**Torts Outline**

**POLICY CONSIDERATIONS OF TORT LAW**

* Purposes: Compensation; Deterrence; Punishment
* Freedom and Individual Autonomy. *Lamson* (hatchet; right to contract)
	+ Limited in *Hudson v. Craft* (boxing; some risks won’t allow)
	+ Put affirmative duties in *Kline v. 1500 Mass*
	+ Overrode contract clause in *Dalury* (ski)
* Chilling Effect on Valuable Behavior
* Aspiring to Better Norms/Society. *T.J. Hooper*/*Mayhew* (custom was not where it should be)
* Overcompensation. (NIED)
* Perceived Legitimacy of the Court. *Dillon* (need comp.; if deny, loose legit.)
* Notice. *Bird v. Holbrook* (defending property)
* Efficiency and Fairness. *Li v. Yellow Cab* (moving from CN to CmN)
* Flooding the Courts with Litigation. *Shaw* (tobacco); *Mitchell* (scared by horses);
* Evidentiary Issues/People Faking. *Mitchell*
* Progress of Society**.** *Brown v. Collins*; *Ryan* (house 130 ft. away fire)
	+ But sometimes make innovations pay their social costs. *Powell*
* Dynamism v. Static Standard. *Blythe* (frozen cap)
* Role of the Courts: Legislative v. Bench? *Li v. Yellow Cab* (court did gymnastics to modify statutory scheme than allowed CN but not CmN)
	+ Courts shouldn’t set rules they are unfamiliar with. *Helling*
* Reflecting Changing Technology/Society. *Rowland* (get rid of land categories); *MacDonald v. Ortho* (changing relationship w/ patient)
* Expanding Liability Generally: IIED, NIED, Market Share Liability (relaxing causation requirements), Contributory 🡪 Comparative Causation, Harm to Third Parties (*Tarasoff*), Products Liability (generally expanding), No duty to trespassers 🡪 *Rowland*.
	+ Want to expand liability so juries don’t take into own hands. Create specific exceptions.
* Contracting liability: NIED cases (said no to boyfriend/girlfriends /close friends/aunts for familial relationships, and have to see); duty to take care on land (relaxed liability for natural harms; recreational use); post-*Kline* contraction – *Mastriano* (taxi only had to ensure safe exit); *Nivens* (did not have to provide security guards); *Atcovits v. Gulph Mills* (tennis court did not have to provide defibrillator); limits on duty to warn in products liability – *Hood* (don’t have to list everything on warning); limits on foreseeability in intentional torts, *Shaw*.
* Changing to adapt to new fact scenarios. *Dillon v. Legg* (mother outside zone of danger)
* Putting liability on those we want to change. *Hudson v. Craft* (illegal boxing); *Powell v. Fall* (dangerous machines)
* Putting burden on party who is in best position to affect change: *Kline* (dangerous apartment); *Dalury* (best position to ensure ski safety).
* Respecting Industry (traditional) vs. Reject Custom/Norms. *Mayhew* (poop hole); *TJ Hooper* (barges & radios)
	+ Originally companies NOT insurers of the public 🡪 now more so, e.g. products liability, *Kline*
* Protect Human Life. *Eckert* (saving kid from rail road)
* Don’t want to overly burden others. *Carroll* (BPL)
* Tort law cares about children as future of society. *Roberts v. Ring*
* Free Speech. *Hustler Magazine*; *Snyder v. Phelps*
* Limited funds for P. *Norfolk* (asbestos and ED)
* Eliminate fake distinctions. *Spano* (dynamite, non-physical invasion)

**INTENTIONAL TORTS**

* Types of Intentional Torts:
	+ Battery
	+ Trespass
	+ Assault
	+ Offensive Battery
	+ False Imprisonment
	+ IIED (intentional infliction of emotional distress)
* Prima Facie Elements
	+ Intent
		- Desire/purpose
		- Knowledge with substantial certainty
	+ Causation
	+ Injury

**Physical Harms**

#Battery

* BATTERY: (1) act by P brings about a **harmful or offensive contact** with the D’s person, (2) **caused** by the D, (3) with the **required intent**.
	+ P needn’t be aware of the contact at the time.
	+ Person includes anything connect w/ them – clothes, handbag, etc.
	+ Don’t have to intend harm—only contact.
		- Harmful contact 🡪 one that produces actual injury, pain, or disfigurement.
		- Offensive contact 🡪 offends a reasonable sense of personal dignity (if it’s hostile, insulting, loathsome, or unduly personal)
* [Unlawful Intent] *Vosburg v. Putney* (boy tapped knee of kid in class; liable)
	+ New Framework**: intent was unlawful** OR **defendant is at fault**.
		- Unlawful intent = act is unlawful (unlawful to kick in class). **Don’t have to intend to do harm***.*  **Liable for unlawful intent**
		- Foreseeability **does not matter*.*** Liable for ALL damages, whether you see them or not.
			* Intention to perform the act is all that matters.
* [Two Types Of Intent] *Garratt v. Dailey* (5 year old moves chair, women gets hurt; liable)
	+ Two Part Test (either prong qualifies)
		- (1) **Desire or purpose** to cause the harm.
		- (2) Knowledge with **substantial certainty** that harm **will** occur.
			* Not “could happen,” or quickly would be everything.
	+ “Contact” includes moving the chair.
* [RST & RTT]: Adopts *Vosburg* and *Garratt*
	+ **RST 13**: battery (harmful contact)
		- Actor is subject to liability to another for battery if
			* He acts **intending to cause a harmful or offensive contact** with the person of the other or a third person, or an **imminent apprehension** of such a contact, and
			* A harmful contact with the person of the other **direct or indirectly results**
	+ **RTT 1**: Intent
		- A person acts with the intent to produce a consequence if: (a) the person acts with the **purpose** of producing that consequence; or (b) the person acts **knowing** that the consequence is substantially certain to result
* [Extreme Intent] *White v. University of Idaho* (Prof touched back of piano player)
	+ **Intent to touch** is sufficient. No intent to harm or offend necessary.
		- Very plaintiff friendly. Diluted sense of intent. Lighter than restatement.
* [General Knowledge] *Shaw v. Brown & Williamson Tobacco Corp* (claimed battery for secondhand smoke inhalation)
	+ NOT sufficient intent. Generalized knowledge **insufficient,** no **substantial degree of certainty**. There must be some specificity w/ regards to the person harmed (you can’t just have substantial certainty someone will be hurt but not who).
	+ Pushes back on contact. Courts unwilling to go too far back.
* [Transferred Intent] *Talmage v. Smith* (threw stick, hit wrong person)
	+ Intent to hit someone, doesn’t matter who.
	+ No transferred intent if you **get the person you intended**. Mistake is not TI.
* [Range Of Intent]
	+ Intent to voluntary act 🡪 contact 🡪 harmful/offense contact 🡪 full range of consequences.
	+ Policy concerns
		- What type of intent and what the objects of the intern should be are chosen based on how big or small want to make the world of intentional torts
		- If want the world to be very small, and very fault-based only then go with desire/purpose for full range of consequences
		- If want the world to be huge, then go with desire/purpose or knowledge for moving body
		- Want to balance compensation rationale that encourages a wider view with the chilling effect that it will have on people’s behavior
		- Ultimately it’s a decision about what sort of society we want, what sort of social contracts we are allowing courts to enforce between us

#Trespass

* [Traditional Trespass] *Dougherty v. Stepp* (Thought land was his, entered land to survey; no harm done)
	+ **Willful entry** constitutes trespass.
	+ Intent = making contact with ground. No harmful intent. No need to show damage.
	+ Highlights importance of property rights in tort law. Sanctity of castle.
* [Strict Liability Intent]
	+ *Hutchinson v. Smimmelfeder* (earth falls into neighbor’s lot; trespass)
	+ *Smith v. Smith* (eaves of barn hanging over; trespass)
	+ *Cleveland Park Club v. Perry* (child puts rubber ball in pool; trespass)
		- Intent controlling is the intent to complete physical act.

**Emotional Harms**

#Assault

* ASSAULT: **intentional act** causing **apprehension** of an **imminent** harmful or offensive contact.
	+ Elements: Intent, mental contact (apprehension…), injury, causation.
	+ Won’t work if you find out after the fact.
	+ Apprehension must be ***reasonable***, unless person knows weakness and exploits it.
* *I. de S. and Wife v. W. de S.* (D insulted and tried to hit women w/ hatchet; missed, no harm done)
	+ Harm is assault. Can recover.
		- Apprehension v. fear: **don’t have to be afraid** of contact to have apprehension.
	+ [Verbal] *Tuberville v. Savage* (P put hand on sword, said “if judge were not in town”)
		- No assault with **no intention to act**.

#Offensive Battery

* **Offensive**, but NOT harmful contact. Physical contact that **causes emotional damage**.
	+ Need injury. Can’t have tort if you weren’t offended.
	+ [GENERAL RULE] – offensive conduct is **objective standard**, unless person knows weakness and exploits it.
* [Mental Contact] *Alcorn v. Mitchell* (D spit on P outside courtroom)
	+ Punitive damages for malice. “…vindictive damages where there are circumstances of malice, willfulness, wantonness, outrage and indignity attending the wrong complained of.”

#False Imprisonment

* **Mental** harm due to **physical incarceration**. 1**) act/omission** that **confines/restrains** the P to a bounded area, 2) **intent**, 3) **causation**.
	+ Can work if P is restrained by force (physical/threats) directed at immediate family or P’s property (purse).
	+ Does NOT work for **moral pressure** or **future threats**.
* [Requirements] *Bird v Jones* (blocking one end of a public highway)
	+ FI depends on **effective confinement**, not simply restriction of movement. Three walls do not make a prison.
* Area may be large, need not be stationary, e.g. boat. *SRT Sec. 36 (b)*
	+ Jury decides where size of area means exclusion, not confinement.
* Usually defendant must **intend** to confine plaintiff. No liability for negligently caused imprisonments.
	+ - For example, no liability for locking someone in a room you thought was empty, thought person had a key, thought there was another door, etc.
		- If a person suffers serious physical harm from negligently caused imprisonment, then normal negligence principles take over.
* [Consent]
	+ **Consent is an effective defense** against false imprisonment. If consent is given it cannot easily be revoked. *Herd v. Weardale Steel, Coal & Coke Co.* (miner sent to mine for normal shift but wanted to come up for alleged safety concerns)
* [Imprisonment Through Words]
	+ **Prisons can be intangible** like keeping travel documents to restrict travel or spreading lies about potential dangers outside an area. *Chellen v. John Pickle Co.* (indian workers brought to US)
* Persons must know they are imprisoned **while they’re imprisoned**. Can’t find out afterward.
* Prisoner might have a duty to try **reasonable means** to escape.
	+ Non-trivial risk not required to take. Easy and reasonable = required.
* FI must be tied to **physical**. Can’t use emotional threats to confine someone
	+ E.g. “stay here or I won’t love you anymore”
* Mistaken identity is no excuse 🡪 transferred intent.

#Intentional Infliction of Emotional Distress (#IIED)

* *RST §46 – Outrageous Conduct Causing Severe Emotional Distress*
	+ (1) One who by **extreme and outrageous** conduct **intentionally or recklessly** causes **severe emotional distress** to another is subject to liability for such emotional distress, and if bodily harm to the other results form it, for such bodily harm.
	+ (2) Where such conduct is directed at a **third person**, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
		- (a) to a member of such person’s **immediate family** who is **present at the time**, whether or not such distress results in bodily harm, or
		- (b) to any other person who is **present at the time**, if such distress **results in bodily harm**.
* [Classic Case] *Wilkinson v Downton* (joked that husband had smashed up leg, resulted in severe physical harm)
	+ Intent to cause physical harm, lead to severe emotional distress
	+ Did not fit into traditional tort 🡪 new tort: tort of outrage.
	+ Also would work for repeated insults or exploiting known weakness.
* [Other Examples]
	+ Strong-arm tactics. *State Rubbish Collectors Association v. Siliznoff* [CB. 72].
	+ Aggressive bill collecting tactics: *George v. Jordan Marsh Co.* [CB. 73]
	+ Outrageous professional conduct (doctor refused to treat victim of car accident, made them wait outside in rain). *Rockhill v. Pollard* [CB. 73]
	+ Denying access to a family member’s dead body: *Estate of Trentadue v. United States* [CB. 73]
	+ Racial insults: *Patterson v. McLean Credit Union* [CB. 73]
* **First Amendment rights** can temper the scope of the tort of intentional infliction of emotional distress. There is a tort, but first amendment protection too important.
	+ Discussion centers on whether the speech at issue is public or private in nature. i.e. the content of the speech deals with public issues or private attacks.
		- *Hustler Magazine v. Farwell* (fake interview with Farwell) [CB. 74]: public figure, political cartoon, parody. **Public figure = protected speech**.
		- *Snyder v. Phelps* (Westboro Baptist Church protest) [Supp. 54]: malicious intent and victims emotionally vulnerable but protest dealt with public issues on public space, not targeted at specific family.
			* Government CAN have reasonable time, manner, place restrictions.

