1.01 INTRODUCTION TO TORT LAW (p.2)

- set of rules regarding liability and compensation for personal injury, death, and property damage that one party causes to another - rules for shifting losses from injured victims to the persons and companies causing injuries
- grew out of a focus on bodily injury and physical property damage - now extended to include harm to reputation, privacy, emotional well-being, and economic losses
- includes legislative measures related to torts and alternatives to tort liability

1.02 ACCIDENTS IN THE US (p.4)

A. Introduction
   a. 2003 - accidents were responsible for 101,500 deaths, 21 million disabling injuries, and 40 million hospital emergency room visits - 5th highest cause of death - economic consequences approx. $608 billion - in 2004 approx 16% of the population did not have private insurance - less than 50% are covered by disability insurance providing wage loss protection
   b. tort recovery - 1) if no one was at fault, there typically will be no recovery at all 2) the expenses of tort litigation are very steep (indirectly the courts' expenses are high also)

B. Accidental Deaths
   a. principal causes = motor vehicles (close to half), poison, falls, drowning, fires
   b. downward trend in accidental deaths since 1900 - lowest was in 1992 - 12/hour die
   c. ratio of traffic deaths to miles driven is 1.56 for every 100 million miles
   d. deaths in homes downward trend since 1912 but up since 1987
   e. considerable reduction in workplace deaths

C. Accidental Injuries
   a. serious accidents at home are four times more likely than in car
   b. seat belts reduce chance of death or injury by 50%

D. Accident Costs
   a. 2003 - $608 billion in lost wages, medical expenses, and property damages
   b. 2003 - lost quality of life valued at more than $1,350 billion (calculated from empirical studies based on what people pay to reduce safety and health risks)

E. Tort Claims and Damage Awards
   a. tort reform is very popular at the moment - the perception is that torts cases are out of hand - scholars agree the system has weaknesses – HOWEVER
      i. state court filings are down 4% since 1993 and only comprise a total of 10% of all civil filings - plaintiffs win 49% - jury trials are rare and only happen in about 3% of all tort case dispositions - the median personal injury award is about $50,000 - 85% are below the mean of $455,000 - med malpractice & product liability are higher because more serious injuries - awards over $1 million constitute only 3% of all awards - punitives are rare

1.03 HISTORICAL BACKGROUND OF TORT LAW (p.11)

A. Criminal law and tort law cover much the same ground, in the beginning shared the same scope - law satisfied public & private need for vengeance and to avoid citizens taking the law into their own hands - deterrence of wrongful conduct also came to be an important objective
   a. tort liability was a legal device to dissuade a victim from retaliation by offering monetary compensation - torts were closely related to threats of public disorder/breaches of the peace
   b. the first date more than 3500 years ago and required compensation for certain intentional wrongdoing as well as some careless misconduct

B. Royal Courts in England established after Norman conquest of England in 1066
   a. Roman Law - highly sophisticated - included rules on fault and intentional wrongdoing
   b. England –
      i. writ of trespass - related to direct & immediate aggression against a person or against the personal and real property of an individual
      ii. writ of trespass on the case = indirect injury
c. unintentional accidents/harms - became much more common after 1800 when the country became much more industrialized - common law courts developed accident law to accommodate the changes in society
d. development of negligence law - two theories
   i. designed to assist the development of business during early industrialization
   ii. personal moral culpability combines with economic development
   iii. result = fault based on "social fault" = conduct is measured against the conduct of what a reasonable person would have done in the circumstances
   iv. negligence is the primary system of seeking compensation for unintentional harm
      1. changed since the 1800s as society and reasonable conduct have changed
      2. abnormally dangerous activities are handled under strict liability

1.04 THE FUNCTIONS & GOALS OF TORT LAW (p.13)
   • three perspectives
      ○ victim - wants to be free of risks to his or her bodily and emotional integrity as well as risks to his or her property and economic interests - if injured he or she wants compensation
      ○ injurer - concerned with his or her freedom to engage in personal and business activities without facing potential liability for harming arising out of those activities
      ○ society - interests in compensating victims and in not unduly burdening productive economic activities - also interests in developing tort rules that are workable, effective, and efficient
   A. Deterrence (of unsafe activities) and Accident Prevention
      a. accident law should help to reduce the level of accidents - compensation must be concerned with deterring unsafe conduct - financial responsibility is an important incentive for this
      b. criminal and regulatory law also address safety, but alone are not sufficient w/o torts
   B. Compensation (of injured victims)
      a. resources should be enough for them to get present and future medical and rehabilitative care as well as compensate for lost earnings and impairment of future earnings capacity
      b. pain & suffering, loss of enjoyment of life, & inability to maintain relationships also weighed
   C. Encouragement of Economic Growth & Progress
      a. accident law should not unnecessarily or unduly burden economically productive endeavors - emphasis on entrepreneurial activities b/c they benefit community & business owners
      b. liability insurance grew out of tort liability system - businesses can insure themselves against the financial impact that a tort judgement can have
         i. indemnity insurance obligates the insurance company to reimburse the insured for any tort judgments paid to 3rd parties arising out of the insured's negligence - if the insured is insolvent, the insurance company has no obligation to settle a case or pay a judgment
         ii. indemnity developed into liability insurance which requires the insurance company to defend the insured against negligence claims, take control of the case for settlement purposes, and obligates it to pay any judgments against the insured up to the contractual limits of their policy
            1. spreads any losses widely
            2. assures compensation to victims
   B. Administrative Efficiency: effective and efficient legal process - operative standards must be workable in the legal process, provide guidance to lawyers in preparation and argument of a case and allow for a fair balance of stability and flexibility - resort to law cannot be unduly costly or time consuming
   C. Fairness - justice is integral - public acceptance and support depends on it

1.05 THE CULPABILITY SPECTRUM IN TORT LAW (p.15)
   A. Unintended Harm
      a. Strict Liability –
         i. responsibility is based on causation w/o regard to whether the conduct involves fault
         ii. actual knowledge or foresight of the risks involved is required in some strict liability
         iii. applied modestly in modern tort law, "abnormally dangerous activities" dangerous animals, intruding livestock, product liability, manufacturing defects, special cases
      b. Negligence - unintended harms
i. auto accidents, medical malpractice, "slip and fall" - unreasonable conduct that creates foreseeable risk of harm
ii. much broader than morally culpable conduct - evaluated against a social norm based on what a reasonable person would have foreseen and done under the circumstances - juries define that
iii. plaintiff must prove that she has sustained harm that is legally protected such as bodily injury or property damage - also must prove a causal connection between the injuries and the defendant's unreasonable conduct - compensation is available but punitive damages are not
c. Recklessness - more culpable than negligence - usually can be invoked when conduct shows a conscious disregard of a high risk of harm - opens the possibility of punitive damages award

B. Intended Harm: Intentional Torts
a. Battery – protects against harmful or offensive contact
b. Assault – protects against reasonable apprehension of harmful or offensive contact
c. willfulness – purpose or desire to cause harmful or offensive contact with another – starting point in establishing intent for these torts
d. compensatory damages are available, even if no physical injury – damages can redress an affront to human dignity – punitive damages are also available

1.06 TORT LAW LITIGATION PROCESS (P. 30)
A. Lawyer Consultation
a. Interview
   i. Consideration & compassion – develop rapport
   ii. Explains process & client’s rights & responsibilities
b. Fees
   i. contingency fee arrangement - no fee unless the lawyer wins
   ii. percentage of the total award (usually graduated by process length)
c. Preliminary Investigation - accident scene, police reports, witness statements, doctors, etc
d. Defense Lawyers
   i. often brought in by liability insurance co. - typically paid by the hour
   ii. insurance adjuster has already worked to resolve the problem, investigate facts, & find information on the value of the case

B. Pleadings
a. Complaint - filing of complaint begins the lawsuit
   i. identifies defendants, facts of the accident, the harm, the damages sought, and the legal theories the plaintiff is relying on
   ii. lawyer must identify the appropriate court to file in
   iii. complaints are also served to the defendant who responds with a pleading response
b. Motions - docs filed w/ court & served on the other party request some action by the judge
   i. motion to dismiss - for failure to state a claim upon which relief can be granted
   ii. demurrer - even assuming that all the factual allegations are true, the plaintiff has not stated a valid legal claim - tort law may not recognize the type of claim/harm
   iii. a motion to dismiss raises issues immediately for early discussion
      1. PURPOSE - terminate case early when there is no legal basis for a claim
      2. judge will ask attorneys to file briefs - his decision is called an order
c. Answer - defendant files an answer to the complaint that admits or denies facts and legal conclusions alleged in the complaint and sets forth any defenses that he or she will assert

C. Pre-Trial Procedure
a. Investigation –
   i. both parties are required to investigate before filing complaints
   ii. formal discovery - encourages settlement and preparation
b. Discovery
   i. Basic Information –
      1. names & addresses of all parties
      2. copies and descriptions of all documents, data, and tangible things
      3. computation of any category of damages claimed
      4. copies of any relevant liability insurance policies
ii. Interrogatories - written questions about the case - anything that might be relevant
iii. Depositions –
   1. oral testimony, under oath, of any person having relevant information
   2. depositions can be used when a witness testifies in court - also preserves testimony when a witness is very ill or near death
iv. Production of Documents – computer databases, file record, emails, etc
v. Medical Examinations - plaintiff may be examined to demonstrate impairment
vi. Requests for Admissions
   1. request that the other party admit or deny the truth of any relevant matter - including the genuineness of any document
   2. purpose is to eliminate need to prove matters at trial that are not in dispute
   3. if a party refuses to make an admission, he might need to pay the other party the expense of proving the fact in question
c. Motions
   i. Discovery Motions - if there's a dispute you can ask for the court's ruling
   ii. Motions in Limine - party can file to control some part of the upcoming trial (ex: to preclude a witness or bar certain inappropriate evidence)
   iii. Summary Judgment Motion - either side can seek summary judgment before trial on all or part of their claims or defenses
      1. summary judgment motion tests merits of the claim based on sworn affidavits or discovery responses
      2. FIRST the court must find:
         a. that there is no genuine issue of material fact in dispute
         b. that the moving party is entitled to judgment as a matter of law
      3. three issues that arise in legal analysis:
         a. issues of fact (jury, unless a jury trial has been waived
         b. issues of law (judge)
         c. issues related to the application of the law to the facts (juries)
      4. if facts or a mixed question of law and fact are in dispute - trial is required
      5. if reasonable juror could find the facts either way, then the dispute is genuine, and summary judgment is not an option
d. Settlement Negotiations and Mediation - can occur at and in-between any stage –
   i. very small percentage of personal injury claims go to trial - judges encourage settlement - as trial approaches parties get nervous about uncertain outcome
   ii. mediation, arbitration, and private judges are alternatives
      1. mediation = a neutral third party facilitates a discussion of the issues to help them resolve the dispute - parties are in control instead of a judge
   e. Pre-Trial Conference - typically after discovery - parties and judge work toward developing a pre trial order which specifies the claims of the plaintiff, the defendant's defenses, the admitted facts, the disputed facts, the issues of law, the names of witnesses, and a list of exhibits - judge dictates the order based on the proposals from each side

D. Trial - Part 1
   • Juries - use in civil cases is unique to US - often 6 jurors instead of 12
      • judges decide issues of law - juries decide issues of fact
      • juries determine inferences to be drawn from the facts
      • parties can waive the jury and have a trial by court - judge will decide the legal issues and will act as a triar of facts
   a. jury selection
      i. lawyers ask questions - voir dire
      ii. jurors are removed by the judge "for cause"
      iii. each side can peremptory challenge and excuse a certain number of jurors for any reason except those constituting unlawful discrimination
      iv. jury takes an oath
   b. opening statements
      i. plaintiff - nature of the claim, overview of incident/aftermath, & highlight evidence
      ii. defense - tell the story from defense perspective, outline plaintiff weakness, evidence
   c. plaintiff's case - witnesses, evidence
i. burden of production of evidence - sufficient evidence on each element of the claim so that reasonable jurors could find in plaintiff's favor on each element

ii. burden of persuasion - plaintiff must persuade the jurors that each element of the claim has been established by a preponderance of the evidence

d. defendant's case - focus on weaknesses in plaintiff's claim and on defenses

i. directed verdict - tests whether the plaintiff has satisfied her burden of production of evidence, the trial judge determines this by evaluating the evidence in light most favorable to the plaintiff - the defense is expected to pinpoint the particular elements for which there is insufficient proof, explain the insufficiency, and cite authority from earlier cases - the plaintiff will argue against that, supporting himself - judge grants the motion only if reasonable jurors could not differ on the outcome

e. closing statements - parties review in detail their version of the events and what they establish

E. Trial - Part 2

a. jury instructions

i. judge presents a set to the jury – usually oral, sometimes written

ii. attorneys suggest instructions esp. if they want an instruction included that is different from the norms –

iii. instructions tell jurors that to find for the plaintiff they must be persuaded that a preponderance of the evidence establishes each requisite element of the claim

b. verdict

i. general - whether the jury finds in favor of the plaintiff or the defendant and the total compensatory damages if they ruled for the plaintiff

ii. special - series of specific questions to guide the jury on each of the elements and the categories of damages

c. Motions

i. Judgment NOV Motion (j.n.o.v) - the defendant may request a judgment notwithstanding the verdict (judgment non obstante verdicto) - essentially a renewed motion for a directed verdict (judge says jury was wrong) - if the judge grants this and an appellant overturns, the jury verdict is reinstated

ii. New Trial Motion - losing party can move for a new trial - the judge can grant if he thinks that the jury verdict is against the clear weight of the evidence or if the judge finds admission of some evidence or misconduct by counsel influenced the outcome

d. Judgment- entry of a judgment in the case triggers the opportunity for appeal - must be filed within the time allowed by the rules –

F. Appeal:

• can only reverse errors of law, appellant must specify one or more rulings made by the trial judge that she claims to be erroneous - must identify precise procedural ruling in question

• if it's a purely legal question - appellate court must decide with no regard for the lower court's decision and the appellate's decision will be precedent

• if the ruling in question is the granting of a directed verdict - the standard requires the appellate court to examine the evidence in a light most favorable to the loser

• discretionary rulings (eg motion for a new trial) - reverse only if there was abuse

• sufficiency of evidence - limited precedential value - each case is different

a. Notice of Appeal: no permission needed for appeals to intermediate courts - highest courts usually require approval of the court

b. Briefs: based on the record in the trial court - new evidence may not be introduced - appellant files a brief with the issues on appeal and his legal arguments - also prepares relevant pieces of the trial record - appellee also files a brief

c. Arguments: ordinarily limited to errors that appear in the trial record - even if an attorney knows that the judge will not admit certain evidence, he should offer it to preserve the issue for appeal, the error raised on appeal must have been raised in trial court – ex: the failure to move for a directed verdict will preclude raising the sufficiency of the evidence on appeal

d. Opinion: appellate courts meet in secret to discuss the case

i. if unanimous - a judge will be assigned to write an opinion

ii. if not unanimous –

1. a judge drafts a majority opinion which is circulated –

2. a judge that disagrees can also circulate an opinion to seek support –
3. the outcome is often different from the first secret vote –
4. opinions are often revised by the judges suggestions –
5. when finalized, the decisions are published

iii. typically only a majority opinion - sometimes there's a dissenting opinion - there can also be a concurring opinion when a judge agrees but not with everything in the majority opinion or the judge wants to stress some aspect of the case

1.07 OVERVIEW OF PERSONAL INJURY DAMAGES (p.46)

A. Medical Expenses: all reasonably necessary medical & related treatment expenses
   a. past medical expenses: expenses to the date of the trial must be shown to have been reasonably necessary and reasonably priced - burden usually on plaintiff
   b. future medical expenses likely to be incurred in future years must be shown to be reasonably necessary in the future and reasonably priced, can be inflation

B. Earnings Losses: past and future economic losses related to the injuries including lost wages & income, payment to cover health insurance, pension contributions, social security contributions, etc - lost profits of self-employed might be recoverable
   a. past earnings losses - from the date of the accident to the date of the trial
   b. future earnings losses - likely will occur after the trial due to the permanent character of the injury - include any impaired or destroyed earning capacity
   c. loss of household services - recognized through replacement value approach

C. Pain & Suffering: physical pain, mental suffering, emotional harm to the date of the trial and into the future, loss of enjoyment of life, juries use common sense to determine

D. Loss of Consortium: suffered when a person's partner is seriously injured - can include services, society, companionship, affection, & sexual relations - would be the 2nd plaintiff in a case - generally husbands & wives, sometimes children (unmarried couples can't but are challenging)

E. Life Expectancy: individualized circumstances and established mortality tables are considered to determine whether longevity has been affected by the incident

F. Work-life Expectancy: considered in future earnings determinations - Federal Bureau of Labor Statistics compiles work-life tables which are used in this

G. Reduction to Present Value: a plaintiff could invest an award and make more money, then they would be overcompensated - economists and juries work to reduce expense and lost wage award to present value, pain & suffering losses are generally not reduced

H. Inflation: in the last 25 yrs courts allow some adjustment in damages for inflation

I. Income Taxes: gross income does not include amount of damages (other than punitive) received - pain & suffering, consortium, wrongful death, bystander emotional harm are also not taxable if they are related to physical injury to another person

J. Defending Against Damage Awards: defense's role is to assure that the plaintiff receives no more than he or she is entitled to - defense can challenge plaintiff's proof regarding expenses, losses, etc

