INTENTIONAL TORTS

- Battery
- Assault
- False Imprisonment
- Intentional Infliction of Emotional Distress (IIED)
- Trespass

1. BATTERY

-A battery is an unprivileged contact with the D that is harmful or offensive
- There must be an intent to perform the unlawful act
- Direct or indirect contact (anything connected to the body)

- Intent is transferable
  - If meant to strike one person and actually strike a third party, still battery

Cases – Intent

_Vosburg v. Putney_
(Boy kicks another boy’s leg in classroom)
- Intent to cause harm is not necessary, only the intent to do the unlawful act is necessary
  - Act was violation of standard behavior in the environment => Unreasonable Act!
  - THIN SKULL RULE: Consequences need not be foreseeable as long as intent to act is present

_Garret v. Dailey_
(Boy pulls chair out from under old woman and she is injured)
- Substantively certain knowledge that contact/harm would result from act counts as intent for battery.
  - Knowledge that harm MIGHT occur from act is negligence

Cases – Harmful/Offensive Contact

_Fischer v. Carrousel Motor Hotel_
(Manager snatches plate out of black man’s hands, shouts no negroes are served)
- Contact may be with anything connected to the body.
- Contact may not be harmful, but offends a REASONABLE (not hypersensitive) person’s sense of dignity
  - Vicarious liability: the employer is liable for employee’s tortious actions during course of employment
*Leichtman v. WLW Jacor Communications, Inc.*
(Radio host blew smoke in known anti-smoking advocate’s face repeatedly)
- Indirect physical contact
- Unreasonable act to person
- GLASS CAGE RULE: Cannot erect imaginary cage around self saying any contact will be subject to liability. There must be a substantial certainty that offensive contact will occur.

2. ASSAULT

- There must be apprehension of an IMMEDIATE battery
  - Apprehension must be what a reasonable person would perceive, not a super-sensitive
  - Actual ability to carry out threat does not matter
    - Unloaded gun pointing counts as assault, if don’t know gun is unloaded
- Fear or intimidation does not count
  - Must be WORDS + CONDUCT or no assault

Cases – Assault

*Read v. Coker*
(Workmen threatened to break Read’s neck if he did not leave Coker’s shop)
- Threats of harm, apparent intent to harm, and apparent ability to immediately carry out threat constitute an assault
- Doesn’t matter if it was a bluff

*Beach v. Hancock*
(Hancock aimed unloaded gun at Beach and pulled trigger)
- Apprehension of immediate harm constitutes an assault
  - Doesn’t matter if there is no ability to actually carry out harm

3. FALSE IMPRISONMENT

- Must be sufficient act of restraint
  - Threats are enough
- Must be a bounded area present
  - Inaction is enough as well
    - i.e. refusal to give a boat to cross the ocean
  - Area not bounded if there is a REASONABLE escape that P knows of
- Irrelevant how short period of imprisonment is
- Inconvenience does not count unless it is great enough to break threshold of imprisonment
-CANNOT recover if P did not know he was imprisoned at the time
  -CAN recover from damages incurred during imprisonment however
-mistaken identity/in good faith does not count
  -Once case of false imprisonment is established, BOP is on D to prove legal justification

**Cases – False Imprisonment**

*Whitaker v. Sanford*
(Woman sailed from Syria to Maine, once arrived, was not given boat to go ashore)
-Actual physical impediment/restraint is sufficient, there needs not be a physical exertion of force to restrain a P
  -Lack of personal freedom is P’s injury

*Sindle v. NYC Transit Authority*
(P injured when jumped out of bus, riders were damaging bus so driver bypassed stops and drove to police station)
-Even a person who is imprisoned must use reasonable care when attempting to escape

*Coblyn v. Kennedy’s*
(P was detained by an employee of D who suspected him of shoplifting)
-Any act of physical power that may be avoided only by submission counts as false imprisonment
-A shop owner may REASONABLY detain a suspected shoplifter on REASONABLE grounds for a REASONABLE amount of time

4. **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (IIED)**

-Must be truly OUTRAGEOUS
  **EXCEPTIONS**
  -If D knew that the P was supersensitive, not necessarily outrageous conduct is tortious
  -Continuous
  -Young children, elderly, preggers
-Damages must occur (not necessarily physical injury)
-Common carriers/Innkeepers owe a higher std. of care

-The more outrageous you show the conduct to be, the less you have to show in the way of damages
-IIED is a fallback position in torts. If you can’t prove anything else, you try to prove IIED.
  -i.e. words without conduct that fail a claim of assault

*State Rubbish Collectors v. Sillznoff*
(Collectors threatened numerous inflictions of harm against D if he didn’t join union)
- Threats not backed up by conduct can inflict severe emotional distress and are tortious
- One who inflicts this ED is liable for the physical harm as a result of the ED

5. TRESPASS

Affirmative Defenses to Intentional Torts

- Consent
- Self-Defense
- Defense of Others
- Defense of Property
- Necessity
- Shopkeeper’s Privilege
- Familial and Discipline Privileges
- Authority of Law

1. CONSENT

TEST
*Did the P have capacity for consent?
  - No Capacity  $\Rightarrow$ No Consent
  EXCEPTIONS
  - Extreme intoxication
  - Minor children
  - Emergency Situations

-Given two ways
  - Express consent (2 ways)
    - By words, speaking
      - Did P give consent under duress?
      - Was it a mistake?
  - Implied consent
    - Custom/usage
    - P’s conduct
      - Were boundaries of consent exceeded?

