TORTS OUTLINE: KIM, FALL 2010
*Post-Midterm

I. Negligence continued: Duty to Protect 3rd parties

1. Duties of Alcohol Providers [Dram Acts]
   (a) Generally no duty to protect 3rd parties from guests who drink and drive
   (b) Commercial providers of alcohol (pubs) *do* have a duty
   - Reynolds v. Hicks: Social hosts provided alcohol to a minor at a wedding. Minor later caused a car accident because of intoxication. Hosts owned no duty to the victim.
     i. Social hosts do not have the responsibility or resources to control that vendors do
     ii. Court did not want to restrict people's ability to host social functions by imposing liability and more responsibility

   (c) Negligent Entrustment [creates duty]
   - Vince v. Wilson: D sold car to a drunk and unlicensed driver, paid for by driver's aunt. D knew the driver was unlicensed. Driver later crashed into P.
     i. D who supplies a chattel has a duty to make sure it does not fall into the hands of another whom the D knows or should know may use said chattel in a manner involving unreasonable risk to themselves or a 3rd party.
   - Peterson v. Halsted: Father co-signed for a car, knowing his daughter had a drinking problem. Because the accident was 3 years later, father had no duty.
     i. Holding all co-signors would make for boundless and confusing liability.

2. Duties to non-parties of a K
   (a) Privity typically not required in tort suits
   (b) Can be used to limit D's duty
   - Strauss v. Belle Realty: Apartment complex had K with the utility company. When the power went out, a tenant fell down a flight of stairs in the commons area. Court found no duty to P because he was in the common area. Cardozo held that a duty in this case would provide *crushing liability* for the D, resulting in the defeat of an industry.
     i. Policy that the class P was part of was too large
     ii. Holding a duty over the P's class would result in lost social utility
   - Palka v. Servicemaster Management: P nurse was injured when a hospital fan fell from the wall on her. D had K with hospital to maintain the premises, but not with the P. Court held that D did owe a duty to P, a 3rd party, because the relationship between the D's obligations and the P's reliance and injury were *direct and demonstrable*, and the P was within a *known and identifiable group.*
   - Pulka v. Edelman: P, a pedestrian, when was hit by a car leaving D's garage. Court refused to extend a duty because the D had no reasonable opportunity to control the conduct of the driver.
     i. Finding a duty would create an unnecessary extension, limitless and applicable to all garages (hotels, malls, etc.)

II. Duty of Landowners

1. Invitees: Highest duty owed; Duty to exercise reasonable care to *make safe* or warn against both known dangers and those that *would be revealed by reasonable inspection*.
   (a) Possessor invites with the expectation of a material benefit, or extends an invitation to the general public (with no restriction on class of guests)

i. Business visitor: Enters land with express or implied permission for a purpose directly or indirectly connected with the possessor's business.
ii. Public invitee: Enters land open to the public for a purpose for which the land is held open to the public

2. Licensees: Duty to *warn* against known, non-obvious dangers
(a) Enters land with permission (express or implied), but *not* for a business purpose that serves owner/occupier (*social guests*)

3. Trespassers: No duty to protect or warn against dangers. Duty only to avoid willful misconduct or reckless disregard of safety
(a) Enters land without permission, and whose presence is unknown or objected to if known
(b) Exception: Attractive Nuisance Doctrine
i. Possessor has duty to trespassing children when an artificial condition creates an unreasonable risk of death or serious harm, when possessor knows or has reason to know that children will trespass and they do not realize the risk (ex: pools). Balancing the risk and utility can support eliminating the condition.

4. Modern Approach
(a) Eliminates distinction between invitees and licensees → Lawful visitors
(b) Standard of care owed determined by the *Rowland Test*
i. *Foreseeability* of harm to the P
ii. *Purpose* for which the entrant entered the land
iii. *Time, manner, and circumstances* of which the entrant entered the land
iv. *Use* to which the premises are put/expected
v. Reasonableness of the repair/inspection/warning
vi. Opportunity/ease of repair / giving warning
vii. *Burden* on landowner/community and costs to provide protection
- Heins v. Webster County: P was visiting daughter in D's hospital when he slipped outside and was injured. D claimed he was visiting his daughter on a social call (licensee), and P claimed he was visiting the hospital to discuss playing the role of Santa Claus at Xmas. Case eliminated distinction between invitees and licensees.
- Carter v. Kinney: P was a guest at D's weekly bible study group. P slipped on ice when entering D's property. D did not know ice had formed over night. P was deemed a licensee and D was not held liable.

