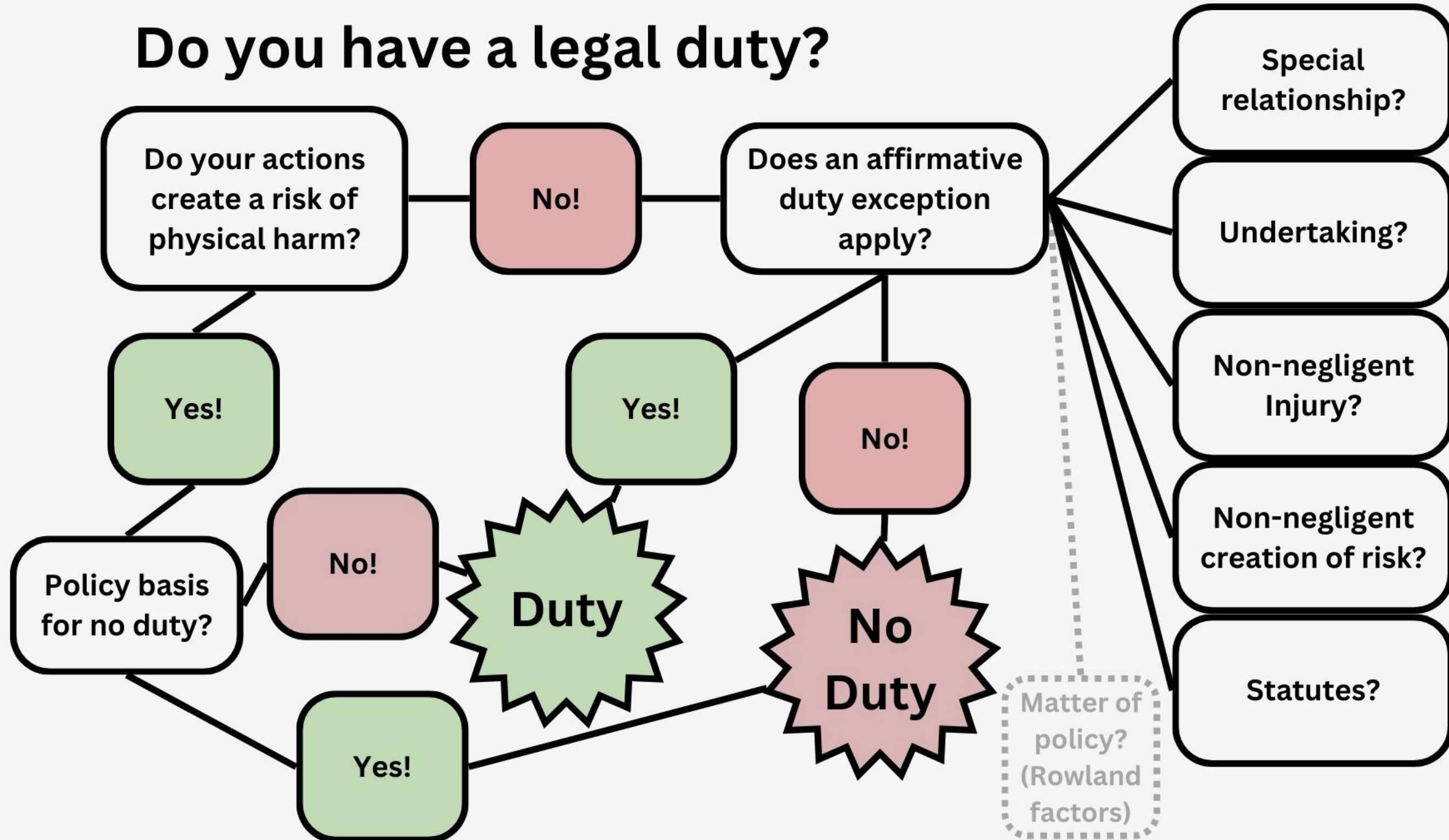
