Introduction
  - Moral responsibility vs. Corrective justice
  - Overall objective of tort law is to define cases in which the law may justly hold one party liable to compensate another
    o Shifting losses from injured victims to injurers
  - Functions of Tort law
    o Compensation
    o Deterrence
    o Economic Goals
    o Administrative efficiency
    o Fairness
  - Culpability spectrum (in decreasing order of culpability)
    o Intent (battery/assault)
      ▪ Compensatory damages as well as possibility of punitive (for deterrence)
    o Unintentional Harm
      ▪ Recklessness
        • conscious disregard of a high risk of harm
        • Punitive damages available
      ▪ Negligence
        • Unreasonable conduct that creates foreseeable risks of harm
        • Compensatory damages to “make injured whole”
        • No punitive
      ▪ Strict Liability (no fault)
        • Responsible but not at fault
        • No fault categories include: Defective products, animals, statutory violation (ie. workers comp), abnormally dangerous activities, vicarious liability
        • Vicarious liability: is valid if employees actions are facilitating or promoting employers business
          o Law is very pro employer > must be intentional tort or statutory violation to win
  - Remedies:
    o Compensatory Damages (most common)
      ▪ Intended to be exactly proportionate to actual injury
      ▪ Injured person has burden of proving damages >
        • Past (lost wages, medical expenses, pain and suffering(mental and emotional))
        • Present
        • Future (lost earning capacity,
    o Punitive
      ▪ Rare, requires malicious/willfull/wonton action when causing injury
o Attorney fees
  ▪ Generally, each party pays own fees > pay lawyers contingency
  o If an award of damages shocks the conscience (mistake)
- Reasonable person must always be a reasonable person in that situation (and usually of their
  same background, ie. ethnic, race, age

**Trial Procedures (order of occurrence)**
- Incident
- Lawyer consultation
  o Interview, fees, preliminary investigation
- Pleadings
  o Complaint
  o Motions
  o Answer
- Pretrial Procedure
  o Investigation
  o Discovery
  o Motions
  o Settlement negotiations and mediation
  o Pretrial conference
- Trial
  o Jury selection
  o Opening statements
  o P’s case
  o D’s case
  o Motions
  o Closing Statements
  o Jury instructions
  o Verdict
  o Motions
  o judgment
- Appeal
  o Notice of appeal
  o Briefs
  o Arguments
  o Opinion
- Types of motions
  o Summary judgment (facts being undisputed, still > they win as a matter of law)
  o Directed verdict (proof/evidence offered by opponent is legally insufficient to enter
    verdict for them)
  o Motions in Limeline (attempt to control some aspect of trial)
  o Judgment NOV motion (similar to directed verdict, but at end of trial)
  o New trial motion (if error committed by trial judge or b/c verdict is against weight of
    evidence or damages unconsionably low/high

**Death**
- The estate can move forward to recoup damages that the deceased would have been entitled to.
- 2 types of recovery will go into the estate
  - **Survival**
    - Medical damages, loss of wages, pain and suffering, emotional distress
  - **Wrongful Death**
    - If proved that death was caused wrongfully > can recoup the loss to survivors

**Fault**
- Vicarious liability (employer’s liability for its employees)

**Strict Liability Exception**

**Intentional Torts**
- P must allege a prima facie case (good case on the face of it)
- P must prove the prima facie case of a particular tort
  - P bears burden of proof on all elements

**Battery**
- Requires fault of D
- Restatement definition
  - Intends to cause a harmful or offensive contact with another, or imminent apprehension of such contact
  - A harmful or offensive contact with the other person directly or indirectly results
- Liability of battery emphasizes P’s lack of consent to the touching
- **Offensive contact occurs if it offends a reasonable sense of personal dignity**
  - Objectively reasonable person standard (based on circumstances)
- Damages - is what is fair and reasonable
- Extended personality rule (indirect contact)
  - Touching something that is so close to the P, that you are by extension touching P
- Intent
  - Desire or purpose to cause contact (explicit intent)
  - Substantial certainty to cause a certain kind of contact that will be harmful or offensive
  - Willful or wanton contact (punitive available)
    - action that shows deliberate intent to harm or indifference to own or others safety
  - Recklessness (punitive available)
    - Conduct that creates a known risk that could have been reduced by modest precautions
  - Transferred intent
    - Intention to tort one person but commit on another
    - Intend one tort but commit another
  - Extended liability
    - D who commits intentional tort is liable for all damages caused, not just the foreseeable ones
  - Child liability
    - Generally can be liable (unless statutes put limit on age)
    - Parents are usually not liable for their children’s torts
- Can be sued for negligent supervision (hard to win)
- Tort must have been committed willfully or wantonly
- Damages available are capped
  - Insane
    - Majority of jurisdictions hold insane people liable for their torts
    - Intent exists even if basis for intent is not rational
    - Understand consequences
  - Dementia/Alzheimer’s
    - Intention irrational and not understand consequences > not liable
  - Dual intent rule
    - Intent to cause contact
    - And intent that the contact be harmful or offensive
  - Single intent rule
    - Intend a contact with another that results in a harmful or offensive touching

Assault
- intent the same as battery
- essentially attempted battery
- must be placed in imminent apprehension of harmful bodily contact to you
  - D’s actions/words put you in fear, threats of future acts generally don’t count
- Restatement Def.
  - Act intending to cause a harmful or offensive contact with another or an imminent apprehension of such a contact
  - And the other person is put in imminent apprehension.
- Reasonable person would be placed in apprehension of harm
- Length of time that apprehension of harm goes on for is only important for amount of damages, the fact that it happened is enough for assault
- Children can assault (as long as reasonable)
- Words alone don’t = assault, must look at other acts and circumstances

False Imprisonment
- Defined
  - conduct that intends to, and does, confine another within boundaries fixed by the actor
  - and the victim is either conscious of confinement (at the time) or is harmed by it
- Threat of physical force or claim of lawful authority (which is false) to restrain is enough to satisfy the confinement requirement
- Confinement implies a limited range of movement, not an exclusion
- Confinement by threats
  - threats or demands of action against the party > depends a lot on the facts surrounding the actions
  - assertion of authority, false imprisonment by a police officer who doesn’t have total legal authority is common type
  - duress of goods, ie. holding someone’s wallet hostage to keep them from leaving
- Damages
  - is a trespassory tort > even if no actual harm occurs > P can still recover damages
Torts to Property

- Trespass to land
  o Goal is to protect land owners exclusive right to possess their land
  o intentional entry upon land of another, by personal entry or causing an object to enter the land
    ▪ also, if you unintentionally enter but then refuse to leave
  o must have intent to enter the land (not necessarily trespass) or substantial certainty that entry will occur
  o trespassory torts > D is liable for damages even if no physical or economic harm has occurred
  o Punitive damages can be awarded if the trespass was deliberate or malicious (based on fact that actual damage has occurred although its immeasurable in mere dollars)
  o Extended liability
    ▪ Trespasser is liable for damages inflicted, even if not intended or unforeseeable (but has limits)
  o Leasee’s have the right to sue for trespass
  o Must be tangible physical object that trespasses (sound not count)
    ▪ Except pollutants or gases
  o Nuisance: interfering with a persons enjoyment of their land (hog farm)
    ▪ Must be substantial and unreasonable interference
    ▪ Remedies: pay for right to do nuisance, stop doing action
    ▪ Public: P must show that they have been damaged in a different way than the general public
    ▪ Private: individual cannot bring claim, must be brought by a public official
    ▪ Factors:
      • What is the P’s interest
      • D’s interest
      • Did P “come to the nuisance”
      • is the activity appropriate/inappropriate (unusual) for the community
      • value of the competing interest to society
      • how great is the harm
    ▪ tend to value residential over commercial interests
- Conversion of chattels – Trover
  o In my opinion essentially theft and the derivations on theft (whether knowingly doing so or not)
  o D must intend to take possession (substantial dominion) of the property
    ▪ but he does not have to be conscious of any wrongdoing (ie. grabbing the wrong book or getting the wrong coat)
  o Not firm principle to determine if the dominion (possession) is enough to qualify for conversion, it is a matter of how serious the indiscretion is, instead the Restatement looks at:
    ▪ Extent and duration of control
    ▪ D’s intent to asset right to the property
    ▪ D’ good faith
    ▪ Harm done
    ▪ Expense or inconvenience caused
o conversion only applies to tangible personal property (common law)
  o serial conversions (stolen watch that is resold example):
    ▪ the original owner has a legal claim against both parties, but can only collect from 1
  o Exception
    ▪ Bona fide purchaser rule
      ▪ Good faith purchaser can get full title over original owner
    ▪ UCC
      ▪ Bailment/bailee’s
  o Remedies:
    ▪ Usually monetary damages measured by the value of the property at time of conversion, or at the highest market value
    ▪ Replevin also can be possible
- Trespass to Chattels
  o involves intermeddling with another’s chattel, but in a way that is short of a conversion
    ▪ it can be a very gray area separating a conversion and a trespass, since conversions by definition vary in degrees
  o liability is available only if the owner suffers dispossession or lost use, or if the owner or the chattel is harmed
    ▪ Liability is based on actual damage, not value of chattel

