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# BASICS

## PURPOSES OF TORT LAW

1. **Compensation**—making plaintiff whole again—perhaps not cost effective

*Compensatory damages, punitive damages, joint and several liability*

1. **Deterrence**—regulate unreasonable risks

*Posner, Hand Formula, compensatory/punitive damages*

1. **Corrective justice**—only harmed individuals can recover; only from those who harmed them

*Intentional torts, NIED*

Exceptions: *joint and several liability, alternative liability, respondeat superior*

1. **Loss Distribution—**allocate responsibility to those who can best cover losses

*strict liability, considerations of the availability of insurance*

1. **Protect Individual Autonomy**—moral commitment to individualism

*No duty to rescue*

1. **Administrative Ease**—tort system is less costly, more efficient than legislation
2. **Uniformity**

## Considerations

1. Least Cost Avoider
2. Foreseeability
3. Degree of certainty of injury
4. Closeness of connection between defendant’s conduct and the injury
5. Moral blame attached to defendant’s conduct
6. Deterrence
7. Consequences to the community of imposing duty
8. Availability/cost of insurance

## Holmes

Tort law should be used to change behavior (not as means of compensation)

## Posner

Tort law should be used to promote efficiency—benefits should always outweigh costs

## MATSUDA

“Foreseeability, closeness in time and space, directness of the sequence of events, the number and kind of intervening causes, privity of contract, degrees of moral blameworthiness, and “no duty” rules are used to limit the range of human actors considered responsible for a given tragedy. **These limiting doctrinal devices are artificial**. That is, they do not represent any **natural, logical, or inevitable restraint on the finding of casual connection between an act and a consequence**.”

# INTENTIONAL TORTS

## BATTERY R2T § 13

“Intentional contact that is either harmful or offensive”

1. A acts (volitional act)
2. Intent to cause contact with B (**MUST** be identified individual—*Madden*) of a type that (turns out to be) harmful or offensive; and
3. A’s act causes such contact to occur.

##### 1. INTENT—Vosburg—White—Nelson—Wagner—Keel—In re White

#### Intent to make contact—not necessarily cause harm [Vosburg v Putney]

* + Can be held liable for contact that is unintentionally harmful—deters risky contact; protects victims
  + Distinguishes from pure accident (and negligence)
  + Eggshell/Thin Skull Rule. Even is victim is unexpectedly ultra-vulnerable—liability attaches

#### …even “joke or compliment” can be battery [White v Univ of Idaho—piano guy]

#### …even without capacity to appreciate the harm/offense—mentally retarded Δ had intent 🡪 liable [Wagner v State—Kmart]

**“liability for battery is not a guilty mind, but rather an intent to make a contact” (*Wagner*)**

* Doctrine of Transferred Intent—R2T § 16(2)—Intending one intentional tort, Δ can be liable for *any* intentional tort

*[In re White]* White misses & shoots the wrong guy🡪 liable

* + **Victim**. Intent to batter someone is satisfied if defendant hits someone other than consenting target *[Keel v Hainline—chalk erasers]*
  + **Intent**. ~specific intent*—*Δ was trying to **hit** π with a gun—fired—sufficient intent *[Nelson v Carroll]*

### 2. VOLUNTARY ACT—Laidlaw

#### If an act is involuntary it cannot be (legally) voluntary 🡪 no liability

#### [Laidlaw v Sage—bank office bombing—influence of pressing danger🡪 involuntary act]

* + IF involuntary🡪 unfair to punish/nothing to correct/can’t properly deter (only purpose compensation)

### 3. CONTACT—Cecarelli—Paul—Leichtman—Madden

* **Harmful contact**—R2T § 15—Injures, disfigures, impairs or causes pain

*[Cecarelli v Maher—guy jumped leaving dance]*

* **Offensive contact**—R2T § 19—(objective standard) offends a reasonable sense of personal dignity under the circumstances

*[Paul v Holbrook—Δ routinely sexually harasses/insults/offends π at work in Florida]*

* **Extended personality**—“anything so connected with the body as to be customarily regarded as part of the other’s person”—classically: the plate grabbed from an African-American
  + “Intentionally offensive contact” with particle matter offending a “reasonable sense of personal dignity” *[Leichtman v WLW Jacor Comm—anti-smoking advocate battered by cigarette smoke]*
  + *[Madden v DC Transit]*—Δ pollutes w/o ***intent*** (or “substantial certainty” of offense/harm to a particular victim) or ***contact****—*Madden is not a particular identified victim

**VICTIM MUST BE IDENTIFIABLE INDIVIDUAL AT TIME OF BATTERY** 🡪 no liability in *Madden*

## ASSAULT—Beach—Brooker—Langford—Vetter

**R2T § 21.** “ An intentional threat or attempt, coupled with apparent ability, to do bodily harm to another, resulting in immediate apprehension of bodily harm. No bodily contact is necessary.”

