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2D

TORTS OUTLINE
PROF. MARTIN - FALL 1995

TORTS - OUTLINE

I. Introduction to Tort Liability
  A. When Should Unintended Injury Result in Liability?
    1. *Hammontree v. Jenner* - J/D - Can't apply strict liability to automobile drivers. Confusion would result unless legislature enacted comprehensive law.

II. The Negligence Principle
  A. Historical Development of Tort Law
    1. *Brown v. Kendall* - If act of hitting P was unintentional and done in the doing of a lawful act, D not liable unless failed to exercise ordinary care. Burden of proof on P.
  B. The Standard of Care
    1. *Adams v. Bullock* - D not liable to P swinging wire across trolley tracks D used reasonable care - accident not foreseeable, no duty to put lines underground.
      a. Negligent if should have anticipated someone would come in contact w/ wires (*Braun*)
      b. Kneeling mechanic not liable when P tripped - common & simple act in plain sight. (*Greene*)
    2. *U.S. v. Carroll Towing* - Hand Formula - If Probability + Seriousnes of Injury > Burden, then negligent.
      a. Problems: too economical; hard to quantify factors; lacks moral considerations.
      b. Emergency doctrine - actor may not be negligent if actions taken are reasonable & prudent in emergency situation - can't be held to same std. as one who had time to reflect (*Rivera*).
  C. The Reasonable Person
    1. Objective; reflects community standards; maintains consistency
    2. *Roberts v. Ramsbottom* - D liable for driving car after epileptic seizure b/c he retained some control and driving was below the required standard. D also had 2 other driving problems that day.
    3. *Reiszel v. Fontana* - 17 yrd. old motorist held to adult standard - Driving adult activity - greater potential for harm - can spread loss.
    4. Professionals (Drs., lawyers) held to higher std. - std. of professional skill and capacity, not reasonable person.
    5. Children usually held to std. of conduct reasonable for persons of their actual age, intelligence, and experience.
  D. The Roles of Judge and Jury
    1. *Balt. & Ohio R.R. v. Goodman* - Holmes announced "Get out and Look" standard. Rule clear and should be announced by courts - not a question for jury to decide.
    2. *Pokora v. Wabash Railway* - *Goodman* not applied - Jury should decide if P exercised reasonable caution not judge. If P got out and looked, train could have come by time got back in.
  E. The Role of Custom
    1. *Andrews v. United Airlines* - D appeals to Hand Formula - small # of accidents, minimal injuries wouldn't merit additional costs and incon-

Custom must be designed to prevent type of harm that occurred (Smooth Rope exam

venience. Court said unless D can show prohibitively expensive, jury might find D negligent. (other airline used netting and retrofitting bins to keep baggage from falling + common carrier has higher std. of care - passengers can't protect themselves)

2. *Trimarco v. Klein* - jury entitled to judge if practice of putting in safety glass was custom. Jury decides if growing custom had transformed shower into one that is not reasonably safe. My answer: custom doesn't mean TT automatically wins

F. The Role of Statutes
   1. *Martin v. Herzog* - violation of statute intended for protection of travelers is negligent in itself. This takes power away from jury. Problem: Why does crim. liability give rise to civil liability? Why didn't legislature provide for civil effect?
   2. *Tedla v. Ellman* - distinguished from *Martin* - Not rule of safety but rule of the road - obeying law would subject pedestrians to danger. Statute did not provide standard replacing general duty of due care like it did in *Martin*.
   3. Elements for stat. violations giving rise to civil liability:
      a. Violation must be causal. Ex: No rear light wouldn't affect head on collision.
      b. Risk must be one statute intended to prevent. Ex: Even though hazards not listed, the statute requiring erection of barrier around hoistway would safeguard against hazard of falling objects (*DeHaen v. Rockwood Sprinkler*). Ex: Sheep kept in pen to protect against disease, not being washed overboard (*Gorris v. Scott*).
      c. Even though violation of statute is negligence per se, compliance w/ statute not always conclusive proof due care was exercised. Ex: Even though warning signs on sacks, don't meet higher std. of due care imposed by common law in tort for negligence (*Hubb. Hall Chem. v. Silverman*).
         1. Huber objects - should defer to regulatory agencies in industries comprehensively regulated.
   4. Licensing statutes have generally not been used to set std. of care. Purpose is to protect public from actions performed by unskilled persons. P must prove D lacked required skill.

When will violating crim statute establish negligence in civil suit? statute must provide criminal penalty; statute must have been designed to prev kind of harm that befell the TT; TT must be member of class that legislature intended to protect by statute

2 Restatement § 285 - violation of statute is NOT negligence per se if: incapacity; lack of knowledge of need to comply; inability to comply; emergency; compliance poses greater risk than violation.

G. Proof of Negligence
   1. *Gordon v. Mus. of Nat. History* - D not negligent b/c no actual or constructive notice of dangerous condition. Elements for Constructive Notice:
      a. Defect must be visible and apparent
      b. Defect must exist for sufficient length of time prior to accident so employers can discover and remedy it.
   2. *Chiara v. Fry's Food* - Mode of Operation Rule - P not required to prove actual or constructive notice if proprietor could reasonably anticipate hazardous conditions would regularly arise.
   3. *Byrne v. Boadle* - Barrel falling out of D's window injuring P affords prima facie case of negligence based on doctrine of res ipsa loquitur. Elements of Res Ispa Loquitur are:
      a. Accident ordinarily doesn't occur in absence of negligence.

b. Caused by agency or instrumentality w/in exclusive control of D.
c. Must not have been due to any voluntary action or contribution on part of P.

4. *Newing v. Cheatham* - D guilty of negligence under res ipsa loquitur b/c assume planes don't crash w/o defects, bad weather, radio calls. D was owner & only one w/ pilot license. P in rear seat - no evidence exerted influence.
    1. In CA, res ipsa is not just an inference, it is a presumption & shifts burden of proof to D - must prove he's not negligent.
    2. In NY, res ispa is only inference. P has burden of proof and jury can find D not negligent even if D doesn't offer any proof.
5. *Ybarra v. Spangard* - P went in for appendectomy & came out w/ paralyzed right arm. Res Ipsa case of negligence. Not all Ds have to be negligent & can't expect unconscious person to know which D was negligent or had control of instrumentality. Shifts burden to party who has access to evidence. Res Ipsa smokes out evidence.

H. Special Case of Medical Malpractice
1. Higher standard of care - specialized knowledge and skill taken into account. Look at standard of care, method of proof, role of custom, and functions of jury.
2. Profession, as group, sets own legal standards of reasonable conduct.
3. Prior to state codes, the std. of care was local standard. Judged by local community b/c different resources, community expectations, opportunities to learn about injuries. Now, easier to gain knowledge and can refer to other doctors. Reject Nationwide Standard.
4. Hard to get expert witnesses - conspiracy of silence - don't want to testify against fellow doctors.
5. *Henning v. Thomas* - VA state code Sec. 8.01-581.20 established statewide standard of care. D questioned expert's knowledge of VA std. of care b/c never practiced in VA. Qualifications rest largely w/ discretion of trial court - not reversed unless "it clearly appears was not qualified to testify as expert." But D must have opportunity to question expert to show bias, prejudice, "hired gun".
6. Juries can't judge the reasonableness of practice - don't have enough knowledge. Therefore, custom becomes conclusive.
7. Juries can judge the credibility of expert witnesses.
8. *Pauscher v. IMMC* - Patient Rule: Dr. should disclose all material risks involved in procedure. Protects P's individual autonomy - can choose not to have procedure b/c of fear. P must prove:
    a. Existence of material risk unknown to patient.
    b. Failure to disclose risk by physician.
    c. Disclosure would lead reasonable patient in P's position to reject procedure or choose different treatment.
    d. Injury

    Here, D wins b/c P had serious infection & risk remote - Risk would not have been significant to someone in P's position.
9. Physician doesn't have duty to disclose if:

a. Might have detrimental effect on physical or psychological wellbeing of patient.
b. Patient incapable of giving consent b/c mental disability or infancy.
c. Emergency makes impractical to obtain consent.
d. Risk so obvious to justify presumption of knowledge of risk.
e. Procedure is simple and danger commonly appreciated to be remote.
f. Physician doesn't know and should not have known of material risk in exercise of ordinary care.

10. Patient Rule is objective, not subjective - otherwise, every patient could say was material to me and wouldn't have procedure if knew. Juries would still judge on objective std.

III. Duty Requirement: Physical Injuries

A. Obligations to Others

1. Distinction between nonfeasance and misfeasance - Duty to do no wrong is Legal Duty; the duty to protect against wrong is moral obligation only.
2. To get into court, enough to say was negligence which caused injury.
3. To see if duty, could apply Hand Formula - but B must incorporate individual autonomy.
4. VT Statute - person should assist if can be done w/o peril to himself or w/o interference w/ duties owed to others.
   a. Person giving assistance not liable unless grossly negligent or will receive money.
   b. Not fined more than $100 - doesn't say anything about civil damages. Might infer state doesn't think that important and wouldn't want person liable for thousands of $ in court.
5. Criteria when determining if Statutes create Duties:
   a. Was statute created for P's especial benefit?
   b. Did Legislature intend to imply such a remedy?
   c. Is remedy consistent w/ underlying purposes of legislation?
   d. Is claim "one traditionally relegated to state law"?
6. *Farwell v. Keaton* - B/C voluntarily came to aid, had duty not to put in worse position or position where couldn't get help. Court also said special relationship b/c were companions. (Dicta)
7. *Harper v. Herman* - social host doesn't owe duty of care to warn guest water too shallow for diving. Court says special relationship is found on part of:
   a. Common Carriers
   b. Innkeepers
   c. Possessors of land held open to public.
   d. Persons who have custody of another under circumstances in which other person is deprived of normal opportunites of self protection.
8. *Moch v. Rensselaer Water Co.* - want to limit "crushing liability" - don't want water to be expensive commodity. If spread loss through insurance, those who use most paying most even though may not be high

Duty to Act For Ers If:
D's Act Created Peril
Special Relationship
D undertaken to act for P's benefit.
Contractual Duty
Statute Creates Duty

Don't subsidize tort insurance fire insuran

fire risk. Risk is disproportionate.

9. *Strauss v. Belle Realty* - court must place controllable limits on liability Con Ed not liable to P injured in common area of apt. where only landlord had privity of contract. But could look to State Public Utilities Commission to avoid crushing liability. (Bd should decide limits of liab)
10. Reliance factor - liable if P relied on promise & would have acted differently w/o it.
11. Court doesn't want to impose duties when long time frame between when acted & when consequences arrived - Want people to get on w/ their business. Long term liability raises difficult proof problems. Duty rules limit liability.

B. Obligations to Control Conduct of Others

1. *Tarasoff v. CA* - Once therapist determines or should have determin. that patient poses serious danger to others, he bears a duty to exer. reasonable care to protect foreseeable victim of that danger.
   Set out Factor when Determining Duty:
   a. Foreseeability of harm to p
   b. Degree of certainty that P suffered injury
   c. Closeness of D's conduct and injury suffered.
   d. Moral blame attached to D's conduct.
   e. Policy of preventing future harm.
   f. Burden to D and consequences to commun. of imposing duty
   g. Cost and prevalence of insurance for risk involved.

   Dissents: difficult to predict violence, Dr./patient confidentiality
2. Garage owes no duty to pedestrians hit by drivers - can't control conduct of drivers; would extend duty beyond manageable limits. (But could say reas if use Tarasoff)
3. CA says Dr. doesn't have duty to warn partner of AIDS patient; Dr. infected w/ AIDS should warn his patients b4 gaining inform. consent (NJ)

Court restricts Tarasoff. self-inflicted harm mere property damage

4. *Vince v. Wilson* - Negligent Entrustment - liable if knows or should have known entrusting item could cause unreasonable risk of harm. Court criticizes cases restricting rule to when D is owner or has right to control instrumentality. (P must prove driving negligent & Δ unreas in allowing turn to drive)
5. *Kelly v. Gwinell* - Social host who serves liquor to visibly drunk guest who will be driving is liable for injuries resulted from negligent driving.
   a. Analogous to liability imposed on owners who lend cars to intoxicated person.
   b. Public Policy goal: reduction of drunk driving
   c. Dissent: Inc. in homeowners' insurance, Neg. drivers already liable, difficult to identify and control intoxicated guests.
6. NJ Statute - if BAC<.10 - irrebutable that not visibly intoxicated; If BAC bet. .10-.15, rebutable presumption. Avoids some of proof prob. Saying not so "morally reprehensible"

C. Landowners and Occupiers

1. *Fitch v. Adler* - Absence of guardrails constituted hazard of which D had duty to warn P. Foreseeable that P would go on deck. Licensee takes land as they find it.
2. Duties landowner owes to Licensees: (social guests, firemen, police)
   a. Avoid willfully, wantonly, or intentionally injuring P.
   b. Refrain from active or affirmative negligence.

warn licensee of KNOWN ← dangerous conditions creating unreas risk of harm where licensee doesn't know about condition & is not likely to discover it.

c. Warn P of known trap or pitfall which can't be avoided in exer. of reasonable care.

3. Invitee - public invitee or business visitor -Owner liable if:
   a. knows of unreasonable risk of harm to invitees.
   b. should expect invitee won't discover danger, and
   c. fails to exercise reasonable care to protect them from danger.

4. Trespasser - Owner has no duty to put land in reasonably safe condition and shouldn't carry out dangers. Duty of reasonable care if know trespassers frequent. liable for willful & wanton conduct
   a. Liable to TRESPASSING CHILDREN if: "Attractive Nuisance Doctrine"
      1. Knows place where children likely to trespass.
      2. Involves unreasonable risk of death or serious injury
      3. Children can't discover or realize risks involved.
      4. Burden of maintenance or elimination slight compared to risk involved.
      5. Fails to exercise reas. care to eliminate danger or protect children.

5. *Rowland v. Christian* - Court wants to get away from common law distinctions (invitee, licensee, etc) and toward duty based on ordinary negligence. If know of concealed condition involving unreasonable risk of harm to others & aware that person on premises will come in contact w/ it, failure to warn or replae constitutes negligence.
   a. Dissent - distinctions worked for years - provide reasonable & workable approach. Opens door to unlimited liab. - function of legislature to provide uniform std. and guidelines.
   b. Result - takes confusing question from judges and gives more complex question to jury. Now jury has to think re: purposes, community stds., cost/benefit analysis.
   c. Several courts maintained trespasser category. CA statute protects landowners against liab. to persons attempting to commit one of 25 offenses.
   d. *Kline* case - Landlord only one in position to take protective measures - can assess risk, take precautions, & spread risk. Ct ~~considered~~ concerned about tenant's financial ability to protect.

