Intentional Torts – Prima Facie Cases

Battery:
- Intentional
- Harmful or offensive (reasonable person standard) contact
- with another's person or a third person

- Can attempt an assault (an apprehension), and battery results if contact is made.

1. Intent
- What consequences do you have to intend?
  - Just a H or O contact (Vosburg). Thin-skull rule carries
- What mental state do you have to have?
  - Just substantial certainty that H or O contact will result (Garratt). Can't just be grave risk, although this is probably negligence.

2. Contact
- What is contact?
  - Just an invasion of their person (Fischer).
  - Or just a contact with particulate matter if it was intentionally disbursed and is offensive (Leichtman). Doesn't count if don't know it will contact a particular person (smoker's battery note case)
  - Offensive contact can be brushing up against someone's backside, pullly bra strap, etc. Would offend reasonable person (Reddick)
- What isn't contact?
  - According to one court, not offensive as a matter of law if dentist has aids but there is no channel for the virus (Brzoska note). Could go other way

Assault:
- Intent to cause
- Reasonable apprehension of an immediate battery (reasonable person standard), and succeed in causing apprehension battery

1. Intent

2. Reasonable apprehension (objective standard)
What is reasonable apprehension?
- Threat + present ability (Reed)
- Doesn't matter if there is actual ability, just reasonable belief there is (Beach)

What is NOT reasonable apprehension?
- Mere words are never assault (Reed)
- It's not enough that the person takes a step toward infliction of a future contact, even if they recognize it and are scared by it (Restatement)
- 13 year old with a fake gun on halloween, must be reasonable (Bouton)
**IIED:**
- extreme and outrageous conduct
- intent, or
- reckless intent (reckless disregard for likelihood of causing severe emotional distress), and
- severe emotional distress results (objective standard, look to the acts and not the result – jury Q)

- Common areas of recovery for IIED: fear of physical harm (Siliznoff), debt collection (Ford Motor Credit, Boyle, J.C. Penney), constitutionally protected rights (Cohen), mishandling of corpses (Nottger, Grey Brown-Services), and hospital cases (Burges, Johnson)

### 1. Extreme and outrageous conduct
What is extreme and outrageous conduct?
- beyond all possible bounds of decency, utterly intolerable in a civilized community (Restatement)
- debt collector calling someone they knew just got out of hospital (Boyle)
- threats about non-existent debt (J.C. Penney)
- hospital fails to honor religious beliefs (Cohen)
- lying to grievers about nature of deaths, odor, and condition of body (Nottger)
- hospital failing to follow patient's instructions for son's brain (Burges)

What is NOT extreme and outrageous conduct?
- conduct that is merely tortious, criminal, intends to inflict emotional distress.

Need more (Restatement)
- mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities (Restatement)

### 2. Intent
- either actual intent or recklessly causes
- it is arguable whether the reckless requirement has been met in any of these cases (particularly mortuary cases), but courts have often stretched this tort to allow recovery when E&O conduct

**False Imprisonment:**
- intent to
- confine other or a third person within boundaries fixed by actor
- directly or indirectly results in confinement and
- other is conscious of it or is harmed by it

If no intent, possibly look to whether the confinement was negligent and threatened bodily harm

### 1. Intent
- must intend the confinement
2. Confine other within boundaries fixed by actor
-What constitutes confinement?
  -Don't need physical force on the person (Whittaker)
  -Doesn't matter if it's a “velvet prison” (Whittaker)
  -Don't even necessarily need “boundaries” - threat of physical force can be the confinement (Coblyn)
What does NOT constitute confinement?
  -moral restraint, the restraint must be physical (Katz)
  -confinement to a whole country, there must be a limit closeness of restraint, hard to define
    -person does not manifest their unwillingness to be there (Rougeau)
    -if the person asks to leave and is let go (Rougeau)
    -if the person isn't aware of it (Restatement)
    -if someone gives consent and never negates it (Faniel)
    -if there is some privilege or immunity (this is really a defense, but ex. Include protection of property, parent or teacher entrusted with supervision, etc.) (Sindle)
-What constitutes boundaries fixed by the actor?
  -Enough that there are physical impediments and the actor has the “key” (Whittaker)

Intentional Torts – Privileges

Consent
-Willingness in fact for conduct to occur. Need not be communicated. (Restatement – one form)
-Objective consent standard: if person's actions would indicate consent and privilege to reasonable person, no liability. We look to the circumstances of the incident, such as signs posted, hold out arm to be vaccinated, etc. (O'Brien)
-One must have the mental capacity to consent, or D is still legally responsible for consequences of his actions, despite subjective intent. (often arises in context of sexual relations with minors)
-When a condition is place on consent, violation of the condition is a battery (Orduno)
-For intentional torts, doesn't matter if D can show P would have consented (Mitchell).
-If a person injures or offends another they are not liable even if the other has not consented if an emergency makes it necessary or apparently necessary to act to prevent harm, and the actor has no reason to believe the other would not consent (ex. Pushing someone out of the way of a bus) (Restatement)
-Certain activities can give rise to an inference of consent to harmful or offensive contacts; the line is blurry, and this is a jury question. Maybe not to a blatantly malicious contact (ex. Football game). This can go both ways, might not be consent. (Hackbart)
-Consent procured by fraud or misrepresentation is not valid (Bowman)
-Consent procured by threat of physical harm is not valid
-Consent given to protect a loved one from physical harm is not valid

