Tort Outline

I. Battery

-The intentional, unprivileged, and either harmful or offensive contact with the person of another
-If any of the elements are eliminated (intent, harmful or offensive conduct, or absence of privilege), there is no battery.

-Restatement: an actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful/offensive contact with the person of the other directly or indirectly results.

1. The Prima Facie Case

a. Intent

(1) What consequences must the defendant intend?
-plaintiff must show either that the intention was unlawful or that the defendant is at fault.
-If the intended act is unlawful, the intention to commit it must necessarily be unlawful.

-Vosburg v. Putney, defendant is liable for injury to defendant even though he did not intend to hurt him because his act (kicking once class had started) was unlawful.
-The wrong-doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not been foreseen by him.
-If it is an intentional act, and the act is unlawful, then the intent is unlawful.
-Thin skull rule: victim must be taken as is, will be liable for all damages.

Note: Liability of Minors
- Minors do not necessarily escape liability for their batteries.
- Some courts have held that very young children may not be capable of having the intent that liability requires.
- Young children are often held to be incapable of acting negligently even when they are deemed old enough to commit a battery.
- All states have statutes that impose some degree of liability on parents for the torts of their children.

(2) Which mental states constitute intent?
- Restatement: In order that an act may be done with the intention of bringing about a harmful or offensive contact or an
apprehension thereof to a particular person, the act must be done for the purpose of causing the contract or with knowledge on the part of the actor that such contact is substantially certain to be produced.

-Garratt v. Dailey, a 5-year old moved an old woman’s chair before she sat down. If he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been, he would be liable.

-Bench trial: means that appellate court can review to see if the conclusions of law follow the findings of fact AND review that the judgment follows the conclusion of law.
-If plaintiff had trespassed, would have been strictly liable for all actions.
-Constructive intent: had intention to do action because had knowledge of the normal consequences of the act.
-Transferred intent: the ill intent that the defendant bore toward a third party is applied to the conduct that harmed the plaintiff.

b. Contact

(1) What constitutes contact?
-The contact requirement does not mean that a part of the defendant’s body must come into direct contact with a part of the plaintiff’s body.
-It is sufficient if the defendant causes contact with something very closely associated with the plaintiff’s person.

(2) Which intended contacts are wrongful?
-Restatement: harm denotes the existence of loss or detriment in fact of any kind to a person resulting from any cause.
-Restatement: bodily harm is any physical impairment of the condition of another’s body, or physical pain or illness.
-Restatement: a bodily contact is offensive if it offends a reasonable sense of personal dignity (unwarranted by the social usages prevalent at the time and place).
-Personal indignity is the essence of an action for battery.
-The defendant is liable not only for contacts which do actual physical harm but also for those which are offensive and insulting.

-Fisher v. Carrousel Motor Hotel, defendant snatched the black plaintiff’s plate away and told him that he could not be served in the club. Defendant’s action was offensive and insulting, and plaintiff was entitled to actual damages for mental suffering due to the willful battery, even in the absence of physical injury.
- Damages for mental suffering do not require actual physical injury but just the unpermitted and intentional invasion of the plaintiff’s body.

- *Leichtman v. WLW Jacor Communications*, intentionally blowing smoke in another’s face is an offensive contact.
  - Harm from secondary smoke if the smoking is not meant to cause harm is not offensive contact (no “smoker’s battery”).
  - To dismiss a case (motion for summary judgment, directed verdict), the court looks at the evidence in the light most favorable to the non-motioning party, and if the court believes that no jury could reasonable find for the non-motioning party, then it dismisses the case.

2. Privileges

- To say that an act is “privileged” connotes that the actor owes no legal duty to refrain from such contact.
- Consensual privileges: depend on the plaintiff agreeing to the defendant’s otherwise tortious act.
- Nonconsensual privileges: shield the defendant from liability for otherwise tortious conduct even if the plaintiff objects to the defendant’s conduct.

a. Consent

- Consent is willingness in fact for the conduct to occur. It need not be communicated to the defendant.
- In determining whether plaintiff consented, defendant must reasonably interpret her overt act and manifestations of her feelings.

- *O’Brien v. Cunard Steamship*, doctor inoculated plaintiff when she acted in a manner consistent with consent. The doctor’s act was lawful because she did not manifest any signs of not consenting.
- The defendant’s subjective state is based on the plaintiff’s objective actions.
- Plaintiff has burden of proof to show intent to commit the act, lack of consent, and harm.
- Privilege is a defense for battery. Defendant has burden to prove.

Minors

- For one to surrender the right to be free from intentional interference by others, one must have the mental capacity to consent.
-Defendant can be liable despite the fact that the plaintiff was subjectively willing and communicated that willingness to the defendant.

-Barton v. Bee Line, plaintiff can not recover damages if she consented to sex with an older man even though she is under the age of consent (minority view).

-Most courts have applied statutory rape statutes in civil cases regardless of proof that the plaintiff was able to understand the consequences of her act and consent.
-It is one thing to punish those who consort with females under the age of consent; it is another to reward such females for their actions.

**Note:** *Minors as parties to litigation*

- Minors usually may not be direct parties to litigation
- Minors can be represented by a guardian for the suit and the next friend.
- The consent of a minor, even a mature one, is not a prerequisite to the appointment of a representative.

**Note:** *Effect of criminal statutes on consent*

- Consent to a criminal act is totally irrelevant in civil cases. In such cases, consent does not constitute a privilege.

**Doctor/Patient**

-Bang v. Charles T. Miller Hospital, where a physician or surgeon can ascertain in advance of an operation alternative situations and no immediate emergency exists, a patient should be informed of the alternative possibilities and given a chance to decide before the doctor proceeds with the operation.

- Plaintiff consented to an operation but not the operation that doctor also performed.
- Not a reasonable person test but rather what that individual would reasonably do.
- “Merchant of Venice” rule: he promises a pound of flesh but not the blood as well.

-Kennedy v. Parrott, a surgeon may lawfully perform such operation as good surgery demands even when it means an extension of the operation further than was originally contemplated, and for so doing he is not to be held in damages as for an unauthorized operation.

- Rule applies to major internal operations where both the patient and the surgeon do not know the exact condition of the patient until the patient is anesthetized and the incision has been made.
Case is not universally followed. In some states, consent is inferred only if there is an emergency that required treatment not expressly authorized.

- **Restatement**: Conduct that injures another does not make the actor liable to the other, even though the other has not consented to it if (a) an emergency makes it necessary or apparently necessary to act before there is opportunity to obtain consent or one empowered to consent for him, and (b) the actor has no reason to believe that the other would decline.

**Sports**

- **Hackbart v. Cincinnati Bengals**, an injury incurred due to an illegal play during a football game is not necessarily consented to (should expect injury as course of game) because a player does not consent or submit to injuries caused by conduct not within the rules or general custom of the game.
  - Factfinder must decide whether the action is within the reasonable boundaries (combination of rules and general custom) of the game.
  - Acts that go outside the rules and customs are outside the realm of privilege.
  - If within the reasonable boundaries, plaintiff gives implied consent.
- In backyard or amateur games, participants impliedly consent to violent contact, but not to conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.

**Note**: Consent procured by fraud or duress

- Consent will not shield the defendant from liability if it is procured by means of fraud or duress.
- Courts invalidate consent procured by duress when defendants threaten the plaintiff or plaintiff’s loved ones with physical harm.

