**TORTS!**

1. **INTENTIONAL TORTS**
   1. **Battery**
      1. Intentional infliction of harmful bodily contact upon another. *Garratt v. Dailey*
      2. Act 🡪 R1 (contact) 🡪 R2 (harmful or offensive quality) 🡪 R3 (specific injury)
      3. **Intent**: Purpose or knowledge (P or K) with substantial certainty.
         1. Intent need only extent to contact (R1), and certainly does not need to extend to specific injury (R3 – however, R3 has to exist for compensation, just doesn’t require intent). But what about R2??
            1. If intent isn’t needed at R2, then battery becomes a form of strict liability.

*White v. U. of Idaho* – Piano Keys on homegirl’s back; he intended to touch but not to offend. Intent element does not require a desire or purpose to bring about a specific injury; it is satisfied if the actor’s affirmative act causes an intended contact which is UNPERMITTED and which is HARMFUL OR OFFENSIVE.

*Polmatier v. Russ* – Strict Liability maxim: where one of two innocent persons must suffer loss from an act done, it is just that it should fall on e the one who caused the loss. This was an insane person who shot somebody (so clearly R3). Didn’t have rational intent, but had crazy intent, and that’s enough.

* + - 1. Unlike negligence, children can have intent – all that’s required is the “state of mind” necessary to commit a particular tort.
         1. However, since they can’t foresee damage/injury, they could not have the capacity of mind for negligence. (*Garratt; Ellis v. D’Angelo*). Also can’t be liable for punitive damages unless they were capable of knowing of wrongness of act (same with insane). Usually cutoff is age 4.
      2. Intent is NOT the same as motive. Debate still exists on fault-based liability vs. form of strict-based liability, and different jurisdictions interpret differently.
    1. **Punitive Damages**
       1. Regular compensation is for an individual’s loss of well-being that he has suffered b/c of injury.
       2. Punitive damages arise not based on Plaintiff’s injuries (that’s covered by compensatory), but by the *defendant’s culpability*. (*Jones v. Fisher, aka PICK YO TEETH UP)*
          1. MALICIOUS MOTIVE or
          2. OUTRAGEOUS (reprehensible) CONDUCT
       3. Not enough to show fully intentional battery, or negligence. *Can* pay attention to net worth.
       4. But are punitive damages necessary when there exists the institution of criminal law? Don’t compensatory damages have enough of a deterrent effect in civil law?
          1. But there’s a private rationale. Add pressure in society that you *won’t* get from the public AG in criminal matters on this level.
    2. **Consent –** an affirmative defense to battery
       1. *Volenti non fit injuria*: to one who chooses, no harm is done.
          1. True to a POINT. Consent certainly trumps normative categories significantly (when there is consent, don’t have R2 harm or offense), but not 100%.
       2. Lack of Consent as offensive contact in itself
          1. Infringes on individual’s dignity and self-determination
          2. *Mink v. U. of Chicago* (a DES case), although they consented to medical treatment, patients did not consent to be tested on DES, which essentially turned them into guinea pigs. So, battery claim was upheld.
          3. *Clayton v. New Dreamland Roller Skating Rink*: Skating rink officer (over protests of P and husband) attempted to reset P’s broken arm. Constituted battery, even though performed with good intentions.
       3. Manifested Consent
          1. *O’Brien v. Cunard Steamship*: Conduct (even silence) can be consent. Plaintiff lined up with passengers on boat to get a vaccine, raised arm, didn’t say she didn’t want it. Since a reasonable person in D’s position would have inferred consent, there is implied consent. Consent is not just a state of mind, it’s *communicative.*
          2. Consent can be: explicit, tacit, “implied”
       4. Medical Consent
          1. Old Rule: It’s a battery if didn’t consent, unless it’s an *emergency* (*Rogers v. Lumbermens Mutual Casualty Co.*, where doctor removed patient’s reproductive organs in appendectomy surgery, but turned out not to be emergency, didn’t get anyone’s consent.)
          2. New Rule: Govern by idea of *medical malpractice*. *Kennedy v. Parrot –* doctor punctured cyst during operation in good faith; P was under the knife so couldn’t consent. Negligence, not battery (too rigid), should rule. Patients might want something removed rather than have another surgery, although patients might not have had chance to tell about other conditions.
          3. Why consent?

Non-utilitarian respect of personal autonomy

Not BPL alone, as need to take particular personal judgments into account – a doctor’s objective professional expertise won’t always be enough.

* + - 1. Continuum of consent
         1. Express (I hereby consent)
         2. Tacit (play ball – but only consent to regular conduct, not “cheap shots”)
         3. Implied (assume someone consents if you rescue them as they’re about to fall off a cliff).
    1. Other affirmative defenses to core battery (R2 intent)
       1. Self-Defense
       2. Defending others against attack
       3. Protection of property (limited)
       4. Performing arrest
       5. Disciplining bad ass kids

1. TORTS AGAINST PROPERTY
   1. **Trespass to Land –** Intentional Interference to Property
      1. Trespass: intentional interference in someone’s interest in *exclusive possession* of land
         1. Act 🡪 R1 (entry) 🡪 R2 (wrongful nature of entry) 🡪 R3 (specific injury)
         2. Intent
            1. Knowledge with substantial certainty
            2. *Cleveland Park Club v. Perry*: kid put tennis ball in pool drain – this was seen as ENTRY.

*Randall v*. Shelton – unintentional, non-negligent entry imposes no liability: gotta have intent in the entry (but see below about what could constitute intent: P or K)

*Longenecker v. Zimmerman* – D need not intend the wrongfulness (would make trespass strict liability)

* + - * 1. Don’t need R3 to make trespass to land claim, but DO need R1 and R2. Need R2 as a matter of *fact*, not in terms of actor’s state of mind. Entry is purely physical.
        2. Intent is more an index of who committed act than an index of fault – entry doesn’t have to be deliberate (Purpose), could just be *known* (knowledge). So, an innocent trespassing mistake could get damages.
      1. Intrusion
         1. Need not be a personal, bodily entry by defendant
         2. Need not cause an actual damage; the intrusion on exclusive possession is itself a damage. D liable for nominal damages if no harm done, and liable for all consequences.
      2. Privileged Trespass
         1. Public Takings – *Monongahela Nv. Co. v. U.S.:* Gov must compensate individuals for public takings

Prevents public from burdening one individual with more than his share

If the benefit is spread to an entire group, so should the burden

* + - * 1. Public Necessity

Destruction of property to safeguard a public a good, for which one person shouldn’t have to bear whole cost (e.g., police destroying house while chasing suspect, *Wegner v. Milwaukee Mutual Insurance Co.*)

* + - * 1. Private Necessity

When private actor’s B>L

*Ploof v. Putnam* – plaintiff had right to trespass and moor his ship to D’s dock during a storm. The D’s expulsion of plaintiff was deemed itself to be a trespass. (Dissent: liability shouldn’t be imposed without fault).

*Vincent v*. *Lake Erie* – here, D was liable to plaintiff for docking ship during a storm, even though B>L. He benefitted from his action, so should bear the externalities he inflicted. Beneficiaries of harmful conduct should share burden. Private actor effectively took property – on balance for the greater good – but still has to pay for “availing itself of P’s property” (i.e. taking it).

This was a knowledge-based intent, not purposeful. Still, it was intentional.

Not a PRIMARY CRITICISM (ought to conduct), but a strict liability SECONDARY CRITICISM (pay for harm done!)

* + - 1. Injunctive Relief
         1. *Crescent Mining Co. v. Silver King Mining Co.*: Df needed water, built pipeline across plaintiff’s land and was sued for trespass, with P seeking equitable injunction. Court found no compensable damages, only granted nominal damages. Refused to grant injunction because the burden of injunction (B) would be greater than the benefit of injunction (L).

Utilitarian argument: tort permits conduct which serves the *greater good*. No primary criticism of utility maximizing conduct done by a reasonable actor. Sometimes, tort law makes that actor still pay for harm that’s done (secondary criticism, *Vincent v. Lake Erie*). Here, there was no such comp.

Today, Crescent Mining would NOT come out this way – issue injunction for purposeful, intentional trespass. Rights trump utility, and property rights are basis of markets.

* + - * 1. Injunctive relief prevents multiple lawsuits arising from same trespass, by creating criminal contempt.

Punitive damages could have similar effect, but need *primary criticism* for these. *Jacque v. Sternberg Homes*.

Injunction test shows difference btw. Neg & SL. In neg, activity should be enjoined because creates unreasonable risk (primary criticism); in SL, don’t enjoin, allow the activity to continue as long as it’s reasonable, pay for “secondary criticism” harms.

* 1. NUISANCE: Intentional and unreasonable invasion of the use and enjoyment of another’s property, creating substantial injury
     1. Core Case: Fallout
     2. Private Nuisance affecting a few plaintiffs is distinguished from public nuisance, which affects a lot of people and gives AG right to sue for abatement. However, a private party can sue too, providing that party is injured in a special way.
     3. Intent
        1. When B<L (don’t need the P here), it’s unreasonable, so mere foreseeability of invasion may be enough.
        2. Intent is built into continuous conduct.
        3. In strict nuisance cases, the invasion is usually not purposeful, but known with substantial certainty (fallout such as dust, smoke from mining – *Wheat v. Freeman Coal Mining Corp.*). So, usually more “soft K” than “hard P” in nuisance intent.
     4. Substantiality – based on what reasonable person would recognize to be substantial harm
        1. Not a hypersensitive person (*See Jenkins v. CSX Transportation,* Plaintiff’s unusual allergy doesn’t make the interference unreasonable.)
        2. Physical interferences are almost always considered substantial
        3. Continuous interference over years, above certain threshold (injunction logically works in situation where D is doing something continuous).
     5. Negligent Nuisance: Primary criticism (unreasonable conduct)
        1. Either conduct OR injury can be deemed unreasonable
        2. Unreasonable conduct leading up to injury (fault based/primary criticism)
           1. B balanced against L. Does harm of conduct outweigh utility? But takes into account damages such as noise and odor, not just physical.
        3. *Boomer v. Atlantic Cement*: Cement plant had fallout damaging neighboring landowners. Cement company used every available precaution to control pollution.
           1. Alternative 1: Who gives a shit. They are still causing substantial harm, enjoin them (a secondary criticism) – entitlement approach, trespass-like
           2. Alternative 2: Don’t enjoin them (don’t make them stop conduct), but do make D pay for the harm already done, and for future harm.

Court chose second alternative, since societal value of plant outweighs harm that would be enjoined.

In doing this, they did a B/L balance

B = cost of injunction. Shutting down a $45 million capital investment.

L = harm to plaintiffs that would be avoided by providing injunction.

* + - * 1. Dissent

This, in effect, puts cement company in a government-like position of eminent domain. They can impose easement, as long as they pay. Substitutes a “judicial market,” with the court setting the value, instead of a real market.

Moreover, the balancing approach is NOT good from a utilitarian perspective, since it doesn’t take all possible ramifications that could be avoided (local & global) by stopping pollution into account.

* + 1. Strict Nuisance Liability: Secondary Criticism
       1. Conduct may be acceptable under primary criticism (so don’t enjoin), but it harms neighbor so should pay for damage
       2. Considerations for liability: character of harm, character of locality, difficulty of avoiding harm (can P just shut the window?)
       3. Unreasonable injury
          1. Restatement §826: When (a) gravity of harm (L) outweighs utility of conduct (B), or (b) when harm caused by conduct is serious and financial burden of compensating for this and similar harm to others would not make continuing conduct infeasible
          2. Fairness rationale (*Bamford v. Turnley*): Gainers should compensate losers, unless recovery would totally enjoin the activity.

Public benefit for trains to run, but not unless they pay expenses/externalities.

* + - * 1. Restatement §829: unreasonable if harm resulting from invasion is severe, and greater than one should be required to bear without compensation.
        2. Spreading Rationale: Even if there is a tie between P&D, spread in such a way that you’ll get “primary pressure” (not primary criticism).
        3. *Copart Industries v. Consolidated Edison Co. of New York*: D steam plant switched to oil from coal, and deactivated precipitator, resulting in damages to P’s car business, which put P out of business. D knew what it was doing, and knew harms were substantial.

Claim 1?: Not here. Not negligent, because gravity of harm didn’t outweigh utility. No injunction.

Claim 2: Need to show intentional, substantial, and caused unreasonable harm (NOT unreasonable conduct – that would be in claim 1)

Criticisms of P’s primary conduct as defense

P “came to the nuisance,” since moved business there after the fact. **“Come to the nuisance” is a factor, though, not a trump (Restatement §840)**. Need to take into account character of the locality – history can’t be the only factor, because if enough people “come to the nuisance,” the nuisance-maker might become the odd man out

P could have mitigated and covered cars.

Deeper: Harm should be *attributed*  to plaintiff. The activity of the plaintiff in moving there is actually what is causing the harm. Wouldn’t exist if he wasn’t there.

