

NEGLIGENCE – #1 DUTY**DUTY TO STANGER****Generally:**

1. No duty to strangers, but if (D) acts, (D) must act reasonably (to avoid foreseeable harms)

Exception:**2. Emergency Medical Care**

1. (D) can be **unreasonable** when acting to **rescue someone in an emergency**, so long as it's not **grossly negligent, willful, wanton or reckless**.
2. A person **cannot interfere** w/ other people's rescue efforts.

AFFIRMATIVE DUTIES

1. Creation of Risk

- If (D) creates the risk, (D) has a **duty to act reasonably and take reasonable precautions** to prevent others from harm.
- NUANCES:
 - Verbal incitement/encouragement is not a creation of risk (unless it was a child/someone who is mentally deficient.)

2. Undertaking

- If a person **undertakes an act**, he must act **reasonably to complete the task** without leaving the person in a **worse position than before**.
- **R2d:** One who **undertakes** (gratuitously or for consideration) to render services to another (to protect a 3rd person or his things) is subject to liability to the 3rd person (or his things) for physical harms resulting from his failure to exercise reasonable care to perform his undertaking if:
 1. *Increased Risk:* His failure to exercise reasonable care increases the risk of such harm
 2. *Transferred Duty:* He has undertaken to perform a duty owed by the other 3rd person
 3. *Reliance:* The harm is suffered b/c of reliance to the other or to the 3rd person upon the undertaking
- NUANCES:
 - What constitutes an undertaking?
 - Express agreement? Does the other party need to know about your undertaking?
 - Undertaking can be gratuitous, so long as you've induced someone to reasonably rely on your promise.
 - If you begin to undertake but stop in the middle – you still can't leave the person in a worse position than before (e.g. waste time/discourage others from rescuing)
 - If there was a voluntary undertaking, one cannot cease to provide the services without reasonable warning/notice to persons relying on that undertaking.

3. Special Relationship

- A person has an **affirmative duty to act reasonably** in the presence of someone with whom he has a **special relationship**.
 - Doctor/Patient
 - Parent/Children
 - Spouses
 - Schools/Students
 - Common Carriers/Passengers
 - 3rd Party Beneficiaries to Ks
 - If not listed, consider Rowland Factors to see if the parties owe a duty to each other.
- A person has a duty to **rescue/warn/protect** others from harmful actions of 3rd parties if there is a **special relationship** b/t the parties.
 - When **Landlords** are on **notice of specific criminal activity**, then they have a duty to protect **Tenants** of criminal activities by 3rd parties.
 - NUANCES:
 - L needs to be on notice of *actual* criminal activity by 3rd parties (not mere accusations)
- **R3d:** A person has an affirmative duty to **warn a 3rd party** of risks posed by someone with whom he has a special relationship.
 - **CA Statute:**
 - A psychotherapist **is not liable** unless his patient communicated a **serious threat of physical violence** against a **reasonably identifiable victim(s)**
 - A psychotherapist is **discharged of a duty** to warn/protect by making **reasonable efforts to communicate** the threat to the victim(s) to a **law enforcement agency**.
 - NUANCES of CA Statute:
 - If the patient threatens suicide, therapist has a duty to warn parents if the patient is under 18y/o
 - The victim must be sufficiently identifiable
 - Threat must be serious enough to lead a reasonable physician to think that it was legitimate (circumstantial evidence such as lack of weapons or history of bluffing is relevant.)

4. Landowners & Occupiers

3 Rules:

1. Common Law
2. Rowland Rule
3. English Rule

[1] Common Law (Traditional Landowners' Liability Rule):

