I. Negligence: A tort with four elements
   ➢ a duty of reasonable care
      o General Duty of Reasonable Care:
         ▪ Macpherson v. Buick Motor Co. (1916): Defendant sold car to a dealer, who then sold car to plaintiff. Car collapsed when plaintiff was in car due to a defective wheel. Wheel was not made by Δ, but was made from another manufacturer. Defects could have been discovered through reasonable inspection, but none was done. Rule: When a danger is reasonably certain, and a future 3rd party is foreseeable, a duty of vigilance is owed to that 3rd party. [Should have inspected] Notes: Cardozo creates a new doctrine: wipes out precedence that duty was “privity bound.” Move from inherently to imminently to probably dangerous. 3rd party was foreseeable. (Llewellyn: law of leeways; go against precedent as times change)
      o Misfeasance: affirmative duty to act; foreseeability & a direct causation issue; Δ creates some new risk to Π which makes Π more at risk
      o Nonfeasance & the No-Duty Rule:
         ▪ Nonfeasance: Failure to take steps to protect someone from harm is not actionable
         ▪ Exceptions to the No-Duty Rule: [Typically commercial/power-driven/Custodial duties]
            • Special relationship to Victim: pre-existing relationship b/w defendant and person needing assistance
               o 1.] Inkeeper-Guest
               o 2.] Master-shipmen
               o 3.] Employer-employee
               o 4.] Jailer-prisoner
            • Special relationship to Perpetrator:
               o 1.] Jailer-Prisoner
               o 2.] Psychiatrist-mental patient
               o 3.] Employer-employee
            • Innocent Creation of Risk: Defendant, w/o negligence, creates risk that causes injury to plaintiff
            • Gratuitous Services Exception:
               o One who, under no duty, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for bodily harm caused by: 1.] failure of actor to exercise reasonable care; 2.] discontinuance of aid to leave the victim in a worse position
         • Farwell v. Keaton (1976): Siegrest & Farwell chased, Farwell badly beaten. Siegrest escaped, came back for Farwell, and applied ice pack to his head. Siegrest drove around w/ Farwell in back of car. Siegrest then left Farwell in car at grandparents’ house, where he was discovered the next day. Farwell died later. Rules: Courts utilize “special relationship” exception (Theory #1) – Farwell/Siegrest were co-adventures, once a fight occurs duty arises to save friend – stretching the “special relationship” exception Theory #2: Siegrest failed to exercise reasonable care after coming to the aid of Farwell – giving of the ice pack = assumption of duty [Causation: “But for Siegrest’s interaction, Farwell might not have died”]
      o Limited Duty:
         ▪ Owners & Occupiers of Land: status trichotomy - Trespasser, licensee, invitee
            • Trespasser (those who enter land w/o express or implied consent of owner): Owner owes no duty of reasonable care to trespassers. Duty merely not to cause intentional injury, to set a trap, or to cause wanton injury.
               o Exceptions: 1.] Duty to known trespasser: duty of ordinary care; 2.] Duty to foreseeable trespassers: if landowner knows that trespassers “constantly” trespass within a “limited area,” landowner has responsibility to use reasonable care; 3.] Duty to children: may require landowner to make safe serious risk that may be remedied w/ little expense
            • Licensee (people on land by owners express or implied consent but who are there for their own purposes; not potentially engaged in direct economic transactions w/ the
owner): No duty of reasonable care \(w/\) respect to conditions on land; owes duty not to intentionally, willfully, or wantonly injure licensee
  - Exceptions: Under at least duty to warn when there is reason to know of 1.] the existence of danger and 2.] plaintiff’s presence in a place where s/he might encounter it; Landowner engaged in active operations on land could pose a risk to licensees: s/he must keep active look-out for licensees and must govern operations \(w/\) reasonable care

- **Invitee** (public invitees or business invitees; entrant’s presence is desired; principle that entrants establish one’s status on one portion of the land and change it in another): Make conditions on land reasonably safe and conduct his/her active operations \(w/\) reasonable care for the invitee whose presence is known/reasonably foreseeable
  - Exceptions: Obvious dangers, unless landowner can foresee harm in spite of obviousness

- **American Industries v. Ruvalcaba** (2001): Johnathan paid a visit \(w/\) his mother to visit father for lunch. Johnathan fell through open bannister, which did not comport with Building Code. Johnathan suffered permanent damage. **Rule:** Treatment of Johnathan as licensee instead of invitee: plaintiff could not prove defendant had actual knowledge of the danger.

- **Rowland v. Christian** (hot water knob): \(\Pi\) invited to \(\Delta\)’s apt. \(\Delta\) told lessors that hot water knob was broken and needed to be fixed. \(\Pi\) suffered injuries. **Rule:** Use of a more general standard of care; elimination of outdated status trichotomy; Defendant could have easily warned plaintiff, yet did not, and was negligent.

- **Policy considerations:** (courts analyze after precedent, reason, and logic)
  - 1.] Deterrence or Accident Prevention Considerations
  - 2.] Economic Considerations (Insurance)
  - 3.] Allocation of Losses: providing compensation to injured victims important
  - 4.] Administrative Concerns of Courts: courts should be able to articulate appropriate standards and instructions
  - 5.] Fairness, Ethical, Moral, and Justice Considerations
  - 6.] Legislative Considerations: statutes or regulations which directly or indirectly support/negate creation of duty

**Controlling Conduct of Others – Duty to Warn/Provide Information:**

  - **Tarasoff v. Regents of the Univ. of California** (1976): psychiatrist’s relationship to a dangerous patient gave rise to a duty to warn the patient’s intended victim that the patient threatened to kill her
  - **Dunkle v. Food Service East** (1990): Eyer, girlfriend of Tindal, was choked on premises of \(\Delta\). Tindal saw a variety of doctors, psychologists, and counselors for schizophrenia. Tindal was on and off drugs to treat his schizo. and switched doctors later on. **Rule:** No duty to warn where patient has not threatened a readily identifiable victim \(w/\) a specific threat; court disposes of foreseeability & probability; emphasis on professional relationship.

  - Reasons against imposing duty:
    - 1.] more violent people
    - 2.] record-keeping becomes discouraged
    - 3.] Therapist might only focus on violence
    - 4.] Privacy rights of patients
    - 5.] Endangerment to therapist if he warns
    - 6.] Question of whether physician must issue a Miranda warning

  - **Randi W. v. Muroc. School District** (1997): Teacher \(w/\) past sexual history unreservedly recommended by prior school district. **Rule:** Writer of letter owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations presents a substantial, foreseeable risk of physical injury to third persons. [key is the degree of deception; chooses to write the letter of recommendation]

**Controlling Conduct of Others – Duty to Provide Reasonable Security:**
• Duty on warn party to take reasonable affirmative measures, such as security precautions, to protect other party from reasonably foreseeable criminal activity
• Courts typically say duty obligations rise out of “special relationships”
  • *Delta Tau Delta v. Johnson* (1999): Π invited to Δ’s frat. party. Beer was served. Alumnus of fraternity offered to drive Π home once he sobered up. Later, Δ locked Π in room and sexually assaulted her. **Rule:** Utilize totality of the circumstances to determine foreseeability, which includes the nature, condition, and location of the land along with prior similar incidents. When there were prior incidents and as in this scenario, Δ was warned of potential harm, there exists a duty to a 3rd party. **Notes:** Case also addressed landowner liability issue – Δ’s were social hosts and Π could be characterized as an invitee
• *KFC v. Superior Ct.* (1997): Robber held KFC up at gunpoint; ended up injuring customer when employee would not meet demands. **Rule:** Duty does not exist to a patron to comply w/ robber’s demand. If so, hostages would always be taken. **Note:** This is a breach of duty question, rather than a duty question. Take decision out of the hands of the jury.

**Controlling Conduct of Others – Duty to Protect Against Gun Violence**
• *Hamilton v. Beretta U.S.A.* (2001): Relatives of gun victims sued 49 handgun manufacturers. **Rule:** Pool of victims is large. There is no evidence to show that degree of risk was enhanced by presence of negligently marketed and distributed guns. No significant relationship b/w classes of dealers and crime guns. No duty.

**Controlling Conduct of Others: Public Agency Duty to Protect Citizens**
• *Kircher v. City of Jamestown* (1989): Plaintiff abducted in parking lot of drug store, and was taking off and brutally raped/beaten. Two witnesses, Allen and Skinner, gave chase to the car, and afterwards tracked down a cop who said he would “call it in.” Witnesses made no further attempt to contact police, and the cop never called it in. Witnesses retrieved Π’s name from drugstore and drove by her house twice. **Rule:** In order to limit liability, when there is no direct contact and there is no reliance, as in this case where the victim did not even communicate with the police, there does not exist a “special relationship” to invoke duty between the Π and policeman.
  • To form a special relationship, municipality must “induce” citizen’s reliance
  • **Kircher Factors:**
    • 1.] direct contact b/w police and victim
    • 2.] police assumption of duty to act or aid
    • 3.] Knowledge of police that inaction could lead to harm
    • 4.] Reliance on the victim of police assurances
  • Recreational Sports:
    • Should the legal standard be recklessness or negligence?
    • *Lestina v. West Bend Insurance Co.* (1993): Π injured while playing a recreational soccer match. Δ slide tackled Π, which was illegal in league, and injured him. **Rule:** J. Abrahamson says negligence is broad enough field to deal w/ divergent circumstances (subsumes all factors and considerations presented by recreational team sports.) Adoption of the negligence standard.
    • Courts typically use recklessness as the gage: do not want to limit how sports are played.
  • Emotional Harm w/o Physical Injury:
    • Traditional Principle (rarely followed): “Impact rule” – recovery for emotional distress proper if plaintiff also suffered physical injury
    • Policy concerns relevant to duty:
      • 1.] fraudulent claims
      • 2.] perjured testimony
      • 3.] Excessive damages based on jury sympathy
    • “Zone of Danger Rule”: recovery allowed for bystander if he was close enough to defendant’s negligent conduct to be placed at risk of physical injury, even though he was actually not touched
      • 1.] bystander within area of risk created by conduct; 2.] injury to them is foreseeable
      • Most courts employ relational element w/ “zone of danger”
• Rule is too arbitrary – father watching son get run over from distance suffers just as much and presence is just as foreseeable

**Dillon Factors:** Still limits recovery from bystanders

- 1.] Proximity
- 2.] Contemporaneous
- 3.] Relational
- 4.] Extreme Emotional Distress (some states have adopted this)
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  - **Thing v. LaChusa** [California Supreme Court, 1989]: each factor was “required” in order to limit liability
  - **Clohessy v. Bachelor** (1996): Mother and son experience emotional shock when witnessing son/brother hit in head by side view mirror of car. **Rule:** Imposing limitations on reasonable foreseeability rule: Three Dillon factors plus the extreme emotional distress factor (Lejuene); public policy dictates duty to bystander; belief that “zone of danger” rule is artificial; still limits liability by requiring “intimate emotional” tie
  - Bystander most likely does not need to know that the act is negligent; rather that he experiences traumatic distress from witnessing the injury

