**TORTS**

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**I. INTRODUCTION**

- A tort is a civil wrong

- Tort law is a mechanism for shifting loss from one party to another

- Regulate and incentive for buying insurance

- Torts are normally related to physical harms

- Tort law is about compensating for harms

**A. Recoverable Harms**

- Usually Physical Harm

- Can be emotional

- More rarely: economic

**B. Fault**

**Two Possibilities for Fault**

**Intentional Torts: acted intentionally/purposefully**

**Negligence Torts: acted negligently/unreasonably**

- Fault is a Continuum

- Intent: purpose or knowledge

- Less than intent: Reckless, willful, or wanton

- Negligence

- Some courts define recklessness as including intent

- In order to bring a successful claim, you cannot merely claim that a harm occurred, you must also prove that someone is at fault for that harm.

- Three year olds can’t reason

- don’t know consequences

- don’t understand risks

- don’ t have a real concept of other people

- Can a five-year old?

- there are advanced five year olds

- some of them can, some of them cannot

- **Macafoos:** Child was too young to be found to have been at fault

**Hypo:** Husband hits his wife, breaks her jaw, bruises her face. Yes, there is fault.

**Hypo:** Walking on the side-walk, car veers off the road and hits you. There is most likely fault.

**Hypo:** Tree in the yard that appears sound and healthy but is in fact rotten, falls and strikes a passerby. Yes, there is probably fault.

**C. Prima Facia Case**

- For each tort there has to be certain **elements** that you plead and prove

- Intentional Torts: you have to plead and prove intent

- Negligent Torts: you have to plead and prove negligence

**II**. **INTENTIONAL TORTS**

**Three Types of Damages in an Intentional Tort**

**1. Nominal Damages:** Valued at $1. This is the minimum recovery. There is no need for physical harm.

**2. Economic Damages:** these can be substantial. Includes pain and suffering. A jury has significant discretion, even for offensive damages.

**- Parasitic Damages:** part of the economic damage (mental result of physical damages, i.e. pain and suffering, mental distress). Different than the stand alone claim of Intentional Infliction of Emotional Distress

**3. Punitive Damages:** are possible. Given over and above economic damages. They are intended to punish the person at fault.

**Intent (Garrat v. Dailey)**

Intent can be either (Restatement Third)

1. Purpose to produce that consequence or

OR

2. Knowledge the consequence is **substantially certain** to result

- substantial certainty = very likely to occur (probably around 85%-90%)

Applying the Intent Rule to Children

1. Simply apply the definition and treat it as a question of fact

2. Absolute age cutoff (often under age 7)

**-** Jury can infer intent from the circumstances

**A. Battery**

**Definition:** Intending to cause a harmful or offensive contact, and when a harmful or offensive contact results.

1. Intent (either dual or single)

2. Harmful or offensive contact

- protects physical integrity

1. Test for when something is offensive: reasonable sense of personal dignity

**2. Intent Garratt v. Daly:**

Purpose to cause a harmful or offensive contact

OR

Knowledge that a harmful or offensive contact would occur

**Restatement Second**

**In order that an act may be done with the intention of bringing about a harmful or offensive contact, the act must be done 1. for the purpose of causing the contact 2. with knowledge that a harmful or offensive contact is substantially certain to be produced.**

**3. Dual Intent vs. Single Intent**

- **Dual Intent** (Majority/General Rule): requires both the intent to contact AND intending that the contact be harmful or offensive

- Dual intent requires that the defendant appreciates the wrongfulness of the contact

- Single Intent: only requires the intent cause a contact that turns out to be harmful/offensive

- Largely only applicable to battery (maybe assault)

4. **Intent and Insanity**

- **General Rule:** Treat the insane or mentally ill like any other plaintiffs. If they have the requisite intent, they are liable. The reason why they have it is irrelevant.

- Polmatier Case (son shot his dad for schizophrenic reasons, liable)

- **Hypo:** A mentally ill patient thinks they are Napoleon and that they are being attacked by the Duke of Wellington. The patient breaks off the leg of a chair and beats the nurse with it. This is a battery. It doesn’t matter why the patient had the intent.

- **Hypo:** D strikes P while D is in an epileptic state. No battery because there is no purpose or knowledge. The defendant was unconscious.

**Hypo:** Family party, long-lost uncle comes in the door, you give him a firm hug, there is a crack, you’ve snapped one of his ribs, in a single-intent state, your uncle can sue you. In a dual intent state, your uncle would have to prove that you also had the intent for your hug to harm him.

**Hypo:** Person on a date who kisses a girl even though she said no (he is so egotistical he doesn’t believe that a “no” is possible). Whether there is a battery depends on the jurisdiction. In a single intent state, there was most likely a battery because the man had the intent (purpose) for the contact to occur. In a dual intent jurisdiction, the Plaintiff would also have to prove that the defendant intended (with knowledge or purpose) that the contact would be harmful or offensive.

**5. The Doctrine of Transferred Intent**

- If you have the intent for a battery against person A, but the harmful or offensive contact is inflicted on person B, person B can sue under the doctrine of transferred intent.

- This is a legal fiction

- Baska Case (mother stepped between a fight at the party, was punched in the face even though D only intended to strike the other person in the fight, liable)

- **Hypo:** food-fight, one of the students picks up a cream puff and aims it at his classmate at the door, the classmate ducks, the cream puff hits someone walking through the door, that person can sue for battery under transferred intent.

- Transferred Intent Between Torts

- Battery, Assault, False imprisonment, Trespass to Land, and Trespass to Chattels (intent can be transferred between these)

**6. Doctrine of Extended Liability**

- **Rule:** If all the elements of a tort are present, the defendant is liable even for unforeseen consequences.

- In negligence, liability is generally limited to foreseeable consequences. Intentional torts, however, hold a significant level of fault and thus the liability for those actions is expanded.

- You take the person as they are (and all the consequences) once all the elements of the tort have been met.

- **Hypo:** The sleeping law student (their head bobs forever after the professor bangs a book on the desk)

**7. Cohen Case**

- Woman said that she could not be seen unclothed by a male other than her husband

- A male nurse both touched her and saw her while unclothed

- Offensive contact that the staff was put on notice of, if the nurse didn’t know that the patient would be offended, he doesn’t have the intent.

**8. Actual Contact**

- Actual contact is not necessary, this is about invasion of person

- Stealing of a purse from a woman on the street = battery

- Knocking someone’s hat off angrily = battery

- Spitting on someone/throwing a drink at them and they deflect it with a book = battery (connected enough)

- Loud music or bright light = no battery, law developed before science. Could be argued, but has not yet been recognized.

- Ozone/chemicals contacting a person are enough

- Non harmful shock where victim tries to avoid it = battery, shows it would have been offensive by trying to avoid it (knowledge)

- Shoving someone = battery (reasonable person wouldn’t like being shoved)

- Rock Thrower Hypo = battery, intent to hit them

- Praying brick dropper = battery if substantially certain

**B. Assault**

**Definition:** Intent (purpose or knowledge) to cause apprehension of a harmful or offensive contact.

1. Intent

2. Apprehension of a harmful or offensive contact

- protects psychological integrity

**Picky Common Law Rules on Assault**

**1. Traditional Rule:** mere words are not enough. Words and action are needed

2. The apprehension must be reasonable

- Not just fear

- “an awareness of an imminent touching that would be a battery if completed”

3. Must be apprehension of an *imminent* battery

4. Every battery does not include assault

- Didn’t see the blow coming, no assault

- Koffman Case (coach throws a kid to the ground, the kid didn’t see it coming, no liability for assault, but for battery there is most likely liability. Some courts say you can’t have assault after the battery is underway.)

5. Damages for Assault

- Can be very large

- Hypo: Guy comes up to a tavern with a hatchet, the door is closed, he wants a beer, he bangs on the door with the hatchet, the wife peeks her head out a window by the door and says that they’re close, he takes a swing at her with the hatchet, she was awarded large damages.

6. The Disgusted Student Hypo

- student storms up to the aging professor, says “If you weren’t old, I’d beat you up right here.” There is no assault, he basically says he isn’t going to beat him up.

**- “words and negating intent”**

**- “apparent ability”**

7. Jason Stathom v. Michael Sara Hypo

- Michael says he’s going to beat up Stathom, swings at Stathom and misses, Stathom knows it won’t do anything if Sera connects with him (What if the person knows the punch wouldn’t harm him?) Apprehension includes fear, but is broader than just fear

**C. False Imprisonment**

**1. Intent (purpose or knowledge)**

**2. Actual confinement**

**3. Knowledge of confinement**

**4. Confinement against the P’s will**

- Relationship of this element to consent

- Protects liberty of person (when your freedom is curtailed, you are affected mentally)

**Hypo:** The Castle Episode (“don’t leave town,” possible false imprisonment, implied threat)

**Hypo:** The Old Police TV show

**Hypo:** The Student Activists (guards posted outside of a faculty meeting to keep students from storming the meeting, no confinement - no false imprisonment)

**Hypo:** The Legal Writing Paper (paper is due, someone is sitting in the library with their paper ready to turn it in, someone comes and grabs it, the first person follows the second person around, false imprisonment is met (to get the property back, the person has to follow it around, “duress of goods”)

**Hypo:** The Married Couple Next Door (Old married couple that fights all the time, you’re coming home and you hear “Help, Help!” It’s the husband, you look up and see that the front door has been blockaded, the wife blocked the husband in when she left, the person can’t get out and there is no phone, are you liable for false imprisonment? All the elements seem to be met, but you never acted to falsely imprison them. You have no duty to release them (unless you promised to do so earlier, then you may be liable))

**Hypo:** Blocked door, open window on the first floor. No false imprisonment.

**- If there is a reasonable means of escape, you are not confined**

- If it was on the second floor, probably confined. If there was a ladder, it depends on whether use of that ladder under the circumstances would be reasonable.

**Hypo:** two drunk guys in a small upstate city in New York, police find them, instead of taking them in, the policemen direct them to get in the police car, drive them to a golf course and let them out, didn’t want to arrest them (took them to a place where they could sleep it off). Were they falsely imprisoned? Yes (in the car - confined, there could be enough evidence of the person’s responsiveness in the car to prove those elements).

- Wander on to a freeway from the golf-course (extended consequences)

- Transferred intent? Probably not

**1. Knowledge of Confinement**

- Even if you don’t know that you are confined, if you are injured while you are confined that’s enough to meet the knowledge of confinement requirement.

**2. Shopkeeper and Shoplifting (Shopkeeper’s Dilemma)**

- You have a right to recover items that have been stolen under certain circumstances

- If you stop someone, you have to be absolutely certain (OCL)

- **Hypo:** security guard accuses someone of stealing, person leaves anyway, security guard brings them back in side, searches them, doesn’t find anything, the store is liable for false imprisonment.

**Restatement Second (Shopkeeper’s Privilege)**

**1. Reasonable Belief (that another has taken the chattel)**

- you can have a reasonable belief that someone is going to take something even if they haven’t left the store

- courts generally say, as long as you’re in the vicinity, you can stop them

**2. Detain on the premises for a reasonable investigation**

If these elements are met, you would be able to apply the complete privilege under this law

**D. Trespass to Land (Real Property)**

**Definition:** Intentional entry into the land of another.

**1. Intent**

**2. Entry**

- protects the right to exclusive possession of real property

**Hypo:** drunk girl dropped off at the wrong house, knocks on the door, sued for trespass to land, liable? Yes, she has intent and committed the entry (intent is purpose or knowledge, this tort does not require you to know it’s someone else’s land)

- Mistake is not a defense

- Damages would be nominal ($1, most likely)

- Can be achieved by an object or person

**Hypo:** game of catch, ball inadvertently goes into another person’s yard, you want your ball back, he says “no,” can you go get your ball? You can go onto the property and retrieve your property and get out (right to recover your own property as long as you did not deliberately throw the ball into their property)

**Hypo:** can there be a trespass when you have been allowed to enter? (Yes, if your time to enter has expired (i.e. lease)

**Hypo:** cement base left on a piece of land after allotted time expired, farmer runs over the base with his tractor, dies, trespass to the land (extended consequences = liability for the death or transferred intent?)

**Hypo:** singing in the rain, stepping on the doorsteps, that is enough for liability under trespass to land

**E. Conversion of Chattels (Personal Property)**

1. Intent to exercise substantial dominion over chattel.

2. Exercise of substantial dominion over chattel.

- “intermeddling” or “interference” is not enough for conversion

**Five Factors of Substantial Dominion**

- extent and duration of control

- the defendant’s intent to assert a right to the property

- the defendant’s good faith

- the harm done; and

- expense or inconvenience caused

**Parasitic Damage Rule Applies**

- P could recover from any emotional distress resulting from the damage or dispossession of the chattel

**F. Trespass to Chattels (Personal Property)**

1. Intent to intermeddle

2. Actual intermeddling

- Actual Harm Required

1. Damage to chattel

2. Dispossession (significant time)

**-** The difference between Trespass to Chattels and Conversion of Chattels is the extent of the interference to chattels. If the damage to the chattels or the dispossession becomes great or extended, it becomes conversion.

**Hypo:** The Defendant pets the plaintiff’s dog although the plaintiff has repeatedly told him not to do so. The dog is not harmed. (Neither)

**Hypo:** The defendant leans against the plaintiff’s car (Neither)

**Hypo:** Defendant takes the car for a joyride against the plaintiff’s will and puts the dog in the front seat with him (Trespass to chattels if the car ride is significant?)

**Hypo:** Defendant, angered at the dog’s barking, kicks the dog, then pushes the car over a cliff, causing substantial damages. (Conversion on the car, trespass to chattels on the dog)

**Hypo:** You take someone’s car keys so they cant drive away. This is probably a trespass to chattel rather than a conversion if the keys are returned in a short amount of time.

**What Qualifies as a Chattel?**

- Traditionally: tangible property

- School of Visual Arts = unwanted email in large amounts was trespass to chattels

**Difference in Remedy Between Conversion and Trespass to Chattels**

1. Forced “purchase” (or replevin) versus damages

- Forced purchase (value of the thing) - conversion

- Actual damages (including loss of use) - trespass to chattels

2. Actual (not nominal) damages required for trespass to chattels

**Conversion: 3-Person Transfer, Fraud, and BFPs**

- A’s property (1) taken by B who (2) sells to C, a person who does not know of the conversion by B (i.e. C is a BFP)

- **General Rule:** Both B AND C are liable

- **Exception:** C is not liable when B gets title (even through fraud or trickery) as long as C is BFP

- B is liable for conversion

**G. Intentional Infliction of Emotional Distress**

1. Intent

2. Extreme and outrageous conduct

3. Severe emotional distress

- Intentional Infliction of Emotional Distress is a stand alone tort

**1. Intent**

- reckless disregard is not intent, but is included under Rest. 46 for IIED

- purpose to inflict severe emotional distress OR knowledge that severe emotional distress was substantially certain to occur

**2. Extreme and Outrageous Conduct**

**1. Relationships (or vulnerability)**

**2. Repetition**

- repetitiousness can be considered extreme and outrageous

- debt collection is allowable, but calling someone repetitively can be extreme and outrageous

- Insults/being rude is not enough

- Must go beyond the bounds of civility

- Can tell by repetitiveness, context (relationship)

**3. Insult Rule: TAYLOR**

- Insults are not enough

- **Exception:** common carriers (held to a higher standard)

- bus driver, airplane attendant, hotel concierge

- Still alive in CA

- Repeated insults could turn into extreme/outrageous conduct

**Hypo:** P boarded a train, the train went from A to B to C, P boarded at A and was going to C, the conductor asked for his ticket, P said he would pay from A to B, then at B would pay for B to C, the conductor said he was a “lunatic and should go to a lunatic asylum and that if he wasn’t on duty he would give the passenger a black eye”

- this is intentional infliction of emotional distress

**Hypo:** fear of clowns = vulnerability that could lead to extreme or outrageous conduct

**4. Third Party IIED (Homer, husband sues wife’s doctor)**

**Special Requirements**

1. Presence (Plaintiff)

- some courts allow for someone who comes upon the victim RIGHT after the event (interpret presence broadly)

2. Knowledge of Presence (D has to know P is there)

3. Bodily harm (if not a member of P’s family)

**Hypo:** D beats the father to a pulp, the daughter comes on the scene during the middle of the beating, D looks over and sees P, keeps beating the father, daughter sues D for IIED. Yes, there is liability.

**Hypo:** Same facts, D doesn’t know P was there, but she’s watching. No liability, D did not have knowledge of presence.

**Hypo:** D knows that P lives with the father. Hears P say, “Bye Dad, I’ll be right back.” P leaves. D beats up father and leaves. Daughter returns. No recovery for IIED, no presence.

**Hypo:** Instead of beating the father up, D takes the mother’s ashes from the mantle, spreads the ashes all over the neighborhood (Father and Daughter see the whole thing), is there a tort?

- Yes, conversion

- Intent to exercise substantial dominion over the chattel

- Did exercise substantial dominion

- Father can sue for emotional distress on parasitic damages

**Hypo:** Parents discover that the neighborhood babysitter serially molested their five-year-old daughter, can they recover? (no presence, no knowledge of presence) Some cases have made exceptions for cases like molestation.

**INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS DOES NOT ALLOW TRANSFERRED INTENT IN EITHER CAPACITY**

**I. PRIVILEGES (DEFENSES)**

- These do not usually challenge the elements of the prima facie case of a tort

- They are affirmative defenses that must be plead and proven by the defendant

- These defenses supply a legal reason or justification for the defendant’s actions that render those actions non-tortious.

- **Privileges rely on reasonableness**

**A. Self Defense**

**Privilege:** You are allowed to use a reasonable amount of force in responding to an immediate threat of force or an ongoing battery.

- The key is proportionality

- Actual punch or contact

- Reasonably certain battery

- privilege to forestall impending or ongoing batteries

- Deadly force can be used when deadly force is going to occur (imminent)

- A person can never retaliate

- Some states require retreat (except in the home), others do not

- You can claim self-defense without force (locking someone in a room)

- **Reasonable** belief of imminent danger is all that is necessary

- Can respond to force with threat of greater force (still can only use reasonable force)

*1. Can a person defend himself or herself*

* + - 1. *Actual punch or contact to you*
      2. *Reasonably certain battery*

*2. When?*

*3. How much force can be used?*

*4. What facts determines whether self-defense is allowed?*

* + - *No specific fact, depends on how all the circumstances blend together*

*5. How do we determine what is reasonable force?*

*- You have to compare the facts to something*

*- The essence of finding negligence is comparing (reasonableness)*

*6. When can deadly force be used?*

*- When deadly force is going to occur*

*7. When can a person retaliate? (never)*

*8. Do you have to retreat if you can?*

*9. Do you have to use force to claim self-defense?*

**Hypo:** Guy in the bar who gets upset with someone, the other person leaves, someone tells him that the guy is still outside, the guy in the bar goes to his car and sees no one in the parking lot, someone runs up to him, the guy turns around and clocks him, it’s a police officer. You can claim self-defense if it’s a reasonable mistake.

**B. Defense of Others**

**Privilege:** you are allowed to use reasonable force in coming to the defense of others against an imminent battery or an ongoing battery.

- Same privilege

- jurisdictions are split on mistake of fact

- **Hypo:** Fight in the bar parking lot, come out of the bar, see the fight, you see your friend is one of the two people in the fight, you pull the other person off of your friend and punch him to stop the fight, it turns out your friend started the fight and the other guy is an undercover policemen.

- Some say you have to be right about who the person is (no mistake allowed)

- Some say as long as it was a reasonable mistake, you can still claim the privilege

**C. Defense of Real Property**

**Privilege:** You are allowed to use reasonable force in defending your property/

removing trespassers.

1. Warning if feasible

2. Reasonable force: start gently

3. But: trespasser has no right to resist. Privilege can turn into the privilege of self defense.

4. Courts are split on the use of force to recapture real property

- some courts allow it (reasonable force)

- many say you must resort to the courts

- You have to ask the trespasser to depart first

- If the other person shows force first, then you do not have to ask

- If the force escalates, it turns into self defense

- You cannot use deadly force to protect property unless the intruder has escalated the situation (turns into self defense)

- Katko Case

- set up a spring gun

- the problem wasn’t necessarily the deadly force, it was that the instrument could not differentiate

- Brown Case

- shot to scare off intruders, hit someone else

- transferred intent question

- on the one hand, there is a tortious intent

- on the other hand, that intent was privileged

**D. Recapture of Chattels**

**Common Law**

You are allowed to recapture chattel that has been wrongfully taken

1. have to be in fresh pursuit

2. has to have the chattels

**Restatement Second Section 120A (Shopkeeper’s Privilege)**

1. Reasonable Belief (that another has taken the chattel)

- you can have a reasonable belief that someone is going to take something even if they haven’t left the store

- courts generally allow you to stop them as long as you are in the vicinity

2. Detain on the premises for a reasonable investigation

- for investigation or summoning of law enforcement

- is the parking lot the premises? good question to analyze

- you can use reasonable force to stop them

- value of the property doesn’t matter, but may weigh on reasonableness (you have a right to recover property)

- some statutes change these requirements

**E. Privilege of Discipline**

**Parents**

1. Force and confinement: within limits

2. There is a concern about intruding on parental rights

**Others**

1. Teachers/School Bus Drivers (acting in place of the parents)

2. Privilege is more limited than parents’ privilege

**F. Consent**

**Interests Arising in Entering the Consent**

- Express or Implied in Actions

- Intent Implied by Law (Emergency)

- Ineffective Consent (capacity to consent, statute against consent in circumstances of fraud or coercion)

- Consent can be revoked

**-** Consent is treated as an affirmative defense, though it slightly alters the element of intent

- Power Dynamics

- Your ability to voluntarily agree is impaired when the person you are consenting to has some measure of power over you.

- employers vs. jailers

- Consent can be oral or through action

- You have to have the capacity to consent

- someone who is intoxicated or mentally impaired may not be able to consent, but they may have the capacity to consent if they understand the situation and the consequences

- some states won’t allow consent in certain classes (minor, impaired)

- Touching Scene

- unexpected consequences (inverse of extended consequences)

- Doe v. Johnson Case

- Hypo: man and a woman have an affair, she asks if he has herpes, he says no, turns out he does, she gets it, liable for battery

- Hypo: she doesn’t ask, he doesn’t tell, liable for battery (material fact necessary for consent)

- If he doesn’t know there is nothing he can give

- “should have known” negligence

- Cases go both ways on whether you can consent to a criminal act

**Scope of Consent**

- Rule: Consent will have parameters to it

- Hypo: left ear, right ear switch

**Conditioned Consent**

- Hypo: blood transfusion

- you decide the circumstances under which they can be touched

**Implied Consent**

- legal fiction

- Emergency

- The ordinary rule, that it is battery when a doctor treats a patient without the patient’s consent, or in excess of the scope of a patient’s consent, may not apply when the doctor must act in an emergency and obtaining consent is not possible.

- Second Operation

- If the doctor found cysts related to the operation at hand (and they were not expected), he could remove them. If it happens often, would have been required to inform the patient. If it is an emergency and needs to be handled immediately, consent is often implied.

- “informed consent” treated as negligence

- consent is invalid if you do not have informed consent

- Hypo: person dying by the side of the highway, a Dr. comes by and saves them, the person had religious beliefs not to be saved. Consent covers them unless the doctor was put on notice of beliefs before he acted. Implied consent does not outweigh the wishes of the person.

**G. Public Necessity**

**- Complete Privilege**

- Privilege not based on the Plaintiff’s conduct

- Rule is one of apparent necessity

- Protects not only public officials, but also private citizens

- Surocco v. Geary

- if the house was going to burn anyway (actual cause issue)

- if there is no privilege, and the house was going to burn anyway, they would be able to recover for the chattels in the house that they could have gotten out

- Hypo: SWAT team uses flash bangs in a convenience store, public necessity applies

- Hypo: Highspeed chase down Harbor freeway, your car is spun out of the way, are you able to recover? Probably not going to meet the intent requirement.

**H. Private Necessity**

**- Incomplete privilege**

- Privilege not based on the Plaintiff’s conduct

- If you get the benefit of saving your property, you have to pay for the benefit, even if your effort to save your property is eventually unsuccessful.

- if there is no damage, there is no recovery

- If a third party acts to save the boat, and the boat is damaged, the privilege doesn’t apply because the boat was damaged.

- If a third party saves the boat but there is no damage to the dock, that person could probably claim private necessity (you can claim it even though it isn’t your property). If the dock is damaged, third party probably has to pay.

**IV. NEGLIGENCE**

**Standard of Fault in Negligence Cases is Much Broader than in Intentional Torts**

- Question of imposition of risk on others that results in injury

- The kind of risk must be an ***unreasonable*** risk

**A. Prima Facie Case for Negligence**

**1. Duty**

**2. Breach of Duty**

**3. Actual Cause**

**4. Proximate (Legal) Cause**

**5. Damage**

**B. Duty**

**- Standard of care is a reasonable standard of care under the circumstances**

**- i.e. the amount of care a reasonable person would exercise under the circumstances**

**- “The D is held to the standard of care that would be exercised by a reasonable person under the same or similar circumstances as the D was in at the time of the alleged negligence.”**

- A “extraordinary degree” of care is not warranted

- Motts v. Stwart (pouring gasoline)

* + - The amount of care may increase under the circumstances (Danger/Risk: probability of harm), but the standard of reasonable care does not change.

- the amount of care varies with the risk/danger

* + - The jury determines the amount of care that would have been “reasonable care” under the circumstances.

- Hypo: you’d use a higher amount of care trying to catch a baby than a book; the amount that is reasonable changes, not the standard of reasonableness.

- Emergencies do not change the standard of care

- they may change what is reasonable under emergency circumstances

- a reasonable person will have more leeway to act in an emergency

**1. RPP**

**- The RPP test is an objective test**

- if there is no risk, there is no action required (negligence is based on risk)

- Jury determines whether the actions of the defendant were reasonable by comparing those actions to the RPP

- If the defendant fails the RPP test, they are likely to be found negligent if they meet the additional elements of the tort of negligence.

**Cal Jury Instruction**

“**Negligence** is the failure to use **reasonable** care to prevent harm to oneself or to others. A person can be negligent by acting or failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.

You must decide how a reasonably careful person would have acted in the defendant’s situation.”

**Two Kinds of Circumstances**

**1. Internal = within the actor**

- i.e. limited vision

- you give the RPP the same impairments as the defendant

- **Hypo**: Country Road (D driving down country road, she drove down it fifteen years ago, was aware that there was a hairpin turn, normal memory would probably forget this, this person has an outstanding memory, goes around the corner, CAN remember it, but he doesn’t pay attention, runs into somebody, sued for negligence, did he act as a RPP under the circumstances? Do we give the RPP a heightened memory or a normal memory? Yes, if you have some sort of superior ability, the RPP will be given that.)

- **Hypo**: Guy stores paint thinner/gas in his garage, starts leaking, smelling, goes in the garage, goes to light a candle (the power had gone out), massive explosion, his story is that he didn’t know/realize what would happen (flame could ignite the fumes from the paint thinner/gas), assume this is true, do we give the RPP the same lack of knowledge? (or do we give the RPP knowledge that the RPP did not have?) We give RPP knowledge, **there are certain things you have to know.**

**- Hypo:** Worn tire, tire blows on the car, hits someone, P says the tire was worn pretty well through, you could see the inside of the lining, D says “I don’t know anything about tires, I rely on my spouse or mechanic for that,” do we give the RPP the lack of knowledge? No, we assume the RPP knows something about tires.

**- Hypo:** left bails of hay next to his property, they combust (they do that apparently), neighbor sues, exercised his best judgment, he didn’t know (RPP has to know that)

- **The Basic Rule:** give the RPP the personal characteristics of the defendant, unless those characteristics don’t allow the RPP to reason (or if the defendant does not know something that a reasonable person should be held to know). (Hill - tractor driver’s experience to the RPP)

- We don’t take mental capacity into account, we give the RPP the ability to reason.

- We don’t make the RPP intoxicated even if the defendant was intoxicated

**Child Standard**

- The child standard for the RPP is a subjective standard in that it provides the RPP with the same age, intelligence, maturity, training, and experience that the defendant himself possessed.

- Exceptions: adult or inherently dangerous activities

- inherently dangerous often involves vehicles

- held to the adult standard here

- Some states (CA, Rest.) say children under 5 are incapable of reason

- Rule of sevens used to be popular (0-6 no negligence, 7-14 presumed incapable, 14-17 likely capable)

**2. External = outside the actor**

- i.e. emergency, dangerous materials, etc.

**Contributory Negligence**

**Common Law:** If P was contributorily negligent, that negligence was a complete defense and P automatically loses the case.

**Modern Rule:** Comparative fault. The jury compares the fault of P to the fault of D.

**B. Breach of Duty**

**1. Foreseeable Risk**

**2. Risk Evaluated**

**3. Alternative Evaluated**

- Clear case is Carroll Towing

- Core of negligence

- Not looking for elaborate construction, it could take pages to discuss breach

**- Negligence is overt conduct that creates unreasonable risks that a reasonable person would avoid. The risk of harm is unreasonable when an RPP would foresee that harm might result and would avoid conduct that creates the risk.**

**Breach**

- A breach occurs when a party fails to exercise reasonable care

When the RPP would foresee the harm might result (i.e. foresee risk) and would avoid the conduct that creates the risk

**- Conduct (either failing to act or acting)**

**Two Cases Where The Jury Is Supplanted**

**1. As a matter of fact**

- 99 witnesses say the light was green, 100th witness ins’t sure

- judge will force the jury to find the reasonable way

**2. Imposing a rule of law on a generic fact situation**

- Judge made rules

- range of lights rule (no longer)

- other circumstances don’t matter

- Chaffin: too narrow, could act reasonably and still produce harm under the rule of law

- “stop,look, and listen” (and get out) (no longer)

- Glaucoma test

- eye doctors always have to do it (still in effect)

**Negligence Per Se (Violation of Statute)**

- supplants the jury on the question of reasonableness

- narrows it down to whether the statute was broken

- lessens P’s burden of proof

- Violating a statute is the equivalent of acting unreasonably

- Three Part Test

1. The statute must prohibit precise conduct

- if it’s vague, RPP will be used

2. Class of Persons

- the plaintiff must be a member of the class of persons the statute or regulation was designed to protect

3. Class of Risks

- the statute/regulation must have been intended to prevent the type of harm the defendant’s act or omission caused

**- If a statute provides for civil liability, the court MUST follow it**

- Where Federal and State laws don’t line up, analyze the statute because it failed on a technicality

- LICENSE STATUTES ARE NOT USED FOR NEGLIGENCE PER SE

- RPP test can be argued as an alternative to negligence per se

- Intentional tort can also lead to negligence (intentional act can be unreasonable)

**Defenses to Negligence Per Se (Restatement)**

a. if the violation is reasonable in light of the actor’s childhood, physical disability, or physical incapacitation

- children will generally not be held to the statute, but it can be introduced

b. the actor exercises reasonable care in attempting to comply with the statute

c. the actor neither knows nor should know the factual circumstances that render the statute applicable

d. the actor’s violation of statute is due to the confusing way in which the requirements of the statute are presented to the public

e. the actor’s compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance.

- Violation of statute IS negligence, unless the defendant proves and pleads the excuse (CA presumes negligence)

- Minority: violation of statute is only evidence of negligence

- Compliance with the statute is not determinative of reasonable behavior (fire codes); if there was a foreseeable risk, the defendant may still have acted negligently

**Custom and Other Similar Evidence (Flexible Approach)**

- Violation of customs or store policies (manuals) are not negligence but may be considered as evidence of negligence

- tend to show what is reasonable, but may be there for cleanliness or other purposes rather than safety

- you have to show that the custom was in place for safety purposes (using specific woods)

- customs that are followed and result in harm may still be negligence

**Foreseeability of Risk**

- Pipher case (pulling the wheel twice)

- Foreseeability is knowing or should have known something

- Foreseeability doesn’t always mean negligence

**Reasonableness (Degree of Care, Conway)**

**1. The likelihood that the conduct will injure others**

**2. The seriousness of the injury if it happens; balanced against**

**3. The interest which he must sacrifice to avoid the risk**

**- Alternatives (cost)**

**- Utility lost**

**1. Foreseeability: Foreseeable Risks**

- Indiana Consolidated (lawn mower in the garage)

- probability of harm x injury

- garage rebuild vs. injury to P

- the higher the injury may be, the lower the probability need be

**2. Alternatives (Carol Towing Formula (B < P xL))**

- Burden < Probability of Harm x Injury

- if burden is less than the PxL a reasonable person takes the precaution

- if the burden is greater than PxL, a reasonable person would not take the precaution

- What is the burden of the alternative?

- Carroll Towing (not keeping someone on board)

- Bernier (changing the design)

**3. Utility**

- Is there any utility lost by changing the conduct?

- Is there an efficient method to change the conduct without losing the utility?

- **In order to determine what the RPP would do, you have to know what the facts of the case are (what the person allegedly did wrong)**

**-** there must be at least some proof of negligence (Santiago, bus case)

- Hypo: kid in the street hit by the car, doesn’t remember seeing the child, no other fact suggesting he acted negligently, no liability (no facts)

- Was going 55 after skidding 129 feet (enough facts to infer negligence)

- **Hypo**: dark, stormy night, person was walking down the alley, there was a telephone pole, attached to the telephone pole was a steel utility box with sharp corners, the utility box was 70 inches from the ground, 20 inches tall, 20 inches deep, person runs into the box and pokes their eye out. Negligence?

- Is that sufficient proof to show the utility company was negligent?

- low probability of harm

- severity of harm is high (poking eye out, other serious injury)

- Burden: move it higher, cover it, without sharp edges

- probably little utility lost

- Is there enough proof for negligence?

