BACKGROUND

I. Elements of a tort
   a. Duty – does the def owe the pltf a duty to conform his conduct to a standard necessary to avoid an unreasonable risk?
   b. Breach – did the def’s conduct fall below the applicable standard of care?
   c. Causation – was this failure to meet the standard of care causally connected to plaintiffs harm
   d. Harm/damages – did the plaintiff suffer harm? Basic tort rule, no harm no foul

II. Tort Causes of Action
   a. Intentional torts: behavior that is intentional in some way, causes injury
   b. Negligent torts: behavior that unreasonably risks personal/property injury
   c. Strict Liability: behavior that is tortuous because it causes damage to another or property, regardless of fault or reasonableness

III. 5 Functions of Tort Law
   a. Corrective Justice: correction of the wrong (through money)
   b. Optimal deterrence: certain losses is not worth what it would take to deter them
   c. Loss Distribution: prefer large number of people bearing the loss than single person bear large one
   d. Compensation
   e. Redress of Social Grievances: especially against large impersonal institutions

INTENTIONAL TORTS

I. Requirements to commit a battery
   a. Is there intent?
   b. Vosburg court: tort of battery occurs when there is intentional touching that leads to harm with an unlawful act, don’t need intent to harm
      i. Implied license: the unlawful act defined by the situation in which it occurs. Intentional touching can occur in certain settings, i.e. sports games or a play ground. Look to see if some i.l.
   c. Restatement: tort of battery occurs when there is intentional touching that leads to harm with an intent to touch offensively with an unlawful act.
      i. 3ed: if person brings about harm either purposefully or knowingly
   e. Consent must be explicit unless an emergency. Information forcing rule, people are their own best decision makers.
      i. Okay consent if:
         1. incapable of giving consent,
         2. immediate action is necessary to save the person’s life
         3. there is no indication that the person would not consent if he were able to,
         4. a reasonable person would consent.
   f. Transferred consent, implied consent, and a helpful intention don’t cut it.
g. **Sports Torts:** special battery rule for certain activities. What is consent and offensive touching within sports?
   i. Within (1) culture of the game, (2) rules of the game, (3) outerbounds of the game – reasonable expectations (4) or just no liability on the court?

II. **Defenses to battery** - con neg is not one.

a. **Insanity** *(McGuire – nurse enters room to help insane woman to prevent harm herself and insane woman hits her)* – an *excuse* on the basis of mental health conditions
   i. To be liable for an intentional tort, *must have been capable of entertaining the level of intent* required by a normal person, and must have in fact entertained that intent.
      1. Court splits the difference of a pro plaintiff and pro defendant rule. Insane person can still get off the hook.
      2. For the jury to decide if pltf has ability to entertain intent

b. **Self defense** *(Courvoisier – man shoots police officer thinking he was one of the robbers)* – a *justification* for your actions
   i. Self defense is a defense to battery where the defendant reasonably believed in the necessity of self defense
      1. Court splits the difference. Not enough to honestly believe (totally subjective – pro defendant), and reality is not the determining facto (totally objective pro pltf) more of a subjective rule
      2. Subjective – what as D’s state of mind, objective – what would a reasonable person due in that state of mind.

b. **Necessity** *(Ploof – hermit living on island doesn’t let boat dock and harm to folks on board and Vincent–)*
   i. *Ploof:* Necessity gives a privilege to trespass
   ii. *Vincent:* imperfect privilege. You are excused from the tort of trespass, but not paying for the tort of trespass.
      1. this conduct rule does not answer who has to pay: here boat no trespass, but must pay.
      2. Vincent rule: imperfect privilege, anti-vincent rule: loss lies where it falls if you take reasonable care (negligence)
         a. **GAME THEORY QUESTIONS:** Lead to better efficient outcomes? Loss spreading? Transaction costs?
   iii. When ought this rule be invoked? (1) risk to life and no risk to from docking (2) risk to property (3) no other possibilities (4) any danger (as opposed to serious danger)risk to property greater than the risk to the trespass (5) other personal risk (6) when you pay a fee (7) only when the dock owner agree

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**STRICT LIABILITY V. NEG**
I. Key thought: Negligence doesn’t account for the negative externalities caused by non-negligent people (e.g., drivers will inevitably cause some accidents, even if they drive non-negligently always).
   a. Now a days, not a replacement for negligence, just an addition for certain non-negligent accidents.

