Outline for Torts

1. INTERNATIONAL TORTS

a) BATTERY

i. General:
   1. Concept of battery: the intentional, unprivileged, and either harmful or offensive contact w/ the person of another.
   2. Prima facie case of battery can be established by unlawful intent and the harmful or offensive contact. To win the case, P has to show the additional element of causation between the contact and the harm he received.
   3. If D has the privilege to inflict harm upon the P, he has the duty to prove this privilege as a defense. P does not have duty to show the absence of the privilege as part of the prima facie evidences.

ii. Unlawful intent
   What consequences must the D intend?
   1. If the act is unlawful, the intent is also unlawful. Vosbury v. Putney (P and D were pupils. P was kicked by D on his previous wound and suffered severe injuries b/c of the kick. The court found for P, awarding full amount of injuries.)
      a) how to decide whether the act is unlawful?
      b) place, time, effect and other circumstances of the case. e.g. in Putney, in a classroom, during school hours and the kick was a violation of order in the classroom.
   2. It is not necessary that D had intent to cause harm, intent to act was enough.

Which Mental States Constitute Intent?

3. The act must be done for the purpose of causing the contact or apprehension or w/ knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced.

4. “Doctrine of Constructive Intent”: If the plaintiff had the knowledge of the substantial certainty of risk that is bringing the harmful result, he has the intent to cause harm and is liable for this conduct. Garrant v. Dailey (D was visiting P and moved the chair on which the P previously sit on, the P fell on the floor by attempt to sit. JNOV entered for the P.)
   a) Knowledge is a factual issue. The knowledge can be inferred from rules of game, (Problem 1), the age of D…

5. When the intent is subject, the little possibility that the harmful conduct will be resulted is not relevant. Garrant.

6. If a child committed a tort w/ force, he is liable to be proceeded against as any other person would be. Garrant.
7. Intentional torts can be committed by minors, but the age may vary in different courts.

8. Doctrine of Constructive Intent may play a role in employment-related cases. Also, arguably, it can be used in product liability cases.

9. Different from Garrant’s approach, i.e. the actor did not subjectively desire the result happen, the other possibility is that the actor DID subjectively intend the result to happen. The result of this intent is that the actor is liable for the harm as long as it did happen, no matter how little possibility it was.

10. “Transferred intent”: one should still be liable even if the victim was not the party that in his original desire.

11. Intent of Offensive Conduct is objective standard, actor does not need to intent to offend.

iii. Contact
What constitute Conduct?
Which Intended Conduct are Wrongful?

1. Restatement §13: harmful contact
An actor is liable to others for battery if
(a) he acts intending to cause harmful or offensive contact w/ the person of the other or a third person, or an imminent apprehension of such a contact, and
(b) an harmful contact with the person of the other directly or indirectly result.

2. RS § 15: the harmful conduct is any physical impairment, even though the alteration caused no other harm.

3. RS § 18: offensive contact
   a) An actor is subject to liability to another for battery if
      i. He acts intending to cause harmful or offensive contact w/ 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 result.

4. The contact requirement does not mean that part of D’s body must come into direct contact w/ a part of P’s body. Garrant (D moved the chair and caused P’s body came into harmful contact w/ the ground)

5. The contact does not need to have physical; contact with clothing or object that is closely identified with the body can also constitute contact. Fisher v. Carrousel Motor Hotel (D’s manager snatched the plate from P when he was standing in line for a luncheon in D’s club, insulting him with racial discriminative language. P was embarrassed at present of many colleges.)

6. The statement accompanied the conduct is evidence for its offensiveness. Otherwise, the D may not be liable for merely taking
away something from P. **Fisher.**

7. P’s apprehension of harm is not necessary in the claim of battery.

8. The standards of “offensiveness” are based on the standards of a reasonable person. P’s susceptibility is NOT taken into account UNLESS the defendant has specific knowledge. **Leichtman v. WLW** (D was the host of a radio property in which P was a guest. P was a actionist against smoking and D smoked to his face by purpose.)

