Definitions:

Tort – A wrongful or twisted act that injures another, or the collection of legal remedies that allow the injured party to obtain redress.

Prima Facie – At first appearance ie. Sufficient to establish fact/case unless disproved

Stare Decisis – Let the decision stand

Paramour – lover, typically adulterous.

Affirmative defense – assume that plaintiff has satisfy prima facie case, BUT considering this, plaintiff is not entitled to damages via comparative negligence and thus mitigation of damages.

I. Negligence: Liability for Physical Harms ► *Duty + Breach + Causation + Harm*

A. Duty – *Question of Law*

1. General Duty of Reasonable Care

Easy Duty	Hard Duty
1. Misfeasance	1. Nonfeasance
2. Physical Harm	2. Economic/Emotional Harm

Generally, no duty to affirmatively act. When acting, general duty of reasonable care.

Walter (5) Wrong drug. Introduction to Negligence.

Winterbottom (55) Postal carriage case. **Strict privity**. Duty of manufacturer limited to primary purchaser.

Thomas v. Winchester (57) Mislabeled poison case. **Liability extended to creation of "imminently dangerous" products.**

Loop v. Litchfield (58) No duty. Riveted wheel on vehicle broke years later.

Logee v. Clute (58) No duty. Steam boiler was tested and accepted before exploding.

Devlin v. Smith (58) Duty Owed. Carelessly made scaffold = imminently dangerous.

Torgesen v. Schultz (58) Bottled carbonated water exploded. **Change from *imminently* to *inherently* dangerous**.

Statler v. Georgia A. Ray Mfg. Co. (59) Duty Owed. Negligently manufactured coffee urn was inherently dangerous.

MacPherson (59) Liability to situations where there is knowledge of a **danger not merely possible but probable.** Faulty wheel. Finished product manufacturer liability to be used without inspection by customer. Use by persons other than dealer foreseen, creates duty.

Mussivand (67) STD case. **General duty of reasonable care owed regarding STD to anyone who foreseeably would be intimately engaged with intermediary.** Duty to warn paramour or paramour's husband of STD, as paramour can be reasonably expected to have intercourse with husband. No duty when paramour is aware of STD. Case of misfeasance – hard duty case. Seems to be limited to STDs, although can make broader by analogy.

Palsgraf (292) **Majority argues that duty is limited to those plaintiffs who could foreseeably be harmed. Dissent argues that a duty is owed to all, and that proximate cause should be used as the bottleneck.**

2. Qualified Duties of Care

a. Premises Liability

Traditional Approach (Salaman) – three Plaintiff Status Categories.

Salaman (74) Reservoir drowning. **Duty does not cover dangerous activities by P, only dangerous conditions.** Did not matter in this case if licensee or invitee.

1. **Trespasser** – Anyone who intentionally enters property without permission, regardless of intent. Does not apply if landowner knows or has reason to know about presence of trespassers (e.g. Salaman; treated as licensee). **Only duty to protect children from attractive nuisances. Also duty to warn known trespassers of artificial hidden hazards. (e.g. bear trap)**

   Duty to protect from attractive nuisances when:
   a. there is a dangerous condition present on the property
   b. frequented by children
   c. likely to cause injury to a child because of their inability to appreciate the risk
   d. is cheap to remedy compared to the magnitude of the risk

2. **Licensee** – Typically a house guest. Duty owed to warn of known hidden hazards. Accepts premises as found. **No duty to inspect/repair premises.**
3. **Invitee** – Confers an immediate material benefit. Owed a reasonable care under the circumstances. May have to correct dangers. Includes person using store restroom if jury determines public invited to use restroom irrespective of purchase. **Loses status if exceed scope of invitation.**
    a. Business Invitee – e.g. Shaws
    b. Public Invitee – e.g. Church
4. **Non-entrants** – No duty to protect against natural conditions (e.g. overhanging branch) **unless** traffic is frequent, land is not heavily wooded and acreage is small.

Rowland v. Christian (80, California)

Eliminated all distinctions. General duty of reasonable care. Jury, however, allowed to consider status in determining if landowner failed to exercise reasonable care. Legislative response eliminated duty to trespassers injured while committing felonies and exception of duty of reasonable care to persons engaging in sports or recreational activities.

Other

Merges Licensee and Invitee from Traditional approach. No case on this approach.

b. Pure Economic Loss

Economic loss is non-recoverable without physical property damage. Can collect on damage to property that P has the right to use. M/V Testbank (82)

Duty owed not to cause economic injury to an identifiable class whom D knows are likely to suffer harm from its conduct. People's Express (91)

c. Affirmative Duties to Rescue and Protect

No general affirmative duty to rescue under common law. Theobald (95)

Exceptions:

1. **Actor causes victim to be imperiled.**
   Osterlind and Theobald
2. **Voluntary Undertakings**
   Some good Samaritan laws immunize certain volunteers from negligence liability.
3. **Special Relationships**
    a. **Carrier/Passenger -** Jones (143; Breach case) – *Common carriers have a higher standard of care under common law, but some jurisdictions apply the reasonable person standard.*
    b. **Landowner/Guest**
    c. **Social Host/Guest - Social host not liable for drunk driving by guest unless actively served alcohol to obviously intoxicated individual** McGuigan (114) *Court will find no duty if host is responsible for consumption if served in free-for-all environment, but is held if apparently drunk when last drink is served by host. Liability to commercial vendor, as expense of insurance is recoverable in cost of drink. Social host uniquely subject to hindsight bias as hindsight of jury after accident is biased compared to moment in time that alcohol was served. Courts reluctant to impose liability due to policy concern when host unaware of drunken person because of inability to identify risk and harm to social relationships. Name of potential victim unknown, thus duty is broad if exists.* **Mass is unique in that it was the only jurisdiction willing to recognize the duty of a social host under any circumstances, which is in direct opposition to the common law rule.**

d. **Parent/Child**
e. **Doctor/Patient** – Tarasoff (102) – The court imposed a duty to warn third parties based on the relationship of mental-health professionals and their patients. **"When a therapist determines… that his patient presents a serious danger of violence to another, he [incurs] an obligation to use reasonable care to protect the intended victim against such danger."** *Rejects common law approach in favor of a balance of factors test (see 104, bottom). Court notes that the protective privilege ends where the public peril begins. Dissent suggests that duty to warn will result in lack of treatment for many resulting in greater harm to society, and new duty to warn will result in CYA commitment of many harmless patients. Qualified duty: No duty for therapist to ascertain identity of potential victim.*

Balance of Factors Test:

1. Forseeability
2. Degree of certainty
3. Closeness of connection of D's conduct and injury
4. Moral blame of D's conduct
5. Policy of preventing future harm
6. Burden to D to exercise reasonable care.

f. **Police/Arrestee**
g. Certain professions have duty to report (suspicions of) child abuse.
h. **Companions on a Social Venture** (Farwell, 101), may have no precedential value.

