Torts - Rothman - Spring 2017

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Basic Elements of Intentional Torts

1. Act
2. Intent
3. Causation
4. Harm

A. Policy

1. **Corrective Justice/Fairness (trying to correct a wrong)**
   i. Compensation for injury
   ii. Rights based, individual focused, and punish who is more morally culpable.
   iii. Majority look to corrective justice
2. **Utilitarianism (a public policy approach to torts)**
   i. Deterrence and efficiency
   ii. Society focused, public policy concerns, incentives, law and economic analysis (cost benefit analysis, cheapest cost avoider, efficiency, maximizing wealth, loss spreading), keeping order
   iii. Sometimes don't want to incentive over analytical behavior in crisis, okay to make a mistake
   iv. Law and Economics analysis terms
      - Kaldor-Hicks Efficiency
         - Come up with rule or plan that makes society better off overall, but can make some people worse off
      - Pareto Efficiency
         - Society is better off and no one is worse off with rule
3. **Administerability**
   i. Consideration of who is best situated to evaluate (develop) a particular issue (can you pre-negotiate rules)
   ii. Who has the expertise? Are courts better to decide what's the safest practice or the industry itself?
      - Who has the information. If you can't calculate likely harm then not workable on balance. In the moment does it give enough guidance, don't want people to do CBA during crisis
   iii. Is the rule workable and does it give enough guidance?
      - Problem of setting different standards of conduct for different people, not workable
4. **Other Factors to Consider**
   i. Relational
      - Encourages good Samaritan behavior, the duty owed to each other because of community ethics
   ii. Distributive Justice
      - We want to evenly distribute justice within society
5. **Tort Remedies**
   i. **Compensatory Damages**
      i. Rule: Wining plaintiff entitled to recover damages to compensate for losses caused by defendant's tortious conduct.
         1. Attempting to make the plaintiff whole again.
         2. Usually have to be able to recover economic damages to then be able to get non-economic
      ii. Two categories of compensatory damages
         1. Economic (special or specific)
            a. This is for physical injuries, includes past and future losses, damages to property, and loss of profits
         2. Non-economic damages (general)
            a. Pain & suffering, loss of consortium, emotional distress, hedonic damages (loss of enjoyment of life like a violin player losing their arm), more difficult to quantify, how much is a life worth?
   ii. **Punitive Damages**
      i. To punish the wrongdoer, greater deterrent effect, public shaming, constitutional limits.
   iii. **Injunctive Relief**
      i. Order from the court telling defendant to stop doing what they're doing.

ii. Less common, usually in property law.

B. <u>**Intentional Harm to a Person**</u>

- <u>Harmful Battery</u> (physical harm against a person)
  - Elements:
    1. Act
    2. With Intent to (jurisdictional split)
       - Restatement: cause a <u>harmful or offensive</u> contact, or imminent apprehension of such a contact; or
       - *Vosburg*: cause an <u>unwanted/unlawful</u> contact or imminent apprehension of such a contact
    3. Causing
    4. A Harmful Contact
       - Harmful if it causes actual injury or pain to P, or P's person
       - May be direct (*Vosburg)* or indirect (*Garratt*)
  - <u>**What is Intent?**</u> - R.3 of Torts
    - A person acts with the intent to produce a consequence if the person acts:
      i. With the <u>**purpose**</u> of producing that consequence, OR
      ii. <u>**Knowing**</u> that the consequence is <u>**substantially certain**</u> to result.
  - <u>Exception</u>: an implied license may defeat a battery claim.
    - You can't sue for battery if someone bumps into you on the subway, because by going onto the subway, you implicitly consent to people accidently touching you.
  - *Vosburg v. Putney***:** boy kicked classmate, leg got infected, and had to be amputated. Court said he did not intend to cause harm but he intended to act and that was enough.
  - *Garratt v. Dailey*: 5 year old boy moved chair from out under his aunt, she hit the ground and was injured. Follows *Vosburg* standard intent to cause contact; Boy's action was considered an indirect contact since he caused her contact with the ground.
  - *White v. University of Idaho*: P sued D, a piano teacher, for touching her on the back while demonstrating piano technique. *Vosburg* jurisdiction, so this was a battery because P didn't want to be touched.

- <u>Offensive Battery</u> (no physical harm, but offends a person's dignity)
  - Elements:
    1. Act
    2. With Intent to (Restatement, or *Vosburg*)
    3. Causing
    4. An Offensive/Unwanted Contact (objective & subjective)
       - Offensive if considered so by a reasonable person or ordinary sensitivities, and subjective if P was actually offended
    - Note: consent will be implied for ordinary contacts of everyday life
  - *Alcorn v. Mitchell*: 2 people were in court and one spit in the other's face after losing a case. No physical damage just damage to dignity.
    - Individual autonomy of a person should be protected even if it doesn't cause personal harm.

- <u>Assault</u> (protects mental peace)
  - Elements:
    1. Act
    2. With the intent to (Restatement or *Vosburg*)
    3. P is thereby put in such imminent apprehension (causation & harm)
       - Apprehension = <u>reasonable belief</u> of imminent harm
         - Must be immediate in terms of time and space
         - P need not be fearful
       - Does not apply to an overly-sensitive P, unless D knows of such sensitivity
  - There has to be a subjective belief that harm is imminent.
    - Ex: If you throw a baseball at someone when their back is turned and they cannot see it coming, then they cannot claim assault because there was no imminent apprehension of harm.
  - *I.de S. and Wife*: D came to P's house to buy wine but tavern was closed, hit the door with hatchet and struck at wife but missed. Assault based on wife's imminent apprehension of harm from hatchet.

- *Tuberville v. Savage*: P put hand on sword and said he would assault D if the judge were not in town. Since the threat of harm was not imminent, no assault.
    - Mere words cannot constitute assault, unless context suggests otherwise.
        - Ex: battered spouse; words may have history of being followed by abusive action; thus, words alone can create sufficient imminent apprehension.
        - Saying "I'm going to punch you" does not constitute assault because there is no imminent apprehension.

- False Imprisonment (protects person's freedom of movement)
    - Elements:
        1. Words or Acts (or omissions) by D
        2. Intent to Confine P
            - Lower standard in some jurisdictions if actual harm occurs (recklessness or negligence)
        3. That causes actual confinement or restraint of P's freedom of movement; and
            - Freedom of movement must be limited in all directions; "4 walls" without a reasonable escape route.
                - P need not resist but must be held against will
        4. Awareness by P he is being confined.
            - Some minority jurisdictions do not require awareness by P if P is physically harmed during the confinement (baby in the freezer example)
    - *Bird v. Jones*: P claims false imprisonment because D wouldn't allow him to pass on the highway and had to take another route. There was no false imprisonment because P could go another route, just not the one he wanted
    - *Coblyn v. Kennedy's*: P (70 year old man) detained in department store when D's security guard thought he stole an ascot. Demonstration of physical power and looming employees was sufficient for FI.
    - Exception: Shopkeeper's Privilege - Merchant can detain someone in a reasonable manner and for a reasonable amount of time if they suspect they stole something.

- Intentional Infliction of Emotional Distress (protects a person's mental peace)
    - Elements:
        1. Acts in an "extreme and outrageous" way; transcends all bound of decency tolerated by society
        2. Intentionally or recklessly
            - Recklessly: deliberate disregard of a substantial risk of harm
        3. Causing
        4. Severe Emotional Distress to P
            - Severe Emotional Distress: substantial or enduring; such a reasonable man could not endure
            - Must be reasonable, unless unreasonable predisposition known to D
    - If directed at a 3rd Party, add:
        5. By conduct directed to a member of P's immediate family who is present at the time; or
            - Immediate Family: Spouses, parents, & children in all jurisdictions, and sometimes siblings, cousins, grandparents, ect… but never friends.
            - Some jurisdictions relax the present at the time requirement to allow when the person finds out within a reasonable amount of time,
        6. To anyone else present, if they suffer bodily harm (must be a physical injury).
    - *Wilkinson v. Downton*: D plays practical joke on P, telling P that her husband has been in a terrible accident. P was in so much shock she vomited and had medical bills.
        - Even if no intent, knew with substantial certainty it would cause harm, and disregarded the risk = recklessness.

C. Intentional Harm to Property

- Trespass to Real Property (protects a person's right to possess and control their property)
    - Elements:
        1. Physical invasion of P's real property
            - D need not enter land; may cause another person or thing to enter
            - May occur when lawful right of entry expires

        - May occur on, below, or above the surface
        - Also intangible invasions like sound, but there needs to be a harm
    2. With the intent to physically invade property
        - Mistake as to the lawfulness of the entry is no defense as long as D intended the entry upon that particular piece of land
        - D need not intend to trespass or cause harm, but only intend to be present on or interfere with P's property
    3. Causation (act causes invasion of property)
    4. Harm (presumed); damages need not be shown
  - *Dougherty v. Stepp*: D went on P's property with a surveyor to try to figure out whose land it was, but caused no damage. Court said that entering the property without permission was the harm itself, and no need to prove additional damages.

- Trespass to Chattels (protects a person's right to possess and control their property)
  - Elements:
    1. Act of interference with chattel
    2. With intent to bring about interfering act
    3. That causes
    4. Harm (actual damages are required)
    - Notes:
        - Mistake or good faith are never defenses
        - If contact occurs by accident, no TC
  - Basic Rule: D intentionally interferes with the possession of personal property, thereby causing injury.
  - *Intel Corp. v Hamidi*: Defendant used work email internal server to send employees messages about how bad the company was. Because there was no physical or functional damage to the servers, no trespass to chattels.

- Conversion (protects a person's right to possess and control their property)
  - Elements:
    1. Act of serious interference with chattel
    2. Intent to perform that act
    3. Caused
    4. Harm (damage or dispossession of the chattel)
    - Notes:
        - The longer the withholding period, and the more extensive the use of the chattel during this time, the more likely it is conversion
        - Standard of care is irrelevant
  - Remedies: trover or replevin
  - *Poggi v. Scott*: defendant sold wine barrels that belonged to the plaintiff thinking they were just junk. Court said that good faith is not a defense for conversion.
  - Difference between conversion and trespass to chattels: Only the person in rightful, long term possession of property can bring a conversion claim. Ex. If you're borrowing someone's umbrella for the day and its taken from you, then you would only have a trespass to chattels claim, and the owner would have a conversion claim. If you were renting the umbrella for the year, then you could bring both claims.
    - For conversion, you are able to ask for the item itself back, or its whole value. For trespass to chattels, you can only get the damage for the amount of injury you sustained.
    - Can't sue for trespass to chattels if you were not in possession of the property at the time it was taken. This doesn't necessarily mean that you have to be physically holding it, just that it's in your "possession".