II. History:
   a. Strict Liability
      i. The Thorns Case – act at your peril, intent or amount of care does not matter
         1. idea that engaging in risky activities is okay, but you have to compensate your victims.
   b. Super Negligence – even an inefficient accident needs to be prevented.
      i. Weaver v. Ward – inevitable accident doctrine. 2 soldiers practice fighting with loaded muskets: not just that a person acted reasonably, but must act unbelievably careful
         1. Involuntary: someone takes your hand and hits someone else
         2. Plaintiff causation: plaintiff ran into path of firing gun
         3. Inevitable action – court would have found in weaver if he pleaded this, but not enough to say it was against my will.
   c. Negligence
      i. Brown v. Kendall (Shaw) – man injured while friend separating fighting dogs. Big friend to industry (big shift from SL), rejects act at your peril idea.
         1. pure accident rule: When there is a pure accident, no liability. Even if the accident causes injury. D could not have avoided by use of due care
            a. This means if no liability for a pure accident must be liability for a negligent accident.
      ii. Rylands (Blackburn) – Having SL, but cabining it somehow. Only rule about escapance on land. SL for non natural uses of land. Rejected by most courts… so talk about with grain of salt.
         1. American reception: at first rejected out right, but later found SL for oil wells, explosives, unusual amounts of water held on land. “Ultrahazardous activities”

STANDARD OF REASONABLE CARE

I. Who is the reasonable man?
   a. Rest: unless you are a kid, exercise care of a reasonable man (§238)
   b. Physical disability: need to take more than ordinary care, take all necessary precautions
      i. Fletcher v. City of Aberdeen – II only has obligation to proceed as reasonable blind person. A categorized objective standard
   c. Sudden incapacity: if you don’t foresee it, you are off the hook.
   d. Stupid person – objective standard. Not a defense, negligence is failure to act as prudent man
      i. Vaughan v. Menlove - stupid stacking of hay stacks
e. **Old people** – objective. held to ordinary care standard  
   i. **Roberts v. Ring** – old man who can’t see or hear driving badly  

f. **Children**: subjective standard. reasonable care that a boy of his same age and maturity would take.  
   i. Exception - **Daniels v. Evans**: when kids doing adult activities like driving car held to adult standard  

g. **Insanity:**  
   i. Rest: in primary negligence you have to act like reasonable man not res crazy man (addresses mental retardation and not illness for con neg.)  
      1. no address of issue  
   ii. **Bruenig** (batwoman): No negligence where illness undermines understanding of care or ability to exercise it and no forewarning).  

h. **Woman**: reasonable man, reasonable woman, or reasonable person. 19th century held to a higher or lower standard, no longer anymore.  

i. **Drunkenness**: ordinary people get drunk, so city must take enough care for even drunks (Robinson - sidewalk issue). Today would not come out the same way… subjective then not any more.  

j. **Objective pros**: No moral hazard, administrability, fraud, incentive to take care (even if it’s very difficult or even impossible for some people)  

k. **Subjective pros**: Fairness/justice (do the best you can and extra-agile people: exceed an objective standard of care); making it objective won’t change anyone’s behavior anyway; not much harder to administer (we do it all the time in crim), efficiency: if your B is so high that it exceeds pL, we don’t want you taking that precaution  

II. **Standard of negligence – calculus of risk**  
   a. **Two standards**  
      i. **Blythe**- reasonable precaution sunder circumstances. Neg – omission of doing something that some one would do under circumstances or doing something that a reasonable man wouldn’t do.  
      ii. **Eckert** (saving child on train tracks) – ex ante analysis not negligent if it is not rash or reckless, case somewhat different because saving life.  
      iii. **Cooley**: extra care is too much to ask.  
   b. **Possibilities**  
      i. **Strict liability**  
      ii. **Any foreseeable injury**: liability results from foreseeable injury  
         2. No consideration of cost, no cost/benefit analysis about whether harm is ok  
      iii. **“Utmost care” standard**: Deft is obligated to prevent even the smallest risk of injury in the practical operation of business

   1. Defendant is negligent if the cost of burden ($B$) is less than the probability of loss ($P$) times the magnitude of loss ($L$)
      a. $B$ – expected value of preventative measure includes cost of prevention (including info costs), value of preventative measure (likelihood of success and magnitude) and alternative risks imposed by prevention ($PL$)

