TORTS  
 Tort - A civil wrong for which the law provides a remedy

I – Liability Based on Fault.

* There are 3 theories of culpability:

1. Intentional
2. Negligent
3. Strictly Liable

II – Intentional Torts

Rules for Intent

* Intent - Is concerned with an actor’s state of mind at the time of the act. It is not concerned with motive or even the results of their act. These considerations involve volition, with which intent is not concerned.
* Two analytical tests sufficient to prove Intent:

1. Act with the purpose to cause
2. Substantial certainty

* 1 – Acting with the purpose to cause, generally, is easy to demonstrate. The actor preformed the action to elicit the result.  
  2 – Substantial certainty asks if a reasonable person in the actor’s position would have known the consequences of their actions were greater than a mere risk.
* Transferred Intent – Once intent has been established, intent will transfer from any intentional tort, except IIED, so that an intent to injure A will become an intent to injure B, regardless of the original target.
* Minors – Minors are held to the same reasonable person standard as adults.
* Mental Illness - The same is true for the mentally ill, except for those torts which require specific intent such as deception. The thinking is that those in charge of the mentally ill have a vested interest in the tranquility of their property. If they do not have money, then holding them liable for their damages does not harm them.
* Mistakes – A mistake, even in good faith, does not negate intent. This carries over to cases of
* Mistaken Identity - Which also does not negate intent. Either could influence damages, however.

II – Battery

The tort of battery exists to provide a remedy for actions which trespass on one’s person. It protects physical tranquility.

* A battery is the intentional act of a harmful or offensive contact upon another.
* Prima Facie Case Requirements:

1. Intentional
2. Either a) Harmful or b) offensive
3. Contact

PRIMA FACIE CASE REQUIREMENTS:

1. Intent follows the same rules given before: SC and PTC tests. Keep the list of qualifications in mind.
2. A) Harmful – easy to prove. It is a factual inquiry.  
   B) Offensive – this goes hand in hand with harm. If a person is harmed, they are assumed to be offended as well.
   * There are cases where the person is not harmed and there is a method to determine whether a *reasonable person* would be offended in that situation. To determine offense one must consider:   
     1) The time,  
     2) The place,   
     3) The circumstances, and  
     4) The relationship of the parties
3. Contact – Contact can be either direct or indirect.
   * A battery may occur with or without actual touching, the act need only contact those things commonly held to be a part of one’s person. This includes cloths and things grasped by the hand.
   * Crowded World – Some touching is assumed in the course of our day to day lives.
   * Battery can occur without a plaintiff being conscious.

III – Assault

The tort of assault exists to provide a remedy for the mental damage. It protects mental tranquility.

* An assault is an intentional act which causes the imminent apprehension of contact coupled with the apparent ability to complete a battery
* . Every conscious, observed battery includes an assault.

Prima Facie Case Requirements:

1. Intent
2. Imminent apprehension of harmful/offensive contact
3. Apparent ability

PRIMA FACIE CASE REQUIREMENT of the elements:

1. Intent follows the same rules given before: SC and PTC tests. Keep the list of qualifications in mind.
2. Imminent apprehension – the anticipation of a battery.
   * This is the focus of analysis for assault. Words alone do not constitute an assault because there is no imminent apprehension that they will be followed.
   * One must be conscious to experience an assault.
   * Does not necessitate fear. Only apprehension or anticipation.
   * Use battery’s standard for harmful/offensive contact
3. Apparent ability– a fact sensitive inquiry, and as such, will vary from case to case.
   * Most jurisdictions find that once Im. App. Is found, App. Ab. goes hand in hand.

IV – False Imprisonment

The tort of false imprisonment exists as a remedy for a physical trespass. It protects physical tranquility.

* False imprisonment is the intentional restraint of another’s physical liberty against his or her will without adequate legal justification.
* Prima Facie Case Requirements:

1. Intentional restraint
2. Against the will of another
3. Without legal justification

PRIMA FACIE CASE REQUIREMENT of the elements:

1. Intent follows the same rules given before: SC and PTC tests. Keep the list of qualifications in mind.
   * The restraint does not have to be literally physical; it need only restrict the physical liberty of another. The courts have ruled false imprisonment in an area as large as a state, however, have drawn the line a countries which are deemed too great an area to be imprisoned.
   * Does not include refusal to admit entry.
   * Includes “pranks,” which ties back into the good faith mistake rule.
   * If a reasonable means of escape exists, then there is NOT false imprisonment
   * If the plaintiff is unaware of the exit, then there IS false imprisonment.
   * Unreasonable escape if:
2. Exposure of a person
3. Material harm to cloths
4. Danger of substantial harm to another
   * If plaintiff is in no danger in their imprisonment, and could escape by unreasonable means, defendant is not liable for damages they may incur during such an escape.
5. Against the will of another – there are two components to this element. One or the other need be satisfied. One must be:
6. Aware of confinement or
7. Harmed by the confinement

* A) Being aware requires being awake. Being unable to recall the confinement later due to a foggy memory does not preclude a false imprisonment claim.
* B) Harm, like in battery, should be fairly easy to demonstrate. It is a factual inquiry.
  + It is not against someone’s will if they agree to stay
  + One may be restrained by acts or words they fear to disregard. In such a situation their consent is not held against them.
  + Giving into moral pressure does not count as an objection.

1. Without legal Justification – The police have legal justification to detain someone if they have:
   1. Probable cause or
   2. A warrant for arrest
   * Being arrested without either leads to “false arrest,” a sub-doctrine of false imprisonment.
   * However, being convicted of the offense is a complete defense for false arrest
   * The shopkeeper rule allows merchants to detain persons they reasonably suspect of shop lifting for a reasonable time.

V – Intentional Infliction of Emotional Distress

IIED exists to protect mental tranquility. Was originally only an aspect of damages, but became more widely accepted during the 1960s and 70s with the advent of psychological medicine.

One who intentionally inflicts, through extreme and outrageous behavior, severe emotional damage is liable for that distress and any physical damage it causes.   
  
Prima facie case requirements:

1. Intentional
2. Extreme or Outrageous
3. Causal connection between wrongful conduct and distress
4. Must be severe

1 – Follows the same rules as other intentional torts, except IIED cannot be transferred. It must be targeted at the plaintiff.

* + There is an exception for family members if defendant simply knew they were there.

2 – The conduct must go beyond the limits which are tolerable by society.

* + The law does not protect the abnormally sensitive person.
  + If the defendant knew of plaintiff’s sensitivity and preyed upon it, it will allow for an IIED claim.
  + The law will consider some specific classes of person’s sensitivities, like children or rape victims.

3 – Casual Connection – This is a fact sensitive inquiry.

4 – Severity – Requires a before and after comparison.

* + Simply crying is not sufficient to prove IIED.
  + Some jurisdictions require evidence supported by expert witness testimony.
  + Most will rely on the defendant’s conduct itself
  + Will also look to physical symptoms
  + Severity parallels damage award.

