I. Overview of Torts
   A. Torts—civil wrong doing (personal injury) to person or thing
      1. trying to compensate the victim
      2. three bases of liability
         a. intent- liable for intending to do something
         b. negligence- liable for doing something not properly, like not paying attention when driving
         c. strict liability- liability without fault- imposed when defendant’s actions are found liable even without fault on part of defendant
         d. majority of cases—must show some type of fault on part of defendant
   B. Relevant Court procedure
      1. motion to dismiss
         a. Made by defendant based only on plaintiff’s complaint. Alleges that there are not enough facts to support a legal claim.
      2. motion for summary judgment
         a. Made by defendant based only on new facts discovered in addition to plaintiff’s complaint. Alleges that there are not enough facts to support a legal claim.
      3. evidence
         a. must relate to case
         b. must object at time evidence is raised
      4. motion for directed verdict
         a. Made at conclusion of opposition’s and case and usually renewed after both sides have presented case. Opposing party’s proof is not enough legally to warrant a jury’s verdict for them.
      5. can object to jury instructions
         a. instructions tell the jury what is needed for the plaintiff to win damages.
      6. motion NOV
         a. Renewal of motion for directed verdict. Evidence was not enough to justify the jury’s verdict.
      7. motion for a new trial
         a. did an error influence the jury?
         b. Is the verdict against the weight of the evidence?

II. Intentional Torts
   A. Prima Facie Case
      1. Battery
         a. An act, with intent to cause harmful or offensive contact or imminent apprehension of harmful or offensive contact that results in harmful or offensive contact.
         b. Battery requires act
            1.) Not acting (ie not helping someone having heart attack) is not a battery
         c. Intent must be to cause harmful or offensive contact—just intent to hug
            1.) Just words alone are not usually enough
            2.) Intent can include either purpose or knowledge with substantial certainty.
3.) Court can reject a defendant’s explanation of intent and decide instead what a reasonable person would have intended.

d.) Have to intend a harmful or offensive contact—i.e. hugging would not be enough in most jurisdictions
  1.) Indirect harmful contact is also liable (i.e. touching something plaintiff is carrying, causing something else to hit plaintiff etc).

e.) Van Camp v. McAfoos
  1.) three year old child ran tricycle into plaintiff’s leg.
  2.) Ruling: children may not be held strictly liable for childish acts. Fault must be alleged in a complaint for battery.
  a) Fault requires a wrongdoing on the part of the defendant
  b) Types of fault:
     i  malice—greatest form of tort (acted with evil)
     ii intent—knowing it will happen
     iii recklessness—disregard risks
     iv negligence—lowest form of tort
  3.) A cause of action must be able to be deduced from the facts alleged in the pleading
  4.) Children can be liable for torts but must have fault.
  5.) Prima facie case must allege all elements of torts.

f.) Synder v. Turk
  1.) Turk, a surgeon, frustrated with a gallbladder operation grabbed Synder, a scrub nurse, by the shoulder and pulled her close the surgical opening and made a demeaning remark.
  2.) Battery requires intent to inflict harmful or offensive contact, not exclusive to intent to inflict personal injury.

g.) Cohen v. Smith
  1.) Cohen’s religious beliefs did not allow a male to see or touch her naked body. During a cesarean section, plaintiff, a nurse, both saw and touched her naked body.
  2.) When a person has special beliefs and the defendant is aware of these special beliefs, these beliefs must be taken into account when deciding if a reasonable person would be offended or harmed by the action.
  3.) “glass cage rule”—don’t have the right to build a glass cage around self, when offensive contact is alleged, must look at whether a reasonable person would be offended,

h.) Leichtman v. WLW radio
  1.) Leichtman was to speak on “great American smokeout” on radio show. While on the show, the host of another show repeatedly blew cigar smoke in his face at the urging of the host of the show.
  2.) The intentional blowing of smoke can constitute a battery.
  3.) Person who urges a battery be committed can be just as liable as a tortfeasor.
  4.) If all the elements of a tort are alleged in a cause of action, then the suit is actionable even if the damages sought are trivial.
5.) There is a distinction between knowing about special circumstance and intent—intentionally blew smoke into face as opposed to just smoking in his presence.

i. Garratt v. Dailey
   1.) Brian Dailey, age five, allegedly either pulled or moved a chair as Ruth Garratt was sitting down causing her to fall and break her hip.
   2.) Intent can include as well as a mental state like a malice, also a knowledge with substantial certainty that harmful or offensive contact would result.
   3.) A child’s age is significant only in determining what they knew and what a reasonable child of that age would be capable of understanding.

j. Davis v. White
   1.) Defendant wanted to shoot someone else but ended up shooting plaintiff in the stomach

k. Walker v. Kelly
   1.) Sharon Kelly age 5 threw a rock to hit Michael Walker age 8.
   2.) Cause of action governed by statute which holds parents liable for “willful or malicious” injuries inflicted by their children—imposes strict liability on parents.
   3.) Five year old is not capable of mindset required for a malicious or willful act even if they did intend the act.
   4.) Rule of “sevens” no longer really applies—what would a child of a similar age, understanding, intelligence do?

l. Polmatier v. Russ
   1.) In criminal proceedings, Russ was found not guilty by reason of insanity for the murder of his father-in-law.
   2.) Insane people are still liable for the torts they commit. Russ knew he was murdering him, and was capable of making a choice even if it was a crazy choice.
   3.) Common law principle that person committing harm must pay even if neither person is at fault.
   4.) Insanity is not a defense for torts claims.
   5.) Two goals of torts claims: hold person accountable and compensation—only compensation is possible with mentally challenged

2. Assault
   a. Act with intent to cause imminent apprehension of a harmful or offensive contact or act to cause harmful or offensive contact where no contact results.
      1.) Intent is same as required under battery—purpose and/or knowledge with substantial certainty
      2.) Words alone usually not enough to create imminent apprehension—exception certain types of telephone calls
      3.) Reasonable person: what would reasonable person intend? Would reasonable person be in imminent apprehension of contact?
      4.) Act to cause imminent apprehension must be towards plaintiff
5.) Must be aware/conscious of threat
   b. **Dickens v. Puryear**
      1.) Statute of limitations passed for plaintiff to file assault and battery charges. In course of assault and battery to plaintiff b/c of plaintiff’s relationship to defendant’s daughter, defendant threatened to kill Dickens if he did not go home, pack up, and leave the state.
      2.) Threat of a future harm does not constitute an assault b/c it does not place the plaintiff in imminent apprehension of a harm.
      3.) Assault must involve an act—words alone are not usually enough.
      4.) Assault only deals with present breaches of the peace.
   c. **Alteri v. Colasso**
      1.) Suit was brought by both mother and child. Child was struck in the eye by a rock thrown by Colasso that was intended to frighten someone other than Colasso.
      2.) Doctrine of transferred intent: Can intend assault but result in battery.

