TORTS OUTLINE – Mark Geistfeld, Fall 2016, Grade: A-

**GOAL:** Give each of us an equal chance of realizing our potentiality as a human being.

**JOB:** Strike balance between liberty and security, responding to social and economic needs.

**GUIDE:** Physical security is paramount because it is a prerequisite to liberty, but it is not an absolute right when: Social life would be paralyzed/threatened OR So restrictive on liberty that security isn’t worth it. (death before loss of liberty)

**NEGLIGENCE**

**Describe Injury, ID tortfeasor.**

**DUTY**

CATEGORICAL/Matter of Law/Dictated by Policy

**Feasance and Foreseeability** (took some action with foreseeable risk of harm to foreseeable categories of plaintiffs considered ex ante)

**No Duty to Rescue**

* **Initiated Rescue?** *Don’t leave worse off/seclude*
  + Should be no duty to complete rescue (even though most jx impose). Don’t want to deter people from trying
  + Breach for attempted rescue = gross negligence
* **Special Relationship with victim?** *Duty to protect against foreseeable risks*
  + E.g. university/students, landlord/tenant, carriers/passengers, landowners/business visitors, hotels/guests, prisons/inmates
* **Special Relationship with tortfeasor?** *Duty to protect foreseeable victims against foreseeable risks*
  + Specially situated to control the risk. (not your feasance, just a policy imposition).

**Palsgraf:** Judge determines the categories of foreseeable right holders that D should consider ex ante. Jury decides whether P was in that category. If P was not, no duty. Courts move this inquiry to proximate cause so that judge’s don’t usurp jury’s role. It is really a duty question.

* ***Limitations on Duty*** (despite F&F)

**a. Emotional Distress (standalone)**

* Full duty if ED stems from tortious physical injury
* **No duty for standalone emotional distress unless limited to a restricted class of plaintiffs small enough that all could be compensated by the ordinary defendant in most situations.**
* Bankruptcy rationale; prioritize physical security
* WATCH for expansive duty CATEGORICALLY. E.g. NO duty for ED from MD to third party (or anything that implicates the med mal category) – important that patient recovers.

**b. Economic Loss (standalone)**

* Full duty if EL stems from tortious physical injury
* **No duty for standalone economic loss unless limited to a VERY restricted class of plaintiffs identified ex ante** (bankruptcy rationale to prioritize physically injured PLUS business/cost rationale [accountant 2 reports])
  + **Privity?** Full duty/recovery. No physically injured plaintiffs to prioritize.
    - **Near Privity?** (only those identified ex ante, VERY limited)
      * E.g. lawyer to inheritor of will, accountant to third party they KNOW will rely on report for client.
* **Argue for duty for standalone EL if economic loss is to protect security interest**
  + Medical Monitoring: P exposed to cancer risk, must spend money on tx to protect physical security. (D counter argue bankruptcy rationale)
* **Commercial parties that COULD have protected interests via contract?** NO duty 🡪 defer to contract law. Only reason for tort duty in contract is information deficit.

**c. Public Utilities** *Limit duty to direct privity*

* Everyone in the community pays for the duty (rent, prices). (want B<PL for RC)
* Limited liability is enough to achieve deterrence, better for us so we don’t have to pay more or have interruptions in service due to bankruptcy.

**b. Landowners and Occupiers**

* **Trespassers** – **No duty** (but can’t set trap or wanton endanger)
* D would win most suits on B<PL, but we don’t want him to subject him to extensive litigation. Also, incentive to keep public lands accessible for recreational use.
  + **Known or reasonably anticipated trespassors** – Duty of reasonable care
  + **Attractive Nuisance (children)** – Duty of reasonable care (PL to children HIGH, children RR, nuisance = feasance)
* **Licensee** (guest/no tangible benefit/friend)
  + **Duty to warn of known dangers, NOT to discover unknown dangers**
    - No duty of reasonable care. (no rationale for imposition of RC standard because I have no incentive to cut costs with RE to friend – same care for myself and family acceptable)
* **Invitee** – business guest/tangible benefit
  + **Duty of reasonable care RE known and constructively known dangers**
* Incentive to cut costs, must impose duty – safety problem
  + - *Some jx merge invitee and licensee, duty RC toward both. Make arguments for duty based on location of land.* (e.g. front entrance to hospital, doesn’t matter if invitee)

**c. Sovereign Immunity/Government Entities**

**a. Discretionary Decision? No duty** Policy judgment/major budgetary decision

* Imposing a tort duty would frustrate the gov’t’s efforts to allocate limited resources
* Elections are our protection
* ***Not every budgetary decision is discretionary*** (e.g. placing stop signs appropriately)

**b. Ministerial Decision Rule? No immunity**

* **Duty** imposed **only if runs toward specific individual**, NOT public at large or general job duty (e.g. ME duty to boss not deceased father)
* **Duty when promise made (Cuffy)**

(1) a promise to act

(2) knowledge that a failure to act could lead to harm

(3) direct contact between the injured party and gov’t agents

(4) reliance by the injured party upon the municipality’s promise to act.

* **Duty when behaves as private entity** (highway, hospital)
  + Allocation of resources is stable
  + **Traffic-decision (e.g. median strip)** No duty unless decisions are plainly inadequate or unreasonable. BUT, if they have made a safety decision and there is unreasonable delay in implementing the measure🡪liability
* ***Statutes and Duty***
* Completely eviscerates existing common-law duty
* Completely defines reasonable care for an existing common law duty (e.g. dram shop)
* **Create a new duty**
* Statute can create a new private cause of action. Same liability rules as negligence per se.
  + - (B complying with the statute Ⓡ(PL) risks regulated by the statute)
* ***Uhr Elements*** – **Does a new statute imply a private right of action?**

a. Who was statute meant to protect? (P must be included)

b. What is the legislative purpose? (private ROA must further)

c. What is the legislative scheme for enforcement? (private ROA must not conflict)

* **Supplements a co-existing common law duty**
* D must consider risks regulated by the statute PLUS risks regulated by the common-law duty

**B complying with the statute Ⓡ(PL) risks regulated by the statute + (PL) other foreseeable risks of physical harm**

* **Provide a policy answer for a related duty question**
* E.g. Tarisoff – court wasn’t sure whether to prioritize psych confidentiality or impose duty to warn 3rd party – they found a related statute that required psych’s to testify in court, which allowed them to conclude that confidentiality was secondary and duty should exist

**Reasonable Person Standard**

**Reasonable Person** Objective standard – those that fall short through no fault are subject to SL

* **Children** Held to a **reasonable child of like age** standard unless engaged in ADULT activity – then held to normal reasonable adult standard.
* Everyone is a child at some point🡪RR; Deterring children from engaging in activities would be detrimental to development.
* ***Adult Activity***? Policy determination– is the activity important to child development in the community?
  + If NOT (adults only), no longer a RR. We assume it’s an adult from afar, don’t take extra precautions.
* **Physically Disabled** Reasonable person with X disability. (equal right to participate in world even though NRR)
* **Mentally ill – NO exception** Unless there is NO capacity for self-control, there is some capacity for self-determination. Tort law does not investigate motivations.