IIED
- P must prove
  o D acted intentionally or recklessly
  o Conduct was extreme and outrageous
  o D’s action > emotional distress for P
  o Resulting emotional distress was severe
- IIED claim cannot be maintained as resulting from another tort
- Generally, jury’s decide if conduct was extreme and outrageous
- Determinants of outrageous
  o Repeated or over a period of time
  o Abuse of one’s power or abuse of someone they know is very vulnerable
- Insults don’t qualify
- Sexual harassment
  o If actions are verbal > no battery, but IIED can apply
- Dead bodies (both human and animal) cases have been received positively by courts
- Damages:
  o Depend on degree of actions/distress
- 3rd parties to an action can recover on an IIED claim if
  o P is a member of the person’s immediate family who is present at the time
  o Anyone else present, if distress > bodily harm

Affirmative Defenses to Intentional Torts
- Defendant has burden of proving affirmative defense

Self Defense/ Defense of Others
- use of reasonable force to defend against harmful bodily contact or confinement, it depends on the apparent necessity of the action not the reality
  - reasonable force > reasonably necessary to prevent harm > threat not death > no use of deadly force
- Reasonable retreat
  - restatement jurisdictions > you must do what is the safest action (retreat or stand ground)
  - majority of jurisdictions > you don’t have to retreat, you can respond (esp. if in your house)
- only reasonable force is covered, excessive force > liable for action
- provocation is not sufficient to > self defense
- self defense allows you to resist false imprisonment
- you may be able to assault or falsely imprison another in self defense
- you may defend others (3rd parties) on the same basis that you may defend yourself
- threat of serious bodily injury is enough to = and warrant deadly force

**Arrest and Detention**
- Shopkeeper has the rights of a “private person” > only has the authority to arrest without warrant when
  - There is a felony being committed
  - Misdemeanor that is a breach of the peace (disorderly/dangerous) is being committed
- Common law
  - property owner can detain against another’s will if he believes that he has tortiously taken his property > if nothing found > arrester liable for false imprisonment
- Restatement
  - Can detain for investigation for a short time, and until police arrive
- Police
  - can make arrests with warrants
  - or with probable cause or reasonable grounds to believe that felony has been committed
- Private parties
  - similar privileges as police, but if they are wrong > no protection

**Defense of Property**
- Restatement
  - a possessor of land cannot do indirectly (ie. setting of traps) and by mechanical device that which, were he present, he could not do immediately and in person
    - Only time you can use a “spring gun” is when the trespasser is committing a felony of violence, or your life is threatened
- the law has always placed a higher value on human safety than on property rights > you cannot use calculated force to cause serious bodily injury or death where only property is threatened
- the use of firearms to prevent an unlawful act that is not at least a felony is inexcusable
- for recovery of chattels
  - you can recapture if you do so immediately or in hot pursuit
  - if you have lost possession > you cannot forcibly recapture at a later date (b/c of possibility of violence)
- repossession of consumer goods (ie. cars)
cannot use force,
- you can repossess if it is peaceful
  - but the buyer (even if he’s in default) can defend his property with reasonable force
- repossession of land
  - courts are split
- Modern (emerging rule)
  - Courts transfer to a trespass > defense of self instead of defense of property > deadly force ok
  - Right to use deadly force on intruders entering your home

**Discipline**
- In all jurisdictions: parents can discipline their children, using force and confinement to do so
- Limits are not clearly defined
- People who are in charge of children also enjoy similar privileges

**Observing Privileges**
- idea that in some common law actions degree is not important (ie. offensive battery, no matter how small or short it lasted) where as in other situations, because the right of privilege (for teachers to discipline students, short term false imprisonment, self defense, etc), the degree to which they were reasonable does matter

**Consent**
- relationship of the parties is key
- in battery cases consent or the appearance of consent conveys the idea that the touching is not offensive
- this is a very subjective area of law
- Types
  - Actual consent
  - apparent consent (conduct)
  - Implied
  - Imposed
- Once you agree to conduct, you cannot then disagree to the harm that resulted from the conduct
- **Duress??????????**
- Incapacity:
  - render consent ineffective only if her condition substantially impairs her ability to understand and weigh the harm and risks of harm against the benefits from under taking an action
  - consent not ineffective unless the D knows of the incapacity
- must acknowledge the differences in parties power (employer/employee) in determining consent
- Federal statutes basically forbid sexual harassment of employees
  - But the damages available under these statutes are not good as those under common law
- Some states forbid any sexual contact between mental health professionals and their patients, because they are inherently unable to consent
- exceeding the scope of conditional consent
- Medical situations
  - A general consent, unless explicitly denied in advance or revoked by someone with authority on sight (husband/parent) is given for the surgeon to extend to operation to remedy any abnormal or diseased condition in the area of the original problem
  - Lack of consent > battery charge
  - Informed consent (Dr. not informing patient of risks) > negligence action
- Competence to consent
  - measured by P’s ability to understand the condition and the treatment and the effects of rejecting
- Minor’s
  - Can consent to abortions
  - Cannot consent to sex > battery
- Consent to a crime > 2 views and the restatement
  - Consent to illegal acts is ineffective
  - You cannot found a cause of action on an illegal act
  - Restatement: rejects any view that consent is ineffective, but that statutes may make some acts illegal to get rid of the pressures to engage in them
- can revoke consent at any time
- Restatement
  - for consent to be effective it must be to the particular conduct or substantially the same conduct as to which the defendant engages
- Consent procured by fraud is not consent
- If the plaintiff makes a mistake (due to a misrepresentation or that is known to the defendant), that mistake must be about the nature of the transaction consented to
  - Deciding if a scenario’s fraud or misleading = a tort > it has to do with the interest that the tort in question protects (ie. battery protects the inviolability of the person and trespass protects inviolability of the person’s property)

Necessity (Privileges not based on plaintiff’s conduct)
- Created by courts for reasons of policy
- police officers are privileged to enter land to execute a search or arrest warrant
- public utilities or common carriers have the privilege to enter appropriate portions of premises > utility cannot deny the right of the public to patronize it
- places generally open to the public cannot exclude patrons on basis of race, gender, etc
- privilege to enter another’s land to reclaim goods of one’s own
- limited privilege to exercise fee speech in shopping centers open to the public and campaign on public issues

Necessity specifically
- Individual rights of property in some situations (tearing down house to stop fire) give way to the higher laws of impending necessity
- Private rights of individual yield to the considerations of general convenience and the interests of society
- Necessity must be shown, if not > liable
- Does police destruction or seizure of property is a constitutional “taking” or not?
  - If it is compensation is required by operation of law
  - If not compensation required
  - I.e. in CA compensation is only required with the taking of public property for improvements
- you can trespass upon another’s land when necessity requires it, specifically to save your life or the lives of others
  - but, if your allowed trespass upon another’s property results in damage, you are liable for those damages

General:

Prima facie case for negligence
- cannot be liable for an act done without fault
- Reasonable person standard

Institutions of negligence practice
- negligence can be any conduct that creates an unreasonable risk of harm to others
- actionable as a tort when risk leads to an actual harm

- general formula for negligence
  - D owed P a legal duty
  - D breached that duty by behaving negligently
  - P suffered actual damage
  - D’s negligence was the actual cause of this damage
  - D’s negligence was the proximate cause of this damage
- P must prove each element of the case by a preponderance of evidence
  - I.e. negligence must be shown to be probable than not
- the fact that a case may be difficult to prove doesn’t relieve P of burden to present sufficient evidence to show the material fact existed
- P must present enough evidence to show more than a reasonable inference, otherwise it’s just speculation

