I. Intentional Torts
   A. Reasons for Tort Law
      i. Corrective Justice
      ii. Compensatory
      iii. Punitive
      iv. Deterrent
   B. Substantive Law Governing Liability for Battery
      i. The Prima Facie Case
         a) Intent
            • In an action to recover damages for an alleged assault and battery, the victim must only show either that the alleged wrongdoer had an unlawful intention to produce harm (i.e., an unlawful intention in committing the act which occurred) or that he committed an unlawful act.
            • “Thin Skull Doctrine”: the tortfeasor must take his victim as he finds him. If the act is wrongful, you are liable for the consequences, even if they are far more severe than can be anticipated
            • The intent necessary for the commission of a battery is present when the person acts, knowing, with substantial certainty, that the harmful contact will occur. Where a reasonable person in the position of the D would believe that a certain result was substantially certain to follow his acts, the defendant will be considered to intend that result.
            • If any person shall commit an unlawful act then the intention to commit that act must also be unlawful even if that person did not intend to cause harm.
            • The wrong-doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him.
            • A party can be liable for battery without a willful or unlawful purpose in taking an action and no intention of bringing about an unauthorized contact with a person only if he/she realizes that to a substantial certainty that contract or apprehension will result.
            • Constructive Intent—basically piece it together that if he intended to move the chair, and knows w/substantial certainty that she's going to try to sit down, then he intended to injure her. Exists because intent is a mental state and the only person who has access to mental states is that person, in this case, D. Age is irrelevant to this. Its only relevant to what D knows. Constructive Intent applies to infants
            • Intent is:
               • purpose, motive, or desire to harm or offend (violate personal dignity) (create fear or apprehension).
               • Look to defendants state of mind as a way to deal with the subjective nature of offense
               • Would a reasonable person be offended?
• The same types of contact may be welcome in some cases and offensive in other cases.
• Knowledge with a substantial certainty that an act will harm or offend
• Whether one particular person will be offended is almost impossible to determine—so it's rare that this standard would be applied to cases of “offensive” contact
• desire to commit act (unlawful)

b) Contact
• A battery may be committed even though there is no physical contact with the person's body, so long as there is contact with something that is attached to or closely identified with the body.
• Actual physical injury of the P is not a requirement of battery, because battery not only protects a person's interest in not being physically harmed, it also protects his personal integrity. An unpermitted, offensive contact with the person or anything identified with the person, violates a person's integrity, even if he is not harmed.
• For purposes of establishing liability for battery, contact that is offensive to a reasonable sense of personal dignity is offensive contact.
• Actual physical contact is not required for a battery so long as there is contact with clothing or an object closely identified with the body, as was the plate.
• Damages for mental suffering are recoverable without the necessity for showing actual physical injury in a case of willful battery because the basis of that action is the unpermitted and intentional invasion of P's person and not the actual harm done to P's body. Personal indignity is the essence of an action for battery; and the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting.
• An employer can be held liable for exemplary damages for a willful battery committed by one of their employees if at the time of the battery the employee is acting within the course and scope of his employment and acts maliciously and with a wanton disregard of the rights and feelings of the plaintiff, even if the employer does not authorize or approve the conduct of the employee.

ii. Privileges
a) Consent
• Silence and inaction may imply consent to defendant's acts if the circumstances are such that a reasonable person would speak if he objected.
• In determining whether there was consent the court must be guided by the overt words and acts of the P, not subjective states of mind.
• Even if a statutory rape statute claims that a woman under 18 cannot consent to intercourse with someone over 18, a female under the age of 18 has no civil cause of action against a male with whom she willingly has intercourse, if she knows the nature and quality of the act.
• In an action to recover damages for an unauthorized operation, the question of whether or not there was an unauthorized operation is a fact issue which must be submitted to the jury.

• For the consent to an intentional tort to be valid, it must be a knowing and intelligent consent.

• Where an internal operation indicated and performed, a surgeon may lawfully (in fact it is his duty to) extend the operation to remedy any abnormal or diseased condition in the area of the original incision whenever he, in the exercise of his sound professional judgment determines that correct surgical procedure dictates and requires such an extension of the operation originally contemplated.

• Consent may be implied by law whenever such an invasion is necessary to save or “some other important interest in person or property” if
  • the person is not present or able to consider the matter, and
  • an immediate decision is necessary, and
  • there is no reason to believe the person would not give his consent if he were able to do so, and
  • a reasonable person in the same position would consent.

• An injury inflicted by one player upon another during a professional football game may give rise to liability where the cause of the injury was an intentional blow.

• There is not a cause of action for battery if a physician vaccinates an individual on a ship who does not want to be vaccinated but who does not make her wishes known.

• Ask these two questions for consent
  • Did doctor believe she consented (subjective consent)
  • would a reasonable person believe she consented (objective consent)

• A 15 year old girl who knowingly “consents” to a sex act, although a victim of statutory rape, cannot recover damages in a tort action.

• Where a physician or surgeon can ascertain in advance of an operation alternative situations and no immediate emergency exists, a patient should be informed of the alternative operation.

• If A contacts B and B is injured then A is liable to B; therefore If S cut P and P is injured then S is liable to P.

• If P consents to S cutting then S is privileged and thus not liable.

• Where an internal operation is indicated, a surgeon may lawfully perform, and it is 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 doing so he is not to be held in damages for an unauthorized operation—Not every jurisdiction applies this

• Its more about negligence than battery now
  • Would a reasonable surgeon have done what this surgeon did? (typical negligence approach)
- Would a reasonable patient in the position of this patient have consented in advance had the condition been known? (minority approach)
- Sometimes still battery, though, if its RIDICULOUS

Informed Consent
- One way to avoid tort is to have a contract—like an informed consent form
- Issue of Informed Consent involves two distinct situations
  - When the doctor is given consent to perform a certain medical operation or treatment and thereafter extends the operation or treatment beyond the boundaries of consent given
  - When the doctor fails to explain to the patient the risk of side effects of a treatment to which the patient has consented. In such cases most courts determine the doctor's liability via the law of negligence.
- Restatement (Second) § 892D Emergency Action Without Consent: Conduct that injures another does not make the actor liable to the other, even though the other has not consented to it if
  - (a) an emergency makes it necessary or apparently necessary, in order to prevent harm to the other, to act before there is opportunity to obtain consent from the other or one empowered to consent for him, and
  - (b) the actor has no reason to believe that the other, if he had the opportunity to consent, would decline
- Problems with Informed Consent Approach
  - so much scary language that patient won't do necessary surgery
  - form so vague that court won't uphold this
  - words will take on a meaning AFTER the fact, so you have to be super careful with every word you choose

b) Self-Defense
- An action of force is justified by self-defense whenever 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.
- Restatement (Second): Self-Defense by Force not threatening death or serious bodily harm
  - (1) An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.
  - (2) Self-defense is privileged under the conditions stated in Subsection (1) although the actor correctly or reasonably believes that he can avoid the necessity of so defending himself
    - (a) by retreating or otherwise giving up a right or privilege, or
    - (b) by complying with a command with which the actor is under no
duty to comply or which the other is not privileged to enforce by the
means threatened

- Restatement 2: Self-Defense by Force Threatening Death or Serious Bodily Harm
  - (1) Subject to the statement in Subsection (3), an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that
    - (a) the other is about to inflict upon him an intentional contact or other bodily harm, and that
    - (b) he is thereby put in peril of death or serious bodily harm or ravishment, which can safely be prevented only by the immediate use of such force.
  - (2) The privilege stated in Subsection (1) exists although the actor correctly or reasonably believes he can safely avoid the necessity of so defending himself by
    - (a) retreating if he is attacked within his dwelling place, which is not also the dwelling place of the other, or
    - (b) permitting the other to intrude upon or dispossess him of his dwelling place, or
    - (c) abandoning an attempt to affect a lawful arrest
  - (3) The privilege stated in Subsection (1) does not exist if the actor correctly or reasonably believes that he can with complete safety avoid the necessity of so defending himself by
    - (a) retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling of the other, or
    - (b) relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest.