2. Problems with Hand:
   3. Economic efficiency may not be a goal preferred over others (p. 64)

4. Variable can’t always be reduced to monetary values and some times variables are incomparable – judges and juries must intuit a number rather than calculate

5. Juries not comfortable applying rule, can’t apply rule to human life (GM issue)

6. Some more risk averse than others.

7. If you are big business with deep pockets, people are more likely to sue…so invest more in safety, can loss spread easier

8. ex-ante might not know which measures are worth taking

   c. **Custom**
      i. **Custom tends to show reasonableness, and not following shows negligence.**
         1. 

   d. Three standards

      ii. **Custom doesn’t matter:** Defendant is held to standard of reasonable behavior according to the jury. Too soft. Mayhew v. Sullivan Mining (1884): Miner falls down ladder hole.

      iii. **Custom is instructive but not dispositive.** This is the rule!!!
          1. Learned Hand rule: we’re interested in custom, but not bound by it.
          2. T.J. Hooper (1931): No radio on boat = no warning of storm

   e. Defenses
      i. Complying was dangerous under the circumstances
      ii. Reasonably believe he precautions are superior

   f. **Medmal exception:** instead of instructive here, custom is dispositive.
      i. **Usual rule:** custom is the floor and the ceiling.
1. **Lamas**: back problems, surgery, infection. Infection may have been prevented with ordinary care

   ii. **Locality issue**: doctors held to a national standard not a local one.

   1. **Brune**: patient drugged for 11 hours after surgery, doc can’t way we give more anesthesia in our town.

   iii. **Informed consent**: custom does not control. Duty to reveal any material risk. Shift from what doc thinks is material to what reasonable person thinks is material (still a judge question) Court trusts patient to make rational decision.

      1. **Cantebury v. Spence**: kid has back surgery and is paralyzed though not warned of that risk. Doctor is liable.

   2. **Two-step**: Breach (judge) and causation (jury). Was breach but for cause of the harm (jury) and was breach of duty (judge). Only liability if failure was but for cause

   3. reality is that most patients follow advice of doctor, but this protects the idiosyntractic patient who does not have he same values as most, and this is an info forcing rule to get info to the patients who would follow docs advice with or without information.

   iv. **Cost benefit analysis**: going beyond scope of custom, ordinary care sometimes expected.

      1. **Helling v. Carey**: doctor should have given glaucoma test because so cheap even though not custom. Instance where law changed custom, do we need more of that?

   g. **Statutes**: statutory causes of action, or defo of negligence

   h. **Effect of violation**

      i. Unexcused violation of statute which is adopted by court as the standard is negligence itself

      ii. Unexcused violation of statute with not adopted by the court as the standard relevant evidence

   i. **Excused violations**: excused violation is not negligent. Not fully adopted, so take with grain of salt.

      i. Violation reasonable because of actors incapacity

      ii. Actor has not reason to know of occasion for compliance

      iii. Unable after reasonable diligence or care to comply

      iv. Confronted with an emergency not due to his own conduct

      v. Compliance would involve greater risk of harm to actor or others

j. **Statutory violations as Negligence per se**: someone sues in negligence and says in violation of a statue (usually criminal whose enforcement not available to the parties). To meet prima facie case:

   i. **Rest. § 14**: Actor is negligent if w/o excuse, the actor violates a statute that is (1) designed to protect against the type of harm the accident causes and (2)accident victim is within the class of persons the statute intended to protect (3) causation
1. asking: is this the kind of statute that is trying to effect safety? Is this a statute that is protecting against this harm? Judge decides what legal status of statute is.