3. False imprisonment
   a. Act to confine another intentionally without lawful privilege and against his/her consent
      1.) Does not have be for long time
      2.) Does not have to be in small space—don’t need walls, could be town
      3.) Need an act: simply not helping is not false imprisonment
      4.) Intent: purpose or knowledge with substantial certainty.
      5.) Plaintiff must be conscious of confinement UNLESS actual harm or injury results from the confinement
         a) Parents/ guardians of mentally ill can petition to become representative even if person is not aware of confinement.
      6.) Don’t always have to have threat of force
         a) Threat can be towards third person—ie. Child
      7.) Person liable does not always have to be confiner if that person caused the confinement of another.
      8.) Confinement can start out lawful and end up unlawful if it extends beyond lawful point
   b. Doctrine of extended consequences applied to false imprisonment
      1.) If there is a means of escape the person is not required to take it unless it is a reasonable alternative
      2.) Was person’s action in freeing himself reasonable?
   c. Can have same circumstances but different outcomes—age and vulnerability of victim matter
   d. Duress of goods: someone takes something you need and you have to follow them around trying to get it back
   e. **Hardy v. Labelle**
      1.) Employee was accused of stealing watch, was led under false pretenses to interrogation where she consented to take lie detector test.
      2.) Not false imprisonment b/c she consented to being there. Said she would have gone anyway. Did not make move to leave.

4. Torts to Property
a. Trespass of Land
   1.) Act w/intent to enter or cause the entry of someone’s land and entry results
      a) Need only to intend to enter—do not need to intend to trespass or to even know where the boundary lines are
         i. Can unintentionally enter and trespass by refusing to leave
      b) Does not require a bad state of mind
      c) Injury is the entry
      d) Object entering can be very small, does not need to land
         i. Congress owns some airspace—but low flying objects are trespassing
         ii. Object needs to visible to the naked the eye—tangible items only usually count as trespass
            (a) Exception: if substantial damages result from the trespass—must prove trespass + substantial damages
      e) Trespass can start out lawful and end up unlawful—outside course and scope of consent given
   2.) Difficult time pursuing trespass of sidewalk or parking spaces on street
   3.) Protecting owner/renter’s exclusive right to the property
   4.) Doctrine of extended consequences applies to intentional trespassers

b. Nuisance
   1.) Protecting right to use and enjoyment of land
      a) Two kinds of nuisance—public and private
   2.) Does not have to be a tangible invasion like trespass
   3.) What would the reasonable person think?
   4.) Is defendant’s actions unreasonable
      a) Interest in protecting home from nuisance greater than protecting business
      b) Is there a social utility to the nuisance? Did Plaintiff come to the nuisance?
   5.) Remedies for nuisance:
      a) Money
      b) Injunction
         i. Mandatory make defendant do something
         ii. Prohibitive stop defendant from doing something—plaintiff may have to pay to help shut def. Down (compensative injunction)

c. Conversion of chattels
   1.) “stealing”—converted property to own use by excercising “substantial dominion” over it
      a) “Trover” cause of action in conversion cases
      b) substantial dominion—depends on amount of interference with ownership
         i. extent and duration of control
         ii. defendant’s intent to assert a right to the property
         iii. defendant’s good faith
iv harm done
v expense or inconvenience caused
c) liable for buying converted goods—even if buyer is acting in good faith
i UCC protects buyers who buy from established merchants
2.) intentional tort—but do not have to be aware of wrongdoing—just intend to exercise substantial dominion
3.) damages usually value of goods—but might seek specific performance or return of the chattel “replevin” + damages
   a) was the interference with ownership great enough to justify making def. Pay for the item—if not then trespass to chattels
4.) Usually only tangible goods can be converted
   a) Not land, not usually money
d. trespass to chattels
   1.) not quite conversion but still interference with ownership
   2.) liability based on actual damage not market value of chattel—some form of harm besides interference must result
   3.) mistake is no excuse
   4.) usually tangible item but can have computer trespass
5. Doctrine of transferred intent
   a. Liable for torts committed if you intended a tort for someone and ended up committing a tort against someone else. Also liable if you intended one tort and another results.
   b. Applies to battery, assault, false imprisonment, trespass to land, and trespass to chattels
   c. Cases of mistaken identity don’t need
d. transferred intent—intended to shoot A and shot A
6. Doctrine of Extended consequences—liable for what happened if you intended tort, even if consequences were not what you intended (ie intended to hurt but instead killed—liable for the death).
   