- Jury must find did he reasonably believe, which includes:
  - whether a reasonable person would believe? (objective)
  - did D believe? (subjective)
- Say we don't want spring guns because could hurt kids or someone could enter who didn't have an intent to commit theft (i.e. run in during storm) and we want to deter the use of spring guns in this case to prevent their use in those cases

  c) Defense of Property
  - Reasonable force may be used to protect property, but not such force as will take humane life or inflict great bodily harm.
  - A person may use “reasonable force” to protect property if
    - the intrusion by another is not justified,
    - he reasonably believes such force is necessary, and
    - prior to the use of force, he demands that the intruder leave.
  - A person may use deadly force when he reasonably believes he is in danger
of death or serious bodily harm and that such force is necessary for his self-defense.

- A person may also use “reasonable force” to protect any third person from harm.
- Restatement 2: Defense of Possession by Force not Threatening Death or Serious Bodily Harm: An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another's intrusion upon the actor's land or chattels, if
  - (a) the intrusion is not privileged. . .and
  - (b) the actor reasonably believes that the intrusion can be prevented or terminated only by the force used, and
  - (c) the actor has first requested the other to desist and the other has disregarded the request, or the actor reasonably believes that a request will be useless or that substantial harm will be done before it can be made.
- Restatement 2: Defense of Possession by Force Threatening Death or Serious Bodily Harm--The intentional infliction upon another of a harmful or offensive contact or other bodily harm by a means which is intended or likely to cause death or serious bodily harm, for the purpose of preventing or terminating the other's intrusion upon the actor's possession of land or chattels, is privileged if, but only if, the actor reasonably believes that the intruder, unless expelled or excluded, is likely to cause death or serious bodily harm to the actor or to a third person whom the actor is privileged to protect.

d) Necessity
- Necessity justifies the entry upon the land of another.
- Public necessity may require the taking of private property for public purposes; but our system of jurisprudence requires that compensation be made.
- The restatement 2nd creates a privilege in favor of an actor to enter the land of another in order to avoid serious harm, coupled with an obligation on the part of the actor to pay for whatever he damages.
- Necessity is available as a privilege if one is in danger of death or serious bodily injury.
- *Vincent v. Lake Erie Transportation Co* Rationale: the damage to plaintiffs' wharf was not caused by an act of God, which would have excused defendant's liability, but was an injury caused by the defendant's prudent intention to use plaintiffs' property for the purpose of preserving its own more valuable property, and the plaintiffs, therefore, were entitled to compensation for the injury done.
- Restatement 2 recognizes a necessity based privilege to enter the land of another in order to avoid serious harm to one's person, land, or chattels, or to those of a third person. This privilege is coupled with an obligation on the
part of the entrant to pay for whatever harm he causes

- Restatement 2 creates a similar privilege regarding chattels—an actor is privileged to damage the chattels of another in order to avoid serious harm.

e) Miscellaneous Privileges

- Parents and teachers (teachers stand in loco parentis during school hours)
  - protected from battery claims brought on behalf of children they have physically disciplined
  - frequent reform has been to allow minors to sue their parents for intentional torts not rising out of discipline, but to continue to bar such claims if the injuries complained of are due to negligence
- Also traditionally a number of other non-consensual privileges that shield actors from liability for intentionally inflicting harm, including those related to the arrest of lawbreakers and prevention of crime, the enforcement of military orders, and the recapture of land and possessions.

C. Dignitary Wrongs and Intentional Infliction of Mental Upset

i. Battery

a) 1st Restatement requires
- harmful contact
- intent
- no consent
- no privilege

b) 2nd Restatement requires
- intent
- harmful contact
- privilege and consent can be affirmative defenses

ii. Assault

a) An assault is committed when there is a threat of violence exhibiting an intention to assault (i.e., do physical violence to another), coupled with a present ability to carry the threat to execution.

b) An assault is an unlawful attempt, coupled with an apparent present ability, to commit a violent injury to the person of another.

c) “If you don't leave I'll hurt you” vs “If it weren't assize time I would hurt you.”--Difference is a matter of time.
  - Assize was not an assault because the condition to be fulfilled allows for a cooling off period, while the “leave” situation requires instantaneous action.
  - Court seems to buy into this differentiation.

d) Elements of assault in this case
- (1) threat of violence
- (2) exhibiting an intention to assault, and
- (3) a present ability to carry the threat into execution.

e) Beach v. Hancock (1853) This case does not require that the assaulter needs to have the present ability to cause the harm. Instead it is only necessary that the act cause apprehension of harm and that P reasonably believe that there is a
present ability to cause harm

f) Restatement 2 Assaults: An actor is subject to liability to another for assault if
   • he acts intending to cause a harmful or offensive contact with the person of
     the other or a third person, or an imminent apprehension of such a contact,
     and
   • An action which is not done with the intention stated in Subsection (1,a)
     does not make the actor liable to the other for an apprehension caused
     thereby although the act involves an unreasonable risk of causing it and,
     therefore, would be negligent or reckless if the risk threatened bodily harm.

iii. **Intentional Infliction of Mental Upset**

   a) A cause of action is established when it is shown that one, in the absence of any
      privilege, intentionally subjects another to the mental suffering incident to
      serious threats to his physical well-being, whether or not the threats are made
      under such circumstances as to constitute a technical assault.
   
   b) The conduct must go beyond all possible bounds of decency, be atrocious, and
      utterly intolerable in a civilized community. It is not enough that D act with
      tortious or even criminal or malicious intent.
   
   c) A cause of action is established when it is shown that one, in the absence of any
      privilege, intentionally subjects another to the mental suffering incident to
      serious threats to his physical well-being, whether or not the threats are made
      under such circumstances as to constitute a technical assault.
   
   d) P claimed that the threats were threats of future actions, not threats of
      immediate harm---> not assault. Court agrees, but still holds D liable because
      they find another cause of action—outrageous conduct causing severe
      emotional distress. In the past this had been done where:
      • emotional distress accompanied physical injury
      • emotional distress accompanied a battery even when no physical injury
   
   e) New Law: Allowed to collect damages for serious emotional and mental
      distress.
   