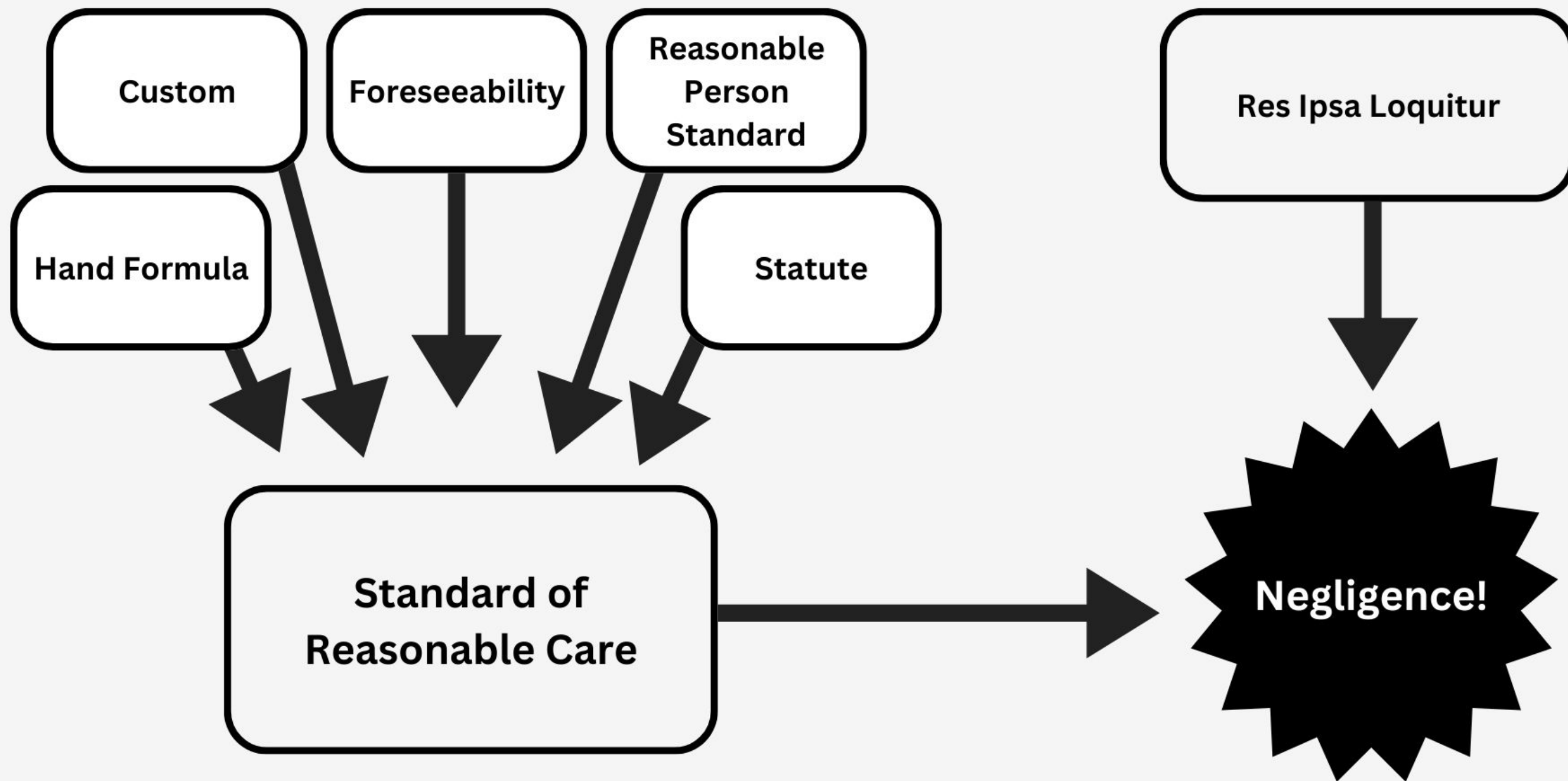


