I. INTRODUCTION

A. Definition: A tort is a wrong not arising out of a contract. It’s generally injury to persons and/or property, usually arising out of an accident.

1. Four Elements:
   a. Duty
      i. Part of living in society requires that people have certain duties toward everyone else, to deal with his own property so as not to injure the property of others
      ii. There is no duty in every situation (e.g., boyfriend does not have duty to avoid hurting your feelings in breaking up)
      iii. Sometimes there is a duty to avoid hurting feelings (e.g., sexual discrimination)
   b. Breach
      i. Without breach, no one has done anything tortious
      ii. No liability without fault IS NOT a mantra of the tort system
   c. Causation
      i. No causation, no liability
      ii. But for causation is important
   d. Harm (except in trespass)
      i. No harm no foul
      ii. Speeding by you and scaring you but not hitting you is not a tort. May be guilty of speeding, though.

2. Three kinds of tort causes of action
   a. Intentional
      i. Trespass to property; if you did not intend it, it is not tortious.
      ii. Sleepwalking and trespass: not tortious even if you hurt the property
      iii. Libel: if you did not intend to defame, no tort
      iv. Always a question of intent to do what (All Vosburg requires is intent to touch)
   b. Negligent Torts: behavior that unreasonably risks personal or property injury is tortious
   c. Strict Liability: behavior is tortious b/c it causes unlawful personal or property damage to another, regardless of fault or reasonableness
      i. Dynamite: blasting is strict liability
      ii. You can do it; just have to pay

B. Common Law Subject.
   1. There are generally not statutes
   2. Mostly rules that arise out of litigations and courts
   3. Rules develop over time

C. Four Relationships (Sometimes opposing, sometimes synergistic)
   1. Tort and Contract (publicly imposed duties vs privately assumed duties)
   2. Substance and Procedure
   3. Causation (as concept of responsibility) and Fault (as concept of responsibility)
      a. Strict liability (causal) and negligence (emphasizing culpability; only pay if you broke it and it was your fault)
      b. Fault Continuum
         i. Intentional torts span range from fault to non-fault
         ii. Negligence = fault .................. SL = non-fault
4. Compensation (to make up for the wrong) and deterrence (ex ante approach looking to avoid the action; looks not to culpability but to prevention)

D. Categories of Arguments
1. Arguments from Morality
2. Arguments from Rights
3. Arguments from Liberty
4. Arguments from Consequences
5. Arguments from Administrability

E. Meta-lessons
1. Our meta-project is learning to be lawyers
   a. Understanding the available alternatives and arguing for the one the client prefers
   b. Judges choose among available alternatives
2. Types of Legal Argument
   a. Reasoning by Analogy: using precedent or intuition
   b. Policy Argument: appealing directly to propositions about the primary social purposes, objectives, values, or ideals to be served by the legal system
3. What purposes are typically most salient? (One of the reasons we see so many Goldilocks solutions is that it has never been resolved that one goal should be pursued at the expense of the others)
   a. Deterrence
   b. Compensation
   c. Loss-Spreading
   d. Administrability
   e. Fairness
   f. Coherence
   g. Morality
   h. Efficiency

II. Background on the Tort System

A. Alternatives to Tort Litigation: Insurance
   1. Car Insurance
      a. Property Losses
      b. Economic Losses (rental costs, etc.)
      c. Injuries caused by you
      d. Third party insurance (operating in shadow of tort system)
   2. Life Insurance
      a. Meant to be income replacement
      b. Does not cover pain & suffering; policy cannot be worth more than income replacement and costs for funeral
   3. Medical Insurance
      a. Does not cover death or replace income
      b. Does not cover pain & suffering or other distress
   4. Why doesn’t first-party insurance include distress?
      a. Endless claimants. Afraid of huge amount of litigation. Ken Feinburg – says that 9/11 litigation is limited to physical harms because the amount of distress experienced would be limitless. This isn’t a very good answer by itself. Why isn’t there money for distress once you have a valid claim?
b. Trivial claims
c. Administrability
   i. Insurance companies don’t want to sell (fear of fraud, variance, moral hazard (making it compensable will make more common). Adverse selections – afraid that pool isn’t regular pool, but one with higher likelihood. Adverse selection problem can be saved by making it universal.
   ii. People do not want to buy. Moral hazard exists there as well. Price out of the market. What if it were priced fairly?

B. Other Alternatives to Deal with Loss
   1. Pension
   2. Worker’s Compensation (medical care and income replacement)
   3. Disability Insurance
   4. Social Welfare, especially Social Security
   5. Occasional programs designed to take care of specific problems (black lung, diseases from vaccinations, disaster relief.)

C. What is Unattractive About the Tort System?
   1. Delay
   2. High transaction costs (lawyers, discovery, court costs)
   3. Uncertainty
   4. Liability Limitations
   5. Undercompensation: where there are large losses, often do not recover enough to cover the losses (small losses tend to be overcompensated)
   6. Solvency

D. A Specific Response to Loss: The 9/11 Fund
   1. Exclusive remedy for harms of 9/11; if you received funds you could not sue under the tort system
   2. Allowed $ for pain and suffering
   3. Capped future income at top 98%, allowed for raises, how long you would live
   4. Collateral offsets: Award discounted by pension, insurance, 401K
      a. Not tort-like to offset
      b. Torts are not about what you need, but what HE OWES
   5. Argument in favor of the 9/11 Fund
      a. Life is tough all over, and there are plenty of terrible, catastrophic things for which there is no compensation
      b. If there are devastating losses that need to be dealt with, maybe there should be a way to deal with that
      c. These losses were to people who were connected: a particular community, ground of companies, a neighborhood, social circles – making need to spread losses all the stronger
      d. This wasn’t just for the victim; it was for everyone to feel like they were doing something
      e. Wasn’t just to save the airline industry, or govt would have offered to pay tort judgments

III. Intentional Torts

A. The Nature of Intent
1. **Battery: requires intent to touch, plus “unlawfulness”** (Vosburg v. Putney)  
   (Note: Assault is threat of touching)  
   a. Optional levels of touch: **intentional**, accidental, involuntary  
   b. Damage Options  
      i. **For all injuries** (this is the general rule)  
      ii. For foreseeable injuries only (this is general K rule)  
      iii. For no injuries  
   c. Causation and Fault Principles  
      i. Injury should “lie where it falls”  
      ii. Only culpable acts result in liability  
      iii. Where no one is culpable, who was more to blame?  
      iv. People act at their own risk. Actor is to blame.  
      v. Which options give people the most liberty or maximizes freedom of action? Which options provide the correct incentives?  
   d. Compensation and Deterrence  
      i. Tort Law basically assesses a tax: Why should actor have to pay? Provide incentives not to act (here, not to touch) – deterrence issue  

2. **Fault Continuum for Intentional Torts**  
   a. Legal system makes decisions about how important fault is  
      i. Negligence is fault-based system  
      ii. Strict liability is not fault-based  
   b. Intentional Torts **span the range**  
      i. Intent to move  
      ii. Intent to touch (Vosburg)  
      iii. Intent to offend/scare  
      iv. Intent to harm  
      v. Intent to seriously injure  
   c. Different intentional torts require different standards  
      i. Battery: Generally the rule is somewhere between touch and offend  
      ii. **RST § 13 Battery, Harmful Contact (limits liability to intentionally offensive contact):** “acts intending to cause a harmful OR offensive contact, and harmful contact with the other directly or indirectly occurs” (purports to be restating Vosburg, but Vosburg did not say that intent to harm was necessary)  
      iii. Assault generally falls between scare and harm  
      iv. Libel requires intent to harm  

3. Categories of Arguments, as relating to Battery  
   a. Arguments from Morality  
      i. Idea that liability should flow from fault; only works when there is fault  
      ii. Moral equivalence when there is no fault  
   b. Arguments from Rights and Liberty  
      i. Right to kick  
      ii. Right not to be kicked  
   c. Arguments from Consequences  
      i. How do we get the consequences that are most socially productive? (Now that Vosburg has experienced this loss, what do we do?)  
      ii. Ex ante
iii. Ex post

4. Intent to Offend

   i. Adult woman files suit against five-year-old child for moving chair resulting in fall.
   ii. What type of intent is necessary? Court does not use RST rule.

b. **White v. University of Idaho** (text p. 8, notes p. 8)
   i. D touched P on back during piano lesson; P had strong reaction and injured back
   ii. Court does not look to RST
   iii. **Any nonconsensual harmful touch is actionable**

c. RST on Intent (text p. 8)
   i. RST 2d: “Intent denotes that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.” Restatement (2d) § 8A.
   ii. RST 3d: “A person intentionally causes harm if the person brings about that harm either purposefully or knowingly.
      a) Purpose. A person purposefully causes harm if the person acts with the desire to bring about that harm.
      b) Knowledge. A person knowingly causes harm if the person engaged in action knowing that harm is substantially certain to occur.”

5. **Intent to Help**: is no defense

a. **Mohr v. Williams** (1905)(text p. 20, notes p. 9)
   i. P consented to surgery on right ear. Doctor operates on left ear, which he believes is worse. Court finds that since the doctor performed the surgery without her consent, it was wrongful, and since it was wrongful, it was unlawful.
   ii. Intent to touch, where touch was nonconsensual.
   iii. Idea that doctor is best equipped to make the decision may not always be true; people weigh risks and benefits differently and ability to make own decisions is fundamental liberty.
   iv. Case changed consent procedures

B. Defenses

   b. Defenses (Yeah, but). Potential (usually exculpating) additional facts the D can assert to defeat liability)

2. Consent. (Mohr): sometimes part of case-in-chief, sometimes defense

3. Insanity.
      i. Nurse injured by psychotic patient can recover in tort
      ii. Potential Rules
         a) **Pro-D**: Insanity is a complete defense to tort liability
         b) Insanity is a defense when it is what caused the injury. (Subjective rule: what is in the head of the D; difficult b/c it is unadministrable, encourages fraud, manipulable by the parties.)
c) **Rule of Law** (goldilocks rule): To be liable for intentional tort, insane D “must have been capable of entertaining [requisite] intent and must have entertained it in fact.”

d) Insanity is no defense where everyone is aware that the insane person is dangerous

e) **Pro-P**: Insanity is never a defense (entirely **objective**; does not take into account what is in D’s head)

iii. Is this a good rule?
   a) Law is about drawing lines: this rule makes Almy liable, but not the Batman defendant (who thought she could fly over the truck she hit while driving her car). Is this a good line?
   b) Does the rule deter? Who would it deter?

4. **Self-defense.**
      i. Courvoisier mistakenly shot police officer Raymond when trying to defend his store and home from thieves
      ii. Potential Rules:
         a) **Pro-P**: Entirely objective. Only true state of affairs matters; no defense of mistake
         b) **Rule of Law**: Only reasonable mistakes defeat liability
         c) **Pro-D**: Entirely subjective – all honestly held mistakes relieve liability
      iii. Which Rule leads to people doing the right thing?
         a) Entirely objective rule chills self-defense. Person is less likely to “make a mistake” if he is held liable
         b) Entirely subjective standard is susceptible to fraud and may encourage people to be trigger-happy
         c) Are we really thinking about liability when our lives are on the line? Maybe deterrence should not have any weight on this issue
      iv. Rule in Courvoisier: Fault vs. Non-Fault
         a) Combines subjective “what was in his mind” (vs. objective state of affairs) with objective “what he should have thought” (vs. what he thought)

5. **Necessity.**
   a. **Trespass**
      i. Modern meaning is a tort – intentionally going on to someone else’s land. Only tort where no harm no foul does not apply.
      ii. Archaic meaning: form of action or a writ. Trespass on the case is cause of action for any direct harm (as opposed to indirect). Does not line up with intentional or negligent.
      i. **Necessity as defense to trespass**
         ii. P moored his sloop to D’s dock during a violent storm in order to protect his family and property. D by his servant unmoored the sloop, which was driven upon the shore by the storm and destroyed, injuring his family members
      iii. D claimed he had right to expel trespasser; Ploof uses defense of necessity against the tort of trespass. Necessity is a complete defense
      iv. Who pays for necessary harms?
v. Under what circumstances should he be able to dock? Options:
   a) Any danger to boat or passengers
   b) Serious danger to boat or passengers
      1) Difficulty of placing monetary value on human life
      2) Arguably the wrong incentive structure
   c) Danger to boat o/w damage to dock owner
      1) Rule is the only efficient outcome
      2) Cost-benefit analysis
      3) Probabilistic harms (Prob*Cost)
      4) Determination of probability and cost is difficult
   d) Danger to boat and no danger to dock owner
   e) Boat pays reasonable fee
   f) With permission only

vi. How do we determine the right rule?
   a) Reduction of costs
      1) Looking at overall costs
      2) Some accidents aren't worth preventing
   b) Prevention of Accidents
      1) Imposes a cost
      2) If we wanted to prevent all car accidents we would stay out of cars
   c) Promotion of Cooperation

C. Game Theory and Tort Modeling (Supp II 1-14)
   1. Vincent vs. Anti-Vincent rule
      a. When dock is worth more than boat
         i. Vincent rule: boat stays at sea
         ii. Anti-Vincent rule: Boat owner docks and is released by dock owner
         iii. Different behavior, but no difference in loss incurred. Only distributional difference.
   2. Game says that if you hold those things constant there is no difference in results, not that you SHOULD keep those things constant
   3. Is Dockowner indifferent to paying for repairs to the dock since he has been compensated?
      a. Economic damages that occur while repairs are being done
      b. Cost of litigation
      c. Transaction costs
      d. Shift in business b/c dock owner sued over trivial matter
   4. If we are thinking about which rule is better, things to think about:
      a. Who is better equipped to pay?
      b. How can we minimize transaction costs?

