NEGLIGENCE

Elements:

a. Duty: Did Δ have a legal obligation to exercise some level of care to avoid risk of harming persons or property
b. Breach of duty: Did Δ’s conduct fall below the level of care owed to Π?
c. Causation: Did a causal connection exist between the defendant’s unreasonable conduct and plaintiff’s harm?
d. Proximate Cause/Scope of liability: Did Δ’s obligation include the general type of harm Π suffered?

DUTY: legal obligation to exercise reasonable care to avoid risk of harming persons or property. Legal duties are made up by courts, not matters of fact. Duty often used to limit foreseeable harms; proximate cause used to limit unforeseeable harms; used interchangeably.

1. Who has a legal duty?
   a. Nonfeasance: no liability for failing to do anything (vs. misfeasance: duty to protect others against foreseeable risks created by ones actions)
      i. “Individuals are responsible for their own conduct and should not be held liable for the misconduct of others”
      ii. Rationale:
          1. Otherwise circle of liability would be huge (drowning person/crowded beach)
          2. Liability might hinder altruism
          3. People should not count on nonprofessionals for rescue
   b. Yania v. Bigan: Δ had not duty to save Π from drowning (Π leapt into water as a reasonable adult with a sound mind)
   c. Rocha v. Faltys: Δ had no duty to save Π from drowning even when they had been drinking, Δ encouraged Π to jump, and knew Π could not swim (attempted but failed to rescue).
      i. Exceptions:
          1. Δ knows or has reason to know his negligence caused harm, has duty to assist to prevent further harm
          2. Δ has duty to prevent harm from occurring from his or her negligence
          3. Good Samaritan laws that require affirmative action
          4. Special relationship to victim or perpetrator
             a. Parent/child
             b. Teacher/student
c. Contractual obligations to provide aid
d. Statute imposes duty to assist

5. Δ gives voluntary gratuitous services/aid
d. **Wakulich v. Mraz**: After convincing Π to drink an entire bottle of liquor, Δ undertook to provide care for Π after she loses consciousness, prevent others from calling 911 (later dies). Δ liable, “one who voluntarily undertakes to render services to another is liable for bodily harm caused by his failure to perform such services with due care or with such competence and skill as he possesses.

e. **Krieg v. Massey**: Woman may have assumed duty suicidal man (removed gun, put it in closet), but may not have breached that duty (did what a reasonable person would have done).

f. **Farwell v. Keaton**: Court finds special relationship (companions engaged in a common undertaking), holds Δ liable for not seeking medical attention for friend Π after he is beaten up (he dies).

2. **STANDARD OF REASONABLE CARE**

   a. Duty owed is that of a standard of reasonable care that would be exercised by a reasonable person under same or similar circumstances.

      i. **There is only one standard of care**: standard does not heighten in more dangerous situations (Stewart v Moss)

      ii. **Sudden emergency doctrine**: in emergency situations, one must act as a reasonable person in an emergency; some courts will say normal standard (Wilson v Sibert)

      iii. **Child standard of care**: reasonable child of same intelligence, maturity, experience in same circumstances (Robinson v Lindsay)

          1. Exception: when child is engaging in activity reserved for adults, held to reasonable adult standard (motor vehicles). Very young kids can’t be negligent.

      iv. **Insane person standard**: regular adult standard, as it provides incentive for caretakers to control Δ, deters people from faking mental illness, allocates fault to the one who caused the harm (Creasy v Rusk)

      v. **Medically/physically disabled standard**: not liable unless they acted unreasonably (Gobbo)

      vi. **Superior vs. inferior skills**: same standard of care (reasonable person in same/similar circumstances)

      vii. **Negligence as a matter of law**: when court concludes that a reasonable jury could not find a Δ not negligent, finds for opposing party (Chaffin v. Brame, truck on highway case)

