INTENTIONAL TORTS

I. INTENTIONAL INFLICTION OF HARM

A. HARMFUL BATTERY:

1. **Definition:** the intentional, unprivileged, and either harmful or offensive contact with the person of another. Must have all of these elements to be battery.
   a) **The Prima Facie case:** act + intent + harmful or offensive contact + causal connection between the harm incurred and D’s conduct. (If there was a privilege to inflict harm, D must prove this, not P.)
   b) An act is a voluntary external manifestation of actor’s will; need not be by his actual body, but can also be via instrumentality i.e. car

2. **Restatement § 13: Harmful Contact**:
   a) An actor is subject to liability to another for battery if
      i. 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
      ii. A harmful contact with the person of the other directly or indirectly results.

3. **Restatement Sec. 15: What Constitutes Bodily Harm**
   a) physical impairment, pain, or illness

4. **Intent**
   a) **Generally:** measured by desire to cause a result or knowledge that the result was substantially certain to occur (See *Garrett v. Dailey* below for “substantially certain” application). Intent need not contain malice/motive (this is only necessary to show when awarding punitive damages)
   b) **If act unlawful, intent is unlawful, which can lead to battery.**
      [**Vosburg v. Putney:** D lightly touched P’s leg in school. P later felt pain, and suffered vomiting, bone destruction, inability to use leg. Prior to this incident, P had been injured on that leg from sledding, and this had put the leg in a diseased condition. D’s kick triggered the further injuries, though the kick itself left no mark.]
      i. If intent was unlawful or D is at fault, then there is a battery; if the act was unlawful, then the intent was unlawful.
      ii. Here, D’s action was unlawful because he kicked P in school setting (based on court’s interpretation of classroom setting)
      iii. Court seems to sidestep the traditional way we think of intent by looking at whether act was unlawful instead of whether D intended to harm.
      iv. Two meanings of intent: intent to touch, and intent to harm
         i. Must intend to act and make contact, but not necessarily have intent to harm. But since it is battery, you can have intent to act, and the act results in harmful/offensive contact. (two steps)
         v. Important to consider context of the incident; there might have been a different result had D kicked P on playground instead.
         vi. Thin skull rule: person who is at fault takes the consequences of his act even if he does not foresee results.
   c) **Substantially certain knowledge that contact will result can lead to constructive intent.**
      [**Garrett v. Dailey:** P came into yard where 5 year old D was, and before P attempted to sit in a chair, D moved the chair and P fell and fractured her hip. (Trial court’s version of facts is that D tried to move the chair back to where it was when he realized P wanted to sit, but appellate court says he moved it as she was trying to sit.) In trial court, P failed to show how *Vosburg* would apply in this case because she failed to show Brian moved the chair while she was in the act of sitting down.]
      i. Knowledge of foreseeable consequences of a certain action can be sufficient to make that action qualify as battery if the actor is substantially certain the contact will result; intent can be inferred from this knowledge.
         i. In this case, Brian knew she would intend to sit down. Court doesn’t ask whether he had intent to “hit her with the ground” (to establish the
harmful contact); rather, the Court asks whether he knew she would try to sit down in the chair. If he had this knowledge, we can infer that he knew she would hit the ground.

ii. There need not be malice.

ii. Minors can also have intent to commit battery. The only time age matters is when determining D’s level of knowledge.

iii. Test of knowledge is subjective—look to what D knew at the time, not necessarily what a reasonable person would know in that situation.

B. HARMFUL/OFFENSIVE BATTERY

1. Offensive Contact
   a) Restatement § 18: Offensive Contact
      i. An actor is subject to liability to another for battery if
         i. 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
         ii. An offensive contact with the person of the other directly or indirectly results.
   b) Restatement § 19: What Constitutes Offensive Contact:
      i. A bodily contact is offensive if it offends a reasonable sense of personal dignity. (look to “ordinary person” and social standards)
   c) Note: if P is hypersensitive to something and D knows about it, then you can surpass the reasonable person standard, because D explicitly knew P would be offended.
   d) Contact with objects close to another’s person can be battery. [Fisher v. Carrousel Motor Hotel. P was guest at meeting hosted by D. When he was in line to get buffet, manager of D snatched his plate and shouted that P could not be served because he was Negro. P was never touched, but won in suit for battery.]
      i. While some physical contact is necessary to constitute a battery (in this case to something close to P’s body), in the absence of physical injury to the body, intentional and unpermitted invasion of P’s person is enough to constitute battery. Look at personal dignity.
      ii. Manager of company made his company liable for punitive damages in this case, because of his managerial capacity.
   e) In cases of offensive battery, the nature of the act is key component; mere physical contact may not be enough.
      i. [Leichtman v. WLW Jacor Communications. P was well-known anti-smoking advocate invited to speak on D’s radio talk show. The radio show host deliberately and repeatedly blew cigar smoke in P’s face. P won on a claim for offensive battery, even though there was no physical contact to him.]
      ii. Garrett rule does not apply here, because it doesn’t matter that D knew with substantial certainty the smoke would hit P. The Fisher rule applies, because we look at nature of conduct and the offense.
         i. Constructive intent does not work in cases like this, i.e. smoker’s battery and smoke touching the other person, because we’re not looking at physical injury, but rather offense.
            1. Important to draw line between physical injury and offense: For physical injury, ok to say D knew with substantial certainty, but with offense, it’s the intent behind the act (the nature of the act) that makes it offensive, i.e. the reason why smoker’s battery can’t count as offensive.
      iii. Offense must be reasonable (reasonableness is decided by jury). Must draw a line or else anything could qualify as offensive.

2. Assault
   a) Prima Facie Case; act by D + intent + apprehension + causation (again D would have burden to prove he had a privilege)
b) Restatement 2d: § 21 Assault
   i. An actor is liable for assault if (a) he acts intending to cause a harmful or offensive contact with another, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension.
   ii. An action which is not done with the intention stated in subsection 1a does not make the actor liable for an apprehension caused thereby, though it might be reckless or negligent.

c) Restatement 2d § 29 Apprehension of Imminent and Future Contact
   i. To make the actor liable for an assault he must put the other in apprehension of an imminent contact
   ii. An act intended by the actor as a step toward the infliction of a future contact, which is so recognized by the other, does not make the actor liable for assault.

d) Explanation of components of assault:
   i. Threat must be in present; threat to harm in the future is not assault.
      i. However, conditional threats may constitute assault as long as D isn’t privileged to assert the condition via self-defense of privilege of arrest, etc.
   ii. P’s apprehension must be about her own person, not to her property or a third person.
      i. However, fear is not required.
   iii. P must be aware of the threat at the time thereof in order to claim assault.
      i. Contrast this to battery, in which case P need not be aware of the touching at the time in order to have a claim for battery.
   iv. Intent is always required: If actor mistakenly does something that puts another in apprehension of danger, there is no assault because there is no intent.
      i. As in battery, intent must come from desire or belief in substantial certainty. No malice needed.
   v. In some instances, D may also may also be liable for an assault where he arouses apprehension of harm from someone else, i.e. if D says “Watch out! X just threw a rock at you!” for purpose of making P apprehensive.

e) Courts find assault when there is “a threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution.”
   Read v. Coker. P was D’s tenant, and after working out an arrangement together to have P remain there when he was behind on rent, D told him to leave. P refused. D got some big workmen together and had them threaten to break P’s neck if he did not leave. Fearing they would hurt him, P sued for assault and won.
   • Important to look at 1) reasonable person standard and 2) objective components (was threat even really there?). (from class notes)

f) Appearance of threat to harm is enough if reasonable (reasonable person standard):
   Beach v. Hancock. Even though the gun D was pointing at P was 60 feet away and unloaded, P could win for assault because a reasonable person would feel threatened by that. He did not know it was unloaded.
   • Court brings up public policy regarding a need for a society in which people feel safe.

3. Intentional Infliction of Severe Emotional Distress
   a) Prima Facie Case:
      i. Extreme/Outrageous act by D + intent or reckless disregard + causation + severe emotional distress
   b) If actor intends to cause another battery and it instead results in IIED, the intent does not transfer.
   c) Restatement 2d § 46 Outrageous Conduct Causing Severe Emo. Distress
      i. 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 [the distress], for such bodily harm.

ii. Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
   i. to any member of such person’s immediate family who is present at the time whether or not such distress results in bodily harm, or
   ii. to any other person present at the time, if such distress results in bodily harm...

iii. Comment: intent is not enough here, must be extreme/outrageous.

d) Siliznoff standard differs from Restatement First in that it does not focus on extreme/outrageous, does not mention that the emotional distress must be severe, and does not mention P’s burden of proof to show there was absence of privilege. However, both Restatement and Siliznoff mention intent.

   i. Justice Traynor’s rule/standard: “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.”

   ii. “A D who intentionally subjected another to mental distress without intending to cause bodily harm would nevertheless be liable for resulting bodily harm if he should have foreseen that the mental distress might cause such harm.”