5. .. To prevent Criminal Acts
(a) Generally no duty to protect against criminal acts of 3rd persons
(b) Generally no duty to comply with a robber's demand (ex: P held hostage on D's premises)
- Kline v. 1500 Mass Ave: P tenant was injured in common area of residence. Court found a duty to protect because the D landlord was in the best position to protect the tenants. Landlord had exclusive control over the commons while law enforcement could not even monitor them. Court weighed foreseeability of harm with broader policy goals (responsibility, costs, etc.).
- Posecai v. Wal-Mart: P customer was mugged in the parking lot. D business had no duty because they did not possess the requisite degree of foreseeability. Court considered 4 tests of foreseeability:

i. Specific harm: No duty unless landowner is aware of specific and imminent harm. Court say this is too restrictive and limiting.
ii. Prior similar incidents: Foreseeability established by evidence of previous crimes on or near the premises. Court says it is too arbitrary.
iii. Totality of the circumstances: Also considers nature, condition, and location of the land when determining foreseeability. Court decides against because it is too broad (concurrence argues for this).
iv. Balancing test: Addresses interests of business and customers by balancing foreseeability of harm with burden of prevention. Applied.

III. Duties for Non-Physical Injuries: NIED

1. Emotional distress follows from actual physical injury
→ P would sue for physical injuries under traditional N analysis, & include ED in damages

2. Emotional distress results from threat of physical injury [Zone of Danger 1]
(a) Test: *Near* physical impact; fright; imminent
(b) Ps can recover for NIED when the negligent act caused a *reasonable* fear of *immediate* personal injury, and fright results in substantial bodily injury or sickness *had they occurred as a consequence of direct physical injury* rather than fright. (Symptom could be recovered for had it happened if *actually* hit.)
(c) Limited to pre-impact frights, often automobile and airplane accidents. P must have been aware of the impending doom, decided on case-by-case basis (ex: must be seated on side of the plane where engine detached).
    - Falzone v. Busch: P suffered physical harm as a direct result of her emotional harm suffered when D's car veered towards her. P was afraid of being hit, but the car actually hit her visible husband standing a fair distance away. Overruled the *Ward Doctrine* by allowing recovery, finding that any impact is sufficient for recovery, the common law naturally evolves, and credibility of claims can be determined by improving medical evidence. *Zone of danger.*
        i. Ward v. West Jersey: Denied recovery in the absence of physical impact on the P for 3 reasons: a D is only legally responsible for the natural and proximate results of his negligent act (fright does not naturally or probably cause physical suffering), the court believed that no liability exists in the absence of impact, and physical manifestations of *emotional harm* are far too easy to fabricate (court feared a floodgate of close-calls).
    - Buckley v. Metro-North: P was exposed to asbestos for years at work and later feared developing cancer. Court found he *could not* recover for his emotional injury because he did not pass the *zone of danger* test. Mere exposure is not equivalent to physical impact. It was also not imminent because the chance of developing cancer was *less than 50%*. It was not immediate, there was no actual harm, and the risk of future harm was less than 50%.

3. Plaintiff is a direct victim of conduct that creates an unreasonable risk of emotional distress
(a) *Foreseeability*: Where D should have reasonably foreseen that serious emotional distress would result from their negligence, D is subject to liability.
(b) Unique or special relationship between the parties is required (limits liability)
(c) Serious emotional distress measured as "a reasonable person, normally constituted, would be unable to adequately cope with." Not necessarily *physical* symptoms.

- Gammon v. Osteopathic Hospital: P's father had passed away at D hospital. Expecting to collect some personal belongings, P opened a package sent by the D containing a severed leg. P suffered immediate traumatic distress and familial relationships declined, but he sought no medical attention or offered and expert medical testimony. Was permitted recovery.

