INTENTIONAL TORTS

Generally
1. Act (voluntary)
2. Intent
   a. Subjective Intent to do unpermitted act (not intent to do all harm)
      i. Exception to subjective intent: IEDD (reckless/wanton)
   b. Enough to know w/ substantial certainty that act will result from your actions
   c. Need not foresee the extent of the harm; if act intended, liable for all harm
   d. Transferred intent: legal fiction, intent to commit the specific act to some specific victim enough, no matter who actually gets injured. Narrow doctrine
      i. Must be completed tort except that hits different victim than intended.
3. Causation: D’s act which caused the harm
4. Harm – often just contact; can get nominal damages

Specific Torts Grid

<table>
<thead>
<tr>
<th>Act</th>
<th>Intent</th>
<th>Cause</th>
<th>Harm</th>
</tr>
</thead>
<tbody>
<tr>
<td>Battery</td>
<td>Unauthorized, unpermitted, unwanted touching (Mohr v. Williams, Fox says: essence of battery)</td>
<td>➔ Intend to contact w/o permission; an objective std. (O’Brian v. Cunard) ➔ Certainty act will cause contact</td>
<td>➔ Not much here; usually fact question ➔ Once act is shown, cause is pretty clear ➔ need not be foreseeable, etc.</td>
</tr>
<tr>
<td>Assault</td>
<td>➔ striking at P; usually unambiguous ➔ words usually insufficient ➔ words may create ambiguity</td>
<td>➔ to create apprehension ➔ need more intent than for battery b/c of ambiguity ➔ failed battery</td>
<td>Not much here; direct</td>
</tr>
<tr>
<td>Trespass</td>
<td>➔ Similar to battery ➔ Unauthorized touching, entry on property of another</td>
<td>➔ intent like battery ➔ good motive irrelevant; no ignorance of permission</td>
<td>Not much here</td>
</tr>
<tr>
<td>False Imprisonment</td>
<td>➔ Complete confinement w/o means of escape; ➔ moving prison OK</td>
<td>➔ Intent is to confine w/o permission</td>
<td>Not much here</td>
</tr>
<tr>
<td>Intentional Infliction of Emotional Distress</td>
<td>➔ Extreme &amp; Outrageous Conduct ➔ Malicious, Reckless ➔ Words, Might be an act ➔ Calculated to cause distress, physical injury</td>
<td>➔ Intent to cause harm, not just intent to disturb ➔ Recklessness also ok</td>
<td>None</td>
</tr>
</tbody>
</table>

Emotional & dignitary harms = Assault, Offensive Battery, False Imprisonment
Battery
1. **Act:**
   a. Physical act, must have contact
   b. Can also including spitting, hitting cane (extension of person), blowing smoke
      i. Note: spitting in face = battery
   c. Direct (A hits B) and indirect (A shoots, throws something at, B)
   d. Offensive Battery = spitting in face, emotional & dignitary harm
2. **Intent:**
   a. Intent to make contact enough, don’t have to intend harm, *Vosburg v. Putney*
   b. Substantial certainty of harm/contact is sufficient *Garrett v Daley*, (chair-pulling)
3. **Cause:** act caused contact
4. **Harm:**
   a. Unpermitted/offensive touching enough
   b. P need not be aware of contact (could be sleeping)
   c. Damages: all consequences of unpermitted touching recoverable *Vosberg*
   d. People have right to freedom from physical interference = essence of battery
      i. *Mohr v. Williams*, left ear/right ear surgery
Assault
1. **Act:** striking at P, creating apprehension of battery
   a. Appearance of looking like you will strike (just shy of battery)
      i. Thrust forward/coming at that appears to be a battery
      ii. Note: purposeful spit in which spit does not reach person = assault
   b. Words may convey immediacy of act but conditional threats not enough
      i. *Tuberville v. Savage* (if I weren’t in court, I’d kill you)
   a. Violator must intend to strike, might have intended a battery, or assaulter intended
to create appearance that battery was about to happen
2. **Intent**
   a. Intent to strike, intended battery that misses
   b. Intent to create appearance that battery will happen
      i. Points unloaded gun: *Allen v. Hannaford*
      ii. Swinging hatchet at door, *I. de S. and Wife v. W. de S*
   c. Actual capability to touch not necessary
3. **Harm**
   a. Assault itself is harm; need not be direct physical contact
      i. P need not be fearful, just apprehend harm (Goliath can fear David)
   b. P must apprehend imminent harm, no tort if person does not see assault
   c. Apprehension subject to reasonable personal analysis; paranoia
      i. If A knows B = paranoid, & A does something that would scare B = tort
False Imprisonment (FI):
1. **Act:** to forcibly, completely confined *Bird v. Jones*
   a. Classically, D confines P in 4 walls with no way to escape,
   b. P knows he is confined – no other harm is necessary
      i. P need not know he is confined unless FI has harmful results
      ii. Ex: P drunk & locked in cold area, can be neg. FI instead (70)
   c. Detention can be very short
2. **Intent**: to commit act of forced confinement

3. **Harm**:
   a. Can have tort if P free to move but remains to protect property, *Griffin v. Clark*
      i. Fox: stretches law, hard to say P was imprisoned
   b. Liberal view: flexible boundaries OK if D coercively detains P, *Coblyn*
      i. *Coblyn* – shoplifting case, finds unreasonable citizen’s arrest by D
      ii. Fox: fits better as **false arrest**

**Intentional Infliction of Emotional Distress by Extreme and Outrageous Conduct**

1. **Act**: outrageousness conduct
   a. Would RP by outraged by act? *2R 46*
   b. Words calculated to induce harm, distress, (but not mere insults)

2. **Intent**: to do outrageous act, need not be malicious
   a. Restatement says intent = knowingly, wanting consequences, or recklessly
   b. Recklessness enough, *Wilkinson v. Downton* ("Your husband’s legs = broken!").

3. **Harm**:
   a. Emotional distress verifiable by medical doctor (e.g., nervous shock)
   b. If D knows that P is extra-sensitive, and exploits, = sufficient harm

**Trespass to Property**: D physically enters P’s land or causes (w/object) such invasion.

1. **Act**: Must be unpermitted entry
2. **Intent**: Intent to enter the land, not to harm
   a. *Brown v Dellinger* – set fire to house by accident
3. Reasonable mistake as to ownership is no defense:
   a. No defense: walk on unseen line, good intentions, or think its your land
   b. Can sue even if no damage result, technical trespass

**AFFIRMATIVE DEFENSES** = No denial that act was committed

**Non-defenses**

1. Youth, insanity, AOR, CN, etc. (may help as denials)
2. Insanity not defense b/c of public policy *McGuire v. Almy* (Nutso attacks nurse)
   a. Deter (make people take better care of insane)
   b. Don’t burden innocent victims

**Self-defense**

1. Requires: fear of imminent bodily harm (assault); force used must be proportional
2. Mistake OK only if reasonable, *Courvosier v. Raymond* (D accidentally shot cop)
3. No liab. for accidental harm to 3rd party, *Morris v. Platt*

**Defense of Property**

1. Can’t do indirectly what you can’t do directly (e.g., *Bird v. Holbrook*, spring gun case)
2. No deadly force may be used
3. Force must be reasonably necessary, proportionate
   a. Booby traps (*Bird v. Holbrook* – no spring guns, even w/ notice)
   b. Key to necessary: intent? Spikes on wall = deterrence b/c can see them. Trap w/o notice & not meant to deter = not legal
Necessity (public & private)

1. Public: generally by gov’t, property would have been lost anyway; complete aff. defense
   a. Complete Privilege: prevent harm to society (58-9)
   b. Ex: in war, destroy houses to prevent capture of city
2. Private: can interfere w/ property of others if great harm (e.g., death)
   a. Qualified Priv: owner can’t bar entry, D liab. for damages (Ploof, Vincent)
   b. Private if only preventing harm to self, not society
   c. Reasonable necessity makes trespass/damage OK, Ploof v. Putnam
   d. But you must pay for what you damage, Vincent v. Erie
3. US Ethic/pioneer spirit: absolute right to self-defense v. limited right to private necessity

Consent

1. Express consent
   a. Must be for the specific act D commits. Mohr v Williams
   b. D cannot exceed the scope of consent.
2. Implied consent
   a. Implied from objective manifestations of P: behavior, silence, cooperation, etc.
      i. O’Brien: P raised arm in vaccine line.
   b. Would reasonable person in P’s position have consented to the act?
   c. Implied in emergency situation: P unconscious, life threatened, RP would consent.
3. Bars to Consent: people who cannot give consent/situations where consent not allowed
   a. Infant/minor – Guardian can give substituted consent
   b. Incapacity – Mentally ill, etc.
   c. Fraud – consent obtained by fraud not recognized
   d. Duress – consent obtained by duress not recognized
   e. Criminal act
      i. P cannot consent to illegal act
      ii. Protected class cannot waive protection. Hudson v Craft (boxing match)
   f. Mistake
      i. P’s mistake as to nature of conduct
      ii. D knew of mistake and failed to warn P.