3. **NEGLIGENCE PER SE (“judicial legislation”)**

   a. Statute defines a specific code of conduct (but does not provide for a specific cause of action)
b. Action violates this code of conduct, renders action negligent as a matter of law
c. Court's discretion whether a person's action was unreasonable as per the statute
   i. Elements
      1. Whether plaintiff belonged to class of people the statute was designed to protect
      2. Whether plaintiff's injury is of the type that the statute was designed to prevent
   ii. Examples:
      1. *Rains v Bend of River*: seller of ammunition is not liable for Π death; statute prohibiting sale of ammunition to a minor not designed to prevent minors from committing suicide
      2. *Wright v Brown*: Δ found to be negligent per se for releasing dog prior to amount of time set for quarantine; plaintiff within class of people statute designed to protect (public); injury from dog supposed to be quarantined
      3. *Haver v. Hinson*: person parks on wrong side of street, looks carefully before leaving but still hits child. NOT negligence per se, statute regarding parking not designed to protect children
      4. *Impson v. Structural Metals*: truck passed car within 100 feet of intersection, caused accident. Δ tries to claim excuses that hold him not liable, court does not believe them, guilty
   iii. Non-liability excuses for negligence per se
      1. Incapacity to follow statute
      2. Neither knows nor has reason to know of statute
      3. Unable, after reasonable care, to comply
      4. Faced with emergency not due to own conduct
      5. Compliance would cause greater harm to actor

4. DUTY TO PROTECT FROM THIRD PARTIES
   a. Duty of businesses/landowners: greater the foreseeability and gravity of the harm, greater the duty of care imposed on landowners.
      FOUR FRAMEWORKS:
      i. Specific harm rule: only a duty to protect when Δ has knowledge that specific, imminent harm is about to befall Π (outdated, too restrictive in limiting Δ's duty)
      ii. Prior incidents test: foreseeability establish by evidence of prior crimes on premises, owner has notice of future risk. Consider nature/extent of crime, frequency, recency, similarity
      iii. Totality of circumstances test: reviews same factors as prior incidents test, also looks at nature/condition/location of land,
other relevant factual circumstances. Lack of prior incidents does not preclude a duty (MOST COMMON)

iv. Balancing test: balances between foreseeability of harm vs. burden of imposing duty to protect upon landowner. (CA/TN, 1999). MORE Δ FRIENDLY, no duty even if harm foreseeable

**Posecai v. Wal-Mart:** Π suing Sam’s Club when she was robbed in parking lot; during 6 year period there were 3 robberies at Sam’s but 83 offenses on the same block. Court found the incidents unlike Π’s incident and too few to impose liability.

**Parish v. Truman:** Π at Δ’s home in high crime area, Δ “negligently” opens door without checking who it was, criminals enter and Π is shot. No liability: absent special relationship, private person has no duty to protect from criminal attacks.

- **Creditor beneficiary of a K:** when someone is a beneficiary of a K when the performance by the promisee is meant to benefit that person; can be sued for breach of duty (Woman raped in mall, sues Δ owner and Δ security company for breaching duty to protect)

**BREACH:** when has a party breached a duty of care?

**Indiana Ins. v. Mathew:** When Δ exercised a reasonable standard of care given the circumstances, did not breach (Garage burned down when Δ started mower and it burst into flames; law values human life above property)

**Stinnett v. Buchele:** The dangerous nature of work does not necessarily signify breach in failing to provide a safe place to work (Worker fell off roof and sued man who hired him for not creating safe place to work)

1. Probability of risk/when is there liability
   a. Low probability = low liability
      - **Lee v. GNLV Corp:** Restaurant staff not liable for man’s choking death; burden on food industry to provide medical training is high, probability of choking deaths low
   b. Low probability = still liable
      - **Bernier v. Boston Edison:** Boston Ed found liable for poor pole design, could not reasonably withstand vehicular impact; “in balancing factors, jury made a judgment as to social acceptability of design”
   c. Liability restricted by public policy
      - **Parsons v. Crown Disposal:** Π’s horse startled by garbage truck