   State Rubbish Collectors Assoc. v. Siliznoff. P threatened to beat up D if he did not pay his membership fees to the association, and sued D to recover the money. D’s defenses were duress and P’s assaults to compel D to join the association. The court found that even in the absence of actual assault, D could win because of IIED.

   iii. This case reflects the modern view of IIED, that P can recover even though there is no physical injury; distress alone can suffice. Rationale for this is that the nature of D’s act may be a more reliable indication of damage to P than actual physical injury.

      i. “In cases where mental suffering constitutes a major element of damages, it is anomalous to deny recovery because D’s intentional misconduct fell short of producing some physical injury.”

      ii. “Greater proof that mental suffering occurred is found in D’s conduct designed to bring it about than in the physical injury that may or may not have resulted therefrom.”

      • Court notes that Restatement recognizes that some forms of mental distress could be so intense that it reasonably could be foreseen that bodily harm may result.

   e) Other examples of where IIED applies: threats/lies to coerce people to act in certain ways (telling them their kids died, etc.); women who had religious beliefs against being seen naked by a man recovered for hospital using male nurse to deliver her baby; mishandling of corpses at funerals;

   f) Where a comment/action is made toward a specific type of person, i.e. racial comment made to an African American, that specific type of person becomes the “reasonable person” standard. Taylor v. Metzger. However, courts must also evaluate how serious the comment was.

   g) Transferred intent does not apply in this tort.

4. False Imprisonment

   a) Restatement 2d § 35 False Imprisonment

      i. An actor is subject to liability for false imprisonment if

         i. a) he acts to confine the other within boundaries fixed by the actor, and
         ii. b) his act directly or indirectly results in such confinement, and
         iii. c) the other is conscious of the confinement or is harmed by it.
ii. An act not done with the intention stated in subsection 1 does not make the actor liable for transitory/harmless confinement, though it may involve unreasonable risk/negligence/recklessness.

b) Prima Facie Case: act + intent + confinement + causation (D has burden of proof to show there was a privilege)
   i. Note: words alone may be a sufficient act, i.e. threats or legal authority like “I arrest you”

c) Confinement:
   i. P must be restricted to a limited area without knowledge of a reasonable means of escape.
   ii. Confinement can be caused by physical force/threats to P or immediate family, or actual barriers, or arrest.
   iii. False imprisonment need not involve physical force; even if D just locks P in a room without providing a key, this is the simplest form of false imprisonment, as “the four walls and the locked door are physical impediments to escape.”

   Whittaker v. Sanford. [case about the woman on the yacht with the religious sect, who was told she could not have a boat to take her to shore. She won, but with lower damages because her false imprisonment did not include humiliation/disgrace. She was actually comfortably kept on the yacht.]

d) If a P is allowed to leave upon request or if he does not inform anyone of his desire not to be restrained, P has no cause of action under false imprisonment because he was not fully restrained and he showed implied consent.

   Rougeau v. Firestone Tire & Rubber Co. Lawnmowers were stolen from P’s work, so some of D’s employees went to P’s house to search for them. These investigators told P to wait in the guard house, telling the guards to keep him there. P did not express his objection to being kept there, and he was also allowed to leave when he fell sick in the guard house. P was only kept in the guard house for 30 minutes or less.

e) Defenses to false imprisonment:
   i. (FROM: Sindle v. NYC Transit Authority—case about bus driver containing kids on the bus because of their destructive behavior, and the one boy trying to jump out of the window like all the other kids had done successfully. When he tried to do it, the bus hit the curb, he fell out, and bus ran over him.)
      i. P’s injuries resulted in P’s own negligence while being falsely imprisoned (contributory negligence, share in damages).
         i. Thus, P still has duty of reasonable care for himself even when he is falsely imprisoned.
      ii. D could justify his actions to “falsely imprison” others were to protect his personal property.
   ii. (FROM: Coblyn v. Kennedy’s Inc. case about the old man in the store accused by employee who grabbed his arm of stealing a scarf and being made to go back upstairs in the store, thereby suffering heart problems.)
      i. Statute for merchants’ defense: “In an action for false arrest or false imprisonment brought by any person by reason of having been detained for questioning on or in the immediate vicinity of the premises of a merchant, if such person was detained in a reasonable manner and for not more than a reasonable length of time by a person authorized to make arrests or by the merchant of his agent or servant authorized for such purpose and if there were reasonable grounds to believe that the person so detained was committing or attempting to commit larceny of goods for sale on such premises, it shall be a defense to such action. If such goods had not been purchased and were concealed on or amongst the belongings of a person so detained it shall be presumed that there were reasonable grounds for such belief.” [SEE CLASS NOTES FOR ANALYSIS OF STATUTE’S LANGUAGE]
      ii. Contrast to Rougeau, in which P did not express that he didn’t want to be confined. In Coblyn, he didn’t say anything because he felt threatened.
II. Privileges

A. Two types:
   i. Consensual: depend on P’s agreeing to the D’s otherwise tortuous act
   ii. Nonconsensual: shield D from liability for otherwise tortuous conduct even if P objects to D’s conduct.

B. Consent:
   i. Consent by P’s Behavior/Apparent Consent:
      1. Definition: Consent is willingness in fact for conduct to occur. It need not be communicated to D. Restatement 2d.
         a. Can be actual express (P actually communicates it), or apparent (implied from P’s conduct)
      2. Though general rule refers to subjective consent, consent can also manifest objectively.
         a. [O’Brien v. Cunard Steamship Co. P was immigrant on ship coming to U.S. D was accustomed to having on-board doctors give smallpox vaccines to passengers so they wouldn’t be quarantined at port. P could see that 200 other women were having it done, etc. She did not tell the doctor she did not want the vaccine and he gave it to her. When she sued later (likely because of a reaction to the vaccine) she could not recover because she manifested intent.]
         b. [Barton v. Bee Line: P was 15 year old girl on D’s bus and claims chauffer raped her, although chauffer claims she consented. Court ruled that P had a full understanding of her act and therefore should not be able to recover. Treated the case more criminally than civilly, but still awarded with money damages.]
         c. Under the statute, a female would be protected even if she consented, simply because she was a minor.
            i. Also raises concern whether statute is sexist in only focusing on male raping female.
   ii. Informed consent:
      1. Where a physician can ascertain in advance of an operation alternative situations and no immediate emergency exists, a patient should be informed of the alternative possibilities and given a chance to decide before the doctor proceeds with the operation.
         a. [Bang v. Charles T. Miller Hospital. P was unaware that his surgery for urination problems would entail cutting his spermatic cords. D asked consent for the surgery itself but did not explain its details.]
         b. Key issue here was whether there was a fact question for jury as to whether P consented to the severance of his spermatic cords when he submitted to the operation. Court said yes; P should have had a chance at least to decide what he wanted to do if there were no emergency that gave the doctor another privilege.
      2. When physician is given consent to perform a certain medical operation or treatment and thereafter extends the operation beyond boundaries of the consent, courts take two views:
         a. Once a patient has consented to a surgery, the surgeon may lawfully (and without liability) perform as good surgery demands to remedy a diseased condition in the area open for surgery, even when surgeon decides to extend the procedure.
            i. [Kennedy v. Parrott. P had surgery for appendicitis. During operation, D (surgeon) saw enlarged cysts on her ovary and punctured them. Later P developed phlebitis. P sued for trespass on her person. D won.]
            ii. “Where one has voluntarily submitted himself to a physician or surgeon for diagnosis and treatment of an ailment I, in the absence of evidence to the contrary, will be presumed that what the doctor did was either expressly or by implication authorized to be done.”
            iii. Rationale: Public policy. Surgeon cannot always receive consent nowadays. In major operations, both parties are aware that doctor won’t
see full condition until he opens up the patient. It is totally consistent with sound surgical procedure for the doctor to puncture the cysts he saw in there.

b. Only allow consent to be applied in emergency situations.
   i. Restatement 2d: Emergency Action without Consent:
      1. Doctor not liable for injuries when patient hasn’t consented if 1) emergency makes it necessary or apparently necessary to act before the patient could have a chance to consent, and 2) the actor has no reason to believe that the patient would object if he had the chance.

c. Note: Where treatment is unauthorized and performed without consent, the doctor has committed battery. However, where the doctor obtains consent but has breached a duty adequately to inform patient of risks, the patient has a cause of action in negligence.
   i. To claim a battery, all the patient has to prove is that the doctor did not adequately explain the nature of the operation.
   ii. Under negligence, the doctor would have defense that either the failure to explain that the failure to inform did not cause the harm.

iii. Implied consent to violence only covers that violence that is customarily appropriate in the given setting.
   a) [Hackbart v. Cincinnati Bengals]. This case showed that though a football player shows implied consent for some types of violent behavior, the line is drawn where the actions break specific rules of football.
      a. Note: Consent from P will not shield D in cases where the consent was procured by means of fraud or duress.
      i. Ex. DeMay v. Roberts: P sued because her doctor, to whose services she had consented, did not tell her that his assistant was not medically trained.
      ii. Duress can be either physical or economic.