Common Law Duty of Care – Good notes

General duty of care: prudent person standard
- General duty of care owed is to exercise the care that would be exercised by a reasonable and prudent person under the same or similar circumstances to avoid or minimize risks of harm to others
  - Reasonable person cares only about the kinds of harms that are foreseeable to reasonable people and risks that are sufficiently great to require precaution
- Reasonable depends on the risk of harm involved and the practicability of preventing it
  - Reasonable is proportionate to the danger involved in the activity
- Standard care remains the same under all circumstances
  - If danger is high reasonable person will exercise greater care
- Reasonable person in the same circumstances
  - If an emergency how a reasonable person would react
- Children sued for negligence are held to the reasonably careful child of same age, intelligence and experience standard
  - Very young children cannot be held negligent (rule of 7’s)
Child engaged in an adult activity > adult standard applies (motor vehicles)
- Generally, mental incapacity does not > exception for reasonable person standard
  - Policy reasons for applying standard negligence
    - Allocates losses between 2 innocent parties to the one who caused the loss
    - Incentive for those responsible for people with disabilities to restrain those who are potentially dangerous
    - Removes chance of fake mental disorders to avoid liability
    - Removes issue of trying to determine the significance of the persons liability
    - Forces disabled people to pay for the damage they do if they want to live in the world
  - Exception:
    - Mentally disabled person who is involuntarily hospitalized does not owe a duty of care to his professional caregiver > not liable for neg. or recklessness causing the caregiver harm
- Specialist/professionals
  - Any expertise or specialty that D has will be taken into account
  - Reasonable professional in the same situation and community
- Sudden medical emergency defense
  - D has an excuse for neg. if D can prove that a sudden medical emergency that was not foreseeable solely led to the negligence
- Physical disability (ie. bad eyesight) > not required to exercise a higher degree of care to avoid injury than is required of a person without disability
  - Ordinary care for a physically disabled person is the same as an reasonable person with the same disability would exercise under the same circumstances
- Intoxicated person owes the same care as a sober person
- Must exercise the memory of a reasonable person in recognizing a risk

Statutory Duties (negligence per se) – Good notes
- Violation of statutes is negligence per se
- If D violated the statute and that violation was a proximate cause of P’s harm > D is liable
  - Applies to violation of city ordinances, administrative regulations and state statutes
- 2 ways legislature can create legal duties
  - Can create a legal duty and provide a civil cause of action for its breach
  - Can enact a penal statute that does not explicitly provide a civil remedy and the courts derive a civil legal duty from the penal statute
- Negligence per se = conduct is negligent as a matter of law
- 2 threshold questions that must be answered
  - If P belongs in the class of persons the statute is designed to protect
  - If P’s injury is of the type that the statute was designed to prevent
  - Restatement: D is neg. if, without excuse, D violates a statute designed to protect against the type of accident caused and if the victim is within the class of persons the statute is designed to protect
- Courts can expand or contract class depending on their interpretation of legislative intent
- Neg. per se only resolves the breach of duty issue, still must prove proximate cause
- Courts must follow statutes
- Statutes can create new torts (ie. civil rights act)
If CL obligation did not exist and the statute does create a new action for recovery (or say which one should be used) > no recovery available for violation of statute (statute with no teeth)

- Minors violation doesn’t = neg. per se, but can lead to neg.
- Excused violation of a statute > not negligence > 5 categories for excusability (this is not an exclusive list
  o Violation is reasonable b/c of D’s incapacity
  o D neither knows nor should know of the occasion for compliance
  o D is unable after reasonable diligence or care to comply
  o D is confronted by an emergency not due to his own misconduct
  o Compliance would involve a greater risk of harm to D or others

**Special and Limited Duties**

1. **Medical Malpractice**
   a. Traditional duties of health care providers in traditional practice
      i. usually must be a patient to assert a medical malpractice claim
      ii. Medical standard of care
         1. P must establish the standard of care necessary for the specific type of medical action through expert testimony
            a. Must be a general standard for that procedure, not just a certain doctors preference or opinion
         2. P must then prove that judged on these standards the doctor was unskillful or negligent and that his lack of skill/care caused the injury to P
         3. Expert testimony is needed to support a charge of malpractice because jurors are not skilled enough in the practice of medicine to determine the duty of care necessary
            a. Exception:
               i. Conditions where doctors conduct was extremely grossly negligent or treatment was so common that a layman could judge it
         4. Rationale for different standards of care:
            a. Medical profession is one which involves the exercise of individual judgment within the framework of established procedures
            b. Differences in opinion are constant with the exercise of due care
      5. medical standards = a rule for the exact situation involving P’s case
      6. often jury instructions emphasize D’s side of case by telling jury that D is not liable for an honest mistake or bona fide error
      7. when competent medical authority is divided > physician will not be held responsible if he followed a course of treatment advocated by a considerable number of recognized and respected professionals in his area of expertise
     iii. Modified locality rule
        1. modified locality rule
a. not used often anymore, originated in late 1800’s when medical care was greatly different in different areas
b. standard of care is that degree of care, skill and proficiency which is commonly exercised by ordinarily careful, skillful and prudent physicians at the time of the operation and in similar localities
c. means only a local physician or doctor that knows what the local standard is can testify against the doctor

iv. Specialists
1. specialists are held to the standard of their specialties
2. nonspecialists can sometimes testify at specialist trials but will only be helpful if their expertise overlaps with that of D

v. Nonmedical practitioners
1. nonmedical practitioners (ie. chiropractors, podiatrist, etc) are subject to the standards of the school they profess not to medical standards
2. Medical practitioners must refer their patients to specialists when the standard of care so requires

vi. Good Samaritan Rule
1. Good Samaritan rule
   a. A physician who in good faith renders emergency care at the scene of the emergency will not be liable for any civil damages as a result of any acts or omissions by such person in rendering emergency service. (Utah)
   b. Other versions of this leave open possibility for liability for gross negligence, wanton conduct or intentional wrongdoing
   c. Exception:
      i. Physician cannot have a preexisting duty to aid that person
      ii. Presence of a preexisting duty depends on doctor-patient relationship, contractual duty to respond, hospital rules, etc
2. 29 states have good Samaritan statutes that do not explicitly address whether in-hospital care can be shielded from liability under the statute (includes NJ)
   a. Other jurisdictions are evenly split between the 2 other extremes
3. NJ court looked to legislative intent of statute and decided that it only covered situations in which a physician by chance comes upon a victim who requires immediate emergency medical care
   a. A hospital or medical center does not qualify under the terms of the good Samaritan act
4. many other special statutes that favor physicians who act in an emergency, some don’t give immunity but simply make it more difficult on P to prove

vii. Other professionals
1. nurses are held to the standard of nurses in a similar practice, doctors can testify on that standard
2. hospitals owe a duty of reasonable care under national standards fixed by the Joint Commission on Accreditation of Hospitals
3. Pharmacists owe no duty to clients to warn that their physician has prescribed an excessive dosage, they can only be liable if they voluntarily give appropriate warnings and fail to give correct ones
4. Members of learned professions or skilled trades (architects, engineers, accountants, and lawyers) > expert testimony may be required to establish risk, and also to establish that the risk was a violation of professional standards
5. If alleged educational malpractice is a product of training, testing, promotion, failure, or classification of the student > there is little or no duty
   a. Possible exception:
      i. Bad advice from guidance counselor > missed scholarship
b. RIL
   i. test for exclusive control is not a strict requirement in RIL (maj and restatement)
   ii. If P received unusual injuries while unconscious by anesthetic > all D’s who had control over his body or the instruments that might have caused the injuries can be called as D’s and forced to give an explanation of their conduct
   iii. Assisting physicians and nurses that assist a surgeon become temporary servants of the surgeon and liability for their negligent acts can be transferred to him via vicarious liability
c. Informed consent
   i. every competent adult has a right to forgo treatment or cure
   ii. physician is required to divulge in a reasonable manner sufficient info to enable patient to make an informed judgment
   iii. physician owes duty to patient to disclose in a reasonable manner all significant medical info that the physician possesses or reasonably should possess that is material to an intelligent decision by the patient whether to undergo a procedure
      1. materiality = the significance a reasonable person in the patients position, in the view of a reasonable physician, would attach to the disclosed risks in deciding whether to have treatment
      2. layperson can make determination of materiality
   iv. there are situations that call for a privilege of nondisclosure
   v. burden of proof is on physician
   vi. there must be a consequence as a result of the undisclosed risk
   vii. P must show that if proper info had been given > neither P nor a reasonable person in a similar situation would have undergone the procedure
   viii. majority > when no statute defining the standard, the materiality of the information is the correct standard
   ix. court must abide by patients wishes unless there are truly extraordinary and compelling reasons to override them
   x. the standard for disclosure is that of a reasonable medical practitioner > need expert testimony