D. DEFENSES TO INTENTIONAL TORTS

1. Attack Prima Facie Case e.g. no intent, no contact

2. Consent (Affirmative Defense; if there is consent, then no tortious conduct)
    - Can be either explicit (actually consent to something verbally or in writing) or implied (Where there was no actual consent, but some conduct or words imply consent i.e. the subway bumping example).
    - Factors when considering implied consent:
        1. Expectations (based on conduct & words)

2. Relevant laws & statutes (e.g. statutory rape)
3. Custom (medical, sports)
4. Public policy (emergency rule)

- Views of Implied Consent
  - *Mohr v. Williams*: Dr. operated on P's ears. Had permission to operate on right ear, but saw that the left was worse, and decided to operate on the left instead. The court said that implied consent doctrine only applies when there is no reasonably feasible way to obtain explicit consent, but they could've woken up P to ask.
  - *Kennedy v. Parrot*: P got an appendectomy, but during procedure Dr. discovered cists on her ovary, and without negligence punctured them while trying to remove them. Dr. accidently severed a blood vessel, causing injury. Court found that once incision is done and operation begins, there is an implied general consent to any subsequent procedure due to an abnormal or diseased condition in the area of the original incision.
  - *Hoofnel v. Segal*: women goes in for consultation and says she doesn't want her lady parts removed, but then later signed a written consent form allowing their removal. When they were removed, she sued, but court found that the written form consent superseded the verbal statement.
- Rule: If it is possible to get consent, you have to get consent.
- Revoking Consent: You can revoke at any time, and once it is received by the other party, they need to respond to that revocation in a reasonable amount of time.
  - *Herd v. Weardale*: Miner was contracted to go down into the mine to work, but then asked to be brought up. The company took a half hour to bring him up even though they could've done it immediately. Court found that this was a reasonable amount of time to respond to the miner's revocation of consent.
- Age
  - Minors can consent to certain things that are appropriate to their age.
    - Ex. A 5 year old can consent to play soccer, but not to undergo surgery.
- Emergencies
  - Consent is implied in emergencies where patient is unconscious and it is necessary to operate; assumption P would have consented if asked.
- Sports & Implied Consent
  - P consents to injuries from blows administered in accordance with the rules of the game, not illegal contact
  - There is a stronger case consent was not given to a penalty that is enacted for safety purposes
  - The more it occurs, the more consent is likely
  - As long as the contact was within the rules of the sport, P will be found to have impliedly consented to such contact
- Consent Through Conduct
  - *O'Brien v. Cunard SS Co.*: Doctor gave smallpox vaccine to immigrant. By raising her arm to the doctor and allowing him to vaccinate her, the court found she consented through their conduct.
- Limits on Consent
  1. Capacity (e.g. children, intoxicated and incompetent persons)
  2. Crimes (jurisdictional split --> some jurisdictions don't allow consent to a crime, while others do)
     - i.e., in a jurisdiction that doesn't allow consent to a crime, if one engages in a duel and injures their opponent, the survivor cannot cite their opponent's consent as a defense, and the injured person can still sue for their injury
     - i.e., in a jurisdiction that allows consent to a crime, the injured party would not be able to bring a claim
  3. Fraud (defeats consent; must be as to a material fact)
  4. Mistake: typically not a defense, unless it rises to the level of fraud
  5. Duress: consent given under the threat of physical force
  6. Scope: consent only goes as far as the consent - can agree to one aspect of something, and not everything i.e. *Mohr*.
     - Note: look for revocation, and duration; consent must be at the time, cannot be after the fact
  - *Zysk v. Zysk*: P sued D for battery for failing to disclose that he had herpes and then giving her herpes. Consent was fraudulently induced because P would not have had sex with him had she know about his herpes. Additionally, statute made fornication a crime, so since the injury was sustained during the commission of a crime, P had no claim.

3. <u>Mental Disability</u> (Not an Affirmative Defense - used to attack the prima facie case ; corrective justice & distributive justice)
    - <u>Rule</u>: insanity is typically not a defense, unless the mental illness defeats intent
        - The mentally ill are liable for intentional torts if they are capable of forming the requisite level of intent
    - *McGuire v. Almy*: P is a nurse taking care of D. D locked herself in a room when she acted up due to her mental illness. P entered the room and was attacked and injured by D. Court held that D had the requisite mental capacity to form intent, so therefore there could be a battery claim.

4. <u>Self Defense & Defense of Others</u> (Justification Defense; allows a person to protect themselves, or others)
    - <u>Rule</u>: what matters is what D reasonably should have thought under the circumstances.
        - Permits the use of reasonable force to prevent harmful or offensive bodily contact; no excessive force
        - Reasonable belief one must defend self or others; mistakes okay
        - Must exist a threat of actual bodily injury; provocation is not enough
        - No defense for retaliation
        - Duty to retreat does not exist, unless before the use of deadly force, if you are not within your home
        - *Courvoisier v. Raymond*: D shot police officer (P) because he thought officer was one of the men who had broken into his building. Court came up with the rule that P's subjective belief does not matter, only what a reasonable person would've thought in the same circumstances. A reasonable person would have thought that same thing, so no liability.
    - Defense of Others
        - <u>Rule</u>: You can defend others to the same level that the other person would be able to defend themselves, but you have to be reasonable in this belief.
            1. Must be reasonable belief that must defend self or others – reasonable mistake OK
            2. No Defense of Retaliation
            3. No Defense of Provocation
            4. No Excessive Force – can only use force reasonable under the circumstances
            5. Retreat not required – though some jurisdictions require retreat before use of deadly force

5. <u>Defense of Property</u> (Justification Defense; protects person's right to control and possess their property)
    - <u>Summary of Defense of Property Rules</u>
        - Can use force to repel, but not to harm
        - Can't use deadly force or even wounding force to protect property
        - Must ask to leave property before using force (if feasible to do so)
        - Usually, must give notice
    - *Bird v. Holbrook*: P entered D's land attempting to get his pea fowl (bird) back; it wandered onto D's property. D had installed spring gun to "catch" intruders (had problems with people stealing from his garden) upon entry P shot in knee. D argued that because P was trespassing he isn't entitled to relief. Although some force may be used to defend property, the force must not be intended solely to inflict bodily harm upon trespassers, so D is liable because he didn't put up any notice and there seemed to be intent to commit bodily harm to trespassers.
        - If D provided notice of the spring gun, his purpose is to prevent people from coming into the garden, and there wouldn't be an intentional tort then.
    - *M'Ilvoy v. Cockran*: plaintiff tearing down fence, defendant repelled him, causing injury.
        - Warning needed before using force.
        - Must use reasonable force and no right to deadly force -> Cannot wound, life > property

6. <u>Necessity</u> (Justification Defense; gives a person an option to save self)
    - No liability for trespass to property in a situation where there would otherwise be liability if something outside the party's control necessitated that action.
        - Public necessity: government involvement; complete defense (damage would have happened regardless)

        - Private necessity: D is liable to P for the damage done to P's property; the privilege is conditioned on the privileged party's later compensating the other party for using P's property
    - *Ploof v. Putnam*: P tied his boat to D's dock during a storm. D had his servant untie P's boat because he was trespassing on the dock, causing it to crash into the rocks. Court found that necessity allowed P's trespass because he needed to dock to save his boat from the storm.
    - *Vincent v. Erie Transportation Co.*: D tied to P's dock during a storm, and the dock was damaged from the boat knocking up against it. Court found that necessity was a defense to the trespass, but D still had to pay for damage to the dock caused by his boat.
    - General Rules
        - Belief of necessity must be objectively reasonable under the circumstances, but can be wrong in your belief
        - Need not make the best choice under the circumstances, only a reasonable one
        - You can put yourself in a perilous situation as long as you are reasonable when using the property to get yourself out of the situation.
        - Necessity is a complete defense if no harm results
            - Partial defense if harm results (must pay for damage, like *Vincent*).
        - Cannot cause substantial bodily harm or death to another while saving self
            - Open question of whether you can intentionally cause even slight physical harm to another while saving self

E. **Negligent Torts**

- Elements of Negligent Torts
    1. Duty (basic, heightened, or affirmative)
    2. Breach (common sense, hand formula, custom, negligence per se, res ipsa loquitor)
    3. Causation
        a. Cause in fact
        b. Legal / proximate cause
    4. Harm (type, recovery)
- Behavior that unreasonably risks personal or property injury to another and causes injury.
- Evolution: Fault Based v. Act Based Liability
    - In the writ system, there were 2 main writs:
        - Trespass (for direct harm)
        - Case (for indirect harm)
    - *Scott v. Shephard*: D threw a squib into a crowd. A bystander picked it up and threw it away, but it exploded and injured P. Court found D was liable for P's injury stemming from his own original unlawful action.
    - *Weaver v. Ward*: 2 solders were doing training exercises with their muskets and one accidently discharged and injured P.
    - *Brown v. Kendall*: D tried to break up a dogfight with a stick and accidently hit P in the eye, causing injury.