DENIALS – of prima facie elements

No Act

1. Automatism, e.g., epilepsy, someone grabs your hand & hits someone else
2. Consent – scope of consent (act must be within scope given, e.g. Mohr)
3. Fuzzy line between implied consent & assumption of risk
4. Burden to prove non-consent is P’s

No Intent: see each tort for separate intent

No Cause: Intervening causes

No Harm: Used more w/ emotional/dignitary damages
   (Usually no denial here, very little harm needed to show liability)
TORT HISTORY, NEG & SL

1. Trespass = SL, don’t need intent or fault; intention irrelevant, *Thorns*
      i. Facts: D liab for accidentally shooting P during exercises
   b. D’s act must be volitional, *Smith v. Stone* (p 93-4)
      i. 3rd party carries D onto P’s land = no trespass
   c. Duress no excuse, *Gilbert* (D must take gelding from robbers or die)
   d. Ds responsible for animals, *Gibbons*

2. Old Writs: critical before, if plead wrong writ, lose case, can’t amend
   a. Trespass: narrow writ for direct & forcible injury, or just unlawful = SL
   b. Case: indirect harm/injury, = neg.
   c. Ambiguity – what if unlawful and indirect?

3. Squib case: *Scott v. Shepherd* case
   a. Lighted squib thrown by D, then thrown by 2 others before hurting P
      i. Debates by judges shows woodenness of case/trespass distinction

   a. Started categories of intent, neg., non-neg. harms
   b. P has burden to prove neg., very pro-D ruling
   c. Horwitz thesis: pro-D ruling, b/c cts didn’t want SL, favored companies, didn’t want to hurt expansion during Industrial Revolution

5. SL for bringing unnatural things to property, *Fletcher v. Rylands*
   a. Facts: D owns mill & reservoir (didn’t know old mine under it), floods P’s mine
   b. P says = trespass, SL, D claims accident
   c. Cairns: makes natural v. non-natural distinction
      1. Natural user = no SL (if also no neg., no intent)
      2. Non-natural user = SL
      3. Fox: unclear, natural seems = customary use based on surrounding
      4. Seed of modern rule: abnormally dangerous, ultrahazardous = SL

6. US ignores *Rylands*: *Brown v Collins* (123), also *Turner v Biglake*, *Powell v. Fall*


8. Debate (151-2): does neg. or SL best minimize sum of cost of accidents & prevention?
NEGLIGENCE

Prima Facie Elements
1. Duty – D had duty not to expose P to unreasonable risk of harm
   a. Duty is usually circular; not usually central in most cases
2. Breach of Duty – falling below std. of care
3. Cause
   a. Cause in fact – but/for
   b. Cause in law - prox cause; how long is chain of causation; use Kinsman in US
4. Harm to P – must be real harm unlike intentional

Duty of Care
1. Reasonable Person std.: composite of ordinary person, ask how RP in same circumstances would have acted, *Vaughn v. Menlove*
   a. D’s haystack caught fire (despite warnings), burned P’s house
2. Ex ante duty to take precautions to avoid accident
   a. Examine facts ex ante not ex post (can’t have accident, say “should have known”)
3. Calculus of risk: Reasonable to pay for safety precautions minimizing risk; also reasonable not to pay when too expensive

Exceptions to Duty of Care
1. Ordinary RP std. – no exception
   a. Stupidity, *Vaughn*
   b. Old age, *Roberts v. Ring*
      i. D expected to know infirmities, avoid activities impaired by them
      ii. Facts: Boy rides buggy, jumps in front of D’s car, going slowly
   c. Insanity, *Breunig v Amer. Fam Ins.*
      i. Exception: if no foreknowledge of insanity, “sudden seizure”
   d. Intoxication *Robinson v. Pioche*
   e. Wealthy, *Denver & Rio Grande v. Peterson*
   f. Children doing dangerous adult-like activities, *Daniels v. Evans*
   g. Beginners: usually not given leeway
2. Special, tailored std.
   a. Handicapped (but may have duty to avoid certain activities or take more caution)
      i. Blind - *Fletcher v. City of Aberdeen*; Bad eyesight - *Poyner v. Loftus*
   b. Children: = “reasonable youth of same age & maturity”
      i. Except dangerous activities *Daniels v. Evans*
3. Emergency: not tailored, but D held to std. of RP in that situation, *Lyons v. Midnight Sun*

Calculus of Risk
1. Ex ante, not ex post calc: induces optimal care & no more … safety to a point
   a. More care = wasted resources; people also willing to accept certain risks
2. No neg. for extreme, unforeseeable events, *Blyth v. Birmingham WW (UK)*
   a. Facts: Frost freezes plugs, D doesn’t clear ice, so water pipes burst
3. No CN for attempting to save life w/o rashness, *Eckert v. Long Island RR*
   a. Cost-benefit analysis shows attempt to save child worth it, not CN for P
4. **Hand formula**: neg. if, _ex ante_, **PL > B**, *US v. Carroll Towing*
   a. Probability of accident x Loss/damage potential > Burden of prevention
   b. Facts: Tug (D) pulls barge, barge breaks away & gets damaged; tug was neg., but was P CN for not having bargee aboard? Yes, b/c B = 0
5. **Posner Formula** (191): if **COA < COP** (Cost of Accidents < Prevention), society better off letting accident happen – allow tort rather than make co pay high cost of prevention
   a. **Jadranska** (Hand applied by Posner): high B, high L but low P; low utility of B
      i. CN issues: Posner says not necessary, just do Hand analysis
      ii. Best case for P: Open hatches so clearly a danger, than anyone can tell
         1. Flaw: D says that everyone knows that its dangers
         2. Response: P says still so hazardous, you don’t just let it exist
         3. Least likely to get directed verdict
      iii. Best case for D: Hatches have to be opened sometime

**Custom & duty of care**
1. General rule: Custom is evidence but not definitive of Duty of Care (*TJ Hooper*)
   a. If you don’t follow custom, presumed neg.; if you do, still might be neg
2. Old rule: if D followed custom, no neg., *Titus v.* (freight car case)
   a. Q: If Cost of Prevention to high, and neg. doesn’t deter, would SL deter?
      i. Probably railroad would allow accidents, b/c COA > COP
      ii. SL rule = fewer hurdles for Ps, more cost of accidents for Ds
3. **Custom not due care if D gross neg.** *Mayhew v. Sullivan Minin* (D liab, miner fell in hole)
4. **Custom not std. of care if COA/COP applies** *T.J. Hooper*
   a. Facts: Ship had no radio, would avoid storm w/ radio; COP small, so D neg.
   b. Even if D followed custom, industry may be too lax in adopting new safety stds.
      i. Also, shouldn’t set own std.; incentives to make stds. lower than due care
   c. Epstein: COA/COP interventionist, flexible, ad hoc = business unpredictable
NEG: MEDICAL MALPRACTICE

Standards of Care
1. Generally, custom almost always a safe harbor; if comply, no neg. (but see *Helling*)
   a. Medical custom usually governs std. of care
      i. Usually relevant national std., no regional, *Brune v. Benlinkoff*
      ii. Upheld by recent case *Lama* (doctor didn’t give conservative treatment)
   b. Std. = degree of skill & learning possessed, used by persons in same profession
2. Need expert testimony unless obvious (sponge sewed in patient’ stomach)
3. Doctors can be subject to B < PL test despite following custom, *Helling v. Carey*
   a. Facts: doctors not supposed to give glaucoma test to patients under 40
   b. Doctor held liable b/c cost of benefit < cost of accident, like *TJ Hooper*
4. Schools of Thought: usually safe harbor to follow dominant school
   a. But well-supported alternative school acceptable as std. of care, *Jones v Chidester*
   b. Having few respected doctors view = at least admissible to a jury as ev.
   c. Other sources help elucidate std. of care = rebuttable presumption

