I. Battery:
   A. Elements:
      1. Intent
      2. Absence of privilege
      3. Either harmful or offensive contact with the person of the other
   B. Simple and Workable Definition: Intentional, unprivileged, harmful or offensive contact with the person of another
   C. Restatements § 13: Battery: Harmful Contact
      An actor is subject to liability to another for battery if
      (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an immediate apprehension of such a contact, and
      (b) a harmful contact with the person of the other directly or indirectly results
   D. Restatements § 18: Battery: Offensive Contact
      An actor is subject to liability to another for battery if
      (a) 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
      (b) an offensive contact with the person of the other directly or indirectly results
   E. The Prima Facie case:
      1. To win, P must prove:
         (a) Intent
         (b) Harmful or Offensive Contact
         (c) Causal connection between the harm incurred and D’s conduct
      2. Privilege: If D had a privilege to inflict harm, it is up to D to assert this privilege as a defense, it is not up to P to assert the absence of privilege as part of the prima facie case.
   F. Intent: What mental states constitute Intent?
      1. An actor intends a consequence when the actor subjectively desires that the consequence flow from her act.
      2. Any intent to do an act which is wrong is sufficient for battery, malice is not necessary.
      3. In the absence of actual contact between P and D, If D knew with substantial certainty that such contact would occur as a result of D’s actions, D can be held liable for battery (Garratt v. Dailey).
      4. As long as D desires to cause the harmful or offensive contact, and the contact actually occurs as a result of the defendant’s actions, a battery is established.
   F. Application:
      *Vosburg v Putney: D kicked P in the school classroom, after class was called to order. As a result, P later lost use of the leg.
      *Rule of Law: In an action to recover damages for an alleged assault and battery, the victim must only show that the alleged wrongdoer had an unlawful intention to produce harm (ie: an unlawful intention in committing the act which occurred) or that he committed an unlawful act.
      *Any intent to do an act which is wrong is sufficient for battery, malice is not necessary.
      *Because D’s actions were a violation of the order and decorum of the classroom, the intent to do such conduct was unlawful and the act itself was unlawful.
      *Garratt v Dailey: D pulled a chair out from under P as P began to sit down in it
      *Rule of Law: The intent necessary for the commission of a battery is present when the person acts, knowing with substantial certainty, that the harmful contact will occur.
G. Contact:  
1. The element of Contact has two aspects:  
   A. What constitutes contact?  
      1. Garratt: the 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. It is sufficient if the defendant causes contact with something very closely associated with the plaintiff’s person, such as clothing, canes, vehicles, etc.  
   B. What sorts of contacts are wrongful?  
      1. Wrongful intended contacts are either harmful or offensive  
         a. Harm denotes the existence of loss or detriment in fact of any kind to a person resulting from any cause  
         b. § 15: What constitutes bodily harm?  
            Bodily harm is any physical impairment of the condition of another’s body, or physical pain or illness  
            Comment: There is an impairment of the physical condition of another’s body if the structure or function of any part of the other’s body is altered to any extent even though the alteration causes no other harm  
         c. § 19: What constitutes offensive contact?  
            A bodily contact is offensive if it offends a reasonable sense of personal dignity  
            Comment: In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.  
   H. Application:  
      *Fisher v Carrousel Motor Hotel, Inc.: P, while in line at a buffet luncheon, had his plate snatched from his hands by an employee of D, who also insulted him.  
      *Rule of Law: A battery may be committed even though there is no physical contact with the person’s body, so long as there is contact with something that is attached to or closely identified with the body.  
      *Leichtman v WLW Jacor Communications: D encouraged another talk show host to blow smoke into the face of P, an anti-smoking advocate. P filed suit for battery against D.  
      *Rule of Law: For purposes of establishing liability for battery, contact that is offensive to a reasonable sense of personal dignity is offensive contact  
      *Glass cage theory: person cannot erect a glass cage around themselves and say that all contact with their person is at the expense of liability.  
II. Punitive Damages:  
   A. Application:  
      *Owens-Illinois v Zenobia: As a result of injuries P allegedly suffered from asbestos manufactured by D, P brought a product liability negligence action to recover punitive damages for his injuries  
      *Rule of Law: In a nonintentional tort action, the trier of fact may award punitive damages only where the Plaintiff establishes by clear and convincing evidence that D’s conduct was characterized by actual malice.  
   B. Determination of whether award of damages is excessive:
1. Is there a reasonable relationship between the punitive damages award and the harm likely to result from defendant’s conduct as well as the harm that actually occurred?
2. The degree of reprehensibility of the defendant’s conduct, the duration of that conduct, the defendant’s awareness, any concealment, and the existence and frequency of similar past conduct
3. The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss.
4. The financial position of the defendant
5. all the costs of litigation
6. the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation
7. the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation

C. Objectives:
1. Retribution
   A. Implies desert, controlled by a broader principle of fairness
2. Deterrence
   A. Seeks to provide a better state of the world through efficient means
   B. Punitive damages can be shown to promote efficient levels of deterrence only in those cases where expected liability for compensatory damages is less than expected harm to society or where harm is deliberately caused and the satisfaction obtained by the actor is “illicit.”