Cases – Consent

*Barton v. Bee Line*
(15 yr girl was raped or had consensual sex with the chauffer)
-A man having sex with a woman under 18 who is not his wife is guilty of rape even if she consents
**Bang v. Miller Hospital**
(Dr. severed P’s spermatic cords during surgery without giving consent to that exact procedure)
- In an action against unauthorized surgery, the decision of whether or not the surgery is unauthorized goes to the jury
- Dr. must inform patient of all (within reason) possible alternative procedures

**O’Brien v. Cunard Steam Ship**
(Dr. vaccinated P, who was holding out her arm and waiting in a line to be examined for immunization. P sued for assault, but D claimed that she had consented)
- If it is reasonably believed that consent came from the person’s actions, then consent was given regardless of the person’s state of mind

**Kennedy v. Parrot**
(Dr. punctured cyst in ovary and by mistake cut a blood vessel)
- A surgeon may lawfully perform, and it’s his duty to perform, such operation as good surgery demands, even when it means an extension of the operation further than was originally contemplated, and for so doing he isn’t liable for damages as for an unauthorized operation
- Silence and inaction when considered in connection with the surrounding circumstances may constitute consent to what otherwise would be assault.
- Consent was implied since PP would have consented if awake (objective test…what would a reasonable patient have consented to)?

**Hackbart v. Cincinnati Bengals, Inc.**
(Player was intentionally struck during the game)
- Participating in a usually violent professional sport does not constitute consent to all injuries which may be inflicted by an adversary and thus one who intentionally attacks or injures his opponent may be liable in tort.

2. SELF-DEFENSE (of SELF, OTHERS, or PROPERTY)

**TEST (3 Steps)**
1. **Timing requirement**
   - Tort must be occurring
   - Or about to occur
     - If tort has already occurred, NO DEFENSE
     - NO RETALIATION
2. **Reasonable Belief Test**
   - Reasonably believe that tort was occurring
3. **D must stay within boundaries**
   - May not use too much force
     - Defending self or other people
       - Reasonable force or deadly force
- Defending property
  - Reasonable force
    - May never inflict serious bodily harm
    - When in your home you are not protecting your property, you are protecting your family
    - Deadly force is permitted

Cases – Self Defense

*Courvoisier v. Raymond*
(D believed that P was one of the rioters outside his shop and shot him)
- An action of force is justified by self-defense wherever the circumstances are such as to cause a reasonable man to believe that his life is in danger or that he is in danger of receiving great bodily harm and that it is necessary to use such force for protection.

3. NECESSITY

- This defense is used in property torts
  - Public Necessity
    - Done for the benefit of a ton of people
    - Absolute unlimited privilege
  - Private Necessity
    - Done for the benefit for a small number of people
    - Actual damages awarded for public policy
- Conflict of necessity versus self-defense of property
  - Necessity wins out

Cases – Necessity

*Ploof v. Putnam*
(P sued when D disallowed P’s family to moor on dock during storm)
- Necessity justifies entering the land of another
- Necessity beats out protection of personal property

*Vincent v. Lake Erie Transportation Co.*
(Boat was docked during storm, heavy damage to dock)
- While private necessity permits the invasion of another’s property (trespass) even if it is not done in negligence, the invader is liable for resulting damages for protecting his own property at the cost of another
NEGLIGENCE

FOUR PARTS
1. Duty
2. Breach
3. Causation
4. Damages

1. DUTY

- 2 Core Elements
  - *Foreseeable Plaintiff
  - *Standard of Care

- Foreseeable plaintiff to which a duty of care is owed
  - Exception: *Palsgraf*
    - Clearly foreseeable P (man trying to get on train) to which a duty of care is owed, there is a breach of duty to that plaintiff and a second plaintiff is injured in the process => is the 2nd P a foreseeable P?
      - CARDOZO versus ANDREWS: viewpoints
        - Cardozo (slight present day majority)
          - Was that P within the foreseeable zone of danger?
        - Andrews
          - Plaintiff will almost always be foreseeable
            - Unless foreseeability facts are EXTREME

Cases – Foreseeable Plaintiff

*Weirum v. RKO General Inc.*
(People chasing a radio host in cars for money crashed and killed a man)
- If it is foreseeable that a party’s conduct will cause others to behave in a negligent and dangerous manner, that party will not be relieved of liability by the intervening negligence of another.

