**[Prima Facie Case of Negligence]**

The prima facie [self evident, presumption meaning there is sufficient evidence to get to a jury] case of negligence is made up of four elements: (1) Duty, a question of law (2) Breach (negligence), a question of fact (3) Causation, a question of law and fact, and (4) Damages, a question of fact. Prima facie evidence is always enough to get passed the MSJ, for there is sufficient evidence.

**[DUTY INTRO]**

Duty is the legal relationship between two parties. Negligence is often referred to as “breach of duty,” and some duty must exist before a defendant can be said to have committed actionable negligence. Plaintiff must establish her case through proving that a general duty of due care exists or a modified duty exists between the parties. In special cases, a defendant may argue that a lower standard of duty exists (physical handicap; children). When there is a special relationship among the parties, plaintiff may argue that an affirmative duty exists. The affirmative duty, however, is still the duty to exercise reasonable and ordinary care while acting affirmatively to assist the plaintiff.

**[The Privity Doctrine]**

Traditionally, no third parties affected by the contract nor bystanders could recover, for a lack of contractual relationship giving rise to duty. Duty is now extended to bystanders that suffered and third parties that relied on the contract (departing from the Privity Doctrine).

**[Vicarious Liability; The Doctrine of *Respondeat Superior*]**

An Employer is liable for the torts of the employee if the employee was acting within the scope of employment at the time of the accident (*Christensen v. Swenson*). An employer may be liable for its own negligence, such as negligent hiring or negligent supervision. However, an employer is not liable for harm to its own employee –in every state, the Worker’s Compensation System, implemented by statute, has replaced an employee’s tort action against its employer. This system reduces costs for the employer while providing a higher chance of compensation for the employee.

**Birkner Test:** Factors to determine whether the employee was acting within the scope by employment: (1) Employee was going about Employer’s business; (2) Employee’s conduct occurs substantially within business hours and in ordinary spatial boundaries; and (3) Employee’s conduct motivated at least in part by serving employer’s interest. When conduct falls within scope of employment, the employer is vicariously liable – even for intentional torts. However, when an employee commits an intentional tort for purely personal reasons unrelated to the employment, most jurisdictions will not hold the employer liable.

Hospitals have a **non-delegable duty**: R.2d Torts (p.25): One who employs an independent contractor is liable to the same extent as though employer were supplying services himself.

**Apparent Authority:** Courts apply the principle of Apparent Authority if the plaintiff or the general public believes that the Contractor is working for the Principal. In general, an employer is not liable for the acts of its independent contractor. However, this doctrine states that the Principal knowingly accepts being associated with an independent contractor. In cases of Apparent Authority, the Principal is responsible for the torts of independent contractors, even though they are not employees. In *Roessler v. Novak* 2003 (p.24), the court employs three elements: (1) Representation by the purported Principal; (2) Reliance on that representation by a third party; and (3) Change in position by the third party in reliance of the representation.

**[The Doctrine of Sovereign Immunity]**

The traditional notion that “the King can do no harm” has been going through a revolution in the past 60 years in the United States as courts started distinguishing between Discretionary governmental duties and Ministerial propriety duties of the government. Ministerial duties are duties that can be duplicated by a private proprietary organization, such as building highways or medical care.

* Police do not owe a duty to protect an individual from crimes; courts do not want to tell police department how to allocate their limited resources.

In general, courts are reluctant to impose a duty on a government entity unless a special relationship exists (*Riss v. City of New York*). The Cuffy Principles in NY evaluate the special relationship between Plaintiff and the government: (1) Assumption by the municipality through promise or action of an affirmative duty to act on behalf of injured party; (2) Knowledge on part of municipality that inaction could lead to harm; (3) Some form of direct contact between the P and municipality; AND (4) P’s justifiable reliance on the municipality’s undertaking

**Qualified Immunity:** State locality owes a non-delegable duty to keep public highways in a reasonably safe condition. They must undertake a reasonable study, but courts will not second-guess that study unless study is plainly inadequate. Once the decision has been made, these agencies have a duty to implement it in a reasonable manner (*Friedman v. State of NY*).

Exception to Waiver of Sovereign Immunity:

**The Federal Tort Claims Act** **(1946)** waives government immunity in cases where private individuals would have been held liable. The exception in § 2680 states that the government agent acting within the scope of discretionary duties still have immunity from civil liability.

**[General Duty Owed]**

Everyone owes a general duty to exercise reasonable care to others. When we act, we have a duty to act reasonably and carefully. When we believe that something would cause injury to another, we have a duty to avoid the harm if we can reasonably do so. **Misfeasance** occurs when D performs a lawful act improperly and harms or endangers P.

There is a modified standard of care for:

* **Children,** who have a duty to exercise the amount of care reasonable to a child of similar age, intelligence and experience. An exception occurs when a child is engaging in an adult activity, such as driving.
* **Professionals,** who have a duty to exercise the amount of care customary in the profession. Professionals have a duty not to deviate from the “minimum common skill of members in good standing of the profession (*Sheely v. Memorial Hospital* p.107).
* **Public Utilities,** who are held to duties and obligations consistent with the purposes of their creation, where non-performance could give rise to an action. However, there is a limited duty in situations where the plaintiff has another means of recovery (insurance) and the public utility may be exposed to a “crushing liability” (*Strauss v. Bell Realty Co.* p.168).
* **Hazardous Activities**, such as owning handguns, managing electric utilities, etc, may be determined by the government to require a higher standard of duty.

**[The Question of Foreseeability]**

Courts may limit the imposition of duty in cases where there was an “**unforeseeable plaintiff**.” The orbit of the duty is the “orbit of he danger as disclosed to the eye of reasonable vigilance.” – Judge Cardozo, *Palsgraf v. Long Island Railroad Co.* p.418. Conversely, courts have recognized that “danger invites rescue,” and include potential rescuers in the class of foreseeable plaintiffs (Judge Cardozo, *Wagner v. International Railway Co.* p.427).

The question of foreseeability has been interpreted in recent years as a question of breach, rather than duty. In *A.W. v. Lancaster School* (p.211), the court finds that deciding what is reasonably foreseeable involves common sense, common experience and application of the standards and behavioral norms of the community – matters interpreted by the finder of fact, not by those with legal training.

* **R.3d Torts:** Foreseeable risk is an element of negligence, not legal duty, to be determined by factfinder unless no reasonable minds could differ on whether an actor exercised reasonable care.

**[Specific Duty Owed]**

There is no legal obligation to act. Nonfeasance, or the failure to act, is generally insufficient to impose liability on a defendant if his inaction results in harm to the plaintiff. However, D has an affirmative duty to act when there is a special relationship between the defendant and the plaintiff (R.2d §314) and D realizes that action is necessary for another’s aid or protection (*Harper v. Herman*). The defendant should exercise reasonable care to help the plaintiff or prevent the plaintiff from further harm if he could do so without putting himself in a worse situation.

**[Types of Special Relationships]**

The problem with imposing duty on strangers to rescue is that there is no feasible way to impose altruism as a legal duty and hold all bystanders liable; there could be 10, 20, 50 bystanders who failed to act. There are however, exceptions to the No Duty to Rescue Rule (No duty to rescue if it will put you in a worse situation) when plaintiff can prove a special relationship between the parties. There are different types of special relationships:

1. **Contractual Relationship or Material Benefit**
   1. **Common Carriers and Innkeepers:** Traditionally, common carriers and innkeepers were held to the “highest standard of care,” the rationale being that a plaintiff has paid money in exchange for these entities to provide comfort and security. This heightened duty was that of extraordinary care, where one must exercise the highest degree of care that human prudence and foresight can provide. Although this standard was overturned in 1998 in *Bethel v. New York City Transit Authority*, many courts have applied the rationale to this rule to businesses, thus requiring more from businesses than the general duty to act reasonably in regards to their paying customers.
   2. **Business Relationships:** Business owners have an affirmative duty to warn and assist their patrons, regardless of the source of danger or harm. This is because they are probably the landowners or occupiers of the land, and also have a contractual duty to the customers.
      1. **Cases of criminal activity**: Business owners, including landlords, have a duty to take reasonable measures against foreseeable criminal activity on the premises. There are four tests used in *Posecai v. Wal-Mart* for determining Foreseeability:
         1. Whether harm was imminent
         2. Prior similar incidents
         3. Totality of circumstances (most common approach): Nature and location of land; prior similar incidents; any other reasons why criminal activity may be predictable
         4. Balancing Test (CA): Totality of Circumstances v. Burden of imposing duty
   3. **Landlords:** Traditionally, a landlord is liable in tort if there is a: (1) hidden danger in the premises landlord knows about but tenant is aware of; (2) premises leased for public use; (3) premises retained under landlord’s control, such as common stairways; OR (4) premises negligently repaired by the landlord. More recently, courts have said let’s not limit ourselves to certain circumstances, there is a standard of reasonable care for all circumstances.
2. **Custody**: When one party is trusted and depended on by another who is deprived of normal opportunities of caring for him/herself, the party has a duty to warn or assist the dependent.
   1. **Parent-child; Hospital-patient; School-pupil**
3. **Common Undertaking:** Courts may impose a duty on D if he was P’s companion on a common pursuit, such as hiking or scuba diving. In *Farwell v. Keaton* (p.136), the Supreme Court of MI stretches this rule to apply to D, who was engaged in a common pursuit of drinking and chasing girls with the deceased.
4. **Voluntary Assumption of Duty:** When a person voluntarily undertakes a responsibility to aid a victim, there is a duty to take reasonable efforts to keep P safe while P is in D’s care. D may not discontinue the aid to P if doing so would leave P in a worse condition than P had been if nothing had been done (R.2d §324). This duty begins only after the performance begins.
   1. **EXCEPTION:** Good Samaritan Statutes: where a medical personnel or others who render emergency services in good faith and without compensation is immune from civil liability unless there was gross or wanton willful conduct
   2. **Mere Promise:** Traditionally, a mere promise by D to help P without actual commencement of assistance is not enough to make D liable for not following through. Modern courts will make D liable if P relied on this promise.
5. **Landowners:** Traditionally, there were three categories of visitors to one’s land: invitees, licensees, and trespassers. Landowners only had a duty to invitees and licensees, since trespassers do not have a relationship with the landowner. In some jurisdictions, courts have moved towards eliminating these distinctions, holding all landowners as well as land occupiers to a reasonable person standard of duty. This shifts the court’s focus to the foreseeability of the injury rather than the reason for a person’s visit (*Heins v. Webster County*). The foreseeability of injury is a question for the jury, so as to protect those landowners with big plots of land where it would be unreasonable to ask the landowner to inspect his property regularly. CA was the first to remove these categories and implement a system of landowner duty owed to all visitors; except for those visitors who trespass into one’s property with the intent to commit a crime, which was added later through the legislature.
   1. **Invitees:** Invitees are owed a higher duty of care than licensees, to reasonably inspect and warn of dangers. This is because the invitee’s presence provides material benefit to the landowner. Invitees include anyone on one’s land for a business purpose as well as any member of the general public that is invited onto the land.
   2. **Licensees:** Licensees are owed a duty of reasonable care without special accommodations. They are equivalent to family members, social guests or anyone whose presence on the land is legally permitted or even merely tolerated. They are only owed the duty to warn or make safe dangers known by the landowner (*Carter v. Kinney*).
   3. **Trespassers:** Traditionally owed only a duty to avoid reckless or intentional harm, now owed a duty of reasonable care. If the owner is aware that there is consistent trespass or that a minor may trespass, it may give rise to a duty.
      1. **EXCEPTION:** Criminal trespassers are not owed a duty by the owner.
6. **Creating the Risk of Harm**: D will have a duty to warn, help and prevent any or further harm if the danger or injury is due to D’s own conduct or an instrument under D’s control. D has this duty whether he was acting negligently or not.
   1. **Negligent Entrustment**: A person may be held liable for damages if a reasonable person would not have entrusted the item to a person who is likely to use it in a manner involving “unreasonable risk of physical harm.” (*Vince v. Wilson*)
   2. **Liquor Vendors:** Entities in the business of providing liquor if patron is a minor or visibly intoxicated – courts try to balance the profit-motive of bars/restaurants with a duty of care. This duty is not imposed on social hosts serving liquor, for vendors are better equipped to monitor and regulate a customer’s consumption of alcohol (*Reynolds v. Hicks*). If a minor is intoxicated, the duty runs from the social host to the minor, not towards any third-parties.
   3. **Injury to Property:** may also create an affirmative duty.
7. **Identifiable Victims/ Third-Parties:** There is a duty to exercise reasonable care when negligence would provide substantial, foreseeable risk of physical injury to a 3rd party. The court needs to objectively evaluate whether the negligent conduct at issue is sufficiently likely to result in the kind of harm experienced. Factors to consider from *Randi W. v. Muroc* (p.142) are: (1) Foreseeability of harm to P; (2) Degree of certainty that P suffered injury; (3) Closeness of the connection between D’s conduct and injury suffered; (4) Moral blame attached to D’s conduct; (5) Policy of preventing future harm; (6) Extent of burden to D; (7) Consequences to the community of imposing such a duty; and (8) Availability, cost and prevalence of insurance for risk involved
   1. **Psychotherapists** are under a duty to report if the doctor has reason to believe that the patient is in such a mental condition as to be dangerous to himself or to the person or property of another (*Tarasoff v. Regents of UC*). Courts also look to the ethics code within the profession to evaluate the standard of care within the custom of the profession.
   2. **Accountants** may be held liable to people that the accountant or client intends to give the report for reliance on a transaction. It is not required that the person who is to become the P is identified or known to D at the time of report. It is sufficient that D supplies the info for repetition to a certain group of class of persons and the P proves to be one of them (R.2d Torts § 552). This was the test applied in (*Nycal v. KPMG*). The court considered two other approaches:

* **Foreseeability Test**: Liable to any person whom the accountant could reasonably have foreseen would obtain and rely on the accountant’s opinion
* **Near-Privity Test**: Liable to non-contractual third parties who rely to their detriment on an inaccurate financial report if the accountant was aware that the report was to be used for a particular purpose and the accountant has reached out to that party in a way that evidences the accountant’s understanding of the party’s reliance
  1. **Attorneys** may be held liable to beneficiaries or a will or estate, if drafted or executed incorrectly.

**[DUTY; NON-PHYSICAL HARM p.260]**

**[EMOTIONAL DISTRESS]**

Traditionally, courts have been reluctant to give P recovery for emotional distress without accompanying physical injury. However, courts started granting recovery for intentionally inflicted emotional distress and slowly allowed recovery for other circumstances. Emotional distress is not necessarily more difficult to prove than physical injury, despite what the earlier Courts were worried about. In both cases, courts rely on medical records, corroboration and physical symptoms as evidence to P’s injury.

* Exceptions to no recovery:

1. Mishandling of a human corpse;
2. Misinforming someone about a close relative’s death or injury (*Gammon v. Osteopathic Hospital*);
3. Loss of Consortium – this is one area where all states allow recovery for emotional harm suffered by a spouse for loss of companionship. Only some states allow recovery for the loss of companionship by a child or a parent.

**Physical Impact Rule:** P cannot recover for emotional harm without a physical impact sustained by D’s negligence, but may recover for pain and suffering as a result of the physical impact.

* Physical Impact does not include contact with asbestos; not a “traumatic” injury; there is no recovery for fear of developing in the future

**Zone of Danger Test:** Those plaintiffs, who are placed in immediate risk or reasonable fear of physical harm by D’s conduct, may recover for emotional injury (*Falzone v. Busch*). In every case where recovery for emotional distress was permitted, the case involved a threatened physical contact that caused immediate traumatic harm. Mere exposure to a dangerous substance, without symptoms, is not sufficient to be in the Zone of Danger (*Metro-North RR Co. v. Buckley*).

**Bystanders:** Courts may provide P recovery for emotional distress as a bystander.

* CA Dillon Factors: (1) P and Victim are closely related; (2) P witnesses the accident (only witnesses will suffer a traumatic sense of loss); (3) P’s physical proximity to victim (similar to #2); AND (4) Severity of injury – needs to be great bodily injury or death.
  + For #2, it is unclear whether P must witness the accident or the pain and suffering.
* In *Portee v. Jaffee*, where the factors were turned into elements, the proximity of the plaintiff is considered an essential element, although the recovery is based on the harmful effects of the plaintiff from her own perception of the accident (whether she sees it on TV or in person).

**Policy Question**: Courts are split on how to award damages for emotional distress. They try to balance the compensation of victims who suffered foreseeable emotional injury against the risk of exposing defendants to too great a scope of liability.

* Many states turned these factors into a rule;
* Many states have not permitted bystander recovery to non-family members
* Some jurisdictions, like NY, have not adopted the Dillon approach and continue to follow only the Zone of Danger approach for bystander liability, even for close relatives
* Other states allow recovery for family members who comes upon the scene shortly after the accident or for those who heard about it later (*Ochoa v. Superior Court*)
* **Special Case of Maine:** The Supreme Court of Maine have discarded all exceptions and have imposed a duty of general care to avoid emotional harm. Most states do not go this far and retain the pockets of available recovery.

**[ECONOMIC HARM]**

Courts have generally denied recovery when the harm is purely economic, not accompanied by damage to person or property. Negligence claims based on economic loss alone fall beyond the scope of the duty owed by Ds. Ds are only liable to physical and property damages that directly hurt people and to those with whom Ds had a contractual relationship (*532 Madison Avenue Gourmet Foods Inc. v. Finlandia Center, Inc.*). Foreseeability of harm does not define duty. Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm. (p.312)

* Business owners have business interruption insurance they can use to recover economic losses, so this remedy is just and will not place a disproportionate liability on the Ds.
* Policy reason: If Ds are liable and everyone sues, recovery would be very small per person since a lot of businesses will sue

Negligent misinformation: definitely owe a duty to those with whom you are in privity; do you owe a duty to third parties reasonably foreseen to rely on the information?

* Most states restrict the duty:
  + NY: those who are in “near privity” who are aware that the information was to be used for a particular purpose; some link between you and parties; you knew party was going to rely on it
  + In half the states, you don’t have to know particularly who is going to rely on it; as long as it is a particular group of persons who would rely on it
  + OR they know recipient intends to use it to influence a transaction (no general duty to all who will have access to the information)

Legal Malpractice

* Transactional malpractice
* Litigation malpractice – missing statute of limitations
* Duty to third parties – beneficiaries to a negligently drafted will
* Need to prove causation; client would otherwise be able to succeed

Property Damage

* Can be liable for physical harm to the property, but if no property damage, in general no liability for purely economic harm (Madison Ave case)
* One of the considerations here is that business insurance is available and is a more efficient way of compensating

**[BREACH: THE NEGLIGENCE PRINCIPLE]**

Negligence is the breach of a duty owed to plaintiff. D breaches that duty when D knew or should have known that his conduct imposes an unreasonable risk upon P, resulting in P’s injury.

**[The Standard of Care: The Reasonable Person p.49]**

The law determines liability by what the average man of ordinary intelligence and prudence would do. The failure to conform D’s conduct to this standard is the negligence. The standard of law is an external standard, and a man can have as bad of a heart as long as he exercises due care and follows the rules. Because of this external standard, courts have also declined to take a defendant’s mental disability in evaluating liability. A person’s physical disability is taken into account. Children are held to a reasonable child of the age and same circumstances, unless engaging in an adult activity such as driving.

* R.3d Torts: Foreseeable risk is an element of negligence (breach), not legal duty, to be determined by fact-finder unless no reasonable minds could differ on whether an actor exercised reasonable care.

**[The Hand Formula]**

Courts use the Hand Formula in order to determine unreasonableness. If the probability of a harm occurring multiplied by the gravity of the harm is greater than the burden of avoiding the harm, an action would be deemed unreasonable (*United States v. Carroll Towing Co.*). This mathematical balancing test is useful in some cases, but not useful when estimating human behavior/emotional injury.

**[Proof of Negligence p.85]**

Plaintiff has the burden of proof that D’s conduct fell below the standard of reasonable care. The most convincing type of proof is “real evidence,” such as documents, photographs, videos, etc… “Direct evidence” refers to eyewitnesses that testify, though Defense will cross-examine to show erroneous recall of events or cast doubt on witness’s credibility. Most of the time, we must rely on “circumstantial evidence,” where the jury is asked to infer from the evidence.