Medical consent:
-Consent that is not informed does not absolve one from liability (Bang)
- At common law, patients needed to give consent to broadening of a surgical operation (was feasible). Failing to get this constituted battery.
- General consent for surgeries: The Kennedy rule says when a patient is incapable of giving consent and no one with authority is there to consent for him, a surgeon may extend an operation as he determines is necessary using his professional judgment (Kennedy).
- In Washburn, the court says that where a doctor exceeds the consent given, he's committed a battery even if it was inadvertent (Washburn).
- When a condition is place on consent, violation of the condition is a battery (Orduno).
- Where a claim is made in negligence for failure to explain risks of a procedure, D has a defense if he can show that P would have consented if they had known all of the risks. Under battery, doesn't work (Mitchell).

Generally, consent by a person with legal capacity and not under duress is valid. However, in some cases courts will override consent:
- Often arises in medical cases:
  - One court appointed a guardian when a patient refused a blood transfusion on religious ground and then lost consciousness. Trial court allowed, appellate court reversed let her die (Estate of Brooks).
  - One court overrode patient's refusal to give consent to blood transfusion because she had a seven-month-old child (Georgetown College). Another court would do this in a similar case with a pregnant woman (Fetus Brown).
  - These cases are rare and no judicial response can be called typical.

**Self-Defense**
- An person can use self-defense by force not threatening death or serious bodily harm to defend himself against battery or other physical harm another is going to inflict on him, even if he believes he could avoid the necessity of using SD by retreating or otherwise giving up a right or privilege or by complying with a threatening command with which he is under no duty to comply.

- A person can use self defense by force threatening death or serious bodily harm when he believes the other is going to inflict on him an intentional contact or other bodily harm and it will put him in peril of death or serious bodily harm or ravishment which can be prevented only by the use of such force. He has this privilege even if he reasonably believes he can safely avoid the necessity by retreating if he's attacked in his home, which is not the home of the other, or abandoning an attempt to make a lawful arrest (for cops). The privilege does not exist if the actor correctly or reasonably believes he can with complete safety avoid the necessity of so defending himself by retreating in any other place than his home or in a place which is also the dwelling of the other or relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his home or to effect a lawful arrest (for cops).

- A person can't use more force than he reasonably believes is necessary for his protection.

- The person must subjectively and reasonably believe (one or the other isn't good...
**Defense of Property**

- A person can use force **not threatening death or serious bodily harm** to prevent or terminate another's intrusion upon his land or personal property if the intrusion isn't privileged, and the person reasonably believes that the intrusion can be prevented or stopped only by the force used, and he has first requested the other to desist and the other has disregarded the request or he reasonably believes a request would be useless or substantial harm will be done before it can be made.

- A person can use force **threatening death or serious bodily harm** to prevent or terminate another's intrusion upon his land or personal property only if he 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.

- The Katko court tells us that a person can't use force threatening serious bodily harm or death to protect an abandoned property (where no one's life or injury is at stake). Most courts don't allow the use of spring guns to protect property because their use is suggestive of an indiscriminate and malicious intent.

- Ds have been much more successful in cases where people they used chains to block their properties from motorcycles and other similar vehicles. Even though these can be equally lethal

**Necessity (qualified privilege - not an absolute defense against liability for trespass, the tort we're talking about)**

- A person has a necessity-based privilege to enter the land of another in order to avoid serious harm to one's person, land, or personal property, or to those of a third person. This privilege is coupled with an obligation to pay for whatever harm he causes to the other's property. (Restatement)

- There is a similar privilege to damage the chattels of another to avoid serious harm. (Restatement, Ploof, Vincent, Protectus)

- The dispute arises over right to damage another's property to protect one's own property. Vincent and Protectus allow this privilege to protect one's own property where the property being harmed was much less valuable (docks v. boats). Some have criticised this privilege, however, including the restatement. Make opposing arguments: prop owner will argue is isn't right to allow this privilege when the other's life isn't at stake, shouldn't be able to put their property ahead of the other's. Conclude based on the value of the properties (if protecting a valuable piece of prop, allow like these court. If similar, argue like Restatement that it is a better legal argument to hold liable for trespass in that case).

**Miscellaneous Privileges**

- *Disiplinary privilege*: Protects, to some extent, parents and teachers from battery claims brought on behalf of children they have physically disciplined. Teachers considered stand-ins for parents, generally the harm must be related to
the social goals underlying the privilege (train kids to be good citizens)
- Other privileges that have traditionally been recognized by tort law include those
  relating to the arrest of lawbreakers and the prevention of crime, the enforcement
  of military orders, and the recapture of land and possessions. The details of the
  rules vary, but they all tend to manifest a theme common to the privileges
  discussed above. The Reasonableness of the actor's perception of the need to
  use force, as well as the reasonableness of the harm actually inflicted, are
  typically the touchstones upon which the availability of the privilege turns.