II. Assault
A. Elements:
   1. Intent to commit harm
   2. Threat Causing Apprehension
   3. Present Ability
B. Restatements § 21 Assault
   (1) An actor is subject to liability to another for assault if
      (a) 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
      (b) the other is thereby put in such imminent apprehension
   (2) An action which is not done with the intention stated in Subsection (1,a) does not make the actor liable to the other for an apprehension caused therby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.
§ 29 Apprehension of Imminent and Future Contact:
   (1) To make the actor liable for an assault he must put the other in apprehension of an imminent contact
   (2) An act intended by the actor as a step toward the infliction of a future contact, which is so recognized by the other, does not make the actor liable for an assault under the rule stated in § 21.

B. Assault requires an attempt, and a present ability to commit violence
C. Threat does not have to be genuine, can be based on perception
D. Application:
   *Read v Coker: D’s workmen threatened to break P’s neck if he did not leave D’s shop
*Rule of Law: An assault is committed when there is a threat of violence exhibiting an intention to assault (i.e. do physical violence to another), coupled with a present ability to carry the threat to execution

* Beach v Hancock: D aimed a gun at P, who was nearby and snapped the trigger. P was unaware that the gun was not loaded

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

III. False Imprisonment

A. Restatements § 35 False Imprisonment
   (1) An actor is subject to liability to another for false imprisonment if
      (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and
      (b) the act directly or indirectly results in such a confinement of the other
      (c) the other is conscious of the confinement or is harmed by it
   (2) 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.

B. Application:
   *Whittaker v Sanford: D, leader of a religious sect, convinced P, a sect member, to return to the US from Syria aboard the sect’s yacht, but upon arrival in the United States, would not allow her to disembark.
      *Rule of Law: To commit a false imprisonment, it is not necessary that the tortfeasor actually apply physical force to the person of the plaintiff, but only that the plaintiff be physically constrained.
   *Rougeau v Firestone: P was asked to wait in his employer’s guardhouse during an investigation. He sued the employer for false imprisonment when it was determined he had nothing to do with the suspected theft.
      *Rule of Law: False imprisonment is the intentional confinement to another within boundaries set by the actor.
   *Sindle v NYC Transit Authority: P, a 14 year old boy, was injured when he fell under the wheels of an authority school bus when he attempted to climb out after the bus driver locked the doors to prevent vandals from escaping.
      *Rule of Law: A person falsely imprisoned is not relieved of the duty of reasonable care for his own safety in extricating himself from the unlawful detention.
   *Coblyn v Kennedy’s: P was detained by an employee of D, who suspected P of shoplifting
      *Rule of Law: (1) If a man is restrained of his personal liberty by fear of a personal difficulty, it amounts to false imprisonment. (2) If a shopkeeper has reasonable grounds to believe a person has committed or is attempting to commit larceny of goods for sale on the premises, he may detain that person in a reasonable manner for a reasonable length of time.

IV. Intentional Infliction of Mental Upset

A. Prosser, *Insult and Outrage*
   1. “Intentional infliction of mental suffering, or mental anguish, or mental disturbance, or emotional distress that it is entitled to be regarded as a separate tort.
   2. Restatements §46 Outrageous Conduct Causing Sever Emotional Distress
      (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm
(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
   (a) to a member of such person’s immediate family who is present at the time, whether or not such distress results in bodily harm, or
   (b) to any other person who is present at the time, if such distress results in bodily harm.

Comment: It is not enough to base liability here if defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by “malice”, or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

B. Application:
   *State Rubbish Collectors Association v Siliznoff: The Association (D) threatened to beat up Siliznoff (P), destroy his truck, or force him out of business unless he joined The Association (D), and paid dues to it.
   *Rule of Law: 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 to his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault.

C. A cause of action for intentional infliction of mental upset might arise where ordinarily it would not if the circumstances involve constitutionally protected rights.

V. Defenses to a charge of battery
   A. Privileges:
      1. Even if a plaintiff succeeds in providing the elements of the prima facie case, the defendant may escape liability by pleading and proving the existence of a privilege to inflict the harmful or offensive contact. To say that an act is privileged is to say that the actor owes no legal duty to refrain from such conduct.
      2. Two types of privileges:
         (a) Consensual privileges: depend on the plaintiff agreeing to the defendant’s otherwise tortious act.
         (b) Non-consensual privileges: Shield the defendant from liability for otherwise tortious conduct even if the plaintiff objects to the defendant’s conduct
      3. Consent: Consent is willingness in fact for conduct to occur. It need not be communicated to the defendant
   B. Application:
      *O’Brien v Cunard Steamship Co.: P held out her arm without objection to the doctor employed by Cunard (D) to be vaccinated.
      *Rule of Law: Silence and inaction may imply consent to defendant’s acts if the circumstances are such that a reasonable person would speak if he objected.
      *Barton v Bee Line: 15-year old Barton (P) claimed that while she was a passenger on the Bee Line, Inc. (D), the Bee Line’s chauffeur forcibly raped her, but the chauffeur claimed that Barton consented to sexual intercourse
      *Rule of Law: Penal Law holds that a person who has sexual intercourse with a female, not his wife, under the age of eighteen, is guilty of rape even if the female consented to such intercourse; but a female under the age of eighteen has no civil
cause of action against a male with whom she willingly has intercourse, if she knows the nature and quality of her act.