2. *Gorris v. Scott*: sheep go overboard in storm. II can not recover, even though violate statute of penning diseased animals in, because not harm statute designed to protect

k. **Why statutes matter?** Democracy, reliance by others, information advantage of legislature, cheaper to have rule, performance for rules over standard.

l. Inferences are 5 ways that litigation process structures the statute influence on negligence:
   i. Impermissible inference: irrelevant, inadmissible if possible.
   ii. Relevant (some) evidence: needs more for an inference, on its face will not support a jury verdict.
   iii. Permissive inference (prima facie case): meets the burden of production and gets to the jury. Supports a jury verdict.
   iv. Rebuttable presumption, mandatory inference: meets burden of persuasion, unless met with permissible rebuttal. The jury must conclude that there was negligence, without a rebuttal.
      1. *Martin v. Herzog* - the fact that buggy had no light and that a statute required such, provides a mandatory inference of negligence
      2. *Telda*: deaf girl walking on wrong side of road against statute. Has excuse… heavy traffic. Statute taken into consideration but does not bar recover
   v. Irrebuttable presumption, mandatory inference: meets the burden of persuasion and jury must find negligence, without opportunity for rebuttal.
      1. *Osborne v. McMasters* (or could be rebuttable inference) – employee pharmacist failed to label substance poison according to statute and kills lady

**WHO DECIDES NEGLIGENCE**

I. **Judges v. Juries**
   a. *Burden of production* (pltf) – judge decides… could a rational trier of fact think that the conduct was negligent? Inference of negligence must be permissible, jury not required to find negligence though
   b. *Burden of proof* (pltf) – jury decides… what the conduct negligent? Jury fines negligence only if P persuaded them by a preponderance of the evidence (more probably than not), if tie P fails (equipoise)
II. **Res Ipsa Lociutor** - some accidents just don’t happen without somebody being at fault. Case of factual uncertainty but negligence anyways. Either prima facie case or rebuttable inference (usually prima facie – so not a sure thing, but absent compelling arguments good to go). Byrne v. Boadle: falling flour barrel

   a. **Reminder**: must be very careful to apply, does not apply to all cases with circumstantial evidence or no evidence of negligence. Sometimes it is just that P has not met burden of production, analyze this first.
   b. **Requirements**: (prosser) (1) must be kind of event that does not normally occur in the absence of negligence (2) must be caused by some agent w/i exclusive control of the defendant (3) no voluntary or contributory negligence on plaintiffs part.
      i. **Rest**: same no. 1, but no 2 and 3. Just other responsible causes have been eliminated by the evidence.
      ii. Use Res Ipsa when defs are talking, this usually smokes out evidence from the defendants (usually days before discovery)

   c. **MedMal**: generally don’t find res ipsa in medmal cases, but narrow set of facts where you do. Kambat – 18” pad left in abdomen

   d. **Defs acting in concert**: Once plaintiff meets burden of production, defs must prove non-negligence. Defs must have reason to know what happened and plaintiff does not, it is incumbent on the defs to come forward and disprove charges
      i. to meet burden of persuasion, jury will ask: is it more likely than not that 1 of defs was negligent.

   e. **Defenses to res ipsa**: def can show he did not do anything negligent. Imig: def showed he properly hitched car and was freak accident when car loose and went across lanes.
      i. Non negligence
      ii. Alternative explanation – Kambat try to some up with some other explanation.

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**PLAINTIFFS CONDUCT**

I. **Contributory Negligence**

   a. **Standard**: conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection
      i. breach of a duty to exercise ordinary care
      ii. causation= “but for” the p’s action, there wouldn’t have been harm.

   b. Contrib negligence by the P is a complete defense to D’s liability for negligence. One person acting neg doesn’t mean another is excused from taking ordinary care.
      i. **Butterfield v. Forrester**: drunk guy riding hose from bar gallops across pole in road. Can’t sue pltf for pole because he was totally negligent in his riding.

   c. Contrib. neg. bars liability only if it was a causal factor in the accident.
      i. **Geyerman v US lines**: fishmeal sacks
d. Ordinarily, D bears the burden of pleading, production, and proof as to contributory negligence.
e. Question of con neg is usually for the trier of fact.

II. Last clear chance
a. In accidents that unfold over time, when d can see p being careless, we don’t want d to also be careless.
b. So last clear chance gives the d a reason to take care because it is all about when the d can see what is happening to the p.
c. It is an exception to a defense. Rebutts the plea of contrib. negligence. (eg) D says “contrib. negl.” P then says “last clear chance! You, d, had the last clear chance to stop and not to hurt me!” A d will never say last clear chance.
   i. Fuller: P says you hit me on the railroad tracks, D says you were con neg for being there, P says you had a lcc to stop.