**How would RP act? (B>PL or B®PL)? … or SL?** (standard of reasonable care)

**Activity common to large fraction of the community? *Reciprocal Risk* 🡪 B<PL**

* We all reciprocally benefit from a lowered standard of care. (interpersonal 🡪 intrapersonal)
* For those that don’t participate, they can’t unilaterally determine our liability so still B<PL.

**Contractual Relationship? B<PL**

* P internalizes D’s duty since she is paying. B<PL i.e. self-care best for P. (same for products)
* Make D do what a well-informed P would want. Tort duty compensate’s for P information deficit and solves safety problem where D wants to cut costs.

**Abnormally dangerous activity? 🡪 Strict Liability** (+ Punitive Damages for B®PL violation)

* B®PL standard = B\* + $WTA
* All precautions that D would take under strict liability (those that satisfy B<PL)
* PLUS burdens in the ex ante $WTA amount

**Option A. Compensatory Rationale**

(a) highly dangerous (P and L)

(c) reasonable care will not eliminate the risk

(d) not common to the community

(e) inappropriately located

(f) value outweighs risks BUT VALUE LARGELY PRIVATE

* ***You have a right to engage in this activity but I must be compensated because it’s a non-reciprocal risk. Can’t get you on negligence, impose SL***

**Option B. Deterrence Rationale**

(a) highly dangerous (P and L)

(c) to prove breach – counterfactual hypothesis unclear.

(d) not common to the community

(e) inappropriately located

(f) risk could be reduced by relocating activity

* ***Force D to consider locating activity elsewhere. Can’t get him with negligence due to evidentiary problem.***

**Option C.** **Criminal Noncompliance** with Negligence Regime

**E.g Handguns.** If everyone exercised reasonable care, no one would get hurt. So not a candidate for compensatory rationale. But we should make manufacturers SL so they are deterred from letting guns onto the black market. Must answer policy question – which is more socially valuable – having handguns for self-defense or people not getting hurt?

**Defendant BREACHED the Standard of Reasonable Care**

***A. Untaken Precaution*** *Allege as many as possible!*

* RP would have taken X precaution in the circumstances AND precaution would have prevented injury in counterfactual world. Frame this carefully. (e.g. accident may still have occurred had you followed speed limit)

***B. Custom***

* **Did D depart from custom?** If custom applies to D, conclusive evidence of breach. Taking care is costly so the custom must be there for a reason. (custom unlikely to be in excess of B<PL)
* **D defense**: 1) Custom *not applicable* to me 2) I have an *equal or better* method
* **Did D comply with custom?**  Not dispositive because many customs are unreasonable (e.g. jaywalking). If custom is reasonable, it can serve as evidence for D.
* **Did MD comply with custom?**
  + CONCLUSIVE evidence of RC because MD’s market incentive is to give too much care, plus patients less likely to refuse due to insurance coverage. P must prove departure from custom.
    - **UNLESS informed consent issue**: custom might be to cut time on informing P of risks, bc MD already knows he’s right. Custom doesn’t control here.

***C. Statute***

* **Negligence per se**

**1. Safety statute**

**2. Injury was the kind the statute was aimed at reducing**

**c. P within the class of persons the statute was intended to protect.**

**d. D had no excuse for violation**

*Rationale*: Defer to legislature definition of RC rather than let jury decide.

* + **Violation excused if:**

1) Safer to violate statute than comply

2) Technical violation (despite exercising reasonable care)

*Rationale:* No safety purpose served by following statute.

* + - **NOT excuses**

1) custom (e.g. jaywalking)

2) ignorance of statute

* **No Safety Rationale (irrelevant!)**: Only regulates risky conduct incidental to its primary purpose
* **Promotes Safe Practices in General (irrelevant!)**: Must define the behavioral standard of reasonable care and not just safe practices in general (e.g. driving without a license)
* **Has a different safety rationale (still use!)**
  + Can still use legislative judgment to make arguments (e.g. sheep case)
  + If legislature decided B®PL(statute), of course:
    - * B®[PL(statute)+PL(common-law)+PL(other foreseeable)]
* **Parallel common-law duty** (statute has weight but CL trumps unless statute displaces)

**Compliance with statute does not conclusively establish RC – FLOOR not ceiling**

* Legislators may not have considered your specific situation. If the PL you created was greater, you must up your precaution.

***D. Judicial Rule*** (not jury)

* Same weight as a statute in NPS scheme
  + if rationale applies, D breached as matter of law (easy cases)
  + if rationale doesn’t apply, violation excused (most cases)

***E. Res Ipsa Loquitor*** (we don’t know what happened, can’t prove untaken precaution)

Jury decides based on common sense:

1. **Out of the universe of these types of accidents, > 50% are due to someone’s negligence**
   1. i.e. the standard of reasonable care is very demanding, requires a lot of behavioral precautions.
2. **D had exclusive control over the instrument that caused the injury**

Jury can conclude D more likely than not negligently caused injury

* **Constructive Notice Rule:** To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit D to discover and remedy it.

**Defendant’s breach CAUSED Plaintiff’s injury**

***1. Factual Cause***

**A. But-for test – [Counterfactual inquiry]**

1. Form counterfactual hypothesis in which defendant takes the precaution.

2. Examine whether P’s injuries would have occurred more likely than not.

If > 50% chance P’s injuries would not have occurred, all set!

* CANNOT be total speculation (e.g. dead guest in hotel room, no other evidence)
* Need something to give **weight to conclusion** (e.g. no one recognized rapist in dorm room)
  + DON’T need to eliminate all other causes.
* ***Alternatives to But-For*** (when it fails!)

**B. Liberal But-For Test** (use DUTY)

1. Negligent act deemed wrongful because of the chances of X type of accident
2. X type of accident occurred

The existence of the duty allows the jury to infer that the precaution would prevent a significant number of accidents. (use as long as survival chance greater than zero)

* Burden of proof shifts to D to disprove factual cause if he can

1. **Proportional Liability**

* If D has been negligent (e.g. released carcinogens into environment), but causation is only <50%. (e.g. background risk goes from 2/10k 🡪 3/10k – only 30% chance caused P cancer)
* Argue to subject him to proportional liability (e.g. 30% damages) for deterrence rationale.
  + Justify this by arguing we should extend loss of chance doctrine but limit it to plaintiff’s who actually got the cancer. (tort law about making world safer place)

1. **Loss of Chance**

* Patient comes in to hospital with <50% survival, and MD med mal
* Since but-for fails, hold MD liable for loss of chance
  + We could never get MD on regular but-for, and this creates a safety problem where sick people aren’t protected.
  + We shouldn’t use liberal but-for, because MD would be liable for entire death and thus no one would want to treat sick people.
* Rather than re-conceptualizing injury as a lost chance, make MD strictly liable for entire death and then apportion damages by lost chance.

