I. Overview
   A. What torts are there?
      1. Identify Plaintiff and Defendant for the specific tort.
   B. Is there liability?
      1. Can plaintiff make prima facie case requirements for that tort.
      2. Are there any good affirmative defenses
      ex: self defense, consent, etc.
   C. General Considerations
      1. ex: vicarious liability considerations
      2.
   D. Policy Considerations
      1. Deterrence or Accident Prevention
      2. Economic
      3. Allocation of Losses
      4. Administrative
      5. Fairness, Ethical, Moral, and Justice
      6. Legislative

II. Typical questions
   A. Super-sensitive plaintiff
      1. treat plaintiffs as an average joe under an objective test
      a. unless defendant knows about the sensitivity
   B. Incapacitated defendant
      1. everyone is liable for intentional torts
   C. Transferred intent doctrine
      1. Requirements
      a. transferred from person to person
      b. transferred from tort to tort (within the same level???)
      i. ex: from would be assault to actual battery

III. Intentional Torts
   A. Intent
      1. Intentional act with an intentional OR UNintentional injury
      a. only tortuous contact, not the injury, must be intended – Villa v. Derouen
      b. dual intent: D must have intend tortuous contact AND intended it to be harmful or offensive – White v. Muniz
      2. capacity
      a. minority, mental deficiency, etc. are not a defense to the intent requirements
      but characteristics that a jury will examine that may make it more difficult to establish intent. – White v. Muniz
      3. employer against employee intent – Ailiff v. Mar-bal Inc.
      a. requirements (AND test)
      i. employer knew of the danger
      ii. knew the danger was substantially certain (not just high risk) to harm employees
      iii. required employee to continue to perform the dangerous task
      iv. NOT required to prove employer intended harm
b. under workers comp employees cannot get paid but cannot sue their employers, except for intentional torts

4. transferred intent
   a. the more serious the culpability, the farther courts are willing to transfer
   b. can transfer from person to person
   c. can transfer from tort to tort
   d. Hall v. McBryde: plaintiff shot back at armed attackers and accidentally hit a neighbor. Courts found his intended assault on the attackers satisfied the intent requirement for battery on the neighbor.

B. Other issues
   1. courts are more willing to stretch scope with intentional torts
   2. knowledge of the tort by the victim
      a. NOT required for battery
      b. assault: must know of the actual act but not of the source/plan
         ex: someone plants a bomb that scares you when it goes off
      c. typically required for false imprisonment
         i. case with the children on the airplane – says NO

C. Battery
   *Villa v. DeRouen, White v. Muniz,*
   1. Requirements
      a. harmful or offensive contact
         i. minimum threshold = unpermitted contact
            o. tobacco smoke blown in one's face is a harmful or offensive contact
               -- *Leichtman v. WLW Jacor Comm., Inc.*
         ii. “offensive = disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultingness.
         iii. provoking contact
            o. one who is present and encourages or incites commission of a battery by words can be equally liable as a principal - *Leichtman*
      b. with plaintiff's person
         i. DOES NOT require touching of the body
         ii. only must contact that which is in contact with the plaintiff
         iii. can be setting in motion something which offensively contacts
      c. But For Causation
   2. Other issues
      a. capacity
         i. age is only determinative of whether they knew what they were doing
            o. parents are not liable for their children's intentional torts
            o. home insurance or waiting for the kid to reach adulthood to get recovery
            o. see if parents can be gotten for negligent supervision
      b. battered party doesn't need to know about it
      c. practice questions on pg 797

D. Assault
   1. Requirements (from Restatement (2d) Torts §31)
      a. apprehension
i. reasonable
   o. ability to carry out threat, from P perspective
      1. ex: man who points a gun when only he knows it is not loaded
      o. must be aware of the treat
   ii. fear NOT required
      o. ex: old lady can try to fight Mike Tyson, he might not be afraid or intimidatd but he would have apprehension
b. of an immediate battery (harmful and offensive contact)
   i. words alone CANNOT satisfy this requirement
   ii. words + conduct CAN satisfy – *Vetter v. Morgan*
      o. words might undo the conduct
      oo. ex: “if you weren’t my friend I would punch you in the mouth”
   iii. must be immediate, threats for the future are IIED - *Dickens v. Puryear*
c. But For Causation
d. other
   i. assaulted person CAN avail themselves of self defense or flight
   ii. cannot be accidental
E. Intentional Infliction of Emotional Distress
   *Brandon v. County of Richardson, Alcorn v. Anbro Engineering, Swenson v. Northern Crop Insurance, Logan v. Sears, Roebuck*
   1. Requirements
      a. outrageous conduct
         i. outside the bounds of civil society
            o. racism – *Alcorn*
            o. sexism – *Swenson*
            o. sexuality NOT outside – *Logan*
               1. court found that a gay could be called “queer”
         ii. words alone CAN satisfy requirements
            o. threats for the future are not assaults but IIED - *Dickens v. Puryear*
         iii. professors love to take non-outrageous conduct and make it outrageous
            o. continuous
            o. type of P
               1. minors, elderly, pregnant women, sensitive adult if D knows
            o. type of D
               1. common carriers, inn keepers
                  a. also must have a passenger or guest as P
               2. positions of power
                  a. police - *Brandon*
                  b. employer - *Alcorn*
                  c. landlord
        iv. in some cases it has to be the sole reason for the contact
b. damage
   i. DOES NOT require physical injury – *Dickens v. Puryear*
   ii. DOES require substantial emotional distress
   iii. the more outrageous the conduct the less you must show damages
   iv. DOES NOT necessarily require medical evidence
c. intent OR reckless
   i. high degree
   ii. substantial certainty
d. but for causation