II. Nonfeasance (no duty to act rule)
   a. General
i. CL rule
   1. D is generally subject to liability for misfeasance (negligence in doing something active)
   2. But, is not for nonfeasance (doing nothing)
   3. A person doesn’t owe another any duty to take affirmative steps for the others protection

ii. Misfeasance
   1. if D has done something unlawfully that it could have done lawfully

iii. if D does not have legal responsibility for placing P in the situation > law imposes no duty on D to rescue
   1. Mere fact that D saw P in a position of peril imposes no legal duty to go to P’s rescue, unless D was legally responsible (to any extent) for placing P in that position

iv. individuals should be responsible for their own actions and should not be liable for others independent misconduct

v. rationales for nonfeasance rule:
   1. should not count on nonprofessionals for rescue
   2. # of potentially liable nonrescuers would be hard to define
   3. Threat of liability would deter prospective rescuers from attempting rescue

b. Exceptions and Qualifications
   i. General qualifications
      1. if D has reason to know, or should have reason to know, that his conduct (tortious or innocent) has caused harm to another > D has a duty to render assistance to prevent further harm (man hit by train example)
      2. If D has created an unreasonable risk of harm (even innocently) > a duty of reasonable care arises to employ reasonable care to prevent the harm from occurring (motorist hits horse on road, has duty to remove horse)
      3. If a statute or ordinance requires D to act affirmatively for the protection of another (landlord placing locks on doors)

ii. Assumption of care
   1. If D voluntarily undertakes action to care for P and then fails to exercise due care in the performance of that action > liable
      a. Voluntary assumption of care
      b. Girl dies from alcohol poisoning after drinking goldschlager
      c. Preventing others form calling for help (ie. ambulance) is a violation of the exercise of due care
   2. Restatement:
      a. If D takes action to render services to another, when D knows or should know that these services will reduce the risk of harm to other, D has a duty to use reasonable care in rendering services if:
         i. Failure to exercise care would increase the risk of harm beyond what existed before D’s action
         ii. The other person relies on D using reasonable care in the action
3. legal duty to everyone to avoid any affirmative act which may make a situation worse
   a. if D discontinues aid, liability is imposed if by acting unreasonably he left the victim in a “worse position”
4. if D voluntarily begins to take charge of an imperiled or helpless person, then he assumes a duty to take charge in a reasonable manner
5. “special relationships” recognized by the restatement that place D under a duty or reasonable care for P’s safety, including reasonable and affirmative efforts to rescue
   a. This list is not exclusive and the court can find additional relationships that give rise to a duty to assist
   b. Carrier-passenger
   c. Innkeeper-guest
   d. Landowner-lawful entrant
   e. Employer-employee
   f. School-student
   g. Landlord-tenant
   h. Custodian-person in custody
iii. no duty to exists to prevent suicide
   1. rationale: if D tries to intervene but P still commits suicide later > D placed P in no worse of a position than before she intervened
   2. exception: custodial relationship or special circumstances
c. 14th amendment (due process clause)
i. 14th amendment (due process clause which requires the State to protect the life, liberty and property of its citizens against invasion by private actors)
   1. Does not impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means
   2. Its purpose is to protect the people from the State, not ensure that the State protected them from each other
ii. Since 14th amend. Does not require the State to provide particular/specific protective services > State cannot be held liable under amend. For injuries that could have been avoided if it had chosen to provide them
iii. State’s affirmative act of restraining an individuals freedom to act on his own (incarceration, institutionalization, etc.) > deprivation of liberty > triggers the protections of 14th amend.
iv. Statutes and courts decisions can impose affirmative duties of care
v. Con argument to not applying 14th amend.
   1. Inaction can be as abusive of power as action
   2. Oppression can result when a State undertakes a vital duty and then ignores it
d. State Tort law protections for abused children
   i. Some courts have held that State child protective statutes > creation of “special relationship”
      1. Statute that was closely focused on protection of a specific class of persons and directed action by specific public entities > special duty/relationship
ii. Others completely disagree

e. Custody and section 1983 claims
   i. No due process right to a safe place in which to work

f. Other grounds for creating a constitutional duty
   i. P could have a constitutional duties claim if:
      1. P was in custody and officials intentionally failed to protect her
      2. P was a victim of selectively unfavorable treatment of disfavored groups
      3. P had an entitlement created by state law and the officials deprived her of that entitlement w/o due process
      4. Officials actively created the danger > harm to P

ii. State created danger
      1. If state officer takes affirmative actions that create a danger > D is under constitutional duty to P
      2. Equal protection route (instead of due process)
         a. If police action (or inaction) is the product of intentional discrimination > it violates the equal protection clause

III. Duty to protect from 3rd persons
      - generally, defendants owe no duty to protect P from a 3rd person’s conduct, this chapter is all exceptions
         a. D’s relationship to P
            i. whether a duty is owed is a question of law
            ii. 4 approaches to resolving the foreseeability issue
               1. Specific harm rule (outdated/too restrictive)
                  a. Landowner doesn’t owe duty to protect patrons from violent 3rd parties, unless he is aware of specific, imminent harm about to befall them
               2. Prior similar incidents test (can lead to arbitrary results)
                  a. Foreseeability is established by evidence of previous crimes on or near the premises
               3. Totality of circumstances (most common approach, has been criticized for being too broad > imposes unqualified duty to protect customers in areas experiencing any significant level of criminal activity)
                  a. Many factors into account
                     i. Ie. nature, condition, and location of the land, as well as other relevant factual circumstances bearing on foreseeability
                     ii. If owner knew or should have know
                     iii. Places greater duty on owners to foresee risk of criminal attacks on their property
               b. not require prior similar incidents
               c. treat foreseeability as a fact question to be determined like other facts, from any relevant circumstances
               4. Balancing test (Ca and Tn)
                  a. Balances the foreseeability of harm against the burden of imposing a duty to protect against the criminal acts of 3rd persons
b. Made in attempt to get rid of unfairness in totality test and balance interest of businesses and their customers
c. High degree of foreseeability required will rarely be proven in the absence of similar incidents
d. foreseeability, when analyzed to determine the existence or scope of duty, is a question of law

iii. foreseeability does not require identical crimes in identical locations
   1. previous crimes on the premises or nearby > foreseeable

iv. imminent harm known > tavern owner who knew man was drunk, who then attacked another patron > owner liable for failing to deal with the situation

v. Special relationship
   1. in general, a private person has no duty to protect another from criminal acts by a 3rd person, unless there is a “special relationship”
      a. in house invitee cases > even if there is a special relationship and 2 guests fight > owner not liable unless he had knowledge of attackers criminal propensity
      b. special relationships are determined by the courts from the facts, not by some list

vi. employers duty to its employees (end in class)
   1. employer only owes reasonable care to protect employees from 3rd parties if employee comes into a position of imminent danger and this is known to the employer

vii. Schools/child abuse
   1. schools share a special relationship with students entrusted in their care > scope of duty is limited by what risks are reasonably foreseeable
   2. school employees who have supervisory responsibilities have duty
   3. time of duty is limited to periods when parental protection is compromised
   4. employees with supervisory power over hiring and firing might be liable for negligent hiring and retention, if they should have known person was an abuser
   5. when a school official knows or should know of abuse or harassment by teachers > they are in breach of their duty of care if they do nothing about the abuse
   6. child abuse statutes > 3 directives arise in tort cases
      a. statute directs child protective agency to investigate and protect
      b. statute directs public agency to investigate child-care facilities and to refuse or cancel a license if necessary
      c. statute directs anyone who reasonably suspects child abuse to report to protective agency
   7. any duty to report child abuse would be based on a special relationship with the child or the abuser