1. **Duty (Basic and Affirmative)**

1. **Basic Duty**: The Reasonable Person Standard of Care
    - Standard: when a person acts, he or she must use reasonable care to avoid reasonably foreseeable harms
        - Note: standard may be higher, because of a heightened duty
            - Ex: engineers, experts in specific fields
    - *Stone v. Bolton*: P was struck in the head by cricket ball from D's cricket club.
        - Because the risk was so small a reasonable person would not have acted to prevent danger, in building a higher fence, D used reasonable care.
        - Policy: Even though cricket isn't perfectly safe, it is worth keeping around because of the value society gets from the sport (fun).
2. **Affirmative Duties**
    - General Rule: no duty to act unless law confers an affirmative duty. There is no duty to strangers, but cannot interfere with someone else trying to help a stranger.
        - **Misfeasance** (commission of a wrong) vs. **Nonfeasance** (a failure to act)
            - Can usually only be held legally liable for misfeasance; unless there's an affirmative duty to act

        - *Buch v. Amory*: P trespassed in D's weaving mill, and was told to leave. Because P didn't understand English, he did not understand and did not leave. P then hurt his hand on D's machine. P argued that D should've forcibly ejected him.
            - Because D had no duty to help P, a trespasser, D was not liable.
        - *Hurley v. Eddingfield*: Doctor decides not to treat patient in another town, even though there were no other physicians around.
            - Doctor not liable for patient's death because he had no obligation to assist.
        - *Genovese* Case: When a woman was being assaulted outside, nobody called the police even though there were multiple witnesses. Court found that the witnesses had no duty to call the police or come to the victim's rescue.
            - Good policy examples in notes
    - Good Samaritan Laws
        - Good Samaritan Laws insulate people from liability when helping others.
        - Common law says there no duty to be a good Samaritan, but many states have adopted laws that create a duty or relieve liability for acting in an emergency.
            - **Vermont Statute**
                - Imposes a duty to help as long as it does not put you in danger or conflict with another imposed duty.
            - **California Law**
                - No liability if you negligently provide medical care or non-medical care (like pulling someone out of a burning car) in an emergency situation for no compensation. Relieves someone from liability if they act in good faith and render care at he scene of an emergency.
        - *Soldano v. O'Daniels*: Bartender refused to call police when someone came into the bar to ask to use the phone since someone was in imminent danger.
            - The bartender did not have a duty to help, but had a duty not to obstruct the good Samaritan seeking to use the phone.
        - *Van Horn v. Watson*: D thought that P's car was going to explode after an accident, so D negligently pulled her out, paralyzing P. Statute provided insulation from liability for providing medical care in emergency situations, but not for non-medical care.
            - D was liable because he did not administer "medical" care.
            - CA legislature agreed with *Van Horn* dissent and amended its Good Samaritan Law.
    - Exceptions to No Affirmative Duty Rule (also subject to heightened duty)
        - 4 Exceptions
            1. Creation of Risk
            2. Undertakings,
            3. Special Relationships
            4. Landowners and Occupiers
        1. <u>Creation of Risk:</u> if you create a risk, you need act affirmatively to alleviate the risk to others, including strangers
            - *Montgomery v. National Convoy*: D's truck stalled on an icy highway at the bottom of a hill, blocking the road, and did not do enough to warn other drivers of the hazard before it was too late for them to react.
                - Although D took acts to warn (turning on hazard lights), they were insufficient because they weren't placed at the top of the hill.
                    - Warnings must be reasonable
            - *Yania v. Bigan*: D taunted P to jump in a puddle. When P jumped in, he drowned. P tried to argue that D had a duty to rescue P after jumping into the water. Court said since D merely taunted P and P made a volitional choice, D and no duty to rescue.
                - Note: there may be an additional obligation to not taunt children or mentally deficient people.
        2. <u>Undertakings</u>: once a person undertakes a task, including a rescue, person must undertake such act reasonably
            - An undertaking may be established via:
                - Increased risk; transferred duty; reliance

        - Note: undertakings have a limited scope re 3rd parties
    - Rule: You can let people know you are no longer undertaking, as long as you tell them in a reasonable manner and you don't leave them in a worse off position.
        - But it can increase the standard of care - if there were no accidents when you had the watchman and then once you get rid of the watchman there were a bunch of accidents, then there's an argument that you are now acting below the standard of care and acting unreasonably.
    - *Coggs v. Bernard*: D moved P's brandy casks without any payment or contract. He did so unreasonably, the casks broke, and the brandy was lost. Since D agreed to move the brandy, he had a duty to do so reasonably. Because he was negligent, he was liable.
        - Even if it's a gratuitous undertaking, still liable for any damage caused if you act unreasonably.
    - *Thorne v. Deas*: P was the captain of a ship about to set sale. D told P he would get insurance for the ship, but ended up not getting the insurance. The ship sank and P sued D for not getting the insurance like he promised. Court held D liable.
    - *Marsalis v. LaSalle*: D's cat bit P. D agreed to quarantine the cat to make sure it didn't have rabies, but made no changes to the cat's usual routine and let it escape. After it escaped, it could not be tested for rabies, so P got the rabies shot as a precaution. P had an adverse reaction to the shot and was injured.
        - Liable because D undertook responsibility of the cat.
        - Note: in some jurisdictions animals get one "free bite" before liability.
    - *Erie RR v. Stewart*: P was hit by D's train while crossing the tracks. D usually had a watchman at the intersection where accident occurred, but he wasn't there at the time.
        - Although no statute required the watchman, D was liable because he removed the watchman without providing notice and P relied on the watchman.
    - *Indian Towing v. US*: One that undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner.
    - *Moch v. Renssealaer Water*: P's building was destroyed by a fire due to a lack of water provided by D.
        - Here, because D did not act, and was instead a denial of a benefit, D, a contractor, was not liable as it did not have an individual duty to P, a citizen, but only to the city.
        - Rule: one who undertakes to perform a contract duty for another, and breaches by non performance, he owes no special duty to any 3rd party harmed by non performance unless he specifically agreed to perform for the third party.

3. Special Relationships: you must first identify special relationship, then identify the duties attached to such relationship
    - Landlord - Tenant Relationship
        - *Kline v. 1500 MA Ave. Apartments*: P, lessee of D, was assaulted and robbed in a common hallway of D's apartment; D had previously employed a doorman and the front desk was usually unattended, but P had complained about the lack of security.
            - Because D had exclusive power to maintain safe premises, he was liable as the lack of precautions caused the harm
                - Safety measures must have equaled those in place when P moved in because that represented a reasonable standard of care; no reliance on the contract because P had notice that the security was lacking and lease was month-to-month so she could leave.
            - Note: landlords owe no duty to protect tenants from harm from other tenants, unless they have notice of dangerous propensities.
        - *Ann M. v. Pacific Plaza Shopping Center*: Mall was not held liable because even though there were complaints of crime, court said there hadn't been a specific incident of assault in the mall, so not sufficiently foreseeable; Mall was on notice thereafter.
    - Rowland Relationships

- *Tarasoff v. Regents of UC*: Patient killed P after telling D that he was going to kill P during a therapy session. P asserted D, a psychiatrist, had a duty to warn their daughter of threats made by his patient. Because D failed to warn of a credible threat by his patient, D was liable.
    - Rule: Doctors have an obligation to protect others from foreseeable harm from their patients.
    - Applied the Rowland Factors to determine there was a duty owed (See below)
- Cal. Civ. Code Section 43.92 (Came after *Tarasoff*)
    - Psychologists have to report serious physical threats to identifiable victims and cannot be found liable for doing so and breaching privacy.
    - Have to make reasonable efforts to communicate the threat to the victim or victims and to a law enforcement
        - Raises the bar- makes more clear and defined the actions that should have been taken in *Tarasoff*.

4. Landowners & Occupiers

- Basic Rule: **on your own land, you can act unreasonably depending on the situation.**
    - Exceptions
        a. Willful & wanton/recklessness
        b. Attractive nuisance
            - Artificial conditions highly dangerous to trespassing children; elements:
                1. Attractive to children
                2. Artificial condition
                3. Possessor knows or has reason to know children will trespass
                4. Possessor knows or should realize condition creates an unreasonable risk of death/serious harm to children
                5. Child did not assume risk
                6. Risk utility calculation supports eliminating condition
                7. Possessor failed to exercise reasonable care
        c. Active operations
            - Opening up property for business, even if only social and not trying to make and money
                - e.g., having a swimming pool party or ice skating party on your private frozen lake
            - Arises in the context of licensees for a particular event
                - While attendees are licensees, the standard of care is raised to that of invitees
- Common Law Categories of Guests
    i. **Invitee**
        - One who has a business interest (includes places open to the public)
        - Duty: reasonable person; no negligence; warn of traps or concealed danger; must also make reasonable inspections to discover dangerous conditions and make them safe
    ii. **Licensee**
        - Social guests/people permitted to be on property. Also includes implied licensees like the mailman or other service providers.
        - Duty: only to ensure there is no trap or concealed danger; must warn if there is; may be negligent
    iii. **Trespassers**
        - People with no permission to be on the property.
        - Duty: only to avoid willful misconduct or reckless disregard of safety
        - *Addie v. Dumbreck*
            - P's son trespassed onto D's land and was killed by D's haulage system; premises had signs and Ps were warned

- Rule: a trespasser comes onto D's premises at his own risk; D is only liable to trespassers willful misconduct
- D was not liable because it was not willful

- *Rowland* Factors: *Rowland v. Christian*
  - ***Only necessary if there is not an obvious special relationship (pointless to do the analysis for a parent-child relationship)
  - P was invited over as a social guest and was injured by D's faucet; D had known the handle was broken, but failed to warn P
    - Because P was a licensee, D had a duty to disclose all concealed dangers; because D failed, he was liable
  - Rule: there is a general duty to exercise reasonable care to make property safe for all, including trespassers, but the nature and scope of the duty depends on the Rowland Factors (eliminated CL categorization):
    1. Foreseeability of harm to P
    2. Degree of certainty P suffered injury
    3. Closeness of connection between D's conduct and injury suffered
    4. Moral blame
    5. Policy of preventing future harm
    6. Extent of burden on D
    7. Consequences to community of imposing duty
    8. Insurance (availability, cost, prevalence)
- **3 Different Standards Applied by US Courts For Determining Duties Owed to People on Your Land:**
  i. Common Law: Minority - may act negligently on own land, subject to exceptions; 3 categories re invitee, licensee, trespasser
  ii. Rowland: CA Rule - general duty to all, including trespassers; apply factors to determine whether there is a specific duty to P
  iii. English Rule: Majority - similar to common law, but eliminates invitees/licensees distinction (both are treated at the higher standard of invitees)
    - Cannot be negligent to any non trespasser
    - No duty to trespassers; subject to Common Law exceptions

2. **Breach**

- Ways to determine breach of the basic duty of care:
  1. Reasonable Person Standard
  2. Calculus of Risk / Cost-Benefit Analysis
  3. Custom
  4. Negligence Per Se (i.e. violation of statute)
  - *Res Ipsa Loquitor* - Evidentiary Tool

1. Reasonable Person Standard
   - Objective Standard**:** D breaches the duty of reasonable care when, judged objectively from the perspective of a reasonably prudent person in D's position, he fails to act with reasonable care to avoid a reasonably foreseeable risk to P.
   - *Vaughn v. Menlove*
     - D improperly stacked hay near P's cottages after being warned the hay could ignite; hay eventually ignited P's cottages
     - Rule: The standard of reasonable is that of a ordinary person.
     - Because a reasonable person would have stacked the hay properly or would have changed it after being warned of the potential danger, D was liable despite subjectively believing he was acting safely.
   - Exceptions
     1. Women
        - May be held to different standards in harassment cases
     2. Physically Disabled
        - **Standard**: must exercise reasonable care as a person with same disability
        - *Fletcher v. City of Aberdeen*
          - D dug a ditch, and failed to put up a barrier. P, a blind man, fell into the ditch and was injured. He was using a cane, and would have detected the barriers if they

had not been removed.

