INTENTIONAL TORTS

• Always deal with \( \pi \) as if he were an average person – don't take into account any supersensitivities – unless \( \Delta \) knows of the supersensitivities.
• EVERYBODY is liable for an intentional tort.

1) BATTERY – (1) harmful or offensive (intentional) contact with (2) \( \pi \) person.
  • Offensive = unpermitted, intentional. Don't take into account \( \pi \) supersensitivities.
  • CONTACT: With \( \pi \) person = don't have to actually touch the body – could be something connected to \( \pi \) person. Anything reasonably attached.
  • \textit{Fisher v. Carrousel Motor Hotel, Inc.}
    Facts: A plate was snatched from Fisher's hands by one of \( \Delta \) employees while shouting that "no Negro could be served."
    Issue: Is the intentional snatching of an object from a person's hands without touching or injuring his body a battery?
    Holding: Knocking or snatching anything from a person's hand, or touching anything connected with his person in an offensive manner, is an offense to his dignity and constitutes battery.
  • \textit{Leichtman v. Jacor Communications, Inc.}
    Facts: Leichtman, an antismoking advocate, appeared on the WLW Bill Cunningham radio show on the day of the Great American Smokeout. Furman, another radio host, was also in the studio. Furman let a cigar while in the studio and repeatedly blew smoke in Leichtman's face.
    Issue: Does intentionally directing tobacco smoke at another constitute battery?
    Holding: Intentionally directing smoke at another constitutes battery. Tobacco smoke has the physical properties capable of making physical contact. No matter how trivial the incident, a battery is actionable.
  • The tort is the contact and thus \( \pi \) need not have been aware of it at the time.
  • \textbf{INTENT:} \( \Delta \) must have intended to touch, but need not have intended to harm.
    • \textit{Vosburg v. Putney} – \textbf{intent to harm not necessary} - \( \Delta \) desired to cause harmful or offensive content – even if intent to harm is not present, intent to do the tortious act is still present.
    Facts: one student lightly kicked the leg of another student during class intending no harm. The leg was sensitive from a previous injury and was severely damaged by the kick.
    Issue: is proof of intent to harm required to recover damages for assault and battery? Is \( \Delta \) liable for a battery if he did not intend to harm but if intent to commit an unlawful act exists? Is \( \Delta \) liable for all injuries resulting from the unlawful act even if they could not have been foreseen?
    Holding: intent to harm isn't an element of battery. Only proof of unlawful intent or of fault is necessary. Intent to do an unlawful act is unlawful intent.
    o \textbf{Foreseeable consequences} - as long as intent is present, the consequences need not be foreseeable by the actor (thin skull rule).
• Garratt v. Dailey – **constructive intent** - Δ knew with substantial certainty that such contact would occur as a result of Δ actions – suffices for establishment of prima facie tort.

  **Facts:** Δ, 5, pulled a chair from under π knowing she was about to sit down.
  **Issue:** May one be liable for battery without an intent to harm?
  **Holding:** The “intent” element of battery is fulfilled if one knew with “substantial certainty” that contact would occur.

• **Transferred intent** - if person has necessary intent to commit battery on A, but misses and strikes B, his intent is transferred, and he is deemed to have the intent necessary for a battery on B.

• If π consents to the contact, Δ is privileged and there is no tort. Consent may sometimes be assumed. Consider relationship of the parties, reasonability, custom, time, place, and circumstances.

• Restatement agrees with this.

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<thead>
<tr>
<th>CONTACT?</th>
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<tr>
<td>YES</td>
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<tr>
<td>• Intentional (substantial certainty that he knew of consequences)?</td>
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<tr>
<td>• No → No battery</td>
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</table>
|   • Yes →
|     • Harmful or Offensive? |
|       • No → No battery |
|       • Yes →
|         • Privilege or Consent? |
|           • Yes → No battery |
|           • No → BATTERY |

**NO → No battery**

2) **ASSAULT** – (1) apprehension (2) of an immediate battery.

• **Apprehension**
  i) must be reasonable – don’t look at supersensitivities
  ii) not to be confused with fear or intimidation – all you need is reasonable apprehension of an offensive contact.
  iii) Both an objective and subjective factor. Objectively, a reasonable person would have been apprehensive. Subjectively, person was actually apprehensive.
  iv) Apparentability will create a reasonable apprehension. E.g., if he’s pointing a gun at me, though not loaded, there can be apprehension – to me it could be apparent that it is loaded. Δ apparentability created reasonable apprehension.

• **Immediate battery**
  i) Words alone are not enough. Need words coupled with conduct.
  ii) If words undo the conduct, no reasonable apprehension.

• There must be an apparent present ability and opportunity to commit the threatened battery.

• Δ must intend to commit and intentional tort but need not intend to commit a battery – maybe only intended an assault.
CASES

Read v. Coker

**Facts:** Coker’s workmen threatened to break Read’s neck if he did not leave Coker’s shop.

**Issue:** Has an assault been committed when there is a threat of violence exhibiting an intention to assault, coupled with a present ability to carry the threat to execution?

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

Apparent Ability – even though didn’t have present ability because gun wasn’t loaded, there is still the apparent ability. If reasonable person would have perceived the present ability, that’s enough.

Beach v. Hancock

**Facts:** Hancock aimed a gun at Beach who was nearby, and snapped the trigger.

**Issue:** May an assault be committed if there was no actual ability to harm another?

**Rule:** An assault is an unlawful attempt, coupled with an apparent ability, to commit a violent injury to the person of another.

3) **FALSE IMPRISONMENT** – (1) sufficient act of restraint and (2) bounded area.
   - Sufficient act of restraint – common sense analyze the facts to reach the conclusion.
     - i) Threats are enough – don’t need actual application of force.
     - ii) Inaction is enough (case where don’t give boat to put woman ashore) – in order to conclude inaction is enough, must find that there is an understanding that Δ would do something.
     - iii) Irrelevant how short the period of confinement is.
   - Bounded area – freedom of movement is limited. There is a threshold level – inconvenience doesn’t do it. But if inconvenience is great enough, then will get you over the threshold.
     - i) Area not bounded if reasonable means of escape that the π knows of.
   - π must know he’s confined at the time or there is no tort. But he may also recover damages caused by the confinement; and where such damages are incurred there is a cause of action even though, due to his mental incapacity or for another reason, he then incapable of realizing that he is confined.
   - Mistake of identity is no excuse, neither is good faith that the confinement is justified. Once fact of intentional confinement is shown, the burden is on Δ to prove legal justification.

CASES

Whittaker v. Sandford

**Facts:** Whittaker voluntarily boarded Sandford’s yacht and sailed from Syria to Maine. On arrival, Sandford refused to furnish Whittaker with a small boat to go ashore.

**Issue:** Can one commit false imprisonment without using physical force?

**Holding:** One need not exert physical force to be liable for false imprisonment; actual physical restraint is sufficient.

Sindle v. NYC Transit Authority

**Facts:** Sindle was passenger on a school bus. Driver bypassed several stops and drove to police station because the students were damaging the bus. Sindle was injured when he jumped out of the bus.

**Issue:** May a person who is falsely imprisoned recover for injuries incurred while attempting to escape?

**Holding:** Even a person who is falsely imprisoned must exercise reasonable care when extricating himself from detention.
Coblyn v. Kennedy’s
Facts: Coblyn was detained by an employee of Kennedy’s who suspected Coblyn of shoplifting.
Issue: (1) Does submitting to restraint on one’s personal liberty for fear of personal difficulty amount to false imprisonment? (2) Can a shopkeeper detain a person who he “honestly suspects” of being a shoplifter?
Rule: (1) If a man is restrained of his personal liberty by fear of personal difficulty, it amounts to false imprisonment. (2) If a shopkeeper has reasonable grounds to believe a person has committed or is attempting to commit larceny of goods for sale on the premises he may detain that person in a reasonable manner for a reasonable length of time.

4) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS – (1) outrageous conduct; (2) damages.
   - Outrageous – really has to be outrageous.
     i) Normally will give you conduct that isn’t normally outrageous, but throw something else in to make it outrageous. Do this in three ways.
        (1) Conduct is continuous.
        (2) Will give you a certain kind of \(\pi\) (kid, pregnant woman, supersensitive adult where \(\Delta\) knew of supersensitivities, elderly)
        (3) \(\Delta\) they give you. E.g. common carriers or innkeepers – they get screwed – only if it’s the right kind of \(\pi\) - must be passenger or guest.
   - Damages – need a clear showing of substantial emotional distress.
     i) The more outrageous the conduct, the less you need to come up with in the way of damages.
   - Adopted by courts as fallback tort position when can’t make out prima facie case for other ones.

CASES
State Rubbish Association v. Siliznoff
Facts: The Association threatened to beat up Siliznoff, burn his truck, and destroy his business if unless he joined the association.
Issue: Can one be liable for inflicting severe emotional distress which is unaccompanied by physical injury?
Holding: One who, without privilege to do so, intentionally causes severe emotional distress to another is liable for such emotional distress, and for bodily harm resulting from it.

Intentional Property Torts
1) TRESPASS TO LAND - (1) physically invade (2) \(\pi\) land
   - Physically invade - \(\Delta\) need not personally go onto the land to do this. Is required that some physical object goes onto the land.
   - Land – you don’t personally have to go onto the land or touch surface of land – concept of land includes reasonable distance going up and down from the surface.
2) TRESPASS TO CHATTELS (personal property) – some physical damage or interference with possessory rights.
3) CONVERSION – lots of physical damage or interference with possessory rights.
   - Some damage, trespass to chattels; a lot of damage, conversion.

DEFENSES
1) CONSENT – (1) \(\pi\) had to have had capacity; (2) what kind of consent (3) boundaries.
   - Capacity – e.g. children don't have it.
**Barton v. Bee Line, Inc.**

**Facts:** 15-year-old Barton claimed that while she was a passenger on the Bee Line Inc., the Bee Line's chauffeur forcibly raped her, but the chauffeur claimed that Barton consented.

**Issue:** Is a female under 18 entitled to collect damages in a civil cause of action for an act of intercourse to which she willingly consented?

**Rule:** §2010 of the Penal Law provides that a person who has sexual intercourse with a female, not his wife, under 18 is guilty of rape even if the female consented; but, a female under 18 has no civil cause of action against a male with whom she willingly has intercourse, if she knows the nature and quality of her act.

**Express – words were used – no intentional tort unless consented because of fraud or coerced or mistake.**

1) In the case of operation, must be informed consent.

**Bang v. Charles T. Miller Hospital**

**Facts:** A doctor performed a prostrate operation on Bang, and, during this operation, he severed Bang's spermatic cords.

**Issue:** In an action to recover for an unauthorized operation, must the question of whether or not there was an unauthorized operation be submitted to a jury.

**Rule:** In an action to recover damages for an unauthorized operation, the question of whether or not there was an unauthorized operation is a fact issue which must be submitted to the jury.

2) **Implied – apparent implied consent – via custom and usage and/or conduct.**

1. Exists if the actions of the plaintiff can be reasonably interpreted as though consent has been given.

   **O'Brien v. Cunard Steamship**

   **Facts:** A doctor vaccinated π, who was holding out her arm and waiting in a line to be examined for immunization. π sued for assault, but Cunard claimed that she had consented.

   **Issue:** Must consent be verbal?

   **Holding:** Silence and inaction when considered in connection with the surrounding circumstances may constitute consent to what otherwise would be assault.

2. Exists when it's reasonable to assume that π would have consented if had been able to.

   **Kennedy v. Parrot**

   Doctor in course of an appendectomy, punctured cysts on plaintiff's ovaries. Held, consent was implied since plaintiff would have consented if awake.

3) **Privilege Defenses – (1) Timing requirement must be satisfied; (2) test for defense privilege is satisfied (see each below); (3) boundaries.**

   **Timing requirement – happening right now or about to happen; if past tense, no go. But if in hot pursuit, okay.**

   **Boundaries – within? Exceed boundaries by using too much force.**

2) **SELF DEFENSE – reasonably believe a tort is being committed on you.**

   **An actor may use reasonable force to defend himself against unprivileged imminent or harmful or offensive contact which he reasonably believes another is about to inflict on him even if he can prevent having to do so by**

   1. Retreating or otherwise giving up a right, or
ii) Complying with a command which he does not have to or which the other person can not enforce by the means threatened.

- An actor may use deadly force if he reasonably believes another is about to inflict force that will put him in peril of death or serious bodily harm, and he need not retreat but only if:
  i) He is in his home and not the home of another, or
  ii) He is trying to complete a lawful arrest.

- *Courvoisier v. Raymond*
  Facts: Courvoisier believed that Raymond, a policeman, was one of the rioters outside his home and shot him as he approached.
  Issue: Can a person justify the use of force as self-defense only if he was “actually” in danger of being killed or seriously injured?
  Rule: An action of force is justified by self-defense wherever the circumstances are such as to cause a reasonable man to believe that his life is in danger or that he is in danger of receiving great bodily harm and that it is necessary to use such force for protection.

3) **DEFENSE OF OTHERS** – there must actually be a tort being committed on a 3rd person – can’t just have a reasonable belief.
   - Boundaries – can use any reasonable force.

4) **DEFENSE TO PROPERTY** – reasonable belief is enough.
   - A person may use reasonable nondeadly force to prevent or terminate another’s intrusion upon land or chattels so long as:
     i) The intrusion is not privileged;
     ii) The intrusion can only be prevent or terminated by use of force; and
     iii) The actor has first requested that the other desist unless such a request is substantially certain to be disregarded or harm will be done before a request can be made.
   - A person can use deadly physical force to prevent or terminate another’s intrusion upon land or chattels only if the actor reasonably believes that the intruder is likely to cause death or gbh to actor or third person whom actor is privileged to protect.
   - If in your own home, not considered defense of property – self defense or defense of others. A hidden instrument capable of deadly force can only be used to protect property when deadly force would be privileged had the owner been present at the time of the intrusion, or if the intruder was committing a felony of violence.
     - *Katko v. Briney*
       Facts: Briney booby-trapped his boarded up farmhouse with a spring gun to protect against trespassers. Katko was severely injured when he entered Briney’s house to steal fruit jars.
       Issue: May a person protect his property with deadly force?
       Holding: A person may not take actions that would cause serious injury to another person in defense of his property.

5) **NECESSITY** – can only use for property tort – trespass of land usually.
   - Public necessity – always a defense – benefits many people.
   - Private necessity – benefits limited number of people – however, liable for actual damage caused.
   - Defense of property collides with necessity – necessity always wins.
     - *Ploof v. Putnam*
       Facts: Ploof sued for damages caused when Putnam denied him the use of a safe mooring for his boat during a storm.
       Issue: Does necessity justify an entry upon the land of another?
Rule: Necessity justifies the entry upon the land of another.

- But π still has to pay for damages that result.
- Vincent v. Lake Erie Transportation Co.