1. **Substantial Factor**

Traditional but-for fails because two tortious causes converge, and either could have caused all damage (two fires). Causation is satisfied when jury concludes D’s action were a substantial factor.

***2. Proximate Cause***

* **(wrong!) Directness Test + Within the Risk**:
  + D liable for all physical harms directly caused by the tortious misconduct
    - Only NEW (after D’s act) and UNFORESEEABLE forces cut of directness
  + As long as P’s injury was “within the risk” that made D’s act wrongful (e.g. speeding train/tree)
* **(correct!) Foreseeability Test + Eggshell Skull Rule**
* Prima facie case:
  + Reasonable person would foresee risk category at time of safety decision (just initial compensable harm e.g. chest bruise)
* Damages phase:
  + D liable for all harm directly caused by initial compensable harm identified in liability phase, even if not foreseeable. (new and unforeseeable forces cut off causation)
    - D get to pay unforeseeably low damages when hard skull (windfall), must pay unforeseeably high damages when egg-shell skull.
    - P only burdened to prove directness with as much certainty as circumstances will permit. D bears burden of factual uncertainty since he created problem.

**3. *Multiple Tortfeasors***

**a. Joint and Several Liability** [multiple known tortious causes]

**When more than one defendant is legally responsible for P’s entire injury, she can recover 100% damages from any.** Risk of one D insolvency shifts to D’s.

* Duty/Breach: concert of action/substantial factor/indivisible harm
* Causation: P’s but-for causal proof applies to the group of defendants rather than each defendant individually.
  + Burden shifts to D to rebut causation or apportion fault.

**b. Alternative Liability**

* When the **conduct** **of two or more actors** is **so related** to an event that their **combined conduct**, viewed as a whole, is a **but-for cause of the event**, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.

1. Join all tortfeasors
2. Show each defendant breached a duty
3. Show one of them could have caused P’s injury (~fungible)
4. Show one of them actually did cause P’s injury
   * P recovers from each D proportionally (100% recovery). Burden shifts to D to rebut.

*Rationale*: Injustice of having burden on plaintiff when defendants all generated tortious risk

***Causal Grouping***: Plaintiff’s but for causal proof applies to the group of defendants rather than each defendant individually. D can rebut presumption.

***This is proportional liability*** as well, because each D is paying for the chance that he caused the injury.

**c. Marketshare Liability**

* P can recover against a group of manufacturer’s comprising a“substantial share” of a relevant market. Courts typically require that the tortfeasors engage in fungible/substantially similar tortious conduct.

1. Join a substantial share of the market
2. Show each defendant breached a duty
3. Show all of them could have caused P’s injury (~fungible)
   * + P does not get 100% recovery, D’s only pay up to amount representing the probability they caused P’s injury.
     + ***Causal Grouping***: Plaintiff’s but-for causal proof applies to the group of defendants rather than each defendant individually. D can rebut presumption.
       - If he could join >50% of market, could get 100% damages under this theory
     + ***Proportional Liability:*** Each D pays for the chance that he caused the injury (market contribution).

**d. Vicarious Liability**

* Employer strictly liable for tortious conduct of employee acting within the scope of employment
  + Is the tort attributable to a foreseeable risk of harm attributable to the employment relationship, that is above that of the community in general? (i.e. is the risk characteristic of the relationship?)

Still make arguments when:

* employee doesn’t consider his own actions as within the scope of employment,
* employee does an act expressly forbidden by the employer
* risks associated with bringing people together – e.g. fights – but NOT things from the employee’s personal life.
* **Independent contractors**
* If employer has control over the means and ends of the independent contractor’s activities, the label does not matter and the employer is liable. (master/servant relationship).
  + Duty coextensive with control
* **Apparent Authority**
  + If someone relies on the representation by an employer that the independent contractor is his agent, vicarious liability applies to risks generated by that representation.
    - also determine whether the contractor had to follow the protocols of the principal
* **Non-Delegable Duty**
  + If risk is “fairly attributed” to the employer, he is vicariously liable. Still responsible for risks characteristic of his business whether or not his hiring scheme is independent contractors or direct employment.

**Defenses based on Plaintiff’s Conduct**

**a. Express AOR** [waivers]

* Rarely EVER enforceable. Not enforceable when:

1. **P did not have enough information to make an informed decision [knowledge]**
   * If a plaintiff thinks he is consenting to something materially different from the actual risk, this negates the waiver. This is not secondary assumption of risk as the plaintiff was faced with a materially different choice at the time of the safety decision than was the defendant due to the plaintiff’s lack of knowledge of the associated risks.
     + Note: even if P aware of general risks of skiing, not aware of risks on mountain on THAT day.
2. **P was a weak bargainer [choice]**
   * If P was a weak bargainer, he did not make a meaningful choice.
     + P can still be a weak bargainer when activity is discretionary (e.g.) snowtubing. Tunkl wrong!
3. **The waiver violates public policy** (i.e. create a **safety problem**) (almost always do!)
   * + E.g. Frustrates need to incentivize owners to maintain safe mountain and minimize accidents.

* **Policy Arguments on both sides**

***Enforce Agreement*:** If P made a well-informed choice, we must enforce the agreement to protect self-determination.

***Do not enforce*:** If P was poorly informed or a weak bargainer, don’t enforce agreement because we have a safety problem.

* **Commercial Contracts – usually enforce**

Enforce most of the time because parties are well-informed, equal bargainers. We must protect people’s ability to make autonomous private agreements.

* **Products liability – never enforceable**

Manufacturer is in a better position to learn of and correct harm. We always assume the consumer does not have enough information to make a meaningful choice.

**b. Primary AOR**

* **When an activity has inherent risks that cannot be reduced without fundamentally changing the activity itself, AND the ordinary participant would agree to the risk, defendant has PrAOR Def.** 
  + Objective standard based on ordinary participant, NOT case by case.

E.g. baseball: Ordinary participant wants to be protected by net behind home plate but not in the outfield. (low risk of getting hit compared with fun of unobstructed view and opportunity to catch ball).

Just because one attendee knows nothing about baseball and wouldn’t choose risk, stadium not liable.

