- Negligence
  - Negligence
    - PL > B
    - Reasonable person
      - emergency
      - child
    - Custom, Statute
    - Notice: Constructive/Actual
    - Res Ipsa Loquiter
    - Medical Malpractice
      - Locality Rule eliminated
      - Patient Rule
  - Duty
    - Physical Harm
      - Contractual
      - Attempted to assist, leaving Π in worse position
      - Only Instrument of Rescue
      - Special Relationship
      - Negligent Entrustment
      - Dram Shop Act
      - Landowner
        - Invitee
        - Licensee
        - Trespasser
      - Government Entities
        - Municipal Immunity
        - Qualified Immunity
        - Federal Tort Claims Act
          - Discretionary Function Exception
    - Emotional Harm
      - Zone of Danger
      - Foreseeability
    - Wrongful Birth
    - Wrongful Life
    - Economic Harm
      - Identifiable or Particularly Foreseeable Group, NOT an Indeterminate Class
      - Loss of Prospective Economic Advantage
      - Professional Liability
        - Attorneys
        - Accountants
  - Cause
    - "But For" Test
    - All or Nothing
    - Loss of Opportunity for Life
    - Enhanced Risk
    - Multiple Defendants
      - Joint and Several Liability
      - Concerted Action
      - Successive Tortfeasors
      - Market Share Liability
      - Substantial Factor
  - Medical
    - All or nothing

- Loss of opportunity of life
- Enhanced risk
- Proximate Cause
  - Extent of Harm
  - Type of Harm
  - Unexpected Manner
    - Intervening Superseding Cause
  - Unexpected Victim
    - Zone of Risk
    - Foreseeable Victims
- Injury
- Π's Fault-Defenses
  - Contributory Negligence
  - Comparative Negligence: pure/modified
  - Assumption of Risk
    - Express
    - Implied
- Immunities
  - Charitable
  - Family

Strict Liability
- Unnatural collection/unnatural use
- Abnormally dangerous
- Calabresi-economic
- Professional services

Defective Products
- Manufacturing Defects
- Design Defects
  - Unreasonably dangerous
    - Consumer expectancy test
    - Cost-benefits analysis test
  - Crashworthiness
  - Unavoidably dangerous
    - Vaccines
- Warnings
  - Reduce Risk
  - Intrinsic Risk
  - Alteration to Originally Safe Product
    - Foreseeable
    - Unforeseeable
  - Learned Intermediary
  - State-of-the -Art

Trespass

Nuisance
- Public
- Private

Damage

Insurance
- Specials
  - meds
  - employment
- Non-economic harm
- Exemplary, punitive

Alternatives
    No-fault
Intentional Harm
    Battery
    Assault
    False Imprisonment
    International infliction of emotional distress
    Employment Discrimination
Defamation
Policy
    Floodgates
    Limit Orbit of Liability
    Innocent Victim
    Cost-Spreading
    Reciprocity of Risk Creation

I. MARTIN ON EXAMS

1. He wants a result which depends on the role you are asked to play.
2. Usually you can plausibly reach more than one result.
3. How you arrive at an answer is more important than the answer itself.
4. "Show me what your thinking process was in arriving at an answer."
5. Arguments + Counter-arguments ⇨ Resolution
6. Structure of the answer:
   a) *Each paragraph deals with another issue.*
   b) *In each paragraph, both sides are shown in alternating sentences.*
   c) *Each sentence contains reference to law and fact.*
7. Only deal with the dispositive issues, i.e. do not talk about issues that do not have to do with the question.
8. No case names.

II. INTRODUCTION TO TORT LIABILITY

A. *PROLOGUE*

1. Primary concern of tort law is whether one whose actions harm another should be required to pay compensation for injury.
2. The tort system partially fills the gaps in compensation by reimbursing people who may not have otherwise received compensation for their out-of-pocket expenses due to illness or injury.