4. Bystander Emotional Harm – Distress results from physical injury to another
   (a) *Zone of Danger 2*: In order for bystanders to recover, they must witness physical injury to an immediate family member.
   (b) *Dillon-Portee Test*: P must have been in close proximity to the accident (any sensory awareness, auditory or visual but must be live and not on TV), witnessed it first hand, and had a close relationship with the injured victim, and result in severe emotional distress.
   - Portee v. Jaffe: P mother witnessed her son die slowly and painfully as he was crushed between the elevator doors negligently maintained by D building owner. Episode lasted 4+ hours, followed by intense psychotherapy. Recovery allowed.
   - Johnson v. Jamaica Hospital: P parents of newborn baby who was abducted while under care of D hospital. Ps denied recovery because court found D had no duty to the parents (indirect emotional distress), only a duty to the baby (direct emotional distress).

5. Policy concerns of NEID
   (a) Allocation of losses/compensation
   (b) Fairness
   (c) Deterrence
   (d) Economic Concerns (difficulty in measuring)
   (e) Fraud (Difficulty of proving suffering)
   (f) Crushing Liability
   (g) Floodgates
   → Also policy concerns of *causation*, below

IV. Causation

1. Cause-in-fact: "But for"
   (a) P must prove that, more likely than not, injury would not have occurred "but for" D's negligent act.
   - Stubbs v. City of Rochester: P contracted typhoid and sued the city for negligently crossing the cities water lines which contaminated the P's drinking water. Contamination was linked to typhoid but the disease can be contracted in a variety of ways. D argued that P must eliminate all other possible causes of contraction. Court held that if multiple *possible* causes exist, and P brings evidence to show that the direct cause of the injury was the one for which D was liable with *reasonable certainty* (51% chance), P has complied with the spirit of cause-in-fact.

   (b) Substantial factor test: multiple sufficient causes
   i. If 2 forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about. (ex: Twin fires engulf a dwelling, both sufficient but neither "but for", liability extended.) Negligent act can only escape liability when it is not "but for."

ii. *Frye* Test (traditional): Requires scientific evidence to be based on techniques generally regarded as reliable in the scientific community.
iii. *Daubert* test (adopted by Zuchowicz): Trial judges charged with ensuring the expert testimony both rests on a reliable foundation, and is relevant to the task at hand (makes judges serve a gatekeeping role in screening admissibility of expert testimony.
iv. Rest 432: Act increased the chance of the accident occurring, and it did in fact occur.

- Zuchowicz v. United States: P was prescribed double the maximum dosage of Danocrine by D hospital. Within months of the negligent RX, P developed PPH and died. Court adopted the substantial factor test to determine if the overdose caused P's death. Recovery allowed. Experts can determine the "but for" and the burden shifts to the D.

(c) Loss of Chance [medical context]
i. Recovery is measured by the percentage value of the P's chance for a better outcome
ii. >50% → prove negligence for full recovery; <50% → % chance lost X % value lost
iii. P can only recover if he shows, with reasonable medical probability, that the D's medical malpractice caused the loss of chance, and that the harm that might have been avoided *did in fact occur*.

- Alberts v. Schultz: P's leg developed gangrene and required amputation "because" of the D's negligence in conducting prompt tests. However, court did not find enough causal connection between D's negligence and P's loss of chance to permit recovery.

(d) Joint & Several Liability
i. Joint: each D is liable for the entire judgment, but P can only recover judgment once
ii. Several: D responsible for their portion of judgment only
iii. Risk of insolvency is placed on tortfeasors → maximum possibility of recovery
iv. When are D's J/S liable? Concurrent tortfeasors, D's acting in concert, alternative/market-share liability, multiple sufficient causes, inability to apportion, and vicarious/enterprise liability.
v. When *aren't* D's J/S liable? Distinct harms, successive injuries, apportionable injuries.

- Summers v. Tice: Hunting trip gone wrong when 2 Ds shot but 'only' 1 bullet struck the P. Neither party could prove which bullet caused injury. *Alternative liability* where Ds are J/S liable unless either can prove he was not the shooter.
- Hymowitz v. Eli Lilly: Multiple drug companies sold DES to prevent miscarriages, but later discovered to cause other problems. P's could not distinguish which D made the drug they took. Court adopted m*arket-share liability* on a national scale to determine several liability. Too many D's for alternative liability. *Sindell* precedent used local market-share's and allowed D's to exculpate themselves by disproving individual causation.