Negligence

History of development of the General Standard
- “Trespass on the case” developed out of stricter forms of liability. Brown case in 1850
  says that if D is using ordinary care, he's not liable. If D is negligent and P is negligent,
  D is not liable. Lays out idea of standard of care and of contributory negligence.
- Ordinary care is reasonable care under the circumstances.

Hand Formula
- In Carroll Towing, we get the Hand Formula: If B < PL, liability. Tries to express the
  idea of reasonable care in mathematical terms and identify the factors actors consider
  when acting.
- In Washington, we see the court taking this question back from the jury, better at
  looking at thing ex ante; courts trying deal with these new problems that arise out of
  negligence. We call this a hybrid question of law and fact, and it is often given to the
  jury, but sometimes courts fight back. See the idea of foreseeability used against the D,
  should have seen this coming. Court ultimately disagrees, relying on Hand Formula.
- We see the idea of duty in Weirum, and it depends on foreseeability. Can be liable for
  another's actions if your conduct causes a third party harm by way of the second person,
  and it was foreseeable.

Modification of the General Standard Arising out of Special Relationships Between
the Parties

Responsibility of Possessors of Land for the Safety of Trespassers, Liscensees, and
Invitees
- Rigid scheme based on classifications has long governed instead of the general standard.

Invitees: business invitee (customer) or public invitee (invited to remain on the land as
member of the public – need some inducement or encouragement to enter) (meter reader,
mailman, person who provides services generally)
- The standard: possessor of land is subject to liability for physical harm caused to his
  invitees by a condition on the land if he knows or by using RC would discover the
  condition and should realize it is dangerous, and he should expect that they will not
  discover or realize the danger or will fail to protect themselves against it, and he fails to
  use RC to protect them against the danger.
Licensee: Privileged to remain on land by virtue of possessor's consent (social guests, cops, fire fighters, door-to-door salesmen)

- The standard: possessor of land is subject to liability for physical harm caused to his licensees by a condition on the land if he knows or has reason to know of the condition and should realize that it is dangerous, and should expect that they will not discover or realize the danger, and he fails to exercise RC to make the condition safe or to warn the licensees of the condition and the risk involved, and the licensees don't know or have reason to know of the condition and its danger.

Trespasser: no privilege to be on the land.

- The general duty of the trespasser is to refrain from wanton or willful conduct. There are some Restatement exceptions.

Reasonable care to warn trespassers of dangerous conditions

- Artificial conditions highly dangerous to constant trespassers on a limited area: 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 or maintains and is, to his knowledge, likely to cause death or serious bodily harm to 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 RC to warn them of the condition and its danger.

- Artificial conditions highly dangerous to known trespassers on a limited area: 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 or maintains and is, to his knowledge, likely to cause death or serious bodily harm to such trespassers, and the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk.

- Note that these sections do NOT apply to natural conditions on the land. A quicksand bog does not give rise to liability. Also note that the sections DO apply even if the possessor has done all that can reasonably be done to keep trespassers from the land.

Attractive Nuisance Doctrine - Artificial Conditions Highly Dangerous to Trespassing Children: A possessor of land if 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 of 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.

- Most states follow the “attractive nuisance doctrine,” but some courts have refused to adopt it because it places the failure of the kids' parents on the possessor.

- Are we heading toward a general RC under the circumstances standard? Rowland abandons the immunities based on classifications of people as invitees, licensees, and trespassers, and moves to a standard of “reasonable man view of the probability of injury to others.” The person's status is relevant but not determinitive.

- Many courts have adopted a middle ground, getting rid of the first two but keeping trespasser.

**Responsibility of Common Carriers for the Safety of their Passengers**

Responsibility of Common Carriers for the Safety of Their Passengers
- In most states, common carriers are held to a duty to their passengers higher than that of reasonable care. The language varies (“highest” degree of care, “extraordinary care,” “utmost care,” “great caution,” or something similar).
- A few states have adhered to the general standard of reasonableness and simply said that it is sufficiently flexible alone to permit courts and juries fully to take into account the ultrahazardous nature of a tortfeasor's activity.

**Responsibility of Operators of Motor Vehicles for the Safety of Their Passengers**

Responsibility of Operators of Motor Vehicles for the Safety of Their Passengers
- A few states have laws that lower the standard of care owed by operators of automobiles to their nonpaying guests (Automobile Guest Statutes).
- Most of this legislation has been repealed and now only a handful of states have a modified duty.

**Limitations on Liability**

**The Absence of a General Duty to Rescue**
- Generally, no duty to rescue even if realize action is necessary for another's aid.
- First exception is **preexisting relationship**. Innkeepers and their guests, possessor and public invitee, if voluntarily taken custody where care to protect from harm is expected (camp counsellor and camper).
- Another exception is **reliance-based duty**. If someone takes a precaution for the safety of others and they come to rely on it, a duty of care is assumed, and they must maintain the precaution or warn if they change it. (Erie)
- Another exception is **injury caused by D**. If a person knows or has reason to know that their conduct, wrongful or innocent, has caused harm to another that makes him helpless and in danger of future harm, he has a duty to exercise RC.
to prevent the further harm. (ex. Injuries caused by instrument in control of defendant) (Tubbs)

Under common law, there was no duty to control the conduct of another. Another exception, according to the Tarasoff court, is that a therapist owes a duty of RC to protect the foreseeable victim when he determines or under the professional standard should have determined that a patient poses a serious danger of violence to others. A special relationship between therapist and patient.