Informed Consent - Doctor’s duty to disclose
2. Causation: if disclosed, Reasonable Patient would not have done procedure
   a. What patient says *ex post* irrelevant (but std. can be tailored to particular patient)
   b. Disclosure = autonomy model: balances UK (paternalism) & Ger. (full disclosure)
3. Expert testimony: not needed on disclosure (except explaining risks), *Canterbury*
   a. Before, disclosure std. = custom, so needed expert testimony
4. Exceptions: Emergency (no time for disclosure), Neurotic Patient (would really freak)
5. Informed Consent v. Battery: if give drugs w/o telling patients, can be both, *Mink*
   a. Double blind experiment w/ DES (drug to stop miscarriage), patients given pills
      w/o knowing why, then turned out DES = massive birth defects
      i. Neg. or battery? Ct.: said battery; patients didn’t know what pill was
      ii. Battery = unauthorized treatment, right to autonomy, *Mohr*
NEG PER SE: STATUTES & LICENSES

Statutes &, neg. per se
1. Generally: if statute = duty of care, violation = neg per se
   a. Neg must still be cause-in-fact and cause-in-law
2. Duty: Statute sets particular safety standard to protect people of a class of P
   a. D can’t say, “I did it my way, reasonably” Osborne v. McMasters (poison label)
   b. Legislature sets std. of care not jury
3. Cause: Conclusive ev of neg if D violates std. & causes harm law protects against, 3R 12
   a. Also, violated statute always = neg., but did neg. cause accident (was it in air)?
      i. P = CN per se for not having lights when hit by D Martin v. Herzog
   b. No neg: city fails to shovel sidewalk, P falls, Fitzwater v. Sunset
   c. No neg: D didn’t pen sheep to stop disease, washed overboard, Gorris v. Scott
   d. Neg., even w/ 3rd party intervenes, if law intends to stop harm, Ross v. Hartman
      i. Ord. said “no keys in car,” thief steals car, hits P; law meant to stop theft
4. Exception: if greater harm following statute, Tedla v. Ellman
   a. P walks on right of road (law says walk left) to avoid construction, killed by D
5. Legislative problems:
   a. Jury? Role less clear in neg per se cases (Thayer, 243)
   b. Defective statute: if facts clear, statute still creates duty, Clinkscales v. Carver
      i. Stop sign erected in wrong place, still valid,
   c. Defective statute may still indicate legislative intent, = ev. of std.
      i. Ex post laws: no neg. per se, but strong ev. of std. if legislature passed law
      ii. No neg: P made rig just before OSHA mandated new safety laws, Hammond v. Int’l Harvester

3 ways to view evidence. & neg.
1. Conclusive presumption (neg per se): so clear jury must find neg. (unless aff def, excuse)
2. Prima facie ev.: enough to go to jury as question of fact
3. Inference of neg.: “some evidence” but ask, How strong is inference?

Evidence Spectrum

<table>
<thead>
<tr>
<th>Judgment for P (J/P)</th>
<th>Room to have jury answer question – prima facie case (Most cases here)</th>
<th>Judgment for D (J/D)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Osborne</td>
<td>Byrne v. Boadle (RIL)</td>
<td>Martin v. Herzog (CN of P)</td>
</tr>
<tr>
<td></td>
<td>Mayhew</td>
<td>Brown v. Slyne</td>
</tr>
<tr>
<td></td>
<td>Strong inference</td>
<td></td>
</tr>
</tbody>
</table>

Licensing Statutes & Neg. per se
1. License does not set std. of care, Brown v. Shyne (chiropracter w/o license no liab)
   a. Mere lack of license = not neg. per se, no inference of neg.; need more ev to
   b. Unless (1) law says “no license =neg.” or (2) law protects vs. harm lack of license
      causes – then neg per se Ross v. Hartman
2. Prox Cause: Is D’s lack of license sufficiently connected w/ P’s harm
   a. Hypo: You fail to renew driver’s license; have accident
      i. Some states have statute, says no license = prima facie ev. of neg.; others
         say no neg. per se, but if new, bad driver, may draw inference of neg.
Res Ipsa Loquitor & Circumstantial evidence

1. **Prima Facie criteria:** given that accident happened: *(Byrne v Boadle 1st case)*
   a. Would probably not have occurred w/o neg.
   b. Cause of harm exclusively in only D’s control
      i. Exception: Some duties are non-delegable *Colmenares*
      ii. Exception: Policy reasons, protect vs. “conspiracy of silence,” *Ybarra*
         • Too many doctors to prove RIL under normal rules
   c. Not due to act of P

2. **Evidence:** if RIL satisfied, burden shifts to D
   a. If “moderate infer.” jury decides; if “strong,” D must disprove or P wins 2R 326d
   b. “I did things carefully” excuse does not take edge of inference
      i. Baker hypo: P neg. – carefully bakes bread but mouse in it, D freaks out,

3. Fact Patterns:
   a. Yes RIL: P hit by flying barrel: they don’t just fall from windows, *Byrne v Boadle*
   b. No: P hit by chair from hotel, guests also control chairs *Larson v St Francis Hotel*
   c. Yes: D’s car skids into P’s lane during clear weather, *Pfaffenbach*
   d. *Rylands case res ipsa loquitur?*

4. **Medical RIL:** *Ybarra v. Spangard*
   a. P had surgery, awoke w/ unrelated shoulder pain; many doctors involved
   b. Hypo: Small town, 5 yellow cabs, P is run down, witness: by a yellow cab.
      i. RIL? Should be thrown out; P won’t get to trial

5. Circumstantial evidence in non-RIL situations
   a. Also infer, ev. spectrum (some ev., prima facie, conclusive unless explained)
   b. Strong infer. of neg: *TJ Hooper:* everyone had radio, custom, infer b/c TJ no radio
   c. Weak/no inference of neg.: *Mayhew:* Guard-rails not custom in coal-mines
**AFFIRMATIVE DEFENSES TO NEGLIGENCE**

CN, Seatbelt Defense, AOR, LCC, Comparative Neg.

**Range:** P did it * P caused own harm * P neg’ly caused own harm * P assumed risk

**Response chain:**

<table>
<thead>
<tr>
<th>P: You acted neg.’ly towards me causing my harm</th>
<th>D response (aff defense): But you were CN, Or you assumed risk</th>
<th>P response: But you were willful or Had Last Clear Ch</th>
</tr>
</thead>
</table>

**CN Spectrum:**

<table>
<thead>
<tr>
<th>No CN, Judgment for P</th>
<th>Jury</th>
<th>CN, Judgment for D</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>3</td>
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<td>4</td>
<td>5</td>
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**Contributory Negligence**

1. **Prima Facie:** P unreasonably exposed self to risk, completely bars recovery
   - **Burden:** D has burden of to prove CN
   - **Causation:** D must prove CN = prox cause, not CN in the air
     - *Gyerman* = P neg., but no prox cause. (D wouldn’t fix problem)
2. Origin of doctrine: *Butterfield v. Forrester* (P rode violently, hit D’s neg. placed pole)
3. No CN for wanton/reckless by D: *Beams v. Chicago* P uncouples cars, D ignored signal
4. No CN: *Gyerman* – P, worker, hurt by negly stacked fishsacks, D says CN, AOR
5. *Schwartz*: during Indust. Revolution, CN & AR = cunning trap to protect industry
   - *Titus* good case for thinking about Schwartz’s CN/AR
   - *Fox*: Horwitz arg. is largely right; D used to win even if P was a tiny bit CN

**Seatbelt defense**

1. **Damages:** ↓ P’s damages by amt. avoidable by wearing seatbelt, *Spier v. Barker*
2. **Doctrine:** similar to comp neg.
   - Never CN, P didn’t cause accident, wouldn’t recover, *Derheim v. N. Florito Co.*
   - Not avoidable con, b/c seatbelt = *ex ante*, not mitigation of harm from D’s neg.
3. **Statutes:** some states require that you must buckle up NY: crim. statutes for not wearing
4. **Evidence:** seatbelt = jury question, *Spiers*

**Last Clear Chance (LCC)**

1. **Doctrine:** P’s response to CN: D had last clear chance to avoid accident
   - Donkey case – *Davies v. McMann*, cited in *Fuller v. IL*
   - D could also be recklessly indifferent not knowing to avoid harm
2. 2 kinds
   - Helpless peril - knew or should have of peril
   - Inattentive – knew peril, should have known P was inattentive
3. *Butterfield*: Lord Ellenborough – P could have avoided accident at end

**Assumption of the Risk (AOR)**

1. **Doctrine:** AOR = P fully knows & appreciates risk and chooses to encounter risk
   - Now, no AOR if P economically had no choice
2. **Foreseeable:** P = AOR if danger foreseen & not severe, *Murphy v. Steeplechase* (Flopper)

3. **Reasonable v. Unreasonable:** reasonable = P recovers, unreasonable = secondary AOR
   a. Not reasonable AOR if injury greater than expected