2. LEARNED HAND FORMULA: Burden < Probability of Risk × Injury
   a. **United States v. Carroll Towing:** Absent bargee, barge got away from tug and dumped cargo of flour into harbor. Owner had a duty to provide against injury as a function of probability that barge would break away, gravity of resulting injury vs. burden of adequate precautions

3. Proving breach of duty/liability
a. **Santiago v. First Student:** Plaintiff bears burden of presenting sufficient evidence to show existence of a material question of fact

b. **Upchurch v Rotenberry:** ∆ was only witness to accident that killed Π's son; in these cases court will defer to jury to determine breach of duty

c. **Uncontradicted testimony** does not equal directed verdict, jury determines witness and evidence credibility

d. **Thoma v. Cracker Barrel:** When there is a dangerous condition that either ∆ created or should have known about, may be liable for resulting injury (reasonableness; how long was H20 on ground?)

4. **CUSTOM**

   a. Existence of safety custom (and subsequent breach thereof)
      i. Might prove harm was foreseeable
      ii. Might show ∆ knew or should have known of risk
      iii. Might show risk was unreasonable unless custom followed

   b. **Wal-Mart v. Wright:** ∆'s set rules/procedures (Wal-Mart's guidelines for employees) may exceed the normal standard of care; ∆ is not held to any standard except reasonable person standard

   c. **T.J. Hooper:** Case involving lost boats that had no radio sets; court found ∆ liable, even though it was not industry custom to have radios, because they should have been custom (cheap, eliminate risk)

5. **RES IPSA LOQUITUR (proving unspecified negligence):** “the thing speaks for itself,” when Π must rely on circumstantial evidence to prove negligence. Can get Π to the jury if res ipsa is granted.

   a. **Occurs when even would not happen absent negligence (“more probable than not”)**
      i. **Byrne v. Boadle:** Π lost recollection while walking down a road; ∆ had negligently dropped a barrel of flour on his head, but could not prove. “Accidents do not take place without a cause,” found for Π
      
      ii. **Valley Prop. v. Steadman's Hardware:** ∆ rented space in Π's warehouse, which caught fire; Π could not prove specific negligence. Held for ∆, fire could have happened without negligence.
      
      iii. **Eaton v. Eaton:** mother dies in car accident potentially caused by daughter; RIL granted against daughter, Π must still provide burden of proof.
      
      iv. **Koch v. Norris Pub:** power lines fell during normal weather conditions, RIL used against power company (if line falls without explanation, must have been negligence of some kind)
      
      v. **Warren v. Jeffries:** child is killed when car rolls backwards without a driver and he tries to jump out. RIL not applicable; car not examined after accident, speculation as to why it rolled; Π failed to find out what happened

   b. **Negligence was probably caused by the defendant**
      i. **Widmyer v. Southeast Skyways:**
c. Other responsible causes (Π or 3rd party) are sufficiently eliminated (“exclusive control by Δ” element)
   i. **Giles v. New Haven**: Elevator operator lost control of elevator, injured, sues using res ipsa, could not have occurred without someone’s (Π OR Δ) negligence; Π had literal control of elevator, but court ruled that Δ had duty to maintain and thus had a different type of exclusive control; “control is flexible”

d. **EXCEPTIONS**
   i. Cannot get RIL in slip and fall cases
   ii. Normally cannot have two Δs, unless there is consecutive control where at least one or both could have caused Π's negligence

   1. **Collins v. Superior Ambulance**: elderly woman broke leg and was dehydrated after being transported by ambulance and staying in care center. RIL allowed.