In cases where the defendant has an affirmative duty to act, the plaintiff must establish actual or constructive notice to prove negligence. Actual notice is established when P can prove that D was notified of the dangerous condition – not acting upon the dangerous condition within a reasonable time is the negligence. Constructive notice is established when P can demonstrate through circumstantial evidence that the dangerous condition was there long enough that the D should have known – not conducting reasonable inspection is the negligence.

Negligence is the breach of a duty owed to plaintiff. D breaches that duty when D knew or should have known that his conduct imposes an unreasonable risk upon P, resulting in P’s injury. The law determines liability by how the average man of ordinary intelligence and prudence would act under the circumstances. The failure to conform D’s conduct to this standard is the negligence. Courts sometimes employ the Hand Formula in order to determine unreasonableness. If the probability of a harm occurring multiplied by the gravity of the harm is greater than the burden of avoiding the harm, an action would be deemed unreasonable (*United States v. Carroll Towing Co.*). This mathematical balancing test is useful in some cases, but not useful when estimating human behavior/emotional injury.

In cases where the defendant has an affirmative duty to act, the Plaintiff must establish actual or constructive notice to prove negligence. Actual notice is established when P can prove that D was notified of the dangerous condition – not acting upon the dangerous condition within a reasonable time is the negligence. Constructive notice is established when P can demonstrate through circumstantial evidence that the dangerous condition was there long enough that the D should have known – not conducting reasonable inspection is the negligence (*Negri v. Stop & Shop*). To constitute constructive notice, defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident (*Gordon v. American Museum of Natural History*).

**[The Role of Statutes p.74: NEGLIGENCE PER SE]**

In instances of Negligence Per Se, defendant owes a statutory duty to the plaintiff and the elements of duty and breach can be easily met when D violates the statute. The statute must be applicable and relevant in the standard of care, such that it is (1) intended to prevent the type of harm occurred and (2) P is within the class of persons protected by the statute.

* + - R.2d Torts §286: The court may find as the standard of conduct of a reasonable man the requirements of a legislative enactment whose purpose is found to be:

1. Protect a class of persons whose interest is invaded
2. Protect particular interest which is being invaded
3. Protect that interest against the kind of harm which has resulted
4. Protect that interest against the particular hazard from which the harm results

However, the judge retains discretion to refuse to adopt the law as the standard of care when the law is obscure, unknown, outdated or arbitrary. The breach of statutory duty may be excused if there is an inability to comply, there is an emergency, or compliance poses a greater risk than violation (*Tedla v. Ellman*). The Judge must look to the intent of the statute to evaluate whether an exception can be applied.

**[The Role of Custom p.68]**

Showing that the defendant did not follow the custom is not always conclusive evidence of negligence. Once custom is established, court still needs to find negligence by the jury evaluating the custom’s reasonableness and the reasonableness of the behavior which adhered to the custom. In *Trimarco v. Klein*, the court uses custom to establish: (1) Notice, actual or constructive, that D should have known others in his industry are following the custom; (2) Reasonability, inference that if most reasonable person s are following a certain practice, it is more likely than not a reasonable practice; and (3) Feasibility, if others in the industry can manage the customary practice, the burden must not be too great and thus feasible.

If the finder of fact finds that the custom itself is unreasonable, this is sufficient proof of breach.

**[Auto Accidents]**

The default rule for auto accidents it a negligence analysis – that the driver is liable because he was careless. There could be cases of strict liability where the actor is liable just for driving – e.g. drunk driving cases. In *Hammontree v. Jenner* (p.3), the D is not found liable when he crashes his car as a result of a sudden, unexpected illness (epileptic seizure). The court refused to impose strict liability of products liability upon drivers.

Here, D failed to conform her conduct to a general care of duty owed to others while driving. Applying the Hand Formula, we see that the probability of a harm occurring multiplied by the gravity of the harm is great. The road is a dangerous place, which is why we as a society agree and enforce strict traffic procedures to be followed. The high probability and gravity of auto accidents are well established and widely documented in our society. The burden of avoiding the harm in this case is very low; a driver can easily decrease her speed while driving, either by braking, staying neutral, and not accelerating so much in the first place.

**[Special Cases of Medical Malpractice p.106]**

The Law imposes a higher standard of care on doctors, but the profession, as a group, sets its own legal standard for reasonable conduct. The standard here is not the “reasonable person,” but whether P can prove that D departed from the custom of practice. The evidence of custom is conclusive for the standard of care in medical malpractice cases. P must present expert witnesses to aid a jury determine the appropriate standard of care and whether D’s conduct conformed or deviated from that standard.

The Similar Locality Rule, where the expert testifying needs to be the same community as D, is an outdated rule in today’s world of medicine where education and residency is nationalized.

Consent, traditionally only necessary for invasive procedures, is now required for all procedures. The doctor must present all reasonable courses of treatment that a reasonable patient would want to know. Failure to obtain informed consent is a form of medical negligence (*Matthies v. Mastromonaco*).

**[*Res Ipsa Loquitor* Cases p.91]**

*Res Ipsa Loquitor* is a type of *prima facie evidence* in which breach can be inferred directly from the nature of the accident. The standard for *res ipsa* is whether the accident is more likely than not due to negligence. P has only the burden of proving causation, and if *res ipsa* is satisfied, P has enough evidence to get to a jury. There is no need to eliminate all other causes associated with the cause of the accident, since we only need to show that negligence more likely than not resulted in the accident.

The factors to consider are (1) whether the accident would normally occur without negligence (rely on judge’s common sense and experience to determine this factor), and (2) whether D was in control of the instrumentality and because of this P has no way of proving the negligence. There is a third factor commonly used in medical/hospital care cases, (3) Accident not due to any voluntary action or contribution of P.

EXAMPLES: (1) *Byrne* case, barrel would not fall out of a window without negligence.

(2) *McDou*gald*,* D owned the tire, truck, chains, for years, no one else had access.

(3) *Ybarra*, P was unconscious when 1 of 6 medicals damaged his shoulder in surgery.

Plaintiff may use expert testimony to prove *res ipsa loquitor.*

**[CAUSATION INTRO]**

Causation is the link between Defendant’s negligence and the harm suffered by Plaintiff. Causation has two parts: Factual and Proximate (Legal) Cause.

**[CAUSE IN FACT]**

Factual cause asks whether D’s negligence was more likely than not a substantial factor in the resulting harm, rather than the sole cause of the harm (*Stubbs v. City of Rochester*). We use the “but for” test to evaluate whether D in fact caused P’s harm. In order for the causation requirement to be met, a trier of fact must be able to determine, by a preponderance of the evidence (over a 50% likelihood), that the defendant’s negligence was responsible for the injury.

* When a factual cause requires medical testimony, courts use the **Daubert Factors** (*Zuchowicz v. US*)
  + Theory tested by scientific method;
  + Peer review and publication;
  + Known and potential rate of error;
  + Theory generally accepted by scientific community

Three factors bear on whether a plaintiff can satisfy the burden of proof on **causation based only on the negligent act and inference:** 1) circumstantial evidence; (2) the relative ability of the parties to obtain evidence about what happened; and (3) whether the case is one in which there is reason to have different concerns about errors favoring plaintiffs as opposed to defendants (policy reason, usually OK when P was seriously wronged).

**[Loss of Chance Medical Malpractice Suits]**

When a physician’s negligence diminishes or destroys a patient’s chance of survival or healing, the patient has suffered real injury (*Matsuyama v. Birnbaum*). The injury need not mean a patient’s death or harm, only the chance he lost in avoiding the harm. We use expert testimony to estimate a patient’s probability of survival to a reasonable degree of medical certainty. **Where credible evidence establishes that there was a diminishing in chance, causation is established.** 10 of 30 states who reviewed this theory rejected it. 20/30 use it. You can also use LOC in non-med-mal cases.

**R.3d of Torts**: Liability for Physical Harm 26 Comment n: provides strong reasons to apply LOC to Med Mal

1) Reliable expert evidence establishing loss of chance is more likely to be available in medical field

2) Physician should take every reasonable measure to obtain an optimal outcome for the patient

3) It is not uncommon for patients to have a less than even chance of survival when they present themselves for diagnosis, so the shortcomings of the All or Nothing rule are particularly widespread

4) Failure to recognize loss of chances forces the party who is the least capable of preventing the harm to bear the consequences of the more capable party’s negligence

The Burden of Proof shifts to Defendant in LOC Med Mal cases. P usually has the **burden of proof of “more likely than not.”** D did something wrong (breached his duty). The breach increased the risk of harm for P. There is an uncertainty in causation link. D will now have to prove that negligence did not cause the harm. **P only needs to show breach.** Judge Cardozo in *Martin v. Herzog* notes, “when a negligent side effect is the result of a drug wrongly prescribed, P who is injured has generally shown enough to permit the finder of fact to conclude causation based on “substantial factor” test.

**[Multiple Sufficient Causes]**

An exception to the “but-for” rule occurs when there are two or more sufficient causes to an accident. In this case, Plaintiff only needs to show that D’s action was a “substantial factor” in causing the damage (*Stubbs v. City of Rochester*). Some causes may be insubstantial/insignificant; **the cause alone needs to be sufficient to produce the injury**. Courts have also used the “reasonable certainty” test, which is ambiguous language, but which suggests a higher standard than “more likely than not,” while a lower standard than “beyond a reasonable doubt.”

**[Joint and Several Liability for Multiple Defendants]**

The Joint and Several Liability Doctrine allows Plaintiff to sue negligent defendants together or separately and recover the full extent of the damages against either one. When two or more tort-feasors act concurrently (at the same time) or in concert (but for each other, no act, but for act, no injury) to produce a single injury, they may be held jointly and severally liable for the full recovery. The traditional aim of Joint and Several Liability is that the injured party should not have to bear the burden of the damages if a defendant is insolvent. The other negligent party (D2), will have to bear the burden. This is the presumption for multiple defendants unless there is a statute indicating otherwise.