2. Proximate Cause
(a) Unexpected *harm*
i. Direct results (extent of the harm)

- Polemis v. Furness: P negligently dropped a board used in loading cargo into the hull of a ship. It's crash created a spark which ignited petrol vapors, causing the ship to catch afire. Court held P liable because, even though the extent of the damage was not foreseeable, *some* damage was expected from the negligent act. Court rejects limiting damages to just foreseeable harm (damage caused by the board in the absence of a spark), and rules that D is

responsible for all damages directly traceable to his negligent act. [overruled]

ii. Foreseeable types of harm
- Wagon Mound: D negligently spilled oil into the port which collected around P's docks. After mutually determining that the oil could not catch afire, P resumed work. 2 days later a piece of debris ignited and set the oil afire, damaging the docks. High court rejected the *Polemis* directness test and held for the D because the fire was not foreseeable under the circumstances.

iii. Harm within the risk; defines what is foreseeable
- Berry v. Sugar Notch: Speeding trolley caused the trolley to be at the place where a tree branch fell. No causation because the speeding was unrelated to the probability of the branch falling.
- Rest. 3D S29 - An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious.

iv. Eggshell-Skull Plaintiffs
- Benn v. Thomas: P died of a heart attack shortly after a car accident caused by D. *Extent* of injury was unforeseeable, but the *type* of injury was. Court ruled the D is liable for the full extent of the harm, even if the extent is unforeseeable.

v. Secondary harms
- D is liable for further injuries resulting from the "normal efforts" of a 3rd party rendering aid which the P's injury reasonably requires irrespective of whether such aid is given in a negligent manner or not. Injury invites rescue. [ex: ambulance taking P from accident caused by D hits a tree on the way to hospital; but cannot be gross negligence.]

(b) Unexpected *manner*

i. Intervening cause but the result is foreseeable *or* within the scope of risk created → proximate cause
Rest 442 (b):

ii. Unforeseeable intervening cause outside the scope of risk created → Superceding causes, *not* the proximate cause
- Doe v. Manheimer: P was raped behind overgrown bushes on D's property. Because the act was not foreseeable nor in the scope of risk, there was no liability. [Because there were no prior incidents,] the rape was an unforeseeable and superceding event.

(c) Unexpected *Plaintiff*

i. Rescue cases: Danger invites rescue. D could have foreseen that his negligent actions would create a situation where someone might try to rescue. In such a case, the original tortfeasor would be liable because it is within the scope of risk. Normal efforts of a 3rd party to rescue victim of D's negligent act are not superceding causes.
ii. Cardozo argues that the P must be specifically foreseeable (narrow). Andrews argues for a broader concept of foreseeability, that all individuals are foreseeable; and that issue of proximate cause should have gone to the jury.
- Palsgraf v. Long Island RR: P was standing fair distance away when another passenger jumped onto a departing train. D's employee helped assist the passenger board safely when a wrapped package fell to the tracks and exploded, causing a scale across the platform to fall over, injuring the P. D not liable because P and harm were not foreseeable.

V. Defenses

1. Plaintiff's Fault

(a) Contributory negligence – former rule, complete defense

i. Burden shifts to the D to prove that P was also negligent and breached a duty owed to himself. All-or-nothing approach.

ii. *Last clear chance* – Where P negligently puts self in danger and D could have avoided the injury with due care, P can recover. D cannot raise defense of contributory negligence. [replaced with *comparative fault doctrine*]

(b) Comparative fault – P's recovery is reduced by the amount of P's fault

i. Each party is responsible for the share of the damages they caused

ii. *Pure*: No threshold. P responsible for 90% of their injuries can still recover 10%

iii. *Modified* (2): P must less than *or* equal to D's N to recover for the difference

iv. Uniform Comparative Fault Act requires the jury to consider the *nature of the conduct* of each party and the *causal relation* between the conduct and injury.

v. If a D is insolvent, the UCFA provides that the court shall reallocate any uncollectible amount among the other parties proportionate to their respective percentages of fault.