2. Notes:
a. this is a fall back tort → use IIED if you cannot prove other intentional torts
   i. on tests when other intentional torts fail check for IIED

3. Practice problems
F. False imprisonment
*Wal-Mart v. Cockrell, Eilers v. Coy*

1. Requirements
a. sufficient act of restraint
   i. no good rule – use common sense analysis
   ii. quote cases
   iii. minimum threshold = legitimate threats of force
      o. words alone can satisfy
      o. moral pressure or threats for the future will NOT satisfy
   iv. inaction can be an act of restraint
      o. when there is an affirmative duty on the D to act
   v. generally must be known at the time of confinement
   vi. only a brief time required
   vii. duress
   viii. false exertion of legal authority
b. bounded area
   i. requirements
      o. no reasonable means of escape
      o. or the plaintiff does not know of it
   ii. inconvenience is not enough
   iii. sometimes you can be bounded from going to a place
c. but for causation
d. lack of consent
e. EXCEPTION: Shopkeepers privilege – *Walmart v. Cockrell*
   i. reasonable belief that they were stealing
      o. some court have allowed racial profiling for this requirement
   ii. detain in a reasonable manner
   iii. for a reasonable time

2. Practice Problems pg 830
G. Trespass to Chattels / Conversion
*U.S. v. Arora*

1. Requirements
a. some damage = trespass to chattels
b. lot of damage or destruction = conversion
c. damages include:
   i. physical
   ii. interference with possessory rights.
2. Tres to Chat can happen when person is deprived of his property for a period of time, or the property is damaged. Damages include temporary loss of use and repair costs.

3. Conversion of property occurs when deprivation of the property is for a lengthy period of time, or the prop is lost of destroyed. Damages included fair market value of good.

4. Factors to distinguish conversion and trespass:
   a. duration;
   b. intent to assert a right inconsistent with the other’s right of control;
   c. good faith
   d. harm done to the chattel
   e. the inconvenience and expense caused

5. Practice prob. Pg 837

IV. Intentional Tort Defenses

A. Consent

_Hogan v. Tavzel, Hellriegel v. Tholl, Reavis v. Slominski_

1. capacity
   a. ex: drunkenness, minority, history of abuse (Reavis), etc.
   b. if D knows of the incapacity then he is liable - Reavis
   c. exceptions: emergency conditions

2. consent was given
   a. expressly – _Hellriegel_
      i. ex: “do it I dare you.”
   b. implicitly
      i. custom and usage
      ii. plaintiff’s conduct
      iii. ex: impact sports
          o. as long as the injury does not depart from the rules of the game

3. how the consent obtained
   a. fraud
   b. duress
   c. mistake – if the defendant knew of the mistake

4. boundaries of the consent must not have been exceeded
   a. consent to sex is not consent to infection with STD – _Hogan_
   b. ex: tag a guy in touch football OK, kick him in the groin NOT OK.

5. consent might be given by law, if a reasonable person would have consented
   a. ex: emergency doctrine

6. certain things you cannot consent to
   a. allowing someone to kill you
   b. selling organs

7. Practice problems pg 849

B. Self Defense/Defense of Others/Property

_Bradley v Hunter, Juarez-Martinez v. Deans_

1. Requirements
   a. immediacy: the tort must be happening now or just about to happen
i. if the tort has already occurred there is no self defense
b. reasonable force
c. subjective belief that the force was necessary
d. reasonable belief that the force was necessary
e. verbal threats + aggressive conduct are sufficient

2. to Abandon the fight - *Juarez-Martinez*
a. must be obvious and clear

3. Self

4. Others
   a. reasonable force = equal force (including deadly force)
   b. in protecting others one becomes a *rescuer*
   c. some courts apply only if the other could have invoked self-defense
   d. other course apply where the intervention would appear necessary to a reasonable person, even if it turns out to be mistaken