III. Comparative Fault: started in 1970s and now all states adopted it
a. Liability apportioned according to responsibility.
b. Pure: apportions liability in direct proportion to fault in all cases. Party 10% responsible, they pay 10% of damages
c. Impure: Apportions liability in proportion to fault up to the point at which the p’s negligence is equal to or greater than the d’s; at that point, p may not recover. P can’t recover if the p is half or more at fault.
d. Pro Comp Fault
   i. Liability should follow fault, full appreciate for joint causation, skepticism about incentives, pro(ish) injure
   e. Consequences: Last clear chance and assumption of risk out the window, they merge with ordinary principles of comp. fault

IV. Assumption of Risk
a. Defo: If you knowingly do something risky, you bear the loss if harm occurs (tippy ax rack case – Lamson v. American Axe – contributorily negligent.) Bringing into torts a contract idea.
b. Three theories:
   i. No negligence with assumption of risk
   ii. Strict contract theory – is there a contract, was there duress, what does contract say?
      1. should ask yourself is this the kind of thing that people should be able to contract out? What about mandatory safety benefits?
         a. Mandated safety benefits can solve market failures, distributional problems or effectuate moral values
         i. But only helps workers if they get something for nothing, prefer safety to wages, or are better off with safety regardless of preference.
      iii. Contributory negligence
   c. Exceptions to assumption of risk (Cardoza in the Flopper case (Murphy v. American Steeplechase)
i. No fair warning
ii. Not hazard invited or foreseen (must have had actual knowledge)
iii. Excessive danger
   1. trap for the unwary—beyond the risk you had any reason to foresee
   2. too perilous to be endured – public safety theory
iv. Latent defect: Problem in equipment, not obvious or known
d. Endowment effect: people value higher the things they own. People don’t tend to follow grass is greener theory, people require more money than they already have.

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**CAUSATION IN FACT**

I. **Factual Causation Issues** – What would have happened without d negligence? If nothing, then should be off the hook. Most juries are asked whether your negligence *probably* caused the harm. On appeal, judges determine might a reasonable jury find your negligence might have caused the harm.
   
   a. what is the substantive standard (i.e. the question the jury is asked/answering)?
      i. Mostly does not change… mostly did the defendant’s neg cause the accident, was it the but for cause?
   b. What showing meets the burden of production?
      i. General answer: could a reasonable juror find that the defendant more likely than not caused the plaintiff’s harm.
   c. Who bears the burden of proof?
      i. See Below… proof of causation
   d. Standard of proof: How certainly must the facts be established?
      i. Solid answer - more likely than not
   e. Different from res ipsa because here you know D was negligent, just don’t know if that negligence caused the harm

II. **Overdetermined Harm (concurrent causes):** 2 events cause harm, either one would have been sufficient to cause substantially the same harm. Each is held liable for the injury. Not covered in the “but for” test.
   
   a. *Kingston v. Chicago Ry.*— sparks from train create fire, which unites with fire of unknown origin an burn down house. Not be equitable to allow D to escape liability, so D liable.
   b. **Apportionable harm:** if you can apportion the amount of harm to each cause then done that way, but when not possible… you use this.

III. **Proof of actual cause:**
   
   a. **But for:** plaintiff does not need to prove with absolute certainty, but that it is the probable injury. Inferences from jury are acceptable and usually done
      i. **Rule:** speculation does not count (Grimstad – drowning 1)
      ii. **Rule:** “might” the neg have caused harm (Kirinich, drowning 2)
      iii. **Rule:** Calabresi rule. Ff the harm is within the risk that was anticipated that is enough to get to the jury. Negligent act deemed wrongful because it increased the likelihood of a certain harm then that harm occurs… that is enough to go to the jury.
         1. **Zuchowicz:** doctor gave wrong dosage, pltf died of PPH. PPH is not proved to be caused by overdosage of this medicine.
iv. Rule: burden of proof shits to defendant when negligence not only enhance chance of accident, but simultaneously suppressed information.
   I. Haft v. Lone Palm Motel: no lifeguard, no signs. Boy drowns, no one knows what happened. Without rule D can take advantage of the lifeguardless situation they created.

