d party spoils evid
        - AK: 1st indep CoA for negl spoliation
            - Knowl of pending/potential litigation
            - Vol'y undertaking, agreement, or req'mt est'ing duty
            - Vitality of destroyed evidence

f) Ybarra v. Spangard (CA 1944)

- π appendectomy, anesthetized, traumatic shoulder injury
- Nonsuit for Δ b/c division of 1) responsibility, 2) instrumentalities
- Rev'd for π, remanded for trial:
    - Team effort under surgeon's leadership (~ resp superior)
    - Alt justification for res ipsa:
        - Trad'l (Prosser): more likely than not negl
        - Wigmore: some evid negl + Δ > access to info
- Sebseq: π's verdict v all Δs based only on circumstantial evid
    - Big step → SL; "unsettling resolution"

- Inouye v. Black (CA 1965): nonsuit aff'd b/c π sued only surgeon for unexpected fragmentation of surgical wire – cited Ybarra for group causation, but no other Δs to testify
  - BUT Chin v. St Barnabas Med. Ctr. (NJ 1999): aff'd π's verdict agst 4/5 Δs b/c appropriate burden shift: 1) blameless victim, 2) negl-type accident, 3) all pot'l Δs before court
- Fireman's Fund v. Knobbe (NV 1977): rejected Ybarra, aff'g Δ's SJ b/c π insurer unable to prove which smoking Δ caused hotel fire
  - Traynor (CA 1951): Ybarra risk unfair distribution liability: flower pot fall, pedestrian could sue entire bldg. – all liable unless ID guilty one
    - "Not one of Justice Traynor's better days"
- Dead witnesses → presumption rule
  - Judson v. Giant Powder (CA 1895): prop dmg suit fr plant explosion
  - Newing v. Cheatham (CA 1975): π's verdict after plane crash
- Rejection Ybarra: Barnett v. Emmanuel Hosp. (OR 1983):
  - Modern discovery makes < need for res ipsa approach
  - Res ipsa only when particular Δ's probability of causation
  - Other ways to protect unconscious πs (eg respondeat superior)

6. Medical Malpractice

a) Robbins v. Foster (DC Cir 1977)

- Compl agst bd-cert obstetrician
- Higher std of care: conformity w/ profession's common practice
  - Common practice est'd by expert testimony (trad'ly same/sim cty)
  - Judge's job to maintain objectivity: Klein (RI 1995): overturned Δ's verdict for prejudicing π in jury chg: "doc ≠ liable for injury if honest mistake or error in judgment"

b) Sheeley v. Memorial Hosp. (RI 1998)

- Δ 2d yr family practice resident; π injured after episiotomy (perineum)
- Granted Δ's motion to excl π's expert: retired NY OBGYN b/c ≠ fam pract
  - Precedent: Soares (RI 1993) misreading medmal law expert = field (there, excl neur/IM when Δ FP/EM)
- Rev'd for π, remanded new trial
  - Intervening decisions clarifying ≠ same specialty, as long as qualified
  - Overruled same/sim locality rule as outdated (leg'v silence deliberate)
- National/board standards:
  - Pro: > speed info, training
  - Con: still facilities limits, training, colleagues
- Arpin v. US (7th 2008): Δ 2d yr fam pract res failed to test for rare, treatable muscle disease that killed π – same std as exp'd doc
- Nat'l stds more likely if bd certified, eg Robbins: Δ holds self out as specialist accdg to nat'l, uniform stds – locality rule would ignore prof reality
- Sami v. Varn (VA 2000): exp witness "active clinical pract either in Δ's specialty or related field w/in 1yr of act/omission"

  - Waldt (MD 2009): disqualified retired docs, anyone >20% prof time as expert witness (prof time ≠ reading, peer reviewing)
- Gala v. Hamilton (PA 1998): gen'l vs. local anesthesia – upheld jury chg allowing dismissal if Δ found to follow "reputable and respected school of thought," even if unofficial, unacknowledged in literature
- Henning v. Thomas (VA 1988): reversible error to disallow Δ fr telling jury that π expert "doc for hire"
- Conspiracy of silence under same locality rule
  - 1961 survey: 30% surgeons would expert for removing wrong kidney
  - Ostracism fr local med community
- Expert testimony unnec'y if w/in "layman's common knowledge"
  - Eg leaving instruments in body, operating on wrong body part
  - May still hear custom, but ≠ conclusive
- Peters (2000): 12 states reject custom as conclusive; 10 more → reas'lness std

c) Res ipsa: Sides v. St. Anthony's (MD 2008)

- π put under for back surgery, E coli at site – dismissed for ≠ specific theory
- Rev'd for π, remanded to allow expert: res ipsa
  - 1962 Hasemeier: π died after birth surgery, insuff facts for res ipsa – later misinterpreted as precluding res ipsa expert in med mal
  - 1965 R2T §328D comment d endorsed b/c ≠ fund of common knowl
    - Adopted by "vast majority of courts and commentators"
  - Med mal prima facie case
    - π unable to show which acts → injury
    - All pot'l causes under Δs' control
    - Δ greater access to knowledge of cause
    - Med expert testifies res ipsa negl
- Hypo: even if 5/100 procedures fail, no res ipsa unless evid 50+% negl
- Some courts unwilling to allow res ipsa experts b/c inaccessible info based on non-obvious facts from empirical work, experience of expert
- Res ipsa experts currently limited to med mal (but why not construction?)

d) Informed Consent: Matthies v. Mastromonaco (NJ 1999)

- π, 81, previously mobile and indep, broke hip at home
- Δ recommended bed rest b/c frail, osteoporosis, stroke paralysis
  - π's expert: bed rest only for terminal, vegetative patients
  - Δ's expert: surgery would've < risk displacement, but brittle bones
- Δ's verdict: trial ct refused informed consent chg b/c noninvasive procedure
  - Rev'd on appeal for ≠ informed consent chg
- Aff'd reversal for π, remand for retrial
  - Informed consent: explain med'ly reas'l invasive and noninv alts, incl risks and likely outcomes, even if recommending noninvasive
  - Dvpmt of consent from battery → personal inviolability
  - "Physicians may neither impose their values on their patients nor sub their own level of risk aversion"
- Different objective standards:
  - Trad'l (NY): disclosure by reas'l med prof

    - Modern (NJ): disclosure that reas'l patient would want
- BUT PA still maintains battery analogy (invasiveness key)
- McKinney v. Nash (CA 1981): consent for hernia surgery w/ 1/1000 risk testicular atrophy, which happened, submitted as jury Q
    - Moore v. Baker (11th 1993): GA law req discl of only gen'ly recognized alts, not experimental
- Variability of medical error rates: solutions?
    - Twerski & Cohen (1992): award pro-rated damages
    - NYTimes (2000): national registry
    - CA: public access data
- False statements/omissions:
    - Howard (NJ 2002): false answers re experience, credentials weigh on informed consent, but left open aff'v duty
    - Duttry (PA 2001): false cl of # of operations irrelevant
    - Cleveland (GA 2000): no duty to disclose cocaine use
- Ashe (TN 1999): when ≠ given or expressed choice:
    - Subj std: indiv control of treatment (con: credibility of hindsight)
        - What would patient have expected to know
        - What would patient have done with info
    - Obj std: impossible to prove what π would've done
- Bernard v. Char (HI 1995): obj std + π's subj goals
- Twerski & Cohen (1988): alt dmg: dignitary harm by denial of decision rights
    - Avoid mitigation problem (inadmissible at trial), but how to measure?
- Many states have legislated written consent
- Troublesome aspects of informed consent doctrine:
    - Damages nuances (mitigation, harms avoided) ignored at trial
    - Credibility Q: totally reliant on π's, Δ's own versions/recollections
    - No way to judge what π would've done
        - Obj std inconsistent w/ indiv π
        - Obj std unintelligible given variance of indiv πs
        - Subj std vulnerable to hindsight bias, absence extrinsic evid
    - Rabin: gen'ly right principle, though difficult to admin, leave uneasy

e) Wrongful birth/life cases

- Negligent (ineffective) sterilization
    - Recovery sought:
        - Childbirth $ – all cts allow
        - Raising to adulthood – some liberal cts
        - Emo distress/hardship – reluctance
- Birth of unhealthy child
    - Recovery sought:
        - Economic loss – gen'ly allowed through adulthood
            - Actuarial challenges re life expectancy
            - Emo distress: Parent? Child? – reluctance b/c metaphysics

C. Cause in fact

- Usually uncontested at trial
- But-for/necessary condition – indep sufficiency not req'd
- Rinaldo v. McGovern (NY 1991): Δ's failure "fore!" too remote prevent injury to submit jury
- Tollison v. State (WA 1998): despite Δ's duty to disclose statute-mandated adoption info, π's admission that would've adopted anyway reas'ly broke causal chain

1. Stubbs v. City of Rochester (NY 1919): toxicity "reas'l certainty"

- Facts:
  - 5/1910 Δ municipal drinking, firefighting water lines mixed, sewage contam
  - 9/1910 π contracted typhoid
  - 10/1910 Δ city discovered contamination
- Rev'd dismissal, retrial b/c suff evid to est "reas'l certainty" of causation (>50%)
  - At least 8 causes typhoid (8th = unknown causes), some overlap w/ water
  - 4 med experts: contamination caused illness
  - Best avail evidence, despite pot'l confounders (milk, cyclical outbreaks)
  - No guarantee π wins – jury Q = reas'l either way

2. Probabalistic Recovery

- Rosenberg (1984): proportional liability for non-expected harm (eg if 10/58 residents expected to fall ill ea year, then ea victim 48/58 of award
  - Problem: ea victim undercompensated or windfall
- No pure emo distress, costs med monitoring

a) Simmons (PA 1996): 2-disease rule (majority)

- Eg 1st asbestos exposure, 2d lung cancer
- Emo distress only at time of 2d suit/disease
- Avoid unfair windfall to πs who won't dvp
  - Avoid depleting $ for actual present sufferers

b) Mauro (NJ 1989): full future damages if > 50%

- Threshold > 50% chance contraction (reas'l med probability)
- Avoid stale evidence later
  - Allow deterrence now

c) Dillon (IL 2002): pure proportional allocation

- No probability threshold, just allocate dmg proportionally

d) Legaly compensable harm (injury)

- Paz (5th 2009): beryllium exposure → benign immune sys response
  - ≠ impairment so ≠ conpensable
- Simmons (PA 1996): same for asbestos → benign pleural plaque

3. Multiple Sufficient Causes

- Anderson (MN 1920): substantial factor test

- 2 fires each but-for causes of home destruction
- If time delay, likely only recovery by suff cause 1st in time
- If one of sufficient causes non-negl, unlikely recovery from that actor

- Blasko (2d 1969): π blinded by 1 of 2 drugs (same Δ mfg), or combo
  - Suff cause b/c Δ's negl subst'l factor → harm
  - Penalize wrongdoing, deter future harm

a) Zuchowicz v. US (Calabresi, 2d 1998): "res ipsa" causation?

- Facts:
  - Δ naval hosp π Danocrine: 1mo twice max, 2mo max, stop
  - π dvp primary pulmonary hypertension 4mo later → wait list lung
  - π pregnancy ≠ transplant, died after birth
- Aff'd for π
  - Admissible:
    - Daubert (US 1993) trial judge's flex inquiry, incl sci method, peer reviewed, error rate, gen'ly accepted theory, etc.
  - But-for causation
    - Danocrine itself (non-negl): causal based on expert testimony
    - Overdose (negl):
      - Trad'l std: Wolf v. Kaufman (NY 1929): req direct evid
      - Modern: suff if 1) > % type harm; 2) type harm occurs
        - Cardozo: Martin v. Herzog
        - Traynor: Clark v. Gibbons (CA 1967)
      - Suff evid overdose → harm b/c FDA dosage meant to balance benefit > risk harm (retreat in Williams)
        - Bootstrapping negl issue in causation
      - Δ's possible retort: evid so rare
- Williams v. Utica Coll (2d 2006): aff'd SJ for Δ in student's suit alleging insuff security → sex'l assault in dorm b/c ≠ proof intruder (vs. resident)
  - Factors to prove causation based only on Δ's negl + inference
    - Circumstantial evidence
    - Parties' relative ability to gather evidence
    - Concerns re errors benefiting one party or other
- Trad'l view's aversion to "post hoc, ergo propter hoc"
  - Wolf v. Kaufman: Δ's judgment for π who fell dark stairs but but ≠ proof dark stairs caused fall/injury
  - But Hinman v. Sobocienski (AK 1991): rev'd Δ's judgment b/c "common experience" = dark stairs > risk fall, so when π falls, infer causation ("precisely the sort of thing")
- Epidemiology used in toxic cases > trauma cases
  - Estate Joshua T v. State (NH 2003): foster child's suicide – expert testimony if causal inference outside communal experience
- Why use Substantial Factor test?
  - Supplement but-for test when multiople sufficient causes
  - Some causes too insignificant to "count" (R2T §§431-32)
  - But rejected 3d Restatement

- June v. U. Carbide (10th 2009): haz waste uranium disposal – rejected subst'l factor test b/c nec'y ≠ suff ≠ pot'l cause
  - ≠ mult suff causes present

b) Daubert Rule: expert causation testimony

- Trad'l Frye test: req tecehniques gen'ly regarded reliable by sci community
- Daubert (US 1993): Benedictine morning sickness drug → birth defects?
  - Fed R Evid 702 easier admissibility std
  - Jud'l gatekeeping: inquiry incl sci orthodoxy, but also beyond
    - Fed judge "trauma" w/o sci bkgd?
    - Result: > excl b/c worry junk sci, prof experts
  - 4-factor test for relevance & reliability:
    - Scientific method?
    - Peer reviewed?
    - Error rate?
    - Gen'ly accepted?
  - GE v. Joiner (US 1997): std of review = abuse of discretion
- Kumho (US 1999): appeal of trial judge's excl expert test tire blowout
  - Breyer, upholding excl: expand Daubert to all tech/specialized knowl; flex/non-exhaustive list of factors
  - Scalia concur: unreas'l failure to apply 1+ Daubert factor would be abuse discretion
- B/c Daubert interp Fed R Evid, state cts may choose ≠ apply
  - Some states still follow Frye sci orthodoxy test

4. Matsuyama v. Birnbaum (MA 2008): Lost opportunity gastric cancer

- Facts:
  - Δ primary care doc treated π Jap smoker 1995-99, knew 10-20x cancer risk
  - π complained gastric pain since 1988, dvping moles
  - Δ didn't take symptims, tests seriously until 1999: confirmed gastric cancer
- Aff'd π's award for lost opportunity
  - Calculation:
    - At time of Δ's negl, π stage 2: 37.5% survival – after: ~0%
    - Full wrongful death = $875k; lost chance = (875k)(.375) = $328,125
  - Adopted by 20 states, rejected by 10
    - Origins in dissatisfaction w/ all-or-nothing trad'l tort
      - 51% survival? 100% recovery – 49% survival? Nothing
      - ≠ tort aims: risk allocation, deterrence, incentivize std care, compensation
    - Recognize injustice b/c Δ's negl → impossible counterfactual
    - Sig minority rejection: Fennel (MD 1990): confusing reliance on data
  - Injury theory, ≠ causation: > 50% but-for chance that Δ's negl caused drop in π's opportunity for better med outcome
    - Injury must have already occurred (≠ future risk, eg toxic torts)
    - Modern sci: > confidence outcome expectations
    - Complexities in all torts (eg life expectancy wrongful death)
  - Policy reasons to limit to med mal torts:

        - Reliable experts
        - Doc-patient relationship
        - Common < 50% survival
        - Power to prevent harm: doc > patient
    - Damage calc: (orig. – subseq. chance survival) x (total wrongful death)
        - Economic:
            - Med expenses: survival action
                - Weird possibility earlier detection < lost chance
            - Lost income: wrongful death action
        - Pain/suffering: full for learning of lost chance (~ false+ diagnosis)
            - Similar to negl infliction emo distress, esp if survive
- Loss of chance in Farwell friends fighting? Negl undisputed
    - Difference in causation: med profs vs. laypeople
        - Hardy v. SW Bell (OK 1996) ≠ loss of chance 911 operator
    - If > 50% chance survival, then trad'l tort liab (Farwell actually)
- Logical extension to probabilistic causation?
    - Rothman (NJ 1999): ER physician
    - Doll v. Brown (7th 1996): employment discrimination

5. Joint and Several Liability

- Joint liability alone:
    - Types of cases:
        - Concerted action (drag racing, blasting caps)
        - Concurrent action (2 fires, simult car accident)
        - Respondeat superior (vicarious)
    - Once joint liability established, allocate fault
- Basic doctrine
    - Eg 2-car collision (both drivers negl), 1 car onto sidewalk hits pedestrian
    - Trad'ly π recover entire amt from either/both Δ1 % Δ2
        - If either paid more than share, then cross-claim "contribution"
        - Δ's burden to pursue other tortfeasors
    - Ravo v. Regatnick (NY 1987): π brain dmg at birth
        - Jury: 80% OB's, 20% pediatrician's fault
        - Judge still allowed 100% recovery from either
            - % fault only relevant for cross-claim "contrib"
- Recent changes
    - Prorated contribution cross-claim based on relative fault
        - CL: ea Δ wholly liable full dmg
        - Today: factfinder assess % causation; apply fault statute
    - Qs of fairness when Δ w/ > fault insolvent
    - Leg'v responses
        - ~12 states abolished jt-sev liability outright
        - ~12 req threshold fault to apply (usually 50%)
        - Few, incl CA, allow jt-sev only for econ dmg
        - Some reallocate prorated share insolvent Δ to other Δs
        - Some retain only in specific types of cases
            - NY: driving, recklessness, environmental

a) Summers v. Tice (CA 1948): quail hunting

- Facts:
  - 3 friends quail hunting, 2Δs (both negl) fired same time, same gauge
  - π Summers (non-negl) hit in eye, source unknown
- Aff'd π's judgment: jointly liable whether acting in concert or indep
  - Ensure π recovery (policy > but-for accuracy)
  - Shift BoP causation to Δs b/c better positioned to know (~Ybarra)
    - Copley v. Putter (CA 1949): virtually simultaneous car accident; burden shift to Δs to prove his accident ≠ injury
- Same result even if more shots, more negl Δs
  - If non-negl, dismiss: Garcia (CA 1978): dismissed prods liab case where only 1 sword mfg negl, unable to ID which one
- Ybarra vs. Summers:
  - Summers stronger b/c all Δs clearly negl
  - Ybarra stronger b/c access to info re causation
- Timing may affect outcome, but-for causation
  - Dillon (NH 1932): boy fell off bridge, grabbed negl'y exposed wire
    - Ct: if killed anyway, sig'ly lower liability for exposed wire
- Causal apportionment
  - Loui v. Oakley (HI 1968): 8/61 accident
    - 3 more accidents before trial: 2/62, 11/62, 1/65
    - Jury instruction: rough apportionament of injuries caused by Δ's negl – if can't then = % ea accident
      - Recognize arbitrary, better than all dmg → 1Δ
      - Future solution: consolidate actions
  - Restatement: apportion liability based on causation
    - Challenge: relative fault ≠ always relative harm
  - Campione v. Soden (NJ 1997): followed Loui: divide dmg even if evid ≠ conclusive
  - Rejected in Gross v. Lyons (FL 2000): full liability unless Δ prove allocation (accidents 3mo apart)
    - Cox v. Spangler (WA 2000): 6mo apart – Δ's burden to unravel harms or pay full dmg
  - Non-tortious causes/pre-existing conditions
    - Rowe v. Munye (MN 2005): π's BoP Δ's causation above/beyond pre-existing condition

b) Hymowitz v. Eli Lilly (NY 1989): nat'l mkt share

- Facts:
  - 1941 FDA approved 12 mfg DES for non-preg illnesses
  - 1958 FDA approved DES to prevent miscarriage
  - 1971 FDA banned DES in pregnancy b/c birth defects → latent cancer
    - Problem: exposure at birth → 2yr SoL → 20yr latency
  - NY late to DES party b/c late leg'v DES SoL exception window
- Aff'd denial of SJ for Δs, despite impossible ID mfg
  - Insuff trad'l tort doctrines

        - ≠ Sumers v. Tice alt liability b/c here > # Δs, latency, Δs ≠ better info, ≠ all Δs at trial, unfair liability if < chance causation
        - ≠ Orser v. George (CA 1967): 2 Δs negl fired toward π; only 2 Δs same gun, Δ3 still liable b/c encouraged tortious behavior
            - ≠ concerted action (drag racing) b/c only here // activity
        - Enterprise liability: Hall v. EI Du Pont (EDNY 1972): small industry (6 mfg), industry-wide safety stds
            - Vs. large pharma industry, FDA oversight
    - Nat'l market share doctrine
        - Expanded Sindell (CA 1980), Brown (CA 1988)
            - CA law: several liability, dmg capped at % Δs at trial, nat'l mkt share
            - Here, prohibit Δ exculp
            - Approaching no-fault insurance scheme
            - Asymmetry: π may still prove Δ's fault, recov 100%
        - Rationale: mkt share as proxy for culp
            - ≠ causation b/c NY mkt ≠ nat'l mkt
            - ≠ risk to particular π b/c ≠ exculp
        - Abstract causation
            - Threshold: subst'l share of mkt at trial
            - Some πs < 100% recovery b/c ≠ all Δs at trial
- Dissent: joint liability + burden shift, exculp suff; no need for jud'l legislating
- Conley v. Boyle Drug (FL 1990): mkt share theory only last resort after π ≠ find specific source – even then limit mkt narrowly to > causal link
    - But Smith v. Eli Lilly (IL 1990): rejected any mkt share theory as incompatible w/ tort law
- Although logically/mathematically possible to index variable ingredients, even different prods, ≠ mkt-share approach to non-fungible prods

D. Proximate Cause

- "Proximate" misleading b/c ≠ strictly time, place, factual
    - R3T "scope of liability" instead

Characterization (Unexpected…)	**Limitation on Recovery**
…amount of harm (Benn eggshell π)	No limitation
…type of harm (Polemis, Wagon Mound)	Split: • Polemis: direct conseq • Wagon Mound: foreseeable
…secondary harm (Pridham ambulance)	Arise out of Δ's negl special risks
…intervening occurrence/superceding cause (Doe)	Scope of risk; foreseeable

…plaintiff (Palsgraf)	Split (Palsgraf maj, dissent): • Cardozo: foreseeable π • Andrews: direct conseq?

1. Unexpected Harm

a) Benn v. Thomas (IA 1994): ehhshell π

- Facts:
  - π Laura Benn fragile health (heart, diab), recent heart attack
  - Δ Thomas rear ended π: bruised chest, fractured ankle, died 6d later
- Aff'd rev'l trial judge's refusal eggshell π instruction
  - Eggshell π rule: liable for full injury, even though latent condition
    - Rule of both prox cause & dmg
    - Reject foreseeability limit gen'ly applied to prox cause
      - R2T §461: liable even though prior cond > inj
- Disputed cause in fact issue → jury Q cred med experts
  - Eg indep, imminent heart attack?
- Error b/c only but-for/subst'l factor instruction fail inform jury that accident could be prox cause even though other causes in fact
  - Subst'l factor (SF) ≠ req'd for eggshell π rule
    - SF only applied to CiF if simultaneous harm
- Steinhauser v. Hertz (2d 1970): 14yo minor car accident, ≠ inj, but precipitated schiz – allowed recovery although < dmg if evid schiz anyway
  - Bartolone v. Jeckovich (NY AD 1984): full recovery for exacerbation pre-existing schiz by acc b/c precipitated irreversible paranoid schiz
- Suicide: trend → liability
  - Fuller v. Preis (NY 1974): surgeon accident → seizures, + wife's polio paralysis + mom's cancer → π's suicide (w/ note re family windfall)
    - Still allowed recovery
  - Stafford (8th 1987): liable suicide after false diagnosis tumor
  - Zygmaniak (NJ 1974): liable assisted suicide quadriplegic
  - But Maloney v. Badman (NH 2007) ≠ liable b/c suicide superceding
- Emotional distress:
  - R3T full recovery even if ≠ foreseeable prior phys, mental harm

b) Pridham (NH 1976): secondary harm

- Δ liable for 1st accident + ambulance driver's heart attack → crash killing π
- Stoleson (7th 2003): Δ liable negl exposure chem even though π hypochondria exacerbated by bad med advice
  - Miyamoto (HI 2004): reas'lness/negl subseq medical advice irrelevant to liability for orig tort
- Foreseeability gen'ly irrelevant b/c CL corr-justice focus culp Δ, innocent π
  - Deserving π should recover for all injuries caused by wrongdoing Δ
- Wagner (NY 1922): Δ liable π's blameless fall during recovery from break Δ had caused

- Policy time/attenuation limit, even if cause in fact
  - At some point, reintegration into normal life
  - Proportionality negl-harm-recovery
  - Justifies ignoring negl/non of intervening actors

c) Polemis (KB 1921): all direct conseqs

- Δ charterer negl transfer benzene caused plank to fall into hold
  - Unexpected ignition fumes destroyed ship by fire
- Aff'd π's judgment despite ≠ foreseeability type of harm
  - If negl act, foreseeability of type of dmg irrelevant
  - "Exact operation" of conseqs irrelevant
- Smith v. London & S. Wales Ry: π recovery from Δ Ry's trimming hedges, raking piles, 2wk later fire spread to hedges & field, wind 200yd to π's cottage
  - Conseqs ≠ too remote for action

d) Wagon Mound (Privy Council 1961): foreseeable conseqs

- Δ Wagon Mound shipowners spilled furnace oil, left π's warf, Mort's Dock
  - π continued working on ship, 2d later, fire ignited, destroyed
- Rev'd π's judgment, overturning Polemis
  - Direct conseq only proxy for reas'l foreseeability (moral culp)
  - Liability based on conseqs/dmg, not negl act alone
  - Δ's orig negl = phys oil spill (≠ risk fire) – ct unwilling to bootstrap major fire damage onto relatively minor negl
- Wagon Mound II: other π shipowner docked at same warf allowed recovery b/c able to argue initial risk of fire from spill (warf owner barred by contrib negl – continued working despite spill)
- Type vs. extent of harm
  - Type: foreseeability limitation
  - Extent: eggshell π (≠ foreseeability limit)
    - Eg negl driver run over skid row "bum" who turns out to be NBA star?
- Zuchowicz: causal link important when A) but-for & B) prox time, space BUT ≠ reas'l > chance of harm
  - Eg Berry (PA 1899): speeding trolley smashed by falling tree ≠ liable for speeding despite but-for causation b/c ≠ > risk trees falling
  - ~ children darting out cases
  - Ventricelli (NY 1978): rental car co negl unsecured trunk, but ≠ liable for π's choice to park to fix, run over

2. Superceding Causes: Doe v. Manheimer (CT 1989): scope of risk

- Facts:
  - Δ landowner in dangerous hood, negl overgrown bushes
  - π meter maid attacked, dragged behind bushes, raped
- Aff'd trial judge's decision to vacate π's verdict/$540k award
  - Legal cause = cause in fact + proximate cause (distinct)
    - Assailant's premeditation = cause in fact
  - Proximate cause:

        - Subst'l factor test: same type of harm as foreseeable risk
        - Scope of the risk: R2T §442B may incl 3d party tortious/crim conduct if w/in scope of risk of Δ's negl conduct
    - Here, rape ≠ w/in scope of risk of overgrown bushes
        - Condition of land risks direct contact, injury
        - No past experience, common knowledge to associate negl overgrowth w/ risk assault (prior incident notice > chance, maybe jury Q)
- May be liable even if intentional intervenors
    - Hines v. Garrett (VA 1921): RR liable for rape after negl drop-off 18yo woman 1 mi past stop, told to walk through "Hobos' Hollow"
    - Addis v. Steele (WA 1995): Hotel liable for ≠ light, ≠ fire escape, despite arson, forcing πs to jump out 2d story window
- Influence of official accounting of relevant facts:
    - General accounting tends → foreseeable
    - Specific accounting tends → unforeseeable
    - Eg Hines v. Morrow (TX 1921): peg leg in hwy pot hole + rope tow
    - Eg Phan Son Van v. Pena (TX 1999): Δ store ≠ liable for rape, murder of girls by gang mbrs to whom sold beer
        - Foreseeable = drunk driving ≠ gang initiation, murder
- Comparative fault/negl
    - Barry v. Quality Steel Prods (CT 2003): ≠ indep significance for prox cause by intervening conduct if injury w/in scope of risk of Δ's negl act
    - R3T §34: even further: even int'l intervenors irrelev if w/in scope of risk
    - But Exxon v. Sofec (US 1996): π's superceding contrib negl may bar cl even though 3d party superceding acts would not
        - What about comparative negl schemes?