C. The weight of authority is that consent to a criminal act is totally irrelevant in civil cases—in such cases, consent does not constitute a privilege. In addition to statutory rape, these cases involve illegal abortions, illegal fights, illegal purveying of intoxicants, etc. Critics of the majority rule argue that a consent-based privilege should be available even in cases where the underlying conduct is criminal in nature.

- Special reasons may persuade us to honor the statutory scheme—and thereby refuse to recognize consent as a defense to a battery claim—when the statute in issue was intended to protect minors or others whose capacity for consent is legitimately open to question.

- Consistent with this view, most courts have applied statutory rape statutes in civil cases regardless of proof that the individual plaintiff was able to understand the nature and consequences of her act.

D. Application:

* Bang v Charles T. Miller Hospital: A doctor performed a prostate operation on Bang (P) and, during this operation, he severed P’s spermatic cords.

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

* Kennedy v Parrot: While Kennedy (P) consented to operation on her appendix, Doctor Parrot (D), during the operation also cut a blood vessel while puncturing some cysts on her left ovary, and, as a result, Kennedy (P) later developed phlebitis.

* Rule of Law: Where an internal operation indicated and performed, surgeon may lawfully (in fact, it is his duty to) extend the operation to remedy any abnormal or diseased condition in the area of the original incision whenever he, in the exercise of his sound professional judgment, determines that the correct surgical procedure dictates and requires such an extension of the operation originally contemplated.

VI. Emergency Action without Consent

A. Restatements § 892 D. Emergency Action without Consent

Conduct that injures another does not make the actor liable to the other even though the other has not consented to it if

(a) 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

(b) the actor has no reason to believe that the other, if he had the opportunity to consent, would decline.

B. Comments:

1. When a doctor obtains consent, but the patient places a condition on that consent, the condition is a matter of primary importance and the doctor’s act in excess or violation of that condition, if proved, constitute a battery

2. Where treatment is unauthorized and performed without consent, the doctor has committed a battery. On the other hand, where the doctor obtains consent but has breached a duty adequately to inform the patient of risks, the patient has a cause of action in negligence

3. Under a battery theory, the only issue of fact is whether the defendant adequately explained the nature of the operation, but under negligence, the doctor may be able to avoid liability by proving that the failure to explain was reasonable
4. Under negligence, the defendant can also avoid liability by proving that even if the collateral risks of the treatment had been fully explained, the plaintiff would have consented, that is, that the failure to inform did not cause the harm.

5. Apart from how the courts may treat informed consent claims, plaintiffs are free to allege that the physician acted negligently by failing to perform the treatment skillfully.

C. Application:

*Hackbart v Cincinnati Bengals, Inc.: Hackbart (P), a Denver Broncos player, was intentionally injured by a member of the Cincinnati Bengals (D) during a professional football game.

*Rule of Law: An injury inflicted by one player upon another during a professional football game may give rise to liability in tort where the cause of the injury was an intentional blow not called for in the general conduct of the game.

D. Note: Consent procured by fraud or duress:

- Consent will not shield the defendant from liability if it is procured by means of fraud or duress.

- What if a patient is comatose: NJ Supreme Court held that:

  - life-sustaining treatment may be withheld or withdrawn from an incompetent patient if one of three separate tests is satisfied:
    1) If it is clear that the patient would have refused the treatment under the circumstances involved
    2) If there is some trustworthy evidence that the patient would have refused treatment, and the decisionmaker is satisfied that it is clear that the burdens of the patient’s continued life with the treatment outweigh the benefits of that life
    3) In the absence of proof of probable intent, if the net burdens of the patient’s life with the treatment clearly and markedly outweigh the benefits that the patient derives from life, and the effect of administering painful life-sustaining treatment would be inhumane.

VII. Self-Defense

A. Restatements:

§ 63. Self-defense by force not threatening death or serious bodily harm

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

2) Self-defense is privileged under the conditions stated in subsection (1), although the actor correctly or reasonably believes that he can avoid the necessity of so defending himself

   a) by retreating or otherwise giving up a right or privilege, or
   b) by complying with a command with which the actor is under no duty to comply or which the other is not privileged to enforce by the means threatened

§ 65. Self-defense by force threatening death or serious bodily harm

1) Subject to the statement in subsection (3), an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that

   a) the other is about to inflict upon him an intentional contact or other bodily harm, and that
   b) he is thereby put in peril of death or serious bodily harm or ravishment, which can safely be prevented only by the immediate use of such force.
(2) The privilege stated in subsection (1) exists although the actor correctly or reasonably believes that he can safely avoid the necessity of so defending himself by:
   (a) retreating if he is attacked within his dwelling place, which is not also the dwelling place of another
   (b) permitting the other to intrude upon or dispossess him of his dwelling place, or
   (c) abandoning an attempt to effect a lawful arrest/

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

B. Application:
   *Courvoisier v Raymond: Courvoisier (D) believed that Raymond (P), a policeman, was one of the rioter outside of his home and shot him as he approached him
   *Rule of Law: An action of force is justified by self-defense whenever the circumstances are such as to cause a reasonable man to believe that his life is in danger or that he is in danger of receiving great bodily harm and that is necessary to use such force for protection

VIII. Defense of Property:
   A. Restatements:
      § 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 actor’s land or chattels, if
      (a) the intrusion is not privileged…and
      (b) the actor reasonably believes the intrusion can by prevented or terminated only by the force used, and
      (c) the actor has first requested the other to desist and the other has disregarded the request, or the actor reasonably believes that a request will be useless or that substantial harm will be done before it can be made.

