

I) Battery

a) Prima Facie Case

i) Intent

(1) *Vosburg v. Putney*—What Consequences Must the Defendant Intend?

**Facts:** P (14 years old) sued D (11 years old) after D reached across the aisle with his foot and hit the shin of the right leg of the defendant, while at school.

**Rules:** Battery—An actor is subject to liability to another for battery if:

- (a) he acts intending to cause a harmful/offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) a harmful/offensive contact with the person of the other directly or indirectly results

**Holding/Issue:** The appellate court believed that the defendant should be responsible for any injuries that the plaintiff received as a result of this incident, whether or not the defendant intended to do any harm and whether or not the defendant foresaw possible injuries.

**General Info:**

- (a) Intent to commit the act is all that is needed—must be unlawful intent or defendant must be in fault
- (b) unlawful intent--disturbed the order & decorum of classroom—in class; class exercises had begun; time & place important → action acceptable on playground (implied license)
- (c) expectations—areas where we will accept this kind of behavior and other areas where we will not
- (d) Court is setting precedent—even in a case with no intent to harm, when act is unlawful, person who committed act is liable for all injuries resulting directly from the wrongful act, which creates a subjective standard of justice—what is foreseeable to one person might not be foreseeable to another

(2) *Garratt v. Dailey*—Which Mental States Constitute Intent?

**Facts:** Less than 6 year-old D pulled chair from under P

**Rules:** Liability for battery if:

- a) act is done with intention of bringing about a harmful/offensive contact
- b) contact is not consented to by other party
- c) contact is not otherwise privileged

--A minor is liable to be proceeded against just like anyone else if they have committed a tort with force.

**Holding/Issue:** issue of whether defendant knew with **substantial certainty** that the plaintiff would attempt to sit down where the chair had been, and to change the judgment if the findings warrant it.

**General Info:**

- (a) Battery → act done with intent to harm/offend → must be done with purpose or knowledge w/substantial certainty
- (b) 2<sup>nd</sup> Restatement--burden is on the defendant now, not on the plaintiff to prove consent/privilege

ii) Contact

(1) *Fisher v. Carrousel Motor Hotel*—Which Intended Contacts are Wrongful?

**Facts:** As he was about to be served, P was approached by Robert Flynn, who snatched the plate from P's hand and shouted that he, a Negro, could not be served in the club.

**Rules:**

1. Contact requirement does not mean that a part of the defendant's body must come into direct contact with a part of the plaintiff's body.
2. "Harm" denotes "the existence of loss or detriment in fact of any kind to a person resulting from any cause." (2<sup>nd</sup> Restatement, Statute 7)

**Holding/Issue:** Plaintiff is entitled to actual damages for mental suffering due to the willful battery, even in the absence of any physical injury. A principal or master is liable for exemplary or punitive damages because of the acts of his agent, but only if: c) the agent was employed in a managerial capacity and was acting in the scope of employment. Defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting.

**General Info:**

- (a) Restatement, §13 → imminent apprehension of harmful/offensive contact
- (b) "contact unwarranted by social norms/usages is clearly an offensive invasion . . ." or offensive to a reasonable sense of personal dignity that would offend the ordinary person

- (2) *Leichtman v. WLW Jacor Communications, Inc.*—Which Intended Contacts are Wrongful?

**Facts:** P says D repeatedly blew cigar smoke in his face "for the purpose of causing physical discomfort, humiliation and distress."

**Rules:** Liability for battery like *Garrett*, and

1. "contact" means contact which is offensive to a reasonable sense of personal dignity is offensive contact"
2. "offensive" means "disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultfulness"

**Holding/Issue:** Court says smoke is "particulate matter" that has the physical properties capable of making contact

- b) Privileges (\*\*\*\*-This section was not done until after "Dignitary Wrongs")

- i) Consent

- (1) *O'Brien v. Cunard Steamship Co.*

**Facts:** P was vaccinated on ship by D.

**Rules:** Consent is willingness in fact for conduct to occur. It need not be communicated to the [defendant]. (2<sup>nd</sup> Restatement of Torts, Section 892(1))

**Holding/Issue:** If the plaintiff's behavior was such as to indicate consent on her part, he (the doctor) was justified in his act, whatever her unexpressed feelings may have been.

**General Info:**

- (a) need to look at state of mind of both plaintiff and defendant in reasonable person's mind
- (b) burden on plaintiff to prove elements on battery in prima facie case

- (2) *Barton v. Bee Line, Inc.*

**Facts:** P, who was 15 at the time, claims that while a passenger of the D, she was forcibly raped by D's chauffeur (who says she consented).

