- P prove P.F.C. by prepond of evidence (P must show more likely than not each element of claim is satisfied. If P fails at this, loses)

Intentional Torts – Battery & Assault Prima Facie Case

(note: 1 year Statute of Limitations for assault & battery claims)

Battery PFC: Actor A is subject to liability to P for battery if:

1) Act (direct or indirect)
2) Intent to cause harmful/ offensive contact with another (purpose/know w/substantial certainty)
3) Causation
4) Result (reasonable person would view harmful/offensive contact occurring)

Contact: can be established by contact w/anything that is customarily regarded as part of one's body (bodily contact, extended personality) [contact must violate prevailing social standards of acceptable touchings]

- Harmful
- Offensive (offending a reasonable sense of personal dignity)
    - Was P offended? Would it offend a *reasonable* sense of personal dignity?

- *Cecarelli v. Maher (552)* – paradigm harmful battery case, D had obvious intent to cause harmful bodily contact (beat up P in secluded area near dance)
- *Paul v. Holbrook (553)* – offensive battery case, D intended to contact P (massaged her) & P was offended & it would have offended a reasonable sense of personal dignity
- *Nelson v. Carroll (558)* – at bar D had gun and while threatening P he shot him; doesn't matter that gunshot was an accident bc D intended to cause harmful bodily contact anyway (transfer of intent);

Assault PFC: Actor A is subject to liability to P for battery if:

1) Act
2) Intent to cause apprehension of an imminent harmful/offensive bodily contact w/P (purpose/know w/substantial certainty)
3) Causation
4) Result of *reasonable* apprehension of an imminent harmful/offensive bodily contact
    - Not intimidation; reasonable apprehension! For threat to produce fear, need just/reasonable grounds for fear (affect mind of person of ordinary reason)
    - Words alone do not constitute an assault unless circumstances in which a threat could cause reasonable apprehension (present ability of future/imminent injury to occur. If there's no way D could harm/offensively contact P, then there is no reasonable apprehension of a threat)
    - If P does not see A's act – no reasonable apprehension

- *Beach v. Hancock (579)* – D brought gun to P's office that he aimed in threatening manner, P reasonably apprehended harmful contact given gun was aimed at him & for all he knew it was loaded (imminent battery)
- *Brooker v. Silverthorne (580)* – P couldn't reasonably apprehend imminent battery bc D wasn't near & had no intention of breaking his neck ("if I were there, I would break your neck" - threat so ample opportunity to find safety & no promise of future injury); not sufficient that P was apprehensive of a battery sometime in the 'near future'; rather P must reasonably apprehend an imminent harmful/offensive battery
- *Vetter v. Morgan (583)* – car case, D drove & started screaming/threatening P in other car, P reasonably apprehended battery despite door was locked bc D's conduct was extreme & car was extension of her person

P.F.C. #2 Intent

Two types of intent: P must establish that D acted with

1) Purpose – to act w/purpose to cause offensive/harmful contact ***or***
2) *Knowledge with substantial certainty that your contact will cause offensive/harmful contact
    - It is not sufficient if you know w/substantial certainty that *risk* was created (negligence) but rather you must know w/substantial certainty that your actions *will cause* harmful/offensive contact
    - "Should have known" "know of risk" ← not sufficient; must know w/subst certainty your act would cause harm
    - *I must be INTENDING to cause the tort*

***most courts, you can establish intent through purpose or knowledge w/substantial certainty ← subjective!!** (what was D's actual purpose, what did D actually know?)
(ex. putting bomb in the room to protest – purpose not to hurt ppl but know w/substantial certainty someone will be hurt so liable)
It's not sufficient D *should have known* staff would be in the room w/bomb or that D knew there was a *substantial risk* someone would be there; must know w/substantial certainty or purpose that your act would cause harm!!

Exception: workers compensation & statistical knowledge

- Worker's Comp: get this w/o establishing purpose (it's a settlement in exchange that you won't sue company for negligence).
- Statistical Knowledge: much harder to infer purpose w/mere statistical knowledge

Single v. Dual Theory of Intent

- **Single Theory**: sufficient to have D intend to have bodily contact that turns out to be harmful or offensive to a reasonable person even if unforeseen (intent = subjective)(whether contact was harmful/offensive = objective)
  - *Cole v. Hibbard (613)* – P was leaning over stroller & D kicked her in lower back then laughed; D had requisite intent for battery pfc bc D intended the contact & any reasonable P would find it offensive.

- ***Dual Theory**: intent to (1) intend bodily contact *and* (2) intend it to be either harmful/offensive ←common!
  - *Cole* dissent – D did not have requisite intent bc it was a playful kick not intended to be harmful/offensive
    - Rule: to establish battery on dual theory of intent, P has to show that D intended either harmful or offensive contact; it's not sufficient to show that D solely intended a contact, that turned out to be harmful
    - if reasonable person disagrees that D intended either harmful/offense → question of fact (jury)

Transferred Intent – can transfer across persons & across torts

(1) Same Victim, Different Tort
- If you had intent to cause assault & a battery occurred, court will view you as intent to cause battery
- If D intends an offensive contact, he will be liable if the contact turns out to be harmful, even if the harm was neither intended nor reasonably foreseen. Not sufficient that D knew his conduct created a risk
- *Nelson v. Carroll* – sufficient that D intended harmful contact (striking w/gun) and another occurred (gunshot): intent to cause assault is transferred to intent to cause battery
- Policy: wrongdoer should be held liable for whatever results even if unforeseeable as consequence of their wrongful intent

(2) Across Victims
- One who intends a battery is liable for that battery when he unexpectedly hits a stranger instead of the intended victim
- *In re White (621)* – White (D) & Tipton were arguing, D pulls out gun & shoots at Tipton but hits another P; D is liable for battery against P though his contact was directed toward Tipton
- Policy: social element of deterrence

(3) Across Torts and Victims
- One who intends assault but results in battery of another person, they're liable for intending battery of that person even if it wasn't their intent or foreseeable that it would occur
- *In re White example:* if W only intended to assault T by scaring him w/gun & W ends up shooting P, W is liable for battery against P (Intent to scare T → intent to batter T :: Intent to batter T → intent to batter P)

Affirmative Defenses to Battery & Assault

Consent: P cannot prevail on tort claim bc she agreed, under appropriate conditions, to endure a bodily contact/apprehension of contact, that would be otherwise tortuous

- *Express consent*: written/spoken; written consent to operation.
- *Implied consent*: conduct; ppl entering crowded trains implicitly consent to intentionally caused contacts
  - Test of implied consent: whether or not D *reasonably* believed that P was giving consent. Must be objective; subjective belief is not sufficient (doesn't matter if P actually consented)
  - Presumed consent: if victim expressly/implicitly consented to some harmful/inappropriate contact, question is whether contact was of the sort to which P consented (scope of consent; if outside, no defense)
    - (ex. operate on diff part of body than P consented to have touched)
  - Imposed Consent: sometimes law will impose consent (ex. parents can't reject life saving treatment of child)
- Policy: person's right to choose; individual autonomy
- Ineffective Consent (legally ineffective)
  - Fraud – D can't use consent defense if D secures victim's consent by misrepresentation/deceit
  - Coercion – D can't use consent defense if D secures consent through coercion (violence/threat)
- *Koffman v. Garnett (588)* – football case; P was tackled by D in a lesson; jury to decide if P implicitly consented to touching given his football partic (Q of fact); most likely no consent was given for this bc beyond ordinary tackling & P couldn't anticipate it (size disparity, authority, no similar tackling before)

Self-Defense: a victim who *actually & reasonably* believes it's necessary to injure another to avoid *imminent* injuries to herself
(1) actually and reasonably believing *some* physical force is necessary (2) was force used excessive?
subjective: victim must actually & reasonably believe that there is an imminent risk of injury

- juries use surrounding circumstances to decide what is reasonable

objective: has to be an appropriate & proportional response to the perceived threat

- deadly force is only justified when victim actually & reasonably perceives threat of imminent death or serious bodily injury
  - **Safe Retreat**: before you use deadly force, you have an obligation to retreat if you can do so safely & are *not* justified in using deadly force
    - Unless (1) attack is inside you're dwelling (then you can self-defend w/deadly force & you don't have to retreat) or (2) attack is not deadly (rt to stand your ground, you can defend yourself & don't have to retreat if attack is not deadly)

- *Haeussler v. DeLoretto (599)* – P went to D's house about Pdog; P got aggressive & D pushed him out of fear for himself; D acted reasonably out of self defense bc he was protecting himself from bodily injury (it was necessary & reasonable – D knew stories about P's violence, D thought P was going to hit him & D's force was reasonable)

Defense of Others: if D *actually & reasonably* believes that injuring P is *necessary* to avoid an *imminent* injury to one or more 3rd parties, D is privileged to use *proportionate* force against P to prevent such injuries

- objective (must be proportionate) & subjective defense (must actually & reasonably believe imminent harm)
- defensive use of others to protect yourself is not justifiable (can't use innocent bystander to shield yourself from attack)

Defense & Recapture of Property: right to use *reasonable* means to repel trespassers
Possessor can use *reasonable* force to repel a trespass, but can't use force *intended or likely to cause* death/serious bodily harm unless intrusion threatens death/serious bodily harm to the occupiers of premise
(1) was some force necessary? (2) was force used excessive? (objective)

- use this when threat to both property & human life
  - if you're in bed & hear someone trying to break in & out the window you see the person has a gun, you are able to act in defense of property w/deadly force (not self-defense bc threat is not imminent, rather the threat to human life exists)