Vincent v. Lake Erie Transportation Co. (1910)(text p. 51, notes p. 19, 22)
   i. Necessity as imperfect privilege
   ii. D held ship to the dock in a storm in order to prevent it from damage; thereby harming the dock
   iii. Rule: Court does not question that D had a right to dock, but holds that he has to pay for damage done (boat saved itself at the expense of the dock). Necessity as an imperfect defense.
   iv. Dissent: If he had the right to dock, he should not have to pay.
IV. INTRODUCTION TO STRICT LIABILITY/ NEGLIGENCE

A. Introduction
1. When is a D liable for the physical harm he accidentally or inadvertently causes?
2. Strict liability: holds the D prima facie liable for any harm that he causes to the P’s person or property, regardless of fault, reasonableness, etc. (limit=causation)
3. Negligence: allows the P to recover only if, intentional harms aside, the D acted with insufficient care (limit=fault, causation)
4. Causation requirement is common bond, but how should causation be interpreted?
5. Is it enough that the D was careless, or must he also owe the P some duty of care

B. Long Long Ago
1. **The Thorns Case** (1466): competing standards (text p. 82, notes p. 24, 25-27)
   a. Major historical controversy is whether it adopts the theory of SL
   b. D has a privilege to enter and retake the thorns so long as the original cutting was not tortious.
      i. Littleton finds that you must compensate those whom you injure (close to SL)
      ii. Choke agrees, going further: the falling was unlawful, and hence, the taking away was also unlawful. The standard he is using looks is super-negligence: As long as people are trying not to do you harm, and they do cause harm, you cannot recover
   c. Possible Standards
      i. SL: liability based on causation rather than fault
      ii. Super-negligence: Liability for failure to be super-careful
      iii. Negligence: Liability for unreasonable behavior only (otherwise it is damnun absque injuria)
   d. This case is the dawn of negligence law!
   a. Facts: Defendant and plaintiff were soldiers, defendant accidentally shot plaintiff during exercises
   b. Holding: “No man shall be excused of a trespass... except it may be judged utterly without his fault.” Liability is defeated where it appears that the accident “had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.”
   c. Court offers no defn of inevitable accident nor examples of its application
      i. One reading: inevitable accident occupies a niche midway between SL and negligence
      ii. Another reading: literal meaning, applies solely to accidents that “had to happen” whether or not the D acted as he did

C. 19th Century Precedents
1. **Brown v. Kendall** (1850)(text p. 100, notes p. 29-32)
   a. Intellectual sleight of hand and triumph of negligence.
   b. Facts: Two dogs fighting, D took stick and tried to separate them, accidentally striking P
   c. Holding: If D was exercising due care (ordinary care), he was not liable
      i. Shaw decided this case for a reason. He claimed that the reasoning in prior cases was to distinguish trespass from case, which is clear intellectual dishonesty.
ii. Shaping public policy: Shaw is setting up a regime where it is hard to win cases against industry or corporations
iii. Makes no attempt to justify standard of negligence on its own merits
d. Notes
i. Rise of negligence in American tort law has often been viewed as subsidy for the protection of infant industries with less danger of political conflict than taxing (Horwitz, Gregory)
ii. Horwitz theory challenged by arguing that Brown was about private persons and a dog fight, not industry
iii. Schwartz challenged Horwitz thesis: arguing that cases in the early 1800s had operative principles of negligence in most instances

2. **Rylands v. Fletcher** (1865, 1866, 1868)(text p. 104-11, notes. p. 32)
   a. Competing accounts of SL; alternative holdings
   b. Trial Court:
      i. Martin: No trespass, as negligence would have been necessary
      ii. Bramwell: SL, limited by causation
         a) Differentiates this case from collision cases, where negligence is required
         b) Problem: How do you know the cause? How do you know A hit B rather than B hitting A?
   c. Appellate Court
      i. Blackburn: SL for things KNOWN to be dangerous
      ii. Distinguishes cases of collisions b/c traffic on highway cannot be conducted w/o exposing people on neighboring property to some degree of risk. Here, P could not control how D used land
         a) Is this true? Mines are notoriously prone to flooding. Building of reservoir was not a secret.
         b) Risk is in the conjunction of the two.
   d. Lords (Supreme Court)
      i. Cairns: Non-natural use means D should be liable. (This is coal country; mining is central to the economy. Mines are natural; reservoirs are not.
      ii. Cranworth: Agrees with Blackburn
   e. Reconciling Rylands w/ U.S. case law.
      i. Brown v. Kendall says negligence is the law. How do we deal w/ Rylands? Either say it’s wrong or LIMIT it to escaping water.
      ii. For SL advocates: Rylands is the first principled analytic take on the central question of tort law.
   f. “Rylands is tort law’s conscience, and always-available alternative to the negligence system that persistently causes us to examine the justifications for the limitations on liability that are inherent in a body of accident law based primarily on negligence” (Abraham, III-28).
   g. Narrow domain for SL in US tort law is that it would be inconsistent with our values and policies.
      i. Imposing liability is seen to be unfair unless D was at fault in some way or has special cost-bearing capacity
      ii. SL reserved for those few cases in which, despite the absence of real fault, we are comfortable imposing liability b/c of the risk-allocation and risk-spreading advantages of doing so.

3. **Brown v. Collins** (1873)(text p. 115, notes p. 36)
a. Problem: Dealing w/ Rylands precedent. Justice Doe could have distinguished on facts, but chooses to ridicule the Rylands precedent.
b. Facts: P owned a stone post, D riding along highway, lost control of horses which smashed into stone post
c. Holding: Court ruled for D; not be liable for injury done w/o his intent, consent, or desire, when he was using ordinary care. To impose liability for the “unnatural” use of land, or based on the escapance principle used in Rylands would punish those who try to develop and better their land and rise above the primitive condition of mankind. To adopt Rylands would be against the general common law principles of American society.

   a. “Sparks case”; decision by Bramwell
   b. Facts: Injury was done to a rick of hay upon a plaintiff’s farm, adjoining a public highway, by a spark escaping from the fire of a traction engine belonging to the D. The engine was constructed correctly and there was no negligence on the part of the engine conductor or manager.
   c. D was liable. “It is just and reasonable that if a person uses a dangerous machine, he should pay for the damage which it occasions; if the reward which he against for the use of the machine will not pay for the damage, it is mischievous to the public and ought to be suppressed …”

D. Dealing with NE Quadrant of the Grid
   1. Social cost > social benefit, but private cost < private benefit. We need a tax to stop this behavior.
   2. How do we solve this problem?
      a. Strict Liability: internalization of all costs, ex post
         i. Owner decides what is reasonable, taking into account costs of prevention and damages caused by failure to prevent
         ii. One-Owner principle
            a) SL makes people act as if they are the owner. Make decision as if they owned the engine and the haystacks.
            iii. Repeat players with costs and benefits in front of them will make the best decisions and lead us to the correct answer
      b. Mandatory Insurance (internalization of all costs, ex ante)
      c. Regulations (ex ante limit on unduly harmful action)
         i. On output
         ii. On input
      d. Negligence (ex post form liability for unduly harmful action)
         i. If jury decides that costs imposed on world are greater than benefits gained, you are acting unreasonably, and are “taxed”
         ii. ONLY shifts the cost when it is unreasonable

E. Choosing Between SL and Negligence
   1. Deterrence
      a. Not clear that one side is better for accident prevention. Same outcome w/r/t accident prevention regardless of system; only difference is distributional.
      b. Compensation alone fails to justify expense of tort litigation, especially where first party insurance is available. Must identify some social gain as justification.
         i. Need to fashion incentives that reduce the costs of accidents and their prevention.
         ii. Negligence rules provide incentives to avoid costs that exceed the benefits they generate.
2. Morality
   a. Which is more fair?
   b. SL: Anti-Unjust enrichment. If D caused the harm, he should have to pay. Why should the harm lie where it falls?
      i. Rebuttal: Why is the baseline that P pays? Baseline is wherever we set it. Unjust enrichment assumes an answer w/o logic or theory
   c. Negligence: Attention to culpability, interest in reciprocity
      i. Often accidents occur out of joint use
      ii. Sometimes both parties gain enough from their interaction that it is perfectly fair to say that one should not be liable for harm caused where reasonable care was used.
3. Consequences
   a. One argument that is clear: under SL, people who cause more accidents pay more often (distributional difference discussed in Vincent)
   b. Negligence favors industry (Brown v. Collins)
      i. Negligence is better b/c it favors industry, and industry is good
      ii. Horwitz: Rejection of Rylands and triumph of Brown v. Kendall is unprincipled favoritism toward barons of industry.
      iii. Query whether it is true that negligence favors industry
   c. Externalities
      i. SL forces enterprise to always pay for externalities
      ii. Negligence requires enterprise to pay only when not acting with due care
   d. Efficiency:
      i. Least-cost avoider
   e. Social Welfare:
      i. SL Economic Incentives (Bramwell in Powell v. Fall)
         a) Users of dangerous items and imposing risks on others should be prepared to pay for damage it occasions.
         b) If it means they go out of business, that is good b/c it makes sure that they are not imposing risks that unfairly burden social welfare. Private benefit should equal social benefit.
         c) Forces enterprises to take risks (externalities) into consideration
            1) Can pay for harms ex post
            2) Or pay for insurance ex ante (point is to make costs over time equal).
         d) Counter: Negligence is also an incentive-based regulation system, just much more finely tuned and only requiring payment when proper care is not taken.
         e) Counter: One-owner solution w/o some sort of contributory negligence requirement makes it difficult when accidents can be prevented by both parties
         f) Counter: Risky behavior is often more productive
      ii. Negligence Argument:
         a) Lower transaction costs
         b) The superiority of private insurance markets
         c) Productivity of risky vs. other activities
   f. Action is Good
i. One of Holmes’ arguments in favor of negligence. Having a SL system where mantra is “act at your own peril” discourages productive behavior.

ii. Justice Doe in Brown v. Collins: Rylands “unnatural use” argument would discourage development of land and rise above primitive condition of mankind

4. Administrability
   a. SL is easier to administer. Negligence requires that a jury get the right answer to be the most efficient. Jury has to know when an excess of costs are being imposed on the world. Only when it is right does the system work.
   b. Negligence is better administration. The judicial system is best equipped to make these decisions.
   c. Transaction Costs
      i. SL: Easier to determine cause alone than evaluate reasonable care. Larger number of transactions, but low per-unit cost b/c they are more clear-cut.
      ii. Negligence:
         a) Holmes- let losses lie where they fall unless we have a really good reason for the state to intervene. This results in fewer “swaps,” less interference of the “cumbrous and expensive machinery” of the state.
         b) Fewer cases, but they are more difficult to decide.

5. Liberty/ Rights
   a. Which protects more rights?
   b. SL: Right to quiet enjoyment of life and property (D’s argument in Ploof)
      i. Rebuttal Why quiet vs. unquiet? Does & Holmes’s arguments. Why not a right to go forth with your business and develop? Why does right to quiet enjoyment trump right to liberty?
   c. Negligence: Right to act w/o threat of liability

V. NEGLIGENCE IN DETAIL: THE STANDARD OF REASONABLE CARE
A. Negligence and Difference
   1. Negligence law deals with three settings in defining reasonable care
      a. Primary Negligence: What does D need to do? (Reasonable care, how to deal with differences)
      b. Primary Negligence: What kind of behavior need you anticipate? (e.g., City of Aberdeen, needs to anticipate blind people will walk on the street)
      c. Contributory Negligence: What does the P need to do?
      d. There is no obvious connection between (b) and (c). They do not have to correlate; they can easily diverge.
         i. The Jenner D was not negligent for having a seizure
         ii. The Jenner Ps were not negligent for failing to anticipate it
      e. Does not follow that the same reasons justifying the decision in (b) justify the decision in (c)
   2. Objective vs. categorized objective vs. subjective standards
      a. Reasonableness has some notion of normalcy
         i. How do we decide what to do with differences?
         ii. When do we make allowances?
         iii. Looking for some type of doctrinal answer to deal with differences
   3. Holmes: The Common Law (text p. 150, notes p. 53)
If the general notion upon which liability to action is founded is fault or blameworthiness, how do we deal with cases of personal moral shortcoming?

The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. “It does not attempt to see men as God sees them.”

i. Impossibility of measurement

ii. When men live in society, a certain average of conduct is necessary to the general welfare.

iii. Neighbors require those who are hasty and awkward to rise to their standard

c. Exceptions

i. Blink men are not required to see

ii. Infants are only bound to take precautions of which an infant is capable.

iii. Insanity- no general rule. Sometimes a man can be insane and capable of taking precautions, but pronounced insanity which manifested incapacitates the sufferer from complying with the rule which he has broken is ground for excuse.

4. Standards for Negligence:

a. Objective: reasonable care, ordinary prudence, reasonable person, etc.

   i. Examples: Vaughan v. Menlove (stupidity)

b. Categorized objective (“Individualized”): Reasonable blind person; reasonable child, etc.

   i. Examples:

      a) Proneness to seizures (Hammonette v. Jenner)

      b) Infancy (Roberts, Daniels, Goss)

c. Subjective: “According to his best judgment”

5. Should there be different standards for negligence and contributory negligence?

a. Arguments for same standards

   i. How can you possibly tell ex ante who is P or D, especially where they are involved in the same activity (e.g., driving), where the only difference is the person who was injured?

   ii. Different standards increase administrative costs of settlement and litigation.

   iii. Courts resist different standards within a case, although different situations get different treatment.

b. Both standards are soft.

   i. Daniels v. Evans

   ii. Fairness: What can we reasonably expect?

   iii. (for children): Social productivity of training. Importance to have space to act unreasonably and learn it was a bad decision w/o harsh punishment.

   iv. Social productivity. Encourages productive behavior b/c people are not afraid to interact w/ each other

   v. Incentives. (Can we ever make 7-year-olds act like adults?)

c. Both standards are hard.

   i. Need a harsh standard for CN negligence b/c otherwise people will not mind getting hurt b/c they know they will be reimbursed
ii. W/o harsh standard we end up w/ moral hazard, fraud, unnecessary injury; need it to provide incentive to prevent harm
d. CN negligence is hard, negligence is soft
e. CN negligence is soft, negligence is hard
   i. Lessened need for incentive structure in CN negligence since people care about their own well-being
   ii. No unfairness to D, who was, after all, negligent
   iii. Roberts v. Ring (for children, no justification)
   iv. Fleming James:
       a)Allowing softer standard in CN negligence refines the fault principle and furthers the compensation of accident victims by cutting down a defense that would stands in its way
       b) Does not allow this standard for Ds, b/c doing so would unduly burden the victims of substandard behavior
       c) Juries tend to resolve doubts on both issues in favor of P
v. May not need harsh standards w/ CN negligence b/c people do not try to get hurt, overwhelming sense of self-preservation
vi. We have other checks to self-injury, such as possibility that injurer will be insolvent
vii. Easier standard for CN negligence may be justified if our goal is to allow compensation of accident victims by cutting down defense that would stand in its way
viii. Negligence regime is asymmetric; D gets off the hook even when he is at fault. Making a softer standard makes it slightly more symmetrical.