**In Concert/Concurrently not necessary with Indivisible Injury**

Sometimes, tort-feasors who neither act in concert nor concurrently may nevertheless be considered jointly and severally liable. This may occur in certain injuries, which, because of their nature, are incapable of any reasonable division or allocation of liability among multiple tort-feasors i.e. baby suffers brain damage at birth. Brain damage is an indivisible injury, and it is not possible to determine whether pediatrician or delivery doctor was responsible for what portion. Both defendants are still liable for all damages.

**[Alternative Liability Doctrine]**

Where two defendants breach a duty to the plaintiff, but there is uncertainty regarding which one caused the injury, the burden is upon the defendants to prove that he has not caused the harm. Without this device, both defendants will be silent, and plaintiff will not recover. With Alternative Liability however, defendants will be forced to speak and reveal the culpable party, or else be held jointly and severally liable themselves. As a policy reason, where all of the defendants breached a duty to the plaintiff, the likelihood that any one of them injured the plaintiff is relatively high, so that forcing them to exonerate themselves or be held liable, is fair. (*Summer v. Tice*)

This will not work with a lot of possible defendants; when the likelihood of any one defendant being responsible goes down, the fairness of imposing the liability of the defendant also decreases.

* **Exception**: Market Share Liability is a compensation system that holds defendants not jointly but severally only, for D’s share of the market at the time P was injured (*Hymnowitz v. Eli Lilly & Co.*). Some states shift the burden; D may exculpate themselves by showing that they are not liable.
  + “Justice in the aggregate” in this manner is a radical extension of tort law.

**[Comparative Fault for Defendants; Modern Approach to Joint and Several Liability]**

**Legislatures began splitting on when to use joint and several liability. The modern approach is comparative fault, which apportions the damages and holds the defendant liable for only his portion of the damages.**

**[PROXIMATE CAUSE]**

Proximate or Legal Cause asks whether the cause-in-fact of P’s harm will legally justify holding D liable. Proximate cause is an issue when there is an unforeseeable type of harm caused by the breach. Defendants are not responsible for all acts that are a direct and natural result of the D’s negligence; rather, Ds are liable only for damages reasonably foreseeable from the act of negligence. This is consistent with the sovereign principle of torts that the wrongdoer should only be held liable to the extent of his culpability. Holding Ds responsible for only the portion of the harm still serves the deterrence effect of Tort Law. Questions of proximate cause arise when there is an unusual, unpredictable or attenuated chain of events.

Three ways to analyze foreseeability:

**[The Eggshell Plaintiff Rule – Extent of Harm]**

This rule requires the defendant to take his plaintiff as he finds him, even if that means that the defendant must compensate the plaintiff for harm an ordinary person would not have suffered (*Benn v. Thomas*). This rule deems the accident, not the dormant condition, the proximate cause of the injury. D is responsible for the full extent of the damages even though D could not have foreseen the particular results that followed.

When plaintiff suffers greater damages because of pre-existing physical or mental conditions, p may recover for all harm (p.398).

**[Scope of Risk Analysis – Type of Harm]**

The harm actually suffered by the Plaintiff must be within the type of risk created by the Defendant’s negligence (*Overseas Tankship Ltd v. Wagon Mound*). Courts use the Substantial Factor Test to determine whether the harm that occurred was of the same general nature as the foreseeable risk created by the Defendant’s negligence.

In *Palsgraf v. Long Island Railroad Co.* (p.418), Judge Andrews finds that “proximate” cause is only a matter of practical politics. Factors he considers in determining proximate cause are whether:

* The injury is what might ordinarily be expected to follow the negligence
  + Need no great foresight to predict that the natural result would be to injure plaintiff
* There was a natural and continuous sequence, or a direct connection that produced the result
  + “No remoteness in time and little in space”

Restatement says that something is negligent because it creates a risk of harm; and if that is the type of the harm that results, then it is foreseeable.

**[Superseding Cause – Manner of Harm]**

Superseding causes are an intervening force, the unforeseeable nature of which cuts off liability for the original tortfeasor. Concurrent causes do not fall into this analysis. One may be liable for the reasonably foreseeable criminal acts that results from negligence; even though the alleged intervening cause is criminal.

R.2d Torts § 442B (1965): A negligent defendant, whose conduct creates or increases the risk of a particular harm and is a substantial factor in causing that harm, is not relieved from liability by the intervention of another person, ***except*** where the harm is intentionally caused by the third person *and* is not within the scope of the risk created by the defendant’s conduct. In this case, the third person deliberately assumed control of the situation, and all responsibility for the consequences of his act is shifted to him.

R.2d Torts § 441 Comment C: A dependent intervening force, on the other hand, is a predictable response or “reaction to the stimulus of a situation for which the actor has made himself responsible by his negligent conduct.”

**[DAMAGES INTRO]**

Negligence tort actions are awarded with compensatory damages, while intentional (and sometimes recklessness) tort claims are awarded with both compensatory and punitive damages. There are two types of compensatory damages available for a plaintiff: (1) pecuniary damages and (2) non-pecuniary damages. The jury has the sole discretion in coming up with the damage amount, and the judge will review this amount. There has been some tort reform since the US has been criticized for overly high tort awards. Some legislatures put a cap on damages through statutes; for example, CA has a cap for $250K for pain and suffering in med-mal cases. A lot of courts do not accept *per diem* arguments by plaintiff’s counsel, which usually results in higher damage awards.

**[The Collateral Source Rule]**

Plaintiff can recover for full damages even though he/she has already received compensation for injuries from “collateral sources,” such as medical insurance. We, as a society, want to encourage people to insure themselves, and people will not pay insurance premiums if that will eventually help the tortfeasor. In *Arambula v. Wells* 1999 (p.742), the court held that it is favorable to include gratuitous gifts from sources such as family members under the Collateral Source Rule. The family and friends who help an injured do not contribute in order to help the tortfeasor by lowering the damage award, so it is fair that gratuitous contributions are not taken into consideration in damages. There is also a concern by defendants that there may be “double recovery” for plaintiff.

Courts have argued that there is no double recovery since a big portion of the damages go to attorney fees; this argument has been used with respect to the collateral source rule, high pain and suffering damages and in arguments on whether income tax should be calculated into future earnings in damages.

Other collateral sources, such as insurance companies, file a **claim of subrogation** to retrieve their expenses after plaintiff receives damage awards. Subrogation rights may be contractually agreed upon between the insurance company and the plaintiff, or it may be implied in order to prevent double recovery for the plaintiff. The rationale is that a double recovery is contrary to the indemnity purposes of insurance contracts and produces a form of unjust enrichment. Courts have readily applied implied rights of subrogation to property damages. They have not readily recognized implied rights for personal insurance, such as medical expenses or life insurance, which represents an unliquidated, intangible loss. In *Frost v. Porter Leasing Corp* 1982 (p.785), the court refused to recognize the insurance company’s implied rights to subrogation for medical expense damages, applying the rationale above. The dissent argues that an insurance company should not be obligated to forbear from asserting its subrogation rights to “make plaintiff whole,” since its only obligation is to pay for what is contractually covered.

**[Pecuniary Damages]**

Pecuniary damages cover monetary, out-of-pocket expenses. These are easily calculated (relatively). Pecuniary awards include past medical expenses (easy to prove); future medical expenses (need expert testimony and doctor witnesses); lost wages (easy to prove); and future lost wages for total disability (toughest to calculate; things to consider are: potential future raises or lost opportunity; determination of life expectancy (refer to charts and precedent cases); whether to count income tax; and cases of minors where there is no established work history or future career path. Also, it is difficult to calculate when there is a partial disability; uncertainty regarding when plaintiff will return to work.

**[Non-Pecuniary Damages]**

Non-Pecuniary damages cover expenses that are not monetary, such as pain and suffering or the loss of enjoyment of life. When the jury comes back with the verdict, the defendant will make a motion either for a new trial or for a **remitter** (new trial unless P consents to a reduction of damage award). If the trial judge does not grant the motion, D can appeal again and the appellate court will determine whether the award amount “shocks the conscience” in deciding whether to affirm or remand the damage award. Most awards are reduced on appeal. Some states have a provision for when the damages are too low, and may grant a motion for an **additur** (new trial unless D consents to an increase of damage award).

* In *McDougald v. Garber* NY 1989 (p.728), the court rules that cognitive awareness is a prerequisite to recovery for loss of enjoyment life, since no purpose of compensating the plaintiff is fulfilled if plaintiff is comatose. Court rejects the argument that pain and suffering is a separate award than the loss of enjoyment of life. This was a policy choice this court made, and courts may be split on this issue in other states.

**[Death Cases] Available damages are determined by statute;** generally, the more specific statute is said to govern the more general statute.

1. **Survival Action:** Estate brings this action on behalf of deceased for damages they can recover up to the time of death. Damages include loss of wages, medical expenses and pain and suffering up to death. In cases where the decedent died instantly, no pain and suffering is awarded.
   1. In CA, there is no recovery for pain and suffering if the plaintiff is dead at the time of judgment.
2. **Wrongful Death Action:** Action on behalf of the heirs/dependents for what they lost economically, as well as non-economic loss (decided by statute) such as Loss of Consortium. The damages include the net income of the deceased (how much the deceased would have earned in a life – how much the deceased would have spent outside of dependents’ finances).

**[PUNITIVE DAMAGES]**

Punitive damages are awarded to punish the defendant for intentional and sometimes reckless torts. The jury has total discretion over the amount of punitive damages and whether or not to award them. The majority rule is that when a tortfeasor dies, plaintiff will not be able to recover punitive damages from the estate. Almost all states have concluded that punitive awards serve the purpose of deterring serious misconduct. However some courts worry that since punitive damages are NOT covered by insurance, the whole claim may not be covered by insurance, in which case plaintiff will suffer at the defendant’s insolvency.

In order to determine punitive damages, the jury looks to the culpability of the tortfeasor. The wealth of the defendant is not relevant to any other aspects of the case, but the jury is permitted to consider D’s wealth in order to determine an appropriate amount for punishment. However, because of the fear that a jury will punish someone improperly solely based on their wealth, there is a bifurcated trial:

1. Whether punitive damages are appropriate for the liability
2. Determining the amount of punitive damages

**[Punitive Awards for Recklessness]**

Punishing for recklessness still serves a deterrent purpose, in theory. Some jurisdictions award damages for recklessness.