**b. Self-Defense**

- **Restatement**: an actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful contact which he reasonably believes that another is about to inflict.
  - Self-defense is privileged although the actor reasonably believes that he can avoid defending himself by retreating or by complying with a command.
- **Restatement**: an actor is privileged to defend himself against another by force likely to cause death or serious bodily harm when he reasonably believes that (a) the other is about to inflict upon him an intentional contact and (b) he is thereby put in peril of death or
serious bodily harm which can safely be prevented only by immediate use of such force.

- The privilege exists even if the actor believes he can avoid defending himself by (a) retreating within his dwelling place, or (b) permitting the other to intrude upon his dwelling place, or (c) abandoning an attempt to effect a lawful arrest.

- The privilege does not exist if the actor believes that he can avoid defending himself by (a) retreating in any place other than his dwelling place or (b) relinquishing the exercise of any right other than his privilege to prevent intrusion onto his dwelling place.

- Restatement: The actor is not privileged to use any means of self-defense which is intended or likely to cause a bodily harm in excess of that which the actor correctly or reasonably believes to be necessary for his protection.

- Courvoisier v. Raymond, even though plaintiff was not a threat to defendant, he was permitted to use self-defense because the circumstances surrounding the defendant at the time of the shooting were such as to lead a reasonable man to believe that his life was in danger or that he was in danger of receiving great bodily harm at the hands of the plaintiff.

  - Court requires objective and subjective belief (reasonable person could have seen the situation as dangerous and subject believed that he was in danger).

  - A party claiming self-defense must prove not only that he acted honestly in using force, but that his fears were reasonable under the circumstances, and the means of self-defense were reasonable.

**c. Defense of others**

- The self-defense privilege extends to protecting total strangers as well.

- The force that may be used by an intervener to repel an attack on another is measured by the force that the other could lawfully use.

- If the intervener is mistaken, even reasonably mistaken, the privilege is unavailable if it would not be available to the person to be protected.

  - Restatement adopts the view that the intervener’s mistake need only be reasonable; there is no need to show that the victim also had the privilege to defend himself.

**d. Defense of property**

- Restatement: an actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another’s intrusion upon the actor’s land if (a) the
intrusion is not privileged, (b) the actor reasonably believes that
the intrusion can be prevented only by the force used, and (c) the
actor has first requested the other to desist or the actor believes
such request will be useless or substantial harm will be done before
it can be made.

*Restatement:* The intentional infliction which is intended or likely
to cause death or serious bodily harm, for the purpose of
preventing or terminating the other’s intrusion upon the actor’s
possession of land, is privileged only if the actor reasonably
believes that the intruder is likely to cause death or serious bodily
harm.

*Katko v. Briney,* defendants were not privileged in setting up a
loaded spring gun to catch trespassers when there was no notice of
the danger even though it was set up not to seriously injure.

-The only time when setting a spring gun is justified would
be when the trespasser was committing a felony of violence
or a felony punishable by death, or where the trespasser
was endangering human life by his act.

-Only rarely have defendants escaped liability in the case of
spring guns, in part because the use of such devices is so
suggestive of an indiscriminate and malicious intent.

-Trespassers and other inconsiderable violators of the law are not
to be violated by barbarous punishments or prevented by inhuman
inflictions of bodily injuries.

-The law has always placed a higher value upon human safety than
upon mere rights in property.

c. Necessity

-One may sacrifice the personal property of another to save his life
or the lives of his fellows.

*Ploof v. Putnam,* one is privileged by necessity to trespass when
there is a serious threat to life and no other lifesaving option is
available.

-Also, the owner of property may not eject a trespasser if
the trespasser requires entry to protest himself and his
property from harm.

*Vincent v. Lake Erie Transportation Co.,* boat owner was not
privileged to injure a dock in order to save his own property. The
act was not negligence, but the boat owner is liable for damages.

-The necessity privilege to enter the land of another in order to
avoid serious harm is coupled with an obligation on the part of the
entrant to pay for whatever harm he caused.
f. Miscellaneous privileges
- To at least some extent, teachers and parents are exempt from battery claims brought on behalf of children they have physically disciplined.
- Under the doctrine of intrafamily tort immunity, the court bars tort claims by one spouse against the other.
- Common practice today is to allow minors to sue their parents for intentional torts (not arising from an effort to impose reasonable discipline) but bar claims if the injuries complained of are due to the negligence of the parent.
- Other privileges include those relating to the arrest of lawbreakers and the prevention of crime, the enforcement of military orders, and the recapture of land and possessions.
  - The reasonableness of the actor’s perception of the need to use force, as well as the reasonableness of the harm actually inflicted, are typically the touchstones upon which the availability of the privilege turns.

II. Actual Causation
- Did the defendant cause the plaintiff’s harm?
- Ask the question, “But for the defendant having acted at all, would the plaintiff have suffered the harm?”
  - If answer is “no,” the defendant’s conduct, being a necessary condition of plaintiff’s suffering harm, was an actual cause of that harm.
- The concept helps to sort out the worthy cases from the unworthy and to fix the size of the recoveries in the worthy cases.

A. Did the Defendant Cause the Plaintiff’s Harm?
- General causation: whether the activity allegedly engaged in by the defendant is inherently capable of causing the sort of harm suffered by the plaintiff
  - If not, the defendant wins as a matter of law.
  - Rarely an issue, almost always in cases where plaintiffs have been exposed to an allegedly toxic substance and claim to have been injured as a consequence (the birth defect drug case)
  - Courts have begun to scrutinize technical expert testimony, much of which relates to general causation.
  - Even when the plaintiff’s technical proof of general causation is solid and persuasive, specific causation (did exposure to the toxic substance cause this plaintiff’s injury) also must be established.
- Specific causation: the issue presented in most tort cases whether the defendant’s wrongful conduct specifically caused the plaintiff’s injuries
-Hoyt v. Jeffers, plaintiff hotel was nearby defendant sawmill that released sparks, causing things to set fire; the court found for the plaintiff even though no one saw sparks from the mill set the fire.
-If the plaintiff can produce a reasonable belief that the defendant caused the injury based upon circumstantial evidence, he should be at liberty to present such evidence to the jury to decide the evidence’s force or weight.
-There does not need to be direct evidence of defendant’s accused negligence.
-Housley Presumption: a plaintiff’s disability is presumed to have resulted from an accident if she can establish that before the negligent act she was in good health, that her symptoms commenced with the accident, and that there was a reasonable possibility of causal connection between the accident and the disabling condition.
-Smith v. Rapid Transit Inc., plaintiff’s car was run off the road by a bus, which, in all probability, was defendant; court held that a mathematical probability that the defendant caused the accident is not enough to hold the defendant liable.
-Mathematical probability does play a role in products liability cases and DNA evidence (most scientific evidence is probability).
-Procedure: to make a claim off of circumstantial evidence, the trial judge must first decide if it creates an issue for the jury. The judge’s opinion is subject to review on appeal (matter of law).
-Daubert test for admission of scientific evidence: (1) Whether the theory or technique it question can be (and has been) tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community

B. When One of Several Defendants Did It, But We Can’t Tell Which One: Alternative Liability

-Summers v. Tice, plaintiff was shot by one of the two defendants, and both defendants were negligent in shooting in his direction; court found them to be joint tortfeasors because both committed a negligent act but the individual who committed the injury is indeterminate.
-When two or more persons by their actions are possibly the sole cause of an injury, and the plaintiff has introduced evidence that the one of the tow persons is culpable, then the defendant has the burden of proving that the other person was the sole cause of the harm.
-It is unfair to deny the injured person redress simply because he cannot prove how much damage each did.
-Both are jointly and severally liable (liable for the entire amount of damages). Easier for them to work out percentage due by the other because they should know best.
-**Ybarra v. Spangard**, plaintiff was injured during a surgery but did not know whose negligent act caused the injury, so he sued all parties involved; court uses res ipsa loquitur to show that the injury would not have occurred in the absence of negligence, and someone must have been in control of the instrumentality (causation).
  -All parties held jointly liable.
  -Without res ipsa, a patient who received permanent injuries of a serious character, obviously the result of someone’s negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability.
  -It is a just result because the defendants are a community – they owe their loyalty to each other. The defendants are the only ones who know what happened, and they have reasons to remain silent about fault. Holding all at fault puts pressure on them to talk about whom did what.
  -Ruling has not been embraced by many courts.
-**Market-share theory**: when a plaintiff joins the manufacturers of a substantial share of a faulty product, the burden shifts to each defendant to prove it did not produce the product. It is fair to shift the burden of proof on causation to the defendant reasoned of the fact that each defendant’s market share, and therefore its share of the damages, would approximate the probability that it caused the plaintiff’s injuries.