9. No matter how trivial the incident, a battery is actionable, even if damages are only one dollar. **Leithman**

---

**iv. Harm**

1. **Thin-skull/ Egg shell rule: person who makes the act should be liable for all the direct consequences of the wrongful act even though it is not anticipated by the wrongdoer. Putney.**

2. Even if the possibility that the injuries would happen is little, the defendant should still be liable for the injuries that actually happened if he subjectively intended to cause it. **Garrant**

3. P is entitled to recover for mental sufferings due to the willful battery, even if physical injury is absent. **Fisher.**

v. When there is no consent or an implied license, the defendant does not have privilege to touch the plaintiff.

---

**b) ASSAULT**

i. **General:**

1. **RS § 21:**

   a) A actor is subject to liability to another for assault if

      i. He acts intending to cause a harmful or offensive contact w/ the person of the other or a third person, or an imminent apprehension of such a contact and

      ii. The other is thereby put in such imminent apprehension.

   b) An action which is not done w/ the intention stated above does not make the actor liable to others for an apprehension caused thereby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

2. **RS § 29**

   a) To make an actor liable for assault he must put the other in apprehension of an imminent contact.

   b) 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 an assault under the rule in §21.

ii. The standard of apprehension

1. must be objective: reasonable person in P’s circumstances will have
the same apprehension.
2. must be subjective: P must have this apprehension
3. must be apprehension of conduct
4. There must be an apparent present ability and opportunity to commit
   the threatened battery.

   iii. It is not necessary that the D intended to commit a battery: D may only
        intend to cause the apprehension.

   iv. To constitute an assault, there must be an attempt coupled w/ a present
       ability to do personal violence to the party. Read v. Coker, (P was
       surrounded by D's workers as to strike him unless he left. No assault
       since lacks of present capability of harm.)

   v. Assault is more than a threat of violence. There must be some act done
      denoting a present ability and an intention to assault. Read

   vi. It doesn’t matte whether there is actual ability to harm or not, if the
       appearance of the harm is sufficient for a reasonable person to
       apprehend the risk of harmful conduct, it is enough to establish an
       assault. Beach v. Hancock (D pointed to the P w/ a gun unloaded. P
       didn’t know at that time that the gun was unloaded.)

   vii. Concern about breach of peace and needs for security enable the P to
        cover from a reasonable fear, regardless of the trivial damages. Beach.

c) FALSE IMPRISONMENT

   i. Generally
      1. RS § 35:
         a) An actor is subject to liability to another for false imprisonment
            if
            i. he acts intending to confine the other or a third person
               within boundaries fixed by the actor, and
            ii. his act directly or indirectly results in such a confinement
                of the other, and
            iii. The other is conscious of the confinement or is harmed by
                 it.

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

      ii. Intent: should be done w/ intent to cause confinement or substantial
           knowledge that the confinement will result.

      iii. Confine:
           1. Generally, merely inconvenience cannot constitute confinement but
              if the degree of inconvenience is so great that the P cannot
              practically leave, it is sufficient.
2. Indirect confinement can be denial of tools that are needed to leave.
3. Merely moral influence will not be sufficient. Whittaker.
4. Does not need to use force or threat to use force.
5. When a man is restrained of his personal liberty by fear of a personal difficulty, which amounts to a false imprisonment. Coblyn v. Kennedy’s Inc. (a old man was suspected to be a thief and was stopped in public by two guards, who garbed his arm and threat him “better to go”.)

iv. Boundaries: when the P was allowed to leave a room but not granted a key to the room, or denied of boat to ashore, it equals to locking w/ the room or boat.
1. When the boundaries are as large as a country, it is not confinement.

v. Damages:
1. Damages cannot be excessive as to the degree of loss of liberty. Whittaker v. Sanford, (the court finds that a woman that was not allowed to ashore still have freedom in the boat, out and in to do shopping and was respectfully treated.)
2. Merely lost part of freedom but no humiliation or disgrace will not justify.
3. Where damages follow as a consequence of the plaintiff’s detention w/ justification, an award may include the body injuries. And although reasonably perceived false imprisonment invites escape, the victim still has the duty to exercise reasonable care to his own safety. Sindle