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<td>Plaintiff</td>
<td>No Fault</td>
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Taking a chunk out of the NW quadrant from D to give to P makes it feel a little more fair and balanced.

   a. Facts: D had epileptic seizure and crashed car through wall of P’s shop, injuring P’s wife and damaging shop. History of epilepsy was known to DMV and doctor had testified it was safe for D to drive w/ medication.
   b. Holding: Should not be held to standard of SL; must look for evidence of negligence (none here)

7. Stupidity (Vaughan v. Menlove)(text p. 145, notes p. 52)
   a. Facts: D placed a rick close to P’s cottages. Although he was warned that the rick was dangerous, he said “he would chance it.” The rick caught fire and P’s cottages burned. P sued D for damages.
   b. Holding: A person has a duty to act with the caution that a person of ordinary prudence would observe.
   c. Argument is profound: we are not requiring blind men to see; just asking D to be a little smarter. He should have insight to his own condition and take more care.

8. Infancy and Old Age (Roberts, Daniels, Goss)
   a. RST § 283A:
i. If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.

ii. This is the law in most jurisdictions, with the exception of adult activities.

b. Roberts v. Ring (Minn. 1919)(text p. 151, notes p. 54)
   i. Facts: Seven-year-old boy was hit by 77-year-old man’s car. Man suffered from defective sight and hearing.
   ii. Holding: **Boy of seven is not held to same standard of care in self-protection.** Must consider the degree of care commonly exercised by the ordinary boy of his age and maturity in evaluating contributory negligence. Old man was guilty of negligence – when one by his acts or omissions causes injury to others, his negligence is to be judged by the standard of care usually exercised by the ordinarily prudent man.
   iii. This is NOT the rule. Rule offered (w/o justification) is that if the child causes injury to another – there should be an objective standard of care, but that if the child is injured, should be categorized objective standard for boy of his age and maturity.

   i. Facts: 19 year old was killed when his motorcycle collided with defendant’s automobile.
   ii. Holding: **Minor operating a motor vehicle should be held to same standards as an adult.**
   iii. Concerns in prior cases overturned by Daniels: in order to interact w/ adults in an adult environment, children should be allowed to act as children in stages of development and not held to adult standards.

d. Goss v. Allen, (N.J. 1976) :
   i. Court affirmed jury instruction that 17-year-old beginning skier be held, not to adult standard of care, but standard appropriate to youths of the same age. Distinguished case from driving car b/c no license was required for skiing.

e. 9. Mental Illness (Breunig/Batman)
      i. Woman hallucinated and drove into truck, thinking she was Batman and could fly over it.
      ii. Court held that a jury is capable of determining whether plaintiff had warning or knowledge that would reasonably lead her to believe that hallucinations would occur and would affect her ability to drive an automobile. The statement that insanity is no defense is too broad when it is applied to a woman who is suddenly overcome without forewarning by a mental disability or disorder which incapacitates her from conforming his conduct to the standards of a reasonable man under like circumstances.

b. Institutionalized Insane Persons
   i. **Gould** (Wis. 1996): Breunig was not followed. Although the court agreed that ordinarily a mentally disabled person is responsible for his own torts, the rule does not apply here b/c it would place an unreasonable burden on the negligent
institutionalized mentally disabled. Caretaker can “foresee” reasonably and is not “innocent” of the risk involved, is paid for her risk.

ii. **Creasy** (Ind. 2000): Same outcome as **Gould**. Court stressed that disallowing liability advanced a desirous social policy of deinstitutionalizing people with disabilities and integrating them in least restrictive environment.

iii. **Jankey** (Wis. 2000): Court refused to extend liability to an institution that had not restrained the P, a mental health patient, who injured himself while trying to escape, following Breunig in applying an objective standard of care to the insane plaintiff, in part b/c of social preference to minimize the level of institutionalization required of insane people

10. Blindness (Fletcher v. City of Aberdeen)

a. **Fletcher v. City of Aberdeen** (Wash. 1959)(text p. 162, notes p. 58)
   i. Construction worker failed to replace barricade at construction site and blind man was injured as a result.
   ii. Degree of care blind person is held to is degree of care which an ordinarily prudent person similarly afflicted would be held to under the same circumstances. The fact that the P was blind did not excuse the city’s negligence

b. 3d RST: conduct of a person with a physical disability “is negligent if it does not conform to that of a reasonably careful person with the same disability”

c. **Poyner v. Loftus** (D.C. 1997): Legally blind P was not allowed to recover for injuries occasioned by his fall from a four-feet incline that was generally blocked by a bush. Court reasoned that since P was legally blind and knew he could only see 6-8 feet in front of him, he was negligent by turning his head and walking forward.

11. Gender

a. Difference of treatment of women in early tort cases used a number of reasons in women to justify various standards
   i. Require more care of women (cannot do this with mentally incapacitated persons b/c they are less capable of it; however, holding this option open to women leaves open the cognitive equality of women)
   ii. Require same care as required of men (higher “masculine” standard)
   iii. Reasonable person (the average?)
   iv. Lower standard of care (essentially treating them like children)

b. Trajectory of early cases
   i. The courts did not know about outcomes of other cases; courts did not really develop a rule of law on this issue
   ii. Low frequency type of case, since women did not drive much
   iii. We are just examining the possibilities

c. **Daniels v. Clegg** (notes p. 61)
   i. Jury Instruction: “The jury should consider the age of the daughter, and that fact that she was a woman”; she is required only to exercise “that degree of care that a person of her age and sex would ordinarily use.”
   ii. Appellate Court upheld the instructions; D had no right to expect anything more of her.
iii. Categorized objective standard. But, jury instruction does not indicate whether considering her age and sex means she should use more or less care.

iv. Court seems to think that answering (b) question of what the D should expect is the same as the (c) question of what is required of the P. It correlates the two w/o justification.

d. **Tucker v. Hennicker** (notes p. 62)

i. Jury Instruction: "such care, skill, and prudence as ordinary persons like herself were accustomed to use"

ii. App Ct: Error. Jury charge should have referenced “mankind in general.”

iii. Hard to tell whether the instruction was intended to be gendered or if it was the same standard that would have been given for a male P; hard to understand where the court is going

e. **Eichorn v. Ry.** (notes p. 62)

i. P (2 months pregnant) falls b/c of huge step (no platform to get on the train)

ii. The train is negligence b/c it is their duty to provide suitable, safe, and convenient means for getting on and off trains; had to anticipate all sorts of passengers

iii. She is NOT contributorily negligent.

iv. Jury instruction: negligence, etc. means “the lack of such care and caution as reasonable and prudent men would exercise under like circumstances.”

v. App. Ct: No error. “Men’ was generic and embraced ‘women.’”

f. **Asbury v. Ry** (notes p. 63)

i. Jury instruction: “‘Due care’ meant ‘such care as an ordinarily prudent man . . . would use.’”

ii. App. Ct: No error. Women are not bound by a stricter rule than men

iii. Different approach from Eichorn: men meant men, but women are held to same standard as ordinary reasonable man

g. Which doctrinal possibility is best for society?

i. If goal is gender equality, there is something significantly uncomfortably in having different standards. If law is a symbolic site for politics, then it is appealing to have the same standard

ii. Where there are indeed differences, gender equality can leave them worse off. If women do indeed have less practice, skill, strength, and mobility because of less occasion to develop the skills necessary for driving, it may be unfair to hold them to the same standard

iii. Is there anything special about gender that adds to the problem of having a categorized objective standard?

   a) If we think of torts as setting up an incentive structure, having a rule that says that women must drive like men or pay will either encourage better driving, less female drivers, or both.

   b) This means that it can draw the line closer to equal, or draw it farther apart.

   c) The way you answer question (a) will significantly affect your policy decision.
12. The Relevance of Wealth to Negligence Liability (text p. 164-65)
   a. Level of care should be constant regardless of wealth (Abraham &
      Jeffries)
      i. Two major purposes of tort law: deterrence, compensation
      ii. Argues that deterrent function works regardless of wealth: cost-
           benefit calculus is the same whether person is wealthy or poor.
           Wealth does not affect expected value.
      iii. Argues that compensation is to recover for all losses proximately
           resulting from the action for which D is held liable.
   b. Wealthier persons should be subject to higher standard of care (Arlen
      [she])
      i. If potential D has lower marginal utility of wealth than does a
         poorer potential D, he is, in other words, less adversely affected
         by a given expenditure on care than is a poorer person.
      ii. Calls for gradation of Ds by wealth (how would this be
          administered?)
   c. Rejects conclusion that legal rules should offer special preference to the
      poor (Kaplow & Shavell)
      i. Income tax system is better system to redistribute wealth.
      ii. Affects entire population, treats individuals on basis of income.
      iii. Legal rules are imprecise, deal only with small fraction of
           individuals in legal disputes, and may leave distribution
           unchanged b/c of price adjustments that negate the distributive
           effects of the rules

B. The “Calculus of Risk” (text p. 165, notes p. 64)
   1. Factors in reasonable Care: Common Sense
      a. Expected Value (EV) of harm to be prevented
         i. Probability of harm w/o prevention (“risk”)(Blyth: Alderson)
         ii. Magnitude of harm
      b. EV of preventive measure
         i. Cost of prevention (magnitude), including information costs
            (Blyth: Bramwell)
         ii. Value of preventive measure
            a) Probability (likelihood of success)
            b) Magnitude (Terry’s “collateral object,” text p. 169)
         iii. Alternative risk imposed by prevention (Cooley)
            a) Probability
            b) Magnitude
      c. Cases demonstrating evaluation of these factors
         i. **Blyth v. Birmingham Water Works** (1856)(text p. 166)
            a) Facts: Frozen pipes resulted in damage to P’s house. Did
               company take proper care? Jury found for P.
            b) Alderson: No negligence (no “omission to do something
               which a reasonable man … would do.”)
            c) Bramwell: Ds not bound to keep pipe clear. P was under
               quite as much obligation to remove ice and snow as D.
            a) Facts: P saved child on R.R. tracks but was killed when
               train failed to stop.
            b) Grover: Not negligent to save the child. Aff’d jury
decision.
c) Allen, dissenting: CN negligence rule—no one can maintain an action for a wrong when he consents or contributes to the act which occasions his loss. He put himself in danger and cannot recover.

iii. **Cooley v. Public Service Co.**, (N.H. 1940)(p. 173, p. )

a) P suggested that telephone problem could be fixed by maintaining devices at crossovers to prevent falling wires from coming into contact w/ telephone wires, and that Ds were liable for failing to do so

b) Court held that D’s duty to ppl in the street that may be injured by such devices was greater than D’s duty of care toward her.

c) Activity level versus care level

1) Shavell (p. 175): Negligence is not efficient b/c it does not motivate actor to consider the effect on accident losses of his choice of whether to engage in his activity, or, more generally, of the level at which to engage in his activity

2) SL is more efficient b/c injurer must pay for losses whenever he is involved in an accident, and hence he will be induced to consider the effect on accident losses of both his level of care AND his level of activity

iv. Terry, Negligence (p. 169)

a) Risk must be unreasonably great

b) Essence of negligence is unreasonableness; due care is simply reasonable conduct; no mathematical rule

c) Risk is not necessarily unreasonable b/c harmful consequence is more likely than not to follow conduct, nor reasonable b/c chances are against it; must consider magnitude as well.

d) Reasonableness depends on:

1) Magnitude of risk

2) Value of importance of that which is exposed to the risk (principal object)

3) Reason for conduct (collateral object)

4) Utility of the risk (probability that the collateral object will be attained by conduct involving risk to the principal)

5) Necessity of the risk (probability that the collateral object would not have been attained w/o taking the risk)

2. Alternative Standards for Reasonable Care

a. Osborne v. Montgomery (Wis. 1931)(text p. 171, notes p. 64)

i. Court discards jury instructions that include only value of prevention of accident and not its costs, saying that perhaps the value of opening the door is so great that it o/w risk of hitting biker

ii. Court says that the correct test is a balancing test. The rights duties and obligations of mankind are not absolute, and not every want of care results in liability. Must balance social interests involved and determine whether one should be liable for natural consequences of his conduct.
b. Andrews v. United Airlines (9th Cir. 1994)(text p. 184, notes p. 65)
   i. Court used utmost care standard for airline safety (all that human care, vigilance and foresight reasonably can do under all the circumstances). Remanded b/c sufficient evidence existed to reinstate complaint.
   ii. Like Osborne’s erroneous complaint (anything he ought to reasonably foresee), very pro-P standard (utmost care)
   iii. Example of a place where precautions are not symmetric or identical. Ways of prevention and avoidance are different for P and D.
   iv. Utmost care standard does NOT mean that airline will take every possible precaution to prevent harm; so long as payouts are limited to cost of accident; will only pay for precaution if it is less than the payout.