      §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 third person whom the actor is privileged to protect.

   B. Application:
      *Katko v Briney: The Briney’s (D) placed a “shotgun trap” in one of the bedrooms of a house owned but not occupied by them, and Katko (P) was injured by the trap when he broke into the house
      *Rule of Law: Reasonable force may be used to protect property, but not such force as will take human life or inflict great bodily harm.

IX. Necessity:
   A. Application:
      *Ploof v Putnam: Ploof (P) sued for damages caused when Putnam (D) denied him use of a safe mooring for his boat during a storm
      *Rule of Law: Necessity justifies the entry upon the land of another
X.  Negligence:
   A.  Elements:
      1)  Duty
      2)  Breach of Duty
      3)  Causation (The “But For” Question)
      4)  Harm
   B.  For negligence to be found, the conduct must involve a risk of harm greater than society is willing to accept in light of the benefits to be derived from that activity—that is, the risk of harm must be unreasonable
   C.  Application:
      *Brown v. Kendall: Kendall (D), while attempting to separate his dog from Brown’s (P) dog when the two dogs were fighting accidentally struck Brown (P) with a stick
      *Rule of Law: If in the prosecution of a lawful act, a casualty purely accidental arises, i.e., the injury was unavoidable, and the conduct of the defendant was free from blame, no action can be supported for an injury arising therefrom
      *Definition of Ordinary Care: that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger.
   D.  The general standard applicable in most negligence cases is one of reasonable care under the circumstances.
   E.  Application:
      *United States v. Carroll Towing Co.: The attendant of Barge (P) left the vessel unattended for 21 hours. During that period, the barge broke loose and was sunk.
      *Rule of Law: B<PL: Burden of precaution < Probability of the incident occurring x Liability of resulting injury
      -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 was done
   F.  The determination of the applicable general standard of care is one of law for the judge, and the determination of whether the defendant failed to meet the standard is a question of fact for the jury.
   G.  Application:
      *Washington v. Louisiana Power and Light Co.: Washington (P) was electrocuted when a CB Radio antenna he was moving came into contact with an uninsulated 8,000 volt electrical wire that LP&L had refused to pay to insulate or move underground.
      *Rule of Law: Where a power company either knew or should have known of the possibility of an accident, the question is whether the possibility of such an injury or loss constitutes an unreasonable risk of harm. (Does B>PL)
   H.  Application:
*Weirum v. RKO General, Inc.: A radio station conducted a contest which ultimately resulted in Werium (P) being forced off the road and killed by the negligence of one of the contest participants.

*Rule of Law: Where a defendant creates a foreseeable risk that could cause injury by third parties, he will be liable for the negligent conduct of such parties.

I. Responsibility of Possessors of Land for the Safety of Trespassers, Licensees, and Invitees

1. Instead of applying the general reasonableness standard, the duty owed by an owner or possessor to those on the land with respect to conditions on the and has traditionally depended upon a rather rigid scheme of classification of the persons on the land as trespassers, licensees, or invitees.

2. Invitees and Licensees:
   A. Restatements §332: Invitee Defined
      1) An invitee is either a public invitee or a business visitor
      2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open for the public.
      3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land
      Comment d: It is not enough, to hold land open to the public, that the public at large or any considerable number of persons, are permitted to enter at will upon the land for their own purposes. As in other instances of invitation, there must be some inducement or encouragement to enter, some conduct indicating that the premises are provided and intended for public entry and use, and that the public will not merely be tolerated, but is expected and desired to come. When a landowner tacitly permits the boys of the town to play ball on his vacant lot they are licensees only; but if he installs playground equipment and posts a sign saying that the lot is open free to all children, there is then a public invitation, and those who enter in response to it are invitees.
   B. The duty owed an invitee is one of reasonable care under the circumstances: Restatements §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
      (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
      (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
      (c) fails to exercise reasonable care to protect them against the danger
   C. Restatements §330: Licensee Defined:
      A licensee is a person who is privileged to enter or remain in land only by virtue of the possessor’s consent
   D. Restatements § 342: Dangerous conditions known to possessor:
      A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
3. **Trespassers:**
   A. The lowest duty is owed to a trespasser, who is defined by § 329 as “a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor’s consent or otherwise.” In general, the duty of the possessor toward trespassers is to refrain from wanton and willful conduct. However, if the trespasser is on the land for the purpose of committing a crime, the possessor may be liable only for intentionally injuring the trespasser.
   B. Restatements § 335: Artificial conditions highly dangerous to constant trespassers on limited area.
      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 to them by an artificial condition on the land, if
      (a) the condition
          (i) is one which the possessor has created and maintains and
          (ii) is, to his knowledge, likely to cause death or serious bodily harm to such trespassers and
          (iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and
      (b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.
   C. Restatements § 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 persons coming in contact with it, is subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care to warn them of the condition if
      (a) the possessor knows or has reason to know of their presence in dangerous proximity to the condition, and
      (b) the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk.
   D. A higher duty may be owed to young trespassers under the “attractive nuisance doctrine”
   E. Restatements § 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
      (a) 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
      (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area mad dangerous by it, and
(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

4. Application:
*Rowland v. Christian: Rowland (P), a licensee in the apartment of Christian (D), was injured by a broken water faucet handle about which Christian (D) knew, but did not warn.