5. Property - *Katko v. Briney*
   a. reasonable force (NEVER deadly force [except in TEX])
   b. deadly force allowed in your home, but that is a defense of person issue

6. No duty to retreat in the home (often business as well)
   a. not so in the area of domestic violence
   b. not so if retreat would harm 3rd party

7. mistaken identity – must inform
8. Practice problems pg 858

C. Necessity

1. Requirements - *Eilers*
   a. reasonable belief of imminent physical injury to P or others
   b. right to confine to prevent harm last only as long as necessary to get party to the proper lawful authorities
   c. must use least restrictive means of preventing the apprehended harm
   You can only use necessity in conjunction with property torts
2. Public necessity: benefits the many over the few, no damages.
3. Private necessity: *no guilt, but policy is to award actual damages to the P.*
4. Necessity v. defense of property \( \rightarrow \) *necessity wins.*
5. Necessity is an absolute defense against the nominal damages of the claimed tort (ex: trespass) but not from the additional damages from the tort. – *Vincent*

V. Negligence

A. Duty
1. Requirements for breach
   a. foreseeable risk of harm
   b. AND unreasonable conduct in light of those risks
2. Standard of care
   a. Reasonable Person
      i. objective test
ii. how would a reasonable prudent person under similar circumstances act
   o. error in judgement is not necessarily negligence – Reed

ii. hypothetical average person
   o. those above or below the standard are only held to the standard
   o. **DIFFERENT CHARACTERISTICS** are taken into account
      1. physical characteristics
         a. ex: reasonable blind person
         b. this might require a person with a physical disability to exercise greater care than an physically able person
      2. reasonable women – *Edwards v. Johnson*
      3. mentally disabilities have NO affect – Bashi v. Wodarz
      4. children
         a. law absolves very young children of all negligence
         b. child of like age, intelligence, and experience
            i. subjective test
            ii. EXCEPTION: child involved in an inherently dangerous OR adult activity – *Robinson v. Lindsay*
      5. superior skill
         a. one must use all their abilities even superior ones
         b. BUT they do not get a different standard of care

iii. Emergency Defense
   b. Professional Standard of Care
      i. Requirements
         o. reasonable professional
            1. ones expertise will be taken into account
               a. ex: heart surgeon giving mouth to mouth on a plane
         o. in the same or similar communities
            1. rule has been criticized for allowing doctors to protect each other
      ii. Custom
         o. expert testimony on custom sets standard of care
         o. juries cannot disagree, thus prof. standard may be lower than reasonable person standard

iii. Medical Malpractice
   o. medical performance negligence
      1. *Velazquez v. Portadin*
         a. doctors subjective judgement is allowed in choosing btw equally accepted methods
            i. in judgement calls there is no liability for poor results
         b. BUT when there is one method it is for a jury to decide if the conduct met the prof. standard of care
      2. requires expert medical testimony – *Phillips v. Hull*
         a. EXCEPTION to med. testimony requirement when the damage or wrong is “common knowledge”
      o. **informed consent** ← ask aiken about these standards
         1. *Phillips v. Hull*
            a. professional standard (custom)
i. physician required to disclose what a reasonable
physician of like training would disclose under same or
similar circumstances
ii. requires expert medical testimony

b. patient standard (materiality
i. physician disclosure duty measure by patients info needs
ii. does NOT require expert medical testimony

vi. Legal Malpractice – *Smith v. Lewis*
  o. one must use the “skill, prudence, and diligence as lawyers of
ordinary skill and capacity commonly possess and exercise.”
  o. in unsettled area one must undertake reasonable research

c. Common Carrier/Inn Keeper
  i. can be liable for even slight negligence to *passengers* or guests

d. Negligence Per Se / Statutory Standard of Care
  i. Requirements – *Wright v. Brown*
  o. plaintiff must fall within the protected class
  o. statute must protect against this kind of harm
  o. DOES NOT apply to children – *Bauman v. Crawford*

ii. Notes:
  o. Prof will give you the statute, you must discuss it
  o. statutory standard v. reasonable person: statutory wins

iii. if statute applies we have negligence per se
  o. but NOT necessarily liability  since there might be no damages

iv. Excuses
  o. burden of proof on the party claiming the excuse
  o. sufficiency of the use is an issue of fact
  o. Factors – *Ferrell v. Baxter*
    1. incapacity
    2. did not know nor should have known
    3. unable to comply after reasonable diligence
    4. emergency (not due to own misconduct)
    5. compliance would involve greater risk than non-compliance
    6. action was none the less reasonable (*minority rule*)