3. Factors in Reasonable Care: The Learned Hand Test
   a. Precautions are required if and only if B < p*L
      i. Burden < (probability of injury)* (gravity of injury)
      ii. Cost of prevention < (injury risk) * (injury hazard)

b. United States v. Carroll Towing Co. (2d Cir. 1947)(text p175, notes p65)
   i. Bargee left the boat; Learned Hand found him to be contributorily negligent since the burden here was negligible
   ii. Using formula B<pL very loosely here, comparing large # to small #
   iii. Custom is also mentioned as a factor: “It may be that the custom is otherwise ... and that, if so , the situation is one where custom should control.”

c. Using the Hand Formula
   i. If cost of precaution (B) is 100; probability of harm w/o precaution (p) is 0.25; and harm, if it occurs (L) is 1000.
      a) 100 < 250, so precautions are required

d. Carroll Towing Under Four Legal Regimes
   i. Without Tort Law (loss lies where it falls, no precaution and no liability)
   ii. If tort law goes by custom (no precaution, bargee would have acceptable excuse for going on land, D won’t pay)
   iii. Under Hand Formula (sometimes it will be more efficient to take the precaution, sometimes it won’t)
   iv. Under Andrews (Liable under standard of utmost care, takes precaution only when it is less than the cost).
   v. Under SL (Will pay whether or not he takes precaution. He will pay $100 to prevent the accident, but would rather pay the $250 loss if the prevention cost is $400)
      a) Question (a) is whether there will be liability against D
      b) Question (b) is whether D will take the precaution

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<td>No</td>
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<tr>
<td>Tort law following custom</td>
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<td>No</td>
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<tr>
<td>Hand Formula</td>
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<td>Yes</td>
<td>No</td>
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<tr>
<td>Andrews Standard</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Strict Liability</td>
<td>Yes</td>
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4. Cost-Justified Accidents
   a. Non Cost-Justified Accidents: should try to prevent based on economic efficiency (Pareto efficiency- this is wealth-maximizing efficiency)
   b. Under Hand, allowing a cost-justified accident does not mean you have to pay.
   c. Under Andrews and SL, you do have to pay, but the accident is still cost-justified.
   d. Proves that you can have SL w/o having extra care taken. No reason to think that b/c there is SL you are getting more accident prevention than with negligence!
   e. In order to induce efficient accident prevention, we need a standard at least as strict as the Hand Formula, so long as parties are free to make the decision to pay damages as opposed to paying for cost prevention (i.e., so long as the conduct rule and liability rule are not inextricably linked, then any rule from Hand to SL will meet our efficiency goal.)
   f. CONDUCT RULES: If conduct rule were imposed, e.g., you would go to jail for not taking prevention, you would be paying $400 to prevent accident that costs $250, providing inefficient accident prevention
      i. Conduct rules force people to follow rules, rather than pay to avoid them
      ii. Another way (besides threat of prison) to get the same result is to charge treble damages or punitive damages
   g. Measurement problems: Hand himself was sensitive to the fact that the there were difficulties arising from the necessity of applying a quantitative test to an incommensurable subject-matter. Of the three factors, BPL, only care is susceptible of quantitative estimate, and often that is not. Injuries are always variable within limits; probability is difficult to calculate and varies with the severity of the injuries

5. Challenges to Efficiency
   a. If courts enforce an efficient standard of negligence, and you do not pay if you act efficiently, why is there negligence? Why does anyone ever do anything inefficiently?
      i. Efficiency is EX ANTE
         a) Errors as to efficiency
         b) Administration
            1) Errors (random, in one direction or another)
            2) Incommensurability
         c) Irrationality
         d) Immorality (If system is not working b/c people are not sued for inefficient actions)
         e) Risk-Preferring People: Some might pay only $11 to avoid the 10% chance of $100 loss, while others might pay as much as $20. Some modern literature shows that individuals may be risk preferrers in the domain of losses and risk averse in the domain of gains.
         f) Insolvency
            1) Poorest are under-deterred
            2) Middle class are over-deterred
            3) Bill Gates is under-deterred
         g) Ability (mental capacity, cannot afford to pay)
   b. Within utilitarianism
i. Unreality. The system is not capable of fine-tuning efficient behaviors. Sources of inefficient failures to take precautions, inefficient over-precautions.

ii. The declining marginal utility of $. Circumstances where my $ is not worth as much as your $.
   a) Additional precautions are desirable at the margin only as long as an additional dollar reduces the expected costs of injury by at least a dollar.

c. Alternatives to Utilitarianism
   i. The Kantian objection to the one-owner principle (herein of rights and baselines)
   a) One-Owner principle (Negligence’s Morality): take the same precautions you would take if you were on both sides of the transaction (one form of the golden rule)
      1) Your value might be idiosyncratically low
      2) Negligence transfers $ for failing to prevent accidents that are economically efficient – is this the right moral decision?
   b) Alternative to efficiency is the idea of rights; right to quiet enjoyment of land, right to bodily safety, etc.
      1) When you are on both sides of the equation, you get to consent to the use of your stuff
      2) When you are not on both sides, however, you are making decisions FOR other people
      3) Problem w/ one-owner principle is that it lets injurers make decisions for the injured w/o their consent.
      4) Rights tend to be external to the torts system since they are very unstable
   a. Coase knocks down idea of rights by questioning upon what theory the right is granted. If we cannot find a right, we may as well allocate the loss where it is most efficient

   ii. Goal of distributitional justice
      a) A system that fails to take distributitional goals into account is likely to fail
      b) Norm of equality is deeply inconsistent w/ tort recovery (e.g., 9/11 fund)
      c) It can be argued that tort system may be a way of making rich people pay poor people, since Ds are systematically richer than Ps
         1) Not very satisfying answer; better ways exist for distributitional justice than include ALL poor people, and not just poor people involved in lawsuits
         2) Undercut by reality that richer Ps get more in tort damages than poor Ps

   iii. Incommensurability of life and $
      a) Monetization of injury and the ability to trade $ for a right to cause injury feels uncomfortable
      b) Difficulty of valuation of life
      c) Poor person w/ children may be willing to sacrifice his life to save his children at a lower price than a rich person would b/c of need to leave children provided for
iv. Maybe welfare-maximization is the wrong goal. Maybe we should be concerned with liberty, equality, or other systems of rights.

d. Efficiency is deeply troubling. But, there are very few competing accounts that can be justified against it.

C. Custom

1. Early Cases

   
i. Tippy RR cars kill P. Court says that there is no evidence that the use of tippy cars is unusual; standard is one of reasonable care. People take this risk by working in such a job, it must not be unreasonable. Custom is controlling (NOT THE LAW).
   
   ii. “Reasonably safe’ means safe according to the usages, habits, and ordinary risks of the business. … The unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. … The standard of due care is the conduct of the average prudent man.”

b. **Mayhew v. Sullivan Mining Co.** (Me. 1884) (text p. 190, notes p. 73)
   
i. P hired for mining and fell through hole cut in platform that D had not told him about. D is liable. Custom is completely irrelevant; has no place in definition of ordinary care (NOT THE LAW)
   
   ii. “If the defendants had proved that in every mining establishment that has existed since the days of Tubal-Cain, it has been the practice to cut ladder holes in their platforms . . . without guarding or lighting them and without notice . . . it would have no tendency to show that the act was consistent with ordinary prudence or a due regard for the safety of those who were using their premises by their invitation.”

c. **The T.J. Hooper** (S.D.N.Y. 1931) (text p. 191, notes p. 73)
   
i. This is the law on custom! Custom is a consideration but is not dispositive.
   
   ii. Barges and their cargo were lost in a storm b/c TJ Hooper was not equipped with reliable radios that would have allowed them to receive storm warnings. No statutory law requiring radios, and most tugs did have radios.

   iii. Learned Hand said that it is not fair to say that there was a general custom to equip tugs with working radio (some did, some didn’t). In any case, the cost is so long and is of such great protection that the tug was negligent not to have it.

   iv. Re custom
   
   a) District Court said it was a duty to follow custom
   
   b) 2d Circuit said: “In most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in adoption of new and available devices. It never may set its own tests, however persuasive be its usages.”

2. Pros of Custom (Between Two Knowledgeable Consenting Parties, not strangers)

a. Certainty (rather than standard); promotes administrability, equal application, lessened transaction costs

   i. Rule: You must drive under 45 MPH

   ii. Standard: You must drive at reasonable speed
iii. Custom is more toward a rule than standard of reasonable care
b. Self-determination: (privately imposed duties vs. publicly imposed duties)
   i. Different views toward risk
   ii. Liberty: right to choose as long as you understand risks
   iii. Idiosyncratic preferences
   iv. Argument that people can make the best decisions for themselves (efficiency)
c. Bargaining, with all the benefits that entails
d. Harness experience

3. Cons of Custom
a. Homogeneity: Something may be safer that is not industry standard, meaning that people are scared to go beyond the standard out of fear of liability
b. Self-dealing, b/c unequal bargaining power, imperfect information, etc.
c. Stifle (or fail to encourage) innovation

4. Pros of Bargaining
a. Utilitarian Arguments
   i. **Expertise of parties** in what they want and need: people know what they want and need better than a judge or jury and are best able to serve their own interests
   ii. **Idiosyncratic valuation**:
      a) Everyone values things differently, which is why we are able to negotiate
      b) Loss of hand is worth something different to a piano player and to a couch potato; an inevitable averaging goes on when we allow others to make the decision. Letting people decide for themselves decreases need to average.
   iii. Allow **Coasian bargaining** (makes the choice of legal rule less important)
      a) Only works where there are no transaction costs
      b) Parties can pay each other off to get the most efficient outcomes
      c) Reallocation in legal rules according to their value
b. Liberty Arguments (liberty for its own sake)

5. Cons of Bargaining
a. Utilitarian Arguments (notes p. 77)
   i. Inappropriate decision-making by parties (inability to understand risks, inappropriate devaluation of self-harm, etc.)
   ii. Externalities from Inequalities (nonparties impacted in problematic way)
   iii. Imperfect markets:
      a) Unavailable or expensive information
      b) Transaction costs, are too high
b. Equality Arguments
   i. Unequal bargaining power/ information (discontent over allocation of bargaining surplus)
   ii. Default rule tends to favor status quo

6. Conditions for Efficient Operation of Tort System
a. Standard of care at least as demands of Ds as the Hand test (i.e., liability for failure to take cost-effective precautionary measures) or greater, e.g., utmost care standard in Andrews or strict liability
b. Stricter standards of care are only effective where there is a liability rule rather than a conduct rule

7. Possible Rules w/r/t Custom
   a. Custom as mandatory term of K
   b. Reasonable care as mandatory term of K
   c. Custom as default term of K
   d. Custom as available to parties if they expressly bargain for it (so default term is externally developed reasonable care)
   e. If we are interested in bargaining, the first two approaches are out

8. How to Pick a Default Term
   a. Approximate what the parties are likely to bargain for (decrease costs of reaching agreement, thereby serving utility); OR
      i. Custom has developed for a reason
      ii. Evidence of what people want or what they intended
   b. Force better information by picking something the parties are NOT likely to bargain for, requiring them to bargain around it (serves liberty); OR
   c. Distributional considerations (serves equality)
   d. All three methods of choosing a default rule emphasize that bargaining is good. Thinking that bargaining is good does NOT necessarily mean custom wins.

9. Malpractice and Custom
   a. Reasonable care in malpractice cases is in part based on custom; and yet, we do not get the benefits of custom we were talking about before
      i. No certainty (need experts even to tell what standard is)
      ii. No bargaining (patient does not come in to talk about reasonable risks and risk allocation)
   b. Why do we use customary practice as the standard?
      i. This is really a question of WHO rather than what. It’s a question of the legal process and what will produce the best outcome. Since hospitals and doctors come up with standards anyway, why should we duplicate their efforts? Questions of efficiency, expertise.
      ii. The practices of the profession make tort law standard-setting less necessary. (Alternative institutions encourage other-regarding behavior, innovation, training, journals, CME, etc.)
         a) Jury would just listen to experts anyway to determine standard of reasonable care
      iii. Variety of factors make tort law less accurate:
         a) Prevalence of bad outcomes (level of injuries and unfortunate outcomes that would occur even w/o negligence)
         b) Technical difficulty of the subject matter
   c. Rules for Med Mal and Custom
      i. The usual rule: within the range of acceptable alternatives (Lama v. Borras)
      ii. The locality issue (Brune v. Belinkoff)
      iii. The alternative, cost-benefit analysis (Helling v. Carey)
      iv. The special case of informed consent (Canterbury v. Spence)
   d. Lama v. Borras (1st Cir. 1994)(text p. 197, notes p. 78)
      i. Operation occurs w/o customary conservative treatment; patient is injured as a result
      ii. Jury verdict for P aff’d by Circuit Court
iii. **Standard:** Could a reasonable jury find that this violated the applicable standard of care? Was the decision within the range of acceptable alternatives?
   a) **N.B. Modern trend is to make this a little less pro-doctor**

e. **Helling v. Carey** (Wash. 1974)(text p. 207, notes p. 79)
   i. Rejection of the customary standard in favor of cost-benefit analysis.
   ii. C-B analysis of glaucoma test means that the test should have been given: (using Hand formula) the need for the test was “so imperative” that the test was required as a matter of law
   iii. **Quick statutory response:** “the P in order to prevail shall be required to prove by a preponderance of the evidence that the D or Ds failed to exercise that degree of skill, care and learning possessed at that time by other persons in the same profession, and that as a proximate result of such failure the P suffered damages…”
   iv. **Judicial response:** CA “disapproved” of Helling, stating it was not the law in CA, and other courts have interpreted narrowly
   v. **SEE BELOW FOR LONGER DISCUSSION**

f. **Brune v. Belinkoff** (text p. 205, notes p. 79)
   i. The Locality Rule. Where standards of care are different, what do you do?
   ii. Trial Ct: D “must measure up to the standard of professional care and skill ordinarily possessed by others in his profession in the community, which is New Bedford.”
   iii. Overrules Small v. Howard locality rule. Must measure up to national standard. “the degree of care and skill of the average qualified practitioner, taking into acct the advances in the profession.”
   iv. It is permissible to consider the medical resources available to the physician as one circumstance in determining skill and care required. Some allowance for type of community.

   i. Facts: Kid w/ Doctor says he wants to do a laminectomy w/o telling his about the risks. Issue here is not whether the laminectomy was incorrectly performed, but whether he improperly did not disclose the risk.
   ii. Informed consent and custom
      a) No evidence that doctor’s practice is not entirely customary.
      b) “Respect for the patient’s right of self-determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves.”
   iii. **RULE:** Informed Consent 2-Step
      a) Breach: materiality standard
         1) “The test for determining whether a particular peril must be divulged is its materiality to the patient’s decision: all risk potentially affecting the decision must be unmasked”
      b) Causation: But for causation
         1) **Subj.** What would this patient have done
         2) **OBJ:** What would reasonable patient have done
a. A causal connection exists when, but only when, disclosure of significant risk incidental to treatment would have resulted in a decision against it.

b. The causation issue should be "resolve[d] ... on an objective basis: in terms of what a prudent person in the patient's position would have decided.

iv. This is an information-forcing rule. To the extent that disclosure is undesirable to the doctor, it forces him to do it.

v. Why stray from normal reliance on custom for informed consent?
   a) Value choice: priority of autonomy over expertise
   b) Need for incentives: absence of professional norms that serve preferred value (information-forcing)
   c) Idea that while patients and doctors may have convergent interests w/r/t most issues, informed consent may be slightly different
      1) Doctor does not have access to the one thing we are trying to promote, i.e., what the individual would prefer to do. Doctors work on averages, and people should be allowed to express their idiosyncratic preferences
      2) Cost is low enough that it may be worthwhile to mandate informed consent (not free by any means but not overly prohibitive)
      3) Alternative checks in medical profession may not have traction on issues of disclosure.
      4) Doctors do not like disclosure; think that they can make better decisions for the patient. Informed consent questions their judgment, puts them on peer-to-peer status with patients, takes time.
   d) Change in culture of disclosure has resulted from this case. Not b/c Doctors lose cases, but b/c they want to win them at MTD rather than going to trial. No breach = no trial.