1. A acts
2. Intent to cause in B the apprehension of an **imminent (severe/~ significant delay)** harmful or offensive contact; and

* **Test**: desire or belief in substantial certainty of the consequences occurring R2T § 8A

1. A’s act causes B to **reasonably apprehend** such a contact.
   1. Immediate/temporal
   2. Spatially close
   3. Must have apparent ability to inflict harm
   4. Actual (not potential) threat

* Threat of imminent **harm**—*[Beach v Hancock—Δ waives gun in “angry and threatening manner”🡪 assault*]
* If there is a clear Avenue of Escape 🡪 no assault
  + *[Langford v Shu—mongoose lady]*—Langford was trying to escape reasonable fear of an imminent threat when she was harmed 🡪 she had no escape from Shu’s imposed threat 🡪 liable despite prank
* General Rule: words are insufficient to constitute assault
  + - *[Brooker v Silverthorne—threatening caller to telephone operator]* Not imminent threat—MANY avenues for escape (**PLUS****must actually make threat**—“if I were there I would…” 🡪 **no (technical) threat**)
    - **Exception:** *[Vetter v Morgan]* Δ was a passenger in a car at a stoplight—harrassed Vetter—proximate & perception of danger 🡪 could be **held liable for assault**

## Intentional Infliction of Emotional Distress—Roberts—Greer—Littlefield

1. **Intentional** conduct or reckless disregard (high probability that emotional distress will be generated in plaintiff)
2. Conduct is **extreme and outrageous** 
   1. Objectively intolerable in a civilized society
   2. Courts will consider the totality of the circumstances
3. Mental distress must be **extreme and severe**
4. Causal **connection** between conduct and distress

* **Words can be enough—***[Greer v Medders—doctor tells off inpatient and wife]*—“extreme and outrageous” conduct relationally relative
* **…but aren’t necessarily sufficient.** [*Roberts v Saylor—woman whose old Dr says “I don’t like you” can’t recover]*—REQUIRES 2 & 4
* *[Littlefield v McGuffey]*—biracial couple want to rent an apartment—outrageously harassed by landlord

###### no doctrine of transferred intent in intentional infliction of emotional distress cases

## STANDARD DEFENSES

###### CONSENT—Koffman—Grabowski—Brzoska—Werth

**Plaintiff has agreed either EXPRESSLY or IMPLIEDLY to endure a bodily contact that would otherwise be tortuous**

* **Contact must be within the scope of consent.** *[Koffman v Garnett—football coach]* did π consent to play constitute consent to be tackled by coach? “reasonable persons could disagree”—remanded
* **Material change from conditions of consent revokes consent.** (think: implications of depriving right to consent)
  + “Operation w/o patient’s consent is a technical assault” *[Grabowski v Quigley—consented to one Dr., different one performed surgery]* 🡪 lack of consent? “reasonable persons could disagree”—remanded
  + *[Brzoska v Olson—HIV dentist]* Is medical condition material change? No—no patient exposure to HIV or added risk 🡪 material conditions of consent are the same
  + *[Werth v Taylor—Jehovah’s Witness blood transfusion]* π didn’t unequivocally refuse🡪 policy dominated
* **Consent must be freely given** *[Neil v Neil—wife wouldn’t have consented to sex if she’d known about cheating]*
  + **Fraud**—misrepresentation or deceit
  + **Coercion***—*physical violence or threat of violence
  + **Incapacity—**must be known to tortfeasor (e.g. youth, mental incompetence, etc.)
  + **Illegal activities—**can be void if consenting to an illegal act

### SELF-DEFENSE—Haeussler v De Loretto

* Δ “1. **actually and 2. reasonably** believes it necessary to injure another to avoid 3. **imminent** injury”🡪 not liable
* Must be *proportional* or else liable for “excess amount of force”
* CAN CONFLICT WITH THE UNIFORMITY GOAL OF TORT LAW—the government doesn’t have all the guns

## TRESPASS—Jacque v Steenberg Homes

**Requires:** actual ownership—tangible entry—**intent to enter and control over entry**

* S.H. denied access to land—drove across anyway—*no damage BUT “legal right 🡪 actual harm in every trespass”*—liable

## PRIVILEGES: PRIVATE NECESSITY—Ploof—Vincent

A person is privileged to enter another’s land or interfere with their chattels if the entry or interference is necessary to protect any person from death or serious bodily harm or to protect any land or chattels from destruction or injury

* *[Ploof v Putnam—Ploofs moor to Putnam’s dock in a storm to save themselves]* “necessity will (can and did) justify entries upon land and interferences with personal property”
* same privilege does **not** extend to property*—[Vincent v Lake Erie]*—Δ liable for damages to π dock from ship in storm—tying to dock was voluntary act to preserve property to π detriment—avoids huge cost internalization

# NEGLIGENCE

“Failure to exercise the care toward others which a reasonable or prudent person would do in the circumstances or taking action which such a reasonable person would not.”

1. **Duty** of care owed
2. **Breach** of that duty
3. Plaintiff in fact **injured**
4. Breach of duty was actual and proximate **cause** of injury

## BREACH

1. Failure to use ordinary care
2. Reasonably careful/prudent person
3. Doing something OR failing to do something
4. Did circumstances warrant ordinary or extraordinary care?