- Rule: The standard of care required of a person with a disability is that of the level of care which a reasonable person under the same or similar disability would exercise under the circumstances.
    - Fletcher is not liable for contributory negligence because he used the level of care that a reasonable person under the same or similar disability would exercise under the circumstances.

3. Mentally Ill or Disabled
    - **Standard**: those with mental illnesses or disabilities may be held to a different standard of care, depending on whether they had notice of the disposition.
        - If no notice, then not unreasonable; if notice, unreasonable
    - *Breunig v. American Family*
        - D suffered a schizophrenic attack while driving and felt that she should accelerate to "fly like Batman" and injured P
        - Insanity will not be a defense if the individual has some warning or knowledge that insanity could occur and impact his behavior.
4. Children
    - **Standard**: must exercise reasonable care of an ordinary child of same age and maturity
        - Exception: if participating in an adult activity
    - *Daniels v. Evans*
        - P, a minor, was killed when his motorcycle collided with D's automobile.
        - Because P was performing an adult activity, he was held to an adult standard as opposed to that of a child
    - *Roberts v. Rings*
        - D hit P, a young boy, with his car when P ran out into the street from behind a buggy and in front of D's car. D saw P, but failed to stop in time.
        - P is not contributorily negligent because he was behaving as a reasonable child of his age would act.
5. Special Expertise or Knowledge
    - Applies to particular classes of experts in conducting particular aspects of that expertise; held to the standard of an ordinary person in that expertise; heightened duty
    - Usually does not apply outside professional categories, unless someone holds themselves as an expert
        - Reasonable doctor, reasonable lawyer, ect…

2. Calculus of Risk/Cost Benefit Analysis
    - Unprecedented Harm: *Blyth v. Birmingham*
        - A record freeze caused leakage from one of D's underground water mains, damaging P's house
        - Because storm was unprecedented and unforeseeable, D was not liable
    - Moral Duty: *Eckert v. Long Island*
        - P was hit and killed by D's train while rescuing a child
        - Since it was reasonable for P to risk his own life in an attempt to save the child, he was not contributorily negligent. You balance the risk of harm against the benefit of running in front of a train to save a kid, and therefore running in front of a train was not contributorily negligent.
        - Moral Duty analysis
            - Negligence implies some commission or omission wrongful in itself
            - Under the circumstances, it was not wrongful to make every effort to rescue the child if reasonable to do so
    - Balancing Social Interests: *Osborne v. Montgomery*
        - D parked his car on the side of the road (not negligent in itself). D opened his door without looking to see if anyone was coming, and struck P (negligent).
        - Even though the majority of people would do the same, it doesn't mean its not negligent.
            - Not every want of care or harm results in liability

            - Need to weigh the risk of harm against the benefit to society in order to determine if something is negligent e.g. fire truck
- Balancing Different Harms: *Cooley v. Public Service*
    - During a storm, D's electric lines fell causing a loud noise on P's phone line which injured him. D knew that their wires could fall on the telephone wires and potentially harm anyone in the telephone booth. D did take precautions to ensure that the wires would not fall on people below, but when these precautions were in place, there was no way to protect the person in the booth.
    - D was not liable because D's duty to P is outweighed by the duty D owed to the public at large; P failed to show how D could have protected both.
- Cost Benefit Analysis: *US v. Carroll Towing*
    - D employed bargee to supervise the barge that was being moved. Bargee left for 21 hours, and while he was gone the barge sank during a risky maneuver. It was unreasonable for the bargee to leave the barge for that long, and therefore was contributorily negligent.
    - Hand Formula:
        - When B < PL, and no precautions = negligent
        - When B > or = PL = not negligent
        - B: burden of precautions
        - P: probability of harm
        - L: severity of harm
    - The court used the Hand Formula: There was a high probability of harm and a significant severity of harm (to the property) and a low burden of precautions (because they were already paying the bargee to be on the ship), so therefore D was held negligent
- Peter Singer on Health Care:
    - We should value life monetarily, quantify the amount each year is worth
    - Then decide is it worth it to prolong life for another few months if the costs to society are millions of dollars
    - One person gets million dollar treatment, but at costs to others unethical
- McDonalds Case Discussion

3. Custom
    - <u>Modern Governing Rule</u>: Custom is evidence of the standard of care, but not dispositive (TJ Hooper).
        - Exception: In contractual agreements if you agree to more or less than the customary standard, the agreed upon standard in the contract should be used.
    - *Titus v. Bradford*
        - P worked for D's train car transportation company. It was custom to transport cars, even if the car body did not fit securely, by tying the car down. P was on top of an ill-fitting train car when it came loose, and he fell to his death. Since D complied with custom, no liability.
        - <u>Rule</u>: Compliance with custom is dispositive.
    - *Mayhew v. Sullivan Mining Co.*
        - P fell through an unmarked hole in a platform when working in a mine. D claimed that it was custom to not warn workers of holes. Court found that because cutting ladder holes in platform without notice was grossly negligent, D was held liable even though he complied with custom.
        - <u>Rule</u>: Custom is not a defense for grossly negligent acts.
    - *TJ Hooper*
        - P's two barges, towed by D's tugboats were lost in a storm; P alleged negligence for D's failure to equip boats with radios. Neither tugboat was equipped with a reliable radio that would have provided them storm warnings. Other tugboats sailing in the area had radios, received storm warnings, and safely anchored in the Delaware harbor. It was custom for captains or crews to provide a radio, not the owners. However, Court found that the operator is liable for negligence due to its failure to use useful, safety-promoting radio technology, regardless of whether such technology is widely adopted within the navigation community.
            - Courts need to independently evaluate reasonable care; custom is only some evidence of reasonable care.

        - “There are precautions so imperative even their universal disregard will not excuse their omission” - Judge Hand
- *Rodi Yachts v. National Marine*
    - P sued National Marine when National Marine's barge was cast adrift and collided with P's boat, causing damages. National Marine impleaded TDI, the dock owner. There was disagreement as to who was at fault for the barge coming loose. TDI failed to have a crew ready to unload the barge's cargo, while National Marine used insufficient number of lines to secure the boat and failed to inspect those lines. There was a contract between TDI and National Marine for docking the barge. Because a contract existed, the Court looked at what was reasonable within the industry because the parties would expect that industry norms would be followed.
    - <u>Rule</u>: Must conform to industry standards if you are in a contractual agreement because that will be expected, so negligence determined by industry customs.
- Policy Arguments for and again using custom to determine negligence:
    - Pros
        - Objective, predictable standard - you know you're in trouble if you don’t follow custom.
        - Expertise of industry (in good position to know what options work most effectively)
        - Administerability - either they followed custom or they didn’t.
        - Distributive Justice - everyone has to follow custom no matter their social position.
    - Cons
        - Variability in custom from place to place
        - Discourages innovation -> if we have radios and that’s the custom, then why get a PGS?
        - Conformity to custom as a bar to liability
        - May be too broad given a case's facts -> Because deviation from custom creates liability, there may be situations where D deviated, but was not inherently negligent in doing so and yet would still be liable.
- Medical Malpractice
    - Elements
        1. Medical norm for doctors in that specialty (duty)
            - Standard is determined by what is advocated by the majority of the profession
            - In an emergency, reasonable care under the circumstances must be met
        2. Departure form norm (breach)
        3. That departure caused the injury (causation)
        4. Injury
        - <u>Rule</u>: Medical custom is dispositive
            - Compliance with custom insulates D from liability
            - Failure to comply is malpractice, unless waiver allows for use of alternative treatment.
    - When do we shift over to new custom?
        - Have to wait until it becomes the dominant approach, as outlined by medical organizations/associations.
    - *Lama v. Borras*
        - D operated on P without trying more conservative treatment first, which was the custom. They operated, and did not properly prescribe antibiotics. P developed an infection and suffered injury. D was liable for med mal because he deviated from the standard of care and that departure caused P injury.
    - *Bruen*
        - Set the national standard approach
        - 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; some allowance is thus made for the type of community in which the physician carries on his practice
        - If the national standard is to utilize a practice not available to the doctor, doctor must advise patient; may seek waiver

- *Helling v. Carey*: P suffered from glaucoma, and they failed to test her for it (since only people over 40 were regularly rested and she was 32) which led to permanent vision impairment. Court used a cost/benefit analysis. Since test is very cheap and loss of sight is so severe, should have done the test; was unreasonable/negligent not to administer the test.
- *Murray v. UNMC Physicians*: Patient suffers from disease that can cause heart failure. Doc recommends a drug that is usually a successful treatment as long as it is administered continuously, but also very expensive ($100,000/year). Doctor defers medicine until approved by insurance to ensure P won't have to stop if insurance won't pay. Alleged negligent Act = instead of administering medicine right away, doctor waited. Hospital says was "medical decision" to delay. Supreme Ct of Nebraska holds, yes, it was a medically informed decision to delay giving treatment, so not an act of negligence.
    - Policy - Maybe do custom for diagnosis, but cost/benefit for treatment.
        - In the real world, because people have different insurance coverage, not everyone will be able to afford the same thing; if the custom is expensive, then those who can't afford it will arguably get no treatment, for doctors won't want to deviate from custom and open themselves up to liability
- Informed Consent
    - When a patient consents to medical care
    - Rule: To show breach, P must experience bodily injury as a result of the treatment (harm), and show he would have decided not to consent to even properly provided treatment if he had been adequately informed (causation) -> if you need lifesaving surgery, if you don't tell the patient that they may be in the hospital for 4 week then that is likely not material to their decision, so it doesn't matter that you didn't tell them.
        - Exceptions:
            - Emergency Rule
            - Disclosure would make patient extremely ill or emotionally distraught
    - Failure to attain informed consent = breach
    - What does a doctor have to tell or not tell?
        - Must inform the patient of any material risk that would alter a reasonable patient's choice about their treatment. Must inform the patient, in non-technical terms, what is at stake; therapy alternatives, goals expected to achieve, risks that may ensue from particular treatment or no treatment.
    - *Canterbury v. Spence*
        - D told P he needed surgery to fix his back pain but did not disclose the 1% risk of paralysis that came with the surgery; P suffered paralysis. P claims he didn't consent to surgery because he wasn't actually informed of the risk. If he had known, he would not have undergone surgery. Because risk was so small, doctor didn't want to tell P, discourage her from having the surgery. Court ruled that D had to tell patient about the risk of paralysis (even though it was only 1%).
    - Note: Disclosure does not apply to infections, as they are deemed to be a common risk of medical treatment.