**Rules:** sex with female under 18 [even with consent] is guilty of rape in 2<sup>nd</sup> degree

**Holding/Issue:** The court is of the opinion that a female under the age of 18 has no cause of action against a male with whom she willingly consorts, if she knows the nature and quality of her act.

**General Info:**

- (a) Statute is trying to provide adequate deterrence, while court seems to focus on compensation
- (b) Court might look at this by saying that they are becoming a party to prostitution if they reward the girl for having sex with the man—she would be selling her “virtue” for money

(3) *Bang v. Charles T. Miller Hospital*

**Facts:** P had surgery and D cut his sperm cords without his knowledge/consent.

**Holding/Issue:** It is our opinion that a reasonable rule is that, where a physician/surgeon can ascertain in advance of an operation alternative situations and no immediate emergency exists, a patient should be informed of the alternative possibilities and given a chance to decide before the doctor proceeds with the operation.

**General Info:**

- (a) Court says unless he is confident of what he is consenting to, then would not assume consent

(4) *Kennedy v. Parrott*

**Facts:** During P's operation the doctor (D) discovered some enlarged cysts on her left ovary, and he punctured them

**Holding/Issue:** In short, where an internal operation is indicated, a surgeon may lawfully perform, and it is 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 is not to be held in damages as for an unauthorized operation.

If patient consents to undergo surgery, then implied consent to any operation to which a reasonable person would consent to

**General Info:**

- (a) Reasonable patient issue has to go to jury, so jury can decide what a reasonable patient would have done
- (b) Reasonable surgeon issue goes to jury if contest of fact, but since there is no contest of fact, doesn't seem that it has to go to jury, as judge can decide in favor of surgeon
- (c) Today--in some cases, the test is what information a reasonable physician would have provided; others, the test is what information a reasonable patient would have wanted

(5) *Hackbart v. Cincinnati Bengals, Inc.*

**Facts:** While P on ground during football play, D struck a blow with his right forearm to the back of P's head and neck

**Holding/Issue:** Contrary to the position of the court then, there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it.

When a player engages in an inherently dangerous activity he does not consent to all injuries that could result from the game

**General Info:**

- (a) Customs vs. Rules—might be different, but court says in this case, both are violated by Clark
- (b) players have expectations about risks they are encountering;  
players expect other players to act in their role as football players

ii) Self-Defense

(1) *Courvoisier v. Raymond*

**Facts:** P, special policeman, shot by D in self-defense.

**Holding/Issue:** If defendant reasonably believes that an individual is assaulting him, then he can use means of self-defense and use it as a defense in court

**General Info:**

- (a) Why should self-defense be a justification for committing a battery?
  - 1. preventing another battery by acting in self-defense
  - 2. human nature—acting instinctively→can't fault him for obeying instinct and responding naturally
- (b) Reasons justification may be allowed:
  - 1. Human nature
  - 2. Line-of-duty
  - 3. Fairness—reciprocity—if roles were reversed, Raymond would probably do the same thing
- (c) How do we decide which of 2 innocent victims to leave the costs on?
  - 1. let society cover costs if there is no wrong-doing
  - 2. put on person who can bear the costs
  - 3. deterrence—deter someone like Raymond from taking actions they feel are necessary or deter someone like Courv. shooting?

ii) Defense of Property

(1) *Katko v. Briney*

**Facts:** D set up shotgun trap, which injured P when he trespassed.

**Rule:** Restatement (Second), Section 79—Defense of Possession by Force Threatening Death or Serious Bodily Harm

**Holding/Issue:** Cannot use force that will take human life or inflict great bodily injury to protect one's property, but can use reasonable force.

**General Info:**

- (a) court says you could prevent the commission of felonies of violence with deadly force, but not just any felony
- (b) Dissent→using intent as “desire”, while majority uses it as “with substantial certainty”

iii) Necessity

(1) *Ploof v. Putnam*

**Facts:** During storm, P moored to D's dock, but D's servant unmoored boat, causing damages to boat and injuries to P and family

**Holding/Issue:** Necessity allows trespass and thus defendant was negligent in not allowing plaintiff to stay on property

**General Info:**

- (a) Trespass allowed if necessity → emergency doctrine  
--not limited to just saving human life

(2) *Vincent v. Lake Erie Transportation Co.*

**Facts:** D's boat had to stay after unloading because of storm and caused damage to P's dock.

**Holding/Issue:** Necessity may be required, but under our system of jurisprudence, compensation must be made

**General Facts:**

- (a) risk on the dock owner until unloading complete unless otherwise written into the contract; risk shifts to defendant after loading complete
- (b) Defendant does have privilege (because of the storm), but before he became a trespasser (before T1) he should have been more prudent and the act of putting new cables on makes the defendant liable