### REASONABLE PERSON STANDARD—Vaughan—Williams v Hays—Weirs—Friedman—Purtle—Roberts—Dellwo—Appelhans

* *[Vaughan v Menlove—fire in British haystack]—*established duty in “all cases” to act like a **reasonable man**

**Exceptions—how far will we individualize the reasonable man standard? When do we relax it?**

* **Insanity.** NOT relaxed UNLESS results from fulfilling your duty as a reasonable man *[Williams v Hays—quinine]*
* **Language barrier.** *[Weirs v Jones County]*—non-English speaker falls off condemned bridge—RMS does NOT require signs in other languages🡪 contributory negligence
* **Religion**. will relax RMS *[Freidman v State of NY—Curb]*
* **Physical disability.** Reasonable man standard—commiserate to man of similar ability
* **Gender.** Sometimes called a “reasonable woman standard”
* **Knowledge and Skills.** Can hold informed defendant to a higher standard
* **superior qualities, ability, or instrumentalities.** Higher standard requires use of these if available.
* **Children**. to be held accountable as an adult, activity must be: **Dangerous AND normally adults only**
  + **Sufficiently child-like activity** 🡪 no liability *[Purtle v Shelton—17 year old hunters in AK]*
  + **IF child is π**—lower standard for “age and maturity”—*[Roberts v Ring—7 year old hit by car not neg.]*
  + **IF child is Δ**—inflicts harm by normal adult activity held to adult stand. *[Dellwo v Pearson—fishing line/boat]*
  + Tender Years Doctrine**—**incapable of ***negligence*** below a certain age (7)🡪 *[Applehans v McFall—no liability]*
  + Negligent Supervision—parents aware of prior conduct (notice) and had opportunity to control
  + Massachusetts Rule—capable of negligence: objective standard—reasonable care of similarly situated child

|  |  |  |
| --- | --- | --- |
| **Age** | **Rule** | **Source** |
| 0-5 | Incapable of negligence | R3T § 10(b) |
| 0-7 | Incapable of negligence | *Applehans* |
| 7-14 | Standard: reasonable person of like age, intelligence, and experience | R2T § 283A |
| 7-14 | Exceptions: activities that are dangerous AND normally engaged in only by adults | *Dellwo*  R3T § 10(c) |
| 14 + | Rebuttable presumption that child is capable of negligence | R3T § 10(b) |

### COST-BENEFIT ANALYSIS—Carroll Towing—Adams—Rhode Island Hospital Trust National Bank—Bolton—Martin

* *[Adams v Bullock—kid with a wire near a trolley—Cardozo]* high **burden** for small marginal risk reduction—custom and history—“not an insurer”🡪 only liable for reasonably foreseeable/preventable harm **(not negligent)**
* *[Bolton v Stone—cricket]* Reasonable man standard tempered by foreseeability and severity of harm—Lord Reid (focuses on expected risk—substantial risk test)—Lord Radcliffe (basically the Hand Formula)

1. The Hand Formula**—1947-- the purpose of tort law is to deter inefficient conduct**

**If: B**urden of precautions < ∂ **P**robability of loss × **L**oss = **E**xpected **L**oss 🡪 defendant held liable

* **Promulgated**—*[US v Carroll Towing]* **Cost** of bargee would have been small vs. **expected risk** of damage—~bargee 🡪 **negligent**
* “An **industry-wide practice** that saves money without significantly increasing the number of forged checks that the banks erroneously pay is a practice that reflects at least ‘ordinary care.’” *[RIHTNB v Zapata—√ verification]*
* *[Martin v Evans]* Truck driver backs into man—cost of checking < expected loss🡪 negligent (except that jury believed the truck driver who claimed to have checked)
* **Advantages:**
  + Structured analysis
  + Formalized intuitions (draws our attention to the benefits of reasonable care)
  + Reduces uncertainty
  + Avoids allocation of resources to non-beneficial undertakings
  + Takes risk into account
* **Disadvantages:**
  + Requires data to be applied strictly, rather than intuitively
  + Difficult to apply when variables are hard to quantify
  + Overlooks distributional considerations (groups may be disproportionately harmed by a certain harms)
  + Cost internalization could price out some customers

1. SUBSTANTIAL RISK TEST—no longer used—ex ante consideration of risk
   1. If **probability & severity** of risk reach a certain level (without considering burden), Δ should be liable
   2. **Pro**—reduces information costs, corresponds to common intuition
   3. **Con**—obscures the basis of decision-making; inefficient levels of production

