

I. Torts in general

From Latin *tortus* – “twisted”

Torts is about fault - no liability without a wrongful act

Wrongful acts are defined by law

Sometimes, fault is presumptive - some situations create a situation of affirmative responsibility

But usually you have to prove that the act was wrong and intentional

Fault is independent of compensation

Tort Reform - Willie Tinker in the 1950's - it's not the corporation's fault!

Court responded- unsafe product, unreasonably dangerous = strict liability – R.2d 402(a)

Law & Economics - Most important revolution in torts

- Everything is cost-benefit analysis
- Creates a thought change in tort law - what is fair/just/reasonable to probability of harm
- What is the magnitude of the harm?
- Cost of prevention?
- Social utility of object
- Decisions based on consequence - very bad, there must be some way to assign blame based on the action itself, not its consequence
- Prophylactic Counseling - How people can avoid liability

Consumerism and Competition - U.S. tort system is costly

- dead-weight effect on competition
- consumers pay more than they benefit
- Liability needs to be predictable
- What makes torts work is that it is **not** predictable

II. Intentional Torts

Basic Formula – Act + Intent + Causation

Intent – Without Intent, there is no liability for an intentional tort!

- Specific Intent – it’s your goal to do something - purpose
- General Intent – you know with substantial certainty that negative consequences will result
- Don’t need to prove D intended injury, only that D intended act
 - **Garratt v. Dailey** – five year old boy pulls out chair from under aunt
 - D must intend to harm P, or foresee the consequences of his act.
 - Can judge intention by determining probable outcome
 - Intent is a deduction – often a question of fact (it was here)
 - Children cannot show tortious intent, but...
 - 5+ can be liable for trespassory torts if they show intent
 - 7-14 – intent is rebuttable presumption
 - 14+ – Capable of manifesting intent
- Transferred Intent – **A intends to commit a tort against B, ends up injuring C**

- Must have tortious intent to transfer, either specific or general
- Applies only to five trespassory torts
- **Talmage v. Smith** – Man throws stick at boys on shed roof, misses intended target but hits other boy in eye
 - Act was done with certainty that something bad would happen
 - If no trespassory intent, no transferred intent
- Recklessness – **An unjustifiable failure to avoid a known risk**
 - **Matthias v. Accor Economy Lodging** – Motel manager knew rooms infested with bedbugs, refused to allow spraying, rented rooms anyway
 - Conduct here was found equivalent to Battery
 - D who knows of a risk and willingly disregards it is acting with intent, can face punitive damages

Five Trespassory Torts – Battery, Assault, False Imprisonment, Trespass to Land, Trespass to Chattels. AKA “Dignitary Torts.”

Battery – Harmful/Offensive Contact

- **R.2d §13 and 18** – Defined
 - Person acts intending to cause harmful or offensive contact, or an imminent apprehension of such contact
 - Harmful or offensive contact results, directly or indirectly
- **Wallace v. Rosen** – Teacher evacuating students tells parent to move, touches her, parent falls
 - Intent is not a generalized hostile intent, but a specific intent to “invade the interests of another in a way that the law forbids”
 - Here, law prohibiting touching in a “rude, insolent, or angry manner”
 - **Fundamental Test – Would a Reasonable/Prudent Person find the contact Offensive?**
 - No such thing as negligent battery
- **Fisher v. Carousel Motor Hotel** – manager snatches plate of food away from black NASA employee at luncheon, saying “no Negroes served here.”
 - Assault and Battery does not require a defendant to touch the plaintiffs' body
 - Touching or grabbing anything connected with the plaintiff's body in an offensive manner is assault and battery – here, the plate of food

Assault – Reasonable Fear of Imminent Battery

- **I de S v. W de S** – D goes to tavern, finds it closed, beats on door with hatchet. P's wife tells him to go away, D swings hatchet at her.
 - Physical harm not required for assault
 - Look at both P's fear and D's action – reasonableness standard
 - Assault is about intimidation/fear
 - **P must be aware of the threat**
 - **Threat must be immediate/probable**
 - **Threat must create apprehension**
- **Western Union v. Hill** – D's employee tells P “come back here, let me pet you, and I'll fix your clock,” reaches for P, stopped by counter

- Assault does not require a battery, only an attempt to commit a battery
- D's Threatening Language + D's Actions to effect assault + P's well-founded fear = ASSAULT
 - Threat must be immediate, capacity must be real

False Imprisonment – confining a person against their will without lawful authority

- Confinement can occur by physical barrier or by threat of force
 - Moral, economic, future threats don't count
- Must be no reasonable means of escape
- Length of time confined is irrelevant – you can be falsely imprisoned for even a second
- P must know they are being confined. Exception – injured, minors
- **Big Town Nursing Home v. Newman** – nephew admits P to nursing home, P confined against his will in violation of agreement, punished for attempting escape, cannot contact anyone to help, finally escapes
 - False Imprisonment - the direct restraint by one person of the physical liberty of another without adequate legal justification
 - If a person is competent, nobody else can consent to confine them
 - There is no implied authority to detain people without a court order
- **Parvi v. City of Kingston** – Police find drunk who says he has nowhere to go, officers take him to golf course and dump him, drunk wanders onto highway
 - There is no liability for false imprisonment unless the person being confined
 - 1) is aware of the confinement, or
 - 2) is harmed by it
 - Here, P couldn't remember if he had been confined, so no liability
- Hardy v. LaBelle's Distributing Co. – Employee accused of stealing, called into manager's office, confronted by management and police. Kept for 45 minutes
 - The restraint need not be physical; a person can be restrained by acts or words that the person fears to disregard.
 - Here, no liability, since P was in fact free to leave at any time – economic coercion is not enough
- **Enright v. Groves** – D sees P violating leash law (a crime), arrests her for not showing ID (not a crime).
 - An officer who has a valid warrant, or probable cause that an offense has been committed, may arrest
 - Without either one, no lawful authority to arrest – arrest without authority is false imprisonment
 - If suspect is convicted, that's a defense to the tort
- **Whittaker v. Sandford** – cult leader holds woman and her kids on boat offshore, refuses to let them leave unescorted
 - A person can be falsely imprisoned without direct physical restraint simply by not allowing them to leave

Trespass to Land – Invasion of a person's right of exclusive possession of land

- Different from Nuisance
 - Trespass to land – Interferes with use and possession – permanent things
 - Nuisance – Interferes with use and quiet enjoyment – transitory things

- **Bradley v. ASARCO** – Copper smelter dumping heavy metal particles on land, SO₂ and gases into air
 - Trespass and nuisance not mutually exclusive
 - Heavy metals were trespass – they stayed
 - Gases were nuisance
- Exceptions –
 - If you supplant a public function, you give up certain rights to control property
 - Places of Public Accommodation (any place open to public) – cannot discriminate on basis of race, religion, national origin – Civil Rights Act
 - No right to exclude picketers – Fair Labor Standards Act
 - Airspace – only have possessory interest in air immediately adjacent to land
 - Tunnels/Mines – split, most states hold it is trespass to tunnel/mine under another’s land w/o consent, but mining states allow you to follow ore veins wherever they lead, as long as it is unbroken.