b. Increased risk, followed by actual damage: usually arises in medical misdiagnoses.
   i. Herskovits: Cancer not diagnosed in time. Enough to establish that negligence MIGHT have caused harm. Medical testimony of a reduction in chance for survival is suf. evidence to go to the jury.
      I. damages – can only recover for damages due to premature death

c. Mutiple defendants

d. Double fault: Here plaintiff must show that one of two caused the harm, and then Ds have burden to exculpate themselves.
   i. Summers: hunting, two friends shoot negligently and hurt P. Burden is on D to show which shot the P.
   ii. Joint and Several liability: can’t claim you are not the cause because another person’s injury also contributed. P can sue one for all the harm and let them work it out

e. Uncertain Defendants: If P can prove that Ds were negligent (or produced defective product), but can’t say which one, burden is on D. If D unable to prove that he did not cause injury, require D to pay damages amounting to percentage of market share.
   i. Sindell: DES cases. All produced identical formulas for drug that 20 years later was shown to cause repro problems. Each D free to show he did not cause harm. If P can only find 90% of market share, she recovers 90% of damages.
   ii. No joint and several liability in courts adopting market share theory
   iii. What market? National market, regional market

PROXIMATE CAUSE
Defendant should not always be liable for all of the consequences of her act. Very political. Many tests can determine p.c. (mustard plaster)

I. Overall Test: (Foreseeability and harm within risk)
   a. Was there a natural and continuous sequence between cause and effect?
   b. One thing substantial factor in producing the other? **
   c. Was there a direct connection without too many intervening causes?
      i. Intervening v. superseding cause
      ii. Unforeseeable intentional torts – no liability
   d. Could the result be foreseen?***
   e. All should answer this: Is this the kind of result that we think you should have to pay for given your negligence?

II. Limit Liability
III. Coincidence
   a. Test: Could anyone have predicted that speeding made it more likely that a tree could fall on him. Does it ex ante increase the risk? No. Then it is a coincidence.
Berry v. Sugar Notch: Tree falls on train. P says town negligent in placement of tree, D says neg per se you were speeding.

1. Court: fact that he was driving too fast only relevant if tree fell and he could not stop.

IV. Foreseeability – everything of course is imaginable, but is it foreseeable harm within the risk?

a. Direct Causation: D on the hook for any harm that directly resulted from negligence, no matter how unforeseeable.

i. In re Polemis: D negligently dropped a plank that caused a spark which burnt down entire ship. Wagon Mound overruled this case 40 year later.

ii. Critique: causes limitless liability. Ryan: D operates train negligently and sets its woodshed on fire, which in turns causes P’s house located nearby to catch fire– although destruction of shed “ordinary and natural result” of negligence, to play liability is too remote

b. Unforeseeable extent of damages: Anti-Vosburg. Does not matter…you are deo not off the hook.

i. Tom Cruise rule: You are liable for the full extent you caused when only issue is of foreseeability is extent. You run down Tcrazy instead of me, on the hook for more money

ii. Egg shell skull rule: you take plaintiff as they come no matter if they are more susceptible to injury.

c. Unforeseeable type of damages: D on the hook for damages reasonably foreseeable at the time D acted (Cardozo rule). Not really followed.

i. Wagon Mound: D spilled oil in bay, drifted to P wharf. Spark caused cotton rag to ignite, which burnt down whole wharf. Here the P was somewhat foreseeable

d. Unforeseeable plaintiff: Andrews dissent in Palsgraf. D on the hook for not only expected plaintiff, but also who is in fact injured, even if he be outside the general danger zone. Breach of duty to anyone is a breach to everyone who his hurt, negligence is a breach of duty to society.

i. Courts should consider the following in determining proximate cause

1. Natural and continuous sequence between cause and effect
2. Direct connection between cause and effect without too man intervening causes
3. Within harm of risk

V. Intervening causes: force which takes effect after the defendant’s negligence, and contributes to that neglige in producing pltfs injury.

a. General rule: intervening cause held to be a superseding cause (cancel’s def neg) if it was not foreseeable. Follows Cardozo’s foreseeable test.

i. Test: if D should have foreseen the possibility that the intervening cause might occur, or if the kind of harm suffered by the P was foreseeable (even if intervening cause was not) the D conduct will still be the proximate cause.
ii. **Notes:** you remain liable regardless of foreseeability if the intervening cause was the very thing which made your act negligent.
   1. D spills gasoline, but someone else lights it: D on the hook
b. **Exceptions:** normal responses to a defendant’s primary negligence, such as negligent rescue attempts or the negligent provision of medical services are foreseeable and don’t break the “chain of causation
c. **Forces of nature:** so long as not abnormal, they are foreseeable
d. **Criminal conduct** of third party: criminal acts by another party can still hold D liable if they were foreseeable.
   i. *Hines* – girl who is dropped off after station and raped
      1. rule – D could have foreseen risk and therefore on the hook. Harm within the risk.