- *Katko v. Briney (603)* – D had farm land & put shot-gun trap in bedroom, P thought farm was abandoned and entered & got shot in the leg; ct held D was liable because the shot-gun trap was force likely to cause death/serious harm – P's intrusion did not threaten human life & thus D's defense was unjustified
  - Rule: D is privileged to use deadly force in defense of property only when the intrusion to property threatens death/serious bodily harm to the occupiers/users of premises.
    - deadly force – force *intended* to cause death/serious harm & use of means *likely to cause* death/serious bodily harm
  - note: if force was not per se excessive, maybe sign posting relevant on reasonableness of force

Intentional Torts – Intentional Infliction of Emotional Distress (IIED) Prima Facie Case

IIED PFC: Actor A is subject to liability to other person P for IIED if:

1) Act of extreme or outrageous conduct
2) Intent [or reckless] to cause severe emotional distress
3) Causation
4) Severe emotional distress

#2: Intent & Reckless Indifference to likelihood that emotional distress may result (purpose or knowledge that distress was substantially certain to result or reckless infliction of severe emotional distress) (extends to reckless conduct as well; reckless: in deliberate disregard of a high degree of probability that certain harm will occur)

#4: Severe Emotional Distress – don't need physical harm, just severe emotional distress (can recover for it & any other bodily harm which results)

- "Outrageous!" – extreme cases that go beyond all possible bounds of decency;atrocious (merely inappropriate, offensive or careless doesn't count) [this is determined by the court initially]
    - Must be so severe that no reasonable man could be expected to endure it
    - Could encompass threats/apprehension in *future* (*not* imminent bc that's assault)

- *Dickens v. Puryear (650)* – P was tokin' up w/D's daughter, D hardcore threatens P after beating him up; D's threat of future death does not constitute an assault bc not imminent, thus it could be seen as IIED
- *Littlefield v. McGuffey (655)* – P was renting an apartment & D was hardcore racist/threatening P's husband who was a diff race; P sues for IIED & gets $50k compensatory & $100k punitive damages

Defenses to IIED: there aren't any defenses because extreme & outrageous conduct can never be justified

Negligence: Liability for Physical Harms

Negligence: failure to heed a duty of reasonable care owed another that cause injury to another (creates risk)
- Statute of Limitations: 2 years

Negligence PFC: Actor A is subject to liability to person P for Negligence if:
1) Duty of reasonable care *Q of law - judge*
2) Breach of Duty *Q of fact - jury*
3) Causation *Q of fact - jury*
4) Resulting Damages/harm/injury (physical (emot & econ harder to get, but ok if w/physical))

#1 Duty ← question of law (for judge) **don't spend a lot of time on duty unless premises liability, nonfeasance, etc**
Misfeasance (easy duty); D's affirmative action (D's careless conduct caused P physical harm)
- **Rule: Duty to take reasonable care to avoid foreseeable harm to other ← unqualified**
  - *Walter v. Wal-Mart Stores, Inc.* – misfeasance - P filled Rx at WM & pharmy/D failed to comply with standard protocol & gave her the wrong drug, P got super sick from it, Ct held D negligent & thus WM is liable through respondeat superior (Vicarious Liability (Respondeat Superior) – employer vicariously liable for acts committed by employee w/in scope of employment)
- *Majority - Palsgraf Andrews' dissent: duty owed to anyone who happens to be harmed by D's activity; duty owed is to prevent foreseeable harms to others; limit liability w/prox cause
  - Ex. driving owe duty to avoid foreseeable harms to anyone who happens to be hurt; if P 10 blocks away is hurt, you still owed duty to her, the issue would be prox cause

Nonfeasance (hard duty); D not doing something causes P harm
- **Rule: Generally, No duty to act/care;** D is not responsible for failure to act (even if know P needs help) [policy: indiv autonomy/choice][ex. see baby on rr tracks, see train coming & doesn't remove baby is ok] *2nd Rest §314 – D does not have duty to help*
  - *Osterlind v. Hill* 76: nonfeasance: D rented boat to P, P was drunk & drowned, D didn't help; D had no legal duty to intervene to protect P
  - *Mock*– water company didn't supply fire hydrants as result of which P's residence burned down; their neg to supply water to someone w/whom there was no k = nonfeasance

Nonfeasance Exceptions: **Qualified/Limited Duties**: see below & statutory duties (see below)
D does *not* have a duty to aid/protect P, even if he knows they need assistance unless; Exceptions:
Affirmative Duties to Rescue & Protect ←*D has duty of care/to act as ordinary, prudent, reasonable person (see below)*
- ***D caused Imminent Peril to P*** ← D has a duty to interfere/exercise reasonable care when he's caused P's injury
  - ex. I beat you up & leave you in the woods, I have a duty to rescue you
- ***Voluntary Undertakings*** ← *D voluntarily assumes duty*
  - situations in which D volunteered to protect another from physical injury, property damage, rescue
    - *I promise to help & then refuse to do so* (reliance element; P may rely on your promise)
    - *I begin to help & am careless in how I administer aid*
      - But….**Good Samaritan Statutes**: immunize certain persons who undertake rescues from liability for neg in rescuing (ex. off-duty professionals) (policy: don't want to deter rescues) [if you aid, not be liable for simple negligence, only gross]
    - *I begin to help but stop too soon* (if P can prove that D's short-help deterred others from helping, they can apply this voluntary undertaking exception to the general no duty rule (D had a duty))
- ***Special Relationships*** ← Duty to make reasonable efforts to rescue
  Pre-tort special relat bw victim & rescuer: carrier-passenger, school-student, employer-employee, hospital-patient, prison-prisoner (note: social host-guest relat has not been recognized)
  (1) Relationship bw parties (2) reasonable foreseeability of harm ← duty!!!
    - *Tarasoff v. Regents of Univ of California 119* – Poddar told Dr about his intentions to kill Tarasoff, Dr told police & they ended up releasing Poddar, no one warned Tarasoff; Ct held Dr liable for neg bc he had duty to exercise reasonable care to protect intended victim (call police, warn victim, etc.) even if no special relat bw Dr & victim

- ^extended CL special relat bw therapists & patients that created a duty to warn known victims of patient's threatened violence (specific to therapists)
  - *mental health professionals have a duty to exercise *reasonable* care (if doc *should have known*, he would be liable – test is reasonableness)
    - Cts reluctant to apply this to lawyers bc mental health profs trained to know when threats realistic
- *Determining duty w/balancing factors*: forseeability** of harm, degree of certainty, closeness of connection bw D's conduct & injury, moral blame, policy of preventing future harm, burden on D, consequences to community of imposing a duty
  - Dissent: no duty to control another's conduct unless special relat bw d/injured victim or d/wrongdoer – but public policy concerns matter more: patient rts, confidential, etc.
- ^super controversial case!

- Once relationship ends (passenger leaves train), duty ceases to exist
- Policy: storeowner, who derives economic benefit from customer, should assume affirmative duty to exercise reasonable care (help ill customer) as a cost of doing business
  - *Baker v. Fenneman & Brown Properties 77* - P in Taco Bell fell unconscious & sued D for neg, D claim it had no duty to P bc lack of instrumentality (D did not cause ill); Ct held D had duty to provide reasonable care bc business invites public to enter & must provide reasonable assistance, even though D not responsible for P's illness
- *Reporting Obligations* – duty on certain individuals who know a child suffered injuries & has reason to believe they were caused by abuse or neglect must report suspicions
- *Duties to Protect Persons from 3rd Party Misconduct* – sometimes duty to take care to protect another from the threat of being injured by an intervening 3rd party wrongdoer

Defining the Reasonable Person

General rule: a reasonable person standard is external & objective

- *Vaughan v. Menlove 158*– ct use standard of reasonable man (objective); D had hay stack near P's cottages, D warned they posed threat of fire but didn't do anything, fire, D neg uner standard of ordinary prudence
- *3rd Rest §3:* person acts negligently if they do not exercise reasonable care under all circumstances, consider following factors to determine if lack reasonable care: foreseeability that conduct will cause harm, foreseeable severity of harm, burden of precautions to eliminate/reduce risk of harm
  - see Reasonableness Standard clarified below…

Exceptions:

- **Children**:
  - Rest/majority: child under 4 cannot be negligent, above 4 a child's standard of reasonable care is compared to standard of reasonable children of similar age, experience, intelligence (2nd Rest§283A)
    - Except w/"adult activities" – then measured by reasonable person of ordinary prudence standard (adult) [ex. minor driving care]
  - Minority: Tender Years doctrine – child under 7 incapable of neg (bc incapable of recognizing risk)
    - *Applehans v. McFall* 160– P got hit when D (5yrs) rode bike into P, D was incapable of neg bc of stare decisis, tender years doctrine controlled
- **Physical Disabilities**: compare blind person to reasonable blind person – compare their standard to standard of a reasonable same-type of person (man w/1 leg v. reasonable man w/1 leg)
  - Except w/mental disabilities – compare ppl w/mental disabilities to reasonable person (bc these are harder to understand & physical disabilities are more objective [you are or you aren't blind])

Note: parents are *not* vicariously liable for their children's carelessness; P must establish direct parental negligence (negligent supervision – if parent know/should know child's tendency to be neg & failed to exercise reasonable means to restrain) (negligent entrustment – parent carelessly gives child access to dangerous thing child is not equipped to handle safely [ie. gun])

Premises Liability → duty w/land

Land activities: misfeasance duty to exercise reasonable care (if no exercise reasonable care, liable) (ex reas care, not liable)
- Ex. hanging a chandelier that falls; if carrying on activity w/due care/exercising reasonable care, not liable for negligence