K. Wrongful Death Damages: brought by either surviving relatives or the estate of the decedent - entitled relatives can sue for economic losses they will suffer as a result of the decedent's death also lost value of services and lost society/companionship - awards to beneficiaries are not subject to decedent's creditors - awards to estate are subject to decedent's creditors

L. Punitive Damages: available in claims based on intentional torts

M. Attorney Fees: losing party is not liable for attorney fees of the prevailing party - plaintiff's attorney's fees run from 33-50 percent of the recovery - depending on when the case is resolved

1.09 VICARIOUS LIABILITY AND EMPLOYER RESPONSIBILITY (p.51)

A. *respondeat superior* – let the master respond – aka vicarious liability - the negligence of an employee acting within the scope of employment is imputed to the employer – flows automatically from the employee’s tort
   a. injured party can sue the employee as well as the employer and can get a judgment against each but the injured party is only entitled to one satisfaction of the judgment
   b. liable even if it took stringent measures to prevent accidents

B. Rationales:
   a. Control of Conduct: Employers control or have the right to control employees’ conduct
   b. Accident Prevention: increases incentives for safety consciousness through safety education programs and expectations, reducing accidents
   c. Business Enterprise: accident losses of a business are considered expenses of the business
d. Spreading Costs of Accidents: desirable to spread the costs of accidents to those that benefit from the activity - insurance & costs of goods & services provided distribute the cost

e. Assuring Compensation: employers are more likely to have liability insurance than employees and are then able to pay for accidents - important for victims & their families

f. Fairness: since the work being performed is for the benefit of the employer - he is liable

C. "master" and "servant" = "employer" and "employee" - it is the actual control or right to control the work that is most important in this relationship - volunteers can still be "employees"

D. independent contractor - if you hire somebody, you specify the end result, but do not have control in the manner or means of achieving the result = employee (servant) if employer has right of control over the person in the performance of the work (R2d) – considerations:

a. extent of control
b. whether actor is engaged in distinct occupation
c. whether typically performed under employer’s supervision / skill
d. who supplies the tools, equipment, workplace
e. length of time employed
f. payment by time / by job
g. employer’s business & employee’s work
h. parties’ belief re: relationship

E. general rule = employer is vicariously liable for the negligence of an employee that occurs within the scope of the employment - this refers to the acts the employee is employed tot do, as well as acts closely related such that they may be characterized as fairly and reasonably incidental to carrying out the objectives of the employment – considerations (R2d)

a. conduct of kind he is employed to perform
b. occurs substantially within authorized time/space limits
c. actuated by purpose to serve master
d. if force, it’s not unexpectable by the master
e. can include breaks, etc. (R3d)

1.06 THE COFFEE AND CULPABILITY PROBLEMS (p.17)

A. Wilful Misconduct – frustrated employee dumps hot coffee on a customer causing serious burns

a. action probably constitutes battery, but criminal system isn’t designed to help victim
b. civil system – tort law – compensates victim for damage
c. vicarious liability – employer might be for negligence if the harm was caused by the employer’s failure to exercise reasonable care in selecting, training, supervising, or controlling the employee

B. Actual McDonald’s Negligence (& Recklessness) Case

| Jury awarded $200,000 ($160,000) in compensation in addition to $2.7 million (2 days of coffee sales) in punitive damages. Judge reduced to $480,000 in punitive (3x compensation). Parties settled on appeal |

a. Recklessness Culpability – victim must establish:
   i. there was a high probability of risk of very serious harm
   ii. defendant was conscious of the risk or potential harm & acted in disregard of the safety of others

b. Counter Arguments: Challenging Plaintiffs Elements of the Claim
   i. demonstrate the plaintiff cannot satisfy one or more of the essential elements of the claim –
   ii. What did Liebek do wrong that a reasonable person would not have done?
   iii. What did Liebek fail to do that a reasonable person would have done?
   iv. most coffee spill cases do not qualify for a jury because there is no jury issue raised w/regard to reasonable conduct - McDonald's is unique
c. **Affirmative Defenses**: independent legal grounds for denying or limiting a plaintiff’s claim - ex: statute of limitations, contributory or comparative negligence (a plaintiff's own unreasonable conduct in getting injured is an affirmative independent defense in barring a claim or reducing the recovery - should contributory negligence be a total bar to recovery?)

d. **Vicarious and Direct Liability** - *respondeat superior or "vicarious liability"* - when employee and employer are both found liable - the plaintiff is only entitled to a single recovery
   i. McDonald’s was negligent in setting the temp of the coffee so high by policy
   ii. relationships between Corp. and franchisee is not exactly employment relationship - if the corp controls the detail in question (the coffee temp) then it is vicariously liable - if the franchise independently controls the temp - the Corp is not liable

C. **No Fault – Strict Liability** – cup collapses spilling coffee on customer and burning them severely – McDonald’s sets the design specifications for the manufacturer, the very occasional defective cup gets through and fails
   a. Strict liability is the best for safety b/c conduct, reasonable or not, is irrelevant
   b. if my employee causes harm in the scope of their employment, I am liable
   c. if my product causes harm - I am liable

2.01 **OVERVIEW OF NEGLIGENCE LAW** (p.74)

   ▪ Negligence is also called Breach – Breach is also a component of Negligence

   A. **Prima Facie Negligence** (on first view/apparent) – you have each of these elements - Defense wants to argue that \( \Delta \) failed to make out a Prima Facie case
      a. **Duty** – did the \( \Delta \) have a **legal obligation to exercise some level of care** to avoid the risk of harming persons or property?
         i. general duty principle of reasonable care: one has a duty to foreseeable \( \Pi \)s to exercise reasonable care with regard to foreseeable risks of harm arising from one's own conduct
         ii. exceptions establish limited duty rules
      b. **Breach of Duty** - did the \( \Delta \)’s conduct fall below the level of care owed to the \( \Pi \)? In light of the foreseeable risks created by the conduct, was the \( \Delta \)’s conduct unreasonable under the circumstances?
         i. foreseeable risk of harm arising from one’s conduct
         ii. whether one’s conduct was reasonable in light of those risks
         iii. whether defendant failed to meet the standard of care (measure of duty owed)
      c. **Causation (Cause-in-Fact)** - did a **causal connection** exist between the \( \Delta \)’s unreasonable conduct and the \( \Pi \)’s harm?
         i. ties the defendant's breach of duty to the plaintiff's injury
         ii. two tests
            A. "but for" test
            B. "substantial factor" test
      d. **Scope of Liability (proximate cause or legal cause)** – did the \( \Delta \)’s **obligation include the general type of harm** the \( \Pi \) suffered? Are there any intervening causes that are so unexpected that they are superseding?
         i. primary risks - readily foreseeable risks of harm
         ii. ancillary risks - subordinate levels of harm descending from primary risks
         iii. scope of liability determines whether defendant is liable for ancillary harms
      e. **Damages** – what **legally recognizable losses** has the \( \Pi \) incurred to date, and what losses may be incurred in the future?
         i. \( \Pi \) must establish actual loss - damages attempt to return \( \Pi \) to pre-injury condition
         ii. includes compensation for medical costs, lost wages, pain, mental & emotional harm
         iii. \( \Pi \) can also be entitled to future medical expenses & impaired future earning capacity
         iv. typically one-time, lump-sum recovery

2.02 **ANALYSIS OF A NEGLIGENCE CASE** (p.79)

**Rudolph v. Arizona B.A.S.S. Federation** (AZAP 1995): Fishing tournament participant collided with and killed Plaintiff's daughter. The sponsor of a fishing tournament, in planning and conducting a tournament on a public lake owes a duty of reasonable care to avoid injury to non-tournament participants who may foreseeably be at risk from the conduct of tournament participants acting pursuant to
the tournament design. Summary judgment b/c no relationship – no duty – appealed. AZ drivers have a
duty to strangers – CA racing contest planners had a duty. Poorly planned – one weigh-station, crowded,
time element - question for court – could a reasonable juror find enough facts here
to infer that by a preponderance of the evidence a breach/cause occurred?

2.03 THE REASONABLE CARE STANDARD (p.93)
A. in most negligence cases, measure of duty owed = that of reasonable person under the same
   or similar circumstances (OBJECTIVE standard)
B. Breach of Duty - 2 Elements
   a. foreseeable risks of harm
   b. unreasonable conduct in light of those risks
   c. the combination of a & b is what a reasonable person would do
C. courts reject subjective standards such as whether ∆ used best judgment – reasonable
care is a legal judgment, not a moral standard
D. Reasonable Care is a standard used in a variety of contexts - courts can consider a variety of
   factors to strengthen the standard (e.g. customs, safety standards/laws, etc.)
E. Qs - what factors should the standard consider? (age, inexperience, etc)

2.04 THE REASONABLE PERSON (p.94)
A. General Characteristics of Mr. Reasonable
   a. considers foreseeable risks of injury his conduct will impose on community
   b. considers those risks in light of the utility of the conduct
   c. considers the extent of the risks posed by conduct
   d. considers likelihood of a risk causing harm
   e. considers alternatives to proposed conduct
   f. considers the costs of various courses of action

Vaughan v. Menlove (NC 1837) - ∆ left pile of hay on border of Π's property near Π's cottages, the hay
ignited & burned the cottages. Verdict for Π - ∆ argued he acted honestly and did his best - on appeal
court held that "the standard to be applied is that of the reasonably prudent person." (first use
of "reasonable person" terminology – very old idea)

Reed v. Tacoma Ry & Power (WASU 1921) - Π's daughter tried to cross tracks before ∆ got there,
judge instructed jury that if they found there to be an error in judgment on the part of Π, then they
should rule for ∆. On appeal court held that "one may be mistaken as to the best course to pursue
without being guilty of negligence as a matter of law. Mistaken judgment is not necessarily
negligence." Reasonable person is not perfect.

Lussan v. Grain Dealers Mutual Insurance Co (5C 1960) - Driver distracted by bee/wasp in car &
crashed into Π. Jury ruled for ∆. Π wanted instructed verdict and then j.n.o.v. On appeal court held, "An
action which a human being would normally take may be considered by a jury to be that which the law's
ordinary prudent person would have undertaken under such circumstances." legal standard - no reasonable
man could infer that the prudent man would have acted this way

B. The Common Law – Oliver Wendell Holmes (881)
   a. suppose liability is founded on fault or blameworthiness - question is whether it is so in the
      sense of personal moral shortcoming
   b. if ∆ thinks carefully about reasonable conduct & used his best judgment, the
      question is not whether the ∆ thought his conduct was that of a prudent man, but
      whether the jury does
   c. law takes no account of infinite varieties of temperament, intellect, & education which make
      the character of an act different for different men
      i. impossibility of measuring man's powers & limitations is more clear than that of
         ascertaining his knowledge of law
      ii. average of conduct, sacrifice of individual peculiarities beyond a certain point, is
          necessary to the general welfare
   d. law considers what would be blameworthy in the average man, the man of
      ordinary intelligence & prudence, and determines liability by that
e. exceptions "when a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them" - ex: blind man can't see

C. Reasonable Men & Women
a. "reasonable man" standard has uniformly been replaced by "reasonable person"
   b. forms of gender bias
      i. arguments that "reasonable person" is interpreted almost always from the perspective of a male judge, lawyer, or law professor, or even a female lawyer trained to be the same as a male lawyer
      ii. some argue that there is no bias

Edwards v. Johnson (NCUS 1967) - \(\Pi\) came to \(\Delta\)'s house at night while she was home along w/kids, she came to the door with loaded & cocked gun which accidentally fired & hit \(\Delta\) - court found her negligent. DISSENT, "when confronted with emergency, which causes reasonable apprehension of danger - it is not held to the standard of care required of one acting in atmosphere of calm" (sex, age, strength should be part of considering reasonableness of her anxiety and behavior, but are not)

D. Emergency - in Edwards the court suggested the \(\Delta\)'s emergency context was relevant

Foster v. Strutz (IOSU 2001) Strutz's car was attacked and within 10-15 seconds Strutz reversed the car, hitting Foster and crushing her foot. Court held an attack on a parked car and its occupants lasting 10-15 seconds does not constitute a sudden emergency such that those occupants are not liable for injuries resulting from their conduct

a. well settled that \(\Delta\)'s conduct in an emergency situation not of his own making is relevant to the jury's determination of whether the defendant acted reasonably
   i. debate over whether the \(\Delta\) should be able to highlight the emergency with a specific jury instruction
   ii. "with or without emergency, the standard of care a person must exercise is still that of a reasonable person under the circumstances." Lyons v. Midnight Sun Transp
   iii. even if there is an emergency not of the \(\Delta\)'s own making, the jury may determine that the \(\Delta\) is negligent.
   iv. in highly dangerous activities can you exercise "extra" care?

E. Physically Different Characteristics –
   a. the reasonable person of ordinary prudence is always assumed to have the relevant physical disability of that party - person with physical disability required to at as a reasonable person with that disability would
   b. the standard of care may be higher - the conduct must be reasonable, taking into consideration the person's knowledge of his differing ability – if a person is a bodybuilder they might have a different standard of care than a weakling, you can be a super-reasonable person, but you cannot be less than a reasonable person

F. Mentally Disabled Individuals

Bashi v. Wodarz (CAAP 1996) \(\Delta\) hit several cars, including \(\Pi\), \(\Delta\) claims she is not liable because she was struck by sudden & unanticipated mental disorder; Court held that rules which say that a driver is not liable for his negligent actions which result from his suffering sudden physical illness should not and cannot as a matter of policy) be extended to cases of sudden mental illness.

a. standard for mentally disabled & insane is the same as sane, mentally able
b. if "mainstreaming" is the goal (Creasy v. Rush) it might make sense
c. there is recognition that mentally disabled might not be able to meet the standard, but enforcing the standard as a legal matter is important, the person is still liable
d. Roman v. Estate of Gobbo - driver had heart attack & crashed - OH questioned if the different treatment is justified on modern views of the nature of mental illness

G. Children - children do not have the same reasoning capacity and maturity as adults, some allowance is necessary
   a. courts compare child's conduct to what other children of like age, intelligence, experience, and maturity would have done under the circumstances
Robinson v. Lindsay (WASU 1979) a minor operating a snowmobile had an accident that injured his minor-passenger. Court held that a minor engaged in an inherently dangerous activity, such as operating a motorized vehicle, such as a snowmobile, should be held to an adult standard of care in his conduct. Court created exception for minors engaged in inherently dangerous activities.

b. OR there can be exception for minors engaged in adult activities

c. Kids engage in different activities that are not usually gravely dangerous

d. Sometimes there’s a minimum age for negligence
   i. minority of states provide that a child below age seven is incapable of negligence –
   ii. other states use lower ages –
   iii. several courts apply a rebuttable presumption that between the ages of seven and fourteen a minor is incapable of negligence - from the age of fourteen to majority - they are capable of negligence

2.05 DEVELOPING THE REASONABLE CARE STANDARD (p.120)

A. Balancing Risk v. Untaken Precautions

US v. Carroll Towing Co. (2C 1947) Barge was set free by a tug, it was damaged and later sank. A barge company is negligent by not ensuring a bargee would be on board to monitor the barge during the working hours of daylight. If there's a foreseeable risk of the battering of the barges, you have a responsibility to take reasonable precautions to monitor your barge and limit the possibility that the barge would come lose and cause damage. (This isn't very specific) - Hand's risk calculus - liability depends on whether B < PL

a. Hand Formula – Balancing of Risks and Utility – B<PL
   i. **What's the minimum needed to prevent the worst case scenario?**
      A. Likelihood of harm (P) - probability of an accident occurring
      B. Seriousness of the Injury (L)
      C. Burden of Adequate Precautions (B) –
   ii. Π has burden to prove there was a feasible, safer alternative that would have avoided the accident - a solution always involves some preference or choice, consigned to jury
   iii. Hand analysis
      A. alleged negligence:
      B. foreseeability of risk:
      C. probability of risk:
      D. seriousness of threat:
      E. feasibility of precaution:
      F. sacrifice for precaution
      G. Hand Balance:
      H. sufficient for jury:
   iv. Criticism –
      A. exalts economic rationality above all else - only about compensation (Nelson)
      B. gives voice to only the male point of view and not the female (Jacob)
      C. abstracts people from suffering & dehumanizes them (Bender)
   v. Value of the Risk Calculus
      A. **Attorneys for both Δ & Π use it to prepare negligence cases** – helps know where to focus & gather evidence
         A. Π can build cases and focus on pertinent info
         B. Δ can poke holes in Π's case
      B. **Judges find it useful in determining sufficiency of evidence issues**
      C. a few appellate courts have expressly applied the calculus (U Chicago)
      D. particularly helpful at summary judgment/directed verdict stages
   vi. Jury Instructions - **Calculus is rarely given in jury instructions** – jury might be instructed to consider the elements

   i. **court asks, in light of precautions that had been taken, whether some particular precaution promised benefits greater than associated costs**
   ii. Breach of Duty
      A. Π’s burden to suggest untaken precautions to be basis for his case
B. any risk can be included in the calculations as long as it would be reduced by
the untaken precaution in question and as long as it was foreseeable

iii. Restatement (Second) - "conduct is negligent because it tends to subject the
interests of another to an unreasonable risk of harm. Such a risk may be made up
of a number of different hazards, which frequently are of a more or less definite
character. The actor's negligence lies in subjecting the other to the aggregate of
such hazards."