* In *Taylor v. Superior Court*; CA; 1979 (p.750), the court awarded punitive damages when defendant was found to consciously disregard the safety of others (recklessness). D hit P while drinking and driving; had a prior history of DUIs and alcoholism; was a beverage deliveryman.
  + Dean Prosser’s comment: Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or malice, or a fraudulent or evil motive on the part of the defendant, or a *conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton* 
    - Prof: he is describing “criminal indifference”
    - Dissent: if this guy doesn’t care about his criminal liability or compensatory damages as well as the risk to his own life, there would be no deterrent purposes of punitive damages.

In California, punitive damages are awarded “where the D has been guilty of oppression, fraud, or malice, express or implied” CA Civ. Code §3294 (p.750) where fraud and malice are defined in p.755.

**[Employer Liability for Punitive Damages]**

Employers may be held liable for punitive damages in limited circumstances, which is outlined in R.2d §909 (p.759). The Restatement justifies this limited approach as “resulting from the reasons for awarding punitive damages, which make it improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously.”

**[Punitive Damages and the Due Process Clause]**

The Fourteenth Amendment Due Process Clause entitles defendants to be on notice of the conduct that is being punished as well as the severity of the punishment. This explains the minimum and maximum sentence elements of criminal statutes. Thus, an amount of punitive damages that is “grossly excessive” or “arbitrary” does not give D notice of the severity of punishment and violates the Due Process Clause.

* In *State Farm v. Campbell* 2003 (p.760), the Supreme Court rules that the punitive damages of $145 million accompanying an award of $2.6 million of comp damages, reduced to $25mil:1mil was unconstitutional. They held that there is a presumption that single-digit ratios between the two awards will satisfy due process, although nothing in the constitution caps the amount.
  + Court uses *Gore* guideposts:
    - Degree of Reprehensibility of D’s conduct: may consider similar conduct but may not punish D for conduct outside the jurisdiction of the court
    - Disparity between the actual and potential harm suffered (compensatory damages) compared to the punitive damages award
    - Difference between punitive damages awarded by the jury and civil penalties authorized or imposed in comparable cases

**[INSURANCE]**

**[How insurance companies work]**

Insurance companies spread the crushing costs of adverse financial loss by collecting premiums from a group to pay for the financial burden of the portion of the group that suffers from an accident or tort. For instance, insurance companies have an actuary table depicting how many 50yo will die that year. They multiply the number of deaths by the coverage limit then divide that cost among all the 50yo that have a policy with the company in order to pay the coverage and make a profit.

**[Insurance and Contract Law]**

Insurance is a heavily regulated industry in most states. The nature of the insurance contracts are usually statutorily determined, with the only negotiable aspect being the amount of coverage and certain optional types of additional coverage. Insurance beneficiaries are also determined by statute and usually are limited to close family members or important principals of businesses. The language of insurance policy is interpreted according to rules of contract law; pay attention to definitions of words such as “sudden,” “occurrence,” “intended.”

**[Role of Insurance in Torts]**

Insurance drives a huge part of our tort system, yet, we do not reveal to the jury whether the defendant is insured. If the jury knew that the defendant was insured, the jury may unfairly increase the awards against defendant, depriving him of due process of law. It is reversible error to admit evidence about defendant’s insurance.

**Traffic Rules as Proxy to Negligence**

Because traffic laws are a simple set of rules, if you break a traffic law you are automatically at fault with regard to insurance.

**Intentional Torts**

Insurance companies exclude coverage for intentional torts and some insurance policies may exclude coverage for reckless conduct. As a policy reason, we do not want people to be insured against punitive damages, since the idea is to punish and those with more money and better policies will have their sins covered by insurance.

**[Types of Insurance]**

**First Party Insurance** covers the insured for accident or harm, without regard to fault. First Party Insurance explains why public utility companies are not held for the “crushing liability” when for example, it fails to supply water to a fire hydrant and an entire building burns to the ground. Those inside the building will be covered by first party insurance, so the injured are compensated while the water company does not go bankrupt.

* Medical Insurance: Insured pays premiums to be covered for medical expenses/unexpected illnesses.
* Auto Insurance: Insured pays premiums to be covered for when insured’s car gets damaged; insured only needs to pay the deductible and insurance company pays for the rest of the damage up to the policy coverage.
* Homeowner’s Insurance: Insured pays premiums to cover house repairs in accidents like storms, fire, theft, etc… flood and earthquake coverage can be added for a higher premium (more expensive because natural disasters usually affect a large number of people and insurance company will have to pay more than one household.)

**Third Party Insurance (Liability Insurance)** covers the insured against the catastrophic financial loss that results from being held liable as a tortfeasor. There are two components to Liability Insurance: (1) Duty to Indemnify: If the insured causes an accident for which he/she is held liable, the insurance company will pay the amount of judgment to the third party up to the policy coverage and (2) Duty to Defend: The insurance company will also hire the lawyer to defend the insured in the court proceedings.

* Auto Insurance: Anyone on the road is required to have a minimum amount of liability insurance, the idea being that we want compensation available for everyone on the road. If there were no such law, someone could injure another on the road and not be held financially liable once they declare bankruptcy.
  + **Family Purpose Doctrine**: Any member of the family who is driving the car is an agent of the owner and the owner is therefore responsible.
  + **Joint Enterprise Doctrine**: If more than one person is in the car, they are all agents of one another and each may be held liable for negligence of the driver.
    - Typically, no liability for someone else driving the car unless there was negligent entrustment.
* Homeowner’s Insurance:
  + Premise Insurance: Insured pays premiums to pay for the liability if anyone gets injured on his property as the result of a dangerous condition.
  + General Liability Clause: indemnify and defend the insured if they are sued for negligence; if part of homeowner’s insurance, will usually exclude auto accidents to avoid overlapping coverage
    - In *Lalomia v. Bankers & Shippers Insurance Co.* 1970 (p.803), there was a loop hole of coverage between the auto insurance, which only covered private passenger vehicles, and the homeowner’s insurance, which excluded coverage for land-motor vehicles. The court resolved this issue by having the plaintiff’s own first party insurance pay for the torts of the 12yo deceased defendant and having the defendant’s homeowner’s insurance’s general liability clause cover for the torts (negligent entrustment) of defendant father.

**[Conflict between Insured and Insurance Company]**

When there is a conflict between the insurance company and the insured, the lawyer (hired by insurance company’s Duty to Defend the insured), must treat the insured, not the insurance company, as its client (R.3d §134 comment F (2000)). The lawyer may not follow directions of the insurer if doing so would put the insured at increased risk of liability. A lawyer designated to defend the insured may not reveal adverse confidential client information to the insurer without explicit consent of the insured. If the designated lawyer finds it impossible to proceed due to the conflict of interest, the lawyer must withdraw from representation of both parties. (p.806-807)

**[Bad Faith Action]**

Every contract has an implied Covenant of Good Faith and Dealing. In this context, the insurance company has a duty to settle the claim within policy limits if possible and to act within the best interests of the insured. In order to establish a *prima facie* case of Bad Faith, P must establish:

* Deliberate or reckless failure to place the insured’s interest on equal footing with the insurance company’s interest when considering a settlement offer
* Two things need to coincide:
  + An actual opportunity lost by the insured to settle the claim
  + Clear liability of plaintiff where the potential recovery far exceeds the insurance coverage

In *Pavia v. State Farm*1993 (p.812), court rules that plaintiff failed to establish Bad Faith since State Farm turned down the settlement offer while it was still investigating the liability of the driver. Once State Farm thoroughly investigated, they were willing to settle but the victim’s counsel rejected the offer. The two (lost opportunity and excess liability of plaintiff) did not coincide, so there was no Bad Faith claim.

**[WORKERS COMPENSATION]**

**[DEFENSES TO CLAIMS OF NEGLIGENCE]**

The defendant can defend himself against a claim of negligence by negating one of the four elements of a *prima facie* case of negligence, OR by asserting Contributory/Comparative Negligence; Assumption of the Risk; and/or Preemption.

**[The Plaintiff’s Fault – Contributory Negligence]**

Traditionally, contributory negligence was a complete affirmative defense to a prima facie case of negligence. The duty owed by Plaintiff is to avoid actions that would create a risk of harm to him/herself. The Plaintiff’s negligent conduct must be an actual and proximate cause of the Plaintiff’s harm. Contributory negligence is a defense only in cases of negligence. If the misconduct was more serious, such as recklessness or willful misconduct, contributory negligence is irrelevant and Plaintiff will recover all damages.

**[COMPARATIVE NEGLIGENCE]**

Courts have rejected the All-or-Nothing defense of contributory negligence. Most states have adopted the doctrine of comparative negligence, in which a negligent plaintiff’s recovery depended on how serious plaintiff’s negligence was compared to the defendant’s. Comparative fault is not a complete defense; it only reduces the award of damages by percentage of fault.

* Physicians cannot claim a defense of comparative negligence because a patient’s injuries were originally caused by his own negligence. “Negligence of a party which necessitates medical treatment is simply irrelevant to the issue of possible subsequent medical negligence.” *Fritts v. McKinne* 1996 (p.453)

In Pure Comparative Negligence, if Plaintiff is 90% to blame for the injury, he can still recover 10% from D.

In Modified Contributory Negligence, the Plaintiff can recover if P is less than 50% at fault (49%) or no greater than 50% (51%) at fault.

* “Fault,” as defined by the UCFA, includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. (p.441)
* If fault is established, the plaintiff’s recovery will be reduced by the percentage of his fault, but it does not negate the cause of action.

Courts will enact this doctrine through statutes, so you must analyze the statute to apply the doctrine.