**Note: Joint and Several Liability**

-Defendant who are jointly liable can be joined in a single suit, although they need not be.
-Defendants who are severally liable are each liable in full for the plaintiff’s damages, although the plaintiff is entitled to only one recovery.
-Joint and several liability in two situations: where the defendants acted in concert to cause the harm, and where the defendants acted independently but caused indivisible harm.
-Most states provide for contribution among joint tortfeasors
-The Restatement determines the amount of contribution by considering each tortfeasor’s relative degree of fault.
C. When Two or More Causal Agents Would, Independent of Each Other, Have Caused Plaintiff’s Harm: Concurrent and Successive Causation

-Dillon v. Twin State Gas & Electric Co., a boy playing on a bridge grabbed a wire to stop his fall and was electrocuted; court held defendant liable for all damages if the boy would only have been seriously injured by the fall and liable for emotional damages would he have died.
  -But for the current, would he have died anyway.
  -Today, company would probably be held liable regardless because questions about surviving are too speculative.

-Kingston v. Chicago & N.W. Ry., defendant caused a fire in plaintiff’s property that joined with another fire to destroy his home, but either fire could have achieved the same result without the other; court found the defendant liable for the entire damage.
  -One party whose action is the proximate cause of an injury can be liable for the entire damage.
  -It is a settled law in negligence that any one of two or more joint tortfeasors whose concurring acts of negligence result in injury, are each individually responsible for the entire damage resulting from their joint or concurrent acts of negligence.
  -The burden is on the defendant to show that the fire set by him was not the proximate cause of the damage. The plaintiff should not have to prove the origin of both fires in order to recover the damages for which either or both fires are responsible.

-Always ask the question, “But for A, would C have occurred? But for B, would C have occurred?”
  -In Summers, the answer for both is “not necessarily.”
  -In Kingston the answer for both is “yes.” Both fires (A and B) were of equal strength, and each would have caused the fire on the plaintiff’s property.
  -If B in Kingston had been a raging forest fire, then the railroad fire (A) may not necessarily have caused the fire on the plaintiff’s property (C).
  -An intervening cause (raging forest fire) is one that so overwhelms the first cause that the injury becomes the fault of the intervening cause.

D. Relationship Between Actual Causation and Vicarious Liability
- Liability extends beyond the actor to include persons who have not committed a tortious act but on whose behalf the wrongdoer acted.
-When such third persons are held liable for the conduct of others, they are said to be “vicariously” liable under the doctrine of “respondeat superior,” or “let the master pay.”
-For the doctrine to apply, the servant’s conduct must be tortious and the master must control, or have the right to control, the servant’s harmful behavior.

1. Master’s, Servants, and Independent Contractors – Respondeat Superior
   a. General Principles
      -Masters are vicariously liable for the torts of their servants committed while the latter are acting within the scope of their employment.
      -A servant need not receive a wage in order to bind the master vicariously.

   b. Distinguishing Servants from Independent Contractors
      -Where the tortfeasors is an independent contractor, the general rule is that the employer is not vicariously liable for the harm caused by the contractor’s wrongful conduct.
      -Considerations in distinguishing from servant: whether or not the one employed is engaged in a distinct occupation or business, the skill required in the particular occupation, the length of time for which the person is employed, the method of payment, whether by the time or by the job, and whether the parties believe they are creating the relation of master and servant.

   c. Relationship Between the Servant’s Conduct and the Scope of Employment
      -Courts also do not impose vicarious liability unless the plaintiff also demonstrates that the servant was acting within the scope of employment.
      -The servant need not be performing precisely the activity for which he was hired in order to expose the master to liability.
      -Courts are reluctant to hold employers liable for the intentional torts of their servants.
      -Look to a cluster of factors to determine whether to hold liable for intentional: whether the misconduct occurred within the time and space of employment; whether the employee was motivated, at least in part, by a concern for the employer’s interests; and whether the potential for wrongdoing was foreseeable by the employer.
      -The phrase “frolic and detour” is often used to describe a type of conduct that falls outside the scope of employment.

   d. Exceptions to the General Rule of Nonliability of Independent Contractors
      -Three exceptions:
1. The employer is negligent in selecting, instructing, or supervising the independent contractor; 
   -not vicarious liable but negligent
2. the duty of the employer, arising out of some relation to the public or to the particular plaintiff, is nondelegable; 
3. the work is specifically, peculiarly, or inherently dangerous.

e. The Master’s Right of Indemnity Against the Servant
   -The master and servant will be jointy and severally liable when both are joined as defendants. 
   -The master has a right of full indemnification against the servant, but the right is seldom exercised.

2. Other Forms of Vicarious Liability
   a. Joint Enterprise
      -The negligent conduct of each participant in a joint enterprise is imputed to every other participant, assuming the negligent acts to have been committed in the course of the enterprise. 
      -In a joint enterprise, each party has an equal right to control the other’s conduct.

   b. The Family Purpose Doctrine
      -Under certain circumstances, courts impose vicarious liability upon automobile owners for harm caused by persons to whom the automobiles have been loaned or made available. 
      -The family purpose doctrine imposes liability upon the owner of a family automobile for harm negligently caused to others by a family member while operating the automobile for a family purpose. 
      -The use of the automobile must be with permission.

III. Negligence
   -The basis of liability in negligence is the creation of an unreasonable risk of harm to another. 
   -For negligence to be found, the conduct must involve a risk of harm greater than society is willing to accept in light of the benefits to be derived from that activity – that is, the risk of harm must be unreasonable.

A. The Origins and Early Development of the Negligence Concept
   -If the damage complained of is of the immediate act of the defendant, it is trespass vi et armis. If the damage is due to a consequence of the defendant’s act, it is trespass in case 
   -Brown v. Kendall, in trying to break up fight between dogs, defendant hit plaintiff with a stick accidentally; court finds that
plaintiff can only recover if defendant was not exercising due care and plaintiff was.

- The court defines ordinary care as the kind and degree of care which prudent and cautious men would use, such as required by the exigency of the case, and such as is necessary to guard against probable danger to oneself and others.
- Plaintiff has burden to prove that defendant was not exercising due care.
- Defendant has burden to prove that plaintiff was not exercising due care. Plaintiff can not recover if he acted unreasonably.

B. The General Standard

- The general standard applicable in most negligence cases is one of reasonable care under the circumstances.
- *Restatement*: the standard of conduct to which one must conform to avoid being negligent is that of a reasonable man under like circumstances.
- Children are to be judged according to what might be expected of children of similar age and experience.
- Courts refuse to modify standard for actors with mental deficiencies.
- Defendant’s physical disabilities should be taken into consideration in judging whether the conduct has been negligent.