8. medical doctors that violates medical standard of care in failing to report suspected child abuse > is liable for abuse that occurs later and this liability is independent of the statutory reporting requirement
9. schools are under a duty to adequately supervise students and are held liable for foreseeable injuries proximately related to the absence of adequate supervision
10. when a school doesn’t have custody it has no protective obligation/or special relationship
   a. even if student is in the process of traveling to a mandatory school event
11. schools duty is not based on ownership of property but on its relation to the student and that this duty is separate from general duty of responsibility
viii. colleges
   1. colleges not have duty to protect or guide students with regards to sex, alcohol, drugs or even overstudy
ix. Landlord tenant
   1. landlord-tenant relationship is not by itself enough to overcome general rule, b/c landlord is in no position to protect from criminal acts
   2. landlord has control over common passageways and tenant has no power to control them > landlord has duty of reasonable care to maintain in a reasonably safe condition for tenants
   3. standard of care for landlord is that which was in existence when the tenant became a resident > need to keep same relative degree of security
   4. if lessor brings in dangerous 3rd persons, as tenants or visitors, > duty exists
   5. landlord owes a duty to tenants guests in common area’s
b. D’s relationship with dangerous persons
   i. landlord is under a duty to 3rd parties to do all he legally can to get rid of a dangerous condition on the leased premises, including getting rid of tenant
      1. landlord is under (some) duty to take reasonable precautions to protect others from injury by a tenants dog (questionable to what extent)
   ii. employer, by same logic, can be liable for negligently hiring a dangerous person
   iii. halfway house became custodian in charge of prisoner (special relationship) > their duty was not only to victims that might be identified in advance, but to all those who are directly and foreseeably exposed to risk of bodily harm due to their negligence
      1. custody can extend to parole officers and govt. agencies that don’t fulfill duty of care in notifying others
iv. relatives of a repeat offender do not have a duty to warn 3rd party (even when offender dates woman and molests her son at the relatives house)
v. duty to control Children
   1. parents are liable only for failing to control some specific dangerous habit of the child, that the parent knows or should have now in the exercise of reasonable care
   2. parents must have had reason to foresee/know of the particular type of action
   3. parents inability to “control” child (due to age or custody) can be a reason not to impose duty of care
vi. if a therapist determines that a patient poses a serious danger of violence to others > he has a duty to exercise reasonable care to protect the foreseeable victim from danger
   1. the risk of unnecessary warnings is a reasonable price to pay for the lives of possible victims that may be saved
   2. therapists obligation to his patient requires that he doesn’t disclose a confidence unless such disclosure is necessary to avert danger to others
   3. protective privilege ends where the public peril begins
vii. a releasing agent (jail, court, etc.) may be liable for failure to warn, if a released offender poses a predictable threat of harm to a named or readily identifiable victim (cannot be a general class)
viii. some courts have extended this to suicide victims, when a counselor who knew of a possible suicide did not do enough to prevent it
ix. IV. Emotional Harm
   a. old rule: no recovery for fright alone and no recovery for consequences of fright
      i. without physical injury > negligence of D is not a proximate cause
   b. most states did away with the impact rule in the mid 1900’s, b/c they thought there was little difference between if someone was only barely touched vs. not touched
c. many jurisdictions:
   i. refuse to permit recovery for fright or shock alone >
   ii. physical manifestation or objective symptom rule:
      1. if no impact > P can only recover if P produces evidence of physical harm resulting from the shock
      2. or, some type of objective physical manifestation of the shock or fright occurring after the events in question
      3. some courts have modified this to only require: objective corroboration of the emotional distress alleged (often the facts of the event corroborate the claim
      4. other courts > emotional injury must be medically diagnosable as an emotional disorder, but not necessarily reflected in physical manifestations
   iii. some jurisdictions have abolished the physical injury rule
      1. because focus on physical injury was overinclusive (permits recovery for trivial emotional distress from minor injuries)
      2. and underinclusive (mechanically denies claims that might be proven valid if evidence was presented)
      3. > likelihood that an emotional injury is genuine can be found in the facts
d. if P suffered from emotional problems before the incident > if P gets worse b/c of accident > P must be compensated for the full extent of the aggravation
e. when D’s negligence aggravates a preexisting condition > victim must be compensated for the full extent of the aggravation
f. Emotional harm resulting from an injury to another:
g. Mental distress
   1. concerns for allowing recovery of emotional injury w/out any physical injury
a. emotional injuries may occur far removed in time and space from the negligent act that triggered them
b. no limits to the # of people who might experience emotional injury due to a negligent act

2. Zone of danger test: (Dillon)
   a. P within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself
   b. Fear of one’s safety is essential and must be expressed at or near the time of danger for P to win
   c. P can recover fear of for the safety of another if P suffers imminent apprehension of physical harm
   d. Required elements:
      i. P must be within the zone of danger and suffer imminent apprehension of physical harm which causes or contributes to the emotional injury

3. Federal employers liability act > SC adopted zone of danger test for injury claims brought under FELA

4. Exception to zone of danger (Dillon case)
   a. D might owe a duty to protect not only the injured person but those who might foreseeably suffer emotional harm because of the injury > factors determining foreseeability:
      i. P’s proximity to the accident
      ii. Direct emotional impact vs. learning about incident afterwards from others
      iii. Relationship between P and victim

5. Thing rule: restricting the zone of danger test, b/c too broad/open to interpretation > 3 conditions that must be met:
   a. closely related by blood (live in same household)
   b. P is present at the scene and time event occurs and is aware that the event is causing injury to the victim
   c. And, results in P suffering serious emotional distress (a reaction beyond that which would be anticipated from a disinterested witness but not an abnormal response to the circumstances)

6. Bird rule (applies to both Dillon and Thing)
   a. P must be contemporaneously aware of negligent conduct and causation
   b. P was not present at the time the artery was cut (didn’t matter that she was present during some of the emergency treatment and saw her mothers condition)

7. Generally, a parent who doesn’t see event, but see’s child later at hospital > no recovery
   a. Exception: under Dillon rule > P can recover if they arrive at scene of injury before the victims location or condition has changed

8. Most states > must be family member (fiancé usually not count)
9. Co workers and rescuers don’t = close relation
10. But if P was the unwilling trigger to victims harm > sometimes can recover (malfunctioning commercial trash compactor)

11. Another special circumstance in some jurisdiction > can recover for emotional harm if:
   a. Harm to victim was death or severe injury
   b. P witnessed the harm or came on the scene soon after
   c. Close relationship by blood

12. 2 classes of emotional harms cases:
   a. P is a bystander with no preexisting relationship to D > Thing rules apply
   b. P is a direct victim > P has a preexisting relationship with D and P’s claim is based on a breach of duty (assumed, imposed as a matter of law, or arising from a relationship between the parties) > Thing rules not apply > can recover without showing them

h. Consortium

   1. originally for master-servant relationship and loss of services, but has carried over to husband/wife and non-economic losses
   2. concept of consortium includes not only loss of support or services, but also love, companionship, affection, society, sexual relations, solace and more
   3. in 1950’s wife became able to recover
   4. distinction between ED claims and consortium
      a. In emotional distress > courts traditionally emphasize an acute moment (shock or fright)
      b. Consortium claim > recognize legal harm in a chronic ongoing sense of loss
   5. majority of jurisdictions have declined to recognize parent child consortium claims
      a. mostly policy arguments:
         i. consortium claims expand liability of a negligent act
         ii. courts unable to develop rational limits to consortium
         iii. impacts cost of insurance
   6. some states have enacted statutes barring spousal consortium (ie. Utah)
   7. wrongful death cases (which can allow for recovery of the decedent’s loss of society and affection) are distinguishable from consortium cases
   8. example: before injury P’s spent time together enjoying walking, gardening and fishing, but after injury they no longer engage in outdoor activities and spend much of their time watching TV
   9. consortium claims are traditionally viewed to derive from the claim of the physically injured spouse > a derivative claim can rise no higher than the claim from which it is derived
      a. contributory negligence of injured spouse will bar or reduce consortium claim just as it would the injured spouse’s claim
      b. exception in some jurisdictions: claim is independent and not affected by the fault of the injured party, or even a release
   10. some courts have allowed claim for a child’s loss of parental consortium
11. most jurisdictions > parents do not have a claim for consortium with there kids
   a. exception in a few courts and statutes: when kid is severely injured or comatose > courts emphasize that it is closely similar to death
12. rationale or denying consortium to kids loss of parents
   a. greatly expands # of possible P’s
   b. magnifies damages
   c. increase insurance costs, but return is only monetary (parent is still done)
13. until 1994, courts rejected consortium claims by unmarried cohabitants
14. now a few courts allow cohabitant claims, also several states have done so statutorily
15. generally, courts have rejected NIED liability based upon breach of contract or negligent damage to property
   i. Duties to protect emotional wellbeing independent of physical risks
      i. CL and many statutes > forbid NIED if harm is to property
      ii. In burial case > D has a reasonable duty of care to family members who are aware of, and for whose benefit the funeral is being performed
      iii. No NIED where distress is caused by the P’s fear of a nonexistent physical peril
         1. If physical part never comes about > no NIED
   iv. Majority view
      1. P must face actual physical peril to get NIED (majority view)
         a. If actual physical event never occurs > peril not physical > no NIED
      2. Misinformation rarely > a direct risk of physical harm > erroneous/misinformation doesn’t > NIED in those jurisdictions
      3. Messages erroneously announcing a relatives death can > NIED (some jurisdictions)
      4. If P’s emotional distress arises because of info that D has told others about > no NIED claim
      5. no cause of action for emotional distress except where the D creates a risk of physical harm
      6. bystander recovery would work under Dillon rule
   v. Minority view
      1. If serious or severe emotional distress to the P was the reasonably foreseeable consequence of D’s negligent act or omission > NIED claim
      2. Serious or severe > must be proven and a jury will decide whether and to what extent the D’s conduct caused emotional distress
   vi. Extreme minority (emerging rule)
      1. 2 rules set out
         a. The physical manifestation or injury rule will no longer be followed
         b. And, NIED claims should be analyzed under the general negligence approach (same as any other negligence case)
      2. Put in new requirements
         a. Severe injury and expert medical proof
j. Fear of future harm cases (Aids and cancer)