McCarty v. Pheasant Run (7C 1987) ¶ was attacked at Δ's resort when her room was broken into by
an intruder, ¶ alleged Δ had not taken adequate precautions to prevent her injury. ¶ 's motion for
j.n.o.v. was properly denied because plaintiff failed to file a motion for directed verdict on the issue of
defendant's negligence. The court held that judge is not obligated to admit evidence which does
not necessarily support plaintiff's claim that Δ failed to take adequate precautions to prevent
her injury. (Hand Rule)

A. Role of Custom – generally allowed to guide juries determining reasonableness of conduct
   a. Custom evidence can be used in two ways in negligence cases
      i. ¶ plaintiff may introduce the Δ's deviation from custom as evidence of Δ's
         unreasonable conduct
      ii. Δ may introduce evidence of customary practice to show that their own compliance
         with custom demonstrates reasonableness
   b. custom evidence points to what a reasonable person would do - if there's a custom that a
      community of people have come to over a period of time, that's important
   c. if a party wants to introduce custom evidence - you need an expert to testify

Hagerman Construction, Inc. v. Copeland (INAP 1998) Copeland fell to his death through an
uncovered opening on a construction site where he was working. Hagerman objected to witnesses re:
industry standards & customs. Court held, "The conduct of other persons in substantially similar
conditions may be relevant to the reasonableness, under the circumstances, of a particular individual's
acts or omissions. It is therefore proper to receive evidence of others' conduct from which the jury may
determine that the conduct under consideration was or was not reasonable in light of all the
circumstances."

Trimarco v. Klein (NYSU 1982) ¶ was severely injured when his bathtub enclosure, which was made of
real glass instead of safety glass, shattered. Δ objected to the admission of testimony regarding custom
and usage. Court held evidence of custom and usage "by others engaged in the same business"
is submissible in negligence cases. Court reversed b/c of admission of a statute that did not apply to Δ.

a. Prof Clarence Morris (Custom & Negligence, 1942) - custom has three-fold relevancy
   i. alerts fact finder to the impact on business institutions of a finding of negligence
   ii. addresses the feasibility & practicality of alternatives
   iii. demonstrates the opportunity or lack thereof to learn of other safeguards
b. in addition to proving the existence of a well-established custom and defendant's deviation
   therefrom, the plaintiff must also show that the purpose of the custom is to protect
   against the kind of harm suffered by the plaintiff
   i. Levine v. Blaine - plaintiff suffered severe injuries when stiff bristles from hand rope
      used to operate a dumb-waiter lodged in her finger, wanted evidence that the
      custom was to use smooth rope - court said no, could be other reasons
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      used to operate a dumb-waiter lodged in her finger, wanted evidence that the
      custom was to use smooth rope - court said no, could be other reasons
      room, wanted evidence of security measures at other hotels, court said yes, "circumstances
      surrounding the usual practice need not be precisely the same as those surrounding the
      situation at issue; it is sufficient if they are substantially similar" Anderson also wanted
      evidence that after the incident, defendant installed peep holes & safety chains, admitted
      because the defendants had contended that such security devises were infeasible
   c. Duncan v. Corbetta - plaintiff injured walking down stairway when step collapsed, wanted
      evidence that customary practice was to construct w/pressure treated lumber, court allowed
      as the customary practice may be to make greater safety efforts than those required by
      minimum safety requirements of the statute
The T.J.Hooper (2C 1932) (Hand) 2 tugs & 2 barges of coal were lost in a gale, neither tug had a working radio receiver, argued that there is no such industry custom to supply tugs with such receivers. Court held that a lack of custom to take a certain precaution does not preclude liability for negligence.

a. Rejection of a Patently Unreasonable Custom - mine hole cut without warning or notice (as was the custom) a contractor fell down such a hole and was injured, court held that such a custom would not show that the act was consistent with ordinary prudence - grossly careless - Mayhew v. Sullivan Mining Co.
b. Mrs. Baird's Bakeries, Inc. v. Roberts - evidence of custom that violates a statute
c. custom and reasonableness do not necessarily come together
d. Malpractice - custom evidence in malpractice is typically conclusive on due care issue

2.06 ALTERNATIVES TO THE REASONABLE CARE STANDARD (p.150)
A. Specific Judicial Standards - in directed verdict, a judge determines that no reasonable juror could find that a breach of duty existed or that all reasonable jurors would have to find the existence of a breach of duty - implicitly making judgment re: reasonable conduct under the circumstances
a. proposal for minimum standards of care to be evolved by judges to substitute for the reasonable care standard (Holmes supported this)
   i. benefits
      A. consistency of verdicts
      B. reliance of insights by seasoned judges
      C. effective deterrence as rules become known
      D. greater efficiency in jury trials
   ii. Cardozo - standards would not take into consideration all the variables

Baltimore & Ohio R.R. Co. v. Goodman (US 1927) (Holmes) - Goodman was crossing a railroad track in his truck when he was hit and killed by a train. His vision was limited but he could see the train for sufficient distance for him to take precautions. Court held burden on man to take precaution. More controversially, it held, "In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look...."

Pokora v. Wabash Ry. Co. (US 1934) (Cardozo) - Pokora was hit by a train going 25-20 mph driving across a track crossing. The train was obscured from sight by a number of box cars sitting on nearby tracks and the train did not whistle or ring a bell as it approached the crossing. A directed verdict was granted for the ∆ and upheld on Appeal. Supreme Court reversed, holding, "in default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury."

B. Safety Statutes and Regulations as Standards
a. quasi-criminal laws - violators pay a fine - often relevant to negligence actions
   i. in most states - the unexcused violation of a safety statute is considered sufficient to satisfy the breach element
   ii. may be circumstances when a reasonable person would violate such a rule

Ferrell v. Baxter (AKSU 1971) - woman's car collided with mack truck on icy road, her passenger sued. She objected to jury instructions which included statutes relevant to traffic regulations. When there is sufficient evidence for a jury to determine that a traffic statute might have been violated, it is relevant to the case. Before a plaintiff is entitled to an instruction defining the violation [of a statute] as a negligence per se, he must first demonstrate that he is among the protected class and, second, that the injury was caused by a harm against which the law was designed to protect. (TWO STEP RELEVANCY TEST) Dissent, better to go with common law tradition of letting jury define the reasonable person.

b. Statutes - generally silent about civil liability, however...
   i. where legislature explicitly creates civil liability via statute, a court must follow the statute provided it is constitutional
   ii. two step relevancy test
      A. demonstrate plaintiff is among the protected class
      B. injury caused by harm against which the law was designed to protect
   iii. Judicial discretion - courts are frequently drawn into analyzing the "purpose" of the statute from other sources, such as legislative history or context
iv. Clinkscales v. Carver - if city didn't file the proper documents for a stop sign, statutory negligence still applies – no technicalities

Wright v. Brown (CTSU 1975) - a dog which had not been properly quarantined after a bite attacked | who sued Δ for damages. Court held the quarantine statute was intended to protect the general public or, "members of the community, however, the second half of the test fails because the injury is not of the type that the statute was intended to prevent.

c. Relationship of Statutory Standards to the Reasonable Care Standard
   i. Procedural Effect – different for each jurisdiction
      A. negligence per se (Ferrell) - statute becomes standard of care and violation of the statute constitutes a breach of the standard unless a judicially recognized excuse is proven - limited situations where no excuses are allowed at all
      B. evidence of negligence (Ferrell) - standard of care remains the reasonable person standard and the violation of the relevant statute may be considered by the jury in its breach determination
      C. Presumption of Negligence – violator can rebut by showing the reasonable person would have acted the same way
   ii. Compliance - evidence of due care but is not conclusive proof of due care
      A. Restatement 2d - "Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."
      B. Restatement 3d - "If an actor's adoption of a precaution would require the actor to violate a statute, the actor cannot be found negligent for failing to adopt that precaution."
   iii. No-Excuse situations - strict negligence per se applications
      A. child labor laws
      B. pure food and drug laws
      C. hazardous materials safety rules
   iv. Getchell v. Lodge (2003 AK) - court upheld jury determination that Δ driving in lane of oncoming traffic was excused because she was skidding on ice as a result of braking to avoid a moose in her lane of traffic
   v. Sikora v. Wenzel (OH 2000) - Δ contractor negligence b/c violated a state building code that led to the collapse of a deck - excused b/c contractor neither knew nor had reason to know the factual circumstances that caused the violation
   vi. Framework for Using Statutes in Negligence Cases p.172

e. Negligence Per Se & Child Standard of Care
Bauman v. Crawford (WASU 1995) - Child on bike at night without a headlight (violation of ordinance) collided with a driver and sued for damages. Judge instructed on special child standard and negligence per se. Court held that the violation can only be used as evidence if it applies at all. Concurrence, negligence per se is stupid, negligence is an issue of fact.

2.07 PROOF OF NEGLIGENCE (p.178)
Π has the burden to prove breach of duty by a preponderance of the evidence
A. Circumstantial Proof
Clark v. Kmart Corp (MISU 2001)- Π slipped on a smushed grape on the floor of Δ's store. Jury awarded her damages, reversed on appeal b/c Π had "constructive notice" was there. Court held that
where the $\Delta$ had approximately one hour to discover the grape and clean it up, there was sufficient evidence for the jury to decide the negligence issue.

a. Circumstantial Evidence in Negligence
   i. fact finder must make inferences from circumstantial evidence as to a particular negligent act
   ii. test, whether jury may legitimately draw and inference: where from the proven facts the nonexistence of the fact to be inferred appears to be just as probable as its existence (or more probable than its existence), then the conclusion that it exists is a matter of speculation, surmise, and conjecture, and a jury will not be allowed to draw it.

B. Res Ipsa Loquitur – the thing speaks for itself (standard of evidence, not a doctrine)
   a. circumstantial evidence, based on evidence about the accident, allows jury to infer there must have been some negligent act

**Byrne v. Boadle** (EngRep 1863) - $\Pi$ was walking down the street when struck and seriously injured by a barrel of flour falling from $\Delta$’s warehouse. Nobody really knows what happened. Court held that the accident alone can be prima facie evidence of negligence, not likely that negligence wasn’t an issue, and if any facts inconsistent with negligence, it is for the $\Delta$ to prove them.

**Eaton v. Eaton** (NJSU 1990) - $\Pi$ killed in car accident. $\Delta$ denied being driver and claimed they had been avoiding an oncoming car, this was likely untrue. Given that $\Delta$ was found to be the driver and that there was no acceptable reason for the car to go off the road and flip, a *res ipso loquitur* instruction was appropriate.

b. Restatement 2d test for *res ipso loquitur*:
   i. the event is of a kind which *ordinarily doesn’t occur w/o negligence*
   ii. *other responsible causes*, including the conduct of the plaintiff and third persons, *are sufficiently eliminated by the evidence* (possibility doesn’t have to be completely eliminated, but likelihood must be so reduced that a jury can reasonably find negligence lies at $\Delta$’s door)
   iii. the indicated negligence is within the *scope of the $\Delta$’s duty to the $\Pi$*

c. Bottom Line - the harm probably was caused by negligence and the defendant was probably the responsible party – allows $\Pi$ to get to the jury without proving a specific act of negligence - *jury MAY infer negligence, but is NOT REQUIRED to infer*

**Harder v. Clinton** (OKSU 1997) $\Pi$’s sister became very ill after an overdose of a medication while living at a nursing home. The court held that the $\Pi$ had met the requirements for *res ipso loquitur* to be an option, trier of fact decides between favorable inferences and any refutational evidence presented by $\Delta$. Trial judge should not have granted demurrer.

d. Res Ipsa Defenses
   i. defeat the existence of *res ipso loquitur* by showing that one of the elements cannot be established
   ii. show that they exercised due care
   iii. show the actual cause of the accident
   iv. burden of production - $\Delta$ has to say SOMETHING, but doesn’t have to prove anything

e. The Defendant’s Responsibility - The "Control" Element
   i. $\Pi$ must connect the $\Delta$ to the harm-causing event, $\Pi$ has burden of proof
   ii. Control doesn’t need to be exclusive - party's negligence may be inferred when 'other responsible causes are sufficiently eliminated by the evidence.'
      A. Parillo v. Giroux - $\Pi$, bartender, seriously injured when a bottle of grenadine exploded in his hand when he tried to open it - court held that a $\Pi$ didn’t need to exclude all possible conclusions beyond a reasonable doubt - enough to make out a case from which the jury may reasonably conclude that the negligence was, more probably than not, that of the $\Delta$
      B. Giles v. City of New Haven - $\Pi$ injured when elevator fell - permitted to show the $\Delta$’s control even though many others used the elevator

f. Elements of Res Ipsa Loquitur
   i. **Inference that Someone was Negligent** –
      A. accident ordinarily doesn’t occur without someone's negligence
      B. proof: facts of accident, common knowledge, common sense, experts
C. $\Delta$ would usually be in better position for info than $\Pi$

ii. **Inference that $\Delta$ was Negligent** -
   A. apparent cause of the accident is such that the $\Delta$ would be responsible for any negligence connected with it
   B. jury must be able to find that more likely than not the $\Delta$'s negligent conduct or omission caused the accident
   C. proof: evidence of $\Delta$'s exclusive control, if possible; evidence that negligence likely occurred when instrumentality was under the control of the $\Delta$; disprove possible negligence of third parties; remove the $\Pi$ as a possible contributor (or at least less than 50% responsible in comparative negligence)

**Ybarra v. Spangard** (CASU 1944) - after $\Pi$ had appendectomy, he suffered paralysis and atrophy from a shoulder injury, he sued several $\Delta$'s for negligence - $\Delta$s argued that the blame could not be scattered amongst them all & $\Pi$ needed to be specific about exclusive control. Court held that where a $\Pi$ receives unusual injuries while unconscious and in the course of medical treatment, **all those $\Delta$s who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct.** *Res ipsa loquitur* fits.

a. Maki v. Murray - hospital cases are exceptional and res ipsa loquitur should apply with equal force where doctors and nurses take the place of machinery and can injure patients who are then in no position to say who injured them
b. G - this case is famous, Barrett v. Emanuel Hosp. - rejected Ybarra - "The only inference res ipsa loquitur permits is the ultimate fact of negligence, and that inference is permitted only when the $\Pi$ is able to establish by proof, inter alia, the probability that a particular $\Delta$'s conduct was the cause of the $\Pi$'s harm."

2.08 **STANDARD OF CARE IN PROFESSIONAL MALPRACTICE** (p.204)

A. Overview
   a. negligence law treats professionals differently than "non-professionals"
   b. custom sets the standard of care - deviation from custom constitutes breach of duty
   c. G - to succeed with either malpractice claim, $\Pi$ must have all five elements of negligence

B. Negligence Medical Performance

**Velazquez v. Portadin** (NJSU 2000) $\Pi$'s daughter was delivered after Pi tocin had been administered for 1 1/2 hours. While Pi tocin is administered the mother must be closely monitored to prevent injury to the baby. $\Pi$ alleged that $\Delta$s had deviated from the accepted standard while administering the drug to $\Pi$. Trial court held for $\Delta$ and Appellate affirmed. Here the court remanded b/c jury instruction had not taken into account each issue that was raised with regard to the accepted practice and the actual behavior of the $\Delta$s. Stated, "trial court's failure to untangle the facts in relation to the medical judgment charge left the jury free to excuse $\Delta$s based on the evidence of judgment in areas where no judgment was exercised." – ensuring readable results/detecting distress aren't choices

a. when a doctor selects one of two courses, either one of which has substantial support as proper practice, a claim of malpractice cannot be predicated solely on the course pursued.
   b. a doctor who departs from standard medical practice where no judgment is permitted cannot excuse himself from by saying that it w an an exercise of judgment
   c. **Expert Testimony, $\Pi$ must provide expert testimony to show:**
      i. customary practice
      ii. $\Delta$'s deviation from customary practice
      iii. expert must show that she has knowledge of the **customary practice in the area of medicine practiced by the $\Delta$ in the relevant geographical area** - whether the allegations of negligence concern matters within his knowledge and observation
   d. Common Knowledge - jury is permitted to find negligence based on nature of the events that brought about the harm without expert testimony - often these common knowledge exceptions involve proof by res ipsa loquitur
   e. Medical res ipsa – expert can be needed to show it doesn’t usually happen
   f. Locality Test – somewhat abandoned – national standard for specialists
   g. Inherent Risks – professional is not negligent for risks inherent in treatment unless there’s an indication that the risk has been likely to be the result of negligence

C. The Doctrine of Informed Consent
**Phillips v. Hull** (MISU 1987) \(\Pi\) was a diabetic and was sterilized by \(\Delta\) because pregnancy would be very risky to her and the baby. \(\Pi\) thereafter became pregnant and delivered a baby who she claims has cerebral palsy. \(\Pi\) sued claiming that \(\Delta\) was negligent in performing the procedures of delivery & sterilization and that the \(\Delta\) failed to secure informed consent. \(\Pi\) produced no expert witnesses so trial court granted \(\Delta\) summary judgment. Court held w/o experts the negligent performance claim couldn't go forward but informed consent was an issue of fact. The test for informed consent is whether or not a reasonably prudent patient, fully advised of the material known risks, would have consented to the suggested treatment.