vi. **Defense** to false imprisonment:
1. consent: When the P did not present objection, consent is implied and D was not liable for the confinement. Rougeau v. Firestone Tire & Rubber Co. (P did not ask for leave or show uncomfortable in the room. P was allowed to leave when he felt ill. The ct found P was not totally confined.)
2. justification: Restraint or detention that is reasonable under the circumstances in time and manner and imposed for preventing another from inflicting personal injuries or interfering w/ or damaging real or personal property in one’s lawful possession or custody is not unlawful. Sindle v. NY CTA, (a pupil was injuries when trying to jump out of the window of a bus, the driver of which did not stop to prevent passenger pupils from damaging the bus.)
3. Merchant’s “probable cause”
   Common law defense which was codified in Cal.: The justification needs “reasonable grounds” and “probable cause”, which are under objective standards. Coblyn.

**d) INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS**
i. **RS § 46**

1. One who by **extreme and outrageous** conduct *intentionally* or *recklessly* causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

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

   b) to any other person who is present at the time, if such distress results in bodily harm

ii. Generally, only mental or emotional suffering is not actionable, but when the mental distress is so intense so that it is reasonably foreseeable that the illness or other bodily harm might result.

iii. Even though D intentionally subjected another to mental distress w/o intending to cause bodily harm would nevertheless be liable for the consequential bodily harm if he should have *foreseen* that mental distress might cause such harm. *State Rubbish Collectors Ass’n v. Siliznoff* (D threatened to beat up P and he suffered from vomiting and other physical reaction to this threat.)

iv. The conducts need to be extreme and outrageous.

v. Claim can arise from knowledge of the P’s susceptibility to emotional distress b/c of physical, mental condition or peculiarity; however, merely knowledge of the susceptibility cannot make mere insult as extreme and outrageous.

vi. The claim can be stronger where constitutional rights involved; or special parties such as health care provider, common carrier or innkeeper.

vii. Certain situations that IIEM may arise:

1. collection of debts that pass beyond the realm of acceptable business practice
2. circumstances involve Constitutional rights
3. mishandling of corpses and related funeral and burial services
4. hospital and health care providers

2. **DEFENSES**

   a) **CONSENT**

i. **Capability**

   1. The member of a class protected by statute consent to the act that was prohibited if she is clear of the nature and quality of her act. *Barton v. Bee Line, Inc.*, (minor under 18 had intercourse of D’s
employee had no claim under the Penal Code which prohibited absolutely have sexual intercourse w/ girl under 18.)

ii. Implied Consent:

1. Verbal consent is not necessary if conducts and circumstances can imply P’s consent.
   
   If P’s behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feelings may have been. O’Brien v. Cunard Streamship Co., (a passenger in D’s boat was voluntarily in line for vaccination. She lifted up arm after surgeon told her there was no mark so she needed to be vaccinated again.)
   
   a) Efficiency consideration and public health concern will not require the nurse to ask everyone’s expressive consent to be vaccinated.

2. Consent exists where if the P had been given opportunity, he would have consented to D’s otherwise assault or battery conducts.
   
   As long as the surgeon used the due care to further the originally consented surgery, he is not liable for failure in not getting consent when the P was not capable. Kennedy v. Parrot, (D took an additional surgeon after opening the body of P and discover new problems, which caused injuries to P.) (this is a extended consent.)
   
   In emergency, there is no need for consent.

iii. The consent was not effective if the P should be given a chance to be informed and make a choice of whether to accept the operation or not; otherwise, the D will be liable for battery. Bang v. Charles T. Miller Hospital, (P was a patient of D who did not fully explained to him the nature and consequences of the operation.)

iv. When there is no emergency, the patient has the right to be informed before the operation which, if performed, will reduce the risk of infection, but makes him sterilization. Bang

v. Special issues in surgeon/patients cases:

1. Bang case is the extension of previously consented operation. Bang is minority rule, not followed by lots states.

2. the case can also arise when the doctor fails to explain to the patient before the surgeon.
   
a) It can be either a battery case or a negligence case.

b) Difference:
   
i. Negligence: doctor can escape liability if the failure to disclose is reasonable.
   
   ii. Or the failure to disclose did not cause harm: patient would have consented anyway.