Assume Uniform Comparative Fault Act (UCFA) applies on the exam (p.440)

1. Effect of contributory fault
2. Appointment of damages
3. Setoff
4. Right of contribution
5. Enforcement of contribution
6. Effect of release

**[AVOIDABLE CONSEQUENCES]**

The Avoidable Consequences doctrine reduces P’s recovery to the extent that he failed to exercise due care to mitigate the harm done. This is an analysis not of liability but of damages. D could still be entirely at fault, but courts will generally refuse to award damages for complications that could have been avoided by the exercise of due care after the accident. Common avoidable consequences are the P’s failure to obtain medical attention or to follow medical advice. If the medical advice is surgery, the P has no duty to undergo the surgery to mitigate the damages caused by D’s negligence when there is a recognized risk associated with the surgery. Another common avoidable consequence is “anticipatory consequences,” such as the failure to wear a seatbelt, though the burden of proof is on the D to show what portion of the fault is attributed to the failure to wear a seatbelt.

**[ASSUMPTION OF RISK]**

*Volenti non fit injuria “No injury is done to the willing.”* (p.471)

The doctrine of assumption of risk relies on the reasoning that one who takes part in an inherently dangerous activity must accept the risks that are simply a part of the activity.

**Express Agreements (p.458)** are usually in the form of a contract, signed by plaintiff and stating that if plaintiff is later hurt by defendant’s negligence, defendant will not be held liable. Courts require such contracts to (usually) be one for a necessary service, such as medical services, and that the contract in question is sufficiently clear. In addition, courts enforce the well-established rule that contracts that violate public policy are unenforceable. It is consistent with public policy that the risk of negligence should be born by the tortious actor, not by the party with the weaker bargaining power (the plaintiff who signs such a contract.) Therefore, most states decline to enforce this type of waiver in some circumstances, and some states do not allow this type of waiver at all.

In *Hanks v. Power Ridge* 2005 (p.459), the court uses the *Tunkl* factors from CA (p.462) in deciding whether exculpatory agreements violate public policy. The court clarified that an exculpatory agreement may affect the public interest adversely even if some of the factors are not satisfied:

1. The agreement concerns a business of a type generally thought suitable for public regulation
2. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public
3. The party holds himself out as willing to perform this service for any member of the public who seeks it
4. As a result of the essential nature of the service… the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services
5. In exercising a superior bargaining power the party confronts the public with a standardized adhesion [take it or leave it] contract of exculpation and makes no provision about when a purchaser may pay additional reasonable fees to obtain protection against negligence
6. As a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents

**If yes to a factor 🡪 agreement should not be enforced, but factors are not dispositive;** the enforceability of the agreement will depend on the policy stance of the judges and precedents in the states

Other courts consider four factors:

1. The existence of a duty to the public;
2. The nature of the services performed;
3. Whether the contract was fairly entered into;
4. Whether the intentions of the parties are expressed in clear and unambiguous language

**Primary Implied Assumption of Risk** is when plaintiff impliedly assumes those risks inherent in a particular activity. Primary implied assumption of risk is not a true affirmative defense, but instead suggests that the defendant’s legal duty does not encompass the risk encountered by the plaintiff. This is another way of saying that the plaintiff has failed to establish a *prima facie* case of negligence by failing to establish that a duty exists. This is typically used in the context of recreational activities rather than workplaces, where a duty is typically owed to the workers.

**Secondary Implied Assumption of Risk** is when plaintiff knowingly encounters a risk created by the defendant’s negligence. Traditionally, this was a true affirmative defense for the defendant because it was asserted only after plaintiff establishes *prima facie* case of negligence against defendant.

Some jurisdictions have stated that comparative negligence is an objective standard, where we ask if the assumption of the risk was what a reasonable person would choose to do in the plaintiff’s situation. This would allow for an analysis of “comparative assumption of the risk,” where the trier of fact can apportion fault among the parties. (*Davenport v. Cotton Hope Plantation Horizontal Property Regime* 1998 p.475), where plaintiff descended middle staircase knowing that the light was out, and had been reporting it to management for two months.)

On the other hand, some jurisdictions consider assumption of the risk as a subjective standard, where they evaluate whether plaintiff in fact knew of the risk of injury from his conduct. States that have adopted this view still accept the assumption of risk as a complete bar to recovery. (Subjective view is the disfavored choice)

**Fire Fighter’s Rule**: In *Levandoski v. Cone* 2004 (p.483), the court refused to impose the Fire Fighter’s Rule, where police officers and fire fighters are considered licensees and owed a duty of care by the landowner less than that owed to an invitee. The rationale for this rule is that police officers and firefighters voluntarily assume the risk of their occupations and that they are covered by worker’s compensation, which is paid for by taxpayers (primarily landowners).

* + Firefighter is a licensee not an invitee; but not going to apply if D is not the landowner
  + Assumption of the risk: choosing to enter a particular profession
  + Want to prevent double recovery; double jeopardy for taxpayer

**[PRE-EMPTION]**

The defense of preemption has to do with the relationship between federal and state tort law. The doctrine of preemption states that when there is a conflict between these two governing bodies of law, federal law will always prevail. The Supremacy Clause of Article VI of the Constitution states that the Constitution, federal statutes and treaties trump and govern anything in state law to the contrary.

**Express preemption** cases are when Congress passes a statute that expressly states that this law is held over a state’s law, or that this law does not preempt state law.

**Implied preemption:**

1. Field preemption: Congress has regulated in this field so comprehensively that there is no room for state law to make judgment calls on this issue
2. Conflict preemption: Congress had a specific intention in creating the law, and the intention would conflict with the existing state law
   1. **Doctrine of Impossibility**: it would be impossible for an agent to comply with both federal and state law because of these intentions
      * In *Wyeth v. Levine*, defendant asserts an impossibility defense when the drug manufacturer claims that it would have been impossible for the manufacturer to warn of the gangrene/possible amputation without violating FDA regulations. The Court found that absent clear evidence that the FDA would not have approved a change in label, it was not impossible for *Wyeth* to comply with both, and *Wyeth* didn’t even attempt to change the label.
      * In *Pilva v. Mensig*, SCOTUS rules that the impossibility defense will be recognized since the manufacturer of generic drugs cannot independently change the label (made up law/twisted it to fit the case, justices dissented). The Court found that plaintiff’s argument on possible alternative speculations such as “the government may change its rule” is not a sufficient argument. Prof points out that the generic manufacturer could have just not sold the dangerous drug.

**[STRICT LIABILITY]**

**[Intro]**

Traditionally, strict liability was about trespass: the plaintiff’s right to exclude others from his land. If a cow escaped A’s land and damaged B’s land, A is strictly liable without regard to fault. In *Sullivan v. Dunham* (p.516), court used this doctrine as a “trespass of the person” to hold D strictly liable when P was struck on the highway by a fragment resulting from dynamite blast.

**[Philosophy]**

Strict liability is generally disfavored in our legal system since it does not rely on fault as part of the analysis. **The focus is on liability, not fault**. Strict Liability is about cost spreading (purely compensation) unlike negligence (compensation and deterrence). In *Indiana Harbor Belt RR v. American Cyanamid* 1990 (p.520), the court refuses to apply strict liability and remands the case for analysis under negligence when the inherently dangerous chemical was irrelevant to the analysis, for the accident would not have occurred if the transporters exercised reasonable care. “The plaintiff overlooks the fact that **ultra-hazardousness or abnormal dangerousness is, in the contemplation of the law at least, a property not of substances, but of activities**: not of acrylonitrile, but of the transportation of acrylonitrile by rail through populated areas.”

**US Strict Liability – requirement of abnormally dangerous activity/defective product**

In US, there is strict liability only for inherently/abnormally dangerous activity or for defective products. Strict liability is ordinarily imposed only for ultra-hazardous activities. In cases of such activity, the hazard is so great compared to the value of the activity that we as a society discourage the activity altogether. If a plaintiff can establish the ultra-hazardous activity or a product defect (analysis below), then plaintiff only needs to establish causation and no breach (unreasonable conduct) in order to sustain the cause of action.

**[DUTY OF MANUFACTURER]**

The manufacturer of a product has a duty to inspect if the next step in the manufacturing chain (retailer) is not expected to inspect it further. This duty also exists even though the manufacturer purchased parts of the product elsewhere (*Macpherson*). The manufacturer also has a duty to third parties under Contract Law. The **Third Party Beneficiary Rule** states that if two parties make a contract to benefit a third party, the beneficiary can sue for breach of contract even when not a party to the contract. This rule is applicable when the manufacturer knows that the buyer will not be using the product but is only buying to resell or rent the product (e.g. car dealership). The person held liable needs to be “in the business” of selling the product, not someone who is selling used products or someone who provides services. It also applies to leasers, people who rent out equipment, people who give away products and franchisors.

* In *MacPherson v. Buick Motor Co.* 1916 (p.551), Judge Cardozo held that irrespective of contract, the manufacturer of a thing of danger is under a duty to make it carefully. Where danger is to be foreseen, a liability will follow.
* R.2d 402A (p.568): Seller of product is liable for physical or property harm if: (1) seller is engaged in business of selling the product; and (2) the product is expected to and does reach consumer in condition it was sold; also, it is (3) irrelevant if seller used all possible care; and (4) irrelevant if the user has no contractual relationship with the seller

Anyone in the chain of distribution owes a duty to anyone who is injured while using a product in an intended or foreseeable manner. In *Macpherson*, Judge Cardozo held that irrespective of contract, the manufacturer of a thing of danger is under a duty to make it carefully. Where danger is to be foreseen, a liability will follow. According to the R.2d §402A, a seller of a product is liable for damage to a person or property if the seller is engaged in the business of selling, renting, or otherwise distributing a new product and the product reaches the consumer in the condition it was sold. This means that a defect in the product, if any, needs to be present at the time of the sale of the product and the product must reach the consumer without any substantial third party modifications. It is irrelevant that the seller exercised all possible care in manufacturing and distributing the product and also irrelevant that the user of the product has no contractual relationship with anyone in the distribution chain.

**CA Strict Liability**

In *Escola v. Coca Cola* 1944 (p.557), P uses *res ipsa loquitor* to prove D’s negligence when a soda bottle exploded and injured her. Judge Traynor’s dissent stresses that negligence should not be used in product liability analysis; In negligence, D can dispel P’s claim by the showing of proper care and P is not in the position to refute such evidence or ID the cause of defect. P, unlike D, is unfamiliar with the manufacturing process of the product. Since the cost of an injury and loss of time or health is an overwhelming and needless burden on P, the manufacturer should act as an insurer and distribute the cost of liability to the public by slight increases in prices.