Moch v. Rensselar (126 note 1) *Fire hydrant pressure case. Court ruled no duty because case of nonfeasance due to privity. Widely criticized as Cardozo's worst opinion, which was in stark contrast to his opinion in McPherson. Cardozo likened D to a passerby in a tanker full of water who failed to stop and aid.*

Osterlind (91) Drunk Canoe. Nonfeasance. Page 99-100, under Restatement (Second) §321 Osterlind may have prevailed.

Theobald (95) Russian Roulette Suicide. **No duty owed by mere observers.**

d. Policy-Based Duty Limitations

a. **Mussivand** (67) – *D owed no duty once wife/paramour was aware of VD.*
b. **Strauss** (121) – *No duty to persons who D-utility has not contracted with due to policy reasons, preventing crushing liability and thus keeping electricity to society at large.* **Policy-based privity due to crushing liability.**
c. **Hamilton** (128) Gun-trafficking case. Court accepted crushing liability argument for a private company, shielding it from *all* liability, rather than limiting liability as in Strauss. **This is an unusual result.**

B. Breach of Duty – Question of Fact

To prove a breach of duty, the plaintiff must show:
- **There was forseeability that the harm would occur;**
- **If there was, then what D should have done but didn't to prevent this harm.**

Holmes v. Cardozo:

Holmes argues that there should be a specified standard of care for a specific repeated fact pattern should decided by judges because
(1) administrative costs are less with a judge;
(2) juries can be inconsistent;
(3) if juries decide on the same issue and fact pattern consistently, it can serve as precedent for judges to decide the next case with a similar fact pattern without a jury; in other words, after the community has given feedback, you can determining the community standard and apply it across the same fact pattern equally and fairly;
(4) there is a rule and everyone can be expected to know it; and,
(5) sometimes, there are certain situations where judges have to make decisions based on public policy.

Cardozo is less willing to take cases away from juries. He argues that Holmes' judicial standards are not as beneficial as Holmes thinks because
(1) it does not take into account the individual circumstances facing the Δ;
(2) it becomes difficult to take into consideration societal changes, in terms of technological standards, as well as the community standards itself.

1. Duty/Breach Distinction

Rodgers (136) Open campus accident. Not every foreseeable risk is a unreasonable risk. Although the school did have a duty to protect, it was not breached here.

Caliri (140) Icy car crash. **Responsibility to exercise the care as per a reasonably prudent person under the circumstances**. Drivers cannot assume that a road will be safe, but that the municipality will exercise reasonable care to keep the road safe. ***One cannot presume perfection.***

Pingaro (141) Strict Liability Dog Bite. **Strict liability overrides reasonable person standard.**

Jones (143) Bus fall case. **Common carriers have a higher standard of care under common law, but some jurisdictions apply the reasonable person standard.** Common carriers hold themselves out as experts in safe transportation, which is where higher standard of care is derived from.

Washington (145) Median Planter. City owed no duty of care to P as that accident was not a "reasonably foreseeable consequence of THE condition of the median." Could have been a breach case, but courts reluctant to take breach out of the hands of the jury.

2. Defining the Reasonable Person

i. How would a reasonable person under the same circumstances as d have acted?
ii. The reasonable person is an **external and objective standard** that does not take into account the individual characteristics of the defendant, such as intelligence and dexterity. The reasonable person, however, does consider:
- ⇒ The foreseeable risks
- ⇒ The utility of his conduct, as weighed against these risks
- ⇒ The extent of the risks posed by his conduct
- ⇒ The likelihood of a risk actually causing harm
- ⇒ Alternatives that would give the same result with less risk
- ⇒ Costs of the various courses of action as well as the circumstances surrounding the action.

iii. What are the advantages of having an objective standard?
- ⇒ administratively easier
- ⇒ a person can take precautions if they know they don't meet the standard
- ⇒ fairness to the community if everyone is held to the same standard
- ⇒ there is a deterrence factor as well

Emergencies (148) – Juries are sometimes asked to take into account the actor was faced with an emergency situation. Some consider this to be unfair to P.

Exceptions to Objective Standard:

★ **Physical Handicaps** (not mental or intellectual) – *Reasonable blind person, etc*.
- Take physical into account because of administration problem (stupid people are harder to weed out).
- Assume that a blind person (etc.) will interact w/ the world bearing that in mind, and thus are less likely to pose dangers to themselves or others than mentally disabled persons. (What precautions does the reasonable psychotic take? Contradiction in terms.)

★ **Children** – *Parents not automatically held vicariously liable.*
- **Tender years doctrine→** children under a certain age (7) incapable of being negligent
- A child will be held to a standard of a child of the same age, intelligence and experience under like circumstances.
  - Partially objective and partially subjection
  - We are not asking about the best that child could do but what a reasonable similar child would do.
- **Exception to the exception when a child engages in an adult activity** - held to a standard of an adult (e.g. driving)

Vaughn (150) Hay fire. **Objective v. Subjective standard of care.**

Appelhans (153) Child bicyclist hits pedestrian.
- **Tender Years Doctrine**: Child under 7 incapable of negligence.
- **Negligent Supervision**: (1) Parents on notice due to prior incidents and (2) Sufficient opportunity to control the child.
- **P-Child's carelessness considered with comparative negligence defense.** (160 note7) Would be protected by tender years.

3. Reasonableness, Balancing, and Cost-Benefit Analysis

Carroll Towing (183) **Hand Formula, B < PL.** Liable when burden is more than change in probability of loss.
- If (Burden < Cost of Injury x Probability of occurrence), then the accused will not have met the standard of care required.
- If (Burden > pl), then the accused may have met the standard of care.
- *Typically applied abstractly as quantification of elements is difficult.*

Zapata (187) Numerical application of Hand formula. PL is calculated on *expected loss* rather than *actual loss*.

4. Statutory Violations (Negligence Per Se) - *Used to establish breach not duty.*

Notes
- **Parties unable to satisfy negligence per se not precluded from regular negligence claim**
- **Supreme Court has ruled that no private right of action is implied by federal statutes**
- **In CA, statutory violation can legislatively mean negligence per se (See. 331)**
- Some jurisdictions do not follow the negligence per se approach and only treat violations of statutory standards of care as evidence of negligence. (335) An act is not negligence per se if

the statute is merely for record keeping or other innocuous purpose. The statutes must be for the purpose of setting standards of care.