**Loss of Consortium:** impairment of a relative’s opportunity to relate to the party directly injured by the defendant

- Ex. w/ couple: injury interferes w/ recreational activities couple shared, division of labor, sexual society, etc.
- Impairment over time; not shock or trauma
- Less likely to allow claims by parents for “filial” consortium (child is injured)
- Even less likely to allow claims by children whose parents have been injured (no historical precedent)
- Typically does not extend to siblings

**“Direct Victim”**: defendant owed a direct duty to the bystander

- Some cases use straight foreseeability
  - **Burgess v. Superior Ct.** (1992), **California Superior Ct.**: Doctor delayed in emergency caesarean, causing baby to be born with severe brain injuries; Burgess, mother, was anesthetized and not made aware until she woke up. **Rule:** Mother was a direct victim – physician-patient relationship under both physical (Dr. responsible for health of both mother & baby)/emotional realities (mother’s emotional well-being tied to baby’s health); scope of duty falls all the way to mother
  - **Molien v. Kaiser:** Hospital & doctor owed duty directly to husband of patient who was diagnosed incorrectly by doctor as having syphilis and had been told to advise her husband. **Rule:** risk of harm to husband reasonably foreseeable and “alleged tortious” conduct directed to him as well as wife; husband was a direct victim.
  - **Ochoa:** Mother watched her incarcerated son suffer. **Rule:** Since defendants had no preexisting relationship w/ parents, Mrs. Ochoa was in the position of a bystander.
  - **Christensen:** Awarded emotional distress damages for improperly performed funeral. **Rule:** Duty of care assumed by those providing funeral services included not merely performing cremations, but performing them in a dignified and respectful manner.
  - **Marlene F:** Mother recovered for emotional distress arising out of sexual molestation of son by therapist, who was treating them both for intra-family problems. **Rule:** Therapist’s action breached duty of care to mother since it would directly injure her and cause her severe emotional distress and would harm intrafamily relationship under his care.
  - **Boyles v. Kerr** (1993), **Texas Court of Appeals:** Defendant aided by three friends videotaped sexual encounters w/ Kerr; word on videotape got around school. **Rule:** Mental anguish damages only awarded in connection w/ defendant’s breach of some other duty. Had to have intentional infliction of emotional distress.

**Foreseeable Risks of Emotional Harm:** further progression of law – broadening of liability

- **Camper v. Minor** (1996), Tennessee Supreme Court (“Zone of Foreseeable Emotional Harm): Plaintiff ran into car driven by sixteen year old girl, who ran a stop sign.
Plaintiff suffered severe emotional distress from seeing her mangled body. **Rule:**

*General Negligence Approach* – plaintiff must present evidence to each of five elements – with two added limitations: 1.] recovery only provided for “serious” or “severe” emotional injury; 2.] impairment supported by expert/medical proof.

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### Fear of Future Disease:

- *Potter v. Firestone* (1993), California Supreme Court: Firestone disposed toxic wastes in landfill adjacent to landowners subject to exposure of carcinogens. Plaintiffs have not developed cancer, but face risk of developing it. **Rule:** In absence of present physical injury or illness, damages for fear of cancer may be recovered only if plaintiff proves that: 1.] as a result of defendant’s negligent breach plaintiff is exposed to toxic substance and 2.] plaintiff fear stems from knowledge, corroborated by medical/scientific opinion that it is more likely than not plaintiff will develop cancer
  - Everyone is exposed to carcinogens; policy implications: 1.] unrestricted fear liability in health care; 2.] take money out of claims from those who have cancer; 3.] establish definite and predictable threshold; 4.] limit class so emotional injury absent physical harm is still recoverable

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➢ breach of that duty: defendant may be negligent w/o being “liable for negligence.” Ex: plaintiff does not suffer damages from the defendant’s failure to exercise due care
  - duty is breached by failing to exercise reasonable care
    - “Negligence is the omission to do something which a reasonable man, [sic] guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man [sic] would not do.”
  - Reasonable person is fictitious & impossible to create

- **Four factors reasonable person considers:**
  - 1.] considers foreseeable risks of injury that conduct will impose on community; considered in light of utility of conduct
  - 2.] considers extent of risks posed by her conduct (Ex: minor property damages v. personal injury)
  - 3.] likelihood of a risk actually causing harm
  - 4.] do alternatives exist which would achieve same purpose w/ lesser risk

- *Rudolph v. Arizona B.A.S.S.* (1995): GCBB sponsored bass fishing tournament; accepted permit which ensured that all participants would operate boats in reasonable and safe manner. GCBB did not patrol the lake nor provide safety instructions. II’s daughter and friend ran their jet ski into boat of participant. Boat was traveling at 40mph, and weight-in station deadline was in five minutes. Allen, participant on boat, had 2 pound bass. He had won previously w/ a 2.15 pound bass in another competition. **Rule:** Since Δ was conducting large tournament on lake, had duty to II. Nature of tournament provides sufficient evidence on breach. Facts that tournament was hosted on “crowded lake w/ one weigh-in station in congested area” sufficient evidence for juries to find causation.

- **Hand Formula:** what a reasonable person balances during everyday conduct
  - B < PL: B (burden of adequate precautions/cost); P (probability of injury); L (gravity of the injury/damages resulting)
  - Formula fails to consider alternate possibilities, such as adopting different method of achieving given result
  - Impossible to assign value to serious personal injury

- *United States v. Carroll Towing Co.* (1947): Δ operating tugs set barge adrift. Barge crashed into another tanker, causing it to dump cargo of flour and sack. Bargee was not around to see barge leaking; left at 5 in the afternoon day prior, and flotilla broke away at about 2 in the afternoon the following day. Bargee away for a total of 21 hours. **Rule:** Given the burden of staying on barge is not that high, it is a fair requirement for bargee to be on board during the day.

- *McCarty v. Pheasant Run* [1987]: McCarty, II, stayed at Pheasant Run Lodge, where her room was equipped w/ sliding glass door, covered by drape. Door had lock and safety chain. Door could be accessed by public courtyard. II attacked and beaten upon returning from dinner. Door was closed but not locked. **Rule:** II failed to show
precautions could have been made at reasonable cost and efficacy. Jury might have thought it was Δ’s job to supply lock and Π’s job to use it.

- **Reasonable Standard & the relevance of personal circumstances:**
  - Physical disability: judged against that of other actors in same “circumstances,” not against population at large
  - Lacking of good judgment, hastiness, awkwardness: no allowance is made (*Vaughan v. Menlove*)
  - Mental disability: held to same standard as everyone else; consistent w/ *Menlove*
    - *Bashi v. Wodarz* (1996): Δ involved in two separate accidents, one with a third party and another with Π. Δ reportedly was acting bizarre during and after collision, and claims she had no control of her actions. Family has history of mental problems. **Rule:** Unless Π is child, mental deficiency does not excuse Π from action which does not conform to standard of reasonable person.

- **Policy Reasons** (*Restatement)*:
  - 1.] difficulty of drawing line b/w mental deficiencies and variations in temperament
  - 2.] unsatisfactory character of evidence of mental deficiency (easy to fake)
  - 3.] if mental defectives are to live in this world, they should pay the price
  - 4.] if they are liable, those who look after them (estates) will look after them more closely

  - *Cooper v. County of Florence* (1991): Offers both a common law and liberal rule. Collision b/w motorcyclist and Cooper who suffers from schizophrenia. **Rule:** When actor cannot exercise ordinary care nor does he lack the ability to, there is no need to even utilize the liberal rule in judging him.

  - **Children:** not held to adult standard of care, but standard of a “reasonable person of like age, intelligence, and experience under like circumstances.” However, if activity is inherently dangerous, adult reasonable standard of care is applied.
    - *Robinson v. Lindsay* [1979]: Plaintiff injured in snowmobile accident where driver was thirteen years of age. **Rule:** When the activity a child engages in is inherently dangerous, as is the operation of powerful mechanized vehicles, the child should be held to an adult standard of care.

- **Reasonable Standard & the relevance of external circumstances:**
  - Decision may be made in an emergency situation: “emergency doctrine” – in judging the reasonableness of conduct in an emergency, the “circumstance” that the defendant must act quickly is relevant
    - *Foster v. Strutz* (2001): Three young men approached Δ’s car and attacked them. Strutz, passenger in car stepped on pedal sending car in reverse. Π tried to get out of way by pulling herself onto pickup; got out of the way too late and crushed her leg. **Rule:** When Δ’s are confronted with a sudden emergency, and the emergency is not a result of their own negligence, jury should be instructed of the “sudden emergency doctrine.”
  - Custom: fact that conduct is generally engaged in by those in particular trade/profession suggests conduct is acceptable. Gives us an idea of what is safe behavior; gives notice to legislatures, and eventually becomes the law.
    - *Hagerman Construction, Inc. v. Copeland* (1998): Hagerman and Sater contracted for construction of basketball arena. Π slipped and fell in uncovered opening. Expert witnesses testified to contractual responsibility which is customary in construction industry. Three construction workers testified what is typical with other projects and contractors. **Rule:** The conduct of other persons in substantially similar conditions may be relevant to the reasonableness, under the circumstances, of a particular individual’s acts or omissions.
    - *Trimarco v. Klein* [1982]: In 1976, Π opened sliding door to bathtub and glass shattered, suffering lacerations. Door was made of ordinary glass instead of
tempered glass, which shatters. In 1950, shatterproof glazing materials had become to be in use. **Rule:** Enough substantial evidence of reasonable custom and usage to get to a jury. When landlord is put on some type of notice, he has a duty to the tenant.

- Sometimes custom & reasonableness diverge, in which case courts will rule in favor of reasonableness
  - **T.J. Hooper** [1932] (custom used as a defense): Two tugs got lost off coast. Barges which carried coals were towed by tugs. Tugs were not equipped with radio receiving sets. Masters acknowledged had they had them, they would have turned around. **Rule:** In instances where custom deviates from reasonableness, as in this situation, courts will rule in favor of reasonableness. If tugs had been equipped they would have received Arlington reports.

- Custom is not law: jury must decide, customary or not, if what was done comports with the negligence standard itself
  - Requirement under statute of a particular course of action: reasonable person obeys the law; one who does not is typically negligent.
  - Experience in the field: “expert” status is a circumstance…colors the meaning of reasonableness [Ex: “he committed some act that the reasonably competent physician engaged in the practice of surgery would not have done (Ex’s & Ex’s, 81)]
  - Facilities or resources available to actor are relevant to reasonableness analysis
  - Miscellaneous facts of individual case
    - **Edwards v. Johnson** [1967]: Δ alone in house w/ three kids. She is summoned unexpected in the backdoor by person who does not announce identity. Δ grabbed shotgun, and upon trying to move the curtain to see who was outside discharged the gun and shot Π. **Rule:** Reasonableness is also determined based on the circumstances of the situation; sex, age, and physical strength of Δ must be considered in relation to reasonableness of her anxiety and her inability to handle gun while opening door.