  Facts: π vessel was kept docked during a severe storm, causing damage to the dock.
  Issue: Must a party who asserts private necessity as a defense to the invasion of another's property compensate the owner of the property for the resulting damage?
  Holding: While private necessity permits the invasion of another's property, the invader remains liable for resulting damages.
  - This means that actor is not liable for punitive damages, and the owner of the land does not have the privilege to force actor to leave.
  - 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 (as Courvoisier did).

IMMUNITY
- Governmental Immunity
  - Exists except for discretionary functions of government (e.g. policy) which are immune from claims.
  - Municipalities are not included.
- Parental and intrafamily immunity
  - Eroded somewhat due to child, spousal abuse.
  - Courts disagree as to whether it applies to: stepparents and foster parents; acts that don't have to do with parental authority and care; injury to fetus; intentional torts, etc.
- Charitable immunity
  - Eroded somewhat since charities no longer run on tight budgets, but rather more like profit-oriented business.
  - Also liability insurance is available to protect them.

PUNITIVE DAMAGES – trying to punish Δ not compensate π.
Owens-Illinois v. Zenobia
Facts: As a result of injuries Zenobia allegedly suffered from asbestos manufactured by Owens, Zenobia brought product liability negligence action to recover punitive damages for his injuries.
Issue: In a nonintentional tort action, may the trier of facts award punitive damages only where the π establishes by clear and convincing evidence that Δ conduct was characterized by actual malice.
Rule of Law: In a nonintentional tort action, the trier of facts may award punitive damages only where the π establishes by clear and convincing evidence that the Δ conduct was characterized by actual malice.

NEGLIGENCE
Duty
Breach
Causation
Damages

1) DUTY – (1) foreseeable π; (2) standard of care.
   - Foreseeability of π - duties of care only owed to foreseeable π. If injury is reasonably foreseeable, then Δ is negligent.
   - Weirum v. RKO General Inc.
Facts: Radio station sponsored a contest giving prizes to the first person to find its DJ at different locations in the city. The \( \pi \) was killed by a driver who was speeding to reach the DJ’s location.

Issue: If one’s conduct encourages a negligent response by another, is the party liable for the other’s negligence?

Holding: If it is foreseeable that a party’s conduct will cause others to behave in a negligent and dangerous manner, that party will not be relieved of liability by the intervening negligence of another.

i) Unforeseeable \( \pi \) fact pattern – *Palsgraf* – how to spot: there will be negligence as to a foreseeable \( \pi \) (guys they help onto train) and somebody else is injured. As to whether or not they are foreseeable – look to Andrews and Cardozo approach.

1) Cardozo – majority view – whether or not \( \pi \) was within the foreseeable zone of danger for the negligent conduct. If yes, foreseeable \( \pi \).

2) Andrews – if negligence toward one individual injures a 2\textsuperscript{nd}, 2\textsuperscript{nd} is foreseeable \( \pi \). Almost always 2\textsuperscript{nd} person is foreseeable \( \pi \).

- **Standard of care** (if foreseeable \( \pi \)) – at issue in every negligence answer – which standard applies??

  i) Reasonable person – objective test – invent a hypothetical average person, assign traits and characteristics – at trial, don’t look at \( \Delta \) traits and characteristics, but look at what reasonable person would have done. One exception is physical characteristics – disabilities – don’t expect blind people to operate as if they have normal eyesight. But still expected to act as reasonable person with that disability would.

  • *Brown v. Kendall*

    Facts: \( \pi \) dog and \( \Delta \) dog were fighting. \( \Delta \) repeatedly struck the dogs with a stick to separate them, but accidentally hit \( \pi \) in the eye.

    Issue: Is there liability for assault and battery for injuries that are inadvertent and unintentional?

    Holding: One is liable for damages resulting from actions conducted in an unlawful, intentional, or negligent manner. Here, he was acting reasonable, not liable.

ii) Children

  1) under 4, deemed incapable of negligent act, not held liable.

  2) What would have been done by a child of like age, intelligence and experience? That is the standard of care.

    • If child is engaged in an adult activity, hold him to adult standard.

iii) Professionals – typically give you doctors – reasonable professional in the same or similar communities. If specialist, expertise is taken into account – would expect more from specialist than a general practitioner.

iv) Common carriers and innkeepers – can reach them for even slight negligence – must be passenger or guest.

v) Owners and occupiers of land – (1) make sure \( \Delta \) is an owner or occupier or in privity with one (family members, employees) – need right kind of \( \Delta \); (2) did the injury occur on or off the land?

    • On the land – threshold inquiry – is \( \pi \) undiscovered trespasser? If yes, no liability because no duty, no standard of care. If no, was the injury here caused by an activity (anything you’re doing on the property) or dangerous condition?
(a) Activity – standard of care is reasonable person – ordinary negligence case. Don’t discuss kind of π.

(b) Dangerous condition – type of π controls the standard of care. Responsible for different ones for each type.

(i) Invites - one who is invited to enter owner’s land 1) as a member of the public, or 2) for a business purpose. Standard of care is reasonable care under the circumstances (reasonably should have known about a condition; reasonably expect invitees would not discover it; exercises reasonable care to protect invitees from the danger).

(ii) A licensee is a person privileged to enter only because of owner's consent (e.g. a social guest). The licensee "takes the premises as he finds them" (reason to know of a condition; reasonable care to fix it or warn licensees; licensees do not have reason to know of the condition).

(iii) A trespasser is a person not privileged to enter the premises.
1. The duty owed to trespassers is merely to refrain from wanton or willful conduct.
2. Duty to constant trespassers is for artificial conditions known and maintained by owner, and likely to cause death or great bodily harm.

(iv) Attractive nuisance doctrine – 1) artificial condition where children likely to trespass (not necessarily created or maintained by owner), 2) owner knows or has reason to know of condition, and it involves risk of death or gbh, 3) children don’t realize it because of their youth, 4) utility of condition is slight compared to risk, and 5) owner fails to eliminate danger or protect children.

(v) Classification of people as invitees, licensees and trespassers is not determinative now.

- Rowland v. Christian
  
  Facts: π, a social guest, was injured at Δ house by a defective faucet Δ had known about prior to the incident.
  
  Issue: Should the traditional distinctions between trespasser, invitee, and licensee be enforced?
  
  Holding: An owner shall be judged by a reasonable person standard. The π status as a trespasser, invitee, or licensee may have some bearing on the issue of liability but it’s not determinative.
  
  Note: this is a minority view that only a few states have adopted.

ii) Statutory standard of care – prevails over reasonable person standard. (1) π must fall within protected class; (2) statute must be designed to prevent this kind of harm – a lot of times won’t apply – make sure.

- Doesn’t meet the test – still discuss it – say it doesn’t apply. Doesn’t mean that lawsuit is over – this just isn't the standard of care – probably will be reasonable person standard.
- Meets the test – negligence per se – negligence, but not necessarily liability. Conclusive presumption of negligent conduct, but still have to prove liability if applicable statute has been violated. Exceptions:
  
  (a) Where compliance would be more dangerous.
  
  (b) Where compliance would be impossible.

- When a statute fixes a standard of care, its violation is negligence per se.

- Martin v. Herzog
Facts: Martin was killed when his buggy was struck by Herzog's car. Herzog alleged that Martin was contributorily negligent by driving without lights, contrary to a safety statute.

Issue: Is violation of a safety statute evidence of contributory negligence?

Holding: Unexcused omission of a statutory requirement is more than evidence of negligence, it is negligence per se which can't be nullified by a jury. However, it must be shown that such omission contributed to the damages in order to be contributory negligence.