**Breach of Duty – good notes**
- If D has a duty to P and that duty is breached > D is negligent
- Negligence entails overt behavior that creates risks a reasonable person would avoid
  - Must look at alternative conduct
  - A state of mind is not conduct
- What distinguishes negligence from intentional tort, is an intention to act vs. an intention to harm
- Workers comp. statutes are based on the theory that work connected injuries can be regarded as part of the employers cost of doing business (i.e. like broken plates in a restaurant)
- Risk must have been foreseeable
- If the cost is high to avert an action whose probability of risk is low > reasonable care doesn’t require that you take that action, only that you take a reasonable action (choking in restaurant)
- Light pole case
  - D must anticipate the environment that the product will be used in and design against foreseeable risks that might arise in that environment
  - if the injury that results would probably be serious > the likelihood of accidents does not need to be high to warrant increasing safety measures
    - if D could have increased the safety for a marginal cost and didn’t, b/c they wanted to save $$ > will be much more likely to be in breach of duty
  - idea of shortfalls in safety and high probability of serious injury > unacceptable risk of grave injury
- degree of risk of harm to invitees must be weighed against the privilege to protect your property
- social value of D’s action can be important, if is a matter of high social utility (garbage truck scaring horse case)
- **Risk utility weighing to determine negligence**
  - The cost of making D’s activity safer
  - The social usefulness of the activity
  - The probability of any harm from the activity
  - The likely amount of harm if any harm results
- P will point to an alternative conduct that is safer > must determine how much safer and what it would cost
- Applying the risk-utility formula
  - For comparison of costs and benefits > use real #’s
  - Memory of a reasonable person is required (usually regarding dangerous conditions that P knows about)
  - The harm must be foreseeable or risks that would be taken into account by a reasonable person
- Risk utility > maximizes community resources
  - Negative argument to risk utility > puts too much weight on economic factors when weighing potential cost vs. potential risk
- Possible alternatives to the risk utility formula > the judge/jury could look at (not important):
  - What seems to be negligent to them
  - Statutes only
Custom evidences effect on Duties -Good notes
- can set internal standards for yourself that exceed ordinary care
- failure to follow precautionary procedures or steps is not necessarily a failure to exercise ordinary care
  - they are best practices, not legal/industry norms
- how to analyze possible jury instructions
  - correctly states law?
  - supported by evidence on the record?
  - is covered by other instructions?
- Party’s own rules of conduct are relevant and can be put into evidence, with the disclaimer that they are only for evidence and not to serve as a legal standard
- proof of a general custom (or industry practice) is admissible because it establishes a standard with which to judge ordinary care, where the custom exceeds the existing minimum statutory safety requirements
- evidence that D violated customary safety precautions of that industry/community > sufficient to get to jury (sum. j not apply)
- generally, can’t show that it is customary to not abide by a statutory law
- Reasons that courts allow juries to look at safety customs:
  - That a safety precaution was feasible
  - Show that harm was foreseeable
  - D knew or should have known of risk
  - Risk was unreasonable, unless the customary precautions had been taken
- Proof of a custom that is not done for or related to safety at all > not show negligence
- Reasonable man standard > what is usually done is what ought to be done
- Generally accepted methods, practices, or rules of experienced people can be shown to aid the jury in comparing the conduct of the D to the required norm of a “reasonable man”
  - These generally accepted methods are simply evidence, not binding
- If a certain action is not a general custom in a certain industry, the courts can take the power to make it one, including the following guidance:
  - Industries cannot set their own tests/standards (otherwise you have the risk of lagging implementation of new practices)
  - There are precautions that are so important that a whole industries disregard of them will not excuse them not being used
  - Courts have the final say

Res Ipsa Loquitur - Good notes
I. Origins and basic features
   a. Res Ipsa Loquitur: in some cases the fact that an accident occurs raises an inference of negligence which allows P to establish a prima facie case (without evidence of negligence)
      i. Idea that the evidence speaks for itself > D must have been negligent
      ii. When RIL applies > permits inference of negligence that can satisfy the
b. I can be inferred that the harm suffered by P was caused by negligence of D, when:
   i. The event is one which does not normally occur w/o negligence
   ii. Other responsible causes are eliminated (ie. conduct of P or 3rd party) 
       (previously, but thought to be too restrictive, “the instrument that caused
       the accident was under the exclusive control of the defendant”)

   1. Contemporary view of control rule: it is enough that the defendant
      was one of the persons who was probably negligent
   iii. Indicated negligence is within the scope of D’s duty to P

c. Restatement 3rd for
i. negligence inferred when the accident causing harm is the type that
   normally happens because of the negligence of the class of actors of which
   the D is a member

d. Procedural ramifications
i. RIL > P gets past directed verdict and gets to jury
   1. P’s burden of proof > can survive a motion to dismiss
ii. If RIL applies > it will be included in jury instructions, that the jury may
   draw the inference of negligence but that they don’t have to
   1. Inference of negligence is permissible, it doesn’t shift the burden of
      persuasion
iii. However, inference of negligence does not shift the burden of proof
   1. Jury may then weigh evidence and conclude
iv. if judge thinks jury lacks specific knowledge/experience to weigh
   probability > directed verdict for D
v. In very extreme cases (ie. switching babies) directed verdict can be entered
   for the P on a RIL admission

e. Minority of jurisdictions say that RIL > presumption of negligence > 2 choices
i. (shifting burden of persuasion) if RIL applies > D has burden to prove he’s
   not negligent
ii. (shifting burden of production) judge will give directed verdict to P unless
   D can show evidence of not being negligent

II. Attributing the fault to defendant rather than others
a. General purpose of the control requirement: indicating that it probably was the
   defendants negligence that caused the accident
   i. Must show that other possible D’s were not cause of negligence
   ii. control is a flexible term for RIL
   iii. D may be responsible and RIL applied where he shares control with
        another
b. if only 2 D’s and they had consecutive control over P and negligence occurred > RIL
   can be applied even though there are 2 parties 
c. But if serial or consecutive control exists > hard to tell which party is at fault > ? of
   which D is negligent

III. Negligence more probable than not?
a. power line falling without explanation example
   i. if something doesn’t usually occur without fault to a certain party, then if
      that action occurs without explanation > RIL applies to that party
b. fallen power line ignites ruptured gas line example
i. other forces can cause a downed power line (RIL not apply)
ii. But ruptured gas line feeding a fire does not ordinarily occur without negligence > RIL apply
c. if the judge believes that the jury has the common life experience to make a judgment > RIL will apply and question will go to jury for verdict

Actual Harm - Good notes
I. The plaintiff must suffer legally cognizable harm (actual damages)
II. negligence towards animals
   a. if the negligence does not decrease the value of the animal (only hurts it) > no harm done > no damages
III. if P shows that negligence > a legally recognized harm > nominal damages are permissible
     if the amount of actual loss cannot be determined
IV. Personal injury cases
   a. if a cause of action for compensatory or nominal damages is established > punitive damages can be available, but only if D acted in bad state of mind

Cause in Fact – good notes
- Suffered legally recognizable harm and that harm was caused by the defendant
- Conflict between:
  o Neutral factual issues
  o vs. policy judgment of what D’s legal responsibility should be
I. But-for test of causation
   a. but-for D’s conduct, P would have avoided injury
   b. but-for test forces judge/jury to image alternate scenario’s of what would have happened without D’s negligence
   c. Problems with and alternatives to the but-for tests
      i. liability of 2 or more persons
         1. the but-for test will find both parties liable for causing the accident (it works)
         2. indivisible injury caused by multiple parties > cannot apportion liability by causes > must use a form of fault apportionment
         3. if separate injuries are caused to the same P by different D’s > each will be liable for the one he caused
   ii. Cases when D is liable without but-for causation
      1. Respondeat superior liability: employers for their employees during the course of work
      2. Partners > each are liable for the others act
      3. Parties in a conspiracy (in concert) to cause harm are all liable for any harm caused
         a. If 1 person is found to be but-for cause liable > all are liable
   iii. duplicative causation
      1. preempted cause
         a. if 2 actions occur at separate times (can be a difference of seconds) the one that occurs first will be liable, even though the other action would have caused the same effect
2. duplicative cause
   a. if 2 actions both would have caused the same result and would have done so regardless of the other one and then they merge/occur at the same time > both actions are liable
   b. if the tortuous acts of 2 or more parties join to produce an indivisible injury, all of the wrongdoers will be held jointly and severally liable for the entire damages > P can proceed against each D separately or all in 1 suit

iv. Substantial factor test
   1. Use when the but for test would fail b/c two or more causes concur to bring about the same event
   2. Actual causation if the D’s action was a material or substantial element to the harm done

v. Restatement
   1. If tortuous conduct of one tortfeaser (A) fails the but-for test only b/c there is another set of conduct also sufficient to cause the harm > A’s conduct is still a cause in fact

II. Increased Risk showing causation
   a. If there is a strong causal link, the negligent D must bring in evidence that denies the but-for cause and suggesting that in the actual case their wrongful conduct had not been a substantial factor
   b. asbestos cases (increased risk)
      i. under certain conditions D’s negligence is or can be the cause in fact of P’s harm when the harm is of the very kind D should have protected against (not apply very often)