4. **Primary v. Secondary AOR:**
   a. Primary: D not neg. – no duty or P forgives duty, *Murphy*
   b. Secondary: D neg., but P also neg (unreas. AOR, like CN), *Lamson, Gyerman*
      i. *Meistrich v Casino:* D neg, made ice hard & slippery, but P skated anyway

5. Premium paid for risky work not AOR or insurance, Lord Bramwell (p 344)

6. **Express AOR:** K = expressly assume risk, even if particular risk not known appreciated

7. **No fellow servant rule:** abolished by FELA, Worker’s Comp
   a. Industrial Revol. rule: employer not neg. for employee’s acts, unless 3rd party hurt
   b. “Vice-principal” exception: can’t delegate certain duties (e.g., workplace safety)

8. **Sports:** Yes, AOR: Yankees guy played on muddy field, hurt, *Maddox v. City of NY*

9. **AOR also = CN**
   a. *Lamson* – Probably no AOR: No choice w/ place to work
   b. *Murphy* – Probably Reasonable AOR, b/c don’t think
   c. *Gyerman* – Probably unreasonable AOR, jury found CN
   d. *Jadranska* – Likely unreasonable AOR (P avoided hatches, knew would be hurt)
   e. cf *Titus* – P not unreasonable to confront risk

10. **Almy v. McGuire** (if accident, not intent.): reasonable AOR & secondary (D was neg.)

### Comparative Negligence

1. **Doctrine:** allows P recovery even if P neg., *Li v. Yellow Cab* (362)
   a. By 1975, 25 states had Comp. Neg

2. **50/50:** if P > 50% responsible, no recovery

3. **Pure:** P can recover even if 99% neg.

4. **Which is better?** Pure = what if huge damages & D only 5% neg.? More lawsuits?
   a. PA 50/50, paragraph (b): if multiple Ds = jt & several liab.

5. **Comp. Neg.** displaces CN, changes to CN, AOR, LCC:
   a. LCC: folds in, part of damage calc. *Davies v. Mann*
   b. Primary AOR: no fold in, still full defense (remember, D = no duty or no neg.)
   c. Secondary AOR: folds in if P unreasonably neg. (*Meistrich*)
   d. Willful/Wanton: debate (P = full recovery or some allow comp. neg.)
      i. Incentives: want people to avoid intentional/willful/wanton

6. **CN cases:** Huck in *Jadranska* (pure: P=75/ D=25), *Butterfield* (P=50/D=50), *Gyerman* (pure: P=10/D=90), Almy (pure: P=0, D=100 b/c P didn’t forgive waive duty)
JOINT & SEVERAL LIAB

1. Joint Liab.: P can recover full damages from defendants A or B
   a. Concert of Action: Ds conspire to do same neg. act, if one causes harm, both liab.
      i. Ex: A & B drag race, only B on wrong side & hits P – A & B liab.
      ii. Note: Must prove one caused harm; otherwise, try equal liab (Summers)
   b. Joint Cause = joint & several liab: independent acts combine = indivisible harm
      i. Ex: A & B negly set fires that join & destroy P’s $100K house –
         1. P can recover full $100K judgment from A or B
   c. Contribution: P gets $100K from B, then B sues A for contribution (e.g., $50K)
   d. Indemnity: D indemnifies vicariously liable party
      i. Employer D sued by P, indemnified by employee for tort, employee pays
      ii. In Byrne v. Boadle: if employee Z did it, Boadle Flour liab., but Z pays
   e. Hypos: equal contribution
      i. Yes, liab: D’s neg. fire joins w/ unknown fire, burns P’s house, Kingston
         1. Ct assumes unknown fire negly set by other guy, not act of God
      ii. No liab: if D’s negly set fire joins w/ equal, naturally set fire
      iii. No liab: if D’s fire overwhelmed by any other larger fire
      iv. Yes, liab: if 2 neg. actors each = substantial cause
      v. No liab: Natural fire burns P’s house & later D’s negly set fire burns it
         1. Matters what fire actually did, not what it “would have done,”
   f. Yes, liab: D’s fire burns P’s house first, then later natural fire burns it

2. Several Liability:
   a. Apportionment (unequal contribution): what did each D really cause by himself?
      i. Distinct harms OR reas. basis to infer AND P proves who caused what
      1. Ex: cows of A & B eat P’s crops; A had more cows, pays more
      ii. No contribution (=50/50 jt. tort), no apply when individual acts merge
      b. Can have equal liab., w/o concert, even if one caused more harm, Maddux, 465
      i. X hits P, then Y hits P, who has already been harmed; can sue X for full damages if can’t prove Y caused additional harm
      ii. Fox: most cts would say Y is not liable for what X caused before Y hit P
   c. P has burden to prove what Y caused or lose (some cts kind to P, but not always)
      i. Maddux ct. kind to P – accident happened fast, so treated case as joint tort
      ii. P will try to get Y if reason (ex: witness saw P’s condition before Y hit P)

3. Equal liab. if can’t tell which D caused harm (Ds = burden to prove) Summers v. Tice
   a. P flushes out quail, Ds fire at same time, don’t know whose pellets hit P
      i. Usually, Ds must show who caused harm, otherwise jt. and several liab.
   b. Similar to Ybarra, but likely no conspiracy of silence - even Ds don’t know

4. Market Share Recovery: liab. if if products homogeneous, enough makers joined, Sindell
   a. DES taken by pregnant mothers caused cancer in children, 300 companies made it (homogeneous product), 6 cos. had 90% of market
   b. No liab: if product heterogeneous, can’t join all makers, Skipworth lead paint, 470
   c. Must sue enough Ds, Murphy v. E.R Squibb
   d. Ds proving exact mkt share pay just that; other major cos. split rest, McCormack
CAUSE IN FACT (But-for)

5. Doctrine: Always required: D’s neg. act must always cause P’s harm in fact
   a. Otherwise = “neg. in the air” [P must show more than 50% proof of evidence]
   b. e.g., if Grimstad fell out of boat hit rock immediately, neg. doesn’t cause harm

6. Basic cases:
   a. No cause-in-fact: D violated statute = neg in air, had no life buoys on outside of
      barge, which P fell from and drowned, *NY Central RR v. Grimstad* (435)
      i. P didn’t prove decedent would be saved by life buoy anyway
      ii. Ct. may overturn trial ct. on facts if RP can’t find cause-in-fact
      iii. Cts. now give D burden to prove violation not = cause (here, burden on P)
   b. Yes, Cause: 250 lb. woman falls down unlighted railroad steps, *Reynolds* (443)
      i. P didn’t sufficiently prove lack of lights caused fall, but ct. ruled for P
   c. Yes, Cause: increasing risk: P given overdose of drug & died, *Zuchowicz* (p 438)
      i. Experts said overdose = but-for cause of PPH, death – not Danocrine itself
      ii. Enough to say drug = but-for cause, as overdose = neg., burden shifts to D
      iii. Circumstantial evidence = prima facie case

7. Expert Testimony: *Bendectin* (450), how to screen out junk science
   a. *Daubert* rule: US Sup Ct. says district cts. must look at methodology, reliability
      and relevance, expert qualification, publications
      i. Overruled *Frye* (which only allowed generally accepted evidence/experts)
   b. In Ben cases, D used accepted empirical studies that Ben = no cause birth defects
   c. P’s experts did no studies, reinterpreted empirical work, & said Ben = defects

8. Toxic Torts: (Agent Orange, Vietnam)
   a. Prima Facie: P must show (1) substance can cause/produce disease (2) D is
      source of substance (3) P’s exposure to substance caused harm
   b. Signature disease: when it appears, you know X substances caused it
      i. Agent Orange had no signature disease
PROXIMATE CAUSE (Cause in Law)

<table>
<thead>
<tr>
<th>Is clearly prox cause.</th>
<th>Is more likely to be if…</th>
<th>Is less likely to be if…</th>
<th>Is not prox. cause</th>
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1. General: Is D’s causal neg. substantial/close enough P’s harm to justify D’s legal liab.?
   a. Must have cause-in-fact first
   b. Use *Kinsman* test in US (unleashed forces), - is mixture of directness (Polemis, Andrews dissent) & foreseeability (Palsgraf, WM) – Palsgraf = std. in NY
      i. Fox likes Andrews dissent, Truck Driver case, *Kinsman*
      ii. Delegate issue to jury, Magruder (*Marshall v. Nugent*)
   c. Check for intervening forces (risk comes to rest, criminal, etc.)