Restatement (Second) of Torts § 286 (p. 328)
Must show that statute/regulation's purpose was to:
a) Protect a class of persons including the one whose interests were invaded
b) To protect the particular interest which is invaded and
c) To protect that interest against the kind of harm which resulted
d) To protect that interest against the particular hazard from which the harm resulted

Excused Violations (339-40)
1. **Children cannot be statutorily negligent**
2. **Violation of statute was more prudent course of conduct. (Tedla)**
3. **Unable to comply despite reasonable diligence**
4. **If a minor who appears over 21 produces a fake ID**

Once it is relevant, there are four major approaches to **using** statutory standards to establish a breach of duty:

1. **Negligence per se with Excuse** (used in most jurisdictions and approach taken in the Restatements)
   - Unexcused violation of a relevant safety statute is negligence per se (*jury must find for IT*), but the violator may offer evidence of an excuse or justification of the violation.
   - R2Torts §288A offers non-exclusive examples of acceptable excuses:
     - Incapacity (e.g., a minor)
     - Unaware of circumstances that makes one in violation (e.g., tail light goes out while driving)
     - Inability to comply (e.g., blizzard makes it impossible to comply with statute)
     - Emergency (e.g., swerves to avoid child in road)
     - Compliance poses greater risk than violation (e.g, a pedestrian walking with traffic as opposed to against it because of heavy flow; Tedla)
2. **Rebuttable Presumption of Negligence** (some jurisdictions)
   - Plaintiff can provide proof of a statutory violation which creates a presumption that D was negligent until the D rebuts that evidence. If D does not, *the jury must find for P*.
   - D can offer "good reason" for the violation, which is similar to the per se excuse above but more lenient. If the D provides a good reason, the jury considers the reasons as part of the circumstances in the reasonable person standard.
3. **Evidence of Negligence**
   - Under this approach, a violation is evidence of negligence, but not negligence per se.

Dalal (326) P corrective lens restriction. "The absence or possession of a driver's license related only to the authority for operating the vehicle and not to the manner thereof. However, a [statutory] restriction placed upon the license requiring the wearing of glasses when driving related directly to the actual operation of the vehicle…Thus, the **statute sets up a standard of care, the unexcused violation of which is negligence per se**."

Bayne (327) Non-employee Guardrail. **Actor must be aware of statute/regulation being applied.**

Victor (330) Sidewalk crash w/ road construction. The interest invaded was not the kind of harm that the statute was intended to protect.

Martin (335) **A car traveling without lights at night cannot be considered negligent if the accident that occurred was not in any way caused by the absence of lights.**

Chevron (338) No liability for a slip on gas puddle as statute intended to prevent fire, not slips.

Wawanesa (338) "[T]he statute was enacted to prevent young persons from becoming addicted to cigarettes. Not to reduce the risk of fire caused by dropping them while lit."

De Haen (338, 1932) Chief purpose of statue was to prevent people from falling into shaft, however prevention of other falling objects was within the scope of the legislature's intent.

Tedla (340) **Pedestrian walking against traffic not negligent per se despite law requiring them to walk with traffic as the course of action taken was safer.**

Uhr (Supp 1) Scoliosis testing. Does not meet third prong below. ***Statute used not only to establish breach, but also to establish duty.***

1. **Is P one for whose benefit the statute was enacted?**
2. **Would recognition of a private right of action promote legislative purpose?**
    a. **What was legislature seeking to accomplish?**
    b. **Would a private right of action promote that objective?**
3. **Would creation of right of action be consistent with legislative scheme?**

5. Industry and Professional Custom

In some highly specialized professions (eg. law and medicine), negligence is based on deviation from processional custom. Proof of negligence will likely require testimony of another professional in said profession.

Walter (5) **Some situations do not require expert testimony to where the professional negligence and its harmful results "are sufficiently obvious to lie within common knowledge."**

TJ Hooper (164) Weather Radios. Use of hand formula. **Violation of industry standard can be used to establish breach, however adherence cannot be used as a defense if it is unreasonable.**

Johnson (166) Preoxigination case. **Applicable standard of care is that employed by the medical profession generally, not what a particular doctor would have done under the circumstances.** Plaintiff obligated to show violation of industry custom to satisfy malpractice; lack of expert witness precludes P from obtaining relief.

Distinguished from other cases where relief can be granted on violation of standard of reasonable care as opposed to departure from professional custom.

Largey (170) Lymph node informed consent case. **In NJ informed consent is determined according to the objective *reasonable patient standard* rather than the objective *reasonable physician standard*.** What a reasonable patient needs to make an informed decision v. what a reasonable physician should relate in informing a patient about a procedure.

Rationale:

1. The scope of disclosure should depend on an individual patient's unique medical circumstances and not on a general community wide standard.
2. Non-medical circumstances, such as a patient's individual emotional condition, cannot be addressed by a general community wide standard.
3. A patient is totally subject to the whims of the physicians in the particular community and thus inconsistent with the patient's right to self-determination.
4. It is difficult for a patient to find a doctor willing to breach the "community of silence" and testify against a colleague. (expert testimony is necessary to establish community standard)

Newland (542) Dentist sexually touches patient. **D liable despite thinking that patient would like touching, as a reasonable person would find it to be offensive. An act is not necessarily medical malpractice simply because it took place in a medical setting.**

6. Proving Breach: *Res Ipsa Loquitur* - "the thing speaks for itself"
   - "**Where the actual or specific cause of an accident is unknown, under the doctrine of res ipsa loquitor a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant's relation to it**." (201)
   - **P must establish: (201)**
     1. **Event must be of kind not normally occurring in absence of someone's negligence.**
     2. **Must be caused by something within exclusive control of D**
     3. **Must not have been due to any voluntary act or contribution of P**

Byrne (198) **P hit by a barrel of flour outside of a warehouse is given a presumption that D was negligent.** "A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous." (199)

Kambat (200) P with laparotomy pad found inside her after an operation entitled to presumption of negligence by D-hospital.

Ybarra v. Spangard the plaintiff awoke from an appendectomy suffering partial paralysis in his shoulder based on his positioning on the operating table. His position could have been affected by the acts of several nurses and doctors. Citing the inequity of forcing the plaintiff to prove that happened while he was unconscious, as well as a concern that the defendants in this instance each stood to benefit by remaining silent, the California Supreme Court permitted the plaintiff to invoke res to establish the carelessness of each. **Allowed to use *res ipsa* against multiple co-defendants.**

C. Causation ► *Cause-in-fact (actual cause) + proximate or legal cause – Question of Fact*

1. Cause-in-fact
   - **a.** "But for" causation under the preponderance standard

     "**But for D's breach, P's injury would not have occurred.**" Important to keep in mind that there may be no *single* cause of P's injury. We aren't looking to D's breach for *the* cause; we are looking for *a* cause. As to each defendant, but for their breach, would the harm have occurred?

     Skinner (213) Metal tumbler electrocution. **No recovery for P, as cannot show that D's alleged negligent manufacture was a but-for cause of decedent's death.** There are a number of possibilities such that evidence is insufficient for jury to find that it is more likely than not that death was due to defective switch.

     Beswick (220) Corrupt ambulance dispatcher. In allowing 34% chance of survival statement in, court allows jury to determine if increased risk brought about decedent's death. Evidence indicates that Medic Unit 2 could have arrived within 4 minutes, doubling decedent's chances of survival to 68%. P's expert witness said that decedent's chances would have been *at least* 34%, and chances would have been dependent on decedent's personal health. Court also relied on Hamil (see 224) where P's expert witness testified that decedent had a 75% chance of survival under similar circumstances. Hamil relies on Restatement, which states that once P introduces that once D's act or omission increased risk of harm to P and that harm risked was sustained, it becomes a question for the jury as to whether the increased risk was a substantial factor in producing the harm.