- Fritts v. McKinne: P decedent was negligently drunk driving when his car crashed. Subsequent medical negligence by D doctor failed to save his life. D introduced evidence of substance abuse by P, but court found such evidence irrelevant to doctor's negligence. Patients who may have negligently injured themselves are entitled to subsequent non-negligent medical treatment. D's evidence was permissible in determining damages, but not fault.

(c) Avoidable consequences

i. P cannot recover for negligently inflicted damages that he could have avoided or minimized with reasonable care; P has responsibility to mitigate injury. (ex: P fails to seek or follow medical care which results in increased injury)

ii. Typically applies when the court can isolate the different injuries

iii. Normally occurs after the original accident except in cases including helmets, seatbelts, etc.

2. Assumption of Risk

(a) Express: When one party gives explicit (clear & unambiguous) written or oral permission to release another party from an obligation of reasonable care. However, limitations include:

i. Intentional or reckless wrongdoing are never disclaimed by an agreement

ii. Public policy

- Dalury v. S-K-I, Ltd.: P signed waiver of liability in order to ski on D's slopes. Collided with a metal pole. D argued that the P expressly assumed the risk of injuries. Court rejected the argument based on *Tunkl Factors,* which can void an express A/R if some or all of the following are present:
    1. Business type suitable for public regulation
    2. Public service provided is of practical necessity
    3. Services provided is available to any member of the public (or high # of patrons)
    4. Unequal bargaining power
    5. Adhesion K with no "out" provision with increased fee
    6. Purchaser is under seller's control, subject to risk of carelessness

(b) Implied: Can be inferred from a party's conduct and the circumstances

i. P implicitly assumes the risk when there is *knowledge* of the risk, *appreciation* of the risk, and *voluntary exposure* to the risk. [subjective inquiry]
ii. *Primary Implied A/R*: Limited duty principles apply (Not an an affirmative defense, rather it invalidates P's prima facie N case)
    - Murphy v. Steeplechase Amusement: P took a ride on D's carnival ride "The Flopper." P chose to get on and got injured during the ride. Recovery barred because he knew, appreciated, and voluntarily assumed the risk of injury.
iii. *Secondary Implied A/R*: Comparative Fault (affirmative defense)
    - Davenport v. Cotton Hope: P reported a burned out light on a staircase in his residence to D landlord. He continued to use that staircase because it was the closest to his home, even though other lit staircases existed on the premises. He was injured when he tripped on the dark staircase. Recover barred because his assumption of the risk was *unreasonable.* If AR is reasonable (ex: saving a child from burning fire), then recovery is not barred.
iv. Firefighter's Rule: Officer who enters property in the exercise of his duties occupies status of a licensee, and owed a limited duty.
    - Levandoski v. Cone: P police officer was chasing D from a house party through the woods when he fell and injured himself. Court refused to extend the firefighter's rule beyond premises liability, allowing P to recover.
    - Roberts: P's cannot recover for injuries sustained as the result of the *negligence* (limited) that gave rise to their emergency duties.
    - Zanghi: P's cannot recover when injured by hazards from risks that existed because of the position for which they were hired (expanded).

[/Negligence]

VI. Strict Liability

1. Rule of *Rylands*

(a) Blackburn, J: "A person who, for his own purposes, brings on his land and keeps anything *likely to do mischief if it escapes*, keeps it in at his own peril, and if he does not, is prima facie answerable for all damage with is the *natural consequence* of it's escape."
(b) Lord Cairns: Strict liability for non-natural use of land.

- Rylands v. Fletcher: Man-made water reservoir on D's land burst and caused damage to P's land. [England]
- Turner v. Big Lake Oil: TX courts have rejected this specifically because man-made water reservoirs *were* a natural and common use of land in their environment.

(c) The doctrine of SL emerged from ultra-hazardous or abnormally-dangerous activities, concerning itself not with D's blameworthiness as in negligent cases.

2. Ultra-hazardous & abnormally-dangerous activities

(a) Rest 3d S 20: Abnormally dangerous activity if activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors, and activity is not one of common usage.
(b) The safety of others is more sacred than the absolute right of the property owner. [Hay v. Cohoes: expanded from neighboring property owners; more consistent with Lord Cairns.]