**Special Rules Governing the Proof of Negligence**

**Violation of Criminal Statutes**
- Generally, violation of a public safety statute is negligence in itself. It is prima facie evidence of negligence. (Martin)
- One exception is if obeying the statute would be more dangerous to those it is trying to protect under the circumstances. (Tedla)
- A second exception is if it was impossible for D to comply under the circumstances. (Note Material)
- It isn't negligence if it didn't proximately cause the injury (violation didn't cause the harm) (Brown)
- It isn't negligence if the harm isn't within the rationale for the statute (harm isn't within the risk) (Gorris) (Also consider this in Proximate Cause section)
- Statutes generally serve as a surrogate for RC, the Hand Formula

**Custom**
- The evidentiary weight is not negligence in itself here.
- Courts may look to a failure to follow custom as evidence of negligence (surrogate for Hand Formula). (Trimarco)
- While custom is relevant, it isn't determinitive; courts must ultimately say what is required (T.J. Hooper)
- Compliance with custom doesn't insulate one from liability; courts have final say on what's RC (Helling)

**Res Ipsa Loquitur**
- In some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case.
- Generally used when one cannot show duty, breach, causation, injury all together, as she normally would in a negligence claim. (might be able to show duty, can usually show injury, but can't show cause or breach, for example)
- Two requirements for res ipas, which permits an inference of D's negligence by the jury from the happening of the injury:
  - exclusive control/management by defendant of the instrumentality
  - would not happen if D used reasonable care (Boyer)
Res ipsa doesn't apply where the P could have shwon that D was negligent, for example by recreating the incident in court. It only applies when this is impossible; If P has access to the evidence, they have the burden. (Shutt).
Res ipsa won't be applied where it would be against public policy to make the D the insurer of the safety of the P.
According to the Escola court, it doesn't matter if the injury took place some time after D relinquished control. If D had control at the time of the negligent act, and P proves it hasn't been altered since, res ipsa should apply. P doesn't have to eliminate every possible injury to the instrumentality after leaving D's hand, it's enough that he shows evidence permitting a reasonable inference that it was not accessible to other harmful forces.
On “ordinarily would not occur requirement”, it's enough that the thing isn't ordinarily defective without negligence – a probability that D was negligent. (Escola).
Traynor goes one more step in dissent – strict liability for manufacturers.
Res ipsa can be combined with claims of specific negligence.

**Actual Causation – Cause-in-Fact**
-Who is responsible?
-Plaintiffs are required to establish that the defendant's conduct actually caused the harm for which they sought recovery.
-We must ask, “but for the defendant having acted at all, would the plaintiff nevertheless have suffered the same harm?”
-Two types of causation:
  - General causation: activity capable of causing the harm?
  - Specific causation: the issue presented in most tort cases involving actual causation.

**Did the Defendant Cause the Plaintiff's Harm?**
-P can show circumstances tending to prove D's instrumentality was cause-in-fact. If strongly tend to produce reasonable belief ---> jury question. (Hoyt)
-Need more than mathematical probability a proposition was the case. Need actual belief in truth derived from the evidence. (Statistics cases can be problematic) (Rabid Transit)

**General Causation**
-Usually arises in cases of exposure to allegedly toxic substance where P claims to be injured by it. Need expert testimony.

**When One of Several Defendants Did it, But We Can't Tell Which One: Alternative Liability**
-Where two or more people are possibly the sole cause of harm and P shows one of them is culpable, D has burden of showing it was the other D's act that was cause-in-fact. (Summers)
-Where there is no evidence that all Ds have even breached a duty in a res ipsa case where multiple people had control of the instrumentality, burden will be placed on all of the Ds to show it was another's negligence that caused the harm.
When Two or More Causal Agents Would, Independent of Each Other, Have Caused Plaintiff's Harm: Concurrent and Successive Causation

- P can only recover for portion of injury that was caused-in-fact by the defendant's breach of its duty. Use the but-for test! (Dillon)
- Damages measured once effect of the other cause has been accounted for
- If injury was caused by two people acting negligently, both are liable for the whole (we can't apportion). D liable for the whole if other goes missing. (Kingston)
- If injury was caused by one person acting negligently and nature, then D not liable if nature would have produced whole injury (would be no damages using the Dillon calculation) (Kingston)

Proximate Cause

- D can sometimes still escape liability when we have duty, breach, cause-in-fact, and injury.
- Predominant approach is liability for foreseeable consequences. Objective: what would have been foreseeable to reasonably prudent person.
- Can refer to way P was injured or potential for P as foreseeable victim.

a. Liability linked logically to Defendant's Negligence and Limited to Foreseeable Consequences

- General point: If the defendant negligently injures the P, the D is liable even if the extent of the plaintiff's injuries was unforeseeable. Thin Skull Rule.
- Has been suggested that thin skull does not apply to property damage cases.
- The difference between the proximate cause issue and negligence issue (duty+breach) is that negligence is concerned with whether D's conduct created a broader “zone of risk;” the proximate cause is about whether D's conduct foreseeably and substantially caused P's specific injury that actually happened.