6. *Erickson v. Curtis Investment Co.* - Owner/oper. of parking garage has duty to use reasonable care to deter criminal activity on premises Care of reasonably prudent operator in like circumstances. Jury should weigh likelihood of risk w/ financial & practical feasability to meet risk.

7. *Waters v. NYC Housing* - Landlord has no duty to P attacked in his building w/ missing lock b/c not tenant, no control over acts outside on street.

D. Governmental Entities
   1. Until WWII, govt. immunity to tort liability - been abolished through judicial and legislative decisions.
   2. *Riss v. NYC* - Police not liable to P scarred by ex-boyfriend even tho she sought protection b/c police didn't make promises - no specific reliance. Court can't carve out new area of tort liab. - concerned re: limited police resources, crushing liability.

must make property reas. safe
invitee
includes duty to warn of
n dangers ; or if warning
ficient to remove danger,
spect for dangerous conditions
make them safe.

Landlord liable only if
1. Hidden danger the
landlord knows, tenant
doesn't
2. Premises leased
for public use
3. Premises under
Landlord's control
4. Premises
negligently repair.

3. *Schuster v. NYC* - Police had duty to protect P who supplied them w/ information. Police got benefit & were actively soliciting help. P specifically relied on confidentiality and protection.
4. *Sorichetti v. NYC* - distinguished Riss, follows Schuster - front desk assured police would take action. Liable b/c specific reliance. Inaction + prior notice
5. *Friedman v. NYS* - Courts shouldn't intrude on what legislature put in hands of experts. State not liable for hwy. planning decision. Once decision reached to remedy dangerous condition, liable if don't do it w/in reasonable time. Only liable if plan plainly inadequate or no reasonable basis.
6. Why limited liability?
    a. Deference to legislature
    b. Fear of chilling govt. decision making.
    c. Take out of hands of jury - don't trust w/ B<PL calculation. (don't want them to second guess experts)
7. 911 calls - direct communication & reliance needed for special relationship. Require special rel. to limit liability
8. Federal Torts Claims Act - Sect. 2680 Exceptions to liability
    a. Not liable for Discretionary Functions. Ex: *Berkovitz v. US* - To be discretionary, must involve judgment or choice.
        1. Specific, quantitative - Prob. not discretionary - Ex: must follow procedures b4 issuing license - no disc.
        2. Qualitative - "reasonable safe standard" - discretion
    b. Also, no pre-judgment interest, no punitive damages.

IV. The Duty Requirement: Non-Physical Harm.

A. Emotional Harm

1. *KAC v. Benson* - No emotional distress b/c no actual exposure to HIV
   3 Elements for Negligent Infliction of Emotional Distress:
    a. P w/in zone of danger of physical impact.
    b. Reasonably feared for safety
    c. Suffered severe emotional distress w/ physical manifestations.

   Public policy reasons: compromise availability & affordability of insur, juries reach inconsistent results, might leave inadequate comp for Ps who actually contracted AIDS
2. Why limit liability ?
    a. Floodgate Concerns - too much litigation.
    b. Proof Problems - must tie injury to act; not always sure why emotional injuries triggered.
    c. Problems of Fraud.

   Pre-Aids, floodgates not big concern - few claims, small damages
3. *Battala* - Child in ski lift not locked - feared would fall - could recover for emotional distress despite lack of physical impact.
4. *Gammon v. Ost. Hosp. of Maine* - Should abandon showing of phys. impact; Foreseeability provides adequate protection. Duty to foresee psychic harm if harm reasonably could be expected to befall ordinarily sensitive person. (family of deceased vulnerable - reasonable to know mishandling of body will lead to duress.)
5. *Molien* - Foreseeable that wife negligently diagnosed w/ syphilus would cause marital discord & damage to husband even if didn't have

6. *Portee v. Jaffee* - 4 Factors which determine wheter emotional injury foreseeable: (from *Dillon*)
    a. Death or serious inj. of another caused by D's negligence.
    b. Marital or intimate family relationship between P & injured.
    c. Observation of death or injury at scene of accident
    d. Resulting severe emotional distress.
7. *Borer* - Children couldn't recover for loss of parental care. Financial aspects of this loss recoverable in mother's action. But under *Tarasoff* factors, not much different:
    a. Close connection between injury & D's conduct.
    b. Burden - $ - availability of insurance.
    c. Moral blame
    d. Special relationship between mother & common carrier, just like between doctor and patient.

(Facts: Mother injure in plane accident - unabl to provide usual parent care)

8. *Johnson v. Jamaica Hospital* - Parents can't recover for distress from abduction of child - D owed duty to child, not parents; Ct. concerned about open-ended liability; deterrent function served b/c child can have claim.

B. Wrongful Birth and Wrongful Life
    1. *Keel v. Banach* - Dr. who didn't identify & inform parents of abnormalities guilty of wrongful birth b/c Ps couldn't make informed decision. Ct. rejects D's policy reasons: subject to fraud, heavy burden on Ob/Gyns, increase abortion, Inc. cost of prenatal care, stigmatize child, "emotional bastard"
        a. Damages if present:
            1. Med & Hosp expenses
            2. Physical pain suffered by wife.
            3. Loss of consortium
            4. Mental & emotional anguish suffered by parents.
    2. *Zehr v. Haugen* - D's neg. sterilization causes P to have unintended child. P can ask for costs of preg. & birth AND future costs of raising & educating child even though some would consider the birth of healthy child a benefit.

C. Economic Harm
    1. 2 Major Types of Economic Harm:
        a. D negligent in performing service to 3rd party & causes injury to P.
        b. D negligently creates dangerous condition or causes physical harm to 3rd party & causes economic harm to P.
    2. *Prudential v. Dewey Ballantine* - Even if not in direct privity, can be liable if relationship so close to approach privity. Criteria if no privity:
        a. Awareness by maker of statement that it's to be used for particular purpose.
        b. Reliance by KNOWN party on statement for that purpose.
        c. Conduct by maker linking it to relying party & evincing its understanding of reliance.
    3. Floodgate concern - can't just say recover if foreseeable; limitless liab
        a. Floodgates greater problem in econ harm than emotion. harm:
            1. Documents seen & used by more people

2. Burden on Ds potentionally much higher
3. But emotional distress more open to fraud; harder to quantify

b. P in Econ Harm in better position to protect himself
1. Can get insurance
2. Can have contractual provision to pay
3. Can have own lawyers, accts verify info

4. Don't Lose much of deterrent factor if limit recovery to privity - reputation more important, still have contract w/ company
5. Floodgate concern stronger w/ lawyers than accountants
a. Accounting more of exact science
b. Ct. concerned about chilling effects on law practice
c. # of potential Ps of lawyers is less than accountant ← BUT
6. GM puts car on market to indeterminate class, for indeter amt. & time
a. To protect, get insurance, raise product costs, spread costs
b. Ct concerned w/ establishing manageable bounds of liab
7. *J'Aire Corp* - recognize tort of neg loss of prospective econ advantag
a. No privity but foreseeable that P would suffer loss if work not done on time.
b. Able to sue D contractor instead of lessor b/c want to maintain relationship with lessor and lessee
8. *People Express* - Liable to **identifable class** of persons:
a. Particularly foreseeable in term of type of person or entites comprising class
b. The certainty or predictability of presence
c. The approximate # of those in class
d. Type of economic expectation disrupted.

Probably couldn't recover employee wages - D would argue:
a. People could have paid - had choice
b. People Express intervening cause

(Note: Case not widely followed - duty test not easily workable - part foreseeable; don't want to open floodgates)

9. *Rickards* - Retail businesses couldn't recover when D destroyed bridge that was only means of access to P's businesses. Deny access to General Foreseeability, only allow particular foreseeability

V. Causation

A. Cause in Fact
1. Part of P's Claim - P must prove negligence, causation, injury
2. P must show connection between D & harm suffered to P. Can be difficult in toxic torts. Not usually problem in unintentional torts
a. General causation - did effect follow from cause?
b. Specific causation - i.e. linking birth defect difficult b/c other factors relating to toxic elememts in environment
3. "BUT FOR TEST" - But for D's act, would P have been injured? - (Would P been injured if D did everything law requires?)
4. *Stubbs v. Rochester* - Allowed P to recover if proved MORE LIKELY THAN NOT that D's negligence caused P's injuries. - P doesn't have to exclude other causes - just need reas certainty (preponderance)

a. Problem: Slippery Slope - D might be paying for injuries didn't cause
b. Consequences: Overdeterrence on D; overcomp for P

5. Common Law takes "ALL OR NOTHING APPROACH" - If prob that D caused harm > 50%, then can get 100% recovery.
6. *Falcon v. Mem Hosp* - can recover for **loss of opportunity** to survive if prove loss substantial. (Here, 37.5% is substantial)
    a. D negligent b/c B<PL - burden of putting in I.V. low
    b. But now More Likely Than Not Test used differently - show more likely than not that D caused P to lose substantial opp of living.
    c. Court doesn't decide what is "substantial" loss
    d. Multiply chance by full damages
    e. If > 50%, still get full recovery.
    f. Only used when ultimate harm is death
    g. Reasons to go below 50% test:
        1. No deterrence on Dr. after risk falls below 50% mark
        2. Not fair to P if lost 49% chance of living
    h. Prob. only applicable to med malpractice cases - special relationship of Dr., pay them to inc chances
    i. Not purely contractual matter b/c if breached could get nothing (D didn't cause) or value of life (D caused).
7. *Mauro v. Raymark* - can only get damages for **Enchanced Risk** if prove disease reasonably probable to occur.
    a. Can still get emotional distress, medical surveillance
    b. Removal of Statute of limitations & single controversy doctrine allows P w/ asbestos to bring suit at future time.
    c. Arguments for paying now:
        1. Deterrence, D ought to pay for creating risk, harder to prove at later time - other factors could contribute, strong evidence that jury would allow recovery for risk creation even though causation not proven.
    d. Arguments for paying later:
        1. Too Speculative, floodgates, overcompensate those who don't get disease, those that get disease might be undercompensated.

B. Joint and Several Liability - Multiple Defendants
1. P may sue Ds together or separately; may recover FULL extent of harm against either one or both.
2. If one D insolvent, any solvent D may be held liable
3. Under attack for unfairness b/c may have to pay more than share.
4. In past, didn't apportion fault between Ds; In past 25 years, apportion loss & allow Ds to recover among themselves.
5. Been some limitations put on liability. Ex: CA - Ds less than 50% at fault, J & S liable for econ loss but only % share for pain & suffering.
6. Successive Tortfeasors under Traditional Approach.
    a. Initial tortfeasor can be attributable to whole amount
    b. Second tortfeasor attributable for only incremental share.

7. *Summers v. Tice*
    a. Both Ds were negligent - IMPORTANT!
    b. Couldn't tell who shot P so both held Joint & Sev Liable
    c. Shifts burden of proof to Ds - in best position to tell what happened. (Just like *Ybarra*)
    d. Each D liable for whole damage whether acting in concert or independently.
    e. If both same insurance co, loss-shifting doesn't matter
8. Problem of proof of negligence
    a. If 2-3 hunters, all 3 have burden & liable if negligent
    b. But if 10 hunters, hard to prove all negligent.
9. Problem under "but for"
    a. Hypo: 2 fires - 1 set by lightning; other by D's negligence.Both could have destroyed house. Using "But For", if D didn't set fire, P still wouldn't have house. But D should still be liable.
    b. A sets off explosion - destroys P's house. B sets fire that goes over land & would have burned house. Who's liable?
    c. P bears responsibility if harm from non-responsible party (ex. Lightning)
10. Substantial Factor Test - Restatement 431 - Actor's neg conduct is cause of harm if Substantial Factor in bringing about harm.
    a. Two independent forces concur to produce a result which either of them alone would have produced [redacted]
    b. Either force is a cause in fact.
    c. Can recover if substantial but doesn't meet "but for" test
11. *Hymowitz v. Eli Lilly* - **National Market Share Approach**
    a. Ps sued DES manfr. but couldn't identify specific manfr. that caused injury.
    b. Ct. based liability on National Market Share (Not Local Std)
    c. Ds can't exculpate themselves.
    d. Ct. imposes liab for risk creation, not causation
    e. Several liability only - might not get 100% if some D insolvent
    f. Ds can't be liable if not for pregnancy use
    g. Dissent: Ds should be able to exculpate themselves, should be jointly and severally liable.
12. Toxic Tort Cases - Problems
    a. Time Lag - don't occur immediately
    b. Extent of harm unpredictable, large # of victims - don't have to be 1st generation
    c. Often collective harm - considerable # of independently acting enterprises.

C. Proximate Cause
1. Argument raised by D
    a. P claims neg, cause, injury - enough to stay in court
    b. D can claim no duty, not proximate cause
2. Unexpected Harm
    a. *Steinhauser v. Hertz* - Thinskull Plaintiff Rule - P recovers even though injury not foreseeable by D. - Take P as find him
        1. D is precipitating cause of P's injury

2. Survives "but for" test - wouldn't have full blown schizo.
3. But pre-existing condition has bearing on damages

b. But sometimes P in best position to protect against risk.
   1. Ex: If concert pianist hit & loses arm, can take precautions, get insurance.
   2. Driver won't change way drives - Prob small, burden high

c. Aggravation Cases
   1. D liable for further injuries caused by 3rd person giving aid.
   2. If serious injury, have to drive fast - creates special risk so D liable for further injury
   3. But if ordinary traffic, might say ordinary risk of road
   4. If fall b/c defective crutch, D liable for special risk

d. *Polemis* - D liable b/c damage was direct result of D's neg.
   1. Doesn't matter that extent of damage unforeseeable.
   2. Ct. rejects D's argument that explosion in ship is diff type of harm, not extent of harm
   3. Could argue that it is extent of harm - If drop plank in hold, expect physical damage to ship which is what happened w/ explosion. - Just greater damage

e. *Wagon Mound* - D not liable for dock explosion b/c not risk protecting against.
   1. Under *Polemis*, would be liable b/c direct consequence
   2. Expected result of oil spill is fouling of slipway, not fire - different type of harm. Reas person wouldn't guard against risk of fire.

f. Hypo: If choose smooth rope b/c wouldn't break not b/c better on hands, then not liable if get splinter b/c different kind of risk

g. *Wagon Mound #2* - D liable for fire b/c reas foreseeable. In WM#1, P couldn't emphasize that fire foreseeable b/c would show own negligence b/c P thought it was safe.