B. Vicarious Liability
   1. exception to the general rule that must have fault to be liable
   a. statutes like the one in Walker are exceptions to this rule
   2. respondent superior doctrine
   a. can hold employer liable for torts of employee even if employer had no fault
      1.) must prove that X was employee of employer
      2.) that X did commit tort
      3.) that the commission of the tort was under the course and scope of X’s employment
         a) “course and scope”—furthering employers interest—did being employee give him access to commit tort?
   b. Employer for sake of respondent superior is not always the same as employer defined for purposes of workman’s comp.
c. Doctrine is applied differently to negligent versus intentional torts
1. Intentional torts are often not found to be within the course and scope of employment—not in normal course of business
2. State of mind often determines who will be liable
d. Employers usually liable for minor deviations in employee’s conduct
   a) With major deviations—when does employee “reenter” employment?
   b) “going and coming” rule—usually not liable for acts committed on way to or way from work—exception: running errands for employer on way
   c) business trips—employer often liable
e. Liability for conduct of independent contractors—depends on the amount of control employer had over work of independent contractor
   1.) non-delegable duty—duty that cannot be delegated to independent contractor—i.e. some safety issues
f. “borrowed employee” rule—when one employer loans employee to another, the employer controlling employee at time of tort is usually liable.
g. Principle of “apparent agency”—if parent company creates image that franchisee is agent and plaintiff relies on this apparent agency then parent company can also be liable.
h. If employer is not at fault, strict liability is imposed and employer is entitled to “indemnification” by employee—employee can have to pay back all damages imposed on employer
i. If employer is found to be at some sort of fault, he is entitled to contribution from employee—partial reimbursement
3. If employee is injured within course and scope of employment—liability for employer?
a. Workman’s comp—allows for compensation without suing employer for tort—often times only action against employer when injured. Must prove injury occurred within course and scope of employment.
   1.) No pain and suffering damages, no punitive damages
   2.) Exception: can sue employer under certain statutes and if injury was the result of an intentional tort
C. Affirmative Defenses
1. Defendant has burden of raising and proving affirmative defenses
2. Two types
   a. Excuses: plaintiff under some type of disability
   b. Justification: had legitimate reason for actions
3. Privilege ceases once threat is over
4. Can transfer self-defense if third-party is accidentally injured in course of action
5. Privileges a matter of reasonableness and degree
6. Six different affirmative defenses: self-defense, defense of others, defense of property, right to detain, consent and necessity
   a. Self-Defense
      1.) Only applies to assault, battery and false imprisonment
2.) Must use reasonable force—liable for injuries that result from excessive force
   a) Mistake is okay as long as belief was reasonable
3.) Deadly force—may use deadly force only if you reasonably believe life is in danger
   a) If you can retreat with safety you should do so first
   b) Not required to retreat from home
4.) Provocation is not enough, must have threat of assault, battery, false imprisonment
5.) Have right to resist unlawful arrest—may not be best course of action

b. Defense of Others
1.) Defending others from intentional tort
2.) What if you defend the wrong person; two views
   a) You stand in shoes of person you are defending
   b) Was mistaken belief reasonable (restatement)?

c. Right to Detain
1.) Paul v. A&P
   a) store manager suspected Paul of shoplifting, apprehended and detained Paul—Paul did not have flea spray
   b) held: no privilege to detain, belief was not reasonable—Paul had not left the store yet; need probable cause and reasonable belief
   c) property owner can detain to prevent theft, but if belief was mistaken is liable for false imprisonment
      i) privileged to detain if reasonable belief, in reasonable manner for reasonable period of time to conduct reasonable investigation—need all elements
      ii) private citizen (not property owner) has right to detain if breach of peace or felony being committed

d. Defense of Property
1.) Right to reasonably protect property, using reasonable force
   a) Life more valuable than property—not privileged to use deadly force if only property is at stake
   b) Can threaten force you would not be privileged to use, but liable if you do use force
   c) Can only use force by machinery, etc that you yourself would be privileged to use
2.) Katko v. Briney
   a) Briney rigged spring gun to protect abandoned house from trespassers. It blew plaintiff’s leg off.
   b) Held: not privileged to use deadly force to protect property
3.) Brown v. Martinez
   a) Defendant shot intending to scare boys stealing watermelons, hit plaintiff.
   b) Held: liable for consequences that resulted from use of deadly force

e. Consent
1.) Knowing voluntary agreement
2.) Is the person capable of giving consent?
3.) Reavis v. Slominski
   a) Slominski had sex with his employee, Reavis at Christmas party. She argued her consent was invalid because she felt she would lose her job if she said no, and because she was unable to consent because of childhood trauma.
   b) Held: consent is not effective if person lacks ability to give consent.
      i) To be incapable of giving consent must be unable to understand risks and benefits of what is being consented to
      ii) Person asking for consent must be aware of or should have been aware of the incapacity of the plaintiff to be liable
4.) Mental impairments: should defendant have known
5.) Minor: trying to protect minor from self
6.) Ashcraft v. King
   a) Consented to blood transfusion, but only family blood, got HIV blood instead.
   b) Held: action exceed consent given, liable for battery
7.) Kennedy v. Parrott
   a) Woman consented to have appendectomy, while there doctor took care of cysts on ovaries.
   b) Held: consent to surgery = consent to all other medically necessary procedures within area of incision
   c) Encourages doctors to rely on own good judgement
8.) Informed consent—was all relevant information revealed
   a) Doe v. Johnson
      i) Doe consented to sex with Johnson but did not know that Johnson was HIV + should have been informed of risks of consent.
   f. Necessity
1.) Surocco v. Geary
   a) Geary, as city official, ordered Surocco’s house blown up to stop the spread of wide-spread fire.
   b) Held: no liability as Geary acted out of clear necessity.
2.) No liability when acting in good faith out of actual or apparent public necessity—can’t benefit just one person
3.) Private necessity—acting to save own property or life, liable for actual damages which result –incomplete privilege
   a) Just b/c you benefit doesn’t mean it isn’t a public necessity just harder to prove
4.) Ploof v. Putnam
   a) Ploof moored boat to Putnam’s dock during big storm. Putnam unmoored it, argued trespass.
   b) Held: trespass was necessity, Putnam liable for damages. Privilege to sacrifice property of another to save life.
5.) **Vincent v. Lake Erie Transport**
   a) Lake Erie had a ship at Vincent’s dock during a storm. They took actions to secure boat to dock and keep boat in place. Damage resulted to boat.
   b) Held: Even though Lake Erie acted prudently and had privilege to use property, they were still liable for damages which actually resulted to property.