Land conditions (limited/qualified duty to care; you do have a duty – how much depends on legal status…) (having koi pond on land)

Traditional Approach Common Law Distinctions ← duty is Judge (no jury unless Q legal status; bound by these)

if dispute (1) discuss the resulting diff duties in (2). If clear (1) legal status, only discuss that (2) duty

- (1) classify legal status of victim as invitee, licensee, trespasser ← Q of law for judge
  - Invitee – person goes on premise in answer to express/implied invitation for mutual advantage.
    - *material benefit* (Carter v. Kinney) – significant, not trivial (ex. dishwasher repairman, mailmen give you material benefit)
    - *business visitors* or public invitees (Restatement)
  - Licensee – one who enters property for own convenience, pleasure, benefit pursuant to license or implied permission of owner (ex. social guests, encyclopedia salesman bc business-dealing & uninvited)
  - Trespasser – one who enters upon another's premises merely for his own purpose, pleasure, convenience w/o license, invitation or other right
    - note: ppl knocking on your door aren't trespassers bc social norm to walk up walkway and ring the bell. If you have a sign that says 'no solicitations', then trespassers.
- (2) identify duty owed to injured party
  - Invitee – owner has duty to exercise reasonable care, including reasonable inspection & warn about hidden dangers
    - *Rest §342* – owner is liable to invitee if owner knows/would discover condition that involves unreasonable risk, should expect invitee will not discover danger/fail to protect themselves against it (doesn't have to be hidden; if open and obvious, sufficient to establish liability if invitee would fail to protect themselves against it) and fails to exercise reasonable care to protect them against the danger
  - Licensee - owner of premises has duty to warn/make safe of known conditions that are hidden/not obvious (no duty to inspect; licensee takes premises in same way owner does)(if it just snowed & its obviously icy, D doesn't need to warn P about that)
  - Trespasser – owner has duty to refrain from willfully & wantonly injuring (recklessness)
    - *Exceptions where owner owes a greater duty to trespassers:*
      - Attractive Nuisance Doctrine: maintain structure on land that attracts *children* & you know about it and don't do anything to close access, you may owe child trespasser a greater duty *only w/children!*
      - Adult Trespassers – if you're aware they are trekking through property along path A-B & you know dangerous conditions on path, you may have duty to warn them bc you know of their path
- (3) determine if duty was breached by landowner or business operator

*^these are only w/CONDITIONS on land, not activities

- *Leffler v. Sharp 88*– P got drunk and climbed out window on roof, got injured, ct held P was invitee when entering the inn (express/implied invitation for mutual advantage) but not at time of injury bc he went beyond bounds of his invitation & exited inn – no duty was owed; P wasn't a licensee bc D did not give permission, P was a trespasser & owner has no duty to keep his premises safe for trespassers (only to refrain from willful/wanton injury)[in this case, licensee & trespasser in Mississippi have same duty (to avoid wanton/willful harm)]
- **Carter v. Kinney* – traditional CL approach to duty; K invited church people to his house for bible study, C slipped on ice in driveway & broke leg, ct held C was a licensee & thus K did not have duty to protect him from unknown dangerous conditions (K didn't know about driveway)

Non-Traditional Approach to Premises Liability – *Rowland* (CL distinctions were very confusing)

- *§1714 of Civil Code* – everyone has duty of reasonable care in managing property no matter legal status
  - Legal status relevant to breach, but not determinative of duty owed (used by jury to attach weight to P's legal status & decide if D's land was reasonably safe at time of accident – decide whether there was a breach)
- Test: whether in the management of his property, he acted as a reasonable man in view of the probability of injury to others (occupier can be neg when aware of concealed land conditions that pose an unreasonable risk of harm & knows that others are about to contact it & doesn't warn or repair)
- Policy: reasonable person doesn't change their conduct depending on legal status, egalitarianism
- Procedural Effect: transfer of power from judge → jury (judges can't dismiss on no-duty grounds)

- *Rowland v. Christian 110*– nontraditional – always a duty for reasonable care, regardless of legal status; D invited P into apartment, P was injured using bathroom fixtures, D was aware faucet handle was defective, it wasn't obvious & D didn't warn/repair – thus under ordinary principles of neg, D was neg
- Some courts have chosen an intermediate approach & abolish distinction bw invitee & licensee, but maintain distinction bw them & trespasser

Statutory Duty (existence of duty element) ← **statute establishing duty**

- Sheehy 3-Part Test - determine availability of private right of action for violating statutory duty:
  - If statute expressly authorizes private right
  - If statute is silent – may one be fairly implied using 3-prong test?
    - (1) is P in protected class?
    - (2) will private right of action promote legislative purpose?
    - (3) is private right of action consistent w/legislative scheme?
      - *Uhr v. East Greenbush Central School District* – statute education law §905(1) required students to be tested for scoliosis 1/yr, D was neg in failing to examine minor P, P needed surgery; P sues D but failed to establish (3) bc statute had its own admin enforcement & want to immunize schools from liability - thus P can't rely on statute to create a duty where none under CL; P failed to state claim for CL neg
- Child Abuse Reporting Statutes – every st reqs reports by those w/knowledge/reason to suspect child abuse
- Statutory Duty to Report Crime – CA has "Sherrice Iverson Victim Protection Act" – any person who reasonably believes he has observed a murder, rape, other sex crime where victim is under 14 shall notify a peace officer; failure to comply is misdemeanor (Exceptions: relative of victim/offender, reasonable mistake of fact, reasonable fear of own/family's safety)
- Federal Statutes rarely have implied private rights, but Congress can explicitly create federal tort action
  - ex. Emerg Med Treatment & Active Labor Act (EMTALA) – hospitals w/emerg facilities have to accept patients in emerg med conditions & treat until stabilized
- Statutory Limitations on Liability – Good Samaritan Statutes – almost all states have these, attempt to encourage rescue by limiting liability (immunizing the actor from liability) for any civil damages as result of any acts/omissions in rendering care

Pure Economic Loss (1) injury & (2) caused from breach of duty

- Ct usually reluctant to recognize broad duties to care for another's economic well-being (only special situations)

Policy Based Exemptions to Qualified Duties of Care ← ct will limit duty when public policy requires it
Makes certain entities not liable for negligence (no duty of care under public policy bc too hard to remedy legally)

- *Strauss v. Belle Realty Co 453*– misfeasance: S went to basement in dark & got injured, sued B & Con Ed for neg in performance of its duty to provide electricity; ct dismissed & held bc of public policy, Con Ed did not have duty to S bc otherwise would expand Con Ed's liability to include indirect customers (too much, nearly impossible to measure); CE would go bankrupt if liable & there is great public interest to have a comp supplying power at reasonable cost
- ***Social Host Serving Liquor Policy Exemption***
  - Misfeasance – serving alcohol to minor/visibly intoxicated person
    - w/commercial sellers – state legs began passing Dramshop acts – injured Ps can sue commercial owners if they served alky to minor/someone obviously drunk (commercial sellers owe a duty to exercise reasonable care in providing alcohol to minors/visibly intoxicated persons)
    - w/social hosts – most courts do not recognize a duty – social hosts do *not* owe a duty to exercise reasonable care in providing guests with alcohol
  - Policy: more social hosts than taverns so hard to adopt social-host liability, people in business have to take more responsibility for exercising reasonable care (premises-liability), tavern owner gets $ from alcohol consumption so more incentive to serve liquor & have insurance so liability is cost of doing business

#2 Breach of Duty (most commonly litigated) (question of fact for jury)

Functions of judge/jury

- Existence/scope of duty → matter of law (judges)
- Breach of duty → matter of fact (jury)
  - (1) decide factual issues & (2) make normative evaluations (given those circum, what would reasonable person have done?)
  - Judge can take the breach of duty question away from jury
    - *Martin v. Evans 142* – tractor trailer reverse; credibility determinations/Q fact (if Evans took necessary precautions, whether Martin was parked illegally, etc.) are solely for jury; E not neg
    - *Adams v. Bullock 151*– electrocution on bridge; ct ruled on breach as matter of law (judge) & held D not neg bc took all necessary precautions to avoid injuring P; ordinary caution does not involve foreseeing extraordinary circumstances (like A swinging a wire); lack of foreseeability
- 4 Features of Standard Breach Instruction:
  - (1) jury is instructed that negligence means failure to use ordinary care
  - (2) ordinary care is defined by reference to a reasonable person
  - (3) directs jury to consider whether D was negligent in doing something or failing to do something
  - (4) jury is instructed to consider the circumstances of the event

"Reasonableness Standard" in determining if it has been breached has been clarified:

- **specific judge-made rules** specifying when certain conduct constitutes (un)reasonable care: Justice Holmes
  - *Baltimore & O.R. v. Goodman*- man was driving through rr tracks but didn't stop/look, train hits him, J. Holmes held as matter-of-law, P was contributorily negligent & should have stopped/got out/looked. (takes breach of duty into judge's hands bc standard of conduct was clear)
    - Opposite: J. Cardozo overrules ^that in *Pokora* case (train collides w/P's car on rr tracks) & said case should go to jury bc society's evaluation of what is reasonable will change over time & jury more likely to recognize the change (if rule as matter-of-law it won't evolve appropriately). There are 'special' cases that should be decided as matter-of-law (see *Adams v. Bullock*; lack of forseeability)
- **cost/benefit analysis**: Justice Hand & Posner's Balancing Test formula
  - *US v. Carroll Towing* 189– J. Hand: B < PL for comparative fault; tug boat case where Carroll, in releasing lines, pier broke away and hit a tanker that ended up sinking w/US flour; Connors didn't have bargee on board to examine collision & ask for help - thus was contrib neg & should be 1/3 liable for its own sinking damages (along w/Grace's 1/3 & Carroll's 1/3)
    - Hand Formula: duty defined by B < PL (burden < probability x injury)
      - To determine owner's duty to provide against resulting injuries, 3 factors: (1) probability *some* harm will occur (P); (2) gravity of resulting injury (L); (3) burden of adequate precautions (B)
      - Liability depends upon whether B<PL (determine ex ante; before accident - duty to exercise reasonable care if burden of taking the precautions is less than the expected harm from not taking the precautions)
    - Problems w/Hand's formula (hard to determine B, P, L)
      - Whose value do you weigh more – value to protect myself or to protect you? Can't include moral signif.
      - Does level of precaution vary depending on what sort of person/property might be injured? Rich v. poor
      - What about inadvertent/unintentional neg? have you really failed to properly balance burdens & benefits by forgetting to check your mirrors?
    - Posner $ costs of precaution v. $ value of expected harm: if precautions are more expensive than cost of expected harm, don't take precaution bc wasteful of society's resources (only take cost-efficient precautions) ← utilitarian
  - *juries don't use cost-benefit analysis to determine damages; but it helps beak down elements of case/develop arguments
- **Statutory Violations** (breach of duty element)
  - **Criminal statutes & Admin regulations**
    - (1) Relevance – violation only relevant to breach of duty if it's a <u>safety</u> statute
    - (2) 4 Procedural Effects (strongest → weakest)
      - (1) *willful* violation of safety statute is negligence per se (breach as matter-of-law)(**see below**)
        - Bc safety statute, leg determined some conduct is unreasonably unsafe
          - Ex. motor-vehicle code to turn car lights on when dark
        - Judge takes breach Q away from jury bc defer to legislature (public already influenced them so we don't need public input again w/jury); Shifts burden from P → D (D has to prove an excuse)
        - (1) did D violate statute? (2) willfully? (3) is there an excused omission?
          - *Martin v. Herzog* – easy misfeasance; driving wagon w/o lights neg per se
        - <u>Excused Omissions</u>: (initially judge determines if excused, then any Q of fact gets jury)

- Children can't be neg per se simply by noncompliance w/statute
- If violation is more prudent (makes D & everyone safer) then violation is excused (narrow exception, conduct must be safer for *everyone*, not just D)
  - *Tedla v. Ellman*: D not liable for neg per se bc conduct was safer course of action
- If D can show it was unable, despite reasonable diligence to comply w/statute (if club had no means of knowing served alky to minor, D not neg per se)

- (2) Rebuttable presumption of negligence (presume violation of safety statute is neg unless D can explain why jury should not find breach of duty despite violation)
- (3) prima facie evidence of negligence (enough to get to jury on breach, then jury decide if violation constituted a failure to exercise reasonable care)
- (4) statutory violation is not determinative, but rather *some* evidence for breach of duty

- **Negligence Per Se** (breach of duty element) ←**statutory breach of duty**
  - unexcused violation of a <u>safety</u> statutory standard of care, constitutes negligence per se
    - violation of licensing statute is not neg per se - *Brown v. Shyne* med mal case
      - except: in med mal, lack of medical license is p.f. evidence of negligence & goes to jury unless D can prove he had the traits of a practitioner
    - evidence of statutory compliance does *not* constitute reasonableness; can be evidence of it (exception: compliance w/products liability safety statute constitutes reasonable care)
  - *Dalal v. City of NY 338* – car crash w/D not wearing glasses; violated Vehicles & Traffice law statute; D was neg per se bc willfully violated safety statute; decided by judge (no jury)
  - *Bayne v. Todd Shipyards Corp 339*– P/employee truck delivery company, while unloading fell off platform, claimed D's loading platform lacked required guardrail; D violated safety regulat from Admin statute of Dept of Labor & Industries; D was neg per se (violation of admin regulations can constitute neg per se bc represents public consensus (public hearing, not obscure bureaucratic statute))
    - *Note: many admin regulations aren't created publicly so cts split about whether should apply neg per se*
  - *Victor v. Hedges342* – D parked car on sidewalk in front of building, 3rd party hits P &D; P sues D for neg per se bc D violated Vehicle Code; ct held D not liable neg per se bc statute was not designed to prevent type of occurrence that resulted in P's injury

**if D is not liable for neg per se, then it goes to P to establish ordinary negligence under reasonable person standard*

- **Industry Customs & Usage**
  - *Rhode Island Hoop v. Zapata* 194– Z employee forged checks & RI Bank paid them, Z argue bank was comp neg, ct says RI not comp neg bc exercised 'ordinary care' when follow industry-wide practice that saves $ w/o significantly increasing # of forged checks paid; cost of precautions was way > costs saved w/precautions = not cost-efficient
    - you have duty to take extra precautions if the cost of having precautions < cost of not having them (cost of losses)
- **Industry & Professional Custom** ← business custom is relevant but not determinative of reasonable standard of care
  - Business Standard: when industry application is so extensively used it is practically universal, it is considered a custom & those lacking to use it can be held liable for breach of duty
    - *The TJ Hooper* 171: tug owners face storm while pulling barges full of cargo, sank; owners not equipped w/radios= failed to exercise reasonable care bc breach custom
  - Compliance v. Departure from Business Custom:
    - Compliance is not determinative w/Q of whether D exercised reasonable care; but it is relevant (bc entire industries may lag behind evolving standards of due care)
      - <u>Exception</u>: Med Mal/Legal Mal: Doc/atty required to exercise the level of care considered standard by members of the profession (proof of compliance w/professional custom often does establish reasonable care)
        - Use expert testify D didn't conform to standard of care set by prof community
          - Except some jurisdictions w/med mal from lack of informed consent, don't need expert to set standard of care *(Largey)*- see below
      - Products Liability compliance typically establishes product is not 'defective' & thus P can't recover on claims that product should have been designed more safely/warnings
    - Departure from custom is not determinative; but may be relevant to breach of duty

        - ^Usually more probative of lack of care bc if it's an industry custom, it's most likely cost-effective meaning the $ to buy it is less than the expected harm from not having it
        - w/innovation, departure may not be lack care bc may have discovered something new
- **Professional Standards - Medical Malpractice** - P can only establish breach of duty when prove D departed from general professions' standard of care
    - *Johnson v. Riverdale Anesthesia Assoc 173* – P's decedent was having surgery & had adverse rx to anesthesia causing oxygen supply to be interrupted/death; D failed to pre-oxygenate her but not neg bc D followed standard used by medical profession
- Professional Standards v. Business Customs
    - Bus – what other bus ppl do is relevant, but not determinative (court establishes what constitutes reasonable care; less autonomy bc business focused on bottom-line)
    - Prof – P can only win when establish there was a custom & it was breached **(Reasonable Physician Standard)** (profs self-regulate & set cusom: autonomy bc profs work for public interest)
        - Exception: *Hellen v. Kerry* – ct held prof custom was unreasonable & as matter-of-law D departed from reasonable care when didn't order glaucoma test (so inexpensive, no reason not to give test) ← outlier case
        - **Med Mal Claims - Expert Testimony** – P must introduce expert testimony in malprac suits to establish D failed to heed standard of care (don't need it if case which is super obvious; ie. leaving surgical materials in body or informed consent bc layman juror decides)
        - **Prof Standard in Med Mal Informed Consent cases: Jurisdictions split!**
            - **<u>Reasonable Physician Standard</u>**
                - Pro: hindsight bias could skew jury decisions bc will say of course doc should've disclosed risk
                - *Kaplan case*
            - **<u>Prudent Patient Standard</u>**- duty to disclose is measured by the *reasonable* patient's need to review information *material* to the decision ← objective
                - Don't need expert witness– rather P can simply rely on jury to determine what a *reasonable* patient would want to know before being asked to consent to procedure
                - Pro-Prudent Patient Standard: many emotional & nonmed factors dr doesn't know, patient's rt to autonomy/self-determination, under prof standard there is community of silence so hard to get anyone to testify, scope of disclosure depends on spec. situations
                - P must establish: (1) Doc should've disclosed risk & (2) if P had known of risk, P wouldn't have consented to procedure (failure to comply w/applicable standard for disclosure was prox cause of injury)
                    - Some hindsight bias so cts try to objectify the breach of duty (it's not sufficient that this patient wanted to know, rather compare to *reasonable* patient want to know *material* info) & objectify causation standard (determine whether *reasonable* patient would still have procedure)
                - *Largey v. Rothman* 177– P had surgery to remove mass in breast, D failed to warn of risk of lymphedema; P got it; Prudent Patient Standard
- Legal & Accounting professions have same *professional standard* rule

- **Proving Breach: *Res Ipsa Loquitur*** ("the thing speaks for itself") –mere fact of accident having occurred is evidence of negligence & should send case to jury (bypasses breach of duty & causation)
    - Res Ipsa is applicable when: *establish by preponderance of the evidence*
        - (1) injury ordinarily doesn't occur w/o someone's carelessness
            - ^this is hard to prove in most cases; prove more likely than not harm doesn't occur w/o neg
            - When complex medical issues, P can use expert testimony to establish this (educate jury re what injuries are only from medical error) [occurrence is bizarre/proced routine that lay juror would get it, don't need expert test]
        - (2) instrumentality causing injury is in D's exclusive control
            - ^most juris held enough to show that D is likely to be the only one to have undertaken/omitted the relevant acts ("exclusive control"); if lots of others w/access to thing causing harm, ct unlikely to use res ipsa
        - (3) injury must not have arisen from P's actions/carelessness
            - ^If P played significant role in bringing her injury, jury can't presume D's neg caused it ("P's participation")
    - Procedural Effect?
        - (1) prima facie evidence of negligence (allows to go to jury w/o P producing evid about what D did wrong)
        - (2) P can request Res Ipsa charge (judge tells jury that they don't need specific evidence as to what D did to constitute failure to exercise reasonable care, you *may* find from accident alone that whatever D did was negligent)