3. Unexpected Manner
   a. *Mine Safety Appliance* - Intervening Cause - Should have told jury that if Fireman's gross neg [redacted] superceded neg of D, D not liable.
      1. To be superceding cause, had to be grossly negligent - willfully forget to tell nurse proper instructions.
      2. D not liable if wiillful b/c burden too high to protect against.
      3. Dissent disagreed about Traxler's conduct, not legal rule. D still liable even if negligent b/c should anticipate heating blocks could get to 3rd party unwarned.
   b. Railroad liable for dropping off P mile past stop b/c could anticipate criminal conduct b/c knew was disreputable area.
4. Unexpected Victim
   a. *Palsgraf* - Risk is of package dropping, not explosion. D only negligent in relation to holder of package (Cardozo)
      1. D owed no duty to P b/c danger not foreseeable to P -

, Responsible for "Forececable" Intervening Acts

Ceptions:
Malicious, intentional intervening acts
. Intervention by one w/ higher ncal duty to victim (Parent)
3 Extraordinarily negligent acts
+ Acts of God.

uperceding Force -
ancels Δ's liability by reaking causal chain
not 4in risk created by Δ's Original Act

P not in zone of foreseeable risk.

2. Andrews - dissent - have duty of care to fellow man, Foreseeable that dropping package could cause some injury & this was direct consequence of D's negligence. Arbitrarily cutting off liability
3. How would Cardozo decide *Polemis*? - Harm to P was foreseeable - High prob that plank could damage hold of ship.
4. How do you distinguish *Palsgraf* & *Polemis* - talk about expected plaintiff
    a. Mrs. Palsgraf not anticipated to be injured
    b. Ship expected to be damaged

Rescuers, as long as they ← en't reckless, are considered reseeable Tts.

b. Danger invites rescue - Places effects w/in range of natural & probable. - D liable for injuries suffered to rescuer. But many courts say rescue has to be spontaneous.
c. *Kinsman Transit Co* - Risk creating must be risk resulting
    1. Shiras (ship) neg b/c crew didn't react reasonably
    2. Continental dock neg b/c foreseeable that no maintain deadman device, ship come lose & cause damage
    3. City negligent for not lifting bridge when had time to.
    4. If flooding damage to P downstream, Continental still liable b/c unsecured ship is KNOWN danger to all ships & structures downstream. (Must abut river b/c don't protect against risk that ship would jump bank)
    5. If P upstream, not liable b/c not w/in zone of danger
    6. Draw line of liability: business' access on bridge - shift from physical injury to economic risks.

5. Role of Judge & Jury
    a. *Palsgraf* - Cardozo said nothing for jury to decide - Duty ? is question of law for court; But indicates that jury should decide what is w/in range of reasonable apprehension.
        1. Andrews says Jury ? - prox cause matter for jury
    b. But normally jury asked if D exercised reas care; Judge decides earlier that P w/in zone of reas apprehension.
    c. *Firman v. Sacia* - D not liable when his accident victim shot P 7 years later. Take into account passage of time, remoteness. bc of brain injury suffered by victim result of D's neg
        1. Prox cause cuts off chain of causation if have substantial discontinuity of time or discontinuity in types of harm.
        2. **Ask is result that happened w/in Risk?
        3. If shot in stupor on day of accident, D liable b/c take P as find him - thinskull P like *Steinhauser*.

VI. Defenses

A. The Plaintiff's Fault

1. Contributory Negligence
    a. P's conduct must be both actual cause and proximate cause of P's harm.
    b. TOTAL bar to recovery

T case	Δ case
neg	no duty
causation	not PIC
injury	T was o/n

c. D's defense - (Other defenses: no duty, no p/c)
d. In some states, P has to prove not negligent - in best position to explain what happened; In other states, D has burden.
e. Rationale for system:
    1. Cuts down damages, less litigation
    2. P is cause of own injuries, should be innocent to collect
    3. Apportionment difficult - total bar easier system to use
    4. Deterrent argument - people might be more careful
f. Prosser suggests in 19th century:
    1. Distrust of P-minded juries
    2. Want to limit D liability - encourage Rrds, big business
    3. Chronic invalid, attempts to ameliorate "all or nothing" doctrines
    4. Inability to apportion damages.
g. Use capacity-based standard for mentally disturbed P - still hold P responsible for unreasonableness in light of P's diminished capacity.
h. Statutes - Protect group against own inability to protect itself (Ex: Protect school children crossing street) (No c/n for protected group)
i. Contributory negligence not defense if D is reckless, willful, or wanton.
j. Last Clear Chance Doctrine - Cont neg of P irrelevant; Even Even though P careless, D had, but failed to utilize, last clear chance to avoid injury: 2 types of situations:
    1. P in Helpless position & D knows of helplessness & has last clear chance.
    2. P inattentive & D sees him & neg runs into him when has last clear chance to avoid.

	D Knows	D Should Know
P helpless b/c neg	last clear chance	last clear chance only in some states
P negligently inattentive	last clear chance	last clear chance in 1 state only - Missouri

(NY - allows recovery in all 3 cases)

k. What do we gain by allowing negligent Ps to recover?
    1. Deter Defendant
    2. Most cases car accidents - Ds have insurance & can spread loss.
    3. Minimize total amt. of harm to individual person
    4. If leave loss on P, generally don't spread loss. Ex: No spreading of lost earnings
l. Limitations on Imputation of Cont Neg - want to allow recovery & broaden liability. Ex: P driver can't recover if cont neg but P owner can recover from negligent D. Sometimes impute:
    1. Loss of consortium - impute cont neg of spouse on other spouse
m. Jury's Role
    1. Don't generally listen to "all or nothing" c/n instructions
    2. Instead, use comparative neg - Reduce P's damages

Most cts. impute c/n only if:
1. Principal / Agent
2. Joint Venture
3. Suit based on injury to someone else (ex Wrongful Death, Loss of Consortium)

by some amt. rather than returning J/P.

n. Effect of all limitations on cont neg. was still all or nothing approach

2. Comparative Neglience
   a. Reflected dissatisfaction w/ all or nothing - too harsh
   b. Juries didn't follow - made law look stupid, unfair
   c. Political pressure to reform tort system.
   d. 3 VERSIONS:
      1. Pure Version - If P responsible for 90%, could recover 10% from D.
      2. Modified Version - 2 types - P gets to recover % if P's neg is:
         a. Not As Great As D's
         b. No Greater Than D's
   e. Most states adopted modified version; Most enacted through statutes, some through judicial decision.
   f. Criticisms of Modified Version:
      1. Party more at fault has to bear his losses & share other party's losses - worse off than common law
      2. If several parties at fault, creates chaos (esp. if P's fault>some Ds but < others.)
      3. If P's fault greater, relegated to common law which may allow P to recover all - last clear chance. Better off
   g. Criteria when considering degree of fault:
      1. Whether conduct was inadvertent or aware of danger
      2. Magnitude of risk created, including # of persons endangered and potential seriousness of injury
      3. Significance of what actor was seeking to attain
      4. Actor's superior or inferior capacities
      5. Particular circumstances, Ex: emergency requiring hasty decision.
   h. Problem w/ modified: If jury can't apportion, will probably split down middle 50-50. If state has Mod 1 (Not as great as), it's disastrous for P. (% of fault = jury question)
   i. Uniform Comparative Fault Act
      1. Joint and Several Liability
      2. Right of Contribution, can sue other Ds for their %s.
      3. Pure version
      4. If one D insolvent:
         a. Traditional Rule - reallocate risk only on Ds
         b. Now, reallocate among all parties, including P.
      5. No Set-Offs unless both parties agree - don't want ins cos. to just split difference.
   j. PROBLEM: C is your client. A suffered $40,000 damage. A 40%, B 30%, C 10%, D 20%
      1. What if all solvent? Judgment = (40,000 -40%)=24,000 C can be responsible for $24,000 but can sue other Ds for their respective parts.
         B 24,000 x 30/60 = 12,000
         C 24,000 x 10/60 = 4,000

D 24,000 x 20/60 = 8,000

Note: Unif Act = pure version. But if mod version, recover depends on if it aggregates D's fault.

If Aggregate, P recovers (40% < 60%)

If treat Ds separate, P won't recover.

2. What if D insolvent? Allocate D's 20% to everyone else
   - A 40,000 x 40/80 = 20,000 (P eats this loss)
   - B 40,000 x 30/80 = 15,000
   - C 40,000 x 10/80 = 5,000

k. Releases and Settlements
   1. Common law - Settlement w/ 1 joint tortfeasor = settlement w/ all tortfeasors. (nonsettling parties released)
   2. Uniform Act - settlement w/ one doesn't discharge anyone else. Still have apportionment of damages.
      a. Encourages people to settle (ex. B wouldn't settle if thought have to pay more than settlemt.
      b. Amt recovered = damages - equitable share
   3. CA law - NO Contribution - P's recovery reduced by the actual amount settled.
   4. NY Gen. Obligation Rule - P's recovery reduced by the greater of: (1) Amt. released in covenant (amt settled)
      (2) Released tortfeasor's equitable share
   5. Statutes only apply to good faith settlements

l. Problem: A has $50,000 claim against B & C. B settles for $30,000. B 20%, C 80%. What can A get from C?
   1. CA Rule - damages - amt. settled = recovery
      $50,000 - $30,000 = $20,000
   2. NY Rule - damages - > of settled or equ share
      $50,000 - (30,000 or (50,000 x 20%)
      $50,000 - 30,000 = $20,000
   3. Unif Act - damages - equ share
      $50,000 - $10,000 = $40,000

      **A gets 30 from B and 40 from C = $70,000 - more than full damages!!!

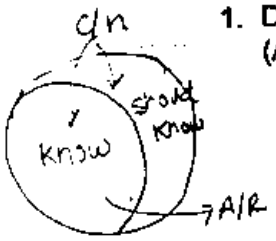
m. Unif Act - can get more, less - Argmt that Justified Result:
   1. B chose to settle & C is only paying equitable share
   2. P entitled to advantage of good settlement if he's held to disadvantage of a bad one. (*Duncan* case)

n. 2 other arguments in *Charles*
   1. Jury verdict is no more accurate a measure of P's injuries as settlement is.
   2. Chance of windfall like this encourages P to settle

o. Avoidable consequences - even if all D's fault, P's recovery will be reduced by failture to exer due care to mitigate harm
Ex: failure to get medical attention, failure to use seat belts. (Cts. divided - some say failure to use seat belts fully bars recovery; Other say can't lose > than 50% of damages; some say inadmissible in civil action)

- Gives P duty to minimize damages

3. Assumption of Risk - Express Agreements
    a. Exculpatory agreement - Parties agree that D need not exer due care for safety of P.
    b. Gross negligence or recklessness can never be disclaimed by agreement.
    c. Disclaimer must be unambigious, clear, & coherent - Don't have to use work "negligent"
    d. *Tunkl v. Regents of Univ of CA* - factors which invalidate exculpatory clause:
        1. Business suitable for public regulation
        2. Important service to public - often practical necessity
        3. Willing to perform service for any member of public
        4. Greater bargaining strength
        5. K of adhesion w/ no opp to pay more to protect against D's negligence
        6. Under control of seller
    e. NY Gen Obl Law - can't enforce if lessors, caterers, contractors, architects, garage & park lot owners, pool, gym, amusement place
        1. Alt argmt: Shouldn't we let parties work this out? Can take out insurance if cheaper than if D insures him
4. Assumption of Risk - Implied
    a. About 1/2 states modified or abandoned doctrine
    b. *Murphy v. Steeplechase Amusement* - Volenti non fit injuria: one who understands the dangers of activity and voluntarily takes part, assumes the risk of danger for that activity.
    c. *Brown v San Fran Ballclub* - use **objective** test - SHOULD have been aware of common risks of baseball. D not liable for obvious dangers or those which should have been observed in the exer of reas care.
        1. Stadium owner didn't breach duty - provided screened seats. If sit in unscreened seat, assume the risks.
        2. Prob: What if never saw game & hit by first pitch? Did not know of risk. Common knowledge of baseball switches from subjective to objective test
    d. *Verduce v. Bd of Ed* - use **subjective** test - P knew of danger & voluntarily exposed herself to such risk.
        1. Dissent: Ass. of Risk distinguishable from cont neg. (A/R is subset of C/N)
            a. A/R - P must know of risk & voluntarily act - unreasonable
            b. C/N - P unreasonable in terms of knowing or **should know** that conduct creates risk; voluntary act.



**Difference is risks should know!

Rescuers don't assume risks!

    e. Rescuers still allowed to recover b/c danger invites rescue even though would fail under both subj & obj test - know or should know risks

f. What difference does it make to distinguish a/r & c/n?
    1. NY CPLR 1411 say culpable conduct including c/n or a/r doesn't bar recovery but reduces damages. But some states kept a/r as full bar
    2. Pleading & Proof problems
        a. Trad, P has burden of pleading duty & neg
        b. D has burden of showing assump of risk.
        c. Ex: D has burden of showing P knew risk & voluntarily exposed. Advantageous for D to treat as negligence case b/c D may not be in good position to prove P knew of risk.
        d. Some states say c/n part of P's case so be better for D to say P c/n instead of a/r b/c P has burden of showing freedom from c/n
    3. Duty is ? for court, ass of risk is ? for jury. Jury decides if P knew of risk & chose to expose.
    4. Under trad cont neg doctrine, cont neg NOT a defense if D is reckless, wanton, or willful. A/R was defense to willful, wanton, or reckless conduct.
    5. Cont neg no defense in many jurisdictions but A/R is
    6. Under trad last clear chance doctrine, c/n doesn't bar recovery but assump of risk would bar recovery.

g. Firemen's Rule - Firemen can't recover for injuries caused by D's negligence in starting fire. Part of agreement is assume risks - being paid to fight fires
    1. Alt argmt: Firefighter often doesn't get full recovery b/c pain & suffering not covered by work comp. (But pain & suff often goes to pay lawyers. If city pays for work comp, no lawyers to pay)
    2. If want to deter, make D liable for everyone injured.

B. Immunities
1. Charitable Immunity - *Albritton v. NCA* - Court rejects policy argument that charity wouldn't be able to survive tort liability. Personal injury no less painful or costly b/c inflicted by charity. Why should individual be stuck?
    a. Alt Argmt: Only Legislature should abolish charitable immunity
    b. Just passing back to another charity - If injured can't pay, then govt. or another charity has to pay. Might as well just put liab on charity that was negligent.
2. Family Immunity - Argument that state shouldn't step in & say how parent should act toward child (privileged relationship); Lawsuits w/in family destructive of family harmony; Judgment paying redistributes assets w/in family.
    a. Most states don't want to make failure to supervise child a tort
    b. Wis - retains immunity for parental discretion w/ respect to food, clothing
    c. CA - judges against "reasonable parent" standard
    d. NY - doesn't allow claim for failure to supervise but has general reasonableness std.

e. Spousal immunity b/c are unit, protect against collusion; family harmony.
    1. NY - No spousal immunity but insurer may exclude claims from spouses for liability.