6.) **Wegner v. Milwaukee Mutual Insurance Co.**
   a) Common law doctrine of public necessity vs. constitutional doctrine of eminent domain
   b) A police suspect barricaded himself in Wegner’s home. Police caused extensive damage with tear gas and flash-bang grenades.
   c) Held: under constitution, such police action constitutes a “taking for public good” and public should compensate for loss.
   d) Other courts have said taking for public use—public improvement only

III. **Negligence**—5 elements (Duty + Breach = Negligence, need cause in fact + proximate cause + injury to = liability)

A. Duty
   1. duty to act as reasonable person would exercising reasonable care in same or similar circumstances
   2. **Clinton v. Commonwealth Edison Co.**
      a. 15 year boy electrocuted when he touched a 25 foot electric line with a metal pole. Argued that transformer should have been located further from the house and that line should have been insulated.
      b. Held: no duty b/c injury was not reasonably foreseeable
         1.) Must balance:
            a) Likelihood of injury
            b) Difficulty of protecting against injury
            c) Burden of placing duty to protect on defendant
            d) Public policy concerns
   3. **Washington v. Louisiana Power and Light Co.**
      a. man electrocuted when cb antenna came into contact with power lines. Previously injured from electric shock when moving same cb antenna.
      b. Held: no duty b/c risk of injury was not unreasonable risk
         1.) Must balance:
            a) Possibility that event would happen
            b) Gravity of resulting injury
            c) Burden of preventing event from happening
   4. **Weirum v. RKO General Inc.**
      a. radio station was awarding cash prize to first to find DJ. Two teenagers were each chasing DJ’s car leading to plaintiff being run off the road and killed.
      b. Held: risk of injury reasonably foreseeable, duty to act in way that would not encourage negligent driving by teens
c. Not entitled to assume that others will act reasonably when your conduct makes the risk of unreasonable conduct.

5. Wilson v. Sibert
   a. defendant was in line at bank and was forced to quickly back up to avoid a collision and hit the plaintiff’s car.
   b. Held: in an emergency situation one has a duty to act as the reasonable person would under the same emergency situation.
      1.) Different from emergency in intentional torts—intentional torts responsible for actual damage under private necessity doctrine, negligence not responsible for damages if acting as reasonable person would have.

6. the greater the risk of injury, the greater the care required—but duty remains to act as reasonable person would

7. reasonable person:
   a. has average intelligence, height, abilities, reflexes, memory
   b. exception: can take on physical disabilities
      1.) duty to act as reasonable person with that condition would act
   c. exception: can take on special abilities—above average intelligence
   d. no exception for voluntarily intoxicated person—same duty of care as reasonable person
   e. prescription drug: did person act as reasonable person taking drug would have (following directions etc)
   f. mental challenges: general rule: insanity is no defense, duty to act as reasonable person
      1.) exception: sudden onset of mental disability treated like a stroke or heart attack would be
         a) man with alzheimer’s disease injures nurse who was attempting to restrain him
         b) held: public policy reasons for holding him to reasonable person not present when mentally disabled injures paid caretaker
   g. children: general rule: held to standard of reasonable child in same or similar circumstances
      1.) reasonable child is of same intelligence, age, mental ability, experience
      2.) exception: Robinson v. Lindsay
         a) 13 year old driving snowmobile injured 11 year old passenger
         b) held: children engaged in dangerous activities like operating motor vehicle are held to adult standard of care

8. negligent as a matter of law—still under common law—reasonable minds could not differ to find that did not act as reasonable person would have in same or similar situation

9. reasonable person is common law standard of duty, statutes can affect standard of duty—negligence per se doctrine
   a. statute that wipes out tort liability wipes out any common law claim
   b. statute could impose strict liability
   c. criminal statutes—judge has discretion whether or not to let in as evidence
1.) options of judge:
   a) don’t use statute
   b) let statute in but rule not applicable to this case
      i example: Rudes v. Gottschalk
         (a) child hit when crossing expressway in violation of statute that pedestrians must cross in cross-walks
         (b) held: child still held to reasonable child standard of care b/c not clear that statute applies to children
   c) negligence per se—statute supplies standard of care and replaces reasonable person standard of care
      i Martin v. Herzog—violation of statute in and of itself is negligence
      ii Court can find common law exception to using statute as standard of care: Tedla v. Ellman
         (a) Brother and sister hit by Ellman when they were walking on right side of the road in violation of statute to kept to left of road
         (b) Held: no negligence per se b/c statute did not specify what to do in all situations—more dangerous to observe statute than to violate it—okay to violate
      iii Impson v. Structural Metals
         (a) plaintiff injured when defendant violated a statute that prohibited passing within 100 feet of an intersection.
         (b) Held: no justifiable excuse, was negligent per se
         (c) Excuses:
            (1) Incapable of complying—i.e. sudden physical disability like heart attack
            (2) Doesn’t know and should not know of occasion for complying—i.e. don’t know tail light is out
            (3) Unable even after reasonable diligence or care to comply
            (4) Emergency not due to own misconduct prevents complying—i.e. brakes go out
            (5) Compliance would involve a greater risk of harm to self or others
   d) Even if negligence per se—not always liable
      i Wright v. Brown
         (a) dog warden released a dog who had been quarantined in violation of statute to keep confined for 14 days and plaintiff was attacked by dog
         (b) held: plaintiff must show that they were a member of the class the statute was designed to protect and that the resulting injury was the one the statute was designed to prevent
      ii still usually have option of bringing common law negligence claim
options to wright rule
(a) statutory violation = negligence presumed
(b) statutory violation = evidence of negligence
d. compliance with statutes does not constitute due care per se—still held to reasonable person standard. Situation may require greater than statutory standard of care.
1.) Exception: some federal statutes set standard of care and “pre-empt” any state common law negligence claims

10. effect of custom and industry standards on duty
a. general rule: custom/industry standard not a defense to reasonable person standard of care
1.) The T.J Hooper
   a) The T.J. Hooper a tug boat lost its cargo in an easterly gale and did not have radios on board.
   b) Held: custom is not evidence of due care when custom needs to change to comply with reasonable prudence.