B. *WHEN SHOULD UNINTENDED INJURY RESULT IN LIABILITY?*

1. The central issue in a system of tort liability for unintended injury is when losses should be shifted from an injury victim to an injurer or some other form of compensation.
2. However, keep in mind that accidents happen.
3. Throughout the topic of unintentional harm, there is tension between strict liability and negligence.
   a) *Strict liability: liability without fault.*
   b) *Negligence: failure to use such care as a reasonably prudent and careful person would use under similar circumstances.*
4. Opponents of strict liability believe that to allow Δs to be held liable when they were not negligent would open the floodgates of litigation. Some argue that it is not up to the judiciary to impose s/l, but up to the legislature.
   a) *<u>Hammontree v. Jenner</u> Rule: Strict liability standard rejected in a case where there was no negligence found on*

the part of Δ epileptic driver who drove into Π's bicycle store causing p/d and p/i while unconscious, having a seizure.

C. THE LITIGATION PROCESS The aggrieved party must initiate the action and pursue until redress or exhaustion of legal remedies.

1. PLEADINGS

a) <u>Complaint</u>: Π alleges the "facts" which are contended to justify relief. The legal theory under which Π brings the suit is usually apparent from the material facts.

b) <u>Demurrer</u>: Assuming for the purpose of this Δ's motion to dismiss that all the facts as alleged by the Π are true, there is no sound legal theory upon which the Π is entitled to relief.

c) <u>Answer</u>: Δ denies some or all of the Π's allegations and may add new facts to destroy Π's case.

d) <u>Summary judgment</u>: Motion to dismiss b/c the conclusion is foreordained.

2. TRIAL

a) <u>Burden</u>: At trial Π must persuade the jury by a "preponderance of the evidence." *If the jury cannot decide which side presented the stronger case,* "equipoise", *they must return a verdict against the party with the burden of proof, generally the Π.*

b) Directed verdict: A party is granted a motion for a directed verdict if the judge believes that based on the evidence presented, no reasonable jury could find for the other side.

c) Reserve decision: The judge can "reserve decision" *on the directed verdict until the jury verdict. That way the judge can dismiss the case if the jury does not come in the way the judge thought it should.*

d) Charge: The instructions given to the jurors by the judge concerning the law and the burdens of proof. Usually the Π and Δ submit their own versions of instructions and the judge chooses one or a compilation of both to give the jury.

e) Judgment n.o.v.-non obstante veredicto: The losing party to a jury verdict can make a motion for judgment, notwithstanding the verdict, arguing that the jury reached a verdict that no reasonable jury could have reached based on the evidence presented.

f) Error: The losing party can claim on appeal that the trial judge committed prejudicial error with regard to the inclusion or exclusion of evidence or the jury charge. If this argument is successful, a new trial may be ordered.

g) Verdict v. Judgment (1)verdict: decision made by the jury. (2)judgment: decision of the court which can be different than the verdict.

3. DAMAGES **The goal of tort law is to return Π to the equivalent of the condition before the harm occurred.**

a) Limitations (1) Π can sue only once for the harm suffered, (2) the statute of limitations limits the time in which a Π may bring suit, (3) Π has no further legal recourse after judgment has been accepted even if further harm arises out of the Δ's tortious act.

4. ATTORNEY FEES

a) In the U.S. both sides have to pay their own attorney fees regardless of outcome whereas in England the loser pays.

b) Contingency fee: injured party only pays attorney fees if the case is concluded successfully.

5. DEATH OF THE Δ

a) SURVIVAL STATUTES allow the estate of the deceased to bring suit for any harm for which the deceased could have sued had death not been a result.

b) WRONGFUL DEATH STATUTES allow suits to be brought by legally designated beneficiaries to recover for the pecuniary loss that the death caused.

c) In case of death the suit is actually brought by an administrator (trix) or executor (trix). When a person dies without a will they are considered "intestate" and the court appoints an administrator.

6. DEFENDANTS

a) Π's attorney must find a defendant who is solvent and would be able to pay a judgment either through independent means or insurance.

b) JUDGMENT PROOF: the term used to refer to defendants who simply would not have the money to pay even if judgment was for Π, i.e. no insurance and not independently wealthy.

c) SPREADING THE RISK is what larger companies can do to make up the money they pay out to Πs by raising their prices for their product or service and in effect making all consumers pay for the loss sustained by a few.