3. To what extent the disclosure will be reasonable and for best interests of patient? (distinction between revealing risks and side
effects and nature and process of the operation)
a) Too little, not sufficient to make an informed decision.
b) Too much would confuse the patient and not efficient for the medical treatment.
c) Revealing risks may be too overwhelming that the patient is reluctant to take reasonable risk
4. Express consent to be the condition of furtherance will negate the effectiveness of the operation
5. Layman may not be in a right position to make medical decision.

vi. How to avoid liability in surgery?
1. Kennedy is a minority rule.
2. The self-help means adopted by the health care provider, e.g. consent form:
a) Con: ct not necessarily take the contract as consent but may still look into the facts; can be a void K b/c of the duress or unconsciousness. over delivering information will make the patient hard to make a sound decision of his own health; adding the anxiety to the patient and reject a safe procedure
b) Pro: simplified
3. Any alternative of the consent form?
a) Conversation between patient and doctors: make sure that the patient was knowingly consent to the operation
i. The problem: the patient may not focus on the details and recalls different version after the operation
ii. Should have other witness on site
iii. Or record the conversation
(a) Piracy problem may arise
4. If the patient is a minor and parents refuse the medication because of the religion
a) Person has the right to decide which medication they consent to
b) If parents do not consent to operation which saves their children’s lives only because the operation goes against their religious belief, the ct will appoint a guardian for the child then the guardian make the consent.

vii. Consent in Professional games
1. The purpose of the rule of the games is to prevent the injuries. Therefore, there is the logic that when certain conducts are prohibited by the rule of the games, the players will not expect the actions therefore no consent to these conducts. Hackbart
2. The intentional infliction of injuries may be outside of the boundaries of what the players have implied consented to by participation in the game. Hackbart.

b) SELF-DEFENSE
i. Use of deadly force

1. RS § 63

   (1) An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.

   (2) Self-defense is privileged under the conditions stated in Subsection (1), although the actor correctly or reasonably believes that he can avoid the necessity of so defending himself, (a) by retreating or otherwise giving up a right or privilege, or (b) by complying with a command with which the actor is under no duty to comply or which the other is not privileged to enforce by the means threatened.

2. RS § 65

   (1) Subject to the statement in Subsection (3), an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that (a) the other is about to inflict upon him an intentional contact or other bodily harm, and that (b) he is thereby put in peril of death or serious bodily harm or ravishment, which can safely be prevented only by the immediate use of such force.

   (2) The privilege stated in Subsection (1) exists although the actor correctly or reasonably believes that he can safely avoid the necessity of so defending himself by (a) retreating if he is attacked within his dwelling place, which is not also the dwelling place of the other, or (b) permitting the other to intrude upon or dispossess him of his dwelling place, or (c) abandoning an attempt to effect a lawful arrest.

   (3) The privilege stated in Subsection (1) does not exist if the actor correctly or reasonably believes that he can with complete safety avoid the necessity of so defending himself by (a) retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling of the other, or (b) relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest.

3. § 70. Character And Extent Of Force Permissible

   (1) The actor is not privileged to use any means of self-defense which is intended or likely to cause a bodily harm or confinement in excess of that which the actor correctly or reasonably believes to be necessary for his protection.
(2) The actor may be privileged in self-defense to do an act which is intended to put another in immediate apprehension of a harmful or offensive contact or other bodily harm or a confinement, which is in excess of that which the actor is privileged to inflict, if his act is intended and reasonably believed by him to be likely to do no more than to create such an apprehension.

ii. Where a D tries to justify his acts by a plea of necessary self-defense, he must prove that he does not only acted honestly in using force, and his fear was reasonable under the circumstances; and also as to the reasonableness of the means made use of. Courvoisier v. Raymond. (D was policeman on duty at night when P was being robbed, and was shot by P when he approaching him w/ warning.)

c) Defense for property

i. RS§77
An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another's intrusion upon the actor's land or chattels, if
(a) the intrusion is not privileged or the other intentionally or negligently causes the actor to believe that it is not privileged, and
(b) the actor reasonably believes that the intrusion can be prevented or terminated only by the force used, and
(c) the actor has first requested the other to desist and the other has disregarded the request, or the actor reasonably believes that a request will be useless or that substantial harm will be done before it can be made.