## II) Damages

### a) Punitive Damages

i) *Owens-Illinois, Inc. v. Zenobia*

**Facts:** Establishes basic standard of wrongful conduct to be used for the allowance of punitive damages in negligence actions generally

**Holding/Issue:** In any tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages. Plaintiff must establish with clear and convincing evidence that defendant acted with "actual malice"

**General Info:**

- (1) Plaintiffs not required to show that defendant's 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. Instead, plaintiffs required to show only that the defendants' conduct was grossly negligent.
- (2) Peculiar aspect of the law of torts, as we usually talk about compensating people for injuries, but here we shift to focus on punishment & deterrence

## III) Dignitary Wrongs and Intentional Infliction of Mental Upset

### a) Assault

i) *Read v. Coker*

**Facts:** D's men threatened to break P's neck if he did not go, and fearing that the men would strike him if he did not do so, P left

**Rules:** 2<sup>nd</sup> Restatement—Section 21

-An actor is subject to liability to another for assault if:

- (a) he acts to cause a harmful or offensive contact with the person of another or an imminent apprehension of such contact

**Holding/Issue:** There was a threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution

- (1) threat of violence exhibiting an intention to assault and ability to carry out threat

- (2) Threat needs to come w/apprehension→need to fear the contact
- (3) we don't look at the state of mind of the defendant, but instead look at the state of mind in the plaintiff's mind or a reasonable person caused by the defendant's actions

ii) *Beach v. Hancock*

**Facts:** D snapped the gun twice at P and P did not know whether the gun was loaded or not [it wasn't].

**Rule:** 2<sup>nd</sup> Restatement, Section 29

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

**General Info:**

- (1) if a reasonable person would have had such apprehension

b) False Imprisonment

i) *Whittaker v. Sanford*

**Facts:** P wanted to leave religious sect, but wasn't allowed to leave ship once they reached America.

**Rule:** Restatement of Torts, Section 35—False Imprisonment

-An actor is subject to liability to another for false imprisonment if

- a) he acts intending to confine another within boundaries fixed by the actor, AND
- b) his act directly or indirectly results in such a confinement of the other, AND
- c) the other is conscious of the confinement or harmed by it

**Holding/Issue:**

The guest (here the plaintiff) is as effectually locked up as if there were walls along the sides of the vessel.

ii) *Rougeau v. Firestone Tire & Rubber Co.*—did not discuss in class

iii) *Sindle v. New York City Transit Authority*

**Facts:** Bus driver keeps student on bus and in attempt to leave through window, student injures himself.

**Holding/Issue:**

- (1) Person who is falsely imprisoned has right to try to escape; injuries during escape would be to defendant unless the escapee acted in negligent way during the escape
- (2) The person falsely imprisoned is not relieved of the duty of reasonable care for his own safety in extricating himself from the unlawful detention

iv) *Coblyn v. Kennedy's, Inc.*

**Facts:** Old man stopped as possible shoplifter, which caused heart condition.

**General Info:**

- (1) Court believes Legislature intended traditional meaning “grounds are reasonable when there is a basis which would appear to the reasonably prudent, cautious, intelligent person”
- (2) If we allow merchant to base on honest suspicions, then we give them more power than police officer to detain people
- (3) Statute--establishes that if you stop person and do find something, we will presume you had the state of mind (probable cause/reasonable grounds) when you stopped them

c) Intentional Infliction of Mental Upset

i) *State Rubbish Collectors Association v. Siliznoff*

**Facts:** D took over as rubbish collector and only agreed to pay fees after threat that he would be beaten up.

**Rule:** If the defendant intentionally subjected the plaintiff to such distress and bodily harm resulted, the defendant would be liable for negligently causing the plaintiff bodily harm.

**Holding/Rationale:** Court concludes however that a cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats of his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault.

**General Info:**

(1) Prior to this, courts had been recognizing mental distress only with other torts; novel idea that it could stand alone (creates a new cause of action)

(2) jury should look at the actual conduct, b/c jury as reasonable people they can judge what could be reasonable

IV) Actual Causation

A) Did Defendant Cause Plaintiff's Harm?

1) *Hoyt v. Jeffers*

**Facts:** P's hotel burned by fire caused from D's sawmill.

**Holding/Issue:** I can see no sound reason why he should not be at liberty to show any circumstances fairly tending to prove, or calculated to produce a reasonable belief, that this fire originated in this way on the occasion in question.

2) *Smith v. Rapid Transit Inc.*

**Facts:** P says a bus, which was proceeding at about 40 MPH, "forced her to turn to the right", and her car collided with a parked car. D says it was not necessarily their bus that did this.