VII. Strict Liability
A. Doctrinal Development
1. Negligence is essentially recent development (150 yrs)
2. *Fletcher v. Rylands* - Imposes S/L when D's reservoir broke.
    a. Blackburn - Liable for non-natural collection that brought onto land that escapes.
    b. Cairns - Liable for non-natural uses. - narrower view
    c. Illustrations of differences: Ex: D mining & builds slag heap which slides & injures P's land.
        1. Blackburn - S/L b/c non-natural collection that escapes
        2. Cairns - not S/L b/c natural use of coal-bearing land is mining & building slag heap. Natural Use.
    d. Generally; use Cairns' non-natural use
3. *Losee* - No S/L for exploding steam boiler. Uses negligence std.
    a. Blackburn would say S/L b/c brought on land and escaped
    b. Cairns - Rapid industrialization - becomes natl. use of land
    c. Ct says risk of living in industrial society - mnfr is social good
4. Prosser - Tendency of Amer. Cts. to misconstrue *Fletcher* - focus on Blackburn's escape test instead of Cairns' natl. use test. If used Cairns prob would have reached same result.
5. Keeping of Animals:
    a. S/L if keep "wild" animals - no social utility so risks > burdens
        1. Any PL>B - ACTIVITY itself negligent
    b. S/L if "domesticated" animal escaped & caused damage.
        1. Burden of not keeping Hi, Risk low
        2. Domestic animal can be controlled. If escapes PL>B so particular conduct negligent, NOT activity itself
        3. Res Ipsa rule - If cattle get out, you pay b/c so easy to control cattle (Burden of control low)
    c. Negligenc liab if "viciousness questions" - b/c of benefits, doesn't create substantial risk, society as whole shares in risk Ex: One bite rule for dogs (Viciousness brought to attention b4 held liable.
6. In *Losee* - can't presume escape negligent b/c steam boiler not easily controlled like cattle. Escape can be accident. Impose negl liab.
7. 1st Restatement - activity was "ultrahazardous" if:
    a. Necessarily involves risk of serious harm to the person, land, or chattels of others which cannot be eliminated by exer of reasonable care
    b. Is not matter of common usage.
8. 2nd Restatement - activity "abnormally dangerous" if:
    a. Existence of high degree of risk of some harm
    b. Likelihood that harm that results from it will be great
    c. Inability to eliminate the risk by exer of reas care
    d. Extent to which the activity is not a matter of common usage

e. Inappropriateness of activity to place where carried on
f. Extent to which its value to the community is outweighed by its dangerous attributes.

9. Blasting is Strict Liability Activity - debris damage is almost certainly b/c someone didn't exercise reas care. Blaster should bear risk of loss b/c:
   a. Blaster knows when blasting occurs, magnitude of risk
   b. Blasting infrequent - non-natural activity
   c. In control of blaster - can protect against it, insure
   d. People most likely to be injured (innocent bystander) can't prepare for accidents, can't insure against (infrequent, don't know magnitude, how much)
   e. No reciprocity of risks
10. Concussion Damage - indirect, consequential harm - Negligence
    Debris Damage - direct harm (treat as trespass) - Strict Liability
    *Distinction no longer used in courts. Spano - NY Ct of App - both concussion & debris damage gives rise to strict liability
11. Want to have industrial activity so impose negligence liab most of time unless good reasons not to.
12. Hypo: Trailer containing gas breaks away b/c someone runs into it, breaks away & explodes. Strictly liable?
    a. 1st Restatement - YES - can't be eliminated by reas care, other idiot drivers.
    b. 2nd Restatement - factors in utility of social activity. High value to community, but many other factors met so prob S/L
13. Hypo: D using explosives to build road. Concussion from blasting frightened mother mink who ate kids. Can P say D S/L?
    **Foreseeability is factor here. Ct. applied prox cause limitation
14. *Yukon* - Did not impose prox cause limitation when there's intervener (didn't apply Restatement 519(2))
15. HYPO: Car ran into gazebo. Can you recover from driver w/o showing negligence? Can no longer argue trespass
    a. Common Law - S/L if unconsented to entry
    b. Then said need to "voluntarily" come on land
    c. Current- Trespass if unconsented entry, voluntary, & know w/ reas certainty consequence of causing injury
16. But if plane falls & crashes into gazebo, hold airline strictly liable
    a. D in better position to distribute loss
    b. Easier to protect against highway accidents
    c. D has better knowledge of risks
    d. No reciprocity of risks (Driving involves reciprocity of risks - even if not on road now, at one time will cause risk)
    e. P would win most cases anyway under res ipsa - inference of negligence when plane falls.
    f. Apply strict liability to land damage; apply res ipsa to passengers injured in fall.
17. IMPORTANT POINTS:
    a. When talk about S/L, it's whole activity, not just particular conduct, that's being judged. (Class of Activity)

b. Question if S/L appropriate is for court, not jury
c. Language - use S/L to talking about cause of action when P doesn't have to show D didn't exercise reas care - Doesn't get rid of defenses. (Absolute Liab - no defenses allowed. Keep 2 concepts Separate!!)

B. Theoretical Perspectives
1. Moral Theories
a. Epstein - S/L based on causation; if cause, you should pay
b. Fletcher - S/L if create non-reciprocal risks; D imposes risk on P, but P doesn't cause corresponding risk on D
2. Economic Theories
a. Risk Spreading - Calabresi's Secondary Accident Cost Avoidance. Minimize costs AFTER accident happened. Better to assign loss to responsible enterprises than leave on victims. Ex: $1000 means less to GM than individual
b. Deterrence Theory - Calabresi's Primary Accident Cost Avoidance. Avoid cost of accidents b4 accidents happen.
1. Specific Deterrence - collective decision of (1)level of activity and (2) how we want it done.
Ex: regulations - prohibit speeding
2. General Deterrence - Market decides level of activity & how we want it done. Mkt makes choices.
c. Transaction Costs - Tertiary Accident Cost Avoidance. Minimize transaction costs; costs of dealing w/ accidents.
d. Michelman - Asks who is best cost avoider - Most likely rough guess - If guess is wrong, party that can remedy mistake
e. Calabresi's guidelines for determining who best cost avoider:
1. Better access to information.
2. Where's cheapest insurance
3. Better able to subcategorize
4. Keep costs on activity - reducing risks of externalization.
5. Better able to cure mistake in allocation more cheaply
6. Better deterrence by general deterrence.

VIII. Liability for Defective Products.
A. Introduction
1. Up to 19th Cent, privity requirement - Limit liab to foreseeable parties
Ex: *Winterbottom* - Required privity to protect against absurd claims to which there is no limit
2. *MacPherson* - Car mnfr liable for negligence even though no privity if nature of thing is reas certain to cause serious injury when negligently made.
a. If sue Buick, cuts out intervening lawsuit b/c dealer would then sue Buick.
b. Buick better able to spread loss, better position (opportunity & knowledge) to inspect.
c. Cardozo expands *Thomas* - imminently dangerous (poison) to all products which if neg made can be dangerous.

a. P foresees & expects knife will cut so sharp knife not defective
b. Can foresee that pebble can get in can of beans but don't expect, so it is defective.

3. *Cronin* - unreasonable dangerous component not required. Don't burden P w/ proof of element that rings of negligence. As consumer, don't know about mnfr. process - can't establish what conduct was.
4. Under Restatement's def of "unreas dangerous" what does P prove?
   a. Prove doesn't meet std of ordinary consumers - easier than having to prove D's conduct. (not as difficult as negligence)
5. Talking about defects requires some notion of reasonableness
   a. Mnfr Defect - Still reasonableness std but difference in point of view.
      1. Trad Neg - look at what is reas from point of view of D
      2. S/L - look at what is reas from point of view of P - consumer.
   b. Design Defect - *Barker* - 2 tests:
      1. Consumer Expectations
      2. Risk/Benefit Analysis - consumer doesn't know how safe should be, too complex.

      Risk/Benefit Anal sounds like negligence but different:
      1. Trad Neg - Point of view of D at time of acting looking forward (Before accident happened)
      2. S/L - Ex post assessment. Knowing what we know now, do risks outweight benefits? Provides added protection for consumers.

      *Also, D has burden of showing reasonableness of design using ex-post assessment. (Caveat: New 3rd Restatement - up to P to show better alternate design based on what know now. Some states also put burden on P)
6. *Soule, Barker* - refuse to get rid of 1st Branch - cons expectations
   a. If consumers do have expectations, no expert testimony re: risks & benefits.
   b. If consumers don't have expectations b/c too complex, should not charge jury that can find defect based on cons expect.
7. W/ design defects, ordinary consumer expect don't always make sense b/c consumers have no way to figure out what designs are safe. **3rd Restatement** - use only Risk/Benefit analysis - Gets rid of consumer expectations. Uses notion of reas alternative design after the fact.
8. Negligence in design makes product defective. Then why S/L for negligently designed product?
   a. Takes away defenses (Only apply S/L defenses not neg de-defenses.
   b. Can spread losses, protect Ps from unusual catastrophic events.
   c. Those downstream in line from mnfr still S/L for selling negligently designed product.
9. *Camacho v. Honda* - rejects "unreas dangerous" test of Restate 402A

Instead, looks at 7 factors developed in *Ortho:*

a. Usefulness and desirability of product
b. Likelihood that it will cause injury
c. Availability of substitute product
d. Mnfr's ability to eliminate unsafe character w/o impairing usefulness or making too expensive to maintain utility
e. User's ability to avoid danger by exer of reas care
f. User's anticipated awareness of inherent dangers
g. Feasability of spreading loss

Is riding motorcycle w/o leg guard unreas dangerous based on 402A
→ No, ordinary consumer knows may slip & if fall, no protection
But Colorado Ct says not matter of consumer expectations - instead use **Risk/Utility** (ex post neg test) even if Obvious & Open Danger
→Obviousness factored into Risk/Utility Test - but obviousness alone is not assumption of risk. A/R must be knowing (actual subjective knowledge). Question if P had knowledge is ? of fact - put to jury.

10. NY like *Camacho* test - obviousness of danger doesn't prove finding of defect but affects consumer expect. If uses product knowing risk, may be assuming risk if use is unreasonable.
Ex: Injured when hand caught in press b/c guard removed. Fact that danger is obvious for intended, reas use, it can't bar recovery - Just factored into test , may diminish damages.
11. How would you decide *Soule* after *Camacho*? Defect ? is not complex, danger clear - use cons expect test. Not defective b/c danger obvious to reas consumer.

C. Warning Defects: 3 types of warnings

1. Warnings that Reduce Risk
   a. *Hahn v. Sterling Drug* - Absence of warning makes unreas dangerous. Warning inadequate if doesn't satisfy some test of reasonableness. Jury decides if warning adequate.
   b. Other courts say ? of law for court - fearful of jury's determination ex post (too easy to judge that must put in a better warning)
   c. Huber - Mnfr not liable if sold free from defects in mnfr & design is not dangerous if used as intended. Mnfr not required to anticipate that user will alter its condition so as to make it dangerous.
      1. If alteration NOT foreseeable, PROX CAUSE defense
      2. If foreseeable, D may argue employee's removal = c/n or a/r
2. Warnings of Intrinsic Risks - alert potential users to some risks that are inherent in product as made & can't be eliminated or reduced at a cost < expected benefits.
   a. *MacDonald v. Ortho* - "learned intermediary" v prescription rule Contraceptive not used on basis of "learned intermediary" - patient herself making decision. Only see dr. once/year. Rely on mnfr warning. Physician has less control.
   b. Warning complied w/ FDA regulations - Why not enough?

Learned Intermediary Exception:
SC cts had that as to pharmaceuticals, adequate warning need only each prescribing physician

1. FDA uses cost/benefit analysis but state still free to make their own after-the-fact cost/benefit analysis.
2. Unless the fed statute expressly preempts state law, compliance w/ regs not conclusive. State law is controlling
3. If w/ preemption statute, if P makes claims based on express warranty, intentional fraud, misrepresentation, conspiracy then those claims not preempted by act.

c. *White v. Wyeth* - Comment K of Restate 402(A) - provides exception to S/L of mnfrs: unavoidably unsafe products:
   a. Product incapable of being made safe
   b. Useful & desirable product
   c. Warned of risks that are unavoidable
d. Not all drugs "unavoidably unsafe" - not per se rule, applied on case-by-case basis.
e. What about DES? Not unavoidably unsafe b/c risk not reas. Costs>Benefits!
f. Comment K suggests that product itself defective - even though design defect b/c doesn't meet ordinary consumer expectations, if satisfactorily warn, there is no liability.
g. *Brown* - CA Approach - applies comment K across board to all prescription drugs. Rejects case-by-case approach. Don't want to diminish mnfr's incentive to develop superior products. Allow them to put on mkt w/o worrying that ct will decide that risks>benefits. (But still liable if negligent in marketing product)
h. Nat'l Childhood Vaccine Injury Act - gives protection against liab so mnfrs continue to make needed vaccines.
i. *O'Brien* - use risk/benefit analysis if adequate warning. Then NJ responds w/ statute - NO risk/utility analysis, just look at consumer expectations. Obvious danger = defense. (NJ & *Brown* show more sympathy towards mnfrs)

3. Unexpected Danger
   a. **Major diff between warning & design defects:
      1. Design - look at products after the fact - ex post (Would reas person put on mkt knowing what I know Now?)
      2. Warning - Not liable if hazard couldn't have been reas known at time of distribution.
   b. Not always ex ante - *Beshada* said D liable for risks NOT knowable (Risk spreading, deterrence, proof prob - save administrative costs)
   c. *Lederle* restricts *Beshada* b/c fear that it will make social benefit unavailable. Mnfr liable only if had actual or constructive knowledge of danger. Based on reasonably obtainable and available reliable info.
   d. Shift of burden to D - D has burden of showing risk was NOT reasonably knowable. Duty to warn lasts AFTER distribution
   e. Product's defect makes all in the chain liable
   f. State of Art Defense - mnfr couldn't anticipate risk; could not

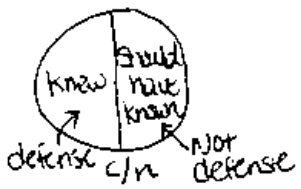
Risk is identified but ↗ no practical way to avoid that risk, Δ is following custom

have known.

1. As opposed to true state of art defense - new technology developed only after product mnfr or designed. D saying following custom of time, using technology available.
2. Court can decide custom itself was defective! Reas person could have used other tech. or not put on mkt.
3. Courts resolve issues in both defenses from ex ante approach. Don't hold liable for what couldn't have known.

