

Outline

Tuesday, January 22, 2013

2:49 PM

- A. Modern justifications for tort law
 - a. Corrective justice
 - b. Utilitarianism
 - c. Administerability (pre-determined by parties, who best to judge, application)
- B. **Intentional Tort**
 - a. **Elements: Act, Intent, Causation, Harm**
 - b. Children over the age of 3 are considered able to form intent for intentional torts
 - c. *Note: eggshell victim essentially means if the case is proven the D is on the hook for all damages no matter how unreasonable. All elements must be met in regular form.*
 - d. **Battery:** An intentional nonconsensual physical contact with another person that causes harm.
 - i. Act (must be an immediate threat/imminent apprehension of act)
 - ii. Intent Two different approaches typically used in court:
 - 1) Intent to cause harmful or offensive contact (*or imminent apprehension of same* i.e. intent to miss but possibility to hit) [White v. Muniz, Restatement]
 - 2) Intent to cause unwanted contact (*or imminent apprehension of same*) [Vosburg v. Putney: kid who (lightly) kicked other kid in knee]
 - a) Garratt v. Dailey (p. 7): if there is an intent to cause indirect contact (i.e. fall on ground by removal of chair) then that counts. If know that contact will happen with *substantial certainty* that counts.
 - b) Hypo: blowing smoke into someone's face intentionally can be an indirect contact. Depends on whether there was intent (sitting at a bar could be implied consent with smoke that is simply swirling around).
 - 3) Restatement: A person acts with the intent to produce a consequence if the person acts:
 - 1. with the **purpose** of producing that consequence, OR
 - 2. **Knowing** that the consequence is substantially certain to result.
 - iii. Causation
 - iv. Harmful (or offensive) Contact
 - 1) Implied consent can derail this
 - e. **Assault:** attempt or offer to beat another (inchoate)
 - i. **Acts**
 - ii. With the **intent** to cause an offensive or harmful contact [or in some jurisdictions unwanted contact] or imminent apprehension of such a contact and
 - iii. The other is thereby put in such imminent apprehension [**causation and harm**]
 - 1) Person has to actually have the imminent apprehension [awareness you are going to be contacted] (subjective) *and*
 - 2) If apprehension was unreasonable then it doesn't stick (objective)
 - f. **False imprisonment:** confinement or restraint of a person
 - i. Words or acts (or omission) by defendant [**act**]
 - ii. **Intended** to confine plaintiff [in some jurisdictions lowered to recklessness or negligence if physical harm occurs]
 - iii. That **causes actual confinement or restraint**
 - iv. Awareness by plaintiff that he/she is being confined [some jurisdictions permit liability w/ knowledge if plaintiff is physically harmed] [**harm**]
 - g. **IIED:** act(s) that cause a reasonable reaction of severe emotional distress
 - i. **Acts** in extreme and outrageous way
 - ii. **Intentionally** (or recklessly) [reckless standard: deliberately disregards a substantial risk of harm]
 - iii. **Causing**
 - iv. Severe emotional distress to the plaintiff (**harm**) [note: severe reaction must be *reasonable* unless unreasonable pre-disposition known]
If the tort is directed to a third party also need...

- i) By conduct directed to a member of plaintiff's immediate family who is present at the time **or**
 - ii) To anyone else present, if they suffer bodily harm
 - h. **Trespass: unlawful entry**
 - i) Physical invasion of P's real property (act)
 - ii) With the intent to physically invade property (intent to act to invade the property)
 - iii) Causation (i.e. act causes invasion)
 - iv) [harm (presumed unless intangible trespass)]
 - i. **Trespass to chattel: D intentionally interferes w/the possession of personal property thereby causing injury**
 - i) Act (of interference w/chattel)
 - ii) Intent to bring about interfering act
 - iii) That causes
 - iv) Harm (note: actual harm or removing from possession)
 - j. **Conversion: dominion or control over the chattel**
 - i) Act of serious interference w/chattel
 - ii) Intent to perform that act
 - iii) Caused
 - iv) Harm - actual or dispossession of chattel
- C. **Defenses to intentional torts**
- a. Types
 - i) Attack prima facie case (e.g., no intent, no contact, consent therefore not offensive)
 - ii) Consent
 - iii) Insanity(?)
 - iv) Self-defense/defense of others
 - v) Defense of property
 - vi) Necessity
 - b. Consensual Defenses
 - i. Explicit (no real case law) & implied (where the case law comes into play)
 - ii. [Mohr v. Williams](#) (p. 14): if the **act by D is unauthorized it is wrongful even if the D does not act with negligence or bad intent.** *Note: Vosburg jurisdiction.*
 - iii. Hackbart v Cincinnati Bengals: **implied consent for participating in a sport** is limited to legal moves allowed by rules of game. *Note: Future cases have required a showing of further reasons for recovering including malice/recklessness or acts that are not part of the inherent risk in sport*
 - iv. **Limits on consent**
 - 1) Capacity
 - 2) Crimes (jurisdictional split & division of category of crimes).
 - a) Ex, jurisdiction that bans duels. Participate and get stabbed. Can you sue? In some cases yes because you can't consent to duel b/c it is illegal. Other say no because you consented to the crime so the consent defeats the tort. Third approach is Zysk which is that you cannot sue if you were involved in committing a crime.
 - b) [Zysk v. Zysk](#) (handout): no recovery when harm stems from any type of illegal activity [not true in all states]
 - 3) Fraud: explicit statement
 - 4) Mistake?: if you know the other party believes X and it is incorrect then you have a duty to correct mistake. *Not usually a defeat of consent. It rises to the level of fraud when there is the duty to correct mistake.*
 - 5) Duress
 - 6) Scope: i.e. *Mohr* consent on one but not other ear
 - v. Factors in considering implied consent
 - 1) Expectations: based on conduct & words [ex, smallpox vaccine upon entry to US. She held out her arm in line so that was deemed implied consent]
 - 2) Relevant laws & statutes [ex, statutory rape laws = legal determination that there is no consent]
 - 3) Custom [ex, sports activities]
 - 4) Public Policy [ex, emergency medical rule, NY subway touching]
 - 5) Revocation [ex, miners who saw unsafe conditions and decided not to stay.]