- The “But for” test: We start by asking whether D's conduct was the cause in fact. “But for D's conduct, would the injury have occurred?” If yes, not liable, now matter how bad D's conduct. (Ford)
  - Loss of a chance: where causation is shown resulting in decedent losing chance at survival, some courts allow recovery proportional to the loss of a chance. Majority have rejected this. Some statutes say must be greater than 50% chance, some don’t. (Cahoon)

Was any harm to the Plaintiff foreseeable when D acted?

Palsgraf:
  - Cardozo: Duty is an issue of foreseeability. If a given plaintiff if not foreseeable, no duty exists. No liability.
  - Andrews: Foreseeability to that plaintiff is not important; the only issue is whether it was the proximate cause; we draw the line somewhere, as a matter of expediency. Jury gives the opinion of the community on whether recovery
is warranted.

- The Ozark Industries court, with gas and the trout pond, adopts Cardozo's unforeseeable plaintiff (1972)
  - The escaped bull gunshot case, Geyer, adopts Andrews: gives Q of proximate cause to the jury.

- We're talking about whether foreseeability can be a question of law (unforeseeable plaintiff), or is always a question of fact (give it to the jury; proximate?)

Rescue Doctrine: we ask whether was proximate cause – rescuers, by law, are foreseeable plaintiffs. (Solomon)
  - Must ask whether the rescuer used RC, or whether subjecting self to danger was negligence.
  
  An exception to rescue doctrine, Firefighter's Rule: this says that professionals are trained to take on risk; don't get this special treatment. There is a J split, trend away from this

Were the Nature and Circumstances of P's Harm Forseeable?
- General rule has been to limit liability to harmful consequences that result from the risk D creates, or from a forseeable risk.
  - The trial judge has to make a determination if reasonable men might differ on the inferences to be drawn. Generally, the issue of proximate cause is left to a jury (can give opinion of community whether sufficiently close to hold D liable)
  - Watson tells us that a proximate cause is one that naturally led to and might have been expected to produce the result.
  
  - If, however, there is an unforeseeable criminal act between D's negligence and the injury, according to Watson, this is superseding cause, extinguishing negligence liability for D.
  
  - Controversial, many courts disagree
  
  - And even according to Watson (and all other courts) if the criminal act was foreseeable, then it is not a superseding cause. (Kush)

Other approaches to the Proximate Cause Issue – Criticisms of Foreseeability
  
  It is not workable – It lacks sufficient substantive content to be capable of rational application across a range of cases.
  
  It is wrong in policy – The defendant should sometimes be liable for consequences that are not foreseeable.

Restatement (Second) of Torts – What Constitutes Legal Cause
The actor's negligent conduct is a legal cause of harm to another if:
  - his conduct is a substantial factor in bringing about the harm, and there is no rule of law relieving the actor from liability because of the
manner in which his
negligence has resulted in the harm.
- The word 'substantial' is used to denote the fact that the defendant's conduct
has such an effect in producing the harm as to lead reasonable men to regard it
as a cause.
- To decide if it's a substantial factor in producing the harm, consider: number of
other factors that contribute, whether there is a series of forces created by D's
conduct, or D's conduct created a harmless situation acted upon by other forces
to produce the harm, and the lapse of time.

- We know that “but-for” alone does not attach liability.
- Kinsman says it is wrong to look to foreseeability, which can be extended to make it
meaningless. Instead, we should do what Andrews suggests: look back ex post and draw
a line where it is fair; and, this line change change with each generation (ex. Because
insurance me work differently from one to another, making it fair to extend further). Do
what is fair after the fact, foreseeability has no meaning. Andrews position.
  - Many courts adopt this view, look back ex post

- Polemis applied the thin-skull rule to negligence in England, saying D was liable for all
injury traceable to the negligent act. Then, Wagon Mound reversed it, saying the
consequences must be foreseeable, although even a slight risk can give rise to liability if a
reasonable man would have foreseen and prevented the risk (Wagon Mound 1, Wagon
Mound 2).

Special Instances of Nonliability for Foreseeable Consequences
Mental and Emotional Upset:
- Impact and Zone of Danger Rules
  - Courts have mostly rejected a “liability based on foreseeability” rule for
emotional upset. Liability limiting approaches:
    - Impact rule, can't recover for fright alone without impact, even for
physical injuries resulting. (Mitchell - 1896)
    - Zone of danger rule: If you're outside the zone of physical danger, can't
recover for ED (Waube) (1935)
  - Still used in some cases, including SCOTUS and MN case