Moreover, very peculiar harm. Car business extraordinarily vulnerable. Location was probably why they got a good lease.

#1 is more of a history-based argument; #2-4 are more activity-based.

Dissent: refers to *Boomer*, which still compensated for harm even though there was no primary criticism.

What was really in dispute was intentionality – majority said not intentional because didn’t know P’s harm was substantially certain to result.

* + - * 1. *Alevizos* *v. Metropolitan Airports Commission*: No recovery for relatively low-level nuisance (reciprocal, trifling, sensibility harms, not physical harms). Here was airport noise case. Fairness required that those close be compensated, but those far not be. “Live & let live” if you benefit from the nuisance.
        2. *In analyzing SL nuisance, do both Calabresi (utilitarian) and fairness*-based rationales.
  1. Trespass vs. Nuisance
     1. Trespass (Interference in exclusive Possession to Land) vs. Nuisance (Interference in interest in use and enjoyment of land)
     2. *Atkinson v. Bernard, Inc.*: Plaintiff homeowners complain about airport noise. Held to be nuisance, not trespass. (But low flyovers could constitute trespass)
     3. *Martin v. Reynolds Metals*: particulates and gases from D’s plant settle on P’s land, rendering it UNFIT for farming (this interferes with protective interest in exclusive possession). Court holds that the particles are BOTH nuisance and trespass.
        1. Trespass can be invisible here.
        2. But see *SDG&E v. Superior Court*: needs to be something *tangible* to constitute a trespass. In this case, the P’s were worried about getting cancer from electromagnetic field, but didn’t have any symptoms yet. So the real difference btw this & *Martin* is whether the harm caused had interfered with exclusive possession in land.

1. **NEGLIGENCE**
   1. Rationale
      1. Premised on FAULT. “As between a faulty actor and an innocent victim, let the faulty actor pay up. Negligence a primary criticism of conduct.
      2. History
         1. Back in the day, original writs were “writs of trespass,” and covered all direct-harm situations, as well as strict liability. Expanded to “trespass on the case,” to issue writs more based on circumstances of the case, and include indirect harm, including neglect.
            1. Distinction

Trespass: Df driving cart with logs. Logs fall off cart. If log hits plaintiff, it’s trespass.

Case: If log obstructs the highway and trips the plaintiff, it’s case. Indirect.

* + - * 1. Trespass liability was strict, “act at your peril.”

*Case of the Thorns*: “he that is damaged ought to be recompensed”

Trespass: Allegation of misfeasance

Case: Defendant was in neglect of duty (duty not to hinder someone else)

*Weaver v. Ward* : “No man excused by trespass” unless there isn’t an act at all.

* + - 1. 19th Century Rise in Fault
         1. Collission Cases led to problem when have TWO actors

Idea of fault: Can attribute harm to one actor, and let the faulty actor pay.

* + - * 1. Policy: Negligence liability would better facilitate economic development/industrialization
        2. *Brown v. Kendall*

Established fault as central idea of tort law

Df lifts staff to separate fighting dogs and hit P in eye.

SL not applicable

Shaw reads “case” to hold that negligence is required

Fault organizes tort – see it in neglect, as well as in “excuses” for trespass.

* + - * 1. *Blyth v. Birmingham Water Works*

Negligence as omission to do something which “Reasonable man” would do

* + - * 1. *Rylands v. Fletcher*

Strict liability was imposed in this 1866 case, in which Rylands reservoir water flooded Fletcher’s coal mine.

A counterpoint in the 19th century rise of fault

Person who brings something on land that is likely to do mischief if it escapes must “keep it in at his mischief.”

But for his act, no mischief would have occurred.

Distinguish from collision cases – no assumption of risk by victim here.

So, there is a restricted realm for negligence liability (in highway-like circumstances). In the resto fhte world, have a right of quiet enjoyment of what’s yours, and anyone who f\*\*\*\* with that should be held liable

Rejected soon after in classical period; then resurges in modern period (*Exner v. Sherman Power)*

* + - * 1. *Nitroglycerine Case*

Tort liability is fault-based and fault-limited. Rejects act-based liability for a nitro explosion in favor of negligence. No case can subject individual to liability without fault.

* + - * 1. *Losee v. Buchanan*

Direct trespass case – boiler explodes and lands on Losee’s land

Another strong reaction against *Rylands* – rule of liability = rule of fault.

* + 1. Theories of Negligence: Right & Utility
       1. Holmes
          1. Life of law has not been logic, but experience (purposes, goals, policy objectives)
          2. Law is rules, but legal argument is also policy
          3. Loss from accident must lie where it falls. Liability is fault-based and fault-limited.
       2. *Losee v. Buchanan* – Classical
          1. Utilitarian: Fault-based will maximize welfare, good consequences by promoting general welfare and supporting economic development. In order to accommodate industry, certain rights have to be modified.
          2. Fairness: It is fair & just to have fault-based liability. Leave fault on victim if no fault. Everybody benefits from improvement of shared public good. Take risk when going on highway of being accidentally harmed by others. Society is like the highway.
       3. Kant – *The Doctrine of Virtue*
          1. 2 great forces in moral universe

Love/Beneficence: Requires us to take happiness of others as important, make others ends our own.

Respect: Respect integrity & autonomy of others. Not using others as means to an end, regard as independent people, not objects.

* + - 1. Fried, *Anatomy of Values* – fairness-based, builds on moral obligations discussed by Kant
         1. Negligence a failure to have due regard for autonomy of others. Exploitative to impose a risk on neighbor. BPL helps us balance respectful conduct, that which person would use if *own* interests were at stake.
         2. Risk Pool

All persons, by virtue of interactions, have common pool of risks. Negligence norm gives us a way of finding the appropriate level of reciprocal risk. Negligent behavior is inherently unfair because it creates an undue risk that’s not reciprocated.

Throw out some non-negligent harming, because that risk is reciprocated, mutual. Reciprocity = fairness.

If hit BPL, the risk is fair.

Risk pool standard is not one of efficiency, but of justice/fairness.

Equality of risk is assessed over time. Unreasonable conduct draws too much from risk pool.

* + - * 1. Posner – “A Theory of Negligence”: Utility maximization, getting good consequences

Negligent behavior sucks because it’s inefficient, leads to bad consequences, and defeats the public good.

Values:

Optimal (but not too much) investment in accident prevention

Regulation of safety

Overall economic value/welfare

Efficency: reaching B=PL

If cost of safety > benefit of accident avoidance, society is better off *foregoing* accident prevention

Regulatory result: pressure on risky actors to induce them to bear a B greater than their PL.

Induces social actors to take cost-justified precautions

Fault system isn’t one of morality – can find someone negligent even if exercised utmost care.

Emphasis on cost-benefit analysis of individual actor, not compensation of victim.

* 1. Step One: Cut a Hole in the Box (or…**look to the defendant**)
     1. **BPL Hand Formula**
        1. Negligence if burden of prevention is less that probability of damage times extent of damage
           1. B = social value of interests
           2. P = extent of chance that actor’s conduct will invade interests of another class; number of persons whose interests are likely to be invaded
           3. L = extent of harm likely to be caused to the interests imperiled
        2. In determining B:
           1. What is the precaution at issue? (verbal description)
           2. What is the cost of precaution? (could be numbers, but doesn’t have to be)

Verbally stating B: *Van Skike v. Zussman*

Sold boy toy with lighter fluid in it

Precautions: don’t have toy in store; don’t have toy in machine; move the machine.

From stating precautions, see that B is low. P is probably low too, but danger is high.

But could increase P if consider many results

* + - 1. P should include *all* accidents that a particular precaution would avoid, not just the one that actually happened (Posner)
         1. *Davis v. Consolidated Rail Corp.* – Blowing a horn wouldn’t just have prevented P’s accident, but many accidents.
      2. Burden can incorporate interests of Plaintiff
         1. *Kimbar v. Estis*, P sued b/c boy fell off of camp path, and asserted should have been better lit. Precaution of floodlighting in woods would preclude seeing enjoyable things in nature.
      3. Must find that stated precaution might have prevented P’s injury
         1. *Snyder v. AABB* : Instituting surrogate tests might have prevented plaintiff from receiving AIDS-contaminated transfusion. What they subjectively thought at time isn’t enough – issue is what reasonable person would have done at the time, *with* that knowledge.
      4. If business can’t internalize these costs, it shouldn’t be in business b/c it is externalizing its costs on others.
    1. Reasonable Care & Objective vs. Subjective Standards
       1. Degrees of Culpability
          1. Error: Trying one’s best but making cognitive or physical mistake. Shades off into no negligence.
          2. Inadvertence: Ordinary Negligence. Awareness of risk, but failing to pay attention to it at the time of action.
          3. Disregard: High Culpability. Knowing about a risk, paying attention to it, and acting anyway. Realm of punitive damages.

*LaMarra v. Adam* – recklessness for driving police car through red light, even though late at night and rushing to hospital.

* + - 1. Legal standard for risk is an objective notion of *reasonability*/*reasonable person*
         1. What would reasonable person have known? And what would a reasonable person have done?

(Cf battery: What was defendant’s state of mind at time of the act? Negligence further back in the wedge)

Hold those with higher knowledge (professional) to higher standard, but not those with lower knowledge, in general.

* + - * 1. Mental Disabilities

Not considered, in general. Creates a form of strict liability – morally innocent (couldn’t do better in light of insanity). Courts hesitate to go that far though.

Idea that a subjective standard would cause too much uncertainty, too various to decide by individual judgment

*Vaughan v. Menlove*: Defendant is mentally challenged, argues that standard of reasonable prudence should be subjective (based on each individual’s own judgment), but Court says would cause too much uncertainty, even if Df is morally blameless.

Mental deficiency which falls short of insanity also does not excuse conduct which is otherwise contributory negligence

*Wright v. Tate*: P’s MC decedent is killed in car accident when the driver is DWI, and found CNeg

*However*, mental capacity CAN be taken into account in CNeg

Desire to support principle that faulty actor should pay between 2 innocents, even if one is insane use reasonable care standard (*Jolley v. Powell)*

BUT minority approach in *Berberian v. Lynn*: should have a capacity approach (in this case was for Alzheimers patient). Already have this approach for Plaintiff’s because of comparative fault. This approach becoming more common.

* + - * 1. Kids – can take mental capacity into account usually

*Mastland, Inc. v Evans Furniture*: Kid starts fire that destroy’s P’s premises. 2-part inquiry

Subjective: What is this child’s capacity (age, experience, intelligence) to perceive and avoid risk?

How would reasonable child of like capacity act?

*Dellwo v. Pearson* – child held to adult standard of reasonable care in operating car, plane, boat

Restatement §11(c) *:* Unless actor is a child, actor’s mental or emotional disability is not considered in determining negligence.

* + - * 1. Physical Disability – reasonable care standard for someone with that disability (Restatement)

*Smith v. Sneller*: Blind plaintiff found Cneg for falling into trench. Didn’t have cane (i.e. didn’t exercise reasonable care).

* + - * 1. Incapacitation/loss of consciousness

Restatement 11: If actor’s conduct occurs because of sudden incapacitiation there is only negligence if not reasonably foreseeable.

*Breunig v. American Family Ins. Co.*: Df’s sudden schizophrenic episode at wheel can be considered, since no forewarning

Sudden Emergency

Df can’t be negligent in creating the emergency, and Df must have had a short interval in which to respond

*Myhaver v. Knutson*: Df swerved to avoid head-on collision, collided with another car. Found not liable b/c didn’t have time to contemplate best action – diff. standard of care. But emergency is just one factor to consider, not determinative.

* + - 1. Customary Practice
         1. *Titus v. Bradford RR*: Classical doctrine – Custom OK. DF not negligent in putting a wide-gauge boxcar on narrow track, because customary in RR business. Customary care a defense, since no one should be held to a higher standard than the avg in his trade.
         2. *TJ Hooper*: Modern doctrine – reasonable care does not equal ordinary/customary care. Custom is a factor, but not sufficient to defend against negligence.

The Df’s were adhering to custom in not carrying radio receivers in their tugboats. But Hand said due care doesn’t equal customary care under BPL – if a trade doesn’t meet a reasonable standard, it f\*\*\*ing should. In this case, assuming this B would have benefitted *all* parties.

* + - * 1. Advantages of using custom standard?

Costly to do BPL analysis

Need a different measure of expertise – error savings

* + - * 1. Posner: Parties can bargain for what level of care they should have.

Market utility: Non-strangers, contract, subjective BPL

In some cases, customary care is bargained for, so the market bargain should stand. Especially in contractual relationship between non-strangers, repeat players.

Regulatory Utility: Strangers, Tort, Objective BPL

But need the regulatory of evidence liability (tort system, not K) for non-strangers. Adhering to custom alone wouldn’t produce utility-maximizing outcome, since industries might be slow to maximize utility, or seek to cut costs.