III. Proof: What was caused?
   a. if it is found that but for a D’s negligent action, the P would still have been injured > damages will be based on P’s condition as if the injury had occurred, not P’s condition before it all happened
   a. Fact pattern: one of two hunters negligently shot another hunter, but don’t know which hunter fired the shot that struck
      i. Generally courts hold both hunters (joint tortfeasers) liable, under the following rationales:
         1. Acting in concert (this is a stretch for this doctrine)
         2. To hold otherwise would be to exonerate both from liability, although each was negligent and the injury resulted from such negligence
         3. Burden of proof shifts to the defendants, if one of them can show that he did not cause it > prove it
         4. D’s are in a much better position to offer evidence and determine which one caused the injury
      ii. Court also found that if the D’s had been independent tortfeasers the same policy considerations > D should have the burden of proof and if apportionment is incapable of proof > wrongdoers should be left to resolve the apportionment
   b. P must prove that all the D’s were negligent, but also that other persons were not and could not have been causes of the harm suffered
      i. “Highly unlikely” is not strong enough to fulfill the “could not have” standard
Apportionment of Fault

II. Assessing Responsibility in Multiparty situation (Apportionment of fault)
   a. using example of light pole case: P1 (hurt kids), P/D (lady driving car), D (company)
   b. Comparative fault
      i. P/D can recover but damages reduced by proportion of her fault
      ii. P/D’s recovery not reduced if D commits an intentional tort, but is reduced for negligence or strict liability
      iii. D’s liability reduced by same amount > pays less damages
   c. Apportioning among D’s
      i. D and P/D would pay damages to P’s based on the proportion of fault
   ii. 2 systems of splitting up damages
      1. Joint and several liability
         a. P can enforce her claim against either D
         b. > Contribution
            i. If P enforced claim against D > D would then charge P/D for the proportion they were liable for
            c. If one of the D’s is insolvent (no S) or immune from liability > the other D would pay all and then no be able to collect contribution
      2. Several liability and comparative fault apportionment
         a. Each D is responsible only for their proportion of fault

III. New forms of apportionment
   a. alternative liability (from Summers v. Tice)
      i. Ds forced to reveal culpable party or be held jointly and severally liable themselves
      ii. Goal is fairness, works best with small number of possible wrongdoers, all of whom breached a duty to the P and the liability that one of them injured the P is relatively high
      iii. Problem: when there are a large # of D’s > probability that any one of them caused it decreases > fairness disappears
   b. Theory of concerted action (drag racing rule)
      i. Holds joint and several liability for all D’s having an understanding, express or tacit, to participate in a common plan or design to commit a tortuous act
   c. Policy reasons and the interests of fairness > court feels compelled to find a way for P to recover
      i. States that this is not a general rule, but in these unusual circumstances it will make a way for P to recover
   d. > Market share theory:
      i. This court adopts a national market share distribution of risk, based on the amount of risk of injury that each D created in the public at large
      ii. Product must have been marketed for the use that caused the problem
      iii. Only several liability > producers that are still in business do not have to make up portions that are due from insolvent producers
      iv. Different hybrids that other courts have tried
1. Must get substantial share of the possible D’s and that each D that could not prove that it did not actually injure P would be liable according to that manufacturer’s market share
   a. Rationale: market share will result in liability on part of the D that is roughly = to the injuries D actually caused
   b. Use national market for easiest and fairest way
2. Each D is liable in proportion to the amount of risk it created that the P would be injured
   a. Risk each D is liable for is a question of fact in each case, with market share being relevant to this determination
3. D’s that have not proven their innocence are presumed to have equal market share totaling 100%
   a. Each D may try to prove that their market share was less than this equal share > if they do > redistribute remaining amount equally
e. Cons to market share theory:
   i. Only addresses the D’s causal responsibility for exposure, not the connection between exposure and subsequent injury
   ii. Some states have rejected the market share theory based on the ground that the P’s burden of proving causation was a fundamental principle of tort law
f. Concert of action
   i. That all the manufacturers should be held jointly and severally liable because they acted in concert
   ii. Enterprise liability
      1. Subset of concert of action, that is based on common adherence to an industry-wide standard
   iii. Often raised but almost never accepted in these cases
g. Vaccine’s (useful drugs)
h. Courts have not applied market share theory to vaccines
   i. Rationale:
      1. Vaccine is “essential to public welfare”
      2. The threat of product liability was causing some manufacturers to withdraw from the market > diminish manufacture of vaccine and diminish safety research
i. Guns
   i. Courts have held (barely) that market share doesn’t apply
   ii. Rationale:
      1. Nature of each manufacturer’s negligence might be different
      2. Not under duty to only market guns to responsible dealers

**Proximate cause – Good notes**

- Requires case specific inquiry
- The harm resulting from the negligent action must be the same kind of harm that led to the finding of negligence in the first place (negligent vasectomy/kid burns down garage example)
- Liability for negligence is liability for the unreasonable risks D created, not for reasonable risks or for those that were unforeseeable

I. Definitions
a. court defined proximate cause as an actual cause that is a substantial factor in the resulting harm

b. proximate cause is a question of fact to be decided by the trier of fact
   i. but court can overturn as a matter of law, if the jury could not have reasonably found that the harm caused was within the foreseeable scope of risk of their negligence

c. restatement on proximate cause
   i. an actor is not liable for harm different from the harms whose risks made the actor’s conduct tortuous

d. The Risk rule
   i. Policy/ justice reasons justifying the risk rule:
      1. Liability must stop somewhere and the but-for causation test would leave people exposed to continuous liability as long as they lived
      2. It is just/logical
         a. If in a case, liability to imposed only for negligence and negligence creates only a risk of harm A, then liability should be limited to harm A
   ii. defendant is liable only for harms within the scope of the risks he negligently created > specifically:
      1. for types of injuries risked by his negligence
      2. to classes of persons risked by his negligence
         a. ie. D not liable unless a reasonable person should have foreseen injuries of the same general type that occurred and the general class of persons who would suffer them
   iii. D’s conduct is not a proximate cause when the defendant could not foresee harm to persons situated like P
   iv. scope of risk must be determined on the facts
      1. questions about the scope of the risk > usually a question for the jury, as long as reasonable people could differ
   v. Dissent in Palsgraf uses a 2 part proximate cause argument (minority)
      1. Person who is negligent to any class of persons is negligent to everyone who is injured
      2. Many factors > to proximate cause, not just foreseeability

vi. Most courts today use the foreseeability test in determining proximate cause
   1. They view foreseeability as a limitation on liability

II. Assessing the scope of the risk
a. Manner in which harm occurs
   i. known source of danger that acted in a way that was not foreseeable > no defense
   ii. variant of the foreseeable > still foreseeable
      1. the damage was not greater or different in kind from that which might have foreseeably occurred
   iii. D only owes P a duty in relation to the foreseeable risk
      1. if the accident was as a result of the intrusion of a new and unexpected factor > not foreseeable (variant test not apply)
   iv. 2 part test
1. It should have been foreseeable that an unreasonably faulty system (fire alarm) could cause harm to a certain type of P (hotel guest).
2. The particular type of harm (injury while walking down stairs) is a foreseeable variety of harm in this circumstance, the extent of the injury may not have been foreseeable, but the underlying injury should have been.

v. Some courts make exceptions to Hughes variant rule > they require foreseeable of many details
1. *i.e. negligent D escapes liability even when he should have foreseen the precise injury that occurred, because he could not foresee the precise manner in which it occurred*

vi. D knew of crimes occurring in its garage > crimes were foreseeable
1. But only foreseeable to employees or others who frequent the garage > P was not a member of this class or any other class that D could have foreseen would be a victim of a criminal act in its garage

b. Unforeseeable extent of harm
i. Thin skull cases
1. Negligent action by D would only cause slight injury in a normal person, but P has an unusually thin skull, a fact D does not know, > P suffers horrible injuries
2. *if D is found guilty of tort > the fact that the harm was much worse than expected does not limit the liability*
   a. *D takes the P as he finds her*
3. Does not impose liability without fault
   a. P must still prove normal liability, action must have caused at least some harm to a normal person
   b. Or, D must have been at fault because he knew or should have known of P’s susceptible condition

ii. Fire Cases
1. If D’s conduct qualifies as the proximate cause of a P’s harm > D doesn’t escape liability simply because the harm was more extensive than anyone could have foreseen

iii. Intervening causes (natural and continuous sequence)
1. A proximate cause of an injury is that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred
2. If tortfeasors act in sequence > first tortfeaser argues that the 2nd tortfeaser is an “intervening cause” that “supersedes” his liability entirely