**CAUSE-IN-FACT:**

- **But-for test**: but for the defendant’s negligence, would Π have suffered the same harm?
  - o **Salinetro v. Nystrom**: woman injured in car accident does not know she is pregnant, gets x-rays and is not asked whether she is pregnant. Fetus dies as a result of x-rays; doctor not liable because Π would have said no if he had asked her if she was pregnant
  - o **Dillon v. Twin State Gas**: Π is electrocuted by grabbing Δ’s uninsulated wires before falling off bridge. Question is whether Π would have survived the fall; if yes, the Δ’s negligence is a cause in fact of loss of Π’s life. If not, the but-for Δ’s negligence, Π would have died anyway (although liability if jury could find Π suffered)

- **Substantial factor test**: cause in fact can be found when Δ’s actions were a substantial factor in causing Π’s harm (esp. in cases where harm is caused by multiple parties)
  - o Δ must prove they are NOT a substantial factor
  - o adequacy of proof shown by preponderance of evidence
  - o **Anderson v. MN and RR**: Fire started by Δ negligently, and third party non-negligently; "substantial factor in producing harm complained of"

- **Multiple tortfeasors**: each tortfeaso is subject to liability
  - o Indivisible injury (fire caused by A and B’s negligent acts): liability apportioned by fault, not causation
    - ▪ **Two acts, harm is indivisible**
      - o **Landers v. East Salt Water Disposal Co**: Two tortfeasors each dump salt water into Π's lake, Harm is indivisible; thus all wrongdoers held jointly and severally liable for entire damages; injured partly may proceed against one separately or both
- **Two actors, one harm, can’t tell which actor is cause**
  - *Summers v. Tice*: both hunters held wholly liable for \( \Pi \)'s injuries, may be treated as joint tortfeasors; if apportionment is impossible, \( \Pi \) should not be deprived of right to recover
    - Burden of proof switched to Ds, will be held jointly and severally liable if cannot disprove guilty
  - Plaintiff must prove not only that all \( \Delta \)'s were negligent, but also that other parties were not and could not have been causes of the harm (blood transfusion case; did not sue one of the blood donors because it was unlikely they gave \( \Pi \) HIV, but did not prove it was impossible)
    - Divisible injury (broken arm by A, broken leg by B): liability apportioned by causation
- **Increased risk**: cause-in-fact can be found if:
  - a negligent act increased the chances that a harm would occur
  - that harm did indeed occur
    - *Zuchowicz v. US*: jury could find that a drug more likely than not was cause of \( \Pi \)'s death; issue was whether \( \Delta \)'s negligent over-prescription of the drug was the cause of death
    - *Safety measure cases*: when \( \Delta \) fails to provide a safety precaution, may have increased \( \Pi \)'s risk of harm; burden of proof switches to \( \Delta \) to proof that action was not a substantial factor in harm
- **Lost chance**: when \( \Delta \)'s action results in reduction of chance of recovery, \( \Pi \) may be able to find causation. Three approaches:
  - “All or nothing approach.” As a result of \( \Delta \)'s negligence, \( \Pi \) was deprived of at least 51% chance of more favorable outcome; if yes, \( \Pi \) can recover for total damages
  - \( \Delta \)'s action destroyed substantial possibility of more favorable outcome, precise degree varying by jurisdiction; if causation found, \( \Pi \) can recover total damages
  - **Majority approach**: no recovery for entire damages; if \( \Pi \) can establish causal link between lost opportunity and \( \Delta \)'s action, can recover portion of damages attributable to lost opportunity
    - *Lord v. Lovett*: \( \Pi \) alleges that due to negligently misdiagnosed spinal injury, lost opportunity of better recovery but could not quantify degree. Court: \( \Pi \) may recover if \( \Delta \)'s negligence aggravates \( \Pi \)'s preexisting injury and deprives \( \Pi \) of substantially better outcome; does not need to calculate degree (preponderance of evidence test)
- **Respondeat superior**: while not a cause-in-fact of \( \Pi \)'s injuries, employer will be held liable when employee’s actions are a cause-in-fact
- **Acting in concert**: all who act in concert will be held liable even if only one actor is the cause-in-fact of \( \Pi \)'s injuries
**PROXIMATE CAUSE/SCOPE OF RISK:**