D. Statutes and Regulations
1. Charts on statutes enforceable by govt and private parties in notes p. 81-82
2. Negligence Per Se
   a. Either criminal or civil statutory scheme is used to give content to what constitutes reasonable care
   b. Does not involve bring action under the statute; bringing regular negligence case - just using standard set up by statute to prove that act is negligence as a matter of law
      i. 55 mph Speed limit
          a) not enforceable by private party if a person is seen speeding.
          b) However, if you get hit by someone speeding, there is evidence that they were negligent (as a matter of law) b/c they violated the statute

3. Thayer (p. 226)
a. Relies on implicit notion of legislative supremacy to justify the rule that noncompliance w/ statute constitutes negligence per se
b. Giving the question of negligence to the jury where a statute exists is in fact saying that it would be consistent with ordinary prudence for an individual to set his own opinion against the judgment authoritatively pronounced by constituted public authority

4. Defective Statutes as source of duty (p.227)
   a. **Clinkscales v. Carver** (Cal. 1943): While the state could not criminally enforce its laws when it erected a stop sign pursuant to a defective statute, it nonetheless was “negligent” as a matter of law to disregard the stop sign
   b. Any reasonable man should know that the public naturally relies upon his observance

5. Subsequently Enacted Statutes
   a. **Hammond v. Int’l Harvester Co.** Court allowed evidence of OSHA regulation effective after manufacture of vehicle to show that loader tractor w/o that element was unsafe for use

6. **Osborne v. McMasters** (text p 228, notes p 82)
   a. Negligence = breach of legal duty, from CL requiring ordinary care or from statute
   b. Violation of statute requiring poison to be labeled was conclusive evidence of negligence (negligence per se)
   c. **Statute sets bound of reasonable care where the statute imposes:**
      i. specific duty for the benefit or protection of others and
      ii. duty is breached and
      iii. when injury is of the character the statute was trying to protect against.
   d. **Violation of statute amounts to negligence if:**
      i. The injuries are of the character the statutes was designed to prevent,
      ii. The injured party is the kind of person the statute was designed to protect
      iii. Causation

7. RST 3d
   a. “An actor is negligent if, without excuse, 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.”
      i. Courts must still evaluate intent of statute
      ii. Can be difficult to identify members of protected class
      iii. Causal connection between the statutory violator’s action and the injury is not enough, violator’s action must have been the type of action that the statute was designed to protect against
      iv. US S.C. has applied “statutory purpose” doctrine less

   a. Contagious Disease Act requiring that animals be penned was violated
   b. P sued when animals fell overboard
   c. Court found no negligence b/c point of the statute was not to prevent animals from falling overboard

9. **Hudson v. Craft** (text p 27, notes p 83): Applies same standards to CONSENT
   a. Was consent an operable defense where youth chose to enter fight w/ Bluto? NO.
      i. Statute was designed to protect ppl like P (youth of 18)
ii. Statute was designed so that consent was not sufficient safeguard
b. Participant in the activity could hold organizers liable for injury, even where participant "consented”

10. Why should statutes matter?
   a. **Democracy**: Where a democratically elected institution has spoken, we should allow their decision to stand. Political preference for legislatures over courts, since we elect legislators.
   b. **Reliance** by others (Clinkscales- stop sign)
   c. **Information advantage** of legislatures (Hammond- OSHA case)
   d. **Cheaper** to have a rule – reduces need to investigate
   e. **Rules over standards**

E. Statutes, Plus Inferences, Presumptions, and Burdens
      a. Jury trial found D liable. App Division reverses for error in instructions. Ct of App aff’d
      b. Incorrect instructions: Jury was told that it mattered that the P was driving w/o lights but it is not conclusive evidence of negligence. The jury is entitled to find for the P or the D
      c. Ct of App (Cardozo) says that the action was definitively negligent: “…unexcused omission of the statutory signals is more than some evidence of negligence. It is negligence.”
      d. Unexcused omission of the statute signals more than some evidence of negligence, it is NEGLIGENCE IN ITSELF.

2. Ways to get out of negligence per se (how to get around liability when a statutory violation leads to finding of negligence automatically.
   a. Violation may be contested
   b. Violation may be excused
   c. Violation may not be the cause of the harm

3. Vocab Chart

<table>
<thead>
<tr>
<th>a) Irrelevant</th>
<th>Impermissible inference</th>
</tr>
</thead>
<tbody>
<tr>
<td>b) Relevant (some) evidence</td>
<td>[needs more for an inference]</td>
</tr>
<tr>
<td>c) Prima facie case</td>
<td>Permissive inference (meets burden of production)</td>
</tr>
<tr>
<td>d) Rebuttable presumption</td>
<td>Mandatory inference (meets burden of persuasion, unless met with permissible rebuttal)</td>
</tr>
<tr>
<td>e) Irrebuttable presumption</td>
<td>“Negligence per se” (meets the burden of persuasion)</td>
</tr>
</tbody>
</table>

a. **Relevant evidence**
   i. It’s relevant, but not sufficient to allow the jury to draw an inference of negligence, OR
   ii. It’s relevant and it IS sufficient for the jury to draw an inference of negligence, but they need not

b. **Inference**: a conclusion that may, but need not, be drawn from particular facts or evidence
   i. **Impermissible**: the jury may not draw the inference
   ii. **Permissive inference** *(prima facie case)*: meets the burden of production, gets to the jury, and gives them the CHOICE of whether or not to use violation as sufficient grounds for a finding of negligence
   iii. **Mandatory inference**: where evidence is the kind that ONLY RARELY is not compelling from the inference (when we don’t
want to give the jury discretion). Meets the burden of production and wins on MSJ, if the facts are uncontested.

c. **Rebuttable Presumption**: the inference is required, UNLESS there’s a rebuttal. At that point the jury/decision-maker can weigh the merits of the rebuttal. (Evidence of an excuse is permitted to rebut a **mandatory inference** of negligence.) The jury decides if the excuse is persuasive.

d. **Usually the law comes out to (c) or (d).**

4. Two Step Process to Determining Winner

a. **Burden of production**: a party has met this when they have produced enough evidence to allow the court to decide the issue (when you have given enough for it to be **permissible** for a court to decide the issue).

b. **Burden of persuasion**: winning your case! You have not just provided enough evidence that a jury **COULD** find for you, you’ve actually persuaded the jury to find for you.

c. **Football Field**

<table>
<thead>
<tr>
<th>Judgment for P as a matter of law</th>
<th>Jury can find for either party</th>
<th>Judgment for Δ as a matter of law</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
</tbody>
</table>

i. **Gorris v. Scott**: (3) the evidence of the violation is insufficient to get to the jury, because the statute was not designed to protect sheep from going overboard.

ii. **Osborne v. McMasters**: (2) we know we’re not in 3 because the P wins.

iii. **Martin v. Herzog**: (1) violation of the statute IS negligence.

iv. **Tedla v. Ellman**: (1 or 2) If there had been no excuse, then violation of the statute would be a mandatory inference. With an excuse, the case goes to the jury to decide if the excuse is persuasive.

   a) Traffic is vastly lighter on the side of the road on which they are walking, but statute requires that they walk against the traffic.

   b) D’s car hits P’s brother who dies.

   c) Court says statute incorporates CL exceptions implicitly, and that the rule is to walk against traffic unless traffic is lighter on the other side.

   d) (This reasoning is garbage)

5. **Brown v. Shyne**

a. Breach or neglect of duty imposed by statute or ordinance may be evidence of negligence only if there is a logical connection between the proven neglect of statutory duty and the alleged negligence.

b. **IN OTHER WORDS**: failure to obtain a license as required by law only gives rise to remedy if it has caused injury.

c. **NOTE**: this case spawned a new statute: practicing medicine without a license shall be deemed **prima facie** evidence of negligence.

6. RST 2d 288A. **Excused Violation**

a. An excused violation of a legislative enactment or an administrative regulation is not negligence.

b. Unless the enactment or regulation is construed not to permit such an excuse, its violation is excused when:

   i. The violation is reasonable b/c of the actor’s incapacity.

   ii. He neither knows not should know of the occasion for compliance.
iii. He is unable after reasonable diligence or care to comply  
iv. He is confronted by an emergency not due to his own misconduct  
v. Compliance would involve a greater risk of harm to the actor or others  
c. The RST is very hostile to statutes!!  
d. Part iii. is HUGE. Indicates you can be excused by showing CARE. Is it the 13th chime telling you that clock isn’t working right?

7. RST 288B. Effect of Violation. RST 288B starts by saying there are two kinds of statutes.  
a. The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.  
b. The unexcused violation of an enactment or regulation which is not so adopted may be relevant evidence bearing on this issue of negligent conduct  

8. Let’s not pretend that insisting on legislative controls is democratic. Legislator can overturn judicial case law just by passing more statutes.

9. Chart of P’s Burdens (or D’s, on Affirmative Defense)  

<table>
<thead>
<tr>
<th>Vocab</th>
<th>Decision-Maker</th>
<th>Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burden of production; Burden of going forward</td>
<td>Judge</td>
<td>Could a rational decision maker THINK that the conduct was negligent, more likely that not?</td>
</tr>
<tr>
<td>Burden of persuasion; burden of proof</td>
<td>Jury</td>
<td>Was the conduct negligent, more likely than not?</td>
</tr>
</tbody>
</table>

VI. RES IPSA LOQUITUR (inferred negligence)  
A. Problems of Circumstantial Evidence  
1. Sometimes proof of the circumstances is sufficient to permit an inference of negligence, but sometimes it is not  
2. Special Rules developed to deal with problems where there is absence of evidence about what happened  

B. Res Ipsa Loquitur: The thing speaks for itself  
1. The event causing the P’s injury must be one that does not ordinarily occur in the absence of negligence  
a. Then courts differ as to what else is needed  
i. D must have directly controlled the thing causing the harm, and  
ii. Injury must not be due to any voluntary act or contribution of P  
iii. OR causes other than the D’s negligence must be eliminated by the evidence.  
2. When the requirements of Res Ipsi are met in most jurisdictions the jury is then permitted though not required to find the D negligent.  
3. Byrne v. Boadle (text p261, notes p 93)  
a. In some cases, the mere fact the accident occurred is evidence of negligence  
b. If a person passing along the road is injured by something falling on him, the accident alone is prima facie evidence of negligence. Any facts inconsistent with negligence are the Δ’s burden to provide  
c. P identified D as the party in control of what occurred (barrels do not roll out of windows w/out negligence)
d. Accident itself is enough to send the case to the jury (permissive inference); could be enough to provide directed verdict for P.

4. **Imig v. Beck** (text p267, notes p93)
   b. The court can find a presumption of negligence under RIL but still accept a rebuttal from Δ. In order to rule for the P (w/ directed verdict or jnov), there must be NO explanation for the accident other than Δ’s negligence.

5. **Newing v. Cheatham** (text p. 268, notes p94)
   a. Directed verdict for P where plane owned and piloted by D’s decedent crashed b/c of pilot drinking, ran out of fuel
   b. Not clear that this is RIL, since RIL is a rule of inference, but there is a great deal of circumstantial evidence indicating cause of accident

6. **RST 3d:** "Only in very unusual situations does the P’s RIL claim justify a directed verdict in favor of the P.

7. How to rebut RIL case
   a. Dispute WHO caused the accident
   b. Dispute HOW the accident occurred
      i. Evidence of alternative
      ii. Evidence suggesting inference is false

8. Prosser’s Requirements for RIL
   a. Accident is unlikely in absence of negligence
   b. Accident’s cause is under the exclusive control of the Δ
   c. No contribution on the part of the P

9. RST’s Requirements for RIL
   a. Accident is unlikely in absence of negligence
   b. Other responsible causes have been eliminated by the evidence

10. **Colmenares Vivas v. Sun Alliance Ins Co** (1st Cir. 1986)(text p268, notes p95)
    a. Trial ct directed verdict for P, holding no RIL
    b. 1st Cir. reverses: there is RIL; duties owed to the public (in areas open to the public), e.g. to maintain safe escalators, are non-delegable
    c. Uses Prosser rules (cited in another case)

    a. P went in for an appendectomy, developed paralysis and atrophy of muscles. Not a normal result from this type of surgery; the medical staff must have done something negligently. P names all of them in his suit
    b. Court shifts burden to Ds to show non-responsibility
    c. RIL deals with the "conspiracy of silence" – when P can’t pin blame on one person because they have incomplete info, but can prove negligence via RIL, he can sue anyone involved (Δ’s are joint and severally liable)
    d. RIL also serves as a discovery device when there is no conspiracy
    e. Shows a general shift in RIL (or at least intrigue) towards a form of enterprise liability, justified by a duty to rescue people from conspiracies of silence. Each D had duty not to act negligently, and to overlook the behavior of others toward a third party
    f. Controversial case

12. **What’s good about res ipsa?** It’s a very powerful doctrine. It makes Ds crazy, and nonetheless it is very much operative even to this day? What is it that’s attractive about it?
VII. Plaintiff’s Conduct
   A. Intro
      1. The defendant bears the burden of pleading these defenses. He must prove that the P
         a. was negligent or assumed the risk
         b. that such conduct was cause in fact of the P’s injury
         c. and that such cause was a proximate cause of this injury