2. No liab. if too remote, *Ryan v. NY Central RR* (480)
   a. D’s train threw sparks, negly caused fire on A’s house, fire spread to B’s
   b. Ct. arbitrarily limits liab. using extreme case: D not liab. if fire goes from A to Z
   c. Most cts no follow *Ryan*, but many have arbitrary limits (only 1st house recovers)

3. Directness: *Polemis* (D dropped plank in hold = spark→ignited petrol vapor, boom)
   a. Most states use *Polemis*
   b. Key words = “probable,” “in facts causes,” direct, traceable
   c. Channel, Blackburn: liab. for unforeseeable consequences as long as direct

4. Foreseeable Plaintiff: *Palsgraf* (guy w/ package, D neg. handles, explodes, scales hit D)
   a. *Cardozo*: D must have *ex ante* duty to P = must be foreseeable (still NY Law)
      i. P can’t be 3rd party beneficiary from duty to another person
      ii. D only had duty to avoid harming guy or package, not P
   b. *Andrews dissent* (508): D has duty to world, not just particular P
      i. Helpful words for Prox Cause: natural, continuous, substantial factor, direct, foreseeable, not too attenuated, remoteness in time and space
   c. Indirect: can still be liab, *Marshall v. Nugent* (D’s truck jackknifes, causes P to get out of car and get hit by traffic) – modern case
      i. Like Andrews dissent: D’s tortious act ‘is sufficiently close’

5. Foreseeable risk: unforeseen = no liab., *Wagon Mound I* (WM leaked oil, got on P’s dock; after told oil not flammable P kept, caught oil on fire; burns own dock & ships)
   a. Ct: what was risked (foreseeable) was just mucking up dock (= duty of care), but burning oil not foreseeable, so no liab.
      i. No one said fire foreseeable b/c D = neg & P = CN, neither wanted
   b. Ct: *Polemis* wrong: unfair to hold D liab. for unforeseeable
   c. BUT: D liab in *Wagon Mound II*: boat burned in same accident, P proved risk of fire foreseeable (low probability but high gravity)

6. Unleashed Forces: “Same forces cause same general risks to same class” *Kinsman* (D1 unmoors ship, dislodges another, D2 neg. fails to lift drawbridge = flooding)
   a. D2 had duty to lift bridge, though unusual, for drifting vessels
   b. Friendly: if high-risk, low probability harm from D acts foreseeable to cause low-risk, high prob harm, D still liab b/c harm from same class
      i. Uses cost/benefit analysis: weigh probability & gravity of harm
      ii. *Wagon Mound* principle wrong, but outcome correct
      iii. Helpful words: consequences direct, tightly direct, “same general sort” risk “same forces caused to same class”
iv. “Forces unleashed” related to risks caused by D’s neg.

7. **Intervening acts** break causal chain, no liab
   a. Responsible adult = risk comes to rest, *Pittsburg Reduction v. Horton*
      i. Facts: D negligently leaves explosive caps, parent sees caps & lets kid play w/ it
      ii. Ct.: parents liab, not D (position of apparent safety = responsibility shifts)
      iii. Fox: troubled by this case, thinks it shouldn’t happen, but D liab. rests
   b. **Criminal intervention:** doesn’t break causal chain if foreseeable, *Brower*
      i. RR car knocks down P’s wagon, criminal steal stuff
   c. Suicide: if can prove cause in fact (neg. = suicide), no break in chain
   d. **Rescuer:** doesn’t break chain if rescue not rash, *Wagner* (danger invites rescue)
      i. P’s cousin fell out of train, P goes to look for cousin and also falls

8. **Intervention cases & prox cause** (yes = foreseeable risk, prox. cause.):
   a. Yes, liab: D’s ship negligently hits P’s; P ruins ship bringing it to port, *City of Lincoln*
      i. Ct. said P’s act of bring ship to port didn’t break causal chain
   b. Yes: P jumps from negligently driven coach = foreseeable intervention *Jones v. Bryce*
   c. Yes (no CN): P exceeds speed limit, hit by D’s negligently maintained oak tree
      i. P’s CN (speeding) = in the air, no prox cause, *Berry v. Sugar Notch*
   d. No: D (railroad), negligently missed P’s stop, stays in hotel & lamp burns P’s hand
      i. Hotel’s neg = unforeseeable intervening neg., *Central of GA Ry v. Price*
   e. Yes: D (railroad), negligently misses P’s stop, leaves P in hobo jungle, P raped twice
      i. Hobo jungle = clear, dangerous foreseeable risk, *Hines v. Garrett*
   g. Yes: multiple car pile up, caused by D, doesn’t cut off D’s liab.
   h. Yes: D’s negligently hit’s P’s car; P put in ambulance, which gets into crash
      i. Yes: D’s negligently hit’s P’s car, P negligently operated on at hospital (jt. liab w/ doctor)
   j. No: *Gorris v. Scott*: same – the sheep falling off boat case

9. **Thin Skull Doctrine:** liab even if harm not foreseen, *Smith v. Brain Leech*
   a. Take D as you find him; if Vosberg = neg., cts. still hold D liab.

10. International – French just talk about directness, not foreseeability

11. No liab. if neg. placement doesn’t cause lesser, unforeseeable harm: (misplaced rat poison explodes, nitroglycerin can hit someone’s foot but doesn’t explode)

12. **Zone of Danger:** Neg. infliction of emotional distress
   a. Parent can recover for neg. death of child: can recover independent of decedent
   b. Emotional harm = injury (shock to system)’ P = close relative: mom, dad, granny
   c. Some cts: parent must be in zone of danger
      i. Parent out of danger zone but saw kid die, still foreseeable & liab., *Dillon*
      ii. Some cts: almost witnessed/ almost in zone of danger = still liab.
AFFIRMATIVE DUTIES

1. Basic Doctrine: no Good Samaritan duty unless statute (ex: VT) & some situations below
   a. Classic case is stranger bystander – duty to come to rescue
   b. When there is, aff duty = liab. for failure to act = nonfeasance (not misfeasance)
   c. No liab (old case): child P trespasses, hand crushed in D’s machine Bush v. Amory
      i. No duty to warn, esp. trespasser; D tried to get P off, didn’t speak English
      ii. Unlikely case would go this way today

2. Duty to help those you imperil, Montgomery v. National Convoy & Trucking, 2R 322
   a. Yes, liab: truck stops at bottom of icy hill, P crashed into D, D didn’t warn

3. Duty not to disable aid giver, Louisville & Nashville RR v. Scruggs, 2R 327
   a. Yes, liab: fire truck going to P’s house, blocked by D’s train, refuses to move

4. Duty if you begin to assist: can’t leave half-way or worse, Black, 2R 324
   a. D drunk, P didn’t complete aid & left P in hazardous position
   b. Zulenko, Gimbles put sick person in store, put in seclusion & prevented other
      people from providing aid.

5. Duty to complete gratuitous promise if P relies, Marsalis v. LaSalle
   a. Yes, liab: D offered to lock up cat for rabies test, didn’t; P got rabies test, got sick
      i. Duty b/c P relies on D’s promise & foregoes other protection
   b. Yes, liab: Lighthouse went out, ship crashed, Indian Towing v. US
      i. Ships (even ones never sailed there) relied on govt’s Good Samaritan act

6. Duty of doctors to warn likely victims of dangerous patients, Tarasoff v. Regents of UC
   a. Yes, liab: P didn’t warn D that patient said “I am going to kill D,” D died
      i. Dissent: hurt privacy, b/c doctors will warn anytime afraid
   b. 2R 319: duty by someone who takes charge of dangerous person
   c. 2R 315: duty to (a) dangerous person (b) to victim, (landlord locks motel doors)

7. Duty for land-owners not to make attractive nuisance for children (covered briefly)

8. Ames Bystander hypotheticals:
   a. Man falls in water: you swim well or there’s rope, but you don’t help
   b. Child on track: Easy to save, you don’t
   c. Surgeon in Calcutta: someone dying in other side of Indian, surgeon won’t go
   d. Man shot by pheasant hunter: hits eye, man falls face first in puddle and drowns

9. Responses to Ames hypos:
   a. Moral (Ames): moral duties should be legal as well
   b. Contractarian (Epstein) – values autonomy, Believes liab = only (d)
      i. Thinks Ames make cases too easy; Posner too intrusive
      ii. Think Bender = limitless liab., slippery slope
      iii. Fox: no slippery slope, in real world, works out OK
   c. Efficient (Posner) – assume contract for mutual obligation to help
      i. Cost/Ben: burden miniscule to help in (a) and (b)
   d. Humanistic (Bender): says (a) (b) (d) are clear duties
   e. Alternate solution: offer rewards for fulfilling duties, not punishment