v. Treatment of excuses
  o. Strict Neg. Per Se: no excuses permitted (*rare*)
  o. Neg. Per Se: presumes breach, D may try to prove excuse (*majority*)
  o. Neg. Per Se: presumes breach, D may try to prove reasonableness
  o. Evidence of Neg. Per Se: reasonable person standard of care still in
effect, statutory violation goes to jury as evidence of breach
    1. use when children violate statutes - *Bauman v. Crawford*

ey. Judicially applied standards
*Baltimore & Ohio R.R. v. Goodman, Pokora v. Wabash*
  i. in former Holmes just creates a standard, not juries
  ii. in later Cardozo overrules this practice  this theory has persisted
3. Hand formula
   a. *U.S. v. Carroll Towing*
      i. probability of damage (P) x severity of damage (L) = burden of adequate precaution (B)
   b. *McCarty v. Pheasant Run*

4. Custom
   a. *Hangerman Construction v. Copeland*
      i. allowed to help determine if conduct was reasonable
   b. *Trimarco v. Klein*
      i. custom need not be universal
      ii. when dangers have been removed due to custom, this custom may be used to prove that the D fell below the standard of care.
   c. *Duncan v. Corbeta*
      i. custom may require greater efforts that statutory requirements
   d. *The T.J. Hooper*
      i. custom may be wrong, and fall below the reasonable person standard
      ii. purpose of the custom must be to protect against the harm
      iii. ex: it cannot just be fore aesthetics or price

B. General Duty of Reasonable Care
   1. General Duty of Care
         i. manufactures now owe a duty to all who could foreseeably be harmed by their product, not just those they are in contractual privity with
      b. *Now a general duty of reasonable care: for foreseeable risks*

C. Limited Duty Rules
   1. NO Duty to Act, Assist or Rescue
      a. Nonfeasance: risk or harm did not arise out of ones conduct
         i. ex: a passerby has no duty to save a drowning stranger
         ii. apply but for test to tell the difference btw Misfeasance & Nonfeasance
      b. *Yania v. Bigan*
         i. no duty – even when you have goaded another into their predicament
      c. no duty to report a crime
   2. EXCEPTIONS to the no duty rule
      a. Misfeasance: risk or harm arose out of ones conduct
         i. intent does not matter
      b. Special relationship
         i. parent/child, teacher/student, landlord/tenant
         ii. coadventurers – *Farwell v. Keaton*
         iii. AND the party knew or should have known of the peril - *Farwell*
      c. K relationships where party has agreed to provide aid
      d. where party has begun to assist
         i. Two theories
            o. no liability if a volunteer quits leaving the other party no worse off
            o. volunteer is held to a standard of reasonable care and may not quit if it is unreasonable to do so.
      e. statutorily imposed duty: All states require…
i. assistance to police, fireman, and government officials
ii. motorists to remain at the scene of an accident
iii. certain persons to report physical and sexual abuse of a child
f. reliance on a gratuitous promise
   i. Marsalis v. LaSalle – promise to confine a cat for rabies observation
g. cannot intentionally prevent others from giving aid
   i. Soldano v. O’Daniels: bartender disallowed Samaritan from calling police

3. Owners and Occupiers of Land
American Industries Life Insurance v. Ruvalcaba
a. only use if D is an owner/occupier or in privity with one
   i. ex: family members, employees
b. the injury must occur ON the land by a dangerous condition OF the land
c. Types - Ruvalcaba
   i. Trespasser: enters without lawful authority, permission or invitation
   o. duty not to injure willfully, wantonly, or through gross negligence
   ii. Licensee: enters w/ owners consent for their own purpose; social guests
   o. duty not to injure willfully, wantonly, or through gross negligence
   AND to warn or make safe of dangers which are actually known.
   iii. Invitee: enters w/ owners consent for the mutual benefit of both
   o. duty to use reasonable care to protect from conditions that create a unreasonable risk of harm which the owner knows or should have known of.
d. Ruvalcaba Rules
   i. children of tenants are INVITEES
   ii. individuals invited into a public store are invitees
e. Rowland v. Christian (minority rule)
   i. the status trichotomy is too rigid, new rule is needed
   ii. whether the owner has acted as a reasonable man in view of the probability of injury to others, and while the facts that create the TLI status might have some bearing they are NOT determinative.
f. attractive nuisance – Restatement 2nd Torts § 339

“A possessor of land get from the internet’
g. some jurisdictions make social guests invitees
h. Discharge the duty
   i. Warning
   o.
   ii. Make it safe
   o. obviously not going to be an issue on the exam