**c. Secondary/Implied AOR**

* In the event that **D breaches the duty and exposes the plaintiff to an unreasonable risk**, a plaintiff who knows of the risk and then chooses to face it is subject to the defense of implied or secondary AOR.
  + **P made the same safety decision involved in the allegation of negligence**
    - If P made different choice, FAIL here. (e.g. choose to use bad tools instead of lose job ≠ choose to use bad tools instead of good tools)
    - If P uninformed/didn’t appreciate risk, NOT a real decision, shouldn’t bar recovery.
  + **The reasonable person would not make the decision that P made** (i.e. P was contributorily negligent)
    - If P has different risk profile, he should be held responsible for his decision. Protect P’s autonomy to face risks (tort law lets P hurt self, not others – different S/L bal)

|  |  |  |
| --- | --- | --- |
| Informed RP face risk? | Plaintiff face risk? | Result |
| Yes | Yes | Primary AOR defense - Flopper |
| Yes | No | Primary AOR defense - Baseball |
| No | Yes, but NOT if had adeq. info! | NO AOR - Snowtubing |
| No | Yes (w/ adq. info/appreciate) | Secondary AOR |

**d. Contributory Negligence**

A **plaintiff who failed to exercise reasonable care** is **completely barred from recovery** under traditional CN.

* Without a normative distinction between P/D unreasonable behavior, the loss must lie where it fell.

**e. Last Clear Chance**

**If the defendant acted negligently after becoming aware of plaintiff’s prior negligence, we can shift the loss to him due to his “bad actor” status.**

* NOT used in CR jurisdictions. (they took it away because misunderstood original purpose – thought it was meant to mitigate CN being “unfair” to P – think no longer relevant bc CN gone in CR jx)

***Still applicable in med mal******everywhere***: A patient deserves reasonable medical care regardless of the source of the medical problem. MD has a special duty.

**f. Comparative Responsibility** (predominant)

Instead of contributory negligence or last clear chance (where either P or D pays 100%), the jury apportions damages between plaintiff and defendant based on relative CULPABILITY and strength of CAUSAL CONNECTION. (unpredictable!)

* **Impure CR** (unfair to P): P only recovers if D’s negligence is equal to or greater than his own. Plaintiff pays 100% damages if he’s 51% at fault. Defendant pays 51% damages if he’s 51% at fault.

**Pure CR** (fair): Liability apportioned in all cases. If P 99% responsible, can still recover 1% from D.

**STRICT PRODUCTS LIABILITY**

* Goal: Protect consumer safety when our actual or constructive expectations are frustrated. Defend consumer choice/product variety (no liability) when our expectations have been met.
* Hx: Privity requirement 🡪 Inherently dangerous restriction 🡪 Res Ipsa 🡪 SL (evidentiary rationale)
* Parallel Hx: Implied warranty of merchantability for food (SL, no examination of RC)

**Restatement 2nd 402a**

Strict liability for anyone who sells a product with a defect making that product unreasonably dangerous.

* + No privity requirement
  + Liable to ultimate user or consumer, not just buyer
  + Long as no substantial change in the condition in which it’s sold.

**Restatement 3rd**

* No “unreasonably dangerous” requirement. (otherwise same as above)
* A product is defective when, at the time of sale or distribution, it:

1. Contains a **manufacturing defect**: Departs from its intended design despite RC.
2. Is **defective in design**: The foreseeable risks of harm could have been reduced or avoided by a reasonable alternative design. B(RAD)<PL(Reduced by RAD)
3. Has **inadequate instructions or warnings**: The foreseeable risks of harm could have been reduced or avoided by a reasonable alternative warning or instruction. The omission of the RAW/I makes the product unreasonably dangerous. B(RAW)<PL(Reduced by RAW)

**A. Malfunctions** Departs from its intended design despite RC.

**Duty**: The consumer does not have adequate information to protect their interests via contract. The tort duty solves the safety problem wherein manufacturers would be incentivized to cut costs and release dangerous products.

**Breach**: The product **malfunctioned in a self-defeating manner**, and thus frustrated the **consumer’s expectations.**

* Show circumstantial evidence for 50.1% conclusion product malfunctioned.
* No expert testimony, no risk utility test

**Causation**: P must prove that the defect caused his injury. (same process as negligence)

* D can argue that injury was unforeseeable despite real defect – no liability!
* ***Enhanced Injury*:** It may be difficult to separate the injuries caused by a natural accident versus the enhanced injuries caused by the product defect. The defendant bears the burden of factual uncertainty – he pays full damages unless he can rebut.

**This is strict liability because** The retailer will always be subject to liability even if they didn’t do anything wrong. (can indemnify from manufacturer later). Also, we don’t ask if P would have been injured in the counterfactual world. We just care that D was injured period.

**B. Design Defects** The foreseeable risks of harm could have been reduced or avoided by a RAD

**Duty**: The consumer does not have adequate information to protect their interests via contract. The tort duty solves the safety problem wherein manufacturers would be incentivized to cut costs and release dangerous products.

**Breach**: **Frustration of *constructive* consumer expectations.**

* The ordinary consumer does not have expectations as to complex product performance, so the regular consumer expectations test breaks down.
* We use the risk-utility test to determine what a well-informed consumer would want. (B<PL – contract rationale). This tells us if consumer expectations were frustrated.
  + *solves deterrence problem and protects contractual relationship.*

There is a **Reasonable Alternative Design** that passes the Risk Utility Test

* B(cost of RAD) < PL(reduced by RAD)
  + The cost of the RAD is reasonable in light of the risks it eliminates
* The RAD cannot fundamentally change the product
  + If P alleges a RAD that fundamentally changes the product (e.g. bullet-proof vest should have sleeves, mini-bus should be sedan), Defendant has Primary AOR Defense. (P made same choice alleged in negligence claim)
  + *Rationale:* This protects consumer choice to select different products. If D’s are held liable, they won’t make bullet-proof vests or minibuses anymore.
  + **Is there an open and obvious danger?**
    - Defendant only has a defense if he offered plaintiff additional protection at an increased price and plaintiff declined. Otherwise, plaintiff made a different choice than is alleged in the negligence claim and secondary AOR is precluded.

Even if Defendant wins here, **Plaintiff can still win with RAD**

*Rationale*: Consumer expectations frustrated if design is not reasonably safe

**Causation**: P must prove that the defect caused his injury. (same process as negligence)

* D can argue that injury was unforeseeable despite real defect – no liability!
* ***Enhanced Injury*:** It may be difficult to separate the injuries caused by a natural accident versus the enhanced injuries caused by the product defect. The defendant bears the burden of factual uncertainty – he pays full damages unless he can rebut.

**This is strict liability because** The retailer will always be subject to liability even if they didn’t do anything wrong. (can indemnify from manufacturer later). Also, we don’t ask if P would have been injured in the counterfactual world. We just care that D was injured period.

* Note: **Don’t argue design defects for Rx**. MD has responsibility to get drug to right subpopulation. E.g. acne medicine causes birth defects, MD makes sure to prescribe it to guys only. Rx not defective.

**C. Defective Warning/Inherent Risks of Product**

**Duty**: When there is information about a product that would be material to the ordinary consumer’s decision-making that she would not otherwise know about, the manufacturer has a duty to provide an appropriate warning.