   B. Contributory Negligence
      1. Basic doctrine
         a. Definition: The failure of the P to exercise reasonable care to protect himself or his property from the risk of harm.
         b. CNN used to be a COMPLETE bar to D’s liability for negligence
            i. Subject to exceptions regarding the D’s “last clear chance” to avoid the harm, or to his willfulness in causing it
            ii. Bars liability only when it was a causal factor in accident
            iii. Ordinarily D bears burden of pleading, production, and proof as to CNN
         a. Unless P himself uses ordinary care, he cannot recover on a negligence claim against another person.
         b. If the P was negligent AND if his negligence was a cause of the accident, he cannot recover
         c. P was riding his horse fast and ran into a pole negligently left by the D across a road. Jury instructions: If a person riding with reasonably and ordinary care could have seen and avoided the instruction, and if they were satisfied that P was riding...without ordinary care, they should find a verdict for the D. Court upheld instructions
         a. If P makes a reasonable effort to avoid the possible harm caused by another’s negligent behavior, he is not contributorily negligent
         b. P was not contributorily negligent in going between the cars after asking the D’s to slow down; he was not required to wait to see if his direction was obeyed
         c. Court agreed jury instruction was correct: if the intestate’s foot was caught between the rails and he “was thus held and run over, without any negligence on the part of the other employees of D... then the P cannot recover anything.”
         a. P was injured while unloading fishmeal sacks in warehouse of D. Sacks were stacked unsafely, and D told D’s chief marine clerk that it was dangerous to proceed, but did not tell his own supervisor (although it was required by his union K)
         b. Trial court found D was negligent, D’s negligence was a proximate cause of P’s harm, but that P’s negligence in failing to stop work in the face of a known danger barred his cause of action. S.C. reversed and remanded (only on issue of P’s CN negligence and whether such negligence, if any, was the proximate cause of accident)
         c. Evidence of custom is generally admissible for its bearing upon contributory negligence
      5. Economics of CNN
         a. First Order Search: For somewhat efficient accident prevention
            i. Do we need CNN defense in general, in accidents in which both parties’ care level is chosen in advance?
### Unilateral vs. Bilateral (when both decisions are made at the same time)

<table>
<thead>
<tr>
<th></th>
<th>Unilateral</th>
<th>Bilateral</th>
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</thead>
<tbody>
<tr>
<td>Strict liability</td>
<td>No</td>
<td>YES</td>
</tr>
<tr>
<td>Negligence</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

#### ii. What about in accidents unfolding over time?

#### iii. Ds have plenty of incentive to act with care, as it is well-regulated even w/o CNN in both cases of negligence and SL

#### iv. P’s Incentives:

a) Under negligence, Ps have incentive to act w/ care b/c they know that D will act with care; don’t want to have to bear loss from accident

b) Under SL, not as much incentive to act w/ care b/c P knows that if there is an accident, he will recover

#### b. Second Order Search: Most efficient rule

i. CNN makes P bear losses that EITHER PARTY could have prevented.

<table>
<thead>
<tr>
<th>D: Care</th>
<th>D: No Care</th>
</tr>
</thead>
<tbody>
<tr>
<td>P: Care</td>
<td>D pays</td>
</tr>
<tr>
<td>P: No Care</td>
<td>P pays</td>
</tr>
</tbody>
</table>

#### ii. Even if we changed the graph so that D paid bottom right quadrant, it would still be asymmetric

#### iii. What if it costs P and D different amounts to avoid the harm? Alternative system could have sliding scale of CNN, shifting burden until it is efficient in each care

6. Cheapest Cost-Avoider

a. Neither system looks to who is the cheapest cost-avoider, as Calabresi would have us do.

b. Calabresi proposed instead that we rethink what fault is. Fault is not taking care when you are the cheapest cost-avoider. Very influential in theory, if not doctrinally.

c. **CNN does not prefer the cheapest cost-avoider. It prefers P to avoid the accident by taking care.**

7. NOTE: Degree of Care

a. In general, juries are a little more inclined to allow a subjective standard of fault in a contributory negligence setting (they’re n-friendly, will find a way to make exceptions for negligent behavior by n’s)

b. Although standards are said to be the same, courts and juries tend to see failure to show self-care is somehow less egregious than failure to take care toward others.

c. Schwartz seems to feel this way, that courts were kinder to Ps than Ds, but Schlanger does not believe this, and the fact that this may have happened in reported cases does not say what happened at trials, and only contain a fraction of what went on.

8. Types of Precautions

a. **Ephemeral precautions:** must be taken each time (usually low cost)

b. **Permanent precautions:** something permanent that solves the risk once and for all (adding a safety latch to machinery, so it won’t work w/o the latch in place)

c. We don’t permanently fix all risks because some risks are reasonable and efficient, also b/c of liberty issues

9. **LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul Ry.** (p.200, notes p.102)
a. It is a simple requirement of law that everyone must use his property so as not to injure others. A risk from a neighbor’s wrongful operation is NOT one of the risks that should be absorbed by landowners.
b. The way to balance a landowners right to use their land however they choose is to make them FEAR LOSS (by knowing that their contributorily negligent behavior may lead to loss which they can’t recover from)
c. Consistent with instructions, jury court found D’s servants had operated negligently by allowing it to emit large quantities of sparks, and that this act of negligence was cause of P’s harm. Jury also found P guilty of CNN b/c stacks were within 100 ft
d. S.C. was left w/ question of whether there was question of CNN to leave to jury, and found that there was not. Although D would not be liable for injury where train was managed prudently, D loses b/c of negligence.
e. McKenna does NOT say SL for trains; P has incentive to stack flax farther from tracks b/c if D was not negligent, he could not recover.
f. Holmes’ Concurrence wants to ask a different question; he does not trust the jury. (If it is true that juries’ make bad decisions, we have a much bigger problem than CNN).

10. Greater Degree of Blame Exception
   a. CNN is not a defense to an intentional tort. Justification is both deterrence and corrective justice. Acting w/ intent is far more objectionable and worth deterring than the failure to take sufficient care to protect oneself from harm. Similarly, corrective justice is better placed w/ the negligent to keep oneself safe, than the intentional tortfeasor.
   b. Where the D’s behavior was gross negligence, recklessness, or wanton and willful misconduct, the greater degree of harm exception is applied to counter contributory negligence (unless P also willful etc.)

11. Why make CNN a bar to negligence liability?
   a. We prefer action to inaction; preference for industry
   b. Preference for non-transfer of losses (avoid use of machinery of state)
   c. Ease of assessment; absolutely and jury competence. Maybe P’s are better at assessing CNN than they are at assessing negligence. More likely to have seen sparks than to have created sparks. Perhaps jury is best suited to decide issue of CNN.
   d. Usually cheaper than negligence to avoid (is this really true?)
   e. Non-economic reasons, e.g., fairness. People should take responsibility first and blame others second (not for consequential reasons like it leads to more accidents, but on principle).

12. Last Clear Chance (w/o this doctrine, CNN is complete windfall to D)
   1. If the negligent defendant had the last clear chance to avoid harming the P, then the P’s contributory negligence is not a bar to recovery.
   2. When a defendant has a chance that is both last and clear the failure to take that chance may well be more blameworthy than ordinary care.
      a. Clear chance is "open and obvious"
      b. If the P could not extricate herself it seems right that if this was clear to D, and he had chance to act he should have.
      a. P’s decedent was CNN (head was down and did not observe D’s oncoming train); but D by reasonable care and prudence could have avoided the consequence. D had last clear chance.
      b. Contributory negligence of the injured party will not defeat the action if it is shown that the Δ might have exercised reasonable care and prudence and could have avoided the consequence of the injured party’s negligence.
4. RST Rule

<table>
<thead>
<tr>
<th>Helpless P (RST § 479)</th>
<th>Inattentive P (RST § 480)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Contributorily negligent P may nonetheless recover if:</strong></td>
<td></td>
</tr>
<tr>
<td>1) D is negligent in failing to avoid the harm</td>
<td></td>
</tr>
<tr>
<td>2) D knows of P's situation (impending danger)</td>
<td></td>
</tr>
<tr>
<td>3) D realizes or has reason to realize</td>
<td></td>
</tr>
<tr>
<td>That the P is helpless</td>
<td>That the P is inattentive</td>
</tr>
<tr>
<td>OR 4) D would discover the situation if D were vigilant, in circumstances in which D has a duty to be vigilant</td>
<td></td>
</tr>
</tbody>
</table>

5. What's the Point of Last Clear Chance?
   a. Sequential; we need it to prevent Ds to commit torts willfully w/o fear of liability
   b. Solves reverse problem CNN solves
      i. CNN solves the problem of the n who sees the Δ’s negligence and acts negligently with assurance that she will recover.
      ii. LCC solves the problem of the Δ who is acting negligently, but sees the n’s negligence and acts negligently with assurance that she will recover
   c. Is last party the cheaper cost-avoider, and thus the party best able to bear the loss? (Attractiveness of position has made doctrine a favorite of law and economic scholars)
   d. Transitional doctrine on the road to CMN regime.

6. **Davies v. Mann** (Ex. 1842)(text p.311, notes p. 104)
   a. P left donkey in plain view on the highway, only to have it run over by the D’s wagon
   b. D should not have done so and was liable event though P was negligent in tying feet together
   c. Making CNN absolute bar reduces likelihood that P will leave his donkey in the road in the first place, but reduces D’s incentive to avoid killing donkey, even when D has reason to know of the danger
   d. LCC applies in only small number of cases, so P can hardly count on it to protect her interests when deciding where to leave the donkey

**D. Comparative Fault**

1. Instead of a complete bar, P’s recovery is reduced “in proportion to the amount of negligence attributable to him”

2. **Pure Comparative Negligence:** P’s negligence is never a complete bar, rather comparative negligence applies regardless of how much more negligent the P was than the D.

3. **Impure Comparative Negligence:** apportionment based on fault up to the point at which n’s negligence is equal to or greater than that of the Δ (once n’s fault exceeds 50%, they cannot recover damages)

4. Prosser on CMF (text p336, notes p 105)(ARGUMENTS VS. CNN)
   a. CNN is inequitable. If liability should follow fault, then CNN is a blemish on the system because it doesn’t follow fault
   b. Juries are particularly unlikely to treat cases consistently with CNN (they know it’s unfair, so they’re more likely to alter their decision in order to tilt the scale back to Δ). Result is widely divergent cases, and like cases are not treated alike.
   c. If CNN is part of an incentive system, it’s unnecessary! Individuals don’t actually consider tort liability, so they’re not going to consider exemptions when making decisions
d. Prosser thinks the "desire to attribute blame to the proximate cause" justification for contributory negligence is crap, b/c we apply blame to groups of unknowns all the time. Additionally, when courts say that D is not proximate cause b/c P was intervening cause, they do not really mean that, b/c to mean that you would need a definition of proximate cause that is found nowhere else. In cases involving two Ds injuring pedestrian P, no one will say that; both will be on the hook.

i. Tort law has no interest in mono-causality. When there are multiple Ds, no one talks about mono-causality b/c it would be incoherent.

ii. Li case: Accident caused when P is turning across three lanes of traffic AND when D speeds through yellow light

e. Courts have used the penal argument (n’s who do something wrong shouldn’t be rewarded). Prosser says this is crap because there are all sorts of exceptions to the clean hands doctrine

f. **Prosser attributes the contributory negligence principle to a preference for industry (the doctrine was a subsidy for industrial development, but it’s no longer necessary so we should move to comparative fault)

5. Other attacks on CNN

a. At CL, CNN was complete defense. If there were multiple Ds, they were each found guilty for the entirety. P could choose who to take $ from based on availability of funds. There was no law of contribution.

b. Idea that liability should follow fault

c. Full appreciation of joint causation

d. Demise of unclean hands theory

e. Skepticism about incentives

f. Realist vision of prior law as implementing preference for D industrial actors over individual Ps

6. **Li v. Yellow Cab Co. of California** (Cal. 1975)(text p337, notes p106)

a. CA S.C. adopts CMF regime (pure form)

b. Accident resulted from negligence of both parties, where P attempted to cross three lanes of oncoming traffic to enter a service station, and D was traveling at an excessive speed when he ran a yellow light just before striking the P’s car

c. CM fault preferable to “all-or-nothing” from the point of view of logic, practical experience, and fundamental justice.

7. Determining relative fault is generally not easy; left to a jury to decide

a. Divisible damages (X% of the harm)

b. Degree of culpability of conduct? How set?

c. Ex ante increase in probability or magnitude of harm

E. Contributory v. Comparative Negligence

1. In deterring accidents neither approach is inherently better

a. P’s are likely to exercise marginally better care under contributory negligence, and D’s are likely to do the same under Comparative fault.

b. Whether potential victims know comparative negligence is in effect may affect the relative deterrence effect of the doctrines

2. Comparative negligence just seems inherently more fair to us

3. **Comparative negligence is the general rule in all but a few jurisdictions**

4. CNN is uneven in doctrine and fundamental departure from negligence law b/c liability does not follow fault; P has no way to recover. CMF splits the difference, but does not say how much each party will pay.

5. CMF does not solve problem of jury behavior

6. Effect of CMF on other CL doctrines
a. LCC is no longer needed as the P and the D’s relative fault are already taken into consideration.
b. Assumption of Risk - likewise as P’s assumption of risk can also be factored in, and is not necessarily needed as a separate doctrine
c. Strict Liability - CMF ought not have much to do w/ this doctrine as fault is irrelevant; however CNN might be considered to serve a role as the D may have entirely clean hands and if the P does not perhaps that should be taken into consideration.
d. What do we do about joint and several liability?

F. Joint and Several Liability
1. Under CNN the D’s were all liable for the harm if the P had clean hands, i.e., one protected the P against another’s insolvency
2. In Comparative Negligence there are 3 approaches.
a. The first is to hold all of the D’s joint and severally liable for their percentage of the harm against the P together
   i. i.e. if the P was 40% negligent then both of the D’s are liable for 60% together. (P can’t collect more than the award once though.)
b. Second is the other extreme of holding each D liable only for the percentage of their fault.
   i. i.e. if one D is found to be 25% negligent then he pays 25% of the damage
   ii. This could leave the P high and dry in the case of one or more insolvent D’s
   iii. The theory is that no one should be more liable than their share
c. Third if each party including the P is an injurer than as a group they should pay the injured party and should bare the risk of an insolvent member of the group.
   i. Here if one D is insolvent the other D and the P bear the risk of the other D’s insolvency in proportion to the amount of the negligence attributable to them.