3. Unexpected Victim: Palsgraf v. LIRR (NY 1928)

- Facts:
    - Δ station gds (negl?) pushed running man onto train, dislodged pkg
    - Pkg = fireworks, explosion knocked scale onto/near π 25ft away: inj, scared
- Cardozo rev'd π's judgment b/c unforeseeable π
    - Δs' duty to man/pkg, not to π (must est duty before examining causation)
    - Privity? π's CoA must derive from direct wrong Δ → π
    - Committed to broad rule (lawyers ≠ duty, prox cause args)
- Andrews dissent: proximate cause analysis
    - Negl = unnec'y risk t others = liability all prox consequences
    - Gen'l duty of care – only Q: whether w'in scope of risk of Δ's coduct
    - Causation analogized to stream
        - Prox cause as legal construct: set policy lim analysis
        - Obj std of reas'l/foreseeable conseqs
    - Prox cause as common-sense std, hard to set rule: subst'l factor, direct connection, attenuation, likelihood, foreseeability, remoteness in time/space
    - Here, Δ's act wrong/negl, so jury Q whether prox cause π's injuries
- Rescues:

- Wagner v. Int'l Ry. (NY 1921): RR liable for injury to vol'y rescuer who accompanied conductor b/c "danger invites rescue" – peril + rescure = single transaction, & rescuer's deliberation vs. impulsive choice irrelevant
- But Moore v. Shah (App Div 1982): son ≠ recover for kidney donation rescue after doc's malpractice on dad – all kidney cases denied

E. Defenses

1. Contributory Negligence

- Prevailed 1800s – late 1960s, now small minority of jxs
  - Elements // Negl claim, except π's duty of care → self
    - π's conduct must be causal (eg Hightower (OR 1977) π's following too close ≠ bar b/c Δ's sudden slow → inj even reas'l distance)
    - Proximate causation (eg π warned ≠ stand on high, shaky platform; does anyway; Δ's wall collapse; π causal but ≠ prox cause)
  - Burden orig on π to prove ≠ contrib negl (Brown v. Kendall)
    - Today, Δ's burden to assert, prove as defense
- Statutes
  - Protect πs unable to protect selves: Chainans v. Bd of Ed. (NY 1995): school bus law req drivers teach kids how cross, flash lights, wait – purpose = protect kids own negl, so ≠ contrib negl defense
  - Limited application: Feisthamel (NY 1982): < ½ dmg for state's statutory failure mark glass enclosure revolving door b/c 9yo contrib negl for walking through it
    - Dissent: purpose = protect all agst unmarked glass
- CL complete bar to recovery
  - Clean-hands notion of "deserving" πs
  - All-or-nothing approach of CL (eg cause in fact, prox cause, eggshell πs, jt and severable liability) – judge's retention of authority
  - Perceived admin difficulty of measuring degree of fault

a) Exceptions: reckless Δ; last clear chance; imputing

- R2T §500: reckless Δ, unless π also reckless
- Δ's last clear chance: Davies v. Mann (1842): π tied donkey mid road, Δ should have noticed helpless condition
  - Variations:
    - Helpless π, Δ able avoid harm by due care
    - Inattentive π, Δ aware of π's inattentiveness
  - R2T §§479-80 chronological aspect: Δ's ability, time to avoid harm
- Refusal to impute contrib negl
  - Eg respondeat superior, derivative actions
  - 19th C peak imputation, now overruled:
    - Driver → passenger
    - Parent → child
  - Today only ltd areas: consortium, wrongful death
    - 50/50 split re bystander emo distress
- Jury's role: trad'ly soften all/nothing approach by submitting jury Q

- Assumption jury would < dmg award instead of outright bar
  - Must be close case
- But Alibrandi v. Helmsley (NY 1970): comfortable but false for bench-trial judge to imagine comparative jury award in contrib jx, despite univ ack'mt jury practice
  - Q of law = law only = total bar in contrib negl jx

2. Comparative Fault

- Reluctance to reform via jud'l action: FL, IL, CA (legislatures followed)
- All other states adopted via legislation: integration w/ other issues (eg contribution)

a) Pure: Uniform Comparative Fault Act

- Proportionate fault/recovery, even 1% (~12 states)
- Joint and several liability: insolvency pro-rated reallocation
- No setoffs: independent recovery
- Special features: Abolish last clear chance; recklessness > fault; includes strict products liability; imputation of negl (respondeat superior) applies; includes assumed risk

b) Modified < 50% ("not as great as")

- Proportional liability if π's fault < 50%
- Several liability: no reallocation

c) Modified ≤ 50% ("no greater than")

- Proportional liability if π's fault ≤ 50%
- Several liability: no reallocation

d) Fritts v. McKinne (OK 1996)

- Fritts drunk-driving accident (driver?) → broke all facial bones
  - Δ surgeon failed tracheostomy → π bled to death
- Trial evidence π's alcohol abuse, drunkenness → jury instruction
  - Rev'd for prejudice (should have bifurcated longevity effects)
    - Gen'l prohibit patient's negl orig injury (irrelevant)
    - Exceptions: conceal med history, false info condition, fail follow med advice, delay recommended treatment
- Reconcile w/ avoidable consequences reduction? Whether π's negl increased risks associated w/ Δ's conduct (no difference whether drunk or beaten)
  - Avoid deterring med care certain patients
- Even conscious creation of risk irrelevant in med context
  - Eg Harding v. Deiss (MT 2000): π horse allergy, still went riding
  - Eg robber w/ bullet wound fr police evasion – avoid undermining doc-patient relationship – doc takes patient as he arrives
- Resurrection of last clear chance doctrine? Helpless π, Δ last chance to fix
  - Eg π's negl driving disables car mid-hwy; Δ's negl speeding crashes into π – distinguishable b/c Δ in unfamiliar/unforeseeable position (vs. doc's business of dealing w/ difficult injuries)

- Δ in Fritts argued weakened artery fr π'sactions
- Wolfgang (10th 1997): racetrack owner liable for add'l injury caused late extinguishing – π's negl driving irrelevant

e) Avoidable Consequences

- π's duty to mitigate avoidable consequences of injury (eg med care)
  - Even if Δ 100% fault, may still < π's damages
- Tension
  - Why should negl Δ impose different lifestyle on π? (Autonomy)
  - Why should victim's idiosyncrasy be subsidized by Δ?
- Religious refusal med treatment worsening condition
  - Munn v. Algee (5th 1991): duty med care even if ≠ religion
  - Critiques: ~eggshell π; "reas'l believer" std?
    - Depends on view of religion: choice?
- No duty to assume more risk (eg surgery): Hall v. Dumitru (IL 1993)
- Synergistic effects, eg smoking worsening effects of asbestosis
  - Champagne (CT 1989): lessened award by 75%
  - Tanberg (IA 1991): found π 70% fault back inj failure lose weight doc's orders (no recovery IA law b/c > 50%)
  - Practical reality: asbestos mfg never joined tobacco mfgs, because tobacco refused ever to settle, high litigation fees
- Anticipatory avoidable consequences: seat belts, bike helmets
  - Trad'l reluctance pre-injury
  - Changes in culture > willingness of courts to ascribe contrib negl
  - High damage differentials: broken wrist vs. broken brain damage

3. Express Assumed Risk

- Exculpatory/hold-harmless Ks (freedom K, consumer sovereignty):
  - Popular until mid-1960s invalidations (hospitals, leases)
    - Tort liability ~ compulsory insurance policy
      - Pass ins costs to customers
  - Qs:
    - Enforceable given type of activity?
    - If enforceable, sufficiently clear?

a) Tunkl (CA 1963): paternalistic invalidation factors

- Unenforceable if affect public interest adversely
- 6 factors:
  - Business type ~ public regulation
  - Important public service (med, housing, banking, etc)
  - Open to the public
  - Essential nature, economic setting → bargaining adv
  - Std form/adhesion K
  - π's person/prop under control of Δ

b) Hanks v. Powder Ridge (CT 2005): increased paternalism

- p459 Δ snowtubing run open to public (> 6yo or 44") – π father broke ankle
  - Claims:
    - Theory Δ's negl = design defect of run
    - K exculp cl (1) unclear, (2) unenforceable
- Trial SJ for Δ under Hyson (CT 2003): suff'ly clear K
- Rev'd for π b/c unenforceable, despite clarity
  - (1) Suff clarity
    - Default ≠ release liability unless express, clear
    - Hyson: same resort, unclear K ("inherent and other risks")
      - ≠ mention Δ's negl
    - Here, "all risks…even if due to Δ's NEGLIGENCE"
  - (2) Unenforceable (minority view): Tunkl factors imp but ≠ dispositive
    - Here, recreation = essential; econ transaction; Δ's care/control; π's < knowl/exp/auth; adhesion K (≠ ins option); barg pwr
    - Family activity, avoid allowing opt-out duty care
    - Enterprise liability: corp should bear costs
    - Rabin: ct's narrow holdin, open Q facts other cases, troublesome ≠ future guidance (p463 totality circs)
- Dissent: Tunkl factors dispositive
  - 4 factors for Δ: ≠ regulation; < importance public service; ≠ essential activity; ≠ Δ control over π's person/prop
  - 2 factors for π: open to public; adhesion K

4. Implied Assumed Risk

- History: principal defense (along w/ fellow servant rule) industrial accidents
  - Virtually impossible employee recovery for employer's negl
  - Workers' Comp movement early 20th C
- Arose more frequently after invalidation hold-harmless agreements

a) Murphy v. Steeplechase Amusement (NY 1929): "The Flopper"

- p470: Coney Island "The Flopper" – π fractured knee cap inclined treadmill
  - π's theory Δ's negl = sudden jerk (≠ insuff padding)
  - π's judgment aff'd on appeal
- Court rev'd for Δ b/c fall "was very hazard that was invited and foreseen"
  - "One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious & nec'y…The timorous may stay home."
    - Different if obscure, unobserved, "so serious", many accidents
    - ≠ prima facie negl b/c inherent risk
  - If jerk had caused mult injs, may have implied malfunction → stronger case: "trap for unwary"
    - If 1/3 broken bones & info posted at entrance & prior observation – dispute re recovery despite notice
      - ~ Tobacco warnings, πs recover in some states, depending on finding comparative negl
- Knight v. Jewett (CA 1992):
  - Crawn v. Campo (NJ 1994):

- But Lestina (WI 1993):
- Davidoff v. Metro. Baseball (NY 1984): spectators assume obj risk injury
  - Non-actionable risks inherent to game
  - Hypo: foreigner, baby injured? Likely no recovery, under obj std
    - Rationale: not unreasonable to put on game w/ risk fly balls
    - Imposing duty would < satisfaction of game
  - Legislation (IL, CO): carve out if hit behind defective net, Δ's reckl

b) Davenport v. Cotton Hope (SC 1998)

- p475: π tenant 2mo report broken stair lights to mgmt; still used (2 alts); fell
  - Δ's negl: failure light – π's negl: use dark stairs
  - DV for Δ b/c either assumed risk, π > negl than Δ
- Rev'd for π, remand new trial b/c ≠ bar unless π's fault > Δ's negl
  - Express Ass'd Risk: contract law
  - Primary Ass'd Risk: quasi-defense b/c duty issue
  - Secondary Ass'd Risk: Δ prima facie negl, π's knowing assumption
    - Absolute bar inconsistent w/ comparative fault (~WV)
      - Only GA, MS, NE, RI, SD, when π voluntary
    - UCFA §1(b) "fault" incl sec'dy assumed risk
      - ≠ express, prim'y assumed risk b/c ≠ π's fault
    - Sec'y "Reas'l" Ass'd Risk: π non-negligent
      - Eg only stairwell available
      - Run into burning bldg. to save baby, not hat
        - Boddie v. Scott (MD 1999): burning pan
- Any utility assumed risk doctrine? Probably not, since overlap other areas
- Firefighters/police rule: bar recovery if professional duties
  - No good explanation/rationale; all circular
    - Δ taxpayer made to pay twice
    - Already generous 1st-party benefits – but so do others
    - Job π was hired to do – circular (bizarro Fritts)

5. Preemption

- Crossroads/tension btwn fed/state admin regulation and tort
  - Regulation: gen'ly single duty (unless no-fault ins/compensation scheme)
  - Tort: double-duty regulation + compensation
- Preemption rooted in CL regulatory/statutory compliance defense, but distinguishable
  - Compliance usually admissible, but not conclusive
  - Compliance defense based on argument for jud'l deference
  - Preemption based on Supremacy Clause – Const'l mandate

a) Express Preemption: Cipollone v. Liggett Grp (1992)

- Pub Health Cig Smoking Act 1965
- 1969 Tobacco Warning Act: fed labeling conformity
- Foundational case on express preemption – esp CL failure to warn
  - Cong'l intent: "requirements" preempts
    - State regs
    - State tort suits, too

        - Fraud suits allowed to continue (πs' lucky break)
        - Sensibility of preemption:
            - Second-guessing regulators, Congress → inconsistencies
            - Epstein: agency stamp approval = end of story
            - Contra Kessler (ex FDA head): preemption only if explicit
            - Rabin (middle ground): latent risks/new evidence, fraud
                - Recognize limits on agency resources/foresight
                - Allow preemption if tort would repeat agency inquiry
    - Questionable foundation: "no requirement or prohibitions"
        - Whether state tort law = requirement, despite sole remedy in damages – free to pay > comply
            - Majority found state CL = req'mt
    - Medtronic v. Lohr (2001): pacemaker approved as subst'ly equiv
        - Refused preemption b/c subst'l equiv < premkt approval
    - Bates v. Dow Agrosciences (2005): agency regulation/directive
        - Fed Insecticide, Fungicide, Rodenticide Act – but FDA "req" only = inadeq label, ≠ design defect
    - 2000: 4 tort preemption cases

b) Express Preemption: Reigel v. Medtronic (US 2008)

- p489: Food Drug & Cosm Act – Med Devices Ams. 1976 after IUD deaths
    - Preemption clause
    - Premarket approval (+ 510k grandfathering "subst'lly similar" prods)
- Δ's Evergreen Balloon Catheter: π's doc improper use → rupture
    - State-law prods liability suit in NDNY dismissed b/c preempted (aff'd)
- SCOTUS (Scalia)
    - MDA premkt approval (but ≠ 510k) = specific req'mt
    - State common law = "req'mt" under MDA, so preempted
        - Consistent effect state positive law, CL
        - Cong'l intent: cost-ben analysis
    - Rule: if agency has issued directive after detailed analysis of risks & tort suit would re-raise same issue of risk, then preempt tort suit
        - Q: new evidence of risks post-approval? Should be carve out
        - Q: fraud by Δ? Should be carve out
- Dissent (Ginsburg)
    - Federalism – presumption ≠ preemption:
        - Req Cong's clear, express intent
        - Heightened scrutiny if trad'l state-law area, like health/safety
        - Avoid preemption if ambiguity
    - Cong'l intent: safety
        - Absurd: > regulation but < liability
        - Intent to preempt state premkt approval, not tort suits
        - Analogy to ≠ preemption FDA-approved drugs
    - Maintain relevance FDA approval in tort suits
        - Δ's defense conflict btwn π's theory & FDA approval
        - Regulatory compliance as important (but ≠ dispositive) factor
- Mensing v. Wyeth (8th 2009)
    - Hatch-Waxman Act: generic labeling = brand-name

- Generic mfg's liability shield? 8th: no preemption
  - SCOTUS (PLIVA v. Mensing (2011)) rev'd: preemption
    - Policy interest in cheap generics

c) Implied Preemption: Wyeth v. Levine (US 2009)

- p501: prescription drugs under FDCA (silent on preemption)
  - π anti-nausea drug, improper IV push artery → gangrene, amputation
  - Tort suit: insuff warning label (20 ~ cases)
    - Also agst hosp for nurse's negl → settled
- State jury award $7.4M, aff'd by VT S. Ct. (FDA = floor)
- SCOTUS aff'd for π, rejecting Δ's implied preemption args:
  - State req'mts to change label reconcilable w/ FDA "change being effected" post-change-approval procedure
    - Δ's burden clear evid FDA wouldn't have approved change
  - No frustration Cong'l purpose b/c ≠ Cong'l intent preempt drug claims
    - Breyer: Cong knew how to write in preemption
    - Thomas: Implied preemption ≠ Const'l Supremacy Cl
  - Δ's preemption defense must est agency affirmative action/inaction
- Dissent: FDA consideration of IV push, found ben > cost
  - Juries ill-equipped cost-ben that Cong delegated to FDA
- Buckman Co. v. Plaintiffs' Legal Cte. (US 2001): state-law fraud claim agst mfg in FDA approval impliedly preempted by FDA auth police compliance – fraud to agency (vs. public)
- Mason v. SmithKline (7th 2010): π's suit for suicide risk label antidepressants dismissed by FDA preemption, aff'd, b/c Δ failed burden clear evid FDA would've disapproved proposed change

d) GM/Chevy Cobalt ignition recall, Congressional NHTSA hearings

- NY Times, April 5, "Minding the Minders of G.M."
- http://www.nytimes.com/2014/04/06/business/minding-the-minders-of-gm.html
- Tort suits as impetus after GM, agency inaction
- No real preemption issue b/c NHTSA = patchwork regulation, gen'l safety directives, ≠ FDA premarket certification
  - Alt issue: GM's liability after bailout reorg ltd to fraud