- **Invitees:** Those w/ joint business or economic interest
 - The landowner owes a duty to take reasonable care that the premises are safe.
- **Licensees:** Social guests
 - The landowner has a duty to ensure that there is no trap or concealed danger.
- **Trespassers:** Not rightfully on the land
 - Landowners don't owe any duty.
- **Exceptions:**
 - Willful and Wanton/Reckless Conduct
 - Landowners have a duty to avoid willful/wanton/reckless conduct (e.g. intentional tort) against others – including trespassers.
 - Attractive Nuisance
 - *Applies only to children
 - Landowners have a duty to trespassing children if he's made a highly dangerous artificial condition that's attractive to children.
 - **R2d:** Landowner **breaches** that duty if...
 - Artificial conditions highly dangerous to children must be:
 1. Attractive to children
 2. In artificial condition (made by owner)
 3. Landowner knows/has reason to know that children will trespass
 4. He should realize the condition creates an unreasonable risk of death or serious harm to children
 5. Child didn't assume risk
 6. Risk-utility calculation supports eliminating condition
 7. Landowner failed to exercise reasonable care
 - Active Operations
 - If the landowner opens up his property for a public service (e.g. ice skating rink), he owes a duty to take reasonable care that the premises are safe to both invitees and licensees.
 - The landowner does not owe a duty to the trespasser.

[2] Rowland Rule:

- A duty to act reasonably will be imposed, considering the following factors:
 1. Foreseeability of harm to P
 2. Degree of certainty that P suffered injury
 3. Closeness of connection b/t D's conduct and injury suffered
 4. Moral Blame
 5. Policy of preventing future harm (deterrence)
 6. Extent of burden on (D)
 7. Consequences to community of imposing duty
 8. Insurance (availability, cost and prevalence)

[3] English Rule:

- Everyone is owed a duty of reasonable care – whether it be invitees or licensees.
- But there is no duty to trespassers.

NEGLIGENCE – #2 BREACH

1. Reasonable Person Standard

- A (D) breaches a duty of reasonable care, when judged from the perspective of a reasonably prudent person in (D)'s position, she fails to act w/ reasonable care to avoid a reasonably foreseeable risk to (P).
- Exceptions:
 - Lower Standard:
 - Physically Disabled
 - A person under a **physical disability** (e.g. blind) is obliged to use the care which a **reasonable** person under the **same or similar ability** would exercise under the circumstances.
 - *This is different from "not-so-smart" person who is still held to an objective reasonable person standard.
 - Children
 - A **child** is held to the standard of a **reasonable child his age**.
 - **Exception: If a child was engaging in an adult activity, he is held to the standard of a reasonable adult.**
 - Adult activity = driving a motor vehicle, operating a tractor
 - Non-adult activity = gun activity
 - Higher Standard:
 - Special Expertise or Knowledge
 - Those with special expertise/knowledge are held to the standard of a reasonable person with the same set of special expertise/knowledge.
 - Special expertise = doctors, lawyers, engineers, ski instructors
 - Depending on Context:
 - Women
 - Women are held to a lower standard only in very rare occasions (e.g. negligent infliction of emotional distress in sexual harassment context)
 - Mentally Ill or Disabled
 - Generally NOT a defense unless it defeats an element
 - If (D) did **not** engage in a "**voluntary act**" (b/c of mental illness like hallucinations) and did **not** have **prior knowledge of susceptibility to a mental illness, there is no breach of duty.**

2. Calculus of Risk / Cost Benefit Analysis

- Generally, if the "cost" outweighs the "benefit," there is a breach
 - Benefit of saving life is regarded as extremely high (fire truck driving unreasonably but to save lives)
 - Risk of death is outweighed by benefit of saving a life (as long as risk was not certain death and it was to save a human, not a cat or crown jewels of England)
- "Hand Formula"
 - $B = \text{Burden of Precaution}$
 - $P = \text{Probability of Harm}$
 - $L = \text{Severity of Harm}$
 - $B < P \times L \rightarrow \text{NEGLIGENT}$
 - $B \geq P \times L \rightarrow \text{NOT NEGLIGENT}$