C. Self-Defense:
   i. 63: Restatement 2d Self-defense by force NOT threatening death or serious bodily harm:
      a) Actor is privileged to use reasonable force, not intended to cause death/serious bodily harm to defend himself against unprivileged harmful or offensive contact or other bodily harm if he reasonably believes the other is going to intentionally inflict harm on him.
      b) Self-defense is privileged under the conditions stated in subsection 1 although the actor correctly or reasonable believes that he can avoid the necessity of so defending himself,
         b. By retreating or otherwise giving up a right or privilege, or
         c. 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.
   iv. 65: Restatement 2d Self-defense by force threatening death or serious bodily harm:
      a) Privilege exists when actor reasonably believes that the other is about to inflict injury that would result in death or serious bodily harm, which can be safely prevented only by the immediate use of such force.
         a. The privilege exists even though actor correctly or reasonably believes he could safely avoid the necessity of so defending himself by
            i. a) retreating if he is attacked in his dwelling place (if it’s not the dwelling place of another), or
            ii. b) permitting the other to intrude upon or dispossess him of his dwelling place, or c) abandoning an attempt to effect a lawful arrest.
      b) The privilege does NOT exist if the actor correctly or reasonably believes that he can avoid the action by
         i. a) retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling place of the other, or
         ii. b) relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossessment of his dwelling place.
v. “Defendant claiming self-defense must show not only that he acted honestly in using force, but that his fears were reasonable under the circumstances, and also as to the reasonableness of the means made use of.” (objective plus subjective)

1. Courvoisier v. Raymond. D was at home, which was above his jewelry store. Group of people came to break in and refused to leave. D had a gun, and when they were all finally outside, he fired a warning shot, which attracted nearby police. One of three police officers, likely not dressed in typical uniform based on facts, approached D and told him to stop shooting because he was a police, but D shot him in the abdomen. D appealed on self-defense and won.
   a. Note: Deterrent effect applies to prevention of the mistake of Raymond shooting the cop and to the intruders. But in comparing criminal to civil liability, civil asks who should bear the burden, whereas criminal doesn’t consider putting cost on the self-defender.

vi. It is generally accepted (also by the Restatement 2d) that the privilege of self-defense extends to defending third parties as well; same guiding principles of reasonable belief/force apply. The split in authorities comes when the defender mistakes who is the aggressor out of the two third-parties.

D. Defense of Property

i. Restatement 2d Section 77: Defense of Possession by Force Not Threatening Death or Serious Bodily Harm
   1. privilege exists if:
      a. the intrusion is not privileged, and
      b. actor reasonably believes that the intrusion can be prevented or terminated only by the force used, and
      c. actor has tried to ask the person to leave and has been rejected, or reasonably believe there’s no point in trying that

ii. Restatement 2d Section 79: Defense of Possession by Force Not Threatening Death or Serious Bodily Harm
   i. Privilege ONLY IF the actor reasonable 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.
   ii. Katko v. Briney

E. Necessity

i. “There are many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal property that would otherwise have been trespass.” Ploof v. Putnam.

   Ploof v. Putnam. D owned an island and dock. P was sailing on the lake there with wife/kids/luggage. Violent storm broke out, so because of the danger, P moored his boat to the dock. D’s servant unmoored the boat, whereupon it was driven upon the shore and destroyed, by no fault of P. P and family were cast upon the shore and were injured.
   • Doctrine of necessity applies with special force to the preservation of human life. One assaulted and in peril of his life may run through the close of another to escape, or may sacrifice the property of another to save his life or the lives of his fellows.

ii. Second Restatement Section 197
   i. Necessity-based privilege to enter land of another in order to avoid serious harm to one’s person, land or chattels, or to those of a third person
   ii. Coupled with obligation on part of entrant to pay for whatever he causes

iii. Second Restatement Section 263
   i. Actor is privilege to damage the chattels of another in order to avoid serious harm

iv. Vincent v. Lake Erie Transportation (D’s vessel attached to P’s dock during storm and caused damage to dock and could not be moved elsewhere)
   i. privilege with obligation to pay for property if your privilege is reason it is damaged
   ii. privilege to use someone else’s property to protect your own but have to compensate other person for any damage that may occur to their property
iii. If, due to dire circumstances, a defendant takes proactive measures to occupy plaintiff’s property, and the defendant’s property inflicts damage on plaintiff’s property, then defendant is liable for the damage even though it was a trespass by necessity.

iv. Placing liability on the privileged trespasser places the incentive on him to analyze the risks involved in his trespass, and not to err in his favor and both sides will balance interests/costs and the right decision will be made.

**NEGLIGENCE**

I. **Origin and Development of the Negligence Concept 147-63, Problem 11**

A. Until 19th century, D would be liable simply because his actions caused harm to P

B. Trespass _vi et armis_: battery case; immediate

C. Trespass on the case (a.k.a. case): this is different from trespass _vi et armis_ because _vi et armis_ is _immediate_, and case is _consequential_
   i. Note distinction between immediate and consequential; Example of consequential: you cut a tree, leave it lying in the road, and then someone on horseback runs over it. Assume that cutting the tree was the wrong act.

D. There is a conflict in general perspectives on negligence: utilitarian/cost-benefit vs. non-utilitarian:
   i. Net effect of negligence rule is to force Ps to bear the accident cost of D’s harm-causing activity as long as the D struck a reasonable balance between accident cost and the costs of the precautions. This is an economic view
   ii. Others hold that sometimes what D does is just wrong, even if his act brings more benefit than harm. Focus on people, not just on cost.

E. Juries generally consider reasonable person standard in deciding negligence cases; this is a common sense approach. Other factors like statutes come in sometimes instead. See below.

F. **CASE: Brown v. Kendall.** P and D’s dogs were fighting. D tried to break up the fight, and as he did so, D backed up toward P and when he raised a stick over his head to stop the dogs from fighting, he hit P in the eye. P was injured and sued. Court rested opinion on assumption that D’s act was unintentional.
   i. Rule: P must show that the intention was unlawful or that D was in fault; if the injury was unavoidable, and the conduct of D was free from blame, he will not be liable. If the act was purely accidental, there can be no cause of action on it. [ordinary care—what prudent, cautious men would use; accident—D could not have avoided it by the use of care necessary in the circumstances]
   ii. Burden of proof should be such that each party has to show the other’s negligence, because otherwise it is difficult to prove a negative i.e. each party showing he himself was using ordinary care.
      a) If D was doing a lawful act and unintentionally hurt P, then unless P shows that D was at fault/careless, P fails to sustain burden of proof.

II. **Duty**

A. **General Standard** 163-75
   i. **Restatement § 283:**
      a) the standard of conduct to which one must conform to avoid being negligent is that one a reasonable man under like circumstances
      b) consider D’s physical disabilities in judging whether he was negligent, but not mental disabilities
         1) hold mentally disabled people to the same reasonable person standard as usual—policy argument: taking into account impairment by the mental disorder versus judging a situation such as schizophrenic person driving and getting wreck (was it because of his disorder or was he just negligent?)
      c) **Characteristics of reasonable person:** 1) normal intelligence, 2) normal perception/memory/minimum standard of knowledge, 3) all of the additional skill/knowledge possessed by the actor, 4) physical attributes
   ii. Two important purposes of using the reasonable person standard
      a) more comprehensible to non-experts on the jury
      b) sets up an objective standard
iii. Note: the standard must both help courts determine if D was negligent, and guide a prospective D’s behavior

iv. **CASE: U.S. v. Carroll Towing:** Barge sank because of bargee’s absence. Court held that “it was not beyond reasonable expectation that with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstance… it was a fair requirement that the owner of the barge should have a bargee aboard unless he had some excuse for his absence, during the working hours of daylight.”

   a) Because there is no general rule for bargees’ absence regarding damage to others’ property [a barge commonly breaks away], need to weight out P (probability that the event will occur—i.e. barge breaking away), L (gravity of resulting harm if it does occur), and B (the burden of adequate precautions)

   b) If B < PL, then D was negligent.

      1) Evaluation of the formula includes any cost that D would incur, the costs to society, looking at it in terms of D and P being in the same “firm” (would it cost more to tie the barge or to pay for the damage? Comparing B and L)

   2) **Criticisms of the Hand Formula:**

      a) Might do social good of efficiency but not do individual justice

      b) Reasonable actor likely to take into account likelihood of suit/court loss in deciding how to act. (For rational actor, looking only to legal consequences of action, issue is whether B < PD, where PD = expected damages and costs of litigation.)

      c) Large corporation may not wish to introduce evidence that saving a life would have cost a certain amount and that amount outweighs the risk/damage (Pinto would rather pay out all P’s settlement claims than to re-call all the cars)

      d) May not apply well to cases where a moment's inattention or negligent forgetfulness causes the injury (Hand suggested this could be a consideration of burden) i.e. picking up your cell phone in a school zone with kids around. Or switching radio station.

      e) Shouldn't be used in cases of non-reciprocal harm (barge breaking loose risks harm to other barges and vice versa; but customer buying coke poses no risk to coke but coke bottle may pose a risk to them—Coke would be seen as using due care so not negligent, but the guy with the faulty bottle would face the loss)

   3) **Justifications for the Hand Formula:**

      a) Provides an incentive for business/individuals to invest in the appropriate amount of safety

      b) Promotes economic efficiency (i.e. Risks that are worth taking produce more gains than losses, so they benefit society as a whole by maximizing wealth though may do individual injustice)

      c) Provides a guide for determining useful evidence

      d) Constrains judges to explain their conclusions about negligence

      e) Although typically viewed in economic terms, can also be viewed as moral proposition (treat others as you would treat yourself)

   4) Consider circumstances/context [i.e. if storm, crowd, bargee’s reasons for going ashore]; here, busy harbor, bustle of activity so maybe not tied properly, bargee had no excuse for not being aboard.

   c) Note: Ultimate question in negligence case is not whether a reasonable person would have recognized the risk, but whether recognizing the risk, that person would have acted differently. Ex) driving a car—always a risk, but have to see when it would be unreasonable.