10. French: civil liab for neglect to act (Art. 1838C), duty to stop crimes if riskless (Art. 63)

11. English law: (p67, handout): focus on liberty, need not warn stranger he’ll fall over cliff
    unless your cliff (p82): Lord Goff would like VT statute, French law
ULTRAHAZARDOUS ACTIVITIES

Ultrahazardous Activities
1. **Prima Facie**: 2R 519/520 (652-3) adopted almost everywhere
   a. Can’t eliminate risk w/ utmost care
   b. Activity not custom usage (e.g., driving cars)
   c. Appropriateness to environment (*Rylands* still applies in many places)
      i. *Rylands* on location: if SL activity in wrong area, clear SL
      ii. If in best possible place no safe harbor: can still have SL
   d. Value of activity vs. harm to community
2. **Causation** 2R 522
   a. Not too many intervening factors
   b. Liab. ltd to specific harm caused by activity (think reciprocal risk)
      i. E.g., SL for falling airplane (no reciprocal risk), but not 2-airplane crash
   c. No SL if P abnormally sensitive: *Madsen v. East Jordan* (minks scared ate babies)
3. **Judge decides, not jury** if it’s a ultrahazardous case

Bhopal
4. Bhopal **Facts**: 2 cases, Oil and Gas, and ?, both went directly to Indian Sup. Ct.
5. **Bhopal: Judicial Background**
   a. Reform of public interest law: 1980, tried to eliminate corruption, make easy to litigate public interest law (can just write letter complaining & will become case)
   b. Sup Ct. has original juris. over public interest cases; low threshold for Const cases
      i. Const. cases = Art. 14 (rt. to equality), Art. 20 (rt. to life, good life, safety)
   a. Is this ultrahazardous according to 2R 519?
      i. Unclear if still risky, even following US stds.; but risk = non-reciprocal
      ii. Location: plant was appropriately located but attracted squatters
   b. *Rylands*: easy case for Blackburn: brought unnatural thing to land, might escape
   c. Union Carbide satisfied regulatory requirements in India, but US stds. higher
   d. Didn’t know cause of accident (product failure, sabotage)
      i. Assumed that higher stds. of US would have prevented accident
   e. If UC held to US safety stds & SL, less likely to bring industry to India?
      i. Unclear if India should impose stds. on MNCs it doesn’t on Indian cos.
7. **Bhopal: Under Indian Law**
   a. Before: influenced by UK common law, *Rylands*
      i. P’s burden of proof lower than in US, SL much easier
      ii. Eliminates all threshold defenses (Act of God), don’t need foreseeability
      iii. *Rylands* natural use: UC says factory is natural use, but no defense
      iv. Deep pockets: bigger you are, more damages you pay
   c. Neg: SL doesn’t say if UC = wrongdoing; punitive damages likely under neg.
      i. Is it neg not follow US stds? Neg. not to have extra backup systems?
      ii. If fired employee caused, P must show UC didn’t do duty to stop sabotage
   d. Sup. Ct. sidestepped neg., issue of what MNC from 1st world should be
PRODUCTS LIABILITY

1. Prima Facie:
   a. PL focused on product, neg. is focused on person
      i. But most juris don’t include damage to product itself as harm
   b. Compare to K Law (warranty):
      i. If product damages itself, not person = K case, not tort (economic loss)
      ii. Statute of limitations: K = x years from sale, Tort = x years from injury
   c. Defect (2R): product is “unreasonably dangerous”
      i. Design defect = “consumer expectation”
   d. Defects (3R):
      i. Manufacturing defect, 3R 2a: departs from intended design
      ii. Design, 3R 2b: design flaw (use Piper risk/utility in US)
      iii. Warning, 3R 2c: product not unreasonably dangerous w/ warning
   e. Defenses: “comparative fault”, state of art, open & obvious, unforeseen misuse

2. History:
   a. Early cases: privity bars recovery except inherently dangerous, Winterbottom
      i. No liab: P, driver, hurt by negly maintained carriage, sued mfr.
   b. 1916: No privity if imminently dangerous, used w/o inspect. MacPherson v Buick
      i. P sues for crash caused by defective wheel made by 3rd party
   c. Escola, 1944: Seeds of privity’s end (exploding Coke bottle left out 36 hours)
      i. Why: barely enough ev. for RIL neg.
      ii. Traynor: should be SL, not RIL b/c: (1) mfr. can better ↓ risks (2) victims shouldn’t pay (3) mfr. can distribute costs (4) D has most facts
      iii. Analogy to food sales warranties: crim. liab. for contaminated food
      iv. Mass production, advertising = SL, people rely on them
      v. Traynor: SL important to ↓ accidents (Fox: unclear; probably a little safer)
   d. 1953: warranty law imported into torts, McCabe v. L.K. Liggett Drug
      i. Yes, liab: for exploding coffee pot (bad design) bought by friend
      ii. Uses implied warranty of merchantability, fitness for use
         1. But limited damages: only get value of replacement product
      iii. UCC 2-318: most states adopt. Warranty runs to 3rd parties
      i. P buys car for wife, crashes spontaneously; sues dealer, Chrysler
      ii. Eliminates privity on basis of new trends: mass-production, advertising
   f. 1963: End of privity SL fully established, Greenman v. Yuba Pwr Prod
      i. Power tool, screws too short; Traynor in majority, important case
   g. 2R in 1965: very influential, spread like wildfire, basically adopts Traynor’s view
      i. 1990s: PL litigation explodes (DES, other pharmaceuticals, asbestos, cigs)
   h. 3R: 1998, intends to fix “bugs” in the doctrine, but most states still use 2R

3. Airplanes: when plane crashes & passenger injured, not PL: passenger buys service, not product. Must be neg or statute (international flights).

4. 2R 402A, comments g. (defective) j. (warning) k. (unavoidably safe):
   a. Excess language? “unreasonably dangerous” not needed; implies neg. std., not SL
   b. Applied to Escola: is Coca-cola SL (as manufacturing defect)?
      i. Probably, but P must prove nothing happened to Coke after it left factory
      ii. But unclear if 2R applies to 3rd parties (3R does cover bystanders)
c. Applied to Yuba (Smithshop/powertool): more clear liab., b/c design defect

5. 3R vs. 2R: Gets rid of “unreasonably dangerous” language
   i. Creates 3 defect categories not in 2R: (a) mfr (b) design (c) warning
   b. Escola = yes SL under 2R, 3R; Yuba: yes, SL, b/c alternate design possible

6. Compare: EU directives (= harmonizing device)
   a. Art. 4: P must prove damage, defect, & causal link btwn 2 (exact same as US law)
   b. Art. 6: Product defective when person entitled to expect safety but unsafe

7. Warranty: express and implied
   a. Yes, liab: implied warranty used, not warning/design defect PL, Denny v. Ford
      i. Small risk of roll-over: same as other SUVs, but worse than other cars
      ii. Sued under warranty, couldn’t prove neg., or design defect
      1. No design defect under 3R 2(b): no alternate design for SUV
      2. Possible 3R warning defect if mfr knows roll-over but no warning
   b. Yes, liab: if express warranty read & relied upon, Hauter v. Zogarts
      i. “Ball will not hit player,” ball hit P = breach of warranty
      1. D can disclaim by replacing product if expressly written in K

8. Ds other than manufacturer
   a. Retailer: yes, SL –stream-of-commerce, etc. Vandermark
   b. Service provider: no SL, e.g., pharmacist Murphy
      i. Seems inconsistent, but no SL for fear that if liab., svc provider stops service (e.g., pharmacists only sells drugs w/ no risk)
   c. Used goods: no SL – people know they take used goods as they are, Tillman

### Design Defects

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<thead>
<tr>
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<th>Consumer Ex.</th>
<th>Risk/Utility</th>
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<tbody>
<tr>
<td>2R</td>
<td>Yes, burden of Proof = P</td>
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<tr>
<td>3R./Piper</td>
<td></td>
<td>Yes, Burden of Proof = P (must have alt design)</td>
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<tr>
<td>Barker (Pro-P)</td>
<td>Yes, BOP P or→</td>
<td>Prox. Cause then Yes, BoP = D</td>
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<tr>
<td>Potter (Pro-P)</td>
<td>Yes, CE becomes R/U (no alt. design required)</td>
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1. General criteria for design defect:
   a. Consumer expectation: 2R 402A:
      i. P has BOP to show product in “unreasonably dangerous”
      ii. Open & obvious defect = strong ev. of no liab.
   b. Risk Utility/Alternate Design: 3R 2b, Piper
      i. More states use this std. than Barker
      ii. P has BOP to show D “could” have adopted alternate design
      iii. Factors: (1) gravity & probability of danger, (2) alternate design (feasibility, cost [B PL], disadvantages)
      iv. Timing: when product was launched; optimal
   c. Barker: if P shows prox cause, D has BOP to show favorable risk/utility
      i. Otherwise, P has BOP to show consumer expectation
      ii. Very P friendly – abandons “unreasonably dangerous”
   d. Potter: mixed consumer expectation/risk-utility test
      i. Very P friendly – need not show alternate design