### AFFIRMATIVE DUTIES

I. **Duty to rescue**
   a. Question: Is there a sufficient relationship between the one who failed to act and the plaintiff to warrant the imposition of liability? (as opposed to merely failing to confer benefit on P)
      i. Historically: no duty to aid drowning swimmer unless you are a life guard, no duty to aid at accident unless victim is your patient
      ii. Today: more likely to find existing relationship such that if victim might reasonably expect aid, or carrier-passenger, school-pupil, parent-child, jailer-prisoner, employer-employee even store-customer and host-guest.
         1. exceptions: if D negligently placed the P in a position of danger, he is liable for not rescuing him, negligent or not
            a. distinction between a failure to rescue (nonfeasance – no liability) and putting P in danger to begin with (misfeasance)
   b. **Nonfeasance:** doing nothing (courts hesitate to enforce duty here)
      i. *Buch v. Amory* – no affirmative duty to trespassing kid
      ii. *Mangan, Yania* – no duty to rescue
c. **Misfeasance:** affirmative act (blurred lines though because can frame any action as either)
      i. *Montgomery:* trucker had duty to put up failure (because of his predicate action)
d. **Enabling Torts:** D brought into existence conditions that enabled another party to engage in a tort, or has a special relationship with the party in danger. Must (1) pre-existing relationship of some sort between P and D (blurred in Tarasoff) and (2) circumstances that put the D on notice of the risk of harm to P from third party.
      i. **Common thread:** hard to find, but just that D are in a place (more than others) to take the necessary precautions to reduce the harm that the third party can put on a victim (P)
ii. Tarasoff – special relationship with doctor and patient (plus foreseeable danger) equals a duty to warn. Limited to situations where third party specifically identified (rarely invoked)

iii. Kline - Special relationship between L and T. LL has duty to maintain safety b/c 1) uniquely situated to fix problem; 2) least cost avoider (most efficient accident preventer)

II. Occupiers of land

a. Invitee (business): Reasonable care premises are safe

b. Licensee (social): No hidden danger, known or ought to be known by the occupier.

c. Trespasser: No intentional or reckless harm
   i. Addie – kid trespassed → no duty (before attractive nuisance)
   ii. Attractive Nuisance: limited duty of reasonable care to trespassers

   i. Special relationship isn’t between occupier and P, but occupier and conditions on it.
   ii. Tosses out categories. Reasonable care for all people on land.
       Historical approach was to decide what category and assign liability. Factors to consider
       1. Foreseeability of harm, closeness of the connection between D conduct and P harm, moral blame attached to P conduct

e. Attractive nuisance
   i. Creates duty of reasonable care to trespassers. But limits
       1. children only
       2. artificial conditions only
   ii. Sometimes a factor if:
       1. D knows of condition
       2. D realizes danger to kis
       3. slight cost of prevention compared to significant risk

TRADITIONAL SL – RESPONDEAT SUPERIOR

I. Vicarious Liability: liability for harm caused under the scope of employment, even absent employer negligence.

a. Rationale: an employer must answer for an employees negligence. Company should be responsible for risks it imposes on the world. It is a deterrent and allows for better loss spreading.
   i. As between the employer and the victim, the employer is in a better position to make safety and research decisions that can make the work place more safe
   ii. Does not substitute employees liability, just adds the employer as an additional defendant.

b. Scope of employment
   i. v1 – actuated at least in part by a purpose to serve the master
1. Old version: “frolic and detour” – applies when on the job, usually frolic not liable (but was in Ira Bushey), and detour you are on the hook.
2. test is not if negligent to the employer, but is action in interest of the employer.

ii. v2 – Ira Bushey & Sons v. US (CCA2, 1968, Friendly)
1. Accidents characteristic of the activities of the enterprise
2. is this the kind of harm that seems fair to attribute to the employer?

c. Limits: fellow servant rule (workers comp took care of this), independent contractor (I am not liable if I hire an inde. Contractor)