- *United States v. Carroll Towing Co.*, a barge sank due to defendant’s negligence, but plaintiff could recover less if the bargee’s absence contributed to the sinking.
  - Judge Learned Hand developed an algebraic equation to determine duty:
    - Have duty when B (burden) is less than P (probability event will occur) times L (the gravity of the resulting injury)
  - The burden of having the bargee on the ship during daylight hours was less than the possibility of a serious accident (PL)
  - May be more beneficial to look at D (amount of damages) instead of L (gravity of injury) because D would take into account litigation costs as well

- The ultimate question in a negligence case is not simply whether a reasonable person would have recognized the risk, but whether recognizing the risk, that person would have acted differently.
  - It is only when such risk-taking is unreasonable that the defendant’s conduct is negligent.
-**Restatement:** In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important:
  a. the social value attached to the interests which are imperiled;
  b. the extent of the chance that the actor’s conduct will cause an invasion of any interest of the other;
  c. the extent of the harm to be caused to the interests imperiled;
  d. the number of persons whose interests are likely to be invaded if the risk takes effect in harm.

-The determination of the applicable general standard of care is one of law for the judge, and the determination of whether the defendant failed to meet that standard is a question of fact for the jury.

-**Washington v. Louisiana Power and Light Co.,** man was electrocuted when his antenna came into contact with power lines; power company not negligent because burden to fix all like situations is much more than the slim possibility of the accident occurring times the great injury. The risk is reasonable.
  -Algebraic formula better for this case because reasonable power company knows risk better than average person does.

-**Weirum v. RKO General,** a radio station sponsored a live contest that led two teenagers to speed and drive recklessly; the radio station was held to be negligent in the death of a driver that the teenagers forced off the road.
  -Duty must be decided on a case-by-case basis and is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as a result of their conduct. Foreseeability of the risk is a primary consideration in establishing the element of duty.
  -The results were foreseeable because the radio station should have foreseen that its youthful listeners would race to arrive first at the next site and disregard the demands of highway safety.
  -Absence of prior injury is not a defensible argument because it means that the first victim does not recover.
  -Here, the reckless conduct of youthful contestants excited by defendant’s broadcast constituted a hazard that defendant should have anticipated.
  -While every act involves some conceivable danger, liability is imposed only if the risk of harm resulting from
the act is deemed unreasonable (the gravity and likelihood of the danger outweigh the utility of the conduct).

Note: The Duty Issue in Negligence Law
- Restatement: A court may determine that an actor has not duty or a duty other than the ordinary duty of reasonable care.
- A defendant is not liable for any harm caused if the court determines the defendant owes no duty to the plaintiff, either in general or in relation to the particular negligence claim.
- If the court determines a defendant is subject to a modified duty, the defendant is subject to liability only for breach of the modified duty.

C. Special Rules Governing the Proof of Negligence
- In an number of situations, an intuitive application of the negligence standard may be difficult or problematic.

1. Violation of Criminal Statutes
- Martin v. Herzog, plaintiff was driving without his lights on when his buggy was hit by defendant, who was driving down the middle of the road; court decides that violating the statute requiring lights is negligence as a matter of law and plaintiff is guilty of contributory negligence.
  - To omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform.
  - The omission of the lights was a wrong, and being wholly unexcused was also a negligent wrong.
  - The absence of lights must be a contributory cause to the accident. The presence of negligence does not necessarily make contributory negligence.
  - A statute designed for the protection of human life is not to be brushed aside as a form or words.

- Tedla v. Ellman, plaintiffs were hit by a car as they walked down the wrong side of the road; court decides that they were negligent as a matter of law because the law was a general rule of conduct for usual conditions (not a statutory standard of care) that could be broken if circumstances made it safer to do otherwise.
  - When the duty to exercise reasonable care under the circumstances is not enough, the Legislature may, by statute, prescribe additional safeguards and may define duty and standard of care in rigid terms. When the Legislature has spoken, the standard of care required is no longer what
the reasonably prudent man would do under the circumstances but what the Legislature has commanded.

-A violation of the statute may also be excused if it was impossible for the defendant under the circumstances to comply with the statute.

-**Brown v. Shyne**, defendant, without a license, gave chiropractic treatment to plaintiff, ultimately paralyzing him. Court held that violation of statute must be proximate cause of negligence to be negligence as a matter of law.
  -Defendant must have acted outside the duty of skill and care required of any physician in order to be liable.
  -After case, legislature passed a law stating that practicing without a license is prima facie evidence for negligence.

-Whenever safety statutes are held to be relevant to the issue of negligence, the ultimate task of evaluating conduct is taken over to some extent by the judge.
-Safety statutes tend to transform the general standard of reasonableness into a particular standard which can be stated in clear terms (allows issues to be resolved as a matter of law).
-The mere violation of a safety statute does not automatically trigger per se inquiry. Rather, the harm suffered by the plaintiff must be within the risks envisioned by the legislature then it passed the statute.

2. Custom

-**Trimarco v. Klein**, plaintiff was a tenant in defendant’s apartment and was injured when a glass shower door shattered because it was not the customary shatterproof glass.
  -When certain dangers have been removed by a customary way of doing things safely, this custom may be used to show that the one charged with the dereliction has fallen below the required standard.
  -When proof of a customary practice is coupled with a showing that it was ignored and that this departure was a proximate cause of the accident, it may serve to establish liability.
  -What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.

-**The T.J. Hooper**, a tugboat was lost at sea because it did not have a radio to warn of the approaching storm, and
radios are not customary. Court holds boat owners liable because custom alone is not enough to absolve one from liability.

- In most cases, custom is reasonable prudence. However, in others a whole section of people may have unduly lagged in the adoption of new and available safety devices.
- When some have thought a device necessary, at least the court may say that the precaution is right, and the other companies are too slack.
- Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.
- Custom might represent the best practical evidence of how the B less than PL calculus would play out in the real world.

-Helling v. Carey, plaintiff acquired glaucoma even though defendant could have prevented her loss of eyesight by testing her; they did not test her because it was not custom to test people her age. The court finds the defendants liable because adhering to custom in medical malpractice cases is not enough to absolve the defendant of liability.
- The court decides that even if glaucoma is rare among people of the plaintiff’s age, she is due the same protection as someone older than her.
- For most courts, in medical malpractice cases, professional custom is not just evidence of the standard of care, it is the standard of care.

3. Res Ipsa Loquitur

- Literally, “the thing speaks for itself,” Allows plaintiffs to win some of the cases in which a gap in the evidence prevents them from proving the specifics of the defendants’ negligent conduct.
- The mere fact of the accident having occurred is evidence of negligence.
- The court is necessarily required to assess the relationship between the parties and the nature of the duty owing by the defendant to the plaintiff.
- Restatement: It may be inferred that the defendant has been negligent when the accident causing the plaintiff’s physical harm is a type of accident that ordinarily happens because of the negligence of the class of actors of which the defendant is the relevant member.
- The preliminary factual elements which it rests must be proved by a preponderance of the evidence.
-Defendant must have control over the instrumentality.