   f) Restatement 2: OUTRAGOUS CONDUCT CAUSING SEVERE
      EMOTIONAL DISTRESS
      • (1)One who by extreme and outrageous conduct intentionally or recklessly
        causes severe emotional distress to another is subject to liability for such
        emotional distress, and if bodily harm to the other results from it, for such
        bodily harm.
      • (2)Where such conduct is directed at a third person, the actor is subject to
        liability if he intentionally or recklessly causes severe emotional distress
        • (a)to a member of such person's immediate family who is present at the
          time, whether or not such distress results in bodily harm, or
        • (b)to any other person who is present at the time, if such distress results
          in bodily harm . .
   
   g) Elements of Outrageous Conduct Causing Severe Emotional Distress
      • resulting from extreme and outrageous conduct (must be beyond all bounds
of decency—hurt feelings and unflattering opinions don't count—not enough to just have tortuous or criminal intent, malice, or degree of aggravation leading to another tort—have to protect freedom of speech)

- intentionally or recklessly causing
- severe emotional distress

### iv. False Imprisonment

a) To commit a false imprisonment, it is not necessary that the tortfeasor actually apply physical force to the person of the P, but only that the P be physically constrained.

b) Not only must the tortfeasor breach a duty to the P, the P must have been aware or conscious of the confinement or have been harmed by it.

c) False imprisonment is the intentional confinement of another within boundaries set by the actor.

d) According to the Restatement 2\textsuperscript{nd} an actor is liable for false imprisonment if he
- acts intending to confine another within boundaries fixed by the actor,
- his act directly or indirectly results in such confinement, and
- the other is conscious of, or harmed by the confinement.

e) A person falsely imprisoned is not relieved of the duty of reasonable care for his own safety in extricating himself from the unlawful detention.

f) If a man is restrained of his personal liberty by fear of a personal difficulty, it amounts to false imprisonment.

g) If a shopkeeper has reasonable grounds to believe a person has committed or is attempting to commit larceny of goods for sale on the premises he may detain that person in a reasonable manner for a reasonable length of time.

h) Restatement 2: False Imprisonment

- (1) An actor is subject to liability to another for false imprisonment if
  - he acts intending to confine the other or a third person within boundaries fixed by the actor and
  - his act directly or indirectly results in such a confinement of the other, and
  - the other is conscious of the confinement or is harmed by it

- (2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm.

i) A person who is falsely imprisoned does have options. There may be an opportunity for escape, but you have to protect your own safety in escaping. In a case for false imprisonment, even if P is found to be falsely imprisoned, P cannot recover damages resulting from their own negligent attempt at escape.

j) Criteria for Imprisonment
- reasonable belief
- reasonable time
reasonable manner—Goss's failure to identify himself and tell P why he was stopping him, coupled with the detainment in a public place—questions about the reasonableness of the manner

II. Actual Causation

A. Did D cause P's harm?
   i. Circumstantial evidence is admissible to show causation, and it is for the jury to determine how much force and weight is to be given to such evidence.
   ii. Causation cannot be shown by mathematical probabilities in the absence of other convincing evidence.
   iii. It is permissible for a jury to consider circumstantial evidence, but the jury is not required to infer causation from circumstantial evidence.
   iv. P using circumstantial evidence puts a burden on D to come forward with other possible causes.
   v. Cause in fact: Did the defendant's mill's sparks CAUSE plaintiff's hotel to burn down?
   vi. A “proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there”

B. When one of Several Defendants Did it, But We Can't Tell Which One: Alternative Liability
   i. When two or more persons by their acts are possibly the sole cause of a harm, and P has introduced evidence that one of the two persons is culpable, then D has the burden of proving that the other person was the sole cause of the harm.
   ii. Where an unexplained injury occurs during a medical procedure to a part of the body not under treatment, res ipsa loquitur applies against all of the doctors and medical employees who take part in caring for the patient.
   iii. Court calls it a greater injustice to let both negligent parties get away with their negligence just because you can't determine which one caused the harm than it would be to hold them both liable. Ordinarily D's are in a better position to prove which one was liable.
   iv. When two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the P has introduced evidence that the one of the two persons, or the one of the same person's two acts, is culpable, then the D has the burden of proving that the other person, or his other act, was the sole cause of the harm....Since, then, the difficulty of proof is the reason, the rule should apply whenever the harm has plural causes, and not merely when they acted in conscious concert....
   v. Joint and severable liability: P can seek to completely recover from any of the Ds. P can collect the entire judgment from D1. Then D1 has to show a right to contribution, an equitable remedy under which he would have to show that D2 contributed to the injury, in order to get any payment from D2.
   vi. Ybarra v. Spangard
a) List of Defendants—so many D's because it encourages them to turn on each other and try to prove who actually was liable.
   - Dr. Tilley—diagnosed
   - Dr. Spangard—surgeon/independent contractor
   - Dr. Keser—anesthesiologist/independent contractor
   - Dr. Swift—owner of hospital/independent contractor
   - Nurse Gisler—wheeled him in/employee of Swift
   - Nurse Thompson—ICU nurse/employee of Swift

b) Can't figure out who's liable or what the instrumentality was for res ipsa purposes, so what do we do? This is different from *Summers v. Tice*. In *Summers* there was just one injury suffered by P that happened at one precise moment, whereas in this case different people had different roles that could have been negligent over an extended period of time.

c) Captain of the Ship Doctrine: Make the doctor the captain of the ship, and everyone is under his watch so everyone is liable.

d) In *Tice* they both breached their duty, but in this case we don't know if they all breached their duties. In Tice we don't feel bad about making someone who didn't cause the injury b/c they were both negligent, but in this case we don't know that all the nurses and doctors were negligent. This time they were all working in concert

e) Perhaps the court is trying to get the Ds to rollover on the guilty D might be behind the court's decision despite pressures in the work place or intimidation to not narc, plus loyalty concerns. They were a team working together while poor P was knocked out on the table. Comes from a history where it was difficult to get medical experts to testify in malpractice cases because of a “thin-blue-line-like” relationship in the medical community.

f) Here we haven't been able to show anyone breached their duty unless we view the group as one entity. If this had been a business it would be a corporation that was held liable. But because in the medical profession we have all these different relationships there isn't one over-arching entity to sue.

C. When Two or More Causal Agents Would, Independent of Each Other, Have Caused P's Harm: Concurrent and Successive Causation

i. Damage may be apportioned in a seemingly indivisible injury if a potential danger from one source has diminished the value of the loss actually inflicted.

   a) Attractive Nuisance Doctrine—something entices a child in a way where he or she can't resist. If the boys are accustomed to the lines not being activated they don't realize there is a hazard.
   b) Rail-road crossing guard case(*Erie RR v. Stewart*)—maybe if it isn't normally powered you have a duty to warn when it is.
   c) Electric Co. argues that boy would have died anyway from the fall if the wires hadn't been there. If the wires hadn't been charged he might not have fallen.

iii. *Kingston*
a) Cannot say “but for the D's fire P's loss would not have occurred.”
b) A wrongdoer who sets a fire that unites with a fire caused by natural causes is exempt from liability. But if it unites with a fire caused by someone else then he is liable for the total destruction. This takes us back to the case of the two guys shooting at another guy at the same time. Burden of proof lies on the D to show the fire was started naturally and not by another person. If the fire were caused by natural causes, then P would have been harmed w/out any human agency. But when the second fire is caused by human agency we get to joint and severable liability.