      1) Class Notes: Look at the probability of the barge **breaking away** and **causing harm in the absence of the bargee**

      2) Bargee’s argument was that even if a reasonable person recognized the risks of leaving the barge unattended, he would have incurred those risks in order to maintain his freedom to move.
v. Restatement § 291: Unreasonableness: How Determined: Magnitude of Risk and Utility of Conduct
   a) 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 magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

vi. Restatement § 292 Factors Considered in Determining Utility of Actor’s Conduct
   a) In determining what the law regards as the utility of the actor’s conduct for the purpose of determining whether the actor is negligent, the following factors are important:
      1) The social value which the law attaches to the interest which is to be advanced;
      2) The extent of the chance that this interest will be advanced or protected by the particular by the conduct;
      3) The extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.

vii. Restatement § 293: Factors Considered in Determining Magnitude of Risk
    a) In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important:
       1) The social value which the law attaches to the interests which are imperiled;
       2) The extent of the chance that the actor’s conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member;
       3) The extent of harm likely to be caused to the interests imperiled;
       4) The number of persons whose interests are likely to be invaded if the risk takes effect in harm.

viii. CASE: *Washington v. Louisiana Power and Light.* Company definitely knew of the problem, but need to consider whether the possibility of such injury constituted unreasonable risk of harm. Apply Hand formula—possibility of escape, gravity of injury, burden of precaution.
   a) There was a very small probability of this happening in this case [here, P knew to stay away from it and had stayed away for 5 years; not like if the power line was in a public area with lots of traffic], though the gravity was large.
      1) In this case, where the coexistence of the power line and the safely installed antenna was no riskier than countless other similar coexistences not considered to involve negligence, the burden to the company of taking precautions against all such slight possibilities of harm should be balanced against the total magnitude of all these risks, including the relatively few losses resulting from the total of all these insignificant risks.
      2) Product of PL is not > B, given the small probability.
   b) Note: Court talks about “common knowledge” here, but it’s really intuition.

ix. CASE: *Weirum v. RKO General Inc.* [radio station competition]
   a) Whether D owed duty is question of law.
   b) Primary issue in establishing duty is foreseeability. (Secondary issues include history, morals). The type of P, type of harm, and type of risk were all foreseeable.
   c) Just because it hadn’t happened before does not mean it was not foreseeable; that looks to hindsight instead of foresight. Even if the death was actually caused by a third party, it was the radio station’s action that stimulated the third party. 1st Amendment doesn’t matter here because it’s about creating risk, not freedom of speech. This situation is distinct from other sales, etc. so this wouldn’t lead to unwarranted extensions of liability.
   d) Note: Distinction between morals and social judgment: morals deal with right/wrong as a matter of principle, but social judgment deals with realistic application to society.
   e) Note: Difference in application of history here than in *Washington*—comparison shows that history can be used as a sword against D, but not as an effective shield for D.
   f) This case is distinct from vicarious liability because it was the radio station itself who hosted the competition.

B. Modification of General Standard
   i. Possessors of Land re Entrants 217-23
      a) Special classifications generally lower the standard, instead of raise.
      b) Restatement § 332 Invitee Defined
1) Either a public invitee or a business visitor

2) Public invitee is a person who is invited to enter or remain on land as member or public, for a purpose for which the land is held open to the public [there must be some inducement to enter, not just generally-open public land]

3) Business visitor is someone invited to enter on land for purpose directly/indirectly connected with business dealings with possessor of land

c) Restatement § 343 Dangerous Conditions Known to or Discoverable by Possessor [duty owed to invitee]

1) 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

   a) Knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to the invitees, AND

   b) Should expect that they will not discover or realize the danger, or will fail to protect themselves against it, AND

   c) Fails to exercise reasonable care to protect them against the danger.

d) Restatement § 330 Licensee Defined

1) A person who is privileged to enter or remain on land only by virtue of possessor’s consent

d) Restatement § 342: Dangerous Conditions Known to Possessor

1) A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if

   a) 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

   b) He fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, AND

   c) The licensees do not know or have reason to know of the condition and the risk involved.

e) Restatement § 329 Trespasser Defined

1) 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

f) Restatement § 335 Artificial Conditions Highly dangerous to Constant Trespassers on Limited Area

1) 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

   a) The condition

   a) is one which the possessor has created or maintains, AND

   b) is, to his knowledge [NOTE: this only says “know” and not “reason to know like in §337], likely to cause death or serious bodily harm to such trespassers, AND

   c) is of such nature that he has reason to believe that such trespassers will not discover it, AND

   b) The possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

i) Restatement § 337 Artificial Conditions Highly Dangerous to Known Trespassers

1) A possessor of land who maintains on the land and 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
a) The possessor knows or has reason to know of their presence in dangerous proximity to the condition, AND
b) The condition is of such a nature that he has the reason to believe that the trespasser will not discover it or realize the risk.

j) **Restatement § 339 Artificial Conditions Highly Dangerous to Trespassing Children**
   1) A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
   a) The place where the condition exists is on upon which the possessor knows or has reason to know that children are likely to trespass, AND
   b) 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
   c) 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
   d) 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
   e) The possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

k) **Attractive Nuisance Doctrine**
   1) Most states follow it because children are children and our changed society has property that affects others more than it did back when things were rural, but other courts say the burden shouldn’t be on the community, but rather on the parents.
   2) Most courts will rule for P even though P is trespasser IF, D lured P in.
   3) HOWEVER, regardless of age, the rule does not apply if the condition is obvious and the child recognizes the danger.

l) **CASE:** *Rowland v. Christian.* [broken faucet case] Court departs from the categories from Restatement, and instead uses CA Civil Code, which says “Everyone is responsible…for an injury occasioned to another by his want of ordinary care of skill in the management of his property or person…(as long as other didn’t bring injury upon himself).”
   1) Court refers to the general rule with the categories: that all three categories are to take the land as it is because the landowner shouldn’t have to make special arrangements. Two exceptions to this rule: 1) active operations which call for reasonable care to licensee, and 2) occupier is aware of the condition and the condition amounts to a concealed trap that the guest is unaware of.
   2) Court says the categories are too confusing [but are they really?] and instead focuses on foreseeability, nexus, moral, policy of prevention, burden, cost/insurance (which court says are not affected by categories). Court says D at least should have duty to warn.
   3) Some courts accept *Rowland* but rely on foreseeability which still implicates categories to some extent.
   4) Some courts take middle ground and only keep trespasser as a separate category.
   5) Some courts reject *Rowland* because categories have been developed and are now stable and predictable, and landowner shouldn’t face unlimited liability.

ii. **Common Carriers and Motorists/Passengers 223-30**
   a) Most states hold common carriers to a higher than standard duty of care, i.e. highest degree of care, extraordinary care, utmost care, great caution
   1) Some states like NY say that a reasonable person standard is sufficient for common carriers as well.
   b) Some states lower the standard for drivers with non-paying passengers via automobile guest statues.

iii. **Absence of General Duty to Rescue**
a) Restatement § 314
   1) The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty so to take such action.

iv. Modification of No-Duty-to-Rescue Rule 231-41
   a) Some exceptions to general no-duty-to-rescue rule exist: i.e. innkeeper, or potential rescuer has voluntarily taken custody of the rescuee and gives rise to special relationship (like summer camp counselors)
       1) But main point is that if there is no pre-existing relationship between the parties, there is no “duty” to rescue.

b) Reliance-Based Duty: CASE: Erie R. Co. v. Stewart. P was passenger in truck and was struck by D’s train, where one of D’s watchman was supposed to be present but was absent at the time of accident. In this case, no statute governing, so need to give facts to jury to decide based on facts. Two pivotal facts: watchman was typically there, and P had knowledge that he was typically there. These facts lead to P’s reliance on watchman being there to warn.
       1) Still would be a duty for D if there was a crossing-gate that was up at the time, and P drive through it and got hit by train, because the main issue is P’s reliance on it. In this situation, there would be a reliance on the general knowledge of the gate’s function.
       2) If P did not know of the watchman ever being there, no duty on D’s part.
       3) If D wanted to stop the practice, must have given warning.