-Boyer v. Iowa High School Athletic Assoc., plaintiff was a spectator at a basketball game when the bleachers under the control of the defendant folded up and injured her. The court found the defendant liable under res ipsa
  -The doctrine requires two foundation facts: (1) exclusive control and management by defendant of the instrumentality which causes the injury, and (2) the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used.
  -The underlying reason for the res ipsa loquitur rule is that the chief evidence of the true cause of the injury is practically accessible to defendant but inaccessible to the injured person.
- In a res ipsa claim:
  -must show that there is a breach under the circumstances
  -need evidence that the event occurred, the plaintiff was injured, circumstantial facts that someone was negligent, and defendant must have had control of accident-causing agent
  -prima facie case by plaintiff and defendant presents no evidence to the contrary
-Res ipsa is a label for a permissible inference by a jury (presumption).

- Shutt v. Kaufman’s, plaintiff sat down in a chair in a show store and a shelf fell on her. Court does not apply res ipsa because the business is not the absolute insurer of customer’s safety, and plaintiff should have been able to prove fault with some research.
  -A storekeeper owes a business visitor (invitee) a duty to protect the visitor not only against known dangers but also against dangers by the exercise of reasonable care he might discover.
  -The mere happening of an accident raises no presumption of negligence except under those circumstances where res ipsa applies.
- Most courts allow a plaintiff to proceed on both a claim of specific negligence and a res ipsa argument, but some evidence can be seen as displacing a res ipsa claim.

-City of Louisville v. Humphrey, plaintiff’s husband died while in a drunk tank. Court does not apply res ipsa
because prison keeper did not have exclusive control of
instrumentality (could not control another prisoner).

-Escola v. Coca Cola Bottling, plaintiff was a waitress in a
restaurant when a Coke bottle broke in her hand without
reason; court applies res ipsa because defendant had
exclusive control when the negligent act occurred.
-There must be no action by the plaintiff that could
possibly cause the accident (question of fact).
-To apply res ipsa, it must appear that bottles of
carbonated liquid are not ordinarily defective
without negligence by the bottling company. If
there is a probability under the evidence that
defendant was negligent in creating an excessive
internal pressure in a sound bottle or creating a
defect in the bottle at safe pressure, then res ipsa
applies.
-Concurring opinion calls for strict liability for
manufacturers of defective products (incorporated
later in California).

D. Modification of the General Standard Arising Out of Special Relationships
Between the Parties

1. Responsibility of Possessors of Land for the Safety of Trespassers,
Licensees, and Invitees

- The duty owed by an owner to those on the land has
traditional depended upon a rather rigid scheme of
classification of the persons on the land as trespassers,
licensees, or invitees.
- The traditional classifications often lower, but never raise,
the normal duty of reasonable care, and therefore benefit
landowners.

a. Invitees and Licensees

- Invitee: public invitee or business visitor; must be some
inducement or encouragement to enter, some conduct
indicating that the premises are proved and intended for
public entry and use
  - Duty owed is one of reasonable care under the
circumstances
  - Is liable if he knows or by the exercise of
reasonable care would discover the condition and
should realize that it involves an unreasonable risk
- A person who provides services for the benefit of
the landowner is generally held to be an invitee.
-Licensee: person who is privileged to enter or remain on land only by virtue of possessor’s consent
   -Liable is he knows or has reason to know of the condition, should realize that it involves an unreasonable risk of harm to licensee, should expect that they will not discover or realize the danger, does not warn licensee, and the licenses do not know of have reason to know of the condition.

b. Trespassers
   -Trespasser: a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor’s consent or otherwise
   -The duty of the possessor is to refrain from wanton and willful conduct.
   -If the trespasser is on the land for the purpose of committing a crime, the possessor may be liable only for intentionally injuring the trespasser.
   -A possessor is liable for injuries due to artificial, highly dangerous conditions on his property if he knows that trespassers constantly intrude upon the area, the danger is of such a nature that the trespassers will not discover it, and the possessor does nothing to warn of the condition.
   -A higher duty may be owed to young trespassers under the “attractive nuisance” doctrine.
     -A possessor is liable for harm to children caused by an artificial condition if possessor knows children are likely to trespass, the possessor knows the condition could cause serious bodily injury or death, the children (because of their youth) do not discover the condition or realize the risk, and the burden is slight.

-Rowland v. Christian, plaintiff was injured by a faulty sink while a guest in defendant’s apartment; court held that defendant owed some duty of care to licensee as an invitee.
  -Factors which should be examined rather than status of injured party are the closeness of the connection between the injury and the defendant’s conduct (causal nexus), the moral blame attached to the defendant’s conduct, foreseeability, certainty that plaintiff would be harmed, and policy against preventing future harm.
-Most states now hold same duty of care (ordinary duty of reasonable care) for invitees and licensees and a lesser duty for trespassers.
2. Responsibility of Common Carriers for the Safety of Their Passengers

-Common carriers are held to a duty to their passengers higher than that of reasonable care (“highest,” “extraordinary care,” “utmost care”).

3. Responsibility of Operations of Motor Vehicles for the Safety of Their Passengers

-A few states have laws that lower the standard of care owed by operators of automobiles to their nonpaying guests (automobile guest statutes).
-Most states have repealed the statutes.

E. Limitations on Liability

1. The Absence of a General Duty to Rescue

-Restatement: the fact that an actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.
-Special circumstances may call for the imposition of a duty to act affirmatively to prevent harm to another, such as a preexisting relationship between the potential rescuer and the person in need of rescue.
-Where the potential rescuer has voluntarily taken custody of the rescuee under circumstances where care to protect against harm is expected of from that relationship, a duty to act affirmatively exists.
-While there is no general duty to rescue, is a duty to exercise reasonable care once one has begun to rescue.

-Erie R. Co. v Stewart, plaintiff was injured by a train when the watchman defendant employed to warn of oncoming trains was not present; court held that one has a duty to continue to maintain a longstanding standard of care if other parties reasonably rely upon that standard for the care of their person.
-If the traveler had not known about the watchman’s presence, it would probably not be negligence. However, where the practice is known to the traveler, and he has been educated into reliance upon it, some positive duty must rest upon the railway.
-Since they led others into reliance of the continuing precaution, the railway may not discontinue the practice without warning.

-Tubbs v. Argus, plaintiff was injured in an automobile accident, and defendant (driver) left the scene, not lending aid to plaintiff; court found defendant liable because one owes a duty to render reasonable aid and assistance to a party whom one has injured.

-**Restatement:** If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger or future harm, the actor is under a duty for the breach of which the appellee is liable for the additional injuries suffered.

-Courts have split on whether to extend duty to rescue to situations where the defendant caused the injury while acting in self-defense.

-Good Samaritan statutes protect rescuers from claims arising out of the rendering of gratuitous assistance.

-Tarasoff v. Regents of U. of California, defendant knew of a death threat to plaintiff’s daughter and did not warn her. Defendant’s held liable because once a therapist determines, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.

-When the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or the potential victim.

-Therapists need only exercise “that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances.”

-Lots of cases dictate that physicians must instruct their patient of risks that they could cause to others. First step is to inform patient of risks of diagnosis (to themselves and others) (relationship with patients first and foremost).
-Next step is to inform supervisor because he will be held liable for your actions so he should know about them. He may also know how to handle the situation.
-May have good reason to believe that patient will not inform others of the risk he poses to them. Physician has a duty to warn a third party of risk if the doctor knows of a risk to a specific individual.

2. Proximate Cause

- Sets an outer limit on the liability of negligent actors.
- The defendant is liable for the foreseeable, but not the unforeseeable, consequences of negligent conduct.
- If the actual consequences of the defendant’s conduct fall within the scope of the preliminarily defined risks, the proximate cause requirement is satisfied.
- Foreseeability of the consequences may refer to the foreseeability of the particular way in which the plaintiff was injured or to the foreseeability of the plaintiff as a potential victim of the defendant’s negligent conduct.

a. Liability Linked Logically to Defendant’s Negligence and Limited to Foreseeable Consequences

- If the defendant negligently injures the plaintiff, the defendant is liable even if the extent of the plaintiff’s injuries was unforeseeable (eggshell skill rule).
- Concerned with whether and to what extent the defendant’s conduct foreseeably and substantially caused the specific injury that actually occurred.