III. THE NEGLIGENCE PRINCIPLE

A. Negligence is both the name we give for a cause of action and the name of a standard of care, i.e. that of a reasonably prudent person under like circumstances.

B. HISTORICAL DEVELOPMENT OF FAULT LIABILITY

1. Actions used to be brought through the Anglo-American writ system.

a) Writ of trespass was derived from conduct "vi et armis" (with force and arms). It covered intentional acts that generally would be classified as criminal.

b) "Trespass on the case" was pleaded when Πs could not make a plausible claim of forcible injury. It has been affiliated with negligence.

2. In cases of unintentional harm the burden of proof is on the Π since Π is the party calling on the state for assistance. The Π must show that Δ failed to exercise REASONABLE CARE; the Δ does not have to prove exercise of extraordinary care.

a) What constitutes ordinary care will vary with the circumstances. It is up to the jury to decide whether Δ exercised due care.

b) Δ was not automatically liable as negligence was a required element.

c) Brown v. Kendall (MA 1850, p.28) Held: The Δ did not have to prove that he was exercising extraordinary care when he accidentally struck Π in the eye with a stick that he was using to stop their two dogs from fighting

C. THE CENTRAL CONCEPT: The Standard of Care

1. Δ cannot be held liable if Π assumed an UNREASONABLE RISK.

2. Δ must only guard against reasonably foreseeable action

a) Adams v. Bullock (NY 1919, p.33) Held: Δ trolley company was not liable for injuries sustained by Π boy who was dangling a wire from a railroad overpass because Δ did not have a duty to anticipate Π's creation of an extraordinary peril.

3. Δ is negligent and liable for resultant harm when the cost of avoiding that harm is less than the risk, i.e. PL<B (P=probability of harm, L=severity of the loss, B=burden of avoiding the risk).

a) Negligence is based on the idea that a reasonable person would invest in prevention if its cost was less than the harm.

b) U.S. v. Carroll Towing Co. (NY 1947, p.37) Held: Π was negligent when their ship sunk because the probability of an accident (high in NY harbor because of the heavy volume of wartime) times the magnitude of the resultant harm (loss of a whole ship) was less than the burden of avoiding that harm (having a bargee on board during normal working hours

D. THE CENTRAL CONCEPT: The Reasonable Person

obj std
avg person
moral std of community

1. **The reasonable person is a legal fiction.**
   a) ***It is used as an objective standard of conduct to determine liability.***
   b) ***It is a person of average intelligence and prudence.***
   c) ***It represents the general level of moral standard of the community.***
2. **Some who are not capable of adhering to this standard are exempt under certain circumstances.**

ex. children
std is someone their own age unless engaging in adult activities

   a) ***CHILDREN are generally held to a standard of conduct for someone of their actual age, intelligence and experience.***
   b) ***ADULT ACTIVITIES: Children have been held to the usual reasonable person standard when they were engaging in driving an automobile, airplane, powerboat.***
   c) ***Some states have put definite age limits for children who would be considered "conclusively presumed incapable of negligence."***
   d) ***The courts do not look fondly on INSANITY defenses for negligence suits. Δ would less likely be exempt if there had been forewarning symptoms.***

E. *THE ROLE OF JUDGE AND JURY: In General*

1. **Π can be held to a standard of conduct to avoid their own injuries that is imposed by the court, i.e. negligence as a question of law.**
   a) ***<u>Baltimore & Ohio Railroad Co. V. Goodman</u> Held: The court decided that Π failed to meet a standard of care when he only slowed down before crossing railroad tracks on which he was struck by a train and killed since he knew of the risks but did not take reasonable steps for his own safety. 52***
2. **Usually it is up to a jury to decide negligence, i.e. whether one rose to a standard of care befitting the circumstances.**
   a) ***<u>Pakora v. Wabash Railroad Co.</u> Held: Π was struck by a train when he proceeded onto the tracks after stopping to listen since his view of the tracks was obstructed. 53***

Common carriers.

higher std. b/c passengers can't protect themselves.