- a. Canterbury v. Spence - "every human being of adult years and sound mind has a right to determine what shall be done with his own body, and a surgeon who performs an operation without his patient's consent commits and assault for which he is liable in damages." (Cardozo)
- b. **prudent patient standard** - a physician must disclose those known risks which would be material to a prudent patient in determining whether or not to undergo the treatment
  - i. two approaches - these speak to causation
    - A. objective - would a reasonable person have made a different decision had the information been disclosed - experts would have to speak about risks/consequence
    - B. subjective - would \(\Pi\) have made a different decision had the information been disclosed - \(\Pi\) takes the stand - credibility questions - experts speak to whether the individual is believable
- c. Disclosure should include: Diagnosis; nature & purpose of proposed treatment; risks & consequences of the proposed treatment; probability that the proposed treatment will be successful; feasible treatment alternatives; prognosis if the proposed treatment is not given
- d. **Emergencies Are DIFFERENT**
- e. **don't need medical expert affidavits to go forward with informed consent**

**D. Legal Malpractice & Liability of Other Professionals**

- a. non-medical professionals are largely **expected to conform to the customary practices of their profession - failure to do so is negligence**
- b. expert testimony typically required to establish the custom and the \(\Delta\)'s deviation therefrom

**Smith v. Lewis** (CASU 1975) \(\Pi\) employed \(\Delta\) to represent her in divorce proceedings. \(\Delta\) did not include federal and state retirement benefits in his filing until \(\Delta\) forced him to, at which time it was too late. The court held that the \(\Delta\) was negligent in not knowing the state benefits were considered community property and not adequately researching the federal benefits issue. It was properly left to the jury to determine whether this negligence caused the damages to the \(\Pi\). "There is nothing strategic or tactical about ignorance."

- c. Experts - generally required, some acts of legal malpractice, such as failing to file a complaint within the statute of limitations, may be so clearly wrong that they fall within a common knowledge exception
- d. G - cause in fact hurdle - you have to show that your lawyer fell beneath his duty and that ALSO if he hadn't you would have won

3.01 **GENERAL DUTY OF REASONABLE CARE** (p.240)

A. Development of general duty principle

- a. before negligence became an independent tort - liability for inadvertent harm only existed in narrow situations where a party's assumption of a status towards another carried with it the obligation to exercise reasonable care - public callings - innkeeper, surgeon, attorney, etc
- b. certain contexts, no duty at all, or very limited duty - landowner's duty to persons entering
- c. G - **existence of duty is for the court to determine, not the jury**
- d. G - historical backdrop of duty the exception, not duty the rule - now complete flip flop

B. **General Duty of Reasonable Care**

**MacPherson v. Buick Motor Co** (NYSU 1916) (Cardozo) - \(\Delta\), car manufacturer, sold car to dealer, who sold car to \(\Pi\). car's defective wheel broke and \(\Pi\) was injured. Court held that the presence of a known danger, attendant upon a known use, makes vigilance a duty. **Test: there must be knowledge of probable danger, must be knowledge that in the usual course of events the danger will be shared by others than the buyer, manufacturer must fail in his duty of inspection.** (birth of
modern product liability) Dissent - this is the same as long history of cases that demand privity, there is no privity here.

**Thomas v. Winchester** - poison falsely labeled, ∆’s negligence put human life in imminent danger

(Majority)

**Winterbottom v. Wright** - mail coach driver was injured when coach collapsed because of improper maintenance of the vehicle - court decided that the coach driver couldn’t sue the repair service operator, despite his likely negligence, because there was no privity of contract.

a. 2 Cooley - "general rule is that a contractor, manufacturer, vender, or furnisher of an article is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of such article." (Dissent)

b. NOW - generally speaking, there's a duty, but there are still pockets where there is no duty

c. Duty Goals: allocation of loss, fairness, deterrence or accident avoidance, economic considerations, administrative concerns related to the legal process, legislative considerations - Considerations: foreseeability, morality

C. American System of Precedent

a. Precedent as a Rule - allowance must be made for distinguishing cases, modifying holdings, and the occasional overruling of cases

b. Binding Nature of Precedent - two options for judges

   i. rule spelled out in the language of the earlier court
   ii. rule based on what the court did in the case despite use of broader language
   iii. judges may use one for making use of precedents that are helpful and the other for dealing with precedents that are troublesome

3.02 LIMITED DUTY RULES (p.254)

A. Limited Duty: Duty to Act, Assist, or Rescue

a. duty of reasonable care if ∆ has engaged in affirmative conduct that created the risks of harm that resulted in an accident

   i. **misfeasance** - risks of harm arose out of one's conduct
   ii. **nonfeasance** - risks of harm do not arise out of one's conduct
   iii. courts allow claims on misfeasance and disallow claims premised on nonfeasance

b. exceptions to misfeasance/nonfeasance rule

   i. special relationships (with perpetrator or victim)

      A. dependency & interdependency (parent/child, teacher/student)
      B. contractual relationships where party has agreed to provide aid

   ii. situations where a party has voluntarily begun to assist (two approaches)

      A. no liability if volunteer quits, leaving the party no worse off than before
      B. volunteer held to standard of reasonable care, can’t quit that’s unreasonable

   iii. where statute imposes a duty to assist (helping police/fire, accidents, reporting)

   iv. innocent prior conduct creating the risk

   v. reliance on a gratuitous promise

   vi. intentional prevention of aid by others

**Yania v. Bigan** (PASU 1959) ∏ went to discuss business with ∆, ∆ asked ∏ for help with a pump. ∆ verbally cajoled ∏ into jumping into more than 8 ft of water, ∏ drown. Court held that ∆ was under no duty to help him and that, because ∏ was a fully capable adult, ∆ was not guilty for cajoling him to jump. “The result of his ignorance, or of his mistake, must rest with himself and cannot be charged to the defendants.”

**Farwell v. Keaton** (MISU 1976) - ∏ and ∆ went out drinking, ∏ got in an altercation and suffered a serious head injury. ∆ gave ∏ ice and drove around for awhile before ∏ fell asleep in the back seat and ∆ left the car in ∏’s driveway. ∏ was discovered in the morning and died three days later. Court held that whether there was a duty or not was a fact issue for the jury and that the parties’ had a special relationship which could impose duty on ∆ to care for ∏. Also, the issue that went to the jury, approved here, whether ∆ had voluntarily begun to assist ∏. Dissent, no authority that the relationship would create a duty here, not the case to change law. G - if you start helping, then you’re held to reasonable person standard.
c. No Duty to Assist Note - *Liability in Negligence (J.C. Smith)*
   i. source of obligation to take care not to create risks of harm when we act is totally different form the course of our obligations to take care to remove risks of harm which we did not create, wherever such duties exist, when they exist
   ii. legal obligation is the converse of a liberty to act - imposition of a duty must be justified for limiting right of freedom of action or free agency of individual
   iii. elimination of the distinction between not injuring neighbor and taking action to prevent harm from happening to your neighbor collapses important distinctions between law and morality; so such a law would now force everyone to be Good Samaritans

d. The Case for a Duty to Rescue (Ernest J. Weinrib, Yale L.J.)
   i. general rule - except when the person endangered and the potential rescuer are linked in a special relationship, there is no special duty to rescue
      A. distinction between infliction of harm and the failure to prevent it
      B. courts have refused to enunciate a general duty to rescue
   ii. "but for" test
      A. focuses on the time at which Δ failed to act to prevent harm to Π and then compares the actual course after that time with the hypothetical course of events for the same subsequent period
      B. Pseudo-nonfeasance: if misfeasance masquerades as nonfeasance, transform the but-for test so it attends not the actual injury but the risk of injury
      C. real nonfeasance when the risk exists independent of the defendant's presence or absence, the defendant's part has no bearing on this fact
   iii. supporting no duty to assist rule
      A. duty to assist strangers would interfere with the liberty we have to conduct our lives as we choose so long as we do not create risks of injury to others
      B. would contradict basic principles of causation
      C. voluntary altruistic acts can retain their full moral values
      D. duty to rescue would create judicial problems of process/pragmatic
   iv. favoring duty to assist
      A. each has right to protection by the community
      B. whether there is a duty is not merely a matter of balancing the autonomy of one citizen against the safety of another - harm to one extends to many

B. Limited Duty: Owners and Occupiers of Land
   a. Protections to landowners when visitors are injured on the owner's property
   b. Duty of care a landowner owes varies with regard to status of visitor

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   c. The **duty of an owner or occupier of land** to keep the premises in a safe condition may subject the owner or occupier to liability in two situations: (1) those arising from a defect in the premises, and (2) those arising from an activity or instrumentality.
      i. **to invitee:** enters another's land with the owner's knowledge and for the mutual benefit of both (some places treat guests as invitees)
         A. tests: (1) economic benefit or advantage test or (2) public invitation test
         B. general duty to use reasonable care - so that invitees are not unnecessarily exposed to danger, things you know about and things you should know about
      ii. **to licensee:** enters and remains on the land with the owner's consent and or his own convenience or on business with someone other than the owner
         A. not to injure willfully, wantonly, or through gross negligence and to warn of or make safe dangerous conditions that you know about
         B. exercise reasonable care to disclose defects that are known to the owner and would not be known by the licensee
iii. **to trespasser**: enters another's property without any lawful authority, permission, or invitation - not to cause injury willfully, wantonly, or through gross negligence  
iv. traditional duty trichotomy under some modification/attack – depends on jurisdiction  
d. Note on **Child Visitors**  
i. Attractive Nuisance - rule: some human developed condition on the land "attract" or "lure" children to play in the area - allurement/attraction gradually eliminated  
ii. Restatement 2d §339: 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 made 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 protect the children  
iii. Prosser - liability and natural risks - owner not required to improve wild land in a state of nature to make it safe for trespassing children - maybe he should be  
iv. Application of Restatement 2d - difficulty applying to common hazards like fire, water, heights, vehicles  
A. children are expected to recognize the dangers in these hazards  
B. moving toward applying general negligence principles to children injured on property regardless of their status in entering  

### Rowland v. Christian (CASU 1968)
- T was visiting D when he badly injured his hand on a broken ceramic faucet which T was allegedly aware of. Court held that the focus on the status of the injured party is contrary to our modern social mores and humanitarian values. **Everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property.** Test = whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others. - General Rule - Heaven v. Pender (QB) - "whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."  

### e. Duty Note  
i. current rules and exceptions resulted from the erosion of harsh earlier rules  
ii. Major Tort Law **Policy Considerations**  
A. **Deterrence** or Accident Prevention Considerations - negligence law should help reduce the level of accidents in society  
B. **Economic** Considerations - negligence law should help to reduce the costs of accidents when they do occur, but should not be an undue economic burden on productive endeavors  
C. Allocation of Losses - Loss-Spreading - compensation to avoid severe economic dislocation for victim/family  
D. **Administrative** Concerns of Courts - negligence principles should create workable legal rules for people - complicated rules might be rejected  
E. **Fairness**, Ethical, Moral, and Justice Considerations – neg. law should be fair, just, moral, & ethical; consider context & society's expectations  
F. Legislative Considerations – neg. law can complement/reinforce legislation  

### f. Landlord Duty  
i. landlords are not generally liable in negligence for injuries to tenants or guests arising from defective/dangerous conditions on the leased premises
ii. exceptions - landlords do have a duty of reasonable care for foreseeable risks where:
   A. concealed dangerous conditions were known to the landlord
   B. dangerous conditions create risks to those outside the premises
   C. the premises are leased for public admission
   D. conditions are in the common areas that the landlord retains control over
   E. the landlord breaches an agreement to repair the premises

iii. Habitability legislation does not necessarily result in tort liability for non-compliance

h. Note on Varying Culpability as a Tool to Limit Duty
   i. a full duty of reasonable care is owed to invitees and lesser duties of care are owed to licensees and trespassers
      A. guest passengers
         A. "guest passenger" laws - guest passengers in vehicles had to prove at least gross negligence or recklessness to recover against the driver
         B. business related passengers owed full duty of reasonable care
   ii. sports - majority of courts - co-participants in sports activities owe a duty to each other only to avoid reckless or intentional misconduct, proof of unreasonable conduct is such contexts is not sufficient to maintain an action

C. Limited Duty: Emotional Harm without Physical Injury
   a. Emotional Distress of Persons Subject to Physical Risk
      i. G - concern re: relative validity/importance of different types of harm
         A. physical injury - person or property, tangible things
         B. physical injury w/emotional harm parasitic to primary physical injury
            A. long been compensable just fine – holistic approach
            B. known as the impact rule
         C. emotional harm w/o physical injury - sometimes hard to differentiate
            A. very strict line here re: compensation
            B. law has moved toward recognizing some of this category

Mitchell v. Rochester Ry Co. (NYSU 1896) - II was frightened when two horse carriages came very close to hitting her, she fainted and had a miscarriage. Court held that she could not recover, the fright would not be recoverable, so the effects of the fright would not be recoverable.

ii. physical risk line of cases
   A. Impact Rule - now, often satisfied by even slightest touching in accident context, some require proof of physical manifestations arising from emotional distress, most dropped that requirement
   B. Zone of Physical Danger Rule I - Fear for One's Own Physical Well-Being
      - space within which a party is at foreseeable risk of physical injury - if party is in the zone, recovery was appropriate for distress from the fear of physical injury - typically emotional harm must be serious and must have arisen in circumstances that tended to corroborate its existence
   C. Zone of Physical Danger Rule II - Fear for the Physical Well-Being of Another - suffered serious emotional distress at seeing the serious injury to a close relative - many do not delineate between fear for one's own safety and distress for a family member

b. Bystander Emotional Harm - Physical Risk to Persons Other than the Person Suffering Emotional Distress
   i. scope - cases are tied to physical risk
      A. plaintiff actually observes the injury (percipient witness)
      B. plaintiff closely related to the victim
         A. NY - limits to "immediate family"
         B. best friends / cousins / uncle & nephew - most excluded
         C. intimate, non-married partners – depends on situation, generally no
   C. resulting emotional distress is severe
      A. (initially) the plaintiff suffers manifest physical consequences from the emotional distress – resulting physical injury rule (may be required)
      B. Might need diagnosable psychological injury
ii. the adoption of bystander recovery rule doesn't eliminate the need to retain he impact or zone of danger rules in situations where the negligent conduct poses only a physical risk to the person suffering the emotional distress.

**Clohessy v. Bachelor** (CTSU 1996) - \( \Pi \) (mother & son) were crossing a street with second son when he was hit and killed by \( \Delta \) who was driving negligently. Court held that bystander may recover damages for emotional distress under the **rule of reasonable foreseeability** if the bystander satisfies the following conditions: (1) he or she is closely related to the injury victim; (2) the emotional injury of the bystander is caused by the contemporaneous sensory perception of the event or conduct that causes the injury, or by arriving on the scene soon thereafter and before substantial change has occurred in the victim's condition or location; (3) the injury of the victim must be substantial, resulting in his or her death or serious physical injury; and (4) the bystander's emotional injury must be serious, beyond that which would be anticipated in a disinterested witness and which is not the result of an abnormal response.

**Dillon v. Legg** (CA) – three factors to consider in determining foreseeability (1) location of \( \Pi \) (2) sensory perception of \( \Pi \) (3) relationship of \( \Pi \) to the victim.

**Thing v. La Chusa** (CA) "\( \Pi \) may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said \( \Pi \): (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress - a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances."

c. Independent Duty for Emotional Well-Being - based on the \( \Delta \)'s breach of an independent duty obligation to act reasonably for the \( \Pi \)'s emotional well-being
   
i. Overview of Emotional Harm Recovery in Independent Duty Contexts
      A. Bodily Remains and Death Notification Cases
         A. negligent mishandling of a decedent's body by a funeral home
         B. loss of a body, switching bodies, mixing up cremated remains
         C. erroneous notification of a loved one's death
         D. limited to persons contracted for the disposition of the body and their immediate relatives

      B. Other Independent Duty Situations Allowing Emotional Distress
         A. Molien v. Kaiser Hospital Foundation (CA 1980) - court held that where physician erroneously diagnosed \( \Pi \) with syphilis and instructed her to inform her husband, doctor could be liable for husband's distress
            A. damages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact
            B. a cause of action to recover damages for negligently inflicted emotional distress will lie in cases where a duty arising from a preexisting relationship is negligently breached
         B. Marlene F. v. Affiliated Psychiatric Medical Clinic (CA 1989) - therapist was treating mother & son, sexually abused son

**Burgess v. Superior Court** (CASU 1992) - pregnant \( \Pi \)'s \( \Delta \) obstetrician was negligent in delivering the baby, caused brain damage, \( \Pi \) sued for her emotional distress. The court held that there is a direct victim between the \( \Delta \) and patient. "Any negligence during delivery which causes injury to the fetus and resultant emotional anguish to the mother, therefore, breaches a duty owed directly to the mother." **Pre-existing physician-patient relationship directed toward mother and fetus.** - G - foreseeability is not exclusive, what about dad, dad probably wouldn't be enough to be direct victim, dad who came to all visits - maybe bystander, if doctor advised the dad, maybe either

**Huggins v. Longs Drug Stores California, Inc.** (CASU 1993) - \( \Pi \) filled a prescription from \( \Delta \)'s pharmacy for her baby, pharmacist included the wrong instructions re: dosage and the baby became ill. The court upheld the trial court in holding that the pharmacy was not liable to the parents because the **parents were not his patients and were not owed a duty**, therefore they could not recover as direct victims. Dissent x2 - the prescription necessarily implicated the parent's participation, the rationale about public policy & efficiency is bogus. G- parents weren't distressed at the time it happened.

ii. Others
   
   A. Rescuers & Emotional Distress (generally not allowed)
B. Cf. Johnson v. Jamaica Hospital (NY) - parents cannot recover for emotional distress where day care center negligently allowed child to be abducted, child was later recovered - G - not present for incident, not bystander

C. Ramona v. Ramona - father could recover when therapist had planted (proven) false history of sexual abuse and daughter confronted father about those allegations

D. Kately v. Wilkinson - friend can recover where boat's steering locked and crashed into skier-friend, pulled dying friend into the boat but couldn't take her to help b/c of steering, emotional distress from watching friend die

Boyles v. Kerr (TXSU 1993) - ∆ secretly videotaped ∏ having sex with him, showed it, gossip spread. Court awarded ∏ $1,000,000. Court held "mental anguish damages should be compensated only in connection with ∆'s breach of some other duty imposed by law." Dissent - this disproportionately affects women.