RS § 79
The intentional infliction upon another of a harmful or offensive contact or other bodily harm by a means which is intended or likely to cause death or serious bodily harm, for the purpose of preventing or terminating the other's intrusion upon the actor's possession of land or chattels, is privileged if, but only if, the actor reasonably believes that the intruder, unless expelled or excluded, is likely to cause death or serious bodily harm to the actor or to a third person whom the actor is privileged to protect.

ii. RS 63 (1)(a): could have retreated

iii. RS 65 (1), (3): no privilege when can avoid by reasonably believing that he can avoid by retreating

iv. No deadly force should be allowed to protect property interest.

v. Devices such as springing gun w/ a non discriminative nature of causing death or severe injuries are prohibited absolutely. Katko v. Briney (D used springing gun to protect a house and severely injured P. Duty not to retreat is not applicable since no one lives in the house.)

d) Necessity

i. one is privileged to use other’s property to protect ones own property,
but he has to compensate the owner.

ii. one is not liable to compensate if the foreseen risk is much lighter than that to the other’s property. Vincent (P tied his boat to D’s dock when the storm came and the dock was damaged.)

iii. The key in Necessity defense: avoid punitive damages. Or even avoid damages at all.

3. INTENTIONAL PROPERTY TORTS

4. NEGLIGENCE

a) General: Four elements of negligence: duty, breach of duty, injuries, causation between injuries and the breach of duty.

i. Ordinary care means the kind and degree of care, which prudent and cautious men would use, such as it required by exigency of the case, and such as is necessary to guard against probable danger. Brown

ii. The specific degree of care varies under particular circumstances. Brown

b) The general standards

i. RS § 291 Unreasonableness

Where an act is one which a reasonable man would recognized 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 the utility of the act or of the particular manner in which it was done.

RS§292

To determine the utility of the act for purpose of the negligence of the actor, the following factors should be considered:

(a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct;
(b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;
(c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.

ii. B<>PL

iii. The modified formula is whether B>PD. PD = expected damages and cost of litigation. If PD<>PL, then B+ or B- (increased or reduced precaution) will result.

iv. When the D is a general public welfare provider such as a electronic company, Court should take the general impact of rising up the standards of care into account when evaluating the burden. Washington v. Louisiana Power and Light Co., (the deceased was electrocuted by the D’s wire, which came into contact w/ cable line by chance.)

v. When the risk is not foreseeable, the possibility of risk may be low. Washington.

vi. The injuries of such accidents are extreme. Yet when the high gravity of the injuries times the little possibilities, the outcome does not
outweighed the cost of taking precaution of relocating or insulating all
the power line. Washington.

vii. All persons are required to use ordinary care to prevent others from
being injured as result of their conduct. Weirum v. PKO, (a pop radio
station to increase receiving, host a chase and find game on highway.)

viii. The mere fact that the accident did not happen before would not be
conclusive as to show the accident was not foreseeable. Weirum

ix. Liability is only imposed when the risk of harm resulting from the act is
deemed unreasonable, i.e. when the gravity and likelihood of the danger
is greater than the utility of the conduct involved. Weirum.

x. B in Hand formula can be the alternative manner to achieve the same
utility of the D’s conduct.

c) Duty to trespasser/ licensee/ invitee

i. Licensee

1. Where the occupier of land is aware of a concealed condition
involving in the absence of precautions an unreasonable risk of harm
to those coming in contact with it, a failure to warn constitutes
negligence. Rowland v. Christian, (P was guest of D, whose water
faucet broken in P’s hand when P was permitted to use it. D request
landlord to repair the faucet before the accident.)

d) Limitation on Liability

i. The absence of general duty to rescue

1. When there was no statutory standard of care, the standards should
be decided by the circumstances. However, when the D has
voluntarily established standards of due care, which has been known
and relied upon by the public, the practice may not be discontinued
w/o exercising reasonable care to give warning of such discontinuance, although D may do thereafter whatever that should
be reasonably necessary. Erie R. Co. v. Stewart, (D had maintained a
watchman at crossing of railway, which was not required by statute
but known to the public, including P.)

