INTENTIONAL TORTS

BATTERY

Intent

- **Vosburg v. Putney** – boy kicks another boy in the leg during classroom time
  - Intent to harm is not necessary (though that works), only intent to do the act
  - DD desired to cause harmful or offensive contact – even if intent to do harm is not present, intent to do the tortuous act is still present
    - If the intent of DD is unlawful (act of kicking is unlawful), then the intention to commit the act must be unlawful.
    - **Conduct was unlawful be it a violation of order and decorum and thus it is a battery**
  - As long as intent is present, the consequences need not be foreseeable by the actor (thin skull rule...take them as you get them)

- **Garret v. Daily** – five year old pulls chair out from under old woman
  - Knowledge that harm might result would be negligent, while knowledge that harm would result (substantially certainty) goes to intent for battery
  - Constructive intent – DD knew with substantial certainty that such contact would occur as a result of his actions – enough for establishment of a prima facie tort.
    - Intent element of battery is fulfilled if one knew with substantial certainty that the contact would occur
      - Doesn’t have to desire contact/harm, just know contact it will occur

Battery: Contact

- **Fisher v. Carrousel Motor Hotel** – plate snatched out of man’s hand by manager, who shouted that no Negro could be served
  - Touching a person or anything connected with that person in an offensive/insulting manner is an offense to one’s dignity (humiliating) and constitutes battery
  - Don’t need physical injury
  - Case of vicarious liability…employer is liable for tort committed by employee acting in the course of his or her employment (**need 4 ways they are held liable in Texas???)

- **Leichtman v. WLW Jacor Communications, Inc.** – PP was an anti-smoking advocate appearing on the radio when a D.J. there blew smoke in his face repeatedly.
  - Battery results from indirect physical contact which is offensive to a reasonable sense of personal dignity
  - Since tobacco smoke has the physical properties of making physical contact, intentionally directing it at someone constitutes battery
  - However, one cannot erect a glass cage around himself and announce that all contact comes at the expense of liability (must have substantial certainty that the contact will occur).

- §13 Battery: Harmful Contact
  - An actor is liable to another for battery if
    - He acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact or with the substantially certainty that such contract or apprehension is substantially likely to occur, and
    - A harmful or offensive contact with the person of the other directly or indirectly results
- When one unintentionally strikes a third person, he is still liable for battery because the DD’s intention was to strike an unlawful blow, to injure some person by his act, and it is not essential that injury be to the one intended.

- §19 What Constitutes Offensive Contract
  - A bodily contact is offensive if it offends a reasonable sense (ordinary person) of personal dignity

  **Defenses to Battery: Consent**

- Consent (willingness for the conduct to occur)
- Did PP have capacity to consent?
  - Was consent given
    - Expressely
    - Actions
    - Apparent implied consent (custom and usage)
      - Football game

- **O’Brien v. Cunard Steamship Co.** — women got vaccine shot even though she claimed to have already had one
  - If it reasonably seemed to the DD that the PP consented, consent will be held to exist regardless of the PP’s subjective state of mind. Only the objective manifestations of the PP are taken into account.
  - If the PPs behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feeling may have been. In determining whether she consented, he could be guided only by her overt acts and the manifestations of her feelings.

- **Barton v. Bee Line, Inc.** — 15 year old was raped or consented to sex with the chauffeur of the DD
  - One does not have a civil cause of action/can’t bring charges of battery, even if under 18, if she consents/willingly has sex and knows the nature and quality of her act.
  - Consent to a criminal act prevents a PP from recovering tort damages for injuries resulting thereof
  - Violation of a criminal act does not equal a tort

- **Bang v. Charles T. Miller Hospital** — PP had spermatic cords severed without knowingly giving that consent
  - If a physician or surgeon can ascertain in advance of an operation alternative situations and no immediate emergency exists, a patient should be informed/explained of the alternative possibilities and given a chance to consent before a doctor proceeds with what he believes is in the best interest of the patient.

- **Kennedy v. Parrott** — doctor punctured cyst in her ovary and cut a blood vessel
  - A surgeon may lawfully perform, and its his duty to perform, such operation as good surgery demands, even when it means an extension of the operation further than was originally contemplated, and for so doing he isn’t liable for damages as for an unauthorized operation.
  - Consent was implied since PP would have consented if awake (objective test…what would a reasonable patient have consented to)?

- Restatement (Second) of Torts
  - §892D. Emergency Action Without Consent
    - Conduct that injures another doesn’t make the actor liable to the other, even though the other hasn’t consented to it, if
      - An emergency makes it necessary or apparently necessary, in order to prevent harm to the other, to act before there is opportunity to obtain consent from the other or one empowered to consent for him, and
The actor has no reason to believe that the other, if he had the opportunity to consent, would decline

- Hackbart v. Cincinnati Bengals, Inc. – player was intentionally struck during the game
  - Participating in a usually violent professional sport does not constitute consent to all injures which may be inflicted by an adversary and thus one who intentionally attacks or injures his opponent may be liable in tort.

**Defense to Battery: Self Defense (privilege)**

- Courvoisier v. Raymond – PP shot police officer thinking he was one of the rioters who tried to break into his house/business
  - An action of force is justified by self-defense wherever the circumstances are such to cause a reasonable man to believe his life is in danger or that he is in danger of receiving great bodily harm and that it’s necessary to use such force for protection

  - §65 Self-Defense by Force Threatening Death or Serious Bodily Harm
    - 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
      - The other is about to inflict upon him an intentional contact or other bodily harm, and that
        - 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.
    - The privilege state in Subsection (1) exists although the actor correctly or reasonably believes that he can safely avoid the necessity of so defending himself by
      - Retreating if he is attacked within his dwelling place, which is not also the dwelling place of the other, or
      - Permitting the to intrude upon or dispossess him of his dwelling place, or
      - Abandoning an attempt to effect a lawful arrest
    - The privilege state 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
      - Retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling of the other, or
      - Relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest.

- §70 Character and extent of force permissible
  - The actor is not privileged to use any means of self-defense which is intended or likely to cause a bodily harm…in excess of that which the actor correctly or reasonably believes to be necessary for his protection.

**Defense to Battery: Defense of Property (privilege)**

- Katko v. Briney – couple rigged a spring-gun to go off in their uninhabitated farmhouse if someone trespassed
  - One is not allowed to utilize deadly force (a spring gun or similar dangerous devices) which will likely take a life or inflict great bodily injury for the purpose defending property (but can to protect life).
  - The use of force must not be in excess of that force reasonably necessary and which persons are entitled to use in the protection of their property…never cause serious bodily injury (different if they had lived there)
  - Prosser - the law has always placed more importance on human safety than property rights

Restatements Second of Torts
§ 77 Defense of Possession by Force not Threatening Death or Serious Bodily Harm
- An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another’s intrusion upon the actors’ land or chattels, if:
  - The intrusion is not privileged…
  - The actor reasonably believes that the intrusion can be prevented or terminated only by the force used, and
  - 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.