Trespass to Chattels – Invasion of a person’s right of exclusive possession of moveable property

- Must show that property has been damaged
- Four conditions – one must apply for tort
 - 1) D dispossesses rightful owner of their chattel
 - 2) chattel is impaired in condition, quality, or value
 - 3) owner is deprived of the use of the chattel
 - 4) If the owner suffers bodily harm or harm to some person or thing in which the owner has a legally protected interest.
- **CompuServe v. Cyber Promotions** – D sent spam e-mail over P’s network, spam was costing P members, \$, time, reputation
 - P suffered monetary damages, impaired condition of their network, lost customers, bad rep – enough to prove damage
 - Property interests become real when value becomes real
- If item can be returned, it’s not trespass, it’s conversion.

Conversion – Intentional exercise of control over another’s property that interferes with rightful owner’s use

- R.2d §222A – “Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may be justly be required to pay the other the full value of the chattel.”
- NOT A TRESPASSORY TORT – transferred intent does not apply
- Conversion does not require that property is damaged, trespass does
- If a person can get their property back on demand, it’s not conversion
- **Pearson v. Dodd** – Former employees of D broke into office, copied documents, gave them to newspaper columnist who wrote about them
 - Original documents not converted – they were replaced
 - Copies not converted – they had no business, literary, or scientific value – not intellectual property
 - No conversion b/c no damage to value, condition, quality, or use
- Conversion applies not only to object, but to things that represent or control an object (keys, titles, deeds, stock certificates)

- No conversion until return of property is demanded and refused

Intentional Infliction of Emotional Distress – In the absence of privilege, one person subjects another to behavior reasonably certain to bring about real and severe emotional distress

- NOT A TRESPASSORY TORT – transferred intent does not apply
- Right to be free from terror, intimidation, and assault.
- 3 Kinds -
 - “Outrageous” Action – simply crazy behavior
 - Acts that are malicious, vicious, violent – so obviously imply malice they disclose intent
 - Specific, calculated action designed to cause harm
- D liable for both distress and resulting physical harm
- Courts cautious in applying it
- **State Rubbish Collectors v. Siliznoff** – P is threatened by D’s with physical harm, coerced into joining mob-controlled association. P became physically ill, could not work for several days.
 - A threat does not have to be an assault to be actionable - threatening a person in order to cause them mental distress is itself a tort, as long as the mental distress also causes physical distress.
 - Threats can be purely verbal
 - Tort based on "the right to be free from negligent interference with physical well-being."
- **Slocum v. Fair Food** Stores – D’s clerk tells P “you stink,” P suffers heart attack.
 - Test is objective
 - D liable only for conduct "especially calculated to cause mental damage of a very serious kind."
 - Simple vulgarity is not enough
 - Commercial establishments (hotels, theaters, common carriers) are held to a higher standard
- **Emotional Distress Must Be Severe!**
- **Harris v. Jones** – D makes fun of P, his employee, for stuttering
 - **Four-Part Test, all four must be met**
 - **1) conduct must be intentional or reckless**
 - **2) conduct must be extreme and outrageous**
 - **3) must be a causal connection between conduct and distress**
 - **4) distress caused must be severe**
 - Here, P did not meet prong 3 (distress preceded conduct) and 4 (not disabling distress)
- **Taylor v. Vallelunga** – P sees D beat her father, D did not know P was present, P not physically injured
 - D must intend to inflict distress on P themselves – no transferred intent
 - No knowledge of P’s presence, no intent
 - Bystander IIED requires
 - Close relationship between P and injured
 - Direct Observation of Harm
 - Knowledge of relationship b/w P and injured on part of D

- Risk of over-deterring behavior if IIED applied too broadly

III. Privileges and Defenses to Intentional Torts

Defenses to Intentional Torts are Defenses to All Torts

Factual Defense – “I Didn’t Do It!” – Biggest Defense

Consent

- Consent can be express or implied
- Must be real, not induced by fraud, deceit or duress
 - If it is, consent is invalid – courts will act as if there never was consent
- Minors cannot Consent
- Consent in Emergencies
 - Consent for person who helps another in good faith in emergency (good Samaritan law) – defense to Tort liability
 - Can’t sue if given medical care in emergency w/o your consent, but still can sue for malpractice
 - To make an emergency argument, must prove that not acting will be fatal.
- Default is that there is no consent unless proven
- **Hackbart v. Cincinnati Bengals** – P, of Denver Broncos, struck in head by Bengals player during break in play. D did not intend to injure P, neither P nor D reported anything to officials and resumed play. P later claimed neck injury.
 - Did P consent to be hit? If so, appropriate punishment found w/I game’s rules.
 - Remanded to see if P’s rights against assault had been violated
 - Court must look to custom, rules, anecdotes, experts, history, public perception, economic analysis to determine scope of rules
 - Rules and customs don’t matter unless there is specific consent
- **Mohr v. Williams** – P gives consent for ear operation, doctor operates on other ear instead
 - Doctors cannot operate w/o consent in non emergency situations, or else assault
 - Fact that P’s physician was present doesn’t matter; he wasn’t authorized by P to give consent
 - Grant of power to consent must be in writing
- **De May v. Roberts** – Dr. D goes to deliver P’s baby. D brings his friend, who was not a Dr., to help. Friend present during delivery, P finds out later he wasn’t a Dr.
 - In order for consent to be valid, it must be informed. Can’t get consent by omission.
 - Fraud or deceit voids consent
 - Dr. had obligation to disclose friend was not a Dr. Failure to do so voids consent.

Self-Defense and Defense of Others

- Self Defense is generally OK
 - To use lethal force in self-defense only if you reasonably believe you or another person will suffer death or serious injury
 - Force cannot be retaliatory, must be based on a reasonable perception of threat
- Defense of others – If another person is in jeopardy and you decide to assist, you are exercising their right of self-defense

- Split – Do you have the right to defend them if they have a right to defend themselves, or must you make your own reasonable perception of a threat?
- If someone breaks into your home, presumption is that they are there to do violence and lethal force justified –
 - But this is a rebuttable presumption. If they are not a threat, can't use lethal force
- **Katko v. Briney** – D sets up spring gun to defend shack containing antique jars on their property. Burglar trips spring gun, gets leg blown off
 - Lethal force can never be used to solely defend property
 - Here, Briney's didn't live in the shack
 - People can't do indirectly what they can't do directly

Recovery of Property/Shopkeeper's Privilege

- Shopkeepers can stop and detain people they reasonably suspect of shoplifting for a reasonable time without liability
- Does not privilege chasing a shoplifter, shopkeeper's privilege vanishes outside store and immediate area
- **Bonkowski v. Arlan's Dept. Store** – D's security stops P in store parking lot after another customer said she was shoplifting, forced P to empty purse
 - No liability, Shopkeeper's privilege applies in parking lot
 - Here, reasonable suspicion that something was stolen

Necessity

- Defense to all torts, but very fuzzy
- The more contemplative the act, the less likely necessity will justify it
- Must distinguish b/w apparent necessity and actual necessity
- More likely to be upheld if act done in official capacity than by private individual
 - Will often be controlled by statute, claims usually covered by compensation funds
- **Surocco v. Geary** – During 1853 SF fire, D mayor ordered P's house destroyed to stop progress of fire.
 - Here, P's house was a nuisance – it was helping to spread fire
 - Right to destroy private property to protect public safety from greater harm recognized in law
- **Vincent v. Lake Erie Transport** – D's ship docked at P's dock, storm blows in, ship refused leave, storms drives ship against dock and destroys dock
 - Necessity is not a defense to damage of private property by private actor trying to protect their own property– must compensate owner for loss.
 - Incomplete privilege – you have a right to act, but you still have to pay
 - You do not get privilege for doing something in which you have a vested interest in doing

Schools – teachers can't use excessive force, discipline must be reasonable, student must know what they are being punished for. Home – “a privilege to punish.”