3. Custom

- T.J. Hooper Standard
 - Custom provides important guidance as to what the reasonable standard of care is, but it's not dispositive.
 - NUANCES:
 - If it's a new product on the market and there is no custom, look at the reasonableness of the act. (D) needs to show that the deviation from custom was reasonable.
- Exceptions:
 - MEDICAL CONTEXT (Custom IS the standard)
 - In order to establish **negligence against a physician**, P must establish:
 1. Medical **norm** for doctors in that specialty
 2. **Departure** from norm
 3. **Causation**
 4. **Harm**
 - Physicians are held to a standard of [1] **generally recognized and accepted practices/procedures** that would be followed by an [2] **average, competent physician** [3] in a **similar field/circumstances**. Compliance with a custom is a [4] **complete defense**.
 - NUANCES:
 - 2 Schools Problem:
 - (1) Advocated by a considerable number of physicians (minority isn't enough)
 - (2) Accepted by reputable, respected and reasonable minority
 - Doctor is obliged to inform the patient of all *available customary tests* (even if it's difficult to obtain)
 - Judge custom by area of *specialty* (not location and avail of medical machines in rural areas)

- ***Helling v. Carey** – Court rejected general rule and held doctor responsible for not performing a glaucoma test on patient under 40y/o. CBA: Test was so simple & cheap in comparison to the grave consequence (loss of vision)
- ***Informed Consent:**
 - Doctor has a **duty to disclose** what a **reasonable person** would want to know that is **material to their decision** to undergo treatment.
 - **NUANCES:**
 - Custom is relevant but **not dispositive** in an “informed consent” context
 - Doctor can **decide on behalf of the patient** if (1) disclosed all risks/details of treatment and (2) patient **waives** her right to make her own choice
 - **Exceptions** to “duty to disclose what a reasonable person would want to know” rule:
 - No duty to disclose if it poses an **imminent medical risk** to the patient’s well-being (very narrow)
 - No duty to disclose if patient **waives her right** to informed consent
 - No duty to disclose things that **reasonable people already know** about
 - No duty to disclose risk of the treatment is the **only avail choice**
 - If patient is **unconscious** and needs to undergo medical treatment, must obtain implied consent or ask family for consent.
- **CONTRACTS CONTEXT** (Unless K states otherwise, custom IS the standard)
 - If a K is silent as to the customary practice, read in custom as an implied term to the K → Custom is the standard of care
 - A K can explicitly override custom.

Elements:

1. **Statute** requires (D) to engage in certain conduct
2. (D) **fails to conform**
3. (P) is within the **class** of those for whom the statute was enacted
4. Statute was enacted to **prevent injuries** of the **character** which occurred
5. Failure to conform to the statute was the **cause** of the injury

NUANCES:

- Courts **enforce** negligence per se even if the law turns out to be **invalid** (didn’t have the right # of votes)
- **Compliance** with the statute is **NOT a complete defense** unless the statute has that provision
- **Causation** is difficult to meet w/ negligence per se.

Excuses to “Negligence Per Se” – Actor is not liable for the violation of a statute if

1. Violation is reasonable in light of actor’s **childhood, physical disability** or **physical incapacitation**
2. Actor exercises **reasonable care** in attempting to comply with the statute
3. Actor **did not know** (should not have known) that the **statute applies to the situation** & its factual circumstance
4. Actor violated the statute b/c it was **confusing to the public**
5. Actor’s compliance w/ the statute would involve a **greater risk of physical harm** to the actor or to others than noncompliance

Res Ipsa Loquitur – ‘The thing speaks for itself’

- Evidentiary tool:
 - If (P) can establish using **circumstantial evidence** that it’s **more likely than not** (>50% chance) that the **injury was caused by (D)’s negligence**, then,
 - The **burden shifts** to (D) to prove that he was **NOT negligent** (and that there’s another explanation for the injury)
- Prosser Statement (Requirements for RIL)
 - Event must be of a kind which **ordinarily does not occur in the absence of someone’s negligence**
 - It must be caused by an agent or instrumentality w/in the **exclusive control of (D)**
 - It must **not** be due to any **voluntary action or contribution** on part of (P)
- R2d:
 - **Rejects the Prosser Statement’s requirement that the (P) not be contributorily negligence.*
 - It may be **inferred** that the (D) have been **negligent** when the accident causing the (P)’s physical harm is a type of accident that **ordinarily happens b/c of the negligence** of the **class** of actors of which the **(D) is a relevant member**
- Probability Calculation:
 - Some courts look at the overall probability of negligence & causation is >50%
 - Other courts require that the probability of negligence and probability of causation are each >50%.
- ***Ybarra v. Spangard** – In the medical context, when multiple people are involved in a procedure and (P) doesn’t know who is responsible, she can group all (D)s together to prove negligence case through RIL. Burden now shifts to (D) who will point fingers at who is truly responsible.