- probably

**Foreseeability**

**1. Constructive Notice**

- banana peel has been there long enough to turn brown

**2. Actual Notice**

- employee spills, doesn’t do anything about it

**3. Manner of Operation**

- pizza slice with grease

- ice cream piled high

- the question in slip-and-fall cases is whether D was negligent in preventing the slip-and-fall

**Res Ipsa Loquitur**

1. Was it the type of accident that doesn’t occur without negligence?

2. Was the instrumentality in the exclusive control of the defendant?

- Elevator Case (loosens exclusive control to probability rather than certainty)

- two defendants, car crash (50-50) can’t use res ipsa

- most courts don’t allow 2 defendants

- Giles is about contributory negligence, not 2 D’s

- two consecutive defendants is okay (Collins, ambulance)

- NOT the general rule

3. The plaintiff did not contribute to the accident or cause it

- The jury can draw this inference or not

- The jury must presume negligence unless D produces some evidence

- D must prove by preponderance that it was not negligence

**Effect of Res Ipsa (Different Jurisdictions)**

**1. (Inference)** If the plaintiff proves 1, 2, and 3, the jury may infer negligence or not

**2. (Presumption Re Burden of Producing Evidence, California)** The Plaintiff has to prove the three res ipsa requirements, gives rise to a presumption. The jury MUST find negligence unless D puts on evidence that there was no negligence, left with an inference (same place as the first jurisdiction).

**3. (Presumption Re Burden of Proof)** The presumptions shifts the burden of proof on the issue of breach to the defendant. The defendant must prove by preponderance of the evidence that it was not negligent.

- A case in equipoise (50-50) normally leads to P losing, here D loses

- Res Ipsa is no substitute for investigation and discovery

- “no means of knowing” whether it was the result of negligence

- If P has a complete explanation for what happened, she cannot use res ipsa, if she has a partial explanation, she can argue res ipsa in the alternative to a standard case of negligence.

**C. Actual Cause**

**- But for the defendant’s negligence, the injury would not have occurred.**

- Cause in fact (Did D cause the injury)

- two screens test

- In cases where the injury is divisible, then the defendant is liable for the damages she caused

**Two Defendant Liability**

**1. Indivisible Injury**

- both are the factual cause of an indivisible injury

**2. D1 sets the stage for D2**

- joint in several liability

- common law: both are liable for the full amount (can only collect the total damages once)

- in cases where it is not able to be determined who actually caused what injury (i.e. D1 hits P1, D2 hits P1 a second later), it’s theoretically a divisible injury, but courts will treat it as an indivisible injury

- use the substantial factor test

**3. Separate Injuries**

- liable only for the injuries you caused

- D1 spins the person around and D2 hits them, D1 is liable for both and D2 is liable for only the second injury

**4. Defendant Causes Part of the Injury**

- D1 sends P to the hospital, D2 hospital is negligent

- D1 is liable for both, D2 is liable for injury at the hospital

**5. D’s liability without “but for” causation**

- employer’s liability (employer is liable for their employee’s actions, can seek indemnity)

- Concert of Action (Drag race stops short, still liable)

**Liability in Two Defendant Cases**

**Common Law Joint in Several:** P can recover from either D1 or D2 or both, but only the full amount once

**Modern Several Liability:**

- P v. D1 (20% negligent) and D2 (80% negligent)

- liability is divided by percentage of fault

- No defendant is liable for more than her share

**Contributory Negligence**

**Common Law:** P could not recover

**Modern Rule:** Comparative fault

- P’s recovery is reduced by P’s negligence

- D’s are responsible either Joint in Several or Severally

**Substantial Factor Test**

- Was the Defendant’s negligence a substantial factor in causing the damage?

- Generally applied when the but-for test won’t work

**Alternative Liability - Summers v. Tice**

- 50-50 probability as to who actually caused the harm

- courts shift the burden to the defendants on actual cause

- if that is not met, then it is joint-in-several liability

**- this test will only apply when all the actors are negligent**

- If it’s 55% that one did it and 45% that the other did it, P can meet the burden of proof against the first actor

**Lost Chance**

**- 50% or less of recovery**

**- California has not adopted this**

**Solutions:**

1. Lost Chance Theory

- loss is the lost chance rather than the life

- P has to prove this lost chance by preponderance

- the damages are calculated by the lost chance’s proportion to the whole

2. Relaxed Causation

- use the substantial factor test to allow recovery

- full amount allowed

- LCT does not apply in anticipation of the harm

- there must be actual damage

**D. Proximate Cause**

**An actor’s liability is limited to those physical harms that result from the risks that made the actor’s conduct tortious.**

**1. Class of Persons**

**2. Class of Risks**

**- Be able to apply basic risk rule (same foreseeable risks that made D’s conduct negligent came to fruition to cause the harm)**

- Proximate Cause questions tend to come up in strange fact patterns

- Negligence Per Se = look to see if the class of risks covers the risk that came to fruition

- There has to be a relationship between the person who is injured and the risk

- no “transferred intent” in negligence (have to be in the “danger zone”)

**Manner of Harm Occurring**

**- Fire case (manhole)**

- Result is the same

- Variant on the foreseeable

- Manner is different

- this is a soft area of the law, courts will generally say that it matters how the harm occurs, but there is some leeway whether the manner matters (just identify the issue and make the argument)

- If it is totally unforeseeable, then it is likely that proximate cause is not met

**Special Rules and Proximate Cause**

**1. Danger Invites Rescue**

- wrongdoer may not have foreseen the coming of a deliverer, he is accountable as if he had

- reasonable belief (by the rescuer) that the person needs rescue

- rescue must be in continuity

- rescue includes when the person has injured themselves

- includes instinctive and calculated rescuers

- Foolish rescuers (try to address this in contributory negligence, emergency doctrine)

**2. Thin Skull/Eggshell Plaintiff/Take the Victim as You Find Them**

- idiosyncratic reactions

- deemed within the risk rule (gangrene walking down the stairs)

- applies to physical OR economic aftermath

**3. Fire Cases**

- NY: “one house” rule

- Midwest: less willing to put proximate cause limitations

**4. Subsequent Medical (or Medically Related) Negligence**

- D1 is liable for D2’s malpractice unless it rises to recklessness

- includes transportation

**5. Accident Aftermath**

- “waters have calmed”

- proximate cause for injuries relating to an accident until the “waters have calmed”

- broad proximate cause (don’t want to sort it out)

**Alternate Way of Assessing the Issues**

A. Is the harm outside the scope of the risk because of the manner in which it occurs?

B. Is the harm outside the scope of the risk because its extent is unforeseeable?

C. Is the harm outside the scope of the risk because it results most directly from an act of an intervening person or force?

**Intervening Causes**

When you have the D1-D2 scenario, if D2’s acts were **reasonably foreseeable** at the time of D1’s act, D1 is still the proximate cause

- analyze whether D2 was negligent or intentional

- Arson case (reasonably foreseeable? probably)

- collins doesn’t care how the fire started (minority)

- Criminal or intentional acts used to cut off liability (not so today)

- *A tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct. (Marcus, general rule)*

- **Suicide**: courts generally see this as an extraordinary event

- **exception**: defendant’s negligence did something to the suicidal person’s ability to understand what was going on OR renders them unable to resist suicidal influence (negligent act CAUSED the person to be in that position)

-i.e. seizures after accident, kills himself

- prisons are responsible for inmates (suicide)

**Negligent Intervening Causes**

“If the intervening act is **extraordinary** under the circumstances, **not foreseeable in the normal course of events,** or **independent** or **far removed** from D’s conduct, it, it may well be a superseding act which breaks the causal nexus.” Deridian (epileptic seizure, crash, worksite)

**Proximate Cause**

- argument relies on a foreseeable outcome that occurs

- often depends on how the facts are emphasized

**Related “Normal” Concepts**

1. Shifting Responsibility (someone else takes charge, dynamite caps)

2. Sufficient passage of time

**Breaking Proximate Cause Down**

**1. Risk Rule**

**2. Intervening Causes**

**3. The Manner of Occurrence**

**4. Special Rules**

**Proximate Cause is overcome by Res Ipsa Loquitur (don’t know the breach, don’t know the but for cause, don’t know the proximate cause because no risks foreseeable in “breach”)**

**E. Actual Damage (Harm)**

**- If there are zero economic damages and zero non-economic damages, the plaintiff loses the case**

- there must be actual damages (no nominal damages as in intentional torts)

**Defendant Pays**

**- Single Defendant:** all actual (economic/non-economic) damages

**- Multiple Defendants**

- Joint in Several Liability

- two defendants who caused an indivisible injury

- both liable for the entire injury (P can pick)

- Pro Rata Contribution

- Paying defendant can demand contribution from the others by their share

- 2 D’s = 1/2, 3 D’s = 1/3, etc.

- if other defendant’s have no money, they are out of luck

- Common Law (modern uses comparative fault)

**Liability in Two Defendant Cases**

**Common Law Joint in Several:** P can recover from either D1 or D2 or both, but only the full amount once

**Modern Several Liability:**

- P v. D1 (20% negligent) and D2 (80% negligent)

- liability is divided by percentage of fault

- No defendant is liable for more than her share

**Indemnity**

- Employer can request indemnity from employee (full amount)

- If employer is negligent in hiring, can be held liable for indivisible injury

**V. DEFENSES TO NEGLIGENCE**

1. **Contributory Negligence**

**Common Law:** P could not recover (complete bar)

**Modern Rule:** Comparative fault

- P’s recovery is reduced by P’s negligence

- if one of the elements of P’s negligence is not met, recovery likely won’t be reduced

- D’s are responsible either Joint in Several or Severally

- **Pure: No limit on recovery**

**- Modified: Limits the Plaintiff’s ability to recover over a certain percent of negligence (usually either up to or up to and including 50%)**

- The Two-Fault Auto Accident

- P and D drive negligently and collide

- P’s Damages = $100,000

- D’s Damages = $50,000

- P = 60% negligent

- D = 40% negligent

**Pure:** $0 (over 50%)

**Modified:** $40,000

- D could get $30,000 on counterclaim

- Comparative Fault Three-Fault Auto Accident

- P = 40%

- D = 20% (1/3)

- D2 = 40% (2/3)

- not worried about percent from P

- worried about calculating the 60% being divided up

- D pays 20%, D2 pays 40% (not 50-50 under pro rata)

**Jury**

- Majority Rule: Jury should be told how comparative fault system works

- P or D can ask judge to instruct jury on the finding’s impact on recovery

**Restatement (Third) and Comparative Fault**

1. Nature of the risk-creating conduct, including awareness or indifference with respect to risk

2. The strength of the causal connection

**2. Mitigation of Damages/Avoidable Consequences**

- Rule: P must minimize damages by reasonable efforts and expenses

- P must use all reasonable efforts in obtaining medical care (therapy, surgery)

- Common Law: not allowed to recover for that portion of the injuries that are avoidable

- Restatement: comparative fault

- Bexiga Principle: Even if the Plaintiff is negligent, it does not bar recovery because the safety device is supposed to protect the plaintiff from his own negligence.

- Some apply Bexiga Principle (no reduction on recovery)

- Some apply Comparative Fault (classic case)

**3. Comparative Fault’s Effect on Prior Doctrinal Rules**

***1. Where P is not negligent***

***2. P is negligent, but P’s negligence is not the actual cause of the injury***

***3. P is negligent, but P’s negligence is not the proximate cause of the injury***

***4. P is negligent, but P’s negligence is a superseding, intervening cause***

***5. Mitigation of damages***

**6. Duty to protect P**

- *Bexiga* (employer supposed to protect P from his own negligence operating a punch-press) and *Christensen* (school district/principal obligated to protect plaintiff from sexual abuse)

- There may be instances in which, even though P is alleged to be contributorily negligent, the court may find for some sort of **policy reason** such as the **relationship** between the Plaintiff and the Defendant where D’s obligation is to **protect** P or the P is particularly **vulnerable,** the contributory negligence will **not reduce recovery**

**1. Protect P from themselves**

**2. Protect P for something someone else could do to them**

**7. Subsequent Medical Negligence (deemed foreseeable)**

- *Mercer:* SC says someone who **injures** **themselves** and goes to the hospital is entitled to non-negligent treatment

- P (drunk in accident); D hospital negligent

**8. Effect on Joint and Several Liability**

Four traditional grounds for JSL:

1. Concert of Action

- A and B acted in concert to commit unlawful act

2. Indivisibile Injury

- concurrent torts where A/B acts produce indivis. injury

3. D1 creates risk of harm by D2

- D1 sets the stage; leaving a hit deer in the road

4. Vicarious Liability

- employer/employee situation; employee liable for own torts

- Traditional Settlement Rules: one judgment rule bars any further recovery from Ds

- Releases: Release of one D releases all (common law)

- Response: Covenants not to sue

- P v. D2 and D3: What if P settles with D2?

Depends on settlement

1. Full satisfaction

- it’s over, can’t sue anyone else

2. Partial Satisfaction

- can still go after D2 for remaining amount of a full settlement

- JSL still applies (as a P you can go after either defendant in either combination you want as long as you don’t go over the full amount)

- Does Comparative Fault Change JSL?

1. Rationale for Comparative Fault

- allows P to recover even with negligence on their part

2. What is the rationale for JSL

- P should be allowed to get full amount

- gives P more options to fully recover

- D was negligent, actually/proximately caused the P’s injury (have to pay more money, but they were at fault)

3. Is the rationale for adopting comparative fault inconsistent with keeping the doctrine of JSL?

- Yes, each D is assigned % of fault

- JSL, D could have to pay an amount beyond that %

- BUT D1 could collect contribution from D2 on a comparative basis (unless insolvent)

- the issue is really who bears the risk of insolvency

- Many courts retain JSL and Comparative Fault

- CA Rule (AMA case, then Prop. 65)

- Non-Economic Damage: no JSL

- Economic Damages: CF and JSL

- Economic Damages are objectively verifiable; non- economic damages are not objectively identifiable including pain and suffering

- NY depends on whether your fault is greater than 50%

- others maintain that CF and JSL are incompatible

- JSL: anyone who is negligent/actual cause/proximate cause of the injury is fully liable

- Several Liability under CF: D’s liability limited by % of fault

- Effect of Settlement with Multiple Ds

P - 10%

D1 - 45%

D2 - 45%

Damages: $100,000

P settles with D1 for $10,000

P can get 80k from D2 at trial (if D1 was covenant not to sue)

Under CF, all you could get is $45,000 (give away D1’s percentage with covenant not to sue)

- If no JSL, no right of contribution

- if there is JSL, D2 cannot demand contribution from D1 if D1’s settlement was a good faith settlement

**9. Comparing Two Defendants**

- D1-D2 scenario

- D1 is negligent in failing to protect P from D2

- D2 acts intentionally

- Do we apply Comparative Fault?

- always look to the statute

- look to see if one of the Ds was supposed to protect P from the second D

- *Basset*

- O was pursued by officers, P passed roadblock, officers did not warn them, let them go through, O smashed into P’s car injuring them

- statute used “fault” to be compared

- court said O’s intentional conduct could be included in CF

- elimination of JSL strengthened the argument O should be in

- only liable for their portion of fault

- Jury gave O only 25% of the liability (sympathetic to Ps)

- *Turner*

*-* intentional conduct should not be compared with negligence where the intentional conduct is the **foreseeable result** of the negligent conduct

- D had been attacked by the patient

- psychiatrist was supposed to protect P from intentional D

**10. Rescue Doctrine**

- Danger invites rescue

- if you create a dangerous situation through your negligence, you will be responsible for any harm that comes to someone who is a rescuer

- rescuer is therefore deemed a foreseeable plaintiff automatically

- **Limitations**:

- reasonable belief (by the rescuer) that the person needs rescue

- rescue must be in continuity

- rescue includes when the person has injured themselves

- includes instinctive and calculated rescuers

- Foolish rescuers (try to address this in contributory negligence, emergency doctrine)

- what if rescuer is negligent?