D. Beyond Products
   1. No S/L for professional services, just negligence standard.
   2. No S/L for medical services b/c:
      a. Often experimental in nature, no certainty of results
      b. Med services absolute necessity to public
      c. Inc costs of med services & could put beyond means of some consumers
      d. Might hamper progress in developing new medicines & med techniques.
   3. S/L grew out of warranty for sale of goods - continuation of historical trend; But never warranty theory in services.
   4. But if ? not on product or activity but on enterprise, not much diff between goods & services. Generally, systematically creates risks & can spread losses through mkt mechanisms.
   5. Some suggestion that enterprise liab applied to both goods & serv, but distinction between non-professional services (beautician) & professional (doctor).
   6. Is that a good distinction?
      a. Importance of activity to society. Impose liab to less important (less concerned about discouraging activity)
      b. Complexity of task, judgment, takes more training
   7. Problem is defining defect. Greenfield says what perfect doctor would do. Rejected in Kelble.
   8. Blood Banks - Legislature & ct. said providing blood is professional service, not sale of goods. Doesn't involve any more judgment than product case, easy to define defect. But Leg doesn't want to discourage activity, put blood banks out of business.

E. Defenses
   1. Comment N Restatement 402(A) ← Pre-Comparative Negligence
      a. Full Defense/ Bar to recovery if proceeding in face of known risk (A/R)
      b. No defense/bar if cont neg b/c should have known but didn't
   2. *Daly v. GM* - Applied comparative negligence to S/L claims:
      a. CA said assumption of risk NOT complete bar to recovery. (Even if know of risk, can still recover based on P's fault)
      ✱ b. Narrows defense available under 402(A)
      c. Cont neg is partial mitigation (Broader view than restatement b/c know partial defense if P should have known of risk)
      d. Doesn't make distinction between A/R & other types of C/N



3. NY CPLR 14A - same approach as CA

F. Personal Injury and the UCC
   1. 2nd Restatement 402(B) - deals w/ express misrepresentations. S/L when product does not perform as represented regardless of scienter. (Like common law action for deceit except c/l requires intent to deceive/ scienter)
   2. Why would people want to use Non-Tort remedy?
      a. Ex: 2/1/90 - Purchases Product
         3/1/90 - Suffers Injury
         What if sues on 4/1/93?
         1. Personal Injury Stat of Limit = 3 years from date of injury.
         2. UCC Stat of Limit = 4 years from date of purchase
         Here, untimely in tort (> 3 yrs) but timely under UCC
         Ex 2: What if injured 4/1/91 & sues on 3/1/94?
         *Timely as tort - 3 yrs from date of injury
         * Untimely as UCC - > 4 yrs from date of purchase.
      b. Reliance Question
         1. UCC 2-313 - Express Warranties - requires express statement as basis of bargain. Doesn't require P reliance.
         2. Tort Claim - P must RELY on express statement
   3. UCC 2-314 - Implied Warranty of Merchantability
   4. UCC 2-315 - Implied Warranty of Fitness for Particular Purpose - Seller knows use & knows P relying on seller's knowledge.
   5. UCC Remedies
      a. UCC 2-316 - Disclaimers - will be strictly construed But "as is" can be used to disclaim all implied warranties (commonly used terms)
      b. UCC 2-719 - Limitation of remedies - Attempted limitation of consequential damages for personal injuries from consumer goods is prima facie unconscionable! (Can't just get $ back, can't limit damages for personal injury)

G. Economic Harm - 3 views:
   1. Majority view - Damage to product itself is best remedied w/ warranty, breach of K. (Economic losses can be insured, concern w/ safety reduced, parties have equal bargaining power & can set own terms & allocate risks.) Ps can K themselves out of breach claim
   2. Intermediate view: differentiate between "disappointed users" and "endangered users"
   3. Minority view: No difference if econ loss b/c all are prox caused by D's conduct. (*Santor* - allowed S/L b/c D can spread losses, avoid defect)
   4. Does it really matter if sue under K or S/L? (*East River*)
      a. To prove K damages, have to show defective product
      b. In tort case, P shows same thing: Says product defective b/c doesn't meet stds & as result, I suffered injury.
   5. What's difference in *East River*?
      a. Here, each charterer signed K that say they assume cost of

repairs. So P trying to get out from under K rights they signed away. Any warranty claims would be subject to D's limitations, both in time & scope, of warranty liability.

b. *People Express* allowed bystander to recover econ loss, but decision not widely followed. But one reason for allowing was b/c there disparity of bargaining power between parties.

IX. Trespass and Nuisance

A. Trespass

1. Early common law - any injury that arose out of direct harm
2. Physical intrusion onto land; invasion of property right - aspects of both intentional and strict liability torts.
3. Traditionally treated as requiring some intent.
4. 2nd Restatement 158 - Intention intrusions liable even if no harm caused. Only need intent to enter, not intent to invade prop right (If intend to enter thinking it's your own land, liable for trespass b/c voluntarily entered & invaded possessory interest even if didn't intend to invade.)
5. 2nd Restatement 165 - Unintended intrusions - those resulting from reckless or negligent conduct or abnormally dangerous activities - subject to liability only if intrusion causes actual harm.
6. Strong concern w/ protecting property rights.
7. How do you distinguish trespass from nuisance?
   a. Trespass - Interference w/ right of exclusive possession; Claims tend to be 1 shot, sporadic invasions.
   b. Nuisance - Interference w/ possessor's use & enjoyment of land; Action used when continuing invasion.
8. *Martin v. Reynolds Metals* - Airborne fluoride compounds from D's plant injured P's land. Ct. upholds claim for trespass: D doesn't have to act negligently, just intentionally.
9. Why isn't *Martin* a nuisance case?
   a. Stat of limit for nuisance (2 yrs) had run;trespass (6 yrs) hadn't
   b. *Martin* indicates trend toward breaking down barrier between trespass & nuisance.
10. Theoretical Background - **Coase** Theorem - In world of perfect competition, no transaction costs, perfect knowledge: from economic efficiency standpoint, doesn't matter what liability rule is. Whichever party gets entitlement, parties will bargain to achieve most econ efficient result.

    Ex: Pollution damages 10 houses x $500 = $5,000; Factory owner can avoid pollutant for $3,000.
    If liable, will buy $3,000 smoke control b/c < damages
    If not liable, people will get together $3,000 & give to D b/c less than amt. of damage to house
    Doesn't matter whose liable b/c cheaper solution reached.

    Ex 2: What if smoke control = $8,000
    If liable, D will pay $5,000 to Ps and not get smoke control
    If not liable, Ps will pay $5,000 to get houses painted.

11. Why is it that homeowners don't "bribe" D? Criticisms:
    a. Information: Ps may not known of D's alternatives
    b. Free Rider Problem: People want everyone else to pay; raises cost for others
12. Epstein & Fletcher - more criticisms of Coase's theorem:
    a. Don't talk about who causes harm
    b. Don't talk about non-reciprocal risks.
13. Coase responds by saying harms result b/c of intersection of 2 activities. If take 1 away, don't have that harm. Causation is not 1 way.
14. Practical Difficulty doesn't mean Coase theory should be ignored:
    a. Ought to assign liab to party best able to implement least cost solution.
    b. Coase theory major foundation of Calabresi's general deterrence theory.

B. Nuisance

1. *Boomer* - Ds plant was not substandard but acting intentional b/c knew conduct is invading or certain to invade another's interest in use & enjoyment of land.
2. Under trad NY practice, P would be enjoined if $100/yr damage. But this court orders injunction only until D pays P sum for past & present damages.
3. If trad view applied, Ds not likely to close down plant. would attempt to purchase settlement - D would purchase from Ps the right to pollute. Problem: P would refuse to give up right & D would say this is extortion.
4. Is it fair to issue injunction that has potential of shutting down multi-million dollar business for minor showing of damages?
    a. Provides incentive to D to solve pollution problem
    b. High value of property rights.
5. How would this case be decided under **1st Restatement?**
    a. TEST: Is gravity of harm > utility of conduct?
    b. Here, no injunction b/c gravity of harm < utility of conduct.
6. Sec 827 - Gravity of harm - Factors Involved:
    a. Extent of harm involved
    b. Character of harm involved
    c. Social value attached to type of use or enjoyment invaded
    d. Suitability of use or enjoyment invaded to the locale
    e. Burden on person harmed of avoiding the harm.
7. Sec 828 - Utility of conduct - Factors Involved:
    a. Social value attached to primary purpose of conduct
    b. Suitability of conduct to locale
    c. Impracticability of preventing or avoiding invasion.
8. So why does NY Court impose damages if D not acting unreasonably

Trad View	*Boomer*	1st Restatement
intentional invasion	intentional inv unreasonable-	intentional invasion unreas (harm>utility)
↓	Harm>utility OR serious but $ won't end conduct (bankruptcy)	↓
Remedy		Remedy

types of interference that constitute nuisance: Interference w:
Land itself (ex. water pollution)
Health / Comfort (noxious odors)
Peace of Mind (leper colony, explosives factory)

Offensive Test: interference ist be offensive, annoying, inconvenient to AVG. member of community. must be UNREASONABLE SUBSTANTIAL.

act done SOLELY to injure a neighbor has 0 utility, so it must be unreasonable.

9. *Boomer* takes intermediate position - looks like 2nd Restatement - Unreasonable if:
    a. Harm > Utility OR
    b. Harm is serious but D could afford to compensate P (no bankruptcy)
10. Ct never addresses why don't use 1st Restatement; Just assume there is harm that needs remedy, then just look at proper remedy. Not every intentional invasion is matter of liab.
11. What if Plant there before P moves in?
    a. 2nd Restatement 840D - Not in itself sufficient to bar action, but is factor to be considered in determining whether nuisance is actionable.
12. What Remedy?
    a. Give damages to P b/c P injured by smoke.
       Problem: P already paid less for land b/c prop value already reduced by smoke.
    b. Trad NY View - Once find nuisance, enjoin D
       Prob: Possibility of extortion, D even less wrongful than *Boomer* b/c hasn't been harming houses & suddenly house comes.
    c. *Spur* - Give P injunction against Ds but say Ps can enforce injunction only if pay D. D gets paid to abate nuisance.
       Prob: Reverse injunction/compensation very unusual. In *Spur*, didn't have multiple Ps, just had one big developer. If multiple Ps, hard to get them to agree.
       Recognizes property interest & also recognizes notion that some activities of social utility may cause harm to others.
13. Argmt against Permanent Damages:
    a. Might have additional harm in future yrs so not full compensation.
    b. *Jost* - If D increases pollution level, P can get recovery for inc in harm.
    c. D can abate nuisance but not common b/c already paid - no incentive.
14. Nuisance law not primary way to prevent pollution; Most remedies from Regulatory means. Reasons:
    a. No individual/group sufficiently injured to bring suit for damage
    b. Tort law requires identifiable harm - sometimes hard to tell consequences of pollution.
    c. Tort law requires identifiable D - Often many Ds contribute in ways that can't be traced to individual D.

X. Damages & Insurance
   A. Things to look for:
      1. What are problems & benefits of using jury to decide damages?
      2. Look at effects of damages decisions on 3 requirements:
         a. Damage & Liability decided in same trial.
         b. Entire loss recovered in 1 lawsuit.
         c. Damages recoverable in money

B. Personal Injury Action: 3 major recoverable elements
    1. Medical Expenses
    2. Lost Earnings
    3. Pain & Suffering

C. Medical Expenses - most basic; easily quantified (bills)
    1. May serve as a basis for general damages (pain & suff); Often, pain & suff is a multiple of medical expenses.
    2. Supposed to be reasonable as to necessity & amount
    3. Ordinarily, past med exp proved by bills, receipts; Future expenses proved by expert testimony (usually includes testimony from treating physician)
    4. Frequent Prob: Separate those that arise from injury at hand & those that reflect pre-existing condition & subsequent injuries.
    5. Prob of Reas of Amt: seldom answered w/ any precision.Top Service specialists rarely contested. (Argue damages & liab in same case so D's lawyer not going to fervently argue damages b/c conceding liab)

D. Lost Earnings - 3 Things to Look At:
    1. <u>P's Normal Earning Power</u> - Generally derived from P's earning history. Complications:
        a. Sole Proprietor - use net profits? Problem about how much taken out & put into business.
        b. Some People don't have earning history.
        c. Independently Wealthy Person - Usual attitude is if didn't work & don't seem likely to work, can't recover.
        d. Assume working for what most qualified. Ex: Editor of law rev working for Legal Aid will get salary for big firm.
        e. Homemaker - no cash earnings. Cts look at value of services homemaker providing (chauffeur, cook, maid). Also, take into account work option - likelihood of going back to work.
        f. Prob if P earning more at time of trial than time of injury.

CPLR 4546 → In med practice cases, court will ermine & deduct inc taxes would paid on lost earnings ? for judge, not jury)

    2. <u>P's Future Earnings</u> - look at Work Life Expectancy. Use tables provided by Labor Depts. Complications:
        a. Less Mandatory Retirement
        b. Increasing Early Retirement (Involuntary & voluntary)
    3. <u>Various Modifications</u> - 2 Major Kinds:
        a. **Taxes**: Compensatory damage awards not taxable but interest earned on lump sum is taxable. Some courts tell jury that award not taxable, other's don't
        b. **Reduction to Present Value**: If think P would get $1 million then give some sum less than that if prudently invested will = $1 million. Prob: What interest rate do you assume? Minor changes in int rates have major effects. (Theorist favor small discount - Real Int Rate approx 2% - other rates include inflation & risk.)

E. Pain & Suffering - *Seffert v. LA Transit*
    1. Judge isn't supposed to reduce damages by himself but can say too high & will grant new trial UNLESS P will accept less. (Remittur)
    2. Judge can also say damages inadequate (Additur)
    3. Trad Rule - Pain & Suff shouldn't exceed pecuniary losses

4. Trial judge acts as 13th juror - Would he decide same thing? Is verdict against weight of evidence? If trial judge doesn't agree, send back for new trial; don't substitute own judgment.
5. Appellate Ct TEST - At 1st blush, does award shock conscience, indicate passion & prejudice of jury? Narrower discretion than trial judge. What does appellate court look at?
    a. Awards in similar cases
    b. Injury itself - ex: suffered great pain, humiliation, anxiety
    c. Ct. also says jury fixed award & trial judge thought wasn't against weight of evidence - Give trial cts a lot of deference. Trial ct saw evidence, witnesses - were in best position.
6. D says per diem argument misleading - pain & suff can't be fixed by means of mathematical formula. But per diem argmt at least gives jury some basis for what damages are worth.