* + - 1. Professional Standards (considered more than customs)
         1. If custom is built out of profit motive, the emphasis is on minimizing/lowering cost of B. In case of medical profession, whole balance has to do with patient.
         2. Normally, expect P to show standard of professional care, and a deviation from that standard – so, there’s a presumption in favor of that standard exemplifying reasonable care. P *can* attack the standard itself, but more difficult, would need expert witness testimony.
         3. *Rossell v. Volkswagen*

Court refused to consider car design standards as prof. standard. Professionals aren’t influenced by time, effort, money considerations, have a fiduciary obligation that industry lacks.

* + - * 1. *Helling v. Carey*

Prof. standard should NOT determine reasonable care IF B<PL. Presumption that a professional standard represents due care can be rebutted. Defendants are found liable even though they adhered to professional standards.

* + - * 1. *Brown v. United Blood Services:* Here, AIDS contamination case allowed blood bank practices to be considered as prof. standard of care.
    1. Negligence Per Se
       1. Defendant’s conduct deemed negligent because it violates a statue. Not just a factor, but negligence in itself. Ironically, though, failing to meet professional standards are closer to “negligence in itself” in reality.
          1. Statutes themselves do not address compensation question, or how to compensate victims hurt by a statute violation.
       2. Statutory requirements
          1. Protects physical safety
          2. P is among class of people protected by statute
          3. Risk is of same type that statute considers
       3. *Martin v. Herzog* – P CNeg per se for traveling without lights on carriage. Statue requiring lights was specifically meant to protect people in P’s class.
       4. *Tedla v. Ellman* – Statute required that pedestrians walk on left side, but Ps walked on right b/c traffic was heavy and seemed safer on other side. No CNeg because observing law would actually have put Ps in greater danger, and the legislature/statute could not have intended a more dangerous result for people it intended to protect.
          1. So, can have an exception when B>PL. They were reasonable in violating the statute, and the PL was lowered by *not* obeying the statute. They weren’t just reasonable, but safer.
          2. Negligence per se a factor, but not determinative.
       5. *Bauman v. Crawford*: Neg per se by minors just counts as evidence. Main judgment is child’s standard of care.
       6. *Gore v. People’s Savings Bank*: Neg per se doesn’t produce strict liability when Df weren’t *aware* they were violating statute.
          1. Tort law doesn’t always take this position, though. In *Spalding v. Wexler*, D was found liable for violating a motor vehicle statute requiring brake maintenance, even though didn’t know brakes were in bad condition.
       7. Neg per se is a sword, but not always an adequate shield. Don’t always meet reasonable care standard just b/c in statute.
       8. Rationale
          1. Judicial Convenience (cheaper than BPL, easy to determine)
          2. Predictable Outcome
          3. Even if seems strict b/c wrongdoer didn’t know of stat violation, still less innocent than the victim.
       9. Counterarguments
          1. Courts infer legislative intent to create a standard of care, but legislature was silent on the matter of compensation. Statutes weren’t built for this shit.
          2. Liability may be imposed without fault if Df was unaware.
          3. Takes the fact-finding out of determining negligence.
    2. **Res Ipsa Loquitur**
       1. The thing speaks for itself: allows P to make a case of negligence based solely on circumstantial evidence.
          1. Prosser: Res ipsa loquitur, sed quid in infernos dicet? The thing speaks for itself, but what the hell did it say?
          2. Notion of proof by preponderance of the evidence

Would have to prove D negligent, and that neg caused injury, more probably than not. A lower standard than “Reasonable doubt.”

* + - 1. **3 Conditions**
         1. **Accident is a type that ordinarily doesn’t happen in absence of negligence**
         2. **Df was in exclusive control of instrumentality that caused accident (could be controlled by many in many modern instances)**
         3. **P was not responsible for causing accident**
      2. More modern statement of factors: “Accident is a type of accident that ordinarily happens because of the negligence of the class of actors of which the defendant is the relevant member.”
      3. *Thompson v. Frankus*
         1. P fell down D’s staircase, which was unlit and in poor condition, didn’t know exactly what she tripped over. Condition of the stairs was sufficient circumstantial evidence from which reasonable inference of neg could be made.

But seems like it doesn’t meet the 3rd standard – P could have been partially responsible for causing accident.

Direct evidence would be if she could testify to exact cause of her fall.

Just have circumstantial, so make inference.

* + - * 1. Here, res ipsa is basis for *inference*  of neg (majority approach, NY)
      1. *Newing v. Cheatham*
         1. P’s decedent was passenger in D’s plane. Circumstantial evidence suggested plane ran out of fuel. Directed verdict for plaintiff. Res ipsa as basis for *presumption* of negligence (minority approach, CA), so D now has burden of coming forward. Normally, P’s proof is just speculation, can lead to inference.

In both CA and NY, cases will come out same if D speaks adequately. But in Cali, if D doesn’t respond, Res Ipsa will presume burden of producing of evidence on D

* + - 1. *Ybarra v. Spangard*: group res ipsa. P goes for surgery, comes out injured. Liability imposed on group that operated on him, putting burden on them of coming forward (if conspiracy of silence holds, they all lose). Smoke those muthafuckas out.
      2. Rationale: Built into 3 conditions is balance of knowledge about the cause of accident. D has access in a way that P doesn’t. This doesn’t go away, even with modern discovery rules there is a fear of D presenting evidence in an imbalanced light. Res Ipsa restores the balance, authorizes jury to find a gross probability that applies to run of cases. An active defendant/passive plaintiff is built into these situations.
         1. However, res ipsa isn’t restricted to cases where Df has better access to evidence.
  1. Step 2: Put your junk in that box (or . . . **look to the Plaintiff’s conduct)**
     1. Contributory Negligence
        1. Assessed by same standard of reasonable care as negligence of defendant.
        2. Focus is on P’s conduct
        3. Classical tort law: Plaintiff is barred from recovery altogether if he was contributorily negligent
        4. Modern tort law replaces contributory negligence with comparative
        5. To be contributorily negligent, P’s negligence must have proximately caused the accident, not just have exacerbated injuries
           1. Spier v. Barker – plaintiff Cneg for not wearing seatbelt. “But for” cause in this case.
        6. Last Clear Chance: P’s contributory negligence doesn’t bear if D had “last clear chance” to avoid injuring the plaintiff
           1. *Washington Metro Transit Authority v. Johnson*: P’s decedent killed self by jumping in front of a train. Death could have been avoided if train conductor, who was hopped up on dro and blow, hadn’t delayed in braking. Held for P, b/c Df had “last clear chance” to save her. Suicides not exempted from LCC.
           2. Requirements for Last Clear Chance

Position of danger caused by own negligence

Oblivious or unable to extricate self from danger

D was, or should have been, aware of danger and P’s inability to extricate self

D, with means available to him, could have avoided injury but failed to do so.

* + - 1. Rationale
         1. Utilitarian (Posner): Cheaper burden for a faulty P to prevent accident, so P, as the cheapest cost avoider, should bear responsibility. “Author of own wrong.”
    1. Comparative Negligence
       1. Two systems
          1. Pure: D responsible for damages proportionate to their fault. Could be any percentage number.
          2. 50%: D is not responsible if P’s negligence is found to have contributed over 50%.
       2. *Li v. Yellow Cab Co*.: P makes left-hand turn in front of oncoming traffic. D is speeding through yellow light. Replaced Cali’s contributory negligence system with pure comparative fault system. Abolished last clear chance and assumption of risk doctrines in cases where P unreasonably assumes risk imposed by D’s negligence – just a variant of contributory negligence.
          1. Fairness rationale: extent of fault should govern extent of liability. Contributory negligence (barring) would fail to hold people liable for acts in a case like this.
       3. How is fault compared?
          1. Uniform Comparative Fault Act

Culpability: Was conduct mere inadvertence? Or engaged in with an awareness of danger involved? (i.e. recklessness)

Magnitude of risk created by conduct: # of persons endangered (P) and potential seriousness of injury (L)

Significance of what actor was seeking to attain (B)

Actor’s superior or inferior capacities (*subjective* fault, not just objective BPL or reasonable man)

Do pay attention to diminished mental capacity when determining comparative negligence, unlike negligence for D. In *Champagne v. U.S.*, most of fault should be on mentally ill person (P’s decedent) who committed intentional suicide. But negligence of hospital was also a cause, and the hospital had a greater capacity than the patient.

Other particular circumstances (i.e. emergency)

* + - * 1. *Blazovich v. Andrich*: D commits intentional tort (battery) against P, but P negligently contributed to injuries. Neg P’s fault can be compared to fault of intentionally wrongdoing D here. P’s comparative neg will reduce recovery for compensatory damages, not punitive.

*But most courts don’t let batterer D use comparison of negligence as a defense*.

* + 1. Assumption of Risk
       1. Focus on choice to expose oneself to a known risk.
          1. Must be voluntary, and is not voluntary if D’s tortious conduct has left no alternative.
          2. Intersection between tort & contract law.
          3. Classic: Barred from recovery. Modern: eroding, but idea still viable.
          4. An unreasonable AR overlaps with CNeg
       2. *Farwell v. Boston & Worcester R. Corp.* (Shaw): Fellow servant not in relation to stranger, but in a bargaining relationship with master (so not a tort, but an implied contract). Victim sued employer for injury arising from course of employment; court rules that employee should have known the risk, and that he was best able to protect himself by reporting fellow employees’ negligence to the employer.
          1. Employee as cheapest cost avoider
          2. No explicit agreement on anything related to risk, but implied in fact by higher wage (but did higher wage arise from higher risk assumption?)
          3. If matter concerning workplace risk might have been dealt with by contract, then assume the contract framework.
       3. *Lamson v. American Ax & Tool* (Holmes): If matter can be dealt with by contract then let tort recede.
          1. Here, P worked in unsafe environment, complained about it once but chose to stay rather than leave, and therefore assumed the risk.
          2. Again, a contractual work relationship between non-strangers.
       4. *Clayards v. Dethick*
          1. P reasonably assumed risk, but isn’t barred from recovery even under classical.
          2. Non-stranger relationship here, unlike *Lamson*. So, no implied understanding.
          3. Also, idea of private property: Can’t be voluntary risk if D’s conduct leaves no reasonable alternative to protect a right which D has no right to deprive! (Restatement §496E)
       5. *Siragusa v. Swedish Hospital*:
          1. Modern approach: Abolishes assumption of risk with regard to “reasonable assumptions/non-strangers.” Only keep in primary AR cases, or when there is an express AR.
          2. Unreasonable AR gives way to comparative fault.
          3. Unreasonable to assume that an employee assents to employer’s negligence.
       6. Types of AR
          1. Express: Explicit agreement, such as consent form (real contract)
          2. Implied (based on conduct)

Primary: Df never owed duty of care in first place.

Ex) Recreation cases, such as skier. But not if operator failed to provide safe facilities.

Primary is pretty much the only AR that still exists as an independent basis for defense.

Secondary: P implicitly agreed to accept risk of harm from D. This has mostly been absorbed into CNeg doctrine now

Reasonable

Unreasonable

* + - * 1. Rationale

Protect employers from human overhead

Posner: Employee might be risk-preferring. Ex) Employee’s wage is $500. Employer could pay $10/year for a safety appliance, which would produce a $15 saving in accident costs. If employee is risk neutral, will need to be paid $515 to be compensated for increased risk without safety appliance. But would employ him at net cost of $510 if they did get the safety device (the employee still making only $500). But if employee prefers some risk, and will work for anything below $510 (i.e. $508 -something above $500), that’s the most cost-minimizing route – employer doesn’t have to install safety device, and employee is making more money. Without AR as defense, this solution would not be possible, because the railroad would have to install safety appliance to avoid negligence in tort.

Here AR reflects subjective, rather than objective BPL. Provided there are no info assymetries, this is a better bargain for employee and employer. Tort (objective) gives way to contract (subjective).

Regulatory Utility: Strangers, Objective BPL, Tort

Market Utility: Non-strangers, Subjective Valuation, Contract

* + 1. Plaintiff’s Status (Determinative of D’s Duty of Care)
       1. No Duty to Act
          1. *Union Pacific R v. Cappier*:

P’s decedent killed after being run over by train while trespassing. D was not negligent in accident, but didn’t offer timely assistance. Legal duty of care can’t be extended to omission when the P’s own negligent acts caused his injury, even if BPL favored helping victim.

No duty to aid someone in peril

Exception: where someone undertakes rescue

Legal vs. Moral Duty

Classical world wants to protect private freedom. Morality of love (helping) is not tort law. Appreciates morality of respect – not harming, not using people as means.

But morality in determining what care is due?

* + - * 1. *LS Ayres & Co. v. Hicks*

Modern approach.

Invitor/invitee relationship. Kid’s fingers get caught in escalator, defendant found negligent in delaying to shut it off. Irrespective of negligence or legal responsibility, a duty of care may be imposed when instrumentality is under the D’s control, or when defendant invited plaintiff to use the instrumentality.