     Jury must find that D's breach was a substantial factor (no need to be > 50%) in decedent's death. If so, entitled to full recovery. Beswick case is one of negligent omission – much more difficult to prove what would have happened in the absence of some precaution. There is a systemic problem in a failure to rescue case.

     Kaminski (216) – train pushes trailer into P near RR tracks, no witnesses but nothing else could have moved the trailer. To prove proximate cause one does not to prove 100% that the P caused the injury, but it must be greater than 50/50. It **must be the most likely theory, and be based in fact.**

     Falcon (229) **Lost chance doctrine.** Redefined harm element of prima facie case as not death but a loss of opportunity. **'But for D's breach of duty, P would not have been deprived of a substantial (37.5%) chance of survival.' However when it comes to damages, P will receive not 100% of the damages for death, but rather a prorated sum**. (Say D reduced chances of survival by 25% and $100k, then D pays $25k.)

     The three above adhere, at least conceptually, to but for rule. Court in Skinner was unsympathetic, whereas the other two were more accommodating as the questions presented systemic circumstances where the burden of proof would be extremely difficult for P. In both Beswick and Falcon, P had a pre-existing condition that was life-threatening. Beswick and Falcon *were harmed* where Skinner was not. In that sense, the Ps were clearly deserving of *something*. As between Falcon and Beswick, B is rather the judge looking the other way for the jury, but F has a pointed logic to it. F seems to calibrate compensation to avoid over or under-deterrence. Why, then, is F a minority approach? Need a statistic as to chances of prevailing, and F has largely been accepted in malpractice cases. Dissent in F notes that it is unfair to single out physicians in F because they have statistics. There is concern that F undermines the traditional system that P can collect at less than 50%, and cannot collect fully when less than 100% certainty of death.

   - **b.** Multiple necessary and multiple sufficient causes
     - **i. Multiple Necessary Causes**

D was one of several necessary causes, all of which satisfy but-for test.

McDonald (237) P was hit in an accident caused by both Ds. P joined Ds for sake of trial and efficiency and that P will be able to collect in full.

Joint & Several (JS) Liability is available when:
1. Both parties were negligent and without negligence of both parties harm would not have occurred. Independent actors, where acts combined cause single indivisible harm. *May require that Ds be all possible Ds.*
2. Conspiracy/joint purpose (i.e. drag racing).

Suppose A driving carelessly causes accident harming P. If P had had good medical treatment, would have survived by been paralyzed. B treats P in negligent fashion s.t. she dies. Both Ds' negligence was necessary cause of death. They were not, however, a single harm, and therefore no JS Liability.

ii. Multiple Sufficient Causes

Each cause, taken independently, was sufficient to cause P's injury.
Jurisdictions may or may not allow P to recover if one cause was a non-negligent act. The Restatements both allow recovery.

Restatement 2d 9§ 431, 432 (pg. 252)

Rest. 2d §431 an actor's negligent conduct is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm.

Rest. 2d §432(2) if two forces are actively operation, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm in another, the actor's negligence may be found to be a substantial factor in bringing it about.

Restatement 3d 9§ 26, 27 (pg. 256)

§ 26 is a but-for test.
§ 27 makes each of a set of multiple sufficient causes culpable.
Removes all consideration of triviality of each cause from actual cause (and moves it to proximate cause).

Aldrige (240) Goodyear manufacturers and sells toxic chemicals to Ps' employer. Ps were exposed to toxic chemicals and now claim that this exposure caused the array of diseases. **Ps unable to establish but-for cause, as D's chemicals were only a portion of the toxic chemicals, and D was not an exclusive supplier of the ones that it did supply.**

Note Two problems that toxic tort Ps face – General causation (must show that Ds chemicals are capable of causing these diseases in the general population) and individual causation (*this* P's disease came from the chemical and not from, say, smoking).

Anderson (253 note 4). But-for test not satisfied as either fire could have caused the injury. In the case of substantial factor test, jury decides if D's conduct was a substantial factor in P's harm. Would it have mattered if the second fire in this case was of a natural origin rather than a human origin? This can be argued either way, although the Anderson court would not allow natural causes to mitigate D's liability.

c. Causation and burden-shifting

Summers (257) P and Ds were hunting when both Ds negligently fired in P's direction. One shot struck P in the eye and there was no way to determine whose shot struck P; no way to determine the "but for" cause. In its effort to deal with the cause-in-fact dilemma, the court holds that in this situation, **where two or more Ds commit substantially**

similar negligent acts, only one of whom caused P's injury, the burden of proof shifts to each of the Ds to show that he did not cause the harm. If they cannot make that showing, both will be held liable for the injury. This rule only holds for this narrow anomaly to the "but for" analysis fails – both Ds are negl., both Ds committed the same act, and there is no way to find one D "more probable than not" the cause of the injury.

Sindell (901) DES Case. **Marketshare Liability. No precedents for permitting P to recover, so court created a new exception called market share liability which differs from Summers approach in that it is not J&S liability; if D can show that they were not responsible they are not liable. Remaining Ds are subject to a percentage of damages corresponding to their market share.**

The **courts have generally resisted extending this doctrine** because this case is considered to be unique. Here's why:

1) The existence of systemic reasons, not bearing on the plaintiff's diligence, for the absence of evidence on product identification.
2) The ability of the defendant to bring before the group a group of defendants that were responsible for almost all sales of a product.
3) The fact that the product in question was entirely fungible in terms of its design, specifications, its manufacture, and its propensity to cause the same illness among differently situated victims
4) The availability of at least some available data on market share.

2. Proximate Cause and *Palsgraf*

a. Proximate cause---three possible tests *(Directness not commonly used in modern courts)*

Direct v. Indirect – Polemis (268 note 3) A timber was negligently knocked into the hold of P's ship, igniting gas vapors and destroying the ship. **D liable because employee's careless acts directly caused the harm.** It was irrelevant that the damages caused to the Polemis were unforeseeable. Although this standard is still relevant in discussing proximate cause, this test would not satisfy the proximate cause element if there were intervening causes and we would have to turn to the forseeability or scope of risk tests

Forseeability – Wagon Mound I & II (269) – Oil spill lit by spark. **The "test for proximate cause should be whether the type of harm suffered . . . was reasonably forseeable to the defendant at the time they acted carelessly."** In Wagon Mound I, not a proximate cause as not forseeable *under the evidence presented*.

Scope of the Risk **– Restatement 3d - Was injury within the scope of risk taken?** *For instance, explosion of can of rat poison that was labeled as green beans is not within the scope of the mislabeling (even though foreseeable).*

Albritton (271) Pump caught fire, and P slipped off of a pipe in returning from dealing with the fire. **No proximate cause as pump fire merely furnished a condition for P's injury.**

Metts (275) **Scope of the Risk.** Greyhound passing case. No proximate cause as **Greyhound could be properly liable only with respect to those harms which proceeded from a risk or hazard the forseeability of which rendered its conduct negligent.** In short, **the reason that speeding is negligent is *not* because it can create snow swirls.**

b. Superseding cause

If an intervening cause is superseding, it relieves D of liability.