* Prof: PS. The elements of *res ipsa loquitor* aren’t even met here: the instrumentality was not solely under D (bottler), it was also at the manufacturer, but the manufacturer provided testimony of reasonable inspection

**Warranty Law extended to Agents**

In Contract Law, there is a theory of implied warranty of merchantability that a product is reasonably safe for use. When the implied warranty is breached, the buyer does not have to be the injured. The buyer acts as an “agent” to the injured i.e. when a wife buys a loaf of bread, husband eats it and gets injured, the wife was acting as an agent of the husband in purchasing the bread and husband can sue for breach of implied warranty.

The warranty law covers the product, and if there is personal or [other] property damage resulting from the defective product, plaintiff may bring an actionable suit in Torts. However, the manufacturer in a commercial relationship has no duty under negligence or strict liability theory to prevent a product from injuring itself *East River Steamship Corp v. Transamerica* *Delaval Inc.* 1986 (p.661). (They only have the duty of implied warranty in Contracts Law). Tort law considers the injury to the product itself purely economic damage, which is not covered by torts.

**[Proving Strict Liability]**

**Duty:** Owed to anyone injured while using the product in an intended or foreseeable manner

**Breach:** Proven through demonstrating one of the three types of defects

**Causation:** Need to show actual cause and proximate cause; for actual cause, “but-for the defect, no injury,” for proximate cause, P needs to show that the defect existed at the time of sale and there were no substantial third-party modifications.

**Damages:** Needs to actually occur from the breach

**[Restatement Factors for Ultra-hazardous]**

Restatement of Torts: Ultra-Hazardous Activity described as involving a risk that “cannot be eliminated by the exercise of the utmost care” and “is not a matter of common usage.”

R.2d §520: Abnormally Dangerous Activity 6 factor test (p.520)

1. Existence of a high degree of risk of some harm to the person, land or chattels of others;
2. Likelihood that results from it will be great;
3. Inability to eliminate the risk by the exercise of reasonable care;
4. Extent to which the activity is not a matter of common usage;
5. Inappropriateness of the activity to the place where it is carried on;
6. Extent to which its value to the community is outweighed by its dangerous attributes

R.3d §20: Abnormally Dangerous Activity has two elements:

1. Foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors (Factor 5 of R.2d, the location, affects the magnitude of risk of harm)
2. Not a matter of common usage (Factor 6 of R.2d, value to community, bears more directly on negligence but valuable, albeit risky, activities may be in more common usage, as with airplane travel)

**[Three Types of Defective Product Claims]**

R.3d §2 describes these three types; note that the “strict liability” language is never used, and there is a focus on foreseeability and reasonableness.

**(1) Manufacturing Defect**: A manufacturing defect is one in which a product departs from its intended design even though all possible care was exercised in preparation, marketing, and distribution of product. This is the classic case of pure strict liability, and P can sue anyone in the manufacture or retail chain.

**(2) Design Defect**: A design defect is one in which a product is designed ineffectively. There are two tests to determine whether the design itself was deficient: (**but after analysis, don’t forget causation!! Must show that if the design were different, it would have prevented the accident)**

1. Consumer expectations test: This test is used in instances where an ordinary plaintiff would know about the product (i.e. not a forklift). A plaintiff must show that an ordinary user, using the product in an intended or reasonably foreseeable manner, would find that the product did not meet his/her minimum expectations about the safety of the product. “Ordinary knowledge as to the product’s characteristics may permit an inference that the product did not perform as safely as it should…” R.2d §402A (*Soule v. GM Corp.* p.575). This test is gone in R.3d but states still use this test.
   * **DEFENSE**: The danger was open and obvious
   * No expert testimony needed; ordinary consumers is the standard, so leave it to jury
   * If the injured is not the actual purchaser, still can hold manufacture liable if they are an intended user or foreseeable beneficiary of the product
2. Risk-benefit test: Tests whether there are reasonable alternative to product. This test considers three factors: (1) foreseeable risk and the gravity of harm; (2) feasibility of alternative; and (3) public policy reasons. This is a similar analysis to negligence.

* Requires expert testimony here to show that the alternative exists AND would be economically feasible

**(3) Warning Defect:** A warning defect occurs when “foreseeable risks of harm could have been reduced or avoided by reasonable instructions or warnings… and the omission of adequate warnings renders the product not reasonably safe [R.3d §2(c) p.621]”. The manufacturer has a duty to conduct all tests reasonable before marketing a product in order to discover and implement risk-avoidance measures. The question here is whether an adequate warning was necessary to inform a reasonable consumer of the risks of the product. Open and obvious risks need not be warned against, but “open and obvious” is not a defense in a situation where the risk benefit test is appropriate (*Camacho)*.

When the warnings are not there at all, a manufacturer or retailer will be held responsible for the knowledge that the results of reasonable testing would provide [R.3d §2(j) p.621] There are four factors used in the R.3d for whether it was reasonable for the seller to warn of a risk (R.3d factors):

1. Seller knows or reasonably should know product poses risk of harm
2. Those who would benefit from the warning can be identified and are likely unaware of the risk
3. A warning can effectively be communicated to and acted upon by recipients
4. Risk of harm is sufficiently greater than the burden of providing warning to such harm

When warnings are there but inadequate, plaintiff can always show that the defendant was aware of the foreseeable risk of harm – otherwise, the defendant would not have the warning there in the first place. A warning must clearly alert the consumer on how to properly and safely use the product. A reasonable and adequate warning not only conveys a fair indication of the dangers involved, but also warns with the degree of intensity required by the nature of the risk. Five Factors used in TN (p.603):

1. The warning must adequately indicate the scope of danger
2. Warning must reasonably communicate the extent or seriousness of the harm that could result from misuse of the product
3. The warning must be prominent enough to alert a reasonably prudent person to the danger
4. A simple directive warning may be inadequate when it fails to indicate the consequences that might result from failure to follow it
5. The means to convey the warning must be adequate

The manufacturer also has duty to warn of the danger of the unintended uses of a product as long as they are reasonably foreseeable (p.642 *Liriano v. Hobart)*. The duty to warn extends after the sale of the product if one can reasonably do so (p.625).

**Courts will use a balancing test to determine whether the adequacy of existing warnings outweigh the burden of providing a more specific warning.**

* In *Hood v. Ryobi America Corp.*, court found that MD does not require an encyclopedic warning, instead, a warning need only be one that is reasonable under the circumstances. A clear and specific warning will normally be sufficient – the manufacturer need not warn of every mishap or source of injury that the mind can imagine flowing from the product. The saw company who put 9 different variations of the warning “DO NOT OPERATE WITHOUT GUARD” was found to warn adequately as a matter of law.
  + “Price of detailed warning label is greater than their additional printing costs alone. Proliferation of detail undermines the effectiveness of the label altogether”

**[BREACH]**

***The Reasonable Person Standard***

Most states have departed from the hindsight approach, where manufacturers are strictly liable for defects discovered after the product is sold. Defendants are only liable for dangers that could have reasonably been known at the time the product was distributed. In *Vassallo v. Baxter Healthcare* (p.620), the court puts an emphasis on the reasonable person standard in warning about a product’s dangers. D is not liable for failure to warn against risks not reasonably foreseeable at the time of sale or risks that could not have been discovered by way of reasonable testing prior to marketing the product. The court notes that the goal of the law is to induce conduct that is capable of being performed.

R.2d §402A comment j: “The seller is required to give warning against a danger, if he has knowledge, or should have knowledge of the danger.”

**[CAUSATION]**

***The Heeding Presumption* (p.605):** This is a presumption in favor of the P that had the warning been adequate, P would have heeded the warning and not be injured. The burden is on the D to show that the user would not have heeded the adequate warning even if the warning was adequate.

***Learned Intermediary Doctrine***

Manufacturer or drug excused from warning each patient who receives product when manufacturer properly warns prescribing physician or pharmacist of the product’s dangers. This doctrine is overturned in *State v. Carl* 2007 (p.611) and manufacturers of drugs are now subject to the same duty to warn consumers about the risks of their products as other manufacturers. Rationale includes the increase in direct-to-consumer marketing (which provides a ready-made forum for defendants to warn) as well as the decreased relationship between doctors and patients.

**[DEFENSES TO STRICT LIABILITY]**

**[Third Party Modifications to Product]**

Machine needs to have the defect at the time of sale. Court looks at whether the machine is adequate for intended use; if it is inadequate, it is reasonably foreseeable that user may modify the product. The Majority view is that P needs to argue that it was reasonably foreseeable that the modification occurs; if the modification is foreseeable, manufacturer is liable. Conversely, *Jones v. Ryobi* (p.637) finds that when a third party’s modification makes a safe product unsafe, the seller is relieved of liability from the failure to warn and from design defect even if the modification is foreseeable (this is the minority view). SL for defective design claim due to 3rd party modification fails as a matter of law. Not every state agrees with this rule.

A manufacturer is not liable for injuries caused by substantial alterations to the product by a third party that render the product defective or unsafe. (*Liriano v. Hobart* citing Robinson p.642) However, where a product is purposefully manufactured to permit its use without a safety picture, P may recover for injuries suffered as a result of moving safety feature (*Liriano v. Hobart* citing Lopez p.642)

**[Assumption of Risk/Comparative Responsibility]**

P has no duty to take steps to discover and guard against product defects (R.2d). However, assumption of risk after knowing about the risk is negligence; Conduct other than mere failure to discover is subject to comparative responsibility. (GM v. Sanchez p.628) Dissent argues that comparing product liability with negligence is impossible. Prof: However SL cases do have a component of negligence.

R.2d §523: Plaintiff’s assumption of the risk of harm from the activity “bars his recovery for the harm.” Plaintiff’s contributory negligence is not a defense to SL except when the plaintiff’s conduct involves “knowingly and unreasonably subjecting himself to the risk of harm from the activity.” (p.530)

R.3d §7: Plaintiff’s negligence that is a legal cause of an indivisible injury to the plaintiff reduces the plaintiff’s recovery in proportion to the share of responsibility the fact finder assigns to the plaintiff (or other person for whose negligence the plaintiff is responsible. (p.530)

**[Product Misuse**]

If the product was used in an unforeseeable manner, the manufacturer may have a defense to recovery. Misuse is not a bar to recovery unless it was an unintended and unforeseeable misuse.