### INDUSTRY AND PROFESSIONAL CUSTOM—TJ Hooper—Rodi Yachts—Riverdale Anesthesia—Rudolf—Largey—Myers

**Custom is admissible as evidence of the standard, but it’s never** **determinative** (The TJ Hooper Rule)

* “Adherence to customary business practices does not itself establish that the defendant acted with reasonable care”—Hand—*[The TJ Hooper]*—if they had radios🡪 known about storm🡪 liable despite following custom
  + *Rationale*: encourages industry to keep up with state-of-the-art
  + *Counterargument*: market efficiencies will do what’s best; industry expertise
* IF parties **contract** 🡪 industry custom governs duty—*[Rodi Yachts v Nat’l Marine—Posner]—*boat docked without a contract “implied by their web of entanglements”
* look to their respective compliance with and departures from custom
* **Medical**: *standard defined by custom*—NOT reasonable doctor stand. *[Johnson v Riverdale—~expert testimony]*
* **Reasonable Physician Standard** 🡪 **Reasonable Patient Standard—**physician didn’t adequately inform the patient of the risks—reasonable person wouldn’t have consented *[Largey v Rothman—patient “assaulted”]*
* **Legal**: “reasonable skill and knowledge” *[Rudolf v Shayne—attorney asks for wrong jury instruction]*
* *[Myers v Heritage Enters]*—old lady dropped in nursing home by nurses—professional or normal stand of negligence? *Normal—*moving lady didn’t require skilled medical care

### NEGLIGENCE PER SE—Dalal—Bayne—Victor

1. Clear statutory duty
2. Violate statute without legally acceptable excuse
3. Death or injury must result from an occurrence which the statute was **designed to prevent**
4. Person suffering must be from the **class of persons** for whose protection the statute was adopted.

* *[Dalal v City of New York]*Mack (Δ) not wearing required glasses while driving🡪 negligence per se
* *[Bayne v Todd Shipyards—non-employee workman injured]*—intended to protect workmen🡪negligence per se
* *[Victor v Hedges—drug car]* not the sort of harm the statute was intended to protect🡪 ~negligence per se
* **Excused Violations R3T § 15:**

1. The violation is reasonable in light of the actor’s
   1. Childhood
   2. Physical disability/incapacitation
2. The actor exercises reasonable care in attempting to comply with the statute
3. The actor neither knows nor should know of the circumstances that render the statute applicable
4. The actor’s violation is due to the consuming way in which the requirements of the statute are presented to the public OR
5. The actor’s compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance.

* **Purposes of negligence per se:**
  + Promotes enforcement of statutes
  + Avoids inconsistency between statutes and common law
  + Statute more democratic than common law
  + Uniformity—jurors won’t overrule a commonly followed statute

### RES IPSA LOQUITUR—Byrne—Combustion Engineering—Kambat—Ybarra—Wolf

1. Injury ordinarily **wouldn’t result absent negligence** on someone’s part
2. Instrumentality must have been within Δ’s **exclusive control**
3. Not have arisen from acts or carelessness on the part of the π

* Fact of the accident (falling bag of flour) constituted negligence—*[Byrne v Boadle]*🡪res ipsa
* **On a construction site**: “falling tool alone would not indicate negligence”—every workman miscalculation is not negligent *[Combustion Engir. V. Hunsberger]*
* **Medical**—look to expert testimony—pad not normally be in a woman’s body post-hysterectomy without negligence *[Kambat v St Francis Hosp]*

\*\*\*Turns on **expectation** and contractual **capacity to bargain** on risk; asymmetric info—**burden🡪 defendant**

* **Groups:**
  + **Team** of nurses and doctors jointly held liable for “unusual (arm) injuries”🡪 info forcing *[Ybarra v Spangard]*
  + Can’t sue **independent** contractors alternatively (couldn’t establish “exclusive control” without identifying contractor)—group must be cohesive before suit *[Wolf v American Tract Company]*

## DUTY—MacPherson—Mussivand

###### 1. the Duty Rule—duty to use reasonable care when conduct creates a risk of harm (r3t § 7 Duty)

* **The Privity Rule.** Required contractual relationship *[Winterbottom v Wright]*
* **Imminently Dangerous Products.**
* **FORESEEABLE USERS** are all owed duty:
  + DO NOT NEED PRIVITY OF CONTRACT—*[MacPherson v Buick—Cardozo]*—**expanded duty**—allowed to sue outside privity—invited customer use—somewhat contra-*Palsgraf*—uses foreseeability to limit duty
  + *[Mussivand v David]*—applies *MacPherson—*duty extends to all foreseeably effected by breach—e.g. sexual relationship between man & wife
* **UNFORESEEABLE VICTIMS**
  + Cardozo—**zone of danger**—duty is owed to foreseeable victims
  + Andrews—duty is owed for foreseeable harm (to anyone who happens to be hurt)

**Modern standard.** A person owes a **duty of care not to cause harm to those around him** when it’s reasonably foreseeable that other persons might suffer as a result of that conduct (fits purposes of tort law)

### 2. NO AFFIRMATIVE DUTY TO RESCUE OR PROTECT—Osterlind—Baker—Tarasoff—Ewing—Kelly

KW-“stands for the **basic background rule that there is/was no duty to rescue**” *[Osterlind v Hill—drunk boaters]*