- **Specific Judicial Standards**: Judge directs a verdict. Minimum standards of reasonable care could be evolved by judges as rules of law to substitute for the reasonable care standard.
  - **Baltimore & Ohio R.R. Co. v. Goodman** (1927): Plaintiff killed when automobile truck was struck by train. **Rule:** Π failed to invoke reasonable standard of care before crossing railroad. [Conclusion by Judge Hand]
  - **Pokora v. Wabash** [1934]: Π driving truck across railway grade when he was struck and injured. Π looked North for trains but did not hear a bell or whistle. **Rule:** Courts must be more cautious in framing standards of behavior that amount to the rules of the law. This particular circumstance is an extraordinary situation, and should be judged by the jury.

- **Negligence per se**: Duty is breached when there is a violation of a statute which has established a standard of care
  - Statutes:
    - 1.] Establish standards of care for private conduct
    - 2.] Promote safety by establishing standards of conduct for particular situations
  - Automatic adoption of the law is too rigid (Holmes’ viewpoint). Reasons we don’t strictly follow legislature:
    - 1.] In unusual circumstances, it is reasonable to disregard the statute
    - 2.] Statutes are silent on the role legislative standard should play in a tort action…courts have discretion to borrow that standard
  - Approaches which allow jury to consider the violation of a statutory standard of care in determining negligence, but avoid making it automatically determinative
    - **Negligence per se w/ “Excuse”**(Restatement): unexcused violation of a statute is negligence per se, but party who violated statute may offer evidence of an excuse or justification for violating it
      - **If defendant provides no explanation:** jury is instructed that if they find that Bourjailly violated the statue, they must find that he was negligent
If defendant provides evidence of a sufficient reason: jury free to conclude that violation was “excused” and would not establish negligence; jury instructed to determine whether Bourjailly acted reasonably under all the circumstances, including his violation of the statute, the reasons offered for noncompliance, and others

**Excuses:** (typically, not exclusive)
- 1.] Incapacity
- 2.] Lack of knowledge of the need to comply (no knowledge of busted taillight)...excuse deals with facts, *not lack of knowledge of the law*
- 3.] Inability to comply
- 4.] Emergency
- 5.] Compliance poses greater risk than violation

What happens in a jurisdiction which utilizes comparative negligence
- Jury may find negligent defendant only 3 percent negligent even if he violated the statute if they place the blame/negligence on plaintiff also
- If plaintiff is not negligent at all, jury must assign 100% of negligence to defendant even if they do not think he is very negligent at all

**“Presumption of Negligence”:**
- Approach similar to “negligence per se w/ excuse”
- Open list of excuses: defendant allowed to offer any competent evidence
- Burden of proof, much like the Restatement, lies with the plaintiff. If plaintiff points to violation of safety statute, and defendant offers a valid excuse, burden remains on plaintiff to convince jury defendant did not behave as a reasonable person under those circumstances

**Evidence of Negligence:**
- Proof of unexcused violation would support a finding of negligence by the jury, but they would still be free to find that the defendant was not negligent, *even if no excuse were offered.*

**Requirement of Relevance:**
- Statute is only relevant in establishing negligence if it meant to protect persons like the plaintiff (class) from the type of harm which actually occurred [*It is the judge’s job to decide whether or not the statute is relevant]*
- **Elements of negligence per se:** 1.] plaintiff included in class of people; 2.] injury sustained to plaintiff is harm which statute is meant to protect; 3.] against the particular interest; 4.] same hazard
- *Wright v. Brown* (1975): Π bitten by dog owned by Δ. Δ’s dog had been quarantined for 14 days for previously biting another person. Dog warden released dog prior to 14 days. Alleged negligence against dog warden & town. *Rule: Court rules that plaintiff, although falling under the class of people statute is designed to protect, did not incur the harm that the statute was designed to protect (protection of diseases instead of dog bites)*
- *Ferrel v. Baxter* (1971): Baxter, Π, sued for personal injuries suffered when Δ, Ferrell drove car into truck. Yellow line was partially worn away, although lanes could be seen due to marks made in snow by other cars. Δ claims she was driving in her side of the road, and truck drove in center. Truck driver & Baxter claim Δ drove in center. *Rule: Court ruled instruction to jury was proper given Restatement. (adoption of negligence per se) Instruction included explanation of negligence per se, and result if defendant offers excuses.*
- If plaintiff does not satisfy one of the elements, she does not necessarily lose the claim. She just cannot prove the second element of her claim – breach of a standard of care – by proving a violation of a standard...she must show negligence under the reasonable person standard.

**vs. Child Standard of Care:**
- **Bauman v. Crawford** (1985): Plaintiff injured while riding bicycle with no headlights, in violation of Seattle Municipal Code. Driver of automobile was 14 years old. **Rule:** The jury must be instructed of special child’s standard of care. The jury may then be instructed that violation of a relevant statute may be considered as evidence of negligence, only if the jury finds that a reasonable child of the same age, intelligence, maturity and experience as petitioner would not have acted in violation of the statute under the same circumstances.

- **Res Ipsa Loquitur:** circumstances bespeak negligence by themselves (form of circumstantial evidence)
  - Circumstantial evidence: evidence of facts from which a jury could infer that the defendant was negligent
    - Ex: Banana peel plaintiffs: try to offer circumstantial evidence to prove that banana peel was on the floor long enough that store employees should have seen and removed it. (Banana peel was black, gritty, or trampled flat) [Clark v. Kmart Corp (1991) – imprints of “thick rubber shoes”]
  - **Byrne v. Boadle** (1863): doctrine originated in this case; plaintiff was hit on head by a flour barrel which fell from defendant’s second story window
    - Judges reasoning: flour barrels don’t just fall out of windows; when they do, it is the result of negligence of the person in control of the circumstances
  - **Elements of res ipsa loquitur (Restatement):**
    - 1. Accident would not have happened w/o negligence
    - 2. Instrumentality under exclusive control of defendant(s)
    - 3. No contributory negligence by plaintiff
    - 4. Evidence within the control of the plaintiff (not necessarily an element)
  - **Element #2 (Focus on Control):**
    - **Escola v. Coca-Cola** (1944): Courts have concluded that bottles typically do not explode unless someone is negligent in filling/handling the bottle. Defendant did not always have control of the bottle; bottles were relinquished and kept in the hands of restaurant plaintiff was working in. Court ruled that it was sufficient and highly probable that the bottles were defective before they were handed over. Because tests were so extensive, it seems sufficient that a bottle would not have exploded if due care had been used. (Defendant does not need exclusive control)
  - **Procedural concerns:**
    - Plaintiff’s burden of proof: the more probable cause was negligence
      - **Harder v. Clinton** (1997): burden of proof shifted to the defendant; party has better access to disprove this
    - Fact that the event happened gets plaintiff into 50% range, and plaintiff gets to see a jury; duty, breach, and causation are met (shuts down discussion of them); covers burden of persuasion
    - Res ipsa loquitur allows plaintiff to escape a directed verdict and reach a jury trial. Jury then decides whether the accident was more probably than not the result of defendant’s negligence. (Jury is “permitted” to infer negligence)
    - Defendant: focus on proving the actual cause of the accident, or attack the foundation elements; show contributory negligence
    - Jurisdiction of inference: plaintiff puts on evidence of three elements & the defendant does nothing, the jury may or may not infer negligence; plaintiff obtains burden of persuasion and production [Restatement]
    - Jurisdiction of presumption (res ipsa as a doctrine): plaintiff puts on evidence of three elements and defendant does nothing, jury must find negligence (burden of production shifts to defendant while burden of persuasion still lies w/ plaintiff) [Colorado law]
  - **Ybarra v. Sp Vanguard** (1944): Plaintiff injured while unconscious during surgery. *Multiple defendants and instrumentalities.* Courts rule everybody had exclusive control at one point during process: defendant must show they did not breach duty. [Several defendants liable.] Defendants forced to show who did this since they were awake and have more information. Tests for exclusivity of control not followed b/c of special circumstances.
• **Joint & Several Liability:** II can collect from any of the Δ’s; who then sue other Δ for portion of the recovery

o **Medical Malpractice:**
  - **Modified Locality Rule:** “Standard of care is...degree of care, skill, and proficiency commonly exercised by ordinary careful, skillful, and prudent persons at time of operation and in similar locations.”
  - **Vergara v. Doan** (1992): Slight modification of the Modified Locality Rule. Degree of care: practitioners in same class acting under same or similar circumstances (some courts provide a distinction for care & skill vs. resources; i.e. national skill vs. locational resources)
  - Plaintiff must provide expert testimony to show customary practice and defendant’s deviation from it
  - **Mireles v. Broderick** (1994): Expert testimony put on by plaintiff did not destroy res ipsa claim. Inference of negligence does not have to be strictly within the common knowledge of jurors. Expert testimony cannot testify to causation, i.e., stating “the injury was caused by the defendant.”