2) Was Any Harm to the Plaintiff Foreseeable When the Defendant Acted?
- Palsgraf v. Long Island R.R., plaintiff was injured on a railway platform when a guard caused another passenger to drop his fireworks; court rules for defendant because plaintiff must show that defendant wronged her.
  - Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right.
  - Proof of negligence in the air, so to speak, will not do.

- Solomon v. Shuell, decedent, while trying to rescue, was shot by police officers because they thought he was a threat; men police were chasing held liable because a negligent defendant may be liable to one who is injured in an effort to rescue another put at risk by the defendant’s negligence.
-The rescue attempt must be reasonable as must be the manner in which he carried out the attempt.
-Danger invites rescue. The wrongdoer may not have foreseen the coming of a rescuer, but he is accountable as if he had.
-The “fire fighter’s” rule bars recovery for professional rescuers for injuries incurred in the course of their duties.
-“Persons within the risk” also arise in the context of violations of statutes. The person must be he who the statute was designed to protect by the measure.

(3) Were the Nature and Circumstances of the Plaintiff’s Harm Foreseeable?
-Marshall v. Nugent, defendant ran plaintiff’s car off the road. Plaintiff was injured by another car while he was trying to divert traffic. Defendant liable because his act was the proximate cause.
-Regarding car accidents in particular, one should contemplate a variety of risks which are created by negligent driving. Until the traffic mix-up has concluded and the area has become safe, the negligent party can be liable for almost any injury accrued, regardless of whether he could have predicted that it could occur.
-In borderline cases like this, it is the duty of the jury to decide if the defendant was negligent. It is an issue of fact. The judge does have to make a preliminary decision whether the issues are such that reasonable men might differ on the inferences to be drawn.
-Criteria the court examines: “but for” test, the “bosom of time,” “still waters” are not yet placid, foreseeability

-Watson v. Kentucky & Indiana Bridge & R. Co., defendant spilt gasoline into puddles on a road, a party lit a match, and plaintiff was injured in the explosion; court held defendant liable only if the match lighter did not do act maliciously or criminally.
-There can be intervening causes between defendant’s act and the subsequent injury.
-Defendant is clearly liable when his negligence sets the intervening causes in motion.
-The mere fact that the concurrent cause of intervening act was unforeseen will not relieve the defendant from liability, but if the intervening
agency is something so unexpected or extraordinary as that he could not or ought not to have anticipated it, he will not be liable (not bound to foreseen criminal acts).

- Defendant is liable when the intentional or criminal interference of a third party is reasonably foreseeable (access to chemicals, dynamite).
- A defendant may also be held liable for injuries attributed to the treatment for the injury caused by the defendant.
- Defendant may also be liable for wrongful death if the decedent commits suicide as a result of defendant’s negligence.

- Gorris v. Scott, plaintiff's sheep were washed overboard of defendant’s ship. Court found that defendants were not guilty of negligence per se for not securing sheep as required by statute because the purpose of the statute was not the safety of the sheep.
  - Since the damage complained of is something totally different from the object of the Act, the action is not maintainable.
  - An actor is negligent, without excuse, if the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.

b. Other Approaches to the Proximate Cause Issue
- Kinsman Transit v. Kinsman, a barge broke loose, running into other barges, damming the river and causing it to flood. The court holds the barge company liable for the flooding.
  - Where, as here, the damages resulted from the same physical force whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable, unforeseeability of the exact developments and of the extent of the loss will not limit liability.
  - The court sees no reason why an actor engaging in conduct which entails a large risk of small damage and a small risk of great damage of the same general sort should be relieved of responsibility for the latter simply because the chance of its occurrence if viewed alone may not have been large enough to require the exercise of care.

3. Special Instances of Nonliability for Foreseeable Consequences
Courts have identified a number of situations where foreseeability itself may be too expansive a test for the limits of liability.

a. Mental and Emotional Upset
   - Plaintiffs are upset by the prospect of themselves being physically injured, or from having experienced other victims suffer physical injury.

   (1) The Impact and Zone of Danger Rules
   - *Waube v. Warrington*, plaintiff was looking out of the window of her house when she was defendant run over her child. Plaintiff can only recover for emotional distress if she is in the zone of danger (fearing for her own physical safety).
     - Duty? (probably not) Breach? (yes) Proximate cause? (injury is close to source of ripple in pond) Injury? (court has to decide since not physical)

   (2) Bystander Liability
   - *Dillon v. Legg*, a mother and sister saw their relative hit by defendant’s car. The court allows them to recover because their injury was foreseeable.
     - Court develops a three-point test:
       1. Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.
       2. Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident.
       3. Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

   - *Thing v. La Chusa*, a mother did not see defendant injure her son but arrived on the scene to see him laying the ground. Court found for defendant because the mother did not see the accident occur.
     - New test: Plaintiff can recover if and only if:
       1. is closely related to the injury victim;
       2. is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim;
(3) as a result suffers serious emotional distress – a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.

-Seven elements relevant to negligence cases generally:
  - foreseeability of harm to the plaintiff
  - degree of certainty that plaintiff suffered injury
  - the closeness of the connection between the conduct and the injury suffered
  - the moral blame attached to defendant’s conduct
  - the policy of preventing future harm
  - the extent of the burden to the defendant
  - the consequences of the community of imposing a duty

(3) Direct Victims
- Burgess v. Superior Court, plaintiff suffered emotional distress because of defendant’s negligent treatment of her baby during childbirth. Court allowed her to recover because she was a direct victim.
  - A cause of action to recover damages for NIED will lie, notwithstanding the criteria imposed upon recovery for bystanders, in cases where a duty arising from a preexisting relationship is negligently breached.
  - The distinction between bystander and direct victim cases is found in the source of the duty owed by the defendant to the plaintiff.
  - Any negligence during delivery which causes injury to the fetus and resultant emotional anguish to the mother, therefore, breaches a duty owed directly to the mother.

b. Injury to Personal Relationships
  - Loss of consortium: for intangible harm; loss of companionship, sexual activity, etc., not economic loss as originally intended
  - Feliciano v. Rosemar Silvar Co., plaintiff lived with defendant’s injured employee as husband and wife but never married. Court did not allow her to sue for loss of consortium because devalued institute of marriage.
-Borer v. American Airlines, children of a woman injured by defendant sued for loss of consortium. Court limits such claims to spouses.
-There must always be a line drawn as to who can recover in emotional distress cases.

4. Contributory Fault

a. Contributory Negligence
-Butterfield v. Forrester, defendant placed a pole across the road, but plaintiff could have avoided hitting it had he exercised due care. Plaintiff did not recover because of contributory negligence.
-Contributory negligence is an absolute defense. Plaintiff is absolutely barred from recovery because one has a duty to take care of oneself.
-Doctrine makes it easier for defendant to get relief from motion for summary judgment or directed verdict.
-No longer a complete defense, becomes comparative negligence.