- **Defined:** serves as a limitation on negligence claims, a liability cut off. Harm must be related to, and within the scope of, the negligent act. Thus, \( \Delta \)'s negligence can be a cause in fact but not a proximate cause of \( \Pi \)'s harm.
  - \( \Pi \) must show that there is a real causal link between negligence and resulting harm, and that it is appropriate to hold \( \Delta \) liable for harm
  - **Reasonableness test:** would a reasonable person think that the harm would have resulted from the negligence?
- **Questions to ask:**
  - Is there an unforeseeable plaintiff?
  - Are there unforeseeable consequences?
  - Is there intervening conduct?
    - Yes to any will involve proximate cause analysis
- **Unforeseeable consequences:** \( \Delta \) was negligent, but the resulting harm was not a foreseeable consequence of \( \Delta \)'s negligence
  - **Medcalf v. Washington Heights:** girl attacked outside apartment building while waiting due to broken buzzer; apt building not liable because attack not foreseeable consequence of broken buzzer
  - **Abrams v. Chicago:** city not negligent for failing to send an ambulance to pregnant woman who then got in a terrible car accident
- **Unforeseeable plaintiff:** \( \Delta \) was negligent, but the plaintiffs harmed were not foreseeable plaintiffs. What class of plaintiffs are foreseeably harmed by the negligence?
  - **Palsgraf v. LIRR:** woman hurt by fireworks exploding was not a foreseeable plaintiff; \( \Delta \)'s conduct might be wrong in relation to the package’s holder, but not wrong in relation to \( \Pi \) standing far away
    - **Dissent:** negligence to one is negligence to all, negligence was a substantial factor in causing the harm, injury was foreseeable from the negligent act, doesn’t matter what type
  - **Mellon v. Holder:** cop sexually assaults someone he pulled over in \( \Delta \)'s parking garage; \( \Delta \) knew that crimes took place in the garage. Court found \( \Delta \) not liable, \( \Pi \) did not frequent the garage, not in class of \( \Pi \)s within scope of \( \Delta \)'s negligence.
- **Intervening acts:** first tortfeasor is not relieved by the intervening act of a second tortfeasor. If an intervening cause lies within the scope of risk original created by actor’s original negligence, original actor not relieved of liability for resulting injury (*Derdiarian*)
  - **Austermiller v. Dosick:** \( \Delta \) physician negligently did not cut off prescription of drug that can cause internal bleeding; \( \Delta \) pharmacist negligently continued supplying the drug (\( \Pi \) dies of internal bleeding). Got to jury on whether pharmacist an intervening cause
  - **Condition vs. cause:** If \( \Delta \)'s negligence merely furnished a condition by which the injury was possible and a subsequent independent act
caused the injury, the existence of such a condition is not a proximate cause of the injury.

- **Sheehan v. New York**: bus negligently stopped in street to let passengers off, was hit by a garbage truck from behind due to failed brakes. Bus driver found to have furnished a condition, for which the truck was an intervening act.

- **Ventricelli v. Kinney**: rental car company negligently rented car to Π with trunk that did not close; Π was injured when trying to fix lid and a third party hit him. Majority held that only cause was third party, ∆ merely furnished condition. Dissent said this is the exact type of injury such negligence would cause.

- **Marshall v. Nugent**: Π injured by third party car after swerves to avoid truck and car runs off road. Truck driver says he merely created a condition in which the injury occurred; court says NO, Π was within class of people at risk by ∆’s negligence, consequences of negligence did not stop when negligence stopped, “irretrievable breach of duty to Π”

  - **Nature as an intervening force**: foreseeability of the natural event will determine ∆’s negligence (∆ negligently fails to protect Π from an avalanche, would need to show avalanche was unforeseeable)

  - **Negligent medical care**: original negligent actor who causes an injury that requires medical attention is not relieved of liability if the medical attention also negligent and makes injury worse

  - **Termination of risk**: occurs when the risk created by the original ∆’s act of negligence no longer exists; plaintiff has reached position of “apparent safety.” (Horton, boy who finds ∆’s explosive dynamite caps, mother sees he has them and does nothing; ∆’s liability is terminated when mother “takes control” of the child)

- **Superseding acts**: when a second negligent act “breaks the causal chain” from the first negligent act, rendering the first actor not liable.