**Defenses to Intentional Torts**

#Consent– for battery, need **absence of consent**.

* D is NOT liable for tortious act if P ***consented*** to D’s act. Consent may be given **expressly**; it may be implied from custom, conduct, or words, or by law.
	+ Consent by mistake, consent is still valid unless mistake is caused by D or D knows of mistake and takes advantage.
* *Mohr v. Williams* (in surgery, doctor operated on different ear than planned; family doctor oked)
	+ Court said no intent. “Medicially right” and “reasonably thought there was consent” insufficient. Harmful contact to left ear = battery.
	+ Rule: unlawful or unauthorized touching, excluding pleasantries, constitutes battery.
		- [Implied Consent] Doctrine is bent a little in **medical emergencies**.
* Consent is only effective if **person had a choice**. Forced consent NOT consent. Needs to be **informed**.
* [Implied In Law No Consent] *Hudson v. Craft* (promoter solicited 18 yr old for illegal fight; boy consented and sustained injury; promoter liable)
	+ Cannot **consent to crime**.
	+ Policy: done to protect participants. Go after promoter to deter illegal fights.
	+ 2nd example: statutory rape. CANNOT CONSENT.
* [Implied In Law Consent]
	+ **Emergencies**
* [Implied In Fact Consent] *O’Brien v. Cunard Steamship Co.* (woman held out her arm for vaccination)
	+ Indicated consent by conduct.
	+ Implied consent to be touched on playground, subways, etc.
* [Substitutionary Consent] – handicaps, children, infants, etc.
	+ Has person been authorized? Who is benefiting? Different weight to diff. authorities?
* [Sports Cases]
	+ Hard to draw line. What’s “in the rules”? E.g. some rules are broken all the time.

#Insanity

* [Traditional Approach]
	+ **Insanity is irrelevant**. Insane person almost always liable.
	+ Gives every possible incentive to restrain.
	+ *McGuire v. Almy* (hired nurse entered room of insane person who threatened to hit; nurse hit; liable)
		- Rule: insane person **liable in same circumstances as normal person.**
		- Court refused to apply “reasonable insane person” standard.
* [Exception] *Anicet v. Gant* (worker hit by insane person confined to lowest functioning ward in hospital)
	+ Worker under contract to assume certain risks. Like fireman. **Policy reasons don’t apply** 🡪 Anicet already maximally restrained.
	+ Other ways to compensate – workers comp?

#Self – Defense

* Basic Standard: based on reasonableness. You can use only that force that ***reasonably appears*** to be **necessary to prevent the harm**. Protected if accidently injured bystanders.
	+ SD is limited to the right to use force to prevent commission of a tort. **NOT for retaliation**.
	+ SD cannot be used by initial aggressor. However, if other used deadly force against an aggressor who only used nondeadly force, the aggressor may defend himself w/ deadly force.
	+ Two concepts merge—(1) intent and (2) negligence.
	+ Policy Determinations: Whose standards of reasonableness? What kinds of risks must be assumed before defense? What means of force are available? In fact or good faith necessary?
		- We want ppl to defend themselves. Leads to less violence, better society.
* *Courvoisier v. Raymond* (man shot at police officer he thought belong to group of thugs attacking his store late at night)
	+ Standard: **reasonable person in light of the circumstances**.
		- Need to actually believer they’re in danger, reasonable belief, and reasonable forced used.
		- Considerations: visibility, degree of threat, proximity to assets, declarations and actions of parties, temporal proximity of events, age/physical abilities.
* [Limits On Self Defense]
	+ (1) Duty to retreat – **varies with diff. jurisdictions**
		- Force = **less** than death/serious bodily injury 🡪 **no** duty to retreat.
		- Force = **more** than death/serious bodily injury 🡪 duty to retreat.
			* EXCEPT in the home, but **force needs to = threat**.
	+ (2) Know person is innocent (and not in the home)

#Defense of Property

* Allowed to use **reasonable force** to protect property, but more limited than self-defense.
* [Excessive Force] *Bird v. Holbrook* (D rented, occupied walled garden with valuable tulips, someone stole some, set up wire and spring gun, 19-year-old scaled wall to fetch pea-fowl, shot)
	+ **Need public notice** when such violent means of protections are used. No man can do indirectly that which he is forbidden to do directly.
	+ *Katko v. Briney* (antiques kept getting robbed, gave no notice of shot gun trap, P shot in legs and perm injured)
		- Must use **reasonable force**. Cannot use means that will **take human lif**e or **inflict great bodily injury**.

#Necessity

* *Ploof v. Putnam* (poor family docked boat during storm; caretaker unhooked)
	+ Allowed to trespass under necessity. **No affirmative duty** to help, but you cannot stop.
		- Not liable for inaction, e.g., refusing to catch rope.
* [Liability] *Vincent v. Lake Erie Transportation Co.* (Ship anchored to wharf during storm; tied and retied boat as fasts broke; wharf injured)
	+ **Right to be there** b/c of necessity (*Ploof*), but you **have to compensate** for damages.
		- Not liable for damage if “act of God.” No intent.
		- **Intentionally harmed dock by re-tying.**

**#NON-INTENTIONAL TORTS: NEGLIGENCE & STRICT LIABILITY** (mostly negligence)

* Elements
	+ Duty (to act or refrain from acting) – general duty of care is imposed on all human activity. Ordinary, prudent, reasonable person. Take precautions to creating unreasonable risks. No duty to take precautions against events that cannot reasonably be foreseen.
	+ Breach (of duty by failing to conform to required standard of care; act or omission)
	+ Cause
		- Causation in fact
		- Proximate causation
	+ Injury
* Standard of Care
	+ Reasonable Person
	+ BPL test
	+ Custom
	+ Statutes
	+ Common carrier exception
	+ Medical exception

**Historical Perspective**

* [Fault-Based Approach] *Brown v Kendall* (D hits P with stick when trying to break up dogs)
	+ Must have unlawful intent or **be at fault**. Standard is **“ordinary care**.” Vary w/circumstance
	+ Plaintiff has burden of proof.
* [Strict Liability] *Fletcher v Rylands* (guy built reservoir on land; water flooded P’s property through mines)
	+ the person who for **his own purpose** brings on his lands and collects and keeps there anything **likely to do mischief** (***non-natural use***), if it escapes, must keep it in at his peril.
		- NOT strictly liable for **natural uses**.
		- Doesn’t work if stayed wholly on one person’s land. Need to be **land to land**.
		- Also, claim cannot include a claim for death/personal injury, since such a claim does not relate to any right in or enjoyment of land.
		- Non-natural?
			* 1) artificial or man-made
			* 2) unreasonable or inappropriate. Adopted in *Rickards v. Lothian* (proper supply of water to business building was outside scope of *Rylands*. Water system was reasonable/necessary, NOT non-natural)
			* Substantial amount of chemicals for tannery found to be non-natural use, but won on appeal. *Cambridge Water v. Easter Counties Leather*
	+ *Rylands* did NOT apply b/c damage caused from **act of God**. *Nichols v. Marsland* (ornamental pools spilled over during heavy rain)
	+ *Rylands* did NOT apply when rats ate through rain-gutter box collecting water. Person brought on property for ***mutual benefit*** for tenants in building. *Carstairs v. Taylor*
* [SL Hinders Progress] *Brown v Collins* (lost control of horses when scared by train; damaged property)
	+ Need **fault-based standard** (show they are doing something wrong). If SL🡪 no one can act, no progress, would not rise above barbarism. Price of civilization. **We want action and progress.**
	+ *Rylands* also rejected. Become member of civilized society, compelled to give up many of my natural rights. We must have factories, machinery, dams, canals and railroads. If have upon lands, and are not a nuisance, then NOT liable if they accidentally and unavoidably damage neighbor. *Losee v. Buchanan*
	+ *Rylands* reject in Texas, where storage of water in large cisterns was a ***“natural” use of land***. *Turner v. Big Lake Oil*
	+ Now, only 7 states reject *Rylands*; 30 accept it.
* [Liability Based On Benefit] *Powell v Fall* (engine sparks set hay stack on fire)
	+ A person that **reaps the reward** for the use of a ***dangerous machine*** **should bear the cost** of injury it does to someone else. Not breaking statute, but still have to pay for damages.
		- Rejects *Brown*. If the value of the use of the machine is not greater than the cost to compensate for injury, the use of the machine should be suppressed.
* [Holmes Argument] Not about causality, but foreseeability. Need **fault-based approach**.
	+ Should be **negligence**, NOT strict liability. No liability in absence of negligence w/ no reasonable foreseeability.
		- SL would lead to absurd liability of long chain of events. We cut it off b/c we don’t think they’re at fault.
		- We don’t hold ppl liable for all voluntary conduct. We ask, who’s at fault?

**The #Reasonable Person**

* More subjective 🡪 (1) difficulties of proof (2) more costs on P, less deterrence.
* [Capacity] *Vaughn v Menlove* (D’s rick of hay caught on fire and burned the P’s cottages; warned beforehand, said he would “chance it”)
	+ Reasonable/ordinary person = **average intelligence**. Objective standard. Not based on abilities or faculties of D.
	+ Policy concerns
		- Ppl can game system
		- Too hard to prove it wasn’t “best judgement”
		- Standard is vague 🡪 no notice.
		- How do you deter?
* [#Age]
	+ Original rule: 7 yrs and under 🡪 not negligent. Now: 5 yrs and under.
	+ [Elderly Lose] *Roberts v Ring* (77 yr old liable for hitting 7 yr old who ran into street; both negligent; both claim reasonable for age)
		- Age taken into account for young (standard=age and maturity), but NOT for old (standard=ordinary prudent normal person).
		- Policy: **Man had notice**. Knew he was old 🡪 extra precaution. **Old ppl are past. Young are future.** Kids need to develop/practice. Social utility.
	+ [Adult-Like] *Daniels v Evans* (kid on motorcycle hit adult driver, died)
		- **Adult-like, high-risk activity**, minors held to **adult standard**.
			* Applies to BOTH child plaintiffs and child defendants.
		- Policy: Driver must have NOTICE. Expects other adult drivers.
		- [Other Scenarios]
			* Distinguished in *Hudson Connor v. Putney*, can see kids behind the wheel of golf cart. Doesn’t require a license.
			* No licence required to ski 🡪 not an adult-like activity. *Gross v. Allen*
			* Operation of speed boat adult-like, even tho no license required. *Dellwo v. Pearson*
			* Adult standard for motorcycles. *Harrelson v. Whitehead*
			* Adult standard for tractor-propelled stalk cutter. *Jackson v. McCuiston*
			* Firearms not adult-like b/c dear hunting not exclusive adult activity. *Purtle v. Shelton*
				+ Third Restatement: handling firearms IS adult-like. **Majority of courts refuse to apply adult standard.**
* [Mental Delusion] *Breunig v. American Family Insurance Co.* (lady had delusion while driving, tried to fly like batman)
	+ Mental delusions are **possible relevant** to standard applied (not traditional harsh approach, *Vaughn*). Must **affect ability** to perform/understand duty. Must be **absence of notice**.
		- If D is **incapable of notice 🡪 relevant**.
		- If D **had notice** 🡪 NOT a defense.
	+ [RTT] Adult D’s mental and emotional disability **generally not considered**.
		- Courts tend to allow [SUDDEN INCAPACITATION] from **physical injury**, but NOT from **mental illness**.
		- Several courts reject RTT and apply *Breunig*. D held liable b/c she had notice of mental breakdown. *Ramey v. Knorr*.
		- *Breunig* narrowed when applied in institutionalized settings.
* [Super Abilities]
	+ Generally, no. Not higher standard. UNLESS person **creates expectations**. Ex. doctor indicates special expertise. Has to **claim/formally advertise**.
* [Anticipating Disability] *Fletcher v. City of Aberdeen* (blind man falls into hole w/o barricades)
	+ City has duty to provide protection for **all persons**, including those with physical disabilities.
	+ [RTT] – actor w/ physical disability has **standard of care of person with that disability**.
		- Generally allow categorical medical disabilities – deaf, blind, etc.
* [Wealth] $$ does NOT affect standard of care. *Denver & Rio Grande R.R. v. Peterson*