6. Statutes of Limitation

- p505: SoL = aff'v defense (Δ must plead, prove)
- Rationales: Accuracy (≠ faded memories, stale evidence); Repose of pot'l Δs
  - Also less-deserving πs?
- Torts SoLs typically 2-3yrs – clock typically starts upon "accrual"/injury
  - Toll (pause) eg minority of child victim, Δ's fraud conceal material facts
- Right to file suit
  - Traumatic injury: after phys injury
  - Toxic harm: depends, eg Griffin v. Unocal Corp. (AL 2008): π chem exposure at work, 10yrs later leukemia, death

- Rev'd dismissal for SoL (2yr after last exposure) & implemented "discovery rule" – begin clock w/ symptom
  - Cts vary what = discovery

STRICT LIABILITY

F. Traditional

- Alt views of historical dvpmt
  - Pendulum-like dvpmt: trespass/SL → negl → SL
  - Rabin (1981): pre-negl era = no liability unless specific writs, case, exceptions
    - Industrial era tension: negl vs no liability
      - Bars to recovery: fellow-servant, assumed risk, contrib negl, privity
        - Standalone emotional distress, economic loss
        - Sovereign/Government immunity
        - Floodgates concerns
      - Baseline no liability unless exception, eg ultrahazardous activities
    - Clashing regimes:
      - Contracts vs. Torts (eg privity)
      - Property vs. Torts (eg extend landowner liability only to invitees)
    - Negl fault doctrine 20th C dvpmt in tension w/ no liability
      - Earlier cases = duty strangers, eg Brown v. Kendall
      - Relational cases slower to dvp → claims explosion industrial era
        - Responses: Workers comp; MacPherson SL
- Both more ancient (trespass) and more modern (prods liability) than Negligence
- Never completely eliminated: trespass, blasting, defamation
- Late-20th-C resurgence: prods liability
- Classic tort-law tension: strict or negligence-based liability? (pp. 530-50)
  - Moral bases for SL
    - Must be responsible for overt, direct injury to innocent victim
      - Would sweep more broadly, eg fellow drivers & peds equally
    - Bear costs of imposing non-reciprocal risks (eg blasting)
      - Thus, if reciprocal risks, victim must prove fault
      - But what about non-reciprocal risks by doctor, airline, slip/fall in store, etc, which require proof negligence?
  - Economic bases for SL (Calabresi, 1970, The Costs of Accidents)
    - Safety/Deterrence:
      - Force mfgs to internalize accident costs, incentivize safety
        - Coaseian perfect information unavailable
      - Why SL > negl?
        - Cheaper to decide by category (mfg class) vs. case by case
          - Unless more cases brought
        - No oppy for Δ to underinvest in safety in hope of judge/jury's B > PL mistaken calc – irrelevant under SL
        - SL more dynamic than negl: incentive to continue improving safety/efficiency even when B > PL
    - Enterprise/risk spreading:
      - Mfg can pass costs to consumers, while victim would foot whole bill

        - But not so broad as public insurance/taxing
    - Sometimes conflict in w/ deterrence rationale
        - Hypo: if employee's self-protection = cheapest avoid injury
            - Safety: bar employee by assumed risk
            - Risk-spreading: compensate employee to spread risk
- Implications of SL
    - Economic analysis assumes equal bargaining power/distribution of resources
    - But wealthiest Δs best able to respond to incentives req'mt, deal w/ distr resources
        - Eg price-incentives effects greater on poor
    - Spreading risk may encourage substitution riskier prods/activities (freeriding?)
        - Eg from safer autos to riskier motorcycles

1. <u>Rylands v. Fletcher</u> (Exch. 1866; H.L. 1868): haz land use

- Principle: if harm between 2 innocent parties, allocate loss to causal actor
- (p507) Facts:
    - π Fletcher tenant coal miner
    - Δ Rylands nearby cotton mill – reservoir water escaped, flooded π
        - Latent land defect (ancient mining shafts): fault ≠ Δ = Δ's engineers
            - No indep K'or VL until <u>Bower v. Peate</u> (1876)
- Trial for Δ b/c ≠ negligence
- Exchequer (1866): rev'd for π under SL
    - (1) J. Blackburn (p509) "person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural conseq of its escape."
        - Eg cattle owner obliged to prevent escape
        - Distinguish from "hwy" cases requiring negligence – assumption risk
            - Conclusory? Reflect idea of home as castle?
        - Hypo: If escaping water inj hwy traveler?
            - If π had been down in mine & injd?
            - Restricted to harms to adjacent land, landowner(s)
- House of Lords (1868): aff'd for π
    - (2) L. Cairns: (p512) natural user ≠ liability
        - Non-natural use & "not the result of any work/op on the land" = SL
            - How narrow is non-natural use?
        - (p515) <u>Rickards</u> (1913): "some special use bringing w it > danger to others & must not merely be the odr'y use of the land or such use as is proper for the gen'l benefit of the community."
    - (3) L. Cranworth: SL if "brings or accumulates" anything dangerous if escape
- <u>Losee v. Buchanan</u> (NY 1873): "strong cautionary note" – attachment to negl
    - (p513) Δ's steam boiler exploded, rocketed onto π's prop, destroying bldgs
    - Rejected <u>Rylands</u> SL b/c industry essential to civilization
        - Gen'l antipathy to SL b/c impede growth/progress
        - In crowded, industrial society, limit to liability = fault
    - <u>Losee v. Clute</u> (NY 1873): boiler explosion ≠ mfg b/c end user test (≠ privity)
    - <u>Brown v. Collins</u> (NH 1873): SL would penalize progress/improvement
- <u>Turner v. Big Lake Oil</u> (TX 1936):

- (p514) "Natural use" depends on circumstances
- Rejected Rylands: arid W TX, natural to store water in tanks, ponds, lakes

- Cities Serv. Co. v. State (FL 1975):
  - Δ's phosphate rock mine dam broke, 1B gal slime into river
  - Applied Rylands: crowded society, must protect neighbors from risk
- Ventron (NJ 1983):
  - (p515) Δ mercury pollution highest concentration on Earth
  - Applied Rylands: toxic-waste storage = SL

2. Sullivan v. Dunham (NY 1900): blasting cases

- (p516) Facts: Δ landowner, K blasters dyna 60ft tree – killed π on hwy 400ft
- Trial: π's verdict after SL instruction
- Aff'd for π b/c "safety of prop gen'ly is superior in right to a particular use of a single piece of prop by its owner"
- Hay v. Cohoes Co. (NY 1849): Δ blasting canal on prop, rocks dmg π's house
  - π's judgment on SL: use of own land ltd by > right neighbor's poss'n
  - St. Peter v. Denison (NY 1874): SL for Erie canal blast, rocks onto π @work
  - Heeg v. Licht (NY 1880): SL for dyna storage/acc'l explosion on prop
- Blast cases: debris vs. concussion
  - Distinction based on trespass (direct) vs. case (indirect)
    - Booth v. Rome (NY 1893): debris (SL), concussion (negl)
    - Rabin: "A suspect/dubious distinction": un/intent'l?
  - Eliminated in NY in Spano v. Perini Corp. (NY 1969)
    - Q ≠ whether blasting proper, but = who should bear dmg costs

3. R2T §520 SL for "Abnormally Dangerous" Activities

- (p520) Six-factor test for "abnormally dangerous" activities
  - High degree of risk
  - Likelihood of great harm
  - Reas'l care ineffectual
  - Uncommon activity
  - Inappropriate locale
  - Countervailing public value

4. Ind. Harbor Belt R. Co. v. Am. Cyanamid Co. (7th 1990)

- (p520) Δ La. acrylonitrile mfg (textiles): train to NJ plant via Chicago
  - Spill at π's switch: $1M cleanup
- Trial SJ for π on SL (dismissed negl cl)
- (Posner) rev'd for Δ on SL, remand for trial on negl
  - Guille v. Swan (NY 1822): hot-air balloon land NYC veg garden – §520
    - (1) High risk of (2) great harm; (3) ≠ effect reas'l care (technology); (4) uncommon; (5) inappropriate location; (6) insuff value to comm'y
    - Rabin: bad example case – relocate activity factor more like negl
      - Posner's analysis of Cyanamid could've applied to Guille
  - §520 SL as incentive to change/stop activity when reas'l care ineffectual
    - Eg blasting, dyna in resid'l areas (try wrecking balls)
  - Negl sufficient deterrence here (reas'l care maintain fittings)

        - § 520 "abnormal dangerousness" → activities ≠ substances
        - 124 other hazmats on RRs (acrylonitrile = 53d) – extend to all?
        - Due care would've < risk
            - Alt: reject common carrier immunity from negl claims
            - Alt: disallow homes near dangerous rail yard
        - Impossible to avoid all metro areas in hub-spoke rail sys
    - Siegler v. Kehlman (WA 1972): Δ's gas truck trailer loose hwy, π crashed, fire destroyed all evidence – res ipsa > SL?
- Shift in modern SL cases: moral → economic/enterprise liability rationale
    - 19th C moral cases: land use, blasting ("sic utere")
    - 20th C Restatement approach: abnormally dangerous activities
        - (p528) Chavez v. S. P. Trans Co. (EDCA 1976): gvt bombs exploded on train (Interstate Commerce Act: carrier no choice but to transport)
            - Under moral/fairness rationale, ≠ SL when carrier no choice
            - Under econ/enterprise liab, Δ SL b/c can pass costs to public
                - More efficient allocation resources
- Whether ultra-hazardous activities = logical stopping point?
    - Loss-allocation to causal actor/enterprise rationale can be extended beyond ultrahaz activities to, eg, gen'l products liability

G. Products Liability

1. Manufacturing Defects: SL

a) MacPherson v. Buick Motors (NY 1916): privity unec'y for negl

- (p551) Component wheel mfg → Δ auto mfg → retailer → π customer
    - Defective wood wheel crumbled
        - Tort Story: π's negl driving on gravel road, crash into pole?
            - π had put 15k mi carrying heavy cement road markers
    - π's theory: Δ could've reas'l inspection (≠ fraud)
        - Tort Story: inspection may have been useless, counterprod'v
- Doctrinal development of mfg liability
    - Winterbottom v. Wright (Eng. 1842): privity bar to recovery: Δ mail-coach K'or ≠ liable to π passenger for latent mfg defects
    - Exceptions for inherently dangerous prods:
        - Winchester (NY 1852): mislabeled poison = retailer ≠ mfg
        - Loop (NY 1870): ≠ circular saw, to lessee
        - Losee v. Clute (NY 1873): ≠ steam boiler (end user testing)
        - Devlin (NY 1882): painters' scaffolding
        - Statler (NY 1909): coffee urn
            - Torgesen (NY 1908): same for soda water bottler
- Holding: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, then it is a thing of danger"
    - And knowledge of probable danger
    - And knowledge that probable course of events danger beyond buyer
        - Then duty of care to end users irrespective of privity/contract
    - Shift from K duty to [tort] law breach

        - Absurdity of privity in retail-dealer context: retail seller party least likely to actually use product
    - Why adopt probability of danger doctrine? Unclear from opinion
        - Growth of enterprise? Enterprise risk? Highway safety?
        - New era announced in CL style: appearance of consistency
- Smith v. Peerless Glass (NY 1932): applied MacPherson to component-part mfg, soda bottle-maker
- Warranty law: Ryan v. Progressive Grocery (NY 1931): pin in bread loaf
    - Step beyond MacPherson negl: SL by warranty merch quality

b) Escola v. Coca Cola (CA 1944): res ipsa or SL?

- (p557) Soda bottle broke in π waitress's hand
- Aff'd π's judgment
    - Gibson majority: res ipsa negligence under MacPherson
        - Δ mfg used bottles, too
        - Either excessive charge or defect glass discoverable
        - Δ's exclusive control
    - Traynor concurrence: SL for defective prods
        - Enterprise liability: pass costs to public
        - "Needlessly circuitous" negl fiction
        - MacPherson negl logic extended to SL: shift K → tort
        - Analogy to SL in food prods
        - Limit: normal use, defect upon introduction to market
- Warranty: Henningsen v. Bloomfield Motors (NJ 1960)
    - Steering column defect → SL
    - Stream of commerce = implied warranty merch quality
    - Reject express liability disclaimers in adhesion form Ks
- Subseq CA dvpmts → SL prods torts
    - Greenman v. Yuba Power Prods. (CA 1963): aff'd π's judgment agst Δ mfg defective lathe (wood loosed, struck π)
        - Abandon warranty theory, predicated on notice
        - Avoid artificial invalidation std warranty disclaimers
        - Avoid artificial limit to direct consumer (extend to bystanders)
    - Vandermark v. Ford Motor (CA 1964): Δs incl whole sales chain
        - Both mfg & retailer SL for mfg defect braking sys – disclaimer "immaterial"
    - Elmore v. Am. Motors (CA 1969): πs incl direct & bystanders
        - Auto mfg & retailer SL for drive shaft falling out, killing/injuring both driver and bystanders

Tort	Warranty
MacPherson (NY 1916): negl	
	Ryan (CA 1931): SL
Escola (CA 1944): res ipsa	
	Henningsen (NJ 1960): SL - Disclaimers invalid
Greenman (CA 1963): SL	

Restatement §402A (1965): SL	

- Used goods:
  - Tillman v. Vance Equip. (OR1979):
  - Wilke v. Woodhouse Ford (NE 2009):
- Successors:
  - Trad'ly: liability by agreement, or fraud, or merger, or continuation
  - Ray v. Alad Corp (CA 1977): expand to all complete successors
  - Semenetz (NY 2006): rejected Ray b/c adverse effect small businesses
- Non-sellers:
  - SL = comm'l lessors, franchisors, free samples
  - SL ≠ financing companies
- Irregular sellers: SL even if first such sale, if Δ in gen'l business
- Gov't contractors defense: Boyle (US 1988): defective helicopter hatch
  - Maintain integrity of FTCA military service torts bar
    - Avoid passing costs to fed
    - Test: 1) US approved reas'ly precise military specs; 2) conformity; and 3) supplier warning of known dangers unknown to US
  - See also Agent Orange litigation
- Causation
  - Trull v. VW of Am. (NH 2000): enhanced injury
    - Separate & divisible injuries → π must show enhancement
    - Indivisible injuries:
      - Majority: if subst'l factor, shift burden to Δ of which injuries = accident vs. defect
      - Minority: bar recovery
  - Stahlecker v. Ford Motor (NE 2003): tire blowout ≠ proximate cause assault/murder of female driver in secluded area (≠ scope of risks)
- Emotional distress: Bray v. Marathon Corp (SC 2003): recoverable b/c π working/using on trash compactor w/ decedent
- Strict vs. Absolute liability: SL allows for defenses: comp negl, causation

c) The Restatements

- Second, §402A (1965 – 2yr after Greenman)
  - "defective condition unreas'ly dang to user or consumer"
    - Seller in business and expected to reach consumer unchanged
    - SL despite ≠ privity
  - Basic problem: enacted so soon after prods liability revolution that lacked thoroughness
- Separate Restatement Prods Liability (1998)
  - §1: liability if in business & defective prod
  - §2: three types of defects: a) mfg; b) design; c) warning

d) Manufacturing Defects

- (p569) Flawed unit, right off assembly line (eg exploding Coke bottle)
- Pure SL upon proof malfunction, causation