- Standard of Care
  - Likely to be more than one std. of care for a case
  - Extremely important to identify std.s of care of each lawsuit talking about
- Negligent Standards of Care
  - Reasonable Person Standard
    - Objective Standard – Critical
      - What would a reasonable (average) person have done?
        - EXCEPTIONS
          - i.e. blind person for what a reasonable blind person would have done
Brown v. Kendall
(D accidentally hit P in the eye with a stick while trying to separate their dogs)
-If the D is acting in a reasonable manner, not liable for accidental injuries to others
  -Not negligence, just pure accident

  -Professional’s standard of care
    -What would a reasonable person in the same profession in the community have done?
    -The more specialized the more we expect
      -Heart specialist has higher standards than a general practitioner
  -Children’s standard of care
    -Children under 4 are absolved from liability for negligence
      -If D is very young, is it intentional or negligence?
      -What would a child of like age, characteristics have done?
  -Subjective Test Standard of Care – Opposite of Reasonable Person Standard of Care
    -EXCEPTION
      -Where a child is engaging in an adult activity
        -Tried as an adult
  -Common Carriers and Innkeepers
    -Held liable for even slight negligence
      -HIGHER STANDARD OF CARE!!!
      -Requires right type of P
        -Passenger or Guest
      -Otherwise ordinary case of negligence

-Owners and Occupiers of Land
  -Only use if party is owner/occupier of land or in privity with one
    -Family Members
    -Employees
  -Did injury occur on or off land
  -What caused injury?
    -Owner/occupier’s activity?
      -If this is the case, doesn’t matter who the P is. Reasonable person standard!!!
    -Dangerous condition?
      -Here, type of plaintiff governs std. of care
        1. Undiscovered Trespassers
          -NO DUTY OF CARE
        2. Discovered Trespassers
          -Responsible for artificial conditions causing harm (i.e. dock collapsing)
          -NOT responsible for natural conditions causing harm
        3. Licensees (on the land for his own reason)
-Social Guests
-ALL dangerous conditions that the owner has knowledge of

4. Invitees (on the land for owner’s reasons)
-Business Guests
-ALL dangerous conditions that the owner SHOULD know of
-Imposes a reasonable obligation for owner to inspect his premises

Rowland v. Christian
(D, social guest, was injured by defective faucet which P knew about prior to accident)
-Court here didn’t want to differentiate between different types of D’s, use reasonable person std.
-Minority view
-D is a licensee here, should’ve broken standard of care anyway

-Two ways to dispose of liability in these situations
-Warn of dangerous condition
-Make dangerous condition safe
-Obviously the condition hasn’t been made safe because someone has been injured
-NO LIABILITY FOR A VERY OBVIOUS DANGEROUS CONDITION

-Attractive Doctrine and Infant Trespassers
-For a child to recover, they must show that they did not understand the inherent risk in the dangerous condition

-Statutory Standard of Care
-Governs over the reasonable person std. of care
-TWO PART TEST
-Does P fall within the protected class?
-Is this action the type the statute is designed to protect against?
-If not applicable => reasonable person std.
-If applicable => NEGLIGENCE PER SE
-Court presumes occurrence of negligence conduct
-Therefore, P must then show that the negligence was the cause of the injury
-EXCEPTIONS
-Compliance would be dangerous
-Compliance would be impossible
-i.e. blind person seeing a red light
Cases – Standard of Care

*Martin v. Herzog*
(P killed when D’s car struck P’s buggy. P did not have lights on)
- Breaking a statute is negligence per se
- If it is established that the negligence was a contributory factor to the accident, P forfeits the right to damages
  - Contributory negligence is a full defense!
  - Does not forfeit right to damages if P can prove that he was using an even higher standard of care than the statute

*Tedla v. Ellman*
(P’s were struck by D’s car while allegedly walking on the wrong side of the roadway)
- A violation of a statute will be excused where it would have been more dangerous to comply
- The general duty is established by the statute and deviation from it without good cause is a wrong and the wrongdoer is responsible for the damages resulting for its wrong

*Brown v. Shyne*
(D gave chiropractic treatment to P without a license (against statute), P was paralyzed)
- Violation of the statute itself does not constitute negligence, which would make the DD liable.
- The requirement of a license was intended to protect the public against incompetent practitioners. Therefore, PP must prove that DD was in fact incompetent by showing that the treatment given to PP wasn’t in accordance with the stds. of skill and care which prevail among those treating disease.
- If violation of the statute has no bearing on the injury (not the proximate cause), proof of the violation becomes irrelevant
- DD failed to get license, not proof that he failed to exercise due care

*Gorris v. Scott*
(P claimed negligence when his sheep were washed over board because they had not been in proper pens by the statute)
- The statutory violation cannot be relied upon because the purpose/object of the act was not to protect against this type of harm/danger
- Not every violation of the statute is negligence per se

Summary: Violation of a statute is negligence per se only when:
- Injury is that contemplated by the legislature (*Gorris v. Scott*)
- Violation is proximate cause of injury (*Brown v. Shyne*)
- Strict adherence would not lead to a lower standard of care (*Tedla*)
  adherence was not impossible in the circumstances.

-Two Duty Sidebar Issues
- Affirmative Duty to Act
-THERE IS NO AFFIRMATIVE DUTY TO ACT
-EXCEPTIONS
  -Relationships
  -Personal or Business
  -If a party is the cause of the injury/negligence
-Is there an affirmative duty to control third parties?
  -TWO PART TEST
    -Do you have the right and ability to control?
    -Do you know or should know of facts you can control?
      -i.e. parents controlling bully child!!!