Assumption of Risk

Midterm Review

Do you have a legal duty?





Res ipsa requirements:

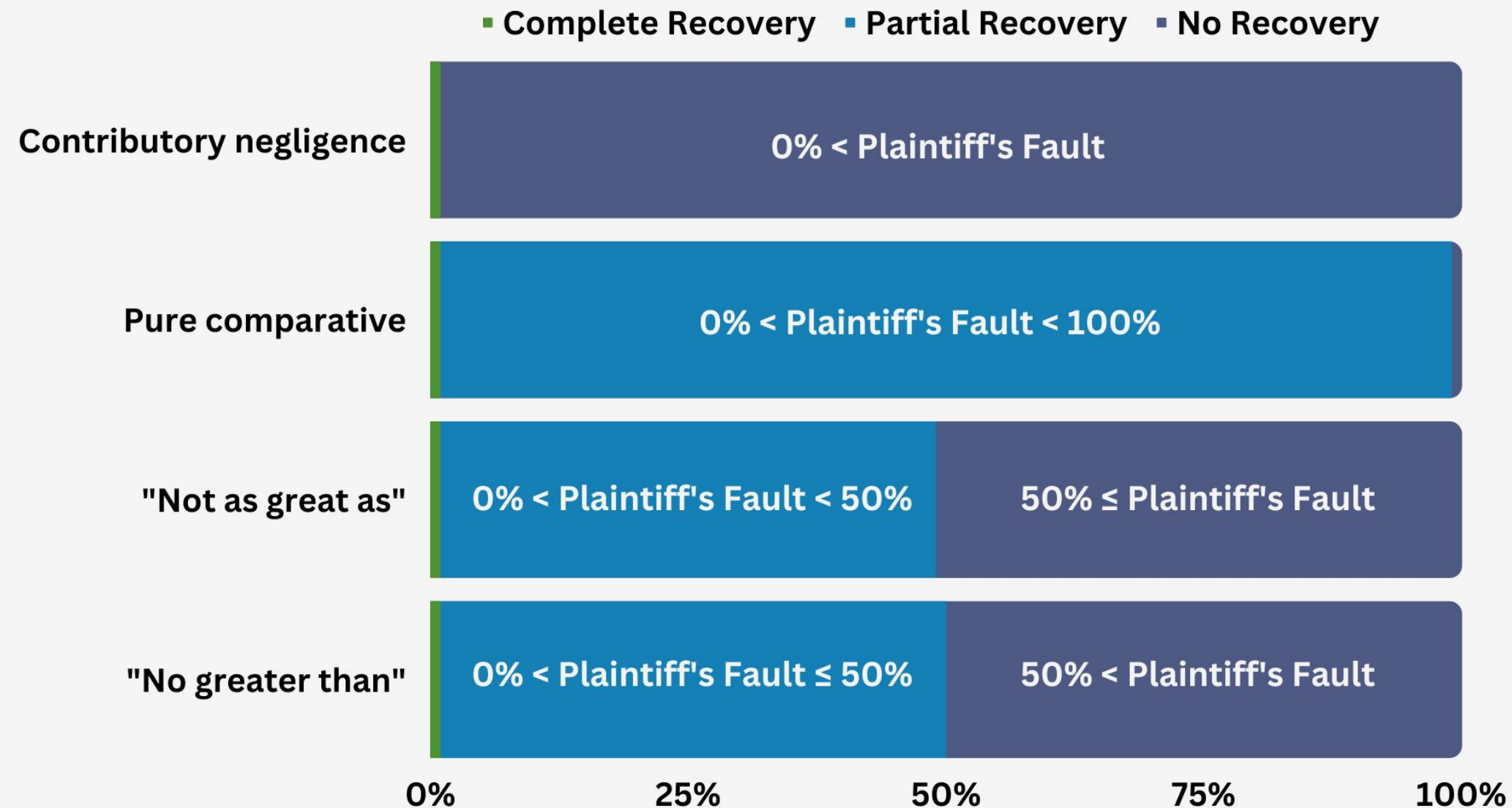
1. Harm results from the kind of situation in which negligence can be inferred
2. Defendant was responsible for the instrument of harm

Comparative Negligence

Three forms:

1. Pure comparative negligence
2. “Not as great as” = (Plaintiff less than 50% at fault)
3. “No greater than” = (Plaintiff 50% or less at fault)

Can the negligent plaintiff recover damages?



If multiple defendants are liable,
how much are they each paying?

Doctrine of Contribution

Traditional Common Law Approach

Two versions:

1. Joint and several liability
2. Several liability

Apportionment based on factual cause

Don't
forget about
factual cause!