- **Disclosure:**
  - **Professional standard:** what do other physicians disclose?; what is expected of others in the medical community [one size fits all]
  - **Patient/Laymen standard:** deal w/ the particulars of each patient and what they individually needed to know. Would the patient have undergone the procedure if they had known the information.
  - **Phillips v. Hull** (1987): Informed consent an issue of material fact. Patients burden of proof: 1.] Factual determination/proof that material risk was unknown to patient; 2.] Failure to disclose the risk; 3.] Disclosure would have led reasonable person to have not elected surgery.
  - Physician’s defense against *prima facie* case:
    - 1.] Disclosure made to parents
    - 2.] Emergency
    - 3.] Obvious risk
    - 4.] Freak risk
    - 5.] Simple procedure w/ remote risk
    - 6.] Candid & complete risk have detrimental effect on the patient
  - Professional standard of care vs. reasonable standard of care: Ex – paramedics have professional standard of care when applying medical services and reasonable standard of care when paramedics perform services not requiring training or judgment

- **CAUSATION:**
  - **Causation in fact:** As a factual matter, the defendant’s act contributed to producing the plaintiff’s injury
  - **But for causation:** “event would not have occurred but for that conduct”
    - Can be instances of multiple “but for” causes
    - No requirement that the defendant’s act be the *sole* “but for” cause of the injury, only that it be a “but for” cause
  - **Sowles v. Moore** (1893): Horses ran into opening in frozen lake and drowned. Statute imposed a fine for failure to place suitable guards around similar openings. Plaintiff sustained injuries and defendant was negligent. **Rule:** Plaintiff cannot recover even though defendant was negligent, since even if the defendant exercised due care, the accident would not have been prevented – but for the lack of a guard rail, the accident would still have occurred.
  - **New York Central R.R. Co v. Grimstad** (1920): Barge was not equipped with proper appliances. Decedent fell into water; wife came out, discovered husband and ran back into cabin. She came back out and he drowned. **Rule:** Jury was left to pure conjecture on whether a life-buoy would have saved decedent from drowning. In cases such as this, where there is no evidence that plaintiff’s injury would not have been sustained but for the defendant’s negligence, cannot find for the plaintiff.
• **Problem w/ test**: We do not know for sure if things would have come out differently if defendant was not negligent. (Ex: Plaintiff suffers chest pains and his doctor fails to diagnose it as a heart attack and provide suitable emergency treatment – would patient have recovered or was death inevitable?)
  o Jury must not only decide what actually happened, but must also speculate about a hypothetical alternative version of events
• **2nd Problem w/ test**: What happens when two defendants act negligently, and either’s act would suffice to cause the plaintiff’s injury?
  o **Corey v. Havener (1902)**: Two motorcyclists roar past plaintiff’s horse and wagon, scaring horse and injuring plaintiff. Causation cannot be established through “but for” approach. **Rule: Substantial Factor Test** – If each contributed to the injury, that is enough to bind both. If both defendants contributed to the accident, the jury could not single out one as the person to blame.
• Utilize “but for” test for most situations
  ▪ **Substantial Factor Test**: Jury makes intuitive judgment both as to what degree of causation is “substantial” and whether defendant’s negligence reaches that level
  ▪ Alternative approach for when “but for” causation does not yield satisfactory results
  ▪ **Mitchell v. Gonzales (1991)**: Defendants invited Demetrie, little boy, to lake to swim. Mr. & Mrs. Gonzales told their son Luis and Demetrie to stay in shallow water. Demetrie drowned. **Rule**: Jury should have received substantial factor instruction, instead of being focused on Demetrie’s inability to swim. “But for” test does not work under these circumstances.
  ▪ **Smith v. J.C. Penney Co., Inc. (1974)**: Plaintiff badly burned when gasoline fire broke out and ignited her flammable fake fur coat. Gasoline line blew spray of gasoline out of vehicle’s opened tank through open door into heater. Heater ignited gasoline on floor which ignited her coat. **Rule**: Hold defendants responsible if they contributed a substantial factor. (Gas service station)
  ▪ **Proof of Causation**:
    ▪ **Res Ipsa Loquitur**: (probabilities negligence) relaxed burden of proof on breach of duty and causation
    ▪ **Ingersoll v. Liberty Bank of Buffalo** (1938): Ingersoll rented two family apt. w/ basement downstairs. Stairway was shaky and lose, never repaired. Decedent fell down stairs @ bottom grasping chest, and died. **Rule**: Even though there are several causes of injury, if plaintiff can show strong enough evidence of causation when viewed w/ most favorable inference, case can go to a jury.
    ▪ **Phillips v. Peril of Pauline Food** (1995): Phillips assaulted in parking lot at Saska’s. Restaurant took minimal security precautions. Nearby restaurant did not experience problems the same night. **Rule**: In determining whether an untaken precaution is a proximate or legal cause for injuries, must look at circumstances if precautions were to have been taken. Rely on assumptions of what if valet would have brought car out, or if workers had come out if they saw the incident on cameras. Also rely on what happened at nearby restaurant.
    ▪ **Zuchowicz v. United States** (1998): Zuchowicz filled prescription. Doctors and pharmacists prescribed wrong dosage of PPH. **Rule**: Courts have been willing to infer causation when the risk which we could anticipate actually occurred even if we can’t say for sure. Court in this case reasoned that FDA does not approve prescription of new drugs above dosages b/c of untoward side effects; rule is meant to reduce the risk. [Cardozo & Traynor: if negligent act was deemed wrongful b/c it increased chances that particular type of accident would occur, and mishap of that sort did happen, this was enough to support finding by trier of fact that negligent behavior caused harm]
  ▪ **Multiple Parties: Apportionment of Damages or Joint Liability** – Courts typically hold each defendant liable for entire harm. Plaintiff limited to only one recovery of damages.
    ▪ **Fugere v. Pierce** (1971): Plaintiff’s car hit in the front by an oncoming car and on the left side by a car following too closely. Plaintiff stated impact on front left side door
was more severe, and recalled hitting her abdomen. Plaintiff’s physician testified injuries result of severe blow to abdomen. **Rule:** Tortfeasor held jointly and severally liable for all of plaintiff’s injuries if the injuries are “indivisible” and the liability therefore cannot be allocated with reasonable certainty to the successive collisions. Burden of proving that harm can be separated falls upon those defendants who contend that it can be apportioned; if competent testimony exists, it becomes a question for the jury.

- **Loss of a Chance of Recovery**
  - Cases where negligent diagnosis may have shortened a life: if patient would have died anyway, there is generally no claim
  - What if the only thing lost is a chance (of six more months of life)?
    - “But for this negligence, would the plaintiff have had six more months to live?”
    - Many courts have rejected loss of chance cases where chances are less than 50%.

- **Shifting the Burden of Proof – Alternative Liability:**
  - **Summers v. Tice (1948):** Two defendants fired shotguns, and a pellet from one or the other injured the plaintiff’s eye. Both defendants were negligent, but it was impossible to show that it was “more probable than not” that either defendant’s pellet had hit him. **Rule:** Alternative Liability: Where two defendants commit substantially similar negligent acts, one of which caused the plaintiff’s injury, the burden of proof shifts to each defendant to show that he did not cause the harm. [In this situation, it must be clear that one of the acts of negligence caused the injury and all potentially negligent parties are present in court]
  - **Barron v. Martin-Marietta Corp. (1994):** Two sets of plaintiffs – three who worked in the morning, and three who worked in the afternoon allege injuries from inhaling fumes. Morning plaintiffs handled only one canister, which was made by defendant, while afternoon plaintiffs handled six canisters, three of which were made by defendant. Plaintiffs want burden of proof to shift to defendants under alternative liability. **Rule:** When no evidence exists that defendant acted tortiously and all possible defendants have not been brought, burden of proof cannot be shifted.

- **Market Share Liability:**
  - California Approach (**Sindell**):
    - 1.] Unclear as to whether plaintiff recovers 100% if defendants each give exact market shares.
    - 2.] Defendant can avoid liability by proving it had no market share.
    - 3.] Defendant not jointly liable: i.e., not liable for other defendant’s damages if other defendant cannot pay.
  - Modified California Approach (**Brown v. Superior Ct.**)
    - 1.] Manufacturer’s liability is several only; plaintiff may recover less than 100%.
    - 2.] National market share
  - Washington Approach: **Martin Labs**
    - 1.] Plaintiff does not bear burden of proof on market share, defendants do.
    - 2.] Plaintiff recovers fully, since market shares of defendants who don’t prove their actual share expand to cover shares of makers who were not served.
    - 3.] Plaintiff can sue just one maker. Defendants have strong incentive to implead other makers.
    - 4.] Defendant can avoid liability by proving it had no market share
  - Wisconsin Case: **Collins v. Lilly**
    - 1.] Defendant held proportional to risk; question of fact to each individual case
  - Michigan Approach:
    - 1.] Defendant can avoid liability by proving it did not manufacture DES for defendant.
2. Any maker who doesn’t make such proof is jointly and severally liable to plaintiff for her damages.

- Holding in *Summers v. Tice* not extended to market share cases, since it would be impossible to bring all defendants to court
- *Hymowitz v. Eli Lilly Co.* (1989): Plaintiff’s mother ingested DES during pregnancy. Plaintiff faced two distinct challenges: 1.] there were multiple DES manufacturers and 2.] Statute of Limitations would run before condition was noticed. Legislation addressed SoL problem instituting “discovery rule” and reviving for one year causes of action. **Rule:** Plaintiff who proves injury from mother’s ingestion of DES recovers from any defendant who participated in the United States market for DES. No defendant can exculpate themselves, even if they offer proof they had no market share at the time. **Defendants are only severally liable. Rationale:** effective deterrent; larger companies are better able to know defects and discover risks due to deep pockets
- *Brenner v. American Cyanamid Company* (1999): Richard Brenner became ill after ingesting lead-based paint chips and dust. In 1992, the Brenners moved into the house built in 1926. Richard was diagnosed with severe lead poisoning and suffering neural dysfunctions. **Rule:** Where there is a problem of direct proof, and a high percentage majority of the defendants have not been named, plaintiff will not be able to use market share theory and instead will have to rely on paradigm case.

### Scientific and Technical Evidence to Prove Causation:

- **Epidemiological Studies:** Arbitrary risk level of 2.0. Some courts have adopted it [*Merrell v. Havner*, 1997] while others did not see the point in it [*Grassì v. Johns*, 1991]
- **Fry Test:** decision in hands of medical field for causation; if generally accepted in scientific community, it is appropriate and reliable evidence.
- **Daubert v. Merrell** (U.S. Supreme Ct., 1993): requires federal trial judges to determine whether expert opinion evidence has sufficient scientific reliability for it to be presented to a jury. Only applied to evidence questions in federal courts. Is the information **reliable and relevant?** [Opinions should be based on good grounds]
- **Kunho Tire:** Use for any specialized knowledge (scientific and technical) has to go through analysis of reliable science
- **General Causation** (Epidemiological studies) vs. **Specific causation** (Specific case you are dealing with; tying person’s injury w/ that toxic substance)
- **Globetti v. Sandoz Pharmaceuticals** (2000): Pregnant women with her sixth child takes Parlodel in order to suppress lactation. Π suffered an acute myocardial infarction. Π’s cardiologists and experts expressed opinions that the drug caused the AMI. No epidemiological test used. **Rule:** Where epidemiological tests are not practical, and experts’ opinion is based on facts known and established through appropriate scientific methodologies (animal studies, medical literature reviews, ADR’s, medical texts, etc.), the opinion will be allowed.
- **Glastetter v. Novartis Pharmaceuticals** (2001): Plaintiff suffered intracerebral hemorrhage two weeks after taking Parlodel to suppress lactation. Plaintiff had migraines prior, was overweight, and was a heavy smoker. **Rule:** (Contradicts Globetti) When there have been no epidemiological studies, and the plaintiff’s experts have relied solely on case reports, texts, animal studies, and the FDA, the opinions cannot be said to be based on reliable evidence.

### Vicarious Liability: employers should be liable for the torts of their employees in the scope of their employment

- **Types of Rationale:**
  - 1.] employers are able to select and control their employees, and thereby prevent injuries
  - 2.] device to provide a “deep pocket” able to pay the Π’s damages
  - 3.] employers are in position to spread the costs of accidents by purchasing liability insurance and raising the price of their products to reflect the inherent accident costs
Where risks are created for master’s benefit, it seems intuitively fair to ascribe the conduct to the party for whom the benefit is undertaken.