3. **It is up to a jury to decide if Δ COMMON CARRIER rose to the heightened standard of utmost care that applied to it.**
   a) ***Common carriers are held to a heightened standard of utmost care because their risk is enhanced by the high number of passengers (potential victims) and the passengers have less of an ability to protect themselves.***
   b) ***A jury could find Δ negligent even though the heightened standard was not the custom since common carriers have to go out of their way to find new safety options available because of the increase in technology.***

c) *Andrews v. United Airlines Held: Jury could find Δ airline liable for Π's serious injuries sustained by a briefcase falling from overhead bin for failing to exercise utmost care because the airline was aware of the risk and some airlines had already installed catchnets.*

F. THE ROLE OF CUSTOM

1. One must comply with general custom or practice to avoid injury and it is up to a jury to decide whether a custom exists.

Custom but just b/c everyone does it does not make it reasonable

2. Custom is a shortcut to defining reasonableness since custom is the result of many people's observations.

a) *Trimarco v. Klein (NY 1982) Held: Δ landlord was liable for Π's injuries sustained when he fell through a glass shower door because by 1965 it was the custom for landlords to replace glass doors with shatterproof glass if asked or if it otherwise arose.*

3. Custom sometimes plays a role in the PL<B comparison. However, although it is sometimes evidence of negligence, it is not conclusive, i.e. just because everyone else does it does not mean it is reasonable.

G. THE ROLE OF STATUTE

1. One can be found negligent as a matter of law for adding to the accident by violating a statute intended to protect, unless there is an adequate excuse for the violation.

violation of statute may be prima facie contrib neg

2. Violation of a statute may be prima facie evidence of contributory negligence which would shift the burden of proof to the Π.

reas person does not violate statute w/o a good excuse

3. A reasonable person does not violate laws designed for their safety without a good excuse which may constitute an exception.

4. Safety statutes are designed not only to protect those who are subjected to them, but also for the guidance and protection of others who should be able to rely on others following the law.

a) *Martin v. Herzog (NY 1920) Held: By driving without his headlights, Π was contributorily negligent as a matter of law because he violated a statute that was intended for his safety without an excuse.*

5. Failure to strictly comply with statute is not necessarily negligence if doing so would yield imminent danger.

6. There is a distinction made between a "rule of the road" and a "rule of safety" (Herzog). The former is not as strict and is supposed to be used as a guideline that is usually most safe, but not followed when circumstances render following the guide dangerous thus defeating the statute.

a) *Tedla v. Ellman (NY 1939) Held: Πs were not contributorily negligent for breaking the statute by walking on the wrong side of the road when following the rule would have placed them in imminent danger because of the volume of traffic.*

H. PROOF OF NEGLIGENCE

constructive notice by circumstantial evidence

1. Rule: A jury could find negligence if there was sufficient circumstantial evidence to prove CONSTRUCTIVE NOTICE.
2. To constitute constructive notice, a defect must be visible and apparent and must exist for a sufficient amount of time before the accident to permit Δ to discover and remedy it.
   a) *Negri v. Stop and Shop, Inc. (NY 1985) Held: Δ could be held liable for Π's injuries sustained when she slipped and fell on baby food in Δ market because there was enough circumstantial evidence to prove constructive notice, i.e. no employee had been in the aisle for at least 50 minutes and another shopper did not hear any breaking glass for at least 15 minutes before Π's fall.*
3. However, causation is insufficient to prove constructive notice of the particular condition.
4. Notice of a general condition does not replace the burden on the Π to prove that Δ had constructive notice of the particular defect.
   a) *Gordon v. American Museum of Natural History (NY 1986) Held: Π slipped on a piece of wax paper on the steps of the museum which he claimed came from a nearby museum concessionaire. Other debris was in the vicinity that Π argued Δ should have known about and cleaned up.*

RES IPSA LOQUITUR - if it happens it was b/c of neg. (it's not the norm) burden of proof shifts to Δ