###### EXCEPTIONS—AFFIRMATIVE DUTY TO RESCUE AND PROTECT:

1. **Relationship between parties**
   1. **Defendant’s doctor** 
      1. *[Tarasoff v Univ of CA—psychiatrist fails to warn victim]*—“privilege ends where public peril begins”🡪 owed duty to warn—expands duty (more like Andrews in *Palsgraf*)
      2. *[Ewing v Goldstein]*—only extends as far as the Dr finds the threat legitimate
   2. **Landlord** has duty to guest even if he didn’t contribute to injury *[Baker v Fenneman & Brown—Taco Bell]*
   3. **Host (Dram Shop)**—liability when: 1) aware of intoxication; 2) actively served 3) driving *[Kelly v Gwinnell]*
2. **Reasonable foreseeability of harm**
3. **Public Policy**—*[Strauss v Belle Realty—too many victims]*; solvency; fraudulent claims—uses foreseeability to limit duty

### 3. DUTY OWED TO RESCUERS—Wagner—Solgaard

* **“Danger invites rescue”**—Cardozo—**initial negligence to victim🡪 also to rescuer** *[Wagner v Internat’l Railway—injured helping cousin who was thrown from the car—no contributory negligence]*
* *[Solgaard v Guy F Adkinson—Dr injured during on-site emergency]*—not rash/negligent🡪 allowed to recover
* **Exceptions:** professional rescuers (e.g. firefighters) and “rash or reckless” rescue attempts

### 4. PREMISES LIABILITY—Leffler—Oettinger—Rowland—Carter

1. **INVITEE**. Invitation OR public space—mutual benefits
   1. **Examples**: business visitors, public invitees (churchgoers) *[Oettinger v Stewart]* Old lady at real estate office **invitee**
   2. **Duty**: reasonably safe premises and warn of hidden dangers
2. **LICENSEE**. Permission for his own pleasure—all non-business guests
   1. **Examples**: social guest, visiting relatives, door-to-door salesmen *[Carter v Kinney—bible study licensee]* 🡪 owed only protection from known dangers 🡪 no recovery
   2. **Duty**: some states same as invitee, others trespasser (e.g. California)
3. **TRESPASSER**. No license or invitation
   1. **Examples**: *[Leffler v Sharp—crawls out hotel window]* **trespasser** *on roof*—reasonably restricted roof🡪 no liability
   2. **Duty**: ~willful or wanton injury = ~extreme departure from ordinary care
   3. **Exceptions**:
      1. **CHILD TRESPASSER**. The younger the child, the more likely “attractive nuisance” will be invoked
         1. **Example**: child so immature—unable to appreciate the (ordinarily foreseeable) danger
         2. **Duty**: eliminate danger—or (if too costly) warn/protect child who wouldn’t appreciate danger
      2. **CONSTANT TRESPASSER**. People using a shortcut *[Erie Railroad v Tompkins]*
         1. **Examples:** persons habitually intruding upon the land—**landlord must be aware of intrusion**
         2. **Duty:** warn and protect against non-obvious and highly dangerous

* **Expanding liability—Standard of Reasonable Care** regardless of status—disregards constructs—*[Rowland v Christian—cuts his hand on sink—though owed lowest duty, still recovered]* **Factors:**
  + Closeness of connection between injury and defendant’s conduct
  + Moral blame attached to defendant’s conduct
  + Probability of deterrence (if we sanction this action and others like it)
  + Foreseeability of harm to an invitee
  + Certainty of injury
  + Cost/availability of insurance

### (NEGLIGENT INFLICTION OF) EMOTIONAL DISTRESS—Consolidated Rail—Dillon—Thing—Johnson

1. **Default rule: there is NO duty to avoid infliction of emotional distress**
2. **Easy case**—physical injury and accompanying ED—recover easily for pain and suffering
3. **Hard case**—no physical injury. Only emotional distress or physical manifestation of ED
   1. **Physical impact test**.
   2. **Zone of Danger**

*[Consolidated Rail v Gottshall—*

* + - 1. *laborer who saw his friend die—direct victim under ZOD*
      2. *promoted plaintiff and long hours lead to nervous breakdown—no recovery]*
    1. Damages for fear for yourself (direct victim)
    2. Damages for witnessing the accident (direct victim)
    3. **Bystander**—recovery subjected to limits
       1. Spatial proximity
       2. Temporal proximity (present AND witness)
       3. Relational proximity

**Established Bystander as a category of recovery:** *[Dillon v Legg]*—daughter hit by car—sister w/in ZOD can easily recover; mom originally can’t—later reversed—“hopeless artificiality of ZOD”

* + - 1. Serious emotional distress (contemplated in *Thing*)

**Solidified Bystander as a category of recovery:** *[Thing v La Chusa]*—daughter hit by car—mother not present🡪 no recovery

*[Johnson v Douglas]* cannot recover for the loss of a dog even if they were present/witnessed