2. There is legal duty to take affirmative action or offer rescue to a
person who is helpless and in the situation of peril, when D was the
invitor or master, or the injury arisen out of a instrumentality which
was under the control of D, no matter he was at fault or not. Tubbs v.
Argus (D was the driver of a vehicle, in which P was the passenger.
P was injured and D abandoned the vehicle and did not render help
to P, which caused further harm.)

3. If the actor knows or has reason to know that his conduct has put
other person helpless and in danger of future harm, he is under the
duty to exercise due care to prevent further harm, no matter he’s at
fault or not. Tubbs (Because P was injured from use of an instrument
under the control of D, there is sufficient relationship to hold the D
liable for breach of a duty imposed to render reasonable aid.)
4. When P’s claim against the D as social passenger to driver is barred by the statute, P can still recover from D for additional harm which was caused by D’s failure to render help. Tubbs

5. To a therapist, if by exercising reasonable degree of skill, knowledge and care ordinarily posses and exercised by members of that professional specialty under similar circumstances, he could have discovered the target of his violent patient, he owns a duty to the target as to protect her from risk of injuries imposed by his patient. Tubbs.

6. The duty of care to the victim arisen from the relationship between the patient and the psychologist. Tubbs.

e) Res ipsa liquotur
   i. P has to show good faith effort that the evidences needed for specific negligence claim cannot be obtain because of difficulty
   ii. When applicable
      1. the instrument was under exclusive control of D. Boyer v. Iowa High School. (P was audient of a game, alleging that D’s negligent in maintaining the bleachers of the gym.)
      2. The accident was of the kind that would not have happened in ordinary course without negligence.
   iii. Exclusive control:
      1. when D or D’s employee or contractor was specifically responsible for the instrumentality, the exclusive control is presumed. Boyer (D is liable when his contractor was taking charge of the whole tournament, during one game of which the P was injured.)
   iv. Res ipsa is merely allowing jury to draw inference from the evidences which otherwise cannot constitute prima facie case.

f) Evidences
   i. violation of statute
      1. Violation of safety statute can be negligence per se. The unexcused omission of duty is negligence itself.
      2. Violation of statute is rebuttable presumption/ prima facie evidence of negligence.
      3. Violation of statute that changes the custom is not negligence itself, nor evidences for negligence. Duty of statute should be subject to the same exceptions.
      4. The juries should be related with the purpose of the statute, i.e. the harm is within the risk foreseen by the legislature. Otherwise, the violation can not be the evidence of negligence.
   ii. failure to comply w/ custom
      1. Even where the custom exists, it is not conclusive evidence of negligence. The jury should first consider its reasonableness, just as the reasonableness of the behavior adheres to the custom and the unreasonableness of violation against the custom. Trimarco.
2. The custom indicates the foreseeability of risks of the injuries. *Trimarco*.
3. The custom is fixed with prudence, no matter the custom is usu. complied with or not. *Trimarco*.

iii. compliance to custom
1. Compliance to custom is not evidence of having exercised due care. *Hooper*
2. The standards of due care can be proved by the reasonableness of compliance to the custom and the unreasonableness not to comply. *Hooper*
3. Compliance with custom may not be sufficient if the custom is not enough prudent to be reasonable care to avoid accident. *Hooper*

**g) Actual Causation**
i. Did the D caused P’s harm
   1. P should be able to provide circumstantial evidences in the absence of direct evidences. *Hoyt*
   2. General causation can be an issue when D or alleged act may not be capable to cause the accident.
   3. When the only circumstantial evidence is scientific static, the prima facie case may not exist.

ii. Alternative Liability
   1. When both Ds are wrongdoers and only issue was the proportion of liability between them, all/both Ds are liable for the full amount of injuries. *Summers v. Tice*, (holding that when P and Ds were hunting and P was injured by two shots of different severance of injuries and it is not possible for P to prove which D caused which injury, both negligent Ds are liable jointly for both injuries.)
   2. “Joint Enterprise” theory: Ds are held as a whole toward the injured party. Therefore, all the Ds are jointly liable. *Summers*
   3. The control, at one time or another, of one or more of various agencies or instrumentalities which may have harmed the P was in the hands of every D or of his employees or temporary servants. This places upon them the burden of initial explanation. Otherwise, since P was unconscious and cannot identify the D, all Ds are jointly liable for the injuries. *Ybarra v. Spangard*, (D sued the doctors and the nurses of his surgeon after which he suffered from pain and injuries that did not exist before, the P was not able to prove which person caused the injuries but it is certain that it happened when he was unconscious.)
   4. When there is loyalty among all the defendants, which makes no defendant to point the truth and would cause the D impossible to allocate the liability, all Ds are jointly liable for the injuries.