§ 79 Defense of Possession by Force Threatening Death or Serious Bodily Harm
- The intentional infliction upon another of a harmful or offensive contact or other bodily harm by a means which is intended or likely to cause death or serious bodily harm, for the purpose of preventing or terminating the other’s intrusion upon the actor’s possession of land or chattels, is privileged if, but only if, the actor reasonably believes that the intruder, unless expelled or excluded, is likely to cause death or serious bodily harm to the actor or to a their person whom the actor is privileged to protect.

Defense to Trespass: Necessity (privilege)
- Ploof v. Putnam – family docks during storm, servant unties boat
  - Entry upon the land of another (trespass) may be justified by necessity of the circumstances
  - Doctrine of necessity = privilege
  - One may sacrifice the personal property of another to save his life or the lives of his fellows.
- Vincent v. Lake Erie Transportation Co. – ship is kept docked and causes damage to dock during storm
  - While private necessity permits the invasion of another’s property (trespass) even if it is not done in negligence, the invader is liable for resulting damages for protecting his own property at the cost of another
  - 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…both sides will balance interests/costs and the right decision will be made
  - Act of god/nonintentional pay for trespass????????

Notes
- Public necessity – always a defense…benefits many people
- Private necessity – benefits limited number of people – always a defense, but liable for damages caused
- Necessity wins over defense of property rights

Summary:
- Contact … person, object associated with the person, floor
- No = no battery
- Yes
  - Intentional (substantial certainty that he knew the consequences or that the act was intentional and unlawful)?
    - No – no battery
    - Yes
      - Harmful or offensive (to a reasonable person)
        - No – no battery
        - Yes
          - Privilege or consent
            - Yes – no battery
            - No - BATTERY
ASSAULT

- Prima Facie Case – present/apparent ability to cause harm, intent to cause harm or apprehension of harm, and suffering of apprehension
  
  o Read v. Coker – workmen threatened to break PP’s neck if he did not leave premises
    - Assault exists where there is an intent to assault coupled with a present ability to do personal violence
    - Don’t need to prove the DD’s state of mind/intention
    - A reasonable person would be put in fear
  
  o Beach v. Hancock – gun aimed at man, who didn’t know it was empty
    - An assault is an unlawful attempt, coupled with an apparent ability (even if there’s no present ability),
      to commit a violent injury to the person of another
    - If a reasonable person would’ve perceived a present ability, that’s enough

Restatement (Second) of Torts
- §21 Assault
  o 1. An actor is subject to liability to another for assault if
    - he acts intending to cause a harmful or offensive contact with the person of the other or a third
      person, or an imminent apprehension of such a contact, and
    - the other is thereby put in such imminent apprehension

Apprehension
- must be reasonable
- not to be confused with fear or intimidation…all you need is reasonable apprehension of an offensive conduct
- It’s both an objective and subjective factor. Objectively, a reasonable person would have been apprehensive.
  Subjectively, a person was actually apprehensive
- Apparent and present ability will create a reasonable apprehension

Immediate battery
- Words alone are not enough. Need words coupled with conduct.
- If words undo the conduct, no reasonable apprehension

FALSE IMPRISIONMENT

o Whittaker v. Sanford – PP tried to leave boat of religious sect; wasn’t provided with boat
  - One doesn’t need to exert physical force to be liable for false imprisonment; actual physical
    restraint/impediment to escape is sufficient
  - Her lack of personal liberty and freedom is her injury

o Rougeau v. Firestone Tire and Rubber Co. – PP kept in guardhouse while employer looked for stolen
  property
  - If PP does not express a will to leave, then he does not have a cause of action (implied consent)

o Sindle v. New York Transit Authority – boy jumped out of bus and was run over
  - Restraint which is reasonable under the circumstances, imposed to prevent another from inflicting
    personal injuries or damaging property in one’s lawful possession or custody, is not unlawful
    (justification defense)
  - if one acts negligently in escaping (doesn’t exercises due care) from a false imprisonment, then those
    that falsely imprison him cannot be held liable for bodily injuries
Coblyn v. Kennedy’s, Inc. – old man detained for ‘stealing’ a ascot

- Any demonstration of physical power, which, to all appearances, can be avoided only by submission, operates as effectually to constitute an imprisonment, if submitted to, as if any amount of force had been exercised.
- If a man is restrained of his personal liberty by fear of a personal difficulty, it amounts to false imprisonment
- An imprisonment is justified is the circumstances would lead a prudent and cautious man to reasonably assume such...objective std, not subjective (shopkeeper’s view).
  - If a shopkeeper has reasonable grounds to believe that a person has shoplifted he may detain the person in a reasonable manner for a reasonable length of time.
- Statute for False Imprisonment (used it there had been reasonable grounds for one being detained).
  - detained in a reasonable manner and for not more than a reasonable length of time by a person authorized to make arrests or by the merchant or his agent or servant authorized for such purpose and if there were reasonable grounds to believe that the person so detained was committing or attempting to commit larceny of goods for sale on such premises, it shall be a defense to such action. If such goods hadn’t been purchased and were concealed on or amongst the belongings of a person so detained it shall be presumed that there were reasonable grounds of such belief.

Restatement (2nd) of Torts
§35 False Imprisonment
- An actor is subject to liability to another for false imprisonment if
  - He acts intending to confine the other or a third person within boundaries fixed by the actor, and
  - By his act directly or indirectly results in such a confinement of the other, and
    - Threats are enough
  - The other is conscious of the confinement or is harmed by it
- An act which is not done with the intention stated in Subsection (1,a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm

- Damages will be greater if there is humiliation or actual physical harm. Otherwise, it is usually nominal damages.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

- State Rubbish Collectors Association v. Siliznoff – Association threatened physical violence and put him out of business if PP did not join the association
  - If one suffers extreme and outrageous threats threatening physical violence (but the threat is not imminent and never occurs) and suffers physical illness or other injury occurs, then the PP has a cause of action for the intentional infliction of emotional distress
  - Court looks beyond assault...no imminent fear or ability to do harm

- Restatement of Torts, Second
  - §46 Outrageous Conduct Causing Sever Emotional Distress
    - One who by extreme and outrageous conduct (outside all possible bounds of decency)
      intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm to the other results from it, for such bodily harm.
    - Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
      - 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
      - To any person who is present at the time, if such distress results in bodily harm

- To recover, you need
• Intent
  • May exist where the DD desires to cause a certain result OR
  • Where she knows with substantial certainty that the result will occur OR
  • Acted recklessly (deliberate disregard of a high probability that the distress would occur).

• Extreme and outrageous conduct
  • Not expected to live with in everyday world

• Actual harm
  • Substantial emotional distress

• Reasonable person std.