- Sullivan v. Dunham: P was killed by wood debris launched from a lawful dynamite explosion on D's property. She was walking on a highway nearby.

- Indiana Harbor Belt v. American Cyanamid: SL rejected in case where D shipped hazardous goods that ended up leaking from a RR car in P's yard, causing damage to the area. Court refused SL because of the distinction between activities and acts (due care could have prevented the leak; negligence applies).

(c) Comparative negligence can be an affirmative defense if D proves P failed to take responsible precautions. Also can use state-of-art, AR, etc.

VII. PRODUCTS LIABILITY *

1. Background
   (a) Privity Doctrine: Required a K between the parties as the basis for a duty. Only a distributor could sue a manufacturer; the consumer could only sue the distributor.
   (b) Policy^: Limiting product liability cases to privity would avoid *crushing liability* for Ds
   (c) Eliminating Privity:
   - MacPherson v. Buick: Cardozo held that the manufacturer of any product capable of serious harm *if negligently made* owed a duty of car in the design, inspection, and fabrication of the product not only to the immediate purchaser but to *all persons who might foreseeably be affected by the product*. In this case, Buick knew it's cars would be resold by the dealership. Foresight of the dangerous consequences involves the creation of a duty.
   - Escola v. Coca-Cola: Adopted "absolute liability" for manufacturers placing products on the market knowing that said products will be used without inspection, where the product "proves to have a defect that causes injury." The court ultimately adopted Res Ipsa, but Traynor argued that this was a case of SL.

   (d) Policy^: Loss minimization, loss internalization/spreading, fairness, deterrence, etc.
   (e) 2d: Manufacturer or seller liable for products sold in a defective condition unreasonably dangerous to users or consumers who are injured by the product.
   (f) 3d: One engaged in the business of selling/distributing and sells a defective product is subject to liability for harm caused by the product.

2. Manufacturing Defects: Product departs from it's intended design, even though all possible care was exercised in the preparation/marketing of the product.
   (a) Rest 2d: Defective condition was unreasonably dangerous
   → [Replaced because it closely resembled Neg.]
   (b) Rest 3d: Product departs from intended design.
   → Excludes malfunction cases that use Res Ipsa in lieu of evidence [also under design defects]
   (c) Proving a manufacturing defect
   i. A product may be found defective through comparison with the same, but non-defective product
   (d) Consumer Expectations Test: Product failed to perform as safely as an ordinary consumer would expect.

3. Design Defects: Product was in intended condition but was unsafely designed
   (a) Rest 2d: Defective condition was unreasonably dangerous
   → [Replaced because it closely resembled Neg.]
   (b) Rest 3d: A product has a design defect if there was a reasonable alternative design that could have reduced or avoided the foreseeable risks of harm posed by the product, and the omission of the alternative design rendered the product not reasonably safe; Risk Utility.

(c) Barker Test: 2 prongs including the consumer expectations and the risk utility tests

i. Consumer Expectations Test: Product failed to perform as safely as an *ordinary consumer* would expect, when used in an *intended or reasonably foreseeable manner*. Most applicable to *generic products* where expertise is not required. Burden on P.

ii. Risk Utility test: Jury balances feasibility, cost, practicality, risk, and benefit of complex designs to see if the risk of inherent danger in the challenged design is outweighed by the benefits of such a design. Is there *excessive preventable danger*? Experts are allowed to defend designs, so this test can favor Ds. Burden on D to justify the risks.

- Soule v. GM: When the nature of an injury is too complex for an ordinary customer to assess under the CE Test, the court *must* instruct the jury to use the RU test. Expert witnesses *may not* be used to demonstrate what an ordinary consumer would expect.
- Camacho v. Honda: Ps motorcycle was not equipped with leg guards by D which exacerbated injuries in an accident. P wanted to introduce RU test, D wanted the CE test. Court held that the **crashworthiness doctrine* required manufacturers to anticipate foreseeable dangers (crashing), and that the jury can balance the CE and RU tests when there are *open and obvious dangers* (Defense-side spin on CE test).
- Dreisonstok v. VW: P sued microbus manufacturer when injured in a head-on collision. Driver's seat was located close to the front and the P alleged this was a design defect. Held the van had a distinctive feature of maximum cargo space that prevented it from being compared with other vehicles. Could not improve it's crashworthiness while maintaining function.
- Sanchez v. GM: P was killed by his car after being pinned against a fence when the transmission was left in hydraulic neutral and shifted to reverse. A consumer has no duty to discover or guard against a product defect, but a consumer's conduct other than the mere failure to discover or guard against a product is subject to comparative responsibility. Court found both parties 50% responsible because P should have left his car in Park, and hydraulic neutral is an unavoidable transmission characteristic.