- Welge v. Planters (7th 1994): peanuts jar

2. Design Defects: ~ Negl

- (p571) Every unit dangerous by design
  - Eg Chevy Cobalt ignition/electrical flaw
  - Eg tobacco prods (toxic chems)
- Restatement (1998) language ~ due care:
  - Foreseeable risks reducible/avoidable by RAD; omission → ≠ reas'ly safe
  - Omits mention of/rejects consumer-expectations test (SL)

a) Cronin v. JBE Olson Corp (CA 1972): ord'y consumer SL

- Bakery truck driver injured by trays sliding forward
- Discomfort Retatement negl std – rejected ifo SL
- Apply Greenman SL to (design? mfg?) defect
  - Proof defect, proximate causation suff Δ ≠ insurer
  - Unclear distinction design/mfg in some cases
- Untenable std b/c ≠ carve out for unreas'ly dangerous use

b) Barker v. Lull Eng'g (CA 1978): reas'ly foreseeable use

- High-lift loader (≠ outriggers) on slope, rolled onto π
- Rev'd Δ's judgment b/c reas'ly foreseeable use
  - Also alt defective design tests
    - Ordinary consumer test (pure SL)
      - ≠ expert testimony
    - Risk-benefit test: "excessive preventable dangers" (~ negl)
      - Gravity/likelihood of danger
      - Safety/costs/conseqs of alt
      - Δ's burden (rare; TN: "aberrant")

c) Soule v. GM (CA 1994): risk-utility balance

- (p573) Car crash, wheel collapse into floorboard crushed π's ankles
  - π's theories: mfg defect (welding) + design defect
- π's judgment on mfg defect, ord'y consumer chg, aff'd on appeal
- Aff'd for π b/c chg error harmless
  - Ord'y consumer test
    - Eg explode while idling, sudden steering/brake failure, rollover/fire at 2mph
      - All mfg defects, not design defects
    - Reserved to cases w/ legitimate ord'y consumer expectations
  - Risk-benefit test
    - ≠ common knowl vehicle crash perf, so risk-ben test applies
    - Crashworthiness: how much impact can design withstand?
  - Why harmless?
    - Despite instruction, experts, arguments effectively proceeded from risk-benefit perspective
    - Advantages to π of ord'y-consumer-expectations test?
      - No need for experts

- Normative analysis, if Δ's redesign very expensive?
  - Fairness may cut ifo non-negl Δ
  - Enterprise liability cuts ifo π's recovery
    - Deterence/safety incentives (R&D)

- Interweaving of issues
  - π's theories of mfg, design defects
  - Δ's denial causation: impact vs. design flaw
- Expensive, expert-dependent:
  - Here: biomech, metallurgy, orthopedics, design eng'g, crash-test simulation
  - Tobacco: addiction, medical, etc.
- Campbell v. GM (CA 1982): bus grab bars common exp
  - Rare ord'y consumer expectations test for design (vs. mfg) defect
- Pruitt v. GM (CA 1999): air bags failure deploy ≠ common exp so risk-ben test, expert testimony
  - But Morton (VA 1995): asbestos exposure = common exp
- Reas'l Alt Design (RAD) – π's burden to prove in risk-utility test
  - Banks v. ICI (CA 1994): whether design chosen reas'l one among feasible choices of which aware/should
  - RAD factors:
    - Magnitude & probability of foreseeable risks harm
    - Instructions & warnings
    - Consumer expectations, incl from mktg
    - Interaction of above factors
- Dreisonstock v. VW (4th 1974): VW minibus front-end design defect?
  - Rejected b/c ~ convertible
    - Factors: price, circumstances of accident
    - Unique feature of vehicle – compare only w/ like vehicles
- O'Brien v. Muskin (NJ 1983): irreducibly unsafe prods
  - Above-ground vinyl pool risk-ben → jury Q
    - Some prods so inessential that SL for injuries
    - Dissent: adequate warning suff
  - Generic risk-util approach – controversy
  - Restricted by NJ leg:
    - No liability if only feasible alt design subst'ly impair function
    - Liability exceptions:
      - Ultrahazardous
      - Ord'y user can't know risks; risks to 3d parties
      - Little usefulness
  - Restatement §2 some inessential prods, eg exploding cigs, but ≠ alcohol, guns, above-ground pools
  - Rejected in Baughn v. Honda (WA 1986): mini-trail bikes mfg ≠ liable use public roads b/c adeq warning

d) Camacho v. Honda (CO 1987): reject consumer-expectations test

- (p585) Motorcycle low-speed crash w/ car broke π's legs – sued for crash bars
- Trial ct: ord'y consumer test barred π's claim

- Rev'd Δ's judgment, remand for fact-finding
  - Larsen v. GM (8th 1968): SL for common-sense safety features
  - Roberts v. May (CO 1978): crashworthiness doctrine – SL
  - Pust (CO 1978): rejected Cronin – must est. inherent dangerousness
    - Rejected §402A (Barker) ord'y consumer test
      - Divert focus from nature of product to consumer
      - Expectations test may bar cheap safety improvements
        - Open-obvious/known risks defense
          - (Prosser: liquor, butter, cigarettes)
        - Irony: test orig'ly (CA) intended pro-π
          - Blind spot: Barker, Soule prods ≠ obv
            - Latent dangers: π's sword
            - Patent dangers: Δ's shield
  - Ortho Pharms. (CO 1986): complex-prods dangerousness test
    - Product utility
    - Likelihood & magnitude of injury
    - Availability of subs
    - Mfg's ability to eliminate risk w/o ≠ utility, cost-proh'v
    - User's ability to avoid risk by due care
    - User's anticip'd awareness of inherent dangers based on common knowledge of danger (~ open/obvious)
    - Feasibility of enterprise liability
  - Hypo: sales rep offer crash-bar option, π refusal
    - At some point, π's behavior may "rise to level" of assumed risk
      - Voluntarily, unreas'ly → (subj'ly known) dgr
      - Jury Q of fact
      - Modern comparative-fault analysis (≠ total bar)
  - Risk-benefit vs. negl test (Learned Hand B < PL)?
    - CA: risk-benefit shift burden to Δ (minority)
    - Most states follow // analysis to negl (no real difference)
- Dissent: consumer expectations test
  - States' various approaches
    - Accepted in AZ, KY, OH
    - Rejected in MI, TX
  - Poor application of Ortho beyond technical/hidden danger cases
    - Motorcycle dangrs open, obvious, known
      - Alternative makes/models available
- Voluntary Industry Stds
  - Robinson v. GGC (NV 1991): box-crusher interlock std admitted as evidence agst mfg
  - But Football helmets outdated stds admitted as compliance protection
- Food Prods
  - Foreign/natural test: Mexicali Rose (CA 1992): chk bone in chk enchilada = negl but ≠ SL, warranty b/c natural
  - Reas'l consumer test: Restatement
- Marketing (p594)
  - Castro v. QVC (2d 1998): too-small pan mktd for 25lb turkey

- Denny v. Ford Motor (NY 1995): off-road truck mktd appropriate normal driving – despite OK risk-ben test for off-road, FAIL consumer expectations test normal driving
  - Resurrection implied warranty merch – Rabin: mistake b/c possible to subsume under SL tort/consumer expect
    - Avoid excluding ≠ privity parties, eg guests, bystanders
- Critiques of case-by-case risk-ben analysis
  - Dawson v. Chrysler (3d 1980): car collapse side-impact, wraparound
    - Design change > rigidity would > risk other accident types
      - Inherent nature jury Q means cases both ways
    - Cong better suited to respond via comprehensive regulation

e) Inferring Defect: Malfunction Theory

- (p596) Restatement §3 (1998) ~ prods liability res ipsa SL counterpart
  - Usually mfg defect cases
- Smoot v. Mazda (7th 2006): airbag malfunction; car repaired before trial
  - Dilemma: evidence preservation vs. π's right to get on w/ life
  - Indep body of law re 3d party meddlers in accident scene, evidence
- McCorvey v. Baxter Healthcare (11th 2002): catheter's spontaneous eruption

f) Misuse

- (p597) Lugo v. LJN Toys (NY 1990): action figure's detachable shield ~ cartoon character's use – Δ mfgs must anticipate
- Price v. Blaine Kern Artista (NV 1995): oversize caricature mask – jury Q whether mfg must anticipate imbalance if pushed
  - Briscoe v. Amazing Prods. (KY 2000): blinded by drain cleaner ≠ mfg liability
- Barnard v. Saturn Corp. (IN 2003): car jack misuse → comparative fault

3. Warnings: ~ Negl

a) Threshold issue: common knowledge/open & obvious ≠ duty to warn

- Eg sharp knife
- Brune (TX 1994): dgr excessive tequila apparent even to 18yo
- Maneely v. GM (9th 1997): unrestrained riding in pickup cargo bed firmly engraved given buckle-up campaigns
  - Pickup truck design utility > risk (Dreisenstock VW bus)
  - One step removed from Camacho motorcycle crash bars (dissent)
- Closer case: Emery v. Federated Foods (MT 1993): whether marshmallow-choking by young kids common knowledge → jury Q

b) Hood v. Ryobi Am. Corp. (4th 1999): aff'vly ignoring warnings

- π disregarded circular saw warnings, detached blade guards, cut self
  - Claimed only believed danger clothes, fingers getting caught
  - Claimed insuff'ly specific warning b/c ≠ pot'l blade detachment
- Aff'd SJ for Δ – std: reasonable under circumstances
  - Pittman v. Upjohn Co. (TN 1994): gen'ly jury Q of fact

        - Factors:
            - Indicate scope of danger
            - Communicate extent, seriousness of harm
            - Physical presentation would alert reas'ly prudent person
            - Consequences > simple directive
            - Adequate medium/means
        - Some courts Q of law by default or if clear case
    - Cost-benefit analysis
        - Info costs incl < effect by increased text
            - Counterarg: few alt conseqs: get caught, detach blade
        - Only one documented prior incident, 15yr prior
            - Counterarg: warn against too-large piece – design & warning at cross-purposes
        - Cotton v. Buckeye Gas (DC Cir 1988): rejected π's warning claim gas tank explosion b/c > warnings would dilute message
- Hypos:
    - Est blade could've been better secured w/o guards < cost – π's judgment on design defect claim? Should adequate warning always cure design defect?
    - Blade detached and injured π's bystander son?
        - Eg toxic prods cases (cleaners, drugs) warning keep away from children? But here, not child's use of saw, but rather foreseeability of particular risk (detachment)
        - Stronger liability arg for 3d party than π user
        - Intervening intermeddler (≠ proximate cause)?
- Content of the Communication (p604)
    - Moran v. Fabergé (MD 1975): cologne onto candle for scent; burns
        - Rev'd for πs b/c minimal cost of add'l warning, prior incidents
    - Ragans (FL 1996): home perm kit misuse explosion, burns
        - Jury Q whether simple directive "do not mix" suff warning
- Adequacy of the Communication (p605)
    - Johnson (NY 1992): π's failure read roach-fogger dir off pilot light only one factor alongside, eg, prominence of warning – jury Q
    - Campos v. Firestone (NJ 1984): may require pictorial messages if known audience = migrant workers
- Causation & "Heeding Presumption" (p605)
    - Req Δ to show that even adeq warning wouldn't have been heeded
    - Coffman v. Keene Corp (NJ 1993): presumption justified despite impossibility to go thru day w/o some conscious ignoring of warnings – powerful incentive to mfgs
    - But GM v. Saenz (TX 1993): rejected heeding presumption for π's overloading truck b/c accident likely regardless
- The addressee (p606)
    - Gen'ly warning must → likely user
        - But, eg, children's prods → parents
    - Cases of disposable cigarette lighters go both ways:
        - Bean v. BIC (AL 1992): jury Q
        - Kirk v. Hanes (6th 1994): MI law no duty b/c obv to adults

- Sophisticated users: Carrel (MA 2006): Boy Scouts suff'ly knowledgable about zip-line rope to know/appreciate dangers (eye)

- Design & Warning Interplay (p607)
  - Hood: warnings won't give immunity from defective design claims
    - Esp if vague
    - But ≠ liability for aff'v steps to contravene clear warnings
  - Luque v. McLean (CA 1972): power mower unprotected grass hole
    - Rev'd for π (mangled hand) b/c open/obv instruction erroneous
  - Hansen v. Sunnyside Prods (CA 1997): household cleaner (hydrofluoric acid) burned π through hole in glove
    - Δ's evid pkg warnings, past effectiveness permissible b/c bottom-line issue = likelihood to cause harm
  - Goodrich Tire (TX 1998): tire exploded during improper mounting
    - 5-4 upheld claim b/c safer alt may > even if misuse
    - Dissent: eg, aerosol can expl warning suff
- Prods dangerous for another exposed class
  - Eg thalidomide: 1960s birth defects; today treat leprosy
  - Concern that liability might restrict consumer choice

c) State v. Karl (WV 2007): learned intermediary doctrine (Rx drugs)

- Facts/Procedure (p610):
  - 1999 π Nancy Gellner d 3d after Δ Dr Wilson Rx Δ's Propulsid
    - Acid reflux treatment – side effect: heart attack
  - 2001 π estate action: prods liability/malpractice
  - 2004 Δ mfg Janssen filed motion SJ: suff'ly warned Dr. Wilson
  - 2006 SJ denied, Δ appealed
- Aff'd for π, rejecting learned intermediary doctrine (LID) (1st rejection)
  - LID: Δ mfg defense if adequate warning to Rx physician
    - ≠ overwhelming maj: 22 states exp approval + 6 favorable LID
      - Rabin: deceptive stats
  - LID justifications:
    - Mfg difficulty warning ult users
    - Patients' reliance on Dr judgment
    - Drs' prof judgment in selecting drugs
    - Drs best positioned to warn
    - Dr-patient relationship, trust
    - Terhune (WA 1978): policy: physicians as gatekeepers
  - LID outdated given modern direct advertising, Internet
    - Informed consent > patient-based decision
      - Counterarg: patient ≠ expert
    - Managed care < time spent w/ each patient
      - Counterarg: > reliance on doc's snap judgment
    - Direct ads > direct communication w/ patients
    - Perez v. Wyeth Labs (NJ 1999): carve out direct-ad drugs
  - Various exceptions to overcome shortcomings of LID (< utility):
    - Exceptions:
      - Vaccines (9th: rarely consultation w/ doc)

- Oral contraceptives (MA: women's informed judgment)
  - Contraceptive devices (8th)
  - Extend rationale to all "well patients"?
    - Alternative to wholesale rejection LID
- Direct-ad drugs (NJ: 1997 FDA reg broad direct ads)
  - Overpromoted drugs (IL)
- Drugs withdrawn from market (EDMI)

▪ Restatement 3d §6(d)(s) gen'l exception:
- Must warn patient if mfg reason/know provider ≠ in position to reduce risk of harm indicated by warning

o Enterprise liability: mfgs reap benefits of direct ads, should bear costs of > risks created by ads