- Common Law: not a bar to recovery unless rescuer was **reckless**

- Comparative Fault: Courts are split

- doesn’t tend to matter

- emergency doctrine: hard to find rescuers negligent

**11. Doctrine of Last Clear Chance**

- Contributory negligence is not a defense if:

(a) D has “last clear chance” to avoid the injury and

(b) P is helpless

- Hypo: D is negligent, P is contributorily negligent (CL: case is over)

- Hypo: D is negligent, P is contrib. neg., P was helpless and D at that point in time had the last clear chance of avoiding the injury

- Donkey is tied in the road, P is driving too fast on the horse, D has the last clear chance to have removed the donkey, there is still full recovery even though P is driving too fast

*- This doctrine is completely abolished?*

*- subsumed by comparative fault*

**12. Res Ipsa Loquitur**

- Control prong became more flexible (elevator case)

- Can use Res Ipsa even though P had some control over the instrument

- reduce recovery by P’s % of fault

- even though we don’t know what D’s neg. was to compare

- l**eave it to the jury to compare**

- **HYPO**: going down the escalator, chooses to illustrate Kobe Bryant’s jumpshot, jumps up and down, falls and alleges/proves that at the same time there was some sort of jerk in the escalator just when he happened to be reaching the arc of his jump, he misses the step, uses Res Ipsa Loquitur

**13. D Acts Intentionally or Recklessly**

- Hypo: bar fight, D hits P, P egged on D and was negligent in doing so, D wants P’s recovery reduced by whatever negligence they have

- Hypo: Woman opens the door to rapist in shady part of town

- Read the statute to see if it allows you to compare (some will not)

- General Rule: reluctance to compare the two

- when dealing with comparing P’s neg v. D’s intentional, comparing may not be appropriate (consider the rape case above)

**14. D’s Illegal Activity**

- **Rule:** Ps engaged in criminal activity ought not to be allowed to recover

- you would bar P instead of applying comparative fault

- BUT, speeding may not bar recovery

- Court draws the line depending on how **serious** the violation and crime are

- all you can do is argue how serious the crime is

- if serious: no recovery

- if not serious: apply comparative fault

- *Barker*

- P (15) was making a pipe-bomb with fire crackers sold by 9 yr. old D

- court held: no recovery, serious crime

- “burglar who breaks his leg while descending the cellar stairs, due to the failure of the owner to replace a missing step cannnot recover compensation from his victims”

- if sold by adult, closer to *Bexiga*, but the basic problem of seriousness is still there

4. **Assumption of the Risk**

**Two Types of Assumption of the Risk**

**1. Express Assumption of the Risk**

- complete bar to recovery

-99% of these cases are in writing

- the only question is whether it covered the injury

- minimum standard of care that cannot be waived

- reckless/grossly negligent, actual knowledge of danger and no action

- *Stelluti* (spinning gym accident)

- signed a waiver, read K carefully, expressly covered injury

- freedom of contract

- there is a minimum standard of care that can’t be waived

- i.e. speared by the cycling machine

- “you can go somewhere else to get the benefit”

- **Gyms are not essential**

- court assumed this

- *Tunkl* (exception, essential services)

- often where **P didn’t have any choice**

- admitted to the hospital after signing a waiver for “any and all liability”

- **essential service** provided to the public

- “No public policy opposes private, voluntary transactions…for a consideration”

*- Tunkl Factors* (use for argument)

1. Concerns business generally suitable for public regulation

2. D is engaged in performing service that is great importance to the public, often practical necessity

3. Party willing to perform service to any member of the public

4. Bargaining power of D, essential service and economic setting

5. Adhesion K, no way to pay more to protect from negligence

6. Person/Property placed under D’s care, subject to the risk of carelessness by seller/agents

- YMCA daycare sexual assault by another child

- essential (no other real alternatives)

- medical cases are the best ones (essential)

- gyms (not an essential service)

- *Moore*

- Riding course after buying an ATV

- hits a rock and gets thrown off/seriously injured

- K covered all injuries (except reckless/intentional)

- rock not in the scope

- court reduces the class of risks

- “all bodily injuries” covered in the ATV course

- why not negligence?

- only those that are “inherent” (language of K)

- **courts read waivers VERY closely**

- could have covered all negligent acts if written better (did not cover general negligence)

- **NO IMPLIED REASONABLENESS IN SCOPE**, just read K closely

**Steps for Express Assumption of the Risk**

1. Read the K

- is it valid (capacity, drunk, signed, etc.)

- does it cover this

2. If covered, is the service essential?

- *Tunkl* factors for policy

- If yes, invalid

- If no, valid

- alternatives?

**Express AoR**

1. Recognized and allowed

2. Not affected by comparative fault

3. Is release “vague or ambiguous?”

4. Does release offend public policy?

- Example: (1) No release from intentional or recklessly caused injury (2) Tunkl: essential services (in some states)

5. What is the scope of the release? Construing the release

- Statutory limitation (2:00, January 21)

**2. Implied Assumption of the Risk**

- implied from facts (similar to consent, in this way)

- consent: encountering risk from an intentional act

- here, encountering the risk from a negligent act

**Common Law Implied Assumption of the Risk**

1. **Knowing** of the risk and **appreciating** its quality

2. **Voluntarily chose** to confront the risk

- voluntarily encounter the risk

- freely decided to take on that risk, you have a choice

- unreasonably encountered it, you’d be negligent, you’d be barred for that (double bar, AoR and Contrib. Neg)

- They will be deemed to have impliedly assumed the risk and it is a complete defense at common law (trumps Ds neg.).

**Comparative Fault Implied Assumption of the Risk**

1. Primary Assumption of Risk

- sports cases (classic)

- within the scope of the sport (recklessness not covered)

- if outside, becomes secondary

- looks forward: future relationship with D

- In entering into the relationship with the D, P is aware that D will not protect the P form certain risks

- Abolish primary assumption of the risk and treat it as a lack of duty (destroys prima facie case)

2. Secondary Assumption of Risk

- D had a duty, breached the duty, and the defendant voluntarily assumed the risk with knowledge and appreciation of the risk

- looks backwards: already a duty and breach

- apply *Carroll Towing* analysis for **reasonableness**

A. Reasonable

- CL they were barred (assumption of risk)

- now, full recovery

- abolishes implied assumption of risk

- courts still use the language of AoR

B. Unreasonable

- treat as CF

- P will get a partial recovery, instead of being barred at common law

- abolishes assumption of the risk

*- Dobbs* (275)

- see what this does\*

- *Betts* (276)

- housekeeper trips over children’s toys

- secondary assumption of the risk

- would be primary if HK didn’t relieve homeowners of duty to pick up toys

- housekeeper assumes risks pertaining to employment which are known or ordinarily discoverable

- *Avila* (279)

- intentionally hits batter in the head

- primary assumption of the risk

- throwing at the batter’s head is part of the sport

- “inherent in a sport” vs. “outside the bounds of the sport”

- *Knight*: athlete does not assume risk of coparticipant’s “intentional or **reckless** conduct ‘totally outside the range of the ordinary activity involved in the sport…”

- Rules of the sport do **not** necessarily lay out everything that’s part of the sport (violating a rule does not always take the conduct outside the “range of ordinary activity” of the sport)

- *Sunday* (278)

- skiier hit a bush on a novice trail, seriously injured

- not a danger inherent to the sport (falling, though, is)

- *Nalwa*

- bumper cars

- recreational activities “involving an inherent risk of injury to voluntary participants…where the risk cannot be eliminated without altering the **fundamental nature** of the activity”

- **no longer a subjective test (AoR abolished)**

- Primary assumption of the risk does not depend on the individual’s knowledge and appreciation of the risk and voluntarily encountering it

**- questions of duty are questions of law for the judge**

- look to general experience of the public, case law, etc.

- Hockey Stick Hypo

- Hit in the kidney with a hockey stick

- acceptable part of the sport, hitting in the face would probably out of the bounds of the sport

- House Fire Hypo

- you come home to your apparent, your building owner has been negligent, as a result your apartment building is on fire, you get home, and your immediate thought is that your tort notes are inside, you rush in to save your tort notes and are injured as a result

- Secondary Unreasonable Assumption of the Risk

- LL owed a duty, breached that duty, you knew the risk, but you decided to act anyway

- CL: you would be barred

- CF: your recovery would be reduced by your percentage, most likely very large

- Renoir Variation

- same hypo, but painting worth $20mil

- could be reasonable, factor in insurance into *Carroll Towing*

- taking the risk for people’s lives is reasonable (rescue doctrine applies, recover unless you’re reckless)

- would probably be full recovery

**VI. LIMITED OR ALTERED DUTY OF CARE**

**Duty Generally**

- “duty to use the care of the reasonable, prudent person under the same or similar circumstances, but other standards or duties can be used”

- Limited Duty or Not Duty

1. Context

2. Relationship between P and D

**1. Duty of Carriers and Drivers**

- Common Carriers/Drivers - hold themselves open for higher

- higher standard of care than the normal driver

- “stops just short of ensuring their care” *Doser*

*- more* than reasonableness

- still exists in most states (CA and elsewhere, some have abolished)

- common carriers, inn keepers, etc.

- Guest Statute (Drivers)

- Alabama Code

- covers individuals who are in motor vehicles while being transported without payment

- no duty to the “guest” except to avoid “willful or wanton” misconduct

- have almost all been abolished

- CA started this trend

**2. Duty of Landowners**

- tension between protecting people from injury, and expanding compensation to uthe point that it diminishes property rights

**1. Trespassers**

- duty to avoid **willful/wanton** conduct

- until actually **discovered** or D has facts within knowledge so that she “**has reason to know**”

- then the duty becomes reasonable care (sort of invitee)

- no duty to inspect the property

- Footpath exception

- indicates you must act reasonably with relationship to the footpath

- tells you someone has been there

- seeing a fire may work, footpath is a generic fact

**2. Invitees**

- business visitor - on the premises for a business purpose

- was there an economic benefit to the landowner?

**- reasonable standard of care**

- public invitation

- public park visitors, hospital visitors, etc.

- even though not on the land for economic gain of landowner

- pollution bridge hypo

- Yale donor; there to donate money, invitee

- Cigar Shop Hypo

- went into a store, didn’t buy anything, went to the bathroom, was injured by a trap door, did not lose his status as an invitee

- open an obvious danger exception

**3. Licensees**

- Permitted to enter

- duty to avoid **willful/wanton conduct**

- includes social guests (invited, not public, not business)

- a licensee who is asked to leave and refuses becomes a trespasser? (Cilley)

- Exception:

- “knows or has reason to know of a concealed dangerous condition”

- duty to warn about that condition

- *Gladon*

- RTA runs over drunk basketball fan

- Gladon wants to be an invitee, limited to on the platform

- once on the track, he is a trespasser (not by the common law elements)

- court said it didn’t matter that someone else pushed him

- tennis shoe (may have alerted the driver)

- argument for willful/wanton, probably not enough

- **your status can change depending on where you are on the land**

**Child Trespassers**

- Attractive Nuisance Doctrine

- *pool hypo?*

*- turntable case?*

- Modern Rule: *Bennett* (307)

- harm caused by an “artificial condition”

1. Children likely to trespass

2. Unreasonable risk

3. Children do not discover/realize

4. Utility/Burden to D

5. Reasonable Care taken by D

- 4 and 5 are breach considerations, but are screening devices for the judge in the duty ontext

- common hazard exception (some states)

- irrigation canal in AZ, wouldn’t apply attractive nuisance

- so essential to the economy, they should not be liable

- pool would be under the attractive nuisance, though

- *Bennett*

- child was young and was killed

- not a trespasser, 15 would be trespasser

- court adopts the Attractive Nuisance Doctrine (below)

- Dangerous instrumentality/turntable doctrine

- **natural conditions are not covered**

- someone who has done nothing, someone who has acted

- mother’s negligence considered under comparative fault

- Mother neg. for not watching child

- Neighbors neg. for not protecting pool

- Mother’s recovery not reduced for injuries while rescuing, but initial negligence would be considered

- rescue doctrine

- D would most likely settle (P is a sympathetic party)

**Restatement Rule for Attractive Nuisance Doctrine**

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an **artificial condition** upon land if:

(a) the place where the condition exists is one upon where the possessor **knows** or has **reason** **to** **know** that **children** **are** **likely** **to** **trespass,** and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an **unreasonable** **risk** **of** **death** or serious bodily **harm** to such children, and

(c) the children because of their youth **do** **not** **discover** **the** **condition** or **realize** **the** **risk** involved in intermeddling with it or in coming within the area made dangerous by it, and

- they can know of the risk, but they may not understand it

- that’s why it usually applies to young children

(d) the **utility** to the possessor of maintaining the condition and the **burden** of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise **reasonable** **care** to eliminate the danger or otherwise protect the children

**Open and Obvious Dangers**

- still alive today

- duty question

**1.** if a danger is open and obvious to a plaintiff the defendant has no duty to protect that plaintiff from the open and obvious danger

2. Exception: D should have anticipated harm despite open and obviousness (*Kentucky Medical)*

- reasonable or unreasonable distraction (apply CF)

- this exception frequently comes into play

3. “residual risk” in the Restatement

*- Kentucky River Medical* (312)

- paramedic trips over a curb, been there 400 times

- D argues she knew the curb was there

- this plays into duty

- D is an invitee, but open an obvious carves out an exception that you can expect the P to deal with the risk themselves

- no liability for known or open and obvious dangers **unless the D should have anticipated harm despite such knowledge or obviousness** (Restatement 34(A))

- hospital should have anticipated the harm

- Diving Board Hypo

- guy gets up on a roof, dives into the shallow end of the swimming pool, injured, sues the defendant for not warning him, “open and obvious,” it’s a swimming pool, the end you dove into was the shallow end, the risks of diving off a roof into the shallow end are obvious

- K-Mart Mirror Hypo

- buys a mirror, runs into the posts outside while carrying it

- open and obvious danger rule

- anticipated the harm

- if you’re selling big stuff, you should anticipate people have to carry it past those posts

- to avoid, K-Mart could

- make people to go to the back with big items

- insist on carrying the packages for the customer

- warning them about the posts

- they’ll forget it quickly, dealing with the mirror

- Icy Floor Hypo

- “dealing with nature, not responsible for injuries”

- doesn’t tell them what the danger is

- even if you warned of icy floors, they would go in and look for a tree, they would not be thinking about the icy floors

- Watermelons in the Grocery Aisle Hypo

- woman fell over watermelons on the floor in the store

- invitee, business customer

- D should have anticipated she would be looking for other stuff

- Duty question

- she can’t recover unless the stuff had been on the floor long enough to give them actual notice or constructive notice (breach)

- if it’s an open and obvious danger, she loses and gets nothing

- if it falls into an exception, she recovers and that recovery is reduced by her negligence (CF defense)

**Duty to Persons Off the Land**

1. Original Distinction

- **Natural** condition on the property - no duty

- trees, natural condition

- mud-slide, did you cause it?

- **Artificial** condition on the property - duty

- aligns with the duty to children rule

2. Natural: Urban-Rural

- **Natural** condition in an **urban area** - duty

- LLS, branch hits a car, duty

- breach is a different issue

3. Abolition of the Categories

- CA, some other states

- You owe a duty of reasonable care to those off the property

- effect is essentially it gets the breach question to the jury

- in rural areas, you’re less likely to get a breach

- foreseeability is down, less people, you’d have to inspect and maintain to prevent injuries from natural conditions

- in urban areas, more foreseeable risks

**Firefighters Rule**

- CL had trouble dealing with firefighters

- not trespassers (they have a right)

- not invitees, no business purposes (haven’t always invited them)

- **General Rule:** no duty owed to firefighters with respect to those risk and services for which they were trained and paid (they are compensated a bit)

- Limited duty

- also applies to police

- CA - this has become limited

- if there is a **tortious act independent** to the reason they came (i.e. cause of the fire)

- **Hypo:** Santa Ana fire, it turned out that there were toxic materials on the site, the firefighters were severely injured, D evoked the Firefighters Rule, this was an **independent risk** of which you were aware and you **didn’t warn them** about that, they can sue you for that, it’s outside the normal scope of what the firefighters deal with

- applies to police officers as well

*- Rationales*

*1. Licensee*

*2. Assumption of the risk*

*3. Too great a burden*

*4. D already paid taxes*

*- Exceptions*

**Abolition of Common Law Categories**

- CA has abolished invitee, licensee, and trespasser categories

- life of a trespasser is not worth any less than another entrant

- categories are not determinative, but relevant

- i.e. a trespasser is less foreseeable

- type of land becomes relevant to foreseeability

Three Possibilities (Rowland is not very popular)

1. Keep categories, merge invitees and licensees

- social guests are invitees, not licensees

2. Rowland; abolish categories (Few states, unpopular)

3. Keep all three categories, but take social guests out of the licensee category and make them invitees

- left in licensee:

- somebody who is allowed to come onto your property not for a business purpose but not socially (some other reason they are on your property)

- famous plant your neighbor wants to see

- permitted to come on

- reasons that don’t have to do with social interactions

- *Scurti* (324)

- kids in a park, crawl under a fence, rail yard, they are injured

- NY has abolished the categories

- with categories, they are trespassers, no willful/wanton

- 14 year olds; too old to treat them under attractive nuisance doc.

- if it wasn’t foreseeable, there will be no breach

- jury will decide this now

- jury may be overly sympathetic

- CL categories, you may win on SJ, no willful/wanton conduct

- “must take reasonable measures to prevent injury to those…who can reasonably be foreseen”

- reasonable care under the circumstances

- it becomes a jury question

- may encourage settlement on both sides

- Hypo: High school kids trespassing at a high school on the weekend, on the roof, walked over a glass part and fell through and was injured

- raises issues without the categories

- foreseeability

**Recreational Use Statutes**

- no duty to keep the premises safe/to warn of hazards when permitted for recreational use

- used to encourage people to open their land for recreational use

- does not apply if you charge people for use of the property

- does not apply if you expressly invite them

**Duty Owed by Lessors**

- Common Law: rooted in property law; no duty

- lessor did not retain the right to possession

- when the lessee was injured on the property, the lessor owed no duty, gave up rights to be on the property

- Exceptions:

1. **Contract** **to** **repair**

- gave rise to a duty

- provisions in the lease that the lessor will repair things that are brought to their attention

2. Owner’s knowledge of a **dangerous condition** on the property and tenant could not be expected to discover it

- lessor owes a duty with respect to that duty

- duty ends when tenant discovers it

- just tell T about it, duty is discharged

3. **Public** **use** of the premises

- lessor owes a duty of care with respect to those on the premises

4. **Common** **areas**: Landowner retains control

- stairwell, hallway, courtyard, rooftop access, etc.