### PURE ECONOMIC LOSS—Aikens—People Express Airlines

1. **Easy case**—damage to property🡪 direct implications = economic loss
2. **Hard case**—economic loss without property damage
   1. *[Aikens v Debow—trackhoe that destroys bridge to motel]* insufficient **foreseeability**🡪 ~recovery
   2. *[People Express Airlines v Consolidated Rail]*—proximity and (class of injured) foreseeable🡪 recovery

**Policy considerations:** don’t want to limit activity levels with too many recoveries—but enough to promote deterrence

###### MUST BE ABLE TO FORESEE IDENTIFIABLE VICTIMS—NOT JUST HARM

### PUBLIC DUTY RULE—Riss—Strauss

* No duty to individual citizens—dissent: improper cost internalization *[Riss v City of New York—The Lye Bride]*
  + **Exception:** government actor established a relationship with plaintiff; assumed an affirmative duty/knew that inaction could cause harm; plaintiff justifiably relied on the special relationship
* ConEd not liable to injured during blackout—want to limit “crushing liability”—hard to reconcile with *MacPherson* *[Strauss v Belle Realty]*
* **Sovereign immunity.** 
  + Separation of powers—courts shouldn’t decide how government spends its money
  + Democratic legitimacy—legislatures are more representative

## FACTUAL CAUSATION

### BUT-FOR CAUSATION—Grimstad—Zuchowicz—Falcon

1. **Basic Rule**: Identify injury & negligent conduct—COUNTERFACTUAL—but-for that negligence, plaintiff harmed?
   1. *[N.Y. Central RR v Grimstad]* Can’t say that **BUT-FOR** lack of life buoys he would have lived 🡪 ~recovery

**Calculus—Δ is liable if he contributes more than half of the realized percentage of risk**

* 1. **Be specific**—court has to examine the marginal change in risk due to negligence (not entire interaction)—recovery *hinged* on: But-for overdose Zuchowicz would not get PPH  *[Zuchowicz v US]*

1. **Adaptations and Extensions**
   1. Loss of Chance. *[Falcon v Memorial Hosp*]—**ONLY** medical malpractice—**ONLY** if patient dies—**NOT** all jurisdictions—Falcon had a high background risk—NOT traditional but-for (but-for negligence she probably would have died)—MH held liable for their relative contribution

### MULTIPLE NECESSARY AND SUFFICIENT CAUSES—McDonald—Aldridge

* + 1. When two or more causes are necessary for injury (both but-for)🡪 jointly and severally liable *[McDonald v Robinson—car crash]—*elaborates/specifies but-for inquiry
    2. *[Aldridge v Goodyear Tire]*—can’t prove injury but-for GT chemicals🡪 SFT🡪 fail, ~liability **Substantial Factor Test**. Was the act more likely than not a substantial element in producing the harm? (only applicable for MSC) Re-conceptualizes But-for.

### Alternative Liability—Summers

1. **Burden shift**—plead that Δs were temporally and equally negligent and that injury resulted🡪 allocation of damages shifts to them *[Summers v Tice]—*purpose: information forcing

### Market-share Liability— Sindell—Hymowitz—Skipworth

1. DES manufacturers produced chemically identical pills—each held liable for contribution of risk to society as a whole NOT to individual plaintiffs—*[Sindell v Abbott Labs—California]*
2. *[Hymowitz v Eli Lilly]—*defendant can’t exculpate itself EVEN if they can show they didn’t directly cause the harm because they contributed to the market—New York
3. *[Skipworth v Lead Industries—lead paint with different toxicity levels]*
4. *REALLY HELPS TO HAVE A “SIGNATURE DISEASE”*
5. **Pros**
   * + 1. Deterrence/compensation
       2. Plaintiff was completely innocent
       3. Deep-pocket theory
       4. Defendant was the least cost avoider
6. **Cons**
   * + 1. Defendants paying plaintiffs they didn’t injure
       2. Companies could limit activity levels
       3. High cost of administering penalty

## PROXIMATE CAUSE

**cause in fact AND foreseeable**

### DIRECTNESS, FORSEEABILITY, AND SCOPE OF THE RISK—Union Pump—Jolley

* If P.C. 🡪 negligence a **“substantial factor”** *[Union Pump v Allbritton—slippery pipes after extinguishing fire]*
* Was the harm **foreseeable**? yes🡪 liable; no🡪 not *[Jolley v Sutton London Borough Council] 14-year-old paraplegic repairing abandoned boat*
* **conduct of plaintiff undermines arguments for liability to the extent that alters ex ante foreseeability**

### SUPERSEDING CAUSE—Pollard—Clark

* “**Natural chain of events**” disrupted by third party conduct that **contributed to harm**🡪 no liability *[Pollard v OK City RR—cousin burned by discarded blasting powder]*
* **No contribution to harm**🡪 no liability *[Clark v Du Pont—McDowell hides solidified nitroglycerin for safety]*