Tricks Prof’s use for intentional torts:
- super sensitive PP
  o don’t take it into account
  o deal with PPs as if they’re average PPs
  o only if DD knows of sensitivities
- Incapacitated DD (young child, mental patient)
  o Everybody is liable for intentional torts!!
  o Note that even if they are incapacitated, they will be liable
- Transferred intent doctrine
  o To have transferred intent, the intent can be transferred from person to person or tort to tort
  o Transfer from would be PP to person actually harmed
  o The tort (assault) can be transferred to person who was to be harmed to one that is harmed

Negligence

Negligence –unintentional caused harms/tort
- basis of liability is the creation of an unreasonable risk of harm to another (have a duty to avoid such a risk)
  o to see if it’s unreasonable, court’s use B<PL
    ▪ must be a risk of harm greater than society is willing to accept in light of the benefits to be derived from that activity
  o courts also use the reasonable person std. (with the same physical characteristics) to see if a person of ordinary prudence would do what D did under the same circumstances.
    ▪ if one recognizes the risk, would that person have acted differently? If so, it’s negligence
  o Brown v. Kendall – man accidentally hit another in the eye with stick while trying to break up dog fight
    ▪ PP must show the injury was avoidable and conduct of DD was not free from blame (want to due care)
    ▪ PP cannot recover if both DD and PP are using ordinary care or both are not using ordinary care or if DD is using ordinary care and PP is not…only time can recover is if DD is not using ordinary when PP is.
    ▪ Ordinary care...kind and degree of care which prudent and cautious men would use to guard against probable danger….depends on circumstances and foreseeability
    ▪ Question: was it lawful and was DD exercising due care? If so, no negligence

General Standard

** Standard of care**
- need in each and every lawsuit
- reasonable person std.
  o exceptions below
    o United States v. Carroll Towing Co. – barge sank, bargee was away from barge
Risk that the mooring lines would come undone and the danger to the barge and to other ships if it did, was sufficiently great that PP should have borne the burden of supplying as watchman, unless he had some excuse for his absence.

The owner’s duty to provide against resulting injuries is a function of three variables:
- The probability that she will break away/of the harm (P)
- The gravity of the resulting injury, if she does (L)
- The burden of adequate precautions (B)

\[ B < PL \]

Basically one should take all precautions such that the burden of taking on those precautions is less than the probability of the event occurring times the liability incurred if the even does occur….balance cost and risk.

Marginal cost
- When the marginal cost of each accident begins to exceed the marginal cost of each precaution, at that point the actor has demonstrated reasonable care and is no longer negligent.

No difference in amt of precautions an actor would take betwn negligence and strict liability

Davis (pg. 160)
- ringing bell was not great burden

- Washington v. Louisiana Power and Light Co. – decedent was electrocuted when he accidentally allowed his band radio antenna to come into contact with a electrical wire in his backyard
  - B < PL
  - Great harm, low probability….does not equal or exceed burden or costs of precautions of relocating or insulating the power lines

- Weirum v. RKO General, Inc. – teenagers cause car accident in race to get radio’s cash prize
  - If defendant should have known of a risk that others would have behaved negligently due to the DD’s actions, then the DD may be liable for those foreseeable risks….need to act with reasonable care
  - Here it is foreseen that a DD will react negligently in response to another party’s negligence
  - Duty extends to those who could be foreseeably injured by your conduct
  - B<PL….instrumentalist perspective…rational decision making
    - Some argue for moral perspective and best efforts std.

- Restatement Second of Torts

  - § 291. Unreasonableness: How determined: Magnitude of risk and utility of conduct
    - Where an Act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done

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

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

o Sudden emergency doctrine
  ▪ A person who through no fault of his or her own, is placed in a sudden emergency, is not 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.

Special Rules Governing Proof of Negligence: Violation of Statute

o **Martin v. Herzog** – PP was driving a buggy without lights when he was hit by DD
  ▪ The unexcused omission of statutory signals set out to safeguard society is more than some evidence of negligence. It is negligence in itself….negligence per se
  ▪ If the disregard of the statue is a contributing factor to the harm, then and only then, does the PP forfeit the right to damages
  ▪ Contributory negligence is a full defense

o **Tedla v. Ellman** – PP and her brother were hit by a car when walking on the wrong side of the road because they perceive that it is safer
  ▪ A violation of a statute will be excused where it would have been more dangerous to comply
  ▪ The general duty is established by the statute and deviation from it without good cause is a wrong and the wrongdoer is responsible for the damages resulting for its wrong

o **Brown v. Shyne** – DD gave chiropractic treatment to PP even though he had no license to practice. The PP because paralyzed due to the treatment
  ▪ Violation of the statute itself does not constitute negligence, which would make the DD liable.
  ▪ The requirement of a license was intended to protect the public against incompetent practitioners. Therefore, PP must prove that DD was in fact incompetent by showing that the treatment given to PP wasn’t in accordance with the stds. of skill and care which prevail among those treating disease.
  ▪ If violation of the statute has no bearing on the injury (not the proximate cause), proof of the violation becomes irrelevant
  ▪ DD failed to get license, not proof that he failed to exercise due care

o **Gorris v. Scott** – PP was carrying sheep when they were washed overboard. To protect sheep from contagious diseases, they were to be divided into pens with footholds
  ▪ The statutory violation cannot be relied upon because the purpose/object of the act was not to protect against this type of harm/danger

o **Summary:** violation of a statute is negligence per se only when:
  ▪ The injury is one contemplated by the legislature and intended to protect that class of person (Gorris)
  ▪ Violation is a proximate cause of injury (Brown v. Shyne and Martin)
  ▪ Strict adherence would not lead to a lower std. of care (Tedla)

Special Rules Governing Proof of Negligence: Custom

o **Trimarco v. Klein** – PP was severely injured when a glass shower door shattered as he stepped out of the shower
  ▪ When proof of an accepted practice is accompanied by evidence that the dd conformed to it, this may establish due care
  ▪ However, when proof of a customary practice is coupled with a showing that it was ignored and this departure was the proximate cause of the accident, it may serve to establish liability
  ▪ What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a std. of reasonable prudence, whether it usually is complied with or not
o **The T.J. Hopper** – tugboats were lost at sea, but may have been saved if boat had a radio receiver (which is inexpensive, but no general custom to have one…only one did)
  - In most cases reasonable prudence is in fact common prudence, but strictly it is never the measure…a whole calling may have lagged
  - Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.
  - When some have though a device necessary, the court may say they were right and others too slack
  - **Opposite of Carroll Towing? Custom…boat men would have not been off**

o **Helling v. Carey** – ophthalmologist did not test for glaucoma on a 32 year old patient and she went partially blind. However, only 1 in 25,000 get glaucoma in that age group
  - If a test is so imperative that irrespective of the stds. of the profession, it is the duty of the courts to say what is required to protect patients.
  - B<PL
  - Here custom does not set the std. for reasonable care
    - Reasonable prudence requires the giving of the test

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**Special Rules Governing Proof of Negligence: Res Ipsa Loquitur**