Cases – Duties Defined by Relationships of Parties

*Tarasoff v. Regents of U of Ca*
(Doctors at D hospital knew that a mental patient they were releasing intended to kill Tatiana Tarasoff. D didn’t warn P of the danger, and she was murdered.)
-Because of the psychologist’s special relationship with a patient, the psychologist has a duty to warn third persons of the patient’s violent intentions even if the psychologist has no special relationship with the foreseeable victim.

*Erie R. Co. v. Stewart*
(D was injured when his truck was hit by an Erie RR train. P usually maintained a watchman at the crossing, though it was not obligated to do so. D relied on the presence of the watchman and interpreted the absence of warning from the watchman as an assurance of safety in crossing the tracks.)
-if a party acts in accordance with a greater standard of care than that required by law, and another party relies on the provision of extra care, it may be negligent to discontinue the use of extra care without adequately warning of the discontinuance.

Cases- Duty to Rescue

*Tubbs v. Argus*
(D booked it after got in accident and P was injured. P sued for additional injuries due to D’s flight)
-NO DUTY TO RESCUE (affirmative duty to act)
EXCEPTIONS
-If a person’s innocent or tortious actions have caused injury to another, must reasonably help that person
-If there is a special relationship between the two parties

*Automobile Guest Statutes*
-Falling out of favor with states
-Can’t sue driver for injuries unless driver was grossly Vanilla Sky negligent
Cases – Duties Related to Custom

**Trimarco v. Klein**
(P was injured when his bathtub’s door enclosure shattered. P sued for negligence asserting that the manufacturer should have made the door from the tempered glass used throughout the industry.)

- The custom and usage of a profession or trade is one factor in deciding the reasonableness of conduct. The reasonableness of the custom itself need also be considered.
  - Custom is just A FACTOR, not the end-all
  - Court may still find that custom is too low standard of care

**The T.J. Hooper**
(Tugboats were lost at sea, but may have been saved if boat had a radio receiver (which is inexpensive, but no general custom to have one, only one tug did)
- When some have though a device necessary, the court may say they were right and others too slack
- Opposite of Carroll Towing? Custom: boat men would have not been off
- Regardless of the custom of an industry or trade, a Δ will be liable if his actions fall beneath the standard of average and prudent man

**Helling v. Carey**
(D, ophthalmologist, did not test for glaucoma on a 32 year old patient and she went partially blind. However, only 1 in 25,000 get glaucoma in that age group)
- Professionals whose actions conform to the standards of their given specialty may, nevertheless, commit malpractice if such conduct is not reasonably prudent.
- If a test is so imperative that irrespective of the stds. of the profession, it is the duty of the courts to say what is required to protect patients.
- B<PL
- Here custom does not set the std. for reasonable care
  - Reasonable prudence requires the giving of the test
  - But not necessarily

**THE HAND FORMULA**
- B > P L
  - if the burden on the defendant to place a precaution in place is lower than the probability multiplied by the possible loss, then the absence of the precaution is negligent.

Cases – The Hand Formula and Negligence

**U.S. v. Carroll Towing**
(The attendant of the P’s barge left the vessel unwatched for 21 hours. During that period, the barge broke loose and was sunk)
  - Risk that the mooring lines would come undone and the danger to the barge and to other ships if it did, was sufficiently great that PP should
have borne the burden of supplying as watchman, unless he had some excuse for his absence.

The owner’s duty to provide against resulting injuries is a function of three variables:
- The probability that she will break away of the harm (P)
- The gravity of the resulting injury, if she does (L)
- The burden of adequate precautions (B)

\[ B < PL \]

Basically one should take all precautions such that the burden of taking on those precautions is less than the probability of the event occurring times the liability incurred if the event does occur. Balance cost and risk.

Marginal cost

When the marginal cost of each accident begins to exceed the marginal cost of each precaution, at that point the actor has demonstrated reasonable care and is no longer negligent.

- No difference in amount of precautions an actor would take between negligence and strict liability

*Washington v. LA Light and Power*

(Decedent was electrocuted when he accidentally allowed his radio antenna to touch the power lines that D had refused to make safer)

- Burden of precautions was greater than PL, so D not liable
- Great harm, low probability….does not equal or exceed burden or costs of precautions of relocating or insulating the power lines

-Negligent Infliction of Emotional Distress (NIED)
- In order to recover for NIED you must show some evidence of physical injury resulting from the ED
- In contrast to Intentional Infliction of Emotional Distress (IIED) where you don’t need to show physical injury manifesting from ED, but you do need to show truly OUTRAGEOUS conduct
- You must show that you were in the target zone of the negligent conduct (majority rule)
  - Strong push for ability to recover outside target zone of negligent conduct
    - Family members
      - If you perceive the negligence
        - i.e. mother watches child being injured

2. BREACH (of duty => negligence)

- Either the D met the std. of care and was not negligent OR the D did not meet the std. of care and was negligent
-Res Ipsa Loquitor
  -When P can’t establish negligence with available evidence
    -In all probability some negligence was involved and now someone is injured because usually this doesn’t happen
    -Airplane crashes
    -P cannot have ANY contributory negligence
    -P must prove that neither he nor third party was in control of the instrumentality
      -D had total control of instrumentality
    -Res Ipsa establishment doesn’t mean P has won
      -Only means that P has the inference of negligence
    -Beats out directed verdict for D and goes to jury
    -Jury can then accept or reject the Res Ipsa negligence