c) When D puts P in situation so that P needs help: CASE: Tubbs v. Argus. P was passenger in D’s car. D drove into a tree; P was injured; D abandoned the car and did not render reasonable assistance to P.
       1) In this case, we’re not trying to make D liable for negligence in causing the injury, because there is guest statute. Even if he had used ordinary care, we would still try to hold him liable, because of control of instrumentality giving rise to relationship which gives rise to liability for inaction.
       2) RULE from this case: In certain relationships, a duty does exist to help in event of injury, even when the injury is not caused by the party charged with the duty, and certainly when injuries come from an instrumentality under D’s control.
       3) Court here notes that moral/humanitarian considerations may require someone to help someone who is injured, even if he didn’t cause the injury or even if the injured person caused it for himself. Masters/invitees/instrumentality.
       4) Restatement § 322: (Cited in Tubbs)
          a) If the actor knows or has reason to know that by his conduct, whether tortuous or innocent, he has caused such bodily harm to another as to make him helpless and in danger of future harm, the actor is under a duty to exercise reasonable care to prevent such future harm.
       5) This has been extended to cases in which someone injured someone else out of self-defense but then failed to help seek medical attention after that.

v. Limited Duty to Rescue 241-57
   a) CASE: Tarasnoff v. Regents of University of California. Issue here was whether the psychologist had a duty to inform the victim of her attacker’s intent to kill her when the psychologist found out the information because the attacker was his patient.
       1) Legal duties not discoverable facts, but conclusory expressions.
       2) General principle: D owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.
       3) But in this case, modification (change from Rowland especially with regard to foreseeability): when the avoidance of foreseeable harm requires D to control the conduct of another person or to warn of such conduct, common law has
traditionally imposed liability only if D bears special relationship to the
dangerous person or potential victim.

a) Restatement § 315: duty of care may arise from either:
   a) special relation between actor and third person which imposes a
duty upon the actor to control the third person’s conduct, OR
   b) special relation between actor and the other which gives to the
other a right of protection.

4) Reasonable degree of skill by psychologist, and only break confidentiality when
must do so by law or necessary in order to protect someone/community.

5) If the therapist determines, or under reasonable standards should have
determined, that the patient poses serious danger to a foreseeable victim, then
he bears a duty to exercise reasonable care to protect the victim.

b) Policy concerns:
   1) Stick vs. carrot approach; some jurisdictions say there is a limited duty in certain
circumstances; others say there should be no duty because tort law should be
about cause and not fault

III. Breach

A. Violation of Criminal/Safety Statutes 175-87

i. NOTE: one significant effect of safety statutes is that whenever violations of such statutes are
held to be relevant to the issue of negligence, the ultimate task of evaluating conduct (usually
performed by jury) is taken over by the judge— statutes particularize the reasonable person
standard, so they are law for the judge to deal with instead of factual bases for jury.

ii. NOTE: We keep the Hand formula in the background of analysis, but when we can’t weigh out
the factors ourselves, we can look to the statute to have the same effect, because Legislature has
already done the balancing of factors in making the law the way it is.

iii. Restatement 3d Section 14:
   a) An actor is negligent if, without excuse, the actor violates a statute that is designed to
protect against a type of accident the actor’s conduct causes, and if the accident victim is
in the class of victims that the statute was intended to protect.
   b) If D’s violation of a statute results in a completely unrelated harm to the P, then the P
may not recover from negligence by the D’s violation. A violation is no evidence of
negligence.

iv. “failing to abide by the statute (without an excuse) is negligence itself”
   a) CASE: Martin v. Herzog. P and husband riding in buggy. Struck by D’s car. Buggy was
supposed to have lights on, as mandated by statute. Court said breaking statute was
negligence itself, and jury shouldn’t have discretion to see whether P was contributorily
negligent because of it. P still won, though, because
   1) Establishing negligence is not enough. Also need causal connection.
      a) P is not to forfeit right to damages unless the absence of lights is at
least a contributing cause of the disaster.
   2) Safety statutes → to protect others on the road → standard of care

v. Violation of statute is only prima facie evidence of negligence
   a) CASE: Tedla v. Ellman. P and brother walking on side of road, stuck by a passing car.
They were walking on opposite side of the road than the statute mandated. Walking on
correct side would have been more dangerous.
   1) Court held that statutes codifying customs setting standards of negligence are
subject to the same exceptions as customary rules— treat as prima facie
evidence— so if, as here, following the rule would be more dangerous, then
you can break the statute rule.
   2) Court treated this as just a rule-of-the-road, unlike Martin, where the court says
the statute provides safeguards to follow to protect people/property.
   3) Statutes should not apply when they “outline no specific standard of care, or
when they regulate conflicting rights, or when observance may cause
accidents”

vi. Violation of statute is “some evidence”
a) **CASE: Brown v. Shyne.** P employed D to give chiropractic treatment to her for a disease or physical condition. D had no license to practice medicine, yet he held himself out as being able to diagnose and treat disease and under the provisions of the Public Health Law, he was guilty of a misdemeanor. P was paralyzed as result of the treatment (court assumes causation here).

1) If violation of the statute was the cause of the injury, P can recover. If not, no. Neglect to obtain a license results in wrong to the state, but if no injury to the patient, then no private wrong.

2) **DISSENT:**
   a) 2 questions to ask: 1) whether D’s acts were the direct cause of injury, and 2) whether the acts were negligent.
   b) Contradiction in saying courts hold such a man to standards of a physician, while legislature doesn’t even recognize him as a physician at all
   c) The prohibition against practicing medicine without a license was for the very purpose of protecting the public from just what happened in this case. The violation of this statute has been the direct and proximate cause of the injury.

b) **CASE: Gorris v. Scott.** Look to intention of the Act—in this case it was for sanitation and disease prevention, not for protecting against the sheep/animals being washed ashore.

1) If not for the violation, the injury would not have occurred, so why can’t P recover? Because of the intent of the statute.

   a) This case is distinct from Brown with regard to the violation being the cause of the injury. In Brown, issue is whether the violation is the cause of the injury—Court said it was not. But here, we’re seeing “harm without risk,” which means there was harm outside of the risk being guarded. [P asserted a risk of the animals being washed overboard, but the risk that the statute was intended to guard against was the risk of disease.] [Statute required pens to protect against the risk of disease, not the risk of harming.]

   b) Question to ask: If the statute had been followed, would the thing that happened have been less likely to happen? If yes, that might be a clue that that was the type of harm the statute was intended to protect against (not necessarily though, but a consideration to make) i.e. the kid hiding under the car that was parked on the left side of the road, when the statute said cars must drive and park on the right side of the road. This could have happened anyway, whereas maybe someone aware of the rule only crossed at that time because of reliance on the statute.)

B. **Custom/Expert Testimony 187-203**

i. **CASE: Trimarco v. Klein.** P was D’s tenant, and was injured when his shower door shattered. P sued for D not having shatterproof glass on the door, as was customary.

   a) When proof of an accepted practice is accompanied by evidence that D conformed, this can show due care.

      1) Common practice + reasonable [custom itself must be reasonable]
      2) This shows that failure to abide by custom is not negligence in itself but rather is *prima facie* evidence.

   b) Custom need not be universal, only fairly well-defined.

   c) Rationale for use of custom as standard: reflects judgment of many, has direct bearing on feasibility, demonstrates the safe way to do things

   d) Note on procedure with custom: Note that “custom + reasonable” in itself is not a *prima facie evidence*; it’s just part of this—jury would also need to consider the cost, availability, etc.

ii. **CASE: The TJ Hooper.** A tugboat lost two barges of cargo at sea. Barge owner sued tugboat owner, claiming that the tugboat wasn’t equipped as it should have been. But at this time, such equipment was not customary. Court said that even though not customary, some tugs did use that
equipment, so this shows they thought it was necessary and the others were too slack. “The injury was a direct consequence of this unseaworthiness.”

a) Custom may not always be a reliable proxy for reasonable care, because need to keep in mind what is reasonable, too. (like the two-prong-plug custom)
   1) This case shows how custom is not effective as a shield (i.e. saying no one else followed the custom) whereas in other situations it can be an effective sword

b) How to explain why custom would not apply here but it would in *Carroll Towing* [Note material]
   1) Necessary conditions for the custom to develop:
      a) actors who directly affect the levels of risk generated by an activity must possess roughly the same knowledge of the real work in which their activity plays out
      b) actors must possess capacity to act effectively on their knowledge, and
def) In other words—[in order for custom to meaningfully show reasonable care, needs to meet Hand formula-type reasoning]

iii. CASE: *Helling v. Carey*. P developed glaucoma that could have been prevented by a test by ophthalmologist. She sued them for negligence in not testing her for it. She had been D’s patient for a number of years, but she was only 32 when diagnosed, whereas the custom was not to start testing until after the age of forty, because probability before that was 1/25000

a) Court said that because the test was painless and easy, D should have given it.

b) “What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not.” [quote from Justice Holmes]

c) Agree with *TJ Hoope* in saying that custom is not a strict measure.

d) NOTE: this case follows *TJ Hooper* closely, but is actually an aberration, because generally in the medical profession, the custom IS the standard. This case unique because no expert testimony and still negligent as a matter of law.

e) THIS CASE WAS OVERRULED, but these Ds were still liable.