Justification – “It's a research term.” Moral constructs have some place in tort law, but they're never firm or fixed.

IV. Negligence

Negligence allows behavior to be challenged even though there is no wrongful act and nothing was done intentionally

Basic Negligence Formula

Duty of Care + Breach of Duty + Causation + Injury = NEGLIGENCE

- Duty of Care – duty to use reasonable care, standard to conform to.
 - What is appropriate standard/ behavior? What should/should not be done?
- Breach of Duty – conduct that is inconsistent with standard of care
 - What didn't conform to the duty? Was was/wasn't done that shouldn't/should have been done?
- Causation – If cause is too far out, it falls apart
 - Cause decisions are ultimately political, judges can roam free!
 - Causation, substantial factor, cause-in-fact, proximate cause
- Injury – Must be actual injury to P's person/property. No injury, no negligence
- Considerations
 - Can outcome be foreseen, or is it hindsight only?
 - Proximate cause – foreseeability doesn't matter
 - Where did standard of care come from? License? Special Relationship?
 - Force of intervening offense – Are intervenors liable?
 - Look at sequence of events – what happened first?
 - Cause in fact – “but for X, there would have never been Y.”
 - Did plaintiff contribute to his own harm or assume the risk?
 - How do you prove what is reasonable? How is reasonable defined?
- **Lubitz v. Wells** – D hit P's son in head with golf club left on ground
 - Here, golf club not intrinsically dangerous, not negligent to leave it on ground
- **Blyth v. Birmingham Waterworks** – BWC installs water mains and hydrants, three years later one of them freezes and bursts, flooding P's house
 - Frost was not foreseen, no reasonable man could provide for it.
 - Duty of care is assessed based on what is reasonably required of the D.
- **Gulf Refining v. Williams** – exploding gas can caused by frayed bunghole threads
 - An event is foreseeable if a reasonable person believes, or should believe, that a dangerous condition exists as a result of their actions.
 - Here – actual notice – refinery knew threads were frayed
- **Chicago B&Q RR v. Kravenbuhl** – trespassing kids playing on RR turntable, foot gets caught in spindle and severed.
 - The standard of care is what a "reasonable" person would take "as a man of ordinary care and prudence."
 - When children are involved, more precautions may be required – attractive nuisance
 - Does not apply to natural hazard
 - Must be the sort of risk a child can't foresee

- Duty to refrain from wanton/willful injury to unanticipated trespassers
- Anticipated trespassers (incl. children) owed higher duty of care
- **Davison v. Snohomish County** – P’s car crashes through guardrail
 - Burden placed on a party to avoid negligent conduct must be a reasonable burden justified by the circumstances
 - Sometimes "due care" is all about how much money it is reasonable to spend
 - Better guardrails too expensive then – 1928 – but not 40 years later!
- **U.S. v. Carroll Towing** – chartered barge, bargee left and didn’t return, lines broke and barge crashed and sunk.
 - **Mathematical Rule for Liability: If (probability * cost of injury) < burden of precautions, then Liability. Otherwise, no liability.**
 - When is the cost of guarding against an injury prudent? Follow formula!

Standards of Care

- Reasonable and Prudent Person
 - Negligence is most often judged by this standard
 - Based on composite reasonable person, not any specific person – judgment of individuals too varied and inconsistent to be useful
 - **Vaughan v. Menlove** – D built hay stack near P’s house. P warned about fire danger from fermenting hay. D said he’d “chance it,” hay caught fire and burned down P’s house
 - Reasonable person would have concluded that stack would lead to fermenting hay and fire
 - **You can’t just do your best or what’s good enough, you have to do what is reasonably prudent**
 - **Delair v. McAdoo** – worn out tire on D’s car causes crash
 - **If you know or reasonably should know, of a dangerous condition that you are responsible for correcting and you do not, you are liable**
 - Here, reasonable and people are capable of understanding and correcting risk
 - Courts can impute knowledge
 - **Trimarco v. Klein** – P hurt when shower door shatters, D didn’t use safety glass, wasn’t required to
 - When proof of an accepted practice is accompanied by evidence that the defendant conformed to that practice, duty of care is established
 - Questions on this are for juries
 - Duty of care does not need to be established by formal rules, but may be established by custom
 - **Cordas v. Peerless Transportation** – Man was robbed, robber got into cab, D cab driver hits brakes and jumps out, cab hits P and her two kids
 - Emergencies lower the duty of care so that a person is held to a lower standard for negligence
 - Cannot use emergency exception if you caused the emergency
 - You must have no time and no other options
- Diminished/Differentiated Capacity – lower duty of care for handicapped, minors, insane
 - Must live down to your lowest capacity

- Diminished capacity is not mere stupidity, but about tangible mental illness. Stupidity does not lower the standard of care.
- **Roberts v. Louisiana** – P blind man went to use bathroom, did not take cane, bumped into D, who was injured
 - Handicapped still have to show their conduct was reasonable in light of their disability. Here, it was
- **Robinson v. Lindsay** – D, 13, tows P, 11, on inner tube, P's thumb tangled in line and severed
 - Children are usually held to lower standard of care than adults, taking into consideration their age, experience, intelligence, training, and maturity
 - In cases where children are engaging in dangerous activities (e.g. driving) they are held to an adult's standard of care
- Case Example - **Breunig v. American Family Insurance** – D had acute schizophrenic episode, thought God was controlling her car and that she could fly, hit truck and flew through windshield instead. No prior warning of delusion
 - In order for insanity to be a defense, it must
 - 1) affect the person's ability to understand their duty of care or control themselves in a reasonable matter
 - 2) there must be no warning of an onset of illness or hallucination
 - A temporarily insane person enjoys a relaxed duty of care, a permanently insane person does not
 - 1) to make the person incurring an injury bear the loss
 - 2) to induce the relatives of the insane person to control them
 - 3) to prevent insanity from being falsely claimed as a defense
 - Applies only to negligence torts, not intentional torts
- Professionals – higher duty of care
 - Professionals held to the standard of care generally accepted in their profession
 - **Heath v. Swift Wings** – Pilot crashed, killing himself, wife, and son. Wife & son's estate sues D owner of aircraft for negligence
 - X's are to be judged by the standards of a reasonable and prudent X
 - Duty of care for professionals is a defined, uniform standard for each profession (doctor, lawyer, pilot, etc.)
 - **Hodges v. Carter** – P loses business in fire, insurance doesn't pay. D lawyer serves process incorrectly, loses case. P sues lawyer for malpractice
 - As long as a professional is following the established rules of their profession with their best judgment and due diligence, they are never considered negligent.
 - Lawyers not negligent if they lose a case
 - Legal Malpractice – most common forms
 - 1) Chronic Neglect - not answering calls
 - 2) Failing to appear
 - 3) Dealing in bad faith that results in legal injury
 - 4) Co-mingling of assets
 - Medical Malpractice – patient has right to know
 - 1) Risk of treatment & probabilities
 - 2) Consequences of non-treatment