4. Negligence Per Se (violation of a statute)
    - Only occurs when there is a violation of a statute that creates a duty of care.
        - This is essentially the legislature setting the reasonable standard of care for something.
    - Elements:
        1. Statute requires defendant to engage in certain conduct (duty)
        2. Defendant fails to conform (breach)
        3. Plaintiff is within class of those for whom statute was enacted
        4. Statute enacted to prevent injuries of character which occurred; and
        5. Failure to conform to statute was cause of injury (causation & harm)
    - *Osborne v. McMasters*
        - D's clerk sold to P a deadly poison without labeling it, as required by statute. P ingested the poison thinking it was medicine and died; negligence per se because D violated the statute.
    - *Gorris v. Scott*
        - D violated a statute that required livestock to be fenced in on ships to prevent transmission of disease. D didn't fence in the sheep, and they went overboard during a storm. Court found no

negligence per se because the statute was to prevent disease, not sheep falling overboard.

- *Tedla v. Ellman*
    - P and brother were walking along a divided highway shortly after dark. Instead of walking against traffic, as required by statute so as to face oncoming traffic, they walked with traffic approaching them from behind. D struck them with his car, hurting P and killing her brother.
    - Court interpreted the statute as including a customary exception (required pedestrians walk with traffic when the traffic coming from behind was much lighter). Since the purpose of the statute is to promote public safety, failure to follow the statute for good cause is not negligence, unless there is clear language to the contrary.
- *Martin v. Herzog*
    - Statute said that you have to have lights on your vehicle after dark. Parties were involved in a car accident; D asserted contributory negligence as P was driving without any lights. D had to show that the lack of lights was the cause of the injury to have negligence per se here.
    - D was not liable because P’s violation of the statute led to the accident = contributory negligence.
- *Brown v. Shyne*
    - D, a chiropractor, violated statute by practicing without a license. P was injured by D's treatment even though it was within the standard of care. Negligence per se failed because even though there was a violation of a statute, P failed to show failure to have a license caused the harm.
- Excuses defeating Negligence Per Se Claims - R.3d §15.
    - An actor’s violation of a statute is excused and not negligence if:
        1. Violation is <u>reasonable</u> in light of the actor’s <u>childhood, physical disability/incapacitation</u>
        2. Actor exercises <u>reasonable care in attempting to comply</u> with statute
        3. Actor <u>neither knows nor should know of the factual circumstances that render the statute applicable</u>
        4. Actor’s violating of the statute is due to the <u>confusing way in which the requirements of the statute are presented</u>
        5. Actor’s <u>compliance with the statute would involve a greater risk of physical harm</u> to the actor or to others than noncompliance

5. Res Ipsa Loquitor (Evidentiary Tool)
    - Doctrine: “thing speaks for itself”
        - P can win a case even if he can't prove the sequence of events that led to the action in question. Accident itself is evidence of the negligence.
    - Elements (*Prosser* Statement):
        1. Event must be of a kind which ordinarily does not occur in the absence of someone’s negligence
        2. It must be caused by an agent or instrumentality within the exclusive control of D; and
        3. It must not be due to any voluntary action or contribution on part of P
        - Note: Once requirements are met, the <u>burden shifts to D</u> to prove it was not negligent
    - *Byrne v. Boadle*
        - P was walking in front of D’s premises when he was hit by a barrel of flour that fell from a window . Nobody actually saw how the barrel fell. P does not have any evidence, but D should have sufficient evidence to prove that it was not their fault if they were not liable. Court found RIL was established, shifting the burden to D.
        - <u>Rule</u>: Where it’s more likely then not, on its face, that D's acts were negligent and likely to cause the injury, burden shifts to D to show he wasn’t negligent.
    - *Larson v. St. Francis*
        - Chair was thrown out of D's hotel's window and hurt P. Hotel can’t control every guest at the hotel, so guests not an agent of the hotel. Court refused to apply RIL because a guest threw the chair, and because hotels are not responsible for guests, D was not at fault (failed #2).
            - Might be different if the hotel was on notice about rowdy behavior.
    - *Ybarra v. Spangard*
        - P had a pain in his shoulder after an appendectomy. He eventually lost use of a shoulder. Experts say it was caused by strain or trauma during his appendectomy. Difficult for P to provide prima facie evidence, since he was unconscious during the surgery, so RIL is helpful.

1. Injury doesn't normally occur during appendectomy -> more likely than not caused by negligence
2. Caused by instrumentality within exclusive control of D (at issue in this case – multiple Ds)
3. P not contributorily negligent because he was unconscious

3. **Causation**
   - BASIC RULE: plaintiff must show duty, breach, AND that the particular breach caused injury
     - Two types of causation must be shown:
       1. Cause-in-Fact
       2. Proximate
       - Substantial Factor Test (CA)
         - CA evaluates causation based on substantial factor, which is a combination of cause-in-fact and proximate cause.
         - "Substantial factor in bringing about the harm"
         - Rest.2d Torts § 431: Defining the word "substantial" as : "denot[ing] the fact that the D's conduct has such an effect on producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility…"
     - **also applies to intentional torts and strict liability
     - Once P establishes that D has engaged in wrongful conduct must link that conduct to the harm suffered

1. **Cause-in-Fact (factual cause, actual cause, but for cause, what caused the harm)**
   - *NY Central RR v. Grimstad*
     - Captain fell overboard; he could not swim. Wife tried to find a line to throw to him, but he drowned. Alleged negligent act --> D was negligent for not providing buoys on board (a reasonable barge owner would have equipped the boat with buoys).
     - P's case failed because there was no evidence presented that, if there had been a life buoy on board, the wife would have been able to get it and throw it to him in time.
   - Actual Cause Test (Simple, But-For Test)
     - Jury must determine the following by a preponderance of the evidence:
       - But for D's tortious conduct [or P's negligence for comparative negligence purposes] in _____, the injury would not have occurred.
     - Rest.3d § 26 – Factual Cause
       - Tortious conduct must be a factual cause of physical harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct.
     - *Zuchowicz v. U.S.*
       - Doctor prescribed overdose of medication to P which resulted in P developing a terminal disease (PPH), which led to her death.
       - In order for P to prevail, must show that is was the overdose that caused the harm, not just the medication.
       - Court found that where there is evidence that a negative side effect is caused by an overdose, and P shows those side effects after an overdose, the burden shifts to D to prove that the overdose was not the cause.
   - Loss Chance of Survival
     - Lost chance only applies if the patient had less than 50% chance of survival at the time he was misdiagnosed by the doctor.
     - There are 3 approaches used to determine how LCOS will impact the amount damages if chance of survival is under 50%:
       1. *Herskovits* Opinion 1
          - P cannot recover the value of his lost chance to survive, but he can recover any additional expenses that flow from the improper diagnosis (e.g., if there are more medical expenses because the disease got worse and now you have to do more treatment; also lost wages).
       2. *Herskovits* Dissent

        - If the P is more likely to die than not when he originally visited doctor, P gets nothing.
    3. *Herskovits* Opinion 2
        - If person has less than 50% chance of survival -> P recovers amount of value of life according to lost chance (percentage of lost chance)
        - If P had greater than 50% chance of survival -> P gets full recovery
  - *Herskovits v. Group Health*
    - Cancer patient would have had 39% of survival, but doctor failed to diagnose and thereby decreased chance by another 14%.
    - Court held that P should recover 39% * total value of life.
      - If he would've been more than 50% likely to survive, P would've recovered the full value of his life.
- Multiple Sufficient Causes
  - Rest.3d § 26
    - 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.
  - *Kingston v. Chicago & N.W. RY*
    - Two fires simultaneously burn down P’s property. Fire A is caused by D's train, Fire B is a fire of unknown origin (both fires were negligently caused). Each fire on its own would've burned down P's house.
    - Rule: When two or more people both cause injury to a plaintiff, and only one is identified, the plaintiff may recover the full amount of damages suffered from the one known wrongdoer.
      - D can find out who caused fire B and seek contribution (but court holds that is not P’s responsibility).
- Alternative Causes
  - *Summers v. Tice*
    - P was quail hunting with the 2 Ds. Both Ds shoot negligently in P’s direction; P injured in eye and lip, but the eye injury was more serious.
    - Kingston does not apply because only one D could have fired the shot that hit the eye.
    - Rule: Two independent tortfeasors* may be held jointly liable if it is impossible to tell which one caused the P's injuries, and the burden of proof will shift to the Ds to either absolve themselves of liability or apportion the damages between them.
      - *both tortfeasors must have acted negligently. If one did not act negligently, cannot hold both jointly liable.
  - Rest.3d § 28- Factual Cause & Burden of Proof
    a. P has burden to prove that D’s tortious conduct was a factual cause of P’s physical harm
    b. When P sues all of the multiple actors and proves each engaged in tortious conduct that exposed P to a risk of physical harm and one or more caused the harm, but P cannot reasonably be expected to prove which actor caused the harm, the burden of proof, including both production & persuasion, on factual causation is shifted to D.
- Market Share Liability
  - 4 part test:
    1. All named defendants are potential tortfeasors
    2. Alleged products of all tortfeasors are fungible (share same properties, materially identical)
    3. Plaintiff through no fault of her own, cannot identify which defendant caused injury
    4. Plaintiff brings in as defendants those representing a substantial market share.
      - Substantial market share does not necessarily need to be a majority… not clear what constitutes a substantial number.
  - Don’t use market share liability if you have a **KNOWN D** then you just sue the known D under regular causation
    - i.e., you remember the pills being pink and oval and only one company sold pink oval pills.