- The thing speaks for itself
- Allows PPs to win some of the cases in which a gap in the evidence prevents them from proving the specifics of the DD’s negligent conduct….often the PP doesn’t have knowledge or access to the facts about the DDs conduct.
- There must be reasonable evidence of negligence
  - Look for:
    - No direct evidence as to D’s precise conduct
    - Event that doesn’t *normally* occur without negligence by someone
    - D is the only one whose negligence could’ve caused the event (under his control)

- **First formulation of res ipsa loquitur**
  - But where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

- **§17.  Res Ipsa Loquitur**
  - It may be inferred that the defendant has been negligent when the accident causing the plaintiff’s physical harm is a type of accident that ordinarily happens because of the negligence of the class of actors of which the defendant is the relevant member.

o **Boyer v. Iowa High School Athletic Ass’n.** – pp was injured when the bleachers in which she sat for a basketball game collapsed
  - The bleachers were in the exclusive control of the DD of the bleachers at the time of the negligent act, as failure to inspect AND
  - The occurrence is such as in the ordinary course of things would not happen if reasonable care had been utilized…bleachers don’t ordinarily collapse
  - The burden is on DD to determine that something else caused the injury if PP doesn’t have the ability to inspect
  - No evidence to support that the spectators movement caused the bleachers to collapse…it is purely speculative

o **Shutt v. Kaufman’s, Inc.** – PP sat down on a chair which bumped a table and caused a metal shoe stand to topple and strike PP on the head
  - The shopkeeper must exercise reasonable care for the business visitor, but is not an insurer of the safety of such visitor.
  - No gap in evidence….negligent for putting them too close??
- PP could have checked to see if the display table was unstable…had the means available to her to establish negligence on the part of the DD.

  - **City of Louisville v. Humphrey** – drunk died in drunk tank due to subdural hemotoma
    - The instrumentality wasn’t in control of the police at all times (he could have hurt himself before he was in police custody)
    - Court says that the prison keeper is not the insurer of the safety and well-being of the prisoner

  - **Escola v. Coca Cola Bottling Co.** – glass coke bottle breaks in waitress’s hand
    - As long as DD had control at the time of the alleged negligent act, although not at the time of the accident, and PP proves that the condition of the instrumentality has not been changed after it left the DD’s possession, the DD can be held liable
    - Res ipsa loquitur doesn’t apply as long as PPs and any third parties can account for their own conduct
    - Must find that there’s no other reasonable explanation
    - **Dissent**
      - Want absolute liability…don’t have to prove res ipsa to recover
      - Impose strict liability when the manufacturer placed the product in the mkt and knows it won’t be inspected and has a defect which causes injury to a person
      - Discourage making defective product…deterrence
      - Manufacturer in best position to absorb costs
        - Can anticipate hazards and guard against them
        - Can insure
          - Spread it across the public…internalize the externality
          - We’re paying to protect ourselves against the risk
          - Declining value of the dollar
            - The more you have the less another one helps
            - A large loss hurts more than a trivial loss
            - Thus put large loss on many people
      - change in marketing
        - people can’t check product for themselves…old relationship doesn’t exist
        - trademarks…allows people to rely on it….a statement/warranty of quality
        - lulls people to rely on it

**Modification of duty arising out of special relationships**

- **Restatement of Torts**
  - §6 Liability for negligent conduct
    - An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct poses a risk of physical harm
    - Unless the court determines under S7 that the duty of reasonable care is inapplicable, an actor whose failure to exercise reasonable care is a factual cause of physical harm is subject to liability for any such harm within the scope of liability.

  - § 7. Duty
    - A court may determine that an actor has no duty other than the ordinary duty of reasonable care.
    - Determinations of no duty and modifications of the duty of reasonable care are unusual and are based on special problems of principle or policy that warrant denying liability or limiting the ordinary duty of care in a particular class of cases. A defendant is not liable for any harm caused if the court determines the defendant owes no duty to the plaintiff, either in general or in relation to the particular negligence claim. If the court determines a defendant is subject to a modified duty, the defendant is subject to liability only for breach of the modified duty.

- **Elements of duty rule**
  - Duty of care of a reasonable person….duty to act….that there was foreseeable danger if care was not used
    - Usually no
- Exceptions
  - Common carriers and innkeepers
  - DD has duty if injury is due to her own conduct or an instrument under her control
  - Responsibility of Common Carriers for the Safety of their Passengers
    - Some states have a guest statute, that only allows recovery for a willful or wanton misconduct
  - Assumption of duty…volunteers assistance, then must proceed with reasonable care
  - Past custom (Erie Co)
  - Defendant-third party relationship (Tarasoff)
  - Children…child of like age, intelligence, and experience
  - Owners and occupiers of land
    - Breach…failure to exercise the reasonable care
      - Consider if there was a good cause for this
      - Is it in the range of things a reasonable person might do
    - Harm
    - Causation…that the failure of care actually and proximately caused the harm

- Restatement Second of Torts
  - § 332. Invitee Defined
    - An invitee is either a public invitee or a business visitor
      - connected with business dealings with the possessor of the land.
      - (must be some inducement or encouragement to enter…some conduct indicating that the premises are provided and intended for public entry and use)
  - § 343 Dangerous conditions known to or discoverable by possessor
    - A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land, if, but only if, he
      - Knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
      - Should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
      - Fails to exercise reasonable care to protect them against the danger
  - § 330 Licensee Defined
    - A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor’s consent (door to door salesman)
  - § 342 Dangerous conditions known to possessor
    - A possessor of land is subject to liability for physical harm cause to licensees by a condition on the land, if but only if,
      - The possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
      - He fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
      - The licensees do not know of the condition and the risk involved.
  - § 329 Trespasser
    - a person who enters or remains on the land in the possession of another without a privilege to do so
    - (in general the duty of possessor is to refrain from wanton and willful conduct)
    - (if possessor is on the land for the purpose of committing a crime, the possessor may be liable only for intentionally injuring the trespasser)
  - § 335 Artificial conditions highly dangerous to constant trespassers on limited area (harder on PP to prove)
    - A possessor of land who knows, or from facts within his knowledge should know that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused them by an artificial condition on the land, if
      - the condition
o is one which the possessor has created or maintains and
o is, to his knowledge, likely to cause death or serious bodily harm to such trespassers and
o is of such a nature that he has reason to believe that such trespassers will not discover it, and
• the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved

- §337. Artificial conditions highly dangerous to known trespassers
  - A possessor of land who maintains on the land an artificial condition which involves a risk of death or serious bodily harm to person coming in contact with it, is subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care to warn them of the condition if
    • The possessor knows or has reason to know of their presence in dangerous proximity to the condition, and
    • The condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk

- § 339. Artificial Conditions Highly Dangerous to Trespassing Children
  - A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
    • The place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
    • The condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
    • The children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
    • The utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
    • The possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