- Bystander Liability:
  - Before Dillon, could recover for ED only if physically injured.
  - Dillon says can recover, guidelines are: proximity, observing it as it happens,
close relations. This opens the door in a lot of places for bystander recovery.
    - Then, some court say don't have to be at the scene, some say don't have to
simultaneously observe it
    - So back in Cali, Thing says the guidelines didn't work. Now need elements:
close relation, present at scene and aware it's causing injury to victim, and serious
emotional distress and reaction beyond what disinterest person would feel that isn't
abnormal
  - Wisconsin overturns Waube in Bowen (1994), saying can recover. Each case
decided on its merits considering where: too remote, out of proportion to culpability,
foreseeable, burden would be too great on tortfeasor, would cause too many fraudulent
claims, would create slippery slopes.
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-Direct Victims:
  - One court says mother can recover for ED if baby hurt during childbirth because
    she is a direct victim. (Burgess)
  - One court says mother can recover when kids molested by psychologist because
    injures the relationship, she's direct victim (Marlene)
  - One court says CAN'T recover for ED cause by lessened chance of having kid
    with husband, who's procedure reduced his fertility (Cohen).
  - Another court say CAN recover where embryo implanted in wrong woman, since
    hospital owed duty directly to P
  - Many funeral cases, although this has taken on a special section in the law and
    sometimes will be IIMU
-The key is to find a link making the person a direct victim to whom a duty was owed

Injury to Personal Relationships
- E: clear area where there has been a different line in tort law (complicated, gendered
  history)
- Generally, can recover for loss of consortium for injured spouse (within foreseeability).
 Exceptions:
  - One court says can't recover for injury to long-ter partner not spouse, public
    policy (Feliciano)
  - varies from state to state for relationships outside marriage. Some allow
    grandmother-
  - Almost all courts deny recovery to parents and children (ex. Borer). Problematic,
    could recover if died

**Strict Liability**

a. Maintaining Custody of Animals
- At CL, strictly liable for damage caused by wandering livestock.
- This was opposite in western US. Had to fence them out.
- Strict liability for people who keep wild animals (elephants, ferrets more controversial but SL). P must
  show ownership and possession, not just living on one's property.
- Exception for public zookeepers, but not for private.
- SL for domestic animals know to the owner to be dangerous. (can apply to dangerous dogs)
- Some statutes hold all dog owners strictly liable (similar to parent-child liability, since liability without of
  fault in both cases)

b. Abnormally Dangerous Activities

**Fletcher v. Rylands (1866), Exch., p. 417**
Facts: Water from reservoir leaks into neighbor's mine.
**Rule:** If a person brings onto his land and kept anything dangererous, they are strictly liable for damage
caused by its escape.

**Rylands v. Fletcher (1868), higher english court**
Facts: Same
**Rule:** If a person uses their land for any non-natural use, they are strictly liable for damage caused by its escape.
Turner v. Big Lake Oil Co., (1936) p. 420
Facts: Salt water from reservoirs of oil company infecting fresh water of cattle industry.
Rule: Where a person brings onto their land something dangerous but it is a natural use, they are not strictly liable for its escape.
-E: what we're talking about here is who is going to bear the costs of the cattle industry having fresh water or who's going to bear the costs of producing the oil. It is equally arguable that if fresh water is necessary to the cattle industry, then they should bear their costs too.

Atlas Chem. Indus., Inc. v. Anderson, p. 422 (Note)
Facts: Deliberate dumping of industrial wastes, but not intended to harm P.
Rule: Strict liability for intentional discharge of pollutants.

Indiana Harbor Belt Co. v. American Cyanamid Co., p. 423 (Note)
Facts: P sued shipper of toxic chemical claiming SL when it spilled and contaminated his property. It was the 53rd most toxic chemical that is transported.
Rule: No strict liability for transport of a moderately toxic chemical.
- Would have to extend it to all, negligence regime can handle it. But, it would loss spread.

Siegler v. Kuhlman (1972), Supreme Court of Washington, p. 423
Facts: Girl died when gas being transported spilled and was ignited by her automobile.
Rule: Abnormally transporting gas is subject to SL (it is an abnormally dangerous activity)
Concurrence: It loss-spreads, also.

The first half of cases in this country for SL tended to be the use of explosive, which were used for mining, road building, etc. And the law developed that those who were using explosives would be held strictly liable for debris that was throw as a result of the explosion. The way we catagorized these situations was ultra-hazardous activities (this became kind of circular – why is siegler ultra-hazardous but not the preceeding note case)
-E: think about how the Escola court would have decided Siegler. We don't know in either case what actually caused the (what caused the leak, what caused the defect in the bottle). One might say that this is a good case for res ipsa. If you end up holding the tank wagon liable, suppose it turns out the cause was a deffective hitch. Just as coke would have had a claim against the bottle manucturere if this turned out to be the cause, the same would be true here. In both, the innocent plaintiff is allowed to recover from someone who was in a better posistion to prevent and could shift the costs.

Contributory Fault

Contributory Negligence
-Butterfield (1809) first to bar recover or Ps negligence
-Davies v. Mann (1842) Last Clear Chance Doctrine, way for jury to get around contributory nelgigence. If D had last chance to avoid with RC, P can recover

Assumption of the Risk
-the other primary defense to negligence
-Prior to the adoption of employers liability acts and workers comp, an injured worker who sued his employer was confronted with three potential defenses:
- contrib neg.
-assumption of the risk (risky employment)
-fellow servant rule (flew in the face of vicarious liability) – couldn’t
recover from employer if your injury resulted from a fellow employee.