D. Relationship between Actual Causation and Vicarious Liability—Masters, Servants, and Independent Contractors—Respondeat Superior

i. Masters are vicariously liable for the torts of their servants committed while the latter are acting within the scope of their employment.

ii. Independent contractors are those who contract with another person to do something but who are not controlled by the other person nor subject to the other person's right to control. Where the tortfeasor is an independent contractor the employer is not vicariously liable for harm caused by the contractor's wrongful conduct.

iii. Look at the following factors to determine if one is an employee or an independent contractor:
   a) whether or not the one employed is engaged in a distinct occupation or business
   b) the skill required in the particular occupation
   c) the length of time for which the person is employed
   d) the method of payment (by time or by the job)
   e) whether or not the parties believe they are creating the relationship of master-servant

iv. Scope of employment factors
   a) whether or not the act that causes harm is one commonly done by servants of the sort involved in the particular case
   b) the previous relations between the master and the servant
   c) whether or not the master has reason to expect that such an act will be done
   d) the similarity in quality of the act done to the act authorized, and
   e) whether or not the act is seriously criminal

v. The servant need not be performing precisely the activity for which he was hired in order to expose the master to liability. The tortious conduct for which the master will be held accountable need not involve physical injuries.

vi. Modern courts are reluctant to hold employers liable when their servants commit intentional torts. When they do, they look to a cluster of factors including whether the misconduct occurred within the time and space of employment, whether the employee was motivated, at least in part, by a concern for the employer's interests, and whether the potential for wrongdoing was foreseeable to the employer.

vii. Employer is not liable for conduct of “frolic and detour,” where an employee is sent out to do something for the employer and on the way runs a personal errand,
during which the employee commits a tort.

viii. Exceptions to the General Rule of Non-liability of Independent Contractors
a) The employer is negligent in selecting, instructing, or supervising the independent contractor;
b) The duty of the employer, arising out of some relation to the public or to the particular P, is nondelegable; or
c) the work is specifically, peculiarly, or inherently dangerous.

ix. Regardless of whether the master is liable, the servant will be personally liable to the P for his tortious conduct.

x. At common law, the general rule was that the master enjoyed a right of full indemnification against the servant when the master was held vicariously liable for the wrongs of the servant. This rule remains intact, although some courts and commentators have questioned whether allowing the employer to seek indemnification from the harm-causing employee defeats the social policies that underlie the general doctrine of vicarious liability. However, as a practical matter, this right is seldom exercised.

III. Negligence
A. The Origins and Early Development of the Negligence Concept
i. Elements of Negligence
   a) Duty (foreseeable)
   b) Breach
   c) Proximate cause
   d) Injury

ii. If in the prosecution of a lawful act, a casualty purely accidental arises, i.e., the injury was unavoidable, and the conduct of the defendant was free from blame, no action can be supported for an injury arising there from.

iii. Brown v. Kendall--Watershed case that said even absent an intentional bad act and absent a special duty, one is still required to act with ordinary care.

iv. In order for the Defendant to be found negligent, it must be shown that D was negligent and P acted with ordinary care.

v. The burden of proof here is different from modern negligence. There is a presumption now that P was using ordinary care, and D has to take the proactive step of showing that P was negligent.

vi. Ordinary Care:
   a) Much more open-ended than, say, elements of battery
   b) How would an ordinary and prudent person act to prevent injury?

B. The General Standard
i. Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such a magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it was done.

ii. The ultimate question in a negligence case, therefore, is not simply whether a person would have recognized the risk he was creating, but whether, recognizing
the risk, that person would have acted differently. If a reasonable person would realize a risk, but not change his conduct, chances are that he would not be considered to have acted negligently.

iii. Where a power company either knew or should have known of the possibility of an accident, the question is whether the possibility of such injury or loss constitutes an unreasonable risk of harm.

iv. Where defendant creates a foreseeable risk that could cause injury by third parties, he will be liable for the negligent conduct of such parties. The mere fact that an accident of a specific nature has never occurred before does not show that such an accident could not have reasonably been foreseen.

v. Whether or not D committed an actionable wrong turns on whether or not he/she acted as a reasonable person would have.

vi. United States v. Carroll Towing Co.--Judge Hand comes up with formula: B<PL then the person who does not except the burden in question is acting negligently, but if B> or =PL then the person who does not except the burden is not negligent and is acting reasonably. Actor will look at B>PD (probability of damages)
   a) B=Burden of preventing harm (having bargee on the barge)
   b) P=Probability of harm (Probability that barge will break away—is the absence of the bargee at least a contributing factor in the breaking away of the barge)
   c) L=Magnitude of injury if P

vii. What Problem 11 is doing is saying you take an additional precaution, once you’ve taken a certain level of precaution, and ask whether its cost is > < or = the benefit gained from that additional precaution.

viii. Look at probability of being found liable (B<PD) rather than probability of injury. There are all sorts of obstacles between equating liability with loss.

ix. Wrongful Death Cases
   a) at common law, your claim died with you. So if you died from the injuries you received, you had no claim
   b) Wrongful Death is death resulting from a tortious act, and today you CAN collect damages for

x. Attempt at Hand’s formula—One of the few cases that overtly applies the Hand formula
   a) B = cost of insulating power lines
   b) P = possibility of escape of electricity from uninsulated power lines (court's formulation sucks—they really mean possibility that the power line will come into contact with people—evidence of difficulty judges have applying Hand's formula)
   c) L = gravity of resulting injury
   d) The damn court is looking at this in terms of overall risk. Should they be looking at just this case and how risky this guy is because they KNOW he has this antenna? But think about the impracticality of insulating ONLY his lines. That is why the court looks at the entire system.

C. Special Rules Governing the Proof of Negligence. General Duty is reasonable care
under the circumstances; Breach is a failure to adhere to that duty. To determine what is reasonable care under the circumstances, we look at the following things to try to figure out what constitutes breach: res ipsa, statutes, and customs.

i. **Violation of Criminal Statutes**

   a) The unexcused violation of a statute applies to the facts of a case is negligence per se.

   b) Where a statutory general rule of conduct fixes no definite standard of care, but merely codifies or supplements a common law rule, which has been subject to exceptions; or where the statute is intended to promote public convenience or safety, then in the absence of clear language to the contrary, it is not negligence as a matter of law for one to violate the statute, if by doing so he is likely to prevent—rather than cause—the accident which it is the purpose of the statute to avoid.

   c) A licensing statute intended to protect the public against incompetent practitioners creates no liability against an unlicensed practitioner unless he is in fact shown to be incompetent.

   d) *Martin v. Herzog*—

      • Court holds that statute that is designed to protect public safety cannot be ignored by a jury.
      • Statute creates a standard of care and thus violation of that statute = negligence as a matter of law
      • “A statute designed for the protection of human life is not to be brushed aside as a form of words, its commands reduced to the level of cautions, and th duty to obey attenuated into an option to conform.”