Majca v. Beekil (ILSU 1998) - two claims, ∏1 exposed to scalpel used by podiatrist who had AIDS, ∏2 was treated by a dentist who had HIV. Both ∏ wanted damages for their fear of contracting AIDS for the time period between possible exposure and receipt of reasonably conclusive HIV-negative test results. Court held that fear during the "window of anxiety" is reasonable; however, neither of these ∏s presented evidence of actual exposure to HIV, which would be necessary to distinguish claim from those based on conjecture/speculation from those based on genuine fear of contracting AIDS. (majority of courts agree there)

i. Brzoska v. Olsen (DE) "it is unreasonable for a person to fear infection when that person has not been exposed to a disease."

ii. G - even if they could show actual exposure, the ∆ argued that it still wouldn't be likely they would become infected - court said that didn't really matter, emotional distress would be okay

Potter v. Firestone Tire & Rubber Co. - four landowners living next to a landfill - as a result of ∆ dumping toxic liquid waste, landowners were subjected to prolonged exposure to carcinogens through underground water supplies - damages for causing risk of cancer, anxiety over developing cancer, medical monitoring - court denied risk claim, said for emotional distress you needed probability that you would contract cancer (could be waived if fraud, recklessness) - recovery for medical monitoring if significant exposure and doctor reasonably prescribed monitoring

iii. Ayers v. Jackson Township (NJ) - factors for awarding medical monitoring damages; likelihood of future disease, degree of exposure, seriousness of disease; value of early diagnosis

A. Bourgeois v. A.P. Green Indus, Inc (LA) - ∏ must prove monitoring is likely to help detect disease and that early diagnosis/treatment can help cure or mitigate disease

B. Boryla v. Pash - when there is a present injury, such as present emotional distress, the "more likely than not" standard is inapplicable - ∏ can recover for emotional distress based on a reasonable concern that she has an enhanced risk of further disease (juries can deal with this)

iv. Physical Impact – might need to demonstrate present, existing physical impact

D. Limited Duty: Responsibility for Conduct of Others - you don’t have to try to control somebody - it's really just doing something besides ignoring it

a. Mental Health Professional's Duty to third parties based on a special relationship with person posing risk

Tarasoff v. Regents of University of California (CASU 1976) - ∏'s daughter was killed by a man who had told his psychologist that he intended to kill her. Court held that once a therapist does determine, or under applicable professional standards 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. No hard rule, depends on circumstances. Dissent - therapists notified police that patient was planning to kill a girl named X, unsure what more should be required.

i. Rowland v. Christian (quoting Heaven v. Pender) - whenever one person is by circumstances placed in such a position with regard to another... that if he did not use ordinary care and skill in his own conduct ... he would cause danger of injury to
the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

ii. G - many states have adopted various versions of the Tarasoff duty, different in every jurisdiction

iii. G - somebody has information that somebody is posing a risk to another person - outside of therapist context this usually comes up in:
   A. schools and school officials (generally younger students)
   B. anybody with information about possible child abuse risk
   C. G - Restatement 2d exception to general rule - look for any relationship between defendant & harmer or between defendant and harmed - CA court says you need both relationships

iv. arguments against duty
   A. therapist might be under a duty to violate confidentiality - answer - statute says there is not duty not to disclose
   B. therapists cannot always accurately predict whether there is a danger - court says they just have to act as other professionals would act
   C. G - risk for therapists not reporting, not record keeping, having to inform patients about duty, inadvertently encouraging harm

Dunkle v. Food Service East (PASU 1990) - ∏ was violent when not on meds, psychiatrist knew this, discharged him, ∏ killed live-in girlfriend. Trial granted summary judgment to psychiatrist, counselor, doctor, Appeals affirmed. Court here held that **psychologist owes no duty to warn or otherwise protect a non-patient where the patient has not threatened to inflict harm on a particular individual.**

v. Cal Evid Code - "A testimonial privilege is accorded to a patient regarding all information developed in a patient/psychotherapist relationship except that the therapist may testify if the therapist reasonably believes that the patient is a danger to himself or to others, and communication is necessary to prevent the danger."

vi. AMA - "A physician may not reveal the confidence entrusted to him in the course of medical attendance ... unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community."

vii. Cal Civ Code - after Tarasoff - adopted statute giving therapists immunity for failure to warn "except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." - duty discharged by warning the victim and a law enforcement agency

viii. HIPAA regs trump state laws - but create an exemption for Tarasoff claims

b. **Duty to Protect Against Criminal Activity** - in some relationships, common law imposes a duty on a party to take reasonable affirmative measures, such as security precautions, to protect the other party from foreseeable criminal activity

Delta Tau Delta v. Johnson (INSU 1999) - ∆ college student was raped at a party at ∏ fraternity house. Trial court denied ∏'s motion for summary judgment on the grounds they did not owe invitee a duty of care against third party criminal behavior. Court of Appeals reversed. Supreme says "IN courts confronted with the issue of whether a landowner owes a duty to take reasonable care to protect an invitee from the criminal acts of a third party should apply the **totality of the circumstances tests** to determine whether the crime in question was foreseeable. Here, the circumstances show that it was foreseeable.

i. four basic approaches that courts use to determine foreseeability in this context
   A. **specific harm test** - no duty unless the owner knew or should have known that the specific harm was occurring or was about to occur
   B. **prior similar incidents** (PSI) test - landowner may owe a duty of reasonable care if evidence or prior similar incidents of crime on or near the landowner's property shows that the crime in question was foreseeable
   C. **totality of circumstances** - all circumstances surrounding an events, including the nature, condition, and location of the land, as well as prior similar incidents, to determine whether a criminal act was foreseeable
   D. **balancing test** - court balances "the degree of foreseeability of harm against the burden of the duty to be imposed." (McClung)

c. Public Agency Duty to Protect Citizens
Cuffy v. City of New York (NYSU 1987) ¶ family was involved in dispute with one of their tenants, had called the police in response to several altercations. After one incident police told the father that they would arrest tenant in the morning, Δ family decided to stay. Next day, in the evening, huge fight between tenant & ¶'s visiting son, he, mother, and his brother were all severely injured. Court held those ¶'s justifiable reliance had dissipated by midday, was not causally related to their involvement in the fight in the evening. Narrow class of cases recognize exception to the general rule of no municipal duty based on "special relationship" between municipality and claimant - elements: (1) assumption by the municipality through promises or actions of an affirmative duty to act on behalf of the party who was injured (2) knowledge on the part of the municipality’s agents that inaction could lead to harm (3) some form of direct contact between the municipality's agents and the injured party (4) that party’s justifiable reliance on the municipality's affirmative undertaking

i. Public Duty Rule - very well established rule that you can't sustain a claim against municipalities/police, not an immunity, this is a no duty situation
   A. followed in majority of jurisdictions as articulated in Cuffy
   B. tort claims acts waive “immunity” and set conditions and limits for governmental liability - exclusions from liability based on governmental discretionary policies such as resource allocations

ii. Requirements for a Special Relationship - Beal v. City of Seattle (WA) - requiring "direct contact or privity" between victim and police, and "express assurances" from police that they would assist, leading to "justifiable reliance." - police promised to accompany woman, they didn't show up, husband murdered her

iii. Domestic Violence Protective Orders as Basis for Finding Duty

4.01 CONCEPTUAL BASIS OF CAUSATION (p.438)

cause in fact = literal (distinguished from proximate cause or legal cause)

A. But for Causation: Δ’s conduct is a cause of the event if the event would not have occurred but for the conduct – sine qua non - No defense for one negligent actor that somebody else’s negligence also contributed

Sowles v. Moore (VTSU 1893) - ¶'s horses became frightened and drowned after falling through an unguarded ice hole in a lake. The court held that the ¶ cannot recover if the Δ by exercises of due care, could not have prevented the accident from occurring. - statute imposes a fine for failure to place suitable guards around such openings, but did not prescribe the manner in which such openings should be guarded, might be liable for other incidents under the statute, but not for this incident

New York Central R.R. Co. v. Grimstad (2C 1920) - ¶'s husband falls off the barge and drowns, ¶ couldn't find anything to save him with. Court held that the Δ wasn't negligent in failing to provide life preserver because it was not clear that a preserver would have helped at all.

B. Substantial Factor Test - Δ would be a cause in fact of the damage if the jury found that its act was a material or substantial element in producing it
   a. Overview
      i. in multiple cause situations, the test can fail to produce fair and equitable results - sometimes over-inclusive, sometimes under-inclusive
      ii. substantial factor language communicates to the jury more clearly their function in weighing and evaluating the evidence - the adequacy of proof - in difficult causation cases - allows more equitable and appropriate result

Corey v. Havener (MASU 1902) - Δs were on motor-tricycles when they passed ¶ quickly on either side of the horse he was riding, the ¶ was thrown. Court held that where there was no evidence of concert between the Δs, damages could be extruded from both Δs, no "but for" instruction needed.

Mitchell v. Gonzales (CASU 1991) - ¶'s son went to a lake with Δ's family, they were aware that he couldn’t swim, didn't watch him very closely and he drowned. Court held that when jury was given a "but for" instruction without a "substantial factor" instruction, it was confusing and they might have found otherwise. Restatement 2d Torts §431 - "What constitutes legal cause. The actors negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing
about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

**Smith v. JC Penney** (ORSU 1974) - π burned when gasoline fire broke out at service station and ignited "fake fur" coat π was wearing. Δ argued for jury instruction that if jury found one Δ's conduct was such a predominant cause of the injury, that the other Δ's conduct would be insignificant and not a cause. Court said no, substantial factor test.

b. Incorporation of But-For into Substantial Factor
   i. many courts use substantial factor
   ii. some courts use either test depending on the nature of the case presented
   iii. substantial factor test is not easier test than but-for test
      A. **different way of stating the same requirement for typical case**
      B. incorporates a workable rule for the multiple causation cases
      C. articulates rule for juries that is more consistent with their role in evaluating cumulated evidence on causation under the preponderance of the evidence test

C. Proof of Causation
   a. Cumulating Proof to Identify the Cause

**Ingersoll v. Liberty Bank of Buffalo** (NYSU 1938) - π was tenant of lower apartment owned by Δ, there was a step that was faulty on stairs to basement. Δ’s husband, a large man, carried a large box down the stairs, fell through the faulty step, and fell, he died. Court held that the question of whether the broken step caused the fall was one for the jury, it was not unreasonable to think that it might have been. - G - lots of cases where you can call it cause in fact, but it's not really a verifiable fact, there's discretion here, you'll never be able to prove one way or the other

i. π’s evidence -
   A. Rosenberg v. Schwartz (NY) "The π was not required to offer evidence which positively excluded every other possible cause of the accident."
   B. Stubbs v. City of Rochester (NY) - It is enough that he shows facts and conditions from which the negligence of the Δ and the causation of the accident by that negligence may be reasonably inferred.

ii. Proving Causation Note - Morris on Torts (1980) §2 Actual Cause-Proof Problems
   A. tort π usually has the burden of proving that the Δ’s wrong was a cause in fact of π’s injury
   B. Methods of Establishing Actual Cause
      A. Eyewitnesses - can foreclose a dispute on causation
      B. Expert Testimony
      C. Circumstantial Evidence

b. Untaken Precautions: Proving the Counterfactual

**Saelzler v. Advanced Group 400** (CASU 2001) - π, a FedEx delivery person, was assaulted while delivering package to Δ's apt complex - sued Δ for failing to meet duties to provide adequate security. Court held that the π must establish, by nonspeculative evidence, some actual causal link between the π’s injury and the Δ’s failure to provide adequate security measures. Dissent: π only has to raise a triable issue as to whether she would have been attacked were there additional security precautions.

**Zuchowicz v. United States** (2C 1998) - π filled a prescription, erroneous instructions to take 2x the maximum recommended dosage, π became ill and died. Expert testified that the timeline of her illness suggested the cause was the overdose. Court held that expert suggested a finding of causation was reasonable. **Cardozo Test** - if 1) a negligent act was deemed wrongful because that act increased the chances that a particular type of accident would occur and 2) a mishap of that very sort did happen - enough to support finding by trier of fact that negligent behavior caused the harm (π gets to the jury). Here, FDA regulation designed to prevent harms.

i. Untaken Precautions and Causation
   A. G - under Zuchowicz test, sort of like res ipsa, ordinarily you’d need somebody to come in and precisely identify the negligence, here the jury can infer on less
B. where the injury that happens is precisely the risk that made the ∆'s conduct negligent, courts often find that the connection between the risk and the harm to be sufficient proof of causation

C. Haft v. Lone Pine Hotel (CA 1970) - hotel failed to have a lifeguard or post a sign warning that there was no lifeguard, two people drowned, court shifted burden of proof on the issue of causation to ∆ - "to require the ∏'s to establish ... causation to a greater certainty than they have in the instant case, would permit ∆s to gain the advantage of the lack of proof inherent in the lifeguardless situation which they have created."

ii. Ruminations in Cause-in-Fact - Malone, Stan LR
   A. trier must arrange the events established by evidence into a relationship of some kind and he must satisfy himself that the relationship can properly be labeled "cause"
   B. formula - an issue must be submitted to a jury if reasonable persons may draw different conclusions from the evidentiary data
   C. the affinity of causal likelihood between ∆ and ∏ must be sufficiently close in the opinion of the judge to bring into effective play the rule of law that would make the ∆'s conduct wrongful
   D. task of defining the proper reach or thrust of a rule must be undertaken by courts in each case where it arises

c. Multiple Parties: Apportionment of Damages or Joint Liability
   i. Where two or more independently negligent parties cause a single indivisible harm courts generally opt for the simple solution of holding each ∆ liable for the entire harm. - provides greater security for the ∏ for getting compensated in full in case one of the ∆s is insolvent or has no insurance

   Fugere v. Pierce (WAAP 1971) - ∏ was in a three-car, two-stage traffic accident - poor driving conditions, no way to tell which of the two cars that hit ∏ had caused which elements of her injuries. ∏ objected to jury instruction that said, "∆s are not liable for any injury or damages sustained by ∏ which were proximately caused by the negligence of some person other than the ∆s." Court held that the instruction was an invitation to speculate, too high a burden of proof that would be impossible to sustain. Burden of proving the harm can be separated falls on the ∆s who believe it can be.

   ii. Young v. Dille (WA 1923) - "to be joint tort-feasors the parties must either act together in committing the wrong, or their acts, if independent of each other, must unite in causing a single injury."

   iii. ALR - majority view, where there are collisions in rapid succession producing a single end result, no substantial proof as to what damage was caused by which collision, it to hold each tort-feasor jointly and severally liable

   iv. G - rule - where more than one ∆ combines to cause indivisible injury, the burden which is normally on the ∏, shifts to the ∆s

   v. Note on Joint and Several Liability
      A. concert of action - more than one ∆ taking part in harmful action
      B. joint and several liability - each ∆ can be held responsible for paying the entire judgment damage award to the ∏ instead of being liable only for a proportionate share - ∏ can only collect once for her harm, no multiple recoveries

C. Three categories
   A. true joint tort category - purpose is to create joint liability where the parties deliberately engaged in a joint tort activity even though the harm was caused by only one party
   B. vicarious liability - typically imposed in employer-employee and principal and agent contexts - where employer pays the judgment, they could recover from employee, rarely do, insurance usually covers both employer and employee
   C. independent actions concurring to cause harm - courts treat these ∆s as jointly and severally liable as a way of dealing with what otherwise would be difficult causation problems.

D. Effects
A. where act of single tortfeasor alone was sufficient to cause the entire harm, joint and several
B. where act of single tortfeasor was insufficient to cause the entire harm, but together results in harm, joint and several
C. where act of single tortfeasor was sufficient to cause some but not all, and another tortfeasor contributed, courts require divisibility if possible
   A. Δs have burden of proving more likely than not the division of the harm
   B. if the pedestrian dies, harm is (probably) indivisible

E. History
   A. before comparative negligence
      A. no question of joint and several liability where the slightest fault of the ∏, that was enough to bar recovery
      B. if no contributory negligence, joint and several liability only if each Δ was concluded to be negligent and the negligence of each was a contributing cause of the harm
   B. after adoption of comparative negligence
      A. percentages of fault are attributed to each party
      B. courts began to consider that in weighing the equities between the ∏ and Δ, joint and several assured full compensation
      C. problem - assuring full recovery, not imposing too much damages on one Δ

4.01 PROVING WHO CAUSED THE HARM (p. 519)
   A. Alternative Liability – where there is inadequate proof of a causal relationship because the Δ’s actions or carelessness make it impossible to determine causation one way or the other - some courts shift burden of proof to Δ - minimal requirements for ∏ - jury instruction Fn12p522

**Summers v. Tice** (CASU 1948) - ∏ was hunting with 2Δs, ∏ was hit in the face by birdshot. Court held that if Δs are independent tortfeasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. **The wrongdoers should be left to work out between themselves any apportionment.**

**Barron v. Martin-Marietta Corp** (CAND 1994) - one group of ∏s was loading an MMI missile and were exposed to toulene, severe injuries. another group of ∏ was loading 3 MMI missiles with 3 IMI missiles and were exposed to toulene, severe injuries. The navy said the MMI missiles had a lower level of toulene, might explain leak, specific guides for building missiles. Court held the first group could get to the jury but the second group hadn’t shown any evidence that the MMI missile was the cause of their injuries.