**Holding/Issue:** The most that can be said of the evidence in the instant case is that perhaps the mathematical chances somewhat favor the proposition that a bus of the defendant caused the accident. This was not enough.

B) When One of Several Defendants Did It, But We Can't Tell Which One: Alternative Liability

1) *Summers v. Tice*

**Facts:** P and 2 Ds were hunting, with each D holding a shotgun. Both Ds shot at a quail and hit the plaintiff in the eye and upper lip.

**Holding/Issue:** When two or more person by their acts are possibly the sole cause of a harm and the plaintiff has introduced this evidence, then the defendant has the burden of proving that the other person was the sole cause of the harm.

Ordinarily, defendants are in a far better position to offer evidence to determine which one caused the injury.

2) *Ybarra v. Spangard*

**Facts:** P hurt during operation, but can't prove which one of many Ds did it.

**Holding/Issue:**

Every defendant was bound to exercise ordinary care and any defendant who negligently injured him would be liable.

It is manifestly unreasonable for the defendants to insist that the plaintiff identify any one of them as the person who did the alleged negligent act.

C) When Two or More Causal Agents Would, Independent of Each Other, Have Caused Plaintiff's Harm: Concurrent and Successive Causation

1) *Dillon v. Twin State Gas & Electric Co.*

**Facts:** D had wires across bridge, which normally didn't have current during day. P fell and grabbed wires and was electrocuted.

**Holding/Issue:** If he would've died anyway → electric company can't be held liable for cutting short life by only a few seconds

If he would've been seriously injured → then he was robbed of a crippled life and should be compensated for that

2) *Kingston v. Chicago & N.W. Ry.*

**Facts:** A fire to the northeast of Ps property was set by sparks emitted from Ds locomotive. There was also a fire from the northwest as well, which was clearly set by some (unknown) human agency. The fires were comparatively of equal rank.

**Holding/Issue:** No principle of justice requires that the plaintiff be placed under the burden of specifically identifying the origin of both fires in order to recover the damages for which either or both fires are responsible.

-It appearing that the northeast fire, for the origin of which the defendant is responsible, was a proximate cause of plaintiff's loss, the defendant is responsible for the entire amount of that loss.

V) Negligence

a) The Origins and Early Development of the Negligence Concept

i) *Brown v. Kendall*

**Facts:** D took out stick to hit dog, but instead hit P in eye.

**Holding/Rationale:** If defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.

Burden: D's got burden to prove D was using extraordinary care or P was not using ordinary care; P has burden to show D not using ordinary care

**General Info:**

(1)

	Plaintiff Not ordinary care	Plaintiff ordinary care
Defendant ordinary care	No liability	No liability
Defendant not ordinary care	No liability	Liability

(2) says distinction between direct and indirect injuries is not the important distinction

(3) unlawful act and due care is the important distinction to be made

b) The General Standard

i) *United States v. Carroll Towing Co.*

**Facts:** A barge sank, along with its cargo, allegedly because of defendant's negligence.

**General Info:**

(1) B < PL

- (2) From a standpoint of efficiency, a level that reduces total costs of accidents, then we would look at having strict liability
- ii) *Washington v. Louisiana Power and Light Co.*  
**Facts:** P electrocuted and killed when antenna came in contact with uninsulated line.  
**Holding/Issue:** When the high degree of gravity of loss is multiplied by the very small possibility of the accident occurring in this case, we think it is clear that the product does not outweigh the burden or costs of the precautions of relocating or insulating the power line.  
**General Info:**  
 (1) reasonable person has to understand what probable loss is or can be → foreseeability
- iii) *Weirum v. RKO General, Inc.*  
**Facts:** In pursuit of DJ and prize, one of two minors forced car off the road, killing the driver.  
**Holding/Issue:** Every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct.  
**General Info:**  
 (1) Duty—is a question of law and decided by the court  
 (a) all are required to use ordinary care to prevent others from being injured as a result of their conduct  
 (b) foreseeability ties the two actors together—foreseeability is a question of facts  
 (2) foreseeability → does the actor foresee that the PL is greater than the burden of foregoing it?  
 (3) Foreseen that 3<sup>rd</sup> parties will act negligently in response to a party's negligence  
 (4) "The mere fact that a particular kind of an accident had not happened before does not . . . show that such accident is one which might not reasonably been anticipated."
- c) Special Rules Governing the Proof of Negligence (\*\*--This section done after IV d & e)
- i) Violation of Criminal Statutes  
 (1) *Martin v. Herzog*  
**Facts:** D, driving negligently on wrong side of center, killed P, who was also negligent in not having lights on.  
**Holding/Issue:** P's contributory negligence to an accident should be important in assessing defendant's negligence  
**General Info:**  
 (a) Prima facie evidence—matter of law, not a matter of fact  
 (b) Prima facie negligence—in the absence of showing of changing one's minds
- (2) *Tedla v. Ellman*  
**Facts:** P and brother hit by D while walking on wrong side of road.  
**Holding/Issue:** Disregard of statute does not automatically mean contributory negligence by P and thus does not bar recovery  
**General Info:**  
 A general rule of conduct—and, specifically, a rule of the road—may accomplish its intended purpose under usual conditions, but, when the unusual occurs, strict observance may defeat the purpose of the rule and produce catastrophic results.