iii. When Two or More Causal Agents would, Independent of Each Other, Have Caused P’s Harm: Concurrent and Successive Causation
1. The mere fact of that the deceased would have died or severely injured for other causes will not release D from liability. The factual issue should be decided by the jury as the damages measured by the difference between severely injured life and death. *Dillon v. Twin State Gas & Electric Co.* (Deceased was electrocuted by current in the wire which was maintained by D, when he was falling down from the bridge and)

2. When two or more parties are negligent and their actions combine to cause indivisible harm, they are both jointly and severely liable for the entire harm.

3. When there are two negligent acts, each of which could independently have caused the same harm regardless of the other, the wrongdoer is not allowed to escape liability. *Kingston v. Chicago & N.W. Ry.*, (2 fires from different directions, one of which was caused by D’s negligence. The D was liable for the injuries.)

   iv. Proximate Causation

   liability logically linked to P’s harm and D’s negligence was any harm of P foreseeable by D?

   1. Actual causation was sometimes referred as “cause in fact”. “But for” D’s act, the P would not have been injured. This question can establish the prima facie case but not sufficient for P to win. The P should also prove that the D’s act was the proximate causation of the harm.

   2. D is only liable for the foreseeable, but not the unforeseeable, consequences of the negligent conduct. The standards are damages that are foreseeable for the prudent person in the position of D at the time of the negligent conduct. *Palsgraf v. Long Island R&R*, (D’s employee was negligent in pushing a passenger and causing a package fell off, which was fireworks. Explosion shook off the roof and hit P who was on the other end of platform.)

   3. If P was not foreseeable to the D, D did not owe her a duty thus no negligence. *Palsgraf*.

   4. The issue was that “proximate” means “close in time, in place or in relationship”. *Palsgraf*

   5. rescuer rule:

      a) rescuer is always w/ the foreseeable scope to D.

      b) however, rescuer should also exercise due care as act reasonably

      i. otherwise, it may be a contributory negligence, to reduce the amount of remedy or barred from recovery. *Solomon v. Shuell*, (D was policeman and hurt P when chasing a flee since P thought the flee needed help.)

      c) Exception: firefighters or police who are trained and paid for taking the specific risk cannot be recovered as a rescuer.

Were the nature and circumstances of P’s harm foreseeable?
6. When a party, such as a passenger of a vehicle in an accident which D was negligent, was injured by the oncoming motorist caused by the mix-up traffic caused by the accident, P can recover from D since he was directly related to the accident therefore he is foreseeable P to D. Marshall v. Nugent, (P was passenger of D and stroke by third car when voluntarily helping to warn the traffic.)

7. The mere fact of an intervening act will not release the D from liability if the intervening act or even crime is foreseeable or a nature consequences of D’s negligence. Waton v. Kentucky & Indiana Bridge & R. Co. (D was negligent in causing gasoline flowing on the street, which exploded b/c of third party lighted it.)

8. However, when the intervening act was malicious and done for purpose of causing the explosion, D would not be liable for the accident, because it was unforeseeable. Waton.

9. When P’s injuries are direct consequences of D’s negligence, P was recoverable no matter whether he is foreseeable or not.

v. Special issues for foreseeable consequences

Mental and emotional distress

1. Zone of Danger:
   a) D is liable for the people that were put in peril for his conducts of negligence. The person affrighted or sustaining shock was actually put in peril of physical impact, and under this circumstances, it was immaterial that the physical impact did not materialize.