B. Market Share Liability
   a. Market Share Theory
      i. generally - ∏ must present sufficient evidence that the alleged defective condition was a but-for cause or a substantial factor in contributing to the injuries
      ii. theory of market share liability deals with problem where plaintiff cannot identify which manufacturer produced the product that caused the injury

**Hymowitz v. Eli Lilly Co.** (NYSU 1989) - ∏ took DES during her pregnancy, turned out to be a dangerous drug. Court held that even though there were many Δ-manufacturers and ∏ could not identify who caused her harm, they could be held liable through market share liability. **Each Δ has responsibility to show that they were NOT responsible and the others divide liability according to their national market share.** Where there is a small number of possible wrongdoers, all of whom breached a duty to the ∏, the likelihood that any one of them injured the ∏ is relatively high, so that forcing them to exonerate themselves, or be held liable, is not unfair. Use of alternative liability doctrine generally requires the Δs have better access to information than does the ∏ and that all possible tortfeasors be before the court. Also concert of action does not work here.
5.01 THE CONCEPTUAL BASIS OF SCOPE OF LIABILITY (aka proximate cause, legal cause) (p.547)

A. Basics
   a. purpose – set the outer boundaries of liability in negligence cases
   b. consider whether the careless conduct of the ∆ is sufficiently related to the harm suffered by the particular ∏ to warrant holding the ∆ liable
   c. Test - to determine if a scope of liability issue exists:
      i. is there an arguably unforeseeable plaintiff?
      ii. are there arguably unforeseeable consequences?
      iii. is there arguably intervening conduct?
      iv. a positive answer to any of those questions suggests need for careful analysis of scope of liability
      v. negative answers to all of the questions probably means only primary risks are involved and no scope of liability issue exists
   d. when this element is in dispute - it tends to be in a certain group of scenarios
   e. situations involving an arguably unforeseeable type of harm (oh my gosh I can't believe that happened) - unforeseeable plaintiff - unforeseeable intervening events

B. The Direct Consequence Test (old test)
   a. In Re Arbitration Between Polemis & Partner and Furness, Withy & Co. (EngRep 1921) - Stevedores dropped wooden planks in the cargo of a ship docked in Casablanca, planks sparked a fire that destroyed the ship - court found the ∆ liable because the fire was directly caused by and traced to the negligence of ∆s - since some collision injury or damage was foreseeable, under the direct consequences test, it did not matter that a spark from a falling plank was not a reasonably foreseeable result of the accident
   b. problem - no principled way to cut off liability without making arbitrary decision

C. Foresight Test
   a. when courts apply the foresight analysis to scope of liability issues involving arguable unforeseeable plaintiffs or unforeseeable consequences, they examine:
      i. whether the plaintiff, or the class of persons that plaintiff is a member of, were within the scope of the risks created by the defendant's negligent conduct; OR
      ii. whether the result was within the scope of the risks created
   b. not required that a reasonable person be able to foresee the exact manner in which the injury occurs or the precise person injured; she need only foresee the general manner in which the injury occurs and the class of persons likely to be affected by the conduct
   c. attractive b/c believed to set limit of liability based on risks that made the conduct unreasonable in the first place
   d. limits on liability must be based on a common sense, community values judgment about each risk in question

Allen v. Shiroma (ORSU 1973) - ∏ was injured when, as he was helping ∆ who had just been in an accident, he asked somebody to move his own car out of traffic and that individual drove into ∏. Court held that there was no evidence from which the jury could find that ∆ should have foreseen this kind of injury to the class of persons to which ∏ belonged.

5.02 APPLICATIONS OF THE Foresight Rule (p.552)

A. Unforeseeable Plaintiffs

Palsgraf v. Long Island R.R. Co. (NYSU 1928) - ∏ was standing on a platform at ∆’s railroad, ∆’s employee was assisting another passenger onto a train, that passenger dropped a package which turned out to be full of explosives. The package exploded upon hitting the track and caused a set of scales to fall and injure ∏. Court held that the ∆’s conduct might be wrong in relation to the package’s holder, but was not wrong in relation to the ∏ who was standing far away. Dissent - everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others, there’s a proximate cause (scope of liability) question here. (this is a torts classic)

a. West Virginia central & P.R. Co. v. State - "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury."
b. Munsey v. Webb - "It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye."

c. **juries decide proximate cause** (scope of liability) in the vast majority of cases - Lanzet v. Greenberg - A typical jury instruction might inform the jury that a proximate cause is a "cause which naturally and probably led to and might have been expected to produce the occurrence complained of."

### B. Unforeseeable Consequences

**Juisti v. Hyatt Hotel Corporation of Maryland** (4D 1996) - Pi was staying in Delta's hotel when the fire alarm went off after being triggered by a crew that was cleaning an oven hood in the kitchen without using proper ventilation. Pi used fire escape stairs to exit building and suffered a collapsed lung. Court held that it must be determined whether the hotel might have anticipated that Pi might suffer injury as a consequence of evacuating the hotel by taking the stairs when the hotel's negligence caused the fire alarm to go off. Dissent - we don't want to discourage hotels from having working fire alarms.

a. Stone v. Chicago Title Ins. Co. - "Our analysis of foreseeability in the proximate cause context turns on whether the actual harm to the Pi fell within a general field of danger that Delta should have anticipated... rather than whether the harm was the specific kind that he should have expected."

b. G - de novo - no deference to the lower court - from scratch - usually you let the lower court stand unless they were really crazy

c. well-accepted rule - as long as the Delta's negligence created a reasonably foreseeable risk of the general kind of harm that befell the Pi, the exact way or precise manner the harm occurs does not matter for purposes of scope of liability.

d. Restatement 3d Torts - adopts risk standard rather than foresight rule
   i. both risk standard & foreseeability test exclude liability for harms that were sufficiently unforeseeable at the time of the actor's tortious conduct that they were not among the risks that made the actor negligent
   ii. risks that make an actor negligent are limited to foreseeable ones, factfinder must determine whether the type of harm that occurred is among those reasonably foreseeable potential harms that made the actor's conduct negligent
   iii. risk standard takes into account the circumstances at the time of the actor's conduct and risks posed by that conduct

e. Jury Instruction - Foreseeability Standard - "reasonably foreseeable consequences of his or her actions"

f. Jury Instruction - Risk Standard - "Delta is liable... if you find that the Pi's harm arose from the same general type of danger that was one of those that the Delta should have taken reasonable steps to avoid."

### C. Intervening Forces – Criminal Conduct of a Third Person

**McClenahan v. Cooley** (TNSU 1991) - Delta left his car unattended with the keys in the ignition, the car was stolen by a thief who crashed into and killed Pi's pregnant wife and child and injured Pi's second child. Court held that leaving a key in the ignition of an unattended automobile could be found by a jury to be negligent. This is a foreseeability issue regarding proximate causation and intervening cause, this is a question of fact one which reasonable minds can/do differ.

a. Smith v. Gore - proximate cause test 1) the tortfeasor's conduct must have been a "substantial factor" in bringing about the harm being complained of 2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm and 3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence

b. city of Elizabethtown v. Sluder - "The fact that an accident may be freakish does not per se make it unpredictable or unforeseen."

c. Shell Oil Co. v. Blanks - It's enough that harm in the abstract could reasonably be foreseen

d. Brookins v. The Round Table, Inc. - proximate causation is a jury question unless the uncontroverted facts and inferences to be drawn from them make it so clear that all reasonable persons must agree on the proper outcome

e. Cartwright v. Graves - it is not necessary that tortfeasors or concurrent forces act in concert, or that there be a joint operation or a union of act or intent, in order for the
negligence of each to be regarded as the proximate cause of the injuries, thereby rendering all tortfeasors liable.

Price v. Blaine Kern Arista, Inc. (NVSU 1995) - Π, at work, was wearing a character head of George Bush made by Δ when he was pushed and fell, injuring his neck b/c the head had no neck supports. The court held that the intervening push by the third party could be reasonably foreseeable and was thus a matter of fact for the jury.

a. **Gun Stores and Burglars**
   i. Kimbler v. Stillwell (OR) - stolen gun used in random killing - Π argued that Δ knew or should have known lack of security would make theft foreseeable - court held that it could not be said as a matter of law that the harm was not foreseeable - "The fact that a Π's injury was inflicted by the intentional, even criminal, act of a third person does not foreclose liability if such an act was a foreseeable risk facilitated by the Δ's alleged negligence."
   ii. Buchler v. Oregon Corrections Div. - overruled Kimbler - facilitation is not enough - "a Δ, to be liable, must have unreasonably created the risk of the sort of harm to the Π that befell him" (how would this work out different if used in Kimbler)

D. **Intervening Forces - Shifting Responsibility** Issue
   a. sometimes the third party's conduct, although perhaps foreseeable, is so egregious that a court is motivated to conclude that the third party alone is liable for the consequences
      i. the mere fact of an intervenor does not in itself cut off the liability of the original negligent party nor is the nature of the intervening act (intentional, criminal, or merely negligent) necessarily determinative
      ii. what matters is whether the intervening act is a foreseeable risk of the original negligence
   iii. Δ might assert reliance on the due care of a second party as a strategy in defending a negligence case - shifting responsibility
      A. analyze whether reliance on the due care of the second party was appropriate in light of the factors set forth below
      B. sometimes analyzed as a matter of law, sometimes as a jury question in terms of whether the Δ exercised reasonable care in relying upon the second party

McLaughlin v. Mine Safety Appliances Co. (NYSU 1962) - Π's daughter nearly drowned, was resuscitated by firefighter and bystander nurse using, in part, heat blocks which were applied directly to her skin without insulation, resulting in third degree burns. Court held that jury instruction improperly led to verdict for Π. "...whether or not the distributor furnished ample warning on his product to third persons in general was not important here, if the jury believed the firefighter had actual notice of the danger... and that he deprived the nurse of her opportunity to read/gather any such notice." Dissent - rule is not absolute that it is not necessary to anticipate the negligence or even the crime of a third party. G - negligence here is cut off by fireman's intervening conduct.

a. Restatement Torts - "The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if a) the actor at the time of his negligent conduct should have realized that a third person might do so."

b. G - if original negligence, the third party intervening negligence might not be anticipated

c. **in shifting responsibility - analyze:**
   i. culpability of the intervenor-intentional, criminal, reckless, negligent, or innocent
   ii. the competence and reliability of the person upon whom reliance is placed
   iii. intervenor's understanding of the facts and situation
   iv. seriousness of the danger
   v. number of persons likely to be at risk of danger
   vi. length of time elapsed between the conduct of the parties
   vii. likelihood that proper care will or will not be used
   viii. ease with which each of the parties can take precautions

Bigbee v. Pacific Telephone & Telegraph Co. (CASU 1983) - Π was standing in one of Δ's phone booth when a drunk driver veered off the road and smashed into him, the door to the booth jammed and he could not escape. The court held that they could not conclude, as a matter of law, that it was unforeseeable that the booth might be struck by a car and cause serious injury to a person trapped within
and it didn't matter that the harm to the Ⅲ came about through the negligent or reckless acts of a third party. Dissent - (duty analysis) without more information, as a matter of law no one should be said to be under a duty of care to protect others from them, particularly where there is no reason to believe that the party sought to be charged was in a position to foresee the risk of harm.

5.03 EXCEPTIONS TO THE FORESIGHT RULE (p.590)
A. The Medical Malpractice Complications Rule

Association for Retarded Citizens - Volusia v. Fletcher (FLAP 1999) - Ⅲ's son had a seizure while swimming, unsupervised, at Δ's camp. Court held that a Δ in a person injury lawsuit who is alleged to have negligently caused the Ⅲ's initial injury cannot require the Ⅲ to litigate a medical malpractice claim against medical care providers who subsequently treated the injury.

a. Emory v. Florida Freedom Newspapers (FL) - "the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskilful treatment thereof, and holds him liable therefore."
b. Stuart - allowing Δ to require Ⅲ to pursue malpractice would "confuse and obfuscate" the issue of the original tortfeasor's liability by turning a simple personal injury action into a complex medical malpractice action."
c. Rationales
   i. ease of bringing one lawsuit instead of two
   ii. burden is on the Δ to seek contribution for medical malpractice

d. courts have also applied this rule when Ⅲ is injured on the way to the hospital or other medical treatment

B. The Eggshell Plaintiff Rule

Pace v. Ohio Department of Transportation (OHSU 1991) - Δ's snowplow hit Ⅲ's car, Ⅲ, a diabetic, smashed his finger against the door, the finger became infected and had to be amputated. Court held that a negligent actor must bear the risk that his liability will be increased by reason of the actual physical condition of the other toward whom his act is negligent.

a. AmJur - "A tortfeasor runs the risk that the person whom he injures may be in such condition that the injury will be far more serious than had such person been strong. Thus, one who violates the duty, imposed by law, of exercising due care not to injure others may be compelled to respond in damages for all the injuries which he inflicts by reason of the violation of such duty, even if a particular injury may have been aggravated by or might not have happened at all except for the peculiar physical condition of the injured person. This is the rule that the defendant takes the plaintiff as he finds him, or the "thin skull" or "eggshells skull" rule."
b. Restatement 2d Torts - "The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct."
c. mental distress & thin-skulled rule
   i. applies to preexisting mental conditions if the defendant's negligence physically injured the plaintiff and that mental condition is aggravated as well
   ii. if Δ's negligence causes mental distress w/o physical injury the rule might not apply

C. The Rescuer Rule

Sears v. Morrison (CASU 1999) - Δ was repairing a piece of machinery when, while trying to empty his ashtray, the machinery fell on top of him. Ⅲ seriously injured her hand while attempting to rescue Δ. Court held an individual has a duty to prudently manage his person so as not to endanger others.

b. Restatement 2d - "The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about."
c. Restatement 2d - "If the actor's negligent conduct threatens harm to another's person, land, or chattels, the normal efforts of the other or a third person to avert the threatened harm are not a superseding cause of harm resulting from such efforts."

d. "The rule applies equally where the conduct of the actor has created a danger only to himself, if at the time of such conduct he should reasonably anticipate that others might attempt to rescue him from his self-created peril, and sustain harm in doing so.

e. G - if you're unlucky enough to rescue somebody who was involved in a pure accident with no negligence involved too bad

Oscar Klein Plumbing and Heating v. Boyd (FLAP 1984) - ∆ was doing work on ∏'s jewelry shop and negligently caused clouds of dust to raise and settle on the jewelry, ∏ and her children spent nearly three months of nonstop cleaning to clean the jewelry. ∏ contracted carpal tunnel syndrome. On appeal, court held that rescue instruction wasn't needed because the property was not in imminent peril as a matter of law, there's no other way to bridge the gap of foreseeability.

a. Eyrich v. Dam - man who rescued child from leopard at circus recovered as a rescuer, his bystander wife did not

b. Suicide Exception - courts are generally reluctant to find defendants liable for a victim's conscious decision to commit suicide after an accident causing physical and mental distress.
   i. exception if defendant's negligence caused victim to become insane and mental disorder created an irresistible impulse to commit suicide
   ii. courts do not hold the tortfeasor liable for damages stemming from the death where suicide is a conscious response to negligently inflicted injuries
      A. exception where original tort creates a state of insanity in the victim, causing an irresistible impulse in him to commit suicide
      B. contrary to psychology - psychiatrists see all suicide as equally foreseeable
   iii. no requirement for showing insanity if ∆ is in an institution such as a mental hospital or prison that has the responsibility or duty to "prevent suicides"

6.01 PERSONAL INJURY DAMAGES (p.620)
A. Overview - Three areas of personal injury damages
   a. past earnings losses and future earning power losses
   b. past and future medical and hospital expenses
   c. past and future pain and suffering

Calva-Cerqueira v. United States (DCD 2003) - ∏ was struck by ∆'s Smithsonian bus as it ran a red light, ∏ is severely injured, paralyzed, nonfunctional. Court based pain & suffering award on similar situation in another case. Court held that ∏ could receive entire medical expenses regardless of discounts. Court used discounting methodology to determine present award for future damages - methodology must take into account time-value of money and must consider the effects of inflation (given safest investment). Court held future medical expenses do not demand ∏ accepts less costly standard of care and should not be considered apart from tax. Court held future lost wages should take into account age, sex, socio-economic status, behavior, academic record, intelligence, and dexterity. FTCA limits damages to initial request made by ∏, in this case $20 million.