- c. Insanity (only a defense if defeats intent)
 - i. **Rule:** The mentally ill are liable for intentional torts if they are capable of forming the requisite level of intent, and do so.
 - ii. *McGuire v. Almy* (p. 28): **note: assumption of risk does not imply consent**
 - d. Self-Defense/Defense of others [retaliation is no defense. Defense of others would be same right as you would have in sit.]
 - i. **Rule:** what matters is what defendant reasonably (objective - not including Ds emotional characteristics) should have thought
 - ii. Limitations
 - 1) Must be reasonable belief that must defend self or others - reasonable mistake ok (objective reasonability)
 - 2) No retaliation
 - 3) No provocation (as defense)
 - 4) Must be physical danger
 - 5) Duty to retreat - not required, but some jurisdictions require before using deadly force
 - 6) Excessive force: Can only be what is reasonably necessary to prevent harm to yourself or others.
 - 7) Note: defense of others is an available defense to intentional torts even if not related to individual
 - iii. [Courvoisier v. Raymond](#) (p. 32): reasonable standard (even if two innocent actors)
 - e. Defense of property
 - i. Usually value life over property: general rule - can defend self w/force but not defend prop w/"wounding" force - serious bodily injury [if feasible ask person to leave before using force]
 - ii. [Bird v. Holbrook](#) (p. 37):
 - 1) Battery argument (prima facie case made here)
 - 2) Some states have laws that say an individual who is in the process of committing a crime in a house (i.e. breaking into someone's house) does not have the ability to sue for harm
 - iii. Summary
 - 1) Can use force to repel, but not to harm
 - 2) Can't use deadly force or even wounding force to protect property
 - 3) Must ask to leave property before using any force (if feasible to do so)
 - 4) Usually must give notice
 - f. Necessity
 - i. Difference from other defenses - usually the P is not the wrongdoer. Frequently two innocent parties
 - ii. Elements/requirements
 - 1) Mistake as to necessity of action is okay (if reasonable)
 - 2) Reasonableness of actions leading up to necessity irrelevant
 - 3) DO not need to make best plan under circumstances, only reasonable
 - 4) Private necessity is an incomplete defense - must pay for damages to property
 - 5) Public necessity is a complete defense [NOTE: NOT ON TEST]
 - 6) Can NOT cause substantial bodily harm to another - open question of whether can intentionally cause even slight physical harm to another
 - iii. [Ploof v. Putnam](#) (p. 44): trespass defeated by necessity therefore other acts by D provides P with ability to collect.
 - iv. [Vincent v. Lake Erie Transportation Co](#) (p 47): necessity allows act, but individual should still compensate reasonable amount for damages. **Makes necessity an incomplete defense.**
- D. Negligence: behavior that **unreasonably** risks personal/property injury to another and causes injury (limits: fault & causation)
- a. Elements
 - i. Duty
 - 1) General rule: When a person acts, he or she must use reasonable care to avoid reasonably foreseeable harms.
 - a) Reasonable person
 - b) CBA
 - c) Custom
 - d) Negligence per se