  - Events which are bizarre, highly improbable and give rise to a risk different from the one ∆ should have anticipated may be superseding

  - **Criminal acts**: courts do not agree that criminal acts are superseding causes, may depend on foreseeability (Watson: gas negligently spilled on bridge, criminal lights it on fire, ∆ not liable because others’ crimes not foreseeable); Criminal acts that ARE foreseeable may not cut off liability (Hines: train skips woman’s stop and lets her off in a bad neighborhood where she is assaulted)

    - What made ∆ negligent?
    - What risks are created by such negligence?
    - Were resulting injuries a result of that risk (even if part of a criminal act?)

- **Manner of the harm**: the manner in which the harm occurs need not be foreseeable (Hughes v. Lord Advocate – it was not foreseeable that a fire
would be caused in the specific way that it did, but because the fire itself was foreseeable, Δ still can be held liable)

- Distinguish with *Doughty v. Turner* (Π injured by explosion from cover negligently falling to vat of molten liquid; court held Δ was not liable, duty not to knock cover into vat was to prevent splashing, not to prevent a chemical reaction that causes an explosion)

- *Derdiarian v. Felix Corp*: epilepsy/failure to create safe place to work case. Epileptic driver was an intervening cause, but Δ still liable, Π did not have to prove that epileptic seizure was foreseeable because car entering work site was foreseeable

**Rescue doctrine:**
- Rescuer of someone being harmed by a negligent act can generally also recover from the negligent actor.

- **THIN SKULL RULE**: Δ “takes the Π as he finds her.” If Π is unusually sensitive and/or the harm suffered is much worse than was foreseeable, Δ is still liable
  - Example: Alcoholic in a car accident gets delerium tremens and dies

### MEDICAL MALPRACTICE:

- **Elements:**
  - Must prove a standard
    - generally through expert testimony, although there are cases where “any fool would know” that action was negligence and expert not required (there to fill in gap in jury knowledge)
    - where the medical community does not agree on one standard, physician will not be held liable if s/he followed a course of treatment advocated by a considerable number of recognized and respected professional in the given area of expertise
  - Must prove conduct fell short of that standard
    - *Smith v. Knowles*: Π suing for wrongful death of his wife and stillborn child, arguing that Δ physician was negligent in diagnosis and treatment of wife’s condition. Π called no expert witnesses but relied on medical treatises and cross examination of Δ. Δ’s testimony corroborated the treatises; Π failed to show Δ deviated from standard
    - Must prove the but for the conduct, would not have been injured
  - **Similar to, but not the reasonable care standard**
    - Similar in that doctors are held to a standard of care exercised by a doctors with the same skill and knowledge
    - Different in that the medical standard can fall below the reasonable person standard; what doctors might practice could involve increased risk with no demonstrable benefit and still be reasonable (under *Carroll Towing*, this would not be reasonable)
  - **What must expert testimony demonstrate?** They must actually show that there exists a general standard of care
• **Walski v. Tiesenga**: Δ operated on Π’s thyroid, risk was loss of voice, which actually occurred because Δ made a certain type of cut. Π’s medical expert could not testify generally, only that he personally disagreed with Δ’s decision (“medicine is not an exact science, differences of opinion are consistent with the exercise of due care”)

• **Modified locality rule**: the standard of care is that degree of care, skill, and proficiency which is commonly exercised by ordinarily skillful, careful, and prudent physicians at the time of the operation and in similar localities

  • This was important in the past when isolated communities might have had a lower standard of care, doctors with less skill/knowledge due to their locality would only be held to that standard

  • **Vergara v. Doan**: changed IN from a modified locality jurisdiction to a general standard of care based on class: “physician must exercise degree of care/skill exercised by a reasonable practitioner in the same class to which s/he belongs in same or similar circumstance.”