- Some courts have kept distinctions, some have abolished them, and some have kept distinction just btwn licensee/invitee and trespasser
- Business can bear the burden better

**Special Relationship Between the Parties**

- **Rowland v. Christian** – faucet broke in bathroom, social guest hurt hand
  - Breaks down tort distinctions…DD should be expected to exercise reasonable care regardless of relationship with PP
  - PPs status as trespasser, licensee or invitee will not be dispositive as to the duty of care owed to him.
  - The test will be whether the owner acted as a reasonable person in view of the probability of injury to others, and, although the PPs status as trespasser, licensee, or invitee may in light of the facts giving rise to such have some bearing on the question of liability, the status is not determinative
  - Balancing of considerations
    • Foreseeability of harm to the PP
    • Degree of certainty that the PP suffered injury
    • Closeness of the connection btwn DDs conduct and injury suffered
    • Moral blame attached to the DDs conduct
    • Policy of preventing future harm
    • Extent of the burden to the DD
    • Consequences to the community of imposing a duty to exercise care with resulting liability for breach
    • The availability, cost, and prevalence of insurance for risk involved.
Limitations on Liability

- The absence of a General Duty to Rescue
  - § 314 Restatement Second of Torts
    - the fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection doesn’t of itself impose upon him a duty to take such action
  - Exceptions
    - Preexisting relationship
      - Innkeeper, landowner to invitees and licensees, camp counselors
  - **Erie R. Co. v. Stewart** - car passenger hit by train when watchman was missing
    - Where one has established a higher std. of due care for itself and through past custom has led PP to rely upon the std., it is negligent to discontinue the use of extra care without adequately warning of the discontuance….there’s a duty to act
    - If one can conclude a lack of due care and there is no reason for that lack, then negligence appears as a matter of law
  - **Tubbs v. Argus** – PP was guest in DD’s car when it struck a tree and PP abandoned car and did not help injured DD
    - At common law, there’s no general duty to aid a person who’s in peril, BUT
      - The DD may be held liable for injuries if a special relationship exists or its an instrumentality under control of the DD
        - Tippecanoe Loan
          - There may be a legal obligation to take positive steps to effect the rescue of a person who is helpless and in a situation of peril, when the one proceeded against is an invitor or when the injury resulted from use of an instrumentality under the control of the defendant.
    - § 322 Restatement Second of Torts
      - If the actor knows or has reason to know that by his conduct, whether tortuous or innocent, he has caused such bodily harm to another as to make him helpless and in danger of future harm, the actor is under a duty to exercise reasonable care to prevent such further harm
  - **Tarasoff v. Regents of University of California** – PP was killed by man who told therapist that he would kill
    - Once a DD determines or should have determined from his professional stds, that one that he has a special relationship with poses a serious threat to another, DD bears a duty to exercise reasonable care to protect the foreseeable victim (should warn victim or her family)
      - One need only exercise the reasonable skill, knowledge, and care ordinarily possessed and exercised by member of that professional specialty under similar circumstances

Actual Causation (without this, there’s no proximate causation)

- Did the DD cause the PP’s harm?
  - Whether the activity allegedly engaged (the negligence) in by the defendant is inherently capable of causing the sort of harm suffered by the plaintiff.
    - Could it cause the harm?
    - And did it cause the harm?
- But For….DD’s negligence, would this conduct have occurred?
- Substantial factor test
  - If there are two people, this doesn’t work
  - But if each one’s action was a substantial factor in causing the injury
- Alternative causes test
  - Both acted negligently, but only one caused the harm, don’t know who
  - But he burden on them
- **Hoyt v. Jeffers** – sparks from mill chimney possibly/probably set fire to the hotel
  - General causation – due to history of starting fires, it is capable and probable that the mill started the fire
    - Evidence of past causation can prove specific present causation if the instrumentality is in the same condition
  - Pattern of negligence…reasonable person would infer such

- **Smith v. Rapid Transit Inc.** – bus coming toward PP, she was forced to hit parked car…not known which bus, but believes it can be inferred from route schedules
  - It is not enough that mathematically the chances somewhat favor a proposition to be proved….it remains a matter of conjecture
  - Needs to be a direct link btwn DD and cause of accident…at least reasonably certain

**When One of Several Defendants Did It, But We Can’t Tell Which One: Alternative Liability**

- **Summers v. Tice** – PP shot in eye and mouth while quail hunting…don’t know which of two friends did it
  - Notion of contingent liability….When two or more persons by their acts are possibly the sole cause of a harm, and the plaintiff has introduced evidence that the one of the two persons, then the defendant has the burden of proving that the other person was the sole cause of harm
    - The joint tortfeasor is responsible for the whole damage unless he can prove he wasn’t responsible…jointly and severally liable
  - Both failed to exercise reasonable care and thus both will be held liable even though only one caused the harm

- **Ybarra v. Spangard** – During an appendectomy, man’s shoulder was injured. He doesn’t know specifically who injured him, but brings a negligence suit against all doctors and nurses who worked on him
  - The control at one time or another of the various instrumentalities, which might have harmed the PP, was in the hands of every DD of his employees and thus places on them the burden of initial explanation
    - Each had a duty to see no harm befall PP
    - Shift burden of proof…helps avoid conspiracy of silence
  - Masters (employers) can be held liable for their servants (employees) wrongful conduct as long as he was acting in the scope of employment and it’s not intentional…spreads loss on the one who can bear it and cause them to exercise care in hiring

- **Jointly liable**
  - DDs can be joined in a single suit; right of any party who is sued to insist that others be sued jointly with him because of their shared liability

- **Severally liable**
  - Each is liable in full for the PPs damages, although the PP is entitled to only one total recovery

- **Jointly and severally liable**
  - Two or more DDs acted in concert to cause the harm and where DDs acted independently but caused indivisible harm
  - Liability is in the form of vicarious liability…all DDs will be responsible for the harm actually caused by only one of them
  - Can bring them under the same action or can choose to sue one and recover everything from one

**Joint Tortfeasors: When Two or More Causal Agents Would, Independent of Each Other, Have Caused PPs Harm: Concurrent and Successive Causation**

- **Concurrent Causes**
  - When two parties are negligent and their actions combine to cause an indivisible harm, they are both jointly and severally liable for the entire harm; each of these concurring events is a cause of the injury, insofar as it would have been sufficient to bring that injury about
Successive causes
- If a negligent act causes an injury, and a successive occurrence comes to pass which would have caused the same injury later, recovery is not limited to just the difference between the two, but the full damages that would’ve resulted….(if apprortionment isn’t feasible)

- **Dillon v. Twin State Gas & Electric Co.** – boy grabbed electric wire to stop from falling off bridge, was electrocuted
  - PP can recover only the difference between his life prospects were had he not grabbed the wire…nothing bc he died or limited life from harm caused by falling…liable for an extra harm/damages
  - Appportionment is feasible

- **Kingston v. Chicago & N.W. Ry.** – Two similar fires that contributed to destroying PPs property. Only one fire’s source is identifiable, though the second wasn’t caused by an act of nature
  - Where two causes attributable to the neg of a responsible person concur in producing an injury to another, either of which causes would produce it regardless of the other, each is liable for the entirity of the fire
  - If harm is indivisible, then once the DD is liable at all, he is liable for all the harm (joint tortfeasor)
  - Substantial factor in producing the result

Actual Causation??