**Breach:** All warnings that are B(info costs)>PL(risks reduced) are defective.

* Warning is not easily understood (buried 4 pages deep)
* Warning does not have sufficient detail to inform P’s decision (“warning, product may cause injury”)
* Warning lists risks from least to most serious (frustrates expectations – info costs should correlate)
* Warning includes less serious risks than one P alleges is missing.
* Warning includes insignificant risks or risks already known to community B(info)>PL(reduced)
  + D counter-argue if L is high or many consumers are unaware
  + As PL decreases, there must be a larger proportion of uninformed consumers to justify the warning.
* **Warning is missing material information**

1. The ordinary consumer would find the risk to be material in the decision to buy or use the product
2. The ordinary consumer was not otherwise sufficiently aware of the risk.

**3. There is a Reasonable Alternative Warning** B(info costs) < PL(reduced by RAW)

* Create a warning that would materially improve the safety decision without increasing the information costs or undermining more important disclosures. (concise but powerful)
* OR argue that the PL is so great that the info costs can go up.
  + **Defendant counter-argue**: If I had to disclose X, I’d also have to disclose all other risks of equal or greater magnitude. The info costs will outweigh the risks reduced, and there will be a safety problem where people don’t read the warning.

**Causation** **– Strict Liability**

Plaintiff must establish that she would not have used the product had the disclosure been present. In “inherent risk” cases, whether or not the reasonable person would have used the product is not relevant, because we all have different health backgrounds.

* The **heeding presumption** allows the plaintiff to establish causation even if the reasonable person would have gone ahead and used the product given the disclosure.
  + Consumer expectations have clearly been frustrated since plaintiff suffered injury, and the manufacturer is strictly liable for that frustration under strict products liability.
  + Plaintiff otherwise could not complete the tort, and this would generate a safety problem (deterrence/evidentiary rationale for SL)

**NOTE: *Manufacturer cannot warn if design change would be the more reasonable way to reduce PL in question*** *e.g.* warning of "no airbag" doesn't help consumer (doesn't affect behavior bc there's no way I can reduce risk)

* + **ARGUE: risk is not inherent in the product** (but watch for AOR)

**End rationale:** Markets depend on good information. But overly long warnings are self-defeating because no one reads them.

**D. Defective Warning/Safety Instructions**

The plaintiff can prove that a product is defective for not adequately instructing the consumer of the need to take a particular precaution while using the product.

**Duty:** When there is a precaution that the ordinary consumer would find worthwhile to take and would not otherwise know about, D has a duty to provide an appropriate warning.

**Breach**:

1. The ordinary consumer would not otherwise know about the need to take the precaution
2. The ordinary consumer would find it worthwhile to take the precaution had they been informed
3. The ordinary consumer would find it worthwhile to read the proposed RAW given the info costs.
   * Argue a RAW where B(info costs)<PL(risks reduced)

**Causation:**

Plaintiff must establish that if she had been adequately warned of the risk, she would have changed her behavior and avoided the injury in question.

* We have already established in breach that the ordinary consumer would read the RAW
* We presume that the ordinary person would heed any safety instructions therein
* The heeding presumption allows us to presume that plaintiff, more likely than not, is like the ordinary consumer.

**F. Defenses**

**A. Sophisticated Intermediary Rule (warnings)**: A supplier has no duty to warn the ultimate user when:

1. End user’s employer already has a full knowledge of dangers, OR

2. Supplier has provided adequate warnings and instructions to the employer

* AND used reasonable care in relying on the intermediary (informing the end user directly would have been more burdensome)

**B. Learned Intermediary Rule (warnings)** (Rx drugs):

* Rx manufacturer has a duty to provide adequate warnings to the prescribing MD. Once they fulfill this duty, they are no longer liable to the patient.
  + The MD has to disclose all risks to the patient to get informed consent to treatment, so the duty to warn transfers to them.
* ***Advertising Exception***: When Rx are marketed directly to the consumer, the learned intermediary rule breaks down. Liability stays with the drug manufacturer, because the patient may discount the MD’s warnings and attend to the ad instead.

**C. Risk was Unforeseeable or Low Magnitude (warnings)** If the burden of disclosure is greater than the probability of injury combined with the magnitude of possible injury, defendant did not breach.

* A manufacturer only has a duty to warn the consumer about risks they are aware of or risks which they should be aware had they performed reasonable testing.

**Defenses based on Consumer Conduct** (all strict liability):

**a. Primary AOR**

* Plaintiff was offered additional protection and declined
* Plaintiff’s RAD fundamentally changes the nature of the product
* *Rationale*: Defer to choice of ordinary right holder to preserve market variety and consumer choice.

**b. Did plaintiff misuse the product?**

* Seller has a **duty to protect** against risks derived from **foreseeable misuse** of the product.
* If plaintiff’s misuse (regardless of injury) is unforeseeable, it falls outside the seller’s duty.

**c. Plaintiff was contributorily negligent**

* Plaintiff has **no duty to discover** manufacturing, design, or warning **defects**. We can assume a product is safe and the warning is adequate.
  + *Rationale*: Protect consumer information costs.
* Plaintiff DOES have a **duty to protect himself against known defects** or risks. (go to CR or CN)
  + *Rationale*: Protect consumer choice to purchase risky products when adequately informed. (market variety).

**The Restatements and Contributory Negligence:**

Preserving seller duty to protect against foreseeable misuse.

* **Restatement 2nd/**NO contributory negligence
  + At this point in history CN completely barred recovery. This undermined the seller’s duty to protect against foreseeable misuse, so the Restatement did not recognize CN. (safety problem)
* **Restatement 3rd**/YES contributory negligence
  + Once comparative responsibility adopted, CN no longer barred recovery completely. (fault apportioned). P gets partial recovery and D gets punitive damages.

**Statutory Preemption** **for Design Defects:**

* A statute can prohibit any tort claims that seek to impose features outside those required by statute.
* Proof of regulatory compliance can be a shield for defendant. (floor)
* **Does statute *explicitly* preempt a private cause of action?**
  + No tort claim
* **Does statute *impliedly* preempt a private cause of action?**

1. **The risks the statute is aimed at reducing caused P’s injury** (statute applies to the issue)
2. **The legislature’s risk-utility analysis is still relevant**

* The legislature will define a standard of care in the statute that involves a B<PL judgment call. The B may have changed due to new technologies. If so, the standard of care no longer governs because it’s outdated.

**Ex. implied preemption:**  Legislature passed a statute that car makers could choose whether or not to put airbags in cars. The B was not worth PL because airbags were risky (killed kids, hard to maintain). The legislature intended to allow makers to come up with new technologies. No tort claims based on lack of airbags.

**Ex. no implied preemption:** Statute stated that car makers could choose whether to put a lap belt in the middle backseat, or a full shoulder strap. In the following years, seatbelt technology improved such that B was low and they could powerfully reduce PL. NO implied preemption because the legislature’s B<PL determination was outdated.