Per Rest. 2d §449 (284), **acts of a third party do not preclude liability if the likelihood of said acts is one of the things that makes D negligent.**

Britton (282) – **Arson did not break causal chain in negligence. Criminal acts do not preclude liability for antecedent negligence unless they are "highly extraordinary" (in which case the negligence is ruled out as a matter of law)** (286, bottom) **** Note ** In this jurisdiction, intervening illegal acts would normally preclude liability.**

Arneil (284) If intervening criminal act might reasonably have been foreseen, it does not interrupt relation of cause.

D'Hedouville (285) - Intervening criminal act does not create superseding cause.

Mozer (285) - "The scope of defendant's duty to maintain reasonably safe premises does not include a duty to foresee a particular fire but it does include a duty to reasonably guard against the risk of fire."

Hodge (285) - Intervening act of arson does not supersede landlord's duty to provide second egress.

House (286) - D was driving recklessly, and a passenger was startled and awakened and grabbed the steering wheel causing a crash. D failed to shift blame. "[I]ntervening act must be so 'highly extraordinary' that antecedent negligence should be ruled out."

Peterson (286) - D, whose negligence started a fire failed to shift burden to owner and fire department on claim that it was their negligence after the fire started that actually caused building to burn down.

c. Eggshell Skull Doctrine

If D negligently inflicted some contact/etc., D is responsible for any injury stemming from it, no matter how unforeseeable.

d. *Palsgraf*---Proximate cause and relational duty.

Palsgraf (272) - Due to negl. of the RR, a man drops a package containing fireworks, which exploded, overturning some scales a distance down the platform injuring Mrs. Paslgraf. **According to majority, only able to collect if it is clear that you could be injured by the act.** Employs forseeability, through a zone-of-danger analysis, and concludes that although a duty was owed to the man w/ the box, it was not owed by these employees to Palsgraff. **Dissent argues for a directness test, such that P can collect as her injuries stem directly from D's actions.**

**** If something is within the scope of the risk, it is foreseeable, but not vice-verse.**
**** Most jurisdictions use forseeability standard.**

D. Defenses

Sometimes the fault of P reduces or eliminates D's liability.

1. Contributory Negligence and Comparative Negligence (or Responsibility)

D must make prima facie case against P:

- P has duty to exercise reasonable care for own safety (need not be proved)
- Did P breach duty? Did P fail to exercise reasonable care for own safety?
- Actual and Proximate Causation
- Injury – already proven.

Contributory negligence is a complete defense. Doctrine of **last clear chance** would preclude use of this defense if D had the last clear chance to avoid the harm.

Exceptions:

i. Intentional torts
ii. Does not extend to recklessness or intentional wrong doing of D
iii. Negligence Per Se. Contributory negligence can usually be asserted as a defense except when the statue was enacted solely for the purpose of protecting a class of which P is a member, eg, speeding in a school zone when a child negligently steps into the street..
iv. *Last Clear Chance*. If, just before the accident, D had an opportunity to prevent the harm, a failure to do so wipes out the effect of P's contributory negligence.

Comparative negligence/responsibility proportions damages between parties according to their responsibility.

a. Pure – P recovers a percentage of damages corresponding to D's fault. No bar to recovery if D has a very low level of comparative culpability.

Reliable Transfer (381) Ship ran aground in part due to Coast Guard's failure to operate warning light. **District court applied admiralty rule of divided damages**, where if P contributed to their injury, the only collect ½ of the damages from D**. The Supreme Court overturned, applying comparative negligence** - damages proportional to responsibility - where such responsibility can be determined.

b. Modified – P barred from recovery if more responsible than D (P at least 50 or 51% responsible, depending on jurisdiction)

Hunt (383) Snowblower injury. **P would have been precluded from recovery if *more than* 50% responsible for her injuries.**

**** Jurisdictions differ widely on how to handle apportionment between multiple defendants.**
**** % responsibility usually determined by jury.**

2. Assumption of the Risk - **P has forfeited right to complain about D's conduct b/c of knowing and voluntary decision to encounter risks associated w/ D's conduct.** ***Typically decided as a matter of law.***

Three part test

1) Did the plaintiff in fact take on such a risk
2) Did she do so knowingly and voluntarily
3) Are there policy reasons for courts to impose liability anyway

a. Express Assumption of the Risk – Complete Defense – Usually involves written agreement.

Jones (393) P precluded from recovery from negligent crash of airplane due to written exculpatory agreement.

Must Consider in Determined Exculpatory Agreement to be Valid:

a. Existence of duty to public
b. Nature of service performed
c. Whether K was fairly entered into
d. Whether intention of parties is expressed in clears and unambiguous language.

Dalury (398) Skiing accident. Rest. 2d §496B says exculpatory agreements upheld where they are (1) freely and fairly made, (2) between parties of equal bargaining power and (3) there is no public policy reason to void them. Agreement voided due to concern that public interest is enforcing the law, and common law has established that an invitor has certain obligations to invitees.

b. Implied Assumption of the Risk – Often combined w/ comparative negligence into a doctrine known as comparative fault. Prior to comparative defense, was a complete defense

a. Primary – Typically involves sports or other recreational activities. P assumes risk by engaging in an activity, knowing that said activity carries certain risks.

Murphy (410) P injured on carnival ride "The Flopper" precluded from recovery as he participated knowing of the risks involved.

b. Secondary - D typically has already violated duty owed to P; P encounters, observes and then chooses to take risk. Complete or Partial Defense (see below).

Monk (403) – Construction electrocution. **P precluded from recovery as the statutory construction in USVI makes assumption of the risk a complete defense separate from comparative negligence.**

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 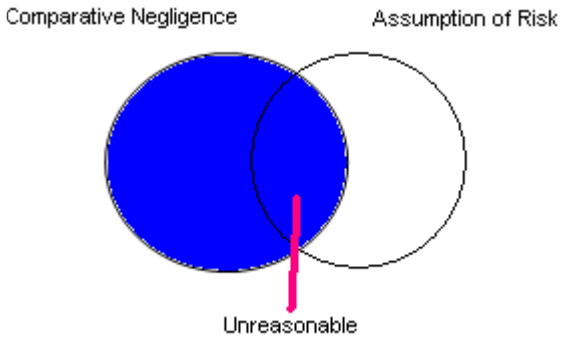
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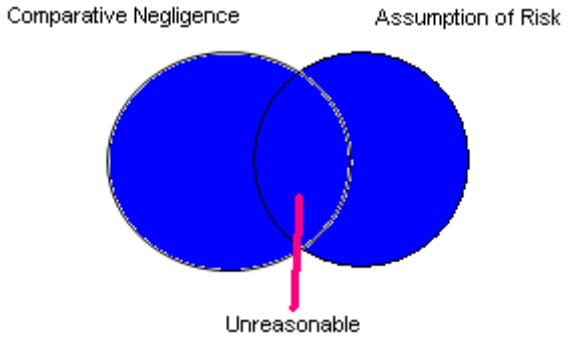
Hybrid statute. Separate defenses working together under comparative fault. Juries assign fault to P either because of contrib. neg. or assumption of risk.
 