- (a) Two judges who dissent, do so on basis of *Martin v. Herzog* → violation of a safety statute is negligence
    - 1) this case modifies it to say “unexcused violation of a safety statute is negligence”
  - (b) Violation of a safety statute is prima facie negligence
  - (c) Plaintiff has burden to show they had excuse
  - (d) *Martin*—statutory violation was a sword P could use against D  
*Tedla*—statutory violation was a shield to try to protect D from liability
- (3) *Brown v. Shyne*

**Facts:** Chiropractor with no license injured P, who thought D had license.

**Holding/Issue:** Defendant’s violation of statute does not automatically mean that he was negligent

**General Info:**

- (a) court says can’t infer negligence simply from violation of statute
- (b) If violation of the statute by the D was the proximate cause of the plaintiff’s injury, then P may recover upon proof of violation; if violation of the statute had no direct bearing on the injury, proof of the violation becomes irrelevant.
- (c) The protection which the statute was intended to provide was against the risk of injury by the unskilled or careless practitioner, and unless the plaintiff’s injury was caused by carelessness or lack of skill, the defendant’s failure to obtain a license was not connected with the injury.
- (d) Dissent-- It seems strange that the courts can hold up for such a man the standards of the licensed physician, while the Legislature, declares that he cannot practice at all as a physician.
- (e) Dissent-- The prohibition against practicing medicine without a license was for the very purpose of protecting the public from just what happened in this case.

ii) Custom

(1) *Trimarco v. Klein*

**Facts:** Plaintiff, a tenant in an apartment owned by the defendant, was severely injured when a glass shower door shattered as he stepped out of the shower.

**Holding/Issue:** When proof of a customary practice is coupled with a showing that it was ignored and that this departure was a proximate cause of the accident, it may serve to establish liability.

(2) *The T.J. Hooper*

**Facts:** Barges lost at sea, which were not equipped with radios.

**Holding/Issue:** Even if custom not practiced by many, can still be liable if do not follow that custom. (here it is radios)

The people in the business are probably in a better position to make rational judgments than Judge Hand

--customers have made judgment that radios don’t add enough safety to pay additional costs

--let the market sort it out

(3) *Helling v. Carey*

**Facts:** P did not give test usually not given to those under 40 (P was 32), but P got glaucoma.

**Holding/Issue:** That 1 person in 25,000 under 40 who gets glaucoma is entitled to the same protection, as afforded persons over 40, essential for timely detection of the evidence of glaucoma where it can be arrested to avoid the grave and devastating result of this disease.

Court making the rule makes it retroactive law → doctors punished for what they did and any similar cases to be decided will be decided in favor of the patient  
--if legislature made it, it would be proactive (for the future)

iii) Res Ipsa Loquitur)

(1) *Boyer v. IHSAA*

**Facts:** P injured after bleachers collapse after basketball game.

**Holding/Issue:** Where injury occurs by an instrumentality under the exclusive control and management of defendant and the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used, the happening of the injury permits but does not compel an inference that defendant was negligent.

**General Info:**

Reason for res ipsa → someone gets hurt but does not know what caused the injury

Two foundation facts for application of res ipsa loquitur:

1. Exclusive control and management by D of the instrumentality which causes injury
2. Occurrence is such as in the ordinary course of things would not happen if reasonable care had been used

(2) *Shutt v. Kaufman's, Inc.*

**Facts:** P, a customer in D's shoe store, sat down on a chair which bumped a display table causing a metal shoe stand to topple and strike plaintiff on the head.

**Holding/Issue:** Although the storekeeper must exercise reasonable care for the safety of the business visitor, he is not an insurer of the safety of such visitor; thus, the mere happening of an accident raises no presumption of negligence, except under those circumstances where the doctrine of res ipsa loquitur is applicable.

(3) *City of Louisville v. Humphrey*

**Facts:** Humphrey died under care of city (in jail), but not sure whether due to negligence of guard or another prisoner or perhaps other reason.