4. Emotional Harm WITHOUT Physical Injury
a. Zone of Danger: area in which a party is at foreseeable risk of phys. injury
   i. recovery allowed when one or ones family member is seriously injured when both are within the zone of danger, and the party is w/o phys. injury
   – Restatement 2nd 313
b. Dillon Rule: Reasonable Foreseeability
   i. emotional harm to bystander is reasonably foreseeable (compensable)
o. when the P is located near the scene
   o. a “contemporaneous sensory observance” caused the shock
      i. as opposed to learning of it from others
   o. P and victim were closely related
      ii. these factors are circumstances to be considered in determining whether
          the emotional injury was foreseeable, case-by-case, flexible rule

  c. Thing Rule: created to put limits on the Dillon rule.
     i. plaintiff may recover if
        o. P is present, at the time it occurs and is aware of the injury to victim
        o. P is closely related to the victim
        o. P suffers serious emotional injury > that of disinterested witness

  d. Clohessy Rule
     i. plaintiff may recover if
        o. P had a contemporaneous sensory perception of the event OR
        conduct that causes the injury OR by view the victim immediately
        after the event if no material change has occurred in victims location
        or condition
        o. P is closely related to the victim
        o. P suffers serious emotional injury > that of disinterested witness
        o. injury to the victim must be death or serious physical injury

  e. Majority of states recognize bystander emotional distress under either “zone
     of danger” or “Dillon-Thing” analysis
     i. Dillon-Thing is the majority rule

  f. Policies for not expanding bystander recovery
     i. liability disproportionate to fault
     ii. it would lead to numerous claims and burdensome liability
     iii. limitation on filing of trivial and fraudulent claims

5. Independent Duty of Emotional Well-Being: Direct Victim Analysis
   a. duty to reasonably protect against foreseeable emotional distress arises
      from an independent legal obligation or relationship that assumes the duty
      i. main issue is what relationships qualify
      ii. ex: negligent mishandling of decedents body by funeral home

      i. woman under anesthesia (no contemporaneous perception) recovered for
         negligent infliction of emotional distress when a doctor negligent injured
         her child during delivery
      ii. rationale: physician-patient relationship created duty; P is a direct
         victim there is an obvious physical and emotional connection between
         mother and fetus; they were both the physicians patients

   c. man was a “direct victim” of his wife’s doctor who negligently diagnosed
      her w/ syphilis and told her to warn her husband - Molien

   d. mother was a “direct victim” of therapist who was treating her and her son,
      and sexually abused the son – Marlene F.

   e. parents were NOT “direct victims” when juvenile authorities who
      wrongfully refused medical care to their son – Ochoa
f. parents were NOT “direct victims” of pharmacist who negligently filled their infant sons prescription – *Huggins*

g. analysis: *Burgess, Marlene F.* recovered because they were patients, *Molien* recovered because physician told patient to tell her husband.
h. rescuers CANNOT recover under this theory

5. Duty to protect against fear of future disease

a. *Majca v. Beekil*
   i. Plaintiff must show exposure to the disease and reasonable fear of the affects of the disease. But it is not required to show the likelihood of developing the disease in the future. If a reliable test has shown negative results for infection, fear is no longer reasonable.

b. *Potter v. Firestone (pg 350)*
   i. P claimed damages for causing the enhanced risk of cancer
      o. no payments for wage losses and medical bills that have yet to occur and only have a probability of occuring
      o. risks were only increased so award would = increase in risk
   ii. P claimed damages for causing anxiety over developing cancer
      o. P must prove “more likely than not” that they would develop cancer, UNLESS D acted with oppression, fraud, or knowing and reckless disregard of the health of the people exposed.
   iii. recovery for necessary medical monitoring
      o. P can recover for the costs of early detection if it is beneficial and a reasonable physician would prescribe a monitoring regime.

6. Prenatal torts

a. Wrongful life - usually not allowed - brought by the child: claiming that they would rather not be alive, courts who have allowed limit damages to cost of extra medical care
b. Wrongful birth – brought by parents: negligent birth control operation damages = extra cost of raising the child
c. Wrongful conception – brought by parents: negligent birth control operation damages = general cost of raising the child
d. Pre-conception negligence - only issue is foreseeibility
e. claims don’t really exist any more as courts began mitigating damages with the benefits of having a child

7. Duty for conduct of 3rd parties

a. generally no one has a duty to control the conduct of another
b. mental health prof. duty to 3rd party based on relationship w/ attacker
   i. *Tarasoff*
      o. by entering into a doctor-patient relationship the therapist owes a duty of reasonable care to protect the patient or a foreseeable third party victim from danger.
      o. the therapist must exercise a reasonable degree of skill knowledge, and care of an ordinary therapist in similar situations
         1. sounds like a professional standard of care
   ii. *Dunkle*
a. a victim is not ‘readily identifiable’ (foreseeable) because there is a statistical probability of a higher likelihood of attack, therapist need only warn specifically identified persons