G. Assumption of Risk
1. History of A of R rule
   a. In the 19th century, employees were not allowed to recover for the negligence of their fellow employee, known as the fellow servant rule (an exception to the vicarious liability rule that holds employers liable for the negligence of their employees)
   b. This exception faded away (employees could sue employers for negligence of their fellow employees), and the assumption of risk rule appeared
2. Examples of A of R
   a. Where no duty of care was breached by the D, e.g., going to a ball game and getting hit by a ball. You assumed the risk of such an accident
   b. Taking unreasonable risks
      i. P’s careless failure to appreciate the risk
      ii. P’s conscious taking of an unreasonable risk
   c. Ordinarily only the conscious taking of an unreasonable risk (negligent assumption of risk) is a defense
   a. Thinking about it w/o A of R doctrine
      i. Was there negligence? CNN?
      ii. Did he waiver or K out in agreeing to work there?
iii. On strict K theory
   a) Is there a K? What does it say?
   b) Was there duress?

iv. State abrogation: Is this the kind of issue about which people should be allowed to K? Are mandatory safety benefits the solution?

b. Fellow Servant rule is gone, courts are overwhelmed with suits against employers. This case is not about liability of fellow servant, but the court is in a position where they are trying to figure out what to do in the absence of this rule.

c. Ps who can perfectly see what injury is about to befall them and do not remove themselves from the dangerous situation cannot recover damages when the injury does occur. (Specifically, employees who choose to continue working in hazardous conditions cannot recover)

4. Mandatory Safety Benefits
   a. If Lamson had come out the other way, there would be mandatory safety benefits. When is this a good idea?
      i. Mandates to Solve Market Failures
         a) Information problems (erroneous valuation, etc.)
         b) Collective action problems (transaction costs, free riding)
         c) Externalities: People with interests that are not represented in the bargaining (not so much a problem in workplace safety)
         d) Duress or Hold-up: Parties in certain kinds of markets are forced to deal with each other (monopoly, monopsony). Position allows one to hold the other over a barrel, and the transaction does not occur b/c they feel it is unfair or they realize it is a hold-up. Other times, transactions do occur, but on unfair terms.
      ii. Mandates to solve distributional problems
          a) Problems resulting from existence of hold-up. Force the party with more bargaining power to provide what the weaker party needs.
          b) Possibly a failure, if end result is a wage cut
          c) Endowment effects can alter this assessment (Once you have something, you value it more highly (notes p110)
      iii. Mandates as effectuating moral values

b. Safety Mandates help workers if:
   i. They get something for nothing (no wage cut); or
      a) Might happen if employers cannot easily fire people (e.g., fixed investment, need for labor) AND some group of employees will leave if their wages are cut (requires bargaining power)
   ii. They turn out to prefer safety over wages; or
      a) Might happen if there is a market failure prior to the mandate (information failure, collective action problem, little bargaining power), or if the endowment effect is correct in this case
   iii. They are better off with safety over wages, regardless of their preferences
      a) Paternalism. They are actually better off w/ safety and/or society as a whole is better of if they have safety rather than $
1) Externalities
2) False consciousness

5. **Murphy v. Steeplechase Amusement Co.** (N.Y. 1929)(text p322, notes p111)
   a. One who takes part in a risky sport accepts that dangers are inherent in that sport, so far as the dangers are obvious and necessary
   b. If the dangers inherent to a sport are obscure or unobserved, or so serious as to justify the belief that precautions of some kind should have been taken to avert them, then participants might have grounds for recovery

6. Exceptions to A of R
   a. Excessive danger
      i. Trap for the unwary
      ii. Too perilous to be endured (public safety theory)
   b. Latent Defect: defect in equipment, not obvious or known

7. Why have A of R at all?
   a. A of R is substitute for:
      i. A finding of no breach (it had to have been a reasonable risk, or the defendant wouldn’t have taken it on), OR
      ii. A finding of no negligence (the defendant was contributorily negligent)
   b. LOOK AT NOTES FROM REVIEW SESSION ON THIS TOPIC
   c. Decision of which purpose it serves is based on context

8. Difference in JUDICIAL TREATMENT for different A of R purposes
   a. Substituting for finding of no breach: question of whether it is reasonable. It becomes part of the law of negligence and we do not merge it up.
   b. Substituting for finding of CNN: suffers from flaws of CNN (liability does not follow fault). Doctrinally, it becomes part of the law of negligence and it’s merged into CMF. Li v. Yellow Cab: “The adoption of a system of CM negligence should entail the merger of the defense of A of R into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variance of CN negligence.
   c. 

9. What happens w/o A of R?
   a. Juries apply the general idea anyway, finding that there’s nothing unreasonable about the activity (juries substitute w/ finding of “no negligence”
   b. Determining if someone knowingly assumed the risk is more likely to be a question for the judge than for the jury. W/o A of R, more cases are likely to go to juries
   c. The ride operator could simply pay the damages whenever an accident occurs. Then the system becomes similar to SL and the ride will only survive if the profits are more than the damages.

10. What A of R allows:
    a. Answers negligence question in way that is more D-friendly and more cheaply; protects some degree of variety in that question
    b. If risk is not too great and is not too perilous, it imposes the average. This allows risk-taking community to engage in activities that they would not be able to otherwise.

**VIII. Causation**

A. **Principles to decide causation**
   1. Motion
   2. Knowledge
3. Ability to Prevent (least cost avoider)
4. Whoever is at fault
5. Did either party do anything unreasonable

B. Causation in Fact
1. How do we know there is causation?
   a. This is a METAPHYSICAL question, not generally a factual question
   b. We will never know whether person would drown had they been given proper life preserver; we will never know whether Zuchowicz would have developed PPH had she been given the proper dose of Danocrine
   c. We have to decide when this question will be given to the jury
      i. When will it be permissible inference?
      ii. When will it be impermissible inference?
      iii. When will it be mandatory inference?

2. Three Problems:
   a. **Factual uncertainty**: negligent $\Delta$, uncertainty as to whether it caused the harm (or whether the harm was caused by some non-human or non-culpable agent) – *Grimstad, Kirinich, Haft, Zuchowicz, Reynolds*
      i. What level of evidence do we require to get to the jury on question of causation?
      ii. What level of evidence do we require to meet the burden of persuasion?
   b. Negligent $\Delta$'s, **uncertainty as to which one caused** the harm – *Summers v. Tice, DES cases*
   c. **Over-determination**: they ALL did it, even if you take an actor or many actors out of the equation, the accident would have occurred anyway (fires merging) – *Kingston*

3. **New York Central R.R. v. Grimstad**: (text p. 394, notes p. 113)
   a. Barge operator falls overboard; D did not have appropriate life preservers
   b. Court: Even if D was negligent, it is not certain that they would have saved the P
   c. D wins as a matter of law. OUTLIER CASE. (Courts are generally not as strict on “but-for” cause.) Cause in fact cannot be established through pure conjecture alone

4. **Ford v. Trident Fisheries Co.** (1919)(text p. 398)
   a. Court held that even if D was negligent, “there is nothing to show they in any way contributed to Ford’s death. He disappeared when he fell from the trawler, and it does not appear that if the boat had been suspended from davits and a different methods of propelling it had been used he could have been rescued.”

5. **Kirincich v. Standard Dredging Co.** (3d Cir. 1940)(text p396, notes p114)
   a. Where shipmates tried to save deceased with inadequate life-saving equipment, 3d Circuit preferred Hand’s analysis that a reasonable man would have grasped for and gotten hold of a larger more buoyant life-saving device, over the precedent of *Grimstad*.

   a. Father and son drowned in a pool at a hotel and wrongful death action was brought; applicable statute provided that “lifeguard services shall be provided or signs shall be erected clearly indicating that such service is not provided.” D did neither.
   b. Court said that the failure to provided a lifeguard greatly enhanced the chances of the occurrence of the instant drowning (lifeguards aid those in danger, witness accidents that do occur)
c. Ps have gone as far as they possibly can in providing the requisite causal link between D’s negligence and the accidents.
d. **Shifts burden of proof to Ds to absolve themselves if they can.**
e. This is a **MANDATORY REBUTTABLE INFERENCE**. Ds have to show that absence of a lifeguard did NOT cause the accident.
f. It’s also the D’s fault that we do not have any information about how the accident occurred (another reason to place burden on them)

7. Burden shifting rationale was rejected in **Schwabe v. Custer’s Inn Associates, LLP** (Mont. 2000) in which decedent drowned in a pool that did have a no lifeguard sign, but which lacked the onsite personnel, required by statute when no lifeguard was present, capably of performing CPR. Court concluded that due to length of time decedent was underwater, no intervention could have saved him

8. When do we shift burden of proof?
   a. When Δ has greatly enhanced the risk (this is all about increasing the accuracy of the trial process – when Δ is guilty we want him to be found guilty on a regular basis)
   b. When it’s the Δ’s fault that we have no info

9. **Zuchowicz v. United States** (2d Cir. 1998)(text p398, notes p115-17)
   a. Decision by CALABRESI: MIGHT the Danocrine OD have caused the PPH?
   b. Uses Cardozo and Traynor’s HARM WITHIN THE RISK TEST (d)
   c. If P establishes the D was negligent, and the negligent act was deemed wrongful BECAUSE that act increased the chances that a particular type of accident would occur, AND that accident did occur, that is enough to support a finding by a trier of fact that the negligent behavior caused the harm (P has made out a prima facie case (or even a rebuttable presumption) of causation).
   d. How did Calabresi find causation in this case?
      i. Timing (contracted PPH after taking the drug)
      ii. Elimination of other known causes
      iii. Course of the disease LOOKS like drug-induced PPH
      iv. Taken together, these findings create a **permissive inference**

10. Second Problem: Who did it?
    a. **Summers v. Tice** (Cal. 1948)(text p425, notes p121)
       i. Two Ds injure P by shooting gun at quail in P's direction; one hits his eye; one hits his lip. We know that one caused the harm, but not which one. If P has burden of persuasion, won’t help P, since both Ds are 50% likely to have caused the injury
       ii. Shifts burden of proof to Ds
       iii. Read **aggressively**: when Δ’s are involved in a joint course of action, and when they are all negligent, but there is uncertainty as to which ONE of them actually caused the harm, they’re all **jointly and severally liable**. Summers read aggressively does more than shift burden of proof; it shifts the substantive standard.
       iv. Read **conservatively**: When there are Δ’s in a joint course of action and there is uncertainty about which one caused the harm, the Δ’s bear the burden of proof, so it’s available to them to show that it is MORE LIKELY THAN NOT that he did not cause the harm (no joint liability when >2 actors)
       v. The different readings lead to significantly different outcomes
vi. Has been read AGGRESSIVELY more than conservatively, but not consistently aggressively

b. DES Cases
   i. Women who took DES during pregnancy, children ended up having harm to reproductive systems. Not until children of DES moms grew up and tried to get pregnant that it was discovered. No one remembered which drug they took.
   ii. NOT more likely than not that any one Δ caused the P's harm
   iii. The theory being that since each manufacturer caused some harm they should not escape liability just b/c we can't prove which specific woman each of them harmed. The products were chemically identical.
   iv. Courts solved the problem by allocating damages according to market share
   v. Good for deterrence, b/c each D pays in share for what harm done, but not exactly for corrective justice b/c each manufacture didn’t compensate exactly the woman they harmed
   vi. Market share is used in very few cases.

11. Third Problem: Over determined Harm
      i. Two fires united and burned P's property. One fire's cause was identified as D's locomotive; and other cause could not be identified, although it was reasoned that it was a human rather than natural cause.
      ii. D is liable
      iii. Any one of two or more joint tortfeasors, or one of two or more wrongdoers 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
      iv. Two inconsistent outcomes:
         a) If Δ's fire had combined with another negligently set fire, Δ would be liable
         b) If Δ's negligent fire had combined with a fire originating from NATURAL causes, then Δ would be exempt from liability

12. We solve problems of lack of information about causation by changing the questions and standards in certain situations.
   a. What is the substantive standard?
      i. Ordinary answer: Did the D's negligence cause the P's harm? (but-for causation)
      ii. Kingston premise: two D case – Would each of the D's breaches have caused the harm, independently of the other?
      iii. Summers: aggressively: did negligence of one of the Δ's cause the harm? (DES cases are similar, but adjust damages to acct. for odds).
   b. What showing meets the burden of production?
      i. General answer: could a reasonable juror find that the Δ, more likely than not, caused the P's harm?
      ii. Grimstad: speculation doesn’t count; THIS IS NOT THE LAW
      iii. Kirincich: ”might” the negligence of have caused the harm?
      iv. Zuchowicz: where the act is deemed negligent because it increases the risks of the very kind of accident that occurred, that meets the burden of production
c. Who bears the burden of proof? Governing (i) Risk of absence of information and (ii) Winner in equipoise?
   i. Ordinary answer: the \( \pi \)
   ii. \text{Haft:} where the breach greatly enhanced the chances of the harm (maybe only where lack of proof is also caused by the breach), \( \Delta \)’s bear the burden of proof (Zuchowicz maybe comes out the same)
   iii. \text{Sommers,} conservatively: the \( \Delta \)’s where they acted in concert
d. What is the standard of proof? How certainly must the facts be established? (The same throughout)