* **A tort claim can go forward if the policy decision in the statute is no longer applicable (e.g. improvements in technology). A defendant has a full defense if he complied with a regulation that is still relevant.**
* **FDA – Decision to Release Rx Drugs**
  + It is impossible to know all the risks of Rx drugs before release because of limited sample sizes. Risks don’t materialize until several years after release.
  + The FDA’s decision to release a drug does not reflect a policy judgment relevant to tort law because it was made on inadequate information.
  + Even if consumer expectations are frustrated, Rx makers should not be held liable for *unforeseeable* risks of Rx. (given reasonable testing)
    - We benefit from having cheaper and more drugs on the market
    - There is no deterrence objective when a risk is unforeseeable. This is a compensation objective that should be channeled to insurance.

**Pure Economic Loss**:

* Product defect causes no physical damage and no property damage (other than damage to the product itself), it **only causes plaintiff to lose income or expend money.**
  + NO tort duty – dispute governed by contract law.
    - The rationale for a tort duty to supplement a contractual relationship (information deficit) is gone. Plaintiff is in the best position to understand his financial risk exposure.

**Pure Economic Loss but Security implicated**

* If security is implicated (e.g. medical monitoring, asbestos exposure), we should impose a tort duty to solve the safety problem.

**DAMAGES**

**B<PL 🡪 What is L?** (informs standard of reasonable care)

* **Economic loss proximately caused by physical injury**
  + How to project economic loss in the future to settle now?
    - Standard is NOT more-likely-than not. Plaintiff produces reasonable evidence (e.g. expert testimony re average wages). Defendant bears the burden of factual uncertainty.
* **Pain & Suffering** (about half of tort awards)
  + **How NOT to calculate P&S award**
    - NOT zero for dead person (no loss of life’s pleasures) – cheaper to kill someone than hurt them.
    - NOT infinity problematic because life would be paralyzed.
    - SHOULDN’T cap damages because then attys will not take cases where economic loss is low 🡪 unequal access to tort system.
    - Juries make arbitrary decision tied to monetary damages (BAD)
  + **How to calculate P&S award** 
    - NOT what you would take to be in P’s position. Based on violation of the tort right which entitles you to protection from RISK.

1. **What is the probability of injury?**

* B®(x/100)(L)

1. **How much money would the reasonable person accept to face the PL ex ante?**

* WTA = (x/100)(L)

1. **Solve for L**

* WTA/(x/100) = L
* For the EPA, this L value represents the value of one life. The amount of lives saved by a regulation multiplied by L = the benefit of the regulation.

***Conclusion: Divide the WTA amount by the probability of injury to get L.***

* **Punitive Damages** (about half of tort awards)
  + Not every consumer will come forward with a tort claim, so manufacturer may behave like this:
    - **B<PD** (anticipated compensatory damages instead of anticipated injuries)
    - **If manufacturers are caught doing this, they are subject to punitive damages** 
      * This incentivizes them to exercise B<PL ex ante.
* **Cannot violate Due Process** (per SCOTUS)

1. **Cannot be more than 3x the compensatory award**
   * this factor dispositive in practice, often reduced to multiple of 3
2. **Use relevant civil or regulatory fines as a guidepost** (1-9x)
3. **Consider reprehensibility of conduct**
4. **Must be based entirely on violation of plaintiff’s individual tort right** 
   * SCOTUS TAKES A RIGHTS BASED APPROACH TO TORT LAW, so we cannot justify the above with deterrence argument.
     + Plaintiff argues: D acted like B<PD toward me (violated my right)
     + **Regular damages should correct to B<PL**
     + **Punitive damages should be additional to this (so up factor 2)**

**Damages for extraordinarily dangerous activities** (not products liability)

* **Plaintiff should get B\* + WTA amount ex ante in the form of extraordinary care**
  + We use punitive damages to enforce this standard ex ante. So resultant damages should correct to B®PL and then add punitive on top.

**INTENTIONAL TORTS**

*Tort law is aimed at* ***victim compensation*** *in this area, NOT deterrence (crim)*

**1. Intent**

D acted with the purpose or knowledge that a contact prohibited by tort law would occur, and the contact occurred.

**2. Tort**

* **Battery**: D acted with the purpose or knowledge that a **harmful or offensive contact** with P’s person would directly or indirectly occur, and the contact occurred. *Interest: Security*
* Plaintiff does have to intend harm or offense. He just must know it is nonconsensual.
  + Strict liability for non-reciprocal risk (no fault inquiry)
  + Does not have to intend physical harm (shin kick), but is liable for physical harm resulting from the offensive (nonconsensual) contact.
  + Can be done through another person (promoter/boxer)
* Offensive = offends a reasonable sense of personal dignity.
  + Neither plaintiff nor defendant can unilaterally determine what is offensive
  + Nonconsensual contact is always offensive (even if, for e.g., MD thinks x treatment is best)
  + “Offensive” can be determined by policy (e.g. MD’s with HIV not offensive)
  + Low level contacts are reciprocal risks –result of community life (no liability)
* Limited to a particular plaintiff or small class of plaintiffs within localized area
  + Protects product manufacturers who know that some products will injure some people
  + Does not apply to someone who shoots into a crowd, because they know one person will interact with the bullet in a harmful way.
* **Assault:** D intended to cause a harmful or offensive contact with P’s person, OR intended to put P in imminent apprehension of such contact. P was thereby put in **imminent apprehension** of such contact. *Interest: Security*.
  + If contact actually occurs, merges into battery.
  + Goal: prevent dignitary attacks which provoke a violent response.
  + D does not have to be “afraid”, (e.g. blackbelt), just has to apprehend the contact. (shouldn’t have to defend self + we want to prevent violence)
  + **Threat must be truly imminent, NOT conditional**
    - *Rationale*: You should channel dispute to police
* Same “offensive” definition as battery
* **False Imprisonment**: D intentionally confines the plaintiff against his or her will when the plaintiff is aware of such confinement. *Interest: Freedom of movement*.
  + Confinement must be complete
    - P would run any risk of harm to self or property if tried to escape.
  + NO liability for partial confinement unless P is unaware of reasonable means of escape
  + Area can be large and/or mobile
  + Shopkeepers can detain shoplifters reasonably while they are still in the store, but not if they have left.
* **Intentional Infliction of Emotional Distress:**

1. D’s conduct is intentional or reckless, and
2. An ordinary person would exclaim OUTRAGEOUS!!! (really extreme)
3. Causal connection between conduct and emotional distress
4. Distress has to be severe