- lessor retains control, owes duty

5. **Negligent** **repairs**

- lessor repairs something and does so negligently, tenant is injured, duty with respect to that

- Hypo: balcony collapses while moving sister’s mattress

- wasn’t a tenant

- may be able to sue lessee depending on category (invitee, doing work for her)

- not a pure estate in land that lessor gets rid of, they still have a relationship (no warranty of habitability)

- New Rule: Duty to Exercise Ordinary Care

- reasonableness and foreseeability

- general duty, fact oriented

- Start with who occupies the property

1. Land Owner

- categories

2. Lessee

- CL: no duty

- Modern: reasonableness and foreseeability

- categories as between T and anyone else

**3. Duty of Professionals**

- not a separate COA, 5 elements must be satisfied

- these are just extra rules (usually plaid out in duty)

- Doctor’s taking of the patient represents an undertaking of care

- Ps evidence of negligence

- need for expert testimony

- Customary practice in the medical community under similar circumstances are the **standard**

**-** Medical **“standards”** almost always reflect particular **customs** or **procedures** used under the very particular circumstances

- the exact circumstances P acted in

- “what the average qualified physician would do in a particular situation *is* the standard”

- “need not be proven effective or scientifically tested”

- doctors are allowed to choose what school of medicine they practice

- as long as it is an accepted way of treating a condition

- if a considerable number of people follow it = school of medicine

- the fact that there is another way of treating it won’t necessarily mean malpractice

- rare conditions with no set treatment, may not be malpractice

- cutting edge treatment

- informed consent COA becomes important

- **Locality Rule:** professionals in the same area as the defendant are used for comparison

- **Modified**: similar area

- **Modified** **Further**: just one of the circumstances taken into consideration when experts testify

- specialists generally held to a national standard

- **Modified Again**: Generally, the locality rule is abolished

- the internet makes information more readily available

- lack of equipment isn’t enough, if you don’t have it you’d send them to someone that does

- *Walski (329)*

- scar tissue, D made too wide a cut, cuts P’s vocal nerves, they’re paralyzed

- P used expert witness (Berger) to prove negligence

- Berger said what *he* would do

- did not testify as to the “customary practice” in the medical community

- area of expertise outside the common knowledge of the juror

- gross treatment would not require an expert (left something in)

- *Pilot Hypo*

- apply the professional standard to all professionals

- lawyers, nurses, accountants, engineers, doctors, pilots, etc.

*- licenses are not enough to suggest professional?*

- you’re trained to do a specific job, professional implies a standard you should be held to

- a job that imposes risks on others in some fashion

- Down Side: what’s customarily done isn’t always the right thing or reasonable to do

- “same training and experience” jury instruction

- RPP standard, not the right one

- custom among pilots would be the proper standard

- *Vegara* (334)

- Locality Rule - Same or similar locality

- rural location (probably general practitioner) v. big cities (more specialized area of practice)

- this gets relaxed (small areas, limited number of professionals, hard to get people that know each other to testify against one another)

**Good Samaritan Statutes**

- doctors and medical professionals rendering emergency care

- medical professionals have no duty to respond to accidents

- once they respond, they would owe a duty

- meant to counteract people responding to emergencies being fearful of liability

CA Statute

- If you know CPR, went through a course, not liable for damages as a result of acts or omissions in rendering emergency care

- Gross negligence is NOT covered

- *Hirpa* (340)

- patient in labor began to have a seizure, unresponsive

- “Code Blue”

- P died, emergency statute applied (Good Samaritan)

- hospital locale is irrelevant

- depends on whether there was a preexisting duty

**Need for Expert Medical Testimony**

1. To establish (a) the standard of care, (b) that the standard was violated by the D, and (c) that the violation caused P’s injury.

2. To establish the foundation for the use of the doctrine of res ipsa loquitur in the medical situation.

3. No need for medical testimony in malpractice when it’s obvious

**Professional Standard and Res Ipsa Loquitur**

- **General Rule:** court allows the use of Res Ipsa in medical malpractice cases, as long as there is medical testimony that this kind of injury does not normally occur during this kind of medical procedure

- shifts burden of proof to Ds to prove they were not neg.

- gives them an incentive to tell what actually happened

- ONLY in the Ybarra type of situation, has not been extended

*Ybarra v. Spangard\**

- surgery, comes out with neck pain, can’t use shoulder or arm

- seven defendants

- he doesn’t know what happened, brings Res Ipsa

- we don’t know which instrument caused the issue, control issue (7 people could have caused the accident)

- everyone said they don’t know how it happened

- higher standard in Professional cases

- court allows the use of Res Ipsa

- shifts the burden of proof to the defendants to prove that they were not the cause of the injury

- “all those defendants who had control over his body or the instrumentalities…may be called up to meet the inference of negligence by giving an explanation of their conduct”

**Hypo**: someone that went in for a procedure, they were trying to go through the nose, the instrument ended up in their brain, and fluids started coming out, you could have an expert testify that in this kind of procedure, you should not have an injury to that part of the body

**Doctrine of Informed Consent**

1. The Battery Theory

- only some states

- purpose or knowledge (intent) of a harmful or offensive contact

- invalid consent (material aspect of what your consenting to he failed to tell you)

- discomfort charging doctors with battery when they just failed to inform

- *Schleffendorf\**

2. The Negligence Theory (Patient Standard)

- most states

- doctor has an obligation to inform the patient of facts material to an intelligent decision

- material: something that could alter the decision

- could be utility v. risks, alternatives, risks/benefits of alternatives, severity of harm that could result

**- general rule for informed consent**

- you need expert testimony to say what alternatives and risks were (not whether they were material, or what is customarily disclosed)

- *Harnish* (342)

- having tumor removed, nerve severed, can’t use tongue

- that was a risk of the surgery (material and foreseeable)

- “disclose in a reasonable manner all **significant medical information** that the physician possesses or reasonably should possess that is **material to an intelligent decision by the patient”**

- avoid undue burden on doctor (not everything he knows)

- does not include all risks the physician reasonably believes the patient already has

3. Professional Standard

- significant number of jurisdictions apply the normal professional standard (what is customarily disclosed to the patient)

- many jurisdictions do not use the professional standard, because the professional community could usurp the decision making power of the patient, they think they know what’s best

**Causation Standard**

- you have to meet both in most jurisdictions

- if P says, “I would have done the surgery anyway,” actual cause problem

- retrospective problem (hindsight of P)

- many jurisdictions

- the idiosyncratic patient gets thrown under the bus because we’re suspicious about the plaintiff

1. Subjective test

- P would not have gone forward

2. Objective test

- reasonable person in that situation would not have gone forward

Exceptions to the Disclosure Requirement

1. Emergencies

- not capable of giving consent

2. Hypo: The Sixth Tummy Tuck

- you’ve already been put on notice of the risks

- as long as there are not new risks

3. Theraputic Privilege

- D doesn’t want to tell P, thinks it will harm them

- psychological meltdown, etc.

- “disclosure would complicate the patient’s medical condition or render him unfit for treatment” *Harnish*

*-* D can’t chose not to disclose simply because he thinks P really needs this treatment

- Burden on D to claim this privilege

Professional v. Patient Rule, Again

- *Wooley* (344)

- operated on P’s back, tore spinal tissue, injured P

- tear is normal risk, but did not disclose to P

- “reasonable medical practitioner” (professional standard)

- NOT RPP (NO ONE APPLIES RPP)

- professional standard in informed consent

- not clear which is the majority (patient standard is on the rise)

- uses subjective and objective tests

- held in favor of D

**Limitations on Informed Consent**

1. No duty to disclose individual failure rate

- not an actual risk, too complicated to figure out success rate

- would have to disclose overall success rate

- *Wolinski -* kidney failure, transplant success rates

- success rate was “good”

- performed transplant from mother to son

- P died, 5 of 7 transplants had failed

2. The Surgical Biopsy (More Risky Alternatives)

- needle biopsy, general anesthetic alternative, needle biopsy is local

- not a less risky alternative (there are big GA risks)

- causation problem (P would have to testify she would have taken the more risky route)

3. “The Truth” About Condition

- it has to be strictly about whether the patient will have that procedure

- *Arato* (348)\*

- P wants to know “truth” about condition

- doctor does not give him the high statistics that he would die (would have rearranged his estate)

- no duty to disclose, not a risk, the situation he’s in, not material to moving forward

4. Pap Smear (Risk of Not Having a Procedure)

- duty to disclose the risks associated if the patient is declining a certain type of medical treatment/test

- juries are more likely to find actual cause, here

- *Truman* (350)\*

- Dr. recommends pap smear

- P doesn’t do it, dies of cervical cancer

- it’s the risk of *not* having the procedure

- court says D had to disclose risks of not having doing the procedure

- Court says it’s unreasonable that D assumed P knew the risk

5. The Trusting Patient

- You should have a right to say you don’t want to hear it, but the doctor isn’t required to go through with the treatment if you refuse to do it under the circumstances they are happy with

6. Boilerplate Information

- if it doesn’t make the risks clear to the patient, it’s not good enough

- if it does make it clear, you have to analyze the facts

- how much time, are they rushed through, etc.

CA - Medical Insurance Injury Reform Act

- limits recovery of P&S to $250,000 (noneconomic damages)

- has a big effect on malpractice cases

**4. Nonfeasance and Creation of Duty**

**1. Basic “no duty” rule for nonfeasance**

- If you do not act, you do not owe a duty

- Hypo: Crossing the Metrolink track, you see that a mother has dropped a one year old on the tracks, the mother is lying with a broken leg on the side of the track, there is a train coming, all you would have to do to save the child is take two steps and move the child off the track; you are about to do this when you look at your watch and say, “I’m going to be late for Torts,” you leave them there; the train hits the baby

- no liability, nonfeasance (no duty to act/take affirmative steps to protect another)

- Common Law - still the rule

- *Cilley* (400)

- breakup at trailer, calls neighbor for help, C gets rifle and shoots himself

- possibly an accident

- landowner categories - trespasser or licensee debate (on the threshold)

- *why does this matter? still willful/wanton*

- invitees - would have a duty (preexisting relationship)

- no liability, no duty to seek emergency assistance if no special relationship or D did not create the harm

- *Yania* (403, Note 3)

- strip miner who had large trenches filled with water, Yania came onto D’s property to discuss a business matter, D taunted Yania to jump in to remove a water pump, D did not assist P, P drowned

- taunting him was not enough for misfeasance, he was an adult

- Could argue P was an invitee

- owed a duty then, but not made in the case

**2. Distinction between nonfeasance and misfeasance**

- nonfeasance: failure to act (doing nothing)

- misfeasance: negligence in doing something active (done something)

- **General Rule**: once you act, you owe a duty of care to individuals to whom you impose a risk

- Hypo: speed demon got into his car on the way to school, owed a duty, driving negligently is misfeasance

- Hypo: park on a hill, car is in neutral, goes down hill and hits someone

- from the time the car started to move, you did nothing

- misfeasance, you were driving

- *Newton* (399)

- fixing a road, holes, unlighted

- P’s carriage was drawn into an unlighted hole, injured

- Court: misfeasance, overall activity of repairing the road is what you’re doing

*- rationale for the nonfeasance rule (contributing money to a cause)*

**3. Exceptions to the basic “no duty” rule for nonfeasance**

1. Duty arises when D causes **harm** (even if non negligently)

2. Duty arises when D **creates** **a** **risk of harm**

3. D assumes a duty

- “no worse position” = termination of duty

4. Special Relationships

- create a duty despite nonfeasance

- determinate and indeterminate relationships

**1. Duty arises when D causes harm (even if non-negligently)**

- Hypo: RR Accident

- Collision between a pickup truck and a train, train hits the pickup truck, train is not negligent, train operator does nothing to help the person in the pickup, pickup wasn’t negligent (if he was, it would come up in comparative fault)

- train owes a duty

- obligated to do what you can to help them

- you can’t claim nonfeasance if you fail to help them

- negligence elements will be applied if they fail to fulfill their duty to render aid

- subsequent injury

- “if the actor knows or has reason to know that he caused bodily harm to someone to make them helpless or in danger” (Restatement)

2. Duty arises when D creates a risk of harm

- Hypo: The Deer in the Headlights

- Lawyer arguing a case in the eastern part of CA, deer runs in front of her car, the car hits the deer, leaves the deer on the road, a second car comes up and doesn’t see the deer in time (through no negligence) and runs over the deer, goes of the side of the road and injures them, did the first car who hit the deer owed a duty to the second car

- you owe a duty with respect to that risk

- the driver should have moved the deer off the road, called someone to move it, put a flare out to notify drivers, etc.

**3. Duty arises when D voluntarily assumes the duty**

- When D voluntarily assumes the duty (i.e. begins to render aid), they have a duty to act reasonably under the circumstances towards P

- *Wakulich* (406)

- give a girl a whole bottle of alcohol, bet her she could not drink the whole thing without getting sick or losing consciousness, she died

- placed her on a couch, put a pillow under her head

- kept people from calling 911, took her to another home

- no negligence in giving underage person alcohol in Ill.

- negligence in not rendering aid

- alcohol wouldn’t count for misfeasance (social hosts)

- **court in CA and others hesitant to impose a duty on social hosts, most states allow providing underage drinkers as misfeasance**

- carrying her downstairs, misfeasance

- assumed a duty by administering some aid

- at that point, must act as RPP

- emergency doctrine may come into play: once you voluntarily assume the duty you have to act reasonably

- Hypo: car goes off the road and bursts into flames, police officer arrives almost immediately, calls the fire department, gets out and begins directing traffic, does nothing to try to rescue the individuals in the vehicle, doesn’t call an ambulance, pregnant woman in the car dies, don’t police officers owe a duty generally? did he owe a duty in this case?

- difficult to say general duty

- directing traffic, close to voluntarily assuming duty

- court held there was no duty, in that

- called fire department, action directed at a person in the car

- assumed a duty, have to act reasonably

- he probably did

- Carroll Towing - would not have to risk serious harm to themselves to assist another, he did what was reasonable

- Hypo: The manager and the tenant’s gun

guy rents a room in an apartment building, the manager comes in and finds the tenant waiving a gun around and threatening to kill himself, the manager takes the gun out of the persons hand and puts it on top of a tall dresser in the room, tells him to leave it up there, the LL leaves, the tenant kills himself, estate sues the manager, did she assume a duty?

- Restatement: you have a duty if the failure to exercise care would increase the risk of harm beyond that which would have existed without the undertaking

- “no worse position”

- termination of the duty

- duty being assumed could be the gun, but you could categorize it more broadly as “render aid reasonably to this person” in whatever way available

- proximate cause issue (two steps that you would have to meet\*)

- Hypo: person in a desert, you drive them for ten miles, kick them out

- no worse position, duty ends

- Restatement Third

“When a person is in imminent peril of serious bodily injury, the rescuer must exercise reasonable care in deciding whether to discontinue the rescue”

- rescuer of drowning swimmer can’t stop halfway

“Once they have secured the safety of the other, the rescuer may not then return the other to peril even if the peril is no greater than that that existed at the time the actor initiated the rescue”

- can’t leave the swimmer in the highway

4. Special Relationships

- Determinate Relationship

- preexisting relationships

- Restatement Third:

- employee/employer, teacher/student, carrier/passengers, innkeeper/guest, landlord/tenant, custodian/prisoner, landowner/public (if held out for public use)

- Indeterminate Relationship

- ad hoc relationships

- *Farwell* - common undertaking

- can be for a single night

- *Farwell v. Keaton* (408)

- two friends having beer, girls had their friends chase them away, one friend escape, the other was beaten

- Beaten friend picked up by the other friend, drive him to a house, leave him in the car, put ice on his head, needed medical attention, died

- not voluntarily assumed (put him in a better position)

- special relationship: common undertaking

- they were hanging out

- Application Hypo

- P is applying for a job at a corporation; has to undergo a pre-employment physical with a doctor employed by the company; P is not shown the results; later finds out that he has a cancer; corp failed to disclose it to him; the disease got worse as a result

- basic nonfeasance rule, no duty

- special relationship takes it out of nonfeasance

- probably indeterminate

- reasonable duty of care with respect to what was in the physical

- *Rocha* (410)

- urged someone to jump into a swimming pool

- he couldn’t swim, fraternity brothers, didn’t do anything

- not the seven categories for determinate, no voluntarily assumed duty, not misfeasance (he decided to jump)

- “common undertaking,” could say they breached by encouraging, but *Yania* (adults and taunts)

- probably duty to act reasonably to save him

- *Podias* (410)

- M driving, N and S passengers, N asleep, raining, lost control and hit a motorcyclist

- driver owed a duty because he was driving, he caused the harm

- passengers, special relationship with the driver, but not the motorcyclist

- didn’t call for assistance, N and S made several calls

- left the scene, didn’t do anything

- court held they owed a duty

- doesn’t fit the general framework

- instrumentality of the injury was operated for the common purpose and mutual benefit of the defendants

- relationship to the incident by getting in the car

- doesn’t turn on driver drinking

- Ds obligated not to prevent driver from acting

- persuaded him not to do anything

- orchestrated scheme to avoid detection

- coconspirators, essentially, most convincing

- nonfeasance is evolving to create more exceptions

- becoming very fact based

- *Podias* is limited to these types of facts

**5. Contracts, Promises, and Creation of Duty**

1. Can a duty arise independently of a contract?

- yes, **misfeasance**

- **the duty arises because they are acting in a way that’s creating risk**

- this is the basic misfeasance rule

*- Affiliated Fm. (415)*

- K between Seattle and SMS

- Claim was LTK was negligent in servicing/making the repairs

- SMS gets injured

- Does LTK owe a duty to SMS?