- 3) Nature of the treatment
 - 4) Alternatives
- **Boyce v. Brown** – P gets broken ankle set, screw causes infection, P sues original doctor
 - 1. Physicians are expected to possess the average level of skill and learning of a physician in their community, and to apply that skill with reasonable care to their patients.
 - 2. For a physician to be liable for malpractice, they must have done something which the general standard of care forbids, or failed to do something which the general standard of care requires.
 - 3. The standard of medical care must be affirmatively proved; a jury is not allowed to speculate what the standard is or should be.
 - 4. Negligence must be affirmatively proven; the fact that a treatment fails is not itself evidence of negligence.
 - 5. A negligent departure from the standard of care must be established by expert testimony, unless the negligence is "grossly apparent."
 - 6. Testimony from other physicians that they would have treated a patient differently is not itself evidence of malpractice unless the treatment followed deviated from the standard of care.
- **Morrison v. MacNamara** – P fainted during test while standing and hit head. National standard of care for test said patients were required to be sitting, local standard said OK to stand.
 - National standards apply in all med-mal cases (but not medical resource cases)
 - Medical care and training standardized throughout nation, so doctors held to a uniform standard of care. "Country Doc" exception no longer applies
- **Scott v. Bradford** – P goes in for hysterectomy, develops complications from botched surgery, has to have more surgeries. P sues D for failing to disclose risks
 - Informed consent = disclosure of all material risks prior to a medical procedure
 - New rule on informed consent applied only prospectively, not retroactively. Here, P is SOL.
- **Moore v. Regents** – P diagnosed w/ leukemia, D uses cells to make cell line and make \$, without informing P.
 - Informed consent requires a physician to explain any personal or economic benefit they have in the treatment to a patient prior to beginning treatment.
 - Professionals must separate their own interests from those they are serving

Aggravated Negligence – Certain torts, you can only prevail if gross negligence

- Possibility of Punitive Damages
- Contributory Negligence much harder to prove

Violation of Statute

- Failure to comply with criminal statute not per se evidence of negligence

- No obligation to intervene on behalf of a third party outside of statute
- Usually legislature must make statutory compliance an explicit cause of action. Scalia: “Congress does not hide elephants in mouseholes.”
- Perry v. S.N. and S.N – P’s attended day care center, owner of center sexually abused them. D neighbors saw abuse and did not report.
 - Duty to obey law does not create duty of care outside of common law or statute
 - Courts will take great care in imposing common law duty – they didn’t here.
- Zeni v. Anderson – P walking on right side of road through snow, facing away from traffic. Hit by D, whose windshield was fogged and was driving too close to curb. D tried to claim P was contributorily negligent.
 - Violation of a statute only creates a rebuttable presumption of strict liability.
 - However, the evidence required to rebut the presumption must be positive, unequivocal and strong.
 - If a defendant is liable even after exercising due care and having a reasonable excuse, it is strict liability, not negligence.

Proof of Negligence

- Courts and Juries – Factual Proofs
 - Comparative Case Examples – **Goddard v. Boston and Maine RR** and **Anjou v. Boston Elevated Railway** – banana slips and fall cases.
 - Difference is that banana was fresh vs. rotten.
 - Indicative of a duty of care in cleaning station
 - Proof of an accident is not proof of negligence – the evidence must speak!
 - Imputed notice – what could D do to rebut inference of negligence?
 - **Joye v. A&P** – banana slip and fall case
 - In order to be held negligent, a D must have either
 - 1) caused the hazard it had a duty to prevent
 - 2) had actual notice that a hazard existed that it had a duty to prevent.
 - **Ortega v. K-Mart** – milk slip and fall case
 - To show constructive notice, P must prove that the defendant had notice of a hazardous condition they are responsible for and sufficient time to correct it.
 - Knowledge may be demonstrated by circumstantial evidence
 - **Jasko v. F.W. Woolworth** – pizza slip and fall case, wax paper service over terrazzo floor
 - When operating methods that inherently create a hazard are used, constructive notice need not be shown
 - **H.E. Butt v. Resendez** – grape slip and fall case, with railing, non-skid mats, warning cones
 - Not all conditions create inherent negligence... only those that fail the test of reasonable care
 - Here, care reasonable

Res Ipsa Loquitur

- Designed to assist D in obtaining evidence. Proof-assisting doctrine.

- Must be the kind of event that would not have occurred unless the person holding the duty of care breached the duty
- **Defendant must control the instrumentality of the harm at the time of the breach, NOT ALWAYS THE TIME OF THE INJURY!**
 - RIL is rebuttable, defendants can assert
 - 1) they weren't in control of the instrumentality
 - 2) they were exercising reasonable care in its use, when the harm occurred.
 - (Or they could assert an alternate theory of liability; try to make them plausible...)
- Defendant must be in a better position to assess the evidence to a plaintiff
- **Proof of breach, not proof of causation!**
- **Byrne v. Boadle** – P walking past D's flour shop. D's employees lowering barrel down, barrel came free and hit D.
 - To assert RIL, P must have suffered an injury by something that was under the D's control, and would not have happened but for D's negligence.
 - Shifts burden of proof to D to prove there was no N
- **McDougald v. Perry** – Tractor-trailer case, spare tire came loose after owner failed to maintain chain that held it
 - N can be inferred in matters of common experience without expert testimony
 - RIL should never result in strict liability – need proof of causation
- **Larsen v. St. Francis Hotel** – flying furniture case
 - RIL not applied, hotel could not be expected to control behavior of guests
 - Without exclusive control and duty of care, RIL cannot be used
- Case Example – **Ybarra v. Spangard** – P goes in for operation, gets his arm hurt
 - RIL can be asserted against multiple D's who share in a common duty of care, even if you don't know which one caused the injury – they all had a duty of care, they all were in control over an instrumentality of harm (RIL is the solution to the doctor joke)
 - All D's have to do to escape RIL is prove they couldn't have caused the harm
- **Sullivan v. Crabtree** – Guy hitches ride in truck, truck driver loses control and crashes.
 - RIL does not require a jury to infer negligence – they can infer N, presume N against D, require D to prove he was not N, or even make irrebutable presumption of N and directed verdict.
 - Here, Jury was not required to infer N – how they use RIL is up to them

Proof of Causation – What proves causation? Risk perceived vs. Risk that occurred?

- Don't be so seduced by simplicity! Was it a substantial factor? If it was a breach, fine, but that doesn't make it a cause of the accident. Or does it? Is it a natural and probable consequence?
- To get to Proximate Cause, you must get through Cause in Fact - "but for the act" doesn't work when there are multiple factors
- Is the injury one of a class you would expect?
- Did they set in motion an event that led to an injury? Did one thing cause the next?
- Can breach of duty and cause be so connected that a single event can bring them together?