- e) *Res ipsa loquitur* (evidentiary tool)
 - 2) Affirmative duties:
 - a) Undertaking
 - b) Creation of risk
 - c) Special relationship
 - 3) Negligence per se
 - a. Breach
 - b. Causation
 - i. Cause-in-fact [actual cause] &
 - ii. Legal or proximate cause
 - c. Harm
- b. RP and standard of ordinary care
- a. **RP standard:** A D breaches the duty of reasonable care when, judged from the perspective of a reasonably prudent person in D's position, she fails to act with reasonable care to avoid a reasonably foreseeable risk to P. [obj standard]
 - 1) **Exceptions**
 - a) (woman?) - sometimes but usually not. Some exceptions around sexual harassment or something similar when gender would matter.
 - b) Physically disabled - yes, get defense provided you're acting reasonable for someone w/your physical disability
 - a. Fletcher (City removed barricades around a ditch in order to do some work and neglected to put them back up. Blind man fell in. He sued arguing the city was negligent. City argued RP wouldn't fall in. Court found proper standard was reasonable blind person not reasonable sighted person)
 - c) Mentally ill or disabled - if sudden onset get some defense, those w/lower cognitive ability still held to same standard
 - a. Breunig (D hit P but claims no liability on the basis that she was mentally ill. P argued that she already knew she had the mental issues and therefore shouldn't have been driving.)
 - d) Children (exception if adult-activity where socially we want them to rise to the level of an adult as a way to encourage better behavior)
 - a. Roberts (D was driving slowly, hit boy who darted in front of car). **Negligence by P includes age because minor.**
 - b. Daniels: **Minors driving a car are subject to same RP standard as adults.**
 - e) Special expertise or knowledge (generally only applies in instances where the special expertise or knowledge is known and conveyed/promised to plaintiff - a relationship basis)
- c. Calculus of Risk (CBA)
- a. **The Hand Formula: use 1) probability of scenario, 2) seriousness of injury (loss) if it happens, 3) burden of precautions [B<PL=negligence, B≥PL=no negligence]**
 - b. Application
 - 1) Blyth (frozen plugs): don't need to account for obscure situations
 - 2) Eckert (baby and train): can risk life to save another life if calculated risk is reasonable -- PERHAPS EVEN IF UNREASONABLE
 - 3) Osborne (paper route boy): weigh P's action along w/D's action -- PERHAPS IN SENSE OF LEAST COST AVOIDER
 - 4) Cooley (phone, storm, traumatic neurosis): balance dangers
- d. Custom
- a. **Main rule: custom is some evidence of what is reasonable care but is not dispositive (TJ Hooper)**
 - b. Titus (the usual practice of the railroad was to prevent car bodies from wobbling by tying them down with wood blocks. The decedent was a brakeman riding on top of one of these cars. The car started wobbling and he tried to get away but was killed by the following car.): **When acting according to custom and the P has assumed some of the risk (i.e. inherently risky job), then a full defense to negligence for acting according to custom.**
 - c. Mayhew (A mineworker's platform was modified without his knowledge, by a whole being cut into it.

- No railing, etc, was provided. He fell through and was injured): **Limitation on custom - requires prudence (so custom doesn't provide defense w/gross negligence).**
- d. The T.J. Hooper (Two barges were caught in a storm and were lost along with their cargo. There was a negligence claim on the basis they were not equipped w/radios and therefore did not, like other barges in the area, avoid the storm.) Appeal: **Reasonable prudence trumps even when it is not common prudence. Custom can influence whether or not the prudence was reasonable.**
 - e. Yachts [A barge (owned by National Marine) slipped its moorings at a dock (owned by TDI) and caused about \$100K in damages.] - in absence of agreement, court should use custom to determine duty then allocate fault appropriately.
- e. Custom & medical malpractice (exception to TJ Hooper rule)
- a. **Medical Malpractice Rule:** P must establish
 - i. Medical norm for doctors in that specialty [DUTY]
 - ii. Departure from norm [BREACH]
 - iii. Causation
 - iv. Injury
 - b. **National standard approach** (current standard) (Bruen) Question is whether the physician, "if a general practitioner, has exercised the degree of care and skill of the average qualified practitioner, taking into account the advances in the profession. In applying this standard it is permissible to consider the medical resources available to the physician as one circumstance in determining the skill and care required. Under this standard some allowance is thus made for the type of community with which the physician carries on his practice..." **Note: this makes conforming to custom basically a complete defense.**
 - c. **Emergency rule exception:** held to standard of physician in same specialty (like if a general practitioner has to do an emergency delivery they are held to standard of general practitioner) in *those circumstances*.
 - d. Lama (Romero was not subjected to standard conservative treatment in advance of back surgery. The first operation was unsuccessful so there was a second operation. It was also unsuccessful. He was then diagnosed with discitis which required several months of hospitalization. Ps sued for negligence. Trial court found for Ps.)
 - e. *Helling* Calculus of Risk Approach (overruled by state legislature):
 - i. Suppose can value loss of vision at \$250K and likelihood of loss in vision from not doing test is 1 in 25,000. Under Hand formula what would cost of precaution have to be to show negligence. B<PL
 - f. Canterbury (p. 220): **Duty to disclose** (informed consent - governed by TJ Hooper)
 - i. **What must be disclosed:** "Generally informing the patient in nontechnical terms as to what is at stake; the therapy alternatives open to him, the goals expected to be achieved, and the risks that may ensue from particular treatment and no treatment." [Canterbury]. *Need to also show that the patient would have made a different choice if given this information.*
 - ii. **Scope?** The scope must be determined by the patient's need (i.e. how material the information is to the decision). **Materiality** = when a reasonable person in the position (or what the physician knows or should know of the person) would want to know. **Exceptions:** emergency rule, when risk-disclosure poses threat of being too detrimental, it is such common information that a person would/should already know.
- f. Negligence per se (*Note: D can still put on an affirmative defense and say "I'm not negligent even though I violated the statute. In reverse, you can comply with the statute and still be found negligent.*)
- a. **Negligence per se elements**
 - i. Statute requires D to engage in certain conduct (duty)
 - ii. D fails to conform (breach)
 - iii. P w/i class of those for whom statute was enacted
 - iv. Statute enacted to prevent injuries of the character which occurred and
 - a) *Gorris*: statute requiring sheep to be enclosed was enacted to combat diseases so does not constitute negligence per se [scenario: uncontained sheep on boat. Fell off. Not negligence per se.]
 - v. Failure to conform to statute was cause of injury (causation & harm)
 - vi. An actor's violation of a statute is excused and not negligence if:

- a) the violation is reasonable in light of the **actor's childhood, physical disability, or physical incapacitation**;
- b) the actor exercises **reasonable care in attempting to comply** with the statute;
- c) **the actor neither knows nor should know of the factual circumstances** that render the statute applicable;
- d) the actor's violation of the statute is due to the **confusing way in which the requirements of the statute are presented** to the public; or
- e) the actor's **compliance with the statute would involve a greater risk of physical harm** to the actor or to others than noncompliance.
 - ◇ Tedla (P was walking along road. Hit by car. Statute indicated which way to walk to be safe.): **Exception carved out "when the actor exercises reasonable care in attempting to comply with the statute."**
- b. Osborne (Defendant's clerk in his drugstore sold to Plaintiff a deadly poison without labeling it as "Poison" as required by statute. Not knowing it was poison, Plaintiff consumed it and died. Plaintiff sued Defendant for negligence. P won on a negligence per se theory.)
- c. Martin (Decedent (P) was driving without his lights on (in violation of statute). The D wanted a rule that this was "prima facie evidence of contributory negligence." The court refused.) **Still need to prove causation w/contrib neg.**
- g. Res Ipsa Loquitur (must be more likely than not that it was negligence)
 - a. **Elements** (Prosser statement)
 - i. Event must be of a kind which does not ordinarily occur in the absence of someone's negligence;
 - ii. It must be caused by an agent or instrumentality within the exclusive control of defendant; and
 - iii. It must not be due to any voluntary action or contribution on part of plaintiff.
 - b. Third restatement version:
 - i. It may be inferred that the D has been negligent when the accident causing the P's physical harm is a type of accident that ordinarily happens because of the negligence of the class of actors of which the D is the relevant member.
 - c. Byrne v. Boadle (P was injured by a barrel of flour that was being lowered, then fell and hit the P.)
 - d. Ybarra v. Spangard (Group of medical D's where one must have been negligent using res ipsa loquitur. Court found all Ds could be held liable.)
- h. **General affirmative duty rule: general rule is no duty to strangers**
 - a. **Duty to rescue: there is NO duty to rescue**
 - 1) **If do undertake rescue, must do so reasonably**
 - a) Buch v. Amory (p. 511): generally no duty to remove others from danger/rescue them (8 year old boy in weaving mill)
 - b) Hurley v. Eddingfield (p. 514): no duty to assume a contractual obligation (even medical)
 - 2) **Can't leave person in worse position**
 - 3) **If created risk, may be obligation to act either to rescue or to prevent injury** (exception is where there's nothing you can reasonably do)
 - a) Montgomery (Trucks stalled (through no fault) and the drivers did not place a sign at the top of the hill.): where the potential rescuer creates a risk (negligent or innocent), they have a duty to engage in an "easy" rescue (reasonable duty to warn, etc)
 - b) Yania - just encouraging someone to do something stupid and dangerous does not constitute creation of the risk.
 - a) If it was a child (adult egging on child) then would probably be different
 - b) Also *might* be different if individual didn't know depth of water/risk and other party withheld info then *maybe* is creation of risk
 - 4) **Cannot interfere with rescue efforts (?)** (*Soldano* - having a bartender allow a person to use their phone to call 911 - in some jurisdictions, circumstances)
 - 5) **Perhaps can't incite dangerous act and then not rescue if child involved (?)** (diving case)
 - 6) **Also special relationships**
 - b. Gratuitous undertakings: **If undertake, must act reasonably** Restatement:
 - 1) One who undertakes, gratuitously or for consideration to render services to another which he should recognize as necessary for the protection of a third person or his things, **is subject to**

liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- a) His failure to exercise reasonable care increases the risk of such harm [**increased risk**] or
- b) He has undertaken to perform a duty owed by the other to the third person [**transferred duty**] or
 - i) Moch Co: no liability to party benefitting from service if not the contractual party; no liability from reliance because not a relationship that had gone so far as to induce reliance by this specific individual/scope is too broad (distinction between act & non-act); not a statutory duty. *Policy: extensive liability, want to encourage people to purchase fire insurance*
- c) The harm is suffered because of reliance of the other or the third person upon the undertaking [**reliance**]
 - i) Eire Railroad Co. (p. 554): if have a practice upon which the P acts in reliance, then have duty to conduct practice without negligence. **General rule: need to show reliance on a practice in order to establish duty the D needs to continue.**
- i. Special relationships
 - a. Must start by identifying what the duty is (e.g. duty to rescue, duty to protect, duty to control...)
 - b. No definitive definition of what a special relationship is. Use examples and make comparisons. Examples:
 - i. Shop owners and customers
 - ii. Third party beneficiaries of contracts
 - iii. Landowners and guests
 - iv. Parents & children
 - v. Spouses
 - vi. Schools/teachers and students
 - vii. Common carriers and passengers
 - viii. Doctors and patients
 - c. Kline (apartment abandoned safety precautions. P was on month to month. Assaulted.): **landlords have a duty to take reasonable safety precautions on behalf of their tenants.**
 - d. Expansion of duty to colleges and universities, common carriers, condominiums, etc... (see p. 576-577).
 - i. CA has backed off a bit (see *Ann M.* p 577)
 - e. Tarasoff: duty to warn on basis of special relationship between therapist and patient (Rowland factors come into play here). Also duty to "control" the patient on basis of special relationship.
 - i. Duty w/3rd party criminal act requires high foreseeability [CA].
- j. Duties to Owners and Occupier
 - a. **Common law** is that you can be negligent on your own land. Then there are exceptions to rule.
 - i. Exceptions
 - 1) Willful & wanton/recklessness
 - 2) Attractive nuisance (defined on p 534)
 - 3) Active operations - only in some states(?) (ex, a swimming pool party)
 - 4) Status on land. Robert Addie & Sons : definitions of invitee, licensee, and trespasser and corresponding duties (facts: 4 year old boy who fell into wheel and was killed)
 - i) *Note: not creation of risk because on private property*
 - ii) Distinguishing
 - One. Invitee - on land for some purpose in which he and owner/occupier have a (potential) joint economic interest (ex, door to door salesman would qualify). Duty: reasonable care.
 - Two. Licensee - someone not invited for a business purpose to serve owner/occupier, but there with permission (includes social guests). Duty: ensure no trap or concealed danger.
 - Three. Trespasser - person there w/o invitation and whose presence is either unknown or objected to if known. Duty: avoid willful misconduct or reckless disregard of safety.
 - iii) Restatement added public invitees (open a business then open to public and all

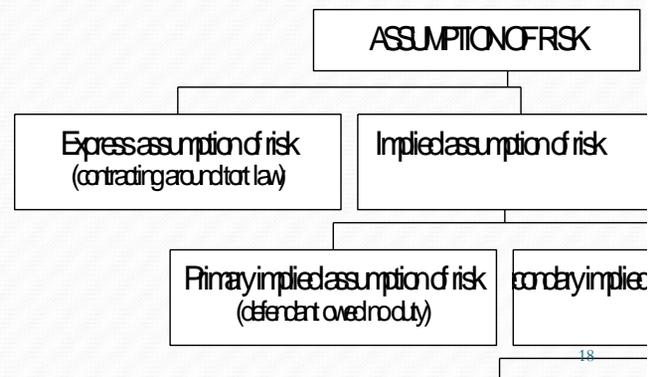
members of the public are invitees)