**Holding/Issue:** Not only was there no direct evidence that City caused injury, but no evidence that the injury even occurred after the arrest

(4) *Escola v. Coca Cola Bottling Co.*

**Facts:** P injured when Coke bottle broke in her hand.

**Holding/Issue:** The doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, provided that plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession.

**Concur:** Wants strict liability for manufacturers.

2 possible forms of negligence:

1. Flaw in bottle → Defendant negligent because inspection was inadequate
2. Excess pressure → Defendant negligent because they put too much in

d) Modification of the General Standard Arising Out of Special Relationships Between the Parties

i) *Rowland v. Christian*—Trespassers

**Facts:** P, social guest of D, hurt hand on cracked water faucet.

**Holding/Issue:** Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence

**General Info:**

- (1) use ordinary care to prevent others from being injured from their conduct
- (2) common law—social guest takes the premises as they are, just as the host does
- (3)

	Restatement 2 <sup>nd</sup>	Rowland	Other States
Invitee	Reasonable care under the circumstances	Reasonable care under the circumstances	Reasonable care under the circumstances
Licensee	Know or has reason to know of a dangerous condition, must warn (“trap”)	Reasonable care under the circumstances	Some followed Rowland, some followed Restatement
Trespasser	Must avoid wilful or wanton acts (i.e. intentional torts)	Reasonable care under the circumstances	Some followed Rowland, many more don’t allow recovery for trespassers
Constant Trespassers on limited area	Highly dangerous condition and known to owner, then duty to warn	Reasonable care under the circumstances	
Child Trespasser	Know or has reason to know that there are child trespassers who might discover condition because of age and artificial condition highly dangerous to children or utility slight and risk high, then duty to warn	Reasonable care under the circumstances	

(4) Duty is said to be a question of law, therefore for the court (judge)

(5) reasonable care is a question of fact (also called a mixed question of fact of law)→therefore for fact finder to decide (jury)

- (6) It is apparent that the classifications of trespasser, licensee, and invitee often do not reflect the major factors which should determine whether immunity should be conferred upon the possessor of land.
  - (7) A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he came upon the land of another without permission or with permission but without a business purpose.
- e) Limitations on Liability
- i) Absence of a General Duty to Rescue
    - (1) *Erie R. Co. v. Stewart*

**Facts:** Stewart was passenger in car. Normally railroad company employed watchman, but they did not here, and car hit by train.

**General Info:**

      - a) The practice may not be discontinued without exercising reasonable care to give warning of such discontinuance
      - b) So, in the present case, the evidence conclusively establishes the voluntary employment of a watchman, knowledge of this fact and reliance upon it by the plaintiff, a duty, therefore, that the company, through the watchman, will exercise reasonable care in warning such travelers as plaintiff, the presence of the watchman thereabouts, and no explanation of the failure to warn.
      - c) Saying matter of law tells the jury that if they find:
        - 1. absence
        - 2. maintained
        - 3. known by plaintiff
 --Then, there is negligence, if no explanation
    - (2) *Tubbs v. Argus*

**Facts:** P was in D's car, when got in accident. D left seen without helping P, which P says caused more injuries.

**Holding/Issue:** The driver of a car has an obligation to help a passenger of the car after an accident

There may be a legal obligation to take positive or affirmative steps to effect the rescue of a person who is helpless and in a situation of peril, when . . . the injury resulted from use of an instrumentality under the control of the defendant.

      - a) Everyone has a duty to exercise reasonable care to avoid foreseeable injury to others
        - 1) exception—no duty to rescue
        - 2) exception to exception—relationship; injured by his instrument
      - b) “moral and humanitarian” duties—failure to do so may constitute actionable negligence
      - c) Why is there no general duty to rescue?
        - 1) hard to enforce → hard to figure out how drove by/saw the injury
        - 2) might try to sue the people with the most money
        - 3) hard to determine when they have fulfilled their duty to rescue
        - 4) might put yourself in liability for failure to use reasonable care during rescue efforts
          - a) easier to say they did something they shouldn't have done than to say they didn't do something they should have done

5) imposing on people to take affirmative step to help

(3) *Tarasoff v. Regents of University of California*

**Facts:** P killed by 3<sup>rd</sup> party, who had told physician at Cal that he would do so.

**Holding/Issue:** Once a therapist determines or reasonably should have determined that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.