*Rule of Law: Where a land occupier is aware of a concealed condition involving, in the absence of precautions, an unreasonable risk of harm to those coming in contact with it, and is aware that a person is about to come in contact with it, the failure to warn or to repair the condition constitutes negligence.

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

2. The courts have recognized that special circumstances may call for the imposition of a duty to act affirmatively to prevent harm to another. Perhaps the most typical set of circumstances involves a pre-existing relationship between the potential rescuer and the person in need of rescue.

K. Application:
*Erie R. Co. v. Stewart: Stewart (P) was a passenger in a vehicle which was struck by a train. The railroad (D) customarily maintained a watchman at the site, but he had provided no warning that the watchman was not there that evening.

*Rule of Law: A party who voluntarily assumes a duty not imposed upon him by law may be deemed negligent if, without proper notice, he discontinues his performance of that duty.

*Tubbs v. Argus: Following an accident of a car driven by Argus (D), she abandoned the car without assisting Tubbs (P), her guest passenger, who sought damages for additional injuries caused by Argus’ (D) failure to render aid.

*Rule of Law: One whose innocent or tortious act has caused another bodily harm, leaving the victim helpless and in further danger, has a duty to use reasonable care to prevent foreseeable additional injuries to the victim.

L. The lawyer’s professional responsibility: the relevance of moral considerations
1. Application:
*Tarasoff v. Regents of University of California: Moore (D) a psychologist, did not inform the Tarasoffs (P) that Poddar had threatened to kill their daughter in a counseling session and he later did kill her.

*Rule of Law: Once a therapist knows or should know that his patient presents a real danger to a third party, there is a duty to warn or otherwise take reasonable actions to prevent the danger.

M. Special Rules governing the proof of negligence:
1. Violation of criminal statutes:
Application:
*Martin v. Herzog: Martin (P) sued Herzog (D) for the death of Martin’s husband in a collision between Martin’s buggy and Herzog’s automobile. Martin was driving the buggy without the use of lights.

*Rule of Law: The unexcused violation of a statute that applies to the facts of a case is negligence per se.

*Tedla v. Ellman: Ellman (D), the driver of a car which injured Tedla (P) and killed her brother, defended a suit against him by asserting the fact that the victims were struck while walking on the right side of the roadway was a violation of statute.

*Rule of Law: Where a statutory general rule of conduct fixes no definite standard of care, but merely codifies or supplements a common law rule, which has been subject to exceptions; or where the statute is intended to promote public convenience or safety, then in the absence of clear language to the contrary, it is not negligence as a matter of law for one to violate the statute, if by so doing he is likely to prevent—rather than cause—the accident which it is the purpose of the statute to avoid.

2. A violation of a statute may also be excused if it was impossible for the defendant under the circumstances to comply with the statute.

3. Safety statute violations:

Application:

*Brown v. Shyne: Brown (P) became paralyzed after chiropractic treatment by Shyne (D) who was not a licensed practitioner.

*Rule of Law: A licensing statute intended to protect the public against incompetent practitioners creates no liability against an unlicensed practitioner unless he is in fact shown to be incompetent.

N. Proximate cause problems in situations where violations of criminal safety statutes give rise to causes of action in negligence.

1. Application:

*Gorris v. Scott: Gorris (P) alleged negligence when his sheep were washed overboard during a storm because they were not in pens as required by a statute intended to prevent the spread of infectious disease among livestock.

*Rule of Law: Not every violation of a statute constitutes negligence per se.

O. Role of Custom:

*Application:

*Trimarco v. Klein: Klein’s tenant, Trimarco (P) attempted to show that use of shatterproof glass for tub enclosures had become common over the years and that the regular glass enclosure on which he was injured therefore no longer met accepted safety standards.

*Rule of Law: Evidence of custom and usage by others engaged in the same business is admissible as bearing on what is reasonable conduct under all the circumstances, which is the quintessential test of negligence.

*The T.J. Hooper: D, the owner of two tugs, unsuccessfully appealed the refusal of the trial court to limit D’s liability toward the owners of barges and their cargoes of coal which were lost in a storm which the tugs could have avoided had they been equipped with radio receivers.

*Rule of Law: Regardless of the custom of an industry or trade, a defendant will be held liable if his actions fall beneath the standard of the average prudent man.
*Helling v. Carey: Because Caery (D) failed to give a glaucoma test to Helling (P), a regular patient who received routine eye exams from Carey, P’s glaucoma was aggravated by late detection and she bought this action.