* + - * 1. *Stockberger v. U.S.*: duties to act: rescuer assumed a contractual duty – victim was in rescuer’s custody and without access to alternative rescuers, or victim’s peril was caused by rescuer himself, even if not negligently.
      1. Variable Duty of Landowner’s
         1. Three classical Statuses

Trespass: No duty, but can’t do “willful, wanton, or aggressive” acts (i.e. traps)

Licensee: Duty to warn if reasonable entrant wouldn’t discover (i.e. social guest). Otherwise, licensee takes premise as he finds them

Invitee: Keep premises reasonably safe, if warning is insufficient. Business visitor.

Classical – warning alone is enough. But there are plenty of cases in which warnings could be given and not heeded.

* + - * 1. Classical has to do with who benefits. Distinction existed between licensee and invitee because of distinction between permission and benefit (i.e. business visitor benefits).
        2. *Basso v. Miller*: Gets rid of the categories, replaces with reasonable care under the circumstances. Status can be a factor, but not determinative. Also consider who plaintiff is, and their purpose. Standard should be foreseeability of premises’ use and of resulting injuries.
      1. Product Liability
         1. *Thomas v. Winchester*: **Classical Approach.**If A has negligent product that sells to B to B, and that injures C, there is not bargaining relationship between A&C. A’s duty of care is solely to B. If want contract to settle the relationship, tort has to back out.
         2. *Ward v. Morehead City Seafood Co.:* **Modern Approach**. Does away with privity of contract. D sells fish to intermediary, who sells to P’s decedent, who was poisoned. Court finds D did have duty of care. Beginning of modern product liability.
  1. Step 3: Make her open the box . . . (or, look to the causal connection between Defendant & Plaintiff)
     1. **Actual (but-for) causation**
        1. But for the defendant’s action, would the plaintiff have suffered his injury?
        2. *Barnes v. Bovenmeyer*: Df doctor delayed in removing an object from P’s eye, but his negligence was found not to be bausal according to expert, since even if he had been careful, the eye probably (more than 50% likely) couldn’t have been saved. So, if no causal link, no liability even if negligent.
        3. *Scafidi v. Seiler* (loss of chance): P goes into early labor and loses her baby after negligent treatment. Doctor’s negligence might not have been a but-for cause, but it did increase the risk. Held, that D should pay in proportion to the enhanced risk. Where someone undertakes service of another (malpractice, etc.), enhanced risk doctrine applies.
           1. Analogous to contributory vs. comparative negligence. “But for” leads to all-or-nothing/no liability, loss of chance leads to apportionment, probabilities.
        4. **Joint-&-Several Liability**
           1. When two or more tortfeasors are each causally responsible for the same harm, the entire loss can be recovered against any one of them. Burden of further redistribution is placed on the defendant, allowing them to implead a third party for contributions under Rule 14.
           2. *Johnson v. Chapman*: P’s warehouse abuts both defendant’s warehouses; wall collapses on account of both defendants’ failure to maintain it. Both Ds are but-for causes, and P can sue both, but under J&S liability, cannot recover more than $10K between the two of them.
           3. Pro Rata (Uniform Contribution Act): Damages divided evenly among defendants. All or nothing.
           4. Comparative (Uniform Comparative Fault Act): Damages divided according to percentage of fault.
           5. Ends up becoming a “deep pockets” rule in cases where, for example, a crash is caused by neg of both a driver and the highway engineer. If the highway department’s negligence is only a small portion, it seems unfair to put the entire burden on it to recover contributions from the driver, who might be judgment-proof.
           6. States have restricted J&S liability in recent years, with some only retaining it for specific areas (e.g. toxic torts, where causation difficult to sort).
     2. **Legal (proximate) causation**
        1. Was D’s conduct close enough to P’s injury?
        2. *Berry v. Sugar Notch Borough*: D’s tree falls on P’s speeding car. D argues that there was Cneg because speeding was proximate cause. Held, that speeding was a but-for cause but not a proximate cause, since it was mere chance and not foreseeable that speed would put him at the place of the accident at the exact moment tree would fall. Neither foresight nor hindsight support proximate cause here.
        3. Hindsight Approach
           1. 2 piles

Injury directly connected to negligence (liability)

Injury too remote, intervening factors (no liability)

* + - * 1. Stronger on intuition than analysis
        2. *Palsgraf v. Long Island RR* (Andrews, dissent)

Hypo: Chauffeur negligently collides with car full of explosives, causing explosion. Ten blocks away, a startled nurse drops a baby. Baby shouldn’t be able to recover, b/c too remote, not a proximate result of chauffeur’s negligence, even though chauffeur was but-for cause. But people on sidewalk closer get to recover.

Proximate cause in *Palsgraf* b/c there was no intervening event; there was a direct and continuous line between D’s act and P’s injury.

“Foresight” shouldn’t be a mechanical framework for cranking out answers. Proximate means that law arbitrarily declines to trace a series of events beyond a certain point.

* + - * 1. Eggshell skull scenarios (*Watson v. Rheinderknecht*): D takes victim as he finds him. Peculiarity or unpredictability of the injury has no bearing, as long as it was attributable to D’s negligence.
        2. *Dellwo v. Pearson*: 12-year-old operating motorboat passed too close to P’s boat, broke the reel of his fishing line, and struck P in the eye. Held that foresight is a negligence test but NOT a proximate cause test. D is liable for consequences in unbroken sequence w/o an intervening cause, regardless of foreseeability.
      1. Foresight approach (dominant today)
         1. Movie Approach: Run the film of D’s conduct up to point where negligent. Stop the movie: think what is the PL, and is it within scope of risk?
         2. *Palsgraf v. Long Island RR* (Cardozo, majority)

Man carrying package of fireworks is pushed onto moving train by D’s employee; package falls to ground and fireworks explode. Explosion dislodges a large scale which hits P.

Held, that D’s negligence was an actual cause but not a proximate cause, being outside the range of foreseeability

Structural CCA would be RR – they were arguably neg in starting train with door open, tolerating people getting on moving train.

P’s argument: Negligence creates an entire package of risks to the class of potential passengers, of which she was one. Many things could go wrong due to such negligent operation, and this was one.

* + - * 1. *Larrimore v. American National Insurance Co*. (neg per se)*.* D gives tenant some rat poison, which is kept next to a heater and happens to explode, injuring the plaintiff. D argues neg per se b/c statute requires poison to be kept in a safe place. Held, that neg per se doesn’t apply b/c the purpose of statute was to protect from poisoning, not explosion. The placement of poision was an actual cause but not a proximate cause, since explosion wasn’t foreseeable.
        2. *Wagon Mound* Case

Ship enters Sydney harbor and negligently discharges furnace oil; neg was in failing to have proper equipment. Spilled oil is ignited by molten metal from P’s dock, causing a fire which burns down the wharf. Held, that reasonable person wouldn’t have foreseen this damage, and thus that D’s neg was not proximate cause.

B is greater than PL of fire, b/c Ds couldn’t foresee that fire would happen.

* + - * 1. Alternative Foresight Approach: Ds should take into account all possible consequences. (*See Davis v. Consolidated Rail*). B is less than the PL of fire combined with all other PLs, small or large.

*Petition of Kinsman Transit Co.* (Friendly): “No reason why an intervening actor engaging in conduct which entails a large risk of small damage and a small risk of other and greater damage of the same general sort . . . should be relieved of responsibility for the latter simply because the chance of its occurrence, if viewed alone, may not have been large enough to require the exercise of care.”

* + 1. **Intervening Actions (“superseding cause”)**
       1. If A1 acts negligently and A2 later does so as well, resulting in injury, did A2’s negligence break the chain and thereby relieve A1 of liability?
       2. *McLaughlin v. Mine Safety Appliance Co.* (contributory negligence scheme): D negligently manufactures heat blocks w/o written instruction on the blocks; firefighter, instructed on how to apply them, is also neg in not passing this info onto nurse, who applies blocks incorrectly and burns victim. Held for D, since fireman’s neg superseded.
          1. Was intervening actor’s (fireman’s) neg foreseeable to first negligent actor (mfr)? Majority holds that it was not, since mfr couldn’t have foreseen that fireman would disregard its instructions.
          2. Dissent: the use of the block by an untrained third party was a foreseeable risk, and so the chain of causation wasn’t disrupted by the fireman.

Would have been a small B on mfr’s part to put warning (instead of instruction) on blocks. Should have anticipated mistake.

* + - 1. Dramshop liability: people who negligently sell alcohol which is then negligently consumed leading to accident aren’t relieved from liability if risk was foreseeable.
      2. *Godesky v. Provo City* (comparative negligence scheme): P, electrocuted on a roofing job, utility company 70% neg in installing electric wire; building owner 20% neg in knowing wire was live and not warning; roofing company 10% neg in observing that there was a transformer at end of the wire. Instead of superseding cause, liability allocated on basis of fault comporting with comparative neg.
    1. Compensation for Harm: Personal & Relational
       1. Purposes of compensatory damages
          1. Compensating for P’s injuries (personal or property) and deterring D and future Ds

*Sherlock v. Stillwater Clinic:* place injured plaintiffs in position that they would have been in had no wrong occurred

*Jones v. Fisher*: amount of money which will compensate an individual for whatever loss of wellbeing he has suffered as result of injury

*Posner*: Posner explains tax-risk vs. tax-harm system. Tax-risk is PL. Tax-harm is just L. Harder to compensate victims in tax risk system in torts suits. So tort is a tax harm system – wait for harm to come from accident.

By approximating L, damages will internalize total social cost of accident. This will induce actors to obey formula, assume B if less than PL.

Punitive damages are appropriate if social cost is greater than compensation needed by D, or if tort was intentional.

* + - * 1. Calculation of compensatory damages

*Christopher v. United States*: Med Mal leaves patient a paraplegic. How to add up total loss suffered?

Economic Costs/Reparation: Medical (annual medical expenses x life expectancy) & wage loss (past & future – how hard worked, how many years he could have worked, wages already lost).

Subjective/Compensation

2 possible ways

How much would finder of fact pay to avoid the P’s P&S, or how much would they charge to experience it willingly?

How much would finder of fact demand to assume the risk of P&S experienced by the victim?

Point is not to undo, but to offset harm that you can’t undo

Problem of 1/3 of award going to lawyer – from full deterrence perspective, not a problem, but conflicts with full compensation objective.

*Burke v. Rivo*: Parents allowed to recover costs of rearing a child when D physician negligently sterilized the mother, but benefit of raising a child must be subtracted from costs.

* + - * 1. Wrongful Death Actions

Recoverable under survival statutes (covers damages up to point of death; personal damages; party suing is estate), or death statutes (covers damages after death; people suing are family members)

What can be recovered?

Illinois statute: “what benefits of pecuniary value, including money, goods, and services, the decedent might reasonably have been expected to contribute,” but not P&S or loss of consortium

Loss of consortium/associational loss – applicable to spouses and parents, but not to children who lost parents (*Borer v. American Airlines*)

Grief, sorrow, or mental distress (solatium/emotional loss) damages: states are divided

*Roberts v. Stevens*: damages for wrongful death aren’t supposed to reflect the (incommensurable) value of the life itself

Who can recover?

Near relatives of deceased

VT statue: consortium expands to civil union

*Clymer v. Webster*: consortium for parents of adult children

*Cassano v. Durham*: no consortium for live-in partner

Issues

People who are killed won’t receive as much in damages as victims injured non-fatally (cheaper to kill your victim than leave maimed)

Spouse can sue for consortium

Primary victim can be compensated for economic losses

In some states, kids and parents can get consortium damages

No compensation for loss of life to the person who lost it. Consortium and solatium are harms suffered by others on account of victim’s death, but worst harm of all was the victim losing his life. So social cost is higher than compensation, and feels like full deterrence objective is not met. Posnerian scheme doesn’t work here.

* + - * 1. Compensation for economic loss

Economic loss doctrine holds that there is no tort liability for mere economic harm (e.g. secondary harm) when there is no accompanying physical harm.

Rationale: Much greater number of potential Ps would raise costs of litigation, clog courts, etc. Insurance is a cheaper and more efficient way of compensating for purely financial harm.

Liability for pure financial harms could create “perverse incentives” (e.g. making insurance premiums unaffordable)

*Barber Lines v. Donau Maru*: D negligently spills oil into Boston Harbor, causing physical harms to some (who can recover) and preventing P’s ship from docking. Held, P can’t revcover b/c damages are only economic and there are too many Ps with economic damages.

Exceptions: commercial fishermen (V is fish they can’t sue, would help internalize costs), misrepresentation, accompanying physical harm, defamation, etc.

*People Express Airlines v. Consolidated Rail*: P suffered no physical harm, but was within zone of physical risk. If it can be shown that P suffered economic loss but was member of a particularly foreseeable and identifiable class (i.e, Ds knew exactly who they were and of their presence), then recovery should be allowed.