- b. **Rowland**: shift to **case by case determines duty using factors** for policy reasons
 - i. **Factors (Rowland factors)**
 - 1) Foreseeability of harm to P
 - 2) Degree of certainty that P suffered injury (severity of harm was foreseeable)
 - 3) Closeness of connection between 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)
 - c. **English rule**: gets rid of invitee/licensee distinction but maintains the no duty to trespasser rule (still has exceptions for willful, attractive, active).
- k. Causation
 - a. Case in fact (actual cause, but for cause)
 - 1) **Test**: Jury must determine the following by a preponderance of the evidence: "But for D's tortious conduct [or plaintiff's negligence - for comparative negligence purposes] in _____, the injury would not have occurred." [aggregate Ds acts]
 - 1) NY Central RR: puts burden of causation on P [P's husband died b/c he couldn't swim so he drowned after being thrown off of the boat. The boat did not have life preservers, etc. However, P didn't show that the cause of the drowning was the lack of life preserver.]
 - 2) **Loss of chance of survival**: courts allow collection but are split on how to calculate
 - 3) **Multiple sufficient causes** (i.e. but-for doesn't work)
 - a) Kingston v. Chicago & NW Ry (p. 402): if two (non-natural: not still a caveat in all jurisdictions) causes exist but not sure which caused injury/but for cause doesn't work, merely establishing proximate cause prongs are enough
 - b) Restatement (Third) - Multiple Sufficient Causes: if multiple acts exist, each of which alone would have been a factual cause of the physical harm at the same time, each act is regarded as a factual cause of the harm.
 - 4) **Alternative liability**
 - a) Restatement - factual cause and burden of proof (section 28)
 - i) When the P sues all of multiple actors and proves that each engaged in tortious conduct that exposed the P to a risk of physical harm and that the tortious conduct of one or more of them cause the P's harm but the P cannot reasonably be expected to prove which actor caused the harm, the burden of proof, including both production and persuasion, on factual causation is shifted to the Ds [NOTE: this changes the "more likely than not" standard so the 1/47 chance works in restatement jurisdictions].
 - b) Summers v. Tice (p. 407): **when find multiple parties negligence and proximate cause, but no proof of which party was direct cause, then burden shifts to D**. [ex: 2 ppl shooting at bird but shot D]
 - i) Not same as Kingston because it was only one or the other (couldn't be both who caused the injury).
 - ii) B/c the standard is more likely than not (this is a fudge at 50/50) so really only works w/2 Ds.
 - c) Market share liability [has not really been applied outside DES - very rare - rejected in mass lead paint cases, etc...]
 - i) Market share liability
 - One. All name Ds are potential tortfeasors
 - Two. Alleged products of all tortfeasors are fungible (i.e. share same properties, materially identical)
 - Three. P, through no fault of her own, cannot identify which D caused injury
 - Four. P brings in as Ds those representing a substantial market share
 - ii) Sindell v. Abbott (p. 410): example of market share liability

- b. Proximate cause (aka legal cause) - three tests (directness, foreseeability, risk test)
 - 1) *Intervening acts*: Restatement (second) of Torts: intervening criminal acts break the chain of causation "unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."
 - 2) **Directness test (Polemis)** - chain of causation analysis. In re Polemis & Furness, Withy & Co: **damages only need to be direct**
 - 3) **Foreseeability test (most jurisdictions use)**
 - a) **Foreseeable plaintiff (Palsgraf)** - the D's agents did not have a duty to P to protect her from materials that a third party was carrying, even though they caused the item to fall and explode. [this is because the risk reasonably perceived was not to her. Dissent argues any unreasonable risk should go to a proximate cause analysis not eliminate the duty.]
 - b) **Foreseeable harm (Wagon Mound)** - reasonable foreseeability (determined by jury) Wagon Mound 1 & 2 (p. 466)
 - 4) **Risk test** - scope of harm (**Restatement (Third)**): an actor is not liable for harm different from the harm's whose risks made the actor's conduct tortious.
 - c. Third version: combines both and call it "substantial factor" (CA uses)
- E. Defenses to Negligence
- a. Contributory Negligence: running an unreasonable risk of harm to one's self.
 - a. Negligence elements (same apply to contributory negligence, burden on D to prove):
 - a. Duty
 - b. Breach
 - c. Causation
 - d. Injury
 - b. Limiters
 - a. Ds need to prove negligence case (unreasonable act *Beems* and causation *Gyerman*)
 - 1) *Beems* (P's foot was stuck when trying to uncouple RR cars): P was not acting unreasonably b/c acted under SOP (signaled, etc)
 - 2) *Gyerman* (unloading of fishmeal sacks improperly stacked. P had failed to report to correct supervisor. Court found lack of evidence of causation - i.e. that correct supervisor would have made a difference): **burden to prove contributory negligence and causation on D**
 - b. Emergency doctrine (goes to reasonableness but also live-saving *Eckert*)
 - c. Last clear chance
 - 1) *Fuller* (train that hit wagon and killed P): the party who has the last "clear chance" to avoid an accident (even if other party is negligent) is solely responsible for it (i.e. D must, if knows or has reason to know of danger, react reasonably)
 - d. Not a defense to intentional torts
 - e. Not a defense to willful, wanton, or reckless behavior
 - c. Approaches:
 - a. **P's negligence could bar recovery** [dominant rule mid-late 20th century]
 - 1) *Butterfield* (guy who ran into pole on horseback): P's have duty to act w/reasonable care. D was negligent but P's act bars recovery.
 - b. **P's negligence could affect the amount of recovery** [majority rule today, CA also]
 - i. **Pure approach** - apportion fault and allocate recovery accordingly [CA rule]
 - i. *Li* (P tried to cross 3 lanes into gas station and was hit by D. Both were being stupid.): comparative negligence using "pure" form (liability in proportion to fault) as opposed to apportionment based on fault up to the point the P's negligence is equal to or greater than Ds
 - ii. **Modified** - if P's fault is greater than 50% responsible, contributory negligence is a complete defense (if 50% or less then recovery is just limited by fault percent)
 - c. **P's negligence could be considered irrelevant** to the issue of recovery [sometimes used in mid-late 20th century]
 - b. Assumption of Risk
 - a. General idea: P appreciated the risk but undertook activity anyway