III. **Res Ipsa Loquitur**

A. Arises from the courts reaction to a gap in evidence that prevents a plaintiff from presenting a sufficiently complete picture of the defendant’s conduct.

B. In some cases, courts have held that the mere fact of the accident occurring is evidence of negligence.

C. Res Ipsa permits, but does not compel, the jury to find that the defendant acted negligently.

D. The court may instruct the jury that if they find on a preponderance of the evidence that the defendant had control over the instrumentality in question, and the accident was one which would not ordinarily have occurred in the absence of defendant’s negligence, they may find the defendant acted negligently.

E. **Restatements § 117: 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 a relevant member.

F. **Rule:**

The two foundational facts for the application of the res ipsa doctrine are:

1) Exclusive control and management by the defendant of the instrumentality which caused the injury

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

G. Application:

*Boyer v. Iowa: Boyer was injured when she fell nine feet from gymnasium bleachers which suddenly folded back into the wall.

*Rule of Law: To invoke the doctrine of res ipsa, it is not necessary to show that evidence as to the cause of injury is accessible only to the defendant and not to the plaintiff.

*Shutt v. Kaufman’s: A metal shoe stand toppled from a table and hit Shutt (P) on the head when her chair bumped the table. She sued the shoe store, alleging negligence.

*Rule of Law: Res Ipsa does not apply if a plaintiff has the means to establish negligence on the part of a defendant.

*City of Louisville v. Humphrey: After having been arrested and left in the city drunk tank, a man died from head injuries. His survivors brought a wrongful death suit against the city.

*Rule of Law:

1) Res Ipsa does not apply where the injury may have been caused by someone not under the control of the defendant.

2) If an injury is caused by a person under the control or in the custody of the defendant, it must be shown that defendant knew of the violent propensities of that person.

*Escola v. Coca-Cola Bottling: A waitress, Escola was injured when a Coca Cola bottle broke in her hand, She sued Coca Cola alleging negligence in the preparation of the bottle for sale.

*Rule of Law:

1) Res ipsa may apply where an accident occurs sometime after D relinquished control over the injury-causing instrumentality, if P shows
that the condition of the instrumentality did not change after it left D’s hands and that P handled it with due care.
2) Res ipsa may apply if the accident is of such a nature that it would not occur absent negligence.

IV. Proximate Cause
A. The rules of proximate cause sometimes allow a defendant to escape liability even if all other elements of the prima facie case—negligence, cause-in-fact, and harm—have been established.
B. The prominent approach to proximate cause is one of foreseeability, under which the defendant is liable for the foreseeable, but not the unforeseeable, consequences of negligent conduct. This formulation requires an evaluation of the defendant’s negligence in terms of the harm that would have been foreseeable to the reasonably prudent person at the time the defendant acted.
C. thin skull rule: if it is found that a defendant negligently injured the plaintiff, the defendant is liable even if the full extent of the injuries is unforeseeable.
D. Most proximate cause issues are determined by the fact finder.
E. Proximate cause assumes that there was actual causation.
F. Application:
   *Ford v. Trident Fisheries: The rescue of the deceased, who fell overboard while working in the D’s boat, was obstructed due to an inaccessible and under-equipped lifeboat.
   *Rule of Law: An act or omission is not regarded as the proximate cause of an event if the particular event would have occurred without it.
   *Lyons v. Midnight Sun: Lyons’ wife was killed when her car was struck by Midnight Sun’s truck; a jury found that the truck driver had been negligent.
   *Rule of Law: The sudden emergency instruction should not be used unless a court finds that the particular and peculiar facts of a case warrant more explanation of the standard of care than is generally required.
   *Cahoon v. Cummings: Cummings (P) died of esophageal cancer. His doctors (D) were accused of negligently failing to diagnose and treat his cancer.
   *Rule of Law: Upon a showing of causation, damages are proportional to the increased risk attributable to the defendant’s negligent act or omission. (Loss of Chance)

V. Actual Causation
A. Negligence cases share with battery cases the requirement that the plaintiff prove that the defendant’s conduct caused the harm of which the plaintiff complains.
B. But For the defendant having acted at all, would the plaintiff nevertheless have suffered the same harm?
   1. Negative answer: Defendant’s action was an actual cause of plaintiff’s harm
   2. Affirmative answer: Defendant’s conduct was not an actual cause.
C. Application:
   *Hoyt v. Jeffers: Hoyt (P) claimed that a saw mill owned by Jeffers (D) emitted sparks which set fire to Hoyt’s (P) hotel and destroyed it.
   *Rule of Law: Circumstantial evidence is permissible to show causation, and it is for the jury to determine how much force and weight is to be give to such evidence.
   *Smith v. Rapid Transit: Smith (P) claimed that a bus had forced her car off the road causing injuries. Rapid Transit (D) denied that it was its bus which was involved.
   *Rule of Law: Causation cannot be show by mathematical probabilities in the absence of other convincing evidence.
VI. Joint and Several Liability
A. Application:
   *Summers v. Tice: Summers (P) sued two defendants for personal injury when both defendants shot in his direction.
   *Rule of Law: When two or more persons by their acts are possibly the sole cause of harm, and the plaintiff has introduced evidence that one of the two persons is culpable, then the defendant has the burden of proving that the other person was the sole cause of the harm.
   *Ybarra v. Spangard: Ybarra (P) suffered an injury to his right arm and shoulder while he was unconscious having his appendix removed under the care of six doctors and medical employees (D).
   *Rule of Law: Where an unexplained injury occurs during a medical procedure to a part of the body not under treatment, res ipsa applies against all of the doctors and medical employees who take part in caring for the patient.
B. Requires a substantial factor test, rather than a “But For” test.