VI – Trespass to Land

This tort exists to protect possessory rights to exclusive ownership.   
The Intentional incursion onto the land of another

Prima Facie case requirements:

1. Intentional entry
2. Against will of the owner

* No damages have to be proved

1 – Intent, same as other intentional torts.

* + If through the entry, the defendant takes possession of the land, plaintiff may have a cause of action for ejectment. This would entitle the plaintiff to get a sheriff and remove the defendant.
  + If trespass to land is found, it does not matter what the defendant was doing on the land. Even if it was beneficial. This connects back to the idea that intent does not consider motive.
  + *Cujus est solum* – sky to soil, traditional limits of property rights
  + FAA regulations dictate that all airspace necessary for safe takeoff and landing belongs to the public.

2 - Against will of the owner

* + Owner retains the right to deny anyone access to their land
  + Exceptions:
    1. Public utilities
    2. Innkeepers
    3. Common carriers
  + Privilege to be on someone’s land may expire because of:

1. Time – If guest knows they are no longer welcome
2. Location – guest may over step there bounds
3. Purpose – guest preforms some act they shouldn’t, like arson
   * Defendant is liable for the consequence of their trespass, even if they were not foreseeable

VI – Trespass to Chattels

Protects property rights.   
Trespass to chattel is the intentional intermeddling with the chattel of another that either a) dispossesses the chattel; b) damages chattel; c) deprives the owner of use of the chattel; or d) either harms an owner physically or the owner’s interests.

* Must prove damages
* Automatic nominal damages if liable, to protect against other intermeddlers.
* Little brother to Tort of Conversion, covers less than total loss

There are different prima facie case requirements for each type of intermeddling:

1. Intent – Same for each
2. Dispossessed / Impaired / deprived / harmed
3. C must additionally prove damages, a b and d take care of that in element two:
   * Why not A? Dispossession of chattel is regarded as damage in itself.
   * Mere interference must prove damage (c).

VII – Conversion

An intentional exercise of dominion or control over a chattel of another which so seriously interferes with the right of another to control it that the actor may justly be required to pay the owner the full value of the chattel.

1. Intent
2. Dominion or Control
3. Severity
   * Land, and anything attached to it, cannot be converted. If the things attached, like crops, are severed from the land, they become chattel and a plaintiff may bring action for conversion.
   * Anyone who is in possession of a chattel can maintain an action for conversion, even if their possession is wrongful and in defiance of the true owner.
   * Allows recovery by those who do
4. Intent – same tests

* Can be liable even if defendant was not subjectively at fault. Good faith mistakes do not stop intent, may influence punitive damages.
  + Good Faith Purchases, there is a distinction between purchases that transfer a title and those that do not
    - Purchasing stolen goods **is** conversion, thief cannot give title
    - Purchasing stolen goods obtained through fraud, **not** conversion, title was transferred to thief.
    - Purchasing stolen goods through a dealer of the same kind, **not** conversion

1. Dominion or Control –

How an actor converted the chattel:

* + Acquiring possession (stealing it)
  + Destroying it (killing an animal)
  + Using it up
  + Receiving it (purchasing from a thief)
  + Throwing it away
  + Misdelivering it
    - Money must have changed hands so the chattel would be legally the plaintiff’s when it is lost
  + Refusing to surrender it
    - May make two causes of action: one when possession was taken, another when it was not returned
    - Returning goods may not bar the action for conversion, but might reduce damages

1. Severe - Must render the chattel useless, either through extreme inconvenience or destruction
   * Measure for damages is the market value of the chattel at the time the conversion took place.
   * Damages cannot be recovered on the basis of sentiment.
   * Outrageous behavior may allow plaintiff to recover emotional damages
   * Punitive damages may be recovered if the conversion was malicious

VIII – Privileges

Some defenses will apply to all torts towards people and property. Some apply just to property and others just to people.

* Issue is not the privilege, the privilege arises because there is something to defend again.

IX – Consent: Applies to both people and property.

* Two types of consent exist.
  + Expressed – verbalized, written
  + Implied – Actors can only be guided by overt acts and physical manifestations of feelings.

4 instances where consent is not applicable:

1. The plaintiff is mistaken of the nature or character of the defendant
2. Consent is coerced
3. There is a situation that no one could consent to, like statutory rape
4. The plaintiff lacks the capacity to consent
   * Consent to tortious acts is not implied by participation in violent sports
   * Doctors must, generally, obtain consent from their patients.
   * Consent cannot be fraudulently induced.

* Medical Care Exception: 1) patient is unconscious or incompetent, 2) there is risk of serious bodily harm if treatment is delayed 3) a reasonable person would not object to the treatment 4) the doctor has no reason to believe the patient would object to the treatment.
* Extended Operation: If a surgeon finds a new, damaging ailment in the same area of incision he is operation on, he/she may elect to extend the operation without asking consent.
  + Consent is ineffective if the person is drunk
  + Consent may be invalidated if it was in violation of a criminal statute. Depends on the jurisdiction, considerations: a) denying compensation to a wrongdoer who is injured in the course of that wrongdoing, b) the deterrent effect of not allowing compensations c) the question of whether the intentional tort actually took place, and d) the maxim “in equal guilt, the position of the defendant is stronger.”

X – Self-Defense

Anyone is privileged to use reasonable force to defend himself against the battery of another.

* If a defendant REASONABLY believes the force is necessary and a REASONABLE PERSON in the same position would believe the same, there is a privilege EVEN IF they are mistaken about the need for force.
* It is an affirmative defense, meaning the defendant must demonstrate the reasonable person standard
* UNLESS the defendant is a police officer. In that case, the plaintiff must demonstrate the prima facie elements for a battery exist and that the force was unreasonable.
* Once the threat of harm is gone, the privilege disappears.
* Insults do not justify self-defense but provocation may mitigate damages.
* Defendant has burden of proving force was reasonable.
* Transferred intent also carries over: defending against A and hitting B does not make one liable to B, absent negligence

XI – Defense of Others

Similar to self-defense, most cases involve family members.

* The restatement of torts has adopted the view that reasonable force is justified even when mistaken that it is necessary
* Main question is use of force, like self-defense

XII – Defense of Property

Reasonable force is justified when defending one’s property.

* At **common law**, deadly force is **never** justified in defending property. Self-defense takes over if one feels like they are threatened.
* Statutes like the “Make My Day” laws permit the use of deadly force when defending a home against intruders.
* Absent this, only reasonable force necessary to protect property is justified.

XIII – Recovery of Property

Reasonable force is justified in pursuit of the recovery of property

* Recovery must 1) come in continuous, fresh, hot pursuit (*aww yeah*) of dispossession and 2) must demand property back. No force will be justified without these elements.
* If mistaken, recovery of property will not act as a defense.
* Again, only reasonable force that does not breach the peace.
* Merchant’s Privilege: able to detain suspected shoplifters provided they have 1) a proper cause for detention 2) proper purpose, which includes only searching belongings and calling the police, 3) do so in a reasonable manner, and 4) the detention is for a reasonable time. While this is a conservative privilege, it has been expanded to include the area immediately adjacent to the shop as well as hot pursuit of a fleeing shoplifter.