Don't forget about factual cause!

Tortfeasors are only liable for the injuries they caused.

Order of operations with multiple injuries and multiple liable defendants

First step:

Separate injuries based on factual cause.

Second step:

For injuries that multiple defendants caused, sort out liability based on the contribution rule in the jurisdiction.

Doctrine of Contribution

Traditional Common Law Approach

Example:

Four defendants (A, B, C, and D) with \$100k damages.

Joint and several liability jurisdiction

A, B, C, and D have plenty of money

Who pays what?

Doctrine of Contribution

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Doctrine of Contribution

Modern Approach

Apportionment based on comparative fault.

Example: Four defendants (A, B, C, and D) with \$100k damages.

A is 40% at fault.

B is 10% at fault.

C is 20% at fault.

D is 30% at fault.

Doctrine of Contribution

Modern Approach

Apportionment based on comparative fault.

Example: Four defendants (A, B, C, and D) with \$100k damages.

A is 40% at fault. So A owes \$40k.

B is 10% at fault. So B owes \$10k.

C is 20% at fault. So C owes \$20k.

D is 30% at fault. So D owes \$30k.

What about vicarious liability?

Vicarious liability and the doctrine of contribution

Modern Approach

Apportionment based on comparative fault.

Example: Four defendants (A, B, C, and D) with \$100k damages.

A is 40% at fault.

B is 10% at fault.

C is 20% at fault.

D is 30% at fault.

E is vicariously liable for D's negligence.

Vicarious liability and the doctrine of contribution

Modern Approach

Apportionment based on comparative fault.

Example: Four defendants (A, B, C, and D) with \$100k damages.

A is 40% at fault. So A owes \$40k.

B is 10% at fault. So B owes \$10k.

C is 20% at fault. So C owes \$20k.

D is 30% at fault. E is vicariously liable for D's negligence. So E owes \$30k.

Fritts v. McKanne

“The Doctor Who Blamed the Drunk Driver”

McCarty v. Pheasant Run, Inc.

“Unlocked Hotel Room Door”

and

Wassell v. Adams

“Opened Hotel Room Door”

Discussion Questions

Given the facts of these cases, what would a just outcome in each case have been?

How capable is our legal system of producing just outcomes in these cases? How does it fall short? What would need to change?

Assumption of Risk

Hanks v. Powder Ridge Restaurant Corp.

“Snowtubing Waiver”

Two Common Issues

1. Was the contract clear enough about releasing the defendant from liability?
2. Will the court enforce contract?

- I fully assume all risks associated with [s]nowtubing, even if due to the NEGLIGENCE of [the defendants]
- I ... agree I will defend, indemnify and hold harmless [the defendants] ... from any and all claims, suits or demands ... including claims of NEGLIGENCE on the part of [the defendants]
- I will not sue [the defendants] ... for money damages for personal injury ... even if due to the NEGLIGENCE of [the defendants]

Will the court enforce contract?

Various legal tests for determining if liability waiver is against public policy:

- Liability waivers are unenforceable
- Totality of the circumstances
- Six factors from *Tunkl*

Tunkl factors

1. Business of a type generally thought suitable for public regulation.
2. Defendant performs a service of great importance to the public (often a matter of practical necessity for some members of the public)
3. Defendant willing to perform this service for any member of the public
4. Defendant has bargaining advantage
5. Standardized adhesion contract of exculpation
6. Plaintiff placed under the control of the defendant, subject to the risk of carelessness by the seller or his agents.

Tort Law Values

Era	Philosophy	Primary Goal	Concern
Classical	Corrective justice	Individual accountability	Autonomy
New Deal	Political Economy	Distributive justice	Power
Neoliberal	Economics	Maximize utility	Efficiency

Murphy v. Steeplechase

“The Flopper”

volenti non fit injuria

volenti non fit injuria

“to one who is willing, no wrong is done”

Cardozo's counter-examples

1. “Obscure and unobserved” dangers
2. Too many accidents

Knight v. Jewett

“Touch Football Injuries”

Explicit assumption of risk

Implicit assumption of risk