Cases – Res Ipsa Loquitor/Breach of Duty

Boyer v. High School Assn.
(P was injured when the bleachers she was on collapsed)
- The bleachers were in the exclusive control of the D of the bleachers at the time of the negligent act, as failure to inspect AND
  -The occurrence is such as in the ordinary course of things would not happen if reasonable care had been utilized…bleachers don’t ordinarily collapse
  -No evidence to support that the spectators movement caused the bleachers to collapse…it is purely speculative
  -Now BOP is on D to prove he is not liable and something else caused the harm
    -The reasons underlying the harm are more accessible to the D than the injured P
    -Can’t make the injured/dead P get up off the floor and prove

Shutt v. Kauffman’s
(A metal shoe stand toppled from a table and hit Shutt on the head when her chair bumped the table. She sued the shoe store alleging negligence.)
-Just show negligence! Not appropriate to use Res Ipsa here.
  -Res ipsa doesn’t apply if a π has the means to establish the negligence of D

Escola v. Coca-Cola
(Glass bottle of Coke broke in a waitress’s hand)
-(1) Res ipsa may apply where an accident occurs sometime after the Δ relinquished control over the injury-causing instrumentality if the π shoes that the condition of the instrumentality didn’t change after it left Δ hands and that π handled it with due care. (2) Res ipsa may apply if the accident is of such a nature that it would not ordinarily occur in the absence of negligence.
  -If a res ipsa finding of negligence would place too high a burden on the Δ, the doctrine does not apply, i.e. the Hand formula can still apply in res ipsa cases.
City of Louisville v. Humphrey
(Humphrey died in the drunk tank)
- The instrumentality wasn’t in control of the police at all times (he could have hurt himself before he was in police custody)
- Court says that the prison keeper is not the insurer of the safety and well-being of the prisoner
- If an injury is caused by a person under the control or in the custody of Δ, it must be shown that Δ knew of the violent propensities of that person

3. CAUSATION
- Two Types
  - Actual
  - Proximate
- MUST HANDLE ACTUAL FIRST
  - If actual causation does not exist, lawsuit is OVER
    - Get to proximate causation only after establish actual causation
- Actual causation:
  - Was the D’s negligence the direct cause of the causation/injury?
    - “BUT FOR” TEST
      - “But for the D’s conduct, would this injury have happened?”
        - If no, the D wins
  - Alternative Test
    - D’s conduct was a substantial factor in causing the injury
    - Each of the Ds caused the injury
  - Alternative Causes Test – Summers v. Tice
    - One of a group of Ds caused the injury but unsure which one
      - SHIFT BOP TO Ds TO PROVE WHO DID IT
        - If no proof => liability on whole group

Cases – Actual (Specific) Causation

Hoyt v. Jeffers
(Factory emitting sparks may have set fire to a hotel)
- General causation: due to history of starting fires, it is capable and probable that the mill started the fire
- Evidence of past causation can prove specific present causation if the instrumentality is in the same condition
  - Pattern of negligence…reasonable person would infer such

Smith v. Rapid Transit
(P claims bus forced her to veer and hit a parked car, D claims it was not a bus that caused the accident)
- Causation can’t be shown by mathematical probabilities in the absence of other convincing evidence
- Needs to be a direct link btwn D and cause of accident…at least reasonably certain
Cases – Alternative Causes/Liability

Summers v. Tice
(P shot in eye and mouth while hunting, doesn’t know which of two friends did it)
-Both Ds acted negligently but don’t know which actually caused harm
-BOP shifted to Ds to prove who did it
-Otherwise both are liable

Ybarra v. Spangard
(During an appendectomy, man’s shoulder was injured. He doesn’t know specifically who injured him, but brings a negligence suit against all doctors and nurses who worked on him)
-Patient’s care in the control of all of the workers at one point
-Shift BOP on them to prove not negligent

- Jointly liable
  o DDs can be joined in a single suit; right of any party who is sued to insist that others be sued jointly with him because of their shared liability
- Severally liable
  o Each is liable in full for the PPs damages, although the PP is entitled to only one total recovery
- Jointly and severally liable
  o Two or more DDs acted in concert to cause the harm and where DDs acted independently but caused indivisible harm
  o Liability is in the form of vicarious liability…all DDs will be responsible for the harm actually caused by only one of them
  o Can bring them under the same action or can choose to sue one and recover everything from one

- Concurrent Causes
  o When two parties are negligent and their actions combine to cause an indivisible harm, they are both jointly and severally liable for the entire harm; each of these concurring events is a cause of the injury, insofar as it would have been sufficient to bring that injury about
- Successive causes
  o If a negligent act causes an injury, and a successive occurrence comes to pass which would have caused the same injury later, recovery is not limited to just the difference between the two, but the full damages that would’ve resulted….if appportionment isn’t feasible

Dillon v. Twin State Gas
(Boy grabbed livewire to stop from falling off bridge, was electrocuted and died)
-Damage may be apportioned in a seemingly indivisible injury if potential danger from one source has diminished the value of the loss actually incurred.
-P can recover only the difference between his life prospects were had he not grabbed the wire….nothing because he died or limited life from harm caused by falling…liable for an extra harm/damages

**Kingston v. Chicago & NW RY**
(2 unnatural fires destroyed P’s property, only 1 could be attributed to the D)
- Where two causes attributable to the neg of a responsible person concur in producing an injury to another, either of which causes would produce it regardless of the other, each is liable for the entirety of the fire
- If harm is indivisible, then once the DD is liable at all, he is liable for all the harm (joint tortfeasor)
- Substantial factor in producing the result
- If the concurrent acts of 2 or more joint tortfeasors cause a wrong, each is individually responsible for the entire damage.