- LTK and city are in privity of K

- there is a duty under the K

- what they were doing under the K gave rise to physical risks

- fixed the monorail, created the risk (misfeasance)

- SMS could recover because they had a legally protected interest in the monorail  **(listen to this case again\*)**

- duty wouldn’t exist but for the K, but doesn’t arise out of the K

**- 419 (reasonably prudent engineer?)**

- Note 4, 421\*

- risk creation created the duty, not the K

**Economic Loss Rule**

- no duty to prevent economic loss

- *Thorne v. Deas*

- co-owners of a ship

- one promised to get insurance, did not

- ship sank, loss of **money from insurance policy**, NOT physical injury, that’s economic loss

- K law gives you economic damages

- if co-owner sailed ship negligently, ship sank, could sue for 1/2

- lost business falls under the Economic Loss Rule

- Failure to put add in yellow pages

- Yellow Pages didn’t include your ad in the yellowpages

- presumably acted unreasonably

- can’t recovery, these losses are under the economic loss rule

**- *Mulk v. Renslayer\****

- R K’s to provide water to city, fire, engines hook up, no water

- P’s building burns down

*-* We look at whether the breach is reasonable, but there is a duty

- recovery would be in K

**Nonfeasance and K Duty**

**- (**K to render services to lessen risk of physical harm)

- parties are in privity

1. *Spengler (422)* (Old Rule; no Tort Liability for K)

- duty must be separate from K

*-* A had a K with ADT to install/monitor security system

- mother used the call button, ADT gave the wrong address

- mother died

- D did not create the risk (as in the last case)

- K - agrees to render service to reduce the risk of physical harm

- clear K promise, no tort liability for clear K promises

2. Restatement 3rd

- an actor who undertakes to render **service** to another, when the actor **knows** or **should** **know** that the services will **reduce** the **risk** of physical harm to the other, owes a duty of **reasonable** **care** in carrying out that undertaking if (a) the failure to exercise care **increases** the **risk** of harm beyond that which would have existed without the undertaking, or (b) the other person **relies** on the undertaking.

- would change Spengler in P’s favor

- she relied (K provision agreed to + reliance)

- K limited liability to $500

- Tort recovery would be limited to $500 if it covered Tort liability (unless it was unconscionable)

- if the provision was only related to the K, then no

3. Scope of Duty

- related to the contract

- *Diaz (424)*

- Jiffy Lube, did not inspect tires, checked tire pressure, P’s tires were worn, spun out in the rain, injured

- 3:13

- Duty arises out of a specific promise?

- if the risks were going to have to do with tires and tread, they presumably would’ve contracted for that

- if it goes broader than the K provision, then you’re going beyond the K’s expectations

- Is the scope of the contract determinative?

- “significantly influences” suggests there is room to entertain arguments that in some situations the alleged negligence is so closely connected to the contract even though it isn’t an explicit provision

- **IN GENERAL:** most of the cases will say the tort duty is circumscribed by what you’re promising to do in the K

**Compare: Research Contract Hypo**

- these cases are rare

- Scientific experiment, the individuals agreed to live in a house that was not free of lead, they paid for this, they submitted to blood sampling for sampling and testing for lead, P suffered high lead levels, the D did everything under the K

- court said there was a duty extended beyond the K

- you were dealing with people that were being exposed

- read a duty in the K that was broader than terms

- no risk creation\*

**Duties to Third Parties Not in Privity of K**

*- Winterbottom* (429) - The Starting Point

- D K with post office to supply carriages and keep in good repair

- P, a coachman, was lamed for life when the coach broke

**- no privity of K between the parties**

- P is a third party

- if P, then every passerby could sue

- Modern Rule: *Palka* (428)

- **reasonable** **expectations based on the K and no “high magnitude of liability” (i.e. blackouts)**

- argue between *Palka* and blackout case

- line is not clear

- P was a nurse, hosptial had K with Servicemaster to manage maintenance operations, ceiling fan fell

- fans were within the scope of the K, Servicemaster had a duty to P

1. Did the K have any provisions that if they were not carried out would give rise to physical risks? (yes, fan could fall)

- outsourcing won’t cut off liability, it’s a factor, the duty existed to begin with, D knew they were taking on that duty

- reasonably interconnect/anticipated relationships, particularity of the assumed responsibility, displacement and substitution of a safety function designed to protect this plaintiff, reasonable expectations of the parties

- NY Blackout case

- rents an apartment, goes into the basement to get water, trips, is injured, sues Con Ed, cannot recover (in privity with LL not Con Ed)

- no liability

- Restatement Factors

1. The failure to exercise care increases the risk of harm beyond that which would have existed without the undertaking

2. The actor has undertaken to perform a duty owed by another to a third person, or

3. the person to whom services are provided, the third person or another person relies on the undertaking

*- Florence (430)*

- no K, crossing guard service for a period, district is promising that service, you rely on that service

**- promise + reliance can give rise to a duty**

- “adequate police protection” city has no duty to provide

- if two kids, one who didn’t know about the crossing guard get injured, the one who didn’t know did not rely, no recovery

- promise can’t be secondhand knowledge, has to come from the promisor in the K model

- reasonable notice can terminate the duty

- Hypo: In a parking lot a criminal drags a woman kicking and screaming and throws her in the trunk of a car and starts driving away, two people that happen to be in the parking lot, give chase for awhile, get the license plate, get a police officer, tell the officer what happened, give him the license plate, and the police officer says he will call it in, he doesn’t and the woman is murdered

*-* promise wasn’t made to P, didn’t rely, no duty

- *Kircher*

- Hypo: only crossing guards in the afternoon

- scope of the duty, not promising for the morning

- there is no automatic breach, could be reasonable that there was no crossing guard, P has to show breach/unreasonableness

**6. Duty to Protect from Third Persons**

Is there a duty owed by D to protect P from criminal conduct (or negligence) of a third party because of either:

1. D’s relationship to P

2. D’s relationship to the third party

- if no relationship, the basic nonfeasance rule applies

1. Duty arising from D’s special relationship with P

i. special relationships

- *Isberg v. Gross* (435)

- Partnership deal with I (P) and S (D)

- F and G are defendants (failed to warn, both knew)

- S had threatened I’s life, acted, I injured

- court: no special relationship

- court looked for a determinate relationship

ii. Businesses (Four Rules)

1. Imminent Specific Harm

- about to befall P

- narrow

- if a landowner knows something is imminent (imminent risk) that’s when the duty arises (low odds of this happening)

2. Prior Similar Incidents

- previous crimes on or near the premises

- someone else is injured in the same crime previously

- duty shaped by a risk (you have a duty to act as an RPP with that specific risk)

- better lighting, security, etc.

- actual or constructive notice

- time of previous incidents, location, method, etc.

3. Totality of the Circumstances

- nature, condition and location of land, circumstances bearing on foreseeability

- much wider

- petty crimes can indicate a more serious threat

- Hypo: prior to this shooting in the parking lot there was a mugging that didn’t involve a shooting, would this mugging under this totality of the circumstances, would that be enough for a duty to be imposed?

- maybe not enough, two would be though

- amorphous test

4. Balancing

- foreseeability of harm against burden of imposing the duty

- Carroll Towing (transported to duty)

- high foreseeability, high burden

- security guard may be called for

- *Prosecai v. Wal-Mart* (439)

- woman shopping, attacked in the parking lot by man under car

- many previous offenses near the store

- court has wide discretion (much easier if analogous case)

- Hypo: woman goes to the Tuscan airport to meet her husband who was coming back from a tour of duty, several months later they found her buried several miles away, the parking garage was dimly lit, assume that there was duty?

- RPP would put more lights in

- have to prove proximate cause, actual cause

- don’t know enough to say what happened (2:36)\*

- courts take a broad look

iii. Schools

- student-teacher (school) relationship

- using the reporting statute

- *Marguay* (443)

- three students, teachers/sports coach had assaulted/ sexually harassed them

- owed a duty to report sexual abuse of students carried out by other school personnel

- flows from compulsory school attendance (impairs parental and self protection)

- reporting would have prevented subsequent abuse = liability

- Hypo (off campus)

- teacher decides to go out to the movies that friday night and see the Lego movie; happens to notice one of their fellow teachers sitting in the back row making out with one of the high school student; fellow school employee does nothing; school sues fellow school employee that didn’t stop the other employee

- scope of the duty

- no clear answer, but presumably in parent’s control

- if you see them during school hours, you are liable for what happens off campus/out of school

- Hypo (dropped off early)

- school has AP classes at 6:30; mother drops child off at 6:30, child doesn’t have a class; child gets raped, sues the school district, did the school owe her a duty?

- general duty of care, invited students generally at that time

- Hypo (students threatening other students) (*Mirand)*

- threatened student, tried to report, couldn’t find security guard

- voluntarily assumed duty by having guard

- now it’s a question of breach

Examining the specific relationships

1. Teachers

2. Principal and superintendent

Rationale for the special relationship

- Hypo: 18 year old in college

- student gets into drugs, etc., student drops out

- 17 year old, you have a different duty than an 18 year old

- no liability with liquor, unless providing it

- RAs are not the same as security guards

- may be LL/Tenant

- Fraternity?

- down’t own the building, fraternity owns a duty, if University says “no kegs,” they have voluntarily undertaken a duty

- Generally, if you’re talking about alcohol, for adults you don’t owe a duty of care

- duty comes from elsewhere, voluntarily assumed, LL/T, rules can give rise to a duty

*- What about Reporting Statute?\**

iv. Landlords and Tenants

- **General Rule**: no duty to protect a tenant from a third party

Exceptions

1. LL created or is responsible for known defective conditions that enhances the risk or attack

2. LL undertakes to provide security

- internal v. external (guard v. gatekeeper)

- most courts: common areas

**- 5 exceptions\***

- undertaking security

- foreseeability of crimes

- ?

- 342

- *Ward* (446)

- S and W were neighbors, W complained

- S stabbed W outside her apartment

- D did not create or were responsible for physical defect that foreseeably enhanced the risk of criminal attack

- D did not undertake security

- *Kline* (448 note 2)

- K and initial conditions circumscribed the duty

- doorman at the beginning, no doorman, other protection lapsed

- same relative degree of safety needed to be kept

- foreseeability of crimes (others had happened)

- LL’s control over common passageways

- neighborhood changing condition

*- (listen to this part of class)*

**Duty Issue Generally**

“Whether a duty is owed is a question of law. In deciding whether to impose a duty…the court must make a policy decision…The court may consider various **moral, social, and economi factors**, including the **fairness** of imposing liability; the **economic impact on the D** and on similarly situated parties; the need for an **incentive to prevent future harm;** the **nature** of D’s activity; the potential for an **unmanageable flow of litigation**; the historical development of the **precedent**; and the direction in which **society and its institutions** are evolving.”

2. Duty arising form D’s relationship with Dangerous person (Third Party)

i. Felons in a halfway house

**- knowledge and ability to control**

- *Dudley* (449)

- S convicted felon, long criminal history, engaged in beatings in prison

- repeated violation of rules, minimal security

- broke into a nearby apartment, beat/raped/killed P

- custodian/prisoner relationship

- danger of prisoner = risk

- “directly and foreseeably exposed to risk of bodily harm”

- Decedent was in the area of danger

- difficult to see where the edges are for the duty, hard to see where to apply breach (who in the neighborhood, how far)

ii. Dangerous tenants

**- knowledge and ability to control**

- *Rosales* (450 n. 2)

- man fires gun in back yard, LL does nothing

- kills 10 year old who was struck by bullet in own yard

- dangerous condition on the leased premises

- knowledge and ability to control

- BUT - problem with actual cause

- give him notice, 30 days, shooting took place 15 days after

- no liability

- *Strunk* (450 n. 2)

- LL has a vicious dog, tells LL

- LL rents to him

- LL must take reasonable precautions to prevent injury by the dog

iii. Negligent entrustment

- when you entrust someone who is clearly incompetent

- someone who has never driven a car before, someone using a chainsaw

- there is a duty not to do that

iv. Duty to control employees

- (4:25)

v. Parents and children

- narrow circumstances

1. Knowledge of specific, dangerous habit

2. Present opportunity and need to restrain the child to prevent imminently foreseeable harm

vi. Psychotherapist and Patient

- *Tarasoff* (451)

- Poddar threatened T, police detain him

- P kills T

- P has to show that in this circumstance it would be customary for doctors to recognize that this patient posed a risk to T (determines duty)

- easy in this case

- they acted on the threat, suggests doctor thought it was a real threat

- RPP comes in, what would RPP do (breach)

- *Thompson* (453 n. 2)

- criminal threatens to kill child, released, kills child

- definition of the scope of the duty

- child was not named

- could argue some obligation to warn in immediate area

- Child Suicide Cases

- child living with parents, child is suicidal

- self inflicted dangers are different, did not impose duty in CA

- statutes don’t cover this, generally need to report it, but not necessarily to the parents

- Hypo: patient is a child, tells the psychotherapist that he is going to go out and burn the neighbor’s barn down to get even with his father

- obligation to warn the neighbors

- Alcohol Providers

- Traditional Rule: no proximate cause

- *Brigance* (459)

- special relationship (bartender/person driving)

- sort of like negligent entrustment

- friend in the car, no proximate cause

- New Rule: Duty owed by provider

- they will impose liability

- duty

- it is required that the bartender knows that the person is driving

- circumstances, have to have reason to know or actual knowledge that the person was going to drive

Extent of the New Rule

1. Dinner Party Hypo

- Final exams come, you have people over to your house, one of them drinks too much, it’s quite clear, you give them more beer, they leave and run into someone and hit them, are you liable?

- didnt’ charge for the alcohol

- you knew the person had driven, but Social Host Rule (**social host** is not liable) (CA)

- has to be some unreasonable conduct, something clearly a problem (vomit at your feet)

2. Velvet Dove Redux

- P is the driver

- cannot sue the tavern, no duty to the driver

- *Brigance*: for tavern owners, the general rule is that you can be liable to third parties, but not to the driver

3. CASC: charging for alcohol can lead to liability

D hosts a party at a vacant rental residence owned by her parents without their consent, the party was publicized by word of mouth, 40-60 people (most under 21) came, she provides 60 for buying rum and charges people 5 to come in, they buy more alcohol, two individuals are visibly intoxicated on arrival, they get in a fight, one of them runs down the other one and kills him, are the Ds liable?

- yes, exception to the general rule, you sold liquor

**7. Duty to Protect from Emotional Distress (Negligent Infliction of Emotional Distress)**

- NIED is negligence COA, but for severe emotional distress

- we are concerned with the limits of the liability in NIED

**Categorizing the factual situations for NIED**

1. Emotional distress from risk of physical harm (but no physical harm-otherwise parasitic)

a. Where Ps are at risk

b. Where third parties are at risk

2. Emotional distress independent of physical risk

**Development of the Duty where P is at Physical Risk**

1. Impact Rule

- *Mitchell*

*-* two horses stop right next to a preg. woman, miscarriage

- no recovery, no physical injury (miscarriage result of fright)

- this is the old rule, have to have physical harm

- Impact ——> Emotional Distress

2. Physical Injury OR Physical Manifestation

- Emotional distress—-> Injury/Manifestation of that distress

3. Pure emotional distress only

- Bystanders: The Zone of Danger Rule

- *Catron* (477)

- C was pulling two tubes, L hit one of the tubers, killed her

- C was depressed, anxiety disorder, PTSD

- no recovery, didn’t fear his own safety (not in the zone of danger)

1. P must be within **zone of danger** of physical impact

2. Fear for **one’s own safety** is a prerequisite

- If so: can recover for distress from fear for others

- Other courts: can recover only from distress “to oneself”

- Discarding the Zone of Danger

- *Dillon* (480)

- saw child get struck in the crosswalk

- duty those who might “foreseeably suffer emotional harm because of the injury”

- If not the zone of danger: (**FACTORS)**

1. Located near the scene of the accident

- (over at a distance away from it)

2. **Direct emotional impact** from sensory and contemporaneous observance of the accident

- (over learning about the accident from others)

- implies you have serious emotional distress

3. Close relationship

- fiancee isn’t good enough

- presence of all these factors indicate that the plaintiff has alleged a sufficient Prima Facie case

**Two Ways to Recover in CA (THING AND DIRECT VICTIM)**

- *Thing* (481) (**ELEMENTS)**

- son struck by an automobile

- didn’t hear or see the accident, she was near, she didn’t see it, but coming upon the body aftwards thinking her son is dead, there is a harsh impact, they are closely related

1. Closely related

- blood related, family in the same household, spouse, registered partnership, siblings, parents, children, grandchildren

2. Present at the scene of the injury producing event at the time it occurs and aware that it is causing injury

- she was not present and aware (came on afterward)

- no recovery

3. Serious emotional distress

- beyond what would be anticipated in a disinterested witness, and which is not an abnormal response to the circumstances

- CA - allows people to recover under *Thing* who come on the scene right after the incident

- *Burgess* (483)

- mother giving birth, she was sedated during the c-section

- under *Thing,* could argue that you would just sedate the person if things were going poorly

- “Direct Victim Rule”