- *Byrne v. Boadle 205*–barrel of flour fell from window & injured P, jury found D neg from res ipsa; P didn't have to prove accident *had* to result from negligence, rather P established p.f. evidence of negligence from res ipsa & D had burden to prove facts inconsistent
- *Kambat v. St. Francis Hospital* 206– D left pad in P's body after hysterectomy, P argued neg claim based on res ipsa – P satisfied all 3 reqs & case should've gone to jury to determine liability

Res Ipsa is rarely used w/multiple Ds; only applies to cases involving med mal or med mal/products liability

- *Ybarra v. Spangard* – P underwent appendectomy, woke up suffering partial paralysis in shoulder, alleges it was from how he was positioned on operating table & sues several nurses/drs; ct permits res ipsa on ground that it's unfair to force P to prove what happened bc he was unconscious & bc conspiracy of silence (each D stood to benefit by remaining silent so if no res ipsa, P wouldn't get relief) ← rare case!
    - ^ used res ipsa bc public policy concerns (conspiracy of silence, P was unconscious)
- *Samson v. Reising* – P suffered illness from eating contaminated chicken salad at band fundraiser (11 mothers brought individual batches of it); ct does not permit res ipsa bc no exclusive control element
    - ^ no res ipsa bc judicial system doesn't have to make accommodations in each situation so P gets remedies; "life is tough"

#3 Causation (actual cause + proximate cause)

Direct evid– look & see raindrops (almost always to jury bc credibility issue) Circumstantial evid– look & see ppl w/umbrellas, infer rain

Actual Cause ("Cause in Fact") ← usually jury issue

- **"But-For" Causation under the Preponderance Standard**
  - P must present circumstantial evidence sufficient to permit a reasonable fact-finder to infer that D's beach of duty more likely than not functioned as a but-for cause of P's injury
  - "But For" (absent)**:** but-for D's neg, P wouldn't have been injured, harm wouldn't have occurred absent D's conduct)
  - *Skinner v. Square D Co.221*- But-for w/prepond – P had tumbling machine & got electrocuted (products liability), ct held P failed to establish but-for causation & concluded mere possibilities which are not sufficient to establish causation ← majority

Exceptions to Preponderance of the Evidence standard for Causation

- Res Ipsa (act alone is sufficient to infer neg, don't need to establish circum evid to infer causal connection)
- Med Mal cases w/ Loss of Chance (Loss opportunity to survive)
  - Can get recovery for injury in med mal cases even if less than 50% chance of survival (must be loss of opportunity when you were deprived a chance to live)(even if you do not have a more likely than not chance of survival (over 50%), D still has duty to exercise reasonable care)
  - Policy: Duty on physician to avoid physical harm & take reasonable action to avoid loss opportunity/chance to survive even if odds of survival are < 50%
    - ^minority view & limited to med mal; very controversial bc no boundaries of liability (who determines what a substantial opportunity is, if you accept loss-of-opportunity
  - *Falcon v. Memorial Hospital 231*- loss of opportunity to survive test (deprived of chance to live); by D failing to insert an IV, P's opportunity of living was reduced/died ← breach of Ds duty & thus D is liable even though D's neg risked a less than 50% opportunity to survive

If pre-comparative neg – traditional Joint & Several liability avail when injury has multiple sufficient causes (2 Ds both liable for 100%

If post-adoption of comparative negligence – there is tremendous variation among jurisdictions w/J&S liability

Joint & Several Liability (used for single indivisible injuries) – use when:

- 1) D's common intent, purpose, & design/conspiracy to cause P injury
- 2) acts concur & but-for such acts concurring, harm would not have occurred & injury is indivisible

To establish liability for any one of the Ds, causation must be established under 1 of the 2 doctrines:

Multiple Necessary Causes (each Ds combined caused harm, each pass but-for test; sued separately or jointly)

- D's actions must be one of the but-for causes, not the only one (Carelessness of each is necessary to cause P's injury)
- *McDonald v. Robinson 239* – car accident w/2 drivers, but-for the concurrent neg, P's injury would not have occurred; Ds are held joint & severally liable

Multiple Sufficient Causes (doesn't need but-for; rather each D alone could have caused harm)

- 2+ causes of injury are present, all of them are sufficient to cause the harm on their own, hence all fail the but-for test – still since they all could have independently caused harm, all liable
- *Anderson v. Minneapolis* – D generated fire that merged w/another fire of unknown origin, merged fires caused damage to P's property; each fire itself was sufficient to cause damage, even though neither is but-for cause, each should be treated as cause of injury
- *2nd Rest §432*
  - (1) but-for test establishes factual causation (actual cause)
  - (2) multiple sufficient causes – each liable even though individually do not pass but-for test
  - ^P doesn't have to satisfy the but-for test, each D is considered a substantial factor
- *3rd Rest §26 – but-for causation (factual cause/actual cause)*
- *3rd Rest §27 – always use but-for test except in cases involving mult sufficient causes (no 'substantial' factor language in Rest §431)*

*note: if one of the causes was natural, ct require but-for causation bc under sufficient cause test, someone would get windfall (D caused fire neg that would be sufficient to burn P's house, same time lightening hit, ct use but-for test bc lightening was natural & d is not liable bc but-for the fire, P would have still suffered injuries)

- *Aldridge v. Goodyear Tire & Rubber Co 242*– P alleges G sold 10% of dangerous chemicals to Kelly manufacturing; employees developed disease from 'toxic soup', D not liable bc P can't isolate toxic effects of G's chemicals from other's; evid was not sufficient to establish multiple necessary OR multiple sufficient causes; no causation bc P couldn't establish but-for G's chem. harm wouldn't occur
  - In toxic tort cases, P must establish that these particular chemicals are capable of causing these diseases & it was this specific company's chemicals & not someone else's that caused the diseases

Causation & Burden-Shifting

Alternative Liability: exception of but-for cause only in narrow cases (shifts burden of proof of causation onto D & sends to jury ← only w/multiple D's)

- Rule: when 2+ Ds are possibly sole but-for cause of harm (evid that *each* D breached duty of care) & P introduces evidence that Ds are culpable, then D has burden of proving that other person was sole cause of harm; if D can exonerate he is not liable for neg
  - 1D is 2/3 more likely, P don't need alt liability bc can use but-for & recover 100% of damages bc greater than 50% D is responsible
  - Policy: each tortfeasor responsible for whole damages bc otherwise denying injured P redress simply bc can't prove how much damage each D did would be unfair
    - ***Summers** v. Tice* 259– hunting case; 2 Ds shooting quail, hit P, P sued but couldn't identity which was the but-for cause of harm, ct said each was at least 50% likely to be responsible, so shift burden of proof & let D establish lack of actual causation
  - *when not equal likelihood that each D responsible (50/50) cts are reluctant to impose alt liability

Market Share Liability – D responsible for % of damages according to % of market he occupies ← not all courts accept this & it's very rarely applied beyond DES

- *Sindell v. Abbott Labs 929*– Market Share Liability – D made DES which mothers took to prevent miscarriage, P got tumors as result of drug, P can't identify specific Ds causation - ct still holds Ds liable & measures D's liability by % each D sold DES vs. entire production of DES. D is liable for approx the injuries it caused; presence of Substantial Share of the Appropriate Market (D liable for proportion of J represented by its share of market) (if any D owned 51% of market share, P could go after them for 100%)
  - Not applied to asbestos or tobacco bc cases are diff (asbestos levels differ & therefore not fungible), and confusion bw national/local market share?

…once actual causation is proved or presumed…P must establish proximate causation…

Proximate Cause (cause is not fortuitous (not accidental)) ← usually jury Q unless judge decides as matter-of-law

- P must prove that D's breach of duty (owed to P) was an actual cause of P's injury AND breach occurred in natural manner (breach → injury must be proximate (not remote))

Proximate Cause – 3 Possible Tests

- Natural & Ordinary – injury must flow naturally & ordinarily from Ds breach of duty to be prox cause
  - *Ryan v. NY Central RR (1800s)* – rr in Syracuse was careless & sparks ignited wood in shed that eventually spread to P's house, burned down, D's neg was not prox cause of p's house burning
    - Adopts 1-leap rule for neg; afraid of disproportionate liability w/expanding cause
  - Most crts don't use this, though lang still used

- Directness – if breach of duty directly causes injury, prox cause is satisfied
  - *Polemis Case (1900s)* – Polemis leased steamship to Furness, while F was hoisting containers up ships' deck they knocked wooden plank into area that had benzene vapor, fire started & whole ship burnt down; fire was actual cause & F's neg directly caused explosion
  - Rejects foreseeability – says it's irrelevant
  - UK rejected this test (where it originated); some US follow but most reject & use w/breach factors