VII. Concurrent and Successive Causation
A. Application:
   *Dillon v. Twin State: Dillon (P) was sitting on the beam of defendant’s bridge and lost his balance; so to save himself from falling to certain death or severe injury, Dillon (P) grabbed one of the wires belonging to D, electrocuting himself before he could fall to his death.
   *Rule of Law: Damages may be apportioned in a seemingly indivisible injury if a potential danger from one source has diminished the value of the loss actually inflicted.
   *Kingston v. Chicago: Two fires united and destroyed P’s property. D was the cause of one fire, but the origin of the other fire was unknown.
   *Rule of Law: If the concurrent acts of two or more joint tortfeasors cause a wrong, each is individually responsible for the entire damage.

VIII. Vicarious Liability
A. Masters are vicariously liable for the torts of their servants committed while the latter are acting within the scope of their employment.
B. For vicarious liability to apply, the servant’s conduct must be tortious; and the master must control, or have the right to control, the servant’s harmful behavior.

IX. More Proximate Cause
A. Was the Harm to the plaintiff foreseeable when the defendant acted?
B. Application:
   *Palzgraf v. LIRR: P was injured on D’s train platform when D servant helped a passenger aboard a moving train, jostling his package, causing it to fall to the tracks. The package, containing fireworks, exploded creating a shock which tipped a scale on P.
   *Cardozo: The risk reasonably perceived defines the duty to be obeyed. The range of duty is limited by the range of danger.
   *Andrews: A person who does a negligent act should be liable for its proximate results. D owed a duty to Mrs. Palzgraf even though her harm was not foreseeable.
   *Solomon v. Shuell: When Solomon (P) saw police officers in plainclothes arresting robbery suspects, he came out of his house with a gun because he thought the suspects needed help, and one of the officers shot him.
   *Rule of Law: A person who goes to the rescue of another who is in imminent and serious peril caused by the negligence of someone else is not contributorily negligent, so long as the rescue attempt is not recklessly or rashly made.
C. Were the nature and circumstances of the plaintiff’s harm foreseeable?
   Application:
   *Marshall v. Nugent: Marshall (P) was struck by a car as he was attempting to warn oncoming traffic that D’s truck, driven by D’s servant, was blocking traffic.
   *Rule of Law: The defendant remains liable for the full consequence of his negligent act when the intervening is one which a reasonable man would have foreseen as likely to occur under the circumstances, and the issue of foreseeability remains a question for the jury.
   *Watson v. Kentucky: Through D’s negligence a tank car of gasoline derailed and began leaking. Duerr then struck a match, causing the vapor to explode and injure P.
   *Rule of Law: The mere fact that an intervening act was unforeseen will not relieve the defendant guilty of primary negligence from liability unless the intervening act is something so unexpected or extraordinary as that it could not or ought not to be anticipated.

D. Other Approaches to Proximate Cause
   Application:
   *Petition Of Kinsman Transit Co.: D negligently moors its ship, and the ship breaks away. It smashed into a draw bridge, causing it to create a dam, which results in a flood. The Ps, who are riverside property owners have their property flooded as a result. They sue. Held, these owners can recover against D, even though it would have been hard to foresee which particular owners might be flooded. All of the Ps were members of the general class of riverbank property owners, as to which class there was a risk of harm from flooding.
   *Rule of Law: The fact that injury to the particular plaintiff was not especially foreseeable is irrelevant, as long as P is a member of a class as to which there was a general foreseeability of harm.

E. Special instances of nonliability for foreseeable consequences
   1. One Approach: “Liability based on foreseeability” under which the plaintiff may recover for mental and emotional upset whenever it is determined that the psychological harm to the plaintiff was foreseeable.
   2. Other Approaches:
      a. The Impact and Zone of Danger Rules: Impact rule has largely been replaced with the zone of danger rule.
      Application:
      *Waube v. Warrington: A mother died from the shock of seeing, from a window, the killing of her child by a negligent driver.
      *Rule of Law: A plaintiff may not recover for emotional injuries and shock occasioned by the sight of impact on a third person unless the shock is due to fear of immediate impact upon plaintiff.
      b. Bystander Liability
      Application:
      *Dillon v. Legg: Dillon (P) saw her daughter get hit by Legg’s (D) car
      *Rule of Law (Minority View): The zone of danger rule does not bar a recovery for negligent infliction of emotional distress where a close family member outside the zone views an accident causing an injury or death to another family member.
      *Court has to determine if the injury to the plaintiff (bystander) was reasonably foreseeable by looking at the following factors:
         1) Was the plaintiff located near the scene of the accident as contrasted with one who was far away from it.
2) Whether the shock resulted from a direct emotional impact upon P from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident after the fact.
3) Whether the plaintiff and the victim were closely related, as contrasted with the absence of any relationship or the presence of only a distant relationship.