            - Conversely, if the P says that the pills were definitely NOT pink and oval, then that company would not be a joint tortfeasor and would be dismissed from the suit.
        - *Sindell v. Abbot Laboratories*
            i. D manufactured DES, which was said to decrease miscarriages in pregnant women, but it sometimes increased baby's cancer risk. P was a child of a mother that took DES, and P now has cancer. P couldn't identify the exact manufacturer since many companies made DES during that time.
            ii. Where multiple manufacturers of fungible goods are named as defendants in a negligence action and it cannot be determined which manufacturer caused the precise harm complained of, the manufacturers will be held proportionately liable in accordance with their market share in the market of the good that caused the injury.

2. **Proximate Cause (Legal Cause)**
    - Used by courts, considering policy, to limit liability.
        - See if any other intervening acts broke the chain of causation
    - Three Tests for Proximate Cause:
        1. Directness Test
        2. Foreseeability Test
        3. Risk Test
    - Tests for Proximate Cause
        a. **Directness Test**
            - <u>Test</u>: Was the harm close in time and space to the P's injury and was there an unbroken chain between the negligent act and the harm that occurred?
            - *In Re Polemis*
                - Plank negligently dropped in cargo hold of the ship transporting flammable gas, which created a spark and destroyed the vessel. D argues that while it would be foreseeable that dropping a plank might hurt someone below, it was not foreseeable that dropping a plank would cause an explosion. Court said that it doesn't matter that the harm was not reasonably foreseeable, just that the harm was a direct consequence of the negligent act.
            - *Ryan v. NY Central RR*
                - D caused a fire that burned down P's woodshed and then spread to P's house, burning it down. Court found that D wasn't liable for burning down P's house because it was a remote result of the fire. D had not control over the other circumstances like the wind.
                    - Holding largely based on policy considerations -> each homeowner should have fire insurance. We don't want to hold someone liable for an entire town burning down because of their fire.
                        - Benefit to society not to hold D liable b/c then would go bankrupt.
                    - Outside of NY you are responsible for all homes that burn down because of your negligently started fire.
                        - The NY rule is limited to urban fires.
        b. **Foreseeability Test (mostly used)**
            - 2 Parts
                i. Foreseeable Plaintiff (*Palsgraf*)
                ii. Foreseeable Harm (*Wagon Mound*)
                    - Foreseeable type of harm, not a foreseeable extent of the harm (Eggshell plaintiff).
                - Need to have both a foreseeable plaintiff and a foreseeable harm
            i. **Foreseeable Plaintiff**
                - *Palsgraf v. Long Island RR*
                    - P was standing on D's train platform. 2 men tried to jump onto the moving train. D's attendants tried to help one of them onto the train, but in doing so, the man dropped a package of fireworks onto the tracks, causing an explosion. The explosion led to a set of scales falling onto P, causing injury.

- Court said since P was not the person to which D's negligent act was directed and it was unlikely for their action to impact P at all, there is no liability.
  - If the negligent act was not tying down the scales, then P would be a foreseeable P, and the causation analysis would be different.

ii. **Foreseeable Harm**

- *Wagon Mound I* - D carelessly discharged oil in Sydney Harbor. P's supervisor was concerned about the oil and told workers to stop welding. After getting assurances it was not flammable, P started welding again. 2 days later, molten material from welding lit the oil and burned the dock.
  - Here there is a foreseeable P, but there is not a foreseeable harm because both P and D did not think the oil would burn (If P argued that the harm was foreseeable, then they would've been contributorily negligent, and therefore unable to recover). Court found that there was no liability because at the time D negligently leaked oil, it was not foreseeable that it would result in causing a fire.
- *Wagon Mound II* - P was able to argue that the harm was foreseeable (because they weren't welding and therefore didn't start the fire, so they weren't contributorily negligent). Court agreed that the harm was foreseeable, and therefore D should be liable.
- *Doughty v. Turner Manufacturing* - D's employees knocked an asbestos cement cover into a vat of molten liquid. This was negligent since the falling cover could've splashed the molten substance on a bystander. No one was hurt by the initial splash. However, a short time later, the cover caused an explosion which injured P. Court found that since the explosion was not a foreseeable consequence of the negligent act, D was not liable.

c. **Risk Test** (R3d § 29- limitations on liability for tortious conduct)

- An actor is not liable for harm different from the harms whose risks made the actor's conduct tortious.
  - Ex: A gives a shotgun to an 8 year old and she drops it and it breaks her foot.
    - Under Directness Test: liable because the injury was a direct consequence of the negligent act of giving a gun to a kid.
    - Under Foreseeability Test: Foreseeable P = Yes, Foreseeable harm = Maybe -> Could argue yes, it was too heavy or unwieldy, but if it was small gun and not too cumbersome, maybe not a foreseeable harm.
    - Under Risk Test: Risk of handing a gun to a child is that they will shoot themselves or another person, not that they may drop it on their toe.

3. Intervening Causes

- An act by a 3rd party can relieve D of some liability because they break the chain of causation.
  - Rule: If **foreseeable** act causes additional injury, original D still liable
    - Ex: medical malpractice, disease, negligent rescuers, normal force of nature, pedestrians throwing matches.
  - Rule: If **unforeseeable** act causes additional injury then chain of causation is broken.
    - Ex: intentional tort, criminal acts, act of God.
- Hypo 1: D negligently hits P while speeding in his sports car; P is injured, taken to hospital where doctor negligently operates on her.
  - D liable for additional/greater severity of her injuries caused by D's negligence because medical malpractice is foreseeable.
- Hypo 2: If the doctor intended to harm P because she was his Ex, his act would not be foreseeable and therefore D would not be liable for the additional injuries caused by the doctor. This would only relieve D of liability for the harm caused by the doctor, not the harm D directly caused by hitting P.

4. Harm

- Just need to show there was some sort of injury

F. Affirmative Defenses

- There are 2 Affirmative Defenses:

1. Contributory Negligence

2. Assumption of Risk

- D has the burden of proof

1. **Contributory Negligence**
    - Running an unreasonable risk of harm to one's self.
        - Go through the negligence elements to see if P was negligent.
            - Look to custom, negligence per se, cost/benefit analysis, etc.
        - Traditionally, P's negligence barred recovery.
    - Majority rule today: Plaintiff's negligence could affect the amount of recovery (comparative fault)
    - *Butterfield v. Forrester*
        - P was riding his horse fast at dusk. D had put a pole across the road. The pole was visible for 100 yards, but P didn't see it in time to stop and he severely injured himself. D argued P was contributory negligent since he was riding his horse at an excessive speed at night. Court held that while D may have been negligent, P failed to use ordinary care and that failure was the cause of the accident.
    - *Gyerman v. U.S. Lines*
        - D did not stack fishmeal sacks in the customary brick-like fashion. The stacks fell and injured P as he was unloading them. D argues P was contributorily negligent because he continued to work knowing the conditions were dangerous, and he did not inform the correct supervisor of the unsafe conditions. However, D failed to show that if P had told the correct supervisor it would have made any difference (causation).
    - Traditional contributory negligence not as extreme as one might think…
        1. Defendants need to prove negligence (prima facie case)
        2. Emergency doctrine (goes to reasonableness but also life-saving)
            a. Okay to be somewhat negligent because we value life so much.
            b. *Eckert v. Long Island*: P was hit and killed by D's train while rescuing a child.
        3. Last Clear Chance
            a. Rule: The party who has the last clear opportunity to avoid the accident, notwithstanding the negligence of his opponent, is liable.
            b. *Fuller v. Ill. Central RR*
                - P was riding his horse and began to cross the train tracks without looking. D's train was running late and going faster than usual. While D could have stopped in time to not hit P, they failed to do so. Even though P may have been contributorily negligent by crossing without looking, D had the "last clear chance" to prevent the harm.
            c. Policy Considerations
                - Its fair to hold the party who had the last chance to prevent the harm liable when they failed to do so (moral culpability).
                - Want to incentivize people to prevent harm when they are able to.
                - Utilitarianism - person in the better position to avoid the harm is the least cost avoider.
    - Comparative Fault
        1. Pure - recover the amount of the other party's fault
            a. Ex: If P is 90% responsible for the harm, then P can still sue D for 10%.
        2. Modified - if plaintiff's fault is greater than 50% contributory negligence is a complete defense.
        - Ex: A suffers $20,000 in damages, B suffered $30,000. A 40% at fault, B 60% at fault.
            - Under traditional contributory system, what do parties recover?
                - A does not recover -> out $20,000
                - B does not recover -> out $30,000
            - Under pure comparative negligence?
                - A gets 60% of its damages (60% of 20k) -> recovers $12,000 from B
                - B gets 40% of its damages (40% of 30k) -> recovers $12,000 from A
            - Under modified comparative negligence?
                - B gets nothing
                - A gets 60% of its damages (60% of 20k) -> recovers $12,000 from B
                    - A has a $8,000 loss and B has $42,000 loss
        - *Li v. Yellow Cab of California*
            - P tried to cross 3 lanes of traffic into a gas station and collided with D's cab that sped through a yellow light. Both parties acted unreasonably.

    - Under a comparative fault regime, liability will either be apportioned depending on each party's relative fault or if one is more than 50% at fault, will recover nothing.
  - Policy Considerations
    - Administerability: Juries and courts already determine fault
    - Fairness: distributes the proportion of fault
    - Corrective Justice: focus on culpability, otherwise one party would be held entirely culpable

2. **Assumption of Risk**
   i. Plaintiff appreciated the risk but undertook the activity anyway (has to have known about the risk)
      - Traditionally complete bar to recovery.