- *Forseeability – Wagon Mound 1 & 2
  - Wagon Mount's crew carelessly released furnace oil into harbor, nearby dock were repairing ship w/torches, Ship supervisor asked WM crew if there was possibility of igniting oil, they said no, employees kept repairing ship – sparks from welding ignited debris in water which ignited the oil & caused fire to destroy dock & ship; Corrimal/ship owner sued WM for neg
    - *Wagon Mound 1* – WM crew couldn't have foreseen that spilling oil inot harbor might cause fire; but still bc spilled oil made a direct contact w/ dock, D was liable (Polemis directness)
      - On appeal – ct held test for prox cause is whether general type of harm P suffered was *reasonably foreseeable* to Ds at time they acted carelessly; D could not have reasonably foreseen risk of fire damage & thus not liable
    - *Wagon Mound 2* – ct held fire was foreseeable consequence of oil spill & should be prox cause of damage to ship (this was diff bc evid was diff – WM1 Corrimal/P was too embarrassed to admit there was foreseeability bc it would have pointed to contrib. neg)
  - *Union Pump Co v. Allbritton 269*– fire, A extinguished it and ended up injuring herself, her injury was too far remote from breach (not foreseeable) = no prox cause. U can't be liable
  - *Jolley v. Sutton London Borough Council 277* – P decided to repair random boat & got injured, D was liable bc P's general injury was reasonably forseeable. (Precise injury doesn't have to be reasonably foreseeable, just general injury (see WM1))

  *3rd Rest –Scope of Risk test –D is liable for P's injury if injury is w/in scope of risks that make D's conduct careless ← alternative to forseeability

- Eggshell Skull Doctrine – once D is found liable, while measuring damages courts will say D takes his victim as he finds him (aka D liable for full extent of damages that actually occurred, even if unforeseeable)
  - ^though determines damages, some jurisdictions include this doctrine as part of prox cause analysis

Intervening Wrong & Superseding Cause

- Whether intervening wrongdoing functions as a superseding cause that relieves the more remote wrongdoer of responsibility even though her wrongdoing was also a but-for cause of P's injury
  - causal connection is broken & thus no prox cause is established & D is not liable
  - *Pollard v. Oklahoma City Ry. Co 288*– D threw cans of dynamite powder aside, P & friend found it, brought it home & while playing with it got burned. D was not neg bc there were several responsible adults who intervened after D's original neg – thus causal chain of sequence was broken & each act seen as separate; D's neg was too remote & not prox cause of P's injury
- Mere intrusion does not always excuse original wrongdoer; if intervening act & resulting injury was foreseeable/anticipated accord to common experience, it does not relieve D of liability

- *Clark v. EI du Pont de Nemours Powder Co. 292*– D left glycerine near well, P was concerned about it staying there so took it to abandoned graveyard, later found it & brought it home; explosion. D was liable bc conduct was prox cause bc it was foreseeable that someone would get hurt from it (glycerine was dangerous the whole time & P/intervenor did not add any danger to it)

***Palsgraf v. LIRR Co* – Proximate Cause & Relational Duty** (299) ← *using duty to deal w/prox cause*
P standing on train platform, D's employees pushed man onto train that was moving & dropped a package that had explosives – it exploded, P was not injured by explosion but explosion broke scales that fell on P.

- **J. Cardozo –** (majority) – case should be dismissed bc D didn't have a duty to Palsgraf bc she was outside the 'zone of danger' (D could not reasonably foresee his action would harm her, though package man could sue for neg)
  - Focuses on duty – (Q of law for judge) – D only owes a care of duty to those who are in the reasonably *foreseeable* Zone of Danger (once you have someone in zone of danger/to whom duty is owed, D is liable for all harm even if unforeseeable) ← relational aspect of duty
- ***J. Andrews –** (minority) – Duty is *not* relational; D's duty to act w/reasonable care to avoid foreseeable harm is owed to anyone harmed as a result of the action (public at large)
  - Focuses on proximate cause to limit liability (question for jury) & says it is a matter of public policy (protect society from unnecessary danger) (foreseeability is only factor in hindsight)
  - Factors ct should consider in determining whether consequences are so remote that liability should not attach: whether there was a "natural and continuous sequence" bw cause & effect, there was a "direct connection" bw them, w/o "too many intervening causes," the result was too remote from the cause.
  - ***3rd Rest §7*** – no relational duty, duty only limited/denied for particular class of cases but ct decides

General Exceptions to Prox Cause
"Danger Invites Rescue" ← special rule of proximate cause (*rescuers can recover!*)

- *Wagner v. Int'l Railway Co* – D operated an electric tram, P & cousin were in doorway, car turned, cousin was thrown off car, P went to look for him & while looking he fell.
  - Crt app: D could be liable even if not explicitly invite P to participate dangerous rescue; danger invites rescue when rescue carried out reasonably & contemporaneously w/carelessly created peril

#4 Damage/Injury: physical harm (bodily & tangible harm to property), economic harm (not generally legally recognized on its own), emotional (this also usually supplements physical harm; D is not held to be under a duty of reasonable care to avoid mere economic harm or mere emotional distress)

Defenses for Negligence (D has burden of proof)

Contributory Negligence
- D must establish that P had duty to exercise reasonable care for P's own safety, P breached that duty, actual & proximate cause of P's injury, resulting injury
- Traditional CL: all-or-nothing; *any* carelessness on P's part constitutes per se bar to recovery (P recovers nothing)
  - Doctrine of Last Clear Chance: if D had last clear chance to avoid the accident, can't use contrib. neg as defense; p has burden to prove this ← this has been abolished!!
- *This was eliminated & replaced with Comparative Negligence in all but 4 US jurisdictions

Comparative Negligence/Responsibility
- Pure Comparative Negligence – jury calculates amt of damages & subtracts P's comparative % of fault from total (if P was 99% at fault, can still recover 1%)

- Modified Comparative Negligence – P's fault operates to defeat her cause of action if it passes a certain threshold in relation to D's fault
  - if P & D guilty ½ & ½ → P can recover
    - Ohio – if P's fault > than D (over 50%) suit is dismissed/P is barred (if P 50%, can still recover if equally culpable)
  - if P & D guilty ½ & ½ → P can't recover
    - Tennessee – if P's fault was ≥ than D (over 49%), suit is dismissed (if P 50%, no recover)
    - If P <50%, P can recover full amt - her comparative %
  - Note, whether jurisdiction separates or combines D's %s will alter outcome (P = 40%, D1 =30%, D2 = 30% -- if separate, P must be less neg than either (40%>30% so no) if combine, P must be less neg than both D's (60%>40% so recover)
- *US v. Reliable Transfer Co* 393 – P's tanker was stranded on sandbar when D failed to maintain flashing light, it was 75% P's fault & 25% D's; when 2+ parties fault has contributed to a maritime collision, liability should be allocated according to proportionality (only equally if equally at fault or not poss to measure %)
- *Hunt v. Ohio Dept of Rehabilitation & Correction 395* –special relat bw P/inmate & D/state; D breached when fail to warn P of risks using snow blower, D liable for damages. But P comp neg 40%, J= total – 40%
- *Martin v. Herzog* – D was driving his car at dusk on wrong side of road, slammed into buggy driven by P's decedent w/o lights on; P's conduct was per se unreasonable but D couldn't use comp neg bc didn't play role in causing her injuries

Assumption of the Risk
- P *knowingly* and *voluntarily* took on risks associated w/D's careless conduct (P consented to it)
- Express – *complete defense*, P does not recover
  - Assumption of risk is explicit, P agrees that D does not have a duty (usually in K)
    - (1) consent to accept risk is freely given & (2) P clearly consents to accept the particular risk that led to the injury (ex. if sign general waiver of liability for injuries from baseball game, he assumes risk of usual baseball injuries (get hit) but does not assume risk of falling into a sink hole bc not in mind @ time of King)
  - *Jones v. Dressel 404*– P enters K w/D for skydiving, w/in K is express covenant not to sue, P got injured when plane crashed, D was insulated from liability bc P expressly assumed the risk & exculpatory agreement was valid as matter of public policy (4 factors; no duty to public, nature of service performed was not essential, K was fairly entered into, parties intention was clear/unambiguous) ← not premises liability case
    - *4 factors:* (1) duty to public? (2) nature of service performed (3) was K fairly entered into? (4) was parties' intention clear/unambiguous
    - *more prevalent view – cts will recognize exculpatory agreements w/nonessentials bc you don't have to engage in it (autonomy) and some activities are inherently risky
  - *Dalury v. S-K-I Ltd. 409* – P was skiing & hit a pole, exculpatory agreement was not valid & D was not immune to liability; can't immunize D from liability bc services were substantial public interest as it was a place of public accommodation (if immune, no incentive for ski areas to manage risk & public would bear cost of resulting injuries) ← premises liability case & public policy conccerns

- *2nd Rest §496(b)* – an exculpatory agreement should be upheld if it is (1) fairly & freely made (2) bw parties who are in equal bargaining positions (3) no social interest w/which it interferes
  - When facility becomes a place of public accomadation, it renders a service which as become public interest

Implied assumption of the risk – one can infer from P's conduct that she has in fact made an informed choice to genuinely knowingly/voluntarily encounter an identified danger

- Primary Implied – *complete defense* (sports & recreational; D does *not* owe a duty)
  - P's participation in certain kind of activity are owed no duty of reasonable care by others by virtue of P's decision to participate & assume the risks inherent to the activity (sports/recreational activity)
    - As long as D reasonably believes that participants understood nature of the risk, D is ordinarily not responsible (if P didn't know about risk, but D reasonably thought he did, P no recover)
  - *Murphy*- P boarded a Coney Island amusement park ride "flopper" & fell/broke knee; ct held P assumed risk of being injured by that sort of neg as fall was inherent risk; P cant recover
    - It's not that P is consenting to any and all injury or that owner has no duty at all – simply D doesn't have duty to exercise reasonable care with *inherent* risks of activity