-Because of the use of assumption of the risk in these cases, it acquired a bad name.

-Meistrich (1959) tells us have been two kinds
  -primary: no duty, no breach (flag football game, trespasser falls through some boards)
  -secondary: duty, breach, but...
-Jury doesn’t get to consider both that there was no duty and that there was assumption of the risk

Comparative Negligence
-Has replaced contrib. neg in every state, usually by statute. However, varies by J
  -Pure: apportion based on any percentage distribution. Can recover 1%
  -Modified comparative negligence:
    -51% rule: If P’s negligence is 51%, he cannot recover.
    -50% rule: If P’s negligence equals D’s negligence, P cannot recover.
-Joint and Several Liability complicates this:
-Unit rule
  -Suppose 2 Ds, each 25% negligent: P is entitled to 50%, under joint and several liability the plaintiff can recover 50% from either one of the Ds. If we have contribution in the state, then -If contribution in the state, D1 can recover half of what D1’s paid out from D2 (if D 1 paid full)
-Modified Unit rule:
  -D1 only liable for 25%
  -D2 only liable for 25%
  (Eliminates the need for joint and several rule).
-Under this rule, we look at the defendants collectively.

-Individual rule says, ok, Ps negligence exceeds either one of the defendants, so P is not entitled to recover from either of them. P recovers nothing.

-Problem: D1 90% negligent, D2 10% negligent.
- D1 has 10k of insurance.
- D2 is the state or corporation (deep pocket).
-Under joint and several liability, the P can recover against either party. So the attorney recovers from the deep pocket, and the they can only able to get a contribution of 10,000. The deep pocket pays 90%, even though they should have only had to pay 10%
-If the lawyer can get it to the jury, even though the jury isn't supposed to know that the D only has 10,000, the concern is that the jury will find liability against the large defendant when this is dubious.
-This has caused a movement to eliminate or curtail joint and several liability. The notion under JSs that we don't know how to apportion it, so we came up with this device. Comparative negligence undermines this.

**What can be recovered?**
- In a battery case, can recover for physical injuries, mental suffering (even if no physical harm), punitive damages
- In an assault case, can recover for physical injuries, mental suffering (even if no physical harm), punitive damages
- In an IIMU case, can recover for physical injuries, mental suffering, punitive damages with proof of its genuineness through physical consequences that could be attested to objectively or in the nature of the defendant’s conduct and the circumstances of the case. Objective standard

**Random:**

Minors and intentional torts: Minors can be held liable. Some courts say 2, some say over 7, and everything in between. Parents can be held liable for kid's iTorts (all 50 states by stat, must be intentional), can also be negligent for failing to supervise for tort purposes.

Damages: Can recover for mental suffering in battery case even if no physical harm (common w/ off. battery).

**Immunities (p. 371-377)**

a. Governmental Immunity
- This is the rule that the government cannot be sued. It comes from the ancient English maxim, “the King can do no wrong.”
- This was incorporated into American law early, even though it seems quite undemocratic.
- The notion is that “a sovereign is exempt from suit” because there can be no legal right against the authority that makes the law on which the right
depends.
-Tort liability of the US government is now controlled by the Federal Torts Claims Act, enacted in 1946.
   -Not a general consent. Certain types of claims are specifically excluded, including certain types of tort actions, such as assault, battery, defamation, and interference with contract.
   -More importantly, there is an exclusion of liability for a claim based on “exercise or performance or the failure to exercise or perform a discretionary function or duty,” which the Supreme Court has interpreted to mean that it precludes recovery based upon conduct of administrators “in establishing plans, specifications or schedules of operations.” Later cases have interpreted it to be distinguishing between conduct at the planning level and conduct at the operational level with liability imposed only in connection with the latter.
-Sovereign immunity also applies to state and local governments, although a trend toward cutting back the extent of the immunity exists. This has been done by statute and by judicial decision. Most courts are hostile to sovereign immunity, although some have preserved it.
   -In states that have abrogated the immunity to some extent, it still remains with respect to discretionary or governmental functions (a few case examples: operation of public housing project, fire fighting decisions, issuance of automobile operators' licenses).
-Statutory attempts to preserve sovereign immunity, in whole or in part, have been subject to constitutional attack. A court in a New Hampshire case struck down a broad statutory grant of immunity to municipalities for injuries caused by the operation and maintenance of highways and sidewalks. The court held that the immunity could extend only to legislative, judicial, and other functions involving a high level of judgment or discretion.

b. Charitable Immunity
-This is the rule that charitable organizations are not liable in tort. This rule stems from an early English case where the court reasoned that the payment of tort claims would be inconsistent with the purposes of the donors in contributing.
-Eventually gained almost universal acceptance in the United States. However, the doctrine has now been abolished or significantly limited in all but a handful of states. Most have done so by judicial decision, although a few have done so by statute.
-The policies behind this immunity are still relevant today, and this has led to many statutes preserving the immunity. There are two concerns with regard to permitting tort suits against charities:
   -Deterrent effect the abrogation might have on persons who engage in charitable activities without compensation. The costs would likely be externalized to the very people that the charity is intended to benefit by the abandonment of charitable activities by those subject to liability.
Some legislatures have responded to this concern by passing statutes giving immunity to charitable organization volunteers for negligence under some circumstances.