b. Exception: medical malpractice—standard is the custom of particular medical speciality—as long as did what a reasonable medical professional in that field would do no liability
1.) Standard established by use of expert testimony—if jury does not need help understanding then no expert testimony
   a) Helpful but not necessary that expert be of same specialty—must testify familiar with standards and practices of that specialty
2.) Old rule: standard of care based on medical professionals in same geographic area—same or similar community
3.) Duty to obtain informed consent: duty to disclose in consistency with practice in that specialty
   a) Must show that a reasonable person would have refused operation with knowledge

11. Is there a duty to act?
a. General rule: no cause of action for nonfeasance (non-action) only for malfeasance (wrong action)
1.) Yania v. Bigan
   a) No duty to rescue Yania from drowning even though may have verbally encouraged him to jump in
   b) Held: mere words not enough to establish a duty to act
      i) Exception: aiding and abetting—encouraging another to commit a tort
      ii) Exception: encouraging child/mentally incompetent adult to do something

b. Exception: duty to act if you are legally responsible for harm defendant is in
1.) Restatement § 321—if know or should know that you created unreasonable risk of harm to another then under duty to prevent risk from happening
c. Exception: few state statutes—duty to assist if you can do so w/o endangering self—duty to assist as reasonable person would

d. Exception: Restatement § 322 duty to exercise reasonable care to prevent further harm from happening to plaintiff if you tortiously or innocently cause harm to plaintiff

e. Exception: Restatement § 323 duty to exercise reasonable care when rendering services to protect a person or their things if failure to exercise reasonable care increases risk of such harm or if the harm is suffered b/c person relied on protection.

f. Exception: Farwell v. Keaton
   1.) Duty to exercise reasonable care when taking charge of friend who was in fight, duty extended to at least notifying someone where he was and not leaving in car.
   2.) Restatement § 324 once you take charge of another who is helpless to protect themselves, duty to use reasonable care to secure safety while in charge and duty when discontinuing aid not to leave in a worse position than when took charge

(g. Exception: special relationship exists between plaintiff and defendant
   1.) Friends + Companions on a social venture: implicit agreement to render assistance if can do so w/o endangering self
   2.) Business invitor and invitee—have duty to customers and business invitees to assist if they are injured
   3.) Other pre-existing relationships can be argued to carry a duty to assist
   4.) Employee/employer

h. Deshaney v. Winnebago County Dept. of Social Services
   1.) no 14th amendment constitutional action against social services for not acting to remove boy from home
   2.) possibly duty under tort law
      a) took charge—eliminated possibility that others would help, system encourages others to rely on it as exclusive remedy—cases usually not successful on either misfeasance or non-feasance grounds
      b) exception: Dahmer case—police took affirmative action to escort young man back to Dahmer’s apartment—not just nonfeasance. Additionally established special relationship when escorted him back to danger.

12. Is there a duty to act to stop a 3rd party from injuring the plaintiff?
   a. General rule Restatement § 314: No
      1.) Exception: special relationship
         a) Common carriers/passengers
         b) Innkeepers/guests
         c) Business invitor/business invitee
         d) Custodian/ward
         e) Can argue for additional ones
   b. Exception: Restatement § 344 duty of owners of premises open to the public for business purposes liable for acts of third parties which injure people on the premises for business purposes if did not use reasonable care
to discover such acts were or were likely to have been occurring or if did not warn of harm. Duty to act reasonably to protect.

1.) **Nallan v. Helmsley-Spear**
   a) duty to protect visitor for union meeting from being shot as owner knew of previous crimes in area
   b) can be liable for employee’s failure to use reasonable care

c. Exception: employer/employee when in imminent

d. Is there an exception for colleges and students? No—no duty to warn of dangerous students and no duty to protect against acts of third parties or of own bad judgement

e. Exception: Landlord/tenant if knew or should have known of crime in area
   1.) If landlord knows of/has control over tenant’s dangerous behavior then a duty to protect others from tenant

f. Exception: **Tarasoff v. Board of Regents of U of Ca**
   1.) Held: duty to warn of patient’s plan to murder tarasoff
   2.) If therapist reasonably determines that patient is a risk to self or others—duty to warn

B. Breach of duty

1. general rule: requires affirmative act and direct proof of negligence

2. **Bernier v. Boston Edison**
   a. a driver hit a light pole owned by Edison which fell on plaintiff
   b. held: breach of duty b/c injury was foreseeable and safe, cheap alternatives were available
   c. don’t always have to have available alternatives—i.e. cigarette cases

3. **U.S. v. Carroll Towing**
   a. a barge broke adrift and sank. Had there been a bargee on board the ship could have been saved.
   b. Held: for there to be recovery the probability of an event happening and the gravity of the resulting injury must be weighed against the burden of taking adequate precautions: B<PL (Learned Hand’s formula)

4. **Gift v. Palmer**
   a. man driving hit child—no evidence as to what happened
   b. held: not negligence b/c no evidence that the injury was foreseeable and could have been prevented with reasonable care—need to allege a specific act of negligence

5. Exception: **Res Ipsa Loquitur** “The thing speaks for itself”—can prove negligence with only circumstantial evidence
   a. **Byrne v. Boadle**
      1.) plaintiff injured when a barrel of flour fell on him
      2.) held: in some cases the accident itself is proof of negligence
   b. Two different sets of elements for Res Ipsi Loquitur
      1.) Valley Properties—
         a) Thing does not usually happen w/o negligence
         b) Others causes of injury eliminated
         c) Negligence was in scope of duty to plaintiff
      2.) Eaton
a) Thing does not happen unless someone negligent
b) Thing or person which caused the accident was under the exclusive control of the defendant
c) Injured person did not cause or contribute to accident
d) Not many jurisdictions require exclusive control by the defendant any more
   i  **Giles v. City of New Haven**
      (a) elevator operator injured when elevator chain broke free
      (b) need to prove that defendant was more likely than not responsible for negligence—in control at time of negligence even if not at time of accident