C. Res Ipsa Loquitur 203-217

i. Overview:

a) When P cannot make an adequately detailed argument as to how D was negligent, P can try to sue under res ipsa loquitur, which allows Ps to win some of the cases in which a gap in the evidence prevents them from proving the specifics of D’s negligent conduct.

b) Literally translated, res ipsa loquitur means “the thing speaks for itself.”

c) Res ipsa gives rise to a permissible inference of negligence—that is, it permits, but does not compel, the jury to find that D acted negligently.

d) It’s not really a “doctrine”; it’s just a basis upon we can decide circumstantial facts.

e) In other states, the doctrine gives rise to a rebuttable presumption of negligence.

f) *Jury instructions*: If the judge determines that res ipsa applies, the jury will be advised that they may draw an inference of fault, but may not be told of the doctrine as such. Thus, the court may instruct the jury that if they find on a preponderance of the evidence that D had control of the instrumentality in question, and that the accident was one which would not ordinarily have occurred in the absence of D’s negligence, they may find D to have acted negligently.

ii. CASE: *Boyer v. Iowa High School Athletics Ass’n*. (bleachers collapsed under P and the other spectators; no specific evidence, so P sued on res ipsa) P won.

a) Two criteria:

1) exclusive control and mgt by D of the instrumentality which causes the injury

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

b) Reason/relationship behind these criteria: If something doesn’t usually happen, we need to ascribe the negligence to a person, so it might as well be someone who is in control.

c) D is in best position to obtain evidence about the true cause, so shift burden to D.

d) Court saw mgr as the one with exclusive control, but *why not custodian?*
iii. Example of when res ipsa does NOT apply: CASE: Shutt v. Kaufman’s, Inc. P sat down on chair in D’s shoe store and a stand toppled on her head. P tried to sue with res ipsa, but lost.
   a) Although the storekeeper must exercise reasonable care for the safety of the invitee, he is not an insurer of the safety of such visitor; thus, the mere happening of an accident raises no presumption of negligence, except under those circumstances where the doctrine of res ipsa applies.
      1) Res ipsa couldn’t apply because there could have been other things that caused the stand to fall; P could have had a case on negligence.

iv. Most courts will allow P to submit claims on both specific negligence and res ipsa at the same time. When this happens, jury generally considers specific negligence first; if this works, then jury can avoid the more difficult res ipsa application.

v. CASE: City of Louisville v. Humphrey. [jail, drunk tank case] Court would not let P succeed on res ipsa. Court would still be left to speculate whether the cause of injury was jail employee or inmate. Also, if court let P win on res ipsa, then burden would shift to D (the jail), and this would make D an absolute insurer, which the court found unfair. Public policy heavy here, because it’s not like P would have had a hard time with evidence, so it’s not really the most effective idea to leave burden with P.
   a) The court is saying that because one of the two ways that he could have been injured is not within jail’s duty of care, you can’t say that jail is liable for it all, because otherwise you’d make jail an absolute insurer because you’d potentially be holding it liable for something it didn’t have a duty to protect. No absolute insurer ➔ no duty ➔ no res ipsa.

vi. CASE: Escola v. Coca Cola Bottling Co. Yes, res ipsa applied and worked. Although not clear whether the explosion was caused by excessive charge or defect in glass, there is sufficient showing that neither cause would ordinarily have been present if due care had been used.
   a) Court infers that the bottle was not damaged by extraneous force after delivery, so it must have been defective upon leaving D’s control. (P has burden to show bottle didn’t change since it left D and also that P handled it carefully.)
   b) To show whether D could have been negligent, look at the ways the bottle could have been faulty and see probability that it was because of D. (Court assumes Owens-Illinois wouldn’t have delivered faulty bottles to Coca Cola, because their inspection deemed “infallible” according to expert witness [light most favorable to P]. D only re-tested visibly-defective bottles.
   c) NOTE TRAYNOR’s Concurrence: Foundation for absolute/strict liability:
      1) “It should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.”
      2) Elements: Manufacturer + when item is placed on the market + when consumer can’t inspect the product + defect + causes + injury to human beings
      3) Rationale: discourage marketing faulty products, mfr can anticipate and guard against problems happening, consumers should be able to rely (they cannot inspect the products), insure/distribute costs, hard for consumer to refute mfr’s evidence

IV. Factual Causation
   A. But-for Test 258-63
      i. Cause in fact – “but for D’s act would the injury have occurred?” If no, then breach of duty
   B. Circumstantial Evidence of Causation 101-16
      i. Overview: When there is no direct evidence, look to circumstances to see if you can infer specific causation.
      ii. CASE: Hoyt v. Jeffers. P’s hotel was damaged by fire that P claims was started by D’s chimney. No direct evidence, so look at circumstantial evidence. Court allowed evidence from before the time D raised the chimney because there was also a fire after this case, so an uninterrupted series of fires was apparent (prior evidence became ok to use). The issue is whether the circumstances here can lead to an inference of specific causation. P won here.
iii. **CASE: Smith v. Rapid Transit.** P claimed that D’s bus came toward her and made her veer off the road and collide with a parked car. Not enough circumstances to show that it was D. D had three bus routes, there, but maybe it was a charter bus. The most that could be said about this case was that maybe the mathematical probabilities of it being D’s bus favored the idea that it was D, but you can’t just rely on that.

a) Preponderance of the evidence works when it appears more likely in the sense that actual belief in its truth, derived from the evidence exists despite any doubt that might be there—it is much more than a mathematical number.

iv. From Note Material: **Important points about General Causation:**

a) General causation issue arises with some frequency in cases involving exposure to hazardous substances and can be critical to P’s chances in these contexts

b) American court have begun to scrutinize technical expert testimony, much of which relates to general causation, and

c) Even when P’s technical proof of general causation is solid and persuasive, specific causation—i.e. did exposure to the toxic substance cause this P’s injury—also must be established.

C. Liability 116-31

i. **Alternative Liability**

a) **CASE: Ybarra v. Spangard.** P went in for appendectomy, was anesthetized, and when he woke up, he had a sharp pain, which developed into paralysis and atrophy. He sued all the people at the hospital who would have had anything to do with an instrumentality that harmed him.

1) **Holding:** The control, at one time or another, of one or more of the various agencies or instrumentalities which might have harmed the P was in the hands of every D or of his employees or temporary servants. The Ds now have the burden of proof.

a) We don’t give D the burden of proof just because D is in best position to have evidence (this would be like saying witnesses of car accident should have burden of proof instead of the drivers); instead, we give Ds the burden here because they all work together; they can sort it out among themselves.

2) **NOTE:** though the edited version of this case does not say so, the court was applying res ipsa, because no specific evidence of negligence. It’s easiest to consider P’s body as the instrumentality over which most or all of the Ds had control at some point.

b) **Note:** Difference between *Summers* and *Ybarra* is that in *Summers*, P could at least prove that both Ds breached a duty. In *Ybarra*, P was in various people’s control at various times.

ii. **Joint and Several Liability**

a) **Overview:** Jointly and severally just means that Ds are sued together, but they are still liable separately for the whole amount.

1) At common law, two situations gave rise to joint and several liability: a) D’s acted in concert to cause the harm, and b) Ds acted independently but caused indivisible harm. Historically, Ds could only be joint tortfeasors in situation (a), because of procedural obstacles.

a) Modern law allows joint tortfeasors in both situations. Ex) A and B are both racing cars in the street, and A runs over C. Both A and B will be liable to C.

2) Most states allow a right to contribution under the Uniform Contribution Among Tortfeasors Act:

a) Where two or more persons become jointly or severally liable in tort for the same injury to person/property/wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

b) No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.
c) If joint tortfeasor makes a settlement instead, the right to contribution

does not apply to him anymore.

3) In determining pro rata shares, relative degrees of fault shall NOT be considered,

according to Act above. This would be like comparative fault.

4) Ds who are jointly liable can be joined in a single suit, but they need not be.

5) Ds are both liable in full, although P is only entitled to one full recovery.

b) CASE: Summers v. Tice. Two Ds and P went hunting, and both D’s shot at a bird and

ended up hitting P in the face. But it was not clear whether both of P’s injuries came from

one D, or whether each D caused on injury.

1) When two or more persons by their acts are possibly the sole cause of harm, or

when two or more acts of the same person are possibly the sole cause, and the P

has introduced evidence that one of the two persons, or one pf the same person’s

two acts, is culpable, then D has burden of proving that the other person, or his

other act, was the sole cause of the harm.

2) Rationale: P shouldn’t be denied harm just because he can’t say which D did it.

ii. Market Share Liability pg. 120

a) In the classic case of D-identification, P is harmed by a defective product manufactured

and distributed by many companies, under circumstances where P cannot prove which

company actually produced and distributed the harm-causing product unit.

1) Ex. of problems leading to market share liability: Sindell v. Abott Labs. CA court

rejected the “alternative liability” theory from Summers and Ybarra. Not only did

the companies lack any comparative advantage in determining which company’s

drug had caused the cancer, but the numbers of victims were also much greater,

and not all of the possible Ds could be joined in one legal action. Plus, allocating

liability pro-rata among the companies overlooked the reality that some

companies produced much more than others.

a) Sindell court adopted the “market share theory” to overcome these

problems: When P joins the manufacturers of a substantial share of the

relevant DES market, the burden shifts to each D to prove it did not

produce the drug that her mother ingested.

b) Ds’ market shares would approximate the probability that they caused

P’s injury.

2) Later, in Collins v. Eli Lilly Co., Sindell was modified in case it would harm P.