**Calculus of #Risk** (judicial efforts to fashion/apply a standard of reasonable care)

* [Forseeability] *Blyth v. Birmingham Water Works* (severe storm encrusted stopper with ice; house flooded)
	+ Not liable if risk is not **reasonable foreseeable** (e.g. crazy storm).
		- Foreseeability = average or ordinary. “average circumstances in ordinary years”
		- Very D friendly. Not aspirational. Static.
		- Criticism: want ppl to **respond** to un-ordinary circumstances with **heightened standard of care**. Standard lacks dynamism. Mistake to treat negligence at **single point**.
* [Value Of Activity] *Eckert v. Long Island R.R.* (man saves child from train; injures himself in process and dies)
	+ No contributory negligence in trying to save another’s life if not rash/reckless. Not enough to say conduct causes foreseeable risk (one-sided). Need to also look at **value** of activity.
		- Risk big, then value of object needs to be big. Would NOT work for **own purpose** (*Ryland*) or **property**. Intuitive **risk/benefit analysis**.
		- Railroad **still has to be negligent**. Doesn’t matter if not.
	+ [Terry Factors] – essence of negligence is **unreasonableness**.
		- (1) Magnitude of risk.
		- (2) Value/importance of object exposed to risk.
		- (3) Collateral object (reason person takes risk)
		- (4) Probability collateral object will be attained by risky behavior (utility of risk)
		- (5) Probability collateral object will not be attained if not for risky behavior (necessity of risk)
* [Duty To Two Classes] *Cooley v. Public Service Co.* (D constructed non-insulated lines above insolated lines, storms knocked D’s power lines🡪hit other wires🡪violent agitation and loud noise through P’s phone🡪physical injuries)
	+ Can’t have two conflicting duties that are simultaneously impossible. Protect class **most likely to suffer**. **Reasonable balance** between competing risks given **all circumstances**.
		- Don’t want “liable if you do, liable if you don’t.”
		- Problem: not negligent now, but what about when you built wire? Temporal scheme.
* [#BPL/Learned Hand Test] *United States v. Carroll Towing* (barge sank during normal hours while caretaker wasn’t on board)
	+ If B < PL 🡪 negligent. **Economic interpretation of negligence.**
		- B: Burden of adequate precautions
		- P: probability of risk being realized
		- L: magnitude/gravity of risk
	+ Critique:
		- Is economic efficiency point of tort law?
		- What about notions of morality?
		- How do you assign #’s?
		- Relevant, but not conclusive?
		- Many different types of “B’s” and “L’s”
		- Really expensive for P to calculate (burden of proof)
	+ [RTT] – also takes **balancing approach**
		- Negligence = reasonable care under **all** circumstances. Factors to consider: foreseeable **likelihood** of harm, foreseeable **severity** of harm, **burden of precautions** to eliminate/reduce risk.
* [Common Carrier] *Andrews v. United Airlines* (baggage fell from overhead bins)
	+ BPL applied, but “utmost care” required b/c airline common carrier.
		- BPL applied but not decisive.
	+ Slipping in railroad station does NOT require **utmost care** b/c not “distinctive railroad operation.” *Kelly v. Manhattan*

**#Custom**

* Custom as **sword and shield** (asymmetric)
	+ Compliance w/ custom is **evidence** of non-negligence
	+ Non-compliance w/ custom is **significant indicator** of negligence.
		- Custom dispositive? Relevant? Irrelevant?
	+ **Arg. For**: easy, reliable (rather than jury guessing). Sense of fairness in regard to expectations.
	+ **Arg. Against**: Not aspirational. Forces that create custom are broken/corrupt.
	+ **Older cases**: Custom more dispositive.
	+ **Later cases**: Custom more relevant than dispositive.
		- Non-compliance more weighty than compliance.
		- **Internal rules** used as evidence? Could create **perverse incentives**, but some courts allow. P could have relied on standards.
	+ **Custom most relevant in medical sphere**.
* [Traditional] *Titus v. Bradford, B. & K. R. Co.* (railroad cars with round bottoms fell off train)
	+ CUSTOM DESPOSTIVE. No negligence if **in line with custom** (**industry standards**). Custom = usual and ordinary way. **Proxy for reasonableness**.
		- Assumes a level of good faith in industry (that they are best position to set standards)
		- Worry that judges/juries will make mistakes by constantly second-guessing industries. Don’t want to interfere with marketplace.
* [Reject Custom] *Mayhew v. Sullivan Mining Co.* (made hole in corner of platform w/o guards; consistent with industry custom)
	+ CUSTOM IRRELEVANT. “Custom” or “average” have **no proper place** in definition of ordinary care. **Negligence is negligence**, no matter what industry says.
	+ Critique: what about assumption of risk? Ppl **know** custom. Know risks they’re assuming.
	+ *Mayhew* gained little following (both then and today)
* [Middle Ground] *The T.J. Hooper* (didn’t have radio in tugboat; caught in weather)
	+ Most cases reasonable prudence = common prudence (custom). BUT some industries **lag behind**. Universal disregard does NOT excuse omission. **Courts must decide what is required** 🡪 BPL analysis.
		- DC looked to custom, but Circuit court said **should have done BPL**.
* [RTT]
	+ Downgrades the role of custom. Compliance with custom is **evidence**, but NOT preclusive of negligence. Departure from custom **evidence of negligence**, but NOT conclusive.
* [Medical] – more willingness to follow custom. Business is to **minimize injury**. Strong **incentive structure**. Culture is different. Less worry about industry standards. More worry about second-guessing. Also, **licensing commission** in place. **Regulated industry**. Assumption is **custom is right**.
	+ *Lama v. Borras* (back surgery; didn’t do customary “conservative treatment”)
		- Negligent for **not following custom**, but **causation** was tougher issue. Hard to show **what would have happened**. If risk that made negligent was foreseeable 🡪 go to jury. Fairly light standard.
	+ **“Two Schools” Doctrine**: if two schools of though exist for treatment, can comply with **either one**.
		- Worried about chilling change and progress.
	+ Physician not liable for any resulting injuries if exercises degree/skill **commonly applied** under all the circumstances by **average prudent reputable physician**.
		- Purely factual. Unlike normative “reasonable care” standard for non-professionals.
	+ [Breaking Custom] Short period of **strict liability** following *Helling v. Carey* (BPL analysis; cheap test but custom didn’t require it), but swift statutory response shut down. Customary care standard survived.
		- Problem: if SL 🡪 “B” is not small. Tests required for **everyone**. Also could lead to false positives. Risk of courts saying “B is easy, do it.”
	+ [Locality Rule] **Locality rule died** under *Brune v. Belinkoff*. Doctor must act like **average** physician. Can take into account **medical resources available**.
		- R: riskier procedures. Doctors are more specialized. No longer “jack of all trades.” More communication. National community w/ shared standards. Technology overcomes locality arguments. Nationalized training.
	+ Debate over diff standard for residents v. doctors.
	+ Expert testimony generally required to determine SoC in medical malpractice. Drug package inserts and PDR references are not enough.

**#Statutes & Regulations**

* Statutes proscribe standard of conduct, almost always have **own penalty scheme**. When **silent**, do P have **private right of action?** If legislature says not relevant 🡪 not relevant (statute trumps CL).
* [Traditional Approach]
	+ Compliance = no tort. Non-compliance = automatic tort (*Schmitz v. Canadian Pacific Ry. Co.*)
		- Over time, boundaries have become less clear.
	+ *Thayer* – violation of statute is **negligence per se**. Don’t want judges/juries 2nd-guessing legislature.
		- **RTT** – Negligent if violates statute designed to protect **type of accident** and w/in **class of persons** statute is designed to protect.
			* Judgment of legislature privileged over jury assessment. **Later-enacted statutes** can be admitted as **evidence of negligence** (depending on temporal distance), but NOT negligence per se.
			* **Lack of license** NOT negligence per se nor evidence of negligence unless D has violated “substantive safety standards” enforced by licensing requirement.
* [Purpose] *Osborne v. McMasters* (sold deadly poison w/o label)
	+ **Notes:** violation does NOT equal negligence per se. Must look at **purpose** of statute.
		- Violation could be dispositive/evidence/prima facie evidence/irrelevant.
	+ Three possible functions of statutes in tort action:
		- (1) statute **creates** a private right of action (can sue if D breaks it)
		- (2) p can bring CL negligenge suit. D’s violation of statue may consitutute **negligence per se**.
		- (3) If not negligence per se, P can still argue D was negligent.
	+ [Broad] *Stimpson v. Wellington Service Corp.* (truck broke pipes in nearby building)
		- Statue had **dual purpose** (injury streets AND nearby property)
	+ [Narrow] *Burnett v. Imerys Marble, Inc.* (fell off marble truck trying to put tarps on)
		- P not a miner. Danger not associated with mining. Not as statue was **designed for**, even tho truck failed to comply with regulations.
	+ [Precise] *Grris v. Scott* (sheep not penned on boat; washed overboard)
		- Act targeted at **disease**. Not ***aimed***at that risk.
* [#License]
	+ Reasons that license has not been renewed **might not relate** to operator’s lack of skill. *Michaels v. Avitech*
	+ Lack of license is **irrelevant** unless connected w/ injury. Should be judged by standard of licensed doctor. Counter-intuitive. *Brown v. Shyne*
* [Causation] *Martin v. Herzog* (dead P was driving buggy w/o lights in violation of statute)
	+ Statutory violation is negligence per se, BUT that does not mean violation ***caused*** harm. Negligence, but NOT always **contributory negligence.**
		- Shift from looking at D to looking at P.
	+ Must look at ***intent of legislature*** in applying *Martin*. Violated statute, but allowed exception given intent. *Tedla v. Ellman* (pushing junk down highway after dark; walking on wrong side of road against statute)
		- *Tedla* endorsed by **both Restatements**.
			* Covered if compliance would involve greater risk than non-compliance.
			* Also, violation may be excused in cases of **necessity, emergency, or by reason of incapacity**.
			* RTT excuses violation if action exercised **reasonable care** in attempting to comply.

**Plaintiff’s Conduct: Contributory Negligence, Assumption of Risk, and Comparative Negligence**

#Contributory Negligence

* CN an **affirmative defense** by D. Combines w/ D negligence to cause harm.
	+ Formula for determine negligence same as ordinary negligence.
	+ **BoP** is on D. Though for a time, a minority placed it on P.
* [Basic Doctrine] *Butterfield v. Forrester* (riding fast on horse, hit by pole he didn’t see)
	+ **Recovery barred** if not taking **reasonable and ordinary care**.
		- Care defined by **non-negligent conduct**.
	+ Should you have to anticipate potential negligence?
		- Yes: Ppl are often negligent. Easier for tort law to reduce damages.
		- No: Make D more careful. Not fair to P (don’t want to infringe on autonomy/independence).
* [Casuation] *Gyerman v. United States Lines Co.* (unloading fish meal sacks; stacked wrong; recovery barred at lower court b/c P didn’t stop working)
	+ P contributory negligent, but that was NOT **proximate cause** of injury. Can recover.
		- Negligence has to **contribute**. Need to ask precise question, not just “but-for” question.
		- Can construe purposes of statutes/rules that caused negligence to be **broad or narrow**.
	+ **RST §465**: Contributing cause if P negligence is **substantial factor** and there is no rule restricting behavior.
		- P negligence not contributing if not **“within the risk”** of rule barring behavior. *Smithwick v. Hall & Upson Co.* (went to forbidden part of scaffold and house collapses; forbidden b/c of slippage concerns)
* [Statute]
	+ If D has **violated statute**, evidence of CN and AoR will be barred. *Koenig v. Patrick Construction Corp.*
	+ If no defective workplace condition is shown, contributory negligence bars recovery. *Robinson v. East Medical Center* (P fell off top of latter he stood on)
* [Medical]
	+ Doctor superior knowledge and expertise may negate critical elements of CN. Higher standard. *Dunphy v. Kaiser*
* [Custodial Care]
	+ No contributory negligence if you are in **custodial care** and **can’t control** your actions. *Padua v. State* (inmates at rehab center drank printing fluid)
* [Emergency]
	+ No CN if you are **responding to emergency** and act as a **reasonably prudent person** would. *Raimondo v. Harding*
	+ **RTT** adopts this position. Unexpected emergency requires rapid response.
		- Can’t rely though if person’s negligence **created emergency**.
* [Property] *LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul Ry.* (railroad sparks lit haystacks placed near tracks)
	+ CN has **no place**. **Legitimate use** of property. Someone else’s negligence cannot take away property rights of another.
		- Traditional Approach. Amount of burden placed on D **would not matter**.
		- BUT can’t used property to put other’s property at risk. Tort law ***can*** redefine property rights in **certain cases**.
* [Seatbelts] *Derheim v. N. Fiorito Co.* (P wasn’t wearing seatbelt and hit D’s truck)
	+ No seatbelt defense for CN.
		- Didn’t affect “P”
		- Timing issue: traditionally courts have said “take P as you find them” (thin skull rule). Not willing to put obligations on P **beforehand**. Do have duty to mitigate damages ***after***.
			* Practically **problematic**. Lots of ways to avoid consquences beforehand. Worry it would be **unfair and unpractical**.
		- If Legislature wants defense, they can do it. No statutory duty to wear seat belts (at that time).
	+ Jury can take into account lack of seatbelt in awarding **damages**, not determining liability. *Spier v. Barker*
	+ Helmet defense **also excluded**. *Dare v. Sobule*
		- Other courts have gone opposite direction.