4. Negligence Per Se

NEGLIGENCE – #3 CAUSATION**Actual Cause (But-For) Test**

- But-for the (D)'s tortious conduct, the harm would not have occurred.

Restatement: Factual Cause

- Tortious conduct must be a factual cause of physical harm for liability to be imposed.
- Conduct is the factual cause of harm when the harm would not have occurred absence the conduct.

[1] "Loss of Chance" Doctrine

- When (P) already has a "less than 50% chance of survival" and an alleged medical misdiagnosis reduces his chance of survival,
 1. **[JDX 1]** Harm is the additional medical costs incurred due to misdiagnosis. Allows (P) to recover out-of-pocket expenses such as lost wages and additional medical expenses.
 2. **[JDX 2]** Harm is the loss on life. Allows (P) to recover the loss of chance on life.
 3. **[JDX 3]** No harm b/c (P) was more likely than not to die and fails the but-for test. No recovery.

[2] "Multiple but Sufficient Causes & 1 Injury"

- If multiple acts occur, each of which alone would have been the factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as the factual cause of the harm.
 - *Doesn't meet the general but-for test: "But-for A's act, harm STILL WOULD HAVE OCCURRED b/c of B's act"*
 - *But we still don't want to let A off the hook. Therefore, multiple but sufficient causes are each factual causes.*
- Apportioning liability of multiple tortfeasors:
 - **Joint & Several Liability:** (P) can recover full liability from all/any of the (D)s – regardless of their individual share of the liability.
 - **Several Liability:** Each (D) is liable only for its own specified obligation.

[3] "Multiple and Insufficient Causes & 1 Injury"

- If multiple acts caused the harm but each alone **would not have been sufficient** to cause the harm, it satisfies the general "but-for" test.
- **[EX]** A's motorcycle and B's motorcycle together cause enough noise to startle (P)'s horse whereby (P) is thrown off and harmed.
 - But-for B's motorcycle, the harm would not have occurred.
 - But-for A's motorcycle, the harm would not have occurred.
 - Therefore, both B and A are liable. Liability is apportioned according to jurisdiction.

1. But-For
(Actual)
Cause

[4] "Alternative Liability"

- When there are multiple (D)s who acted and at least one of them is responsible for the harm, but (P) cannot prove which one caused the harm, the burden shifts to the (D)s to prove who actually did it.
 - *All potential (D)s must have **acted** for the burden to shift.
- Restatement – Factual Cause and Burden of Proof
 1. When (P) sues all multiple actors,
 2. Proves that each engaged in tortious conduct exposing (P) to a risk of harm,
 3. And the conduct of one/more of them caused (P)'s harm
 4. But (P) cannot reasonably be expected to prove which actor caused the harm,
 5. The burden of proof (production & persuasion) on factual causation is shifted to the (D)s.
- When each of (D)'s probability of liability is <50%:
A, B, and C each shot at (P). Each (D) has a 33% chance that he hit (P).
 - **[Rest. Jdx]** Still allow (D)s to be grouped together and shift the burden
 - **[Jdx 2]** Does not allow recover b/c there is a "less likely than not" chance that they were responsible.

[5] "Market Share Liability"

- Applies when there are multiple manufacturers of the same type of drug in the market and (P) cannot prove exactly which manufacturer's drug he took that caused him harm.
- Elements:
 1. All named (D)s are potential tortfeasors
 2. Alleged products of all tortfeasors are fungible (e.g. shares same properties/materially identical)
 3. (P), through no fault of her own, cannot identify which (D) caused the injury
 4. (P) brings in as (D)s those representing a substantial market share
 5. Then each (D) is responsible for his share of the market.
- NUANCES:
 - **Causation** as to the drug (not any particular manufacturer's drug) must be met.
 - If (P) can **identify a specific manufacturer**, can't use this theory.
 - If (D) can be eliminated from being a potential tortfeasor, it's not liable.