- Dissent (p616):
  - Not all drus equally mktd
    - Mass mktd drugs already Fed warning req'mts
  - Case-by-case analysis better, to cover trad'ly distributed drugs
- Concurrence (p618):
  - Fairness: keep mfgs on hook relative to small WV docs
- Pharmaceutical design defect
  - Gen'ly address pharma risks by warning b/c safe for intended use(rs)
  - Rest 2d confusing language
  - Rest 3d §6(c): defective design = foreseeable risks > benefits → reas'l provider wouldn't Rx for any class of patients
    - But Freeman v. Hoffman-La Roche (NE 2000): rejected §6(c) b/c liability for all defeated if drug suitable for any patients

d) Vassallo v. Baxter Healthcare (MA 1998): ex ante knowl post-sale risks

- Hypo timelines:
  - T1: prod distribution
    - If π harmed here: depends on analysis
      - Ex ante: no liability
      - Ex post: liability
  - T2: new risk information
    - If π harmed here: negl issue – duty to warn? (Lovick)
  - T3: trial
- Failed silicone implants → π's injury, husband's lost consortium (p620)
  - Δ argued risk unknown at time (long latency)
  - π's verdicts aff'd on appeal under state law hindsight analysis
- Overturned hindsight → known, knowable test (aff'd on other grounds)
  - Rest §402A: known, knowable (majority)
    - Impute knowledge of expert in field
    - Duty to discover, continuing duty to warn
  - State reversals from SL → known/knowable: CO, LA, NJ
    - Beshada (NJ 1982): pure ex post SL asbestos, to internalize industry failure to dicover risks; incentivize better R&D
      - Irony: prevalence asbestos risk cover-up; ct assumed mfg ignorance of risks

        - Risk distribution
        - Incetivize safety (dubious)
    - Feldman (NJ 1984): teeth discolor by respiratory infection drug
        - Reversed Beshada outside asbestos – adopted ex ante
            - Shift burden to Δ of whether/when avail info
                - Effectively, still close to ex post
            - Duty very similar to negl analysis
    - Goal of law = induce conduct capable of being performed
        - ≠ advanced by liability fail warn risks incapable of knowing
- Hard (Rabin: impossible?) distinction: ex ante SL vs. negl:
    - James v. Bessemer Processing (NJ 1998):
        - SL: impute knowledge of risk if existed in industry at time
        - Negl: subj Δ knew/should have known risks
    - Ferayorni v. Hyundai (FL 1998): defective seat belt hurt small π
        - Knowledge in SL < negl (hybrid trad'l SL & negl)
            - CA: Anderson, Carlin: ex ante SL knowl > negl
        - Gen'ly recognized & prevailing best knowl avail
            - ≠ foreseeableness test
- Hard definition: State of the Art
    - Industry custom or practice?
    - Safest existing technology adopted for use?
    - Cutting edge technology?
    - Known/knowable risks?
- Post-sale discovery
    - Lovick v. Wil-Rich (IA 1999): Δ mfg learned of competitor John Deere's safety interventions 7yr before starting own → π's verdict
        - Rationale identical to pre-sale duty
        - Scope different (Rest 3d §10):
            - Seller knows/should know subst'l risk to users
            - Users likely unaware, can be identified
            - Warning can be effectively communicated, acted on
            - Risk of harm > burden of warning
        - ≠ duty to retrofit (own $), recall – leg'v interventions
- Subsequent remedial measures
    - Rules of Evid prohibit admission Δ's own remedial actions
        - Incentivize safety w/o worry about opening up to liability
    - Diehl v. Blaw-Knox (3d 2004): rule ≠ extend to remedial measures taken by 3d party ≠ subject to liability (contractor)
- Misrepresentations – §402B
    - Physical harm
    - Justifiable reliance, even by ≠ buyer
    - SL

4. Defenses

a) GM v. Sanchez (TX 1999): Contrib Negl, Comp Resp, Assumed Risk

- Facts/procedural history (p628):

- π died when truck rolled back, pinned π agst fence, bled out
  - Theory: transmission defect: "hydraulic neutral"
- Jury: π 50% fault – Ct: full dmg b/c SL

- Rev'd for 50% reduction b/c π's gen'l duty care in using prod
  - π failed reas'l precautions (manual): park, e-brake, remove keys
    - Add'l state licensure, heightened resp on drivers
  - R2T §402A: Keen (TX 1988): fail disc defect ≠ defense to SL prods
    - Dichotomy: failure discover vs. assumed risk (absolute bar)
    - Here, probably not assumed risk despite reading manual
  - But R3T §17 and 1987 legislation (≠ Keen): π due care / comp'v responsibility both negl & SL
    - π no reason to expect defect, but duty to guard against runaway
    - Middle ground actions between failure disc & assumed risk
      - Still ≠ duty to discover defects
    - Broader than assumed risk b/c incl inadvertent negl
    - Narrower than assumed risk b/c comp'v fault ≠ absolute bar
  - When would π prevail under R3T? No reason to expect defect
    - Eg exploding tires (defect) when speeding (negl) – indep cause
    - Despite π's fault, no bar to recovery
- Comparative "responsibility" or "fault"?
  - "Responsibility" recognizes causation even when relatively < fault
- Daly v. GM (CA 1978): logic of assigning percentages?
  - Facts: π Daly drunk driving w/o seatbelt, unlocked door – crashed into median, forced door open (button handle), ejected/killed π
    - Court (4-3) compared π's fault to design, comparative bar
    - Dissent: illogical comparison π's negl & Δ's SL design defect
      - But design defect cases effectively negl test
- Enhanced injuries: π's or 3d party's conduct
  - Zuern v. Ford (AZ 1996): 3d party fault (drunk driver) < recovery
    - Jahn v. Hyundai (IA 2009): π's fault reduces recovery
    - R3T would apportion liability
  - But Binakonsky v. Ford (4th 1998): Δ fully responsible b/c no matter how accident happened, design was defective
    - D'Amario v. Ford (FL 2001): cabin initial injuries
    - ~Fritz medmal after accident
  - Choice of above approach may depend on liability scheme
    - Jt & several: Δ mfg effectively responsible for both anyway
    - Several: choice of rule makes big difference (max liability)

b) Other Aff'v Defenses: Disclaimers, Statutes of Repose, Preemption

- Disclaimers:
  - Westlye v. Look Sports (CA 1993): disclaimer for ski rental bar negl action but ≠ SL
  - But Mohney v. USA Hockey (NDOH 1999): b/c SL culp < negl culp, logic extend disclaimer waiver/bar to both
- Statutes of Repose: triggered by release distribution
  - Effect of vigorous, successful private lobbying
  - Tanges v. Heidelberg N.A. (NY 1999): printing press – 10yr after sale

        - "Tool to alleviate the increasing cost burden borne by mfgs and sellers seeking to obtain prods liability ins"
    - Federal aviation: 18yr after first delivery
- Preemption (see E.5)

5. Work-Related Injuries: 3d parties

- Workers' Comp benefits: med expenses, ~2/3 lost income (w/ statutory caps)
    - Employer suits barred
- 3d p tort suit: med befits, lost income, pain & suffering
    - Gen'ly no double recovery
    - Examples:
        - Escola v. Coca-Cola cracked bottle
        - Cronin bread truck trays
        - Barker v. Lull Eng'g loader turnover
        - Asbestos cases

a) Jones v. Ryobi (8th (MO) 1994): foreseeable modifications

- π worked at printing press – industry std remove guards, interlock > efficiency
    - π knew dangers, feared being fired
    - Δ mfg (tools for removal) and distributer (knew of removal)
- Trial JAML for Δ on §402A consumer expectations test (open/obvious)
    - JAML b/c π admitted to 3d party mod
    - Aff'd for Δ under alt rule: no liability if any 3d party mod (minority)
        - Maybe uneasy w/ open/obv bar b/c history of 19th-C employee assumed risk
        - Proximate cause argument: employer fault > mfg
            - Pot'l solution by contribution impleader: mfg → employer, % allocation
                - Rejected by maj states b/c undermine WC tradeoff: limit liability for ≠ fault req'mt
                - Minority allow to correct injustice unequal dmg
- Dissent: same rule, different outcome:
    - Guards defective as mfgd
    - Distributor's maintenance, knowledge of modification
    - Industy practice corroborates design flaw – open/obv'ness insuff alone
        - Cheap RAD, eg adjustment handles
- Majority rule (eg AZ in Anderson): liable for foreseeable modifications
- Leg'v responses:

b) Liriano v. Hobart Corp. (NY 1998): post-sale failure to warn

- 2d Cir cert Qs:
    - Mfg SL failure warn even when ≠ design defect b/c subst'l mod? Yes.
    - Facts of this case? Too factual. You decide.
        - Remand: jury Q b/c inexperienced, immigrant π, hidden danger
- Facts: 17yo immigrant grocer hand in unguarded/unwarned meat grinder
    - Mfg had added removal warning to later grinder models
- Trial: liability: 5% Δ mfg, 95% employer – π 1/3 responsible

- Robinson v. Reed-Prentice (NY 1980): ≠ mfg liability if subst'l mods
  - Rationale: mfg resp for purposeful design choice → unreas'l dgr
    - Limited liability b/c unlimited mod options
    - Defficult tech'l inquiry into burden of RAD
  - But duty to warn more limited: foreseeability of misuse
    - Low-cost safety-enhancing option
      - Info cost: no duty patently dangerous, open/obv risks too many warnings dilutes effect
- Lopez v. Precision Papers (NY 1986): liability if purposeful mfg removable safety features – removable top on forklift
- But Anderson v. Nissei ASB (AZ 1999): bottle-crusher defective as mktd guard doors too easily removed, no warning on inevitable drool-clean-up issue
  - Distinguished from Robinson b/c proper functioning issue, rather than mere efficiency
  - Rejected Ryobi b/c MO law ≠ liability even foreseeable dang mod
- Employee's behavior – 3 possible scenarios, assuming inadequate warning or foreseeable mod
  - Employee doesn't know: assumed risk bar would return to 19th C
  - Employee does know: given coercive setting, assumed risk would return to 19th C
  - Employee modifies: stronger argument for assumed risk, but still Q of full/partial bar in era of comparative responsibility

6. Intersection of Tort and Contract: E. River Steamship v. Transamerica (US 1986)

- (p660) Facts:
  - π chartered faulty ship mfgd by Δ
  - π's lost profits, repair $ b/c K w/ owner assumed all losses
- SCOTUS denied pure econ loss b/c recovery under K, not tort
  - Seely v. White Motors (CA 1965):
    - π bought faulty truck from Δ retailer; K warranty disclaimer all liability except repairs
    - Denied even repairs recovery b/c econ loss ≠ SL in tort
      - Econ liability waivable (unlike injury liability)
      - Econ loss ltd to K, warranty
      - Personal injury, property dmg = tort
    - Why allow property dmg in tort? Allow bystander recovery despite ≠ privity of K

DAMAGES

H. Compensatory Damages

- Fundamental goal: return as close as possible to status quo ante
  - Single judgment: past and future damages
    - Encourage speedy recovery, avoid running up tab
    - But < admin efficiency justification, given tech advances
  - Why not ongoing liability on Δ, annual reporting by π?
    - Avoid malingering victims

        - Certainty of payout, esp for ins cos
        - Jud'l admin costs of relitigating ongoing issues (eg adequacy of amounts)
        - Risk of Δ's insolvency, flight
        - BUT parties free to negotiate structured settlement (eg States v. Big Tobacco)
- Components: uncertainties abound!
    - Medical expenses
        - Past and future rehabilitation: drugs, phys therapy, psychotherapy, etc
        - Possibility of relapse, unanticipated recovery/deterioration
        - Discretionary, conjectural issues: lifetime estimates
    - Lost income
        - Expected career, retirement – estimates, social/econ changes
        - Normal annual earning power
            - Qualifications: earnings increases over time, partial disability
        - Discount rate
    - Pain and suffering

1. *<u>Seffert v. L.A. Transit</u> (CA 1961): shock the conscience*

- Facts/Procedure (p711):
    - Δ bus operator closed door on π's hand, dragged π
        - Severe injuries to left foot: nerve dmg, blood vessel dmg, shortening
        - 9 ops in 8mo: open wounds, grafts, ulcer on heel
    - Trial ct sustained jury verdict, dmg:
        - $54,000 past/future pecuniary loss
        - $134,000 pain & suffering (~$1M in 2010)
- Issue: whether P&S dmg award excessive as matter of law
- Majority (Peters): not excessive; aff'd trial
    - Appellate review std:
        - Shocks conscience
        - Jury passion, prejudice, corruption
    - Deference to fact-finding jury, judge's discretion
    - Δ failed to object to π's introduction of dmg #s, so waiver
- Dissent (Traynor):
    - Appellate responsibility to future litigants – set dmg precedent
        - Consistency w/ previous awards
            - Deterrence function
            - Fairness: treat like cases alike
    - Passion, prejudice, corruption std → exceeds any amt justified by evid
    - Bkgd criticism P&S awards – proposed solutions to predictability issue
        - Ratio approach: P&S ≤ pecuniary losses
            - But wealthier people higher awards
                - Solution? Limit to med expenses?
                    - But often mismatch btwn med costs and dignity
        - Categorical approach: weigh similar-injury awards
            - Leg'v schedules
    - π's dmg #s ($100/d, $2,000/yr) improper – mislead jury
        - Pro: as good an arbitrary measure as any
        - Con: opinion/conclusion on matters not disclosed by evidence
    - Rabin: "Wasn't Traynor pro-π?"

- Tort system as social ins system: distribution of predictable risks
- Expand liability but limit damage awards to predictable amounts

a) Past and Future Pecuniary Losses

- Past losses
  - Med expenses, lost earnings
  - Taxation issue? Cong: phys inj (but not emo harm) untaxable
    - Divided cts on whether/how to tell jury
- Future losses:
  - Drug costs, therapy, counseling
  - Life-expectancy tables for lifelong treatment, future earnings
  - Challenges:
    - Retirement age
    - Gender/race/class effects on earnings& life expectancy
    - Career: raises, promos, CoL increases, fringe benefits
    - Un/underemployment
  - Mitigation, countervailing consids:
    - After-tax adjustment
    - Deduct avoided costs
  - Snow v. Villacci (ME 2000): π may recover for lost opp'y from injury in 20th/25mo financial consultant program, if but-for causation

b) Discount Rate

- How much money today so that, if invested prudently, would support payout equal to what income-stream would've been
- Divided approaches:
  - Total Offset: inflation rate cancels out discount rate, so don't discount
    - Rabin: "easy way out"
  - Real Interest Rate:
    - Avoid compensating any risk beyond safe investments
    - Avoid overcompensating w/ total offest

c) Legal Impediments to Employment

- Eg incarceration, undocumented immigrant status
- Silva v. Wilcox (CO 2009): immigration status relevant & admissible
  - Ct ≠ answer pot'l prejudice of alien status on judgment
- Hoffman Plastic v. NLRB (US 2002): denied backpay to illegal immigrant despite NLRA violation b/c illegal to knowingly hire undocumented immigrants under Immigration Reform & Control Act

d) Pain and Suffering

- Jaffe (1953): damages = punishment, but < justification if only negl conduct
  - Pain = harm/injury, but ≠ economic significance
    - Acknowl pot'l future P&S/loss enjoyment
  - "Doubtful justice to seriously embarrass negl Δ by econ loss to honor π's experience of pain"

- Ins pools shouldn't have to bear indeterminate costs to compensate for non-economic harm
- Intangible character → impossible consistency one case to next

- But Posner (1987): econ measure of pain – how much would pay to avoid?
  - Deterrent effect of liability → < negl
  - Counterarg: no one buys P&S insurance
- Tort focus on particularized justice supports inclusion of P&S
  - Rabin: "Money can buy quite a bit of happiness"
  - Financial means to approach restoration of status quo ante

e) Guidance

- Std of Review
  - CA: shocks the conscience
  - 1980s NY statute: "deviates materially from reas'l compensation"
- Cond'l grant new trial
  - Remittur: unless π consents to < excessive award
  - Additur: unless Δ consents to > inadeq award
    - Less frequent & never in fed ct b/c ≠ 7th Am jury trial right
- Monetary guides (eg per diem)
  - Most states permit parties to introduce $ guides
    - Even CT 1989 decision barring was overturned by statute
  - Some permit argument w/o numbers
- Usually ≠ discount for nonecon loss b/c "so speculative & imprecise" already

f) Statistical Analysis of Comparable Awards?