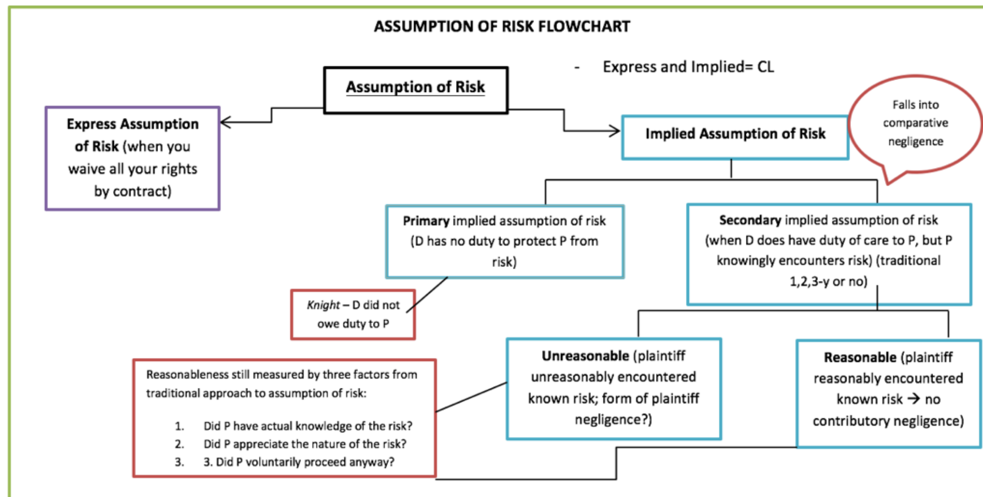
   ii. Traditional Assumption of Risk (D has to prove)
      1. Plaintiff has specific knowledge of risk
      2. Plaintiff appreciated the nature of the risk
      3. Plaintiff voluntarily proceeded

      - Restatement adds a willingness by plaintiff to accept responsibility of the risk

   iii. Express assumption of risk
      - Governed by contract principles
        - i.e., you can contract around it: signing a waiver to ride a bull

   iv. Implicit assumption of risk.
      1. Primary Implied Assumption of Risk
         - No recovery because D owes no duty of care -> i.e., don't owe skiers a duty to protect against moguls
           i. D does not owe P any specific duty of care for inherent risks of activity
           ii. P assumes ordinary risks inherent to activity by choosing to participate so no recovery
         - Firefighter’s Rule - If a firefighter goes to fight a fire, the person that negligently started the fire is not liable for any of the firefighter’s injuries since the nature of being a firefighter poses inherent risks.
           - Worker compensation schemes already set up to pay for those kinds of injuries/losses
           - Don’t want to deter people from calling firefighters for help -> If they can be sued for negligently started fires, they’re less likely to call for help
           - Extends to other similar contexts -> Applied to police officers
         - Veterinarian Rule - inherent risk of being a vet is that an animal you're treating might bite you, so you can't sue the owner if their pet bites you.
           - May be different if the pet is known to bite.
         - *Knight v. Jewett*
           - During a touch football game, P was injured when D and accidently stepped on her hand. Court found that D was acting reasonably within the scope of a pick-up football game and had no special duty to protect P. Furthermore it is an inherent risk of touch football that others may play recklessly, so just a duty to protect against intentional/ grossly reckless harm.
         - *Murphy v. Steeplechase Park*
           - P went on a ride called "The Flopper" at D's amusement park. The ride is designed to knock you off balance and make you fall down. P fell and broke his kneecap. Court held that P assumed the risk of the ride because he saw all the people riding before him fall down -> there is an inherent risk of falling down when riding "The Flopper," so if you don't want to fall don't ride.
         - *Kahn v. East Side Union High*
           - P was pressured into diving during a high school swim meet by her coach without receiving proper training beforehand. P dove in and broke her neck. Court held that coaches are expected to push athletes, so they should only be held liable if the coach acted recklessly outside of standard of care or intentionally. Therefore D was not held liable.
             - Policy: Coaches can't effectively push athletes if they are worried about being sued for negligence all the time.
         - Additional examples: Ski moguls, foul balls, getting hit by a golf ball while playing
      2. Secondary Implied Assumption of Risk
         - If P was owed a duty of care by D and D breached that duty.

- If a duty of care existed, then need to determine if P was reasonable or unreasonable in encountering the risk.
    a. If unreasonable then P a form of P negligence, apportion
    b. If reasonable then no P negligence and can fully recover
- *Lamson v. American Axe*
    - P worked at D's company painting hatchets. D installed new drying racks above P's workstation, so P complained to D racks were not safe because the hatchets could fall on him. P was told either keep working or leave. P stayed and was injured by a falling hatchet. Court said that P acted unreasonably by continuing to work -> P knew about the risk and decided to stay anyways, thereby assuming the risk.
- Additional Examples: *Gyerman* (fish meal sacks falling), Flopper Hypo - if P had fallen on the non-padded part of the ride.



G. Strict Liability

- Strict Liability Categories
    1. Vicarious Liability
    2. Fire (intentional start, unintentional spread)
    3. Animals
    4. Ultrahazardous or Abnormally Dangerous Activities
    5. Products Liability (manufacturing only)
    6. Nuisance
- *Fletcher v. Rylands*
    - D hired contractors to build a reservoir on D's land. The reservoir leaked into abandoned underground mines which spread the water onto P's property, causing damage to P's property. D was not aware of the mines, but the contractors may have been. D is not liable for what the independent contractors did or did not know because they are not employees (i.e., no vicarious liability).
        - No negligence here because D didn't know about the mines, but P wins on strict liability -> D created the reservoir, he is strictly liable for any damages caused by the water escaping.
    - Rule: A person who brings on his land anything that was not naturally there, and which is likely to do mischief if it escapes, must keep it at his peril (strict liability).
    - For dams in the US most adopt Rylands law.

1. Vicarious liability
    - Makes principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment.
        - Frolic & Detour Exception
            - If the employee goes off and does an unofficial act outside the scope of his job during his shift, then the employer is likely not liable for it.
    - Employers not liable for intentional torts committed by employees unless the employer had reason to know of the employee's risk of committing the tort.
    - Modern law includes independent contractors
2. Fire

- There is only strict liability when a fire is intentionally started and unintentionally spread.
- If the fire is negligently started, then it is analyzed under negligence. If it was intentionally started, then it is analyzed as an intentional tort.

3. Animals
   i. Livestock
      - Common Law: The animals' owner is strictly liable for any damage caused your trespassing livestock (cow, sheep, horse, chicken).
      - Western States: The homeowner has an obligation to protect his own land by fencing the cattle out.

   ii. Domesticated Pets / Tame Animals
      - *Gehrts v. Batteen*
         - D's St. Bernard was tied down to D's pick up truck. P asked D if he can pet the dog, and D said yes. P went to pet the dog and was bitten. Court said that there was no evidence of the dog's propensity to bite, so no SL. State legislature should change this if they see fit, but not the court's place to make the law.

      a. Common Law rule
         - If your dog is known to have a dangerous propensity, then SL applies. If not known, then negligence applies.

      b. Common Law altered by statute
         - Cal. Civ. Code 3342 - In CA, if a dog bites a person in a public place or a person in a private place when lawfully there, regardless of whether the owner knew of the dog's propensity, the owner is strictly liable for the bite.
         - Exceptions for police dogs on the job or if the dog was provoked.

      c. Altered by Common Law Courts
         - In *Gehrts*, South Dakota rejected SL and instead evaluated under negligence.
         - Courts can decide to examine using the standard they see fit (SL or negligence).

   iii. Wild Animals
      - The owner is strictly liable for actions of wild animals that are ferocious by nature.
         - Ferocious by nature = lions and koalas (SL)
         - Tame by nature = deer (Negligence)
            - *but if you have a particularly ferocious deer, it's judged under SL
      - ZOO EXCEPTION: Bulk of decisions suggest zoos are exception to ferocious wild animal rule -> negligence standard used instead of SL even if ferocious.
         - This is the rule in CA.
         - Patrons at zoos assume risk of wild animals attack, as long as the zoo doesn't act unreasonably.

4. Ultrahazardous or Abnormally Dangerous Activities
   i. 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.
      i. Examples: Blasting, explosions, fumigation, transportation of hazardous material, reservoirs, dams (Even if exercise all reasonable care, still likely to be damage/injuries given its inherent hazardousness).

   ii. Spano v. Perini
      i. D was blasting rock out of an underground tunnel in the middle of NYC using 196 sticks of dynamite. The shockwave caused damage to P's nearby garage.
      ii. <u>Rule</u>: One who engages in blasting must assume responsibility and be strictly liable for any injury he causes to neighboring property even if he is not negligent.

   - **R.2d § 519**
      1. One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting form the activity, although he has exercise the utmost care to prevent the harm.
      2. This strict liability is <u>limited to the kind of harm</u>, the possibility of <u>which makes the activity abnormally dangerous</u>.
         - *Madsen v. East Jordan*
            - There was a blast next to a mink farm which caused the minks to start eating each other. This was not a foreseeable consequence of the blasting and minks eating each other is not what makes blasting dangerous. Therefore no strict liability.

- **R.2d § 520**
  - In determining whether an activity is abnormally dangerous, the following factors are to be considered:
    a. Existence of a high degree of risk of some harm to the person, land or chattels of others;
    b. Likelihood that the harm that results from it will be great
    c. Inability to eliminate the risk by the exercise of reasonable care
    d. Extent to which the activity is not a matter of common usage
    e. Inappropriateness of the activity to the place where it is carried on and
    f. Extent to which its value to the community is outweighed by the dangerous attributes
      - *Guille v. Swan*
        - D was in a hot air balloon and it landed on P's garden. When crowds gathered to see the balloon, they trampled the garden. The court held that hot air ballooning was abnormally dangerous because it provides little value to society (compared to transporting hazardous materials, which benefits society).
- *Indiana Harbor Belt RR v. American Cyanamid Co.*
  - D was transporting dangerous chemicals by train. When the train arrived at P's railyard, they noticed the container was leaking the chemical. P had to decontaminate the railyard and pay fines to the city. P argued transporting the chemical was an abnormally dangerous activity and therefore D should be strictly liable. The court held that since the transportation of hazardous materials trough Chicago is NOT something that we want to stop or relocate, it should be evaluated under a negligence standard. Furthermore, the chemical itself is not corrosive, so it could only have leaked because of D's negligence, and therefore is not abnormally dangerous.

5. Defenses to Strict Liability
   i. Attack the Prima Facie Case
      - Including causation
        a. Actual cause - "It wasn't me!"
        b. Proximate cause - harm must be within scope of what makes activity abnormally dangerous
           i. Not disrupted by negligence or recklessness by 3rd parties
           ii. Intentional torts may often break the chain
   ii. Contributory Negligence
      - 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)
   iii. Assumption of Risk
      - If P assumes the risk of harm from an abnormally dangerous activity, it bars his recovery.
      - P assumes the risk of harm if
        1. Has specific knowledge of the risk
        2. Appreciates the nature of the risk and
        3. Voluntarily proceeds

H. Products Liability
   - 3 Types
     i. Manufacturing Defects
     ii. Design Defects
     iii. Warning Defects

1. Manufacturing Defects (**Strict Liability**)
   - In the manufacturing process, something went wrong that wasn't intended to happen, and therefore the company should be held strictly liable.
     - *Escola v. Coca-Cola*
       - Coke bottle exploded in P's hand as she was loading coke machine. P alleged that the glass used to make the bottle was too thin and that it was over pressurized. This case determined that SL is the standard for manufacturing defects.
     - *Pouncey v. Ford*
       - Radiator fan broke off and struck P in the face, disfiguring him. P claimed the metal used to make the fan contained impurities, weakening it. Court found this was a manufacturing defect, and therefore D should be held strictly liable.
   - Restatement 3rd- a product contains a **manufacturing defect** when the product departs from its intended design **even though all possible care was exercised** in the preparation and marketing of the product.