c.  **Res Ipsa in Medical Malpractice**
   1.) Can use where injury does not usually occur w/o negligence—same as other cases but still held to standard of care of medical industry
   2.) Control of instrumentality not necessary but still need to eliminate other possible causes
   3.) Can use even if don’t know who caused the injury. If all possible tortfeasors are before the court and plaintiff does not know who caused injury, burden shifts to defendant to prove not the cause

d.  Three options when Res Ipsa proven
   1.) Jury can infer negligence—maj.
   2.) Presumption of negligence—defendant can rebut it
      a) Reasonable defense can “pop” res ipsa and doesn’t go to jury unless plaintiff can allege specific negligence
   3.) Burden of proof shifts to defendant—must show more likely than not 51% that was not negligent

e.  **Warren v. Jefferies**
   1.) little boy killed when car suddenly went into reverse and children jumped from car
   2.) held: still have to rule out other possible causes of accident—res ipsa no substitute for investigation and discovery

f.  **Widmyer v. Southeast Skyways**
   1.) plane crashed—conflicting inferences of experts as to possible causes of accident
   2.) held: can still use res ipsa even when plaintiff offers partial explanation of cause of accident
   3.) res ipsa often used where defendant has superior knowledge about what happened—but not an element
   4.) when evidence presents a complete explanation for the accident then no res ipsa allowed
   5.) looking for if it was more probable than not that negligence caused the accident and that defendant was the cause of the negligence

C.  **Cause in Fact**
   1.  general rule: but for defendant’s negligence the injury would not have happened
      a.  **Salinetro v. Nystrom**
1.) woman miscarried b/c she was x-rayed after accident and was not asked if she was pregnant.
2.) Held: not the cause of the injury b/c even if she was asked she would have said no b/c she didn’t know

2. problem when 2 or more parties are at fault
   a. sometimes passes but-for test—but for A’s negligence and but for B’s negligence the accident would not have happened
   b. joint and several liability—both are responsible for injury—“jointly and severally” liable for resulting damages—could collect from either or from both—each a “guarantor” of the other
      1.) if plaintiff collects all from one defendant, that defendant may be able to get contribution from the others
      2.) joint and several liability applies where the defendants “act in concert” or where concurring events result in a single indivisible injury or where A’s negligence creates risk of further harm by B’s negligence or where defendant is vicariously liable for someone else’s torts
   3.) general rule: “pro-rata” division of damages—equally divided not based on fault
   4.) new rule: comparative fault division of damages—share equal to share at fault

3. general rule: not fair for someone to pay for an injury that they didn’t cause
      1.) Both East Texas and Sun Oil dumped salt water killing fish in lake
      2.) Held: where there is a single indivisible injury that can not be reasonably apportioned, both tortfeasors shall be held jointly and severally liable
      3.) If injury is divisible then each tortfeasor responsible for what they caused
   b. Exception: Anderson v. Minneapolis St. Paul Railway
      1.) Railroad engine caused fire, other fires also sweeping through
      2.) Held: only must prove that defendant’s action was a substantial factor in plaintiff’s injury

4. General rule: pay for what you caused—had defendant not been negligent what would have been outcome
   a. Dillon c. Twin State Gas and Electric
      1.) boy electrocuted when he grabbed onto defendant’s wire as he fell off bridge
      2.) held: recovery limited by what would have happened had defendant not been negligent—would have been maimed or killed.
      3.) Look at what would have been likely outcome of life had defendant not been negligent—prior conditions relevant
   b. Wollen v. Depaul Health Center
      1.) Plaintiff had a 30% chance of surviving gastric cancer, but b/c of defendant’s negligence died
      2.) Held: can recover 30% of negligence award—but can still recover
c. Discount for pre-existing conditions and discount for conditions that would have occurred anyway.

d. Exception: *Summers v. Tice*.
   1.) Defendants both negligent in shooting at plaintiff, one shot hit eye and one shot hit lip—impossible to tell which shot which. Either one could have been the cause but only one was.
   2.) Held: Alternative Liability Doctrine: When all possible tortfeasors are before the court and all were negligent, burden shifts to defense to prove that they were not actual cause of injury otherwise jointly and severally liable.

e. Exception: *Hymowitz v. Eli Lilly and Co*.
   1.) DES daughters attempting to recover from manufacturers of the drug. Problem—over 300 companies manufactured DES, not all are still around, not all sold in each area.
   2.) Held: Liability of DES manufacturers to be several only and based on a national market share.
   3.) Variation: CA rule, once you have a substantial share of the market before the court, burden shifts to the defense to prove that you were not the cause.

D. Proximate cause—“legal cause”—policy driven
1. In *Re Arbitration between Polememis and Furness, Withy and Co*.
   a. Heavy Planks across the hatchway of the ship fell and b/c of vapor in the hold caused a fire.
   b. Held: doesn’t matter that specific consequences of injury not foreseeable, enough that an injury was foreseeable—once negligence proven liable whether or not actual injury foreseeable.
   c. “direct cause test”—as long as injury can be directly traced to negligence then liable.

   a. Plaintiff’s wharf damaged when oil leaked from defendant’s ship caught fire b/c of debris underneath and sparks from welding on the wharf.
   b. Held: only liable for those consequences which a reasonable person could reasonably foresee to be a possible result of the negligence.
   c. “scope of the risk test”—liable if resulting injury is one which could have been reasonable foreseen as a result of negligence.
   d. if injury foreseeable still liable if more serious injury results. If can foresee small fire then liable for big fire.
   1.) Thin-skull rule—take plaintiff as you find them with special conditions and such.