C. Proximate Cause
1. Even after it is proved that the D was negligent and engaged in an activity that was responsible for the P’s harm he is not liable unless it is also proven that his actions were the proximate cause as well
   a. FIRST must prove negligence
   b. THEN but-for causation
   c. THEN address issue of proximate cause
2. Doctrine of Proximate cause acts as a limit on liability.
   a. Sometimes used by judge and jury as “fudge factor” that permits them only to assign liability if they think there ought to be.
   b. Uses logic, common sense, justice, policy, and precedent
3. THE BASICS
   a. The foreseeability test
      i. The D’s negligence is a proximate cause of the P’s harm if causing the harm was a foreseeable result of acting as the D did
      ii. A foreseeable connection exists when a given negligent act, viewed ex ante, makes the resulting accident more probable
   b. Harm within the risk test
      i. This test clarifies and sharpens the above test.
      ii. Is the risk of the injury the P suffered one of the risks that makes this particular action of the D negligent?
      iii. If the D’s negligence did not foreseeably increase the risk of harm that the P actually suffered there is no proximate cause.
4. COINCIDENCE.
   a. \text{Berry v. Borough of Sugar Notch} (text p440, notes p124)
      i. Trolley driver was speeding; the tree fell on him
      ii. It was not foreseeable that the tree would fall; it was not foreseeable that speeding would put one at risk of being hit by a falling tree
      iii. Because P could not foresee that his high rate of speed would cause him to pass under a tree at the moment of its fall, P’s high rate of speed cannot be the proximate cause of his accident
5. INTERVENING CAUSES
   a. “Ordinary and Natural Consequences:
      i. Most restrictive test: Only necessary results
      ii. Less restrictive test: Non-necessary, including reasonable, ordinary, probable (foreseeable?). What do we do with results that are either independently negligent or criminal?
         a) Harm within the Risk (Hines v. Garrett)
         b) Foreseeability
            1) Special rules for criminal misconduct? Watson, yes; Brower, no
   i. Sparks were not the cause of P’s fire; it caught fire from the shed
   ii. A person is more likely to be held liable for remote damages when their negligent act was intentional
   iii. In developed areas, each man runs the hazard of his neighbor’s conduct, and therefore should insure himself in order to guard against that hazard
   iv. RULE (test here is NOT foreseeability): Proximate cause does not exist unless negligent act was the NECESSARY CAUSE of the resulting injury
   v. **Controversial case with very restrictive test**
   vi. Policy concern: reduction of liability with insurance rationale

c. **Hines v. Garrett** (Va. 1921)(text p442, notes p124)
   i. The general rule is: no liability exists in the first negligent person when an independent act of a third person intervenes between the negligence complained of and the injury
   ii. BUT, this rule does not apply where the very negligence alleged consists of exposing the injured party to the act causing the injury (HARM WITHIN THE RISK)
   iii. Ryan court would have found Δ not negligent, because their actions were not the “necessary cause” of P’s injury

   i. The acts of a 3rd person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrong-doer, if such act ought to have been foreseen
   ii. Ryan court would have found Δ not negligent, because their actions were not the “necessary cause” of the theft
   iii. Hines court would have found Δ not negligent, because train accidents are not negligent ONLY because of the risk of theft of goods scattered by the accident
   iv. Δ is found negligent b/c the theft of the goods was FORESEEABLE by the train security guards
   v. DISSENT: There was break in chain of causation, therefore no liability. (query whether a “chain” is a good description of causality; seems to imply mono-causality, or at least one line). Additionally, crime is not something that should be foreseeable, as the law is otherwise

e. **Watson v. Kentucky & Indiana Bridge & R.R.** (Ky. 1910)(text p446)
   i. Takes the position in Brower dissent
   ii. Tank car leaking gasoline derailed through D’s negligence, and another man intentionally threw a match on it, starting a large fire.
   iii. Malicious or wanton acts are not foreseeable or anticipated, and cannot be guarded against; malicious acts entitle D to directed verdict on proximate cause grounds

6. **Intervening and Superseding Cause**
   a. In such cases the subsequent acts of independent third parties or forces are the immediate cause of harm that results from the original negligence of the D.
      i. So the question then is the “original” D relieved of liability b/c of the subsequent acts?
b. If the intervening act does NOT break the chain of causation leading from the D’s act to the P’s harm/b/c the intervention was foreseeable then the D is still liable (well it will go to the jury anyway)
   i. EG. Where the D negligently left keys in a car at his service station and then a thief stole the car and got in an accident. It was foreseeable that this might happen.

c. If it were not the kind of thing that was foreseeable or taken into account at all then the subsequent act by a third person would be a **superseding** cause and the negligence of the D is not a proximate cause of the P’s injury. The subsequent act of negligence supersedes the D’s act and breaks the chain of causation.

d. Where I negligently injure you and your injuries are aggravated by subsequent non-negligent medical care, there is no question that my negligence is a proximate cause of the aggravation. Such aggravation is sufficiently common to make it foreseeable.

e. Just to be clear- the subsequent actor would also be liable in these cases.
   i. Original D is more likely to be solvent, insured or both

7. **What Must be Foreseeable**
   a. There are 4 situations in which something is unforeseeable and the question is whether there is proximate cause despite this unforeseeability
      i. Unforeseeable P’s
      ii. Unforeseeable types of harms
      iii. Unforeseeable extent of harm
      iv. Unforeseeable manner of harm.

b. Unforeseeable P
   i. **Palsgraf v. LIRR**
      a) RR employee helped a passenger on to train and in jostling him a bag of fireworks fell causing an explosion which caused a rushing on the platform which caused some scales to fall which injured Mrs. Palsgraf.
      b) Cordozo wrote that the D had not breached a duty to Mrs. P b/c harm to her was not foreseeable.
         1) Schlanger confident that this reasoning is faulty.
      c) The dissent (Andrews) felt it should have gone to the jury b/c foreseeability is more malleable and felt that such an injury (of a person on the platform) could be reasonably enough foreseeable that it was a question for the jury if there was proximate cause.
         1) He further felt that once a D is negligent in some way towardssomeone then whether that negligence is a proximate cause of the harm that actually results is “all a question of expediency”

c. Unforeseeable extent of harm
   i. Thin skull rule governs
   ii. It is no defense that the P had an unforeseeable weakness or infirmity that caused his or he injury, or caused injury of much greater severity than would have been suffered in the absence of this weakness.
   iii. D takes his victim as he finds him
   iv. Why?
      a) Ease of administrability- it would be too hard to d3etermine otherwise
b) b/c the D who can foresee the risk of injury to a particular P or class of Ps must know that there is a distribution of the probable severity of the injury risked by any given acton.

1) can promote optimal deterrence

v. This all being said courts don’t always impose this rule and seem to do so only when they see fit

d. Unforeseeable Type of harm

i. Polemis

a) A plank was dropped into the hole of a boat and caused an explosion that destroyed the ship.

b) The harm that would have been expected would have been something like hitting someone or scraping banging something etc.

c) The falling plank caused a spark that started the explosion.

d) Court found the negligence of letting it fall was a proximate cause even though a spark was not anticipated.

ii. The Wagon Mound (overruled this finding)

a) Oil was negligently allowed to escape in the Sydney harbor and several days later it caught fire destroying the dock where a welding operation was going on.

b) It was foreseeable that oil would foul the dock, but not catch it on fire. Court held D was not liable then for the damage done by fire to the dock.

1) there can be no liability when a foreseeable P suffers an unforeseeable type of harm even if that harm is a direct consequence of such negligence but there is till liability to a foreseeable P for an unforeseeable extent of harm.

iii. The courts though have not settled on what the general rule ought to be. Wagon mound 1 is harsher than most US courts go for.

8. Judge/Jury

a. If reasonable ppl could disagree it is a question for the jury

9. THre Underlying Purpose of the Doctrine

a. liability limiting doctrine-Takes all of the claims that are eligible for liability and designates which ones should have liability imposed

b. often these issues are decided by a judge as a matter of law.- ths not everything going on is always captured

c. Even in the jury room it is likely that discussions such as nthat not every negligent D should always bear liability. This doctrine allows limitation

i. Allows jury to use its judgement in deciding wheter a D was sufficiently blameworthy

ii. Practical b/c it asks the jury to step back after it has applied the individual pieces of the liability puzzle and look at the whole picture before it makes its final decision.

IX. Affirmative Duties

A. Duty to Rescue

1. In the absence of special circumstances, or a special relationship, one person has no affirmative duty to rescue another person from a position of danger.
a. This is true even if the risk to the D is small or non-existent

2. Why?
   a. Individual Liberty- we should not impose extra duties on ppl, they should be allowed to mind their own business
   b. ease of administrability- it would be difficult to devise a rule as to who is required to act when a number of ppl are available
   c. having such a rule would make ppl want to help less- they wouldn’t feel like heroes

3. However if a D has negligently places the P in a position of danger he may be held liable for failing to rescue that person
   a. This is the difference btwn nonfeasance and misfeasance. The former being inaction and the latter being wrongful action.

4. Duty or no duty if I do decide to rescue I am liable for conducting the rescue negligently if I do.

B. Gratuitous Undertakings and Special Relationships
   1. Where a D has negligently "enabled" a 3rd party to cause harm.
   2. Giving keys negligently to a person who doesn’t have a license b/c they have had too many DUIs. If the person then drives drunk I could be liable for enabling the action

   a. Court held Landlord liable after he negligently allowed security measures in his building to fail and knew of the danger and muggings and then when the P was mugged he is liable.
   b. Here there was a pre-existing relationship and the D was on notice about the danger. (thus constituting a duty)
   c. Factors looked at once duty established:
      i. Whether risk was sufficiently probably
      ii. Harm sufficiently great
      iii. Cost of reducing sufficiently small
      iv. Ie Hand Formula

4. Tarasoff v. Regents of U of C
   a. psychiatrist who was held liable when his patient injured a 3rd party
   b. the patient had said he was going to and even the person who he was going to harm
   c. the doc. Did try to stop to some degree, but did NOT warn the 3rd party
   d. Problematic though the court found him liable there are issues of Doc /Patient confidentiality
   e. and even Psychs say they aren’t good at predicting if someone is actually going to do what they say.

5. Hard to pinpoint common principles, BUT
   a. Ds in enabling torts are all strategically placed to take precautions reducing the risk that 3rd parties will injureb victims in P’s position
   b. often some sort of pre-existing relationship is in existence (out of which grows a duty)

C. Tort Liability of Owners and Occupiers of Land
   1. Owners and Occupiers of land owe a duty to exercise reasonable care to those whom they invite onto their property.
   2. Invitees- ppl invited on prop. for business purposes (anyone who is there to benefit the owner)
      a. Those who are owed a reasonable care
   3. Liscesees- social guests
      a. get a lesser duty of care. The premises must only be as safe as the owner makes it for himself. The owner must warn the liscesee of
hidden dangerous conditions, but need not eliminate those conditions.

4. Tresspassers
   a. the owner owes a duty to refrain from wantonly and willfully injuring them (no hidden traps)

5. Many states say owner owe “discovered tresspassers” reasonable care

6. "Attractive Nuisance"- child tresspassers who trespass because of some particularly “attractive” dangerous condition maintained by the owner, such as a railroad turntable or ferris wheel, especially when the danger the condition poses can be eliminated at comparatively low cost.

7. The stringentness of the three above categories of ppl allow for ease of administrability as the are readily ascertainable, and predictable outcomes

8. Rowland v. Christian
   a. rejected the use of the three categories and instead inserted a number of factors that courts should consider.
      i. The D’s duty
      ii. Forseeability of harm
      iii. Closeness of connection btwn D’s conduct and P’s harm
      iv. Moral blame attached to P’s conduct.
   b. Court decided that the 3 categories weren’t good and should be replaced by a “reasonable conduct under all circumstances” test.
   c. Wholesale change has not occurred and most courts still use the tripartite.

X. Traditional Strict Liability
   A. Vicarious Liability
      a. An Employer whose employee commits a tort may be liable in his own right for negligence in hiring or supervising the employee but this is not vicarious liability.
      b. Employers may be liable actually for the tort of their employee without any negligence at all on their own part.
         i. The activity causing the harm should be “within the scope of employment”
            1. detour and frolic- what is w/in the scope of liability?
               a. If not immediately regarding work, but only a short detour away-probably liable
               b. If employee has gone off frolicking- probably not
               c. For the purpose of furthering goal of job.
            2. Employers may be better at avoiding the harm
            3. it may be hard to know which particular employee caused the harm
            ii. Employer should be able to control the manner and means of the work being done
               iii.
   c. Negligent actor continues to be liable as well, now we are just adding some deeper pockets
   d. Ira S. Bushey v. US
      i. Sailor on shore leave got drunk, came back to boat to berth and let water out of valves flooding the dry dock and doing a lot of damage.
      ii. Court held it is foreseeable sailors on shore leave will go get drnk, and returning to the berth was w/in scope of employment (ie. the very reason he was even there was b/c of his job)
      iii. And the navy conduct is somewhat subject to control by the employer.
XI. Causation

XII. Affirmative Duties

A. Duty to Rescue

   a.

2. Hurley v. Eddingfield (Ind. 1901)
   a.

   a.

B. Gratuitous Undertakings and Special Relationships

   a. Issue: Whether a duty should be placed on a L to take steps to protect Ts

   a.

C. Tort liability of owners and Occupiers of Land

1. Rober Addie & Sons Ltd. v. Dumbreck (1929)
   a. D operated wheel that was attractive to children. Employees often told trespassers to stay off property but were ignored. Court held that P’s son was a trespasser and that D owed him no special duty of care
   b. **Invitee**: by invitation, for business purposes. Duty owed is reasonable care that premises are safe
   c. **Licensee**: by permission, implied or express, including social guests. No duty that premises are safe, but may not create a trap or allow concealed danger to exist which is not apparent to visitor
   d. **Trespasser**: No duty to take reasonable care or to protect from concealed danger; enters at his risk

2. **Rowland v. Christian** (Cal. 1968)
   a. P was social guest who cut himself on broken porcelain sink handle that D knew was broken. Duty to warn social guests of dangerous conditions.
   b. Court holds there is standard of reasonable care in all circumstances
   c. Dissent (Burke): Likes the CL distinctions for invitee, licensee, trespasser; not court’s function to make “sweeping modifications of tort liability law”

XIII. Traditional Strict Liability

A. Vicarious Liability

1. The Fellow Servant Rule
   a. Farwell v. Boston & Worcester R.R. Corp (1842)(decision by Chief Justice Shaw): original version of assumption of the risk defense. P lost right hand through negligence of another employee. Employer had not been negligent, and Shaw held that P had assumed the risk and could not recover against the RR. (Higher standard than assumption of the risk; status alone was enough; did not require knowledge)
   b. Vice-Principal Exception: certain duties of the employer discharged by the supervisory personnel were regarded as non-delegable (e.g., to furnish safe work place, proper equipment, etc.
   c. Critics of Fellow Servant rule
      i. Judges use it to favor the wealthy and deprive protection against employers
      ii. Legislation has changed the rule to some degree