### PALSGRAF—Palsgraf—Kinsman

* **General type of harm must be foreseeable**—even if magnitude is not *[Kinsman Transit—loose ship, slow bridge]*
  + **City—**once ship was loose harm of slow bridge was clearly foreseeable🡪 liable
  + **Kinsman—**didn’t make a reasonable effort to slow ship, harm clearly foreseeable🡪 liable
  + **Continental—**supplied the defective cleat, type (not magnitude) of harm foreseeable 🡪 liable
* **[Palsgraf v Long Island RR]**—
  + **Cardozo—DUTY**—“Risk reasonably perceived defines the duty owed.”*—***duty owed to foreseeable victims**—was all about deterrence—the railroad owed a
  + **Andrews (dissent)—PROXIMATE CAUSE**—**duty is generally owed based on foreseeability of events**—if there’s an injury there must be a duty—**uses proximate cause to do more work**—doesn’t place limits on the boundaries of foreseeability—car hypothetical: car explodes and nanny drops a baby—“if the act is wrongful then the actor is liable for all proximate results”—uses proximate cause to limit where Cardozo would limit duty—the *misfeasance* of knocking the package was a but-for cause of the injury (wouldn’t necessarily see the same with nonfeasance i.e. doctor not warning in *Tarasoff*)

## DEFENSES

CONTRIBUTORY NEGLIGENCE—used to be a bar to recovery—no longer

COMPARATIVE FAULT—Reliable Transfer—Hunt—Baldwin

Plaintiff’s negligents LIMITS his recovery

* *[Hunt v Ohio Dept of Rehab] Inmate 40% responsible for severing finger on a snowblower—ODRC 60%*
* **Pure comparative fault**—plaintiff can recover 1% of his damages even if he’s 99% responsible
  + *[US v Reliable Transfer]* Ship owner 75% liable—USG 25%—can still recover—comparative fault in maritime
* **Modified comparative fault**—plaintiff can’t recover if his responsibility exceeds some threshold
  + *[Baldwin v City of Omaha]* mentally ill man 55% at fault; police 45% (didn’t follow protocol) 🡪 no recovery

### ASSUMPTION OF RISK—Jones—Dalury— Murphy —Smollett

Plaintiff accepts the risk—bars his recovery

* **EXPRESS—waiver/release for non-negligent conduct**
  + Enforced waiver—minor skydiver could have paid $50 more to not waive🡪 ~recovery *[Jones v Dressel]*
  + Unenforced waiver—skiier had unequal bargaining power, back of the ticket 🡪 recovered *[Dalury v S-K-I]*
* **IMPLIED—not always reconciled with comparative fault (limits recovery) 🡪 becomes a BAR to recovery**
  + **Primary Implied Assumption of Risk**—risk inherent in the activity—e.g. contact sports
    - *[Murphy v Steeplechase Amusement—π injured on* The Flopper*—point of the ride: would fall eventually]*
  + **Secondary Implied Assumption of Risk*—***π understood and accepted a non-inherent risk
    - π understood risk of ice skating (~guardrails, carpet, elevated rink) 🡪 implied assumption *[Smollett v Skayting Dev Corp]—\*\*could also be characterized as comparative fault*

# STRICT LIABILITY—Rylands

**NO NEED TO ESTABLISH BREACH**—No proven or presumed carelessness, recklessness, or intentional wrongdoing

1. ***[Rylands v Fletcher]*** Digging a reservoir—water goes through mine shafts and destroys neighbor’s property🡪 liable for “utra-hazardous activity”—competing rationales
   1. “unnatural uses of land” (Cairns)
   2. acting party should be liable (eventually Blackburn in Siegler]
2. **Restatement (2nd) § 520 *(Indiana Harbor* and *Siegler*)**
   1. Whether the activity involves a **high degree of risk** of harm to the person, land, or chattels of others
   2. Whether the **gravity of the harm** which may result from it is likely to be great
   3. Whether the risk **cannot be eliminated** by the exercise of reasonable care
      1. 1-3 impose strict liability when activities are extremely risk—Blackburn/Cranworth idea—risky activities likely to impose great costs on others
   4. Whether the activity is **not a matter of common usage—frequency**
   5. Whether the activity is **inappropriate** to the place where it is carried on and—location
      1. 4-5 focus on describing unnatural activity—Cairns idea
   6. The **value of the activity** to the community—dropped in 3rd, perhaps because it wasn’t doing much
3. **Draft (3rd) Restatement § 20—not too many interpretations—relatively new document**
   1. Foreseeable and highly significant risk of harm even when reasonable care is exercised by all actors (1-3 from § 520)—Blackburn/Cranworth
   2. Activity is not one of common usage (4-5 from section 520)—Cairns

## ABNORMALLY DANGEROUS ACTIVITIES—Indiana Harbor Belt RR—Siegler

* *[Indiana Harbor Belt RR v American Cyanamid]*—manufacturers of chemical **NOT STRICTLY LIABLE**—reasonable care and negligence could have prevented accident without affecting activity levels
* *[Siegler v Kuhlman]*—gasoline hauling car accident—**STRICTLY LIABLE**—control activity level
* Rationale—
  + Assumption/benefit of hazardous activities
  + Destruction of evidence proving negligence
  + Asymmetric information
  + Control activity levels of abnormally dangerous activities
  + Cost internalization—charge customers for benefits of imposing risk