- **Employer is liable if he is an “employee” and acts in the “scope of employment”**
  - **Employee**: Factors to consider (NO NEED TO MEMORIZE)
    1. Extent of control master is authorized to exercise over details of the work
    2. Whether actor is engaged in distinct occupation (employee) or business
    3. Whether work is customarily performed under employer’s supervision or by specialist w/o supervision (contract), and the extent of skill required.
    4. Who supplies tools, equipment, place to work
    5. Length of time for which person is employed (shorter period = contractor)
    6. Whether person is paid on time basis or by job (hourly/weekly = employee)
    7. Whether employer is in business, and whether work is part of employer’s regular business
    8. Parties’ belief as to nature of relation

- **Conduct is within scope of employment if:**
  1. *it is of the kind he is employed to perform*
  2. *it occurs substantially within the authorized time and space limits*
  3. *it is actuated, at least in part, by purpose to serve master*
  4. *if force is used intentionally by servant against another, the use of force is not unexpectable by master.*

- **Anderson v. Gobea**: Gobea took air compressor, which was mounted on the back of his truck, to the job site the next morning. Δ collided w/ another vehicle. **Rule**: Normally, the drive to and from work is not within the employer’s scope of liability. The exception is when the drive to and from work is essential and determined to be part of the employment.

- **Riviello v. Waldron**: Cook took out pocket knife while chatting with regulars and accidently stabbed customer. **Rule**: An act is within the scope of employment, if the employer could have anticipated in the course of the cook’s activities he might do some injury.

- **Frolic vs. Detour**:
  - The court takes into consideration 1.] the kind of activity; 2.] location of activity; 3.] length of activity; 4.] other persons engaged in activity
  - Is the detour reasonably foreseeable?
  - Employer liable for detour, not frolic
  - **Pine v. Witmer**: Δ involved in accident after driving back from taking certification test. Δ was intoxicated. Wreck occurred two and a half hours after the test was taken. **Rule**: Evidence which is inconclusive as to whether Δ was on a frolic or detour, sufficient to get to a jury. Mere passage of time does not mean frolic.

- **Dual purpose role – Wilson v. Joma, Inc**: Employee went to go pick up lunch and was involved in an accident. Employees not permitted to leave station during business hours. This was done not to inconvenience customers: not formal policy. **Rule**: Where an employer has a firm policy in effect to benefit the customer, and employee is serving this interest by going to pick up food to bring it back, the employee serves a dual purpose role – for both him and the employer.

- **Intentional torts**: Employers held liable for some intentional torts
  1. Intentional tort committed to serve employer’s purpose
  2. Brawls arising in course of work: courts mixed – some say employer is liable b/c it is incidental to the work
  3. Sexual contacts in medical care/psychotherapy – courts mixed
• **Olson v. Connerly:** Δ engaged in sexual contact w/ vulnerable Π as part of his counseling. Π worked for Δ. **Rule:** Where the employee’s personal purpose trumps the employer’s purpose, and the act does not further the employer’s goal, the employee is acting outside the scope of employment.
  o 4.] Abuse of official position to facilitate intentional tort: tort is not motivated by work or work purpose - courts deny recovery
  o Outcomes are policy choices which courts differ

• **Emergency Employee Rule:** Marter v. Scott: Off duty Pepsi employee involved in accident while helping out fellow employee whose truck was on the side of the road. **Rule:** Courts will not impose employer liability where one person is asking the other to simply do a favor and there is no emergency situation.

• **Independent Contractors:** employers are generally not held liable for torts of independent contracts.
  o Non-delegable duty: **The contractor’s independence does not always absolve the owner of responsibility, since courts often refuse, for policy reasons, to allow owners to wash their hands of the matter by hiring out the work**
  o Owners can be negligent in their hiring of the independent contractor: choosing them for the wrong job, failing to supervise the contractor, etc.

**SCOPE OF LIABILITY:**

- There is a difference between a proximate cause and a “cause in fact.” Proximate cause describes a “legal cause” to emphasize the issue of whether liability should be imposed, not whether the Δ’s act was a cause-in-fact of the Π’s harm. The court must draw the line to limit liability for the consequences of a negligent act.
- **Direct Consequences** Test:
  o **In Re Polemis and Furness, Withy & Co:** Workman dropped board into the hold of Π’s ship, which caused a spark and ignited petrol vapors in hold, destroying ship. **Holding:** Explosion deemed unforeseeable, Δ was still liable. **Rule:** If Δ’s act is the “direct cause” of the Π’s injury, as opposed to a “remote” cause.
  o **Problems with Test:**
    ▪ 1.] **Restrictive:** cuts off intervening forces
    ▪ 2.] Sometimes we agree that Δ’s act led directly to the harm, yet he should not be held liable
    ▪ 3.] Limitless

- **Foreseeable Consequences** Test: whether Δ, at the time he acted, could foresee the risk that injured the Π
  o **If the Δ should have anticipated a particular risk at the time he acted, and he negligently failed to avert that risk, he would liable if that risk caused the Π’s harm.**
  o **Wagon Mound:** Δ’s oil fouled the waters around the Π’s dock, where welding was in progress. Oil was unlikely to burn, but it did, through a strange concatenation of circumstances. **Holding:** Fouling of the slips foreseeable. Δ was not liable for unforeseeable fire which destroyed dock. **Rule:** One is only liable for foreseeable damages; foreseeable harm should be measure of liability.
  o **Palsgraf v. Long Island:** Δ’s conductors negligent in assisting rushing passenger onto a moving train, causing him to drop a package. Package contained firecrackers, which exploded, overturning scales a distance away. Scales fell and injured Π. **Holding:** Conductors could not anticipate injury to Π from their conduct. She was an “unforeseeable Π” whom no unreasonable risk could be anticipated. **Rule:** Person involved in act or omission must be foreseeable. Harm to that person or interest must be foreseeable. (Cardozo also says victim must be within the “zone of danger.”)
  o **Stafford v. Neurological Medicine, Inc.** Decedent went in for a brain scan, was cleared. Δ’s followed insurance company policy of prohibiting “rule out diagnosis.” Insurance claim, which stated she had brain cancer, eventually made its way to decedent’s home. Decedent committed suicide. **Holding:** Facts meet foreseeability test. **Rule:** When determining foreseeability, courts take into account the circumstances surrounding the victim (age and medical history). (Jury: could find that it was reasonably foreseeable that patients would see a copy of the forms, and that this would result in suicide)
  o **Bigbee v. Pacific Telephone and Telegraph Co.** Π was severely injured when automobile driven by Δ struck telephone booth in which Δ was standing. Booth was defective in design/manufacture that door to booth “jammed and stuck” trapping Π inside. Booths nearby previously hit. **Rule:** Given the circumstances, swift traffic on a major thoroughfare, and the risk surrounding them, intoxicated drivers,
it is reasonably foreseeable that a booth might be struck by a car and cause injury to a person trapped within.

- **Supervening Cause**: If intervening cause is foreseeable, or intervening cause was not foreseeable but the consequences are the type that the Δ can see, the intervening cause will not cut off liability.
  - **McClenahan v. Cooley**: Δ left keys in ignition in parked automobile. Thief took car and crashed into another automobile. Δ was a police officer. **Rule**: Test to determine if there is a cutoff of liability –
    - 1.] party is a substantial factor in bringing about harm complained of
    - 2.] no rule or policy which should relieve wrongdoer from liability b/c of manner in which negligence has resulted in harm
    - 3.] harm is reasonably foreseeable or anticipated.
  - Sometimes, third party intervening conduct, **even though foreseeable**, is so egregious, a court is motivated to conclude that the third party alone is responsible for the damages and that his conduct superseded the negligent conduct of the initial actor.
    - **McLaughlin v. Mine Safety Appliances Co.**: Nurse applied heating blocks to child who almost drowned in lake. Nurse applied blocks directly to child’s skin, causing third degree burns. Fireman, who was present at Δ’s demonstrations on proper use of block, stated he warned nurse. Infant’s aunt said there was no such warning. Furthermore, only on outside of containers was there instruction on proper use. **Rule**: If intervening act of negligence is extremely egregious, it can supersede the negligence of the Δ and insulate it from liability. [In this case, it was still reasonably foreseeable that the blocks would find their way to an unwarned third person]
    - **Restatement §435**: There is no cut off of liability if actor foresaw or could have foreseen the manner in which the harm occurred. Look back at what happened, and if they are highly extraordinary, we are not liable. (does not conform to Hand’s approach)
    - **Allen v. Shiroma**: Δ negligently caused an accident. Π got out and directed traffic. Π gave keys to young man to move his car. Π eventually hit with car. **Rule**: Where the injuries resulting from a supervening cause are “highly unusual,” the event is not considered foreseeable.

- **Medical Malpractice Complications**:
  - **Association for Retarded Citizens-Volusia v. Fletcher**: Decedent had severe developmental disability and suffered grand mal seizures. Decedent swam to deep end when counselors were not looking and drowned. He was resuscitated but died nine days later. **Rule**: Initial tortfeasor cannot defend against a claim of negligence by proving that Π’s injuries were aggravated by subsequent negligent medical treatment.

- **Rescuers**:
  - **Sears v. Morrison**: Δ tripped and swamp cooler fell on top of him. Π injured trying to rescue Δ. **Rule**: Actor is liable for injuries sustained by a person who is trying to rescue the actor from his own negligence.
    - Δ, under these circumstances, has a duty to prudently manage his person so as not to endanger others.
  - **Oscar Klein Plumbing & Heating v. Boyd**: Rescue doctrine can be extended to property. **Rule**: Rescue doctrine does not apply, when property is not in imminent peril.

- **Criminal Conduct of a 3rd party**:
  - **Price v. Blaine Kern Artista, Inc.**: Π, wearing oversized caricature mask, was pushed from behind causing weight of mask to strain and injure his neck as he fell to the ground. **Rule**: The criminal conduct of a third party does not insulate the Δ, where the trier of fact can reasonably find that the Δ should have foreseen the possibility or the probability of some sort of violent reaction.

- **Guidelines**:
  - 1.] If Π’s injury is truly beyond the type of harm to be expected from the Δ’s conduct, the Π will virtually always go uncompensated.
  - 2.] Where a particular type of injury to the Π is foreseeable, the Δ is liable for the injury sustained, even though it is more serious than might have been anticipated.
    - “Thin Skull” Rule: the fact that the victim is more susceptible to injury than the average person is not a defense to liability.
    - **Pace v. Ohio Department of Transportation**: Δ struck vehicle of Π’s, who was a diabetic. Π injured finger, incurred treatment, and eventually had to have it amputated. Treatment frustrated b/c she was a diabetic. **Rule**: Even though a particular injury may be aggravated by physical condition of person, the tortfeasor is still liable.
3. Cases distinguish unforeseeable consequences of a negligent act from consequences that are foreseeable but take place in an unusual manner.
4. Injury does not have to be likely or probable in order to be foreseeable in proximate cause analysis.