*Union Oil Co. v. Oppen*: Commercial fishermen suffer purely economic harm from massive oil spill, but are allowed to recover. Since only victims of the tort here are fish, allowing fishermen to recover makes sense because puts pressure on D’s behavior to internalize costs.

1. **STRICT LIABILITY**
   1. Onus is no longer on faulty conduct, but simply on risk-creating, even if the risk is reasonable. “Let the one who created the risk pay up.” As such, strict liability is a *secondary* criticism, imposed after the fact solely on the basis of the harm itself.
   2. **INSURANCE: 2 types: Loss & Liability**
      1. **Loss insurance**
         1. Victim insurance, 1st party gets proceed when certain harm from risk comes to pass
         2. Exs
            1. Health insurance
            2. Homeowners’ insurance
            3. Non-fault collision insurance, if car gets damages in collision you get paid (subject to deductible)
            4. Social insurance (Medicare/Medicaid, food stamps, Social Security)
         3. Subrogation: loss insurance company pays damages to the insured, and assumes in return the right to sue the actor who caused the harm
         4. Collateral source rule (*Helfend v. Southern Cali Rapid Transit District*): Even if the injured plaintiff is compensated by an independent source (e.g., health insurance) requiring refund of tort recoveries, that payment should NOT be deducted from damages plaintiff would collect from the tortfeasor.
            1. Encourages people to buy insurance
            2. Unfair for tortfeasors to, in effect, benefit from their victim’s providence
            3. Insurance usually provides subrogation or refund of tort recoveries anyway, so double recovery isn’t usually an issue.
            4. Juries aren’t informed of contingent attorney fees; why should they be informed of insurance policies?
      2. **Liability Insurance**: Actor (3rd party) worried about chance of being made liable in tort; insurance company promises to pay judgment against you to victims.
         1. Exs.
            1. Mandatory for drivers in many states
            2. Bodily injuries to others.
            3. Homeowner policy usually has a premises liability provision, so insurance will pay liabilities if someone has accident at your house.
         2. Liability insurance as risk tax
            1. Tort waits for risk to mature as harm; liability insurance **turns the harm tax into a risk tax** instead. How? Through POOLING.

1/1000 (P) x 10,000 (L)

|  |  |  |
| --- | --- | --- |
|  | Risk | Harm |
| A1 | 10 | 10,000 |
| A2 | 10 | 0 |
| A1000 | 10 | 0 |

Each of the 1000 actors creates a risk of 10

Each creates the risk once a year (or once in a planning period)

They each create the exact same risk. On avg, the 1000 actors will create the same risk, but one of them will be unlucky and hurt somebody, with harm of 10,000. Actors are equal in terms of their actions, but unequal in terms of what they end up paying as loss to themselves through tort.

Since all of the 1000 are worried about having to possibly pay the 10,000, there’s an incentive for them to come together, create a pool, and thereby turn the harm tax into a risk tax.

Avoids crushing loss.

Risk tax is the “pure premium” that you pay to the pool in order to join it.

Pool will pay harm tax when it is due.

Makes individual losses collectively predictable. It would be impossible to predict for an individual actor, but collectively, can predict.

Motivated by shift away from classical sovereign immunity

*Hicks v. State*

Governmental and charitable immunity from negligence liability used to exist (idea that “the sovereign can do no wrong” – overly feudalistic). Court said the state could now get adequate insurance. Also placing financial burden upon state, which can distribute losses throughout populace, more just and equitable than forcing individual to bear burden.

*Pierce v. Yakima Valley Memorial Hospital*

Non-profit hospitals used to be immune from tort as well. There was a fear that big liability might harm charity, but in a world with insurance, organization could join a charitable POOL.

In a world with insurance, the great fear of deterring socially valuable activity is decreased.

The Homes fear (“There is no policy of putting liability on actors when they act for the common good “) goes down with insurance pool.

* + - * 1. Characterisitcs

Large number of homogeneous exposure units (law of large numbers)

Loss produced by risk must be definite

Loss occurrence must be accidental or fortuitous, and beyond control of the insured

Potential loss must be large enough to cause hardship

Cost of insurance must be economically feasible

Chance of loss must be calculable

Peril must be unlikely to produce loss to too many units at once.

* + - * 1. Rating/Premium: How to pay to join the pool

Premium is calculated by rating. A perfect rating should be the risk tax, proportionate to the amount of risk the actor creates. But since insurance is bought for a future period, to get rates, you have to have a way of finding facts that are true at the beginning of insurance – risk wouldn’t work this way. With large numbers/groups, though, becomes easier to predict.

So ratings use large, rough categories

In auto ratings for individual motorists, for example, amount of risk varies depends on age, gender, miles driven, where care is garaged, length of commute, etc.

Puts cost pressure on group, rather than individual, and spreads out deterrent effect of liability.

Egotist is worried about tort judgment, not hurting others. So a good group premium will always come to rest on a group that deters more & less safe actors equally.

Can also have experience/merit rating

Restores some cost pressure to the insurance pool, but still produces classes that are charged the same.

Problems

If have actors creating relatively small amount of risk so that they won’t actually cause harm, it follows that the occurrence of an accident doesn’t have much predictive value to what will happen in the future (it’s an accident). Past experience isn’t always determinative if it’s just bad luck instead of actual carelessness.

Homogenization of risk will always be true with law of large numbers. Better.

* + - * 1. Small versus large actors

Small actors create so little risk in the planning period that it’s unlikely that harm will happen.

Large actors, however, do the 1/1000 risk more often (i.e. cab company), and thereby cause more harm.

**For large actors, experience ratings make more sense.** If see worse than average safety record with big cab company, can say that it wasn’t just chance, but something about company safety policy, and charge higher premium. Vice versa also true.

**Self insurance**

Small actors have incentive to join a pool because of the law of large numbers, but as an actor creates more risk, the incentive to join goes down because the actor himself becomes his own pool (e.g., the actor creating the 1/1000 chance of 10,000 is doing so 1000 times a year), so deterrence pressure returns. Instead of joining pool, large actor might just create own insurance pool by doing its own risk tax – setting aside funds every month, and using past knowledge as indicator of future.

If probabilities don’t hold and something unlikely happens, the self-insurer may have reinsurance – a policy with a vast deductible just to prevent catastrophic losses.

* 1. **Rationale: Theory of Activity Liability: Utility**
     1. General Claim: Liability in tort to pay compensation should be activity-based, not fault-based.
        1. Every activity that creates risk of harm should pay for its own characteristic accident cost.
     2. Calabresi
        1. Utilitarian framework, hitting the optimum level of costs & benefits**.** But SL is better than fault at getting society to B=PL level and serving a regulatory role in taxing risks.
        2. Three costs (goal is to minimize all 3)
           1. Primary: Out of court conduct that causes the accident (BPL) (this will be background safety, market allocation)
           2. Secondary: Spreading among consumers after the accident (Spreading)
           3. Tertiary: Overhead costs, administrative costs.
        3. **Background Safety**
           1. SL better than fault to get actors to organize their affairs in deep background, and reach the optimum level there.

Ex) Blyth v. Birmingham Water Works – negligence may lie in the construction of water pipes/hydrants.

* + - * 1. In principle, negligence is ok at getting at background safety. But Calabresi argues that in practice, this turns out not to be true.

Background safety often escapes criticism in negligence tort suits, because the deeper you get into the complicated, expertise-driven background of an accident situation, the more you are in the defendant’s exclusive camp of knowledge, and the harder it will be for the average plaintiff to show. Harder to convince factfinder that balance struck by actor was wrong. If you can convince that there was negligence in background, could be very hard to show actual causation. SL automatically will induce background precautions and BPL balancing, b/c activity must pay *all* its characteristic accident costs. Forces actor to engage in SELF-CRITICISM.

Ex) Products liability: The producer is in position to compare existing accident cost with cost of avoiding accident by developing either a new product or a test which would serve to identify the risky .0001 percent; the consumer cannot make this comparison. Very far in background. Goes back to right research product to develop new product.

Attribution problem: Accidents happen at intersections of activities: making the product, and using the product. Which activity to attribute cost to?

Search for CCA as between alternative activities and actors. Emphasis here is on party in best position to *make* BPL cost benefit analysis, separate from acting on that analysis once it is made. The capacity to be able to do that planning is a key component of CCA.

Some actors are best strategically well-positioned to think about the field of risk, and come up with alternatives: the *structural* CCA, not the situational CCA (which is what the fault system would look for). Large actors have more of the fundamental cognitive capacity to understand risk and alternatives all the way into a deep background of a risky situation, so prefer them as CCA.

Attribution is relational. Even if there is no known way in which a manufacturer can improve safety, the manufacturer is still better suited to make the CBA than the consumer. Ex) No way manufacturer can make a risky medicine safer for users, but relatively, can make a C-B analysis that matters: new product vs. damages.

* + - 1. **Market Allocation**
         1. Adds to relative prices of products and services. The market can serve as an agency of criticism of risk, allocating resources between more and less BPL optimality. Enormous macro pressure.
         2. Example: Consider 2 activities that compete with each other to bring about the same result: long haul trucking and coastal tugging. Assume that at optimality level, the costs and prices are the same, but they have different accident costs, since trucks cause more damage than tugs even when run reasonably. Prices in fault system, where accident costs can be externalized, will basically be the same. But in SL, the relative prices of trucking vs tugging will change; tugging could offer a lower relative price, and lead people to patronize that more than they would otherwise. Operates as a deterrence mechanism, making risky activities internalize costs.
         3. **So, SL induces market criticism of relatively costly activity, which you wouldn’t get under fault regime**.
         4. Moreover, SL is easier to apply than the calculus of fault. Fault system requires gov. to determine who can make C/B analysis, and what the results of that analysis should be – danger exists that gov deciders will resolve that analysis incorrectly.
      2. **Spreading (secondary costs)**
         1. Two ways to pay a medical bill arising from accident

Concentration: Person injured pays $100,000 out of own resources.

Spreading: Have 100,000 people give $1 each.

* + - * 1. From utilitarian standpoint, spreading better, because don’t have to dig as deep into personal resources. Secondary costs (unlike primary) could be reduced to zero through effective spreading. SL is a spreading device.

By making actor whose risk gave rise to the harm pay for it, the loss is transferred from victim to actor, and spread by profit or price. Large actor accident cost will cause actor to raise price or reduce profit; small actor accident cost will assume joining a liability insurance pool that will spread. Assumption that actors, in charge of characteristic risk, are better spreaders than victims.

* + - * 1. Externalization Issue

What if there is a medical cost caused by blasting misfire – Victim could recover from “blasting” insurance, or from their own health insurance. Seems that there’s no advantage in spreading through blasting insurance, since both get rid of the secondary cost of individualized concentration.

But first of all, the bottom 1/3 of economic spectrum don’t have as effective loss insurance as a company would have for liability insurance.

And Calabresi would argue that victim-spreading would externalize the cost of accidents from the actual activities that gave rise to them. If a blasting accident gets taken care of by victim’s health insurance, has NO effect on the primary activity, puts no pressure on the blasting industry. Going through 3rd party insurance, it does.

By getting primary and secondary cost control together, keeps cost of accidents on risky activity, and market responds accordingly.

* + 1. **Fairness – Reciprocity (Fletcher)**
       1. Like fault (Posner vs. Fried), SL can be justified both in terms of utilitarianism/economics and in terms of fairness.
       2. Fletcher argues that risky activity ought to pay for characteristic risks: traditional SL (vicarious liability, abnormally dangerous, nuisance), modern SL forms (products liability, workers comp, auto no-fault).
       3. **Fairness as reciprocity**
          1. In fairness, risks created by people in society offset one another, and there is an equality of risk-imposition and risk-sufferance. In unfairness, harm happens from unequal risk (SL rule for non-reciprocated risk).
          2. Reciprocity

Community of risk, e.g. people who drive cars (big community, must suffer costs of ordinary drivers), people who play a particular game. In a community of risk, let the loss lie because there is reciprocity; whoever causes damage ought not be held liable.

* + - * 1. Non-reciprocal harm, however, ought to be paid for by risk creator.

Victim has right to recover for injuries caused by risk greater in degree/difference in order from those created by victim and imposed on defendant.

Not based on fault – risks could be reasonable in a BPL sense, and there is still recovery

* + - * 1. How to tell if risks are equal?

Look at particular accident situation – was there reciprocity of risk?

Fletcher looks for a middle ground between Fried’s risk pool and situational determination. Not extremes (i.e. driver hitting a pedestrian, and them being in same category b/c pedestrian is probably a driver too). Instead, looks to categories

These categories fit with ideas of abnormally dangerous, ultrahazardous activity – uncommon activities represent non-reciprocal risk.

Against auto no-fault

Problem: Theory doesn’t apply to non-strangers because people at either sides of contract are often in same community of risk. So workers comp and products liability don’t comport with Fletcher’s theory.

Also, doesn’t fit well into modern world where insurance is presumed.