- Secondary Implied – jurisdictions split as to whether *complete, partial, no defense*
  - P assumed risks created by D's breach of exercising due care (D's unreasonable conduct) (ex. D sets off fireworks in public street, P anxious to see show stands next to D & is injured when one explodes)
    - P, aware of unreasonable risk created by D, chooses to encounter it→ suffers injury
  - *Smollett v. Skayting Development Corp 414*– P's ice skates swerved onto carpet and broke wrist; D was not liable bc P implicitly assumed risk as she was aware of risks while walking through skating rink to carpet area & skated many times before; unreasonable assumption risk
  - Procedural Effects:
    - Traditional view w/Contributory Negligence: P barred w/contrib neg & w/unreasonable or reasonable assumption of risk - complete defense (P recovers nothing)
    - Under Comparative Fault Regimes: 3 different approaches
      - If P was unreasonable (abolish AR, treated like neg under comp fault) = *partial defense* (P's damages reduced by amt contributed to own fault) (*Smollett)*
      - If P was reasonable → 3 diff approaches:
        - (1) No defense (majority)
          - eliminates reasonable assumption of the risk (P can recover fully bc conduct was not faulty!)
        - (2) Separate, partial defense (NY)
          - RAR is separate defense & folded into comp fault; Ps damages are reduced according to jury determination
        - (3) Separate, complete defense (P doesn't recover)
          - ^ weird bc if P was unreasonable, she'll get partial compensation; whereas if reasonable she'd get nothing

Negligence: Liability for Emotional Distress

Negligent Infliction of Emotional Distress (NIED) - duty to exercise reasonable care to avoid severe emot distress -- Two policy concerns for limiting NIED:

- (1) recognizing a broad duty could lead to frivolous/fraudulent suits because distress is easy to fake
- (2) unlimited liability – neg often causes distress and thus there could be way too much litigation

*General Rule: Ps cannot recover for mere NIED bc ½ of life would be in court; there are special kinds in which you can (zone of danger, bystander, special duty: telegraph, funeral parlor)

Duty Element:

- ***Wyman v. Leavitt*** *700*– CL approach –W was afraid of D's blasting rocks but W not recover bc she did not suffer physical injury *and* emotional distress – rather she only suffered emotional distress & that alone is not sufficient. emotional distress alone is not sufficient for neg action
  - *^earliest NIED = courts say no recovery for mere emotional distress (even if resulted in physical harm bc that's too remote & if can't recover for fright alone/can't recover for physicality of fright)*
    - Either bc no duty or bc harm was not legally cognizable
  - **Impact Test** –P must have suffered physical harm as a result of some 'physical injury' from impact; physical harm has to be directly attributable to D's neg, must be other than injury resulting from emotional distress (P can recover if D made any slight physical contact w/P; dust in eye, etc.) ← **minority view**
    - Ex. if Wyman ran away from rocks bc of fear & tripped/hurt herself – obvious impact & she could recover bc harm was result of physical injuries & not emotional distress itself; fact that she injured herself is insignificant bc her fall was caused by D's neg
  - Once pfc satsfied, P can recover for physical harm & then recover for non-physical harms (emotional distress/econ harm) that flow from physical damages- need physical injuries!!!

- ***Robb v. Pennsylvania RR Co*** *701* – P's car stalled at rr crossing, she jumped when train hit car & did not suffer physical injuries, though she was emotionally disturbed & later suffered fright-induced-physical injuries prox caused by D's neg; P w/in zone of danger & thus entitled to recover.
  - **Zone of Danger** – as long as D's neg caused fright to a P w/in imm zone of physical danger & that fright produced physical consequences, P is entitled to recover ← **majority view**
  - *^ P recover for NIED w/ physicality of emotional distress when in zone of danger of physical impact*
  - Robb rejects Impact Rule bc (1) medical advancement allows causation to be proved; (2) no logical reason to distinguish bw physical-impact & fright-induced-physical harms bc both result from fright of D's conduct; (3) it is court's duty to provide redress.

- ***Consolidated Rail Corp. v. Gottshall*** *705* – Gottshall saw coworker collapse and was ordered back to work, had PTSD. Carlisle was forced to work erratic hours & suffered insomnia. Ct appeals uses a Genuineness Test – P can recover if claim is genuine & injuries were foreseeable ← *most jurisdictions do NOT use this!*
  - Ct apply CL Zone of Danger to limit NIED liability (see below). Both cases remanded bc ct app's genuineness test is shitty. Gottshall could potentially recover bc feared his own physical harm (actual danger to physical health). Carlisle reversed bc stressful working conditions did not create risk of physical harms, only emotional distress (outside FELA)
- **Common Law Limiting Tests**
  - (1) Physical Impact Test – P seeking damages for emotional injury must have contemporaneously sustained physical impact (no matter how slight) [most jurisdictions don't use this, but some do]
  - **(2) Zone of Danger Test – P can recover for emotional injury when they've sustained physical impact or when they are placed in immediate risk of physical harm by D's conduct**
  - (3) Bystanders - P's relatives can recover when they are traumatized by observing P being physically injured by D's carelessness

Today, most cts allow P recover when fear of being endangered results in observable physical symptoms (sleeplessness, PTSD, nervous behavior)-[objective!] some cts eliminate physical symptoms req (allow recovery for nervous breakdown)
*Most jurisdictions allow Ps to recover regardless of impact, but P *must* be in zone of danger (fear of impact, fear of physical harm to herself, other than through emotional distress alone) (ppl have duty to take reasonable care not to conduct themselves in a manner that physically endangers another so as to distress other by placing her in fear of imminent bodily harm)

No duty → Impact test (some impact, P may recover for emotional distress when results in physical harm) → Zone of Danger test (P may recover for emotional distress if results in physical manifestation & P was in 'zone')

- Initially under Zone of Danger - you can only recover for emotional distress from fearing your *own* danger
- Modern view of Zone of Danger - you can recover not merely for own fear of being hurt, but even if only emotional distress from seeing victim harmed

Voluntary Undertakings and other Special Circumstances

Special Circumstances: Pockets of liability in specially-vulnerable P cases: D must take reasonable care to avoid severe emotional stress to Ps *outside* the zone of danger in several special circumstances:

- **Courts allow P to recover for carelessly caused emotional distress in a few cases**
  - ex. telegram case w/T carelessly failed to deliver telegram to R (telling that his relative died). T was liable, funeral home messing up dead body, common carriers for causing them severe distress while in transit bc common carriers have elevated duty of reasonable care
- ^tend to involve death & very vulnerable parties

Courts handle recovery for NIED outside zone of danger on a case-by-case basis!

Beyond the Zone: Bystander Claims **on essay, raise Q about how it would be handled in diff jurisdictions**

- Courts are generally cautious to extend NIED claims outside the "zone of danger"
  - Exceptions – imposition of 'bystander' liability: liability to certain persons who witness another being injured/killed by the defendant's carelessness
- ***Waube v. Warrington*** *731* – **traditional rule** – P looked out window & saw daughter get run over and as result of witnessing she died; P cannot recover for NIED in witnessing the death of a child/sister unless she also feared for her own safety bc she was actually w/in zone of physical impact. Thus in this case, D was not liable for mother's injuries as a result of her witnessing her daughter's death bc mom was outside zone.
  - **No bystander recovery for Ps outside Zone of Danger!! ← early CL position**
    - Duty issue: D does not have duty to exercise reasonable care to bystanders
    - Admin convenient, Social ramifications of extending liability outside zone of danger: concern about fraudulent claims, disproportionate liability, unreasonable economic burden (pay for injuries to daughter & any relatives who may have observed), no boundaries, etc.
  - some jurisdictions still apply this rule (ex. NY) (though was reversed in Wisconsin)
  - Once P suffers injury w/in zone of danger & thus has right to recover, you can tack on additional damages as measure of damages (can recover for all emotional distress) = "parasitic damages"

- ****Dillon v. Legg*** *734* – bystander claims are OK if the injury was reasonably foreseeable to D at time of injury. D neg drove car & hit Erin killing her, P witnessed & suffered emotional distress which resulted in physical suffering, D could have reasonably foreseen that negligently driving a car and colliding/killing a child would affect their mother & thus D was liable.
  - **Bystanders may recover, even if outside zone, if emotional distress was *foreseeable* to D @ time of injury ← *most cts follow Dillon's Foreseeability**
    - **Only for Ps who suffer severe emotional distress that results in physical harm**
    - **Factors** to determine degree of reasonable forseeability: (1) whether P was near scene; (2) shock from direct emotional impact from contemporaneously witnessing accident; (3) P was closely related to victim [case-by-case]

- ***Thing v. La Chusa*** *741*– for public policy reasons, bystander Ps can recover for NIED only if (1) P is closely related to the victim; (2) P is present at scene and is aware it is causing injury; and (3) as a result P suffers emotional distress beyond that which would be anticipated in a disinterested witness & is not an abnormal response. P's son was hit by D's car but P didn't see/hear accident rather heard about it, P cannot recover because she was not present at scene & did not observe the accident.
  - **Bystander claims if P was close relation, @ scene, greater emotional distress than stranger**
    - P must be relative, unless extensive circumstances, foreseeability alone is not sufficient, **CA uses** approach (overrules Dillon)
  - **Requirements for Recovery:**
    - 1) P is closely related to victim (live in same household or parents, siblings, children, grandparents)
    - 2) P is present at scene of injury & is aware it is causing serious emotional distress
    - 3) as a result P suffers serious emotional distress
      - ***don't need physical harm**
  - Focuses on social cost of imposing liability - Public Policy reasons: Social costs of attempting to compensate P, Intangible nature of the loss, Inadequacy of monetary damages, Difficult to measure damage, Multiplication of D's liability, Lack of predictability (less settlement because unkown limits of liability) [this is new to Thing]

Strict Liability (Liability w/o Fault)

liability regardless of whether damages resulted from negligence (*no amount of due care will relieve D of strict liability*)
strict liability is about injuries that occur when consumer is unaware of risks posed by defective products

Strict Liability of Abnormally Dangerous/Ultrahazardous Activities PFC

- (1) Was D's activity abnormally dangerous?
- (2) Was D's activity both the actual (but-for) *and* proximate cause of P's harm?