iii. A superseding cause breaks the causal chain
1. An intervening cause that lies within the scope of the foreseeable risk (part of the risk the first D created), or has a reasonable connection to it, is not a superseding cause
2. But, if the intervening act results in harm outside the scope of the risk negligently created by the 1st tortfeaser > he is relieved of liability
iv. Evaluation and determination of superseding causes is for the jury to decide
v. if the intervening agent is something so unexpected or extraordinary that the 1st
tortfeasor could not have anticipated it > not liable
vi. if negligent D’s conduct creates or increases the risk of a certain harm and is a
substantial factor in causing that harm > not relieved of liability by intervening
party
   1. exception: where harm is intentionally caused by an intervening party
      and the harm was not within the scope of risk created by D
   2. but if the tortious or criminal acts were foreseeable > they would be
      within the scope of the created risk
vii. generally courts say that intervening criminal conduct was not foreseeable to a
reasonable person
viii. if the likelihood of an event makes a party’s conduct negligent and subjects the
party to liability, then that event happening cannot relieve him from liability
ix. liability turns on whether the intervening act is a normal or foreseeable
consequence of the situation created by D’s negligence
   1. if the intervening act is extraordinary under the circumstances, not
      foreseeable in the normal course of events, or independent of or far
      removed from D’s conduct > can be a superseding act which breaks the
      causal nexus
x. arguments made to intervening/superseding cause removes liability:
   1. intervening act was divorced from and not the foreseeable risk associated
      with the original negligence
   2. and, the injuries were different in kind than those which would have
      normally been expected from D’s negligence
   3. > negligence of D merely furnished the occasion for an unrelated act to
      cause injuries not ordinarily anticipated
xi. precise manner of the event need not be anticipated to retain liability
   1. an intervening action that falls squarely within the scope of the original
      risk will not supersede D’s responsibility
xii. foreseeable required is of the risk of harm not of the particular intervening act
xiii. tortfeasor responsible for the original accident is also liable for the injuries or
death occurring during the course of medical treatment to treat injuries suffered
in that accident
d. Intervening forces of nature (acts of god)
   i. D can escape liability if the harm done is different from the harm that was risked
      by D’s conduct
   ii. Unforeseeable intervening force defense (act of god defense) > burden to show
      that the natural force was unforeseeable is on D
III. Rescuer doctrine
   a. “danger invites rescue”
   b. Cases generally agree that the rescuer can recover from D whose negligence prompts
      the rescue
      i. Includes when D negligently injures or endangers himself and P is injured in an
         attempted rescue
   c. Rescuer doctrine affects comparative negligence as well as scope of risk
IV. Firefighters rule
a. CL doctrine that precludes a firefighter (and certain other public employees, including police officers) from recovering against a D whose negligence caused the firefighter’s on-the-job injury
b. Rationale for:
   i. Firefighter is a licensee of the private property owner > as long as homeowner refrains from willful or affirmative injurious acts > firefighter not recover tort damages if owner negligence was normal
   ii. Aware of risk and have assumed those risks
   iii. Public policy
      1. Injuries already compensable through workers comp.
c. Has been expanded to police officers, EMT’s and lifeguards
   i. Not apply to professional firefighter/safety official who was privately employed
d. Wrongdoing is not covered within the rule
   i. Intentional or willful wrongdoer
   ii. Some jurisdictions > violation of a fire-safety statute
   iii. Does not cover harms resulting from risks not inherent in the job the officer has undertaken or those the officer is not paid to assume
e. rule is moving towards extinction, through statutes, judicial opinion, exceptions and some jurisdictions that have never adopted it

Affirmative Defenses to Negligence – good notes
I. Contributory negligence/comparative fault
a. Contributory negligence: CL
   i. ancient case > contrib. neg > removes all liability of D
   ii. contrib. neg. was an all or nothing defense
      1. even if D’s neg. was extreme and P’s was merely minor
   iii. If P fell under an exception > full recovery
   iv. Only 5 states use now
b. Contributory negligence rules to permit recovery
   i. Comparative fault
      1. Fact finder assigns comparative %’s of responsibility
         2. 45 states use
         3. Pure
            a. Recovers % of the total damage based on the distribution of liability between P and D’s
            b. P recovers unless 100% negligent
        4. modified #1
           a. P’s fault cannot exceed D’s fault (D’s fault must be greater than P’s)
        5. modified #2
           a. P’s fault cannot equal or exceed D’s fault (50-50 > no recovery)
   ii. Rescuers
      1. rescue doctrine > P who is a rescuer cannot be held contrib. neg. unless the rescuer acted recklessly
      2. it is for the jury to weigh the negligence of the P/rescuer and the D
   iii. RIL
1. can apply contrib. neg. to RIL cases > P in an RIL will have their damages reduced but will not be bared from using RIL

c. Exceptions to contributory negligence bar
   i. Last chance or discovered peril
      1. Fact pattern:
         a. start w/ contrib. neg. P, but after P’s neg. the D had the last clear chance to avoid and didn’t > if accepted it will remove P’s contrib. neg.
      2. last clear chance doctrine has been abolished in all comparative neg. cases
         a. but the facts can still be included and the trier of fact will consider them when they are dividing up the respective negligence
      3. P must be helpless and unable to remove himself from danger
      4. only found in contrib. neg. cases
      5. this was an escape doctrine for judges to apply in contrib. neg. jurisdictions, b/c it gave them a way to let P still recover
   ii. D’s reckless or intentional misconduct
      1. Traditionally > intentional tort (reckless or wanton) D could not use contrib. neg. defense
      2. Restatement: application of comparative fault rules for all claims for personal injury, death, and harms to tangible property
   iii. P’s illegal activity
      1. Based on public policy, when P’s injury is a direct result of his knowing and intentional participation in a criminal act > cannot seek compensation for loss
      2. applies to 2 situations
         a. Claims where the parties to the suit were involved in the underlying criminal conduct
         b. Where the criminal P seeks to impose a duty arising out of a legal act
      3. If the duty that D owed P did not arise out of an illegal act of P > D owes the duty regardless if the cause of the actual accident was P’s fault (drunken driver in shitty car case)
   
d. Causation and scope of risk in comparative fault
      i. Disregarding the D’s fault on causal, scope of risk, or superseding cause grounds
         1. D’s comparative fault is irrelevant if D’s fault caused no harm
         2. If P’s act was unforeseeable and superseding event > absolves D of any liability
         3. If P and D’s acts are indistinguishable > cannot use causal apportionment > must give full recovery, no recovery or use comparative fault apportionment
         4. CL > P must minimize damage, otherwise > no recovery
      ii. Disregarding the P’s fault on causal or scope of risk grounds
         1. cause in fact and proximate cause apply to the P’s negligence > if they don’t have both of these > they can recover
2. if P’s injury was not within the risk created by her fault > can recover
3. In a case involving negligent rendition of service, including medical services, a factfinder does not consider any of P’s conduct that created the condition the service was employed to remedy (restatement)

II. **Implied Assumption of the Risk**
   a. Confronting a known risk
      i. if you voluntarily assume the risk of confronting the type of danger that > the injury > you have accepted that responsibility > assumption of the risk > complete bar on recovery
      ii. P can also voluntarily contract to assume the risk
      iii. Primary assumption of the risk
          1. true consent
          2. limited duty
          3. knew of risk
          4. complete bar on recovery
   b. Assumed risk as an agreement to accept responsibility
      i. traditional assumed risk rules found consent when P knew the risk, appreciated its severity and still voluntarily chose to confront it
      ii. however, voluntary confrontation of a risk (jaywalker) does not communicate a release of the other party from their duties of ordinary care, the P is just being negligent
      iii. employer has a duty to furnish a safe place to work
      iv. assumed risk is now merged into the comparative negligence system
      v. **restatement and majority of jurisdictions > assumed risk is to be considered in comparative fault > P’s negligence reduces her recovery of damages**
      vi. if D reasonably believes that P has accepted the risk > D might not be negligent at all in relying on P to achieve safety
      vii. there is a separate and complete defense based on contractual assumption of the risk
   c. Assumed risk as a limited duty or no D negligence
      i. Secondary assumption of the risk
          1. unreasonable conduct
          2. fault
          3. is not a total bar
          4. has been merged into the comparative fault weighing
      ii. If an employer negligently fails in their duty to provide a safe place to work, they cannot use the defense that the injured employee is barred from recovery b/c they should have been aware/known of the dangerous condition that was negligently created/maintained, to an action by the employee for a breach of that duty
      iii. if evidence suggests the existence or assumption of duty and its breach > the risk is not assumed by the P, the P doesn’t assume the risk of injury but the use of reasonable care by the D
      iv. broken rope intertubing case
          1. rider assumes all risks inherent to the sport, including some degree of negligence of the driver
2. rider does not assume the risk of dangers not inherent to the sport (ie. defective equipment)
3. If D’s act significantly increases the risk to P, greater than what P had assumed > can be considered that P might not have assumed the increased risk
v. The P has no claim if D has violated no duty
vi. participants in an activity/sport do not consent to acts which are reckless or intentional
   1. if they are within the known, apparent and foreseeable dangers of the sport > not actionable
   2. personal injury arising out of an athletic event must be based on reckless disregard of safety
   3. majority in sports cases > D owes only a duty to avoid reckless or wanton injury
   4. in non contact sports > reasonable expectations of the parties