   a. Plaintiff injured when guards helping man onto train caused unmarked package of fireworks to drop and explode.
   b. Held: no liability b/c injury to plaintiff specifically was not risked by defendant’s conduct.
   c. Was this plaintiff foreseeable? Was the injury to this plaintiff foreseeable?
   d. Are rescuers foreseeable plaintiffs?
1.) General rule: Yes, in most jurisdictions given reasonable rescue and that X was negligent towards Y—have to prove that negligence caused first injury.
   a) Average citizens foreseeable
   b) Exception Firefighter’s rule: professional rescuers who are paid to assume risk who are injured while performing professional duties can’t recover from defendant whose ordinary negligence created the emergency
      i) Exceptions:
         (a) Intentional torts—X commits intentional tort against Y, firefighter rescues, injured can recover
         (b) Violation of statute
         (c) Hidden dangers and didn’t warn—didn’t tell there were no basement stairs
         (d) Independent and separate harms—there b/c of Y but injured b/c of x
      ii) Peripheral personnel (nurses, doctors, EMT’s) different from public safety personnel—peripheral people can usually recover

4. Hughes v. Lord Advocate
   a. Workers left manhole open and kerosene laterns out. Boy was injured as he climbed out and knocked latern in causing explosion from vaporized kerosene.
   b. Held: liable b/c injury was foreseeable, doesn’t matter that manner that injury happened was unforeseeable. Burns foreseeable, burns happened.

   a. Lid fell into vat w/o splash, made chemical reaction and exploded
   b. Held: explosion not a variant on risk of injury foreseen by defendant

6. Problem of intervening causes
   a. Was intervening cause foreseeable? If not than intervening cause supercedes the negligence of the first plaintiff
   b. Does negligence of first actor expose plaintiff to criminal or intentional torts of others? Possible liability. What matters is if act of 2nd actor was foreseeable?
   c. Derian v. Felix Contracting Corp.
      1.) construction workers did not properly barricade off the area where they were pouring hot liquid, driver of a car had a seizure and crashed through barricade
      2.) Held: foreseeable that driver’s negligence could cause injury—precise manner of negligence did not need to be anticipated
   d. Ventricelli v. Kinney System Rent-a-car
      1.) Plaintiff rented a car from defendant with a trunk that would not close. While stopped to close trunk, he was hit from behind by another car.
      2.) Held: not the proximate cause b/c might have been there even if defendant had not been negligent. Could not have forseen collision between parked cars.
e. Force of nature—not liable if resulting harm is not the one risked by original negligence

7. problem of subsequent injuries
   a. If subsequent injury could be reasonably foreseeable then can be liable. X injures Y, hospital then injures Y. X can be jointly and severally liable with hospital for second injury.
   b. Would subsequent act have not occurred but for the negligence of the first actor?

E. Injury
   1. must suffer legally recognized harm—“actual damages”
   2. Copeland v. Compton
      a. defendant was negligent, but not liable b/c was not proven that she was cause of plaintiff’s back troubles

IV. Affirmative Defenses to Negligence
   A. Immunities
      1. based on jurisdiction i.e. parent/child
      2. some by statute—workmen’s comp.
      3. defendant has to raise issue
   B. Contributory Negligence
      1. minority of jurisdictions recognize today—used to be complete bar to recovery—most use comparative fault
      2. Butterfield v. Forrester
         a. plaintiff’s failure to exercise reasonable care for himself contributed to injury—no recovery—could have prevented injury had he used reasonable care
      3. exceptions:
         a. greater mental than negligence on part of defendant
         b. when defendant has a duty to protect plaintiff from the very thing that plaintiff did
         c. last clear chance doctrine
            1.) even though plaintiff negligent, defendant had last clear chance to avoid what happened
            2.) elements
               a) plaintiff helpless
                  i) if just inattentive must have discovered in time to avoid
               b) defendant knew or should have known that plaintiff was helpless
               c) After that time knew or should have known, defendant failed to use reasonable care to avoid what happened
                  i) Had he discovered in time could have prevented accident
                  ii) If nothing could have done then last clear chance doesn’t apply
   C. Comparative Fault
      1. recovery reduced for amount plaintiff at fault
      2. Pure
         a. Plaintiff can recover as long as not 100% at fault
      3. Modified #1
a. Plaintiff can recover as long as their fault doesn’t exceed that of defendant
b. Problem with multiple defendants
   1.) Some say each defendant separately, some allow defendants to be combined
4. Modified #2
   a. Plaintiff can recovery until their negligence equals defendant’s
   b. Total bar after 50%

D. Assumption of the Risk
   1. similar to consent in intentional torts
   2. expressed
      a. specifically agree to assume risk—part of contracts
   3. Implied
      a. Focuses on conduct—why did you do something—available choices
      b. Elements:
         1.) Voluntarily proceed
         2.) Know risk
         3.) Appreciate danger/unreasonableness of risk
   4. Primary assumption of risk
      a. Don’t owe you a duty for dangers inherent in activity
         1.) I.e. sports cases
            a) Consent not limited by rules of sport
         2.) No duty unless willfully or recklessly injured