**[Crashworthiness Doctrine]**

A motor vehicle is expected to be reasonably safe in a collision, even by negligent driving. Liability may be imposed on the manufacturer for design defect; however, they will not be responsible for the cause of the accident, only the cause of enhanced injuries.

**[SOL/SOR]**

Unlike Statute of Limitations, where time begins to run when the claim accrues, Statutes of Repose runs when the specific event takes place, regardless of whether a potential claim has accrued or whether any injury has occurred, i.e. 10 years from day product was sold; where there is an absolute barrier on SL suits after the time limitation passes (p.636). The SOR limits liability for D.

**[Disclaimers and Waivers]**

Disclaimers or contractual waivers do not bar otherwise valid product liability claims against sellers or distributors. (R.3d§18 p.635)

**[Preemption]** Federal statutes may reduce the scope of state tort liability. (p.637)

**[INTENTIONAL HARM]**

**[Proving Intent]**

In defining intent we no longer speak of risk but rather of “purpose” to bring about consequences, or knowledge that such consequences are “substantially certain” to occur.

The R.3d Torts: Liability for Physical and Emotional harm §1 requires that (a) the person acts with the purpose of producing the consequence or (b) the person acts knowing that the consequence is substantially certain to occur.

**[Transferred Intent]**

A intends to commit tort on B, but commits different tort

A intends to commit tort on B but commits same tort on C

A intends to commit tort on B but commits a different tort on C

**[Damages in Intentional Torts]**

Contributory negligence and even contributory recklessness are not defenses to intentional misconduct, and punitive damages may be available.

“Willful and malicious injury,” as opposed to negligently inflicted harm, may not be discharged in bankruptcy [11 U.S.C. §523(6)].

**[ASSAULT]**

Assault is purely a fear-based claim that has been recognized in common law for centuries. No other ways to recover for purely emotional distress appears until very recently. Today, negligent as well as intentional infliction of emotional distress is actionable.

Assault is a physical act of a threatening nature of corporal injury which puts a reasonable person in reasonable fear of imminent bodily harm. It is the plaintiff’s apprehension of injury which renders the act compensable. These include mental disturbance, including fright, humiliation and the like, as well as any physical illness which may result from them.

Defense: Threats for the future are insufficient.

**[BATTERY]**

Battery is the intentional infliction of unconsented touching or harmful bodily contact upon another. The contact does not have to actually inflict injury; it could be any offensive or unpermitted contact with anything connected to the body such as clothing, cane or something grasped in the hand that is “universally regarded as part of the person.” R.2d §18 comment C at 31, (*Picard v. Barry Pontiac-Buick* p.904). However, defendant need not himself actually contact the victim; he could set in motion something that does contact the victim.

For comprehensive definition 🡪 [R.2d §18-19 definition of “Offensive Contact” p.908-909]

Sufficient intent for battery:

* Intent to cause the harmful or offensive contact
* Intent to injure plaintiff
  + This intent unnecessary in a situation in which defendant willfully sets in motion a force that in its ordinary course causes the injury (*Picard v. Barry Pontiac-Buick Inc.* p.904)
* Intent to cause a consequence of the offensive contact (embarrass plaintiff; play prank on plaintiff)
* Intent to cause assault or frighten, and contact ensues, this is sufficient intent for battery even when the contact is with an unintended victim
* Knowledge that the unwanted contact is substantially certain to occur
  + The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or commit an assault and battery on her would not absolve the defendant from liability if in fact he had knowledge that the unwanted contact is substantially certain to occur (*Garrat v. Dailey* 1955 p.898).

Causation: The defendant’s voluntary action must be the direct or legal cause of the harmful or offensive contact.

Defense**:** If the complainant is “unduly sensitive as to his personal dignity” so that an ordinary person would not have been offended, the contact will not count as battery. (*Wishnatsky v. Huey* p.907)

**[FALSE IMPRISONMENT]**

The common law tort of false imprisonment is the unlawful restraint of an individual’s personal liberty or freedom of locomotion. This conduct encompasses any unlawful exercise or show of force by which a person is compelled to remain where he does not wish to remain or to go where he does not wish to go. It is essential that the confinement is against plaintiff’s will; moral pressure, as where plaintiff remains to clear her reputation, is not sufficient (*Lopez v. Winchell’s Donut House* p.911).

Intent: Actual or legal intent to restrain

Act: May be words alone, acts alone, or both; actual force is unnecessary

R.2d §38-41 Ways in which actions may bring about the confinement required as an element of false imprisonment:

* Actual or apparent physical barriers;
* Overpowering physical force or by submission to physical force;
* Threats of physical force;
* Other duress;
* Asserted Legal Authority

Defenses: If a person voluntarily consents to the confinement there can be no false imprisonment.

**[INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS]**

Most courts today allow recovery against one who by his “extreme and outrageous” conduct intentionally or recklessly causes another severe emotional distress. Plaintiff can recover for the emotional distress as well as any physical harm that results from the emotional distress.

The actor must have one of these intents:

* Specific purpose to bring about the emotional distress
* Desire the result of emotional distress
* Knew that distress is certain, or substantially certain to result from his conduct
* Consciously disregarded that emotional distress would occur
* Knew or should have known that emotional distress would likely result

**[Proving I.I.E.D. R.2d §46 at 71]**

Plaintiff needs to show through a preponderance of the evidence (1) requisite intent; (2) conduct was “outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; (3) causal connection between actor’s conduct and emotional distress; AND (4) emotional distress was severe.

The standard is “extreme and outrageous,” and when you have this, you have causation.

Where reasonable men may differ on the outcome, the question is for the jury. Jury has a lot of discretion in these cases.

There is no Eggshell Plaintiff Rule for emotional distress.

**[Racial Harassment]**

Statutory cause of action used since it is broader and easier to meet: USC §1981 originally for racial discrimination in making contracts. However, as of 1991 you can use this for racial harassment that occurs in the scope of employment. (p.924)

**[Sexual Harassment]**

Factors to consider in determining workplace claim of “outrageous conduct”

* Abuse of power
* Repeated incidents/pattern of harassment
* Unwelcome touching/offensive non-negligible physical contact; and
* Retaliation for refusing or reporting sexually-motivated advances

Three causes of action (P must prove one):

1. Quid Pro Quo: get employment benefits only in return of sexual performance (sleep with boss for promotion)
2. Hostile/Abusive work environment (objective standard): take into consideration the frequency and severity of the alleged discrimination, humiliation and intimidation that is going on
3. Retaliation: Adverse employment action as a result of plaintiff’s complaint of discrimination

Vicarious Liability: The Employer is liable if a supervisor commits the sexual harassment. However, if there are no tangible consequences to D, employer needs to show that it took reasonable steps to prevent and correct such harm.

**[Intentional Interference with Family Relationships]**

This cause of action is abolished in most states. There were historically two causes:

1. Criminal Conversation: adultery
2. Alienation of Affection: spouse suing the other man/woman under this cause (not abolished in all states)

**[Libel & Slander]**

There is a Constitutional limitation (First Amendment) on libel and slander; plaintiff cannot use negligence standard for public figures. A higher state of mind is needed – either that the defendant made the statement knowing it was false or recklessly uttered it without caring whether it was true or false. Proof of either prong constitutes “actual malice.” (*New York Times v. Sullivan*; SCOTUS; 1964; p.932)

A state could lawfully punish a defendant for “fighting words” – those which by their very utterance inflict injury or incite an immediate breach of the peace (*Hustler Magazine v. Falwell*; SCOTUS; 1988; p.932).

**[Proving Libel]**

The plaintiff needs to show:

* False statement of fact
  + **Truth is an absolute defense to libel**
  + States that are untrue are still covered under the First Amendment since the law accepts “mistakes” in journalism;
* Defamation – some injury to reputation
  + People less likely to like you/do business with you
* The harm that results is emotional distress

**[DEFENSES TO INTENTIONAL TORTS]**

**[Consent]**

There is an assumption of risk defense to claims of intentional torts. Where plaintiff consents to the defendant’s invasive or offensive contact, a claim for intentional torts is barred.

Common Law Rules in Consensual Fighting (*Hart v. Geysel* p.946):

* Majority Rule: Where the parties engage in mutual combat in anger, each is civilly liable to the other for any physical injury inflicted by him during the fight. The fact that the parties voluntarily engaged in the combat is no defense to an action by either of them to recover damages for personal injuries inflicted upon him by the other.
  + Exception to two general principles: (1) one who has expressed his willingness to suffer has no right to complaint; (2) no man shall profit by his own wrongdoing (the person who is injured in a more severe manner should not be awarded damages).
* Minority Rule: Where parties engage in mutual combat in anger, the act of each is unlawful and relief will be denied them in a civil action; at least, in the absence of a showing of excessive force or malicious intent to do serious injury upon the part of the defendant.

**[Defense of Property]**

The protection of property is not a defense to intentional torts. The law has always played a higher value upon human safety than upon property rights. Unless there is also such a threat to the defendant’s personal safety, spring guns and other man-killing devices are not justifiable against a mere trespasser or petty thief. (*Katko v. Briney* p.952)

**[Self-Defense/Defense of Others]**

Intentional torts committed to defend oneself or others are justified. In *Courvoisier v. Raymond* (p.949), the evidence for the defendant showed that the circumstances surrounding D at the time of shooting a police officer were such that a reasonable man would believe that his life was in danger, or that he was in danger of receiving great bodily harm at the hands of plaintiff.

**[Defense of Necessity]**

Private Necessity: One may destroy the property of another in order to preserve his or her person or property of greater value. Assuming such a privilege exists, however, the party exercising the privilege should nonetheless be liable for damages.

In *Vincent v. Lake Erie Transportation Co.* (p.958), court states, “public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.”

Public Necessity: In cases where private property is destroyed for the protection of the general public, courts may deny recovery; “individual rights of property give way to the higher laws of impending necessity.” In *United States v. Caltex*, SCOTUS found that “in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign” and that there was “no compensable taking.”