**General Facts:**

a) Court says there is a duty to exercise reasonable care if believe threat is going to be carried out

b) Everyone has duty to use reasonable care to avoid injury to others, but no duty to rescue

--exception—sometimes there is a duty to rescue

c) Duty—normally a question for the court

1) duty is to exercise reasonable care → normally a question for the jury

d) Something about a relationship that creates a duty to rescue

--What relationships apply? We have seen:

--driver of automobile that causes initial injury

--psychotherapist/patient

--shopowner/customer

--railroad owner/employee

ii) Proximate Cause

A) But for the Wrongful Quality of Defendant's Conduct, Would the Plaintiff Have Suffered the Same Harm?

(1) *Ford v. Trident Fisheries Co.*

**Facts:** P was thrown overboard while on duty on ship and was never found.

**Holding/Issue:** Even it be assumed that upon these facts it could have been found the defendant was negligent, there is nothing to show they in any way contributed to Ford's death.

**General Info:** Breach of duty was not the cause of P's injury (death).

(2) *Lyons v. Midnight Sun Transportation Service*

**Facts:** P pulled out of parking lot and D tried to avoid accident, but still did, killing P.

**Holding/Issue:** With the element of causation lacking, even the most egregious negligence cannot result in liability.

**Rule:** Duty, breach of duty, causation, and harm are the separate and distinct elements of a negligence claim, all of which must be proven before a defendant can be held liable for the plaintiff's injuries.

(3) *Cahoon v. Cummings*

**Facts:** D failed to diagnose P's disease, but likely that P would have died anyway.

**Holding/Issue:** Holding the defendant liable for the full value of the wrongful death claim in effect would hold doctor liable not only for their own negligence, but also for their patients' illnesses, which are not the product of the doctors' actions.

**General Info:** Many courts will not engage in the "loss of chance" approach, as they will give full damages if more probable than not that patient would have

survived and zero damages if more probable than not that patient would not survive

B) Was Any Harm to the Plaintiff Foreseeable When the Defendant Acted?

(1) *Palsgraf v. Long Island R.R.*

**Facts:** P waiting for train, when fireworks exploded, injuring her.

**Holding/Issue:** The plaintiff must show “a wrong” to herself, i.e., a violation of her own right, and not merely a wrong to someone else, nor conduct “wrongful” because unsocial, but “a wrong” to anyone.

**Dissent:** When injuries do result from our unlawful act we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen and unforeseeable.

Everyone has a duty to act in reasonable care and protect society from unnecessary danger

An act is itself wrongful, even if no one is hurt/wronged

--dangerous because it can cause an injury

--negligent to create a risk even if it does not cause injury

**General Info:** Cardozo (majority) concludes that she wasn't wronged; wrong was only to the gentleman's package

(2) *Solomon v. Shuell*

**Facts:** Undercover police came to arrest P and he thought they needed rescue, and eventually was shot by the police.

**Holding/Issue:** The rescue doctrine applies even if victim never was in actual danger

C) Were the Nature and Circumstances of the Plaintiff's Harm Foreseeable?

(1) *Marshall v. Nugent*

**Facts:** P was passenger in car that had to get off road to avoid accident. Went to go help tell others to watch out for truck in roadway and was hit and injured.

**Holding/Issue:** “Proximate” does not mean that defendant's act must be shown to have been the next or immediate cause of the plaintiff's injury.

The injury plaintiff received was not remote, either in time or place, from the negligent conduct of Prince and occurred while the traffic mix-up resulting from Prince's negligence was still persisting.

(2) *Watson v. Kentucky & Ind. Bridge & Ry.*

**Facts:** Gas spilt by D. 3<sup>rd</sup> party lets match on it and P injured from resulting fire.

**Holding/Issue:** Defendant is clearly responsible where the intervening causes, acts, or conditions were set in motion by his earlier negligence.

(3) *Gorris v. Scott*

**Facts:** Shipped washed overboard, for failure to comply with animal act.

**Holding/Issue:** Court concludes that statute shouldn't be a factor

--purpose of statute was to prevent contagion

--purpose of statute was not to secure sheep

iii) Special Instances of Nonliability of Foreseeable Consequences

A) Mental & Emotional Upset

1) The Impact and Zone of Danger Rules

a) *Waube v. Warrington*

**Facts:** P saw her child negligently killed by D.

**Holding/Issue:** In order to give rise to a right of action grounded on negligent conduct, the emotional distress or shock must be occasioned by fear of personal injury to the person sustaining the shock, and not fear of injury to his property or to the person of another.