<p>2. Proximate Cause</p>	<p>Three tests for Proximate Cause</p> <ol style="list-style-type: none"> 1. Foreseeable Harm (Wagon Mound/Palsgraf) 2. Directness Test (Polemis) 3. Risk Test (R3d) <p><u>[1] Foreseeable Harm</u></p> <ul style="list-style-type: none"> ▪ The actor is proximately liable if both [1] the (P) and the [2] type of harm are foreseeable. <ul style="list-style-type: none"> ○ Foreseeable Plaintiff: Plaintiff was w/in the “zone of danger” ○ Foreseeable Harm: The type of harm, but not the extent, must be foreseeable. ▪ <i>Ryan v. NY Central RR</i> – Fire liability extends only to the first building that was damaged <ul style="list-style-type: none"> ○ Because fire spreading further to neighboring buildings is not foreseeable and would extend too much liability. ○ Wants to encourage insurance ○ *This rule is rejected by many courts. <p><u>[2] Directness Test</u></p> <ul style="list-style-type: none"> ▪ The actor is liable if his negligent act is [1] close in time & space [2] without an intervening cause. ▪ Intervening Act: <ul style="list-style-type: none"> ○ If an unforeseeable intervening act disrupts the chain of causation, the (D) is relieved of liability. <ul style="list-style-type: none"> ▪ [EX] Intentional tort, criminal acts, act of God ▪ Acts that are foreseeable and therefore not intervening: <ul style="list-style-type: none"> • Medical malpractice, disease or accident, negligence of rescuers, normal force of nature, pedestrians throwing matches on the street ○ Exception: An intervening act does NOT relieve (D) of liability if (D) was on notice of the criminal/intentional act and did nothing to prevent. <p><u>[3] Risk Test</u></p> <ul style="list-style-type: none"> ▪ An actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious. ▪ [EX] Handing a gun to a child is dangerous b/c there is a risk that it might go off → child dropping gun & breaking toe → not liable
<p>3. Substantial Factor Test (R2d/CA)</p>	<p><i>Rejected by R3d, essentially combines the “but-for” and “proximate cause”.</i></p> <ul style="list-style-type: none"> ▪ (D) is liable if his tortious conduct was a “substantial factor” in causing the (P)’s harm. ▪ “Substantial Factor” <ul style="list-style-type: none"> ○ (D)’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.