• **Res Ipsa in medical malpractice cases**: usually res ipsa can only be used when a jury could infer based on its own experience that the act would not have occurred without negligence (precludes expert testimony); however, it is allowed in medical malpractice cases. MUST STILL HAVE OTHER RIL ELEMENTS (exclusive control by Δ, no contributory Π negligence)

  • **States v. Lourdes Hospital**: Π can introduce expert testimony to educate jury as to likelihood that something could only occur if there was some kind of negligence (woman had ovarian cysts removed, woke up with injured arm due to negligent anesthesiologist)

  • NO RIL when a procedure has inherent risks that actually occur

  • **Ybarra v. Spangard**: Π undergoes surgery for appendix and wakes up with shoulder problems; because he was unconscious, doesn’t know whose fault it was and so sues everyone. Court: many Δs does not preclude RIL, because Π has no way of know who had exclusive control. Rule: test for RIL becomes whoever had right of control rather than exclusive control may be called to explain conduct.

• **Specialists**: are held to the standard of their specialty, which made be a higher standard than doctors not of that specialty.

• **Non-medical practitioners**: held to the standard of the school they profess, not to the medical standard

• **Hearsay**: treatises or other evidence heard/read out of court is dismissed as hearsay, cannot be used to prove truth of Π’s argument (to allow for cross examination). Can be used to cast doubt on expert testimony.

• **Duty to disclose**: “Every human being of adult years and sound mind has a right to determine what shall be done to his own body.” ~Cardozo

  • Doctors have duty to disclose info material to patient’s decision

    - DUTY TO DISCLOSE: must be disclosed in a reasonable way
    - MEDICAL INFO: what the doctor should reasonably know (need expert testimony to establish)
    - MATERIAL TO PATIENT’S DECISION:
• Lay person standard: measured by patient’s need for info; what would a reasonable person in patient’s position have considered significant in deciding? (this is decided by a jury)
• Professional standard: when are doctors required to disclose risks (proven by expert testimony)
  o Once Δ is found to have breached duty to disclose, burden shifts to Δ to prove that the nondisclosure was privileged
  o What must Π prove?
    ▪ Must show the risk not disclosed by doctor actually occurred
    ▪ But-for causation: but for the nondisclosure, Π would not have chosen to have the procedure
      • Objective standard: what would reasonable person do (most courts require this standard)
      • Subjective standard: what would Π do (jury decides if this is credible)
  o \textit{Harnish v. Children’s Hospital}: Π underwent surgery for tumor, nerve accidentally cut that resulted in loss of tongue; argued that loss of tongue was a material and foreseeable risk of which Π had not been informed (would have not consented to surgery if she had known)
  o \textit{Arato v. Avendon}: Man with terminal cancer, despite request to be “told the truth,” not told that his chances of survival were low. Court held doctor does not have heightened duty disclose just because Π asks; no duty to disclose survival statistics because not about risks.
  o \textit{Truman v. Thomas}: Woman dies of cervical cancer; doctor had informed her of need to have Pap smear but not of risks associated with not having. Court found breach of duty to disclose; Π did not appreciate potentially fatal consequences of her conduct.

• \textbf{LEGAL MALPRACTICE}
  o To prove attorney negligence, need to show:
    ▪ There is an attorney-client relationship
    ▪ Attorney breached duty to client
    ▪ But for this breach, client would not have lost case
  o \textit{Tompkins v. Cervantes}: Π contends Δ could have elicited medical testimony that would have causally and proximately linked therapist’s negligence to their son’s death in a car crash. Court finds that because no medical expert could have done this, attorney was not negligent.