XIV – Necessity

Otherwise tortious acts may be justified out of necessity. Applies exclusively to property.

Three ways property might be taken:

1. War Powers Act
2. Eminent Domain, in the fifth amendment
3. Necessity

* War Powers and eminent domain both follow court proceedings and grantee compensation for the property.
* A growing number of states have statutes which will compensate for necessity

Two types:

* Public Necessity: Sacrifice of private goods for the public good. Public Necessity, traditionally, would not compensate, but many states have statutes allotting for some amount of compensation.
  + An emergency is not sufficient for Public Necessity. There must be an imminent, impending threat to the community or a community interest.
* Private Necessity: A sacrifices B’s property for A. In this situation, A would compensate B’s damages because A trespassed to protect his own property. Once a threat on your life is removed, you must compensate for any damage.

**XV –NEGLIGENCE**

Negligence regulates unreasonable risks.

* Risks are dangers that are known or should have been known.
  + Known – an actual knowledge
  + Should have been known – Constructive knowledge, justifies the imputation of knowledge on an individual
  + Can’t regulate all risks, only unreasonable risks

Four elements make up the prima facie requirements. All must be proven to establish negligence.

1. Is there a duty for reasonable care?
2. Was there a breach of that duty?
3. Was the breach of duty the cause and proximate cause of injury?
4. Were there actual damages done?

Negligence may be used in three ways:

1. Identifying the context of a case (This is a case of negligence)
2. The liability component for a defendant (The defendant was negligent)
3. The context of conduct (Elements one and two, was there a duty?)

***Negligence, Elements 1&2***

Duty

* A duty exists where the law is justified in imposing a special obligation between the plaintiff and the defendant.
* These obligations or duties exist only where there are unreasonable risks.

**Two questions**

1. **Is there a duty?**
2. **If so, what is it?**

Q1: Is there a duty?

* This is a question of law. Once a duty is established one only needs to refer to precedent.
* Three tests exist at common law to asses foreseeable risks:
* Magnitude of Risk Test , Risk Utility Test , and the Carroll Towing Test

Magnitude of Risk Test **-** Asks if the risk is great enough that a reasonably prudent person would avoid it.

* + **Not**  concerned with **probability**
  + “Citizen v. Citizen” cases

Risk Utility (Turntable) Test **–** Is there a **practical** and **feasible** way to reduce the risk?

* + Practical: Cheap
  + Feasible: easy
  + “Citizen v. Business” cases

Carroll Towing – Takes an algebraic approach, asking if the burden of care (B) is less than the probability (meaning foreseeability) (P) of injury (L).

* + Maritime or Admiralty cases
* At common law, the three tests are said to be mutually exclusive, however, each test is designed to reach the same result. Therefore misapplication should not become an issue.
* Once a duty is established by the court, it remains and precedent is all that needs to be consulted.

Q2: What is that duty?

* General rule: What a reasonably prudent person in the same or similar circumstances would do. (RPP SSC)
* The RPP is an ideal, objective standard. He/she should be a reflection of the community, which might be local, regional or even global given todays globalized culture.
* The jury decides what the RPP looks like and if this element has been met.
* Judge may prescribe **relevant circumstances**, or facts influencing the RPPs behavior.

**Relevant Circumstances**

Custom and use – may be entered as evidence if:

1. The custom is widely known to the community
2. The defendant knows about the custom

Custom and use is not dispositive. Just because many people may be doing something it does not make it reasonable. The jury decides if this circumstance is enough to warrant a RPP to modify their behavior.

Child’s standard of care – departs the most from the RPP formula, it is a subjective inquiry applied to minors.

* + Asks what a child of the same background, education and experience would have done.
  + Children will be held to an adults standard of care if they are either engaging in adult or inherently dangerous activities.
  + Some courts maintain arbitrary date limits, so it would be wise to check the local courts policy

Insanity – Insanity will not be a relevant circumstance if it is long term because the defendant should have foreseen the risk. A sudden, short term attack, commonly called temporary insanity, can provide a defense through a relevant circumstance.

Disabilities – People with long term disabilities, like blindness, are held to the standard of care someone with their same disability would have exercised.

* Ignorance is not a relevant circumstance where a RPP would have made an attempt to find out the appropriate information.

Emergency – can be a relevant circumstance, provided it deprives the defendant of the opportunity to think clearly and they did not create the emergency.

* + If the emergency was foreseeable, it is not a relevant circumstance

Professional Standard of Care – A professional is one who holds themselves out as having superior knowledge or skill in a given area. They are held to the standard that includes their profession in the SSC.

Being a professional imposes 6 obligations:

1. Must possess the skills and knowledge they claim to have
2. Must use those abilities in a good faith effort to the benefit of their client.
3. Must behave as a RPP.
4. Must use expert testimony to prove or disprove deviation except in cases of gross negligence
5. Expert testimony must first describe what the RPP standard is
6. Must show how it was deviated from
   1. Undisputed expert testimony is binding on the court!

Locality rule to national standard – Malpractice for doctors operated, historically, on a rule that benefited rural areas which only held physicians accountable to the level of care of a doctor in the region where they lived. This imposed evidentiary and substantive issues (docs wouldn’t testify against their friends, couldn’t get expert witnesses). Many courts now use a National Standard, which looks to the national community of doctors.

* Because professionals are engaged in work that is highly technical, beyond the knowledge of the lay person, expert witnesses are required.

Suits for professional negligence are called malpractice. They compare the defendant to a normal, practicing member in good standing with the community.

**Informed Consent –** Medical Malpractice.Full disclosure of all material risks must be made. A risk is material is it would be likely to effect a patient’s decision.

Cause of action based on Informed Consent

1. Duty to Inform, Doctrine of Informed Consent – A patient has the right to self-determination, to that end, doctors have a **duty to inform** their patients of risks and alternatives to a procedure, except when:
2. The risk is one a patient knows or should have known
3. Cases where disclose detrimental
4. There is an emergency and the patient is incapacitated
5. Causation – Subjective question, asks only what the plaintiff would have done. An objective test would violate the policy objective.

* That being said, there are some jurisdictions that use a Reasonable Patient standard.
* Causal Connection between doc’s choice an injury

1. Damages

* Duty to inform includes conflicts of interest.
* Some jurisdictions ask what a reasonable doctor would discloses while others ask what a reasonable patient would *want*  to know
* Withholding information and changes of conditions can mean a lack of informed consent.
* Court should not determine RPP SSC

**Two Alternatives exist to tell us if a duty exists: Violation of Statute and Res Ipsa Loquitor**

There are two relevant issues concerning RIL:

Q1 – Does the Statute or Doctrine apple?

Q2 – If so, what is the procedural effect?

**XVI - Violation of Statute**

Concerned with the applicability of quasi-criminal statutes leading to negligence. (NEVER when the statute applies to a license).

* Always plead common law negligence because, in the absence of precedence, it is unknown if the a statute will be applied.