- The violation of a statute is prima facie evidence of negligence, but it may be rebutted if the defendant can show that he was actually using a standard of care higher than that which the statute mandates.
  - *Tedla v. Ellman*
    
    Facts: Ellman, the driver of a car which injured Tedla and killed Bachel, defended a suit against him by asserting the fact that the victims were struck while walking on the right side of the roadway was a violation of a statute.
    
    Issue: Is a violation of a statute always regarded as negligence per se?
    
    Rule: Where a statutory general rule of conduct fixes no definite standard of care, but merely codifies or supplements a common law rule, which has been subject to exceptions; or where the statute us intended to promote public safety or convenience, then in the absence of clear language to the contrary, it is not negligence as a matter of law for one to violate the statute, of by doing so he is likely to prevent—rather than cause—the accident which it is the purpose of the statute to avoid.
    
    - If the violation of a statute is not the proximate cause of the injury, then the violation is not negligence per se since the legislative intent is not thwarted.
      - *Brown v. Shyne*
        
        Facts: Brown was paralyzed by Shyne's chiropractic treatment. Shyne practiced medicine without a license, in violation of a state statute.
        
        Issue: Is violation of a statute negligence per se if the statute was not intended to protect the public from the party in violation?
        
        Holding: If statute is not intended to protect against certain proscribed conduct, but rather against such conduct by a certain class of people, a violation of the statute by one who is not part of the regulated class is not negligence per se. Such a violation is not the proximate cause of an injury against which protection is afforded.
        
        - If the injury is not of the type which the legislature intended to prevent, then the violation of the statute is not negligence per se.
          - *Gorris v. Scott*
            
            Facts: Gorris alleged negligence when his sheep were washed overboard during a storm because they were not in pens as required by statute.
            
            Issue: Will violation of a statute constitute negligence per se where the actual harm incurred was not the type of harm the statute was intended to prevent?
            
            Rule: Not every violation of a statute constitutes negligence per se.

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

adherence was not impossible in the circumstances.

**Other duties defined by relationship between the parties**

1) An actor only has a duty to warn others of third party’s foreseeable dangerous conduct if a special relationship exists between the plaintiff and defendant, OR between the defendant and the dangerous person.

   - **Tarasoff v. Regents of University of CA**
     
     **Facts:** Doctors at Δ hospital knew that a mental patient they were releasing intended to kill Tatiana Tarasoff. Δ didn’t warn Tarasoff of the danger, and she was murdered.
     
     **Issue:** Does a psychologist have a duty to warn a third party of a danger posed by one of the psychologist’s patients?
     
     **Holding:** Because of the psychologist’s special relationship with a patient, the psychologist has a duty to warn third persons of the patient’s violent intentions even if the psychologist has no special relationship with the foreseeable victim.

2) There is a **duty to act** if a service is removed that has been relied upon, even if the service was not necessary by law. The requisite relationship between the parties exists.

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

3) **Duty to rescue** is normally absent, except where a special relationship exists.

   - **Tubbs v. Argus**
     
     **Facts:** Following an accident of a car driven by Argus, she abandoned the car without assisting Tubbs, her guest passenger, who sought damages for additional injuries caused by Argus’ failure to render aid.
     
     **Issue:** Where an actor knows or has reason to know that his conduct, whether tortious or innocent, caused bodily harm to another so as to make the victim helpless and in danger of further harm, is he under a duty to exercise reasonable care to prevent the additional harm?
     
     **Rule:** One whose innocent or tortious conduct has caused another bodily harm, leaving the victim helpless and in further danger, has a duty to use reasonable care to prevent foreseeable additional injuries to the victim.

4) **Automobile guest statutes** hold that driver is not liable for injuries to passenger, unless grossly negligent (now a minority of states).

5) **Custom** prevalent in the industry can show the standard of care necessary.

   - If a custom sets a higher standard of care than that which the defendant used, court is likely to find defendant negligent as long as defendant knows or should know of the custom.
   
   - **Trimarco v. Klein**
**Facts:** Trimarco was injured when his bathtub’s door enclosure shattered. He sued for negligence asserting that the manufacturer should have made the door from the tempered glass used throughout the industry.

**Issue:** Is reasonableness determined by the custom and usage of one’s trade?

**Holding:** The custom and usage of a profession or trade is one factor in deciding the reasonableness of conduct. The reasonableness of the custom itself need also be considered.

- The presence of a custom cannot lower the reasonable standard of care; so if a defendant claims that his actions were in line with a custom, the court may still find negligence since the custom sets too low a standard of care.
- **The T.J. Hooper**
  **Facts:** Eastern Transportation Co (Δ), the owner of 2 tugs, unsuccessfully appealed the refusal of the TC to limit Eastern’s liability toward the owners of barges and their cargoes of coal which were lost in a storm which the tugs could have avoided had they been equipped with radio receivers.
  **Issue:** Is negligence in matters of business or industry to be determined by the customs common to the trade?
  **Rule:** Regardless of the custom of an industry or trade, a Δ will be liable if his actions fall beneath the standard of average and prudent man.

- **Helling v. Carey**
  **Facts:** Helling’s eye was permanently damaged because Carey failed to diagnose her glaucoma. Experts for both parties agreed that standards of the specialty didn’t require an exam for glaucoma for patients below 40. Helling was under 40.
  **Issue:** Does compliance with the professional standards of a specialty satisfy the appropriate duty of care?
  **Holding:** Professionals whose actions conform to the standards of their given specialty may, nevertheless, commit malpractice if such conduct is not reasonably prudent.

**Hand Formula – B<PL** - if the burden on the defendant to place a precaution in place is lower than the probability multiplied by the possible loss, then the absence of the precaution is negligent.

- **US v. Carroll Towing**
  **Facts:** The attendant of the Conners Co. (π) barge left the vessel unwatched for 21 hours. During that period, the barge broke loose and was sunk.
  **Issue:** Where an act is one which a reasonable man would recognize as involving a risk of harm to another, is the risk unreasonable and the act 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 was done?
  **Rule:** Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such a magnitude as to outweigh what the law regards as the utility of the act or the particular manner in which it was done. Here, burden of being on barge during daylight hours was not greater than PL, so Δ negligent.

- **Washington v. LP&L Co.**
  **Facts:** Washington was electrocuted when a citizens band radio antenna he was moving came into contact with an uninsulated electrical wire that LA Power & Light Co had refused to pay to insulate or move underground.
Issue: Where a power company either knew or should have known of the possibility of an accident, is the question whether the possibility of such injury or loss constitutes an unreasonable risk of harm?

Rule: Where a power company either knew or should have known of the possibility of an accident, the question is whether the possibility of such injury or loss constitutes an unreasonable risk of harm. Here, burden of precautions was greater than PL, so Δ not liable.

- **Sudden Emergency Doctrine** - if actor is placed in a situation amounting to a sudden emergency through no negligence of her own, her actions are to be weighed for reasonableness taking into account the emergency circumstances.
  - **Young v. Clark**
    
    **Facts:** When Young sustained personal injuries after his car was rear-ended by Clark, Young argued that a car swerving in front of both of them made the collision unavoidable.
    
    **Issue:** Is a person who through no fault of his own is placed in a sudden emergency chargeable with negligence if the person exercises that degree of care which a reasonably careful person would have exercised under the same or similar circumstances?
    
    **Rule:** A person who through no fault of his own is placed in a sudden emergency is not chargeable with negligence if the person exercises that degree of care which a reasonable careful person would have exercised under the same or similar circumstances.