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 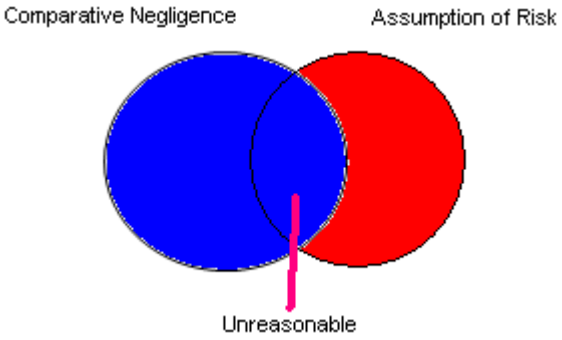
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 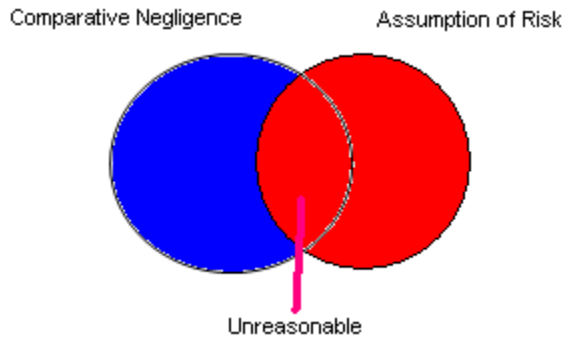
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II. Dignitary Torts and Negligent Infliction of Emotional Distress

A. Battery and Assault

1. Prima Facie Case

Battery: Interest protected is avoidance of harmful or offensive touching.	**Assault**: Interest protected is apprehension of imminent battery.
1. A acts 2. intending to cause a. harmful bodily contact with P ***or*** b. bodily contact with P that is offensive 3. A's act causes such contact 4. Result – harmful or offensive contact	1. A acts 2. intending to cause the apprehension of a. an imminent harmful bodily contact ***or*** b. an imminent bodily contact that is offensive 3. A's act causes such apprehension.

- Intent can often be determined trough circumstantial evidence
- Battery need not be flesh-on-flesh. Shootings and bombings can count as battery.
- Intent v. Motive**.** One can have the necessary intent for battery without the motive. Eg, if one feels it would do a person well to be punched in the face, he has good motives but he intends the harm so he's guilty.
- Can be justified. D may believe Heimlich maneuver was necessary to save P's life
- Knowledge equals intent. One who acts with the knowledge that a harmful or offensive contact is substantially certain to occur is considered to have the intent necessary for negligence. (All Restatements, Garrat v. Dailry p545)
    - Knowledge is subjective. If one unknowingly serves peanuts to one he knows is allergic to them he does not have knowledge or intent needed for battery (though P may have a case of negligence if D should have known)
    - Statistical knowledge. Courts are split on whether you have the intent for battery if, say, you know 1 of every 1,000 Styrofoam coffee cups will be defective and cause serious burns.
    - Some courts treat knowledge as mere circumstantial evidence from which a jury can infer that D intended to cause harmful or offensive contact.
- Knowledge is sufficient but not necessary. Eg, if one shoots at a victim with only a ten percent chance of hitting him, he had the intent necessary for battery.
- Knowledge = Substantially certain
- Courts are split on whether insanity is a defense to intent necessary for battery.
- Unlike the CL there is no assumption a child under 7 cannot form intent.
- Clothing and other objects can be extensions of one's self. If one shoots at a person and produces a bullet hole in his intended victim's clothing or he snaps a plate away from someone's hands his actions may constitute offensive touching.
- Similarly, a massive increase in air pressure resulting from an explosion, or the release or colorless odorless gas, is equivalent to touching for battery purposes.
- Offensive contact is what is <u>against the prevailing standard of acceptable touching</u>
- If a touching is offensive contact or not is sometime up to the factfinder. Eg a tap
- Unawareness of the prevailing standard of acceptable touching is not an excuse
- Thus, one can be held liable for battery even if they meant "no offense."
- Certain contacts that might otherwise be deemed inoffensive as a matter of law can be rendered offensive if D knows P is unusually sensitive or averse to touch.
- Compensatory damages are available to any P who can prove a loss from battery.
- Punitive damages are only available to P's who can establish malicious or willful wrong. A defendant unaware of the prevailing standard is unlikely to qualify.
- Transferred intent allows a court to hold an actor liable when the contact intended is visited upon someone unexpected.
- Furnishing of alcohol is not sufficient to establish battery.

Battery

Intent is subjective, and means purpose or substantial certainty that result would occur.

Depending on jurisdiction, must intend to contact which a reasonable person would find offensive.

Newland (542) Dentist sexually touches patient. **D liable despite thinking that patient would like touching, as a reasonable person would find it to be offensive. An act is not necessarily medical malpractice simply because it took place in a medical setting.**

Herr (549) Kid dies celebrating 21st. Although the serving of alcohol to a person under 21 is negligence per se, regardless of whether or not it is battery, the **issue at hand is "not an act which impinges upon that individual's sense of physical dignity or inviolability."** (550)

Travis (546) **Proof of employer's knowledge that actions would cause harm to employee creates inference that action was with purpose of harming employee.**

Yeager (547) D demonstrated a home-made bomb, which injured some onlookers. Court ruled **did not constitute battery as attempt to protect onlookers shows that harm was recklessness rather than intentional**.

White (548) **Some courts have allowed mental defect as a factor**. Here, the jury was instructed that the P, who had Alzheimer's, was guilty only if he had the capacity to apprehend that such conduct would be harmful.

Weisbart (549) **Tender years doctrine does not apply to torts of intentional harm.**

Fisher (553) **"Touching" applied through doctrine of extended personality**, where an employee ripped a plate out of P's hands, and was liable for battery on grounds that snatching plate was unwanted touching of P.

Paul (554) **Question of offensiveness is often for the factfinder.** In this case, question of whether unwanted rubbing of shoulders was offensive contact was submitted to jury.

Odem (554) **Conduct can amount to battery if D should reasonably believe that contact will be offensive.**

Cohen (554) "[W]hen patient's religion enjoins her to avoid having her skin touched directly by males, and when hospital has notice of, and agrees to abide by, this restriction, the touching of her skin by a male nurse during surgery can constitute offense contact battery."

Assault

There must be *reasonable* belief in the hearer that the threatened contact is *imminent*. As such, although words do not usually constitute assault, under certain circumstances they *can*.