Violation of a statute is a shortcut to establishing negligence because:

* statutes tell us what the duty is - the enacted law, and
* what the RPP SSC would do, obey the law.

Violation of a statute only informs us of the first two prima facie elements of negligence.

Q1 - To determine this ask:

1. Plaintiff in class to be protected
2. Harm the one protected against
3. Is Public Policy furthered

* Afforded greatest weight by the court. Corresponding common law duties to may influence a judge’s willingness to create liability for violating a statute.

Q2 – There are three possible procedural effects

– Procedural effect is concerned with the psychological impact of jury instructions. There are three possible procedural effects with unique impacts. It is a misnomer because all of the effects are the same, providing elements 1 and 2.

1. 1 – Negligence per se- (negligence as a matter of law) gives the jury instruction that can confuse the jury and lead them to confuse negligence with strict liability.
2. Rebuttable Presumption- gives the plaintiff the elements of duty and breach, but the defendant may provide an excuse for the violation of statute. The excuse must be strong and concise in order to be accepted by the jury. If the excuse is accepted by the jury, then the plaintiff will most likely lose unless they can successfully plead common law negligence.
   * Some statutes, like child labor or Pure Food Acts, do not have reasonable excuses.

3 – Evidence of Negligence – jury has the broad discretion to determine negligence in any manner it deems fit. This procedural effect has the weakest legal effect because it has no constraints on the jury.

A judge decides which instructions to give .

***Rules of Law***

*The plaintiff has three duties*

1. *Burden of Pleading*
2. *Coming forward with enough evidence that all of the prima facie case requirements are present*
3. *Burden of persuading the trier of fact (jury).*

*Two types of Evidence:*

1. *Direct Eye-Witness Evidence. This may be manipulated and can be torn apart by the other side.*
2. *Circumstantial Evidence- evidence of a fact from which an inference of the existence of the face in dispute can be drawn. Most say that circumstantial evidence is better to have than eye-witness because the proof is there, and the evidence is much harder to question. With this kind of evidence, one must prove “more likely than not” that the opposing party is liable.*

**XVII - Res Ipsa Loquitor**

“The Thing Speaks for Itself”

In some circumstances, the mere fact of an accident occurring raises an inference that establishes a prima facie case for negligence. It is employed in rare and unusual cases on the grounds that the defendant has superior evidence. Res Ipsa Loquitor is an exception to the two general rules of Civil Liability:

1. Plaintiff has the burden of proof
2. The law will never presume liability

* Res Ipsa Loquitor exists to further the **public policy** that the law will assist those wrongfully injured.

Q1 - To determine if the doctrine applies:

1. Plaintiff must demonstrate that the accident doesn’t normally occur without negligent conduct.
   * Concerned with the character of the event. It must be a rare and unusual event which does not normally occur in the absence of negligence. The conclusion of this objective can be provided by either common knowledge or expert witness testimony.
   * Typically not applicable to car crashes, too common and easily explained
2. The defendant had control over the instrument that caused the plaintiff’s injuries.
   * This way the court can know, more likely than not the correct defendant is before them. Plaintiff should produce evidence that eliminates equal probability that someone else is truly liable

* Medical Treatment Exception – Defendants must absolve themselves when the plaintiff is attempting to recover for injuries received while unconscious and receiving medical treatment.

1. The plaintiff must prove they were not guilty of contributory negligence.
   * This is NOT a common requirement in many jurisdictions.

**Procedural Effect**

There are three possible procedural effects for Res Ipsa Loquitur:

1. Inference of negligence- gives the jury broad discretion. The most it can give the plaintiff are the elements of duty and breach
2. Rebuttable presumption- With this procedural effect, the defendant is allowed to explain precisely how the injury occurred without their negligence. It is not enough for the Defendant to show they exercised reasonable care. Can lead the jury to give the plaintiff all 4 elements of negligence unlike violation of statute.
3. Burden of proof is shifted to the defendant- the plaintiff almost always wins with this procedural effect. Also leads to a prima facie case for negligence.

* Which instruction is given hinges on the rarity of the event.

**XVIII –Legal Cause   
*Negligence, Element Three***

An action must be both the Cause in Fact and Proximate Cause of the plaintiff’s injuries

**Cause in Fact** – Demonstrating that the action was the cause in fact requires plaintiff to prove there is a causal relationship between the defendant’s action and plaintiff’s injury.

At a minimum, the plaintiff must provide evidence that answers the questions:

1. Who caused?
2. What caused?
3. How caused?

The answers to these questions must point to the defendant’s negligence.

Three exceptions exist to these tests as a way to provide remedies to wrongly injured plaintiffs, lacking sufficient proof.

1. Summers v. Tice – concurrent acts of negligence from multiple defendants with only one cause
2. Enterprise liability – allowing for a whole industry to stand trial when the injury was caused only by one member, provided that the industry is quite small and closely regulated
3. Market Share Liability- allowing multiple defendants to stand trial that make up a majority of the market share of the product which caused the injury.
   * Some courts only allow a plaintiff to collect damages which represent the % of the market share owned by each defendant.

* Additionally, one may always ask the court to make a new exception.

At common law, there are two tests to determine cause:

1. Sine Qua Non / But For test - Jury is instructed to create a hypothetical situation where the defendant’s negligence is ignored to determine if the consequences would have still occurred. It has been criticized on two grounds:

* Test would not work with multiple defendants
* Instructed the jury to ignore evidence, which undermines its purposes

1. Substantial Factor Test – Works essentially the same way but, when multiple defendants exist, they are lumped together.

Cause in Fact must be determined before Proximate Cause can be determined.

**Proximate Cause** – The process of limiting liability to some socially acceptable range.

**Public Policy** - Limiting liability is important. We must cut off liability somewhere out of respect for financial security. Cause in fact by itself would leave defendants open to an unceasing chain of liability.

The test for Proximate Cause is a test of **Foreseeability**

An exception to the test of Foreseeability is the **Egg Shell Rule**

1. States that a defendant must take the plaintiff as he finds him.
2. Holds defendant liable for the onset of a pre-existing condition after a negligent act
3. Is only applicable when it is a naturally occurring, pre-existing condition
   1. Some courts limit the application to physical injuries, others protect the fragile psyche as well.
4. No outside agency can be responsible for its cause.
5. Rationale behind the rule is that we want to protect against personal injuries

**Intervening/Superseding Cause**

Intervening causes have no effect on an analysis of negligence; however, if it becomes a superseding cause then it breaks the chain between cause and effect. The test asks if the cause was foreseeable, that is, if the act was within the scope of the risk. If so, then all defendants are liable. May require an expert wittiness to describe want the standard of care was and how it was deviated from.

Exceptions**:**

* + Traditionally at common law **Criminal Acts** where never seen, and **acts of God** where always seen, as superseding causes. Today, criminal acts will be a superseding cause if it was unforeseeable and, conversely, foreseeable acts of God will not be superseding.
  + **Suicide** is generally not a superceeding cause but may become one if it results from an uncontrollable urge, caused by the defendant’s negligence. .
  + **Rescue Doctrine (Public Policy)**
    - “peril invites rescue”
    - Rescue is ALWAYS foreseeable and never superceeding
    - It is foreseeable and presumed.