* Really ambiguous in application. Problem: P gets a settlement from D when claim isn’t actionable but D just wants to protect reputation.
* **Trespass on Land**: D intends to be on a piece of real property owned by plaintiff (or causes a thing or third party to do so) (or remains on land or fails to remove object) *Interest: Possession*
  + D does not have to know he is trespassing, just has to intend to be on the land (strict liability)
  + Protects P’s interest in exclusive possession of his property.
  + Intangible intrusions only included if they cause physical harm to property
    - Otherwise the tort of nuisance would be subsumed, which would be very bad.
    - In the trespass tort, we don’t balance D’s and P’s interest (only care about P’s)
      * We presume nominal damages since P’s right has been violated.
      * P can then seek punitive damages or injunctive relief. (so that D cannot walk across his property and leave a dollar)
    - Nuisance protects the enjoyment of property, and we balance D’s and P’s interests to determine if the intrusion is “unreasonable”. We don’t presume damages.
      * We need to preserve the reasonability inquiry within nuisance so that we can’t unilaterally determine how another enjoys their property.
    - Should not apply to cyberland trespass, because then one unwanted phonecall or email could result in punitive damages or injunctive relief.
* **Conversion**: D intentionally exercises dominion or control over the chattel of another in such a way that so seriously interferes with the others right to control it that D may justly be required to pay the him the full value of the chattel. *Interest: Ownership*
  + Chattel can be intangible
  + Tort completed if D takes something with the intention to steal.
  + Strict liability- D doesn’t have to know it belongs to another
  + Can be restricted for policy reasons
    - E.g. taking a patient’s cells and selling them for research is not conversion because then any downstream users would be strictly liable for the conversion. This would impede medical research and this threaten the security interest. Use informed consent doctrine in the medical sphere.
* **Trespass to Chattels**: D intentionally dispossesses another of a chattel or uses or intermeddles with it (physical contact). *Not enough to threaten ownership interest*
  + We do not presume damages for the right’s violation alone as we do with land trespass
  + Plaintiff has to show either:
    - Actual dispossession
    - Damage to the chattel’s condition
    - Loss of use for a significant period
    - Physical harm to the plaintiff, chattel or other
  + Strict liability- D does not have to know it belongs to another
* Take umbrella and you were without it during the rain might = conversion.
* **Public Nuisance** Unreasonable interference with a public right that we all have in common.
  + To recover in tort, P must establish that his injury was above and beyond that suffered by the public at large. If not, the public authorities will handle.
  + Not relevant to individual rights that are commonly held – e.g. health and safety.
* **Medical Malpractice** (consent): An MD must present all alternative treatments and all material risks, or else a patient’s consent to a treatment choice is ineffectual.
  + Custom does NOT govern, because market pressures push the MD to spend less time explaining.
  + Not a battery, because we don’t want to connote the same culpability
    - A battery occurs when there is a complete absence of consent (unrelated procedure)
  + **Causation for informed consent:** Plaintiff must prove that the disclosure would have been material enough to change the mind of the reasonable person. (more demanding than product warning cases)

**3. Defenses**

* **Consent** The plaintiff’s consent to an intentional invasion of a legally protected interest bars recovery.
* We presume that consent was NOT present, defendant must allege it as a defense
* If consent is shown, defendant’s duty is negated.
* No defense if consent was made with:
* Incomplete information
* Duress or coercion
* Mistake (think you’re consenting to something else)
* Incapacity
* Violates public policy
  + Example: promoter set up boxing match that fighters consented to. Fighter’s consent was ineffectual because it violated a statute that made the fight illegal. Promotor should be liable for battery to the boxers.
* Contact must be **within the scope** of the consent (choices match up same as AOR)
* **Implied Consent** If the reasonable person would think that consent was present and D also so believed, he has a defense of implied consent.
  + Battery is only completed when D intends to cause a nonconsensual contact
    - D is liable if he knew there was no consent even if a reasonable person would not (D’s intent matters).
    - He is liable if he thought there was no consent but a reasonable person would know otherwise.
* **Self-Defense:** You can use reasonable, proportional force if you reasonably believe that another is about to commit a battery against yourself or another. (compensation inadequate to protect security)
  + - Your force must be proportional to the threatened harm you anticipate in the circumstances
    - If your belief is reasonable but mistaken, no liability (even if you shoot an innocent bystander – both were behaving reasonably so loss lies where it falls)
* **Defense of Property**
  + You cannot use force threatening grave injury to protect your property no matter the value of the property (security>property)
    - After asking person to desist, you can have a scuffle and try to grab object back but cannot seriously injure someone (e.g. spring gun)
* **Private Necessity** An individual can interfere with the property of another to protect his security interest, but he must compensate the owner for any damage done.
  + Since the actor is granted control of the property, he must take responsibility for his B<PL decisions RE the property (e.g. save the ship over the dock)
* **Public Necessity** An individual can interfere with or destroy another’s property to avoid “imminent public disaster” PL>PL (inevitable fact of social life)

Notes from last couple classes. Did not put into outline form….

**Insurance & Tort Law**

* Affect the way we formulate tort rules in and of themselves.

1st party insurance:

P would rather get recovery through first party insurance because it is quicker and less expensive than litigation. This means that we want deterrence over compensation for a tort rule, since insurance takes care of comp. This gives us B<PL in contractual relationship and RRs rather than strict liability.

* In order to get insurance, D has to be held liable. If juries know that P has insurance, they made be less likely to rule against D. This is why we have the Collateral Source Rule, that says that plaintiff’s insurance is inadmissible evidence in court.
  + This leads to P getting paid twice (moral hazard – now it’s beneficial to get injured)
  + Solution: SUBROGATION – Insurer indemnifies against D or gets part of tort award. Good because it lowers health insurance costs.

**3rd party insurance**

Evidence of D's insurance inadmissible too (prejudices the jury toward assigning large damages)

* D also has moral hazard issue – not motivated to prevent losses since insurance will pay
  + Solution: insurance makes D pay for some of the loss himself and does not reimburse at all for expected or intended harms.
  + D CAN purchase liability insurance for negligent harms
    - This is good for plaintiffs because we get certain recovery (no insolvency concerns)
    - Also good for D's because we don't face uncertainty RE having to pay tort damages
    - We are reducing the burden of the risky activity for the duty holder.
    - This allows us to use the existence of BI insurance to justify the tort duty in the first instance
  + CONCLUSION: 3rd party insurance (BI) good for plaintiffs and defendants

**Suits can involve both covered and uncovered losses**

-e.g. both negligence and battery in same suit

-insurance company's interests aren't properly represented in P v. D suit.

-P won't push for battery claim because they are worried about D insolvency (D not covered for that loss)

* Solution: courts say that battery v. negligence judgment not binding on insurance co. D and insurance co relitigate the issue on their own and decide if it was battery v. negligence.
* Result: P will make sure there is at least one claim in suit that is covered.
* Insurance company will participate in law suit
  + Good for D because he gets corporate counsel for low cost (D gets litigation insurance)

**Both P and D are funded by insurers in tort suit**

Triangular relationship between policy holder --> insurer --> insurer's attorney that they give to D --> policy holder

* Big conflict of interest bc atty is loyal to the insurer (pays their salary), but they are supposed to be representing D.