(d) Reasonable Alternative Design: Burden remains on the P to prove that the D could have adopted a reasonable alternative design that would have balanced risk, utility, and expectations more appropriately.

(e) Irreducibly unsafe products: "Manifestly unsafe products" may be found defective because it presents a hazard to the public that is not at all outweighed by it's usefulness (ex: vinyl pools). *However*, these can be statutorily overruled when there is no practical alternative design without substantially impairing it's function unless they are egregiously unsafe, the ordinary customer cannot be expected to know the risk, or the product has little or no usefulness.

3. Inadequate Warnings

(a.1) Rest 2d: Defective condition was unreasonably dangerous

→ [Replaced because it closely resembled Neg.]

(a.2) Rest 3d: Inadequate instructions or omission of the instructions or warnings renders the product *not reasonably safe*.

(b) There is an overlap between Warning and Design defects because an inadequate warning renders the product unsafe under the design defect analysis.
(c) Is there a need for a warning?
i. No warnings are necessary when the dangers are apparent (ex: tequila, knives)
ii. If a warning is needed, it must address the ultimate user.
(d) Is the warning adequate? Warning must:
i. Indicate the scope of danger
ii. Communicate the extent of harm that can result from misuse
iii. Physically alert a reasonably prudent person
iv. Indicate consequences of failing to follow it
v. Be adequately communicated
(e) Would the user heed the warning if it were adequate?
i. There is a presumption that the P would have heeded the warning had it been adequate. D may rebut this presumption.
ii. If D proves that P would not have heeded the warning, P fails the causation prong of the products liability case.
(f) P's misuse or unintended use of the product is not a complete defense if the use was one that was reasonably foreseeable to the manufacturer.
- Hood v. Ryobi: Court balanced the benefits of a more detailed warning against the costs of requiring a change. D prevailed when P *modified* a saw that resulted in his injury. Manufacturer need not warn of every mishap or source of injury that the mind can imagine flowing from the product.

(g) Learned Intermediary Doctrine
i. When a manufacturer has adequately warned a prescribing physician of the drug's dangers, the manufacturer is no longer under a duty to provide warnings directly to the ultimate consumer; the manufacturer has transferred the duty to warn onto the *learned intermediary.*
ii. This does not apply to mass immunizations, when the FDA mandates a warning be directly given to the consumer, and when the manufacturer advertises directly to the consumer.
- Edwards v. Basel Pharmaceuticals: P died of a nicotine-induced heart attack that the doctor failed to warn about. D company claimed immunity under the LID, but the court found an exception, holding the D liable regardless of properly warning the prescribing physician (FDA required warnings to be given directly to consumers).

4. Product-specific Defenses
(a) Traditional defenses such as comparative negligence, assumption of risk (disclaimers), etc still apply. [ex: P takes a Tylenol pill that is clearly discolored/misshaped than the rest in the bottle]
(b) Misuse of product: If misuse was *unintended* (by P) *and unforeseeable* (to D), D has a partial defense. (Vultron: foreseeable misuse, D liable)
(c) Product alteration (*Hood v. Ryobi*)
(d) Ex-ante [foresight], State of the Art: D can argue that at the time of manufacture, D developed the best technology available and they did not know, *nor could they have known*, of the defect.