#Assumption of Risk

* **Affirmative defense.** SL for P. If risk is foreseen, and P ***knows and accepts*** risk 🡪 P cannot recover.
	+ Like **consent** for intentional torts.
	+ Powerful doctrine; heavily criticized. Assumes **easy knowledge** and **rational choice**.
		- Driven by ideas of **free market, fairness, personal autonomy**.
	+ Problems: did P ***really*** know “L”? Did P ***really*** know “P”?
		- More precise definition of P and L 🡪 less AoR.
	+ Originally, AoR pushed tort law out of all sort of places as a defense to negligence. Eventually, AoR questioned if it’s a viable defense at all. ***Slowly abandoned.***
		- **Gone** as defense. BUT not as to **relevance**. **Determines negligence**.
		- Is AoR really **telling us anything?** Why stand alone defense? **Most jurisdictions now do comparative negligence**.
	+ LOOK FOR:
		- **Evidence** of AoR – **express & implied**.
		- **Voluntariness** of assumption – physical/mental/moral/economic duress?
		- **Precision** of assumption – what did P ***really*** know? **Kind** and **degree**? **Nature** of injury?
		- **Open & publicized** 🡪 more likely AoR.
		- No **bargaining power**/lack of access to information 🡪 less likely AoR.
* [Traditional Approach] *Lamson v. American Axe & Tool Co.* (employee complained about dangerous hatchet on rack, but kept working)
	+ Employee ***took*****known**risk. **Market** determines AoR, already **calculated risk into wage**.
		- **Subjective** test: what P **did** know, NOT what should have known (contributory negligence)
			* What if P ***misjudged*** probability of risk? Couln’t leave job? No choice b/c of tough market? Traditional answer 🡪 **doesn’t matter**.
	+ Surviving version of AoR depended critically upon employee’s continued willingness to work in face of **known risks**, often after complaints had been voiced and rejected. *St. Louis Cordage Co. v. Miller* (freedom on contract)
* [Foreseeability] *Murphy v. Steeplechase Amusement Co.* (“The Flopper”; P fractured knee cap)
	+ Risks were **foreseen 🡪 AoR**. One who takes part in activity accepts dangers so long as they are **obvious and necessary**. Point of ride was to fall. Different case if dangers were **obscure or unobserved**.
		- Ride wasn’t malfunctioning. **Timid may stay at home**.
		- If ride too dangerous, court might say you **cannot** take that risk.
	+ Sometimes conflicts with **duty to warn**. *Russo v. The Range, Inc.* (specific danger was unknown)
	+ Limited to specific areas of sporting events. *Maisonave v. The Newark Bears* (hit while at vending stand)
	+ [Fireman’s Rule]
		- AoR refuses to die in context of police officers/fireman.
			* Business to deal with **that very hazard**. **Knowingly** and **voluntary** confronted danger.
			* Hazard is reflect in **pay** and **workers comp**.
		- Eroded by statute in some areas. *Guiffrida v. Citibank Corp*.
* [AoR Disfavored] *Dalury v. S-K-I Ltd.* (skier collided with metal pole)
	+ Liability release agreement **void** as **contrary to public policy**. Cannot contract away risk of negligence if public necessity 🡪 not real choice, not real knowledge.
		- Legitimate public interest b/c **substantial # of ppl** take advantage of general invitation to the public.
		- Resort in best position to ensure safety.
	+ [Tunkl Factors - Criteria for Whether Exculpatory Agreement Violates Public Policy] (arose in medical context; cannot contract away right to sue doctors for negligence)
		- Business type generally suitable for public regulation
		- Performing service of great importance to public, often matter of practical necessity
		- Open to any member of public who meet standards
		- Unequal bargaining advantage
		- Presents standardized adhesion contract w/ no option to pay more for protection
		- P is put under control of seller, subject to risk of carelessness
	+ Different courts have gone different ways with AoR w/skiing.

#Comparative Negligence

* Move to get rid of **all or nothing** scheme of contributory negligence.
	+ Today, virtually **all states** have some form of CmN.
* [Classic Case] *Li v. Yellow Cab Co. of California* (P crossed three lanes; D was speeding)
	+ Assess liability in ***direct proportion*** to fault. All or nothing is not fair test. Question of ***degree***.
		- Changes law **retroactively**. Ok w/ civil law, but no criminal law.
		- Juries were ignoring law. Holding no CnN and then reducing damages.
			* Problems: inconsistency, undermines rule of law (integrity).
		- Statute codified all or nothing approach, but court held that purpose of statute wasn’t to freeze the common law, but **reflect it**.
	+ Two types of CmN
		- “Pure” (what court went with) – liability ***directly proportionate***
		- Threshold (partial all or nothing) – applies apportionment based on fault up to the point at which the P’s negligence is equal to or greater than D (then recovery is barred).
	+ Problems: asking the jury a **much harder question**. How to calculate? Arbitrary? Confusing? Cost to justice?
* [SL & CmN] *Bohan v. Rizzo* (fell off of bike when threatened by dog; D liability turned on SL)
	+ SL & CmN are **incompatible concepts**. In SL cases 🡪 use ***comparative causation*** in evaluating damages.
		- Causation, not fault, is common denominator.
* [Intentional Torts]
	+ **No comparative negligence** in intentional tort. *Morgan v. Johnson*
	+ BUT, intentional wrongdoing is “different in degree,” NOT “different in kind.” Can use ***comparative fault*** to **reduce damages**. *Blazovic v. Andrich*
* [Statute]
	+ Violation of safety act evidence of CmN. *Hardy v. Monsanto Envrio-Chem Systems, Inc.*
		- BUT, court refused to reduce recovery for violation of safety statute in *Roy Crook & Sons, Inc. v. Allen*
	+ *Derheim v. Fiorito* still good law. Still no seatbelt defense under CmN. *Amend v. Bell*
* [RTT] – Apportionment of Liability
	+ P’s negligence that is **legal cause** of injury to P ***reduces in proportion*** to the **share of responsibility** the fact finder assigns to the P.

**CAUSATION & DUTY**

* Two types:
	+ **Cause-in-fact or “but-for” cause**.
		- Cut off at some point.
		- RTT – must be **necessary** for outcome.
	+ **Proximate or legal cause**.
		- Two analytical approaches
			* **Forward-looking approach**: chain of events was foreseeable, natural, or probable at time D acted. Denies recovery for those harms not “within the risk.”
			* **Backward-looking approach**: work back to see if any third party or natural event severed causation.

**Cause-in-Fact or #But For Cause**

* [Uncertainty] *New York Central R.R. v. Grimstad* (barge failed to equip life-preservers)
	+ D was **negligent**, but **too uncertain** to say D ***caused*** harm.
		- Pure speculation and conjecture if life buoy would have saved captain. **Too much we don’t know**. Need direct evidence.
		- High bar for P. D has better access to info.
	+ Rescue boats lashed to deck, but couldn’t have lowered in time to rescue P. *Ford v. Trident Fisheries Co.*
	+ [Reduced Bar]
		- If ***reasonable men may disagree*** 🡪 send to jury. *Kirincich v. Standard*
		- BoP **shifted to D**. *Reyes v. Vantage Steamship Co.*
	+ [Slip & Fall]
		- Mere chance that it **might have happened** w/o negligence of D is NOT sufficient to break causal chain. Negligence **greatly multiplied chances**. *Reynolds v. Texas & Pacific Ry.*
* [Risk Realized] *Zuchowicz v. United States* (overdose of drugs; normal amount still caused problem)
	+ Rule: if (a) negligent act wrong b/c it ***increased*** chance harm would occur; and (b) harm occurs 🡪 enough to go to jury.
		- Up to D to bring evidence denying **but-for causation.**
		- **Relaxed test**: one of the risks that made conduct negligent is realized 🡪 enough to go to jury.
* When **evidentiary void** is due to D’s negligence, BoP on issue of causation **shifts to D**. *Haft v. Lone Palm Hotel* (no lifeguard; father and son drowned)
	+ *Haft* has not been widely adopted.
* [Multiple Causes]
	+ Possible Categories:
		- Only one caused it, but more than one might have, and don’t know which one.
		- More than one caused it, but only one was necessary. Either was sufficient by itself.
		- Two caused it. Both were necessary. Neither was sufficient.
		- Several did it. Only two were necessary. Each one wasn’t necessary/sufficient.
	+ Further complications
		- Parties acting in concert or independent.
		- Different contributions from different actors.
		- Temporal issues: acting at different times.
		- One major injury or distinct injuries.
			* **General rule**: if you have ***distinct*** injury 🡪 only liable for that. Possibly responsible for **aggravation** of original injury. Also, apportionment when there is **reasonable basis** for determining contribution (RTT & RST).
			* Hard if **indivisible** injury w/ multiple actors.
* [#Joint And Several Liability] **any one party** responsible for **entire harm**.
	+ P can sue any one of them for whole thing. Huge advantage. Matter of allocation is settled between D’s.
		- JOINT LIABILITY: each of several obligors can be responsible for the ***entire loss*** if the others are unable to pay.
		- SEVERAL LIABILITY: each person has an obligation to pay ***only a proportionate share***, thereby casting on the P the risk of the insolvency of the other D’s.
	+ **#J&S** if:
		- Single cause in fact, multiple potential. *Summers v. Tice*
		- Joint, but neither party is sufficient. *J.C. Penney Co*.
		- 2 causes; both necessary, neither sufficient.
		- 2/3 need, but no 2 is necessary.
	+ RTT is less embracing of J&S than STT (led to widespread liability).
		- Joint liability is **proper** if ***two or more causes act synergistically*** so that the combined effect is greater than the sum of its parts.
		- Also limited by legislation. Some places have got rid of it entirely (CO, UT, WY); others have done ad hoc fixes (e.g. liable if less than 50% responsible)
	+ [Applied] *Smith v. J.C. Penney Co*. (flammable coat and negligence gas station employee)
		- J&S liable b/c **cannot divide harm**. Arose out of **totality of condition**. Single, indivisible injury.
			* Greater effort by tort law now to divide up harm.
	+ [Alternative Liability] *Summers v. Tice* (two shotguns, not sure which hit P)
		- Jointly liable b/c we don’t know, and D’s negligence caused us not to know.
			* Burden usually on P to show which one caused harm. **Burden switch when negligence is cause of making it hard to tell**.
* [Market Share Liability] *Sindell v. Abbott Laboratories* (drug hurt P [birth defects from synthetic estrogen pills], but don’t know which company out of many made specific pills taken)
	+ Companies who had **substantial percentage** of market 🡪 liable for **proportionate (market share)** of harm.
		- Trigger to be roped in still negligence (violated FDA statute)
		- Hard to show causation b/c **drugs were fungible**. Evidence problem like *Summers****.***
		- Not traditional rules b/c druge issue is a large problem. Compensation and deterrence require burden on D (P will never prove own on).
		- Problem: how do you **measure** market share? 🡪 inconsistent rulings in different jurisdictions.
		- Considered to be a major innovation. Generally, NOT emulated (most products found to be not fungible).
	+ [Lead Cases] *Sindell* **rejected** b/c (1) relevant time period far more extensive, and (2) lead paint is not a fungible product. *Skipworth v. Lead Industries Ass’n*
		- BUT, *Thomas v. Mallett* applied risk-contribution theory (like market share liability).
* [Loss Of Chance Of Survival] *Herskovits v. Group Health Cooperative* (negligence reduced chance of survival by 14%)
	+ Reduction of chance of survival enough for proximate cause issue to go to the jury. Rejected 51% rule. Damages awarded only those caused by premature death.
		- Problem: already more likely to die than not (started at 39%).
			* If not relevant, **reduced incentive** to care for ppl under 50%. Whole class of people not compensated. No deterrence.
	+ Courts have taken a step back from *Herskovits*. Too **hypothetical** for **preponderance of the evidence**.
	+ [Increased Unrealized Risk] – Generally, no. Not w/o harm. Few outliers.
		- Most cases say **wait until injury happens.**
		- Norfolk (Supp): Physical injury (asbestosis) didn’t cause fear directly, but made fear more reasonable, and that was cool.
	+ American courts split on the viability of **medical monitoring claims**.