**Exceptions:** sometimes courts refuse to hold A’s liable for injuries that could have been foreseen

- Secondary Economic Losses: ex: restriction of liability for fire damage to the first adjacent property burned
  - Policy reasons behind the decision: imposing too much of a burden of liability

**DAMAGES:**

- **Single recovery rule:** P must prove both past damages and any future losses he is likely to experience from the injury in one single trial.
  - P can recover for future consequences of an injury if he proves that they are “reasonably probable”

- **Procedural:**
  - Judge has the capability of reducing the jury’s award for damages
  - Standard appellate courts use in determining whether damages are excessive:
    - 1. “whole man” test
    - 2. compare it to other cases with similar damages
    - 3. “shocking the conscience of the court:” if damages are way out of line from previous cases, then courts will say it is an excessive award
    - 4. Special damages should be roughly equal to general damages

- **ELEMENTS OF COMPENSATORY DAMAGES:**
  - **MEDICAL EXPENSES:**
    - Past medical expenses: fairly easy to calculate; submit medical and hospital bills; offer expert testimony to prove the reasonable value of losses
    - Future medical expenses: harder to attach dollar sums to future expenses
  - **LOST EARNINGS AND EARNING CAPACITY:**
    - Lost Earnings: past income losses due to injury; earnings lost b/w the time of injury and the time of trial
      - Factors:
        - 1. P’s earnings record for period immediately prior to accident
        - 2. evidence of likely advancement had he no been injured
        - 3. evidence concerning changes in salary structure of his employer
    - Earning Capacity: loss of future earning potential
      - Factors:
        - 1. length P would have worked had he not been injured: depends on the type of work he did, life expectancy, state of health prior to injury, level of interest in his work
        - 2. factors which would have forced P to retire early
        - 3. type of work P would have done had he not been injured
        - 4. salary during the years the P would have worked
        - 5. fringe benefits: health insurance, company car, educational credits, bonuses, stock options
        - 6. P could have built a retirement fund
  - **PAIN AND SUFFERING:**
    - Physical pain:
      - Factors:
        - 1. Impact of the accident
        - 2. On-going pain from a wound or long term discomfort from a permanent condition (limp or a weakened back)
        - 3. Pain of medical procedures
    - Mental suffering:
      - Factors:
        - 1. Humiliation, anguish, or embarrassment suffered from living w/ permanent disfigurement
        - 2. Frustration of dealing w/ disability caused by the injury
3. Fright associated w/ traumatic accident
4. Fear of recurrence of accident
5. Depression

- Majority of pain and suffering damages go into attorney’s pockets
- Arguments against pain and suffering: it is subjective; people suffer in different ways
- *Williams v. City of New York*: Π rendered unconscious by accident, and although he reacted once or twice to painful stimuli by opening his eye, he was given no anesthesia during surgery. Π pronounced dead 17 hours after surgery. Π’s expert conceded that opening of eye is not indicative of pain. **Rule:** *If there is no pain, there is no compensation for pain.*
- *Piehnik v. Graff*: Π hit by vehicle, and decided not to have a laminectomy. Π’s election not to have surgery resulted in psychological and physical injuries. Π wants to testify as to the advice his ex-wife and daughter gave to him. **Rule:** *Where the jury finds the Π’s election not to have surgery unreasonable, it will reduce its award of damages.*

**LOSS OF ENJOYMENT OF LIFE**: loss of the opportunity to engage in many of life’s pleasurable activities

- Juries decide
- Some courts treat this as a separate element, others treat it as part of “pain and suffering”
- **Rationale for courts which treat it as part of “pain and suffering”:** it duplicates the pain and suffering instruction and invites the jury to compensate the Π twice for the same losses
- **Rationale for separate element:** Pain and suffering compensates the victim for physical & mental discomfort caused by injury; loss of enjoyment compensates victim for limitations on person’s life created by injury.
  - *Eyoma v. Falco*: Π existed in comatose condition for over a year until he died. **Rule:** Loss of enjoyment of life is a separate and distinct item of damages, recoverable in a *survival* action. Furthermore, while coma might prevent further pain and suffering, it does not diminish loss of enjoyment which the human being would have otherwise experienced.
  - *Mercado v. Ahmed*: District court refused to allow testimony of economist Smith, who would have testified as to the monetary value of “the reduction of Π’s ability to engage in and experience the ordinary value of life that he was experiencing prior to the injury – hedonic damages.” **Rule:** *Where an expert witness does not know better than the average juror how much a life is worth, his testimony will not be allowed.*

**COLLATERAL COMPENSATION SOURCES:**

- Rule prevents Λ’s from informing juries of
  - 1. *insurance policies contracted for and paid for by Π’s*
  - 2. *governmental benefits contingent upon Π’s financial need or status*
  - 3. *gratuitous services rendered to Π*
- **Theory:** Π has made some financial decisions/sacrifices in anticipation of getting compensated; Λ should not benefit for Π’s good planning
- *Washington v. Barnes Hospital*: Π, who suffered permanent brain damage due to medical malpractice during childbirth, had needs for special education/speech therapy. **Rule:** *The collateral source rule does not exclude evidence of free public school programming.*
  - Education expenses are paid for by everyone, where as medical insurance is contracted for
  - Π did not contribute financially to public education
  - **Subrogation:** *If you recover (from insurance companies or others) what the Λ’s paid out, you have to pay them for it.*

**NON-ECONOMIC VS. ECONOMIC:**

- A variety of jurisdictions have enforced a cap on non-economic damages

**VALUING FUTURE DAMAGES:**

- **Actuarial tables:** figure out how long the person would have lived or how long the person would have worked
- **Time value of money:** a dollar today is worth more than a dollar tomorrow; must take this into account since damages are awarded in a lump sum today for what should benefit the Π years down the road
**Inflation adjustment**: increase in future wages, etc. to account for inflation
- **“total offset method”**: rate of inflation and the rate at which the award will earn interest will be roughly equal over the future years (increase for inflation and the decrease for discounting to present value cancel each other out)
- **Difference b/w inflation and interest rates**: Subtract inflation from interest rates, which tend to run about 1 to 3 percent higher.

**Taxation**: some courts require juries to factor in the effects of taxation
- Judgment itself cannot be taxed: “*tort awards received on account of personal physical injuries or physical sickness are not taxable income.*”
- Some courts allow instruction to jury that award is not taxed

**Expert testimony**: use of expert testimony from economists – offer opinion on matters such as likely future income, rates of interest \( \Pi \) should earn on damage award to replace future earnings, proper sum to replace future wage loss, etc.

**Wrongful death**: claim for damages for tortiously causing the death of another
- Allow for losses suffered by surviving relatives, such as the loss of economic support or society of the decedent
- **Common law**: barred recovery for wrongful death
- **Legislature**: established the right to recover for wrongful death; WE PULL OUT A STATUTE AND APPLY IT
- An action for a recognized tort: \( \Pi \) must prove the same elements as in a personal injury negligence claim – duty, breach, causation, and damages (only one that differs)
- **Who receives compensation**: damages for the economic or emotional losses to the survivors of the decedent
- Recovery limited to losses suffered by close relatives
  - **Estate of Pushruk**: Third party who loaned deceased money and cared for him seek loan compensation. **Rule**: If there is no dependent, money is treated as any other asset in estate. The first people to collect are the dependents, and only if there are still remaining funds or no dependents will it go to the estate and pass to heirs. [Dependency determined at time of child’s death]
  - **Horsford v. Horsford**: **Rule**: Where only pecuniary losses are awarded and there is no evidence of continued dependency, the age of majority is utilized as a point where the reasonable expectations of a child for pecuniary contributions from his parent terminate.
    - allocation formula which was based on pecuniary loss to each surviving statutory beneficiary, or what he or she could each reasonably expect to have received in support and other services from the deceased had he lived
  - **Sykes v. Propane Power Corp**.: Deceased’s girlfriend, who was never formally married to him, has individual damage claims for loss of consortium under Wrongful Death Act. **Rule**: Unmarried cohabitant is excluding from an individual claim of damages. [Illegitimate children can collect]
    - It is too difficult for the legislature to sort out real relationship and not.
- Executor/Administrator of the estate brings the action and distributes the losses.
- Wrongful death damages do not go to creditors

**What losses are compensated**: 
- **Historically**: many wrongful death statutes have limited damages to the “pecuniary losses” resulting to the specified survivors (direct financial contributions or services the decedent would have rendered the survivors)
  - Damages for intangible losses are theoretically barred (loss of society, sexual relationship, advice and counsel of decedent, etc.)
  - Highly restrictive when those who survive the decedent are financially dependent, etc.
- **Modern**: 
Cases where the distinction b/w financial loss and non-economic loss has been blurred
- Poor logic: Allowance of consortium losses when direct victim is injured, but denial of consortium losses when relationship is completely destroyed b/c the direct victim is killed.
- Legislature reform: “Pecuniary losses” include elements such as loss of companionship and mental anguish. (some have capped the limit for non-pecuniary damages)
- Larger losses are compensated rather than simply grief.

- LOSS-TO-ESTATE approach (alternate): focus on loss to decedent’s estate from premature death
  - Formula: calculate decedent’s future earnings, subtracting the amount the decedent would have spent on living expenses, and reduce the net figure to “present value” - purely economic measure of damages
  - Cons: does not support damages for death of retired person who lives off current income for person who is not able to save any money ($20,000 yearly income)

- LIMITATIONS: If decedent is contributorily negligent, statutory beneficiaries are limited in their recovery.
- SURVIVAL CLAIM: action brought by representative of the estate of a deceased person for injuries suffered by the decedent before her death
  - Allows estate of decedent to enforce a tort claim for damages suffered by the decedent before death, which he could have enforced personally had he lived (damages include medical expenses, lost wages, pain and suffering sustained from date of accident until death)
  - Common law: “personal” actions could only be prosecuted by the injured person himself.
    - Π had to do so alive, and if he died before suit went to judgment, the action would be abated and could not be prosecuted further.
    - Δ also had to be alive; if Δ died before suit was brought, Π could not sue his estate
  - Statutes: causes of action survive rather than abate at the death of either the tortfeasor or the injured party
    - Decedent’s administrator/executor can bring suit
    - Π can bring suit against decedent’s estate for tort
    - Do not apply only where the Δ’s negligence causes death; if Π is injured, and then dies of natural causes, administrator can still bring suit

- PUNITIVE DAMAGES: purpose is to punish and deter similar conduct by wrongdoer and others
  - What to look for? – Usually must be proved by preponderance of evidence
    - Evil motive
    - Bad intent
    - Callous disregard
    - Ex’s: battery, environmental harm, fraud, repeated conduct, insurers who refuse to pay off policies, etc.