The second concern is with beneficiaries who “bite the hand that feeds them” by suing the charities that help them. In some states, negligence liability to beneficiaries is limited, sometimes by statutes and sometimes by judicial decision.

c. Intrafamily Immunities
- These are the rules barring tort claims between husband and wife and between parent and child.
- The husband and wife immunity comes from the old English concept that the two people are, legally, one person.
  - Most states have no either completely or partially abrogated the immunity
  - many times carving out exceptions to the general immunity
    - examples: in negligence cases, in automobile accident cases, when the parties have been separated for a long time).
- The Restatement (Second) of Torts provides that there is no “liability for an act or omission that, because of the marital relationship, is otherwise privileged or is not tortious.” The comment provides that “the intimacy of the family relationship may also involve some relaxation in the application of the concept of reasonable care, particularly in the confines of the home.”
- The parent-child immunity developed in the United States
  - Rationale: allowing recovery by children against their parents would promote family discord and interfere with parental control.
  - Some courts have retained the parent-child immunity, while others have partially abrogated it,

Note: Joint and Several Liability
- Defendants who are jointly liable can be joined in a single suit, although they need not be.
- Defendants who are severally liable are each liable in full for the plaintiff's damages, although P is only entitled to one total recovery.
- At CL, two situations gave rise to J&S liability:
  where Ds acted in concert to cause the harm – form of vic. Liability where both held liable for harm caused by one (street racing resulting in injury), and
  where Ds acted independently but caused indivisible harm – impossible to allocate harm of either's conduct
- Where acted in concert, were joint tortfeasors and could be joined in one action. Where acted independently to cause indivisible harm, could not be joined. Modern rules allow joinder in indivisible harm cases and Ds like the later are often referred to as JTs.
- At CL, if P sued just one of the JTs and recovered, that D was without legal recourse against the other D. Today, most states provide for contribution among JTs by statute or judicial decision.
Vicarious Liability (and Its Relationship to Actual Causation)

- VL fits here because we're saying, but for the Ds conduct, harm wouldn't have occurred.
- Central Principle: Masters are vicariously liable for the torts of their servants committed while the servants are acting within the scope of their employment. (respondeat superior)
- To be used as basis for liability, need existence of master-servant relationship.
  - "consensual relationship in which one person, the servant, performs services on behalf of another person, the master, and in which the master controls or has the right to control the conduct of the servant."
  - generally employment
- Servants v. Independent contractors
  - ICs are persons who contract with another to do something but who are not controlled by the other nor subject to the other's right to control.
  - Employers not liable for torts of ICs, so distinction is critical. Factors: Skill required, length of employment, method of payment, whether by the time or by the job, and whether parties believe it is master servant
    - DARE v. Rolling Stone case, employing Stephen Glass
- Relationship Between Servant's Conduct and Scope of Employments
  - Even if show was servant, must also ho was acting within the scope.
  - Factors: whehter or not the act is one commonly done by servants of the sort in the case, previous relations between the master and servant, whether master has reason to expect the act, similarity in quiality of the act done to the act authorized, and whether or not the act is seriously criminal.
    - woman fingerprinted on her day o ff to comply with state law, not within scope
    - police officer driving home on lunch break, not within scope
    - ref who threw flag at Brown, within scope
    - doesn't have to be precisely the activity hired to do
      - pocket knife by cook at bar resulting in loss of customer's eyt, within scope
    - doesn't have to involve physical injuries
    - intentional wrongdoing (harder to justify than negligence)
      - generally not liable.
      - however, some jurisdictions hold liable in some cases.
- Exceptions to the General Rule of Nonliability of Independent Contractors
  - employer is negligent in selecting, instructing, or supervising (not VC, but direct negligence) Also applies in master-servant
  - the duty of the employer, arising out of some relation to the public or the
particular P, is nondelegable
work is specifically, peculiarly, or inherently dangerous

The Master's Right to Indemnity Against the Servant
-Servant is also liable. Master and servant are jointly and severally liable when joined as Ds
-MASTER has right of indemnification against servant when master held vicariously liable

Other forms of VL
-Joint Enterprise
-Joint enterprise where each has equal right to control other's conduct. Called “joint enterprise” and “joint venture.” negligent conduct of each is imputed to every other participant, assuming acts committed in courts of the enterprise.
-Family Purpose Doctrine
-domestic equivalent of master servant; applies when one family member takes automobile on family purpose, car owner liable

Wrongful Death
-Under CL, no COA existed to recover for death itself, because it terminated with the potential P's death. Do no liability if P died.
-Today, all jurisdictions have survival statutes preventing the disappearance of COAs (measure of damages = what the person could have recovered), and almost all have separate wrongful death statutes that create new COAs (measure of damages = harm caused to decedent's family by Ds conduct).

Damage to Personal Property
-Measure of damages is difference between market value of prop before the injury and market value after the injury. Sometimes limited to preaccident value of the property.