NEGLIGENCE – #4 (P)'s CONDUCT & AFFIRMATIVE DEFENSES

1. Contributory Negligence	<p><i>When (P) runs an unreasonable risk of harm to himself.</i></p> <p><u>Majority Rule:</u></p> <ul style="list-style-type: none"> (P)'s failure to exercise reasonable care for his own safety could reduce the amount of recovery. <p><u>Minority Rule 1 - Common Law/Traditional Rule:</u></p> <ul style="list-style-type: none"> If (P) fails to exercise reasonable care for his own safety, (D) has a complete defense and (P) is completely barred from recovery. Limitations/Exceptions <ul style="list-style-type: none"> (D) still has to prove all elements of (P)'s negligence – duty, breach, causation and harm. Contributory negligence is NOT a defense to intentional torts / reckless conduct. 1. Emergency Doctrine: <ul style="list-style-type: none"> Acting unreasonably in an emergency to save a life does not bar recovery. 2. Last Clear Chance: <ul style="list-style-type: none"> The party who has the last clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it. <p><u>Minority Rule 2:</u></p> <ul style="list-style-type: none"> (P)'s failure to exercise reasonable care for his own safety is irrelevant to his ability to recover.
2. Assumption of Risk	<p>General Idea: (P) knew about the risk but undertook the activity anyway.</p> <ul style="list-style-type: none"> Implied AoR – through conduct Express AoR – through K <p>Elements of AoR (Traditional Rule)</p> <ol style="list-style-type: none"> (P) has specific knowledge of the risk (<i>knowledge of risk</i>) (P) appreciated the nature of the risk (<i>type of risk</i>) (P) voluntarily proceeded *The Rst. adds "willingness by (P) to accept responsibility for the risk" – but widely rejected.
3. Comparative Negligence/ Fault	<p><u>[1] Modified Approach (Majority)</u></p> <ul style="list-style-type: none"> If (P)'s fault is greater than 50%, contributory negligence is a complete defense (no recovery) <p><u>[2] Pure Approach (Minority)</u></p> <ul style="list-style-type: none"> (P)'s recovery is apportioned proportionally to his fault <p><u>[3] "Assumption of Risk" in Comparative Fault Jurisdictions:</u> *Understanding of AoR changes under this system.</p> <ul style="list-style-type: none"> [3a] Express Assumption of Risk <ul style="list-style-type: none"> Contract term overrides tort law – governed by contract law. [3b] Implied Assumption of Risk <ul style="list-style-type: none"> Primary Implied AoR <ul style="list-style-type: none"> When (D) owes no duty to act reasonably and (P) assumed the risk of the activity, (P) is barred from recovery. (D) owes no duty when... <ul style="list-style-type: none"> 1. By reason of PP, we want to prevent floodgates of litigation <ul style="list-style-type: none"> [EX] People suing each other over amateur, recreational sports 2. There is an inherent risk in the activity <ul style="list-style-type: none"> [EX] The flopper or ski moguls Firefighter Rule: Firefighters cannot recover for injuries from person who has <i>negligently</i> started a fire (b/c it is an inherent risk of the job.) <ul style="list-style-type: none"> Exception: If the injury sustained is not in the nature of the inherent risk, (D) is liable to the firefighter for his negligence. (e.g. inhaling toxic chemicals in fire) Veterinarian Rule: Vets cannot recover for bite/injuries sustained from examining animals even if the owners were negligent (b/c it's an inherent risk of a job.) Secondary Implied AoR <ul style="list-style-type: none"> When (D) owes a duty to act reasonably and (P) unreasonably assumed the risk of the activity, (P) is barred from recovery. (P) unreasonably assumes the risk of the activity if <ul style="list-style-type: none"> (P) had specific knowledge of the risk (P) had appreciated the nature of the risk and (P) voluntarily proceeded

STRICT LIABILITY - POCKETS**Background**

- When (D) acts reasonably (without fault) but causes (P) harm, he is automatically liable under SL.
- Rylands v. Fletcher** – (D) rightfully built a water reservoir on land that had defects unbeknownst to him → floods (P)'s mine nearby. Court finds him liable despite his lack of fault b/c "he who brings something that might escape onto his land does so at his peril"

Vicarious Liability (Respondent Superior)

- If (P) successfully makes out a negligence claim against the employee, an **employer is strictly liable for any employee's negligence**
 - Frolic and Detour Exception**
 - An employer's liability is excused if the employee is **acting outside the scope** of his employment.
- Independent Contractors**
 - In general, a person who hires an **independent contractor** is not strictly liable for the I.C.'s negligent actions
 - Exception:**
 - If he was able to (1) **direct and control** the independent contractor's behavior and (2) **derived a benefit** from the independent contractor's work.

1. Fire

- An actor is **strictly liable** for a fire that was (1) **intentionally started** (2) but **unintentionally spread**, (3) even if he took all **reasonable precautions** to maintain the fire.
- NUANCES
 - (P) would still need to establish causation and **proximate cause may be an issue.**

2. Animals

- [1] Livestock**
 - Common Law:** The animals' owner is **strictly liable** for **trespassing livestock** (cow, sheep, horse, chicken) and any **damage** caused
 - Western States:** The **homeowner** has an obligation to protect his own land by **fencing the cattle out.**
- [2] Domesticated Pets/Tame Animals**
 - Common Law:**
 - Domesticated pets are governed by the **negligence standard**, UNLESS the owner knew or should have known about the **dangerous propensities** of the dog.
 - [EX] Pitbulls are presumed to be violent so owners are strictly liable.
 - CA's S.L. Rule:**
 - The owner of ANY dog is **strictly liable** for damages suffered by anyone who is (1) **bitten** by the dog while in a (2) **public place** or **lawfully in a private place** (including the dog owner's property) – (3) **regardless of the former viciousness** of the dog or the owner's knowledge of such viciousness.
 - Exception: Police dogs**
- [3] Wild Animals**
 - The owner is **strictly liable** for actions of wild animals that are **ferocious by nature**
 - Ferocious by nature = lions and koalas
 - Tame by nature = deer (*but if you have a particularly ferocious deer, it's judged under S.L.)