- What is the risk perceived? Can only be liable for foreseeable consequences? Not always:
- **BEWARE OF POST HOC, ERGO PROPTER HOC! - Just because it happened afterward doesn't mean it was a cause**
- **Reynolds v. Texas & Pac. Ry. Co.** – Fat woman rushing to catch train, falls down unlighted stairwell
 - Causation is an issue of fact: if the jury says you were negligent, it doesn't matter that it could have happened another way.
 - You set up the condition, you pay
- Case Example - **Gentry v. Douglas Hereford Ranch** – trips, falls, shoots lady. Did stairs cause it?
 - Proof of causation is satisfied by proof that a defendant's conduct was a cause in fact of the injury.
 - A party's conduct is cause in fact if, but for the fact that the conduct occurred, plaintiff would not have been injured.
- **Daubert v. Merrell Dow Pharm.** – Bendectin case
 - Can use statistical projection to prove causation
 - General rule – must prove X doubles chance of harm to be cause in fact
 - Judges serve as gatekeepers of scientific evidence, will look to
 - Whether the hypothesis can be tested
 - whether it has been peer-reviewed or relies on accepted sources
 - how much the experts have been paid for their testimony and how that payment has affected their judgment
- **Summers v. Tice** – two shoot at quail, both miss, one bullet hits P in eye. Don't know who fired that shot
 - Defendants who are engaged in negligence together may be held liable together for any injury they cause, so long as no other evidence is available
- **Sindell v. Abbott Labs** – DES case
 - You can hold all product makers responsible – enterprise liability
 - Obligation not to put bad products on to market - all DES manufacturers breached a duty of care
 - Can the manufacturers demonstrate they did not manufacture the product? If not, no way out of enterprise liability

V. Causation

- Proximate Cause - how close in time and space is causation to injury? How foreseeable?
 - Cause in fact is mechanical- how did plaintiff's action affect you?
 - Now, how proximate is the action?
- Ultimately comes down to one of two analyses
 - Hindsight – “But for” D’s actions, P would not have been injured
 - Forseeability – “D should have known” there was risk to P
- **Atlantic Coast Line R. Co. v. Daniels** –
 - Courts have to look at whether a wrongful act was a proximate cause of an injury
 - Legal cause is not always bounded in fact
- **Ryan v. NY Cen. RR. Co.** – D’s engine sets fire to woodshed, fire spreads, set’s P’s house on fire
 - Proximate causes vs. remote causes.
 - Proximate causes result from things that a person can control (a negligent act that leads to a fire).
 - Remote causes result from things that a person cannot control (the condition of adjoining structures, wind speed and direction)
- **Bartolone v. Jeckovich** – Car crash trigger’s P’s latent schizophrenia, disables him
 - P’s injury need not be foreseeable to D – P must take D as he finds him
- **In Re Polemis** – Unloading ship filled with benzene and fuel oil, workers knock down wooden plank that falls and ignites fumes
 - A N act that results in unforeseen consequences still creates liability
 - Anticipations of person involved are irrelevant
- **Wagon Mound I and II** – ship spills oil into harbor, oil ignited by dockworker, dock and other ships destroyed
 - People are generally responsible for the probable consequences of their acts. Liability is not based on the act, but the consequences - there is no such thing as "liability in the air."
 - Here, dock owner set own dock on fire, but ship owners can still sue for damage to their ships
- **Palsgraf v. LIRR** – P was standing on a LIRR rail platform waiting for train. Two men running to catch a different train, one of them carrying package of fireworks. This man jumped aboard the train, but almost fell. Guard on the train and one on the platform pushed him safely aboard, but package of fireworks fell and exploded. Shock knocked down set of scales on the other end of the platform, which fell on P.
 - **Before negligence can result from an act, there must be a pre-existing duty to the individual plaintiff, the observance of which would have averted the injury. But if the risk is abstract and unforeseen, there is no liability. The only negligence that a person can sue for is one that directly affects them.**
 - **The Risk Perceived Defines the Duty to Be Obeyed! – Cardozo**
 - Dissent – duty of care is to everyone, not just this or that P. Look to following factors:
 - Natural/continuous sequence b/w cause and effect?
 - Was one cause substantial factor in producing other cause?
 - Direct connection or intervening cause?

- Cause known or foreseeable to produce effect?
- **Yun v. Ford Motor Co.** – Yun stops car after spare tire falls, father killed crossing highway after retrieving it
 - Not responsible for events which are unforeseeable
 - events which are unforeseeable and highly extraordinary break causal chain
 - Popper – “juries don’t think post hoc ergo propter hoc is a fallacy” – so here, judge rules on facts?
- **Derdiarian v. Felix Contracting Corp.** – D has seizure while driving, goes into construction site, hits tank of hot enamel and is burned. Did constructors take enough precautions?
 - Here, Constructors didn’t exercise reasonable care
 - Risk perceived is the risk that manifested, albeit unusually – such incidents don’t cut off liability because there was no reasonable care
- **Watson v. KY & IN Bridge & RR Co.** – Gasoline tanker car crashes, spills. Duerr lights match. D wanted to set something on fire?
 - Does the risk perceived anticipate criminally negligent behavior? No. Events unexpected, one is not bound to anticipate them.
 - When an intervening criminal act occurs, go through and see how much the act played a role in the harm
- **Fuller v. Preis** – P gets in car accident, suffers head trauma, later commits suicide
 - Mental illness/suicide can be a proximate cause of harm
 - One can retain freedom of action and yet have an "irresistible impulse" to act and be incapable of voluntary conduct
- **McCoy v. Suzuki Motor Corp** – P rescues driver of D’s car who crashed, killed after making rescue. Proximate Causation?
 - Third parties injured while rescuing others can recover for negligence, but they still must prove proximate cause
 - Rescue Doctrine – “danger invites rescue” – liability of D to rescuer if
 - 1) the defendant was negligent to the person rescued and placed them in danger
 - 2) the danger was imminent
 - 3) a reasonable person would have concluded a danger and a need for rescue existed
 - 4) The rescuer acted with reasonable care in rescuing the injured.
- Case Example - **Kelly v. Gwinnell** – D got drunk at friend’s house, goes and crashes into P. Did friend’s acts cause P’s harm? Yes.
 - Proximate cause can be established for reasons of public policy
 - But watch the reasons!
 - In all cases, all host owes is reasonable duty of care. Not a guarantor of safety of others, but if you perceive a risk, you must do something about it.
- **Enright v. Eli Lilly & Co.** – DES case – P’s mother takes DES, P gives birth to premature baby with cerebral palsy
 - Cause will not pass along with generations – to do so would "require the extension of tort concepts beyond manageable bounds."

VI. Joint Tortfeasors

- Concepts
 - ***Vicarious Liability*** - when one person is responsible for the action of another - (i.e. an employer is responsible for the act of an employee)
 - ***Concurrent Cause*** - When events occur and cause harm simultaneously, in tandem, in a foreseeable sequence, in a manner that compounds.
 - ***Single Satisfaction Rule*** - Plaintiffs are generally entitled to full compensation for a loss, but are never entitled to more than 100% of their claimed loss - a single satisfaction. You must establish a fixed monetary claim.
 - ***Collateral Source Rule***: Jury can't be told of funds you receive from collateral sources (including insurance awards)
 - ***Release***: Release of claim, you end your rights; you no longer have a cause of action.
 - If you are dealing with multiple defendants and you sign a release for one, you've released them all!
 - ***Contribution***: When 1 Defendant sues other defendants for their share of damages
 - Can get contribution by impleading defendants into original case, or by filing contribution case (in some states, you hold the jury over).
 - If you do it independent of a lawsuit, there is one rule: in order for there to be a contribution action, there must be a viable cause of action (a chose action) between the party against whom contribution is sought and the original plaintiff. Otherwise, there's a constitutional problem - there's no case or controversy, and consequently no lawsuit. (Which one you use is a question of strategy - do you want to risk letting them drag you down?)
 - No viable cause of action for contribution if the statute of limitations WRT original plaintiff and defendants has run out.
 - There's no contribution for intentional torts
- **Bierczynski v. Rogers** – Drag Racing Case
 - If multiple defendants participate in the same tort (concerted action), they are all liable
 - Can be held liable even if their negligence does not directly harm anyone, since they encouraged and induced the negligent behavior.
 - restricted only to actors who are directly responsible for the tort
- **Knell v. Feltman** – L's passengers in P's car. P hit by D. P sues D, D claims P was contributorily negligent
 - third party can be held liable for negligence even if a plaintiff does not seek damages from them
 - Tortfeasors can seek contributions from third parties for acts of contributory negligence towards a settlement, but cannot seek contributions for intentional torts
- **Elbaor v. Smith** – P with broken ankle, enters into Mary Carter agreements with some D's - D's settled, and would be compensated by P from her award from other D's.
 - Here MC agreements invalid – skew trial process, create “sham of adversity,” allows P to buy support for their case
 - MC agreements valid in some states, valid w/ disclosure in others, illegal in a few