V. Emotional Injuries
   A. Overview
      1. general rule: in absence of physical injury, courts reluctant to allow recovery
      2. need a physical manifestation of the emotional distress—vomiting, nervous breakdown, loss of sleep etc.
   B. Intentional Infliction of Emotional Distress
      1. “outrage”
      2. Elements:
         a. Extreme and outrageous conduct
            1.) need conduct/words
               a) mere words enough
                  i) just insults not enough—can’t have eggshell skin
               b) insults enough for those who provide “essential services to the public”—i.e. common carriers, utility company
               c) racial insults enough
         b. Intended to or recklessly risking emotional distress
            1.) need intent
               a) know/want/know w/ substantially certainty OR recklessly cause
         c. Actually causing severe emotional distress
   3. LaBrier v. Anheuser Ford, Inc.
      a. Husband’s employer knew wife had emotional condition yet harassed her causing emotional distress resulting in rash and bedridden state.
      b. Held: where one engages in extreme and outrageous conduct they are liable for intentional infliction of emotional distress. When one knows that
one has a delicate emotional state conduct not usually outrageous can become so.
c. If hadn’t known about previous condition, “thin skin rule” would have applied.
   1.) Would a reasonable person suffer emotional distress? If so, defendant is liable for all that results even if greater distress is suffered than anticipated. If not, no recovery.
4. Winkler v. United Methodist Church
   a. Held that special fiduciary relationship between pastor and parishioner gave rise to duty to protect from emotional distress
   b. Same conduct as battery can be independent action for emotional distress
5. Indirect Victims/Third Parties
   a. General Rule: no recovery
      1.) **Homer v. Long**
         a) Spouse may not recover from wife’s seducer. Outrageous conduct must be directed toward’s plaintiff
         b. exception: Present and immediate family member of person suffering harm whether or not third party suffers bodily harm
         c. exception: Present, not an immediate family member, and third party suffers bodily harm
         d. problem when defendant does not know that plaintiff is present—harder to get recovery—was presence foreseeable? Problem getting intent/recklessness w/o knowledge of presence
         e. some jurisdictions relaxing presence requirement where know/intend conduct to cause emotional distress to a third party
C. Negligent Infliction of Emotional Distress
   1. old rule: no recovery
   2. next rule: needed to have a physical injury to attach emotional injury to
      a. Mitchell—fright alone not enough
      b. Needed physical impact—minority view today
   3. next rule: Zone of danger—majority view
      a. **Grube v. Union Pacific**
         1.) held: no recovery when only affected by injuries of others. Must fear for own safety even if don’t suffer an injury to recover.
         b. Exception: Dillion—close relatives
            1.) Immediate family member
            2.) At scene of injury—aware injury was occurring
            3.) Contemporaneously suffers emotional harm
            4.) Some jurisdictions relaxing presence requirement
            5.) Dillion jurisdictions still recognize zone of danger claims
   4. direct victim rule:
      a. you owed a duty to me, you breached it, I suffered emotional injury
      b. Burgess—doctor owed duty to pregnant woman to prevent emotional distress
   5. emotional injury w/o any physical risks
      a. relationship between parties—was there a duty to act w/ reasonable care
1.) handling dead bodies
2.) death notices
   a) other kinds of misinformation—false positive for HIV—no recovery
3.) Boyles—no duty to protect girl sleeping with from emotional distress from videotaping sex—no direct victim recovery
   1.) Plaintiff falsely accused of stealing from employer
   2.) Held: independent cause of action for negligent infliction of emotional distress.
      a) Severe emotional distress was the reasonably foreseeable consequence of defendant’s negligent act or omission
   b) Prove elements of negligence get recovery
6. Fear of Disease
   a. Potter v. Firestone Tires
      1.) Held: recovery if more likely than not that will develop cancer in future
      2.) Exception: despicable conduct of defendant warrants punitive damages
   b. KAC v. Benson
      1.) Held: must allege actual exposure to HIV—zone of danger—before recovery for fear of HIV
      2.) Exception: once you have actual physical injury—fear attaches on
D. Loss of Consortium
   1. originally claim master made when servant injured—now extended to husbands and wives
   a. Elements:
      1.) You tortiously injured my spouse
      2.) I am the spouse
      3.) I lost something as a result of your tort
   2. usually rides along with tort claim—depends on whether tort claim succeeds or fails
   3. Parents/children usually can’t claim loss of consortium
   a. Boucher v. Dixie Medical
      1.) held: parents could not recover for loss of consortium with injured adult son
   4. majority allow claim between spouses/minority do not
   5. usually don’t allow unmarried cohabitants to recover
VI. Prenatal Injuries
A. Usually have two separate actions for injury
   1. injury to mom—recovery not difficult
   2. action on behalf of child—more difficult
   a. only owe duties to identifiable persons w/in zone of danger
b. majority view:
   1.) viable at time of injury—most jurisdictions 20 weeks
   2.) child born alive—many jurisdictions waiving this requirement now

c. problem with injuries before child conceived that affect child:
   1.) Renslow—owe duty to those who may be harmed by negligence even
       person is not yet in being—minority view
   2.) Albala—child must be identifiable at time of injury

d. Action can be against medical professional or ordinary person
   1.) Not many states allow action against mom for taking drugs, etc.

B. Wrongful Birth/ Wrongful Life/Wrongful Conception
   1. Wrongful Life
      b. Had you told my mother about the defect she would have aborted me and I
         wouldn’t have been born
      c. Most jurisdictions won’t allow—court can’t make you whole with phone
   2. Wrongful Birth
      a. Had you told me (mother) about defect I would have aborted and wouldn’t
         have had child
      b. Many jurisdictions allow claim—dependent on right to have abortion—
         defect should have been detected at point still had right to have abortion
      c. Greco v. United States
         1.) same as regular negligence/medical malpractice
         2.) can recover extraordinary expenses of raising child/emotional distress
   3. Wrongful Conception
      a. Negligently sterilized plaintiff—pregnancy results
         1.) Many courts allow recovery for pregnancy expenses, abortion, pain of
             pregnancy and lost wages but not for cost of raising healthy child
         2.) Some courts allow recovery of extraordinary expenses
   4. Wrongful Abortion
      a. Lynch—had you not been negligent, I would have known I was pregnant,
         had you not prescribed drug, I would not have had to worry about birth
         defects, because of your negligence I had to choose between chance of
         birth defects and abortion
      b. Held: NY court allowed recovery for expense of abortion and emotional
         distress

5. once you have proven duty still have prove rest of claim

VII. Strict Liability
   A. Abnormally dangerous activities—i.e. explosives
      1. what you are doing is so dangerous you have to be flawless
   B. Wild Animals
      1. strictly liable for injuries caused by wild animals
      2. domestic animals—cat and dog
         1. “first bite rule”—first bite is “freebie,” liable for 2nd bite b/c should have
            known and prevented
   B. statutes
      1. vicarious liability
2. workmen’s comp

C. products

1. defective products/food
   a. any product that is unreasonably dangerous and causes danger
   b. restatement §402A—stream of commerce rule
      1.) you sell product, someone injured, you have to pay
      2.) many people believe it is out of control
   c. new restatement
   d. nothing do w/ manufacture of products—you get ideminity from manufacturer

2. three kinds
   a. manufacturing defect
   b. design
   c. ineffective/absent warning

3. limited to certain kinds of losses
   a. personal injury—not money (have to go under contract)
   b. can’t disclaim tort liability