2. Bystander liability
   a) Factors to limit the scope of Ps qualified to recover:
      i. Propinquity:
      ii. Simultaneous
      iii. Close relationship Dillon v. Legg, (mother observing the death of her child caused by D’s negligence.)

   b) A plaintiff may cover from negligently infliction of emotional distress of a third party if, but only if, said plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim, and (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. Thing v. La Chusa, (P was mother of a child who was stroke by D’s automobile. P was not at scene but shortly arrived.)

3. Direct Victim
   a) When there was a preexisting relationship between the D/P, the D owes a duty to P. Therefore, P’s action was not derivative but as a direct victim. Burgess v. Superior Court, (The mother was a
direct victim of the injuries of her baby which was caused during the delivery process.)

b) Cohabiting partner, other than spouse, cannot sue for damages of loss of consortium for policy reason. Feliciano v. Rosemar

c) Policy plays a role when deciding whether cohabitating party, or common law marriage spouse, will be able to recover from loss of consortium of the other partner, which was caused by negligent D. Feliciano (the court aimed to promote the state institution of marriage and avoid fraudulence.)

d) The court always tries to make a clearer line, even though somewhat arbitrary.

e) Whether the relatives or anyone that was connected w/ the victim who are the subject of D’s negligence, is greatly decided by the nature of their relationship between P/Victim.

vi. Contributory Fault
1. contributory negligence
   a) traditionally, the rule of contributory negligence is that P is barred from recovery of D’s negligence if he failed to exercise due care of his own interests. Butterfield v. Forrester.
   b) The negligence on P’s part which bars P from recovering should be that P could have avoid the consequences of D’s negligence by exercising due care. Davies v. Mann, (P misplaced the ass on off-road side of highway, which was strokes by D’s speeding automobile.)
   c) last clear chance
      i. if the D could have opportunity to avoid the consequences of his negligence immediately preceding the injuries, contributory negligence rules does not apply. Davies.

2. assumption of risk
   a) express AR: covenant of non-suit or waiver of right
   b) Two other different meaning of AR:
      i. Primary meaning:
         (a) D did not owe a duty to P or did not breach this duty,
         (b) Often in the situations of sports games, trespasser, etc.
      ii. Secondary meaning
         (a) D did breach the duty owed to P, however, P’s acted unreasonably because he knew the risk but voluntarily took it on.
   c) RS: assumption of risk is independent affirmative defense.

3. comparative negligence
Most states have statutes to decide why it is a comparative negligence or contributory. Seldom is it established by judicial decisions.
1. Pure comparative: whatever percentage of P’s negligence, he could recover but only deducted the percentage of his own negligence.

2. Modified comparative:
   a) If P’s negligence exceeds D’s, no recovery at all.
      i. 51% rule
   b) When P’s negligence equals D’s, no recovery
      i. 50% rule.
   c) Under Unit Rule: joint liability, we look at D collectively. Therefore, P can recover.
   d) In absence of Joint Liability, under Individual Rule,
      i. P can only recover from each D of whatever percentage of their negligence.
      ii. Therefore, P’s negligence exceeds each D, and no recovery.

Others
1. When the employer is liable for its employee’s personal wrongdoing?
   a) Generally, employer is not liable for the personal wrongful acts of employees expect:
      i. the principal authorized the doing and the manner of the act,
      ii. The agent was unfit and the principal was reckless in employing him
      iii. The agent was employed in a managerial capacity and was acting in the scope of the employment
      iv. The employer or a manager of the employer ratified or approved the act.
   b) Exemplary damage
      i. Exemplary damage is to punish the wrongdoing. Therefore, unless the employer had fault, exemplary damage will not be awarded.
   c) Compensatory damage: the damage can be granted even though the wrongdoer is not a manager but a waiter behind the line, as long as he is acting within his employment.

2. standards of punitive damages
   a) Concerned about the ample amount of cases claiming punitive damage, the huge amount of damage awarded, and the uncertainty of verdict, the court tried to limit awarding punitive damages only when the D is malicious and the evidences are preponderance.
   b) The other concern of the court is that the punitive damages may not have expected effect since D could purchase insurance to avoid the impact.
   c) There is also Constitutional concern in awarding the huge amount of damages.
   d) The amount of damage is hard to decide since if it is too small, it will have no deter and exemplary effect but if it is too large, it will be a wind fall to P.