- **Negligent infliction of emotional distress** – (1) some physical injury; (2) target zone problem (mother standing on sidewalk, sees daughter hit, has heart attack) – mother has to be within target zone to recover – modern trend rejects target zone if close relative.

- **Affirmative duty to act** – no affirmative duty to act.
  - Exceptions – (1) relationship with the person – can’t just drive off. (relatives, employees, common carriers and passengers, owner/occupiers and business licensees). (2) duty to control actions of 3rd persons – right and ability to control – knew or should have known of the facts that should have gotten you to do something. In these cases, affirmative duty to act.

1) **BREACH = negligent conduct.** We have already figured out the standard of care and whether it was met. If met, no breach. If did not, breach, conduct was negligent.

- **RES IPSA LOQUITUR** – doctrine which allows negligence to be found even without specific proof of breach of duty. Elements: (1) exclusive control by Δ of the instrumentality that caused the harm AND (2) the event causing the harm ordinarily does not happen in the absence of negligence.
  - Applies if the evidence is only available to the Δ. Does not apply where evidence to establish negligence is available to π.
  - **Shutt v. Kaufman’s**
    
    **Facts:** A metal shoe stand toppled from a table and hit Shutt on the head when her chair bumped the table. She sued the shoe store alleging negligence.
    
    **Issue:** Does res ipsa apply if a π has the means to establish negligence on the part of a Δ?
    
    **Rule:** Res ipsa doesn’t apply if a π has the means to establish the negligence of Δ.

- Some courts hold res ipsa does apply even if evidence is equally accessible to both parties.

- **Boyer v. Iowa High School Athletic Association**
  
  **Facts:** Boyer was injured when she fell 9 feet from gym bleachers which suddenly folded back into the wall.
  
  **Issue:** In order to invoke the doctrine of res ipsa loquitur, is it necessary to show that evidence as to the cause of injury is accessible only to the Δ and not to the π?
Rule: To invoke the doctrine of res ipsa, it is not necessary to show that evidence as to the cause of the injury is accessible only to the Δ and not the π.

- Before a presumption of negligence by res ipsa, the π must prove that neither he nor any third party who had control of the instrumentality damaged it themselves.
- Escola v. Coca Cola
  Facts: A waitress, Escola, was injured when a Coca Cola bottle broke in her hand. She sued Coca Cola alleging negligence in the preparation of the bottle for sale.
  Issue: (1) May res ipsa apply where the accident occurs sometime after Δ relinquished control over the injury-causing instrumentality, if π shows that the condition of the instrumentality didn’t change after it left Δ hands and that π handled it with due care? (2) May res ipsa apply if the accident is of such a nature that it would not ordinarily occur in the absence of negligence?
  Rule: (1) Res ipsa may apply where an accident occurs sometime after the Δ relinquished control over the injury-causing instrumentality if the π shows that the condition of the instrumentality didn’t change after it left Δ hands and that π handled it with due care. (2) Res ipsa may apply if the accident is of such a nature that it would not ordinarily occur in the absence of negligence.

- If a res ipsa finding of negligence would place too high a burden on the Δ, the doctrine does not apply, i.e. the Hand formula can still apply in res ipsa cases.
- City of Louisville v. Humphrey
  Facts: After having been arrested and left in the city drunk tank, a man died from head injuries. His survivors brought a wrongful death suit against the city.
  Issue: (1) Does res ipsa apply where the injury may have been caused by someone not under the control of Δ? (2) If an injury is caused by a prisoner under the control of or in the custody of a prison-keeper, must Δ show that Δ knew of the violent propensities of that prisoner before res ipsa can be applied?
  Rule: (1) Res ipsa does not apply where the injury may have been caused by someone not under the control of Δ. (2) If an injury is caused by a person under the control or in the custody of Δ, it must be shown that Δ knew of the violent propensities of that person.

2) CAUSATION
- Actual causation (causation in fact)
  i) General Causation – Probabilities may be used to infer general causation. I.e. does this act cause the π type injury generally?
  - Benedictin cases – Scientific studies showed a correlation between ingestion of Benedictin, and birth defects. Held, in order to satisfy causation, the probability of the injury must have been increased by a factor more than 2 as compared to the pure chance that the injury would occur without the drug.
  ii) Specific Causation
  - Probabilities may be used to infer specific causation as well.
  - Hoyt v. Jeffers
    Facts: Hoyt claimed that a saw mill owned by Jeffers emitted sparks which set fire to Hoyt’s hotel and destroyed it.
    Issue: May circumstantial evidence be admitted to show causation in an action for negligence?
Rule: Circumstantial evidence is admissible to show causation, and it's for the jury to determine how much force and weight is to be given to such evidence.

- However, the probability must be substantial enough.
  - Smith v. Rapid Transit
    Facts: Smith claimed that a bus had forced her car off the road causing injuries. Rapid Transit denied that it was its bus which was involved.
    Issue: Can causation be shown by mathematical probabilities in the absence of other convincing evidence?
    Rule: Causation can't be shown by mathematical probabilities in the absence of other convincing evidence.

iii) Alternative liability – all Δ were negligent, but π can't prove which Δ caused the injury.
  - Summers v. Tice
    Facts: Summers sued 2 Δ for personal injuries caused when both Δ shot in his direction.
    Issue: When 2 persons by their acts are possibly the sole cause of a harm, and the π has introduced evidence that one of the 2 persons is culpable, do the Δ have the burden of proving which of them was the sole cause of harm?
    Rule: When 2 or more persons by their acts are possibly the sole cause of a harm, and the π has introduced evidence that one of the 2 persons is culpable, then the Δ has the burden of proving that the other person was the sole cause of harm.

- Ybarra v. Spangard
  Facts: Ybarra suffered an injury to his right arm and shoulder while he was unconscious having appendix removed under the care of 6 doctors and medical employees.
  Issue: Where an unexplained injury occurs during a medical procedure to a part of the body not under treatment, does res ipsa apply to permit negligence to be inferred against all of the doctors and medical employees who took part in caring for the injured patient?
  Rule: Where an unexplained injury occurs during a medical procedure to a part of the body not under treatment, res ipsa applies against all of the doctors and medical employees who take part in caring for the patient.

iv) Concert of Action - Δ acting for the furtherance of a common scheme are jointly and severally liable. Ybarra seems to implicitly invoke this theory.

v) Market Share Liability (Doe v. Cutter) – when a product is inherently dangerous, π may recover from each manufacturer on the basis of the market share that manufacturer supplies. (No need to prove negligence because this is products liability – the product is faulty, therefore strict liability.) This spreads the cost to all manufacturers.
  - Problems with the theory: (1) impossible to get all the manufacturers into court, so doesn't spread the cost to all manufacturers; (2) product may be marketed for a different purpose, therefore one manufacturer's supply may not be indicative of its relative harm to consumers; (3) how to define the market – local markets vary, therefore the probability that a certain π was injured by a certain manufacturer depends on the local market.

vi) Enterprise theory – when a product is manufactured under an industry-wide standard of care, all manufacturers are jointly liable.
  - Doe v. Cutter Biological
Facts: \( \pi \) is hemophiliac. Received a clotting agent known as Factor VIII manufactured by one of 2 companies (\( \Delta \)). In December 1991, \( \pi \) tested positive for HIV. Received treatments between 1975 and 1985.

Issue: (1) Should \( \pi \) be able to recover when it isn't possible for him to proved which \( \Delta \) caused his injury? (2) Does Idaho’s blood shield statute preclude \( \pi \) from alleging claims based on strict liability or implied warranties of merchantability and fitness for a particular purpose against \( \Delta \)?