- a. Explicit - usually a signed agreement
 - i. Similar to explicit consent
 - ii. Governed by contract principles
 - iii. Public policy limits (including unconscionability)
 - iv. Factors
 - 1) Clarity of waiver/AR
 - 2) Importance of service/good to individual
 - 3) Availability of alternative options
 - 4) Severity of danger
- b. Traditional assumption of risk doctrine (implicit):
 - a. P has specific knowledge of risk
 - b. P appreciated the nature of the risk
 - c. P voluntarily proceeded
 - d. [Restatement adds a willingness by P to accept responsibility for risk]
- c. Exceptions:
 - a. Too dangerous (death)
 - b. In exercise of a legal right
 - c. Freely choosing [stretched by courts to include saving a child's life, contemporary: also no choice to leave job]
- d. Lamson: falling hatchets - straight assumption of risk case
- e. Murphy: ride assumption of risk where danger is not hidden and there aren't too many injuries to suggest it is unreasonably dangerous
 - a. No duty to protect against inherent risks in activity, but if not part of activity then have duty to make reasonably safe
- f. Firefighter Rule
 - Policy
 - ◆ Precludes recovery for those injured by hazard they have been employed to confront
 - ◆ Fairness - choose prof so can't complain about the hazard that is the basis of the profession
 - ◆ Receive special public compensation (from taxes) so shouldn't double-pay
 - ◆ Avoids litigation re: indemnification among employer, retirement sys, D's insurer (cost spreading)
 - Application
 - ◆ Acted as police officer in response to suspected criminal activity
 - ◆ Receives special comp
 - ◆ Application of rule is not limited to on-duty only (ex, volunteer firefighters)
 - ◆ Rule is based in relationship between officer/firefighter and public
 - ◆ Distinction between original reason for being somewhere but then taking specific action as a police officer in response
- c. Comparative fault. [Knight v. Jewett](#) (handout): sets up having to determine difference b/t assumption of risk (still a complete bar) and contributory negligence (not necessarily a complete bar) ***NOTE: only applies to comparative fault jurisdictions (which is most)***
 - a. Pure comparative fault - allocation across %. Modified comparative fault - if P is 50%+ contributory negligent then no recovery.
 - i. **Primary assumption of risk (Knight) - danger inherent to activity so no duty of D to act w/reasonable care [can be negligent just can't be gross negligence, reckless, or intentional]** - complete bar to recovery (destroys duty element)
 - ii. **Secondary implied assumption of risk (Lamson) - owe a duty so... [assumption of risk + contributory negligence analysis]**
 - 1) **P is unreasonable: affects recovery as contributory negligence** [comparative fault]
 - 2) **P is reasonable: no P negligence therefore not a factor in recovery** [full recovery]
- a. Kahn (handout): makes Knight majority rule.

Assumption of Risk Flowchart



F. Strict Liability

- a. Strict liability
 - a. (Vicarious liability - holding employer liable for acts of employee with some limitations such as outside of work responsibilities)
 - b. Fire (intentional start, unintentional spread)
 - c. Animals (generally includes livestock)
 - d. Ultrahazardous or abnormally hazardous activities
 - e. Products liability (manufacturing only)
 - f. (Nuisance)
- b. Rylands: introduces philosophies for strict liability. Cranworth: if a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril.
 - a. (not a negligence case b/c of lack of knowledge that mine had existed on land)
- c. Gehrts: No strict liability for domesticated animals (unless knowledge of dangerous behavior of animal or wild animal).
 - a. "Wild" animal: ferocious by nature = strict liability [third restatement - likely to cause injury unless restrained]
 - 1) Livestock is included.
 - b. Zoos: exception to wild animal strict liability
- d. Ultrahazardous/abnormally hazardous activities
 - a. **Restatement (third)**
 - 1) A defendant who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.
 - 2) An activity is abnormally dangerous if:
 - A. The activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and
 - B. The activity is not one of common usage.
 - b. See if **Restatement (second) - most common**: changes the analysis [factors]
 - 1) (e) inappropriateness of the activity to the place where it is carried on and
 - 2) (f) extent to which its value to the community is outweighed by the dangerous attributes
 - c. Spano: One who engages in blasting must assume responsibility and be liable without fault, for any injury he causes to neighboring property.