Collins court said that P needed to only sue one D and allege that the P’s

mom took DES, that DES caused the P’s injuries, that D produced/marketed

the type of DES taken by P’s mom, and that D’s conduct in producing or

marketing the DES breached duty to P. Once prima facie case proved, burden

shifted to D to prove time/geography didn’t match up to P’s case.

D. Concurrent and Successive Causes 131-5

i. CASE: Dillon v. Twin State Gas & Electric Co. Decedent was sitting on girder of bridge and

started to fall, so he grabbed the electric wire to save himself and was electrocuted. The wire

generally was not live during the daytime. Court overruled D’s motion for directed verdict,

because there were too many issues of fact to consider. Various possibilities:

a) If he would have fallen anyway, even without being electrocuted, P would have had a

shortened life or would have died. If it were found that he would have fallen and died, D

wouldn’t be liable for anything but any suffering caused by the shock.

b) RULE: If it should be found that but for the current he would have fallen with serious

injury, then the loss of life or earning capacity resulting from the electrocution would be

measured by its value in such injured condition. [Damages for wrongful death mainly

come from present value of future stream of earnings.]

c) We’re doing 2 things—assume the breach of duty (once you get past trespass issue), and

now look at 1) cause and 2) injury

1) From this, issue becomes, how much of the injury was caused by D’s breach of

duty—“but for D’s breach of duty, would the P have been killed? Injured as

much as he was?”
ii. **CASE: Kingston v. Chicago & NW Ry.** P’s property was damaged in a fire, but there were two separate fires that were both identified as causes. One fire’s source was identified, so a D could be named, but the other (although established that it was manmade) had an unidentified source.

   a) Both sources would be jointly liable if both identified. So if one not identified, the one who is identified is fully liable.
   
   b) Note how court focuses on the jury’s interpreting that the other fire was manmade (if it weren’t, then D might be off the hook, because natural circumstance; not a joint tortfeasor).
   
   1) **If the other fire had been caused by lightning, D would not be liable even if D were still negligent, because there would be no damages—like in Dillon.**
   
   c) Shift burden to D.
   
   d) **To permit each of the two wrongdoers to plead the wrong of the other as a defense to his own wrongdoing would permit both wrongdoers to escape and penalize the innocent party who has been injured by their wrongful acts.**
   
   e) Always ask “but for X would Y have occurred?” If the answer is yes, then X wouldn’t be the cause. But *Kingston* is an unusual case with this, because both were causes.
   
   f) Modern courts would be split on whether to rule the same way as in *Kingston*. More reluctant to hold someone wrongly liable.

E. Vicarious Liability 135-45

V. Proximate/Responsible Cause and Injury

A. Overview:

   i. Should it be enough to ask “but for…”? Maybe not. Suppose there is a car accident on a rainy night when D was driving safely but lost control and killed someone. P’s lawyer couldn’t say that D himself was an accident b/c parent’s birth control failed, and if that had not failed, D wouldn’t even be here to cause the accident.

   a) This leads us into proximate cause.

B. Foreseeable Consequences

   i. Foreseeable Plaintiffs 257-58, 264-73

   a) **CASE: Palsgraf v. Long Island RR.**

   1) **Majority:**

   2) Cardozo says there is no issue of causation here. He’s saying there was no duty to begin with. Focus on duty, without which no point discussing causation.

   3) Guard’s conduct wrongful to the package, not to P. Negligence is not actionable unless it involves the invasion of a legally protected interest. Even if guard had thrown package down intentionally, still not liable to P because wasn’t foreseeable that P would be injured.

   4) Negligence is a term of relation, not abstract.

   5) **Dissent:**

   6) Wrongdoer should be liable for all the act’s proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger.

   7) Proposed rule: Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others; liable to anyone injured, not just those foreseeable people.

   8) One limitation: Draw reasonable line between cause and proximate cause (ex. about RR setting fire to my house, but neighbor can’t claim RR as proximate cause to his house); question of expediency.

   9) But for explosion, P would not have been injured, no intervening cause

   b) **CASE: Solomon v. Shuell.** Decedent thought two people needed help and tried to rescue them, and was killed in the process. The two people were police, though not in uniform.

   1) **Rescue doctrine:** tortfeasor whose negligence endangers the victim owes the victim’s rescuer a duty of reasonable care. Since rescuers, as a class, are foreseeable, the tortfeasor’s duty of care owed to the rescuer is independent of that owed to the victim.

   2) Rescue doctrine serves two purposes:
a) Establishes causal nexus linking tortfeasor’s negligent conduct to the rescuer’s injuries, and therefore the fact that the rescuer voluntarily exposed himself to an increased risk of harm was not, as a matter of law, deemed to be a superseding cause of his own injuries that could then discharge tortfeasor’s liability.

b) When the rescue attempt itself was reasonable, the rescuer’s recovery was not otherwise absolutely barred by affirmative defense of contributory negligence merely because the rescuer voluntarily exposed himself to an increased risk of injury to save the 3rd person.

   a) ***Rescue doctrine says that even if the decision to rescue was foolish and clear that the rescuer couldn’t have actually saved the victim, we’re still going to let the jury decide whether the rescuer should be contributorily negligent, liable.

   b) ***Only if we conclude that the rescuer’s acts were SO far out of bounds would we conclude as a matter of law that the rescuer’s act broke the chain of causation, and the D’s act wasn’t the proximate cause of rescuer’s injuries.

3) Two step analysis:
   a) See what reasonable person would have done (balance utility + risk)
   b) See whether rescuer acted in reasonable manner; if not, then his recovery is reduced by his comparative degree of fault.

4) Exception to rescue doctrine: Firefighter’s Rule

ii. Foreseeable Results 273-87

a) Overview:
   1) If D negligently injures P, D is liable even if the extent of P’s injuries was unforeseeable. [thin skull rule]
   2) Most proximate cause issues are resolved by just, using reasonable person standard.
   3) Proximate cause issue is different from the duty issue, because the duty element of negligence focuses on whether D’s conduct foreseeable created a broader zone of risk that poses a general threat of harm to others; The proximate causation element on the other hand, is concerned with whether and to what extend D’s conduct foreseeable and substantially caused the specific injury that actually occurred.

b) CASE: Marshall v. Nugent. P was passenger in car. Socony came around the bend and intruded P’s lane, causing P’s car to skid off the road. No one injured yet. Socony stopped truck, blocking his lane. P volunteered to walk up the hill to warn oncoming traffic. Then D drive around the curve and hit P. P sued D and Socony. Issue here with Socony:

   1) Socony was the reason P originally was placed in danger; even though that act was over and done with by the time D came, the consequences of it were still “in the bosom of time.” All the risks from Socony’s negligence weren’t done yet, at the time D hit P.

   2) BUT, there is a limit—see when situation had stabilized from Socony’s actions. Ex) If there had just been a delay because of Socony, and P then resumed driving and then got in an accident 30 min later, he couldn’t recover just because Socony caused the delay to make P get there when he did.

   a) Still need to consider cause in fact.

b) CASE: Watson v. Kentucky & Indiana Bridge & R. Co. Gasoline leaked from D’s rail car, and was on the street. Duerr threw match in it. Evidence conflicted as to whether he did so inadvertently or maliciously.

   1) The mere fact that the concurrent cause or intervening act was unforeseen will not relieve D who is liable for the primary negligence, but if the intervening agency is something so unexpected or extraordinary that he could not have anticipated it, he will not be liable (i.e. if Duerr threw match maliciously/criminal act).
a) Main thing to consider: foreseeability.

b) MODERN courts may not agree with this [they would at least leave question for jury]; they may want to hold RR liable anyway, because RR is the one with the dangerous tank so should have duty to take care. Also, both ways the match fell are proximate causes to P’s injury. Plus, deep pocket.

2) But Note Case Kush v. City of Buffalo made the point that even though Watson is correct in how it treats criminal intervening acts, when the intervening intentional act of another is itself the foreseeable harm that shapes the duty imposed, the D who fails to guard against such conduct will not be relieved of liability when that act occurs. (In this case, the teenagers stole the chemicals D was supposed to guard safely.)

3) D may also be liable for any further injury P sustains after the injury caused directly by D; i.e. if D caused car accident with P, P was airlifted to the hospital, and the helicopter died.

d) CASE: Kinsman Transit. Barge broke loose because of negligence of handlers. Barge broke a second vessel and both rammed a drawbridge, got stuck in the debris, and stopped large chunks of ice, damming up the river, and causing a flood upstream.

1) Where damages resulted from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable, unforeseeability of the exact developments and of the extent of the loss will not limit liability.

   a) The existence of a less likely additional risk should add to liability, not subtract from it.

e) Restatement § 431 What Constitutes Legal Cause

   1) The actor’s negligent conduct is a legal cause of harm to another if

      a) His conduct is a substantial factor in bringing about the harm, and

      b) There is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm

C. Other Approaches to Proximate Cause

i. Nonliability for Foreseeable Consequences—Mental/Emotional Harm 287-314

   a) CASE: Waube v. Warrington. P was mother who saw from her window, her child getting hit by a car and dying.

      1) D’s duty and P’s right can neither justly nor expeditiously be extended to any recovery for physical injuries sustained by one out of the range of physical peril as a result of the shock of witnessing another’s danger.

      2) Apply Palsgraf standard.