   e) *Tedla v. Ellman*—Court holds that the rule of the road is not contributory negligence as a matter of law b/c those who were violating the statute would have been endangering their own safety by by following the statute

   f) Notice the way the “rule of the road” vs “safety statute” rhetoric in *Martin & Tedla*, allows the court to come to different results despite the fact that really they are both about statutes that were put in place to protect pedestrians.

   g) In order to get around *Martin*, one could point out that Cardozo said that they were wholly unexcused in violating the statute, which isn't the case in *Tedla*

   h) *Brown v. Shyne*—Trial court said that the lack of license to practice medicine could be some evidence of negligence, but is not negligence as a matter of law. But ultimately the court holds that the lack of license does not directly show that the fake doctor was not skilled. Instead they remand for injured woman to show that the doctor was not skilled, and that such a lack of skill was the cause of her injury. His lack of a license did NOT cause her injuries, but perhaps his lack of skill or failure to apply that skill may have caused her injuries

   i) What statutes can do for a negligence claim

      • (1) create a cause of action
      • (2) *Martin*—negligence as a matter of law
      • (3) *Tedla*—some evidence of negligence
• (4) Brown—no evidence of negligence

j) When we are talking about theses statutes, we are talking about duty and breach. Normally we say B<PL. One approach the court can take is saying that the legislature has established the balance between B and PL, and thus a violation of a statute is breach.

ii. Custom

a) Evidence of custom and usage by others engaged in the same business is admissible as bearing on what is reasonable conduct under all the circumstances, which is the quintessential test of negligence.

b) Regardless of the custom of an industry or trade, a D will be held liable if his actions fall beneath the standard of the average prudent man.

c) A physician who fails to give a simple test to a patient for a serious, though relatively rare, disease is liable for the aggravation of that disease in that patient where the patient is under the periodic care of the physician.

d) The T.J. Hooper—didn't have radios on tugs

- B<PL The tug owners obviously thought that B>PL, b/c they have an interest in protecting their boats. Also, if the radios actually significantly decreased PL then the tug owners would be advertising that they can keep your barges (and thus cargo) safe. Forcing all tugs to have the radios screws with the one company that already had the radios.

- So what if companies that had the radios were charging more than those without? Well, then the person who uses that non-equipped tug is implicitly saying that the B of paying the extra cost is greater than the value of the decrease in the probability of loss.

- Is this similar to choice between car w/OnStar and car w/out OnStar?

- This decision is creating strong incentives for tugboat owners to install the radios.

e) Custom can be used as a shield or a sword.

f) Evidence of conformity sharpens our attention to practicality. If the rest of the industry is doing it, its feasible. But what about the other way around? If custom has people doing what the court's says is necessary?

g) Helling v. Carey—glaucoma case

- What's usually done is not necessarily what should be done.

  - B = simple harmless test that is inexpensive
  - P= 1 out of 25,000 people will be diagnosed
  - L= blindness

- Hold as a matter of law that not giving her the test is negligence.

- When we are talking about the medical profession the traditional approach is that the standard of the profession is the proper standard of due care, as opposed to other industries where it is justs evidence one way or the other as to whether or not the standard of care was met.

- Impact of this case was immediate.

  - The Washington legislature adopted legislation to overturn the court's
decision
- The approach of this court has not been widely adopted

h) Profession changed its standard and routinely provides glaucoma tests at younger ages

iii. **Res Ipsi Loquitur**

a) To invoke the doctrine of res ipsa loquitur, it is not necessary to show that evidence as to the cause of the injury is accessible only to the D and not to P.

b) Res ipsa loquitur does not apply if a P has the means to establish negligence on the part of D.

c) The res ipsa loquitur doctrine does not apply where the injury may have been caused by someone not under the control of the D.

d) If an injury is caused by a person under the control or in the custody of a D, it must be shown that D knew of the violent propensities of that person.

e) Res ipsa loquitur may apply where an accident occurs sometime after D relinquished control over the injury-causing instrumentality, if P shows that the condition of the instrumentality did not change after it left D's hands, and that P handled it with due care.

f) Res ipsa loquitur may apply if the accident is of such a nature that it would not ordinarily occur in the absence of negligence.

g) Res Ipsi Loquitur literally means “the thing speaks for itself.”

h) §17. **RES IPSA LOQUITUR**—It may be inferred that the defendant has been negligent when the accident causing the P's physical harm is a type of accident that ordinarily happens because of the negligence of the class of actors of which the defendant is the relevant member.

i) Two Foundation Facts for Application of the res ipsa doctrine, which permits an inference of defendant's negligence from happening of the injury are:

1. exclusive control and management by D of the instrumentality which causes the injury, and (this element is why Boyer is a bad decision, because the case does not meet this requirement)

2. the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used

j) Underlying reason for the res ipsa rule is that the chief evidence of the true cause of the injury is practically accessible to defendant but inaccessible to the injured person. This is not, however, an indispensable requirement for application of the doctrine.

k) If the defendant was in control of the instrumentality and the injury would not normally occur without negligence on the part of the person in control, then res ipsa loquitur can apply.

l) Should the judge find the foundation facts for res ipsa or should that be left to the jury? Well, the judge needs to find some preliminary finding in order to determine whether he should instruct the jury on res ipsa. That finding should be one of whether the jury could possibly find the foundation facts for res ipsa to exist.
m) *Escola v. Coca Cola Bottling Co.*—bottle of coke bursts in waitress's hand

- Concurrence argues for strict liability on policy grounds. Years later Traynor winds up writing essentially the same opinion for the majority of the court.
  - Distance between time defect occurred and time of injury—go from local producer to modern methods of distribution; unpackaged to bottles/cans/other sealed containers; far more complex pieces of equipment
  - Since there's a constant risk to the public there must be a constant remedy
  - place responsibility for safe product on manufacturer because they are the ones most able to avoid defects occurring (in a product that the consumer does not inspect before consuming) and guard against recurrence
  - Strict liability-->insured-->distribute costs among consumers. Its a way of taking the social cost and making it a private cost.
  - The difficulty of proving negligence and identifying the source of the negligence --> support for strict liability. Shift the burden from the injured plaintiff to the manufacturer.
  - Because of the difficulty of proof, w/out strict liability probability of damages < probability of loss
  - Distribute devastating loss to one person across tons of consumers who 1) won't notice slight price increase and 2) are in part responsible because their demand for the product is why it exists

### D. **Modification of the General Standard Arising out of Special Relationships Between the Parties**—Responsibility of the Possessors of Land for the Safety of Trespassers, Licensees, and Invitees.

i. Invitees and Licensees

a) share the common characteristic of being on the land at least with the permission of the possessor

b) Invitee Defined:

- Is either a public invitee or a business visitor
- A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public
- A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

c) There must be some inducement or encouragement to enter for “public invitee” to apply

d) Duty owed to invitee is one of reasonable care under the circumstances. A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such
invitees, and
- should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- fails to exercise reasonable care to protect them against the danger.
e) Definition of Licensee: A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent.
f) Duty to Licensees: A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
- the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
- he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
- the licensees do not know or have reason to know of the condition and the risk involved.
g) Police officers, door-to-door solicitors, and firefighters are licensees.
h) Mail carriers, utility meter readers, and people who provide services for the benefit of the landowner (even if not for a specific business purpose) are invitees.