- **Ford v. Trident Fisheries Co.** – mate fell overboard, not seen in water, PP sues because life preserving boat was wasn’t suspended from the davits, and there was only one oar
  - Even if the boat and oar were available, he couldn’t have been rescued…DD’s negligence wasn’t the cause of injury
  - Breached duty of care

- **Lyons v. Midnight Sun Transportation Services, Inc.** – PP was killed when her car was hit as she was turning out of parking land
  - Whether DD was speeding or not, she would have died…his negligence was not the cause of injury/death…would have happened regardless
  - If negligence isn’t legal/proximate cause of accident, he’s not liable

- **Cahoon v. Cummings** – doctors negligently failed to diagnose and treat decedent’s esophageal cancer
  - One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, he is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
    - His failure to exercise reasonable care increases the risk or such harm, or
    - The harm is suffered because of the other’s reliance upon the undertaking
  - Even if one’s conduct was not the cause of the resultant damages, damages are proportional to the increased risk attributable to the DDs negligent act or omission.
  - Causation = loss of chance of survival

Proximate Cause

Was Any Harm to the Plaintiff Foreseeable When the Defendant Acted:

- A negligent DD who caused the injury can get off based on foreseeability
  - If the result was unforeseeable, let the DD go
    - Indirect, intervening cause that was unforeseeable
  - If the result was foreseeable, hold the DD liable
allows a defendant to escape liability even if all other elements of the prima facie case – negligence, cause-in-fact, and harm – have been established
- DD is liable for foreseeable (both foreseeable results and foreseeable PPs), but not the unforeseeable, consequences of negligent conduct
- Was the wrongful quality of DDs conduct a necessary condition?
- However liable even if extent of PPs injuries is unforeseeable (thin skull rule)

Courts agree that DD’s liability must stop short of the most far-reaching and bizarre consequences, the difficulty is defining exactly where this dividing line should be
- **Direct causation**
  - Liability for any harm that may have directly resulted from the DD’s negligence, no matter how unforeseeable or unlikely
  - **Exception**
    - An intervening harm
    - Tested by hindsight
- **Foreseeability…seems used more**
  - Limit DD’s liability to those results that are of the same general sort that made the DDs conduct negligent in the first place….results of a generally foreseeable nature at the time one acted, both as to kind of injury and as to person injured
  - **Palsgraf v. Long Island R.R.** – guards helped/pushed man aboard a train, his package/fireworks fell and exploded causing scales to fall many feet away and hit PP
    - Risk reasonably perceived (foreseeable) = duty
    - Although possibly negligent to man (in pushing him), his conduct didn’t involve any foreseeable risk of harm or negligence to the PP, who was far away….there’s no duty to her
    - Since the DDs conduct didn’t involve an unreasonable risk of harm to the PP, the damage to her wasn’t foreseeable…the fact that the conduct was unjustifiably risky to someone else is irrelevant…proof of negligence is in the air
    - There’s no duty or care due the PP
    - **Dissent**…duty is to everyone…only liable where there is proximate cause (direct causation)
      - DD bears a burden of due care to protect SOCIETY from unnecessary danger, not to protect A, B or C alone.
      - **What actually happened…foreseeable after the action**
      - **There must be a natural and continuous sequence btwn cause and effect**
      - The result must not be too remote in time and space from the cause
  - **Solomon v. Shuell** – decedent came out of house with gun pointing to the ground to help robbery suspects being arrested by police not in uniform…he was shot by an officer
    - **Rescue Rule**
      - a person who goes to the rescue of another whether ly in or one thinks is in imminent and serious peril caused by the negligence of someone else, is not contributory negligent, as long as the rescue attempt is not recklessly or rashly made
      - Applies as long as a reasonable person would’ve acted similarly and the rescue attempt was done in a reasonable manner

**Were the Nature and Circumstances of the Plaintiff’s Harm Foreseeable?**
- **Marshall v. Nugent** – PP was walking uphill to warn oncoming traffic of DDs car in the wrong road when he was hit by a car
  - The DD is liable for the full consequences of his negligent act when the intervening force is one which a reasonable man would’ve foreseen as likely to occur under the circumstances
  - DDs basic act of negligence was endangering PP during the initial-near collision
  - Injury was within the scope of risk…part of ongoing chain of events caused by negligent act (foreseeable)
- Watson v. Kentucky & Indiana Bridge & R. Co. – gas escaped from rail car, man threw a match into pool of gas causing an explosion which harmed PP
  - DD was responsible where the intervening causes, acts, conditions were set in motion by his earlier negligence, if the intervening acts should be reasonably anticipated
  - If match was thrown purposefully…that’s not reasonably anticipated

Other Approaches to the Proximate Cause Issue

- Restatement Second of Torts
  - § 431. What Constitutes Legal Cause
    - The actor’s negligent conduct is a legal cause of harm to another if
      - His conduct is a substantial factor in bringing about the harm, and
      - There is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm
  
  - § 433. Considerations Important in Determining Whether Negligent Conduct is Substantial Factor in Producing Harm
    - The following considerations are in themselves or in combo with one another important in determining whether the actor’s conduct is a substantial factor in bringing about harm to another:
      - The number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
      - Whether the actor’s conduct has created a force or a series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible
      - Lapse of time

- Intervening Causes
  - A force which takes effect after DDs negligence which contributes to that negligence in producing PPs injury

- Superseeding Cause
  - An intervening cause that breaks the chain of causation and is sufficient to prevent DD from being negligent

- Foreseeability rules
  - If DD should’ve foreseen the possibility that the intervening cause might occur or if the kind of harm suffered by PP was foreseeable, DDs conduct will nonetheless be the proximate cause. But if neither the intervening cause, nor the kind of harm was foreseeable, the intervening cause will be a superseding one relieving DD of liability.