- Not every battery is an assault. Eg, unconscious plaintiffs or surreptitious batteries like poisoning.
- Fear is not necessary. Apprehension alone is sufficient
- For words to constitute assault there must be *reasonable* belief in the hearer that the threatened contact is imminent. Eg, not "one of these days your gonna get it."
- D is liable if he is aware of P's extra sensitive nature

Beach (556) **Pointing a pistol at someone will reasonably induce fear of an imminent battery.**

Brooker (557) Telling an operator that if you were there you would kill them does not constitute assault. **For there to be an assault, apprehension must be of imminent contact.**

Vetter (560) Two cars at a stoplight at 1am. D spit at P's car and threatened to remove her from it. **Question of assault goes to a jury, as although P was in a locked vehicle, D "had the apparent ability" to harm her, and thus her apprehension may have been reasonable.**

Hill (562) Given D's height and position of counter separating him from P, D's propositioning P coupled with ability to act on it permitted jury to conclude that (a) D "acted with intent to create an apprehension of imminent offensive contact" and (b) P was reasonable in fearing such conduct.

Phelps (563) P was raped by another, and woke up naked on a bed next to fully dressed D. Court found that jury could find assault as D "[got] into bed with her and thereby [caused] her to fear imminent harmful or offensive contact when she awoke."

Transferred Intent & Unintended Consequences

Possible to transfer intent from (non-exclusive):

Assault → Battery
Offensive Contact → Harmful Contact
Intended Victim → Unintended Victim
Chattel → Unintended Victim

Most courts do not require P to show that D intended the particular injury or type of injury sustained. (576, Frey and Note 3)

Cole (573) D kicked P in the lower back as a joke, causing injury to back. **"[I]t is the intentional nature of the contact with the plaintiff that controls the definition, not the intent to cause actual harm or injury."** (574-75)

Villa (576) D pointed unlit torch at P intending to annoy him, but torch lit and caused P burns. Battery claim allowed, as **intent for offensive touching transfers into the harmful touching that resulted.**

Vosburg (576) D kicked P (both schoolboys) in the shin while in class, aggravating a previous infection. **Court held that it was sufficient to intend a kick that was against school rules, and invoked *eggshell skull doctrine* to allow for recovery for unforeseeably injury.**

Frey (576) Reversed verdict for D as court instructed jury to only find for P if D intended the harm, rather than the contact.

White (578) D shot at an acquaintance, T, and the bullet hit P. **Intent to cause harmful intent to T transferred to P, who was the person that said actions actually injured.**

Talmage (580) D saw many boys playing on the roof of his shed and threw a stick at one to scare them off, hitting P in the eye. Court found that as D used excessive force, he **should be held liable regardless of whom he meant to hit.**

Corn (582) D shot at a dog, hitting P. Court held that **"[w]here a person intentionally discharges a firearm for a wrongful purpose and another is hit, he is liable for the injuries inflicted**." (582)

Lynn (582) **Court rejected transfer of intent from trespass to chattels to battery. *Possibly done to allow P to obtain redress when SoL for intentional torts has expired.***

2. Defenses
   a. **Consent** – *In some jurisdictions, Consent is part of the prima facie case.*
      - Express
      - Implied (objectively measured)
      - **No Defense if by Fraud or Coercion**
      - **D must reasonably believe that consent was given**

Koffman (584) Child sustaining injury from tackle by football coach raises factual question of whether or not child consented to be tackled in by coach or only children of like age and experience.

O'Brien (591) **Consent assumed when immigrant followed in line and presented arm for vaccination.**

Neal (592) **Jury may find that husband fraudulently obtained wife's consent to have intercourse by failing to disclose that he was having an affair.**

Mohr (593) **Consent was given to operate on one ear, but not the other. Although operation was successful, Dr. liable for battery.**

b. **Self-Defense**
- Provocation – Actually (subjective) and reasonably (objective) believed in danger of imminent battery.
- Reasonable force used in defense. **Deadly force is only justified when threatened with death or serious bodily injury.**

Haeussler (594) – D hit P to get P off of his property, as P was out of control and acting threateningly toward D, and P had beaten up one someone else in a previous altercation. **Question is not what P intended, but what D reasonably believed at the time.**

Landry (595) D successfully invoked Self-Defense when P was acting belligerently, refused to calm down, and bumped into D in a bar.

c. **Defense of Property**
- Provocation
- Reasonable force used in defense

Katko (597) Spring-gun case. **D not entitled to use a spring-gun to defend against trespassers as, according to Rest. §79 not allowed to use force intended to cause death of severe bodily injury unless intrusion threatens same. Not allowed to do by mechanical means what he could not do were he present.** (600)

Jones (601) Tooth-snatchers. **Cannot commit a battery to recover property that is not yours. Also, cannot commit battery to recover your property from someone in "peaceful possession" thereof.**

**** Note **** In Jacques (608) court awarded significant punitive damages for a trespass claim. This is likely because punitive damages are scaled to D's assets so that impact is meaningful.

B. Infliction of Emotional Distress

Emotional distress is traditionally recoverable as parasitic damages. That is, harm consequent to predicate bodily harm.

Physical manifestations are sometimes required as evidence of the severe emotional distress.

1. Intentional Infliction of Emotional Distress (IIED)

Prima Facie Case:
- Act - An extreme or outrageous act
- Intent - Intentionally or Recklessly causes Severe Emotional Distress
- Cause - Causes
- Result - Severe emotional distress. If results in physical harm, that is also recoverable.

Dickens (631) NC beating case. Lays out elements of prima facie case, and notes that although statue of limitations has run out for battery and assault, action for IIED is still valid as the threat of future death was neither a battery or assault, and constitutes IIED under the circumstances.

McGuffey (635) Landlord racial harassment case. **Recovery permitted despite lack of physical manifestations of emotional distress.**

Silznoff (641) Claim for death threat found valid despite not assault, as timing was indeterminate. Movement toward creation of IIED tort.

Miller (643) Court upheld claim for IIED even though it stemmed from same events as trespass and other claims.

Burgess (643) Claim for IIED allowed even though it could probably have been made as a claim for conversion.

Some courts consider the question of whether there was sufficient outrageousness as a question of law for the court, others as a question of fact for the jury.

In Jones v. Clinton (644) the court concludes that P failed to produce evidence that she had suffered the requisite amount of distress and noted that P never missed work, consulted a therapist, did not suffer adverse effects in her marriage, etc. **Requisite severity of emotional distress is quite high.**

2. Negligent Infliction of Emotional Distress
   **** Note – This is an action in negligence. There is no general duty, but there are these exceptions:**

   a. From No Injury to Zone of Danger
      1. **Impact Test** – P can recover only for parasitic damages; P must have been touched, however lightly, to collect.
      2. **Zone of Impact** – P can recover if in the "zone of danger" when the accident occurred.

      Need for Physical Harm – Three Approaches – None is the majority.
      1. **Must demonstrate actual physical harm** – duty viewed as one to avoid physical harm. However, no longer distinguish btw. that caused directly and as a consequence of emotional distress.
      2. **Must demonstrate physical harm or manifestation** as evidence of emotional distress. Will recognize duty to avoid emotional distress in and of itself in some cases, but require manifestation to guarantee genuineness and non-triviality.
      3. **No requirement of physical harm/manifestation**. Simply relies on nature of circumstances and jury to separate genuine from fraudulent.