Dissenting opinion →

7. Traynor says important to be consistent; want to treat like cases alike
    a. Want predictability in terms of deterrent effect (D has to factor into cost/benefit analysis)
    b. Can affect settlements - won't settle if think amt higher than in similar cases.
8. Eliminating pain & suff not answer to consistency:
    a. Undeterrence on D
    b. Undercompensation - If only give pecuniary damages & then P has to pay attorney fees out of that, P undercompensated.
9. Some jurisdictions now cap pain & suff
    a. Usual cap $250,000 - picked out in CA 10-15 yrs ago
    b. Cap provides for consistency & predictability even though $ damages just a rough estimate.

F. Damages in Death Cases
1. Common Law - no recovery for tortious death of human - 2 rules:
    a. No one entitled to claim someone else's death was an injury (Ex: Wife can't say she was injured by husband's death)
    b. All causes of action abated at death (Both P & D)
2. Changed by Lord Campbell's Act - 1846 - allowed designated beneficiaries to have claim for injury done to them (Wrongful Death) - now most jurisdictions have w/d acts
3. Wrongful Death Statutes
    a. NY EPTL 5-4.1 - People who have cause of action are Intestate Distributees (People who would take if injured person died w/o will - doesn't matter if made will or not).
    b. Recover pecuniary benefits - how much decedent would have brought to wife & kids.
    c. Action brought by Personal Representative:
        1. Administrator (if no will)
        2. Executor (if will)
    d. Wrongful Death of Child - Some cts allow for loss of companionship, not just pecuniary losses. (35 juris allow loss of comp; 14 allow for pecuniary loss only)
4. Survival Statutes
    a. Whatever causes of action decedent has at time of death becomes asset of decedent's estate.

← Has damages for losses suffered by surviving relatives
i.e. loss of econ support or society of decedent

Δ tortfeasor claims also survive so can still sue if tortfeasor dies)

- Allows estate of decedent to enforce tort claims suffered by decedent before death.

b. Basic Elements of Claim:
    1. Medical Expenses during life
    2. Lost Earnings during life
    3. Conscious pain & suff (up to time of death)
c. Decedent's estate goes according to will or intestate distributees if no will.
d. Action brought by personal representative.
e. NY EPTL 11-3.2(B) - Survival Statute - Personal Rep brings 2 actions together ordinarily. But 2 sep decisions b/c wrongful death = injury to beneficiary; survival statute = injury to decedent.

5. Every state has 1 or other or both statutes.
6. Generally, if only 1 statute give it some characteristics of other statute

G. Damages for Loss of Enjoyment of Life
1. No separate recovery from pain & suffering - loss of enj of life not a separate category.
2. Awareness of loss is necessary to receive damages
3. Duplicate & excessive awards might result if separate - separate awards tend to mislead since it is "legal fiction" $ can compensate.
4. Dissent argues loss of enjoy of life is objective vs. pain & suff (subj).

H. Punitive Damages
1. Ensure punishment or deterrence for intentional conduct
2. Vindicate sense of outrage (even if large compensatory award)
3. *Taylor v Sup Ct* - Maj would allow pun damages for all drunk drivers. Dissent says Pun Damages O.K. in this case but not all DWIs.
4. Once inject punitive damages, D's wealth becomes relevant b/c have to know how much will punish. Not nec prejudicial if bifurcate trial: First, decide if D liable. Then allow evidence of punitive damages if appropriate. (But not every ct uses bifurcation.)
5. *TXO Productions* - Jury awarded $19,000 comp damages & $10M punitive. Maj said no due process violation b/c punitive damages can consider potential harm for Ps similarly situated.
   –Dissent: O'Connor/White/Souter - Notion of potential harm never instructed to jury. No bifurcation & lawyers had field day b/c TXO was out-of-state wealthy D.
6. *Honda Motors* - Ct struck down punitive damage award b/c Oregon said could only be struck down if NO evidence to support verdict - this violated due process b/c app cts must serve some review function.
7. Slippage Problem - Substantive std for imposition of pun damages may be slipping, relaxing (can go from willful/wanton to gross neg) - Public outrage seen in damage award
8. Slippage also problem in product liab - can be punitive damages liab for consciously making decision based on cost/benefit analysis & guess wrong. If calculation says minor cost to warn or when D suppresses or ignores info about known risks, then pun damages.
   Ex: Ford Pinto - Jury said Ford made calculation & were wrong, knew was risk.
9. Difficulty when Multiple Claims - ex: asbestos cases (*Fischer*)
    a. If allow punitive damages, may deplete pool of resources b4

some claimants can even get compensatory damages.

b. Don't want punitive damages to go to lawyer who wins race to courthouse.
c. From D's point of view, punitive damages keep punishing Ds for same conduct.
d. Courts try to deal w/ this problem by class actions - way for orderly disposition of damages.
e. Bankruptcy Court - also orderly disposition

10. Problem of overdeterrence - Risk of pun damages will excessively deter Ds from risk-creating activity. Fear could lead D not to make safer product but to get out of industry. Ex: vaccine cases - led to Natl. Childhood Vaccine Injury Act

I. Insurance

1. Integral part of tort law. Most lawsuits in accident cases happen b/c:
   a. 1st party insurance doesn't fully compensate Ps.
   b. Most of time, P anticipates there will be insurance that pays on part of Ds.
   c. Litigation usually conducted on D's side by lawyers provided by insurance company.
2. 3 major types of Insurance:
   a. Life Insurance - Specified sum paid on happening of specified contingency (collective savings)
      →Term Life Insurance - Buy for set period; protection against premature death.
      →Whole Life Insurance - Some ins protection, some savings
   b. 1st Party Insurance - Buying insurance for risk to ME
      Ex: Fire, medical, disability (in case can't do reg work, provide income protection)
      Much of recovery for accidents comes from 1st party ins. Torts payments are only 22%.
   c. 3rd party Insurance - Indemnity or Liab Ins. - Ins Co. will either indemnify you or pay on your behalf what you have to pay to someone else. Ex: malpractice, pollution ins, mnfr ins, workers' comp.
3. Homeowners' & Auto Policies - include both 1st & 3rd party insurance
   Ex: Homeowners - Fire Ins (1st party) + liab for someone tripping on property.
4. From tort perspective, 1st party insurance treated like gifts or benefits - treats as collateral source. 3 possible effects:
   a. Traditional Rule: P gets to keep both tort recovery & med exp
      Prob: 2 recoveries for single injury (double compensation)
      Response: P shouldn't be punished for being prudent - paid for insurance & should be able to recover. Also, it goes to pay attorney fees. Helps pay for things not compensable (p & s of trial, time lost to prepare trial)
   b. D gets benefits of P's recovery - Med expenses reduced by amt already paid by ins co.
      Prob: Reduces deterrent effect b/c cost of accident picked up by Ins Co. rather than driver of mnfr.

Response: D doesn't know if victim has 1st party ins - not going to adjust level of care. Also, not much different than any other tort prob: generally, individualize damages - If hit someone w/o insurance, have to pay more (Take P as find him)

c. Attempt to avoid double recovery (Allow P only 1 recovery) & preserve deterrence effect by process of subrogation. - victim gets $ from ins co. & ins co. steps into shoes of victim & tries to recover from tortfeasor.

Hypos: If have fire ins & are compensated for prop damage, P has no incentive to sue, but Ins Co. wants to sue to get $ back. But if also have personal injuries that are not covered by ins, then both P and Ins Co want to sue tortfeasor.

Problems:

1. Who control the litigation? Action brought in P's name but each of parties have different incentives, concerns. Might have diff trial strategy, willing to settle at diff level
2. What's done if insurance Ks don't say anything about subrogation? *Frost* says prop damage usually subrogated, but personal exp (med, lost earn, pain & suff) not subrogated. ← widely followed

   Reason: For personal injuries, duplicative recovery is uncertain, unlikely. Maj said treat pers inj as whole - don't isolate them out. Concurring opinion disagrees but agrees w/ judgment b/c this is K problem - If does not specifically say in K, then can't subrogate. But will allow if mentioned in K.
3. Effect of Settlement - If settlement < amt of damages, then insurers should share some of risk.- shouldn't get whole part.
4. **Conard** - Subrogation Costs Too Much!

   Ex: If Blue Cross gives P $1000 hospital bill, BC will net $750 b/c will incur administrative expenses for getting subrogation.

   But $1000 D pays will cost ins policy holders $1600 b/c has to pay out selling exp, attorney costs.

   End up w/ having to pay $750 to BC, take $1600 from insured. Groups overlap - people who pay for BC also pay for liab ins. So benefits go to Ins Cos. and lawyers, not injured Ps & liable Ds.

   Prob: Even if didn't allow subrogation, still going to incur costs b/c P suing for lost earn, pain & suff. $600 costs of liab ins will go to pay other expenses as well.

   Conard also says operating tort system is much more expensive than operating insurance system b/c:

   a. 3rd party ins - adversarial relationship between victim & tortfeasor's ins co. Conflicts over amt, liability.

b. 1st party generally deals w/ med expenses - much more certain b/c past expenses, bills. 3rd party deals w/ uncertain damages (lost earn, p & s) - more conflicts, projections.
c. 1st party insurers generally don't fight customer - Usually don't involve lawyers.

5. **Fleming** - Tort law should take secondary residual place to ins system. Deal w/ accident claims through 1st party or govt. (social welfare) b/c:
   a. High costs of tort litigation
   b. Ps better able than Ds to estimate how much ins needed (ex: P knows earning history)
   c. Fault concept expanded to provide compensation.
   d. Vengeance, Retribution, Deterrence mitigated by idea of liability insurance.

5. So trad rule disappearing. Common law - no subrogation for personal expenses. But **NY CPLR 4545(c)** says in all pers inj, prop damage, & wrongful death cases, court should reduce award for economic losses by additional premiums paid by insured.

Ct reduces recover for damages recovered from collateral source (leaving enough in judgmt to pay for additional premiu

6. 3rd Party Liability Insurance
   a. Concern: Remove incentive on drivers to be careful.
   b. Concern has shifted to compensation for victims. Original auto ins was INDEMNITY insurance - indemnify tortfeasor for $ paid to victim. (If D insolvent & doesn't pay, ins co doesn't have to pay & victim left out in cold)
   c. 3 major TRENDS in liab insurance:
      1. Shift from Indemnity ins to Liab Ins - Insurer pays on BEHALF of tortfeasor. So even if D insolvent, ins co will pay victim.
      2. Expansion of Liability:
         a. Originally only vicarious liab (owner liable if agency relationship)
         b. Then "family purpose doctrine" - If driver is member of insured's family and operating for family purposes.
         c. Similarly, "Joint Enterprise" - people working together using car.
         d. Now, "Owner Consent Statute" - Owner liable for everyone using car w/ owner's consent.
      3. Requiring Insurance:
         a. Financial Responsibility Laws - After have accident, must get liab ins (But victim in 1st accident can't recover if no insurance)
         b. NY - Compulsory Insurance (V&T 341)
   d. Sometimes victim given cause of action directly against ins co. (Rejected in most states)

J. Impact of Insurance on Tort Litigation
   1. Family Immunity

a. Liability has gotten rid of reallocation of assets problem by externalizing w/ funds from outside sources.
b. Some says liab ins doesn't remove inherent danger of destruction of family harmony. But as practical matter, lawsuit unlikely to be brought unless family "united" against ins co.
c. Collusion argmt still holds! But this can be avoided by K - ins co. says won't cover. Ex: NY Ins Law 3420(g) - no coverage for claims between spouses unless expressly in Ins K.

2. Fire & Water Cases
   a. Tort law is form of compulsory insurance
   b. But DON'T substitute tort ins for fire insurance:
      1. Less efficient (measured by amt of water used rather than risk of fire)
      2. Owner know prop value best & can negotiate cost & limitations on liability accordingly.
3. *Lalomia v. Bankers & Shippers Ins Co.* - Look at roles that Michael's father plays:
   a. Administrator of Michael's estate, defending action
   b. Beneficiary of wrongful death statute (pecuniary losses)
   c. Beneficiary of survival statute (Michael's pain & suff, med exp)
   d. Receives any $ Michael might get from collateral sources
   e. Named insured on Ins Policies for 2 cars
   f. Names insured on Homeowner's policy
   g. Alleged tortfeasor in negligent entrustment claim.

   This is action for declaratory judgment - Used as way of determining which ins co. is liable & has to defend. Alternative is liability suit where P sues D's estate. After judgment, P could have K actions against ins cos if they don't pay.
   a. Maddock Auto Policy does NOT cover: Only covers after-acquired passenger auto for 30 days - Motorized bike is motor vehicle under V&T law but not private passenger auto as defined in policy.
   b. Maddock Homeowner Policy doesn't extend to automobiles so no liab for Michael's driving. BUT, does cover suit for neg entrustment. (For neg entrust, P must show Mike driving negligently & father unreas in allowing Mike to drive)
   c. P's auto policy does cover b/c gives coverage for uninsured motorists. (Liberty Mutual Policy)

   **NOTE: Notice where Lib Mutual ends up: Paid 1st party expenses to P for med exp, collision damage to her car. Now must defend Mike's driving against own insured - want to show Mike not negligent so don't have to pay uninsured motorists coverage.
4. Far cry from tradl bipolar suits - P has lawyer, D has lawyer, ins cos have separate lawyers.
5. Most cases settle out when it becomes clear who is liable for what after declaratory judgment.
6. Settlement Process - ends up being much simpler process:
   a. Were any traffic laws violated?
   b. Damages: Look at med expenses & then apply multipliers

7. *Pavia* - What std do we use to determine if Ins Co failed in its obligation to settle?
    a. NY - Liable if "grossly disregarded" insured's interest; Deliberate or reckless failure to placeo n equal footing interests of insured w/ own interests.
    b. Gross disregard somewhere between negligence & requiring P to show ins co had dishonest motives (all but impossible to satisfy).
    c. Here, proof insufficient to show gross disregard. Ins Co. had right to make investigation. Even though slow in investigation, not in gross disregard.