* + 1. **Fairness – Proportionality Theory of Distributive Justice (Bohlen)**
       1. Unfair to thrust burden/cost of your beneficial activity onto somebody else while you reap the benefit. Fairness requires sharing of burden. If shifting loss from victim to actor will significantly improve the distribution of loss in relation to benefit, then fairness requires that loss-shifting to occur.
          1. So test is: will shifting of loss significantly improve ratio of benefit to burden? If so, let actor pay. If not, let loss lie.
          2. Different from reciprocity because proportionality is ex post, rather than ex ante evaluation of reciprocal risks before they have caused harm.
       2. Rationale of *Rylands v Fletcher*: improve fairness and distribution of benefit and burden.
       3. Comports with Just Compensation Clause: “When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large.” (*SDG&E v. City of SD* – public should bear costs of benefits received, not just one person). Here Bohlen also overlaps with Calabresi’s loss-spreading argument.
          1. Difference – Calabresi is indifferent as to whether spreading is by actors or victims. Could have spreading through actor liability insurance, or victim loss insurance, as long as secondary costs are avoided. Calabresi prefers actor spreading because of the *primary* cost benefits that it affords to background safety, market allocation. But as for secondary costs *on their own*, actor/victim spreading costs are equal.
          2. Bohlen, on the other hand, says that actor/victim spreading costs are inherently unequal. Victim spreading will keep the burden of risky activity off of that activity, and beneficiaries would reap. Getting those burdens internalized through actor spreading would ensure that beneficiaries aren’t unfairly thrusting burden onto someone else.
          3. Still, not a great conflict between the two.
       4. Proportionality is broader than reciprocity. Covers workers comp, because based on idea of transferring loss to public benefited by the company/worker activities, whereas Fletcher wouldn’t cover b/c non-stranger relationship.
       5. Waterworks Cases (contrast with *Blyth v. Birmingham*)
          1. *Lubin v. Iowa City*: Lubin is a member of community of risk, because benefits from water, and is a citizen of Iowa City. In Bierman case, also beneficiary of water supply.

Reciprocity would say, provided no risk, let the losses lie. Same community, same category.

Proportionality says, this is the case where there should be liability. Look at the harm that happened, and see if it is more proportioned to the benefit, or if risk could be improved by shifting.

Here, risk should be borne by water supplier who is in position to best spread costs. They should bear the loss rather than the unfortunate individual, because it will improve the benefit/burden ratio – too much of a burden to place on the one unlucky consumer whose basement got flooded.

*Bierman v. City of New York* similar. Talks about Calabresi as well (injury prevention concerns) but also fairness – Bierman should only sustain her share of proportional loss. That would come from the water company cost-spreading (so it’s included in the price that Bierman pays for water like everybody else) and thus water company is able to deal with it when held strictly liable – pay for characteristic risks, even if foreseeable.

* 1. **Vicarious Liability**
     1. Master/employer is liable for the negligent torts of his servants/employees while acting within the scope of their employment.
     2. Rationale
        1. Costs of employees’ torts are part of the costs of business, no less than, e.g., workplace injuries caused by machines. Rationale is thus similar to worker’s comp.
           1. Idea of Enterprise Liability

enterprises absorb the risk of “characteristic accidents” as an

operating expense. Costs of accidents should be distributed among those who benefit (customers, employees, suppliers, shareholders, etc.): assumption that enterprise will factor these costs into prices.

Reasonable to impose risks that a company regulates, but not reasonable not to pay for the harms that come from those risks

* + - 1. Instead of focusing on conducting activities with care, focus is on conducting activities with appropriate intensity (i.e. reducing activity of driving completely, not just driving carefully)
    1. **Scope of Employment**
       1. Main Idea: Often employer can’t be more careful in hiring/monitoring employees, but can change nature or extent of activities/operations (e.g., open branches closer to firm office so employed salespeople don’t have to drive as much).
          1. Less incentive to hire financially insolvent employees, who would never have to be compensated for running risk of being sued (judgment proof) for tort committed on employees behalf. With VL, that changes – liability goes to employer.
          2. So, scope of employment is reference to likelihood that liability would induce beneficial changes in activity.
          3. Under negligence, wouldn’t be able to induce these kinds of structural changes, due to difficulty of showing ‘but-for’ causation.
       2. *Kohlman v. Hyland*: Foreseeable that an employee might depart from the prescribed route on the way to work, so still within scope of employment
       3. *Houston Transit Co.:* Df bus driver still within scope of employment even when committing an intentional assault on someone who rear-ended him, since he was reacting to something within the scope of his employment.
       4. *Konradi v. United States*: Rural mailman driving to work, negligently killed P’s decedent. Suit brought against USPS. An employee on the way to work is *normally* not in the employment of the corporation, but here he was because of 3-part Indiana test:
          1. Conferred benefit on employer by providing “essential instrument” (USPS required rural carriers to use *own* cars making rounds)

Increased driving and potential for accidents. But at the same time, not many other public transportation options.

* + - * 1. Employer exerted control over employee’s commuting
        2. Commuting employee was in the service of the employer while commuting because he was maintaining the instrumentality used to deliver mail
      1. *Wood* squib
         1. Didn’t drive directly, but still found employer liable for employee negligence even though particular act was unauthorized. Still maintaining the instrumentality.

But then isn’t he maintaining the instrumentality any time he is driving? Where to draw the line?

* + - 1. *Bushey v. United States*: Bushey a drydock owner overhauling Coast Guard ship. Drunk sailor returned to ship, turned valves of ship, and in doing so caused severe damages. Ship listed, fell off blocks, parts sank.
         1. Seen as within scope of employment. Even though sailor’s action was not done in purpose to serve gov./master, his action was foreseeable.

Foreseeable test used here: **“characteristic of its activities**”

Instead of prudent man’s precautions, focus on accidents that could arise out of labor (workmans comp standard)

Foreseeable that sailor could do damage, be drunk.

Policy was not enough of a reason here

Imposing strict liability couldn’t really lead enterprise to take steps to prevent accident recurrence.

Not necessarily going to lead to higher screening of employees – could spread costs to drydock owner to install locks, or to shipowner. Df might be more able to afford damages, but that doesn’t mean they have to.

Still – fairness rationale existed.

Military especially exerts pervasive control over aspects of sailor’s life. In *Taber v. Maine*, sailor on liberty found negligent for drinking and getting in car accident. Here, still part of employer’s enterprise.

Focus in cases like this was more on using control to induce careful conduct.

* + - 1. *Mary M. v. LA*: Police officer sexual assault found “characteristic of activities.”
         1. Cost should be borne by community b/c of benefits derived from police officers. Use of force seen as part of employment. (But sexual force? And could activity be changed to prevent this?)
    1. **Liability for Independent Contractors**
       1. Generally, no VL for employer of an independent contractor, given that employer has much less control, usually doesn’t supervise detail of contractor’s work, only inspects final output but not specific inputs. BUT exceptions can be made.
          1. Restatement exceptions

Employer was negligent in selecting, instructing, or supervising contractor

Non-delegable duties of employer arising out of some relation toward the public or a particular plaintiff

Ex) liability imposed on defendant whose brakes failed (driving employer’s car) because of independent contractor’s negligence, since the duty to maintain a car under the Vehicle Code is non-delegable. *Maloney v. Ruth*

Some states have no non-delegable duty for hospitals in emergency room malpractice.

Work which is specially, peculiarly, or inherently dangerous

Since strict liability is imposed for dangerous activities anyway, you shouldn’t be able to get around liability just by hiring someone else to do the activity.

Gives employers special incentive to be careful about who they hire to do dangerous work – principal is structural CCA, the only one who can reduce or replace the activity itself.

Df is benefitting from risk being taken, even if contractor was negligent in creating the risk

* + - * 1. *Becker v. Interstate Properties*: Independent contractor was judgment proof, so P allowed to sue hirer of contractor b/c of their failure to hire solvent/insured independent contractor. Did being financially insolvent amount to hiring an incompetent contractor?

Developer better able to bear loss than victim

Liability should go to those in best position to control factors leading to accident. Here, the contractor became one of those factors, and the employer was in position to control by hiring him in the first place.

This is not to say principal could have controlled contractor’s negligence, but could have required him to have insurance.

Costs should be borne by those who secure benefits of activities.

Developer could hire someone judgment proof just to lower operating costs, and shield themselves from suit.

Contrast with *Robinson v. Jiffy Limo* – Limo contracted by casino didn’t have adequate insurance, fatal car accident. Could be too much to ask employers to make inquiry into financial inquiry in every case (esp. harder on start-ups). So adding insurance is an “inexact appendage.”

* + - * 1. *Kansalis v. Fern and Friends* – Liability in partnerships

In partnership, each party stands as agent *and* principal (reciprocity). Needed apparent authority (reasonable person would understand that agent had authority to act – that bears on victim’s ability to decide whether to deal with him) or intent to benefit the partnership.

* + 1. Dangerous Animals
       1. *Marshall v. Ranne:* Df’s boar escapes, terrorizes plaintiff for several weeks, and eventually injures him. Restatement §509 imposes SL for harm done by wild animals which are “characteristically vicious,” or if the owner has reason to know of the viciousness; §519 for domestic animals if they have abnormal propensity of which the owner has reason to know. Liability even if owner exercises utmost care.
          1. P’s contributory negligence has no bearing in a SL case, since the purpose of SL is to place full responsibility on the owner regardless of negligence. (Restatement §515)

Some states do have comparative negligence approach though.

* + - * 1. P couldn’t be said to have assumed the risk, because he had been deprived of other options; he couldn’t have been expected to stay in his house, and he didn’t kill the boar since that would be a crime.
      1. Rationale for wild animal liability
         1. Uncommon, unnecessary, highly dangerous activity with low utility and high risk.
         2. Encourages background safety and extra precautions by owner.
    1. **Abnormally Dangerous Activities**
       1. Restatement, Second §519 (memorize)
          1. One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
          2. This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous (i.e., foreseeable harms)
       2. Restatement, Second §520: What makes an activity “abnormally dangerous”
          1. Danger factors

Existence of a high degree of risk (P)

Likelihood of great harm (L)

Inability to eliminate risk by reasonable care (B)

* + - * 1. Abnormality factors

Extent to which activity is not common

Common activities like driving create reciprocal risks

Whether the activity is inappropriate to the place it is carried on

Extent to which the activity’s value to the community is outweighed by its danger (e.g., oil industry in TX)

* + - 1. *Rylands v. Fletcheri (“*keep it in at your own harm”): Classical confined *R v. F* to extremely dangerous, then re-adopted at beginning of the modern era.
         1. *Shipley v. Fifty Associates*: adopts *Rylands* rule for snow falling off defendant’s roof. (reaction to this helped limit *Rylands* in classical)
      2. *Exner v. Sherman Power:* Came toward end of classical period of tort, when fault reigned supreme. SL imposed in dynamite blasting case despite utmost care on defendants, premised on *Rylands* rule.
      3. *Siegler v. Kuhlman*: Without any established negligence on D’s part, D’s gasoline tank trailer disengaged, skidded off highway, and fell onto a road below, where the P’s decedent drove through and led to a massive explosion. SL imposed under §520, given the high P and L and the inability to eliminate risk by reasonable care. SL claim chosen over *res ipsa (*D having control over instrumentality), and negligence per se (statute).
         1. Concurrence makes loss-spreading and attribution argument: Commercial transporter can spread loss among customers and is the best structural CCA. Obviously the plaintiff isn’t the CCA, but is it the gas hauler or the truck manufacturer? Liability should be put on party that knows most about risk. Hauler could have done background safety through alternate scheduling and routes.
      4. *Langan v. Valicopters*: Crop dusting is abnormally dangerous because not a matter of common usage, not valuable enough to the community, and inappropriate to the location in this case (next to Plaintiffs’ organic farm).
  1. **Products Liability**
     1. **Tort vs. Contract – historical development/rationale**
        1. **Privity (contract backed up by tort)**
           1. No suit directly against the manufacturer because there is no privity of contract between the user and manufacturer, only the user and distributor (*Losee v. Clute, Winterbottom v. Wright, Thomas v. Winchester* as interpreted by dissent in *MacPherson*)
           2. Contract dominated the manufacturer’s obligations to the distributor; as a corollary, the manufacturer had no tort duty to the world, his obligations governed solely by contract with distributor.
        2. **Negligence (tort backed up by contract)**
           1. *Ward v. Morehead City Seafood*: Seafood company should have telegrammed grocers after learning fish was poisoned, held liable for plaintiff’s decedent’s death.
           2. *MacPherson v***.** *Buick Motor Company* (1916): Wheel manufacturer sells wheel to Buick, who sells to dealer, who sells to P injured in crash when wheel collapses. P sues and argues that Buick was negligent in putting on wheel.