*Thing v. LaChusa: When Thing (P) was told that her son had been struck and injured by an automobile, she rushed to the scene of the accident, where she found her son, bloody and unconscious, lying in the roadway.

*Rule of Law: Damages for emotional distress should be recoverable only if the plaintiff is closely related to the injury victim, is present at the scene of the injury-producing event when it occurs, and is then aware that it is causing injury to the victim and, as a result, suffers emotional distress beyond that of a disinterested witness.

*Turned Dillon guidelines into mandatory factors.

c. Direct victims

Application:

*Burgess v. Superior Court: When Burgess’s baby suffered permanent brain and nervous system damage due to oxygen deprivation during a caesarean birth. D argued that P, the mother, could only recover damages for emotional distress as bystander, not as a direct victim.

*Rule of Law: A physician who treats a pregnant woman owes a duty to that pregnant woman with respect to the medical treatment to her fetus.

F. Injury to Personal Relationships

1. It is difficult to draw lines regarding loss of consortia for different relationships.

2. Application:

*Feliciano v. Rosemar Silver: As a result of wrongful conduct on the part of an employee of D, P claimed loss of consortia of the man with whom she lived as husband and wife for about twenty years.

*Rule of Law: Unmarried persons who are cohabitants cannot recover for loss of consortia.


*Rule of law: A child cannot recover for the loss of its parent’s consortium

G. Prenatal Harm

1. Actions by Parents for Their Own Harm

2. Application:

*Werling v. Sandy: The trial court dismissed P’s complaint for the wrongful death of her stillborn fetus on the basis that no cause of action for death to a fetus exists.

*Rule of Law: Beneficiaries of an unborn fetus may recover damages for the fetus’ death occurring prior to birth so long as the fetus was viable at the time the injuries were incurred.

*Fassoulas v. Ramey: P contended that they could recover the expense of raising two of their children who were born after Mr. P had a vasectomy negligently performed by Dr. Ramey.

*Rule of Law: Parents cannot recover the ordinary and necessary cost of child rearing from a physician who negligently fails to prevent the birth, but they can recover for the extraordinary costs associated with raising a special needs child.
X. Contributory Fault

1. Contributory Negligence

2. Application:
   *Butterfield v. Forrester: While riding very fast, P ran into an obstruction D had put in the road and was injured.
   
   *Rule of Law: A plaintiff will not recover where his lack of due care contributed to the occurrence of the accident.

   *Davies v. Mann: Davies left his donkey on a public highway, and Mann drove into it, hitting it, killing it.

   *Rule of Law: The last clear chance doctrine is that where P’s negligence has put him in a dangerous position, and D discovers P’s danger and fails to use due care to avoid injuring P, P’s negligence will not bar recovery.

3. Restatements: Last Clear Chance: Helpless Plaintiff

   § 479. Last Clear Chance: Helpless Plaintiff
   A plaintiff who has negligently subjected himself to a risk of harm from the defendant’s subsequent negligence may recover for harm caused thereby if, immediately preceding the harm,
   (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care
   (b) the defendant is negligent in failing to utilize with reasonable vigilance and care, and competence his then existing opportunity to avoid the harm, when he
   (i) knows of P’s situation and realizes or has reason to realize the peril involved in it, or
   (ii) would discover the situation and thus have reason to realize the peril, if he were to exercise the vigilance which it is then his duty to P to exercise.

   § 480. Last Clear Chance: Inattentive Plaintiff
   A plaintiff who, by the exercise of reasonable vigilance, could discover the danger created by the defendant’s negligence in time to avoid the harm, he can recover if, but only if, the defendant
   (a) know of the plaintiff’s situation, and
   (b) realizes or has reason to realize that the plaintiff is inattentive and therefore unlikely to discover his peril in time to avoid the harm, and
   (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm.

4. Application:
   *Meistrich v. Casino: Although realizing that the ice at a rink was very slippery, P kept on skating and fell and injured himself. The rink asserted assumption of the risk as a defense to Meistrich’s suit for damages.

   *Rule of Law: Assumption of the risk is not a defense independent of contributory negligence.

5. Comparative Negligence

   a. Contributory negligence as a complete bar to recovery by the plaintiff has been replaced in almost every jurisdiction by a variety of comparative fault regimes, under which recovery may be reduced, but not necessarily eliminated by P’s own fault.

   b. Application:
   *Knight v. Jewett: After Knight (P) was injured during a game of touch football when Jewett collided with her, knocking her down, Jewett (d) argued that Knight (P) assumed the risk of injury by participating in the game.
*Rule of Law: A participant in an active sport breaches a legal duty of care to other participants only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.

c. There are two main approaches to the allocation of damages between the plaintiff and the defendant. One is “pure” comparative fault, under which the plaintiff’s recovery is reduced, but never eliminated solely because of the plaintiff’s negligence. The other approach is “modified” comparative fault:

1) P whose negligence equals or exceeds that of the defendant cannot recover at all, or
2) P’s negligence bars recovery only if it exceeds that of the defendant.

*Under both, if P’s negligence has not reached the cut-off point, the recovery is reduced proportionately.