ii. Trespassers: Where a land occupier is aware of a concealed condition involving, in the absence of precautions, an unreasonable risk of harm to those coming in contact with it, and is aware that a person is about to come in contact with it, the failure to warn or to repair the condition constitutes negligence.
a) The lowest duty is owed to a trespasser.
b) A trespasser is defined as, “a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise.
c) In general the duty of the possessor toward trespassers is to refrain from wanton and willful conduct. However, if trespasser is there to commit a crime, the possessor may be liable only for intentionally injuring the trespasser.
d) A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land if:
- the condition
  - is one which the possessor has created and maintains and
  - is, to his knowledge, likely to cause death or serious bodily harm to such trespassers and
  - is of such a nature that he has reason to believe that such trespassers will not discover it, and
- the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.
e) A possessor of land who maintains on the land an artificial condition which
involves a risk of death or serious bodily harm to persons coming in contact with it, is subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care to warn them of the condition if

- the possessor knows or has reason to know of their presence in dangerous proximity to the condition
- the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk

f) **Attractive Nuisance Doctrine:** A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

- the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
- the condition is one which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
- the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
- the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
- the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

**E. Limitations on Liability**

i. **The Absence of a General Duty to Rescue**

a) A party who voluntarily assumes a duty not imposed upon him by law may be deemed negligent if without proper notice he discontinues his performance of that duty.

b) One who's innocent or tortious conduct has caused another bodily harm, leaving the victim helpless and in further danger, has a duty to use reasonable care to prevent foreseeable additional injuries to the victim.

c) Once a therapist knows or should know that his patient presents a real danger to a third party there is a duty to warn or otherwise take reasonable actions to prevent the danger.

d) *Erie R. Co. v. Stewart*--Whether the court erred in charging the jury that the absence of the watchman, where one had been maintained by the D company at a highway crossing over a long period of time to the knowledge of the P, would constitute negligence as a matter of law. No. Can argue for duty by saying that they had previously established the need for a watchman since they had one before. Normally Duty follows foreseeability, so if jury finds foreseeability then there is a duty, but in this case the jury instruction set it up so that foreseeability was already settled and duty need to be found a different way. **When a defendant takes a precaution to prevent injury that others are**
aware of and then stops taking these precautions without warning then D is liable for negligence.

ii. Proximate Cause

a) The predominant approach to proximate cause is one of foreseeability, under which the D is liable for the foreseeable, but not the unforeseeable, consequences of negligent conduct. If the actual consequences of the defendant's conduct fall within the scope of the preliminarily defined risks, the proximate cause requirement is satisfied. If the consequences fall outside the risks, proximate cause is missing and D is not liable.

b) Liability linked logically to D's negligence and limited to foreseeable consequences

• If D negligently injures P, D is liable even if the extent of P's injuries was unforeseeable. This may only apply in personal injury, and not in property damages cases.

• But for the Wrongful Quality of D's Conduct, Would the P have Suffered the Same Harm?
  • An act or omission is not regarded as the proximate cause of an event if the particular event would have occurred without it.
  • The sudden emergency instruction should not be used unless a court finds that the particular and peculiar facts of a case warrant more explanation of the standard of care than is generally required.
  • Upon a showing of causation, damages are proportional to the increased risk attributable to the D's negligent act or omission.

• Was Any Harm to the P Foreseeable When the D Acted?
  • The risk reasonably to be perceived defines the duty to be obeyed.
  • 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.

• Were the Nature and Circumstances of the P's Harm Foreseeable?
  • Not every violation of a statute constitutes negligence per se.
  • 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.
  • The mere fact that an intervening act was unforeseen will not relieve the D guilty of primary negligence from liability unless the intervening act is something so unexpected or extraordinary as that it could not or ought to be anticipated.
  • An intervening force that contributes to P's injury does not necessarily insulate D from liability.

c) Rescue doctrine--The principle that a tortfeasor who negligently endangered a person is liable for injuries to someone who reasonably attempted to rescue the
person in danger. The rationale for this doctrine is that an attempted rescue of someone in danger is always foreseeable. Thus, if the tortfeasor is negligent toward the rescuee, the tortfeasor is also negligent toward the rescuer.

- Rescue must be reasonable—that is, the reasonable person must believe that the person being rescued was in danger
- Rescuers as a class are foreseeable to tortfeasors
- Cause: But for D's act, P not injured
- Proximate Cause: in time and space
- The wrongdoer may not have foreseen the rescue, but still has a duty. How do you reconcile this with *Palsgraf*?
- Doesn't generally apply to firefighters or cops who are injured as rescuers, because they are being compensated for that risk. This principle is breaking down, however.
- New York Rule: Negligent for one fire, not negligent for the burning of a second house if the fire spreads.

**d) The criminal acts of another are not foreseeable.**

**iii. Special Instances of Nonliability for Foreseeable Consequences**

**a) Mental and Emotional Upset**

- the Impact and Zone of Danger Rules
  - P may not recover for emotional injuries and shock occasioned by the sight of impact on a third person unless the shock is due to fear of immediate impact upon P.
  - In order to give rise to a right of action grounded on negligent conduct, the emotional distress or shock must be occasioned by fear of personal injury to the person sustaining the shock, and not fear of injury to his property or to the person of another
  - Fundamentally, D's duty is to use ordinary care to avoid physical injury to those who would be put in physical peril, as that term is commonly understood, by conduct on his part falling short of that standard.
  - Can recover if in “Zone of Danger”—pretty much a universal rule
  - P claims nervous shock. First you have to find primary liability for the injury observed. Then you have to show that the shock resulted in a physical injury. Then there are three factors the court will consider in determining whether P can recover: (not a definite test at first under *Dillon,*.) Many courts still follow this
    - Was P located near the scene of the accident?—proximity in space
    - direct sensory & contemporaneous proximate in time (not just hearing about accident after it happens)
    - P and victim must be closely related
    - The factors help determine foreseeability
  - But then under *Thing* the court sets up three requirements for insurability purposes, because the lower courts were incredibly unpredictable as to how they would rule under the factor test. Chamallas calls this a gendered
decision and says that this, as well as other efforts to cut back on emotional distress damages
  - close relationship
  - Present at sense when it occurs, aware
  - severe emotional distress
  - The *Thing* concurrence would go with the zone of danger rule. Under the zone of danger rule a P who is in legitimate fear of being injured can recover, rather than someone recovering for watching another be injured. It talks about duty, and how protecting third parties from emotional harm isn't really the tortfeasor's duty.

*Burgess*—Mother was under anesthesia when she gave birth to child that was injured by doctors. She wasn't aware, so she couldn't recover under *Thing* criteria.

**Bystanders**
- The zone of danger rule does not bar a recovery for negligent infliction of emotional distress where a close family member outside the zone views an accident causing an injury or death to another family member.
- Damages for emotional distress should be recoverable only if the P 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.

**Direct Victims**
- A physician who treats a pregnant woman owes a duty to that pregnant woman with respect to the medical treatment provided to her fetus.