XI. Incremental Tort Reform/Auto No-Fault
- A. Aimed at reducing tort damages
- B. NY CPLR 4546 - In med malpractice, court will determine & deduct inc taxes P would pay on lost earnings.
- C. NY CPLR 4545 - Ct reduces recovery for damages recovered from collateral sources (Leaving enough in judgment to pay for premiums).
- D. NY CPLR 50-A, 50-B - Judgments for personal injury actions will be paid in periodic payments rather than single lump sum (D buys annuity that pays out over time).
- E. NY CPLR 1601 - If D found 50% or less culpable then that D is liable only for that % of Non-Economic loss (pain & suff). Mainly works w/ multiple Ds.
  - Still give joint & several judgment for economic losses. Subject to # of Exceptions: NY CPLR 1602(1)(b)
    1. If action arises out of use or operation of motor vehicle
    2. In product liability actions where mnfr can't be brought in
    3. Any claim based on intent, knowledge, or knowledge w/ concerted action (Intentional Conduct)
- F. AUTOMOBILE NO-FAULT
    1. In NY, broad displacement of tort law
    2. 5103(a)(1) - V still covered if no car (person other than occupant of another motor vehicle)
    2. Covered Person - any pedestrian injured through use of motor vehicle which is insured or any other person entitled to first party benefits.
    3. Entitled to First Party Benefits (Basic Econ Loss - 20% lost earn if pedestrian, BEL - 20% lost earn - P's deductible if driving another insured vehicle)
        a. Purpose of 20% Lost Earn deduct: taxes,work expenses won't have
    4. Basic Econ Loss
        a. Up to $50,000 med expenses
        b. Max $2,000/month lost earnings
        c. If have employer paid income benefits, can't count that as lost earnings.
    5. No recovery for Non-Economic loss unless serious injury:
        a. Fracture, significant disfigurement
        b. Test for disfigurement: whether reas person would regard as unattractive, objectionable, or object of pity or scorn

6. No recovery for Basic Economic Loss
7. Can sue for Lost Earnings not covered by basic economic loss.
8. Suit will probably not be brought if not enough pain & suff (One of purposes of statute is to discourage tort claims)
9. Insurance follows Car not Person
    a. If you are a pedestrian, covered by person who hit you even if you own your own car.
10. What if involved in crash w/ own car?
    a. Her own insurance covers anyone in her motor vehicle and her own first party benefits.
    b. Exclude from 1st party benefits any deductible under applicable insurance policy (5103(b)(3))
    c. Insurance offered w/o deductible or family deductible up to $200
        1. Deductible operates only against member of own household.
        2. Higher the deductible, cheaper the insurance → deductibles keep costs down & discourage small claims.
11. If D is negligent, insurer can get reimbursement (subrogation) only if:
    a. Vehicle over 6500 lbs.
    b. Vehicle used principally for transportation of person or prop
12. Not worthwhile to make transfers between ins cos. for ordinary accidents:
    a. Will probably balance out
    b. Even if have right to recover, sole remedy = arbitration (no lawsuits between ins cos.)
13. At least economically, P comes out pretty much whole w/ regard to 1st Party Benefits. Why not get rid of tort & leave 1st Party Coverage?
    a. Don't want to externalize - putting on auto policy, ties costs of auto accidents to driving rather than general health of community.
        1. Auto insurance - based on type of car, risk, how many cars
        2. Medical/Personal Insurance - would be subjective/ hard to determine what will be needed.
14. Does it make sense to raise Basic Econ Loss from $50,000 to $500,000? - Premiums ↑, more benefits, more likely to be compensated, less likely to go to tort litigation, might be able to save in liab insurance.
15. NO FAULT EXAMPLE

	Real Injury	BEL	1st Party
Med	$4000	$4000	$4000
(Lost Earnings) → L.E. 1 mo	3000 ← can get $1040 →	2000	2000 (3000 - 20%, 2000 cap)
1/2 mo	1500	1500 ← can't get economic part of BEL →	1200 (1500 - 20%)
	8500	7500	7200

If victim had $20,000 pain & suff from serious injury, what's her tort

recovery?

Pain & Suff	$20,000
Real Injuries	8,500
	28,500
Can recover P & S	(20,000)
1st Party Benefits Already Recovered	(7,200)
Lost Earn for 1 mo	(1,000)
Still out	300

XII. Intentional Harm

A. Historically, intentional torts most significant. Until Industrial Rev, accidents relatively infrequent, sources of compensation not existent. Now, least important part - Frequently no insurance, D is judgment proof - no assets

B. 2 Areas that have significance:
   1. Statutory employment discrimination cases
   2. Civil Rights Cases - frequently brought by arrestees, prisoners. Why?
      a. Large # of violations
      b. Class of Ps w/ time on hands or have representatives out to reform.
      c. Compensation available - Ds as govt agencies may have deep pockets, statutes frequently provide for paying of successful attorney fees (encourage compliance w/ civil rights laws)

ments of Battery
Voluntary Act
Intended to cause harmful contact
Intended to cause P to have
rehension of harmful contact
Harmful or Offensive Contact
Causation
Lack of Consent

C. Intentional torts used to vindicate individual & societal interests.
   1. No contributory negligence, comparative fault defenses
   2. Punitive damages frequently available
   3. Can't be discharged in bankruptcy

ements of Assault
Voluntary Act
Created Apprehension of
reduate harmful Contact
D Intended to caus*
tact or Apprehension
Causation
lack of Consent

D. Litigation Problem: may not be covered by insurance - no "pot of gold"

E. P must prove:
   1. Show protected interest has been invaded.
   2. D had intent to invade this interest.

F. *Garratt v. Bailey* - Court treats as intent both:
   1. Desire to have result, and
   2. Acting w/ knowledge of substantial certainty of result.

G. If Bailey had intended a prank, would have been liable b/c would have intended for P to fall. (Just have to intend contact, don't have to intend harm

H. If Bailey just grabbed near[esr]g chair w/o knowing someone going to sit down:
   1. Not Intentional
   2. Negligent? Depends on what reasonable 5 yr old thinks

I. If Coke puts out bottles knowing there's substantial certainty that 1 in a million will explode, intentional tort? NO:
   1. Know risk but don't know particular contact - Don't know particular P, which bottle will burst.
   2. No substantial certainty that this bottle I'm sending out will explode.

J. But if put cyanide in aspirin bottle, may not know particular P but know which bottle tainted. Know w/ substantial certainty that whoever gets this particular bottle will suffer poisoning.

K. Principal Intentional Torts: Assault, Battery, False Imprison., Intent. Infliction of Emotional Distress

L. Defenses: Consent, self defense, defense of prop, necessity

M. Hypos of Intentional Torts:
   1. Shoots at what thinks is scarecrow, hits person. - NOT battery b/c no intent to invade interest of another.
   2. A shoots a B & misses, hits C - Battery b/c Transferred Intent (No transferred intent in int infliction of emotional distress cases)
   3. A kisses B stranger - Battery - intentional & offensive conduct
   4. A throws snowball at B but misses - Assault only if B has apprehension of being hit. If B facing other way & doesn't see it until it passes, No assault b/c no apprehension of fear.

N. Just have to take action that led to harmful conduct; doesn't have to actually do offensive conduct (Ex: Pulling out chair led to harm)

O. Are we protecting same interest in assault & battery?
   1. Battery - protecting bodily integrity, protecting against harmful & offensive contacts
   2. Assault - protecting against some mental upset.

P. Assault & Battery Not Same in Criminal & Civil Law

	Physical	Mental
Tort	Battery	Assault
Common Law	Battery	Attempted Battery
NY Penal	Assault - completed Attempted Assault- uncompleted act	Menacing

Q. Traditionally, words alone insufficient to commit an assault.
   1. Today, words alone can be intentional infliction of emotional distress
   2. Words may indicate if there's imminent battery or not.
      a. Ex: Conditional words might show no assault: Were you NOT an old man, I'd knock you down. (No immediate apprehension b/c are old man)

R. False Imprisonment - protecting freedom of movement
   1. *Lopez v. Donut House* - No false imprisonment b/c not being restrained against her will, no threat to use force, no assertion of authority.
   2. There must be a detention - confinement w/in boundaries fixed by D.
   3. P must be conscious of confinement or harmed by it.
   4. Confinement must be unjustified.
   5. False detention w/ regard to shoplifters:
      a. Trad, justification requires that person restrained be ACTUALLY guilty. Stopping suspect very risky - not enough if reasonable suspicion.
      b. But NY Statute tried to help shopkeeper - now makes std a question of reasonableness.
   6. Also a problem w/ ARRESTS: Peace officers can avoid by warrant; otherwise violates civil rights.

3 Requirements

if there's reas means of escape, D could still be "bounded" if P is unaware of such means.

Here moral or social pressure isn't such to satisfy confinement element

Stay to Clear Name

Damages not available for jurnes suffered as results. UNREASONABLE attempts to cape, only reas attempts

S. Intentional Infliction of Emotional Distress
   1. *Hustler Magazine v. Falwell* - Requirements under VA Statute:
      a. D's conduct is intentional or reckless
      b. Offends generally accepted standards of decency or morality
      c. Is causally connected w/ P's emotional distress
      d. Caused emotional distress that was severe.

2. Restatement 46 - Liable if:
    a. Extreme and outrageous conduct
    b. Intentionally or recklessly causes severe emotional distress
3. *Falwell* cites *NY Times v. Sullivan* Standard: Need "Actual Malice" - With knowledge that statement was false or w/ reckless disregard as to whether or not it was true. (For Public Figures only)
    a. Sup Ct said no false statement b/c parody not represented as a statement of fact.
    b. Not using *NY Times* for its holding but for the value it expresses by allowing parody of public figure: 1st Amendment value in having robust political debate means can't have liability here

a party can recover if:
Present during outrageous conduct
Suffered Great Distress
Δ knows 3rd party present
Closely related to π

4. Int Infliction of Emotional Distress seen in cases involving **Racial & Sexual Harassment** in the Workplace.
    a. Fed law violation - Title VII
    b. 2 types of Sexual Discrimination:
        1. Quid Pro Quo cases - employment benefits conditioned on sexual favors.
        2. If create an offensive or hostile working environment
    c. Some cts say must be very hostile; injurious to P's psychological well-being.
    d. *Harris* - 1993 case - set out 2 requirements:
        1. Must be **objectively** hostile or abusive environment (Reas person would find hostile)
        2. Victim must have **subjective** perception that it was a hostile environment.

    No need to prove it had severe effect on psychological well-being. Trial ct said didn't interfere w/ work performance or cause injury so dismissed claim. Sup Ct REVERSED - don't need severe effect. Look at all circumstances:
        1. Frequency of conduct
        2. Severity of conduct
        3. Physically threatening & humiliating
        4. Interfere w/ work environment.

T. Defenses
1. Consent - If P consents, then no tort.
    a. Restatement 892(1) - Consent indicates willingness IN FACT for conduct to occur.
        1. May be manifested by action or inaction
        2. Need not be communicated to actor
    b. Restatement 892(2) - Shown by words or conduct reasonably understood as intending consent.
        1. A lot like express or implied assumption of risk - Did P voluntarily & knowingly accept risk of injury by D?
    c. NOT always a defense!! - sometimes cts don't let Ps accept risks as a matter of public policy:
        1. Fights by mutual consent - Consent to unlawful act is no consent at all. Allows system to provide some deterrence on each side:
            a. Deterrence on D that he's committing tort

b. Deterrence on P that can't recover as much

2. Fraud
3. Duress - physical force or threats to P or family
4. Mistake on P's part as to what is being consented to if D aware of mistake or if D caused it.

Also, no anser if exceeded scope consent + lack of capacity

d. Restatement 10 - BURDEN OF PROOF:
   1. P has burden of proof to show lack of consent to personal invasions.
   2. D has burden to show that P consented if invasion of land, chattels. (Protect land and property more)
e. Medical Malpractice cases:
   1. Surgeon can act w/o consent of unconscious patient if he reasonably believes surgery immediately needed
   2. But shouldn't do something that could have been done as well at a later time and after consultation or else it's a battery (Ex: Cutting off mole while performing abdominal operation)

2. Self-Defense/Defense of Property
   a. Privileged to use reasonable force to prevent or resist an attack/ invasion of interest.
   b. Strong notions of protecting property.
   c. Practical concerns of judicial remedy for D - Not effective remedy if D has to let himself be attacked & then sue.
   d. Limited to Reas force under the circumstances - Reas force is normally a jury question. Some situations won't get to jury:
      1. Peaceful invasion of land in presence of possessor- NO force is reasonable unless ask trespasser to depart or request is useless, can't be made safely.
      2. Can't use serious bodily harm to protect PROPERTY- can "gently put hands upon"; escort off property
   e. Deadly force can be used if immediate serious danger to D or family. No longer or harsher than necessary.
   f. May use force to resist invasion but NOT to punish!
   g. Can use force to defend another - come to their aid & use same force they are entitled to use.
      1. Under majority rule, if person you are protecting does not have privilege to protect himself, D doesn't have privilege either.
      2. Restatement 76 - D has privilege even if wrong if it's based on reasonable mistake. (Minority View)

Maj. View - don't have to retreat
Min View - Retreat if Deadly force & can do so safely

   h. Can't use spring gun to protect property:
      1. Privilege of protecting property doesn't extend to infliction of serious bodily harm
      2. Justified only if trespasser committing violent felony or felony punishable by death, or where trespasser was endangering human life by his act.
   i. Posner suggests a "reasonableness test" to determine whether use of deadly force is justified to protect property: Factors -
      1. Value of property measured against costs of human life and limb

2. Existence of adequate legal remedy as alternative.
3. Location of prop in terms of difficulty of protecting it by other means.
4. Kind of warning given.
5. Deadliness of device used
6. Character of the conflicting activities
7. Cost of avoiding interference by other means.

3. Necessity Defense
   a. Looks like self-help, but in self-help, D had legal remedy he is enforcing himself. In necessity, there is no legal remedy.
   b. *Ploof v. Putnam* - D cut boat loose b/c P trespassing, but P claims necessity - boat would have been destroyed by storm.
      1. Ct said not trespasser b/c acted out of necessity.
      2. P chose to trespass, balanced risks and costs.
      3. D can't say used judgment against P's intentional invasion b/c must use reasonable force. Cutting boat loose is unreas force. Put P in danger of serious storm damage. First, have to ask trespasser to leave.
   c. *Vincent v Lake Erie* - Trespassing ship caused damage to dock so A has to pay for damage. even if acted out of necessity.
      1. Don't want dock owner to set boat loose b/c fears damage to dock (But that's not likely to happen)
      2. Doesn't really matter where we put risk b/c costs of risks will be spread:
         a. If P knew couldn't recover, P would insure dock. Raise charges to ships to pay for insurance
         b. If shipowner has to pay, will insure & raise cost of whatever carrying.
      3. Shipowners will spread costs of weak docks but don't know which docks are weak. But if we put costs on dock owner, the price will reflect the risk (More $ for stronger docks)
   d. *Cordas v. Peerless Trans* - Cab driver who leaped out b/c of armed bandit not liable to injured pedestrian:
      1. Pedestrian not going to do anything different if promised compensation so ct won't compensate.