**Ford v. Trident Fisheries**
(The rescue of the deceased, who fell overboard while working on D’s trawler, was obstructed due to the trawler’s life boat not being immediately available and having only one oar.)
- Even if the boat and oar were available, he couldn’t have been rescued…DD’s negligence wasn’t the cause of injury

**Lyons v. Midnight Sun** – decedent pulled out in front of truck and was killed. Held, negligence of defendant speeding was not the proximate cause of death.
- Whether DD was speeding or not, she would have died…his negligence was not the cause of injury/death…would have happened regardless
- If negligence isn’t legal/proximate cause of accident, he’s not liable

**Caboon v. Cummings**
(Dr. negligently failed to diagnose P’s cancer)
- One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, he is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
- His failure to exercise reasonable care increases the risk or such harm, or
- The harm is suffered because of the other’s reliance upon the undertaking
- Even if one’s conduct was not the cause of the resultant damages, damages are proportional to the increased risk attributable to the DDs negligent act or omission.
- Causation = loss of chance of survival
- Proximate Cause
  - Have already showed causation as a result of negligence
    - Not a true causation question
  - This concept means that the causation shown was not proximate enough
    - Way for a D to be let off because results of his actions were unforeseeable
  - Must distinguish between direct cause and indirect cause cases
    - Direct Cause
      - Between negligent action and injury there is an uninterrupted chain of events
    - Indirect Cause
      - Between negligent action and injury there is an affirmative intervening act or event that combined with the negligent act to cause injury
        - Act of God
        - Person let gas build up in area then lightning ignite
  - TWO RULES TO APPLY
    - If the result was unforeseeable => LET D GO!
    - If the result was foreseeable => Hold D liable
      - EXCEPTION: In an “Indirect Cause Case,” if the Intervening Act was an Unforeseeable Intentional Tort or Crime ⇒ Let the Defendant Go!!
        - In Order for this Exception to Apply the Intentional Tort or Crime must have been Unforeseeable
  - Eggshell/Thin Skull Fact Pattern is Not an Unforeseeable Result Fact Pattern
    - All You Have to Foresee is an Injury ⇒ You Do Not Have to Foresee the Extent of the Injury

Cases – Proximate Cause

Palsgraf v. Long Island R.R.
(Key negligence case, scale falls on lady seemingly unforeseeably)
- The risk reasonably to be perceived defines the duty to be obeyed
  - Although possibly negligent to man (in pushing him), his conduct didn’t involve any foreseeable risk of harm or negligence to the PP, who was far away…there’s no duty to her
  § Since the DDs conduct didn’t involve an unreasonable risk of harm to the PP, the damage to her wasn’t foreseeable…the fact that the conduct was unjustifiably risky to someone else is irrelevant…proof of negligence is in the air
  § There’s no duty or care due the PP
  § Dissent…duty is to everyone…only liable where there is proximate cause (direct causation)
DD bears a burden of due care to protect SOCIETY from unnecessary danger, not to protect A, B or C alone.

- It doesn’t have to be foreseeable, but must be proximate
- What actually happened….foreseeable after the action
- There must be a natural and continuous sequence btwn cause and effect
- The result must not be too remote in time and space from the cause

Solomon v. Shuell
(decendent came out of house with gun pointing to the ground to help robbery suspects being arrested by police not in uniform…he was shot by an officer)
-A person who goes to the rescue of another who is in imminent and serious peril caused by the negligence of someone else is not contributorily negligent, so long as the rescue attempt is not recklessly or rashly made.

Marshall v. Nugent
(D hit by a car while walking up the road to try to warn traffic of a truck accident)
- The D remains liable for the full consequences of his negligent act when the intervening force is one which a reasonable man would have foreseen as likely to occur under the circumstances, and the issue of foreseeability remains a question of fact for the jury.
  - Injury here was foreseeable within the scope of risk

Watson v. Kentucky & Indiana R.R.
(R.R. was negligent and rail car leaked gas, man threw match into it, injured P)
-D was responsible where the intervening causes, acts, conditions were set in motion by his earlier negligence, if the intervening acts should be reasonably anticipated
  - If match was thrown purposefully…that’s not reasonably anticipated

- **Foreseeability is not always a determinative.** Other factors may be important.
  - Kinsman Transit – barge broke loose because it was negligently tied up.
    Barge knocked another barge loose, and together they collapsed a bridge. Ice and debris collected, dammed up the river, and flooded plaintiff’s land. Held, since the injury is of the same type as was risked, and plaintiff is in same class of persons that were risked, the defendant's negligence is the proximate cause, despite no reasonable foreseeability.