- if there was a pre-existing relationship, if the negligent act would foreseeably result in emotional distress in the party with whom the defendant has a special relationship, you would cal that person a direct victim

- here, doctor patient

- can be determinate *(and indeterminate?)*

- if father was in the delivery room when it all happens

- can’t recover under direct victim

- he could under *Thing*

- Family who saw mother die in hospital, but not the acts that caused the death not allowed to recover

**Loss of Consortium (485)**

- A type of emotional injury: Chronic, not sudden

- daily type of thing, spouse is bedridden

- “love, companionship, affection, loss of society and sexual relationships”

- have to prove the loss of consortium

- could sue for NEID if you saw him get injured AND sue for loss of consortium for long term effects of his injuries

**General Rules:**

1. Spouses can recover for other spouses

- registered domestic partner can bring it

2. Children generally cannot for parents

- a few states allow it, most don’t

3. Parents generally cannot for children

4. If spouse is injured at work, will be covered by workers’ comp., their spouse can’t sue

- This is a **derivative** cause of action, subject to contributory negligence of the victim

P1 v. D

- main COA, P1 proves negligence

P2 (P1’s spouse) v. D

- derivative cause of action, if P1 is comparatively at fault by 40%, P1’s recovery AND P2’s recovery will be limited to 60% of their individual damages

- spouse was gone two to three months at a time, home for short periods, court found no loss of consortium

**Development of the Duty Independent of Physical Risk**

- **General Rule**: no physical risk, no recovery

CL Exceptions

1. Negligent transmission of death messages

- misinformation (*Heiner* doesn’t expand this)

2. Mishandling of corpses

- harvesting organs/selling them

- *Heiner*(487)

- negligently testing for AIDS (told her she was infected)

- no physical peril, didn’t know that she wasn’t in peril

- court limits expansion of liability, does not allow recovery

- *Boyles* (488)

- sex tape case, showed it to his friends

- no physical risk of harm

- no recovery, privacy issue, maybe Intentional, but tough

- *Camper* (489) (**NEGLIGENCE/END OF EVOLUTIONARY LINE)**

- C was driving a truck, T was at stop sign, pulled in front of C, two collided, T died, C saw T dead in the wreckage

- treat it just like a negligence case

- caveat: must be severe or serious emotional injury

- 3 states follow Camper

- CA follows *Thing*

*- Potter v. Firestone Tire* (491)

- Firestone sends hazardous waste to non-hazardous waste

- gets in the groundwater, P drinks water, emotional distress is clearly real

- no immediate risk of physical harm

- if you could prove they’ve had some physical damage - parasitic damage

- Toxic Exposure and NIED

- prove that it’s more likely than not you’ll get cancer

- hard to prove, multiple ways you can get it

- People get exposed to this all the time, you’re going to have to show that the exposure was sufficient

- would have to prove something closer to “I was exposed for 20 years”

- unless reckless, willful-wanton, etc.

- could get punitive damages

**- For negligence, must prove distress based on a more likely than not basis that P will get cancer**

**- Exception: if D acts with malice**

**VII. STRICT LIABILITY**

**A. Vicarious Liability (i.e. Respondeat Superior)**

- form of strict liability “in which one person or entity is held legally responsible for the fault-based torts of another”

- there is a line between employer’s own negligence (i.e. negligent hiring) and vicarious liability

- Pizza Delivery Hypo

- 30 minutes or less promise - employer is at fault

- injury by driver, no promise - vicarious liability rules

- MUST analyze employee’s negligence, even if it’s P v. Employer

- then see if they are in the scope of employment

- Goals

- prevention of future injury

- assurance of compensation to victims

- equitable spreading of the loss

**Scope of Employment**

**Theories:**

1. Control Theory (original theory, narrow)

- if outside of the authorization, no vicarious liability

- some courts still follow this

2. Doing the master’s work

3. Acting in furtherance of employer’s interests

4. Incident to the enterprise (broad)

- *Rivello* (519)

- employee was flipping a knife, struck a customer in the eye

- bar owner was held liable

- “doing the master’s work”

- *Fruit* (520)

- life insurance salesman, convention he was required to be at, went to a bar, drove and struck P

- within the scope of his employment

- “benefitted from the enterprise”

- company probably wanted him to socialize, make clients

- *Pregnant 18 Year Old Molested During Ultrasound*

- *Listen to this\**

**Employment**

- can be “employed” if not paid

- the key is submission

- if you submit yourself to the control of the employer, you will be deemed to be an employee

**Borrowed Servant**

- E who works for H1 is loaned to H2

- negligence, question of who has greater control

- who was giving you directions

- were you working for H2, but H1 told you what to do

**Captain of the Ship Doctrine (Only for Doctors)**

- surgeries, nurses are negligent, Doctor relies on the nurses

- Captain of the Ship doctrine says that the Doctor is responsible for those under him who are negligent

**Going and Coming Rule**

- an employee is not within the scope of the employment until they arrive at the place of employment

- *Hinman* (522)

- general rule, no liability while driving to work

- he was going to an assigned job site, was paid for the time it took to get there

- employer held liable (CASC case)

- employer got the benefit of reaching into another labor market

- **CA applies incident to the enterprise or at least benefit to the employer**

- *AZ Case*

- driving to work, spends time in a trailer, wasn’t paid for that time

- applies the control theory, he was driving to a place where he would be under the employer’s control

Exceptions:

1. Incidental benefit to employer - *Faul* (572)

- compensation for travel, documented payment

2. Special hazards from the travel

- distance alone is not enough

- do you go through hazardous roads/conditions frequently

3. The “Dual Purpose” doctrine

- personal benefit and employer’s benefit

4. “In and out” of the scope of employment: Frolic or Detour?

- You are allowed minor detours during the work day; but once you cross that magic line, and you no longer in a minor detour, you are engaged in a frolic, and you are outside the scope of employment.

- Postal Employee on Lunch

- dual purpose, he was guarding the mail

- had clear boundaries, literal scope

- Off Duty Police Officer

- required to carry weapon

- incidental benefit, close case

- was “on call”

- cop took car home, court said no

- Drag Race

- dual purpose, went somewhere for the employer

- Went to their place in the morning, were told they had to repair something a distance away and to drive their own truck there, had to repair a machine, had to leave the yards to get the required bolts, got a bottle of whiskey, kept working, got another, kept working, got another, kept working, they leave at 12, they’re gone until 2:30, they’re seen in a cafe drinking some more, they leave to pick up another employee, walk out the door, get in the vehicle, 20 minutes later they have a fatal accident

- didn’t re-enter employment

- distance and time away

- not held immediately liable

- *Edgewater Motels* (526)

- smoking, fire in waste basket

- minor deviation, but you’re allowed to do certain personal things while in the scope of employment

- if he was in bed, not within scope

**Employer’s Liability for an Employee’s Intentional Torts**

- Even in the course and scope of employment, if the employee commits an intentional tort, the employer is not liable (an intentional tort would be purely for personal purposes)

1. Set of enterprises within the job description

2. Well known hazards of a kind of enterprise

- *Bouncer Hypo*

- strong argument for vicarious liability in intentional torts

- *Rhodebush* (530; Battery)

- intoxicated aide at nursing home, slapped patient

- “fairly and naturally incident to the business”

- “arises from impulse or emotion which naturally grew out of or was incident to the attempt to perform the mater’s business”

- dealing with Alzheimer’s patients, may be far, but it could be a known hazard

- *Farhrehdorff* (531)

- “well known hazard of the enterprise”

- power imbalance, had control over those under him, that’s a signal that it’s a known hazard

- Compare Ultrasound Battery and Police Officer Rape

- power imbalance in both cases, BUT known hazard

- some evidence that this has occurred, not that it happens all the time

- Police - impulse didn’t arise out of the situation, Ultrasound did

- Ultrasound - no vicarious liability, Police - closer case

**Independent Contractor**

**Test**: Control over the details versus control over the end result

- generally say, “here’s the problem, fix it”

- assign a task/goal, they go about doing it

- Employer may still be liable for own negligence (negligently hiring an independent contractor)

- plumber, electrician, car mechanic, not employees

- *Mavrikidis* (533)

- dumps asphalt on P

- Petullo (gas station owner) **limited participation** (payment, general supervision), independent contractor (no liability)

**Factors from *Marvikidis:***

1. landowner/principle controls the manner/means of doing work (that’s the control test, not really an exception)

2. engages an incompetent contractor (that’s not an exception, that’s negligence by the contractor)

3. where the activity contracted for is inherently dangerous

Factors from Restatement of Agency

1. Extent of control (basic factor/primary determinate)

2. Distinct Occupation

3. Skill Required

4. Supply of tools

5. Length of time

6. Method of payment (per hour or by job)

7. Regular business of the employer

8. Intention of the parties

**Exceptions:**

**1. Inherently Dangerous Activities**

- Crop dusting

- chemicals are toxic/drift

**2. Peculiar Risk**

- CA term, includes inherently dangerous activities

- something more than ordinary danger

- dump truck (no peculiar risk); heavy/dangerous load on a dump truck (peculiar risk)

- matter of argument, no real clear line

- spray-painting house (yes), demolition of buildings (yes)

- log company hypo

- probably IC

- how were they paid, privately insured, paying driver by the hour, K says independent contractor, lumber company has no control, company picked the trees

**3. Statutory Duties**

Example: safety precautions

- brakes are an example (have to have working brakes)

- still liable, could seek indemnity

- hazardous waste disposal is another example

- hiring someone won’t avoid liability

- “non-delegable”

Worker’s comp

*- B is covered by worker’s comp, CA will not allow this?*

**Other Forms of Vicarious Liability**

1. Partnerships

- partners are liable for torts committed by other partners

- each partner is an agent

- corporations are treated differently

2. Joint Enterprises

- Key: agreement, common purpose, community of interest, equal right of control

- Social ventures

- put in money to go camping

- court is hesitant to apply it to these circumstances

- Doesn’t apply to the internal members of the enterprise

3. Concert of Action

- conspiracy-type situations

- Close to joint enterprise: illegal/tortious enterprise

- thief’s spouse was a D on a concert of action theory

- illegal conduct most often

4. Entrustment of Vehicle

- negligent entrustment

- owner-consent statutes

*- your insurance covers your vehicle (1:44)*

5. Family Purpose Doctrine

- now dealt with by statute

6. Imputed Contributory Negligence: The “Both Ways Rule”

- servant driving master’s car, negligently hits A

- in scope of employment, vicarious liability

- If both servant and Master are liable

- if servant AND A were negligent

- apply CF

- master could sue A for damage to car

- S’s negligence will be attributed to M if M is a defendant in the case, but also if M sues A for some reason

- works if M is a P or if M is a D

**B. Strict Liability and Abnormally Dangerous Activities**

**Development of Strict Liability at Common Law**

Strict Liability: Liability without fault

Previous departures from “fault”

1. *Yania*

2. Trespass to land

- even if you don’t know it’s someone else’s land, liable

3. Negligent (honest) mistake

- mentally disabled held to RPP

- “minimum knowledge”

- if someone thinks about what to do, gives it their best shot, and someone is injured

- not immunized because it was an honest mistake

4. Violation of statute

- deemed to know the statute

5. Vicarious liability

Forms of Action: Trespass and Case

Trespass: Direct

- gun, knife, sword, etc.

Case: Indirect

- got nothign

Example: log thrown/log left in road

- hits someone, directly (SL)

- leaves a log in the road (indirect, originally no recovery)

- concerned with violent acts

Case Development

Strict Liability for Trespass

Fault required for Case

From 14th until middle of 19th century

Then: *Brown v. Kendall* (1850; Mass. Case)

- P and D owned dogs, D tried to break up fight, hits P in eye with stick

Shift to “fault” system: “P must come prepared with evidence to show either that the intention was unlawful, or that the D was in fault [i.e. negligent]”

First clear articulation of the shift from SL for direct, forcible harms to a fault- based liability.

What is left, if anything of strict liability?

After *Brown:* trespassing animals (cattle and barnyard beasts-SL for damage) and nuisance

- wild animals, once you’re on notice “one free bite” idea

*Rylands*

*-* hires someone to put a reservoir, filled in mines, floods P’s property

- nothing to indicate negligence (didn’t know the mine was there)

- no trespass, no intent to enter

- both lower courts find there should be strict liability

- likely to do mischief if it escapes (Exchequer)

- cattle, privy, alkali works

- natural v. non-natural use (House of Lords)

- narrower than Exchequer court

- whether what you’re doing in your property is different than what’s going on in the area

- reservoir itself is not non-natural

- it was a mining area, reservoir is non-natural in a mining area

- would lose on cattle (mining area)

- see who came first

- when you have non-reciprocal risks, that’s when you have strict liability (1:27)

- inconsistent land use

- **you often see strict liability when you have something that’s dangerous with something that is inconsistent with that danger**

*Thomalen* (550, note 3)

- fire-breather on stage, burned someone in the front row

- no escape

- Strict Liability requires an escape under *Rylands*

**1. Rylands**

- mischief

**- natural v. non-natural**

**2. Restatement Second (Abnormal Danger Basis for Modern Law Test)**

- fact specific (depends on the individual facts of the activity)

- generic situations

1. One who carries on an **abnormally dangerous activity** is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

2. The strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

**Factors for Abnormally Dangerous Activity:**

**1. existence of a high degree of risk**

**2. likelihood that harm will be great**

**3. inability to eliminate the risk by reasonable care**

4. activity not a matter of common usage

5. inappropriateness of activity to place

6. value to community outweighs dangerous attributes

**Continuing Development of Strict Liability After Rylands**

- *Sullivan* (558, Note 8)

- blasting case, shook girl out of bed, court says SL

- dangers posed by blasting, ultrahazardous activity

- does away with direct v indirect distinction

- *Dyer* (553)

- home damage by falling rocks

- blasting is the paradigmatic SL activity

- injury is subject to SL

**Strict Liability by Individual Activity**

1. Impoundments (not of water, damns are generally safe)

- yes

- hazardous/toxic

2. Blasting and Explosives

- yes

3. Nuclear

- yes

- fire, no - generally not SL

- usually statute says SL

4. High energy activities

- yes, science projects (cold fusion, laser, etc)

5. Utilities

- no, generally safe

6. Fireworks

- no, some will say yes, some will say no (mostly no)

7. Poisons

- yes, some serious poinsons could be

8. Rocket Testing

- yes

**Prima Facie Case**

1. Duty: not an issue, D is acting affirmatively

2. Strict Liability: Is D strictly liable for injuries caused by this activity?

3. Actual Cause: But for test

4. Proximate Cause

5. Damage

**Proximate Cause and Strict Liability**

- Class of risks will apply

- Class of persons will probably apply

- intervening cause

- dynamite shot by gun

- intentional intervening cause

- negligent intervening cause is more difficult to cut off liability

- you’re only strictly liable for an activity **because of the risks imposed by that activity**

- Restatement 2nd: SL for harms “the possibility of which makes the activity abnormally dangerous”

- Restatement 3rd: “SL limited to those harms that result from the risk justifying strict liability”

1. Hypo: mother mink

- mother mink goes crazy, kills her young, dynamite

- outside of the foreseeable risks

2. Hypo: Rifle and the dynamite truck

- intentional intervening cause, meets the risk test, but no liability

4. Hypo: Covering up the Yukon theft

- set off dynamite to cover their tracks, owners are liable, intervening cause was foreseeable

5. Hypo: The stolen dynamite and the subsequent blast

- dynamite stolen, set off at P’s house, killed, no SL

- blast occurred three weeks later, 100 miles from site

- Palsgraf problem in negligence

- this would seem to show class of persons limitations

**Defenses at Common Law**

- Contributory negligence: inapplicable

- not a bar in SL cases (person not watching horse kicked)

- full recovery

- Theory: can’t “mix and match” the D’s SL and P’s negligence

- Assumption of the risk: acceptable

- knowledge + voluntarily encounter (complete defense)

**Defenses in a Comparative Fault Jurisdiction**

- “comparative responsibility”

- Restatement Section 24: “No strict liability ‘if the person suffers physical or emotional harm as a result of making contact with or coming into proximity to the defendant’s animal or abnormally dangerous activity for the purpose of securing some **benefit** from that contact or that proximity…”

- **Assumption of Risk**

- Primary

- (1:40)

- Secondary Reasonable Unreasonable

- reasonable - full recovery

- emergency, cut across blasting property

- unreasonable - comparative fault

- sees blasting, tries to cross path

- jury will figure it out (fault an non-fault)

- tie to Comparative fault statutes (1:45)

**Nuisance**

- interference with the use and enjoyment of land

1. Is fault required?

- yes, in most instances

- as long as you warn that person you want them to stop, if they don’t you can usually prove intent

2. Substantial invasion

- interference with the use and enjoyment doesn’t require physical invasion (different than SL)

3. Unreasonable invasion: balance of gravity of harm (**not what the risk of harm is, but the actual harm)** versus utility of D’s conduct

- we use the reasonable term different here

- gravity of harm v. utility

- phantom of the opera 24 hours a day (nominal utility)

- power plant’s emissions (huge utility)

4. Coming to the nuisance

- move next to feed lots, you came to the nuisance

- important factor

5. Public nuisances

(1:46)

**VIII. PRODUCTS LIABILITY**

- manufacturer, retailer, wholesaler are all defendants if the product causes an injury

**History of the Development of Products Liability**

**Contract-Based Origin**

- privity limitation

- *Losee v. Clute*

*-* Clute made a boiler, sold to paper company, exploded,

injured neighbor

*-* Neighbor not in privity with Clute

Exceptions to the Privity Requirement Developed

1. Imminently dangerous products (i.e. poison)

2. Generalized into *McPherson* which discarded privity

- Buick made a car, dealer bought from manufacturer, man. made car with wheel from another manuf.