**Joint Tortfeasors**

Before addressing the issue of a defendant’s or defendants’ conduct, the doctrine of Joint Tortfeasors must be examined:

* One plaintiff may only have one recovery for their damages. This is because damages are designed to put a plaintiff into their pre-injury position. All damages, besides pain and suffering, must be show to a mathematical exactitude.

The doctrine of joint tortfeasors joins multiple parties into order to avoid duplicative outcomes. It has been the subject of tort reform in all jurisdictions and as such, varies from state to state. Traditionally, the plaintiff would “own” a lawsuit and could choose which defendants to bring in. Today, all parties own a suit and a defendant is free to file 3rd party suits and cross-claims.

Two relevant issues arise from of Doctrine of Joint Tortfeasors

1. Whether the law is justified in its implementation
2. What is the consequence of implementation?

To answer the first question, we examine three possible scenarios:

1. Concert of Action- there is a concert of action when multiple tortfeasors exercise an agreement to engage in tortuous conduct. The agreement may be expressed, implied, or tacit.
2. Breach of concurrent duties- Applies to joint tortfeasors who were all negligent
3. Indivisibility of harm- is applicable when it is impossible for the plaintiff to determine who among several defendants caused what injury. Applies to negligent and intentional joint tortfeasors

For the second issue of what happens as a consequence of making them joint tortfeasors, there are five possibilities:

1. Joint and Several Liability- each joint tortfeasor is held jointly and severally liable. Either they all pay everything or one pays everything

* All, Some, or one defendant is responsible for full amount of damages.

1. Satisfaction - when the plaintiff has already been made whole by the payment of one or all joint tortfeasors, plaintiff is unable to receive more compensation.
2. Release

* Generally, release of one defendant = Release of all
  + UNLESS, where the plaintiff expressly reserves the right to claims against the other tortfeasors
    - This results in a credit of settlement against the judgment. So, if a plaintiff is awarded 100, settles with one defendant for 50, still may collect the other 50.

1. Contribution

* Allows one tortfeasor to collect part of a payment from another.
* Does not apply to intentional tortfeasors, do not want to reward criminals
  + Does not apply when the plaintiff has no cause of action against the joint tortfeasor. Also, a good faith settlement with the plaintiff protects the settling defendant from a contribution claim brought be a non-settling defendant.

1. Indemnity
   * Where paying party is innocent and it was NOT the cause of the injury, the law affords the right to 100% reimbursement from the party which was the primary cause of injury.

**Public Policy**

As a general rule, there is no duty to help anyone where the risks were not of the defendant’s own making.

However, where a special relationship exists between the plaintiff and the defendant, then a duty may be owed.

1. Between plaintiff and defendant where the defendant has control of the instrumentality.

2. Can be between the defendant and a third party.

3. Examples: Master-Servant, Invitee-Inviter, Social Host

In the past, there was a long laundry list of relationships that qualified as special relationships, but over time 3 frameworks were determined for resolving whether a special relationship exists:

1. Duty arises when the defendant assumes responsibility. By taking control, the defendant prevents others from coming to aid.
2. The defendant voluntarily begins an undertaking
3. The defendant makes a gratuitous promise to assist.

**Negligent Infliction of Emotional Distress**

One who negligent conduct causes in another severe emotional distress. Must go beyond the bounds of acceptable behavior. The conduct must be beyond the range of tolerance of a reasonable person, the law will not assist the abnormally sensitive person.

Prima facie requirements: SAME AS NEGLIGENCE – NIED will take things like “severity” into account in the “damages” section

ii. General Rule: Only recover IF the plaintiff was in the *Zone of Danger*, doesn’t have to be physical impact.

1. EXCEPTION - if it was foreseeable that a third party would be injured.
   1. Where plaintiff was located near the scene of the

accident.

* 1. Observance of the accident
  2. Familial relationship.

3. **Unborn Children**

i. Majority Rule: Viability establishes the line/time at which a cause of action will prove in favor of the still born

ii. Minority Rule: a stillborn does not have a cause of action, must have seen the light of day.

1. **Owners and Occupiers of Land -** *Another way to determine DUTY under public policy*

* **Outside the Premises**
  + 1. Use of Property cannot endanger others outside.
    2. Owner has a duty to protect others outside the premises from artificial conditions on the land which may cause injury.
       1. Artificial Conditions
          1. Must have notice that the dangers exist.
          2. Exception to notice – Where the acts of the operator creates the condition.
    3. No duty to protect against natural causes
       1. EXCEPTION: Trees
          1. Traditionally there was a Rural(no)/Urban(yes) dichotomy
          2. Modern – Must have actual knowledge or should have actual knowledge.

**On the Premises**

* 1. Duty is determined depending on the classification of the injured.
     1. Trespasser
        1. Defined – On premises without permission
        2. The duty is to refrain from purposefully harming the trespasser
           1. if the trespasser is known = elevates the trespasser to the level of a licensee
     2. Licensee
        1. Defined – Must have an invitation (implied/expressed) for benefit of a licensee. (ex. Social Guest)
        2. Duty
           1. To WARN of KNOWN dangers that the Licensee DOESN”T know about.
     3. Invitee
        1. Defined – Someone on virtue of invitation (implied/expressed) for owner/occupier’s furtherance of business or benefit.
        2. Duty – to keep their premises reasonably safe
           1. To inspect
           2. To WARN until REPAIR

Can only warn for a reasonable time.

* + - 1. Grocery Store Exception:
         1. A warning is sufficient if owner knows the invitee will encounter and ignore the warning.
      2. Note: An invitee can forfeit that status and revert back to trespasser or licensee IF they exceed the scope, purpose, time, or area of the invitation.
    1. A minority of jurisdictions have abolished the classification system

1. **Person’s Outside the Established Categories**
   1. Children
      1. The Categories of trespasser-licensee-invitee are abolished
      2. Attractive Nuisance Doctrine
         1. Owners owes a duty to the child if the owner is aware of a condition on the land with would entice a child to enter the premises.
         2. Only where the burden of eliminating the risk is less than the probable/foreseeable injury.
   2. Person’s Privileged to Enter
      1. Firefighter’s Rule
         1. Professional reason for benefit of owner
         2. The owner has no duty to protect against any reasonable/ordinary risks.
            1. If the negligent act is what necessitated the rescue…if NOT and another GROSSLY negligent act, then the owner owes a duty.
2. **Lessor and Lessee**
   1. General Rule:
      1. The landlord may NOT be held liable for the injuries of the guests of their tenants.
   2. Exceptions
      1. Dangers known to the Lessor and not the Lessee
      2. Conditions dangerous to the Outside Premises
      3. Leased for purpose for admission of the public
         1. Obligation PRIOR to transfer to keep reasonably safe
      4. Common areas shared by many tenants – hallways, eg.
      5. Where Lessor contracts to repair
      6. Negligence on part of the Lessor on such repairs
      7. Further exceptions even where the plaintiff does not fall with in any of the 6 exceptions listed above.