         Wyman (681) P claimed to suffer anxiety as a result of a contractor carelessly blasting rocks adjacent to Ps' property. **Applied impact rule, stating that P cannot recover for mental pain and anxiety that do not stem from some physical injury caused by D.**

         Robb (682) P stopped lactating due to fright when car, stuck in a rut that D negligently allowed to form, was struck by a train. **Applied zone of danger rule, rather than traditional impact rule, and concluded that P could recover as she was in the "immediate area of physical danger" when fright occurred.**

Gotschall (686) – Railroad case. Rejected appellate test asking a) Was injury genuine and b) was injury genuine as overbroad, and impact test as too narrow. Adopted zone of danger test.

Lindley (700) **There is something particularly salient about having been distress by virtue of having been imminently dangered.**

b. Special Circumstances

In some special circumstances, Ps have long been able to recover for NIED:

- Telegraph companies that negligently fail to deliver notice of death causing P to miss the funeral
- Morticians mishandling a family member's corpse
- Passengers, particularly young women, distressed by (misfeasance or nonfeasance) a common carrier.
- *Recently expanded by some courts to other circumstances involving unusual vulnerability of P and a voluntary undertaking of D (e.g. medical malpractice).*

c. Beyond the Zone: Bystander Claims

Most courts recognize some bystander liability, and most of these with some limitations.

Waube (712) **Traditional – No Liability.** P, whose daughter was negligently killed by a motorist, precluded from recovery as motorist's duty was to daughter, not mother. Liability would be out of proportion to culpability of conduct of negligent tortfeasor.

Dillon (715, California, 1968) **Liability w/ Limits.** Mother watched daughter negligently killed by motorist. **Expanded NEID recovery to bystander based on three factors to determine forseeability of harm to P:**

1. Was P near the scene of the accident?
2. Was shock from direct emotional impact from witnessing the event?
3. Were P and V closely related?
4. *Court repeatedly refers to physical manifestations of harm, so may be another limiting factor.*

Thing (723, California, 1989) **Liability w/ Greater Limitations.** Mother notified by daughter that son had been hit by motorist.

CA SC revised view of bystander liability, precluding mother in Thing from recovery, by pulling in the guidelines from Dillon and setting *REQUIREMENTS*:

1. P closely related to V (Immediate family, but *not* cohabiter)
2. P must be present at scene of and personally and contemporaneously perceive the injury-producing event.
3. Must produce serious emotional distress, **beyond that which a non-interested party would experience**. No need to prove physical harm, but must be something to support the claim of distress to protect against fraud.

Thing court limits recovery to presence of all three factors, where as Dillon is more flexible and allows for gradual extensions of liability.

III. Strict Liability (Liability Without Fault)

Pingaro (141) Strict Liability Dog Bite. **Strict liability overrides reasonable person standard.**

A. Ultrahazardous Activities

Prima facie case

1. **Was this an activity for which SL is appropriate**
2. **Actual and Proximate cause**

All other torts covered have required that D negligently or intentionally act in a way that the law deems to be wrongful, and thus liability is based on fault. This is a contentious topic, particularly among those who do an economic analysis of law, using economic analysis to determine if society is benefited in some cases if Ps do not have to prove fault (See Pingaro (dog bite), workman's compensation, respondiat superior, etc.).

Rylands (798) Reservoir filled unused vertical mineshafts flooding nearby mine. P allowed to recover, regardless of D's fault. **"[T]he person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he des not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."**

**** Note ** Non-natural things are both things not found in nature and things that are not commonly done (e.g. building a reservoir), as the latter does not carry reciprocal risk.**

Klein (800) Knocked-over fireworks. SL established both through state statute and through Rest 2d.

First Restatement

- Strict liability is to be imposed if the **ultra hazardous** activity:
  - Necessarily involves a risk of serious harm to the person, land, or chattels of others which cannot be eliminated by the exercise of the utmost care, and
  - Is not a matter of common usage.

Second Restatement

- One who carries on an **abnormally dangerous** activity is subject to liability for harm…resulting from the activity, although he has exercised the utmost care to prevent the harm.
- In determining whether an activity is "abnormally dangerous," there are six **factors** for consideration:
  - Existence of a high degree of risk of some harm to the person, land, or chattels of others;
  - Likelihood that the harm results from it will be great;
  - Inability to eliminate the risk by the exercise of reasonable care;
  - Extent to which the activity is not a matter of common usage;
  - Inappropriateness of the activity to the place where it is carried on; and
  - Extent to which its value to the community is outweighed by its dangerous attributes.

Differences from first restatement

- Inability to eliminate the risk by the exercise of reasonable care
- Value of to the community
- Inappropriate to the community

Third Restatement pretty much goes back to two part test of first restatement

- Factors are deemphasized is modern SL

Courts will weight the factors differently, and so SL may not be determined consistently for the same fact pattern across jurisdictions.

B. Defenses to Ultrahazardous Activity

Assumption of the risk is a complete defense. P need not know or understand all elements of risk, but must know that there is an abnormal risk of injury. (e.g. allowing blasting near property and

property is damaged.) Adopted when these defenses were complete; Unclear what would happen in a comparative fault jurisdiction.

Contributory/comparative negligence is *not* a defense, except in cases where P knowingly and unreasonably subjected himself to risk.

C. Product Liability---Product Defects

Precursors to Greenman (1963)

- MacPherson – 1916 – action in negligence that removed privity requirement
- Escola – 1944 – action in negligence essentially applying res ipsa to show breach
- Henningsen – 1960 – K – Extended scope of warranty (no privity)

Escola (817, California) P injured by coke bottle that broke while she was placing it in a refrigerator. **P recovers through *Res Ipsa*, however concurring opinion suggests that it "should not be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury."**

Greenman (826, California) P injured by defective (design) product. **Despite P's inability to recover via warranty, court concludes that a "manufacturer is strictly liable in tort 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."**

Baker (871) **Sellers only obligated to make design and warning choices with *foreseeable* uses of product in mind**. Estate of decedent who jumped on moving harvester to hunt from it and fell to his death barred from recovery as his use thereof was unforeseeable. *Note that this could likely be caught through proximate cause.*

Restatement 2d § 402A – 1965

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if:
    (a) the seller is engaged in the business of selling such a product, and
    (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated above applies although:
    (a) the seller has exercised all possible care in the preparation and sale of his product, and
    (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement 3d § 1 – 1998

One engaged in the *business* of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.
This is not meant to include pure emotional or economic harm.

D. Defenses to Product Liability

i. Non-Comparative – *Rest 2d. comment n (p. 866)*

Contributory negligence is *not* a defense *unless* it is unreasonable secondary assumption of the risk.
Unreasonable secondary assumption of the risk is a complete defense.
Reasonable assumption of the risk *probably* is a complete defense (no meaningful case history).

ii. Comparative

Operates identically to Comparative Negligence & Assumption of the Risk under Negligence.