Holding: \( \pi \) can't recover if he can't show who caused the injury and the statute precludes allegations. \( \Delta \) motion for summary judgment should've been awarded.

vii) Concurrent causes – when 2 parties are negligent and their actions combine to cause an indivisible harm, they are both jointly and severally liable for the entire harm.

- **Kingston v. Chicago & NW Ry.**
  
  Facts: 2 fires united and destroyed Kingston's property. \( \Delta \) was the cause of one fire, but the origin of the second fire was unknown.
  
  Issue: If 2 concurrent acts cause destruction to property, is each tortfeasor responsible for the entire damage?
  
  Rule: If the concurrent acts of 2 or more joint tortfeasors cause a wrong, each is individually responsible for the entire damage.

- **Dillon v. Twin State Gas & Electric Co.**
  
  Facts: Dillon was sitting on the beam of \( \Delta \) bridge and lost his balance; to save himself from falling to certain death or severe injury, Dillon grabbed one of the wires belonging to \( \Delta \) thus electrocuting himself before he could fall to his death.
  
  Issue: Should the court consider in determining damages, the value of the object or person harmed in relation to potential harms which may reduce its or his value?
  
  Rule: Damage may be apportioned in a seemingly indivisible injury if potential danger from one source has diminished the value of the loss actually incurred. [Opposite decision from Kingston, but are these causes successive or concurrent?]

viii) Successive causes – if a negligent act causes an injury, and a successive occurrence comes to pass which would have cause the injury later, recovery is not limited to just the difference between the two, but the full damages that would have resulted. (i.e. treated the same as concurrent cause)

- **Baker v. Willoughby** - defendant negligently hit plaintiff with his car, injuring plaintiff's leg. Later, plaintiff was victim of a shooting, and his leg was amputated. *Held*, plaintiff may recover from defendant full damages for loss of his leg, and the amputation is not to be taken into account.

- **Proximate causation (legal causation)** - \( \pi \) has already shown that there was negligent conduct, there was a breach; shown that the negligent conduct caused the injury – this is \( \Delta \) last opportunity to get out of liability by saying that when you look at totality of facts the result was so unforeseeable that it wouldn’t be fair to hold \( \Delta \) liable. **Way for the jury to let a negligent \( \Delta \) who actually caused the injury off based on lack of foreseeability.**

- **Lost chance doctrine** – different approaches exist, and they all have to do with cases where the probability that \( \Delta \) negligence caused the specific injury is <50%. Happens in cases where the \( \Delta \) merely increased the chances that the injury would occur. View this as \( \Delta \) throwing away an opportunity that the \( \pi \) had to avoid the harm:

  i) If there is a “substantial possibility” that defendant caused the injury, award full damages.
  
  ii) “Substantial possibility” that defendant caused injury, award proportional damages – multiply damages by percentage chance that was lost.
iii) Any lost chance is awarded full damages (pure lost chance approach).
iv) Any lost chance is awarded proportional damages (proportional approach).
v) No recovery, since causation of the injury is not established. Some courts even deny recovery when probability is less than 100%.
   • Weymers v. Khera – plaintiff was negligently treated at a medical center. Had it not been for the negligent treatment, she would have had a 30-40% chance of keeping her kidneys. Held, since the defendant’s negligence more likely than not (i.e. less than 50%) did not cause plaintiff’s injury, he is not liable. To hold him liable would be scrapping the causation element of tort law. Dissent, to hold him liable would not scrap causation since the lost chance itself must still be proven to be more likely than not. The injury is the lost “raffle ticket” at recovery, and not the actual physical injury.

   • Foreseeability and other factors
   • Actual cause exists, i.e. but for Δ actions, harm would not have resulted. However, legal cause is needed to separate those cases where we don’t want to hold Δ liable even if his actions were a but-for cause of the harm.
   • But for the wrongful quality of Δ actions, would harm have resulted?
     • Ford v. Trident
       Facts: The rescue of the deceased, who fell overboard while working on Δ trawler, was obstructed due to the trawler’s life boat not being immediately available and having only one oar.
       Issue: If a result would have occurred in any event, can one be held culpable for having negligently omitted to prevent it?
       Rule: An actor omission is not regarded as the proximate cause of an event if the particular event would have occurred without it.
     • Lyons v. Midnight Sun – decedent pulled out in front of truck and was killed. Held, negligence of defendant speeding was not the proximate cause of death.
   • Orbit of danger – was any harm at all reasonably foreseeable to the π? Foreseeability is linked to duty, or proximate cause. (This is different from thin skull rule where damages need not be foreseeable. Thin skull rule is employed where Δ has already been found liable.)
     • Palsgraf v. Long Island RR
       Facts: π was injured on Δ train platform when Δ servant helped a passenger aboard a moving train, jostling his package, causing it to fall to the tracks. The package, containing fireworks, exploded creating a shock which tipped a scale on π.
       Issue: Does the risk reasonably perceived define the duty to be obeyed?
       Rule: The risk reasonably to be perceived defines the duty to be obeyed.
     • Solomon v. Shuell
       Facts: When π saw police officers in plainclothes arresting robbery suspects, he came out of his house with a gun because he thought the suspects needed help, and one of the police officers shot him.
       Issue: Is a person who goes to the rescue of another who is in imminent and serious peril caused by the negligence of someone else contributorily negligent, so long as the rescue attempt is not recklessly or rashly made?
       Rule: A person who goes to the rescue of another who is in imminent and serious peril caused by the negligence of someone else is not contributorily negligent, so long as the rescue attempt is not recklessly or rashly made.
• **Marshall v. Nugent**
  
  **Facts:** π was struck by a car as he was attempting to warn oncoming traffic that Δ truck was blocking traffic.
  
  **Issue:** Is Δ liable when the injury results from an act of another, which act is deemed by the jury to be a foreseeable act?
  
  **Rule:** The Δ remains liable for the full consequences of his negligent act when the intervening force is one which a reasonable man would have foreseen as likely to occur under the circumstances, and the issue of foreseeability remains a question of fact for the jury.

• **Watson v. Kentucky & Indiana Bridge & RR Co**
  
  **Facts:** Through RR negligence a tank car of gasoline derailed and began leaking. Duerr struck a match causing the vapor to explode and injure π.
  
  **Issue:** Does the mere fact that an intervening act was unforeseen relieve Δ guilty of pecuniary negligence from liability unless the intervening act is something so unexpected or extraordinary as that it couldn’t or ought not to be anticipated?
  
  **Rule:** The mere fact that an intervening act was unforeseen will not relieve Δ guilty of pecuniary negligence from liability unless the intervening act is something so unexpected or extraordinary that it could not nor ought not to be anticipated.

• **Wagonmound I** - negligent oil spill in Sydney Harbor, and acetylene torches being used on the dock ignited the oil and destroyed the docks. Held, injury was not reasonably foreseeable, therefore defendant not liable since his act was not the proximate cause.
  
  • **Wagonmound II** - Held, injury was remotely foreseeable to a reasonable man, therefore defendant is liable.

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

• **Factors important in determining proximate cause (or duty as in Palsgraf):**
  
  o Foreseeability (some courts accept remotely foreseeable, others reasonably foreseeable),
  
  o Nearness of injury temporally and spatially to negligent act,
  
  o Intervening events, i.e. whether a continuous or not, or whether the act was a direct cause of the injury, and not indirect,
  
  o Whether the act is a substantial factor in causing the intervening act,
  
  o Whether the injury was the same general type as that which is risked, and is the π in the same general class of persons that would foreseeably be injured,
  
  o Whether it was the wrongful quality of the negligent act which caused the injury.
  
  o Note: 2 opposing factors in proximate cause issue – (1) desire for clear guidance so as to deter wrongful conduct, and assurances that people will be treated equally in different cases; (2) desire for justice in the particular case.