8. Duty to protect against criminal activity
   a. *Delta Tau Delta v. Johnson*
      i. landowners have a duty to take reasonable precautions to protect their invitees from foreseeable criminal attacks.
   o. 4 tests for foreseeability
      1. specific harm test
         a. no duty unless owner knows or should have known the specific harm was occurring or was about to occur
      2. prior similar incidents test (PSI)
         a. duty owed if evidence of PSI on or near the property show the crime was foreseeable
      3. totality of the circumstances test
         a. consider all the circumstances surrounding the event including nature, condition, and location, & PSIs, to determine foreseeability
      4. balancing test
         a. degree of foreseeability balanced against burden imposed
   ii. court chooses the totality of circumstances test
      o. the court found a duty due to a prior assault and sexual assault at the frat house, as well as statistical info that had been given to fraternity members on rape.
   b. a business does not have a duty to comply w/ an armed robber’s demand for money to avoid increased risk of harm to patrons – *KFC of Cal*

9. Public Agency Duty to Protect Citizens
   a. generally, gov. is not liable for harm resulting from lack of police protection
   b. EXCEPTION: *Cuffy v. City of New York* P may recover when:
      i. police promise protection
         o. “direct contact” ← not strict @ bar the wife and kid were included
      ii to a particular citizen
      iii. who justifiably relies on the promise
      iv. to his detriment
   c. prior to the harm the reliance was no longer justified
   d. today most state have adopted actions that waive some gov. immunity

D. Breach
   1. Breach = Negligent conduct
      a. either the person met the standard of care, or they did not
         “On these facts, when the defendant did blank they did/did not meet the standard of care, thus there is/isn’t a breach.”
   2. Res Ipsa Loquitor
      a. when it is clear that it is impossible for the plaintiff to establish that it was negligent on the Ds part.
      b. probability doctrine
c. ex: barrel falling case

d. Requirements
   o. probably someone was negligent for this does not usually happens
   o. probably that someone was the D.
      i. many times they show that the D had exclusive control of the
         instrumentality
   o. P must be free on contrib. neg.

e. IF Res Ipsa is established:
   o. it does NOT mean you have won the suit
   o. you WILL ONLY have an inference of negligence, so it will overcome
      S.J. or Directed Verdict, and make it to the jury.

E. Causation

1. But for test
   a. *Sowles v. Moore*: if defendant could not have prevented the injury if he *had*
      acted reasonably he is not liable
   b. *Grimstead*: man knocked overboard, wife had to find a rope, NO causation

2. Substantial factor test
   a. when multiple Ds both cause the injury
      i. Ds do NOT have to act in concert
      ii. NO need to determine what portion each is responsible for
      iii. Ds do not have to breach simultaneous
         *Smith v. J.C. Penny*: gas neg.ly blown onto a heater ignited fake fur
   b. Each is guilty if their conduct was a substantial factor in the injury
   c. *Corey v. Havener*: two motorcycles pass on either side and scare a horse

3. Proving Cause & Untaken Precautions
   a. *Ingersoll*: P is not required to eliminate every other possible causes; it is
      enough that he shows facts and condition from which the negligence of the D
      and the causation of the accident by that negligence may be reasonable
      inferred.
   b. Untaken Precautions:
      i. *Saelzler v. Advanced Group 400*: forcing the complex to provide day
         time security is too much of a burden – policy, and would not necessarily
         stop the harm
      i. poorly lit parking garage is not enough to establish liability
   c. *Zuchowicz*: where the injury is exactly the risk that made Ds conduct neg.,
      courts find the *nexus* btw risk and harm to be sufficient proof of causation
      i. burden shifts to D to prove that the wrongful act was NOT but for cause
      ii. car is speeding & accident occurs, and the rules against speeding are
          meant to prevent this kind of accident. Ds negligence is strongly linked to
          the accident, D was undoubtedly the *but for* cause, but was the negligence
          the *but for* cause.

4. Joint and Several liability
   a. multiple negligent D’s cause a single indivisible harm
   b. P can go after either (but not both) D for the full amount
      i. burden of apportionment shifts to Ds, D1 → D2 for his share
   c. *Fugere v. Pierce*
d. Types
   i. true: Ds conduct was an intent. joint tort, but harm caused by only one
      o. ex: two parties trespass to graffiti, but only one paints
   ii. vicarious liability
   iii. independent actions concur to cause harm
      o. act of one was sufficient to cause whole harm
         1. two neg. started fires join to burn down a house
      o. acts of both needed to cause the whole harm
         1. A and B negligently collide which causes them to hit C
   iv. if D can prove divisibility of the injury then no J&S liability

e. in Comparative Fault jurisdictions, % of fault is determined in P's suit.
   i. thus, if D2 is insolvent D1 will be stuck w/ more than his fair share
   ii. conflict: P entitled to be made whole vs. D only liable for his share

f. today no majority rule
   i. 15 states keep J&S and D1 is stuck w/ insolvent party’s share
   ii. 15 states abolish J&S and P is stuck w/ insolvent party’s share
   iii. 20 states adopted a hybrid system.
      o. 6 states all the parties proportionately cover insolvent party’s share.
      o. 9 allow J&S only for economic damages (ex: NOT for pain & suffer)