Waube v. Warrington – PP was looking out the window watching her child cross the highway and witnessed him killed
  - Duty can’t be extended to one OUT OF RANGE of physical peril
Dillon v. Legg – mother saw her child cross the road, get hit and killed. Held, she can recover for NIED since her injury was foreseeable: she was close to the scene (on the curb), suffered distress contemporaneously, and is closely related to victim. Other factors may also be important (i.e. this is not a bright line rule)

-SHE WAS IN THE TARGET ZONE

- Thing v. La Chusa
  - Facts: When π was told that her son had been struck and injured by car, she rushed to the scene of the accident, where she found her son, bloody and unconscious, lying in the road.
  - Issue: Should damages for emotional distress be recoverable only if the π is closely related to the injury victim, is present at the scene of the injury-producing event when it occurs, and is then aware that it is causing injury to the victim and, as a result, suffers emotional distress beyond that of a disinterested witness?
  - Rule: Damages for emotional distress should be recoverable only if π is closely related to the injury victim, is present at the scene of the injury-producing event when it occurs, and is then aware that it is causing injury to the victim and, as a result, suffers emotional distress beyond that of a disinterested witness.
  - Thing factors: (1) π is present at the scene of the injury and is contemporaneously aware of the injury; (2) π closely related to the victim; (3) π suffers beyond that of a normal bystander.

Burgess v. Superior Court – child injured during delivery…mom wants damages for negligently inflicted emotional distress against doctor
  - She doesn’t meet requirements of Thing, but the court creates another category
  - Creates a direct victim category
    - Direct victim – when the DD owed a duty to the victim
    - But when is there a duty (what we wrestled with in Dillion, thing)
      - Here there’s a professional relationship btwn PP and doctor
      - They entered into a contract and DD didn’t exercise due care

- Molien v. Kaiser – wife negligently diagnosed with syphilis, and doctor told her to tell her husband to get tested. Held, husband may recover for NIED, since he was a direct victim. Doctor owed him a duty, and breached it.

- Marlene v. Affiliated Psychiatric – psychologist sexually molested boys who were patients. Mothers sued. Held, mothers were direct victims, since the doctor’s duty was to the ‘mother-child relationship.’ Therefore, mothers may recover for NIED.
Feliciano: Unmarried persons who are cohabitants may not recover for loss of consortium

**Borer v. American Airlines, Inc** – PP was hit by the cover on a lighting fixture and was injured as a result. Her 9 kids sued bc they had been deprived of her services, affection, tutelage, etc.
- They have suffered a loss for which they cannot be compensated and thus should not obtain a future benefit (money) essentially unrelated to that loss
- Damages are difficult to measure
- *Since every serious injury to a parent would engender a claim, the expense of litigating such claims would be sizable*
- No destruction of a sexual life

**Werling v. Sandy** – PPs child was stillborn allegedly due to negligence of DDs
- **R.C. 2125.01**
  - When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensured, the person who would’ve been liable if death had not ensued, or the administrator or executor of the estate of such person shall be liable to an action for damages
  - A duty of care is owed to the fetus, which was viable at the time of injury
  - Wrongful death statute…decedent’s family takes for harm caused by the DDs conduct

Wrongful birth damages: courts are split – some allow recovery for emotional distress for birth defects of a wrongful birth; some allow recovery of pregnancy costs but not costs of raising the child; some allow full recovery for raising the child, even if healthy; some only allow child-rearing costs offset by benefit to the parents. NOTE: argument that the benefit of children outweighs the burden of taking them, otherwise parents would have put them up for adoption or have had an abortion. **BUT**, then no deterrent to doctor, and adoption may not mitigate the damages – emotional.

- **Fassoulas v. Ramey**
  - **Facts**: π contended they could recover the expense of raising 2 children who were born after Mr. F had a vasectomy performed by Δ.
  - **Issue**: Can parents recover the ordinary and necessary expenses of child rearing from a physician who failed to prevent the birth?
  - **Rule**: Parents can’t recover the ordinary and necessary cost of child rearing from a physician who negligently fails to prevent the birth.
NEGLIGENCE DEFENSE

-THREE DEFENSES TO NEGLIGENCE
  1. Contributory Negligence
  2. Comparative Negligence
  3. Implied Assumption of the Risk

1. Contributory Negligence
   -Knowing contributory negligence
   -Unknowing contributory negligence

-Knowing contributory negligence
   -Active type of contrib. neg’l
     -Knowing the problem and still acting unreasonably
       -Fact pattern also supports implied assumption of the risk
         -TWO PART ASSUMPTION OF RISK TEST
           -Knew the risk
           -Voluntarily proceeded in spite of risk
         -EXCEPTIONS
           -When no other viable alternative
           -When acting in an emergency for self or other
             -Not liable!
           -When Somebody Knows of the Risk and then Unreasonably, Voluntarily Took it
             -Write About Contributory Negligence and Assumption of the Risk

-Unknowing contributory negligence
   -Did not see the risk
   -Write about contrib neg’l here but not implied assumption of risk