  - Factors for assessing punitive damages:
    - 1.] Reprehensibility of Δ’s conduct
    - 2.] Δ’s wealth
    - 3.] Profitability of the misconduct
    - 4.] Litigation cost
    - 5.] Aggregate of civil and criminal sanctions against Δ
    - 6.] Ratio b/w harm potentially caused by Δ’s conduct and losses suffered by Π
    - 7.] Award should bear reasonable resemblance to the harm

- Vicarious liability: Courts are split as to whether employers should be vicariously liable; they believe that to effectively deter, the money should come out of the pockets of the responsible party.
- Public entities: cannot be enforced against police department, city, etc.
- Cap: some states cap punitive damages
• **Grimshaw v. Ford Motor Co.**: Ford officials went ahead and produced cars even though the crash tests produced negative results. **Rule**: Punitive damages are awarded when conduct is similar to malicious, i.e. callous and conscious disregard of public safety by those who manufacture and market mass produced articles. [industry in some sort of anti-social state]
  - Commerce related torts: manufacturer may find it more profitable to treat compensatory damages as part of the cost of doing business rather than remedying the defect.
  - Most effective deterrent of defectively designed mass produced articles
• **Young v. Crookham**: 75 persons exposed to E-coli bacteria in a lodge. Δ’s knew of illnesses and kept lodge running. **Rule**: The question of punitive damages is an issue for the trier of fact; the court may neither reexamine nor withhold from the jury such an issue unless there is no evidence to support a finding of malicious or wanton conduct.
  - Courts should not be figuring out case by case how much damages are; it is relevant that the Δ has paid before – how much have you already been punished?

**INSURANCE:**
- **First party interest**: care and services or income to party contracting for service – health insurance
  - **Best Place, Inc. v. Penn America Insurance Co.**: Insurance company believed night club might which burned down might have had unclean hands, and refused payment. **Rule**: Δ’s duty of good faith and fair dealing is unconditional and independent of performance of Π’s contractual obligations. “The insured need not show a conscious awareness of wrongdoing or unjustifiable conduct, nor an evil motive or intent to harm the injured. Unreasonable delay in payment of benefits will warrant recovery for compensatory damages. Conduct based on the interpretation of the insurance contract that is reasonable does not constitute bad faith. Neither does an erroneous decision not to pay a claim for benefits due under policy.”
- **Third party interest**: insurance purchased for benefit of 3rd party – liability insurance (cars); insurance pays 3rd party after liability has been established
  - **Manchester Insurance & Indemnity Co. v. Grundy**: Δ (insurance company) refused to settle injured 3rd parties claim. **Rule**: When determining whether the insurance company acted in “bad faith,” the test should be whether the “insurer’s failure to settle exposed the insured to an unreasonable risk of having a judgment rendered against him in excess of the policy limits.”
    - Jury not equipped to answer this question
- **Subrogation**: A negligently hits B; C is B’s insurance company – C has to pay B for damages, but if B recovers from A, money goes to C

**DEFENSES:**
- **CONTRIBUTORY NEGLIGENCE**: “ones duty to oneself”
  - Used to be complete bar to recovery
  - **Affirmative defense**: Δ has to show Π was contributorily negligent
  - **Exception**: If Δ was reckless or willful there is no contributory negligence defense
  - **Doctrine of last clear chance**: Although Π was contributorily negligent, Δ had last chance to make things right, and that should cut off Π’s contributory negligence
  - **Doctrine of avoidable consequences**: unreasonable behavior by victim that doesn’t cause the accident, but does exacerbate the harm (victim doesn’t get the medical care)
- **ASSUMPTION OF THE RISK**: a person who is aware of a risk, and knowingly decides to encounter it, accepts responsibility for the consequences of that decision, and may not hold a defendant who created the risk liable for resulting injury.
  - Courts accept the argument, that the Π’s knowing choice to encounter danger relieved the Δ of responsibility for resulting injury, even if the Δ negligently created the risk that caused it.
  - **Elements**:
    - 1. Actual knowledge
    - 2. Appreciate the magnitude of the danger (age; how one phrases the risk)
    - 3. Freely encounter the risk
- **EXPRESS ASSUMPTION**:
  - Generally are enforced by courts, even if it is a negligently created risk
Elements:

- 1. Consent to accept the risk must be freely given (sometimes the lack of choice or unequal bargaining power makes the consumers consent “illusory”)
- 2. Π must clearly consent to accept the particular risk that led to the injury (Actual knowledge)
  - Clauses are construed against drafter, and must be quite clear in stating risks
  - Ex: provision releasing Δ from “all claims for personal injury” does not waive recovery for negligence of Δ

Gross negligence can never be disclaimed by an agreement

Foreseeable risks: Express agreements typically revolve around risks that you can foresee; if it is a risk that you cannot foresee or do not expect to occur, court is less likely to enforce express agreement

Express agreement may be contrary to public policy (p. 710)

Δ must prove by preponderance of evidence that Π knew what he was doing when he signed the agreement

- IMPLIED ASSUMPTION: Π may accept risks by engaging in activity w/ knowledge that it entails certain risks
  - Primary implied assumption: risk must be inherent in the activity and unavoidable at a reasonable cost
  - Can be framed as breach of duty: Δ never breaches duty of due care

- SECONDARY IMPLIED ASSUMPTION: Δ breached standard of due care by creating unreasonable care; yet, Π, who is aware of unreasonable risk chooses to encounter it and suffers an injury as a result

- UNREASONABLE ASSUMPTION OF RISK: Π is also contributorily negligent

  Comparative negligence jurisdictions: secondary unreasonable assumption of the risk should be treated as a form of negligence; reduces recovery

  In some jurisdictions, reasonable secondary assumption of risk completely bars recovery

  - Louisiana: If there is assumption of risk, instead of contributory negligence, it is a complete bar.

- Secondary Implied Assumption: unreasonable to take on the risk

- Approaches to deal w/ assumption of risk:
  - 1.] abolish implied assumption of risk; not recognized as a defense
  - 2.] maintaining it as complete and separate defense
  - 3.] merging it into contributory negligence

- COMPARATIVE FAULT:
  - Typically instituted by legislatures
  - Hoffman v. Jones: Rule: Π in a negligence action will no longer be denied any recovery b/c of contributory negligence
  - Wassell v. Adams: Π, staying at hotel, was raped twice. Hotel did not warn Susan nor did they have a security guard. Susan opened door at 1 am. Rule: Trial judge maintains discretion in deciding whether jury’s verdict was against clear weight of evidence. Even where there is an intervening intentional act, contributory negligence can still be used to compare alleged negligence of hotel against Π’s.
  - Should intentional wrongdoing be compared w/ negligence?

- Hutcherson v. City of Phoenix: 911 operator failed to dispatch police quickly, after decedent notified her that ex-boyfriend threatened to kill her. Ex-boyfriend jumped through window and killed decedent and boyfriend. Rule: Jury may apportion fault among Δ’s and non-parties, w/o distinguishing b/w intentional and negligent conduct, or requiring a minimum percentage to be assigned to the former.

- Merrill Crossing Assoc. v. McDonald: Rule: Where an intervening intentional tort is one of the hazards which makes the Δ negligent, the Δ should not be able to reduce his liability.

- Pure: no matter what percentage of fault Π has, she will have damages reduced by that percentage
- Modified Pure: 49% rule; as long as Π’s negligence is no greater than 49%, Π can recover; if Π’s is over 49%, she cannot recover
- **Modified Pure II**: $\Pi$ can recover just as long as his negligence is no greater than defendants. 50-50, $\Pi$ recovers

- **STATUTE OF LIMITATIONS**:
  - As soon as there is any notice of problem, statute of limitations will run: you only need to know that there is a harm, not the extent of the harm (unless some disease develops)
  - Assurances/Fraud: may toll the statute of limitations from running
    - **Gaston v. Parsons**: After procedure $\Pi$ noticed left arm was numb and did not function. $\Delta$ assured $\Pi$ that loss of function in arm was temporary, and would return in six months to two years. $\Pi$ never regained functions. (Statute of limitation: two years) **Rule**: Assurances, as in this case may toll the statute of limitations. Injury requires 1.] harm, 2.] causation, and 3.] tortuous conduct.

- **IMMUNITIES**:
  - **CHARITABLE**:
    - In the past, if you sued a charity, they could claim they were immune from suit.
    - Reasons for hanging onto charitable immunity:
      - 1.] should not divert funds given to charities and divert them to other purposes; that would be outside donative intent
      - 2.] Beneficiary of charity bears the risk of charitable negligence
      - 3.] Donations would be discouraged if charities were liable
    - **Restatement**: no immunity just because of one’s status as a charity.
  - **SPOUSAL**:
    - **Theory**: when parents marry, they become one, and you cannot sue yourself
    - Abolished
    - Used to be that women could not sue on their own behalf; women were eventually given rights to bring actions, just not against their husbands
    - Reasons for spousal immunity in the past: collusion
  - **PARENTAL**:
    - Over time immunity has been abrogated: intentional torts are actionable (some w/ special rules on tolling the statute of limitations)
    - Don’t want to have courts develop appropriate level of parental discipline in specific situations
    - **Illinois rule**: Immunity through conduct which constitutes an exercise of parental authority and supervision over child or exercise of discretion in provision of care to the child. Immunity does not apply where recognized duty is apart from family relationship: such as in automobile operation negligence context.
  - **GOVERNMENTAL**:
    - Based on the notion that the king can do no wrong; you cannot sue the government for tort violation and collect damages
    - Idea of separation of powers; king is a deity
    - **Harry Stoller and Co., Inc. v. City of Lowell**: Fire department used hoses instead of sprinklers, which were used in general practice. Sprinklers probably would have put out the fire. Fire burned down five more buildings. **Rule**: Where the discretionary function involved does not involve any sort of planning or policymaking, governmental immunity does not apply.
    - Judges and legislatures have absolute immunity: need them to feel free to act w/ independence
    - Absolute immunity not granted wholesale to executive officers (prosecutors) unless they have a judicial role.

**INTENTIONAL TORTS**:
- Thin-skull rule holds w/ intentional torts
- Punitive damages allowed for intentional torts at discretion of courts
- Parents: not liable unless they knew or should have known.
- Insurance companies won’t cover unless specifically mentioned or permitted in coverage: if ambiguous, contract construed against insurer.
- **Intentional harm**: “the actor desires to cause consequences of his act or that he believes that the consequences are substantially certain to result from it.” (substantial knowledge may replace desire)
  - No need of hostile intent for causing a particular harm
  - No longer speak of risk, but desire to bring about the consequences.
Brown v. Diversified Hospitality Group: Π shot while working the graveyard shift – she was the only one on. There were no police officers. **Rule:** Where there is only evidence to show that the occurrence of an accident is likely and not substantially certain, the act is not intentional. High probability is not sufficient to establish intent.