Note: Andrew’s dissent in *Palsgraf* notes that the world owes the world a duty. This would put everyone on notice and assumes the duty requirement.

**Element Four: Damages**

1. 5 Rules of Damages
   * + 1. Objective is to put plaintiff in pre injury position
       2. Absent any statute to the contrary, plaintiff gets only one recovery
       3. Where possible, must be shown to mathematical exactitude
       4. Plaintiff is not entitled to recover for any element of damages they do not offer proof of
       5. When recovering for permanent injury, the amount of the reward must be discounted to present day cash value
          1. If invested today, the amount would reach the entirety of the judgments on the day they die

* Two questions are ALLWAYS relevant:

Is the damage subject to the rule of mathematical exactitude?

Is the damage subject to the rule of discount?

* + - * + If so, how does one prove them?

Bills, life expectancy tables, speculation

1. 6 Elements of Damages.
   1. Non-Economic – Jury has Broad discretion with amounts
      1. Past Pain and Suffering and Future Pain and Suffering
         1. Physical
         2. Mental
         3. Brings in Plaintiff’s family, friends, doctors, plaintiff themselves
         4. Not discounted to present day cash value
   2. Economic (must prove to a mathematical exactitude or forfeit)
      1. (Past) Loss of Earnings
         1. What you should have made up until this moment had you been able to work at your previous job.
      2. (Future) Loss of Earning Capacity
         1. Need to bring in an economist and a vocational therapist
         2. Testify to what would have earned, might have earned
            1. What you might REASONABLY become in the future
            2. Look at lifespan
            3. Work span
            4. Look at actuarial tables
         3. In the case of children
            1. Those who have never been employed
            2. Use speculative evidence, but still must have mathematical exactitude.
      3. Past Medical
         1. Necessary and Appropriate
         2. Total of the bills
      4. Future Medical
         1. As doctor and look at future surgeries, medicine, and the like.
         2. Jury can cushion judgment a little to look at unspecified situations.
         3. For a Permanent Injury
            1. The judgment must be discounted to present cash value
            2. To where if invested with the appropriate amount of return, then by the time they die, it will amount to the entirety of the judgment.
   3. Excessive – only if it so SHOCKS the conscious of the court that it is obvious there was bias, passion, and/or prejudice on the part of the jury.
      1. Plaintiff – adijure
      2. Defendant – remittiture
   * Hedonic damages – loss of life satisfaction
   * Loss *of* consortium – loss of a spouse’s ability to help around the house

**Collateral Source Rule**

* + Defendant should not benefit from the plaintiff’s insurance/own astuteness.
  + Defendant cannot admit evidence of a collateral benefit to the plaintiff.
    - EXCEPTIONS ( to permit evidence of a collateral source).

Refute plaintiff’s testimony that they were compelled by financial need to return to work

Refute plaintiff’s testimony they did not work when they had

Shoe the plaintiff had attributed the issue to some other condition, like illness

Impeach testimony that plaintiff had paid for bills themselves

* + - * *If the source was for any OTHER purpose than for mitigating damages.*
        + The Plaintiff MUST mitigate damages

IF failure to mitigate the defendant is not liable for those additional damages.

Defendant is responsible for ALL the mitigation damages.

IF surgery is the form of mitigation, then the court will look to whether a **reasonable person** would do it.

* Measure of property damages
  + Property that can be repaired
    - Fair Market value Before and After
  + Property that CANNOT be repaired – market value of the property at the time it as destroyed
  + Sentimental value cannot be recovered.
* Punitive Damages
  + Not entitled to punitive damages unless the defendant was engaged in egregious conduct, malice

**Defenses**

1. Contributory Negligence – *objective analysis* 
   1. AT traditional common law – all or nothing
      1. Every person is obligated to use reasonable care for themselves.
         1. Failure to do so, then contributory negligence.
         2. If plaintiff was at all contributory negligent, then lost ALL right to damages.
      2. Criticized
         1. Not fair for the plaintiff to bear the entire cost of the injury. Only slight negligence resulted in a complete loss.
      3. Erosion process
         1. To make it an affirmative defense
         2. Make contributory negligence a question of fact for the jury
         3. Restrict the claim of contributory negligence to negligence, excluding intentional torts
         4. **Last Clear Chance Doctrine**
            1. Contributory negligence of the plaintiff will not bar the right to recovery, IF the defendant had the last clear chance to protect from the plaintiff’s negligence.
            2. Criticized because all it does is shift the entire burden of cost to the defendant.
2. Comparative Fault
   1. Objective – Set out a mathematical threshold to which contributory negligence is not applicable.
   2. 2 kinds
      1. Pure
         1. Plaintiff’s damages are reduced in portion to the percentage of negligence attributed to him.
      2. Modified (2 kinds)
         1. Not as great as 50% (50/50)
            1. If less than 50% - Then follow the pure rule
            2. If more than 50% - Then follow contributory negligence
         2. Not greater than 49% (49/51)
            1. If less than 49% - Then follow the pure rule
            2. If more than 49% - Then follow contributory negligence.
   3. “Slight” – Only in South Dakota, apportions damages so long as the plaintiff’s negligence was “slight in comparison with the negligence of the defendant”
3. Assumption of the Risk
   1. At early common law, this was considered a COMPLETE bar of recovery
   2. 2 forms – express and implied
   3. **Express**
      1. Exculpatory Clause “Hold Harmless” (often in a K)
         1. Plaintiff expressly exempt defendant from liability of own negligence
         2. General Rule – Parties have the right to freely contract.
            1. Two Issues:

Was the clause valid

It MUST follow the K in UNAMBIGUIOUS terms

Is it subject to a public policy exception

Protected party intentionally caused harm or engaged in gross negligence.

Grossly unequal bargaining power, exercised to deprive the person of some essential necessity (unconsionability).

When it involves a public interest.

Cannot be criminal

It would shock the community to know that the parties would K without liability.

No universal definition.

Typically an essential element of society.