- d. Indiana Harbor Belt RR: applies restatement (second) factors
- e. Abnormally dangerous? Note - all of these can be argued, some approaches below
 - i. Reservoirs/dams - argue (negligence v. strict liability; value of particular use)
 - ii. Fireworks - argue
 - iii. Aviation - in plane (negligence), on ground (strict liability) - on reciprocal risk/common use
 - iv. Driving - common use
 - v. Police car chases - policy considerations are generally held to outweigh

G. Defenses to Strict Liability

- a. Attack prima facie case
 - a. Causation focus
- b. Harm must be w/i scope of what makes activity abnormally dangerous/proximate cause analysis (Madsen)
- c. Contributory negligence
- d. Assumption of risk
- e. No recovery for special sensitivities (Madsen): no one would have been harmed by activity, except you had a crazily sensitive Mink (diff from eggshell b/c not about *extent* of injuries just about whether someone would normally be injured)

H. Product Liability

- a. For *manufacturing defects* only (other products liability do not fall under strict liability)
- b. Products liability in general (can sue anyone in chain)
 - a. Manufacturing defects - strict liability [Pouncy v. Ford & Escola v. Coca-cola]
 - b. Design defects
 - c. Warning defects (failure to warn or inadequate warnings)
- c. Manufacturing defect
 - a. Restatement (third) of products liability: one engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability from harm...
 - b. Restatement (third) of products liability: Manufacturing defect defined - when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product
 - c. Speller: causation conflict; **application of a res ipsa loquitur principle where a specific defect cannot be specifically identified** (so okay not to identify specific defect because if it was the fridge it would obviously be due to a defect since fridges normally do not catch on fire.)
 - i. Restatement (third) products liability: circumstantial evidence
 - a) It may be inferred that the harm sustained by the P was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the P;
 - i) Was of a kind that ordinarily occurs as a result of product defect; **and**
 - ii) Was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution
- d. Design defect
 - a. Different approaches:
 - i. Initial view: strict liability w/exceptions
 - 1) No defect if problem is "open and obvious"
 - 2) No defect if product caused injury when not used for an "intended use"
 - 3) No defect if product was "altered" by consumer
 - ii. 3 main tests in modern day:
 - 1) **Reasonable expectations test** (consumer expectations - dangerous beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics)
 - i) Volkswagen v. Young (p. 763): liability where manufacturer could have **reasonably foreseen would cause or enhance injuries on impact**, which is not patent or obvious to the user, and which in fact leads to or enhances the injuries
 - 2) **Alternative designs test** (risk-benefit analysis)
 - i) Restatement (Third) Products Liability: [A product] is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided

by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

- ii) Restatement (third) factors for reasonableness of alternative design:
 - i. Magnitude and probability of the foreseeable risks of harm
 - ii. The instructions and warnings accompanying the products
 - iii. The nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing
 - iv. The relative advantages and disadvantages of the product as designed and as it alternatively could have been designed may also be considered.
 - v. The likely effects of the alternative design on production costs; the effects of the alternative design on product longevity, maintenance, repair, and aesthetics; and the range of consumer choice.

3) **Hybrid (combo of two) Barker (CA)**

- i) **If the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, [consumer expectations] or**
- ii) **If, in light of the relevant factors...the benefits of the challenged design do not outweigh the risk of danger inherent in such design. [risk-utility] note: does not fold in consumer expectations or warnings like restatement does.**

4) *Note: exceptions from CL still come up and are partial defense*

e. Warning defects

- a. Restatement (Third): a product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by giving reasonable instruction or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.
- b. Main issues:
 - i. Was a warning necessary?
 - ii. Was the warning adequate?
 - iii. Would adequate warning have made a difference (causation)?
- c. Do not need to warn against things that are obvious. Ex, do not need to label strawberries as "some people are allergic to strawberries."
- d. MacDonald (birth control pills - lead to seizure. P argued blood clot warnings were insufficient.)

I. **Affirmative defenses to PL**

- a. Contributory negligence
- b. Assumption of risk
- c. Misuse - alteration or not intended use

J. Privacy

- a. Intrusion upon seclusion
 - i. Restatement 652B: One who **intentionally intrudes** physically or otherwise, upon the **solitude or seclusion** of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be **highly offensive to a reasonable person**.
- b. Disclosure of private facts
 - i. Restatement 652D: One who gives **publicity** to a matter concerning the **private life** of another is subject to liability to the other for invasions of his privacy if the matter publicized is of a kind that (a) would be **highly offensive** to a reasonable person, and (b) is **not of legitimate public concern**.
- c. False light - D is liable if D:
 - i. Places person in false light;
 - ii. That is highly offensive to RP and
 - iii. Acted w/knowledge or reckless disregard of falsity; and
 - iv. D published/publicizes the misinformation
- d. Appropriation of name or likeness for (commercial or other) advantage [a.k.a. right of publicity]
 - i. Restatement (Second): One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

- ii. Restatement (Third): One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability..."
- e. Defamation v. False Light
 - a. Public figure action for defamation can only be where the publisher knew it was false or acted in reckless disregard of the facts
 - b. Defamation is limited to disparaging remarks rather than just false ones