**#Proximate Cause**

* Three Approaches
	+ [Traditional] – Liable for all direct, non-remote harms.
		- **“Natural and ordinary”**
		- Retrospective approach
		- “Substantial factor” (thrown out by the RTT)
	+ [Newer] – Start with the D conduct. **“Reasonably foreseeable” 🡪 is the risk that made conduct negligent realized?**
		- Problem: how precise will you make “risk”? General harm? Precise harm? Kind of harm?
	+ [Third Way] – Get rid of “proximate.” Not real thing, just a policy consideration (how much to we want to make liable?). Instead, **Legal cause** 🡪 grounded in **duty**.
		- Did you have **duty** to person?
* [Natural And Ordinary] *Ryan v New York Central R.R.* (fire to woodshed, set house 130 ft. away on fire)
	+ Result not **natural and ordinary**. Not liable. Further spread of fire dependent on accidental circumstances
		- Not unusual or unexpected, BUT would be **ruinous** (dense society). No community could long exist if adopted policy.
		- Each man **runs the hazard of neighbors conduct**. Spread risk by **individual insurance**.
		- Harsh approach. Rise about conditions of barbarism. **Policy limitation** to cut off liability.
	+ Other cases reject *Ryan*, holding harder line toward spread of fire.
	+ Human conduct is part of the ordinary course of things. *City of Lincoln* (P was ***responding*** to risk)
		- Guy jumps off runaway coach and injures leg. Can recover if reasonable to jump. *Jones v. Boyce*
		- D’s neg. puts P in **reasonable apprehension** of danger, and P is injured in **reasonable effort** to escape 🡪 can recover. *Tuttle v. Atlantic City R.R.*
			* P can act in **good faith** to minimize risk.
		- [Foresight Limitation] – Woman tripped over chair café while trying to escape (D’s truck on fire). Cannot recover b/c if P didn’t see, how was D supposed to? *Mauney v. Gulf Refining Co.*
			* Generally disfavored. If made harm more general, would be liable.
	+ [Remote] – *Central of Georgia Ry. v. Price* (railroad dropped woman at wrong stop; hurt at hotel)
		- Railroad not liable b/c **too remote**. Interposition of **separate, independent agency**. Harm not **natural** of neg. 🡪 **unusual** and therefore NOT foreseeable.
* [Increased Risk] *Berry v. Sugar Notch Borough* (tree fell on top of speeding car)
	+ Not PC b/c did NOT ***increase*** risk of harm happening. No **relationship** between **negligence and harm**.
		- One of the **foreseeable risks** was NOT realized.
	+ Women raped when walking home after railroad took her too far. Liable. Neg. ***increased risk*** of harm. *Hines v. Garret*
* [Dependent Causes]
	+ Two successive acts sufficient to harm P, but P is exposed to second only b/c negligence involved in first act. Liable only for **incremental damages**. *Dillon v. Twin State Gas & Electric Co.* (not liable for trespass, but for exposed wires)
* [Position Of Safety]
	+ Causal chain broke b/c D’s active force comes to **“rest” (apparent position of safety)** under supervision of adult. At some point, **things have settled**. *Pittsburg Reductoin Co. v. Horton* (mom watch son play with dangerous dynamite cap)
		- Still PC if it rests in **dangerous position**.
* [Third Person Intervention] *Brower v. New York Central H.R.R.* (horse/cart struck by D; thieves came and stole scattered cider kegs)
	+ Liable. Third person intervention with NOT excuse D if damage is **foreseeable**. Even if intervention is **criminal** (also works for intervening **negligence or rescue**).
	+ Aggravated injuries caused by physician still caused by D if physican **acted in good faith**. *Atherton v. Devine*
		- Original harm “substantial factor” in subsequent injury. Rescue/chaos hasn’t **stopped**. Danger invites even **negligent rescue**.
		- Would NOT apply if ambulance crashed and not related to emergency conditions. **Policy** reasons wouldn’t apply (*Anicet v. Gant*)
* **RST** adopts **“substantial factor”** test.
	+ Third person intervention irrelevant if D realized/should have realized third person intervention likely or one of the reasons why act was negligent. **Caselaw uniformly follows**. Not precise and circular. **Impressionistic**. Nothing of something more than “but-for.”
		- Phone company liable when P couldn’t escape from phone booth in time to avoid drunk driver. *Bigbee v. Pacific Telephone and Telegraph Co*.
			* Very expansive.
		- Grocery store still liable for arson fire b/c stacked excessive amounts of flammable trash. *Britton v. Wooten*
		- Girl left behind by school board. Raped on way home. Board liable. *Bell v. Board of Education*
	+ **RTT** changes terminology: “when a force of nature or an independent act is also a factual cause of harm, an actor’s liability is limited to those harms that result form the risks that made the actor’s conduct tortious.” Rejects “substantial factor.” Too vague and circular.
* [Danger Invites Rescue] *Wagner v. International Ry.* (P’s cousin thrown off train; P hurt while trying to find cousin)
	+ ***Danger invites rescue***. Natural response to seek others who are in distress.
		- **Powerful doctrine**. Well-established today.
* [Foreseeability]
	+ [Polemis Standard] *In re Polemis & Furness, Withy & Co.* (dropped plank onto hold in vessel that caused spark which lit ship on fire)
		- In determining **negligence**, ask if act would cause **“some damage.”** If yes 🡪 liable for **all direct consequences**. Don’t care about foreseeability when considering **liability,** once negligence is established.
			* No foreseeability to ***type and kind*** of harm.
	+ [Wagon Mound] *Wagon Mound No. 1* (wharf lit on fire when smoldering cotton dropped onto oily water)
		- ***Type*** of damage must be **foreseeable**. Toss out *Polemis*. New rule: **reasonably foreseeable risks**.
			* Test for negligence should be the same as for liability. Measure of liability should be extent of negligence.
			* Policy argument in terms of **fairness and justice**. *Polemis* would be ruinous (like *Ryan* and *Brown v. Collins*).
		- Asbestos cement dropped into vat of hot solution. Exploded later. Not liable b/c foreseeable risk was splashing, not explosion. *Doughty v. Turner Manufacturing Co., Ltd.*
		- If harm is the same **type** as foreseeable risk, may be close enough. *Hughes v. Lord Advocate*
	+ [Thin Skull Rule] *Smith v. Brain Leech & Co. Ltd.* (splash of molten metal, developed cancer b/c of tendency)
		- ***Take your victim as you find him.*** Solid rule. **Always prevails**.
			* Can’t hold on to *Wagon Mound*. Doesn’t matter if harm is not foreseeable.
			* *Wagon Mound* repeatedly **rejected** b/c of **compensation considerations.**
		- Jury could find D liable for increasing schizophrenic tendencies*. Steinhauser v. Hertz Corp.*
		- American response: NOT going to require a lot of precision w/ regard to **how** or **amount** of foreseeability of **damages are direct** and **damage is expected**. *Kinsman Transit Co.*
* [Duty] *Palsgraf v. Long Island R.R.* (railroad employee knocks fireworks package out of hand of passenger helping get on train, explodes and shingles fall down hurting woman at other end of platform)
	+ PC NOT about foreseeable causation. Reasonable foreseeability is **relevant to duty**. Duty defined by **risks to be perceived to certain persons**.
		- Q: was there reasonable foreseeable risk to **that person**? H: D had no duty to P.
		- Owe duties to different ppl based on proximity to action. Provides precision. No such thing as “negligence in the air.”
		- **Changes analytical framework**.
	+ ***Palsgraf* dissent** (Andrews)**:** proximate cause is a **policy decision**. Cannot do better.
		- PC is only a **rough sense of justice.** Should use **“substantial factor”** test.

|  |  |  |
| --- | --- | --- |
| ***(1)Polemis*, (2) Andrews (dissent)** | ***Palsgraf*** | ***Wagon Mound*** |
| (1) Minimal precision. Loose fit. “Cause some harm.” Not worried about ***kind*** of harm or ***how***. (2) Foreseeable risk of ***some*** ppl being harmed. Not inquiry about duty to specific ppl, but duty to public at large. Proximate cause is a ***directness*** inquiry (direct or not). Is there superseding cause? Andrews: “substantial factor” test. No fine line one can draw. Courts do their best.  | Foreseeability at least to ***who*** the P is. Risk to particular individual, not to society as a whole. Need to ask more ***precise*** question. No “negligence in the air.” Duty breach to individual. No foreseeability, no notice. Duty = risk reasonably foreseen to categories of ppl for particular conduct.  | Rejects *Polemis* as **too harsh** a rule that ignores civil society. Foreseeability should be touchstone along the whole way – negligence, liability, who, how much, what kind.  |