* 1. **Implied** - Subjective analysis
     1. Is an all or nothing proposition – resembles Contributory negligence
     2. Elements for defense:
        1. Plaintiff was aware of the risks
        2. Actual knowledge and could appreciate the magnitude of the risk
        3. Voluntarily consented to taking the risk
     3. Implied Assumption of Risk and Comparative Fault - Works the same (mathematical threshold, **only abolished** where there is **pure** comparative fault)
  2. Statute of Limitations
     1. Two Issues
        1. When does cause of action accrue
           1. When, who, how, why – When those 4 questions don’t arise simultaneously, look to when you **know of injury**
           2. **Discovery** Rule - Cause of action doesn’t arise until you know or should have known
        2. Tolling – Tolling stops the SoL from running
           1. Every cause of action except murder has one
           2. Minor’s don’t start counting until they reach the age of majority
           3. Mentally incompetent, tolled
           4. Tort Claim Acts modify the statutes everywhere

Intent torts = 1 yr

Negligence = 3 or more yrs

**Vicarious Liability**

**Respondeat Superior**

1. Pursuant to the doctrine of vicarious liability, an innocent superior may be responsible for the tortious acts of an inferior.
   1. Exists for the policy that an employer is in the best position to pay and distribute the cost, providing a deep pocket for the plaintiff to reach into.
   2. Applies to all torts
   3. To apply, plaintiffs must prove 2 issues:
      1. A requisite legal relationship existed,
         1. employer/employee
         2. master/servant
         3. principal/agent
      2. The inferior was within the scope of employment
         1. Fact Sensitive and Influenced by Public Policy
            1. *NOT reasonable for acts OUTSIDE the employment, UNLESS the “master” is a guilty tortfeasor*

*This means that the “master” is not liable through respondent superior, however he is liable for his own tortuous acts.*

*Culpable in his own right*

*Negligence of a master/employer/principle can come from a lack of fulfilling its duty to the Servant/Agent/Employee through lack of:*

*Entrustment*

*Training*

*Supervision*

*Hiring*

* + - 1. Three tests for Scope of employment:
         1. Employer had the right to control the employee
         2. The employee acted for the benefit of the employer
         3. Was acting to further the employer’s business

Coming and Going Rule

An employer is not liable for the torts caused by their employees while coming to and from work

EXCEPTIONS

If the employee uses his own car at work.

If the tort was foreseeable by the employer

Note: Merely instructing employee is not enough to excuse liability.

Deviation

Where the employee has a SLIGHT deviation, the employee is still within the scope (6 factors)

Employee’s intent

The nature, time, and place of deviation

The time consumed for the deviation

The work for which the employee was hired

Incidental acts reasonably expected b the employer

The freedom allowed for employee in performing.

Dual purposes ARE in Scope

A total abandonment of employer business, then no liability

However, once the employer returns to the scope, then the doctrine is still applicable.

1. Independent Contractors
   1. General rule is that employer is not responsible for the torts of an independent contactor
   2. The test is whether the contractor had the right to control the physical details of their work. If they did, the employer is not liable
   3. EXCEPTIONS where employer will still be held liable:
      1. Non-delegable duties – activates with a high risk of harm – cannot hide behind contractor and escape liability,
2. Joint Venture/Enterprise
   1. Concerned with commercial relationship
   2. Pursuant to an agreement (expressed or implied) to effectuate a common purpose.
      1. Profit Motives / Profit Driven (Pecuniary interest)
      2. Four elements
         1. An agreement, express or implied, among the members of the group
         2. A common purpose to be carried out by the group
         3. A community of pecuniary interest in that purpose, among the members
         4. An equal right to a voice in the direction of the enterprise, which gives an equal right of control
3. Bailments
   1. Family Car Doctrine
      1. When a car is furnished to a family member with express or implied permission to use it, the owner is vicariously liable for the driver’s negligence.
         1. Driver may be protected by an omnibus clause in the owner’s insurance, granting coverage to drivers they permit.
4. Imputed Contributory Negligence
   1. Only where primary negligence of actor could have been imputed to the plaintiff, if the plaintiff was the defendant.

**Strict Liability**

Various types of SL exists – they will NOT cross apply rules

* 1. Animals
     1. Imposed on those who keep, possess, or harbor the animal, not just the owner
     2. Owner of animals of a kind likely to roam and do damage is strictly liable for there trespasses
        1. EXCLUDES dogs and cats
     3. **Absolute Liability** – Only applied to wild animals
        1. Owner or possessor of nondomesticated animal is subject to absolute liability if the animal injures someone
     4. Unless wild, owner must **know or have reason to know** of animal’s dangerous propensity
  2. Abnormally Dangerous Activities
     1. Deals with non-natural use of land
     2. At C/L, if act was deemed **ultrahazardous**, strict liability was implied. This was nearly absolute liability
        1. Courts now reject this doctrine
     3. Now, courts apply 6 factor test; they weigh the following
        1. **risk of harm is great**
        2. **Likelihood of harm is great**
        3. **accident would not be prevented by using reasonable care**
        4. **Activity is not a matter of public usage**
        5. **Inappropriateness of activity at place it occurred**
        6. **Extent to which value to community is outweighed by risks**
     4. 1,2,and 3 require the establishment of evidence
     5. 4,5,and 6 based on public policy
     6. Number 3 is the MOST PERSUASIVE
     7. Reasonable Care can’t eliminate level of risk in Ab. Dan. Act.
     8. **GenRules**
        1. injury suffered must be w/in scope of the abnormally dangerous activity – foreseeable extraordinary risk which makes the activity abnormally dangerous
           1. Prox. Cause question
        2. Vis Major can operate as a defense to S/L
           1. Unless it is foreseeable
        3. D must have knowledge of dangerous propensity of activy
  3. Limitations to Strict Liability
     1. Assumption of the Risk is a valid Defense
     2. Acts of god are a defense
     3. Contributory Negligence does not apply – this is a negligence doctrine
     4. Question of Law – For the courts
     5. Strict Liability merely gives Prima facie case
        1. It can be rebutted
        2. Rebuttable presumption -
     6. Abnormally dangerous activities
        1. Damages limited to the scope of the dangerous activity
        2. Compartive fault works for S/L as well, operates the same as it does for negligence

1. **Products Liability**
   1. Introduction
      1. Can be applied under
         1. Negligence
         2. UCC (broadest damages, but too many defenses- seller disclaimers, conditions precedent)
         3. 402B – Misrepresentation
         4. 402A – Strict Liability

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Claim:** | **Possible P’s:** | **Possible D’s:** | **Damages:** | **Defenses:** |
| Negligence | Anyone owed a duty | Anyone who breaches | Anything proximately resulting from.. | Ass of risk, comparative/contrib. fault, supervening, statute of lim, immunities |
| UCC 2-715 xpress/Imp/ImpM | Foreseeable P | Seller of goods | Economic, property, person | Disclaimers, conditions… |
| Misrepresentation  402B | One who buys under misr. | One who sells making misr. | Personal injury… | Same as negligence |
| S.L. – 402A  MM/MD/FtW | User, consumer, foreseeable bystander | Maker, seller | Injury to person, property | Open and obvious  Ordinarily aware  Assumed risk  Immunities |

* + 1. **Economic Loss Rule** – No tort theory of recovery allowed for purely economic losses
    2. 1st substantive tort – you must ID which theories can be used in combination and which are mutually exclusive
    3. Under Products Liability, there are no fewer than 8 theories that are actionable
       1. Negligence (1)
       2. UCC
          1. Express (2)
          2. Implied

Merchantability (3)

Fitness (4)

* + - * 1. 402B (5)
        2. 402A

Mismanufacture (6)

Misdesign (7)

Failure to Warn (8)