**Decision whether or not to accept a settlement**

B<PL calculation

How much should D offer in settlement?

Damages (D) = $100k

Attorney fees (A) = $1k

Probability of winning suit (P) = 1/10

1/10 chance D going to have to pay 10k - PL = 10k … +1k atty fees

D will offer 11k for settlement

For P, anything greater than 9k will be worth it (bc I pay atty fee too)

So, settlement will be 9-11k.

Adding insurance….

Say there is insurance for 50k

What settlement does insurer offer? 6k

Result: case goes to trial bc insurer can't agree with D RE how much to offer for settlement and P won't accept

Pavia case:

Insurance company accepted settlement based on it's own B<PL instead of the policy holder

If D's insurance company fails to accept a reasonable settlement offer, they are liable because they've acted in bad faith. They have to pay out entire judgment. (since case should have never gone to trial at all)

How do we know what is a reasonable settlement offer?

-Pretend that there is no insurance (Act as if there are no policy limits)

-e.g. 9-11k range

-insurer can argue that they are trying to protect the ordinary consumer's interests by keeping costs low. Argue that the plaintiff is overreaching.

-the P value is not possible to know for sure.

-juries are biased in evaluating settlement offers, because we think about them from an ex post perspective (once case won)

-SOLUTION: HOLD INSURER LIABLE ONLY WHEN THEY ARE GROSSLY NEGLIGENT IN ACCEPTING SETTLEMENT OFFER

-party can pursue bad faith claim against insurer after trial that wrongly occurs

**LAST CLASS – POLICY NOTES**

Intentional Torts<-----------------Negligence---------------------------> No fault

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Mens Rea (culpable) |  | Obj Fault |  | Strict Liability |

Tort law limits liability by requirements of FEASANCE AND FORESEEABILITY (NOT "a man acts at his peril)

* Objective fault (negligence) is determined by policy (note 1 following Hammontree)
  + Some risky behaviors are important, so we only burden them with requirement to comply with objective fault (negligence liability - NOT strict liability)
  + Only use SL when negligence is too difficult to implement (shows how negligence drives the policy of tort law - SL only comes in when negligence fails, and it comes it to accomplish what we would have wanted negligence to do)

* **So, what is the policy we're pursuing in formulating the objective standard of reasonable care?** (see arrow below, this is build up to it)
  + Discluding intentional torts
  + IMMUNITIES - never liable even if you injure
  + REASONABLE CARE - not liable if you act reasonably
  + STRICT LIABILITY - always liable
* Negligence/Reasonable Care
  + Behavior is reasonable when liberty and security interests are treated equally (even if another is injured)
  + Strict liability really just an offshoot of negligence (bc its supplements it)
* Immunities
  + Behaviors are so socially valuable that tort law doesn't want to burden the behavior.
  + Socially valuable behavior in newly industrialized economy = focus of tort law
* Initial Inadequate answers to above:
  + Deterrence (makes world safer place) - but doesn't require injury
  + Compensation (for injuries) - but doesn't require unreasonable behavior
  + Note: two functions don’t depend on one another
* Expansion and backlash of tort law provoked more rigorous attempts to answer above
  + Efficiency theory (minimize social costs of accidents)
    - Tells us to use B<PL for standard of reasonable care
    - Use strict liability when we have evidentiary problems in proving breach of B<PL
    - Forward looking
  + Rights-based (RC standard should be about justice)
    - Backward looking
    - Deterrence is a consequence of liability (not a motive for liability) - like retribution (this is unsatsifying)
    - Reasonable care = "do what's fair", not B<PL. This is difficult for manufacturers and ppl looking to comply.
  + There is a stand-off between these two theories today, but neither is satisfactory

* **RESOLUTION OF EFFICIENCY v. RIGHT'S BASED APPROACH (MG)**

Against the backdrop of efficiency theory, he realized:

1. Safety matter's more than money
   1. Security interest > Liberty interest
      1. Use compensation to rectify right's violation instead of eye4eye (what's the point in having eye?)

Three paradigmative forms of behavior:

1. Aggression (violence) --inform criminal law
   1. Tort law imposes punitive damages (informed by norm of crim law - supports it)
2. Mutual Advantage (social life - working together toward a common end) --inform contract law
   1. Tort law protects the contractual relationship - protects consumer's expectation interest. (informed by norm of contract law- supports it)
3. **Compensatory Reciprocity**
   1. Nonaggressive behavior that occurs outside of contractual relationships
   2. TORT LAW'S DOMAIN

Compensatory Reciprocity (realm of behavior) - norms:

* Pay compensation for my injury
  + This is sufficient for deterrence because you're behavior wasn't criminal
* This area was governed by STRICT LIABILITY in state of nature
  + Non-criminal behavior between strangers (no contract)
* Initial rule --> a man act's at his peril
* Development --> Limit liability to feasance and foreseeability
  + Strict liability stopped making sense

1. Start with priority of security interest
2. Ask WHY we're prioritizing the security interest
   1. How to balance it with liberty (no complete priority) --> **give each individual an equal opportunity to live life of their choosing**
      1. You must be secure to figure out which kind of life you want to lead

The default rule of strict liability applies to entire arrow

* The right holder doesn't want to prioritize the security interest in:
  + Contractual relationship (I pay for duty) (want B<PL)
  + Reciprocal Risks (want B<PL)
* Strict Liability
  + Abnormally dangerous activites

….courts realized: Negligence is sufficient for reciprocal risks (since B<PL is best for right holder)

* B<PL = equal weight to liberty and security interests

---we are left with non-reciprocal risks outside of contractual relationship, what to do?

* SL not sufficient because it doesn't require a standard of reasonable care, just requires compensation
* Compensation is inadequate to redress death or SBI
  + PREVENTION is preferable to compensation after the fact
  + We want EXTRAORDINARY care

RULES WE END UP WITH:

Ordinary Behavior --> Ordinary Care (B<PL) (behavior toward you as I would toward self)

Extraordinary Dangers --> Extraordinary Care

* If extraordinary care doesn't eliminate injury, I still have to pay (Strict Liability)
* (default rule of negligence, supplemented by SL for compensation)

How to explain this to other people:

* Efficiency based interpretation only gives us B<PL (not sufficient)
* Right's based interpretation doesn't tell us what B®PL consists of
* Compensatory rational (MG) explains what B®PL requires
  + Conceptually, NOT limited to case by case facts

Negligence for product defects

 there must be knowledge by the manufacturer of a danger which may result from negligent manufacturing, and the danger must not only be possible but probable. If the negligent manufacturing occurs by a third party responsible for making one aspect of a finished product, the final manufacturer will only be liable for negligence if the defect could have been discovered through reasonable inspection, and the final manufacturer fails its own duty of inspection.