3. Ultrahazardous or Abnormally Hazardous Activities

- General Rule:**
 - A person who engages in an **abnormally dangerous activity** will be held **strictly liable** for physical harms to the person/property regardless of his exercise of reasonable care.
 - NUANCE: Imposing strict liability turns on whether (D)'s activity is considered abnormally dangerous.
- [1] R3d – Abnormally Dangerous Activities**
 - A (D) who engages in an **abnormally dangerous activity** is subject to **strict liability** for the **kinds of physical harms** that makes the **activity abnormally dangerous.**
 - Abnormally Dangerous Activity:**
 - Activity creates a **foreseeable and highly significant risk** of physical harm, even when **reasonable care is exercised** by all actors AND
 - The activity is **not one of common usage** (something that doesn't have reciprocal risk – owing a dog is reciprocal risk b/c so many people have them.)
- [2] R2d – Abnormally Dangerous Activities (Posner Standard)**
 - A (D) who engages in an **abnormally dangerous activity** is subject to the **strict liability** for the kinds of physical harms that makes the **activity abnormally dangerous.**
 - Abnormally Dangerous Activity – Consider the following factors:**
 - Existence of a high degree of risk of some harm
 - Likelihood that the resulting harm would be great
 - Inability to eliminate risk by exercise of reasonable care
 - Whether activity is of common usage
 - Inappropriateness of location of activity**
 - Value to community vs. Dangerous attributes**
- [3] R1st – Ultrahazardous Activity**
 - An activity is ultrahazardous if
 - It necessarily involves a risk of harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care AND
 - Is not a matter of common usage

STRICT LIABILITY - DEFENSES

- | | |
|-----------------------------------|--|
| 1. Attack on the Prima Facie Case | <ul style="list-style-type: none"> ▪ Attack causation <ul style="list-style-type: none"> ○ [EX] In context of "abnormally dangerous activities," the harm must be within the scope of what makes the activity abnormally dangerous. Could defeat proximate cause if harm is outside scope. |
| 2. Contributory Negligence | <ul style="list-style-type: none"> ▪ <u>[1] Contributory Negligence JDX</u> <ul style="list-style-type: none"> ▪ Contributory negligence is ONLY a defense when it is in the context of assuming the risk of abnormally dangerous activity (e.g. know that (D) is blasting nearby and still sits out to enjoy beer) ▪ <u>[2] Comparative Fault JDX</u> <ul style="list-style-type: none"> ▪ Even if (P) is contributorily negligent, apportion damages w/ respect to fault. |
| 3. Assumption of Risk | <ul style="list-style-type: none"> ▪ If (P) assume the risk of harm from an abnormally dangerous activity, it bars his recovery. ▪ (P) assumes the risk of harm if <ol style="list-style-type: none"> 1. Has specific knowledge of the risk 2. Appreciates the nature of the risk and 3. Voluntarily proceeds |

PRODUCT DEFECTS

1. Manufacturing Defects

*ONLY PRODUCT DEFECT BASED ON STRICT LIABILITY STANDARD

[1] General Rule:

- Anyone in the chain of distribution (manufacturer, distributor or retailer) is strictly liable for manufacturing defects
 - **Manufacturing Defects:**
 - Deviation from (D)'s own manufacturing specifications (e.g. defect in the materials in the product)
- Restatement of Products Liability – **Circumstantial Evidence**
 - It may be inferred that the harm was caused by a product defect w/o proof of a specific defect when the incident
 1. Was a kind that **ordinarily occurs** as a result of the **product defect AND**
 2. Was **not** (in the particular case), **solely the result of causes other than a product defect** existing at the time of sale or dist.