Majority (Cardozo) interprets *Thomas v. Winchester (*mislabeling of poison case, reaffirmed idea of no liability in privity but created exception for poison) as allowing suits for negligence against the manufacturer when a good inflicts harm, regardless of whether or not there was privity. Manufacturers have a duty of due care “if the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made.”

Privity shouldn’t block tort conception that if an actor throws a PL into the world which is undue and could be avoided at less cost (B), then you are liable to anybody foreseeably hurt by that risk. The chain/links don’t matter.

Rosell v. Volkswagen – acid on baby. Having battery in glove compartment was negligent design. Didn’t take privity into account.

Heat blocks case – mine safety appliance sold heat blocks, volunteer nurse put on child – assumed that if negligence that could foreseeably run to victim, recovery in tort.

* + - 1. **Warranty (contract)**
         1. UCC 2-314 provides for an implied warranty of safety – the promise that the thing being sold will be safe in ordinary use. This equates to strict liability, because promissory liability is strict by nature.
         2. There is also an implied warranty of merchantability – that the god be “fit for the ordinary purposes for which such goods are used” – extending to people who might reasonably be expected to use or be affected by the good and are injured by the breach of this warranty.
         3. Warranty allows for the recovery of tort damages (injury to person or property resulting from breach or warranty).
         4. But unlike tort, warranties can be excluded or modified so that the implied warranty of safety is eliminated – goods simply can be sold “as is.”
         5. *Henningsen v. Bloomfield Motors Inc.* (1960): Chrysler sells car to dealer (Bloomfield) which sells to husband whose wife is injured when the car malfunctions while she is driving it. Contract between husband and dealer specified in fine print on back that there are no “Express or implied” warranties.”

Court holds that there is an implied warranty of fitness and safety btw. Chrysler and Bloomfield that runs to buyer of the car. Privity of contract no longer makes sense in a mass-market economy, which all but guarantess that the initial buyer to whom the manufacturer sells won’t be the ultimate consumer. Warranty also extends to buyer’s wife, since her driving was reasonably foreseeable. *Henningsen* thus paralleled *MacPherson* in doing away with privity requirements.

Disclaimer of warranty is held to be unconscionable for procedural reasons (fine print against public policy, lack of equal bargaining power).

*Henningsen* thus creates a bridge from warranty to strict liability, since it establishes that if you have implied warranty of safety that runs to everyone foreseeably affected by party that cannot be waived.

* + - 1. **Strict Liability** (Tort)
         1. *Escola v. Coca Cola Bottling Co. of Fresno*: restaurant waitress is injured when a Coke bottle explodes; she has no privity of ontract with Coke, and brings a negligence claim based on res ipsa.

Traynor: ground of liability should not be negligence, but strictness.

Lawyers have managed to go back to manufacturers on warranty theories. Since buyer can sue under warranty of distributor, Traynor recognizes the ladder/bridge to strict liability, and argues that don’t need the warranty step. These warranty claims were just convoluted forms of SL.

Manufacturers are better loss spreaders and cost avoiders.

* + - * 1. Restatement §402: Mfr is strictly liable for a defective item provided he is engaged in the business of selling such a product and that the product reached the user without substantial change, regardless of whether there is negligence in failing to discover the defect, or privity of contract. “Even though seller has exercised all possible care” – activity based.

Rationale: shifts costs back to manufacturers, who then re-price to reflect *actual* costs, thereby creating rational allocation mechanism.

* + - * 1. Counterargument: Buchanan, *In Defense of Caveat Emptor*

Thinks should let buyer choose, because if there is SL for products, with low quality product the price will rise.

Belief in freedom of choice as matter of personal liberty.

Fight is about default rule – Buchanan wants K to take over.

Economic/Utilitarian: Lower level of safety is optimum level of safety as far as sellers/buyers concerned. They were economically better off.

Caveat emptor would produce more variety, and different attitudes to risk. Market incentive would produce competition.

Equity: Getting rid of low-price option will hurt low-income people. (He doesn’t actually care about this).

Objections

Condition of the market approach is that the bargains only affect them, not third parties, who didn’t make the choice to take a risk. Even products within the home might still impose externalities on guests, etc. Buyers aren’t always the only users.

Choice could be a powerful rationale if it’s real, but proper information is essential. It’s important that consumers have same info as producers, or won’t hit the right level, and people will be surprised by effects of what seems like a market bargain. Unequal balance of info.

SL promotes background safety improvements.

“Buying an adventure”: Ratio of accident costs to all other costs in the low quality product that he positsis high. The main feature of the low quality product is that it is dangerous. In products liability in reality, the product liability ratio is closer to 1 to 20, not 1 to 5.

Safety is only one factor on which products compete, and not even the most important one.

Today, both negligence and SL claims are available. The former as claim one/primary criticism, and the second as claim 2/secondary criticism.

* + - 1. Economic Loss Doctine (*Casa Clara, Moorman Manufacturing)*
         1. Prohibits tort recovery when a product damage causes economic loss, but doesn’t cause damage other than to itself. So tort hasn’t completely triumphed over contract. Would have to bring such a case under UCC.
         2. P’s failure to bargain for adequate K remedies shouldn’t end up being imposed on public at large.
         3. Tort is determined by *duties* – shift burden to whoever is at fault, or who can better bear loss.
         4. Contract deals with disappointed economic *expectations*.
         5. But hard to distinguish btw. Product that just hurts itself vs. other property.
    1. Whom to hold liable?
       1. *Goldberg v. Kollsman Instrument Corp.*: Kollsman manufacturers altimeters for a plane made by Lockheed and flown by American Airlines, which crashed on account of the altimeter, killing P’s decedent. P sues for breach of warranty and SL. Lockheed found liable, but not Kollsman. Why? .
          1. Background Safety/CCA: Probably Lockheed. Can choose other alternatives (assuming there is competitive market in altimeters). Also, can put in backup systems that would come in if Kollsman part were to fail.
          2. Market Allocation: Points to Kollsman, since it is their externality, they are best able to control.
          3. Spreading – Drops out. They’re all good spreaders on their own, in market relationship. So spreading will happen anywhere on chain.
          4. Fairness – probably American.
          5. Targeting Lockheed would also put pressure both up and down the chain. Could bargain with Kollsman in future, and also go to different market.
          6. Dissent: Majority should have paid more attention to policy rationale, and picked American instead of Lockheed. Saw American as easiest positioned to raise fares, and accident was most incident to its enterprise, and it was the party that dealt directly with P.
    2. Manufacturing Defect: One “lemon” product deviates from the product line. Measure defect against general design
       1. This is the strictest form of products liability, since it doesn’t matter how the defect occurred if it doesn’t meet manufacturer’s specifications.
    3. Design Defect: Entire product line is somehow defective. Test can’t just be “but for” – needs to also be assignable to maker, not user. (Snowboards may be but-for cause, but often it is use that causes damage). Two tests: expectation and balancing
       1. Expectation Test: Do risks of design meet expectations/offend expectations of ordinary consumer??
          1. Don’t have to “look under the hood,” or know complex mechanisms of promise. Just macro test of safety.

Strict test, because its roots are in warranty – “fit for normal use” similar to “fits expectation of ordinary consumer.”

* + - * 1. *Green v. Smith & Nephew AHP*, *Inc.*: LATEX. P suffers severe allergic reactions to D’s latex gloves, later found to have a higher than usual level of proteins. The mfr. and medical community didn’t have knowledge of harm (couldn’t do balancing test).

Consumer expectation test – Gloves were dangerous to an extent beyond that which would be contemplated by ordinary consumer who purchased it with the ordinary knowledge common to the community as to the product’s characteristics.

“Unreasonable danger” measures “how safely the ordinary consumer would expect the product to serve its intended purpose. Foreseeablity of harm should have no bearing on D’s liability.

* + - * 1. Rationale

Fairness, backward looking (hindsight) approach. The latex company had profited. Serves purpose of imposing cost of risk on party that created the risk. Costs are there anyway – should they be internalized or externalized?

Since Df didn’t know anything here, probably not background safety, but could encourage manufacturers to to better R&D, and better CBA (foresight-oriented).

* + - * 1. Expectation test difficult to apply in cases where consumers don’t know enough about complex designs to have expectations one way or another. Design in such cases must be judged by a balancing test.
        2. Expectation test isn’t always more plaintiff (i.e. consumer) friendly. Where the danger is obvious (cigarettes, skis, etc.), P’s expectations can’t be violated, even if balancing test would find safer alternative.

Third Restatement makes obviousness only one factor for this, however. Ps might not *know* that there is an alternative design, and accept the obvious risk believing it to be the only choice.

* + - 1. Balancing Test: Is design of product reasonable on balance, or do its risks outweigh its utilities? Akin to negligence (B/PL), except goes beyond to produce a strict liability based on hindsight: *If we knew then what we know now, would prudent manufacturer put into stream of commerce*?
         1. Factors used in balancing test (*Henderson*)

Usefulness of product (B)

Availability of substitutes (B)

Likelihood & seriousness of injury (PL)

Obviousness of danger (consumer assumption of risk)

Common knowledge of danger

Avoidability of injury by care (instructions or warnings)

Ability to eliminate danger without changing effectiveness or price

* + - * 1. If product failed balancing test on **foresight**, design would be **negligent** (*Micallef v. Miehle Co.*). Foresight Balancing:

Reasonable Mfr would have found out about risk

Would have balanced risk and benefit.

* + - * 1. *Grimshaw v. Ford*: Improper balancing of risk/utility because Ford knew that changing its design at a minimal cost would avoid 180 deaths, but devalued those lives significantly in CBA.

Massive punitive damages are against purpose of SL, which imposes costs for innocent culpability. Jury found there were heightened costs in this case because of the devaluation of life and **“cold calculation.”**

CBA was improper here given that deaths were the risk in question and improvements were feasible at low cost.

Choice argument (Buchanan) was offended, because Ford in effect chose for its consumers in deciding what value would be placed on their lives.

* + - 1. *Barker v. Lull*: Once P has shown a risk relating to the product and creating injury, the burden is on the defendant to show that benefits outweigh costs (unlike negligence, where that burden is on P) – so even if foresight balancing (b/c knowledge didn’t change), burden still on D. But also sets expectation test as standard – if product doesn’t perform as safely as reasonable consumer would expect.
         1. *SO STEPS ARE****: Negligence (foresight), shift B of P, Hindsight Balancing, Expectation Test***
         2. Important to distinguish known & unknown risks by mfr.
      2. **Exceptions**
         1. Unavoidable dangers

Second restatement: “Unavoidably unsafe products” (e.g., cigarettes, prescription drugs, guns, etc.) can’t be made safe without changing their fundamental nature.

But, some courts allow the argument that even if there is no alternative, the risk outweighs the utility so the product shouldn’t be sold.

Third Restatement: No need for unavoidably unsafe exception because the standard is reasonable safety; if utility exceeds hard, there is no defect.

* + - * 1. Unintended or unforeseeable uses

Third Restatement: Only applies to “foreseeable” risks; sellers aren’t required to foresee every possible misuse, only those that are reasonably foreseeable.

Even some foreseeable misuses might be so unreasonable that the seller should have no duty to design against them – although there may be a duty to warn.

Car collisions are unintended uses, but foreseeable, so that care manufacturers do have a duty to take reasonable precautions.

Misuse may also be a superseding cause of defect if it was unforeseeable.

* + - 1. **Strict Liability vs negligence for design defect**
         1. Third Restatement §2(b) (risk-utility approach): Design is defective when foreseeable risks could have been reduced or avoided by a reasonable alternative design, the omission of which renders the product not reasonably safe.

Third Restatement approach is thus a negligence-like approach, moving away from SL. P also has to prove that there is a reasonable alternative design, taking into account different costs and utilities and the value of consumer choice.

Also allows for “state of the art” defense – that there were no reasonable alternatives at time of production.

* + - 1. Contributory/Comparative Negligence
         1. Second Restatement: P’s contributory negligence isn’t a defense when P was merely negligent in failing to discover the defect or guard against its possibility. (But there is a bar on recovery when the product is *misused*, since the manufacturer isn’t expected to consider strange misuses.) But assumption of risk is a defense – if P knowingly subjected himself to product risk.
         2. Third restatement: P’s recovery can be reduced if P’s conduct is negligent and partly responsible for the harm (response to rise of comparative negligence), or if P assumes risk, but does *not* bar recovery.

Counterargument: How to compare D’s SL with P’s negligence?

Damages assigned based on causal responsibility, not fault.

* + - 1. **Failure to warn**
         1. **Risk is known to manufacturer (negligent failure to warn), not obvious and beyond ordinary consumer expectation**

Negligence-Based

Third Restatement: Product is defective when foreseeable risks of harm could have been reduced or avoided by reasonable instructions or warnings, the omission of which renders the product not reasonably safe.

**Do BPL – tends to be low B**. Hardest part of claim is usually “failed to do R&D,” but easier if just have to show “would have warned.”

Just because risk is inherent does not eliminate duty to warn.