-Davies v. Mann, plaintiff’s donkey was hit by a wagon because plaintiff did not take care to tie it up. Court found for plaintiff because, regardless of plaintiff’s negligence, defendant had the last chance to prevent the accident.
-Last chance doctrine: a plaintiff who has negligently subjected himself to a risk of harm from the defendant’s subsequent negligence may recover if, immediately preceding the harm, plaintiff is unable to avoid it by the exercise of reasonable vigilance and the defendant is negligent in failing to avoid the incident if he can.
-If plaintiff is inattentive, he can recover if defendant knows that the plaintiff is inattentive, can prevent the accident by exercising due care, and fails to do so.

b. Assumption of the Risk
-Assumption of risk is an absolute defense. If plaintiff assumed the risk that caused the injury, even if it involves negligence of defendant, plaintiff may not recover. Still a complete defense.
-Can either be a circumstance where there is not duty or duty was not breached (type 1) or where a plaintiff chooses to incur the risk (type 2).
-Can contract out of negligence if activity is risky, but courts do not always accept contracts in which the plaintiff accepts the risk (contracts of adhesion).
Most courts enforce contractual releases of liability (exculpatory clauses) unless it violates judicial notions of public policy.

c. Comparative Negligence
- Is a partial defense; plaintiff is not completely barred from recovery. If plaintiff is 10% at fault, damages should be reduced by 10%.
- Courts asked legislatures to regulate because so complicated.
- Pure comparative fault rewards damages based upon pure percentage of fault. If plaintiff is 90% at fault, he recovers 10% of damages.
- Under limited comparative fault, there is a threshold. If plaintiff is 50% or 51% at fault, no recovery.
- Like all unanswerable questions, the jury must decide how much to reward the plaintiff.
- Uniform Comparative Fault Act adopted by several states.
- Further complicated by joint defendants. Rather than holding them both severally liable, courts may divide percentage of liability since already doing so with plaintiff.
- Where an injury stems from defendant’s negligence and plaintiff’s assumption of risk, the courts may apply comparative negligence principles rather than make the assumption of risk an absolute defense if the defendant’s action was particularly reckless.

5. Immunities
a. Governmental Immunity
- Certain types of tort actions (assault, battery, defamation, interference with contract) may not be brought against the federal government.
- No liability for conduct at the planning level but do have liability at the operational level
- State and local governments also have sovereign immunity but to a lesser degree.
- Statutory attempts to preserve sovereign immunity have been subject to constitutional attacks.

b. Charitable Immunity
- Some statutes preserve immunity for torts brought against charitable institutions.

c. Intrafamily Immunities
- Tort claims between husband and wife and between parent and child are barred.
- Both are not complete.
Immunity for parent/child only applies to the exercise of parental authority, the performance of parental supervision, and the provision of parental care and custody.

IV. Trespass to Land and Nuisance

- Trespass protected the right to exclusive possession; nuisance protected the possessor’s right to enjoyment.

A. Trespass

- One who intentionally enters another’s land, or causes a thing or a third party to enter, is liable in trespass irrespective of whether the actors causes actual harm and irrespective of any mistake, however reasonable, not induced by the possessor.
- One who unintentionally enter is liable only for recklessness, negligence, or engaging in ultrahazardous activity.
- To constitute a trespass, the defendant (1) must accomplish an entry on the plaintiff’s land by means of some physical, tangible entry which is (2) unauthorized and (3) intended by the defendant, caused by defendant’s recklessness or negligence, or the result of defendant’s carrying on of an ultrahazardous activity.

B. Nuisance

- Public nuisance: an unreasonable interference with a right common to the general public
  - Need not necessarily involve interference with interests in land
- Private nuisance: a nontrespassory invasion of another’s interest in the private use and enjoyment of land
- To recover for public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public.
- A private nuisance must be (1) an invasion of another’s interest in the enjoyment of land that is either (2) intentional and unreasonable, or unintentional and negligent/dangerous.
- Even if the utility of the defendant’s conduct outweighed the gravity of the harm it is causing, the invasion of the plaintiff’s interest may be found to be unreasonable based solely upon the magnitude of the harm to the plaintiff.

V. Strict Liability

- In contrast to negligence, strict liability makes no distinction based on the presence or absence of fault on the part of the defendant.
- Under strict liability, an actor whose conduct proximately causes harm to another is liable regardless of whether reasonable care, or even extraordinary care, was exercised.
-With strict scrutiny, PD becomes closer to PL (fault in Hand formula is that when PD is less than PL, the formula does not act as an affective deterrent.

A. Maintaining Custody of Animals
-Common law held livestock owners strictly liable for harm cause to real property by wandering livestock.
-Owners of wild animals are strictly liable for harm caused by the dangerous propensities associated with a wild animal of that particular class, or by dangerous characteristics of which the possessor knows or has reason to know.
-Plaintiff must also establish ownership in order to recover.
-The owner of a domestic animal will be liable if and only if the owner knows of the vicious tendencies of the animal.

B. Abnormally Dangerous Activities
-Fletcher v. Rylands, defendant built a reservoir on his property that flooded and caused damage to plaintiff’s land. Court found defendant strictly liable because he brought something on his land that he knew would be dangerous to plaintiff’s land if it escaped.
-Defendant can excuse himself if can show the escape was the plaintiff’s fault or an act of God.
-If defendant’s use of his land was natural, then plaintiff would have no claim.
-If use is unnatural, then defendant acted at own peril and is strictly liable.

-Turner v. Big Lake Oil Co., defendant constructed ponds to hold salt-water byproduct of drilling. Ponds leaked onto plaintiff’s property, causing damage.
-Use of reservoirs in Texas is natural use, so defendants are not strictly liable.

-Siegler v. Kuhlman, defendant’s gasoline truck overturned, and decedent died when her car exploded as she drove through the spill. Court found defendant strictly liable.
-Restatement: one who carries on an abnormally dangerous activity is subject to strict liability limited to the kind of harm the risk of which makes the activity dangerous.
-Test as to what constitutes abnormal activity: (1) whether the activity involves a high degree of risk to others; (2) whether the gravity of harm is likely to be great; (3) whether the risk cannot be eliminated by the exercise of reasonable care; (4)
whether the activity is not a matter of common usage (natural/unnatural; (5) whether the activity is inappropriate to the place where it is carried on; (6) the value of the activity to the community
- Plaintiff claims strict liability and res ipsa. Res ipsa asks jury to infer that defendant caused the injury, and strict liability makes the defendant liable regardless.

-Foster v. Preston Mill Co., defendant’s blasting (an abnormally dangerous activity) caused plaintiff’s mink to become excited and kill their young. Court finds for the defendant because those who participate in ultrahazardous activities are strictly liable only for harm resulting from that which makes the activity ultrahazardous.
- The dangers from blasting are risk to property from flying debris, as well as damage to property caused by vibrations.
- It is the exceedingly nervous nature of the mink rather than the normal risks inherent in ordinary life, that caused the injury.
- The application of strict liability bars injuries that would not have resulted but for the abnormally sensitive character of the plaintiff’s activity.

VII. Damages

- The amount, if any, that the plaintiff receives depends as much on the extent of the injury as it does on the clarity of the defendant’s liability.