**#Emotional Distress (#NIED)**

* Courts generally nervous.
	+ Too many cases (overwhelm courts)
	+ Chilling activities we think are valuable
	+ Too easy to fake ED (worried juries will overcompensate)
	+ Measuring damages (inconsistency & arbitrariness & problems w/ predictability)
	+ Some things we simply don’t want the courts to handle
* [Traditional View] *Mitchell v. Rochester Railway* (scared by horses, had miscarriage; N🡪API🡪ED🡪PI)
	+ **Cannot** recover for injuries caused by **fright**. Thus, **cannot** recover for **consequences** of fright.
		- Emotional reaction **cuts of liability**.
		- Also, NOT proximate result. (ordinary and natural result)
	+ Two traditional justifications:
		- (1) harm was too **remote**
		- (2) would lead to flood of **fabricated claims**
	+ [Allow With Slight Physical Impact]
		- Slight jolt in a very minor auto collision. *Comstock v. Wilson*
		- Mouse hair on stew touched P mouth. *Kenny v. Wong Len*
		- “Something” slight hit neck and got dust in eyes. *Porter v. Delaware*
		- Horse pooped on lap, everyone laughed. *Christy Bros. Circus v. Turnage*
* [Zone Of Danger] *Dulieu v. White & Sons* (almost ran over by horse, had child; N🡪API🡪ED🡪PI)
	+ Rejects *Mitchell*. Can recover for ED from **fear to yourself**.
		- Cannot be fear for another.
		- “Zone of danger,” but only for yourself.
	+ [ZoD Makes No Sense] *Dillon v. Legg* (mother saw daughter hit by car, but outside ZoD)
		- ZoD is **arbitrary** (“all or nothing” lines) and **tells us nothing** about suffering. Outside suffering no less different/deserving of recover than suffering inside.
			* Case cries out for compensation. If deny, court looses legitimacy.
			* ED still needs to **result in physical injury**. And D **still has to be negligent** (primary liability to original party [the child] must be found).
		- Should have ***guidelines*** (allow justice in individual cases):
			* **Space**. P located **near/far** from accident.
			* **Time**. ED result from **direct** impact (saw and heard) vs. **learning from others** after occurrence.
			* **Relationship**. P and victim **closely related** vs. **no relationship**.
				+ In Cali., guidelines quickly turned into hard lines.
	+ **Hearing accident NOT enough**. *Dillon* rejected when P heard screech of brakes and arrived on scene moments later (son injured). ZoD lines are arbitrary, but **have value**. Can’t open it up to everything. *Tobin v. Grossman*
	+ Denied recovery for **unmarried cohabitant**. Only **spouses/siblings**. “Close friends” don’t count. *Elden v. Sheldon*
		- Also doesn’t work for **nieces & aunts**. *Trombetta v. Conkling*
	+ **Have to see**. Opt for **bright-line rule**. *Thing v. La Chusa* (mother didn’t see child die)
		- Mass allows recovery if parent arrives on scene while child still there. *Dziokonski v. Banineau*
	+ **RTT 47**: negligence causes serious emotional disturbance to third party liable if P (a) **perceives the event contemporaneously**, and (b) **close family member**.
* [Drugs & “At Risk”]
	+ Cannot recover for **fear of cancer** if low probability. *Payton v. Abbott Labs*
	+ Cancer must be **more likely than not**. *Potter v. Firestone Tire & Rubber Co*.
	+ *Norfolk v Freeman* (asbestos exposure, developed asbestosis, fear of cancer; N🡪PI🡪ED [easy case, traditional tort])
		- **SCOTUS**: Not strictly traditional tort b/c ED not **caused by** PI (asbestos doesn’t ***cause*** cancer, but only makes it more likely). ***Close enough***. Same conduct **causes both**.
			* **Dissent**: No ***direct*** link that suffices for recovery. Policy considerations: no $$ left for those who actually get cancer.
* [Direct Victims]
	+ **RTT**: NIED for specified categories when neg. is especially likely to cause serious emotional disturbance.
	+ Can recover for marriage discord due to false syphilis report. P was “**direct victim**” and harm foreseeable. *Molien v. Kaiser Foundation Hospitals*
		- Now, foresight is not longer touchstone of duty. Q: did D assume direct duty to P?
			* No direct duty when parents upset by child’s overdose (store dispensed too much). *Huggins v. Longs Drug Stores*
			* No direct duty when psych didn’t report child taken out of country by other spouse. *Schwarz v. Regents*
			* Direct duty to mother when psych molested son; treated both. *Marlene F. v. Affiliated*
* [Case Study] *Paroline v. U.S.* (child porn photos; tried J&S to make D liable for full harm)
	+ No **“but-for” cause** (lower courts thought it was PC case). **Criminal restitution suit**, not traditional J&S. P can get **proportional amount of harm** (non-trivial)
	+ **Dissent**: Roberts 🡪 gets nothing (bad statute). Sotamayer 🡪 gets everything.

**#Affirmative Duties**

* **Three cases** where duty is **separate issue**:
	+ ***Palsgraf*** – question of duty in relation to foreseeability of **categories of ppl** (defined by space/time).
	+ **NEID** – Generally, no duty to not cause NEID. Duty only in certain, more specified cases:
		- Parasitic to physical harm.
		- Parasitic to threats of physical harm (**“zones of danger”**)
		- *Dillon* (outside zone, certain relationship to ppl w/in zone)
		- **Special relationship** – doctor/patient. Funeral homes.
	+ **Inaction**. Is there a duty? Ex. *Ploof v. Putnum* (what if guy just stood there and did nothing instead of undocking boat?)
		- **Traditional Rule**: ***no duty****.*
			* Strong policy reasons: respect for autonomy, property rights, liberty (free to live own life), law shouldn’t force labor (slavery).
			* Liable for **action**, NOT **inaction**.
		- Courts slowly break traditional rule. Line between action/inaction **gets fuzzy**.
			* First step: Action prior to inaction. Courts put inaction **parasitic** to action. Blurs line.
			* End step: **Creates exceptions** (don’t buy traditional rule in these areas). Ex. special relationships. **Expands, then contracts a little**.
* [Trespassing] *Buch v. Amory Manufacturing Co.* (little kid visits brother at work, doesn’t speak English, gets hand caught in machinery)
	+ Trespasser 🡪 no duty of care. Child could be liable for damaging machinery.
		- Did not **owe obligation** (like blind trespasser).
	+ Strings to pull on:
		- Mentions ordinary. Maybe in not ordinary?
		- Doesn’t apply to **enticement or entrapment**.
		- **Allurement** 🡪 attractive nuisance. Ex. swimming pools.
* [Medical]
	+ Doctor NOT required to come to medical aid, even though family doctor and general physician. *Hurley v. Eddingfield*
* [Taunting]
	+ no duty to rescue after **taunting** co-worker to jump in strip-mine. P had **full mental/physical autonomy**. *Yania v. Bigan*
* [Creating Hazard] *Montgomery v. National Convoy & Trucking* (car broke down at bottom of icy hill)
	+ Non-negligent creation of hazard creates duty to mitigate risk for others.
	+ Liable for not putting a warning at night for hole D dug. *Newton v. Ellis*
		- Not inaction, but **blended act** of action and inaction. **Complex act.**
	+ **RTT 39** (codified *Montgomery*): actor’s prior conduct, not tortious, creates a continuing risk of physical harm 🡪 duty to exercise **reasonable care** to **prevent or minimize** the harm.
* [Beginning To Aid] *Zelenko v. Gimbel Bros.* (undertook medical aid to P, kept for 6 hours w/o medical care)
	+ Undertake aid, even if had no prior duty 🡪 must not omit to do what an **ordinary man** would do in performing the task.
		- D prevented another bystander from seeing and calling ambulance. ***Assumed*** duty by beginning aid.
	+ **RS 324** (RTT takes same position): One who, **under no duty** to do so, **takes charge** of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by:
		- (a) failure of the actor to **exercise reasonable care** to secure the safety of other
		- (b) the actor’s discontinuing his aid or protection, if by so doing he leaves the other in a **worse position** than when he took charge of him.
* [Preventing Aid]
	+ No duty to rescue, but did have to allow person to use phone to call for help or call himself. *Soldano v. O’Daniels* (bartender refused to let person use phone to call police)
	+ **RS 327**: liable if negligently prevents/disable third person from giving aid necessary to prevent physical harm.
	+ Criticized *Soldano*; RS 327 requires **affirmative act**. Not just not allowing your refusing to turn over your property. *Eric J. v. Betty M.*
* [Land Ownership As Basis For Duty]
	+ [Traditional] – Depends on **type** of person.
		- Trespasser – owe ***nothing****.*
		- Licensee (social guest) – owe ***something***. Basic duty; **no hidden dangers**.
		- Invitee (business interests) – owe **everything**. General duty to **make safe**.
			* Categories determined like consent: express, implied in fact, implied in law.
	+ [Next Step] – Play w/ cagegories.
		- Adherence in **name**, but movement in how we categorize ppl.
	+ [Final Step] – Jettison categories.
		- *Rowland v. Christian* (friend at house, cut hand on cracked faucet)
			* **Throw categories out**. Property doesn’t what it once meant. Categories not justified in light of modern society/technology. Obscure proper considerations.
			* [Rowland Factors] (determine duty)
				+ **Foreseeability of harm** to P
				+ **Degree of certainty** that P suffered injury
				+ **Extent of the burden** to the D and **consequences to the community** of imposing a duty to exercise care w/ resulting liability for breach
				+ **Closeness of the connection** between the injury and the D’s conduct
				+ The **moral blame** attached to D’s conduct
				+ The **policy of preventing future harm**
				+ The **prevalence and availability of insurance**.

Like fire in *Ryan* case. Who best can bear burden?

* + - * **Dissent**: categories supply a **reasonable and workable** approach. Stability and predictability. Shouldn’t overturn wisdom and experience of the past.
			* Some courts adopted *Rowland* in part, getting rid of the licensee/invitee distinction. Only **two categories**.
			* Most courts unwilling to get rid of categories. *Rowland*: **Everything is relevant. Nothing is dispositive**. 🡪 too **messy**. Less predictability. Jury confusion. Price to get rid of rules.
	+ Landlord owes a general duty of care to **all persons** on his premises. *Sargent v. Ross*
	+ Many states have passes statutes that relax the liability of owners for **recreational or rural lands**.
	+ Most American cases refuse to impose liability for natural conditions, except harm caused by falling trees.
		- Also, D responsible for not cutting down foliage at gas station that obstructed exit views. *Whitt v. Silverman*
* [Duty Based On Special Relationship To Third Person]
	+ **RST 315**: No duty to control third person as to prevent him from causing physical harm to others unless
		- (a) a **special relationship** exists between **actor and third person**, or
		- (b) a **special relationship** exists between **actor and the other** which gives the other a right to protection.
	+ [Relationship Between P And D] *Kline v. 1500 Massachusetts Avenue Apartment Corp.* (unguarded entry ways in apartment complex; tenant robbed/injured)
		- Duty on all premises of legal right to **use ordinary care and diligence** to maintain in **reasonably safe** condition. **Minimize predictable risk**, reasonably anticipated harms.
			* Landlord is **uniquely positioned** to do something about it. P can’t. Standard is security when P moved in.
		- Problems: arbitrary standard. How to apply to other buildings? What standard for newer tenants? Pushes rents up. Bold disruption into market.
		- D position: like Flopper. Risk was **obvious**. D **knew**. Part of reason why tenant is there 🡪 cheap rent! Should be left to contract law and police. Statutory ordinances can establish safety minimum.
		- *Kline* accepted insofar that it got ride of old common law rule that imposed no duty on a landlord to shield tenants form criminal attacks.
			* No duty to provide security personnel. *Nivens v. Hoagy’s Corner*
			* There are issues of **causation**. Have to prove link b/t landlord’s failure and T injuries.
			* Comparative negligence would woman opened her door at night, thinking it was her fiancée. *Wassell v. Adams*
			* Community college had duty to protect student in broad daylight (stairwell, did not trim foliage) b/c of special relationship. *Peterson v. San Fransisco Community*
			* But not in parking garage b/c no reason to foresee the attack than any other place. *DiSalvo*
			* General duty on common carriers. *Lopez v. S. Cali Rapid Transit*
			* Extended to condominiums. *Frances T. Village Green*
			* Eating meal, duty to call for help, but no duty to perform first aid. *Drew v. Le Jay’s*
			* Not required to maintain defibrillator at tennis club. *Atcovits v. Gulph Mills*
			* Taxi driver only had duty to ensure “safe exit,” (not to see if P drove drunk). *Mastriano v. Blyer*
	+ [Relationship Between D And Third Party] *Tarasoff v. Regents of Univ. of Cali* (doctor-patient relationship; patient killed girl he was obsessed with, doctor knew of intention, didn’t warn)
		- If patient poses serious danger of violence to others 🡪 therapist has duty to exercise **reasonable care to protect** foreseeable victim. No **privileged communication**; duty to **disclose**. (“protective privilege ends where the public peril begins”)
			* Factors: (1) Really high danger. Need to reduce. (2) Victim is indentified **specifically**. Easier to do something about it simply and discreetly. (3) High probability of harm.
			* B ***seems*** low. Pyschiatric community freaked out 🡪 **high B!** Destroys trust between patient-doctor relationship. Trust is the reason you get info in the first place. Won’t be able to treat. Huge chilling effect.
		- **RTT 41**: (codified *Tarasoff*)
			* (a) Action in **special relationship** with another owes duty of **reasonable care** to **third persons** w/ regard to **risks posed by the other** that arise within the scope of the relationship.
			* (b) Special relationships include:
				+ Parent w/ children
				+ Custodian w/ those in custody
				+ Employer w/ employees where employment fascilitates the harm to third parties
				+ A mental-health professional w/ patients.
		- Duties are especially strict on D whose steps **facilitate** attacks. *Lundgren v. Fultz* (helped patient get guns returned to him)
		- Liability more contested with limited interaction on outpatient basis.
		- *Tarasoff* has sharpest bite in three situtions
			* Where potential target has been **identified** by disturbed person
			* Where the psychiatrist has **somehow facilitated** the commission of the crime
			* Where the psychiatrist or institution has breached some **explicit promise** to future victim
* [Review]
	+ **RST**: voluntarily decide to help 🡪 trigger duty to act reasonably. Leave P in no worse situation.
	+ **RTT**: If causes (non-negligent) dangerous situation 🡪 duty to act. Defined by **reasonable conduct**. Not SL. Have to show breach of that duty was cause.
	+ [Special Relationships]
		- Land
		- Between P & D
		- Between P & Third Party
	+ Two bookend cases: *Buch 🡨*-------*🡪 Rowland* & aftermath
		- Classic case: *Kline*
			* Traditional approach, pre-*Kline* would have said **no duty**.
			* Says **some duty**, but **stumbles** at second step 🡪 what ***is*** duty?
		- *Trasoff* same as *Kline* in making bold step.
			* Irony: what makes info reliable, core reason for duty, is what is undone by holding.