5. ESSAY APPROACH*
   (a) Is the D a manufacturer, seller, or distributor?
   (b) Is the product defective? 2d & 3d definitions
      i. Barker CE Test (generic products)
      ii. Barker RU Test (complex goods)
      iii. RAD Balancing Test
      iv. Irreducibly unsafe?
      v. Learned Intermediary
      vi. Other tests/factors
   (c) Did the defect cause the P's injury?
      i. Actual cause: Product was defective when marketed and "but for" the defect, P would not have been injured
      ii. Proximate cause: Was the product used in an intended or foreseeable manner by a consumer, user, or bystander?
   (d) D may present defenses: comparative fault, assumption of risk, etc.
   (e) Damages: *MacPherson* eliminates the privity bar

VIII. Damages

1. Compensatory (non-taxable): Intended to make the P whole again
   (a) *Economic Damages* (Pecuniary):
      i. Lost earnings; future earnings
      ii. Medical expenses, past & future
      → Complications:
      i. Life & work expectancy
      ii. Economic & wage inflation (offsetting?)
      iii. Discount rate
      iv. Income taxes
      v. Lump sum v. periodic payments
      vi. Single judgment rule
      vii. Attorney's contingent fees (20-50%)
   (b) *Non-economic Damages* (non-pecuniary)
      i. Pain & suffering, past & future
      → Loss of enjoyment of life
      - Seffert v. LA Transit: P was caught in the bus doors and dragged along, resulting in life-changing injuries. Damage award was record at the time. Traynor dissented, advocating for a limit on pain & suffering (to not exceed pecuniary award) so that D's could have a sense of expectations, awards could be consistent, and to provide for administrative efficiency (parties could settle if damages are predictable). He also thought a cap would prevent undue costs on the rest of society. To be considered excessive, damages must *shock the conscience*. Per diem awards are not common because they are arbitrary and factors can affect their constance).
      - McDougald v. Garber: Established that P must be consciously aware (barely) to be compensated for loss of enjoyment of life, and that the category should be combined with pain & suffering.
   (c) Survival action: Estate sues on behalf of decedent, including any pain & suffering that may have occurred prior to death.
   (d) Wrongful death: Beneficiaries bring the suit for loss of future earnings that would have benefited them. Can also sue for emotional pain & suffering they *personally* experienced.

(e) Statutory caps: CA has capped pain & suffering in medical malpractice cases to $250K

2. Punitive: Intended to punish D and provide deterrence
(a) To be awarded, D's conduct must have been intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence.
(b) Arguments against such awards include the double punishment of the D, windfall award to the P, and that it's a matter for criminal courts.
    - State Farm v. Campbell: An excessive punitive award was appealed to the Supreme Court. Held that while a punitive award was just, an amount exceeding a *single digit ratio* (1:9) violates the 14th Amendment. Court followed the *Gore Guideposts* in determining damages -
        i. Degree of D's reprehensibility
        ii. Disparity between actual or potential harm and the punitive award
        iii. Difference between punitive award and civil penalties in comparable cases
    - Taylor v. Superior Court: D had several DUIs and struck P's car while intoxicated. Punitive award upheld because malice includes the conscious disregard for other's safety. Burden of proof for punitive awards is *clear and convincing* evidence that D acted somewhat more than negligently (80% approx).
    - Remittur:
    - Additur:

XI. Insurance [to be framed within Damages]

1. Collateral Source Rule:
When P is compensated for injuries by a source independent of the tortfeasor, the P is still entitled to full recovery against the tortfeasor. (Exceptions include public benefits, compensation from the tortfeasor prior to the judgment, and compensation from the tortfeasor's family)

2. Subrogation:
The right of the collateral source to recover (receive reimbursements) what it has paid the P when the P recovers from the tortfeasor D. [P=subrogor, CS=subrogee]

3. Different Possibilities (vary by JDX)
(a) CSR with *no* subrogation
    i. P can recover from both the CS (insurance, family, fund, etc.) *and* the D tortfeasor
    ii. Balances the policy that a windfall to the P is better than a windfall to the D (which would reduce the deterrent goal of tort law)
(b) CSR *with* subrogation
    i. Most preferred (albeit complicated) approach because it results in no windfalls to either P or D, while maintaing the deterrence and compensatory goals of tort law
(c) *No* CSR
    i. Unusual because it works against the goals of tort law by reducing deterrence directly

- Arambula v. Wells: P received gratuitous wage payments from family employer and tried including lost wages as damages. Ultimately allowed to recover from D also.
- Frost v. Porter Leasing: P's insurance had no mention of subrogation in the K. Insurer tried subrogating P's damage award but court found *no implied right*.