Π has no way to discover how it happened

5. RES IPSA LOQUITER, i.e. the thing speaks for itself. The Π argues that the prima facie evidence yields a strong inference of negligence.
6. Res ipsa generally can be interpreted as: This sort of thing usually does not happen unless someone has been negligent.
7. If the Π makes a res ipsa case, the burden of proof shifts to the Δ. The burden is shifted to allow Π to recover in these cases where Π has no way to discover how exactly Δ was negligent.
   a) *Byrne v. Boadle (England 1863) Held: Π hit on the head by a barrel of flour that came flying out of a warehouse window above was permitted to claim res ipsa because barrels usually do not come flying out of windows without someone being negligent.*
8. However, if Δ presents facts that are inconsistent with negligence, the burden switches back to the Π to explain them.

9. Res ipsa can be used to establish negligence as a matter of law.

test
1) doesn't usually happen
2) Δ is in ctrl
3) no contrib neg TT

10. RES IPSA TEST: a)accident does not usually happen w/o someone's negligence, b)instrumentality must be in exclusive control of Δ [actual control here, but right of control in Ybarra] and c) no contributory negligence on the part of the Π.

a) Newing v. Cheatham (CA 1975) *Held: Δ Decedent was found liable when Πs and Δ died in Δ's airplane after a normal take-off in clear weather because of re ipsa.*

11. The Court may look to legal responsibility as well as physical control to determine whether the instrumentality was in exclusive control.

12. In NY res ipsa is only an inference that does not automatically win a case for Π, i.e. even if Δ says nothing, Π could still lose.

13. It is not necessary to prove that Δ had exclusive control over instrumentality to use res ipsa if the Π was unconscious at the time of the accident.

14. The cause of the accident is accessible to the Δ but not to Π so this rule helps to smoke out the evidence.

15. Court found that it was unreasonable to require an unconscious patient to know who or what caused the injury.

respondeat superior doctrine

16. An employer could be found liable no matter which employee actually caused the harm under the "respondeat superior" doctrine.

a) Ybarra v. Spangard (CA 1944) *Held: Π was permitted to argue res ipsa when his arm became paralyzed after he had an appendectomy under general anesthesia even though he did not know how the damage happened and no one had exclusive control.*

I. THE SPECIAL CASES OF MEDICAL MALPRACTICE

expert witness

1. (1) The trial court can decide that an expert witness is qualified to testify even if the witness does not practice in the jurisdiction, i.e. elimination of the locality rule and (2) The other party is entitled to present evidence that the expert witness may be biased in order to subtract from credibility.

2. Separate standards of care for doctors are disappearing with the advancement of technology because now it is easier to keep current with journals, conferences, and specialists.

3. Doing away with the locality rule helps to avoid the conspiracy of silence among doctors.

4. It is the jury's role to determine credibility so testimony to reveal bias on the part of the witness is permissible.

a) Henning v. Thomas (VA 1988) Held: Π expert should be allowed to testify b/c he was familiar with the standard of care in VA even though he did not practice in VA. However, Δ was not barred from attempting to prove that Π's witness was biased on x-exam.

5. PATIENT RULE A physician must disclose all risks to the patient but cannot be held liable unless a REASONABLE person would have made a different decision had they been given the information.

6. Under the old "professional rule", the doctor only had to tell the patient what the doctor thought the patient needed to know. With the "patient rule" the doctor is required to tell the patient all material risks.

7. However, the teeth are taken out of the patient rule because the Π must prove that a REASONABLE person would have made a different decision had they been given the additional information which is an objective instead of a subjective standard.

8. Also, there are many exceptions as to when the doctor has to follow the rule. ex. detrimental effect on the patient, emergencies. patient incapable of consenting, etc.

a) Paucher v. Iowa Methodist Medical Center (Iowa 1987) Held: Π decedent could not recover for his wife's wrongful death because a reasonable person would have had the intravenous pyelogram (IVP) even if they had known of the 1 in 100,00 or 150,000 chance of death.