- Blumstein, Bovbjerg & Sloan (1991): analyze award distributions in comparable circs – presumptive validity Q2, Q3 awards
  - Q1, Q4 awards prima facie remit/additur, jury's burden explain
- Jutzi-Johnson v. US (7th 2001): prisoner's suicide – fact-finder mjst consider comparable awards in first instance (≠ wait for post-trial, appeal)
  - Arpin v. US (7th 2008): req'd judge fact-finder to explain basis for $7M loss consortium for widow& adult children
- Kahneman & Spitzer (1995): experiment showed ex ante > ex post awards
  - Ex ante: how much to sell good health for injury? (Loss aversion)
  - Ex post: how much to make whole?
    - Humans' ability to deal w/ changed life circs?

g) Statutory Caps

- Caps on intangible-loss awards
  - CA: $250k limit P&S agst health-care, unchanged since 1970s
  - CO: $250k P&S all cases, unless clear/convincing evid → $500k
  - TX: $250k limit P&S in malpractice, unless hospital
  - Recent trend invalidating caps:
    - Eg IL $1M hosp, $500k doc – separation of powers violation
    - Eg WI $350k medmal cap violated equal protection
  - Eventual after-verdict reduction by remitter, damage caps, comparative fault, settlement

- Caps on total damages
  - VA: $1M in medmal
  - CO: agst gvt: $150k/person, $400k/occurrence

h) Contingent Fees: 20-50%

- Gen'ly 1/3
- 1970s CA Med Injury Compensation Reform: sliding scale < % as > award
- 1990s tie contingent % to timing of settlement offer
- P&S as mechanism to allow π's full recovery out-of-pocket
  - Alt: elim P&S, allow atty fees as part of award
    - But contingency may foster poor's access to courts

2. <u>McDougald v. Garber</u> (NY 1989): loss of enjoyment of life

- Facts/Procedure (p728):
  - Δ's malpractice left π perm'ly comatose
  - Parties agreed on:
    - Liability would incl past/future pecuniary dmg
    - P&S dmg dependent on π's awareness (disagreement re awareness?)
  - Jury instructions:
    - P&S req "some level of awareness"
    - Loss of enjoyment = distinct ≠ req awareness
      - Δ objections: (1) not distinct, (2) req awareness
  - Jury award: $1M P&S, $3.5M loss enjoyment → judge: $2M single award
- Majority rev'd award, remand new calc (restorative, make-whole perspective)
  - Awareness = prereq for loss enjoyment
    - Damage = compensation ≠ punitive
    - Nonecon losses based on legal fiction of calculable $ compensation
      - Acknowledge paradox > harm, < award
  - Loss enjoyment incl in P&S award
    - Exacerbate distortion under guise objectivity
      - Slippery slope of diminished pleasure, how to distinguish various types of P&S
    - Practical concern that distinct awards would just increase total
- Dissent: loss enjoyment = distinct, ≠ awareness
  - Loss enjoyment ≈ crippling injury, loss member
    - Impairment exists indep of π's awareness of it (irrelevant)
  - Distinct damages, ≠ overlap
    - P&S: phys/mental discomfort from injury
    - Loss enjoyment: limitations on life
    - Itemized awards > accuracy, facilitate appellate review
- <u>Fantozzi v. Sanduski Cement</u> (OH 1992): loss enjoyment distinct from P&S
  - Loss of positive experience rather than infliction negative experience
  - Avoid double recovery via elaborate jury instructions
  - But <u>Golden Eagle Archery</u> (TX 2003): physical impairment overlaps w/ lost earning, P&S, loss enjoyment, so steps to avoid double recovery
- Consider victims' ability to adjust to changed circs > observers expect?

3. Damages if Death

a) Survival Actions (by decedent)

- Coverage
  - Medical expenses, loss income
  - P&S from t(injury) → t(death)
- Colella v. JMS Trucking (IL 2010): $1M P&S 3min death after dragged by dump truck
  - But Glaser v. County of Orange (NY 2008): ≠ $1M P&S 3min death after axle through windshield
- Sander v. Geib (SD 1993): $1M P&S failure diagnose cervical cancer, 1yr terinal before death
- Durham v. Marberry (AK 2004): loss of life indep award even when π dies
  - 3-4 add'l states allow loss enjoyment dmg to dead πs
- CA statutory bar nonecon dmg if π dies before judgment

b) Wrongful Death Actions (by surviving beneficiaries)

- Statutory RoA
  - Derivative claim, subject to comparative fault
- Trad'ly (eg NY) limited to econ dmg
  - Lost econ support
  - Paradox 84yo woman worth more dead than alive
  - DeLong v. County of Erie (NY 1983): 12min terror 28yo mother – $200k victim's P&S, $600k value housekeeping to beneficiaries
- Majority now permit nonecon dmg
  - Eg lost companionship (≈ consortium in injury cases)
  - If ltd to spouses, civil union partners ≠ recovery
- Wrongful Death of Child
  - Trad'ly no recovery b/c cost savings > econ losses
    - Easy recovery under lost companionship
  - Green v. Bittner (NJ 1980): d HS senior; allowed loss companionship, advice/guidance, but attempt to limit to econ value of them
  - Lost income of dead children: murky waters (forget about these)
    - Andrews v. Reynolds Mem Hosp (WV 1997): $1.75M lost earnings 1-day-old baby, based on avg income/life expectancy
      - But why parents collect on child's future income?
      - Maybe statutory exception allowing such incongruity
    - Greyhound Lines v. Sutton (MS 2000): ignore class/comm'y-based income decisions, rely on nat'l avg
      - Action by estates of decedents – survival claims
      - But survival claims gen'ly ≠ dmg beyond death

I. Punitive Damages

1. Taylor v. Stille (CA 1979): drunk driver's malice

- (p750) Δ drunk crash into π – Δ alcoholic, prior DDs, probation, pending charge

  - Δ chose beer delivery job, drinking while driving
- Trial dismissed π's punitive damages claim b/c Δ ≠ intent to harm π
  - Trad'l rationale: moral outrage at intended harm
- Rev'd for π: malice (express or implied) suff for punitive damages
  - Malice: conscious & delib disregard safety → wilfull/wanton
  - Rationales:
    - Deterrence: despite dram shop 3d party immunity, no reason to immunize drivers for "almost inevitable risk"
      - Statutory acknowl drinking as prox cause drunken injuries
      - Incentivize π to sue
    - Public safety: US nat'l stats: ½ traffic deaths alcohol related
    - Ineffectiveness of criminal enforcement (eg DD, corp misconduct)
      - Fill in criminal-law gaps
- Concurrence: limit punitive claims to repeated DUI ("2d time no accident")
  - Slippery-slope worry of punitive dmg awards for negl
- Dissent: reasons to eliminate punitive damages
  - Unjust enrichment to π
  - Tort (courts) vs. criminal (leg) → double punishment
    - Rabin: ignores gap-filling issue
  - Avoid considering Δ's wealth as major issue
    - Rabin: resolvable via bifurcation
  - Circumstances of < or ≠ deterrence: covered in crim; = risk to Δ
  - Punitive dmg nullifies insurance cvg (Rabin: what?)
    - Rabin: nullification by state policy ≠ int'l tort, not punitive dmg
      - ½ states prohibit insurance for int'l torts
  - Comparative fault scheme may prohibit drunk π any recovery negl Δ
    - (Later statutory permission some recovery)
- CA leg'v response:
  - Clear & convincing evidence std
  - Defined terms
    - "Malice" = intent or willful & conscious disregard
    - "Oppression" = conscious disregard → cruel/unjust hardship
    - "Fraud" = int'l misrepresentation
  - On Δ's request, bifurcate 's finances until after damages verdict

a) Grimshaw v. Ford (CA 1981): Pinto fires

- Rear fuel tank exploded in crash; killed driver, burned teenage passenger
- Jury: $2.5M compensatory, $125M punitive (judge reduced to $3.5M)
- Ct/public outrage Ford's cost-benefit calcs, $200k valuation human life
  - Is Δ liable any time purposeful cost-ben analysis, wrong result?
    - Probably not: see Hillrichs
    - Liability when B(safety) very low, P(harm) very high
  - Gary Schwartz (1991): misunderstanding of case
    - Ford memos never admitted in case, referred to NHTSA RM
    - $200k = NHTSA valuation
    - Cost-ben foundational tort doctrine: Learned Hand B < PL
    - Practically, Δ lawyer never argue cost calc design feature

- Hillrichs v. Avco (IA 1994): corn-picker
  - Rejected punitive dmg for mfg cost-ben choice to omit emerg stop
  - Dependency hypothesis: avoid unreas'l dependence on safety feature
  - Room reas'l disagreement → no punitive dmg
- Deterrence?
  - But compensatory dmg 1 justification also deterrence
  - But wrongful death, where compensation ≠ deter, ≠ punitive
  - Alt econ justification punitive dmg: under-enforced claims
    - When < 100% tortfeasors discovered
    - When each injury small value, high costs litigation

b) Data

- No significant increases in #, median size of awards
  - Most for economic loss, ≠ pers'l inj
  - 2-3% all trials → punitive dmg awards
    - (πs win 40-60% trials, punitive 5-6% of wins)
  - Comm'l cases 3x more likely (7-8%) punitive dmg awards
  - Median = $64k
  - Mean = $500k (skew)
    - 2014: $9b diabetes drug awawrd for 10yr hiding cancer risk
      - Takida $6b + $3b indemnification by K of Eli Lilly
      - 2011 FDA warning +40% > cancer risk
      - Likely reduction to ~$15m
- Comparative fault:
  - Proportionally reduce compensatory dmg award
  - ≠ affect punitive award

c) Vicarious (Punitive) Liability & §909

- Some states auto flow
- R2T §909 narrower: only if one of following:
  - Authorized doing & manner of act
  - Reckless in hiring unfit actor (Taylor employer of Stille likely liable)
  - Actor was mngr acting in scope of employment
  - Approved the act

d) Death of Tortfeasor or π

- Tortfeasor's death:
  - Majority deny punitive recovery from estate
  - Minority allow:
    - Haralson (AZ 2001): deter drunk driving
    - GJD v. Johnson (PA 1998): Δ suicide after suit for sending nude photos of π
- Victim's death: same issue as post mortem P&S recovery

2. State Farm v. Campbell (US 2003): unconst'l punitive ratios

- Facts (p760)

  - 1981 Campbell pass forced Ospital (killed) swerve into Slusher (paralyzed)
    - State Farm refused settle ($50k ins cap) w/ O, S; ignored advise ≠ trial
      - Ins conflict interest – no incentive to settle
    - Jury: C 100% fault, $186k – State Farm refused to cover $136k excess
  - 1984 C to sue SF bad faith (O&S's attys, role in litigation, 90% recovery)
  - 1989 Utah S Ct denied C's 1981 appeal – SF agreed to pay in full
  - 1991 C sued SF bad faith, fraud, int'l emo distress (trial ct SJ but remand)
    - 1st phase: SF unreas'l not to settle
    - BMW v. Gore (US 1996), but trial ct denied motion excl out-state evid
    - 2d phase: national scheme – jury: $2.6M comp, $145M punitive
      - Trial ct reduced to $1M, $25M, but UT S Ct 25 → $145M
- Kennedy rev'd as excessive/arbitrary under Gore, remand for recalc
  - Can't punish for unrelated conduct, gen'ly "unsavory indiv or business"
    - Federalism – can't punish for nationwide conduct
    - Recidivism issue must ensure replication of conduct
  - Comparable cases, incl criminal statutes (here, $10k fraud penalty)
  - Ratio: punitive gen'ly < 10x compensatory (1:1 if large) – beyond Gore
    - Reas'l and proportionate to amount of harm/recovery
    - Higher punitive if lower compens
    - Consider econ < phys injuries
- Scalia, Thomas dissents: punitive dmg ≠ Const'l due process issue
  - Unwarranted resurrection of subst'v due process (5th/14th only procedural)
- Ginsburg dissent: Federalism
  - Tort damages = trad'l state domain
    - State leg'v prerogative to cap awards
  - Relatively new (7yr) SCOTUS involvement w/ punitive dmg controls
- On remand: $9m punitive (9x)
- SCOTUS ≠ major incursion into punitive dmg
  - State caps more effective in limiting damages (vindicate Ginsburg?)

a) Cooper Inds. v. Leatherman Tools (US 2001): purposes, limits

- Different purposes
  - Compensatory damages: redress π's concrete loss
  - Punitive damages: retribution against Δ, deter future actors
- Due Process limits: grossly excessive or arbitrary punishment
  - No legit purpose & arbitrary deprivation of property
  - ≠ procedural protections of criminal trial

b) BMW v. Gore (US 1996): punitive guideposts

- Reprehensibility of Δ's misconduct
- Disparity btwn π's statutory sanctions and punitive award
  - TXO Prod. (US 1993): allowed $10M punitive on $20k comp – eg shooting into crowd, hitting only glasses
  - Mathias v. Accor Econ. Lodging (7th 2003): hotel known bedbugs; upheld $186k punitive on $5k b/c outrageous behavior, slight/incalculable (emo) harm, < % catching → > dmg
- Ratio btwn award and comparable awards

- (But omit consid of Δ's wealth – many states incl in bifurcated 2d stage)

c) Δ's wealth: Kemezy v. Peters (7th 1996)