- guy who bought the car sues Buick

- can’t sue, no privity

- “knowledge that the thing will be used by those other than the purchaser”

**Liability Based on Warranty**

- still K-based

- misrepresentation

- form of fraud

- problem: retailer makes a warranty, not the manuf. no privity

- Types of warranties

1. Express warranties (*Baxter)*

*-* P buys car from dealer, bought if rom FMC

- ads that windshield wouldn’t break, broke lost eye

- P had a right to rely on representations even though no privity

- ads v. K, FMC gets benefit of ad, P can rely

2. Implied Warranties *(Henningsen)*

*-* P buys a Chrysler, no express/implied except to replace parts in 90 days or 4k miles

- wife driving, hits wall

- P brings claim against warranty (part. purp, merchant.)

- limitation on implied warranties is gone

- Wife sues, court allows it, have to recognize that other people are going to use the car besides the purchaser (Active court)

**Advent of Strict Products Liability**

- *Greenman*

- B - shopsmith from wife for Christmas, wood hits B in the face

- B didn’t uy, no express warranty if not notified within 90 days

*- Greenman* “the liability is not one governed by the law of contract warranties but by the law of strict liability in tort”

- still not pure SL, though, has to be **defective**

- *Greenman* as clearing the air and facilitating analysis

- §402A of the Restatement of Torts 2nd

- “**defective**” because unreasonable dangerous to the consumer. Consumer’s reasonable expectations defined what was a “defective” product.

- you basically have the duty because you make the product

**Scope of Liability for Defective Products**

- how much do we take out of K?

The Economic Loss Rule

- test for determining when loss is “economic” as opposed to physical

- when the product simply doesn’t work well/do what it’s supposed to (this kind of loss can be covered in K law)

- Hypo: you buy an airplane, you parachute out, plane crashes and destroys itself

- just defective, not treated under products liability

- some treat as K, some as torts

**A. Three Types of Defects in Products**

**1. Manufacturing Defects in Products**

- “not the product you intended to product”

- *Lee* (570)

- test for defect

- prima facie case

- coke bottle blew up in here hand

**- you have to prove that the bottle was defective AND that it was defective when it left the Manufacturer’s control**

- more likely than not that there was a defect, okay

- eliminate other possibilities

- 30,000 mile car

- been out of the defendant’s control for 30k miles

- hard to win

- Pyrex dish

- explodes coming out of the oven, if she didn’t just get it, it’s hard to prove (but they are supposed to last forever, closer)

- no liability

- if there were other similar incidents, easier to argue defect

**Manufacturing Defects: Products Liability Restatement**

“a product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.”

- departs from intended design is the core

- “all possible care” signals no negligence (Acted reasonably)

- still liable for manuf. defects

**Manufacturing Defects in Food**

1. Consumer Expectation (*Jackson; 574)* (Majority)

- Chocolate Pecan (bit shell, broke tooth)

- what the consumer reasonably expected biting into the pecan

- *April 17, 1:33*

2. Natural/Non-Natural (*Mexicali Rose;* 575) (CA; minority)

- bit into a one inch chicken bone

- natural to the product, not defective

- Olive Pit Pizza Hypo

- restaurant not liable if they put it together (CA)

- consumer expectation: liable

- if bought from someone else, indemnity (still liable)

**2. Design Defects in Products**

- product you intended to produce, but there is a defect in it

**1. Consumer Expectation Test (*Leichthamer; 575)***

*“*Product may be found defective in design if the plaintiff demonstrates that the product failed to perform safely as an **ordinary consumer would expect** when used in an intended or reasonably foreseeable manner.”

- roll bar was only designed for side-ways roll

- rolled front-to-back, two dead one injured

- design defect

- “reasonably foreseeable manner” talks about even negligence, it’s foreseeable that someone will be negligent using the product

- got punitive damages, Jeep had publicized that they had tested front-to-back, they had not, don’t usually get punitive damages

- Crashworthiness of vehicles

- speeding: negligent, but reasonably foreseeable

- cars must be designed for that kind of crash

- CA: *Soule*

*-* camero, wheel came into legs

- “every day experience” of the product’s user

*- Children? What if they didn’t take danger into account?*

**2. Risk-Utility Test (*Knitz*; 577) (Majority)**

- If the benefits of the challenged design do not outweigh the risk inherent in such design.

- *Knitz (April 17, 1:37)*

- operating a press, lost fingers, requires coordination

- relationship of this test to negligence (Carroll Towing)

- Factors

- same ones as Carroll Towing

- likelihood of injury, gravity of the danger posed, mechanical and economic feasibility of an improved design

- alternative design allows this discussion (factor)

- some things, like firecrackers, pointed dart guns, you can look at the product and automatically determine the risk outweighs the utility

- also use the consumer expectation tests

- Restatement (alternative design required)

“a product is defective in design when the seller could have reduced or avoided the products ‘foreseeable risks of harm’ by ‘the adoption of a reasonable alternative design, and the omission of the alternative design renders the product not reasonably safe’”

**3. Risk-Utility Burden Shifting Test/Consumer Expectation (*Barker*; 581)**

- P, inexperienced lift operator, hit and injured by lumber

- P proves either consumer expectation OR product’s **DESIGN** proximately caused his injury (and D fails to prove that the benefits of the challenged design do not outweigh the risk of danger inherent in such design)

- easy for P to prove prima facie case

- *Campbell* (581 note 2)

- woman on the buss, fell, no railing

- would lose on consumer expectation (there’s no railing, you don’t expect there to be one to grab onto)

- met burden of proof on risk-utility (no railing DESIGN proximately caused her injury)

- GM has to prove utility of not having the rail outweighs the risk, then the jury will decide

- proof required for alternatives

**- *Honda*: the “reasonable alternative design” test**

- backed off the ramp, seatbelt was defective, woman drowned

- alternative design has to be economically feasible, technologically feasible, and safer

- P’s burden, did not meet

- there was an alternative, they said it could be done, but not that it was economically feasible

- would have to prove cost of alternative

- wasn’t enough to get to the jury on this

- P would have hit the jury in CA (Barker)

**1. Safer alternative**

**2. Would have prevented or reduced the risk**

**3. Technological and economically feasible**

- If no evidence of safer design: the product is not unreasonably dangerous

**The Formerly Special Case of Drugs**

- Hypo: the chloroquinine treatment

- Restatement 402A - Comment K

- unavoidably unsafe products

- no design defect liability

- liability for failing to warn

- if it’s unavoidably unsafe, if the product **properly warns** about itself, then there is no design defect

- left with failure to warn, manufacture defect (unusual), and negligence

- maybe they didn’t properly test, they knew there were certain side effects, etc.

- Compare: “unknowable” danger in a product

**3. Warning (Information) Defects in Products**

- The *Liariano* problem: what if the danger is obvious?

- P was injured using a meat grinder, his hand got caught

- constructively warned, sort of, object itself has risks associated

- 17 year old from another country

- employer took off the safeguard

- should’ve foreseen people taking it off

**Functions of Warnings:**

1. To inform of risks associated with the product, telling the person that a particular place, object, or activity is dangerous

2. To inform of alternatives that would avoid the risks

**Test for failure to warn**

- what a “reasonable” manufacturer would do

- “is this a danger that should be warned against”

“A jury could reasonably find that there exist people who are employed as meat grinders and who do not know (a) that it is feasible to reduce the risk with safety guards, (b) that such guards are made available with the grinders, and (c) that the grinders should be used only with the guards. Moreover, a jury can also reasonably find that there are enough such people, and that warning them is sufficiently inexpensive, that a reasonable manufacturer would inform them that safety guards exist and that the grinder is meant to be used only with such guards”

- cost of warning is minimal

- warning has to go in a place that will warn users of the product

- Relation to negligence

**Causation (But For)**

- (3:14 for outline of where this fits in)

- Unless P would have read, understood, and heeded the warning, the failure to warn cannot be a cause of harm

- Shift in the burden of proof

**- Heeding presumption**

- courts **presume** that the warning will be heeded, D must show otherwise

**Placement of Warning**

- *Carruth*

- detector wouldn’t detect the smoke in certain placements, one of the pictures of where to put it was like where the P used (but gave mixed signals in the written portion)

- can’t have inconsistent warnings, placement of the warning makes a difference

Level of detail required in the warning:

1. Reasonably clear

2. **Sufficient** **force** and **intensity** to convey the nature and extent of the risks to a reasonable person

- a big part of warning defect cases rests on this

Inadequate Warnings:

1. In factual content, expression or communication, or in form or mode of communication.

- wasn’t communicated in the proper manner

2. Must contain facts necessary to permit a reasonable person to understand the danger and in some cases avoid it.

3. Sufficient force and intensity to convey the nature and extent of the risks to a reasonable person.

Who Must Warn?

1. The Learned Intermediary Rule

- Restatement 3rd: direct duty to warn the ultimate consumer where:

a. Government says you must give info. to the public

- commonly birth control

b. Mass vaccinations

- doctor/whoever gives the vaccination doesn’t have the time to fully explain it

2. Bulk Products

- (3:42)

3. Knowledgeable Users

- they know the risks

- ads directly to the public, they have to warn them

Relationship between (1) failure to warn, and (2) design defects

1. If defect is obvious, does this prevent design defect case?

2. If warning is given, does this present design defect case?

- no, neither precludes a design defect case

Hypo: The Warning on the Garbage Truck

- “DANGER-DO NOT INSERT ANY OBJECT WHILE COMPACTION CHAMBER IS WORKING-KEEP HANDS AND FEET AWAY”

- if it’s truly obvious, don’t need a warning

- if there is some chance you won’t know, you have to warn

**B. Defenses to Products Liability**

**Contributory Negligence:** How to treat it?

- strict liability cases at CL (contrib. neg. not a defense, AoR was)

1. Minority Rule: *Bowling*

- put his head under the dump truck

- contributory negligence was not a defense (same as SL CL)

2. Majority Rule: CF, *Daly* (Cal. Rule)

- apply comparative fault if you have contributory negligence

- Negligence in failing to discover the defect: 603 n. 2, top paragraph

- is not included in comparative fault

**Assumption of the Risk Bar**

1. Keep it (minority)

2. Abolish it (majority)

- largely ends up being secondary, but could be primary

- Treat as comparative fault, not “no duty”

**Comparative Fault Among Ds**

- *Safeway*

- P v. Safeway 80% negligent and SPL

- NK - 20%, SPL only

- Safeway pays judgment and seeks contribution of 30%

1. Safeway’s argument for 30%

2. The problem: can you compare negligence and SPL

- yes, “comparative responsibility”

- Caveat: comparative fault can not include P’s negligence in failing to discover the defect in the product

**Misuse of the Product**

- Pilot light in *Hughes* (603)

- P was burned by a stove, pilot light had not been relit

- product was unreasonably dangerous in a reasonably foreseeable use + proximate cause

1. Unforeseeable misuse

- precludes recovery (proximate cause issue)

- product not defective, misuse was unforeseeable

- not really a defense, a failure of the PF case

2. Foreseeable misuse

- they have to design the product taking into account what is foreseeable

- product is defective for that reason, if they failed to do so

- MISUSE IS NOT AN AFFIRMATIVE DEFENSE

- “Burden is on the P to prove that the legal cause of the injury was a product defect which rendered the product dangerous in a reasonably foreseeable use”

Relevance of P’s personal characteristics in determining misuse

**Effect of misuse when product is defective:**

1. No contributory negligence (minority)

- trying to argue *Bexiga*

*-* protecting P from his own negligence

2. Comparative fault (most jurisdictions)

- compare P’s negligence to the defective product and reduce recovery

*Hughes*

- “As part of his prima facie case, P must establish that the product was unreasonably dangerous [i.e. defective] in a reasonably foreseeable use.”

*Jurado*

- “When someone is injured while using a product for an unforeseeable purpose or in an unforeseeable manner, the misuse sheds no light on whether the product is defective, because a manufacturer is not under a duty to protect against an unforeseeable misuse.”

**Scope of Products Liability Law**

- The economic damage distinction

- Who are appropriate Ds?

1. The chain of distribution: manuf., wholesaler, retailer

- all of them are liable

- Retailer/distributor: liable, but will have indemnity action against Manuf. because they made the product

2. Lessors of personal property?

- lessors will be liable, but only if they know the product is defective (check)

3. Sellers of used goods?

- wouldn’t be products liability to manufacturer (too far removed)

- no liability unless misrepresentation

- if you refurbished the car, there’s an argument that you could be liable if you’re selling it as a refurbished car

4. Lessors of real property?

- not subject to SPL

5. Hybrid transactions

- *Newmark* - the leading case

- hair product put on your hair at the salon

- why’d you go? Service or Product?

- court held products liability (not professional skills)

- no strict liability for services

- Dentist, no liability, essence was professional

- Test: essence of the transaction

- services v. sales

**IX. PROVING DAMAGES**

**Types of Damages**

- nominal, compensatory, punitive

Compensatory:

1. Medical

2. Lost earning capacity/wage lost

3. Pain and suffering

4. Any other specifically identifiable harm

- travel expenses to get a specific type of treatment

**Pain and Suffering**

- non-economic damages (different than ELR)

- Includes various aspects: loss of enjoyment

**Proving Damages**

Hypo: Motor Bike Accident

- negligence COA, disabled for life, hit a downed electric wire

- Prove:

1. Past medical

- bring in bills

2. Future medical

- expert medical

3. Lost earning capacity

- teachers/counsellors (evaluate above or below average child)

- Economist says child would make X over lifetime in that trade

**Timing Problems on Damages**

1. Time to get to trial: Can P get interest

- no, in CA

2. File one suit and then another four years later?

(2:06)

3. Attorney’s fees?

- sometimes there are attorney’s fees statutes, in torts you mostly don’t get them

- P&S important to compensating lawyer

4. Costs: Code of Civ. Procedure 998

- offer settlement, P refuses and doesn’t get a more favorable award, P shall not recover his/her postoffer costs and shall pay D’s costs from the time of the offer

**The Time Value of Money**

- $1 today or $1 a year from now

- sum of money prudently invested at the time of judgment which will return, over the period the future damages are incurred, the gross amount of the award

- discount rates (P wants a small discount rate; D wants a big discount rate)

- jury determines how to discount back the award (hard to do)

5. Inflation

- reverse problem, has to be taken into account

- $1 now could be the same as $3 in 2070

6. The loss period: life expectancy

- how long will they live (actuary/mortality tables)

7. Events occurring after injury but before trial

- Hypo: Widower’s new marriage

- not admissible, not relevant even if she’s doing better off

**Proving Pain and Suffering**

- keep a journal, therapist/medical testimony, P’s testimony

**-** The “unitary concept of pain”: any pain, discomfort, fears, anxiety, and other mental and emotional distress suffered by the P

- Hypo: the neck injury

- Hypo: the newborn baby

- parents testify to symptoms, discomfert

- Closing arguments: Per Diem

- put an amount on not being able to walk

- for each minute he is in this pain, that should be worth .10 or .20 then multiply that out

- CA allows this (dispute over allowing it)

- generally P’s argument, but can work both ways, D can argue that a huge sum that comes out makes it wrong

- Closing arguments: The Golden Rule

- what would it be worth for you to undergo that pain

- NOT ALLOWED IN CA (and a lot of other states)

**Insurance Policies**

Hypo: Garden Variety Auto Collision

- P in her car, injured, Jury awards $16,400 in general and special damages

- D appeals: wants to put in evidence that D was insured and, in actuality, did not pay more than $100

- Is D entitled to the jury instruction?

- collateral source rule (not admissible)

**Collateral Source Rule and the California Exception**

General Rule: Evidence of payments from collateral source are excluded

- Cal Civ Code 3333.1

- except in malpractice cases in CA, will be included

- disability insurance, worker’s comp, disability, accident insurance, etc.

**Punitive Damages**

- Malice or recklessness

- Willful and wanton disregard

- Purpose

- “clear and convincing evidence”

- Constitutional overlay

- Evidence of D’s wealth

- Subsequent plaintiffs

- Is employer liable for employee’s punitive damage?

**Wrongful Death and Survival Actions**

- Hypo: the dying plaintiff

- Hypo: the dying defendant

- CL: rules concerning death of a tortfeasor or injured person

- COA died with the parties

**Survival Actions**

- All loss or damage that decedent sustained or incurred prior to death (e.g. wage loss, medical loss)

- CA - no pain and suffering

- dies with P

- but can recover punitive damages

**Wrongful Death Action**

- Persons who would succeed to D’s property if he or she died (or were dependent on D)

- Damages:

1. Present value of future contributions from decedent

2. Loss of love, companionship, etc.

3. No punitive damages

- Defenses: P “stands in the shoes” of the decedent

- Comparative fault/assumption of the risk