**STRICT LIABILITY REVISITED & EXPANDED**

**#Wild Animals**

* SL or negligence governs?
	+ (1) SL for **wild animals**. Even if owner exercised **utmost care**.
		- **RTT**: wild animals = NOT been **generally domesticated** and are **likely**, unless restrained, to cause personal injury. Includes lions, tigers, elephants, monkeys, and camels.
		- Does NOT include iguanas or manatees.
	+ (2) No SL for domesticated animals, UNLESS know/reason to know animal has **dangerous propensities**. Tendency to bit is enough. No “one free bite.”
	+ If not (1) or (2) 🡪 (3) normal negligence.
		- Is (3) a fake category? B/c if you don’t know/had reason to know will you ever be negligent? No. (2) is a much more **subjective, demanding** test. NOT reasonable person know/should know, but what **you know/should know**.
* [Dangerous Propesnities] *Gehrts v. Batteen* (st. Bernard bit girl while tied down in truck)
	+ Cannot determine dangerous propensities **after the fact**. Also, allowed to recover if D failed to use **reasonable care** in the circumstances (P should have foreseen the danger?).
		- D did not violate standard.
	+ Master can be liable for attack when in the custody of servant. *Baker v. Snell*
		- Issues: who is owner? Ex. dog-walker?
	+ Hotel did **not own or possess** rapid mongoose. Negligence claim failed b/c there was no warning/anticipation of a possible infestation. *Woods-Leber v. Hyatt Hotels of Puerto Rico*
* [Affirmative Defenses For Wild Animals]
	+ SL rule does not apply to zoos b/c of **public benefit**. Not for own purposes. Normal negligence. *City and County of Denver v. Kennedy*
		- Same conclusion for national parks. *Rubenstein v. United States* (bear attacked camper; not negligent b/c he’d been warned)
* **Barking and running around** does NOT = dangerous propensities. *Collier v. Zambito*
* [Cattle Trespass]
	+ **RTT 21**: Owner/possessor of livestock or other animals, except for dogs and cats, that intrude upon the land of another is subject to SL for physical harm caused by intrusion.

**#Ultrahazardous or #Abnormally Dangerous Activities**

* [Non-Physical Invasion] *Spano v. Perini Corp.* (blasting and damage to property, but no physical invasion)
	+ Law on the books: *Booth v. Rome*: proof of negl. required unless the blast was accompanied by an **actual invasion** of the damaged property. (rested on notions of trespass)
	+ H: *Booth* overruled. Physical distinction is **fake distinction**. Quest is who should bear burden? P who is doing danger activity.
		- Courts had been getting around *Booth* 🡪 if physical harm, then proven negligence (loses point of negligence). Fiction.
		- **Limit**: must be ***intentional blasting***. If unintentional 🡪 negligence standard.
* **RST 519**: General Principle
	+ (1) One who carries on ***abnormally dangerous activity*** is subject to **liability for harm** to person, land or chattels of another resulting from activity, even though exercised **utmost care**.
	+ (2) This SL is **limited** to ***kind of harm***, the possibility of which **makes the activity abnormally dangerous.** (proximate cause question)
* **RST 520**: Abnormally Dangerous Activities
	+ In determining whether activity is **abnormally dangerous**, consider factors:
		- (a) existence of a **high degree of risk** of some harm to the person, land or chattels of others (“P”)
		- (b) **likelihood** that the harm that results from it **will be great** (“L”)
		- (c) **inability to eliminate the risk** by the **exercise of reasonable care** (negligence not good enough; want ***more***, pay or stop)
		- (d) extent to which the activity is NOT a **matter of common usage** (reciprocity; if everyone’s doing it, then risks imposed are returned. ex. cars)
		- (e) **inappropriateness** of the activity in the **place** where it is carried on (geographic
		- (f) extent to which its **value to the community is outweighed** by its dangerous attributes (social value notion)
* **RTT 20**: Abnormally Dangerous Activities
	+ (a) Abnormally dangerous activities subject to **SL**.
	+ (b) abnormally dangerous if:
		- (1) the activity creates a **foreseeable** and **highly significant risk** of physical harm even when **reasonable care** is exercised by **all actors**; and
		- (2) the activity is NOT one of **common usage**
	+ Defendant’s bar got involved. **Dropped social utility**. Controversial b/c social utility is subject to manipulation by judges 🡪 different values. Non sequi-er (different than common usage; just b/c its useful doesn’t mean someone can damage me).
		- *Koos v. Roth*
			* (1) Nature of judgement. Utility and value are subjective and controversial. Valued differently by those who profit and those who are endangered.
			* (2) Question is not whether activity should continue, but **who shall pay for harm**.
* [Increased Care] *Indiana Harbor Belt R.R. v. American Cyanamid Co.* (dangerous chemical leaks on train yard)
	+ No SL. **More care could have reduced risk**. Negligence standard could have handled it.
		- If it was corrosive chemical 🡪 might need SL. Chemical did not make it more likely to get out than water. Nothing about **chemical’s nature that made the “P” high**.
		- Counter: but there is a really high “L”! Its not water.
* [Proximate Cause Issues]
	+ **RST 522**: Contributing Actions of Third Persons, Animals and Forces of Nature
		- One carrying on abnormally dangerous activity is subject to SL for the resulting harm, although it is caused by the unexpectable
			* (a) **innocent, negligent or reckless** conduct of a **third person**, or
			* (b) action of an **animal**, or
			* (c) operation of **force of nature**
	+ **RST 523**: Assumption of Risk
		- The P’s AoR of harm from an abnormally dangerous activity **bars his recovery** for the harm.
	+ **RST 524**: Contributory Negligence
		- (1) Except as stated in (2), the CN of the P is **NOT** a defense to the SL of one who carries on an abnormally dangerous activity.
		- (2) The P’s CN in **knowingly and unreasonably** subjecting himself to the risk of harm from the activity **is a defense** to SL.
	+ **RST 524A**: P’s Abnormally Sensitive Activity
		- No SL if harm would NOT have resulted but for **abnormally sensitive character** of the P’s activity.
	+ **RTT 24**: Scope of SL
		- SL does NOT apply if:
			* (a) P suffers physical/emotional harm as result of contact with wild animal/ADA for **purpose of securing some benefit** from that contact or proximity
			* (b) D has animal/does ADA in **pursuance of an obligation imposed by law**
	+ **RTT 25**: Comparative Responsibility
		- If P is CN, then recovery is **reduced** in accordance with the **share of comparative responsibility** assigned to P
			* Ad hoc evaluation of the facts. Trusted to jury.
	+ Blasting to remote when caused mink mothers to kill young. Not ordinary result of explosion. *Madsen v. East Jordan Irrigation Co.*
	+ SL not defeated even when D had located plant in remote part of town one mile away from nearest public highway. Thieves setting off explosives NOT consider **highly extraordinary**. *Yukon Equipment v. Fireman’s Fund Insurance Co.* (thieves set off explosives)

**#Products Liability**

* Why distinct area?
	+ Concerns about compensation and negligence
	+ Asymmetrical access to information and to who can do something about it.
	+ Overlap with contract law. Worry that it is not doing enough.
		- Contract w/ **vendor**, not w/ manufacturer. Vendor isn’t in a good position to do something about it.
		- Worried about bargaining power. Manufacturer will have $$
	+ Evidentiary problems for P
	+ Concerns of **scale**. Potentially ***a lot*** of injury. Really bid deal, and nothing retailers can really do about it.
* [First Step] – Expand Negligence
	+ Custom is ***not*** a defense
	+ Expand foreseeability
	+ Reduce burden of proof
	+ Negligence per se under statutes
		- Questions the same, answers change over time.
		- PL a **hybrid**. SL w/ negligent test.
* [Old Rule] *Winterbottom v. Wright* (coach driver hurt by defective coach; manufacturer contracted with post-office, who contracted with third party who supplied driver)
	+ **No duty** to driver of the coach. ***No contract***. Tort law shouldn’t be allowed to rewrite contract.
		- Would lead to absurd and infinite consequences. Limits scope of liability to third parties.
		- Must be a **fixed and definite limitation** to liability.
	+ Traditional approach hostile to double remedies (overlap b/t tort and contract law)
	+ [American Adoption] – General rule: not liable to third parties w/ no contractual relation, but **three exceptions**
		- (1) Negligence of manufacturer/vendor which is **imminently dangerous** to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from negligence
		- (2) Owner’s act of negligence which causes injury to one who was **invited by him** to use his defective appliance upon the **owner’s premises** may form basis for action
		- (3) One who sells/delivers article which he knows to be **immently dangerous** to life/limb to another **w/o** **notice of its qualities** is liable to any person who suffers which might be reasonably anticipated, whether theres contract or not.
			* Ex. thresher that had cylinder that could not support weight. Latent defect that could not be discovered by ordinary inspection. Defective condition was known to D.
* [Probable Danger] *MacPherson v. Buick Motor Co.* (wood wheel collapsed)
	+ If knowledge of ***probable danger*** 🡪 duty on manufacturer to **make carefully**. **Negligence standard** (possible liability).
		- Must be **thing of danger** = reasonable certain to place life and limb in peril when negligently made (not limited to poisons, explosives, etc). **Used by third person w/o test**. High “P”, significant “L”
		- First case to break down wall. Not about maker of component parts, but of car.
	+ Allowed a direct action for negligence against manufacturer of **component part**. *Smith v. Peerless Glass Co.*
	+ Today, every jurisdiction follows *MacPherson* rule.
* [Move To Strict Liability] *Escola v. Coca Cola Bottling Co.* (coke bottle exploded, injured hand)
	+ **Majority**: Liable under negligence. **Reduced burden of proof** 🡪 res ipsa loquitur “on its face.” (makes easier for P to recover). Ordinarily wouldn’t happen w/o negligence. Enough for a jury.
	+ **Minority (J. Traynor)**: Liable, but should be ***strict liability*** when put article in the market, knowing it will be used w/o inspection. Needs to be “normal and proper use.”
		- Justification: it is w/in the **public interest**. Too hard for P to prove his case. Want higher deterrent effect. Manufacturer best able to absorb risk and spread cost.
			* Has to be defect. Don’t care if from negl. or not.
			* Something you **know** will be outside in the world.
			* Manufacturer can do something about it. Also, created issue in first instance.
			* Problems of proof: hard/expensive for P to prove.
			* Changing nature of market justifies new rule. Manufacturer can get insurance to spread cost.
			* Like food stuffs law 🡪 SL.
	+ [Strict Liability] *Greenman v. Yuba Power Products* (combination power tool hurt P)
		- **J. Traynor** (now writing majority): Put in commerce, knowing it will be used w/o inspection, has defect 🡪 ***strict liability***
			* Strict products liability does NOT equal strict liability. Negligence standard in some way.
* [Restatements]
	+ **RST 402A**
		- (1) One who sells any product in a **defective condition** ***unreasonably dangerous*** to the user or consumer or to his property is subject to liability for **physical harm** thereby caused to the ultimate user or consumer, or to his property, if:
			* (a) the seller is engaged in the business of selling such a product, and
			* (b) it is **expected** to and **does reach** the user **without substantial change** in the condition in which it is sold.
		- (2) Section (1) applies although
			* (a) the seller has exercised **all possible care** in the preparation and sale of his product (strict liability), and
			* (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
		- No opinion on whether the rule may not apply to:
			* Harm to persons other than users or consumers
			* To the seller of a product expected to be processed or otherwise substantially changed before it reaches consumer
			* To the seller of a component part
		- Issues:
			* “unreasonably dangerous” 🡪 hybrid of neg. and SL.
				+ Words gone in RTT.
				+ Problems: by custom? BPL? Regional? Industry? Statutes (controlling or persuasive)? Sword v. shield?
				+ Dangerous is roughly **heightened harm**. Sounds like higher risk/threat. RTT moves to “safe.”
				+ Article sold must be dangerous to an extent beyond that which would be contemplated by the **ordinary person w/ ordinary knowledge**.
				+ Prevent being unreasonably dangerous, seller may be required to **give directions or warning on container**.
			* One who “sells” 🡪 excludes gifts. Isolated to commercial transactions. Focuses deterrence effect.
			* “any product” 🡪 what is a product? **Excludes services**.
			* “defective condition” 🡪 what is defective? **BoP** is on P to show.
			* “user/consumer” 🡪 gives nothing to third parties. Ppl in “zone of danger”
			* “physical harm 🡪 excludes mental/economic harm.
			* Excludes random, one-off sales. Farmer’s market? Bake sales?
		- Assumption of Risk can be a defense to this section.
		- Current caselaw bypasses RST to allow **injured bystanders** to sue the original manufacturer.
	+ **RTT 1**: Products Liability
		- One engaged in the business of selling or otherwise distributing products who sells or distributes a **defective product** is subject to liability for harm to persons or property caused by the defect.
	+ **RTT 2**: Categories of Product Defects
		- A product is defective, when, at the time of sale or distribution, it contains a **manufacturing defect**, is **defective in design**, or is defective because of **inadequate instructions or warnings**. A product:
			* (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
			* (b) is defective in design when the **foreseeable risks of harm** posed by the product could have been **reduced or avoided** by the adoption of a **reasonable alternative design** by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the **omission of the alternative design** renders the product ***not reasonably safe***;
			* is defective because of **inadequate instructions or warnings** when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product ***not reasonably safe***.
		- Issues:
			* “otherwise distributary” – widening to include more transactions
			* “defective product” – eliminates “condition” of RST
			* Third parties are now in.
			* “harm” – includes **non-physical**
			* Defines **three types** of defects
				+ Manufacturing (original); departs from design 🡪 SL
				+ Design – loses some “strict”

Sounds like negligence standard.