VII. Limited Duty

- When is one party liable for the actions of a third party? Not often, but some exceptions
- Third party liability if factors are present:
 - Notice of Propensity
 - Capacity to control
 - Authority to control
 - Ability to take Reasonable Steps
 - Special Relationship
- **JS and MS v. RTH** – P’s daughter’s molested by D, P’s sue D’s wife for knowing and not doing anything
 - In some cases, the potential for a crime is foreseeable, and will create a duty of care. Imposing this duty still involves balancing conflicting interests of parties
 - Enough factors are here to create risk
 - Enough factors to create duty
 - Special Relation
 - Notice
 - Capacity to change behavior
- **Tarasoff v. Regents of U.Cal.** – Psychiatrist treating man who said he intended to kill P. Doctor did not warn P, and man killed P. Doctor sued for negligence
 - If a defendant stands in a special relationship to a plaintiff whose conduct needs to be controlled or to a potential victim of such conduct, they are liable.
 - Applies to doctors and lawyers too! – If client threatens to commit specific crime, D/L must reveal that info
- **Daley v. LaCroix** – D flew off road, hit power lines, explosion gave P severe emotional distress
 - There can be NIED under certain conditions.
 - If the emotional distress reasonably results in definite and objective physical injury, recovery is possible.
 - However, they cannot recover for emotional distress itself.
- **Thing v. LaChusa** – Minor hit by car and injured. Sister informed mother of accident, mother went and found son injured, sued for NIED.
 - Bystanders can only sue for ED when
 - 1) they are closely related to the bystander
 - 2) the bystander is present when and where the accident occurs
 - 3) The bystander suffers serious emotional distress beyond what an average witness would show.
- **Endresz v. Friedberg** – P pregnant, injured in car crash w/ D, P’s twins stillborn
 - No recovery for wrongful death of unborn children
 - This would only punish tortfeasor – Mom can sue for her own injuries and ED
- **Procanik by Procanik v. Cillo** – “wrongful life” case, doctors had duty of care to warn mother of defect so she could abort?
 - No – Doctor does not cause these harms
 - Medical expenses, but no damages for “wrongful life”
 - How do you weigh non-existence against defective life? It’s not possible to!

VIII. Owners and Occupiers

- Different classes of people on land, different duties
 - Lowest- Trespassers
 - Expected Trespassers - Low duty of care - no wanton or willful conduct
 - Unexpected Trespassers
 - Children - attractive nuisance - duty inches up some more, almost to reasonable care
 - Begins to inch up once trespasser is foreseen
 - If you ask them to be there, they're licensees - social guest of a landowner
 - General duty to them is reasonable care
 - License = Permission
 - Highest Duty - Invitee, person who is there for his benefit and yours
 - Facilitate transactions between buyers and sellers
 - Ordinary and Reasonable Care + Reasonable Inspection and Repair
 - Tenancy offered few rights for the tenant (unless the owner made a guarantee to repair.) Popper: "You used to be called a serf. Now you're called a tenant."
 - Public safety officers (and mailmen!) are licensees - There for common social duty
 - Meter readers, trash collectors are invitees - there by implicit consent. (Tested)
- If something comes off your property, you're not responsible for it... unless you are. (Foreseeable risk or hazard - dead tree on property line that falls into your neighbor's yard.)
- **Rowland v. Christian** - Guest injured in friend's apartment by sink handle. Friend knew, but said nothing to anyone. Guest sues friend.
 - There is liability for known conditions
 - Here, CA court threw out distinctions between classes, instituted common duty of care
- **Borders v. Roseberry** – P slipped and fell on ice in front of house that D leased.
 - Lessor not generally liable for negligence of lessee to third party.
 - Six Exceptions
 - 1. Undisclosed conditions known to lessor but unknown to lessee
 - 2. Conditions dangerous to persons outside the premises
 - 3. Premises leased for admission of the public
 - 4. Parts of land retained in lessor's control which the lessee may use (i.e. common areas)
 - 5. Where lessor contracts to repair
 - 6. Where lessor has been negligent in making repairs
- **Pagelsdorf v. Safeco Ins.** – P injured while helping friends move when balcony rail gave way, sues Ins. Co.
 - landlord is required to exercise a reasonable duty of care in keeping the tenant's apartment maintained
 - leased apartments have an implied warranty of habitability
- **Kline v. 1500 Mass Ave. Apt. Corp.** – P leased Apt., beaten and robbed in common area, no doorman present
 - Landlords have duty of care to protect tenants from injury by foreseeable criminal acts
 - They control entrances, common areas – they have the duty of care

- Analogous to Duty of care b/w innkeeper/patron, common carrier/passenger

IX. Damages

- Compensatory damages – payment for loss caused by tort
- Punitive damages – 3 legs: Punishment, Deterrence, Proportionality
 - Punitive Damages are in relation to the act – the more wrong the act, the more punitive damages
 - For PDs, rated on awareness of probability of harm, not Forseeability of harm
 - Easy to think of scenarios where compensatory damages are too low, but need for deterrence of future conduct is high
- **Richardson v. Chapman** – Richardson & MacGregor rear-ended by Chapman's semi. McG gets one cut, R left a quadriplegic.
 - Compensatory damages excessive when they are unfair/unreasonable, result from passion or prejudice, or would "shock the conscience of the court"
 - What can be considered by a court? - plaintiff's physical condition (expenses and restrictions, possibility of decline, permanency of injury)
 - Must consider how to give present value to future dollars needed
 - Economic (quantifiable) losses v. non-economic (non-quantifiable losses)
- **Cheatham v. Pohle** – Ex-hubby keeps photos of him and wife having sex, he publishes them
 - Plaintiffs do not have a right to punitive damages
 - Punitive damages do not create any property rights. They come from common law; legislatures are free to modify how they are awarded, or even abolish them
 - Requires Compensatory Damages to get punitive damages, plus clear and convincing proof of harm
- **State Farm Ins. Co. v. Campbell** – D driving, forced car off road and into other car, both drivers injured. SF, D's ins., settles case for policy limits against investigator's advice, cut's off D's options. D sues SF for bad faith, jury finds SF's settlement was part of effort to cap payouts, D gets punitive damages.
 - Any ratio greater than 4:1 b/w punitive damages and compensatory damages unreasonable
 - Substantive Due Process of 14th Amendment prohibits excessive punitive damages (they're excessive fines!)