-CONTRIBUTORY NEG’L v. COMPARATIVE NEG’L
  -Four Parts
    -Contributory neg’l state
      -If P contrib neg’l => BAR recovery completely
    -Compar Neg’l state
      -If P contrib neg’l => LOWER recovery amount
        - Traditional compar neg’l state v. Pure compar neg’l state
          -Traditional State
            -If P’s contrib neg’l is less than D’s => $$$
            -If P neg’l > D negl’ => NO recovery at all
          -Pure State
            -P can recover no matter what, just lowers $
-Last Clear Chance Doctrine
  -Don’t count negligence against P if D had the last clear chance to protect
    self and did not take that chance
  -In contrib neg’l states only
    -When it is TOO harsh to bar P’s recovery

-Reckless Tortious Conduct
  -Contrib neg’l as defense doesn’t work in contrib neg’l state
  -Works in compar neg’l state, P’s neg’l offset against D’s
    -Reflects that P’s neg’l was only somewhat a factor and recovery should
      reflect this factor

Cases – Contributory Negligence

  o Butterfield v. Forrester
    Facts: While riding very fast, π ran into an obstruction Δ had put in the road and was injured.
    Issue: Can a π who has not used reasonable care to avoid an accident recover for injury caused by the accident?
    Rule: π won’t be able to recover where his lack of due care contributed to the occurrence of the accident.

Meistrich v. Casino Arena Attractions, Inc. – PP was injured ice skating. The ice was too hard and slippery due to DDs negligence, but PP knew his skates were slipping on turns
  ▪ Restatement
    - One who fully understands the risk of harm to himself caused by
      DDs conduct and nevertheless voluntarily chooses to enter or remain
      within the area of risk, under circumstances that manifest his
      willingness to accept it, is not entitled to recover for harm within that
      risk
  ▪ Assumption of the risk
    - Primary – DD wasn’t negligent…owed no duty or did not breach the duty owed…vosburg on playground
    - Secondary – whether a prudent person in the exercise of due care
      would have incurred the known risk and is so, would that person
      have conducted himself in a manner in which PP acted….pps
      contributory negligence
  ▪ Thus, PPs conduct is to be gauged by the rules of contributory negligence
Davies v. Mann – PP tied ass off the side of the road, when DDs wagon (going at a smart pace) ran over the ass and killed it
- Since the PP lost the opportunity to prevent the accident by the time it occurred and the DD could’ve avoided the accident at any time, the DD was liable
- Even though the animal may have been improperly there, the DD could have avoided injuring the animal through proper care
- Although there might have been negligence on the part of the PP, unless he might, by exercise of ordinary care, have avoided the consequences of the DDs negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong

**STRICT LIABILITY IN TORT**

- Strict liability = liability without fault
  - Public policy: P can recover despite D not being at fault
    - Prima Facie Case
      - Same as negligence except
        - Std. of care replaced with ABSOLUTE DUTY TO MAKE SAFE
  - Defenses
    - Contributory Neg’l State
      - Knowing Contrib Neg’l
        - Complete Defense
      - Unknowing Contrib Neg’l
        - Not Complete Defense at all
    - Comparative Neg’l State
      - Same as comparative neg’l defense for negligence
  - Strict Liability Fact Pattern
    - Ultra Hazardous Materials, Animals, Product Liability
      - Animals
        - Basic domestic pets
          - One bite rule, 2nd bite => Strict Liability
        - Pets with dangerous propensities
          - Strict liability to begin with!
      - Ultra Hazardous Materials
        - Exam will develop extremely cautious and safe D
          - THIS IS WHY WE ARE PURSUING STRICT LIAB.
            - D’s conduct plays NO ROLE AT ALL
    - Product Liability
      - ELLIS: If you want to deal with this, take the upper-level class!
Cases – Strict Liability

Fletcher v. Rylands
(Reservoir was built on D’s land, escaped, and flooded P’s land)
-A person using his land for a dangerous, nonnatural use, is strictly liable for damage to another’s property resulting from such nonnatural use

Turner v. Big Lake Oil Co.
(Salt water escaped from ponds constructed and used by Ds in the operation of oil wells and caused property destruction)
-Absent proof of negligence, there is no liability for injuries caused by water escaping from one’s land
- Storage of water is a natural/necessary and common use of the land, within the contemplation of the State and its grantees

Siegler v. Kuhlman
(Young girl drove into gasoline-loaded trailer which had come loose from its truck. The resulting explosion and fire caused her death)
-Hauling gas as freight involves such a high risk of serious injury which can’t be eliminated by due care that strict liability must be imposed for damages resulting from its explosion or ignition

Foster v. Preston Mill Co.
(P’s Mother mink who was frightened by blasting from the furnace killed her kittens)
-Strict liability is only imposed for those injuries resulting as the natural consequence of that which makes an activity ultra hazardous
-Here, it’s the exceedingly nervous disposition of the mink, rather than the normal risks inherent in blasting operations, which therefore must, as a matter of sound policy bear the responsibility for the loss here sustained
-Strict liability is not to protect against harms incident to the PP’s extraordinary and unusual use of the land