**b) Injury to Personal Relationships**
  - Unmarried persons who are cohabitants may not recover for loss of consortium.
  - A child cannot recover for the loss of its parent's consortium.
  - Loss of Consortium—originally a husband's claim. Now the majority of claims are woman's claims. It's about being dependent on someone for something.
  - *Borer*—loss of consortium cannot be extended to children and parents, and is only a claim a spouse can make. On of the reasons the court gives is that insurance companies should not have to pay claims for numerous relatives. This is strange given usually the CA supreme court likes to nail insurance companies.

**c) Prenatal Harm—Actions By Parents for Their Own Harm**
  - Beneficiaries of an unborn fetus may recover damages for the fetus' death occurring prior to birth so long as the fetus was viable at the time the injuries were incurred.
  - Parents cannot recover the ordinary and necessary cost of child rearing from a physician who negligently fails to prevent birth.
Wrongful Death—
- At common law if you died, your claim died with you. If you injured someone, you had better kill them. Also, if you injured someone and then you died, their claim against you died too.
- Survivor Acts were then passed that said that the claims would survive such death. The estate could claim damages for the injury to the plaintiff and you could recover against a D's estate.
- Then wrongful death came along and created a claim on behalf of the dependents of the dead victim. These are based on a statute, so you have to look at the law of the particular jurisdiction.
- A fetus that is born stillborn should be treated as a “person” and therefore a claim under the Ohio statute exists for wrongful death. But how do we reconcile this with the common view that loss of consortium claims are not available in the parent-child relationship?
- Wrongful Birth--Parents may recover for the wrongful birth of a deformed child for damages resulting from the child being deformed.

F. Contributory Fault
   i. Contributory Negligence
      a) A P will not be able to recover where his lack of due care contributed to the occurrence of the accident.
      b) The last clear chance doctrine is that where P’s negligence has put him in a dangerous position, and D discovers P's danger and fails to use due care to avoid injuring P, P's negligence will not bar his recovery.
      c) Butterfield: In order to collect there must be “no want of ordinary care...on the part of the plaintiff.”
      d) Doctrine of Last Clear Chance (Davies): One party's negligence creates a condition, then the other party's negligence comes at a later time, and but for that second person's negligence the injury would not occur. This is a softening of the Butterfield rule. Seeing this in comparative negligence would be rare, because comparative negligence has different problems than contributory negligence.

   ii. Assumption of the Risk
      a) Assumption of the risk is not a defense independent of contributory negligence.
      b) Most jurisdictions do treat assumption of the risk as a defense separate and distinct from contributory negligence. According to Restatement 2
d, assumption of the risk is an independent defense. It requires that P either expressly accept a known risk, or that his conduct manifests understanding of the risk and voluntary acceptance of that risk.
      c) The issue is whether or not assumption of risk can be an independent defense. The case we read said no unless the P expressly agrees to assume the risk, but the restatement would allow for implied or secondary assumption of risk.

   iii. Comparative Fault
      a) Comparative fault is very specific to the jurisdiction.
b) The plaintiff has more bargaining power in this case than in a case of contributory negligence, because if the plaintiff is at fault it does not mean that the case will be dismissed on summary judgment.
c) Hypo: In a case for $3,000,000 P is 50% at fault, D1 is 25% at fault, and D2 is 25% at fault
   • Under traditional Comparative Fault P is responsible for $1.5 million, and each defendant is responsible for the whole other $1.5 million, but if one D pays that then he/she can seek recovery from the other D. But we are apportioning the blame! So maybe in shouldn't be joint and severable liability.
   • Under the Modified 50% Rule P would not recover anything. Under this rule, if P is 50% or more at fault then it reverts to contributory negligence.
   • Lets say there's just one D. Under the 51% Modified Rule the P would recover 50%, because P will recover so long has his fault does not exceed the fault of the D. Now let's say there are two Ds? P would argue that the purpose of the rule is that a P who is mostly at fault cannot recover (unit rule). D would argue that each defendant is less responsible than P, so they shouldn't be individually held liable (individual rule). Different jurisdictions come down on this in different ways.
d) Problem with joint and severable liability: A deep pocket can be found to be only 5% at fault and still wind up paying the overwhelming majority of a judgment. This has led to modifications and in a few states the elimination of joint and severable liability. One modification is that a P must first try to collect from each D, and if he/she fails then he/she can go back and collect more from the party who she/he can actually collect from.

G. Immunities
   i. Governmental Immunity
      a) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.
      b) Certain tort actions like assault, battery, defamation, and interference with contract may not be brought against the government.
      c) Gov't cannot be found liable on a claim based on the “exercise or performance or the failure to exercise or perform a discretionary function or duty.”
   ii. Charitable Immunity
      a) Most states have abolished.
      b) In many states beneficiaries of charities are not allowed to sue those charities.
   iii. Intrafamily Immunities
      a) Husband and Wife
         • Most states have abrogated this immunity.
         • Abrogation does not mean the spouses will be treated as strangers. Courts have held that they will not recognize a cause of action for intentional
infliction of emotional distress arising out of marital differences.

- There is no liability for an act or omission that, because of the marital relationship, is otherwise privileged or is not tortious.

b) Parent and Child

- Some states have done away with or limited.
- The fear is that allowing children to sue their parents would hurt family unity and parental control.
- Some states allow children to sue parents for intentional torts but not negligence. It has also been held that the immunity does not apply in cases of intentional sexual abuse.

IV. Trespass to Land and Nuisance

A. Trespass

i. The interest sought to be protected by trespass actions for intentional entries is the P's interest in the exclusive possession of land.

ii. To constitute a trespass, the D must accomplish an entry on the P's land by means of some physical, tangible agency. The entry must be unauthorized and:
   a) intended by the defendant, or
   b) caused by the D's recklessness or negligence, or
   c) the result of D's carrying on an ultra-hazardous activity.

iii. The Circumstances in which a D may be privileged to commit an unauthorized, intentional entry are carefully limited by judicial decisions, and there exists no broadly based privilege deliberately to enter the land of another simply because, on balance, the social benefit of doing so appears to outweigh the risks of harm to the land.

iv. Once the D is found to have committed an intentional trespass, in the absence of circumstances giving rise to a privilege, the P is entitled to at least nominal damages and to injunctive relief if further acts by the D threaten similar entries upon his land.

B. Nuisance

i. Public Nuisance

   a) A public nuisance is an unreasonable interference with a right common to the general public.

   b) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
      - whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
      - whether the conduct is proscribed by a statute, ordinance, or administrative regulation, or
      - whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

ii. Who can recover for Public Nuisance
a) In order to recover damages in an individual action for public nuisance one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.
b) In order to maintain a proceeding to enjoin to abate a public nuisance, one must

- have the right to recover damages, and indicated above, or
- have authority as a public official or public agency to represent the state or a political subdivision in the matter, or
- have standing to sue as a representative of the general public as a citizen in a citizen's action or as a member of a class in a class action.

iii. Private Nuisance General Rule: One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
a) intentional and unreasonable, or
b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

iv. An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if:

a) the gravity of the harm outweighs the utility of the actor's conduct, or
b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

v. In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

a) the extent of the harm involved;
b) the character of the harm involved;
c) the social value which the law attaches to the type of use or enjoyment invaded;
d) the suitability of the particular use or enjoyment invaded to the character of the locality;
e) the burden on the person harmed of avoiding the harm.

vi. In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

a) the social value that the law attaches to the primary purpose of the conduct;
b) the suitability of the conduct to the character of the locality; and

c) the impracticability of preventing or avoiding the invasion.

vii. An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation.