• **Limits on foreseeability**
  
  o **Zone of danger rule** – no bystander liability, but NIED claim, i.e. no need for impact to the π. Same problems with predictability of court’s findings, therefore no bystander liability, even though foreseeable.
**Bystander liability** in NIED action is allowed if (1) π is close to the scene; (2) π suffered emotional distress contemporaneously with the victim’s injury; (3) π and victim are closely related. NOTE: these standards from Dillon are fuzzy.

- **Dillon v. Legg** – mother saw her child cross the road, get hit and killed. Held, she can recover for NIED since her injury was foreseeable: she was close to the scene (on the curb), suffered distress contemporaneously, and is closely related to victim. Other factors may also be important (i.e. this is not a bright line rule).

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

**Direct victim versus bystander** seems to get around the bright line test of **Thing**.

- **Burgess v. Superior Court**
  
  **Facts**: When π baby suffered permanent brain and nervous system damage due to oxygen deprivation during c-section, Δ, the ob, argued that π could only recover damages for emotional distress as a bystander, not as a direct victim.
  
  **Issue**: Does a physician who treats a pregnant woman owe a duty to that pregnant woman with respect to the medical treatment provided to her fetus?
  
  **Rule**: A physician who treats a pregnant woman owes a duty to that pregnant woman with respect to the medical treatment provided to her fetus.

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

- **Marlene v. Affiliated Psychiatric** – psychologist sexually molested boys who were patients. Mothers sued. Held, mothers were direct victims, since the doctor’s duty was to the ‘mother-child relationship.’ Therefore, mothers may recover for NIED.

**Injury to personal relationships** not always recoverable even though foreseeable.

- **Feliciano v. Rosemar Silver Co.**
  
  **Facts**: As a result of wrongful conduct on the part of an employee of Δ, π claimed loss of consortium of the man with whom she had lived has husband and wife (though they weren’t legally married) for about 20 years.
Issue: May unmarried persons who are cohabitants recover for loss of consortium?  
Rule: Unmarried persons who are cohabitants may not recover for loss of consortium.

○ **Borer v. American Airlines**  
Facts: π sought damages for loss of consortium of her mother.  
Issue: can a child recover for loss of a parent's consortium?  
Rule: Child can't recover for loss of parent's consortium.

○ **Wrongful death** damages allowed by survival statutes which allow (1) a claim to stay alive despite the death of π; (2) wrongful death can be claimed by estate or descendents, and claim is treated as if the decedent were suing.  

○ **Werling v. Sandy**  
Facts: TC dismissed π complaint for the wrongful death of her stillborn fetus on the basis that no cause of action for death to a fetus exists.  
Issue: May beneficiaries of an unborn fetus recover damages for the fetus' death occurring before birth so long as it was viable at the time the injuries were incurred?  
Rule: Beneficiaries of an unborn fetus may recover damages for fetus' death occurring before birth so long as the fetus was viable at the time the injuries were incurred.  
Note: why choose viability as the determining point? A live born baby can sue for injuries that occurred before viability, so why not wrongful death? (1) Because many other things could happen from conception on that would cause death. Argument that if nonviable fetus dies, there's no injury to it. (2) Other view: do not use conception or viability, but live birth. Death before birth results in no loss to the fetus, but death after birth is different. Argument against this is that an injury that does not kill fetus is recoverable by the baby, but not an injury that kills it! However, mother can claim negligence and recover for loss of fetus in her action.

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

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

3) DEFENSES
• **Contributory negligence** – if \( \pi \) is negligent in any way causing his own harm, he may not recover from the negligent \( \Delta \).
  o *Butterfield v. Forrester*
    Facts: While riding very fast, \( \pi \) ran into an obstruction \( \Delta \) had put in the road and was injured.
    Issue: Can a \( \pi \) who has not used reasonable care to avoid an accident recover for injury caused by the accident?
    Rule: \( \pi \) won’t be able to recover where his lack of due care contributed to the occurrence of the accident.

• **Comparative negligence** – if \( \pi \) is negligent, can only recover damages less percent he was negligent.
  - Pure comparative negligence - \( \pi \) may recover even if his fault is more than 50%.
  - Modified comparative negligence – some courts hold that \( \pi \) may not recover when his fault is greater than 50%.
  - Other courts hold that \( \pi \) may not recover when his fault is 50%.
  i) Implied assumption of the risk is found in contributory negligence states, but is out in comparative negligence states.
  ii) **Last clear chance doctrine** is found in contributory negligence states, but is out in most all comparative negligence states.
    • fact pattern – contributorily negligent \( \pi \); shouldn’t count that contributory negligent because after \( \pi \) was contributorily negligent, \( \Delta \) had chance to avoid the injury and didn’t take it – this happens in contributory negligence states.
    • In comparative negligence state, \( \pi \) is always going to recover. Courts created the doctrine as an escape to harsh result from contributory negligence; don’t have that problem with comparative negligence.
    • Doctrine is inapplicable, but the last clear chance facts are still significant.
      o *Knight v. Jewett*
        Facts: After \( \pi \) was injured during a game of touch football when \( \Delta \) collided with her, knocking her down, \( \Delta \) argued that \( \pi \) assume the risk of injury by participating in the game.
        Issue: Does a participant in an active sport breach a legal duty of care to other participants only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport?
        Rule: A participant in an active sport breaches legal duty of care to other participants only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.

iii) Contributory negligence is not a good defense to reckless tortious conduct in a contributory negligence state. It will be offset against the amount of the award in comparative negligence state.

• **Implied assumption of risk** - one sees the risk and unreasonable, voluntarily takes it on.
  - **Primary assumption of the risk** – when \( \Delta \) does not breach a standard of care (i.e. a defense stating the \( \Delta \) is not negligent). No recovery by \( \pi \).
- **Secondary assumption of the risk** – when \( \Delta \) breaches standard of care, \( \pi \) recovers according to comparative negligence. Note that the standard of care is much lower now since \( \pi \) engaged in risky activity.
  - *Knight v. Jewett*
    - **Facts:** After \( \pi \) was injured during a game of touch football when \( \Delta \) collided with her, knocking her down, \( \Delta \) argued that \( \pi \) assume the risk of injury by participating in the game.
    - **Issue:** Does a participant in an active sport breach a legal duty of care to other participants only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport?
    - **Rule:** A participant in an active sport breaches legal duty of care to other participants only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.
  - *Meistrich v. Casino Area Attractions, Inc*
    - **Facts:** Although realizing that the ice at a rink was very slippery, \( \pi \) kept skating and fell and injured himself. The rink asserted assumption of the risk as a defense to \( \pi \) suit for damages.
    - **Issue:** Is assumption of the risk a defense independent of contributory negligence?
    - **Rule:** Assumption of the risk is not a defense independent of contributory negligence.