1. **UCC – Article II - Can be used to situations involving the sale of goods**
   * 1. What about hybrid sale and service transactions
        1. Look to dominate feature
           1. If dominant feature is the sale – UCC is applicable
           2. If dominant feature is service – UCC doesn’t apply
           3. In close cases, doubt should be resolved in favor of applying the UCC
     2. Warranty Provisions
        1. Express
           1. Test for determining where the language forms a warranty
           2. Whether or not it constitutes an affirmation of a fact, not an opinion
           3. Must lead reasonable person to believe the fact
        2. **Implied**
           1. **Merchantability**

Seller must be a merchant

* + - * 1. **Fitness** for a particular purpose

Seller must know purpose for which buyer is buying product

Seller knows buyer is relying on seller’s skill and expertise

* + 1. Exclusions or Modifications of Warranty
       1. **GenRule** – Warranties may be limited or modified as long as it is reasonable or not unreasonable
       2. **Merchantability – Two ways of disclaiming**
          1. Orally – Must mention “merchantability”; must use words
          2. Writing

Must use word “merchantability”

Must be in a conspicuous place

* + - 1. **Fitness – Must be disclaimed through writing**
      2. **Implied Warranties – May be excluded/modified by course of performance, course of dealings, or usage of trade**
    1. Who has standing to be a P
       1. Warranty extends to any person if it is reasonable to expect that that person may use, consume, or be affected by the good
       2. Courts are to be liberal and broad in defining standing
          1. What is fair in judges sense of justice
       3. Seller can exclude, modify, or disclaim in relation to standing, however, any modification valid to buyer is valid to any consumer with standing
    2. What damages are recoverable
       1. UCC has broadest remedies
       2. No express provision for punitive damages, however, if an action ancillary to claim for which punitive damages are recoverable is present, UCC allows pun. Damages
       3. Liquidation/Limitation of Damages – question of reasonableness
          1. You can agree to be governed by rules outside the UCC
          2. Any condition precedent to contract must be followed, unless unreasonable
    3. Defenses/Limitations
       1. If remedy provided is unreasonable, return to C/L default rules
       2. Limitations of consequential damages for injury in case of consumer is prima facie unconscionable
       3. SoL is subject to agreement
          1. Clock starts ticking when you get the product

1. **402B**
   * 1. Plaintiff – Anyone who a representation is made to; Consumer
     2. Defendant – Maker of a representation or misrepresentation
     3. Damages – Physical Harm and Personal Injury
     4. Defenses – Common Law defenses for negligence
     5. Limitations
        1. If you own it, you can’t recover
        2. Only people hurt by something who doesn’t own it because damages are so limited
2. **402A**
   * 1. Three roads
        1. Mismanufacture – doesn’t comply with design; single product is defective
        2. Misdesign – defective due to bad design; entire product line
        3. Failure to Warn
     2. **GenRule** – Purely economic losses can’t be recovered outside of the UCC; i.e. benefit of the bargain or if the product destroys itself
     3. **Mismanufacture**
        1. Prima Facie
           1. **Defective Condition Unreasonably Dangerous**
           2. Defect must have existed when it left the manufacturer
           3. Proximate Cause
        2. Once 1 is proved, 2 and 3 are normally presupposed; however, 1 is difficult to prove
        3. In MM, DCUD analysis is simple
           1. Just compare to another product from the line
           2. Economic impact is small
     4. **Misdesign**
        1. Prima Facie
           1. **Defective Condition Unreasonably Dangerous**
           2. Defect must have existed when it left the manufacturer
           3. Proximate Cause
        2. In MD, DCUD is more complicated
           1. Can’t compare to another product from the same line because it is a challenge to the design of the entire line
           2. Economic impact can be disastrous to the industry
        3. Dominant Tests to prove Misdesign
           1. Negligence risk utility analysis
           2. 402A risk utility approach
           3. Consumer expectations – where a product is dangerous beyond expectations of ordinary consumer, it is defective;

Currently, no one is an ordinary consumer because everyone knows everything

* + - * 1. Hybrid risk utility and consumer expectation
        2. Failure to Warn – can be a test or a free standing theory
      1. Economic consequences create a need for a policy judgment in relation to MD or FTW
      2. Courts say S/L borrows from negligence analysis
      3. Must courts adopt pure R/U analysis
         1. Usefulness and desirability of product
         2. Safety aspect of the product
         3. Availability of substitute product
         4. Manufacturer’s ability to eliminate the unsafe character of the product
         5. User’s ability to avoid danger
         6. User’s anticipated awareness of the dangers inherent
         7. Feasibility of spreading the loss by manufacturer
      4. Testimony – Expert must testify to the following
         1. The state of the art
         2. Alternative design
    1. **Failure to Warn**
       1. Prima Facie
          1. DCUD
          2. Defect must have existed when it left the manufacturer
          3. Proximate Cause
          4. Knowledge
       2. Look at the conduct of the manufacturer; not the product itself
    2. General Doctrine and Relation to Negligence
       1. Strict liability is based on public policy and Negligence is based on fault; however, they are related – Thus, fault principles slowly creep into S/L and vice versa
       2. **Because S/L is not absolute liability, manufacturers aren’t required to make a product that is failproof – every product has useful life**
       3. Products can cause injury by wearing out – must prove that this wasn’t the reason for the injury
          1. Draw the distinction between product being defective and it wearing out
       4. As long as borrowing from negligence doesn’t diminish rationale and purposes of S/L, its OK
    3. **Defenses to Products Liability**
       1. At C/L, AoR is a complete defense to S/L until the imposition of Comparative Fault (see below, vii 3)
       2. Contributory Negligence is not applied to S/L
       3. **Courts slowly started applying Comparative Fault to S/L**
          1. **Since Comparative Fault abolished AoR in negligence cases, AoR is abolished in S/L**
       4. “Res Ipsa” is not applied to S/L, however, the inferences that are the core of Res Ipsa are.
       5. **Misuse**
          1. Operates as a *complete defense* to S/L and P/L

Manufacturer must foresee some misuses

* + - * 1. A foreseeable misuse doesn’t constitute a defense

Misuse alone: NO S/L

Defect alone: S/L

Misuse AND Defect: “split the baby,” comparative fault

* + 1. Preemption – arises out of fact that we are citizens of two sovereignties
       1. Which sovereignty has proper authority??
       2. Who has controlling power and in what cases??
       3. Where does Fed. law usurp State Law
       4. Express Preemption
          1. Congress says “states may not regulate in this area”
          2. If it is expressly stated in the statute/law
       5. Implied Preemption
          1. Courts reluctant to find preemption out of respect for Federalism – presume Congress didn’t intend to preempt
          2. When court finds that preemption might be found, analyze…

Intent and Purpose of Congress

Legislative Intent of the Statute

Degree to which state system impedes Congressional purpose of Federal Law

* + 1. S/L related to sellers of Used Goods
       1. Some states hold sellers of used goods Strictly Liable
       2. Some states don’t
       3. If product is refurbished, seller is always Strictly Liable
    2. Services Provider
       1. Under 402A, cannot be sued
       2. Only sued under negligence
          1. For things in the GIFTSHOP they are S/L