[2] Prior Common Law

- **Partial defenses** to strict products liability for manufacturing defects:
 1. No defect if the problem is "**open and obvious**"
 2. No defect if product caused an injury when **not used for an "intended use"**
 3. No defect if product was "**altered by consumer**"

2. Design Defects


[1] Consumer Expectation Test

- A manufacturer is **negligent** if a product is [1] **defective in design** such that [2] **it fails to perform as safely as an ordinary consumer would expect [3]** when used in an **intended or reasonably foreseeable manner**.
- NUANCES:
 - Look at what the intended purpose of a product is – was it being used in an intended/foreseeable manner? If not, contributory negligence.
 - Look at what a reasonable consumer would expect

[2] Risk Utility Test

- A manufacturer is **negligent** if the product is [1] **defective in design** such that the [2] **benefits** of the challenged design **do not outweigh the costs**.
- R3d of Products Liability
 - A product is **defective in design** when the [1] **foreseeable risk of harm** posed by the product could have been reduced or avoided by the adoption of a reasonable, alternative design and [2] the omission of the alternative design renders the product not reasonably safe.
 - Factors for determining reasonableness of alt. designs;
 1. Magnitude and probability of the **foreseeable risks of harm**
 2. The **instructions and warning** accompanying the product
 3. *The nature and strength of **consumer expectations** regarding the product, including expectations arising from product portrayal and marketing
 4. The **relative advantages and disadvantages** of the product as designed as it alternatively could have been designed
 5. The likely effects of the alternative design on production **costs**; the effects of the alt. design on product **longevity, maintenance, repair and aesthetics and the range of consumer choice**.

Consumer expectations are ALSO folded into the Risk Utility Test.



[3] Hybrid Test

- A product is defective in design either
 1. If the product has failed to perform as safely as an **ordinary consumer would expect** when used in an **intended or reasonably foreseeable manner OR**
 2. In light of the relevant factors, the **benefits of the challenged design do not outweigh the risk of danger** inherent in such design.
- CA's Hybrid Test
 - (1) **Consumer Expectations Test**
 - A product is defective in design if the product fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.
 - (2) **Risk-Utility Balancing Test**
 - When determining whether the **danger inherent in the design outweighs the benefits** of such design, consider the following factors:
 1. Gravity of danger posed by the challenged design
 2. Likelihood that such danger would occur
 3. Financial cost of improved design
 4. Adverse consequences to the product and consumer that would result from alternative design.

<p>3. Warning Defects</p>	<p><u>In general</u></p> <ul style="list-style-type: none"> ▪ There are 2 types of warning defects: (1) Failure to warn and (2) Inadequate Warning ▪ Elements of Defective Warning – Anyone in the chain of distribution is liable for negligence if... <ol style="list-style-type: none"> 1. A warning was necessary 2. The warning was inadequate 3. An adequate warning would have made a difference (causation) <p><u>R3d of Products Liability – Defective Warning</u></p> <ul style="list-style-type: none"> ▪ A product is defective b/c of inadequate instructions/warnings when... <ol style="list-style-type: none"> 1. The foreseeable risks of harm posed by the product could have been reduced/avoided by the provision of reasonable instructions/warnings AND 2. The omission of he instructions/warnings renders the product not reasonably safe.
<p>Affirmative Defenses</p>	<p><u>[1] Contributory Negligence</u></p> <p><u>[2] Assumption of Risk</u></p> <p><u>[3] Misuse – Alteration or Not Intended Use</u></p> <ul style="list-style-type: none"> ▪ Creates a risk by altering the product (normally, a subset of contributory negligence) <p><u>[4] Preemption by FDA Regulations</u></p> <ul style="list-style-type: none"> ▪ Express Preemption: <ul style="list-style-type: none"> ○ There is a federal statute that expressly provides that state tort law cannot apply in this area ▪ Conflict Preemption: <ul style="list-style-type: none"> ○ Supremacy clause of the US constitution – federal law is the supreme law of the land.