a. Richards v. United States - FTCA - law of the state where the misconduct occurred governs substantive tort liability, including the nature and measure of the damages to be awarded
b. Courts have defined "reasonable certainty" as identical to the preponderance of the evidence standard. In addition, courts should only award damages for future medical expenses when the expenses are reasonable and necessary

c. Wood - Pain and suffering damages are appropriate for "conscious" pain and suffering

d. Hardi v. Mezzanotte - In DC, compensatory damages are subject ot the collateral source rule, which states that "payments to the injured party from a collateral source are not allowed to diminish damages recoverable form the tortfeasor" - applies when either 1) the source of the benefit is independent of the tortfeasor or 2) the plaintiff contracted for the possibility of a double recovery

e. with permanent injuries - ∏ has to establish life expectancy - typically done through mortality tables - individual circumstances must be considered - work life tables are prepared by Federal Bureau of Labor Statistics
f. Inflation - 3 approaches
i. increase the award to provide for inflation then reduce by discounting to present value - \( \Pi \) must establish inflation and discount rates

ii. determine what the "real" interest rate (investment value over and above inflation) is and discount based on that rate –

iii. assume that inflation rate and discount rate cancel each other out and no adjustments are needed

g. Doctrine of Mitigation of Damages or Rule of Avoidable Consequences - if \( \Pi \) fails to undergo medical treatment, \( \Delta \) may be relieved of responsibility for damages - difficult if refusal due to religious beliefs

h. mental anguish before physical injury - such as when plane is crashing and passengers are aware of impending crash

i. Loss of Consortium - loss of life partner's services, society, companionship, affection, sexual relation - usually marriage, sometimes civil union or parents

j. property damage - if personal property is destroyed, the usual measure is the market value on the day of the accident - if property is only damaged, recovery is measured by diminution in market value as of the day of the accident and/or repair costs

7.01 DEFENSES & IMMUNITIES – CONTRIBUTORY NEGLIGENCE

A. History

a. Butterfield v. Forrester (KB 1809) - fast riding plaintiff ran his horse into an obstruction that \( \Delta \) had left in the road - approved jury instruction stated that if a person riding carefully would have avoided crashing into the obstruction, then a verdict had to be returned for the defendant

i. earliest case establishing contributory negligence defense

ii. if both parties were at fault, neither could recover from the other

b. became prevalent during railroad development (1840-1900) - protected railroads from extensive liability

c. courts

i. only allowed defense where \( \Delta \)'s conduct was negligent, if \( \Delta \) was more culpable, \( \Pi \)'s unreasonable conduct didn't matter

ii. "last clear chance" - negligence \( \Pi \) could recover upon proof that the \( \Delta \) was more culpable because he had the opportunity to prevent the harm

iii. not permitted in some contexts such as where \( \Pi \)'s fault was based on a statute, such as a child labor law

B. Overview

a. G - assumption of risk and contributory negligence, two big ticket defenses

b. G - the first defense you'll think about - challenge the \( \Pi \)'s prima facie showing

c. only relevant when \( \Pi \) has established prima facie case of negligence against \( \Delta \)

d. under contributory negligence defense, \( \Pi \)'s recovery is barred b/c of his own conduct, not due to any flaw in the primary negligence claim against \( \Delta \)

C. Process

a. \( \Delta \) must show by preponderance of the evidence - burdens are all on \( \Delta \)

i. \( \Pi \) fell below relevant standard of care

ii. \( \Pi \) breach of duty was cause-in-fact and proximate cause of injury

b. duty is not an issue, everyone has a duty to themselves

c. damages are not relevant

d. even a small amount of \( \Pi \)'s contributory negligence bars her from recovery

7.02 DEFENSES & IMMUNITIES – COMPARATIVE FAULT (p.691)

A. The Basic Policy

a. all but a few states have adopted some form of comparative fault

b. where both a \( \Pi \) and \( \Delta \) are at fault, they should share the responsibility rather than have it fall entirely on one party or the other

i. pure - negligent \( \Pi \) recovers some damages from the negligent \( \Delta \) no matter how much at fault the \( \Pi \) is

ii. modified - \( \Pi \) recovery is barred if \( \Pi \)'s fault is greater than the \( \Delta \)'s or just as great as the \( \Delta \)'s (depends on jurisdiction)
Hoffman v. Jones (FLSU 1973) - whether or not the court should replace the contributory negligence rule with the principles of comparative negligence - contributory negligence is archaic and unfair - held - when the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party - held - a plaintiff in an action based on negligence will no longer be denied any recovery because of his contributory negligence - held - jury should apportion the negligence of the plaintiff and the negligence of the defendant; then, in reaching the amount due the plaintiff, the jury should give the plaintiff only such an amount proportioned with his negligence and the negligence of the defendant.

c. last clear chance no longer relevant because all of the circumstances are taken into account by the jury
d. in multiple defendant cases, the advent of comparative fault raises questions about whether each independent ∆ should be jointly and severally liable for the judgment award or liable only for a proportionate share
e. doctrine of avoidable consequences - ∆ need not pay for any additional harm that the ∏ could have avoided through reasonable care

B. Factors in Assigning Percentages of Fault

Wassell v. Adams (7C 1989) (POSNER) - ∏ was raped while staying in a hotel room, hotel owners gave her no warning about neighborhood, there was no phone in her room and no alarm. On appeal, court upheld her 97% comparative negligence b/c, although they didn't really like it, there wasn't a basis to overturn the jury verdict.

a. Uniform Comparative Fault Act - jury's attention should be addressed to:
   i. whether the conduct was inadvertent or also involved awareness of danger involved
   ii. the probability of the risk
   iii. the gravity of the harm
   iv. the number of persons placed at risk
   v. the significance of what the actor was seeking to achieve by her conduct
   vi. the actor's superior or inferior capacities
   vii. the existence of an emergency
   viii. the relative closeness of the ∆'s wrongful conduct and harm to the ∏

b. Restatement 3d Torts - factors that should bear on assigning percentages of responsibility include
   i. factors necessary to determine whether a party "engaged in legally culpable conduct that was a legal cause of the plaintiff's injury"
   ii. relative character of the risk-creating conduct
   iii. the unreasonableness of the conduct
   iv. "the extent to which the risk-creating conduct failed to meet the applicable legal standard"
   v. the causal connection between the party's conduct and the harm
   vi. the surrounding circumstances
   vii. the party's state of mind

c. Keep in mind fault and Non-Parties

d. jurisdictions are split on whether comparative fault principles should apply when intentional wrongdoing underlies the tort claim

7.03 DEFENSES & IMMUNITIES – ASSUMPTION OF RISK (p.705)

A. Overview

a. arose around 1799
b. Davenport v. Cotton Hope Plantation (SC 1998) - modern notion of assumption of risk has its roots in Latin maxim votenti non fit injuria ("to one who is willing, no harm is done") ... The doctrine of assumption of risk, grounded in laissez-faire economics, flourished during the Industrial Revolution...

B. Express Assumption of Risk

a. public policy can prevent an express agreement to waive liability from taking effect
b. one person gives explicit written or oral permission to release another party from an obligation of reasonable care
   i. Milligan v. Big Valley Corp - experience skier participating in decathlon lost control and died on ski slope, evidence showed the ski resort knew the area where skier had
lost control was perhaps risky, court held that b/c of assumption of the risk by skier, who signed a waiver, his family could not recover

ii. Brooks v. Timberline Tours - court upheld a waiver signed by minor decedent's parents from recovery from arguably negligent snowmobile tour company

c. person signing a waiver gives up more than right to recover if harmed by risks of activity, they give up the right to recover for injuries suffered as a result of the ∆'s unreasonable conduct

d. limitations
i. waiver = contract - language must be clear and unambiguous
ii. courts consider context of the activity to determine whether waiver is void as against public policy - CA identified 6 criteria
   1. concerns a business of a type generally thought suitable for public regulation
   2. party seeking exculpation is engaged in performing a service fo great importance to members of the public
   3. the party holds himself out as willing to perform this service for any member of the public who seeks it or at least any member coming within certain established standards
   4. as a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services
   5. in exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional fees and obtain protection against negligence
   6. as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents
iii. waivers do not relieve ∆s of liability for reckless or intentional wrongdoing
iv. releases to charitable research hospital, school district and university sports

e. VA Supreme Court - to put one party to a contract at the mercy of the other party's misconduct "can never be lawfully done where an enlightened system of jurisprudence prevails."

C. Implied Assumption of Risk
a. three elements
   i. knowledge of the risk
   ii. appreciation of the risk
   iii. voluntary exposure to the risk

Bowen v. Cochran (GAAP 2001) - ∏ bought a gas cooker from ∆, ∆ instructed ∏ how to light the cooker properly but ∏ did not follow directions and the cooker exploded on ∏, burning him. Court held that there was sufficient evidence for a jury to find that ∏ had assumed the risk. Dissent1 - evidence didn't show an actual and specific subjective knowledge or understanding and appreciation of the specific risk. Dissent2 - no evidence to show the ∏ knew or should have known of the specific risk that caused the explosion.

a. the ∆ must present evidence that the ∏ had actual knowledge of the danger, understood and appreciated the risk, and voluntarily exposed himself to that risk."
b. "a ∏'s contributory negligence bars any recovery whatsoever if his failure to use ordinary care for his own safety is the sole proximate cause of his injuries, even though such negligence concurs with the negligence of the ∆."

c. Beringause - "If, in the exercise of ordinary reasonable care for his own safety, ∏ could and should have discovered the danger before he actually did and could and should have avoided the injury, then he would have been contributiorily negligent, but he would not have assumed the risk."
d. effect of implied assumption of risk - many courts have divided the defense of assumption of the risk into two:
   i. limited duty rules
   ii. contributory negligence
Murray v. Ramada Inns, Inc (LASU 1988) - \Pi was paralyzed (and later died) after diving into a shallow pool and striking his head on its bottom. Certified question - whether assumption of risk as a bar to recovery is distinct from comparative fault? Court held that assumption of risk as a bar to recovery is inconsistent with statutory mandate of comparative negligence, \Pi can still waive right to recover, parties such as baseball stadiums still have a duty to act reasonably.

a. Bohlem - idea that \Pi who confronts a known danger necessarily must have chosen to do so was "a terse expression of the individualistic tendency of the common law" which regarded "freedom of individual action as the keystone of the whole [legal] structure.

b. Restatement 2d Torts - "Failure to exercise due care either to discover or understand the danger is not properly a matter of assumption of risk, but of the defense of contributory negligence."

c. Anderson v. Ceccardi - "express assumption of risk" includes cases where \Pi "expressly contracts with another not to sue for any future injuries which may be caused by that person's negligence. - release usually bars \Pi from recovery unless there's a statute or public policy against it

d. Duffy v. Midlothian Country Club - implied - \Pi has made no express agreement to release the \Delta from future liability, but he is presumed to have consented to such a release because he has voluntarily participated in a "particular activity or situation" which involved inherent and well-known risks.

e. after adoption of comparative fault rules, most courts broke assumption of risk down into three parts:
   i. express assumption of risk
   ii. no duty or limited duty situations
   iii. a form of contributory negligence

8. 05 ASSAULT, BATTERY, AND INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS (p.802)
   A. Basics
      a. Intent
         i. Intent is an element in battery, assault, false imprisonment, and intentional infliction of emotional distress
         ii. measured by subjective standard, the \Delta's state of mind
         iii. Restatement: A person acts with the intent to produce a consequence if: (a) The person has the purpose of producing that consequence; or (b) The person knows to a substantial certainty that the consequence will ensue from the person's conduct.
         iv. transferred intent - if A throws a rock at B and hits C, A's intent to hit A is sufficient to satisfy intent requirement for a battery against C
      b. rationale
         i. battery - protecting (1) the interest in physical integrity, freedom from contacts; (2) a dignitary interest, freedom from offensive bodily contact
         ii. assault - conduct which creates apprehension of a harmful or offensive touching, but no actual contact, threats - protection of the mental state of individuals to be free of such wrongful apprehension, protects against threats of harmful or offensive contact and threats of false imprisonment
            1. generally unavailable where there is no accompanying aggressive conduct such as moving toward a person while threatening violent action verbally
            2. not available where abusive verbal comments are not related to harmful or offensive physical contacts
         iii. intentional infliction of emotional distress - recognized in the 1950s - protection against intentionally inflicted emotional harm where the defendant's conduct went beyond the bounds of civilized conduct and could be considered "outrageous"

Dickens v. Puryear (NCSU 1981) - \Pi was dating \Delta's teenage daughter, sex, drugs, alcohol. \Pi went to meet \Delta, \Delta and buddies beat the hell out of him, threatened to castrate or kill him, before releasing him they said that if he didn't leave NC they would kill him. Court held intentional infliction of mental distress consists of (1) extreme and outrageous conduct, (2) intended to cause and does cause (3) severe emotional distress to another. May also exist where \Delta's actions indicate a reckless
indifference to the likelihood that they will cause severe emotional distress. Enough for trial in this case, not enough to demonstrate conspiracy between ∆ and his wife.

a. Hayes v. Lancaster - an assault is an offer to show violence to another without striking him, and a battery is the carrying of the threat into effect by the infliction of a blow
b. State v. Ingram - apprehension created must be one of an immediate harmful or offensive contact, as distinguished from contact in the future
c. Restatement 2d Torts - "to make the actor liable for an assault he must put the other in apprehension of an imminent contact.... the apprehension created must be one of imminent contact, as distinguished from any contact in the future. "Imminent" does not mean immediate, in the sense of instantaneous contact... It means rather that there will be no significant delay."
d. Restatement - "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."
e. Restatement - "∆ is liable for this tort when he desires to inflict severe emotional distress... or knows that such distress is certain, or substantially certain, to result from his conduct.... or where he acts recklessly... in deliberate disregard of a high degree or probability that the emotional distress will follow and the mental distress does in fact result."

**Vetter v. Morgan (KSAP 1995)** - ∆ pulled up next to Π, yelling at Π's car, spat at her, made obscene gestures. Π also alleges ∆ turned van into her when light turned green. Court held that the record was sufficient to support an inference that the threats and circumstances surrounding it could reasonably put someone in Π's position in apprehension of imminent or immediate bodily harm. Whether the actions constituted an assault was a question of fact for a jury.

**Villa v. Derouen** (LAAP 1993) - ∆ was goofing around at work, pointed blowtorch between Π's legs, blowtorch ignited and burned Π. Court held that a reasonable juror could not have found that ∆ did not either intend for the air from his cutting torch to come into contact with Π's groin or, alternatively, we find that a reasonable juror could not have found that ∆, in pointing his torch at Π, as not aware or substantially aware that the oxygen would come into contact with Π's groin area.

a. LSA-RS - If an employee is injured as a result of an intentional act by a co-employee, he can pursue a tort remedy against that employee
b. Bazley v. Tortorich - "an intentional tort" for the purpose of allowing an employee to go beyond the exclusive remedy of workman's compensation, meant "the same as 'intentional tort' in reference to civil liability.
c. Caudle v. Betts - a civil battery - a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff to suffer such a contact
d. Caudle - The intention need not be malicious nor need it be an intention to inflict actual damage. It is sufficient if the actor intends to inflict a harmful or offensive contact without the others consent

**White v. Muniz** (COSU 2000) - Π was struck by ∆'s decedent, who was suffering from Alzheimer's and punched Π while Π was providing personal care for Π. Court held that a plaintiff must prove that the actor desired to cause offensive or harmful consequences by his act. The plaintiff need not prove, however, that the actor intended the harm that actually results.

a. generally an intentional tort requires some proof that the tortfeasor intended harm or offense
b. White v. University of ID - determining that battery requires an intent to cause an unpermitted contact, not an intent to make a harmful or offensive contact
c. G - there are jurisdictions that say "what you have to find is a volitional act that causes harm to a reasonable person" - more jurisdictions will say "we're interested in a volitional act and you have some understanding of the nature of that contact in terms of its harmfulness"

**Ailiff v. Mar-Bal, Inc** (OHAP 1990) - Π suing ∆ employer for intentional tort claim where ∆ made Π use caustic solvent without necessary precautions and Πs suffered injuries. Court held that there was significant evidence to show that ∆ knew that the injuries were substantially certain to result from the procedures inherent in the solvent, and still continued to utilize these methods. Ohio law will treat the company as if it had, in fact, desired the result.
a. Van Fossen v. Babcock & Wilcox Co - In order to establish intent for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following factors must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty and not just a high risk; and (3) that the employer, under such circumstance, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

b. Harasyn v. Normandy Metals - "Under this standard, an intentional tort occurs when the actor desires to cause the consequences of his act, or he believes that the consequences are substantially certain to result from it."

c. Restatement - "The first level, 'direct intent,' is where the actor does something which brings about the exact result desired. In the second [inferred intent], the actor does something which he believes is substantially certain to cause a particular result, even if the actor does not desire that result."

d. G - you can't bring a negligence claim against employer, you're limited to workman's comp, positives - there are no defenses, you just get paid -- negatives - the recovery is well defined

**Leichtman v. WLW Jacor Communications** (OHAP 1994) - ¶, a national anti-smoking advocate, was on a radio show when talk-show host blew smoke in his face. Court held that, under Ohio law, the host committed a battery, no matter how trivial the incident, a battery is actionable even if damages are only one dollar.

a. State v. Phipps - "offensive" = "disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultingness."

b. Lacey v. Laird - no matter how trivial the incident, a battery is actionable even if damages are only one dollar

c. Pound - "In civilized society men must be able to assume that others will do them no intentional injury that others will commit no intentioned aggressions upon them."

d. Osborne - whether an employer is liable under the doctrine of respondeat superior because its employee is acting within the scope of employment is ordinarily a question of fact

**Hall v. McBryde** (COAP 1996) - Δ was shooting at some youths driving by his house, struck his neighbor. ¶. Court holds that by aiming and firing a loaded weapon at the car, Δ intended to put the youths in the car in apprehension of a harmful or offensive bodily contact, SO Δ's intent to place other persons in apprehension of a harmful or offensive contact was sufficient to satisfy the intent requirement for battery against ¶.  