**STRICT LIABILITY** - Liability without fault on the \( \Delta \) part.
- **Prima facie case** – same as negligence, but substitute standard of care with absolute duty to make safe.
- **Defenses** - Majority view – if what you have is knowing contributory negligence, it's a complete defense – no strict liability available. If unknowing, not a defense at all, will recover everything. In most comparative states, comparative liability only in negligence, not strict liability. Modern trend in some states carries it over – will set off contributory negligence.
- **Ultrahazardous activities** - \( \Delta \) is strictly liable for harm the risk of which makes his actions abnormally dangerous.
  - Restatement permits a complete defense of contributory negligence. However, it is uncertain whether or not assumption of the risk would apply when \( \pi \) acts reasonably.
  - **Factors determining whether ultrahazardous** – (1) high degree of risk of harm, and the gravity of harm likely to be great; (2) activity is not a common usage and is carried out in an inappropriate place; (3) risk can't be eliminated by reasonable care; (4) social value of activity.
  - **Policy reasons concerning strict liability** – (1) spread the loss to those who benefit from the hazardous activity; (2) actor is in the best position to avoid the harm from a hazardous activity; (3) idea of nonreciprocal risk to \( \pi \) (\( \pi \) does not impose a similar risk on \( \Delta \), and unfair to say \( \pi \) assumed that risk); (4) good deterrent since no need to show negligence at trial, and actor will question whether to engage in the activity at all; and actor will actually place precautions up to PL line as opposed to the lower PD line if negligence were necessary; (5) HOWEVER, it's not fair to punish an activity that is socially useful just
because it is dangerous; (6) strict liability is not a better deterrent since standard of care will be the same even if negligence is used, according to Hand formula.

CASES

Fletcher v. Rylands

Facts: Water from \( \Delta \) reservoir escaped down through mine shafts below his property and flooded \( \pi \) adjoining mine.

Issue: Is a person who brings something onto his land which is potentially harmful if it escapes, strictly liable for the natural consequences of such action?

Rule: A person who brings something onto his land which is potentially harmful if it escapes is strictly liable for the natural consequences of such action.

Rylands v. Fletcher

Rule: A person using his land for a dangerous, nonnatural use, is strictly liable for damage to another’s property resulting from such nonnatural use.

Turner v. Big Lake Oil Co.

Facts: Polluted water from \( \Delta \) ponds escaped and poisoned \( \pi \) grasslands and water holes.

Issue: Is negligence a prerequisite to recovery for injuries negligently caused by water escaping from land on which it is artificially contained?

Rule: Absent proof of negligence, there is no liability for injuries caused by water escaping from one’s land.

Siegler v. Kuhlman

Facts: Young girl drove into gasoline-loaded trailer which had come loose from its truck. The resulting explosion and fire caused her death.

Issue: Does hauling gas as freight involve such a high risk of serious injury which can’t be eliminated by due care, that strict liability must be imposed for damages resulting from its explosion or ignition?

Rule: Hauling gas as freight involves such a high risk of serious injury which can’t be eliminated by due care that strict liability must be imposed for damages resulting from its explosion or ignition.

Foster v. Preston Mill Co.

Facts: \( \pi \) mother mink, frightened by \( \Delta \) blasting, killed her own kittens.

Issue: Is one who engages in an ultrahazardous activity strictly liable for any and all damages that result?

Rule: Strict liability is only imposed for those injuries resulting as the natural consequence of that which makes an activity ultrahazardous.

VICARIOUS LIABILITY – liability for someone else’s tort.

1) Doctrine of respondeat superior – employers are responsible for torts of employees committed within scope of employment.

- An employee does not include independent contractor. The two are differentiated by the following considerations (Restatement of Agency) i.e. a person is an independent contractor when:
  i) Employer only has general control while contractor has control over the specifics, e.g. Dr. in a hospital.
  ii) Contractor has a distinct occupation or business.
  iii) Contractor’s work is done as a specialist and not under supervision.
  iv) Contractor’s skill is high for the particular occupation.
  v) Contractor supplies the instrumentalities for the work.
vi) Contractor is employed for a shorter time.

vii) Contractor is paid by the job, not by the time.

viii) Contractor's work is not the usual business of the employer.

ix) Contractor does not believe he is entering into relation of master and servant.

- Scope of employment: an act in the same general nature of work, or incidental to it (a small detour can still be within the scope if it's foreseeable); even if the act is forbidden by the employer.

- Employer can still be liable for negligent hiring of an independent contractor even if he's not liable for the torts of the independent contractor.
  - Employer can also be liable if the work is inherently dangerous, or if the duty of the employer should not have been delegated to an independent contractor.

- Compensatory damages are available to the 

- Punitive damages are available only in special circumstances in vicarious liability:
  - If the employee is a manager.
  - If the act was ordered or ratified by the employer.
  - If the employer was reckless in employing the actor.

- Fisher v. Carrousel Motor Hotel, Inc.
  - Facts: A plate was snatched from Fisher's hands by one of \Delta employees while shouting that "no Negro could be served."
  - Issue: Is the intentional snatching of an object from a person's hands without touching or injuring his body a battery?
  - Holding: Knocking or snatching anything from a person's hand, or touching anything connected with his person in an offensive manner, is an offense to his dignity and constitutes battery.

2) Joint Enterprise – persons who are in concert of action, or acting in the furtherance of a common purpose, express or implied (e.g. passengers in a car along with the driver), are jointly liable.

3) Automobile owners and other drivers – owners not liable for torts of other drivers.
   i) Family car doctrine – if immediate household member, can be held liable.
   ii) Permissive use doctrine – if anyone is using with your permission, you can be liable (modern trend).

- Parents and children – parents are not liable for torts of their children.
  i) Exception by statute – imposes liability for intentional torts – limited dollar amount.
  ii) Distinguish between the persons own fault and the person you want to hold them vicariously liable for.

4) Joint Tortfeasors – two or more \Delta, same tort.
   - Release rule – release of one joint tortfeasor does not release the others unless it expressly says so.
   - Joint and several liability – each individual \Delta is liable for entire amount.
   - Contribution – what happens if one of the \Delta pays more than his share? Can he get some back from other \Delta? YES.
     - Will be about equally responsible, will share judgment amount about equally.
   - Indemnification – if have right to this, you can get it all back, not just what you paid over.
     - Other guy was a lot more responsible – you get it all back.
     - Products liability/strict liability
     - Vicarious liability – can always get indemnification from the actual tortfeasor.

5) Comparative Contribution
• Share according to fault. How much they owe is governed by joint and several liability rules – these rules come into play after those rules. Contribution comes into play when one of the Δ pays more of his share.

DAMAGES
1) Goal of damages
   • Compensation – to place the injured party in the position he was in before the wrongful act.
   • Punitive – to punish the wrongdoer because the act was wrongful.
   • Deterrent effect – (1) to deter people from engaging in that sort of wrongful activity; (2) serves a declarative purpose – declares that that sort of activity is not acceptable.

2) Types
   • Nominal – just to declare that a wrong was done.
   • Compensatory
     i) For actual costs sustained;
     ii) For lost earnings in the past and in the future (reduced to present day value);
     iii) For loss of enjoyment of life;
     iv) Loss of consortium;
     v) Emotional distress;
     vi) Wrongful death;
     vii) Damage to property – fair market value.
   • Punitive

3) Policy
   • Collateral Source Rule – evidence of other compensation not allowed to mitigate compensation to π.
     i) Can argue this is against the purpose of compensation, since π is compensated twice; also just hold Δ liable for premiums the π paid for the insurance coverage; however, the Δ would not be deterred; and insurance company has lost.
     ii) Subrogation action – insurance company can sue “standing in the shoe” of π.
   • Damages which are hard to measure should not be allowed since it results in no consistency by the courts.
     i) However, there are many instances where such damages are allowed; assault, IIED, NIED, loss of consortium.
     ii) Also, to disallow them goes against the deterrent and compensation arguments for having damages in the first place.

4) Foreseeability
   • Egg shell/thin skull rule - Δ is liable for all damages even if the extent of the injury is unforeseeable (Vosburg).