2. Defenses: all strong evidence of no SL, but not dispositive
a. **3R** – comparative fault applies in most jurisdictions
b. **Foreseeable misuse** – generally not defense, *Lebeouf, Soler v. Castmaster*
c. **Open & obvious**: not dispositive (3R 2d)
   i. Yes liab: defect not obvious, *Larsen* (steering shaft becomes spear)
   ii. No liab: several version of product, *Linegar* (contour bullet proof vest)
      1. Let buyer choose safety/comfort tradeoff (may not like heavy vest)
   iii. No liab: no roll bar on convertible = obvious defect, *Delvaux v. Ford*
d. **State of the Art** (3R 2d)
   i. Best, feasible technology – harder than “current practice” test
   ii. Still use “consumer expectations”, usually defense vs. older products
      1. E.g., don’t expect Model T to = safety of new cars
   iii. EU directive: each EU state can choose doctrine for state-of-the-art
e. **Safety regulations**: meeting std. not dispositive (but violating = SL), *Piper*
   i. If D meets regulatory stds., P has BOP to show risk/utility or alt. design

3. Who sets the std.
   a. **Legislature**: sometimes Nat’l Traffic & Motor Vehicle Safety Act
      i. Sets crush-resistance stds. for car roofs; very specifc = weighty as std.
      ii. Mores change more than nat’l legislation
   b. **Juries**: Can they find defective? In view of price, utility, safety, aesthetics?

4. **Crashworthiness**: duty to make car crashworthy (neg. std), *VW of America v. Young*
   a. VW seat assembly separates in crash, P dies
   b. **Design defect**: car must be safe for “second collision” (enhances harm, not cause)
   c. **Reasonableness std**: can’t foresee all problems (don’t need pontoons, car in water)
   d. **Burden of proof**: P must generally prove harm from second collision
      i. Restat: if P can’t prove second collision, can hold D liab for whole crash
   e. **No duty**: if product = different, not less, safety than alternate, *Evans*
      i. P: X-type frame less safe for broadside collision than box
      ii. Ct. held car maker not an insurer; safety = question for legislature
      iii. Reasonable to make X-frame, can’t cover entire car w/ metal to stop crash
      iv. Fox: outcome right, not rule (no duty to make crashworthy)

   a. Facts: loader case (tips over on uneven ground, dumps logs on P)
   b. **Excessive danger**: if beyond what “ordinary consumer” expects = SL
      i. “Ordinary consumer” vague = driver? Trained driver? Buyer of loader?
   c. **Risk/utility**: even if risk foreseeable, if P proves prox cause (injury from design),
      gets to jury & D must prove good risk/utility tradeoff
      i. Even if P = low expect., mfr shouldn’t make excessive preventable risk

6. **Meeting regulations not safe harbor but material ev. of no SL**, *Wilson v. Piper* (793)
   a. If D meets regulations, P has burden to prove risk/utility tradeoff = bad
   b. **No liab**: P said carbureted engines = more icing problems than fuel-injection
      i. FAA certified carb. & injection engines; both have icing problems
      ii. P didn’t do real risk/utility: just said carb engine = danger

7. **P need not prove alternative feasible design**, *Potter v. Chicago Pneumatic Equipment*
   a. Facts: Ps got “hand/arm syndrome” from using vibrating equipment for 25 years
   b. 3R 2 (c) (alt. design criteria): Ct. didn’t like it, wanted to help P, used risk/utility
   c. *Potter* = lighter burden on P than *Wilson v. Piper* or 3R
Duty to Warn: Prescription Drugs; learned intermediary; does rule apply to birth control pills?

1. Generally: see 2R 402A comment (j), 3R 2(c), 3R 6d
2. Duty = adequate warning, material risks in lay language, *McDonald v. Ortho*
   a. Yes, liab: non-lay warning on birth control caused P’s stroke, *McDonald v. Ortho*
   b. P duty to prove good warning = wouldn’t take medication (like informed consent)
3. No Learned Intermediary defense if drug = voluntary & unsupervised (birth control)
   a. Must warn users on product, not just let doctor/pharmacist warn,
   b. Ex: birth control use voluntary, rarely see doctor, *McDonald*
   c. Remember: sue doctor for neg. (informed consent), mfr for SL

Mass vaccinations:

4. Duty to warn, even if low prob. of high risk, *Davis v. Wyeth*
   a. Yes, liab: D didn’t warn of one-in-million chance of getting polio from vaccine
5. Statutory exception: if litigation costs = mfrs to stop making vaccines
   a. Whooping cough: stops 322K cases, but some get disease, brain damage, anyway
      i. Many mfrs went out of business from cost of liab.
   b. Nat’l Childhood Vaccine Act = no fault payment of $250K, mfrs relieved of SL
      i. But: decedents/parents can still sue, *Schafer v. Amer. Cyanimid*

Other Warning doctrines

6. Info. overload: no duty to warn of all risks, too much info = consumers ignore warning
   b. Yes, liab: no warning paint explodes (just vapor warning), *Jackson v. Coast Paint*
   c. NO liab: gas canisters, too many warnings can = overload, *Cotton v. Buckeye*
7. Heeding presumption: helps P, presumes P would have heeded warning; D must rebut
   a. Not enough: Butane Inhaled – warning says “don’t breathe spray”, *Pavlik v. Lane*
8. Momentary stupidity: even good warning not enough if cheap to change design (Latin)
   a. Yes, liab: tires too small for rim, warning not enough, *Uniroyal v. Martinez*

Insurance vs. State of the Art, 2R 402A com j, k; 3R comment m, EU

1. Generally policy question: see stds.
   a. 2R 402A, com. j = liab if mfr should have had knowledge; foresee. test, like neg.
      i. State of art = if mfr could have pushed tech frontier & made safer product
   b. 3R = “could have known” rather than “should” = stronger std. (pushes state of art)
   c. EU: state of the art = defense, but up to members state
2. State of Art = defense in most cases but mfr defect
   a. High chance can prove neg. in mfr defect; *Escola = RIL inference*
   b. Low chance to prove neg w/ design or unforeseeable warning
3. If state of art = defense, seller not insurer
   a. No way mfr could have made products safer
      i. E.g., DES: put drug on mkt, mfr had no way to know would cause cancer
   b. This makes less SL, brings in foreseeability & conduct
4. Yes, insurance: *Vassallo – uses 3R test ('98 case)*
   a. Yes, liab: D didn’t know silicone = hurt immune system (but could have known)
   b. Applies hindsight test (no liab if defect couldn’t be discovered by reas. testing)
   c. Dictum: implied warranty = insurance, whether D could know of defect
Reasons for/Against should seller be insurer (& no State of Art Def)?

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<tr>
<th>For</th>
<th>Against</th>
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<td>→ Compensate victims</td>
<td>→ chill intervention</td>
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<td>→ Spread Costs</td>
<td>→ bankrupt “good” providers</td>
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<td>→ More safety? Unclear, there seems to be a margin of safety</td>
<td>→ goal of law is to induce conduct capable of being performed</td>
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Unavoidably Dangerous Products

1. **Hepatitis**: no liab for blood transfusion, *Brody* (no way to detect hepatitis in blood)
   a. Use neg std, SL not effective; hospital = “service provider,” didn’t make blood
2. **Asbestos**: yes, duty to warn, *Borel* (1st case where P could prove neg.)
   a. No state of art defense, D = SL: *Beshada* ’84
      i. Cts, restatement have not followed
      ii. Cts. uncomfortable making mfrs insurers, especially in drug cases

Plaintiff’s Conduct:

1. Restatements
   a. **2R, com. n**: Unreasonable AOR (P knows defect & uses) bars recovery; no CN
   b. **3R sec 17**: Says comparative principles apply, look at state statutes (e.g., PA)
      i. NY: 50/50 rule: still do comparative neg.
   c. **EU, Article 8**: Liab. by producer not reduced even if 3rd party hurt
      i. Liab. ↓ if mfr defect & P’s contributes, depending on member state law
2. Most states use 3R/Daly “comparative fault” – reduce P’s damages by his contribution
   a. Misuse, alteration, etc. not separate defense, but included in comparative fault
   b. Came from *Daly v. GM* – abolished CN/AOR in favor of comp fault
      i. Defect = exposed push button that did not hold in crash
      ii. P drunk, speed, no seatbelt or doorlock; drunk relevant if no use belt, lock
3. Comparative or Pure: Objections to Comparative
   a. Apples and Oranges – don’t use CN for SL (Fox: a bad argument)
   b. Hurts SL, ↓ mfr’s incentives, esp. foreseeable misuse, (Fox: should consider)
   c. Jurors cannot compare (Fox: not really, they can – see *Li*)
   d. Felicitous result (*McCaleb*): but don’t think UAR should be total bar
      i. Policy Q: should it be compared or complete defense? (like *Gyerman*)
      ii. Fox: not easy to separate defect & conduct
   e. Comp. Neg Overdeters (Mosk dissent): products safe for reckless; spend too much on safety, make product too expensive
      i. Terrible rule to allow “comparative” UAR
4. **Melia v. Ford** (837-8): (uncrashworthy) door assembly
   a. P caused crash, but door assembly just didn’t work; this ct. excluded CN evidence
   b. 3R allow P less damages if combines w/defect to cause harm & P’s conduct doesn’t conform w/ rules – but depends on applicable rule (here, PA)
5. No def: foreseeable misuse *Leboeuf* (P drunk, drove 100mph on tires that could take 85)
6. No UAR if no choice, *Messick* (drove car w/ defective steering, couldn’t buy new car)
   a. Cigs: UAR for smoking, but can’t assume risk for addictive qualities of cigs
8. Mfr should pay if products defective even for intended and expected normal use
FEDERAL PREEMPTION, CIGARETTES

1. Theory of fed preemption: state police powers, federal powers to regulate commerce
2. The law of preemption: when does state reg. conflict w/ fed policy?
   a. Presumption vs. preemption
   b. Preemption depends on intent of Congress
      i. Express or Implied (when Congress has occupied field; rare)

Cipollone - fed cigarette labeling & advertising Act

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<th>'65 Act “smoking may be hazardous”</th>
<th>'69 Act: “smoking is dangerous”</th>
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<tr>
<td>➔No other statement re: smoking &amp; health shall be required on any cig package</td>
<td>➔No other requirement or prohibition based on smoking &amp; health shall be imposed under State law re: advertising or promotion of cigs</td>
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<tr>
<td>➔No other statement shall be required in the advertising of cigs (Can’t say more, can’t say less)</td>
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1. Facts: Rose C began smoking L&Ms in 1942, died of lung cancer 1984
   a. Husband & estate sue for failure to warn, express warranties in advertising, fraudulent misrepresentation, design
2. Preemption & Common law tort claims:
   a. '65 ACT doesn’t preempt tort claim (P argued’65 warning not enough)
      i. But this isn’t like state regulatory body making requirement
      ii. Sup Ct held common law action not a “requirement” so P can recover
   b. '69 ACT: does expressly preempt torts (just short of “no tort actions allowed”)
      i. Language all but bans: “prohibition” “imposed” (not required)
3. Claims preempted:
   a. Liggett failed to provide adequate warnings of cigarette’s consequences
   b. L expressly warranted that their cigs didn’t present any significant hazard
4. Not preempted:
   a. Fraudulent Misrep 1: violated state prohibition against promo statements minimizing hazards; labeling not about fraudulent concealment
   b. FM2: fraudulent misrep & concealment (conspiracy to conceal)
   c. Defective design
5. Are cigs defectively designed?
   a. Barker std: Fails to perform as safe as ordinary consumer would expect
      i. Design causes injur: Ds burden to prove injury outweights risk
   b. 3R & Piper: Foreseeable risks could have been avoided by reasonable alt. design
6. P’s conduct:
   a. Did she assume risk? Reasonable or unreasonable? Primary or secondary?
   b. D argues P assumed harm caused after 1965
   c. Under 2R comment n (747) & see comment I (746): probably bar if UAR
   d. Under 3R? p 838
      i. Under Daly: could go to jury, even if UAR (not a bar to recovery)
      ii. Mosk would say (836-7): UAR a total bar
FOX EXAM TIPS

- On exam, people bring motions to dismiss, summary judgment, judgment nonwithstanding verdict
  - Do what you think you would do as litigator/judge
- Don’t clutter problem w/ noise – write things you’re unsure of at end (“I did not mention AOR because I thought it wasn’t relevant”)
- Jt. & severally liab. – do this b/c D wouldn’t be liab. otherwise
- Indemnity: Marshall – company sued for icy hill truck problem; seek indemnity from truck driver, the real wrongdoer
- Contribution:

Battery:
act (contact/touching; must be unpermitted),
intent (only intent to make contact; “unlawful intent” not helpful; it’s a conclusion), cause
harm (all you need is unpermitted contact)

Defenses: I didn’t touch you (denial); intent (if Putney said no intent to touch); D must plead & prove aff defs.

Vosberg – D said he didn’t mean to hurt P;
- D brings judgment nonwithstanding verdict; it focuses on question whether intent to harm is necessary element of prima facie case
- If P admits at outset that D didn’t mean to hurt P; then can bring up as motion to dismiss
- If leg so diseased, would fall off in a month, damages = ask what exactly did kick cause -

NEG
- Reasonable Person test – helps you tell if neg. is there; falling below std. of reas. care; should not impose unreasonable risk of harm on others
- Sometimes calculus of the risk might also help if RP not enough
  - B:PL or COA:COP; victims can value risk (their own lives) themselves
  - Is investing in safety worth it? If not, no neg.
  - Custom – not cont
- Jadranska – close tops & open all lower hatches (throwing them in darkness); and the only good risk minimizer is to close hatch doors;
  - Shipowner announces very clearly to everyone that this is the practice; always stay out of hold after work is completed
  - Burden: time & money to close hatch doors;
  - P*L: Loss is high (death); probability low: don’t expect anyone to go into hold
  - Would ship owner have any chance to dismiss case before trial?
    - Maybe?
  - AOR not a complete defense; just Comp Neg.
    - If in 50/50 juris, higher chance D will win on motion to dismiss
    - If not 50/50, depends of judge’s view of individual responsibility & corporate responsibility

Neg per se – safety statute that sets safety std. of care (Osborn)
- conclusive proof of ev w/ very small gateway (crossing yellow line to avoid child)
**RIL** – about evidence & how to prove neg. from circumstantial evidence

- **98%** = logical inference from the facts themselves; P couldn’t have known what had happened *(Byrne v. Boadle)*
- Other **2%** = policy, ct. shifts burden to D b/c D has violated statute (lifeguard case; statutory violation, but question of causation to D), giving P more equity
- Usually a jury question; rare that jury MUST draw inference & D has no defense
- Question is if you can infer neg and who caused it

**Cause in fact:** sometimes must ask hypo to figure it out

- Grimstad: we know D neg. but don’t know if no neg would have saved P
- Ask if but-for neg., would P have been saved?
- But-for works when there are not 2 simultaneous causes

**Cause in law:** even if but-for cause, not necessarily prox cause

- 3 screening devices: (1) neg. cause in fact unrelated to harm (2) directness/foreseeability (3) shift in responsibility
- *Berry* – tree case; but for city’s neg, P would not have been killed; but purely
  - CN case: but for P’s neg. in driving too fast, would not have been hit by try, but it was pure luck; really unrelated except by happenstance
- *Gorris v. Scott* – another happenstance case; penned
- If prox cause questionable: go to jury

**Strict Products Liab**

- Be familiar w/ 2R & 3R stds. & difference
- Be familiar w/ *Barker* as real alternative to restatements (3R), much more friendly to P – if no consumer ex, D has burden to do risk/utility
  - *Piper* – 793, sympathetic w/ 3R
- AOR – *Daly* – accepted by majority (but Mosk = different way of thinking about it)
- For secondary AOR, it’s folded in as comparative neg.
- P’s conduct: 373 – examples for P’s conduct vis-à-vis D’s conduct; most states have comparative regime
- Joint Ds: if jt & severally liab, P can go any one of them, as between Ds, can do contribution

Increase in accidents and mass disasters = greater sympathy for P & that we should share risk

Author: traditional thinking that law follows values; values get molded by law & solutions we have to problems

**Burden of Going Forward** – RIL case, can “D meet burden of going forward”

- Minimum threshold to raise question of material fact – no summary judgment
- Takes the edge off of inference for D

**Burden of proof** = preponderance of evidence
  - = affirmative showing above and beyond BOGF