- Kinsman Transit Co. (note) – barge broke from moorings, knocked a vessel loose and the two barges created a dam in the river
  - If some harm was foreseeable, DD is liable even if actual harm resulting was of a different kind

- In re Polemis & Furness (note) – DDs servant knocked a plank into the hold of a ship containing benzene which caused a spark and thus a fire…direct causation
  - DD was negligent in dropping the plank and some damage to the ship could’ve been foreseen, but not that the dropped plank would cause a spark
  - If the act would cause damage and it does cause damage, but not the exact kind it would expect, that is immaterial, as long as the damage is in fact directly (no intervening cause) traceable to the negligent act

- Wagon Mound #1 – spilled oil into the harbor which ignited after coming into contact with acetylene torches and the fire destroyed the wharf
  - Overruled Polemis
  - As a general rule, DD is only liable for those consequences of his negligence which are reasonably foreseeable at the time he acted
- A slight act of negligence which results in some trivial foreseeable damage, should not mean the actor is liable for all consequences however grave
  - Wagon Mound #2 – same case...PP was owner of two ships damaged by the fire
    - If harm was remotely foreseeable, liability is imposed even if consequences as highly unlikely
    - Should be foreseeable that there’s a small risk of fire
    - If there’s a risk that reasonable person in the position of the DD (chief engineer) wouldn’t brush aside as far-fetched, liability can be imposed
  - B<PL

**Special Instances of Nonliability for foreseeable Consequences**

**Mental and Emotional Upset**

- **Waube v. Warrington** – PP was looking out the window watching her child cross the highway and witnessed him killed
  - Duty can’t be extended to one out of the range of physical peril

**Bystanders**

- **Dillon v. Legg** – PPs (mom and sister) were at the scene and saw young boy injured by car. Sued for emotional harm
  - Whether DD should reasonably foresee the injury to PP....whether DD owes PP a duty of due care, the courts consider
    - Whether the PP was located near the scene of the accident as contrasted with one who was a distance away from it (zone of danger...and thus suffered fear for her own safety)
    - Whether the shock resulted from a direct emotional impact upon PP from the sensory and contemporaneous observance of the accident, as opposed to learning of the accident from others after its occurrence
    - Whether PP and victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship
  - A negligent driver who causes the death of a young child may reasonably expect that the mother won’t be far distant and upon witnessing the accident suffer emotional trauma

- **Thing v. La Chusa** – PPs son was injured in a car accident that PP didn’t witness, but she rushed to the scene where she saw her bloody and unconscious child, whom she thought dead
  - Tries to rigidify the Dillion guidelines by only allowing PP to recover if the PP is
    - Closely related to the injury victim
    - Is present at the scene of the injury producing event at the time it occurs and is then aware that its’ causing injury to the victim
    - Suffers emotional distress...reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances
  - Whether PP suffers emotional distress beyond that which would be anticipated in a disinterested witness
  - Since PP was not at the scene, she cannot establish a right to recover for the emotional distress she suffered when she subsequently learned of the accident and observed its consequences

**Direct Victim**

- **Burgess v. Superior Court** – child injured during delivery...mom wants damages for negligently inflicted emotional distress against doctor
  - She doesn’t meet requirements of Thing, but the court creates another category
  - Creates a direct victim category
    - Direct victim – when the DD owed a duty to the victim
    - But when is there a duty (what we wrestled with in Dillion, thing)
Here there’s a professional relationship btwn PP and doctor
They entered into a contract and DD didn’t exercise due care

According to Molien, damages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact AND
In cases where a duty arising from a preexisting relationship is negligently breach

- Courts don’t like to give damages for IIED
  - False claims
  - Need to live with hard knocks (people all die)
  - Limitless liability (all who say world trade center collapse)

**Injury to Personal Relationships**

- **Feliciano v. Rosemar Silver Co.** – PP and gf lived together as husband and wife for 20 years before PP was injured
  - PP was not allowed to recover for loss of consortium because marriage is a social institution of the highest importance and the courts don’t want to jeopardize that integrity
  - Relationship is important like NIED cases…good place to draw the line

- **Borer v. American Airlines, Inc** – PP was hit by the cover on a lighting fixture and was injured as a result. Her 9 kids sued bc they had been deprived of her services, affection, tutelage, etc.
  - They have suffered a loss for which they cannot be compensated and thus should not obtain a future benefit (money) essentially unrelated to that loss
  - Damages are difficult to measure
  - Since every serious injury to a parent would engender a claim, the expense of litigating such claims would be sizable
  - No destruction of a sexual life

**Prenatal Harm**

- **Werling v. Sandy** – PPs child was stillborn allegedly due to negligence of DDs
  - R.C. 2125.01
    - When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensured, the person who would’ve been liable if death had not ensued, or the administrator or executor of the estate of such person shall be liable to an action for damages
    - A duty of care is owed to the fetus, which was viable at the time of injury
    - Wrongful death statute…decedent’s family takes for harm caused by the DDs conduct

- **Fassoulas v. Ramey** – PPs had two kids born with severe abnormalities. Thus PP had a vasectomy, but had two kids later, one normal, one with sever abnormalities
  - A parent can’t be said to have been damaged by the birth and rearing of a normal, healthy child
    - The child is the child of the parent and its’ their legal obligation to support the child
    - Benefits to the parents outweigh their economic loss in rearing and education a healthy, normal child
  - However, an exception exists in the case of special upbringing expenses associated with a deformed child
    - No valid policy arguments against parents being recompensated for these costs of extraordinary care in raising a deformed child.

- Tupin…

**Contributory Fault**

**Contributory Negligence**
• A PP who is negligent (not taking reasonable care to protect his own safety) and who negligence contributes proximately to his injuries, is totally barred from recovery.
  • It’s a complete defense

  o **Butterfield v. Forrester** – DD put a pole across his side of road, which would have been observed by a PP riding at normal speed.
    ▪ One must use common and ordinary caution and care for himself, otherwise he will be partly at fault and will not recover
    ▪ Restatement
      ▪ PPs negligence is conduct that falls below the std. to which the PP should conform (std. of reasonableness)

  o **Davies v. Mann** – PP tied ass off the side of the road, when DDs wagon (going at a smart pace) ran over the ass and killed it
    ▪ Since the PP lost the opportunity to prevent the accident by the time it occurred and the DD could’ve avoided the accident at any time, the DD was liable
    ▪ Even though the animal may have been improperly there, the DD could have avoided injuring the animal through proper care
    ▪ Although there might have been negligence on the part of the PP, unless he might, by exercise of ordinary care, have avoided the consequences of the DDs negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong

  o Restatement: Last Clear Chance: Helpless Plaintiff
    ▪ A PP who has negligently subjected himself to a risk of harm from the DDs subsequent negligence may recover for harm caused thereby, if immediately preceding the harm
      ▪ The PP is unable to avoid it by the exercise of reasonable vigilance and care, and
      ▪ The defendant is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm, when he
        ▪ Knows of the PPs situation and realizes or has reason to realize the peril involved in it or
        ▪ Would discover the situation and thus have reason to realize the peril, if he were to exercise the vigilance which it is then his duty to PP to exercise

  o Restatement: Last Clear Chance: Inattentive Plaintiff
    ▪ A PP who, by the exercise of reasonable vigilance, could discover the danger created by the DD’s negligence in time to avoid the harm to him, can recover if, but only if, the defendant
      ▪ Knows of the PPs situation and
      ▪ Realizes or has reason to realize that the PP is inattentive and therefore unlikely to discover his peril in time to avoid the harm, and
      ▪ Thereafter is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm

- Clear chance summary:
  ▪ if just before the accident the DD has an opportunity to prevent the harm and PP doesn’t have such an opportunity, the existence of this opportunity wipes out the effect of the PPs contributory negligence

**Assumption of the Risk**

  o **Meistrich v. Casino Arena Attractions, Inc.** – PP was injured ice skating. The ice was too hard and slippery due to DDs negligence, but PP knew his skates were slipping on turns
    ▪ Restatement
      ▪ One who fully understands the risk of harm to himself caused by DDs conduct and nevertheless voluntarily chooses to enter or remain within the area of risk, under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk
- Assumption of the risk
  - Primary – DD wasn’t negligent…owed no duty or did not breach the duty owed…vosburg on playground
  - Secondary – whether a prudent person in the exercise of due care would have incurred the known risk and is so, would that person have conducted himself in a manner in which PP acted….pps contributory negligence
- Thus, PPs conduct is to be gauged by the rules of contributory negligence

**Comparative Negligence**

- Recovery is reduced, but not necessarily eliminated, by the PPs own fault
- Try to divide liability between PP and DD, in proportion to their relative degrees of fault
- Pure comparative fault
  - PPs recovery is reduced, but not eliminated because of the PPs negligence
- Modified comparative fault
  - PP whose negligence equals or exceeds that of the DD cannot recover at all
  - If it does not, then recovery is reduced proportionately

  o **Knight v. Jewett** – PP caught a pass playing touch football, when she was hit by DD, fell down, and he ran over her hand
    - Court said she assumed the risk by participating in the game
    - Legal duty is only breached if the conduct was intentional or so reckless to be outside of the range of ordinary activity involved in the sport

  - **Immunities**
    - Government
    - Charities
    - Family – btwn husband and wife and parent and child

**Strict Liability**

- **Maintaining Custody of Animals**
  - Restatement
    - A possessor of livestock which intrudes upon the land of another is liable for their intrusion and for any harm done while upon the land…although the possessor of the livestock exercised the utmost care to prevent them from intruding
    - Owners and possessors of wild animals are strictly liable for harm, including personal injures, caused by their animals…only those dangerous propensities associated with the animal
    - Includes harm done by a dangerous domestic animal (dangerous propensities known)

- **Abnormally Dangerous Activities**

  o **Fletcher v. Rylands** – reservoir was constructed on DD’s land and water escaped and flooded PP’s property
    - The person who for his own purpose brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his own peril, and if he doesn’t, is answerable for all the damage which is the natural consequences of its escape
    - PP did not take upon himself any risk arising from the uses to which the DDS chose to apply their land
    - For any nonnatural/unforeseeable use of land, DDs must do at their own peril…strict liability

  o **Turner v. Big Lake Oil Co.** – salt water escaped from ponds constructed and used by DDs in the operation of oil wells and caused property destruction
    - Negligence is a prerequisite to recovery
    - Storage of water is a natural/necessary and common use of the land, within the contemplation of the State and its grantees
Siegler v. Kuhlman – PP hit an overturned gasoline truck, which then exploded and killed her
- Transport of gas is an activity with a high degree of risk which cannot be eliminated with reasonable care
- B <>PL….all are high
- Restatement:
  - One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent such harm
  - Such strict liability is limited to the kind of harm, the risk of which makes the activity abnormally dangerous
  - Factors of an abnormal activity
    - Whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;
    - Whether the gravity of the harm which may result from it is likely to be great
    - Whether the risk cannot be eliminated by the exercise of reasonable care
    - Whether the activity is not a matter of common usage
    - Whether the activity is inappropriate to the place where it is carried on
    - The value of the activity to the community
  - Hauling gasoline is dangerous and meets all the factors…thus strict liability…such a great risk of harm to innocents

- Rationale for strict liability
  - More fair
  - Can spread cost among consumers
  - Beyond the accepted and shared level of risks
  - Provides and incentive to prevent the accident

Foster v. Preston Mill Co. – blasting operations by the DD frightened PP’s mother mink and caused the mink to kill their kittens
- One who carries on an ultra-hazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultra-hazardous, although the utmost care is exercised to prevent the harm
- Here, it’s the exceedingly nervous disposition of the mink, rather than the normal risks inherent in blasting operations, which therefore must, as a matter of sound policy bear the responsibility for the loss here sustained…strict liability is not to protect against harms incident to the PP’s extraordinary and unusual use of the land
- The risk here is not the kind which makes the activity ultra hazardous
Vicarious liability
- hold employer responsible if employee is acting in the scope of employment
- if it is non intentional (though some are now holding them responsible for these)
- Independent contractors are usually not liable
  - Exceptions
    - Employer is negligent in selecting the independent contractor
    - Held liable for negligence not vicariously liable
    - The duty to public or particular PP is nondelegable
    - Work is inherently dangerous
- Master can full indemnification from servant
- Why are employers held liable?
  - Deep pockets
  - Spreading the costs
  - Pressures them in ensuring how servants act and also whether and to what extent they act

Damages
- Compensatory
  - Amt of money necessary to restore PP to the preinjury condition
  - Medical expenses
    - Necessary and reasonable
    - May reduce recovery if you don’t get treatment (Williams v. Bright…jeovah’s witness)
  - collateral source rule – can recover medical expenses from insurance and DD
    - Coyne v. Campbell…physican can’t recover medical expenses he didn’t pay for
- Lost earnings and Impairment of Earning Capacity
  - Base it on life expectancy
  - Won’t give damages for a possible future injury unless it is over 50% that you will get it
    - Can bring a claim in the future when you have it
  - Account for inflation, but subtract interest
- Pain and suffering

Settlements
- it is the uncertainty of cases that leads to settlement
- often done with insurance companies
- Negotiating Strategies
  - Competitive Strategy
  - Cooperative Strategy
  - Integrative Strategy

Damages
- Nominal
  - Small in amount
  - Only available in intentional tort cases
- Compensatory Damages
  - Reflect the harm actually suffered
  - Includes doctors bills, pain and suffering, lost wages
- Punitive Damages
  - Are to punish the DD for wrongdoing
  - Are often substantial in amount
  - Ordinarily available if the DD is found to have acted with malice or reckless indifference
Owens-Illinois, Inc. V. Zenobia – writ of certiorari to consider principles governing awards of punitive damages in tort cases

**Shifted burden of proof??**
- Heightened std of proof (from preponderance to clear and convincing) required of PP seeking an award of punitive damages in a nonintentional tort case
  - Need to show actual malice, not just implied malice (used to have to just show it was grossly negligent)
    - Need clear and convincing evidence
    - Show that DDs conduct was characterized by evil motive, intent to injure, fraud or actual knowledge of the defective nature of the products coupled with a deliberate disregard of the consequences.
    - Excludes nonintentional torts
    - Ellis – punitive damages aren’t applied fairly…there is high uncertainty