- *Rylands v. Fletcher* –D owns mill & builds reservoir that ends up breaking and floods P's mine, D is stricty liable for P's damages
  - Distinction bw natural & non-natural purposes
    - If D uses land for natural purposes (ordinary) – D not liable (P should have guarded himself against damage)
    - If D used land for non-natural purposes (extraordinary;brings extra onto land) – D is liable no matter if he acted w/due care or not
  - This was later extended to include activities that weren't solely focused on land
- *Klein v. Pyrodyne Corp* –Ps injured from fireworks, D/pyrotechnic company strictly liable for injuries bc fireworks are abnormally dangerous activities w/risk of malfunction & no matter how much care pyrotechs exercise, the high risk is inherent (satisfy a, b, c, d; public policy support it bc D should bear loss as evidence is gone post-explosion so P would struggle to prove liability& statute calls for it)(not d bc few ppl conduct fireworks displays)

2nd Rest. §519 – any party carrying on an 'abnormally dangerous activity' is strictly liable for ensuing damages (what constitutes 'abnormally dangerous activity' is a Q of law; judges)

2nd Rest. §520 – 6 factors to determine whether activity is 'abnormally dangerous':
- a) existence of a high degree of risk
- b) gravity of that risk
- c) inability to eliminate the risk by the exercise of reasonable care
- d) extent to which activity is not a matter of common usage
- e) inappropriateness activity to the place where it is carried on
- f) extent to which its danger outweighs its value to community (danger > value)
  - *^not necessarily sufficient on their own, but they don't all have to be present – they are to be weighed together
  - Ex. if value to community > risk – that should mitigate against imposition of strict liabilty

2nd Rest. §522: neg intervention by 3rd party will *not* relieve D strict liability w/abnormally dangerous activities

3rd Rest. §20(b) – activity is abnormally dangerous if (1) creates a foreseeable & highly significant risk of physical harm even when reasonable care is exercised and (2) is not of common usage

D's Defenses to Strict Liability for Abnormally Dangerous Activities:

- Contributory Negligence *(2nd Rest §524)* – P's own lack of care to discover/precaution is not a defense
  - Unless → P unreasonably assumed the risk, then complete defense (P knew of danger & his contrib. neg was cause of the activity's harm – then D not liable)(otherwise, D liable)
- Assumption of Risk (reasonable/unreasonable) is complete defense (if P assumed risk, D is not liable)

2nd Rest was pre-comparative fault- so will be subject to rethinking with the possibility of comparative responsibility in mind.

Contrib. neg on its own – no defense
Assumption of risk (unreasonable/reasonable) – complete defense

Strict Products Liability:

Strict Products Liability is liability w/o fault - allow Ps to recover in strict liability when manufacturer puts a defective product on market (purpose: deter & prevent – if manufacturer knows will be strictly liable, every possible incentive to act to make sure the product is safe)

Strict Products Liability P.F.C.

- Actor A is subject to liability to person P in products liability if:
  - 1. P has suffered an *injury;*
  - 2. A *sold* a product;
  - 3. A is a commercial *seller of such products*;
  - 4. at the time it was sold by A, the product was in a *defective condition*; and
  - 5. the defect functioned as an *actual and proximate cause* of P's injury

- Seller – retailers, manufacturer, distributor in business of selling (actors w/in distributive chain in business of placing product on the market/stream of commerce)(otherwise D doesn't have expertise or receive commercial benefit)
  - P does not have to be a buyer– sufficient if P is sufficiently close to normal domain of marketplace
- Defect – defect ***must*** have occurred when product was sold/marketed. 3 different types: manufacturing, design, failure to warn

Analyze under both!

- *2nd Rest § 402(A)* – Special Liability of Seller of Product for Physical Harm to User or Consumer
  - (1) one who sells any product in a defective condition unreasonably dangerous to the user, consumer, or to his property is subject to liability for physical harms thereby caused if:
    - (a) seller is engaged in the business of selling such a product, and
    - (b) product is expected & does reach the user/consumer w/o substantial change in condition in which it is sold
  - (2) the rule stated in (1) applies although
    - (a) the seller has applied all possible care in the preparation and sale of product, and
    - (b) the user/consumer has not bought the product from/entered into K w/seller
  - Note: excludes foods known to be dangerous (sugar, butter) & good tobacco/properly functioning guns

- **3rd Rest § 1* – 1998 – Liability of Commercial Seller or Distributor for Harm Caused by Defective Products
  - One engaged in the business of selling or distributing products who sells/distributes a defective product is subject to liability for harm to persons/property caused by the defect
    - Defect must render product 'not reasonably safe'
  - ^adds liability for distributors (includes lessors, companies sending free samples & other comm. Distributors) & considers *anyone* foreseeably harmed by product (not just consumers)

- *MacPherson v. Buick Motor Co*. (59)– D was automobile manufacturer who sold car with a defective wheel that could've been discovered through reasonable inspection; P drove car & it collapsed bc of wheel; D was liable to P though it sold the car to retail dealer bc D owed duty of care to any foreseeable user of the car
  - *Expands imminently dangerous rule* – doesn't matter if product itself is inherently dangerous (unlike Thomas v. Winchester – woman died from mislabeled poison, manufacturer has duty of care for products that are imminently dangerous (normal function is to destroy/injure))
  - Under Winterbottom - manufacturer's duty was limited to only those who had K relat w/manufacturer (privity) - ***MacPherson Abolishes the Winterbottom privity rule***
    - D owed a duty of care to any foreseeable user of the car. If the nature of the product is be dangerous when negligently made & it is foreseeable that persons other than the purchaser will use it, then a duty of care should extend beyond the privity of K
    - *Manufacturer has a duty in negligence to exercise reasonable care as to those who may be reasonably foreseeably harmed by its defective product. (ex. driver, anyone driving car w/owners permission, passenger, bystander*
  - ****IF (1) a product, when negligently made, places people in danger, and (2) manufacturer has knowledge that it will be used by persons other than the buyer, THEN manufacturer owes a duty of care to make it carefully and is liable to any foreseeable user.****
    - **Presence of a known danger, not privity, is the source of liability.**

- *Escola v. Coca Cola Bottling Co*.(p.845) - P had difficulty proving that it was manufacturer's duty to exercise reasonable care bc doesn't really know what caused Coke bottle to explode.Uses res ipsa: (1) bottle was in complete control of D until explosion & (2) accident would not occur w/o negligence by D. Ct uses res ipsa to send case to jury → determines D was negligent
    - J. Traynor, concurring, says strict products liability is a better way to go because of the nature of the modern relationship bw assembly-line manufacturer & consumer.
    - **A manufacturer should incur *absolute liability* when an article he has placed on the market without inspection proves to have a defect that causes injury (regardless of negligence)**.
    - Reasons for strict liability law:
        - Manufacturer more able to detect defect (deter!); encourage them to be diligent
        - Manufacturer can spread costs of insurance over customers
        - Difficulty for P to prove neg w/o special knowledge
        - If two doctrines reach same conclusion, use the simpler one

- *Greenman v. Yuba Power Products* 1963–(854) strict products liability - Shopsmith pwr tool defect caused wood to shoot out & hit P's head. P sued; Ct held sufficient to establish D's liability if P proves injured while using Shopsmith in a way it was intended bc of a design defect that P was unaware of.
    - ***A manufacturer is strictly liable when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. ← imposed by law of strict liability in tort**
    - Purpose: insure that costs of injuries from defective products are borne by manufacturers rather than consumers who are powerless to protect themselves

Defenses for Strict Products Liability:

- *Cepeda v. Cumberland Engine Co* (p.886) - 1978- workman operating a pelletizing machine, guard was removed before P work & injured. P claims machine was defectively designed bc guard should not be so easily removable. Jury concluded machine was defectively designed & that its defective features caused P's injury
- *Rest 2d § 402A*
    - **Contributory Negligence – NOT a defense**, w/strict products liability, if P failed to discover/guard against defect – NOT a defense [mere carelessness or inadvertence is not a defense]
        - bc we want manufacturers to be deterred from foreseeable inadvertent injuries; incentives to make product safe
    - **Assumption of the Risk – complete DEFENSE** (regardless if reasonable/unreasonable); if P decides to encounter a known danger–D is not liable for strict liability
        - If P knows about defect & nevertheless proceeds to use product, ct says this is an intervening event that relieves D of liability, it's beyond scope of risk that made manufacturer strictly liable in the 1st place (strict liability is about injuries that occur when consumer is *unaware* of risks posed by defective products)
- *Rest 3d § 1* - How did Comparative Fault change this? – same approach as neg cases (AR depends on regime)
    - ct apportion P liability w/% of P's fault if it was also a but-for cause of injury (accord to jury)
    - jury compares manufacturer's responsibility for defect vs. P's responsibility/fault/assumption of risk
        - Pure comparative fault – P gets something
        - Modified comparative fault – if P's fault passes a certain threshold relative to D's, P will be barred from recovery