5. Alternative Liability
   a. not enough causation proof due Ds conduct
   b. burden of proof shifts to D
      i. as long as P proves minimum requirements
      ii. as long as D has better access to information that P does
   c. *Summers v. Tice*: man negligently shot, when two hunters fired
      i. compare to *Ybarra*
   d. how is this different then J&S, in case the parties say they were not Joint
      tortfeasors does that matter
   e. bring all possible Ps to court

6. Market Share
   a. Theory: like Alternative Liability but D does not have better information,
      and there is a large number of Ds so the probability that they committed
      the harm is small and thus forcing Ds to exonerate themselves is unfair.
   b. Rule:
      i. P must bring a substantial share of Ds in the suit,
      ii. Ds who could not prove that they did NOT harm P
      iii. would be liable in proportion to their national market share.
         o. no exculpation allowed
   c. Rationale:
      Fairness: Ds would end up paying for about equal to the harm they caused
      to the public at large, but because it is applied state by state national
      market shares can distort true liability
   d. **KEY QUESTIONS**
      i. What size of the market?
      ii. Can parties exculpate themselves?
      iii. How is the math done?
iv. How many of the defendants must be sued?

**LOSS OF CHANCE IS IT ON THE TEST**

D. Proximate Cause/Scope of Liability ← need to argue this on the exam

1. Tests
   a. Direct Consequences Test (min.)
      i. *Polemis*: dock workers negligently dropped planks which caused a fire
         o. H for P: all losses despite that dmsgs cannot be reasonably foreseen
         o. R: if negligent conduct could foreseeably cause some dmg → tortfeasor is responsible for all dmg
   ii. Rationale:
      o. one is responsible for the direct consequences of one’s negligence.
      o. policy: D should be responsible
   iii. Liability is cut off by 1) unforeseeable 2) intervening forces
   b. Foresight Test (maj.): Liability by risk that made act neg. in the 1st place
      i. foreseeable P
         o. and the general class of persons likely to be injured
      ii. foreseeable harm
         o. *McClenahan v. Cooley* (D left car running thief stole, hit P, SJ)
            1. need NOT foresee the exact harm only general manner
               1. type of manner of harm
      c. Scope of risk (likely to be accepted by the Restatement second)
         i. risks that made conduct negligent in the first place caused the harm to P
   2. Unforeseeable P
      a. *Palsgraf* (man helped onto train package drop, explodes, scales drop on P)
         i. Cardozo: this isn’t scope there was no duty to the woman because she was not foreseeable
         ii. Andrews: duty to everyone and the woman was inside the scope
      b. *Allen* (A left car on rd. to direct cars around accident, kid moves car hits A)
         i. leaving car and having kid move it are unforeseeable
   3. Unforeseeable Consequences
      a. *Juisti v. Hyatt Hotel* (fire alarm neg. set off P collapses lung going ↓ steps)
         i. if any harm could be foreseen NOT the specific harm
         ii. dissent says it has to be the foreseen type of harm
   4. Intervening Conduct
      a. ONLY unforeseeable intervening acts break the chain of causation
         i. intervening criminal acts are held to the same foreseeability standard
      c. Shifting responsibility
         i. intervening actor though foresee acts so egregiously that liability shifts
         ii. *McLaughlin* (firefighter w/ notice gives heat brick to nurse to use on P)
            o. jury could have found firefighters gross neg. insulated manufacturer
         iii. *Bigbee* (car hits phonebooth w/ jammed door w/ P inside)
            o. dissent: the risk of harm must be UNreasonable in itself
      d. Comparative fault has made much of these rules obsolete
6. Exceptions to Foresight Rule
   a. Medical Malpractice
      i. *Fletcher* (P had seizure while neg. supervised by D, doctors also neg.)
         o. P can sue orig. tortfeasor for full dmgs even if neg. medical providers aggravated the orig. harm
         o. Orig. tortfeasors can then sue neg. medical providers
   b. Eggshell P
      i. *Pace* (snow plow hits man small injury to finger $\rightarrow$ big due to diabetes)
      ii. Ds take there Ps as they find them even if condition is unforeseeable
   c. Rescuers
      i. *Sears v. Morrison* (man puts himself in danger, rescuer is injured)
         o. actor is liable to rescuers (because rescue is foreseeable) whether the rescuer is helping 3rd or 1st parties, despite lack of duty towards self.