- π ≠ req'd to present evid of Δ's insolvency (Δ free to plead for mercy)
- Awards otherwise presumptively excessive may be OK if rich Δ
- Courts gen'ly focus more on Δ's specific conduct

d) Philip Morris USA v. Williams (US 2007): punitive ≠ harm to others

- OR S Ct upheld $80M punitive (on $800k compens) for smoker
  - Jury instruction ignored harm to others issue
  - Rejected Δ's instr: you may consider extent of harm suffered by others in determining reas'l relationship btwn punitive dmg & harm to π, but not punish Δ for misconduct on other persons who may bring suit
- SCOTUS prohibited harm to others (even if same state) in dmg calc
  - But fine distinction: allow harm to others in assessing reprehensibility & deciding on ratio – but final punitive amount ltd to indiv π
    - Concern for repetitive awards (Waters) – fed leg'v scheme?
  - Stevens dissent: "This nuance eludes me."
    - How can jury cabin mass distribution/mktg of tobacco?
    - Inherent uniformity of Δ's conduct in mass tort actions
- Remand → OR: upheld exclusion of Δ's intstruction, therefore award
- Bullock v. Philip Morris USA (CA 2008): overturned $28B award ($28M on remitter) under Williams

e) Exxon Shipping v. Baker (US 2008): 1:1 in Fed maritime CL

- Citing empirical data (Eisenberg, Heise, & Wells)
  - Disagged to show
    - 100-1 when < $1k
    - 1.5-1 when > $10k
- Little influence beyond fed maritime CL

f) WR Grace v. Waters (FL 1994): repetitive awards

- Refused to bar asbestos punitive dmg based on other states' awards
  - Equal footing w/ nonresidents
  - Only solution: fed legislation aggregating pun'v dmgs
- Bifurcate trial to mitigate prejudice (>12 states use)
  - 1st: liability, compensatory ward, punitive liability
  - 2d: punitive award w/ evid of past awards
- Challenges:
  - For π: depleted funds (asbestos)
  - For Δ: unfairness to keep punishing for same act
    - Weinstein (EDNY) tried to cert class action (punitive) tobacco, but 2d Cir rev'd b/c compens dmgs too individualized
- Dunn v. HOVIC (3d 1993):
  - Repetitive awards ≠ per se unconst'l, but relevant to const'l attack
  - Early punitive awards risk depleting funds for later compensatory

g) Statutory Alternatives/Caps

- Abolish punitive damages
- 20 states > BoP: "clear and convincing"
- 12 states damage caps: eg greater of $250k or 3x compens
- Split recovery w/ state
  - OR statute: 60% to crime victims compensation fund
  - OH judgment (CL): 1/3 to π, then atty fees, then cancer fund
    - Dissent: bad use jud'l power

J. Insurance, Collateral Source Rule, & Subrogation

- Types:
  - 1st party:
    - Health, disability
    - Homeowners damage
    - Auto casualty
    - Earthquake
  - 3d party:
    - Homeowners liability
    - Auto liability
    - Prods liability
- Consequences: cost: 3d party (incl tort) > 1st party (no-fault)
  - No ongoing claimant-insurer relationship in 3d party context
  - Unpredictable losses (eg eggshell π)
    - Vs. 1st party maximums (eg home value, actuarial stats)
  - Gen'ly determination of fault/defect in 3d party claims
  - Incl noneconomic damages in 3d party claims

1. Collateral Source Rule

- Ignore π's collateral (eg insurance, gifts) sources in calculating tort dmgs
  - Minority: jury discretion to deduct π's collateral sources
- Justification:
  - Trad'ly: Δ shouldn't get windfall just because π insured
    - But π's ≠ need to pay ≠ windfall
      - But π did have to pay premiums for ins recovery
        - But π collects > premiums, may have recently taken ins
  - Modern: avoid allowing Δ to externalize fault to ins industry
    - When combined w/ subrogation
    - If no subrogation, then inefficient result b/c double-recovery
- Issue: discrepancy consumer > insurer medical bills
  - CA (Howell): π can only recover amounts actually paid (ins rates)
- Eg Δ blaster destroys π's $500k home
  - If π ≠ ins, then sue Δ for full $500k (SL abnormally dangerous)
  - If ins pays π's loss, then ins co sue Δ to recover/reimburse full $500k
    - Shift loss back to activity that caused harm
    - Assume net benefit even considering transaction/litigation costs
  - If no collateral source rule & no subrogation, then ins co pays π, end of story
    - Blaster externalizing cost of dang activity to ins mkt

2. Subrogation

- Reimburse insurer/collateral source from dmg award
- 3 possibilities
  - Collateral source rule w/o subrogation: π's double recovery
  - Collateral source rule w/ subrogation: π reimburses insurer from dmg award
    - Formal reimbursement
    - More commonly, insurer joins litigation, direct payment by Δ
  - No collateral source rule: reduce dmg award by ins amount
    - But externalizing Δ's fault to ins industry
- Real world:
  - Workers comp & homeowners insurers exercise right subrog v. 3d parties
  - Health insurers ≠ exercise right subrogation – why?
    - Tracking tort claims/recoveries too complex
    - Most health ins payouts ≠ tort awards
      - 95+% tort settlements: unclear portion to med expenses
        - Some states pro rata, but P&S hard pretrial measure

3. Experience Rating

- Avoid cross-subsidization problem, maintain deterrence value
  - Eg young male drivers > ins rates, but also firms, workplaces
- Practical limitations:
  - Products: ltd evidence w/ new product lines (≠ history)
  - Small firms (< data)
  - Medical practitioners w/in specialization (diff specializations easier)
- Eg NY Times story on digital driving monitor instead of "crude proxies" like demos
  - User-based, individ'ly priced insurance → avg 10% discount
  - Currently "blind" data – no GPS, speed-lim referents
  - 2-way ratchet allowing increased rates?

ALTERNATIVES TO TORT

K. Incremental Reforms

- (p820) Stats:
  - 2007:
    - 120,000 accidental deaths: 43k home, 43k auto, 3k workplace ≠ auto
    - 33.2m disabling injuries (3m hosp): 10.4m home, 3.4m job, 2.2m auto
    - Unintentiona injuries 5th cause of death overall (1st ages 1-44)
    - $684b costs: $344b productivity, $134b med, $129b admin (is, police, legal)
      - $257b auto, $175b job, $165b home
  - Tort suits
    - 1996–2008 decline by 1/3 (costs/awards consisten over time)
      - Legal restrictions
      - Legal & political culture shifts
    - 2002: 53% auto, 40% other, 4% prods, 3% medmal
    - 2% go to trial: πs win 64% auto, 55% asbestos, 23% medmal
      - 2% filed in fed courts
    - 42% indiv v. indiv, 28% indiv v. bus, 11% indiv v. gvt agency/hosp

        - 10% all civil filings (vs. 41% domestic relations)
        - 11% of total compensation accidental harms
            - 46% to injured victims (52% auto, 43% other)
            - 30% victims' legal fees, 16–28% Δs' legal fees
                - Efficient?
- Leg'v reforms (focus on dmg > liability issues)
    - Methods:
        - Caps on nonecon/P&S loss, punitive dmg awards
            - Pro: predictability, counter rising award levels
            - Con: recognize suffering, burden of < full recovery, arbitrary limits, rising award levels = econ loss/med costs > P&S
                - Caps both under-deter & under-compensate
                - Better to cap wage loss: enterprise liability prods liability ins premium equally spread among consumers, but regressive impact lost-income recovery
                - Better to schedule/categorize P&S losses, allow special circs
                    - Inherent challenge echo-chamber bad past awards
        - Replace jt&sev liability – varied approaches
            - Eliminate jt&sev altogether
            - Conditional:
                - Jt&sev only if >50% fault
                - Rabin/CA: Jt&sev only for econ losses – sev only for P&S
            - Goals in tension – best bet = middle ground
                - Assure full compensation even if insolvent Δ
                - Liability proportional to fault
            - Allow atty's fees (esp if P&S constrained, collateral source rule elim)
        - Elimination collateral source rule
            - Depends on how value litigation costs vs. deterent effect
            - Compromise: allow recoupment
        - Scheduling contingency fees
    - Mostly state-level reforms
    - 1970s Med Mal
        - 1975 CA Med Inj Compensation Rule (MICRA)
            - P&S cap $250k (2014 referendum to > to $1m, CoL adjs), periodic payments if > $50k, contingent fee schedule
            - Jury discretion collateral source rule
            - Hard to find a medmal π's lawyer in CA now
    - 1980s Gen'l applicability
        - NY collateral source, periodic payments, severable liability if < 50%
        - Statutes of repose in prods liability (gen'l 10-12yr)
        - Problems of state-by-state reform: Blankenship v. GM (WV 1991): fed cert Q; WV adopted majority crashworthiness b/c residents already paying nat'l premium for GM's liability elsewhere
    - 1990s: class actions, bond posting, atty sunshine rules, jt&sev, P&S caps, punitive
        - 2003 TX reform (+ const'l amendment) → lower claims/payouts
        - 2005 fed Class Action Fairness Act – also immunity to gun mfgs
        - Constitutional challenges to caps
            - Ferdon (WI 2005): equal protection

- Lebron (IL 2010): separation of powers (leg'v remitter)
- Nestlehutt (GA 2010): right to jury trial
- Putman (WA 2009): med expert cert req'mt ≠ sep powers

▪ Some Const'l challenges to state appropriation % as takings: Kirk (CO 1991)

L. No-Fault Schemes

- Wholesale substitutes to tort law
  - o Loss-shifting systems:
    - ▪ Tort: moral perspective: "wrongful" Δ, "deserving" π
    - ▪ WC/No-fault: social-welfare perspective: "arising out of" nexus
      - Lose deterent effect of punitive dmg awards
    - ▪ Social insurance: social-welfare perspective: loss per se
      - Eg SSDI recovery based only on perm disability
      - Lose deterent effect altogether unless subrogation right by ins system

1. Workers Comp

- o 1910s Progressive Era – 1st major, most far-reaching tort-reform mvmt
  - ▪ vs. auto no-fault (only ½ states, only partial tort replacement)
- o 1st explicit embrace enterprise-liability ideology: internalize costs, spread risk
  - ▪ Dormant until mid-1960s CA prods liability revolution
- o 3d party no-fault scheme: employer purchases from insurer who pays employees' cls
  - ▪ vs. auto no-fault 1st party coverage
- o Efficiency – recovery/admin Tort ≈ 50/50 vs. WC ≈ 66/33 vs. SSDI ≈ 90/10
- o Challenging areas (orig set up to deal w/ phys injuries)
  - ▪ Occupational disease: same causal issues as tort (genetics, diet, exposure?)
  - ▪ Mental stresses
    - Eg witness coworker's death fairly easy to deal with
    - But eg eventual stress of job? Deadline pressure? State-by-state
- o Scheduled recovery:
  - ▪ All medical costs (but ≠ P&S)
  - ▪ 2/3 wage loss: weeks' compensation (w/ absolute caps) per "member lost"
    - Partial loss, partial recovery
  - ▪ Lump-sum payments in case of death
- o 3d-party prods liability suits outside WC system
  - ▪ Mfg contribution agst employer? Most states no, b/c mandatory WC payments

2. Auto No-Fault

- o 1920/30s studies showing pattern skewed recoveries under- over-compensation
  - ▪ Mfrs getting small claims out of way, taking large claims seriously
- o 1960s spike insurance premiums coincided w/ progressive welfare mvmt
  - ▪ Nader auto safety, environmentalism, social welfare
  - ▪ ½ states have adopted auto no fault (vs. all states workers comp)
    - Many lip-serv only: eg only capped portion no-fault
    - NY, MI more full-scale systems
  - ▪ Why other states haven't adopted
    - Softening of tort by comparative fault
    - US political shift to right

- NY no-fault ≤ $50,000 econ loss, ≤ $2,000/wk wages
  - ≠ P&S, but allow add'l tort suit for specific sig-harm injuries
  - Blended 1st-party ins system:
    - 1: tree crash: pass'r & driver collect from owner's insurer
    - 2: ped crash: ped, pass'r & driver all collect each owner's plans
    - 3: two-car crash: occupants each car collect from car's driver
      - Uninsured motorist pool
      - Out-of-state drivers: NY req ins cos rec'z NY no-fault
- Good sys b/c most cases undeterrable through tort: young/reckl, old, drunks
  - Compensation

3. Selective No-Fault Schemes

- Lobbying for predictability, eg:
  - Black Lung
  - Childhood Vaccines
  - Price-Anderson nuclear accident
- Bigger areas more complicated: what = compensable event?
  - Med mal
    - Time lags
    - Good but not great treatment
    - Health-compromised patients
  - Products
    - Funding mechanism, contributors?
    - Designated compensable event? Qs of defect back into tort sys

4. 9/11 Compensation, Rabin & Sugarman (2007)

- Contrast w/ no-fault schemes
  - Gvt funding
  - Single-event application
- Default baseline compensation systems
  - Tort law: fault, immunities
  - Private life ins
  - Overlaping benefits:
    - Workers comp (1910s):
      - 2/3 wages (+ med expenses but ≠ P&S)
      - Substitute tort claim
    - Social Security (1930s): survivor benefits, disability, med expenses
    - Employer-based health ins (1940/50s)
  - Leg'v victims-of-violent-crime schemes
  - No-fault schemes
    - 1970s Auto (Quebec, NY, MI)
    - 1980s Childhood vaccines
- Alternatives:
  - Ex ante, ongoing compensation funds
    - Characteristics:
      - Anticipation of contin future stream injs arising out of activity
      - Social ins ags socially predictable risk

- Enterprise liability – cost of business/activity
- Stable bureaucratic claims-processing
- Partial wage replacement
- Mandatory substitute for tort claims

- Israel: same as military benefits (unique circumstances)
  - Nation at war
  - Victims = fallen soldiers
- N. Ireland: incl intangible losses
  - Broad, modest scheme: all victims int'l harm
- N/A to USA context:
  - < frequency terrorist attack
    - Only foreign terrorists?
    - If nat'l bereavement: mass shootings, disasters?
  - < prevalent military service

- Ex post ad hoc funds
  - 9/11 Fund (Kenneth Feinberg)
    - Event-centered single-incident plan
    - Single-admin (eg 9/11 czar)
    - Full wage replacement, incl intangible loss (but collateral rule)
      - $250k min – $7.1m
    - Choice of Fund or tort claim
    - Issues
      - Prevent collapse US airlines via tort liability
      - Nat'l tragedy: sense of community
      - US nat'l security failures
    - Feinberg Goals:
      - Seduce claimants away form tort (> payouts)
      - Equal dignity of each life lost ($250k flat P&S)
      - Assure basic needs of each family (reduce > payouts)
    - Feinberg reflection: = payouts better
  - Contrast 9/11 with Katrina, OKC (non)compensation
    - Better to strengthen baseline default systems
      - State victim compensation funds
    - Improve ad hoc responses:
      - Limit to collective-response events
      - Focus on basic-needs goal (≠ hybrid tort/social welfare)
        - ≈ military survival benefits
      - Exclusive recovery (bar tort, except agst perps)
      - Allow Fund reimbursement agst wrongdoers (costly)
  - Likely < legacy b/c difficult boundary special consids terrorist victims
  - Footnote: compensation for latent injuries 9/11 1st responders

5. NZ Comprehensive No-Fault

- Historical strong commitment tort alternatives
- Probably N/A to US, b/c social/political differences, resistance to compulsion
  - High visible costs, even if offset tort (hidden costs)
- Leave deterrence to regulatory system?

INTENTIONAL HARM

M. Intent: Garratt v. Dailey (WA 1955)

N. Assault & Battery

1. *Picard v. Barry Pontiac-Buick (RI 1995)*

2. *Wishnatskey v. Huey (ND 1998)*

O. False Imprisonment:

1. *Lopez v. Winchell's Donuts (IL 1984)*

2. *Shoplifting*

P. Intentional Infliction of Emotional Distress:

1. *Womack v. Eldridge (VA 1974)*

2. *Harassment: CL and Title VII*

a) Racial Harassment

b) Sexual Harassment

c) School Harassment

3. *Constitutional Defense: Hustler Mag. v. Falwell (US 1988)*