A. Compensatory Damages

- Is the amount of money necessary to restore the plaintiff to the preinjury condition

1. Personal Injury

a. Medical Expenses

- In order to be compensable, the expense must be reasonably related to the doctor’s wrongful conduct.
- The expenses must be reasonable.
- Plaintiff must take reasonable steps to mitigate costs.
- Can recover the value of nursing and domestic help performed by a family member

b. Lost Earnings and Impairment of Earning Capacity

- Impairment of ability to earn may be the most justifiable element of general compensatory damages.
-Lost earnings are those actually lost up to the time of trial or settlement.
-Lost earning potential is the diminution in the capacity to earn in the future.
-The variables that determine the size of the award are: (1) the plaintiff’s basic earning capacity; (2) the percentage by which the plaintiff’s earning capacity has been diminished; (3) the expected duration of the disability; and, if permanent (4) the life expectancy of the plaintiff (before the accident).

c. Pain, Suffering, and Other Intangible Elements
-Recovety for noneconomic loss has become the preeminent element of recovery in personal injury cases.
-To recover for physical pain associated with the injury, the injured person must have been conscious.
-A number of states have enacted statutes limiting recovery for intangible harm.

2. Wrongful Death
-Survival Act: Recovery is most often potential income. Estimate life expectancy and earnings, figure out discount rate depending upon interest rates.
-Wrongful Death Act (Lord Campbell’s Act): looks to plaintiff’s survivors, damage award depends upon status of deceased (father’s death recovers more than mother’s)
-Damages = Income – cost of living + intangibles (loss of companionship, more children, etc.)
-Some states only allow recovery for wrongful death in the form of punitive damages.
-Some states have monetary limits.
-All states allow survivorship of claims regardless of the kind of wrongful death statutes they have.

3. Damage to Personal Property
-The basic measure is the difference between the market value of the property before the injury and its market value after.

B. Punitive Damages
-All the court has to limit punitive damages is instructions to juries.
-Some states have adopted statutes limiting punitive damages.
-Serve the dual purpose of deterrence and retribution
-Owens-Illinois, Inc. v. Zenobia, defendants accused of manufacturing asbestos; court holds that plaintiff should be required to establish by clear and convincing evidence that the defendant’s conduct was characterized by actual malice. -Requires more than a preponderance of the evidence, less than beyond reasonable doubt

VIII. The Role of Liability Insurance in the Torts Process

A. The Nature and Function of Liability Insurance
- In exchange for the premium paid by the insured, the company agrees to defend any claim against the insured covered by the policy and to pay to the claimant any amount, up to the limits stated in the policy.
- The insurer also has the right to defend, and thus takes over the effective management of the claim.
- In almost every instance, the lawyer for the defense will be selected and paid by the insurer.
- Problem when insurance company and claimant have a conflict in interest over the settlement of the claim.

IX. Compensation Systems as Alternatives to the System of Tort Liability Based on Fault

- Replace fault as the key to compensation with an activity-connected event.
- Explicit use is made of insurance. In fact, the claim for compensation is made against an insurer rather than one who has caused the harm.
- Compensation for intangible harm is largely not available, and compensation for economic loss may be less than actual loss.

A. Workers’ Compensation
- Provides compensation for what might loosely be called work-related injuries without regard to either employee or employer fault.
- Provides unlimited compensation for medical expenses, limited compensation for impaired capacity to earn, and no compensation for intangible harm.
- In exchange for no-fault plan, employers give up the right to recover against employers in tort.
- Usually work through administrative courts rather than judicial.
- Losing party can appeal to the Superior Court.
Fault can still be relevant. In some states, if the injury is caused by the serious and willful misconduct of the employee, the employee is not entitled to compensation. An injured employee may be entitled to double compensation if the injury is caused by serious and willful misconduct of the employer.

X. Dignitary Wrongs and Intentional Infliction of Mental Upset

A. Offensive Battery

-Offensive battery is battery in the absence of bodily harm (Fisher, sexual harassment cases).

B. Assualt

-Restatement: An actor is liable for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension.

-An act intended as a step toward the infliction of a future contact, which is so recognized by the other, does not make the actor liable for an assault under the rule.
-Read v. Coker, defendant’s agents surrounded the plaintiff, threatening to break his neck if did not leave; court found assault because where there is a threat of violence exhibiting an intention to assault and the present ability to carry the threat into execution, then it is assault.
-A jury need find that a reasonable person would be afraid (objective) and that the plaintiff was afraid (subjective).

-Beach v. Hancock, defendant pointed a gun at plaintiff in an excited manner; court found for plaintiff because defendant’s conduct should not be permitted in a peacefully society.
-Victims of assault may take law into their own hands.

C. False Imprisonment

-Restatement: An actor is liable for false imprisonment if (a) he acts intending to confine the other within boundaries fixed by the actor, and (b) his act directly or indirectly results in such a confinement, and (3) the other is conscious of the confinement or is harmed by it.
-Whittaker v. Sanford, defendant only allowed plaintiff to leave his yacht for short periods of time but she could not permanently leave; court found false imprisonment in the refusal to let her leave permanently but limited damages.

-Refusal the rowboat to allow her to leave is akin to locking someone in a room and turning the key. The impassable sea is the physical barrier.

-Jury must find evidence of physical restraint (not necessarily on her person) and not merely moral influence.

-Rougeau v. Firestone Tire, plaintiff was detained for questioning regarding theft. Court said could not be false imprisonment because plaintiff never asked to leave, effectively granting an implied consent.

-Sindle v. New York City Transit Authority, plaintiff was on a bus when children began vandalizing it. The bus driver threatened to take them to the police station, and plaintiff jumped out a back window, injuring himself. The court allows the defendant to raise a justification defense to false imprisonment and limit plaintiff’s damages if he was negligent in jumping out the window.

-It is reasonable to restrain someone for the purposes of preventing the infliction of personal injuries or the damaging of property in one’s possession.

-A person attempting to escape from imprisonment does not relinquish the duty of reasonable care for his person. Therefore, if the factfinder finds that plaintiff was falsely imprisoned but he acted negligently in trying to escape, recovery for bodily injuries sustained in the negligent act should be barred.

-Coblyn v. Kennedy’s Inc., defendant thought plaintiff was shoplifting and detained him, causing him to have a heart attack. Court found defendant guilty of false imprisonment because they were not reasonably justified in believing that plaintiff was a shoplifter.

-If a man is restrained of his personal liberty by fear of a personal difficulty, it amounts to a false imprisonment.

-Any genuine restraint is sufficient to constitute an imprisonment and any demonstration of physical
power which can be avoided only by submission, operates as effectually to constitute an imprisonment.
-Absent a merchant protection statute, common law employs a “prudent and cautious man” rule to determine if restraint was reasonable.

D. Intentional Infliction of Mental Upset
-Includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, anger, embarrassment, chagrin, disappointment, worry, and nausea
-\textit{Restatement}: One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress is subject to liability for such emotional distress and if bodily harm results from it, for such bodily harm.
-Where such conduct is directed at a third person, the actor is subject to liability if he intentionally causes severe emotional distress to a member of such person’s immediate family who is present whether or not such distress results in bodily harm, or to any other person present if such distress results in bodily harm.
-The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

-\textit{State Rubbish Collectors Assoc. v. Siliznoff}, plaintiff was threatened with serious physical abuse if he did not join defendant’s organization. Court made up the tort of intentional infliction of emotional distress absent proof of actual physical injury.
-Plaintiff must show intent, mental suffering, and threat to physical well-being.
-Is not assault because threat is for some time in the future.

-Damages sometimes awarded where the defendant intentionally engaged in some conduct toward the plaintiff (a) with the purpose of inflicting emotional distress, or (b) where any reasonable person would have known that such would result, and his actions are of such a natures as to be considered outrageous and intolerable.
-A racial slur uttered by a high-ranking public official, who knew better and is required to do better, and who is the boss of the party
whom the slur is directed, can be liable for infliction of emotional distress.
-Sexual assault often combines elements of assault, battery, and intentional infliction of mental upset. Plaintiff also has to avoid workers’ compensation limitations.