   **type v. extent of harm (wiggle room with extent not with type?)**

1. Foreseeability
   a. *(type of harm)* if the result was unforeseeable let D go!
   b. if the result was foreseeable hold the D liable
      i. **EXCEPTION:** Indirect cause case if the *intervening act* was an unforeseeable intentional tort or crime, let D go!
         Ex: garage owner does not replace light bulb which foreseeably increased the likelihood of crime
   c. direct cause cases the results are foreseeable 99% of the time
   d. egg shell plaintiff is not unforeseeable
      i. you must only foresee an injury NOT the *extent* of the injury
   e. is the plaintiff foreseeable
      i. Cardoza makes it a duty issue
      ii. court says non-foreseeable plaintiff is outside scope

2. Restatements rule write in

3. Indirect v. Direct causes
   a. Direct: btw negligent act & injury, there is an uninterrupted chain of events
   b. Indirect: btw negligent act & injury there is an affirmative intervening act

5. Exceptions
   a. Medical Malpractice
   b. Eggshell P
   c. Rescuer Rule

V. Negligence Defenses
   A. Contrib. Neg.
      1. Knowning
         a. P knew of the risk and acting anyways
         b. also is implied assumption of the risk
      2. Unknowning
         a. P DID NOT know or comprehend the risk
3. Any contrib. neg. completely bars recovery
4. Last clear chance doctrine → created to avoid the harsh contrib. neg. rule
   a. after the admitted contrib. neg. other party had the last clear chance to avoid
5. Reckless tortuous conduct – not good.

B. Comparative Fault
1. Any comp. fault merely lowers the amount of recovery
2. Pure (majority): you can recover even if your contrib. neg. is more than the other parties
3. Traditional (minority): you will recover as long as your contrib. neg. has been less than other parties
   Note: the act is always called contrib. neg. no matter the system
4. Last clear chance has generally been abolished in these jurisdictions, but the facts still affect how the trier of fact divies up the fault
5. Some shit about reckless tortuous conduct

C. Implied/Express Assumption of the Risk
   Implied
1. knows of the risks
2. unreasonable acts in disregard of that risk
3. EXCEPTIONS
   a. no other viable alternative
   b. emergency
      o. ex: plaintiff pushes someone out of the way of a speeding car and they are injured
      o. Can be another is in an emergency situation?
4. Has been abolished in most comp. neg. states because it was redundant
   Express
   a. *tunkle factors*
   Secondary
   a. looks like contrib. neg.
      → pretty much subsumed into comparative neg.

D. Strict Liability/Liability Without Fault
1. Ultra-hazardous activities
   a.
2. Products liability
   a. show the defect in the product existed when the defendant had control of it
      i. inference that the defect existed at any given defendants control if since then the product has moved through normal channels of distribution.
   b. workable theory
      i. negligence
         o. (P = anyone w/in foreseeable zone of risk even bystanders)
         o. (D = manufactures almost always, retailers almost never)
            1. retailers when they have notice of a defect and continue to sell
            o. just like a normal negligence case
            o. but focus on *conduct*
               1. negligent design
               2. negligent manufacture
3. negligent warnings
4. negligent inspection
   ii. strict liability
      o. (P = anyone w/in foreseeable zone of risk even bystanders)
      o. (D = retailers, wholesalers, manufacturers, everyone)
         1. retailers have a claim against those above them in the chain
            o. NOT about conduct
            o. unreasonably dangerous condition
            o. which caused the injury
   c. products liability is not a tort, you sue on strict liability or negligence
   d. adequate warnings generally insulate from liability
   e. feasible alternatives approach
      i. if you could have cured the defect for a minor amount relative to the risk involved you should have cured it.
         ii. a warning will not save you
   d. If product is incidental to the performance of a service then strict liability is unavailable.
      i. ex: defective blood is given to a medical patient
3. Absolute duty to be safe
4. Policy reasons
   a. D conduct plays no role
5. in a Contrib. state
   a. knowing: complete defense
   b. unknowing: no defense
6. Comp. state
   a. it will just factor in
7. One free bite with animals with no dangerous propensity

VI. General considerations
   A. Vicarious liability
      1. employers are liable for employees for torts committed in the scope of employment
         a. simple fact analysis
         b. cite cases
      2. Does not apply to subcontractors
   B. Parents
      1. Parents are not liable for torts committed by their children
         a. EXCEPTION: by statute parents are liable for intentional torts of children up to a certain dollar amount.
   C. Tests like to confuse you on who you are going after and how
      1. Look for direct neg. in addition to vicarious liability