- P using *res ipsa loquitor* – doesn't need to show manufacture/design defect for circumstantial case
    - Can infer manufacturing defect even without proof of defect if the incident that cause harm to P:
        a. Was of the kind that ordinarily occurs because of a product defect
        b. Wasn't, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution
    - *Speller v. Sears*
        - P's decedent died in house fire. It was undisputed that the fire originated in the kitchen of the home, but there was a factual dispute about whether the fire started because of the stove or the fridge. All of the evidence burned up in the fire. Experts thought it was started by a defect in the fridge.
- Policy for manufacturing defects being SL
    - Loss spreading -> rather than P absorb the whole loss, D company can spread the loss better.
    - Fairness -> sometimes hard to point to a piece of evidence, and don't want P to be unable to recover because of that.
    - Corrective Justice -> company put the product out there and it hurt P. P did nothing wrong and was injured, so D should have to pay for that.
    - Incentivizes safer products and manufacturing.

2. <u>Design Defects</u>
    - Product conforms with manufacturing instructions but designed in such a way that causes injury, brings in reasonableness
    - 3 tests:
        - <u>Design Defect Tests</u>
            1. Reasonable Consumer Expectations Test
            2. Alternative Design Test
            3. Hybrid Test – *Barker* (CA Law)
        1. **Reasonable Consumer Expectations 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.
            - *VW v. Young*
                - P was rear-ended in 1968 VW beetle, which caused seat mechanism to break. This hurled P to rear of car and killed him. Court concluded VW's obligation regarding design wasn't that it had to create a car that resists all harm, it just can't enhance the risk of injuries.
                - <u>Rule</u>: an automobile manufacturer is liable for a defect in design which the **[1]** manufacturer could have r<u>easonably foreseen</u> would cause of enhance injuries on impact, **[2]**which is not <u>patent or obvious</u> to the user, and **[3]** which in <u>fact leads to or enhances the injuries</u> in an automobile collision.
        2. **Alternative Design Test**
            - 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 and the omission of the alternative design renders the product not reasonably safe.
                - If the plaintiff cannot show a reasonable alternative would have eliminated the risk that injured the plaintiff, then the product is not defective.
            - <u>Factors for determining reasonableness of alternative designs</u>
                a. The magnitude and probability of the foreseeable risks of harm
                b. The instructions and warning accompanying the product
                c. The nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing.
                d. The relative advantages and disadvantages of the product as designed and as it alternatively could have been designed may also be considered.
                e. The likely effects of the alternative design on production costs; the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and the range of consumer choice.
            - *Linegar v. Armour*

        - P, a police officer, was wearing a bulletproof vest made by D that only covered his front and back, but left his sides exposed. P was in a shootout with a criminal and was hit on his side where the vest did not cover and died. P argued a design defect. D countered by saying that it was an alternative design (increased mobility; cooler), and no consumer expectations because it was unreasonable for P to expect to be protected where his vest did not cover.
      - *O'Brien v. Muskin*
        - P injured when he dove into a pool with a slippery vinyl bottom. Note case.
    3. **Hybrid Test**
      - A product is defective in design if either:
        a. (Consumer Expectations) 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
        b. (Risk - Utility) In light of relevant factors, the benefits of the challenged design do not outweigh the risk of danger inherent in such a design
          - Risk / Utility Analysis Factors:
            1. The gravity of the danger posed by the challenged design
            2. The likelihood that such danger would occur
            3. The financial cost of improved design and
            4. The adverse consequences to the product and consumer that would result from the alternative design.
      - *Barker v. Lull Engineering*
        - P was injured while using D's high-lift loader on uneven ground. It tipped over, P jumped and was injured by falling lumber. The court applied a 2 part hybrid test to determine if there was a design defect by D.
  - Common law exceptions to products liability
    1. No defect if the problem is "open and obvious"
      - Inherently dangerous (ax)
    2. No defect if product caused injury when not used for an "intended use" (product misuse)
    3. No defect if product was "altered" by consumer (product misuse)
3. Warning Defects
  - **Definition**: When the foreseeable risks of harm could have been reduced/avoided by the provision of instructions/warning by the seller/manufacturer/distributor, and the omission of the instructions or warning renders the product not reasonably safe.
  - Main questions:
    i. Was a warning necessary?
    ii. Was the warning adequate?
    iii. Would an adequate warning have made a difference? (causation)
  - *MacDonald v. Ortho Pharm.*
    i. P took birth control made by D and suffered a stroke. P claimed there was not sufficient warning about the risk of stroke because saying there was a risk of blood clots was not enough. Court held that this was not adequate warning because the company needed to warn directly about the stroke. Because P testified that she read the entire warning pamphlet, there is no causation issue because she said she would have made a different decision had she known of the stroke risk.

- Affirmative defenses to Products liability
  - Contributory negligence
  - Assumption of risk
  - Misuse-alteration or not intended use
  - Preemption (federal laws that preempt state tort law)
    i. Express provisions - statute tells you what to do
      1. State law cannot govern
    ii. Supremacy clause preemption-
      1. Conflict preemption
        a. If there's a conflict between state and Federal law, Federal law trumps
      2. Field preemption
        a. Federal regulations cover the entirety of a field (Pesticides, prescriptions, etc…), so the state law plays no role

I. Privacy Torts
  - 4 Categories of Privacy Torts
    1. Intrusion upon seclusion
    2. Disclosure of Private Facts
    3. False Light
    4. Appropriation of name or likeness for (commercial or other) advantage [Right of Publicity]
  1. Intrusion Upon Seclusion
    - §652(B)
      - 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.
    - Intrusion Upon Seclusion Elements
      1. Intentional intrusion
      2. On seclusion and
      3. Intrusion would be highly offensive to a reasonable person
    - *Nader v. GM*
      - P wrote a book called "Unsafe at Any Speed" which criticized D's cars. D tried to undermine P's credibility by interviewing friends and family in order to get embarrassing things and tried to get prostitutes to sleep with him. They also stalked him, having someone see how much he withdrew from the bank and made threatening phone calls.
        - Court held that watching P in public at bank an intrusion upon seclusion because it invaded his "bubble." Interviewing friends and family was not intrusion because you lose the expectation of privacy once you disclose stuff to them. The threatening phone calls and prostitute thing were offensive, but didn't constitute an invasion of privacy.
  2. Disclosure of private facts
    - R.2d § 652D – Privacy Given to Private Life
      - One who gives publicity to matter concerning the private life of another is subject to liability to the other for invasion of privacy IF the matter publicized is the kind that:
        - Would be highly offensive to a reasonable person AND
        - is not of legitimate public concern [sometimes raised as defense rather than in prima facie case]
    - Publication of Private Facts Elements
      1. Publication or publicity to
      2. Private information
      3. The publication of such matter would be highly offensive to a reasonable person and
      4. The matter is not legitimate public concern (i.e., is not newsworthy)
    - *Sidis v. F-R Publishing Corp.*
      - P was a child math prodigy - graduated from Harvard at 16, but then went into seclusion as an adult. Years later, New Yorker interviewed him and published a ruthless portrait of him. Sued saying publication of private facts. Court held that P was a quasi public figure, and that therefore as long as the story was limited to what made them a quasi public figure, it was ok.
      - Once you get public figure status, it is very hard to lose it. You have no say in whether you are a public figure or not.
    - Exceptions
      - *Melvin v. Reid*
        - Movie made about former prostitute and how she had reformed herself (changed name; living as suburban housewife). Court said it was a privacy violation -> although this story was news worthy, her specific identity was not.
      - Ex. Reformed criminal -> it is in the public's interest to encourage criminals to reform, so we might want to keep their identity secret. Therefore it may be a privacy violation if you published an article with the criminal's name.
  3. False Light
    - Defamation - tort for making <u>false or misleading</u> statement about another person or business and those statements <u>disparage</u> them.
    - False light - similar to defamation, but does not have to be disparaging, just has to be false or misleading and a reasonable person has to find it highly offensive.

- D is liable for false light if:
    i. Places person in false light
    ii. Highly offensive to reasonable person
    iii. Acted with knowledge or reckless disregard of falsity [at least as related to public or quasi-public figures] and
    iv. Defendant published/publicizes the misinformation
- *Time, Inc. v. Hill*
    - Hill family was held hostage for 19 hours (big news story). They moved to another state to regain privacy. There was a Broadway play, and D published an article connecting the fictionalized play to the real life Hill family. The play was factually inaccurate, portraying the father acting heroically and the daughter being sexually assaulted. P couldn't bring defamation case because the comments weren't disparaging, so instead brought false light claim.
    - Actual Malice Standard: In order to have liability, must show that the statements were made with knowledge or recklessness as to the truth of the facts/ statements

4. Appropriation of name or licensees for (commercial or other) advantage a.k.a. right of publicity
    - **R.2d § 652C** – Appropriation of Name or Likeness
        - 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.
    - **R.3d § 46** – Appropriation of the Commercial Value of Person's Identity: The Right of Publicity
        - 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.
    - *Zacchini v. Scripps-Howard Broadcasting*
        - P was a human cannonball who told D not to film his performance. D filmed it anyways and showed it on the news. Court said 1st Amendment did not protect this use of P's name and likeness on the news.
    - *Doe (Twist) v. TCI Cablevision*
        - D wrote a comic book based on P, an NHL player. Court said that this use of P's likeness was not protected by the 1st Amendment; if the news wasn't protected in *Zacchini*, then a comic book shouldn't be protected.
    - *In re NCAA (Keller v. Electronic Arts)*
        - D made video games with for NCAA football and basketball. The games used the likenesses of NCAA players without their permission. Court held that D had to pay the NCAA athletes for using their likenesses in their games.
    - *White v. Samsung*
        - Vanna White (wheel of fortune) sued Samsung for running advertising campaigns with a robot that looked like her. Robot didn't use her name or likeness, but still a violation of her right to publicity.