IV. THE DUTY REQUIREMENT: PHYSICAL INJURIES

A. INTRODUCTION

1. Traditionally Π had to prove that Δ owed a duty to Π which was breached causing the injury. Today Π only has to allege that Δ failed to exercise due care and caused the injury. Δ may argue the defense of no duty.

2. The question of duty is a matter of law for the judge.

B. OBLIGATION TO OTHERS

1. The courts have drawn the distinction between misfeasance and nonfeasance. Causing an injury is recognized and enforced by law whereas there is only a moral obligation to prevent an injury.

2. Δ is only liable if Δ neglected to perform a legal duty owed to the Π.

3. Δ owes a duty of reasonable care after attempting to voluntarily aid Π if Δ knew or should have known of the peril. Δ would be liable for leaving Π in a worse position than where they were before the Δ interfered.

a) Farwell v. Keaton (MI 1976) Held: Δ was liable for Π's death when they had been out drinking together, Δ had gotten severely beaten up and Δ left Π in a car after trying to wake when Π would have had an 80-85% chance of survival had Δ brought him to the hospital that night.

4. The dissent asserts that there is no clear precedent to impose liability in this case. The idea that social venture gives rise to a special relationship with responsibilities is dicta.

5. If Δ begins attempting to assist and in so doing effectively cuts Π off from the possibility of anyone else finding and helping Π, Δ's responsibility heightened.

6. Δ may also be liable for failing to use the only instrumentality of rescue.

7. The Court may limit the extension of duty in cases where Π may have otherwise had a claim in order to control the limits of liability.

8. If something effects a huge amount of people, the Court may decided to limit liability by only allowing recovery by Πs who were in privity with the Δ.

9. The Court does not want to "violate its responsibility to define an orbit of duty" that places a controllable limit on liability.

10. City council is in a position to negotiate with utilities with leverage such as contract renewal and permissible rates.

a) Strauss v. Belle Realty Co. (NY 1985) Held: Δ Con Ed was not liable for injuries sustained when Π tenant tripped and fell on a defective stair in a common area of the building in part due to the absence of light during the 1977 NYC blackout because he was not in privity with the electric co. This decision despite the fact that the company had found to be grossly negligent with regard to the blackout in a previous suit.

b) The dissent argues that the utility would be better able to redistribute the loss and that the number of injuries that result from the negligence speaks directly to the amount of culpability.

C. OBLIGATION TO CONTROL THE CONDUCT OF OTHERS

1. Tarasoff v. Regents of the Univ. Of CA (CA 1976) Rule: Δ may have a duty when Δ is in a special relationship either with the person who needs to be controlled or with the foreseeable victim of that conduct.

a) Facts: Poddar told Δ that he intended to kill Tatiana. Δ failed to detain Poddar or warn Tatiana and P killed T.

b) Rationale: (1) The Court balanced a lot of considerations in deciding whether to impose liability:

Tarasoff test

foreseeability
degree of certainty
degree of connection
moral blame
burden to the Δ
consq on community
avail of insur.
policy of preventing

foreseeability of harm to P, degree of certainty that the Π will be injured, degree of connection between Δ's conduct and Π's injury, moral blame of Δ's behavior, policy of preventing future harm, burden to the Δ, consequences on the community and the availability of insurance. (2) Therapist-patient relationship is special on which duty can be imposed.

2. Vince v. Wilson (VT 1989) Rule: Δ can be liable for negligent entrustment if Δ knew or should have known that there was a HIGH FORESEEABILITY of harm.

a) Facts: Δ aunt gave Δ nephew $ to buy a car when she knew that he failed his driving test, did not have a license and abused drugs and alcohol. Evidence showed that car dealership also knew this info when they sold the car to the nephew. Nephew got into a car accident injuring Π.

b) Rationale: (1) The Court relied on the Restatement, that if one supplies an item which they know will be used at an UNREASONABLE RISK, they should expect to share in the liability. (2) FORESEEABILITY of result.