*MacDonald v. Ortho Pharmaceutical Corp.*: Df manufactured birth control pills, made no mention of stroke in its booklet about risk, patient suffered stroke. Mfr full warning to prescribing physician wasn’t enough, was negligent in failure to warn on pills.

But what is effective warning?

Learned intermediary idea – giving warning to doctor (as “consumer”) often enough. But here, important to inform user directly.

FDA had approved warning – but compliance with regulatory statute is not a shield, just a factor.

Gave info about blood clotting disorder, but didn’t say “stroke.” Just say it.

Didn’t put users on adequate NOTICE of brain damage.

* + - * 1. **Risk is not known to manufacturer (Strict Liability Failure to warn)**

Regardless of state of the art, if the defective product proximately cause the plaintiff’s injuries, the manufacturer is strictly liable. The manufacturer is negligent if a reasonable manufacturer should have known and warned about the risk.

*Shanks v. Upjohn*: “If the plaintiff proves that the product as marketed posed a risk of injury to one who uses the product in a reasonably foreseeable manner and the product is marketed without adequate warnings of the risk, the product is defective.” **Rejects** state of the art defense.

Physician’s expectations govern (distinguishable from *MacDonald*: drugs in this case weren’t advertised to consumers or consumer-oriented).

*Beshada v. Johns-Manville Products Corp.*: Rejects state of the art as a negligence defense inapplicable to strict liability for failure to warn.

Where neg failure to warn focuses on the *conduct*, strict liability for failure to warn focuses on the *product*, and is hence *hindsight-based* (would the defendant have been negligent had he known what he knows now?). “A way to determine the dangerousness of the article, as distinguished from the seller’s culpability, is to assume the seller knew of the product’s propensity to injure as it did, and then to ask whether, with such knowledge, he would have been negligent in selling it without a warning.” (*Phillips v. Kimwood Machine Co.*)

Affirmative Misrepresentation: *Crocker v. Winthrop Laboratories* – D manufactured a drug thought to be non-addictive and harmless, and advertised it as such. Found strictly liable on basis of misrepresentation.

**Third Restatement: Harms from unforeseeable risks aren’t a basis of liability.**

* + - * 1. **Safeguards**

If the manufacturer makes a product that will be safe provided that there are no user mistakes, but knows that *some* users will make mistakes, is it negligent not to engineer the product including a safeguard that could be added? What if the cost of safeguard (B) is higher than the sum (B) of all user precautions, but we know that not everyone will meet the burden, so the sum of actual injury exceeds the B of the safeguard? (*Micallef v. Miehle Co.*)

If the cost of the safeguard is less than the cost of using the machine with care, and the use is unintended but foreseeable, then the manufacturer should be held liable (*Micallef*)

Who ends up being the CCA? Manufacturer is structural CCA, and user is situational CCA. Calabresi would prefer imposing costs on former, Posner on the latter, but even Posner would agree some degree of user negligence is to be expected.

Third Restatement – All forms of user mistakes should be taken into account. They would reduce but not bar recovery. Comparative. Abolishes defense of ordinary contributory negligence, but emphasizes a kind of user misconduct – misuse – that is so extreme that when it happens, it’s a complete defense against liability.

* + - * 1. **Obvious Dangers**

Even if a danger is obvious, it doesn’t necessarily eliminate the duty to warn. Buyers not only should be notified of danger, but should be aware of safer alternatives; warnings might also serve this purpose (*Liriano v. Hobart Corp.*)

* + - * 1. **Causation**

Defendant isn’t liable for failure to warn if it can be proven that a warning wouldn’t have prevented the accident from occurring – e.g., if the plaintiff never read any warning label.

* + - 1. **Market Share Liability**
         1. *Sindell v. Abbott:* Class of “DES daughters” sues companies marketing the drug, but don’t know which company’s drug put them in the situation. Held that since P joined a number of Ds who together represented a substantial (over 75%) portion of the market, she can proceed to judgment against all of them and they will be liable in proportion to market share.

The ultimate effect of this method isn’t much different from liability insurance, since each member of a liability insurance pool pays in proportion to the risk it throws out. The premium acts as a tax-risk, which would add up to be the practical result of a tort suit in which you could prove specific causation.

* 1. Proximate Causation***:*** Restatement on abnormally dangerous activity liability: “limited to the kind of harm, the possibility of which makes the activity dangerous” (i.e. foreseeable harm). If harm isn’t foreseeable, utilitarian arguments won’t work because D couldn’t have taken background safety measures.
  2. Comparative negligence weighed against SL
     1. *Marshall v. Ranne* (boar case): contributory negligence isn’t a defense to strict liability
     2. *Andrade v. Shiers*: strict liability weighed against plaintiff’s comparative negligence. But how to weigh fault against non-fault? Comparative responsibility vs. comparative fault.

1. **Principles of Compensation**
   1. **Sarge**
      1. Fault: A faulty actor should be liable and compensate the injured person
      2. Activity: a risky activity should pay, regardless of negligence, for harm from its characteristic risks
         1. Strict tort liability, different types of claims
      3. Choice: Personal choice whether or not to insure oneself, ability to get what one bargains for (Buchanan)
         1. Ex: Contract
      4. Need: Everyone should receive compensation necessary to meet basic needs
         1. Ex: Government benefit programs
   2. **Keeton**
      1. Fault
      2. Strict Accountability (Activity): Risky activity must pay its way out of fairness, prevent “unjust enrichment”
      3. Welfare/Need: Point at various social insurance programs and welfare programs.
2. **Non-Tort Plans**
   1. Based on administrative, rather than adjudicative, processes. Financing is specified rather than left to defendants. Involve attribution rules rather than liability rules.
   2. **Nonfault activity plans, actor-financed**
      1. **Workers Comp – exemplifies “planning”**
         1. 4 features
            1. Broad Attribution (arising out of)
            2. Simplified process
            3. Limits on compensation
            4. Insurance Program
         2. History:
            1. Legislatively enacted throughout the U.S. in the 1910s; all states now have worker’s comp schemes, as does the Federal Government.
            2. Found unconstitutional by NY Court of Appeals in *Ives v. South Buffalo R. Co* because it deprives employers of DP. NY then amended its Constitution and authorized a workers comp statute, and the Supreme Court upheld in *New York Central R v. White* (1917).
         3. Provides no-fault compensation for injuries “arising out of” employment, and replaces tort liability with a more efficient system while also lessening the amount of compensation.
            1. Tort compensates full medical costs, full wage loss, and individualized pain and suffering.
            2. Workers comp provides full medical coverage, but limited wage recovery (subject to scale-downs and to a maximum limit), and no individuated P&S (it would take time and money to find these damages).
            3. Abolishes tort as to the employer when workplace injury occurs, but not to third parties like suppliers or insurance providers (*Pratt v. Libery Mutual*) of accident prevention services.
            4. “Arising out of” employment

Positional risk doctrine (*Whetro v. Awkerman*): employees injured/killed in tornado can recover b/c their injuries arose out of employment. Even if job didn’t cause the injury, it brought Ps into contact with risk. The job was thus a but-for cause.

*Circle K Store v. Industrial Commission of Arizona*: Employee fell on her way out of work after throwing out trash in the parking lot. She wouldn’t have been there and suffered the injury but for her job; recovery is thus allowed.

* + - 1. Rationale
         1. Scale down of compensation incentivizes worker returning to work.

Posner: lump sum award by itself gives you incentive to go back to work.

Scale Down most affects high earners – notion that people who are advantaged should perhaps turn elsewhere for additional recovery (insurance, etc.)

* + - * 1. Efficiency of plans compared to tort. Don’t need fact-specific adjudication.
        2. Schedules keep you from having to do costly, individuated P&S calculations. (But often are arbitrary categories)
        3. Deterrent effect

Background Safety: Insurance

Employers required to have comp. insurance; employees may have loss insurance. If damages were covered by P’s loss insurance, the costs would end up externalized. But if they are covered by D/employer’s insurance, internalized.

Rating categories within insurance determine premiums from expected accidents within a particular category of work (e.g., loggers have to pay more than retailers)

Experience ratings then look at the particular company and whether they are more or less accident-prone.

But this only works with bigger firms, since lack of accidents in small firms might just be luck, too small to be experience rated.

As company gets larger, becomes self-insurer, since have predictive ability from past experience, have own risk pools.

* + 1. Federal Vaccine Act
       1. Sets up an industry financed compensation fund for harms created by an industry by taxing per dose – akin to effect of the *Sindell* case (each company paying proportionate to the risk it creates).
          1. Market allocation effect because price of vaccine higher.
       2. Distinguishable from workers comp because it doesn’t reward companies who manage to achieve greater safety, creating a problematic “flat tax.” No background safety effect. Vaccine plan financed by tax.
          1. Black Lung insurance program for miners different – victim first has to try to find and collect from a responsible operator, and only if they fail can they turn to the industry compensation fund.
    2. Nonfault activity plans, victim-financed
       1. Allows suits within tort if damages are above certain threshold (workers comp abolishes tort).
       2. Shortcomings of negligence system in auto accidents
          1. Negligence & Liability insurance as compensation scheme is inefficient.
          2. Expensive to try negligence claims
          3. Insurance goes mostly to the overhead of the system
          4. Inefficient as a payment mechanism
          5. Also, had tendency to overcompensate small claim and undercompensate large claims

Small claims, with P&S possibility, have a nuisance value, so insurance companies are induced to settle them out.

Large claims are often not brought at all. When they are brought, they tend to be settled for lower fraction of value than the small claims.

* + - 1. Savings/Advantages of shifting to no-fault scheme
         1. Much less costly to get compensation through no-fault portion. Much quicker.
         2. Efficiencies largely come from stopping 3 kinds of adjudications (fact-specific, expensive)

Don’t have to litigate Df’s negligence

Don’t have to litigate CNEg/Comparative Neg of claimant

Can’t litigate individuated P&S

* + - 1. Added costs
         1. More claims, people get to recover (advocates want this)
         2. But agent of insurance company is decider, cheaper
      2. Should threshold be higher/expansion of benefits be greater?
         1. Can have high-threshold plan not in balance, and advocates could say good deal b/c better compensating
      3. Policy
         1. Don’t lessen inducement to safety. What if bad driver harms a good driver? Under auto no-fault, lessening of deterrence for bad driver??
         2. But realistically, there’s insurance in liability fault system as well. Just shifting from one insurance system to another. We’re not shifting from a faulty actor paying out of pocket to one where they don’t.
         3. But there does seem to be a shift from 3rd party insurance to 1st party insurance. Ratings are fundamentally different. In 3rd party, rated on chance you hurt somebody else; 1st party, rated according to chance that you’ll be hurt.

Deterrent pressure is market allocation (cost of driving car), but still keep that in auto no-fault. Driving a car.

Fault advocate making too much out of cost pressure aspect of deterrence. Cost pressures are dwarfed by other deterrent pressures (death).

Whichever rating system you use, you will basically affect the drivers as actors

There are differences in 1st party/3rd party ratings, but not vast ones. The same rating category can work both ways.

Sometimes, though, they can diverge. A potential risk creator pays more for liability insurance than victim. Makes a difference for big truckers to be rated by liability than loss insurance.

If there is a valuable deterrence pressure, no reason it can’t maintain that ratings category under no-fault. Plans are engineered.

But what about bad driver hurting self? Won’t recover in fault system; in no-fault system, gets no-fault benefits. Is there less deterrence here?

But still self-interest, conscious, keeping drivers license, merit rating, protecting passengers . . . if chance of getting compensated is stimulus to harming your own car, you’re weird.

And barred where drugs & alcohol are attributed as cause of injury.

* + 1. New Zealand Alternative to Tort
       1. Abolishes unintentional tort, substitutes big plan for no-fault benefits for accidents
       2. 3 sub-parts
          1. Workplace
          2. Workers comp like enterprise liability scheme
       3. Highway
          1. Financed by gas tanks, per liter of gas
          2. Activity liability scheme. Everybody driving cars has to make contribution
       4. Everything else
          1. Product caused and medical injuries
          2. Off-the-job, off-the-highway injuries to non-earners in home/recreational activities

Not any well known area of risk/safety, but still paid for under scheme by general revenues

* + - 1. Rationale
         1. Fairness

Idea of social web of benefit

* + - * 1. Utilitarian theory wants cost of accidents targeted on some segment of society such that you’ll get pressure to safety. Resists having accidents paid for by everybody, spreading out over whole society. Would prefer more targeted attributions
        2. The fairness branch here would probably prefer them too. Would prefer to have person’s most intense circle of benefits pay for accidents, not random-ass diffuse accidents.
        3. Odd system – looks like reparations because not means tested. But rationale there is idea of basic need. There’s a social obligation on all of us to support people in serious need, but that doesn’t lead to idea of FULL reparation, but of basic support so people can participate as equals. NZ plan, in its fullest extension, seems like a disguised instance of principle of need rather than reparation idea.