X. Defenses/Immunities to Negligence Torts

- Factual Defense – “I didn’t do it!”
- In PL cases, due care is irrelevant, but you can get evidence in through back door by showing your evidence of testing, go from contributory negligence to comparative fault
- Contributory Negligence – Most Common Defense
 - Classical Rule – If P even slightly at fault, no recovery at all
 - **Fellow servant doctrine** - if you were hurt while working and one of your co-workers is responsible, claim was barred.
 - If you brought a negligence claim, you had to plead an absence of contributory negligence
 - Contributory negligence never applied to intentional torts
 - **Davies v. Mann** – Bound ass left by road, killed by D
 - Since P did not exercise his own duty of care, no recovery
- Comparative Fault – apportion liability based upon what each D is responsible for
 - If P’s loss = 100% (single satisfaction rule)
 - Pure Fault – whatever D is responsible for (even 1%), they pay
 - Modified Comparative Fault – if P is no more than 49% responsible, they can recover the remaining 51%, otherwise not
 - Strict Fault – If P is in any way responsible for his own injury, no recovery
 - **McIntyre v. Ballantyne** – Car crash, both men drunk with .17 BAC
 - Here, TN court decides to go to Modified Comparative Fault System
 - 49% rule "ameliorates the harshness of the common law rule while remaining compatible with a fault-based tort system."
- Assumption of Risk
 - Knowing, voluntary, unreasonable engagement with calamity - not a defense in cases with liability by statute or strict liability cases.
 - Not a defense in warranty cases - warranty is an assurance of quality
 - When is it a complete bar to liability, and when is it contributory negligence? The more knowing the behavior is the more risk it assumes.
 - The "I can't participate in this activity unless I sign the contract" IS NOT a contract of adhesion - no one is forcing you, you voluntarily enter into it.
 - Express v. Implied Assumption of Risk
 - **Seigneur v. National Fitness** – P signs liability release that included D’s active/passive N, she’s injured. Claim barred?
 - Exculpatory clause valid - no fraud, overreaching, or undue influence
 - Three exceptions to Exculpatory Clauses
 - when the tort is intentional or grossly negligent
 - when the bargaining power of one party is manifestly unequal
 - when the transaction involves the public interest
 - **Rush v. Commercial Realty Co.** – Tenant went to go use outhouse, fell in.
 - Not an “assumption of risk” – P had no choice but to use outhouse, D had duty to maintain it

- Parent/Child and Family Immunity
 - to preserve the unity of families and to prevent their resources from being drained in lawsuits against each other
 - Exceptions – all extreme conduct and intentional torts, not simple negligence
 - Abandonment
 - Infanticide
 - Sexual Assault
 - Killing parent
 - Suing parent's business partner
 - When minor is legally emancipated
 - Step-parent relationship
 - **Renko v. McLean** – P sued D mother for injuries in car crash while she was a minor
 - Parent/Child Immunity applies in such cases (at least in MD)

- Government Immunity – very broad, covered by FTCA
 - FTCA requires you to exhaust all administrative remedies before suing
 - Protects employees exercising discretionary functions
 - **Deuser v. Vecera** – Drunk arrested by Park Rangers, released away from park rather than being turned over to local police, drunk left in parking lot w/o money, wandered onto highway, hit and killed by car
 - Discretionary function applies here. Applies in cases where
 - the conduct at issue is a matter of judgment of the agency or officer
 - If the judgment is of the kind the discretionary function exemption was meant to shield.

XI. Strict Liability

- Liability applied without proof of fault in cases where no due care can possibly abate risk
 - Used when there is something done that does not naturally happen, that does damage to others, whose effects escape from property
 - Applies primarily to extra-dangerous (ultra-hazardous) activities
 - Three Possible Defenses to its application
 - Unusual Sensitivity
 - Acts of God
 - Assumption of Risk – knowingly bringing calamity upon yourself
 - Evolution
 - R.1st – Applied to explosives or situations of uncontrollable risks. Few situations, many liabilities, few defenses
 - R.2d – “Abnormally dangerous” activities – Many more things, many more defenses
 - R.3d – “Ultra hazardous” activities – few situations as in R.1st, but many more defenses as in R.2d
 - Examples – Things that create artificial danger but not a matter of common usage
 - Blasting
 - Pile Driving
 - Crop Dusting
 - Drilling for Oil/Gas
 - Flame Stacks
 - **Rylands v. Fletcher** – D mill owner builds reservoir over P’s mines, reservoir floods mines
 - A person who lawfully brings on his land something which is harmless but will cause damage to neighboring land or property if it escapes is liable for all the damage.
 - **Miller v. Civil Constructors** – Bullet fired in gravel pit firing range ricochets, hits P
 - **R.2d §520** – Six factors to determine use of strict liability
 - The existence of a high degree of risk to person, land or chattel
 - the likelihood that the harm will be great
 - an inability to eliminate the risk through reasonable care
 - an activity that is not a matter of common usage
 - an inappropriate activity for a place
 - the extent to which value's activity outweighed by dangerous attributes
 - Here, use of firearms not strict liability activity
 - **Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.** – Train car of acrylonitrile derails in switching yard, forcing evacuation of neighborhood
 - Strict liability will only be imposed on activities that cannot be prevented by holding tortfeasors liable for negligence
 - Must prove against at least one of the six factors to use Strict Liability
 - If dealing with risk through due care, not strict liability, but negligence
 - **Foster v. Preston Mill Co.** – Minks go crazy after blasts, kill young
 - Even under strict liability, no liability for every resulting harm
 - Proximate Cause still required for recovery

XII. Tort Reform?

- Caught on in Product Liability, moved on into medical malpractice
- Perfected by late 70's by U.S. Chamber of Commerce
- What has been proposed to limit liability?
 - Caps/limit/abolish punitive damages - anything to make them predictable
 - Abolish joint and several liability - why should one company be liable for torts of another
 - Abolish strict liability - get a standard of due care
 - Changing standards of proof - gross negligence to conscious, flagrant disregard
 - Evidentiary standards - standard to prove due care needs to be easier
 - Government standards defense - if you comply with government's standards, you can't be liable
 - Substantive standards of liability
 - products assessed in terms of practical feasibility
 - nobody should be expected to make products that are impossible/unfeasible
 - reasonable, alternative design
 - Use of products by consumers should be judged by manufacturer's intentions - anticipated use
 - (Consumers want foreseeable use)
 - Abolish Implied Warranty - Manufacturers hate it, it's made up, and you're telling us we breached a made-up contract?
 - State-of-the-art should be an absolute defense
 - If it's as good as you can make it, it's not defective.
 - Declare Tort system to be compensatory - manufacturers don't like fault-based system.
 - Make it like workers' comp, pass cost onto consumers?