U. Intentional Harm: Government Liability
   1. 2 Main Sources of Liability:
      a. Title 42 - Sect 1983: Fed Civil Rights Law - applies to state municipal actions.
      b. *Bivens* actions: applies to Fed Officers
   2. Under Civil Rights Actions:
      a. Indemnification - have solvent D
      b. Possible for P to get attorney fees
   3. Who does 1983 apply to?
      a. Actions by every person (even municipalities)
         1. D never liable on theory of vicarious liability - don't hold municipality liable b/c of police conduct
         2. But municipality liable if have POLICY of promoting

police violation of con rights (Ex: Using billyclubs)
3. Can show municipality has policy w/ respect to its training & supervision (Ex: sargeants look other way)
4. Not terribly important to get municipality b/c P can recover from police officer (indemnified)

b. Deprivation must be "under color of state law" - acting as state agent. (Doesn't apply to private actions)
c. Subjects another to deprivation of right given by federal law or the Fed Constitution.

4. Immunities
   a. Source of immunities NOT in statute
   b. Nevertheless, preexisting common law that gave immunity to some govt officials carried forward even though Congress did not specify.
   c. Immunities Important b/c:
      1. W/ regard to officers, seems unjust to hold personally liable for exercising judgment that he's required to exer under law if he acts in good faith.
      2. Danger that threat of liab will chill the exercise of discretion. Will act tentatively or not at all - must give some freedom to make mistakes.
   d. Different Kinds of Immunities:
      1. Judicial, Legislative officers have ABSOLUTE immunity Chief role of judge is using discretion - don't want to chill, have judicial review to keep in line.
      2. Executive Officers - QUALIFIED immunity - have immunity if acting in good faith.
      3. Prosecutors have ABSOLUTE immunity - Required by virtue of office to exercise discretion & there's judicial review.
   e. *Horta v Sullivan* - 1st officer chases; 2nd officer makes roadblock. Injured passenger sues officers, town, & police chief on training & supervision claims. P claims no discretion b/c just following municipal guidelines. Court found:
      1. 1st officer not liable - no seizure w/in 4th Amend b/c didn't limit freedom of movement
      2. 2nd officer not liable - guidelines left officer substantial amt of discretion & no showing of 4th Amend violation.
   f. *Owen v City of Independence* - Municipality has NO Immunity. Officers get off b/c acted in good faith (qualified immunity) but city still liable.
      1. No chilling effect if impose liab - not going to discourage municipality from acting properly.
      2. Imposing liab will deter violations.
      3. Spreading Loss Notion - If public at large is getting benefit, then public should pick up costs.
      4. Dissent: Ct imposing strict liab on municipalities - At time city acted, was no constitutional right to name-clearing hearing. Yet municipality has to pay.

g. Sec 1983 meets need of providing alternative federal forum for unlawful conduct of officials.
    1. Discourages officials, deterrent effect
    2. But at same time, 1983 has been used to vindicate fairly subtle due process claims. Ex. *Carey v Piphus* - Kids suspended from school w/o hearing can recover only for actual damages - no presumed damages for violation of con rights.
    3. Sup Ct increasingly denying 1983 claims on grounds of federalism, case law - Use state law remedies.
        a. Hard to square w/ original impetus of providing alternative federal action.

5. *Bivens* Actions - Claims against Federal Officials
    a. Sec 1983 doesn't work b/c applies only if "under color of state law"
    b. Sup Ct says b/c con right to be free from unreas searches & seizures, imply a remedy w/in that right.
    c. Potentially very broad - prospect that if fed officer violates any of Bill of Rights can bring action.
    d. But Cts carved out significant limitation - No Bivens action if complementary statutory or regulatory relief.
    e. *Carlson v Green* - Fed Torts Claim Act doesn't bar suit to Biv action:
        1. Doesn't provide jury trial
        2. Punitive damages available only under Bivens
        3. Referred to local law as basis
        4. Deterrence stronger under Bivens when brought against individual defendants.
    f. But floodgates concern - Cts cut back. Ex: Bush v. Lucas - Remedy through civil service system prevents Bivens action.
    g. Immunities under Bivens:
        1. Judicial officers - ABSOLUTE immunity
        2. Unlike 1983, Chief Exec Officer (Pres) - ABSOLUTE (Governor of state has only qualified imm under 1983)
        3. Pres' senior aides only have qualified immunity - don't share Pres' Absolute Immunity.
6. 42 USC 1985(3) - Creates damage remedy for citizens deprived of constitutional rights by persons acting in a conspiracy.

XIII. Defamation
A. Category of claims for injuries to reputation.
B. 2 independent causes of action:
    1. Libel
    2. Slander

(Speak of defamation generally unless looking at elements of individual torts)

C. Common Law - Important b/c:
    1. Constitutional law built upon existing state common law - state law controls unless taken over by Constitution.

2. State law may still give quicker, more determinative resolution:
   Ex: Illinois - "Innocent Construction Rule" - If ambiguous, read it as non-defamatory. D can make motion to dismiss/ SJ
   But 1st Amend issues frequently require some discovery - can't raise issue on motion to dismiss & maybe not even SJ
3. Recently, Sup Ct cutting back constitutional protection & common law requirement becoming more important.

D. Elements of P's Prima Facie Case:
   1. **Publication** - Someone other than P or D has seen or heard statement or reas foreseeable that will hear (ex: use cellular phone)
      * Must be Intentional or Negligent! (NOVA) ← only non-S/L element!
   2. **Defamatory Statement** - Leading to harm to P's reputation. 2 ques:
      a. Can words used reasonably bear meaning P suggests is taken by audience?
         1. Look at from pt of view of Intended Audience.
         2. Common usage/meaning of words
         3. Typography (quotes, capitalization, headlines, caption)
         4. P can call attention to additional facts (inducement) that when combined w/ suggested meaning makes innuendo possible.

inducement → Additional facts that show what makes statement defamatory

      b. Is the meaning defamatory?
         1. Judge by community attitutdes
         2. Ask if injurious to reputation, leads to loss of goodwill or confidence.
   3. **Of and Concerning the Plaintiff** - Is statement referring to this particular P?
      a. Extrinsic facts may be necessary (colloquium). Also, interpretive aids used.
      b. ? is not if D meant for it to refer to P, but if audience understood statements to refer to P (Strict Liability Tort)
      c. When deciding if every member of group can sue, ct looks at:
         1. Size of group. If too large, fails.
         2. Numerator of group - how many are being referred to? (1, some, most, all)

E. Role of Judge and Jury
   1. If clearly not defamatory in any reas meaning, court will dismiss.
   2. If there are 2 or more reas readings, the ? goes to jury - trier of fact.

F. Common law treats defamation as **Strict Liability** tort.
   1. Exception: Publication Element - must be intentional or negligent
   2. Historically, most personal torts strict.
   3. Stems from idea that shouldn't speak ill of others unless sure of your accuracy. (Particular true if speaking about monarch, crown)

G. How is defamation different from personal injury & prop damage?
   1. No 1st Party Insurance
   2. Damages - in some situations, P must plead & prove special damages - pecuniary losses attributable to injury to reputation.
   3. Requirement of Damages offset rigors of strict liability.

H. Difference between Slander and Libel important w/ regard to Damages:
   1. **Libel** - written defamation - Generally don't have to allege any

damages; some damage of reputation is presumed.

2. **Slander** - spoken defamation - Requirement of alleging special damages unless it's **Slander Per Se** (Words are slanderous just by themselves). 4 categories of slander per se:
   a. Impute to P commission of crime (usually, must be crime of moral turpitude)
   b. Injurious to Trade
   c. P has loathesome disease (must be CURRENTLY suffered disease)
   d. Unchastity of a woman
3. Some states make distinction between **libel per se** (Statement is defamatory w/o reference to extrinsic evidence) & **libel per quo** (Need extrinsic evidence). & inducement (Not libel per quod if just need colloquio
   a. If it involves 1 of 4 slander per se categories, then don't have nor inducement to allege special damages.
   b. Any other libel per quo - special damages required
   c. Libel per se - no special damages.

I. Requirement of special damages important b/c so hard to prove.
   1. 3rd parties not eager to admit stopped trading b/c of defamation.
   2. If special damages proved, can get those special damages AND any general damages (General damages are presumed)
   3. Increasingly, cts treat radio & TV cases as libels rather than slanders b/c greater potential for harm..
   4. PUNITIVE damages also available.

Special Damages - cover economic loss (Medical, Lost Earn)

General Damages - cover economic losses un & suff)

L. Defamation Defenses: Complex
   1. Consent - common to all torts
   2. Truth - quintessential defense
      a. Burden on D to establish this as defense.
         1. Presumption of good character.
         2. Grew out of seditious libel against crown so put burden on libeler.
         3. Easier to prove in affirmative than negative (harder for P to prove not a thief than D to prove he is a thief)
      b. Must be Substantial Truth - doesn't have to be all true.
      c. Have to prove truth of underlying charge - Not sufficient to say I accurately quoted.
      d. Not used that much b/c hard to prove and D has other options.
   3. Absolute Privilege
      a. Legislative arena - what's said on floor (comment need not bear relationship to matter at hand)
      b. Statements made in judicial proceedings. (must bear reas relationship to proceedings
      c. Some executives - Prosecutors have absolute privilege
   4. Qualified Privileges:
      a. Privilege of Fair Comment
         1. Started w/ Literary, artistic matters
         2. Privileged as long as it's not only purpose to defame.
      b. Political Fair Comment
         1. Majority View - Underlying facts had to be true & had to honestly hold belief that they were true. Rationale: w/o protection, people wouldn't run for public office.
         2. Minority View - Qualified privilege so long as political comments are honestly believed & underlying facts are

Qualified Privilege - can be destroyed by showing of abuse or malice.
→ Absolute Privilege can't be destroyed

honestly believed (don't have to be true). Rationale: Doesn't seem to discourage people from running - no shortage of candidates.

5. Privilege of Fair & Accurate Reports w/ respect to official proceedings
    a. Agency Notion - Press is agent of people & everyone can't sit in & watch.
    b. Public Supervision - Important for public to know how officials are conducting themselves & how proceedings going.
    c. Public Interest in public proceedings.
    d. Privilage can be lost if:
        1. Report is unfair & inaccurate.
        2. Sole purpose is causing harm.
        3. Cts more lenient here than w/ truth defense b/c recognize there's substantial summarization - has to condense material.
6. Miscellaneous Defenses
    a. Retraction - NOT absolute defense. Just limits P's damages b/c limits harm to P's reputation.
    b. Statute of Limitations & Single Publication Rule:
        1. Short stat of limit. (at most 3 yrs) - begins to run on 1st publication
        2. Both harm & proof passes quickly - incremental harm to reputation of later sales probably not too great. Also, proof disappears - people forget what was said & how it was said.

M. Constitutional Issues
    1. *NY Times v. Sullivan* - Powell expresses concern for fear of large damage awards b/c discourages Ds:
        a. Can't prove telling truth
        b. Can prove but too expensive.
        c. Court might make mistake.
    2. Sup Ct says want to protect some false statements - some erroneous statements are inevitable. Want to provide some breathing space for free debate.
    3. NYT test: Public official can't recover unless there's **actual malice**: "w/ knowledge statement was false or reckless disregard as to whether statement was false or not."
        a. Moderate view between negligence & absolutist view

Dt checking sources generally only negligence, bt recklessness

    4. Who are Public Officials?
        a. Political Officials
        b. Police Officers
        c. Few cts say Teachers, Coaches, Athletic Directors
        d. 3-legged Stool Test - *Kassel v. Gannett Co.*
            1. Apparent importance of position
            2. P's access to communication media to counteract the impact of false statements
            3. Degree to which P has assumed risk of exposure to criticism by media.

5. How do you prove Actual Malice?
    a. *St. Amant* - Clearly subjective test but P has to use objective proof.
    b. *Herbert v. Lando* - P not limited to objective proof - can use discovery to get subjective evidence; can make subjective inquiry.
    c. NY - *Masson* - Author changed some statements that were put in quotations.
        1. P said any alteration of statement was falsity - actual malice.
        2. Ct of App said "rational interpretations"
        3. Sup Ct applied test of "Material Change in Meaning"
6. NY Times provides Procedural Protections also:
    a. Actual malice proved w/ convincing clarity - gives strong hand to D. (Greater than preponderance std)
    b. Summary Judgment Std: On motion for SJ, judge must decide "whether the evidence in the record could support a reas jury finding that P has shown actual malice by clear & convincing evidence"
    c. Appellate cts can independently review arguments - not going to give so much weight to jury finding of facts, especially if P wins below only on credibility evidence.
    d. Libel by Implication: NY Times treats those statements as statements of fact. Up to P to show D intended implication or was aware of implication.
7. *Gertz v Robert Welch* - Focus is Balancing of Identity of Ps, rather than facilitation of democratic debate.
    a. Public different from Private Figure - Access to media, assume risk b/c thrust themselves in forefront.
    b. No liability w/o Fault for publisher/broadcaster.
        1. Usually a negligence std if private P & media D
        2. Isn't easy for D to get SJ or DV
        3. Isn't easy to get P judgment overturned.
        4. Easy for P to prove negligence.
    c. No presumed or punitive damages absent NY Times malice
8. In NY - *Chapadeau* - D given additional protection - Not liable unless "Grossly Irresponsible"
9. *Philadelphia Newspapers* - D given 3rd protection - P has burden to prove falsity on matters of public concern. (In common law, D had to prove truth)
10. *Dun & Bradstreet* - Private P & Private D (not media D)
    a. *Gertz* std requiring negligence doesn't apply b/c Gertz involved only issues of public concern.
    b. Here, Private P & private concern, so common law applies.
11. 3 Categories of Public Figures:
    a. General Public Figure - household name, celebrity
        1. Public figures can return successfully to anonymity & private individual status.

b. Limited Purpose Public Figure - Public figure w/ respect to:
    1. Particular Public Controversy
    2. Thrust himself to forefront of public controversy.
    3. Applicable if D's comment germane to controversy.
    4. Not applicable if comment not related to role in the controversy.
c. Involuntary Public Plaintiff - Drawn into controversy.
    Ex: Johnny Carson's wife if he talks about her in monologue.

12. Press as a Commentator
    a. Opinion is separate category protected by 1st Amend.
    b. *Milkovich* - Relates opinions to general principles of protection:
        1. Whether contains loose, figurative language
        2. Whether it's verifiable
    c. Did D understand or should have understood that readers will understand words to be factual?

Defamation Notes:

Burden of Proof

- If matter of public concern → Π must prove falsity
- If not, Π only has to allege falsity in his complaint & Δ must prove truth in order to use it as ABSOLUTE defense.

- Subsequent Republications, when intentional or foreseeable, are considered proximately cause by original defamer.

- Defamation action is Personal, not surviving death of person defamed.

Trespass to Land

- Mistake no defense - intent = intent to act, not intent to trespass
- Physical invasion only requires that Δ set in motion something that violates exclusive possession

Trespass to Chattels, Conversion ⇒ see notes.