V. Strict Liability
A. Maintaining Custody of Animals
   i. Wild animals = strictly liable
ii. Dogs—depends on jurisdiction, but generally not strictly liable unless knew of dangerous propensity
iii. Livestock—strictly liable, but may require victim to do things like have fences

B. Abnormally Dangerous Activities
i. A person who brings something onto his land which is potentially harmful if it escapes is strictly liable for all the natural consequences of such escape.
ii. A person using his land for a dangerous, non-natural use, is strictly liable for damage to another's property resulting from such non-natural use.
iii. Absent proof of negligence, there is no liability for injuries caused by water escaping from one's land.
iv. Hauling gasoline as freight involves such a high risk of serious harm which cannot be eliminated by due care, that strict liability must be imposed for damages resulting from an explosion or ignition.
v. Strict liability is only imposed for those injuries resulting as the natural consequence of that which makes an activity ultra hazardous.
vi. Rule of strict liability, when applied to an abnormally dangerous activity:
   a) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity although he has exercised the utmost care to prevent such harm.
   b) Such strict liability is limited to the kind of harm, the risk of which makes the activity abnormally dangerous.

vii. In determining whether an activity is abnormally dangerous, the following factors are to be considered:
   a) Whether the activity involves a high degree of risk or some harm to the person, land or chattels of others;
   b) Whether the gravity of the harm which may result from it is likely to be great;
   c) Whether the risk cannot be eliminated by the exercise of reasonable care;
   d) Whether the activity is not a matter of common usage;
   e) Whether the activity is inappropriate to the place where it is carried on; and
   f) The value of the activity to the community.

VI. Damages
A. Compensatory Damages
i. Personal Injury
   a) Medical Expenses
      • In order to be compensable, the expense must be reasonably related to the D's wrongful conduct.
      • Must also be reasonable in amount.
      • P must ordinarily take reasonable steps to mitigate injuries (like losing weight if necessary)
      • The rule of law known as the “collateral source rule,” which provides that the damages may not be mitigated on account of payments received by the P from sources other than the D has been adopted in one or more of its
applications by many jurisdictions.
• Subrogation is a device that puts the collateral source in the shoes of the P so that the collateral source can recover from the D to the extent of the obligation to the P. This right will normally only arise out of contract.

b) Lost Earnings and Impairment of Earning Capacity
• Out of pocket losses up to the time of trial or settlement constitute lost earnings
• anticipated losses in the future constitute impairment of earning capacity
• Variables that determine the size of the award for diminished earning capacity:
  • P's basic earning capacity
  • the percentage by which P's earning capacity has been diminished
  • the expected duration of the disability, and, if permanent
  • the life expectancy of the P.

c) Pain, Suffering, and Other Intangible Elements
• To recover for pain of the actual injury, P must have been conscious.
• Can recover for mental suffering from permanent disfigurement.

B. Punitive Damages
i. In a non-intentional tort action, the trier of fact may award punitive damages only where the plaintiff establishes by clear and convincing evidence that the D's conduct was characterized by actual malice.
ii. A growing number of states require that a P prove the D's malicious conduct by clear and convincing evidence before awarding punitive damages.
iii. Clear and convincing is the proper burden of proof for punitive damages
iv. In a non intentional tort action, the trier of facts may not award punitive damages unless the plaintiff has established that the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud, i.e., “actual malice.”
v. Different Burdens of Proof:
  a) preponderance—51% (civil case, because of balancing,)
  b) clear and convincing—85% (punitive damages) (goal is to punish & deter)
  c) beyond a reasonable doubt—99% (criminal cases) (goal is to punish & deter)
vi. Actual Malice—The deliberate intent to commit an injury, as evidenced by external circumstances.—characterized by evil motive, intent to injure, ill will, or fraud
vii. Implied Malice—Malice inferred from a person's conduct—gross negligence—wanton or reckless disregard for human life
  a) Figuring out what negligence is gross negligence is hard. So they want to tighten the availability of punitive damages to get rid of these gross cases, so that just straight up regular negligence cases don't get sucked in
viii. In a non intentional tort action, the trier of facts may not award punitive damage unless the plaintiff has established that the defendant's conduct was characterized by evil motive, intent to injure, ill will, or fraud, i.e., actual malice.” So they are saying intent is necessary for non intentional torts? What they are
doing is trying to get the lower courts to tighten up—when they are deciding whether to let a jury think about punitive damages that you have a case that REALLY deserves punitive damages, and not just some regular old negligence case. Charge the jury in a way that they understand this.

ix. Sup Ct requires that there be some relation between the compensatory damages and the punitive damages
   a) One solution is bifurcating the trial.
      • Have second mini-trial before the same jury re: damages after the main trial is over.
      • Don't allow defendant's wealth to be introduced until this point
   b) If judge concludes that the size of the punitive award is excessive he can either:
      • order a new trial—big hassle
      • Remittitur—judge says either you except a lower punitive award or I'm ordering a new trial (conditional motion for new trial)

x. Should we allow insurance to cover punitive damages?
   a) Strong arguments say no, because the purpose of punitive damages is to punish and deter that defendant—not to spread the cost and punish all insured people.
   b) Also, if insurance is available, the punitive damages won't really deter behavior
   c) Insurance traditionally has to cover “all damages.” If there are ambiguities in a contract, you interpret against the person who drafted the contract. So although Insurance companies say they shouldn't have to cover punitive, the courts have normally held that “all damages” means ALL damage. A minority of jurisdictions say that its not cool though—goes against public policy.

VII. The Role of Liability Insurance in the Torts Process--The Nature and functions of Liability Insurance

A. The Nature and Functions of Insurance
   i. Risk transfer from comparatively risk-averse to less risk-averse or risk-neutral parties. A risk-neutral party is indifferent as between a small risk of suffering a large loss and greater risk of suffering a small loss, when each risk has the same expected value—the probability of a loss multiplied by its magnitude if it occurs. In contrast, a risk-averse party would prefer the large risk of suffering a small loss to a smaller risk of suffering the large loss.
   ii. Risk-pooling, or diversification: an insurance company is a vehicle by which risk-averse parties combine to share and thereby reduce their collective risk.
   iii. Risk-allocation: In charging for the coverage they provide, insurers attempt to set a price that is proportional to the degree of risk posed by each insured. By classifying risks and then pricing coverage in accordance with their classifications, insurers can create incentives for insured to optimize the degree of risk they pose even when insurance against loss is available.

B. The Problem of Imperfect Information
   i. Adverse selection: All other things being equal, parties facing high risks of loss will be more likely to seek insurance then those facing low risks of loss, and the insurance company is less likely to have information regarding the level of risk
than the insured is.

ii. Moral hazard: the tendency of any insured party to exercise less care to avoid an insured loss than would be exercised if the loss were not insured.