Hall v. McBryde: Γ guilty of intentional tort even though was hit as a result of gunshots fired at a car.

ASSAULT, BATTERY, AND INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS:

ASSAULT: an offer to show violence to another w/o striking him

- Apprehension created must be one of imminent contact, as distinguished from any contact in the future.
- Words coupled w/ other acts/circumstances put the other in reasonable apprehension of imminent harmful or offensive contact w/ the person. [Words alone are not enough]
- There must be apparent ability for the threat to be carried out immediately
- Vetter v. Morgan: Δ drove up next to Π, spat on van door, and veered sharply into her lane.
  **Rule:** Where Δ’s threats and acts and circumstances surrounding it could reasonably put someone in Π’s position in apprehension of imminent or immediate harm, Δ is guilty of assault.

- Elements:
  1. Act by Δ
  2. Intent – cannot be accidental
  3. Apprehension
  4. Causation
  5. Lack of consent.

- Nominal damages: typically awarded even w/o provable damages; punitives not likely for assault alone

- Transferred Intent: Your intent to commit one intentional tort may be transferred to another: intent to commit assault is sufficient to commit a battery.

BATTERY: intentional infliction of harmful or offensive bodily contact upon another

- Offensive: disagreeable, nauseating, or painful b/c of outrage to taste and sensitivities or “affronting insultingness”
- Leichtman v. WLW Jacor Communications, Inc: Deliberate blowing of cigarette smoke for the purposes of causing physical discomfort, humiliation, and distress constitutes battery. [Tobacco has physical properties to make contact]
  - Smoker’s battery (not adopted here): imposes liability if there is substantial certainty that exhaled smoke will predictably contact a non-smoker

- White v. Muniz: Π struck by incapacitated 83-yr. old while changing her diaper. **Rule:** A mentally incapacitated adult will not be held liable for battery, if there is no proof that he intended to commit the act and intended the act to result in a harmful or offensive contact.

- Villa v. Derouen: Δ discharged torch in Π’s groin. Δ claims he did it as a practical joke and did not intend to cause Π pain. **Rule:** Even though the resulting injury was not intended, there is still intent if the harmful or offensive contact was intended. [Δ intended for air to come into contact w/ Π’s groin]
  - **Rule:** If you invade someone’s interest that the law might prohibit you from invading, that probably is offensive.

- Elements:
  1. Act by Δ.
  2. Intent
  3. harmful/offensive touching
  4. causation
  5. lack of consent

INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS:

- Elements:
  1. wrongdoers conduct was intentional or reckless – specific intent
  2. conduct was outrageous and intolerable and offends against general decency and morality
    - Consider the totality of circumstances: not each isolated individual incident
  3. causal connection b/w the wrongdoers conduct and Π’s emotional distress
• 4.] Emotional distress was severe
  - A reasonable person would or should have recognized the likelihood of the serious mental distress he would have caused by taking such action
  - Reasons courts traditionally did not want to recognize:
    • 1.] Difficulties in assuring that harm occurred
    • 2.] Verbal abuse is a part of our everyday life
    • 3.] Speculative and sentimental
    • 4.] Difficult to determine if mental distress created physical injury
  - Lies in cases of racial insults/harassment
  - When Δ’s conduct was aimed only at a particular person, Δ is also liable for infliction of emotional distress to members of that person’s family present at the time of conduct if Δ knew of their presence.
  - Dickens v. Puryear: Π lured into rural county. He was beaten, threatened of castration, and told to leave the state or he would be killed. Rule: Where the threat is not of imminent or immediate harm but of future harm and which inflicts emotional distress, Δ is liable for intentional infliction of emotional distress.
  - Other evidence shows people had capacity to go after Π
  - Twyman v. Twyman: Rule: When awarding tort damages to divorcing spouse (intentional infliction of emotional distress), court may not consider same tortious acts when dividing marital estate.

➢ False imprisonment: unlawful restraint of an individual’s personal liberty or freedom of locomotion which directly or indirectly results in the confinement of another
  - Elements:
    • 1.] Act by Δ
    • 2.] [Actual/Legal] Intent to restrain (does not need to be malicious; can be in good faith)
    • 3.] Confinement
    • 4.] Causation
    • 5.] Lack of consent
  - Can be done by words alone, acts alone or both. Actual force is unnecessary though.
    • 1.] Actual or apparent physical barriers
    • 2.] Overpowering physical force
    • 3.] Threats of physical force
    • 4.] Other duress
    • 5.] Asserted legal authority
  - If confinement is not done intentionally, but confinement results: not liable for false imprisonment but could face negligent charges
  - Length of time: Imprisonment must be conducted in a timely manner; if imprisonment is justified, at a certain point in holding it stops being a lawful detention and becomes a false imprisonment
  - Scofield v. Critical Air Medicine: Alternate Air Evacuation company picked up Π’s son and flew him to the U.S. Rule: Contemporaneous awareness is not an essential element of false imprisonment.
    - False imprisonment is a “dignitary tort”: intended to protect one’s personal interest in freedom from restraint of movement
    - Even though Π is not harmed (against Restatement), court rules this way to prevent ambulance jumping.
  - If Π reasonably believed he was detained, that is sufficient.

➢ Malicious prosecution: Δ claims that prosecution w/o probable cause and for improper purpose. It permits original Δ after exoneration to bring an action for expenses and humiliation sustained in the first case.

➢ Abusive process: using court process like a weapon

➢ Trespass to chattels & conversion:
  - Trespass: “an intentional use or intermeddling w/ the chattel in possession of another, such intermeddling occurring when the chattel is impaired as to its condition, quality or value.”
  - Conversion: “An intentional exercise of dominion or control over a chattel which so seriously interferes w/ the right of another to control it that the actor may justly be required to pay the other the full value of the chattel. Intentional destruction or material alteration of a chattel will subject the actor to liability of conversion.” Factors:
1. extent and duration of actor’s exercise of dominion or control
2. actor’s intent to assert a right in fact inconsistent w/ the other’s right of control
3. actor’s good faith
4. extent and duration of the resulting interference w/ the other’s right of control
5. harm done to the chattel
6. inconvenience and expense caused to others

- United States v. Arora: Δ accused of adulterating cells. Cells are no longer useful. **Rule:** Cell lines are recognized property interests capable of protection. Where Δ caused important inconvenience to a research project, did not act in good faith, intended to act inconsistently w/ another’s control, and dominion or control was total, there is conversion, not trespass.

- Conversion limited to cost of actual product, not to loss of intellectual possibility

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- Paccar Financial Corp. v. Howard: **Rule:** Where possession is for so long that it becomes more than a temporary dispossession, courts will find it has a conversion rather than a trespass.

### DEFENSES AND PRIVILEGES:

- **CONSENT:** [->ASSAULT & BATTERY]
  - When consent is given, Δ has privilege to act in particular way – there is no tort
  - Consent can be given by words, implied
  - **Ineffective Consent:**
    - 1. lacked capacity; consent was coerced
    - 2. consenting person was mistaken by nature and quality of invasion
    - 3. conduct was kind of conduct nobody can give valid consent to
      - Organ selling, killing; depends on who gives consent (minor, insane, intoxicated, coerced, mistaken about nature and quality of invasion)
  - Consent can be found invalidated if procured by fraud and duress.
  - **Hogan v. Tavzel: Rule:** If Π’s consent is without knowledge that Δ was infected, Δ can still be held liable for battery.
    - Consent was exceeded: consent to sexual intercourse, but not to get genital warts.
  - **Hellriegel v. Tholl: Rule:** By consenting to horseplay, the Π consents to all the risks associated w/ it.
  - **Actual & Effective Consent:** Reavis v. Slominski: **Rule:** Where there is an abnormality on the part of the alleged victim, and knowledge of the part of the alleged actor, there is effective consent.
    - Sexual Harassment: consent obtained by abusive power renders the consent ineffective.
    - Ineffective consent: based on lack of full knowledge
    - Invalidated consent: may have been full knowledge, but b/c of lack of competency, or abuse of intoxication, we will invalidate what is apparent assent.

- **SELF DEFENSE AND DEFENSE OF OTHERS:** As long as person reasonably believes self-defense is necessary and uses reasonable force, defense will hold. [-> ASSAULT & BATTERY]
  - **Battery:** Interest is being invaded is of such importance, that if a person is reasonably mistaken, there is a privilege of self-defense.
  - **Bradley v. Hunter:** Self-defense found where two women were threatened by man who entered store w/ a gun. Owner concerned for mother’s safety, who was 82 years old.
  - **Juarez-Martinez v. Deans:** **Rule:** One has no duty to retreat in your own home. Normally, one has a duty to retreat anywhere else.

- **DEFENSE OF PROPERTY:** One cannot use defense of threat of property unless there is a threat of deadly force. You have to know what kind of force is coming.
  - **Mistake:** looks to the notion of intent; all we look at is whether you moved your feet instead of whether you honestly believe you’re the owner
  - **Katko v. Briney:** Π broke into abandoned home to steal old jars. Spring gun discharged and shattered Π’s leg. **Rule:** When defending ones property, an evaluation is required of what kind of threat is posed before there can be a serious response. [Not lawful to set up spring gun in home w/ intent to harm someone]

- **NECESSITY:** [-> FALSE IMPRISONMENT/TRESPASS TO LAND]
- **Public Necessity**: If a house is burning, we allow people to break into homes to come and try to save the house. Reasonable that to protect the public, this needed to happen.

- **Private Necessity**: Given the circumstances for me, I need to violate the interests

  - **Elements**:
    
    1. acted under belief that there was a danger of imminent physical injury to the \( \Pi \) or others
    2. right to confine a person in order to prevent harm that lasts only as long as it takes to get the person to proper law authorities.
    3. actor must use least restrictive means to prevent the apprehended harm.

- **Eilers v. Coy**: \( \Pi \) abducted by deprogrammers. \( \Delta \)’s claim that they had a necessity to do it, since \( \Pi \) wrote a suicidal letter. **Rule**: Where \( \Delta \)’s could have turned \( \Pi \) over to police and sought professional help, defense of necessity fails.

- **Rossi v. Delduca**: **Rule**: You have the right to trespass on someone’s land, if it’s reasonable that you feel in danger of serious harm – one has privilege to trespass if it seems reasonably necessary to prevent bodily harm or loss of property.

- **Vincent v. Lake Erie Transp. Co.**: \( \Pi \) trespassed on another person’s waters during storm and moored ship to dock. \( \Pi \) re-secured moorings, so there was damage to dock. **Rule**: In order to claim necessity for unconsented use of someone’s property, interest one is protecting must outweigh use of what is damaged. [No trespass b/c of necessity]