      3) Modern view does allow a right of action when the emotional distress or shock is first occasioned by fear of personal injury to the person sustaining the shock.

   b) CASE: Dillon. Mom and sister of P were at the scene when the victim was injured by D’s negligent driving of automobile. They both witnessed the incident.

      1) Chief element of duty is foreseeability (not about proximate cause)

      2) No fixed rule, but there can be guidelines: 3 factors: 1) P’s location close? 2) shock direct from impact of D’s act? 3) P and victim closely related?

      3) General test—court left it up to other courts to tweak—Dillon left things uncertain!!

      4) Court seems concerned about: false claims and floodgates

   c) CASE: Thing. P’s son was injured in a car accident. P did not witness the car accident, but as soon as she heard, she came to the scene and saw her bloody and unconscious child.

      1) Held: P may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but ONLY if, said P:

         a) 1) is closely related to the injury victim,

         b) 2) is present at the scene of injury producing event at the time it occurs and is then aware that it is causing injury to the victim, and
c) 3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.

2) Foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when damages sought are for intangible injury. Need to limit liability. It’s arbitrary to limit to close relatives,

3) Unlike an award for damages for IIED, which is punitive, the award for NIED simply reflects society’s belief that a negligent actor bears some responsibility for the effect of his conduct on persons other than those who suffer physical injury.

4) Concurring: should reinstate zone of danger

d) Supreme Court of WI overruled Waube and favored deciding on a case by case basis.
Court stated: historically, NIED raised two concerns:
1) Establishing authenticity of the claim and
2) Ensuring fairness.

c) Public policy concerns brought up by WI court, to be considered for each case:
1) Whether injury is too remote from the negligence
2) Whether the injury is wholly out of proportion to the culpability of the negligent tortfeasor
3) Whether in retrospect it appears to extraordinary that the negligence should have brought about the harm
4) Whether allowance of recovery would place an unreasonably burden on the negligent tortfeasor
5) Whether allowance of recovery would be too likely to invite fraudulent claims
6) Whether allowance of recovery would enter a field that has no sensible or just stopping point

f) Note: you can’t sue just because you were scared you might be hurt—must be either a bystander or an actual victim

ii. Direct Victim
a) CASE: Burgess v. Superior Court. P had c-section, and several hours after delivery, she awoke from sedatives and realized that her baby suffered brain damage from O2 deprivation.

1) From Molien, cited in the case: two important principles from this case: 1) damages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact, and 2) cause of action to recover damages for negligently inflicted emotional distress will lie, notwithstanding the criteria imposed upon recovery by bystanders, in cases where a duty arises from a preexisting relationship is negligently breached.

2) The doctor owed a direct duty to the woman, and court also focused on the birth process and the connection between mother and baby.

3) “Because the professional malpractice alleged in this case breached a duty owed to the mother as well as the child, we hold that the mother can be compensated for emotional distress resulting from the breach of the duty.

4) Always a question of where to draw the line—prenatal? After?

iii. Loss of Consortium, Support, etc.

a) CASE: Feliciano v. Rose

1) Two Ps lived together, used one last name, filed joint tax returns, had joint savings accounts, and acted as a de facto married couple. He was injured at work, and they joined to sue the employer for loss of consortium.

2) As a matter of policy, it must be recognized that tort liability cannot be extended without limit. Must distinguish between marriage relationship and all the others that could arise with various people behaving like these people did.

b) CASE: Borer v. American Airlines. P’s mother was walking in AA terminal and a lighting fixture fell on her head and injured her.

1) Taking into account all considerations which bear on this question, including the inadequacy of monetary compensation to alleviate that tragedy, the difficulty
of measuring damages, and the danger in imposing extended and
disproportionate liability, we should not recognize a non-statutory cause of
action for loss of parental consortium.

2) **Dissent**: All the policy reasons majority uses were actually rejected in *Rodriguez*.
   a) Re: intangible loss → In *Rodriguez*, court said loss of consortium is
      primarily mental suffering which can be compensable in damages.
   b) Re: difficult to measure → no harder to do this than with husband/wife
   c) Re: risk of double recovery → can be avoided by use of joinder and
      appropriate jury instructions
   d) Three distinctions between h/w and child are refuted as well:
      a) Nonsexual loss is at least as great as the sexual loss.
      b) It’s not true that this would result in larger liability and social
         cost because so many children, because statistically, there would
         be more spouses suing than minor children. Actually less
         chances for lawsuit with children.
      c) Just because other jurisdictions are doing something doesn’t
         mean it is right.

3) Note: if it had been wrongful death, kids would have been able to recover for
   sure

iv. **WRONGFUL DEATH**
   a) Two basic types of statutes (most states have adopted both):
      1) Survival statutes prevent abatement of existing causes of action due to the death
         of either party.
         a) Basic measure of recovery is what the P’s decedent would have been
            able to recover had he or she survived
      2) In many jurisdictions, wrongful death statutes create causes of action that allow
         recovery when tortuous conduct of the D causes someone’s death
         a) Basic measure of damages is the harm caused to the decedent’s family
            by the D’s conduct
         b) Two approaches:
            a) Loss, grief, anguish, etc. suffered by the surviving family
               members and next of kin of the decedent
            b) Pecuniary loss suffered by the decedent’s estate
VI. Defenses

A. Contributory Negligence
   i. **CASE: Butterfield v. Forrester.** Under *contributory negligence*, even if P was 1% negligent, couldn’t recover at all. But it’s really hard to break it up into percentages, just speak in relative terms.

B. Last Clear Chance
   i. **CASE: Davies v. Mann.**
   ii. Restatement § 479: Last Clear Chance: Helpless Plaintiff
      a) A plaintiff who has negligently subjected himself to a risk of harm from the D’s subsequent negligence may recover for harm caused thereby if, immediately preceding the harm,
         1) P is unable to avoid it by the exercise of reasonably vigilance and care, AND
         2) D is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm, when he
            a) Knows of P’s situation and realize or has reason to realize the peril involved in it OR
            b) Would discover the situation and thus have reason to realize the peril, if he were to exercise the vigilance which it is then his duty to P to exercise
   iii. Restatement § Last Clear Chance: Inattentive Plaintiff
      a) P who, by the exercise of reasonably vigilance, could discover the danger created by D negligence in time to avoid the harm to him, can recover but only if the D
         1) Knows P’s situation, and
         2) Realizes or has reason to realize that P is inattentive and therefore unlikely to discover his peril in time to avoid the harm, and
         3) Thereafter is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm.

C. Assumption of Risk
   i. **CASE: Meistrich v. Casino Arena Attractions.** Except in instances of express agreement by P to assume the risk involved in D’s conduct, doctrine has no legal vitality, and P’s conduct is to be gauged by the rules of contributory negligence. (regarding issue as to whether to view assumption of risk has a separate defense)
      a) NOTE: this contradicts Restatement, which treats it independently (pg. 358)
   ii. This case is only about an area where injury or damage was neither intended not expressly contracted to be non-actionable. TWO MEANINGS here:
      a) Primary—alternate expression for the proposition that D was not negligent i.e. owed no duty or did not breach the duty owed
         1) Here, accurate to say P assumed risk whether or not he was at fault (we get this by saying D is not negligent)
      b) Secondary—affirmative defense to an established breach of duty
         1) In this situation, it is incorrect to say that P assumed the risk whether or not he was at fault.
         2) **this becomes a mere phase of contributory negligence, the total issue being whether a reasonably prudent man in the exercise of due care a) would have incurred the known risk, and b) if he would, whether such a person in the light of all the circumstances including the appreciated risk would have conducted himself in the manner in which P acted.**

D. Comparative Negligence
   i. It has replaced contributory negligence in every state, often by statute. Occasionally by judicial decision (but this also has been followed by statute in many cases).
      a) This means that you have to see what comparative negligence is in your particular jurisdiction.
   ii. Categories:
      a) **Pure:** If P is 99% and D is 1% negligent, P can recover 1% damages.
      b) **Modified:**
1) **The 51% Rule**: If P’s negligence > D’s, no recovery at all
2) **The 50% Rule**: If P’s negligence = D’s, no recovery

iii. Suppose P’s negligence is 50%, D1 is 25%, and D1 is 25%.
   a) Under pure comparative fault, P could recover 50%
   b) Under 50% Rule, P recovers nothing
   c) Under the 51% Rule, P recovers 50% (because add up the 2 Ds)

E. **Joint and Several Liability**
   i. In above example, P could recover the 50% from either of the Ds.
   ii. If there is *contribution* in the state, then D1 can recover half of what he paid out from D2, provided D2 has the resources.
   iii. **Modified Unity Rule**: D1 and D2 are each only liable for 25%, so eliminates the need for joint and several liability. So, P can only recover 25% of his damages from each one.
   iv. **Individual Rule**: P’s negligence was greater than either of the D’s negligence individually, so he recovers nothing.

F. The notion of j/s liability was that when two+ people were liable, and you couldn’t divide their negligence accurately, hold them both liable.
   i. Once you go to comparative negligence, we undermine that argument because then we DO separate liability by percentages. This shows we DO know how to allocate fault, so if we can do it here, we should be able to get rid of joint/several liability and always allocate it.