2) Bystanders

a) *Dillon v. Legg*

**Facts:** Mother and sister of victim saw him get hit by car.

**Holding/Issue:** 3 factors to whether defendant owes plaintiff duty of care:

1. Plaintiff's distance from accident (proximity)
2. Whether shock was from direct observance or just hearing about the accident
3. Plaintiff's closeness of relationship to victim

b) *Thing v. La Chusa*

**Facts:** P's son injured. Did not see it, but arrived at the scene soon after.

**Holding/Issue:** 3 elements necessary to recover:

1. Close relation to victim
2. Present when injury occurs and know injury is happening
3. As a result, suffers emotional distress

**Concur:** The interest in freedom from emotional distress caused by negligent injury to a third party is simply not, in my view, an interest which the law can or should protect.

**Dissent:** This strict requirement that majority adopts rigidifies what Dillon forcefully told us should be a flexible rule, and will lead to arbitrary results.

3) Direct Victims

a) *Burgess v. Superior Court* (just went over in class quickly)

**Facts:** P told something wrong with baby, which caused anxiety.

Direct victim when defendant owed duty to victim (professional relationship)

**Holding/Issue:** The alleged negligent actions resulting in physical harm to baby breached a duty owed to both mother and child. Mother was unavoidably and unquestionably harmed by this negligent conduct.

B) Injury to Personal Relationships

1) *Feliciano v. Rosemar Silver Co.* (just went over in class quickly)

**Facts:** Lived as de facto married couple, when husband injured, so cannot recover for loss of consortium.

2) *Borer v. American Airlines Co.* (just went over in class quickly)

**Facts:** Children sue for loss of consortium after mother injured

3 reasons for distinguishing parental consortium from spousal consortium:

1. Spousal rests largely on impairment/destruction of sex life
2. Actions by children creates problem of multiplication of actions and damages not present in spousal context
3. No state permits a child to sue for loss of parental consortium.

C) Prenatal Harm

1) Actions by Parents for Their Own Harm

a) *Werling v. Sandy* (quickly covered)

**Facts:** Stillborn child born to plaintiffs, due to defendant's negligence

**Holding/Issue:** It is logically indefensible as well as unjust to deny an action where the child is stillborn, and yet permit the action where the child survives birth but only for a short period of time.

-If you don't allow damages, then allow tortfeasor to get off scott-free

b) *Fassoulas v. Ramey* (quickly covered)

**Facts:** Ps didn't want more children, but due to negligent vasectomy, had 2 more (1 normal and 1 with deformity).

**Holding/Issue:** Cannot recover damages for unwanted birth of healthy child, but can recover expenses, etc. for child with deformity.

iv) Contributory Fault

1) Contributory Negligence

a) *Butterfield v. Forrester* (quickly covered)

**Facts:** D put up pole, which P ran into. Witness said if P was using reasonable care, then would've been able to avoid accident.

**Holding/Issue:** If breach of plaintiff's duty is a proximate cause of their own injury, then cannot recover, even if defendant also breached duty and was proximate cause of injury

Two things must concur to support this action, an obstruction in the road by the fault of the D, and no want of ordinary care to avoid it on the part of the P.

b) *Davies v. Mann* (quickly covered)

**Facts:** D's wagon, with a team of three horses, ran against P's donkey, knocked it down, and ran over it, causing it to die.

**Holding/Issue:** Even though P might be at fault, if D's ordinary care could have avoided the accident, then D's negligence should entitle P to recover.

2) Assumption of the Risk

a) *Meistrich v. Casino Arena Attractions, Inc.* (quickly covered)

**Facts:** P was injured by a fall while ice-skating at rink operated by D.

**Holding/Issue:** Assumption of risk has two distinct risks:

1. Primary sense—either D owed no duty or did not breach the duty owed
2. Secondary sense—assumption of risk is an affirmative defense to an established breach of duty

3) Comparative Negligence

a) *Knight v. Jewett* (quickly covered)

**Facts:** Plaintiff sued D for personal injuries arising out of a touch football game.

**Holding/Issue:** A participant in an active sport breaches legal duty of care to other participants only if participant intentionally injures another or engages in reckless conduct out of ordinary activity involved in the sport.

## VI. Strict Liability

A. Abnormally Dangerous Activities (all quickly covered and not briefed)

1) *Fletcher v. Rylands and Rylands v. Fletcher*

**Facts:** D constructed reservoir on land and water gets into P's mines

**Holding/Issue:** Natural use ok, but liable for nonnatural uses

2) *Turner v. Big Lake Oil Co.*

**Facts:** Oil wells produce salt water that gets into water for cattle

3) *Siegler v. Kuhlman*

**Facts:** Gas being transferred causes fire, killing P

**Holding/Issue:** Apply no fault/strict liability where you have abnormal, ultrahazardous activity

4) *Foster v. Preston Mill Co.*

**Facts:** Mother minks kill young because of blasting done by timber company.

Blasting is ultrahazardous activity—strict liability prevails, so don't have to prove negligence