Focus on product.

If no alternative, does that mean **no defect**? Maybe we shouldn’t have product at all? RTT controversial b/c silent on this point.

* + - * + Inadequate instructions/warning – loses some “strict”

Risky in **design**, make safe through instruction?

* + **RTT 3**: Circumstantial Evidence Supporting Inference of Product Defect
		- It may be **inferred** that the harm sustained by P was caused by a product defect existing at the time of sale or distribution, **without proof** of a **specific defect**, when the incident that harmed P:
			* (a) was of a **kind that ordinarily** occurs as a result of a product defect; and
			* (b) was not, in the particular case, **solely the result** of causes other than product defect existing at the time of sale/distribution.
		- Reduced causation test for P. **Res ipsa-like**. “May be inferred” 🡪 judge can infer (as matter of law) to get to jury.
			* P doesn’t have to show ***what***defect was. Ex. bottle doesn’t explode normally. Don’t have to look at specific bottle.
			* P has to show **two things**:
				+ (1) ordinarily doesn’t happen
				+ (2) nothing strange is going on
			* “May be” does NOT mean “have to.” Jury can disagree. Permissive, not mandatory. Shifts burden to D.
		- If doesn’t fit (a), **requires a little more** for permissive inference. *Speller v. Sears, Roebuck and Co.* (apartment fire, dispute between stove v. fridge)
			* P raised triable question of fact b/c offered **competent evidence** sufficient to rebut D’s alternative cause evidence. Enough for a jury.
		- Modern cases require **reasonable expectations test** for food producs.
			* No distinction between **foreign and natural substances**.
			* Can get to the jury even though you **don’t know exactly what caused harm**. *Schafer v. JLC Food Systems* (bit muffin, had pain in throat)
* [Design Defect] – Case law evolved over time.
	+ Early cases: NOT defect if safety issue was **obvious and open**.
	+ Later cases: Tort law/judges second guess market (design)
		- Two tests:
			* (1) Ordinary consumer expectations
			* (2) BPL
	+ [Open And Obvious Test] *Campo v. Scofield* (hand caught in onion topper)
		- If product functions properly and w/o defect, and its functioning creates no danger or peril that is **not known** to user, than law satisfied. **No duty to make machine accident proof or foolproof.**
		- Dominated law until RST 🡪 consumer expectations test.
	+ Could go to the jury, even **if the danger is obvious**, if reasonable care required extra precaution. Knowledge of dangerous condition does not make bottom drop out on negligent case. *2 Harper and James*
	+ [Wade Factors]
		- The **usefulness and desirability** of the product – utility to user/public.
		- The **safety aspects** of a product – likelihood that it will cause injury, and the probably seriousness of injury.
		- The **availability of a substitute product** which would meet same need and not be unsafe.
		- The manufacturer’s ability to **eliminate the unsafe character** of the product w/o impairing its usefulness or making it too expensive to maintain utility.
		- The user’s ability to **avoid danger** by the **exercise of care** in the use of the product.
		- The user’s **anticipated awareness** of the dangers inherent in the product and their **availability**, b/c of the general public knowledge of the obvious condition of the product, or of the **existence of suitable warnings or instructions**.
		- The **feasibility**, on the part of the manufacturer, of **spreading the loss** by setting the price of the proudct or carrying liability insurance.
	+ [Expansive Test] *Barker v. Lull Engineering Co.* (P hurt while operating loader on slanted terrain)
		- Two available tests:
			* Product failed to perform as safely as **ordinary consumer** would expect, or
			* **Risk/utility** analysis
		- Once P has made **prima facie** showing that injury was proximately caused by design, **BoP shifts to D**. Allow BoP to shift quickly. All P has to show is that is was **caused by design.** Don’t have to show it was defective.
			* **Very pro-P**.
			* P met burden by showing absence of seatbelts, bars, etc.
		- **RTT** makes no reference to **consumer expectations**. Rejected first *Barker* test.
			* Requires P to show a reasonable alternative design.
				+ Majority of states do not impose this burden. To hard on P.
			* Worry that juries didn’t know enough about cost/risk analysis.
			* Prescription drugs, defective design test: **any** class of patient benefit 🡪 no defect.
* [Duty To Warn]
	+ [Direct Duty To Patient] *MacDonald v. Ortho Pharmaceutical Corp.* (birth control said “blood-clotting,” “brain,” and “fatal,” but not “stroke”)
		- Manufacturer owes ***direct duty***to patient.
			* Shows willingness to send to the jury.
		- **Takeaway 1:** Rejected **“Learned Intermediary”** rule. Exception to rule b/c birth control seen as **consumer decision** (active in process). Not like the usual case when doctor prescribes. **More personal**. Doctor plays **limited role** (only sees once a year).
			* Different world now. Ads going **directly to consumer.** Different doctor/patient relationship. Different **role of manufacturer**.
			* Rule upheld b/c doctor played significant role. *Harrison v. American Home Products*
			* Direct duty b/c of massive advertising campaign in magazines. *Perez v. Wyeth Laboratories*
			* Expanded in *Johnson & Johnson v. Karl* 🡪 need to provide warning. Advertising circumventing doctor.
			* Pharmacists not under same duty to warn as doctors. *McKee v. American Home Products Corp*. Vast majority of states follow this.
				+ Some courts have found limited duty b/c of expanding technology. Ex. (1) inform doctor of a contraindication or a abnormally high dosage, (2) warning when pharmacy advertises advanced warning system, (3) pharmacist knows/reason to know of customers allergies.
		- **Takeaway 2**: Role of the FDA.
			* Some asymmetry. Non-compliance = weighty/dispositive. Compliance = evidence. Case specific if fed statute trumps state/tort law. No presumption in this case. FDA approved, but D still liable (can find cases that go the other way)
	+ [Limits On Duty To Warn] *Hood v. Ryobi American Corp.* (took of saw guard; blade flew off)
		- Warnings are NOT required to **spell out all the consequences**. Don’t have to be **specify precise risks** involved in removing safety precautions.
			* Need ***reasonable warning***. Doesn’t have to be encyclopedia 🡪 if was, benefit of warning reduced.
			* Problem: how precise?
		- Some dangers that are **obvious to some are not obvious** to others. *Liriano v Hobarat Corp.* (P had hand caught in meat grinder; didn’t speak English and couldn’t read warning)
			* More **demanding test**. Need to foresee what about be obvious. Lots of uncertainty 🡪 enough for a jury.
		- No duty to warn of dangers that **are common knowledge**, like risks of drinking alcohol. *Garrison v. Heublein*.
			* Not upheld though with alcohol and pancreatic disease. *Hon v. Stroh Brewery Co.*

**#REMEDIES**

* Three kinds:
	+ Damages - $$$. Most typical. **Nominal, compensatory, or punitive**.
		- **Nominal**: proved you have a right even when no signficiant harm. Ex. *Alcorn v. Mitchell*
		- **Compensatory**: past & future losses. Find out injury, make whole.
			* Different than contract comp. remedies. Not private contract, but **social contract**. Take your victim as you find him.
			* Problem: **can’t make whole** w/ money. Hard to find out how much $.
			* Solutions: (1) don’t use money, OR (2) do **best we can**. At least get something. Keeps deterrence.
			* Other issues: **uncertainty**, especially with ***future harms***. BoP is on P. Also, ppl want **finality**. Need to plan. Courts don’t want to keep case. D might die. $$ might run out.
			* Personal injury damages: Lost earnings. Pain/suffering. Med expenses. Loss of enjoyment. Bodily harm.
		- **Punitive**: punish and deter.
			* (1) Focus on **conduct** 🡪 how reprehensible. How far beyond state of norm.
			* (2) Focus on **state of mind** 🡪 maliciousness. How far you intend damage to go.
				+ Due Process concerns. Competency of jury concerns.
	+ Restitution – how much D gained. More rare. Ex. tort of conversion
	+ Injuction – in equity. Ban from doing something. Or do something to remedy tort (ex. clean up spill).
* [LOSS OF ENJOYMENT & SEPERATION OF DAMAGES] *McDougald v. Gaber* (severe brain damage during surgery, now permanent comatose)
	+ **H1**: ***Cognitive awareness*** is **prerequisite** for recovery of **loss of enjoyment** damages. Does not serve purposes of compensatory damages. $$ has no meaning or utility to injured person.
		- Problems: what is meant by conscious? If a little bit 🡪 everything in? Had consciousness for a time? Enormous pressure to play with line.
		- Paradox: the more damage you cause, the less you might have to pay. **Doesn’t matter**. Not PD, but comp damages.
	+ **H2**: Pain & suffering and loss of enjoyment damages = **same category**. **Cannot be calculated separately**.
		- Figure will be **distorted** and **amplified by repetition**. Cannot be calculated with sufficient precision.
		- Other courts split categories. P lawyers are always trying to divide things up.
	+ Past/future mental suffering and past/future emotional distress held to be same thing. *Rounds v. Rush Trucking Corp.*
* [EXCESSIVE DAMAGES] *Duncan v. Kansas City Southern Railway* (three girls in accident; one died, one injured slightly, one quadriplegic)
	+ $8m is excessive. Reduced to $6m. Standard is **reasonable jury**. Deferential. Also, forecast wrong **med expenses**. New average age is 30 years less b/c of harm. $17m 🡪 $10m.
		- Historically, most courts use “shock the conscience” standard to review jury awards. Only when it was “clear miscarriage of justice.”
		- Problem: looked at other cases, but those were ***other people!***
* Some courts use **structured settlements** (reduced guessing of inflation/medical costs, but have high administrative costs) or put **caps on damages**. Some jurisdictions have struck down caps on constitutional grounds.
* [PURE ECONOMIC LOSS]
	+ **Basic rule**: no recover unless **parasitic on physical harm** to property/person.
		- R: would be ***too expansive***. Over deterrent.
		- Doctrine around for long time. Originally championed by Holmes.
	+ [EXCEPTIONS] *People Express Airlines, Inc. v Consolidated Rail Corp.* (chemical spill; airline forced to shut down for a time)
		- Exception b/c of **special relationship 🡪 *heightened foreseeability*.** New rule: D owes duty of care to take **reasonable measures** to avoid the risk of causing economic damages to particular P comprising an **identifiable class**with respect to whom D knows/reason to know are likely to suffer damages. Need **proximate causal relationship**. Types of persons w/ particular foreseeability.
			* Traditional rule: $0. Court said physical harm requirement capriciously showers compensation, regardless of status/circumstances of individual claimants.
		- Problems: **completely amorphous test**. Complete matter of degree. Subject to manipulation. Would let everything in.
			* Most courts have rejected it.