XIII. Product Liability

- Causes of Action
 - **MacPherson v. Buick Motor Co.** – D sold P car w/ 3rd party wheel, but D could have discovered defect with reasonable care
 - Product can be basis for negligence
 - If something is reasonably certain to place life or limb in danger if negligently made, it is a thing of danger, and the manufacturer will be liable for any resulting injury
 - No more privity of contract
 - No more caveat Emptor
 - Negligence
 - Design
 - Manufacture
 - Labeling
 - Warning
 - Inspection
 - Post-Sale Assessment
 - Warranty
 - Express/Implied – not much difference

- Intersection of Tort and Contract Law
- **Henningsen v. Bloomfield Motors**– Auto purchased with contract disclaiming all liability except for replacement of defective parts. Auto crashes due to defect
 - Cannot contract around implied warranty
 - Warranty of merchantability is an integral part of any sale of goods.
 - Laymen have no opportunity to inspect goods or determine their suitability; they rely entirely on the manufacturer.
- ***R.2d 402(b)***
 - 1) Fraudulent - due care is no defense in a warranty case, you're liable even though you're not negligence
 - Express warranty liability is strict!
 - What did you warrant, and was it there?
 - Warranty is a breach of a contract, but...
 - 2) Privity of contract is not a defense either; it doesn't matter who you contract with
 - Initial stream of commerce in the US - if you explicitly warrant something, it has to do it
 - doesn't apply to used goods
- **Baxter v. Ford Motor Co.** - P purchased car from D, claims that D made representation's that car's windshield would not shatter when hit. Windshield hit by rock and shattered.
 - Warranty possible without privity of contract. D made representations that P relied upon
- Strict Liability
 - Prove defect, prove "unreasonably dangerous" risk
 - **Greenman v. Yuba Power Products** - P using product as designed and was injured
 - If the manufacturer makes a product that it knows will be used without inspection which is later shown to be dangerous, it will be held strictly liable.
 - R.2d 402a – Strict Liability of Product Seller when
 - Seller sells product and product is expected to be used w/o alteration
 - Applies despite due care of seller
 - (does not apply to real property)
 - Difference with Absolute liability - product is SO bad and SO dangerous and SO deadly, absolute liability without proof of defect or unreasonable risk
 - only applied in asbestos
 - Absolute liability in express warranty - no defense, you said you would and you didn't
 - Defective Condition
 - R.3d 2 – Product defective when, at manufacture or design
 - Departs from intended design even with due care
 - Foreseeable risks could have been reduced by alternative design

- Inadequate instructions or warnings
- **Prentis v. Yale Mfg.** – P injured by forklift that did not stop – defective design of failsafe?
 - Design defects are based on the product itself, not the manufacturer
 - In order to have a defective design, something must be inherently wrong or unsafe
 - Risk-utility calculation
- **Friedman v. GMC** – Car jumps forward when started, was defective at time of manufacture?
 - Defects can be proven by circumstantial evidence in strict liability case
- **Daly v. GMC** – Driver thrown from car, was drunk and not wearing seat belt
 - Assumption of risk is defense against Strict Liability
- **Ford Motor Co. v. Matthews** – Tractor kill switch fails
 - Misuse is a defense only if the misuse is not reasonably foreseeable
- **Medtronic v. Lohr** – Pacemaker case – was state tort regulation of medical devices pre-empted by Feds?
 - Express Pre-emption
 - Implied Pre-emption (this case) - If you cannot successfully impalement federal regulation without pre-empting state law, you've pre-empted
 - But the assumption is that state law is not pre-empted.
- **Peterson v. Lou Bachrodt Chevrolet** – P's hit by used car – D strictly liable?
 - No. Resellers outside of the original producing and marketing chain
 - Neither create nor assume any risk simply by reselling a used good
- **Hector v. Cedars-Sinai Medical Center** – Pacemaker implanted by doctor fails. Doctor strictly liable?
 - No. Providers of a service that uses a product not strictly liable
 - Can still apply negligence
- Unreasonable/Dangerous
 - **O'Brien v. Muskin Corp.** – P dove into above ground pool (from garage?) Hit head, paralyzed, sued for negligent design
 - Proof of a defect requires not just a showing that the product resulted in an injury, but that the manufacturer either knew the design was defective, or failed to adequately warn of the danger.
 - Design's defect will be based, in part, on its utility – 7 Factors
 - 1) Usefulness of Product
 - 2) Safety of Product
 - 3) Availability of Substitute Product
 - 4) Ability of M to make product safer
 - 5) User's ability to avoid danger
 - 6) User's awareness of danger
 - 7) Feasibility of M spreading cost through price or insurance
- Reasonable/Feasible Alternative Design

- Bystanders cannot use strict liability, but can still use negligence
 - R.3d 402(b) seems to abolish strict liability
 - Failure to Warn
 - As Independent Claim
 - **Anderson v. Owens-Corning Corp.** – Asbestos case – when did M know product was dangerous?
 - In order to be liable, D must be in a position to know about the risk (constructive knowledge)
 - It IS possible to render a product defective simply through the absence of a warning.
 - Warning renders product non-defective.
 - As Subset of Negligence
 - Post-Sale duty to warn
 - R.2d
 - Statutory Duty to Warn
 - Sophisticated Users/Learned Intermediaries - Sophisticated user means someone who's trained in the use of a product that which is an obvious danger expands.
 - Misrepresentation
 - Reliance/Detriment
 - Fraud/Breach of Warranty
- Issues and Tests
 - Consumer Behavior Centered vs. Product Centered
 - Test: Did item function as manufacturer would expect, or as ordinary consumer would expect?
 - R.2d Test
 - Consumer Expectation
 - Risk vs. Utility
 - R.2d 402(a) Comment K – inherently dangerous products + unavoidable use = no strict liability (i.e. drugs), but still negligence
 - Alternative Designs
 - Technology for/Timing of Assessment of Defect
 - Time of Design
 - Time of Manufacture
 - R.3d
 - Time of Sale
 - Time of Harm
 - Time of Trial
 - R.2d
 - Measure Defectiveness by what a reasonable manufacturer should know?
 - R.3d
 - What is known?
 - What is knowable?

XIV. Defamation

- Elements of Defamation
 - Defamatory language
 - Of and concerning a specific plaintiff
 - That is published to a third person
 - That subjects plaintiff to contempt, ridicule, obloquy, or impeaches their honesty, integrity, or reputation
 - And is untrue
 - That causes discernible injury
- If the speaking party is the press, first amendment is implicated - greater constitutional sensitivity.
- If the person defamed is a public figure, the assumption is that they can withstand most defamation, since they have access to the press
- Defamation is a malice-based test, not a negligence based test.
 - Negligence - you must exercise due care - applies to private people
 - **Gertz v. Robert Welch Inc.** – Lawyer libeled by John Birch Society
 - States free to define their own standards for defamation of private individuals – can apply malice or negligence
 - Private individuals lack same capacity to defend themselves as public figures
 - Creates exception to NYT Rule
 - Malice - you know the statement is not true or you recklessly disregards its truth or falsity - applies to public figures
 - **NYT Co. v. Sullivan** – Defamation of public official in NYT ad?
 - Only if libelous statements printed with “actual malice”
 - Public comment on official conduct constitutionally protected
 - Reckless disregard
 - Reasonable Publisher would see a red flag - need second source, shouldn't publish
 - OR a reasonable publisher would have serious doubt about the information
 - OR general professional standards of journalism - reason for second sourcing
- Two types of defamation - libel (written), slander (spoken)
 - Internet and TV are libel b/c they're replicable - slander refers only to spoken speech
 - In case of books, single publication rule, only original publisher is liable.
- Defenses
 - Truth
 - Privilege - absolute privilege for statements made in judicial proceedings, legislative/executive dialogues, compelled speech
 - Qualified privileges - areas where there is common interest in free dialogue - union meetings, critiques of artistic works, entertainment, parody, matters of common interest, letters of recommendation, commentary about children