# Products Liability

* 1. π **suffered an injury**
  2. ∆ **sold** a product AND is a **commercial seller** of that product
  3. When π purchased product it was **defective** and
     1. MANUFACTURING DEFECT—Escola—Greenman—Cronin—prod differs from ∆ own standards
        1. *[****Escola v Coca Cola****—exploding bottle]*
           1. Recovers on res ipsa (despite being in control of bottle)
           2. Traynor in concurrence—res ipsa intellectually dishonest—**strict products liability—internal stand.**
        2. *[****Greenman v Yuba Pwr Prod****]—*using power tools in the intended manner & injured 🡪 **~internal stand.**
        3. *[****Cronin v JBE Olson****]*—bread truck dangerous in an accident 🡪 liability ~internal standards
        4. \*\*Traynor wants recovery to be easier for π 🡪 doesn’t define ‘defect’—would burden like negligence
     2. DESIGN DEFECT—Cepeda—Barker—Soule—reintroduce negligence approaches
        1. **CONSUMER EXPECTATIONS TEST**—product more dangerous than an ordinary customer would expect
        2. **RISK UTILITY TEST**—risks & benefits of this particular design—implicitly compares to an alternate design
           1. *[****Cebeda v Cumberland Eng’g****—NJ—pelletizer could be operated w/o cover]—*creates a test:

usefulness/desireability

safety aspects

availability of a substitute design *(assessment of alternate design required under R3T)*

ability to eliminate unsafe character without impairing usefulness

user’s ability to avoid danger with reasonable care

user’s anticipated awareness of dangers/warnings

feasibility of carrying insurance

* + - * 1. ***[Barker v Lull Eng’g****—CA—construction loader defective]*—implicitly overturned *Cronin* in CA

could use consumer expectation OR risk utility—chose R.U.—easier burden on π

π proves only actual cause (cures problem of information asymmetry & need for strict liability)—∆ must show benefits > risk

* + - * 1. ***[Soule v GM****—improperly designed toe pan to protect against crash]*

can use C.E. when consumers could hold reasonable expectations—**narrows when π can us C.E.**

* + 1. Failure to Warn—safety requires that a product be sold with a warning & it is not
  1. Defect was the **actual and proximate cause** of π injury

# DAMAGES

## COMPENSATORY DAMAGES—Leech Brain—Kenton

* *[Smith v Leech Brain]*—Eggshell Skull Rule (EXTENT of damages don’t have to be foreseeable) + Proximate Cause (only TYPE of damages have to be foreseeable) 🡪 provided that TYPE of damages are foreseeable, π can recover for the FULL EXTENT of harm
* *[Kenton v Hyatt Hotels—collapsing skywalk]*—Kenton uses evidence of what his income would have been but-for the accident—highly individualized—replicates societal inequalities

## PUNITIVE DAMAGES—Mathias—Gore

Punishment and Deterrence—not for “garden variety negligence”

* **Look to:**
  + Reprehensibility of ∆ conduct
  + Harm caused by ∆ compared to π total loss—*[Jacque v Steenburg Homes]—*little loss, big infringement
  + Wealth of the defendant
  + Profitibility of the defendant—(was Accor making lots of money renting these rooms without due care?)
* *[****Mathias v Accor Economy Lodging****]*—Accor **knew** that there were bedbugs in its rooms—still rented them—willful and wanton conduct
* *[****BMW of North America v Gore****]*—car had to be repainted--$4,000 compensatory—$4M punitive
  + Reduced punitive—DON’T CONSIDER OUT OF STATE CONDUCT
  + **Three Guideposts:**
    - 1. How reprehensible was ∆ conduct?
      2. Ratio of punitive to compensatory damages
         1. Exxon Valdez—1:1; have also said single digit—when will it be appropriate to deviate?—focuses on making punitive damages predictable, not on capping payouts
      3. Comparable civil/criminal penalties—much, much lower

## WRONGFUL DEATH CLAIMS—Nelson v Dolan

* **Survival claims**—causes for the decedent’s loss (his lost income, his fear, his distress)—claims he would have brought if he would have survived
  + *[Nelson v Dolan]*—estate sues for fear Nelson experienced in the moments before he was hit by the car
* **Wrongful death claims**—causes for relatives’ loss (companionship, financial support, guidance)

## VICARIOUS LIABILITY—Taber v Maine

* Drunk servicemen in a car accident off base—Navy held vicariously liable
* Respondeant superior—serviceman was acting WITHIN THE SCOPE OF HIS EMPLOYMENT🡪 as agent of Navy
  + **EXTENT of activity**
  + **PERVASIVE CONTROL of Navy**
  + **FORESEEABILITY**

## JOINT LIABILITY AND CONTRIBUTION—Ravo

* *[Ravo v Rogatnick]*—two Drs acting independently injure a child—**impose j&sl if the harm is judged to be indivisible DESPITE non-concurrent activity**—Goal: full recovery for plaintiff