a. Restatement 2d Torts - "If an act is done with the intention of inflicting upon another an offensive but not harmful bodily contact, or of putting another in apprehension of either a harmful or offensive bodily contact, and such act causes a bodily contact to the other, the actor is liable to the other for a battery although the act was not done with the intention of bringing about the resulting bodily harm. (2) If an act is done with the intention of affecting a third person in the manner stated in Subsection (1), but causes a harmful bodily contact to another, the actor is liable to such other as fully as though he intended so to affect him."

b. Elements of Battery
   i. Volitional Act
   ii. Intent (actual/sub. cert/transferred)
   iii. Causation
   iv. Prohibited result

c. if you touch somebody and their shoulder is dislocated - some jurisdictions don't insist of an appreciation of the risk, in those jurisdiction the only consideration is if the contact was intended

8. 05 INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS (p.802)
   A. Basics
      a. developed in last 50 years
      b. culpability can be satisfied by proving either intent or recklessness
c. civility calls for decent and humane conduct and speech towards our neighbors regardless of what free speech may protect

**Brandon v. County of Richardson** (NESU 2001) - Π's daughter was raped and then murdered b/c she was living as a transgender individual. After the rape, Δ interviewed victim and harrassed her pretty seriously, causing her serious emotional distress. Court had dismissed the intentional tort claim, survival of claims issue, whether the claim survives the victim's death. On appeal the court determined that Δ's conduct was **extreme and outrageous** as a matter of law, Δ had a duty to protect victim, and remanded.

a. Iwanski v. Gomes - To recover for intentional infliction of emotional distress, a Π must prove the following: (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.
b. Doe v. Calumet City - Whether conduct is extreme and outrageous is judged on an **objective standard** based on all the facts and circumstances of the particular case.
c. Drejza v. Vaccaro - relationship between the parties and the susceptibility of the plaintiff to emotional distress are important factors to consider.
d. Restatement - mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities that result from living in society do not rise to the level of extreme and outrageous conduct.
e. Outrageous Conduct and Severe Emotional Distress - 2 elements
   i. **outrageous conduct requirement** is designed to assure that the conduct be extraordinarily wrongful to impose liability
   ii. **emotional distress requirement** eliminates minor annoyances and ordinary embarrassing circumstances
f. Restatement - "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. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and **lead him to exclaim, "Outrageous!"**
g. Severe Emotional Distress - in many cases, emotional distress is corroborated by resulting physical problems - some courts require physical consequences - only a few courts require the emotional distress be a diagnosable illness - courts rely on the outrageousness of the conduct to corroborate the existence of serious distress

B. Hate Speech and Free Speech
a. Freedom of expression is not absolute despite the First Amendment's rather clear language that "Congress shall make no law..."
b. commercial speech is given less protection than other speech
c. defamation and privacy allow regulation under restrictive circumstances
d. protection of the public order is another category of regulated speech
e. Lawrence - "There is a great difference between the offensiveness of words that you would rather not hear because they are labeled dirty, impolite, or personally demeaning and the injury inflicted by words that remind the world that you are fair game for physical attack, that evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and that imprint upon you a badge of servitude and subservience for all the world to see."

**Alcorn v. Anbro Engineering Inc.** (CASU 1970) - Π was employed as a truck driver by Δ. Π told another employee not to do something b/c he wasn't a teamster, Δ (supervisor) yelled racial attacks at Π and fired him - Π was re-hired. Court held that triar could find the Δ's conduct extreme and outrageous having a severe and traumatic effect on Π's emotional tranquility.

a. Restatement - "Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability."
b. G - Intent - **should be actual, substantial certainty**, OR reckless

**Swenson v. Northern Crop Insurance, Inc.** (NDSU 1993) - Π was promoted, her boss at Δ employer did not like that, made derogatory and sexist remarks, gave her a lower position - she quit. Court noted
supervisor's authority over Π and supervisor's knowledge of Π's deteriorating emotional condition. Court held that jurors could differ over whether the ∆'s conduct was so outrageous to exceed all bounds of decency under all the circumstances. Concur - sex discrimination without more cannot constitute sufficiently outrageous conduct to raise a jury question.

Logan v. Sears, Roebuck & Co (AK 1985) - Π was credit card user, while on the phone with ∆ he heard them in the background referring to him as a queer. Court held that the statement was relatively trivial insult - no relief - people have been using the word "queer" for a long time.

8. 07 FALSE IMPRISONMENT (p.823)
A. Basics
   a. the wrongful confinement, restraint, or detention of an individual to a limited area.
   b. courts generally hold that the Π must be aware of the confinement, but modern cases have been challenging this rule
   c. false imprisonment cases involving police are typically characterized as false arrest cases and can be maintained as false imprisonment and civil liberties violation claims

Wal-Mart v. Cockrell (TXAP 2001) - Π was in wal-mart with his parents when he was apprehended by a "loss-adjustment officer" who took him in the back and accused him of shoplifting. The officer asked him to take down his pants, pull up his shirt, and remove the bandage over a wound from a recent liver transplant. **Elements are:** willful detention, performed without consent, and without authority of law. Court held that there were facts to support a finding of false imprisonment, that the search was unreasonable in scope (obviously nothing under the bandage), and that there was evidence of mental anguish.
   a. Randall's Food Markets, Inc. v. Johnson - The elements of false imprisonment are: (1) a willful detention; (2) performed without consent; and (3) without the authority of law.
   b. J.C. Penney Co. v. Duran - A person may falsely imprison another by acts alone or by words alone or by both, operating on the person's will
   c. TX Civil Practice & Rem Code - The shopkeeper's privilege expressly grants an employee the authority of law to detain a customer to investigate the ownership of property in a reasonable manner
   d. Knowledge of Confinement -
      i. Restatement 2d - Π must either be aware of the confinement or have suffered more than nominal harm to recover for false imprisonment
      ii. rejected by CA - "A victim may be entirely unaware of confinement and still suffer harm... the relevant factor is whether the unlawful restraint or confinement resulted in harm."

8. 08 TRESPASS TO CHATTLES AND CONVERSION (p.832)
A. Basics
   a. trespass to chattels - when a person is deprived of his property for a period of time, or the property is damaged - damages include temporary loss of use and repair costs
   b. conversion of property occurs when the deprivation of the property is for a lengthy period of time, or the property is lost or destroyed - court will consider that there has been a forced sale to the defendant, damages are measured by fair market value of the good
   c. there can be some overlap between the two torts

United States v. Arora (DMD 1994) - ∆ interfered with cell-line at NIH, killing the cells. The court considered factors: 1) extent and duration of exercise of dominion or control; (2) actor's intent to assert a right in fact inconsistent with the other's right of control; (3) the actor's good faith; (4) the extent and duration of the resulting interference with the other's right of control; (5) the harm done to the chattel; (6) the inconvenience and expense caused to the other. Court held that ∆'s dominion was total, he intended to act inconsistently with other's right to control, he did not act in good faith, and he destroyed the cells. Court held that cell-lines could be converted and this was a conversion.
   a. Restatement 2d Torts - trespass constitutes lesser interference with another's chattel, conversion is a more serious exercise of dominion or control over it
   b. Restatement 2d Torts - trespass = intentional use or intermeddling with the chattel in possession of another, such intermeddling occurring, inter alia, when "the chattel is impaired as to its condition, quality, or value."
c. Restatement 2d Torts - conversion = "An intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value for the chattel"

d. Restatement 2d - impairing the condition, quality, or value for a chattel upon brief interference can constitute a trespass, intentional destruction or material alteration of a chattel will subject the actor to liability for conversion.

e. Duty to mitigate. (?)

8. 09 DEFENSES & PRIVILEGES (p.839)
A. Basics
   a. G - one defense is to say "you didn't make out a prima facie case"
   b. G - other defenses say "even if you made a prima facie case, there's a limitation here"
      i. as with negligence, you get statute of limitations and immunities
      ii. also defenses based on merits - see below

B. Consent
   a. cross between element and privilege, offensive only when not consented to, different from being hit over the head with a hammer - more often treated as a privilege, more likely ∆ will have to show that there was consent

   Hogan v. Tavzel (FLAP 1995) - Π suing ex-husband for battery for infecting her with STD. Court held that there is no reason that a tortfeasor could not be held liable for battery for infecting another with a sexually transmissible disease.

   a. Kathleen K. v. Robert - one party's consent to sexual intercourse is vitiated by partner's fraudulent concealment of the risk of infection with venereal disease
   b. Restatement 2d Torts - consent to sexual intercourse is not the equivalent of consent to be infected with a venereal disease
   c. G - otherwise valid consent can be vitiated by fraudulent concealment of something that they wouldn't consent if they knew
   d. G - if he knew and didn't tell her, not a valid consent - if he didn't know and didn't tell her, there's no intent, the consent doesn't get any stronger, but on his part, the elements of battery aren't there - (can this make a different at all)
   e. G - she gets to decide what kind of contact she's going to engage in

   Hellriegel v. Tholl (WASU 1966) - Π son was engaged in horseplay with friends when one friend fell on his head, breaking his neck and paralyzing him. Court held that the boy had consented to the rough and tumble play and took on the risks therein. The contact that actually broke his neck was accidental not offensive.

   a. Restatement Torts - "to constitute a consent, the assent must be to the invasion itself and not merely to the act which causes it"
   b. McAdams v. Windham - boxer accepts the risk of serious injuries from the blows received
   c. G - if you consent to harmful or offensive contact, you accept the risks that might result
   d. the invasion in horseplay is different - you can't tell the kid that he's going to break his neck

   Reavis v. Slominski (NESU 1996) - Π was an assistant at a dentist's office, she had sex with him many times, claimed that he was "forcing her" to have sex with him. Court held that if ∆ knew that he could engage in sexual contact with Π against her will, then Π could not have given effective consent.

   a. NE - any person who subjects another person to sexual intercourse or sexual contact who knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct is guilty of sexual assault
   b. NE - an otherwise competent person can be sexually assaulted if the person is physically or mentally incapable of resisting
   c. Restatement 2d Torts - Duress is constraint of another's will by which he is compelled to give consent when he is not in reality willing to do so. Persuasion amounting to a form of constraint can take various forms and many of them commonly encountered in daily life, are without legal effect and are not normally characterized as duress.
   d. G - consent is not legally effective if the person giving consent lacks the capability to refuse
e. G - consent is the most challenging of the defenses to intentional torts - there are a few situations where it's not hard
   i. **No consent to criminal conduct** - on the whole, jurisdictions won't let you go to court and say "but he asked me to run over him"
   ii. **Yes consent in emergency situations** - when you get wheeled into the emergency room unconscious, there's implied consent
   iii. most situations where consent is an issue - there's no hard and fast rules, it can help a lot with the analysis to kinda know that there are categories or clusters of issues that tend to come up over and over again, use a set of questions to help

B. Self Defense and Defense of Others
   a. the ∆ must actually believe the force is necessary, and it must be found to be reasonably necessary from the reasonable person's perspective.
   b. defense of others is also a defense where the ∆ goes to the aid of another
      i. some courts deny the application of this defense where the initial person in jeopardy was not privileged to invoke self-defense.
      ii. these courts require that the intervenor's conduct actually be necessary and that only reasonable force be exercised
      iii. other courts allow the defense of others where the intervention would appear necessary to a reasonable person, even if it turns out to be mistaken.
   c. G - there has to be a reasonable belief of danger, the force that's used in return has to be reasonable, there has to be innocence with regard to the situation
   d. G - in some jurisdictions you have to be right, in some jurisdictions it's okay to be wrong as long as you're reasonable

Bradley v. Hunter (LAAP 1982) - Π's husband had harassed ∆ in her shop several times, threatened her, finally one day ∆ shot him outside the shop when he rushed at her yelling and threatening, he was known to have a violent past. Court held that ∆ could have believed in good faith that it was necessary for her to shoot Π to prevent harm to her and her mother.

Juarez-Martinez v. Deans (NCAP 1993) - Π was a migrant worker, living in house on ∆'s land - Π didn't show up for work, ∆ came into Π's house with a metal pipe-thing, poured beer on Π's head, Π reacted by attacking ∆. Court held that Π had not really withdrawn from the conflict, Π was acting in self-defense, ∆ was not.

a. Brasseaux v. Girouard - Π and ∆ involved in boundary dispute, ∆ shot Π, ∆ was behind a truck near relatives and armed with shotgun - court held that this was protection from Π who was 35 feet away - a reasonable person would not believe it was necessary to shoot

Griffin v. Starlite Disco, Inc - "However, the right of self-defense is only available to a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so."

b. State v. Winford - An act of withdrawal must be so clear that the other combatant will know danger has passed an any further action by this other combatant will take the form of vengeance.

c. Requirement of Retreat - retreat is not required in the face of force that doesn't threaten death or serious bodily harm. The majority of states hold that there is no duty to retreat in the face of any force, including serious bodily injury or deadly force can be used as a defense, if the retreat can be done safely. One is always entitled to stand her ground in her own home.

C. Defense of Property

Katko v. Briney (IASU 1971) - Π was trespassing in "abandoned" farmhouse, was seriously injured when spring loaded gun set by ∆ went off and shot Π in the leg. Court held that the only time when setting a 'spring gun' or a like dangerous device is justified would be when the trespasser was committing a felony of violence or a felony punishable by death, or where the trespasser was endangering human life by his act. Value of life and limb can overcome protection of property.

a. Restatement Torts - "The value of human life and limb, not only to the individual concerned but also to society, so outweighs the interest of a possessor of land in excluding from it those whom he is not willing to admit thereto that a possessor of land has, as is stated in §79, no privilege to use force intended or likely to cause death or serious harm against another whom the possessor sees about to enter his premises or meddle with his
chattel, unless the intrusion threatens death or serious bodily harm to the occupiers or users of the premises... he cannot gain a privilege to install... a mechanical device whose only purpose is to inflict death or serious harm upon such as may intrude...

D. Necessity

**Eilers v. Coy** (DMN 1984) - Π and wife were captured by Δ family members and deprogrammers who held Π for five days in an attempt to deprogram him from "cult" he had belonged to. Π escaped. Court held that it wasn't clear that the confinement was necessary to prevent Π from committing suicide or from otherwise harming himself or others, Δ did not meet elements of necessity defense, the right to "capture" would only last long enough to get to authorities.

a. **elements to defense of necessity** (false imprisonment)
   i. the Δ must have acted under reasonable belief that there was a danger of imminent physical injury to the Π or others
   ii. right to confine a person in order to prevent harm to that person lasts only as long as is necessary to get the person to the proper lawful authorities
   iii. actor must use least restrictive means of preventing apprehended harm

b. MN Stat - Δ could have turned the Π over to police or sought to initiate commitment proceedings or sought professional psychiatric or psychological help for the Π with possibility of emergency hospitalization

c. G - property is destroyed toward the end of a public need - stopping fire from spreading, mad cow disease - can be done by a public official or a private person - it doesn't matter who does it, it matters what ends are being served

**Rossie v. Delduca** (MASU 1962) - Π, 8-yr-old girl, was running away from a dog that was chasing her when she ran through Δ's backyard and Δ's dog attacked her. The court held that the jury could find that Π was not a trespasser.

a. GL - "If any dog shall do any damage to either the body or property of any person, the owner or keeper, or if the owner or keeper be a minor, the parent or guardian of such minor, shall be liable for such damage, unless such damage shall have been occasioned to the body or property of a person who, at the time such damage was sustained, was committing a trespass or other tort, or was teasing, tormenting or abusing such dog."

b. **Restatement 2d Torts** - one is privileged to enter land in the possession of another if it is, or reasonably appears to be, necessary to prevent serious harm to the actor or his property.

c. Restatement 2d Torts - "The important difference between the status of one who is a trespasser on land and one who is on the land pursuant to an incomplete privilege is that the latter is entitled to be on the land and therefore the possessor of the land is under a duty to permit him to come and remain there and hence is not privileged to resist."

**Vincent v. Lake Erie Transp. Co.** (MNSU 1910) - Δ's ship was moored to Π's dock, a storm came in and b/c the ship was securely tied and retied to the dock it battered and damaged the dock. The court held that the Δ availed itself of the Π's property for the purpose of preserving its own more valuable property, and the Π's are entitled to compensation for the injury done. Dissent - Π signed up for this when he let Δ moor at his dock.

d. Ploof v. Putnam (VT) - where, under stress of weather, a vessel was without permission moored to a private dock at an island in Lake Champlain owned by the Δ, the Π was not guilty of trespass, and that the Δ was responsible in damages because his representative upon the island unmoored the vessel, permitting it to drift upon the shore, with resultant injuries to it.

e. G - limits of privilege - you don't pay damages, but you do get to pay for your harm

9.01 **TRESPASS TO LAND** (p.879)

A. Basics
   a. involves interference with the exclusive right of possession of another
   b. harm was not required at common law and that concept has substantially survived today

**Creel v. Crim** (ALAP 2001) - Δ cut down trees on Π's property after being told by L that the trees were hers. The court held that Δ was liable to Π but could recover entire burden of loss from L.

a. Granade v. United States Lumber & Cotton Co. - damages in cases involving trespass to land wherein trees are removed are 'not measured by the value of the timber or property severed, but by the injury to the land by reason of its severance - the difference between

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the value of the land immediately before [the trespass] and [the value fo the land immediately] after the trespass.

b. Vandiver v. Pollack - every man... who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify him for all such acts as would be lawful if the employer had the authority he pretends to have

c. indemnity shifts the entire burden of loss from one party to another; thus, the measure of recovery is all or nothing

d. G - it seems that the **woman who hired him did trespass** - this court can't say that she did trespass because she isn't involved in this appeal, so they fixed it as much as they could