3. Kelly v. Gwinell (NJ 1984) Rule: When the social host directly serves the guest alcohol and continues to do so even after the guest is visibly intoxicated, knowing that the guest will soon be driving, the social host may be liable for the consequences of the resultant drunk driving.

a) Facts: Δ1 was at Δ2's home where Δ2 continued to serve Δ1 alcohol until Δ1's bac was 0.286. Δ2 knew Δ1 was going to drive and when he did, he drove head-on into Π.

b) Rationale: (1) Policy: the social goal of the reduction of drunk driving since 50% of mva fatalities involved drinking. (2) The cost to Δ hosts should be weighed in relation to the total social harm created by drunk driving, i.e. $1,150,000,000.00 from 1978-1982.

4. Some states have precluded liability for social hosts by legislative intervention.

5. Dram Shop Acts impose liability on commercial establishments that serve intoxicated patrons who subsequently injure others [book says in 15 states].

D. *LANDOWNERS AND OCCUPIERS*

1. Fitch v. Adler (OR 1981) Rule: A social guest has the status of a licensee to whom Δ has a duty to warn of any trap that might be expected to cause Π injury despite Π's exercise of reasonable care.

a) Facts: Δ host opened deck doors after dinner b/c the room was stuffy. While Δ was out of the room, Π walked out

onto the deck, not knowing that it was not finished and fell, injuring herself.

b) Rationale: (1) Δ should have anticipated that Π would have gone out onto the deck. (2) It was a question of fact whether Π should have been able to discern the condition of the deck within the exercise of reasonable care for her own safety.

c) Hypo: What if instead of an invitee, the injured party was a trespasser? Owners only have a responsibility not to act willfully or wantonly against a trespasser. In order to take the precaution to warn a trespasser, the burden on the Δ would be too great. Also, there is the personal autonomy argument that owners should be able to keep the land the way they want it.

d) Hypo: If Δs instead ran a B&B, they would have had a heightened duty owed to a business invitee to keep the premises reasonably safe.

2. INVITEE: a person who enters Δ's land to do business or if the land is open to the public, is owed a ~~duty~~ of reasonable inspection to find hidden dangers and reasonable care to use affirmative action to remedy the danger.

3. LICENSEE: has the consent of the owner to be there but is not there for business purposes to whom the owner owes a duty to warn of any known dangers. No duty to inspect for unknown dangers. This category largely includes social guests.

4. TRESPASSER: a person without permission to be on the property is generally owed no duty except:

a) owner cannot act willfully or wantonly.

b) constant trespass on a limited area: owner must use reasonable care to make it safe or at least warn of the danger,

c) discovered trespassers are owed a duty of reasonable care,

d) attractive nuisance that owner knows about could prompt a duty of reasonable care to children.

5. MINORITY rule rejects these categories for a standard of reasonable care as seen in Rowlands. NY agrees.

6. Rowland v. Christian (CA 1968, p.171) Rule: The Π's status as an invitee, licensee or trespasser should not matter since the owner of a property has a duty to act reasonably in all situations.

a) Π was a social guest in Δ's home. Δ failed to warn Π of a defective porcelain faucet knob in the bathroom before Π went to the bathroom and seriously injured his hand.

b) Rationale: (1) A person's person does not become less worthy of protection merely depending on their status as invitee, licensee or trespasser. (2) The focus should change from the status of the Π to whether the Δ acted reasonably in view of the probability of injury to others. (3) Liability in this case will only be imposed if the Π can prove that Δ knew about the condition and Π did not. (4) Here the Δ had constructive notice of the risk since she knew about the defect for weeks.

7. Erickson v. Curtis Investment Co. (MN 1989, p.180) Rule: The owner of a property has the duty to exercise reasonable care to deter criminal activity which may cause personal harm to customers.

a) Facts: Π rented space to park her car monthly from the Δ garage. Π was raped in her car by Sabo, a trespasser released from prison hours before the attack. There had been an increasing amount of crime in the lot although none violent.

b) Rationale: (1) The court did not impose a duty automatically, but considered the location and construction of the ramp, the feasibility and cost of security measures, the risk of harm to customers. (2) The landlord was in the best position to assess the risk, prevent crime and spread the cost.

E. GOVERNMENTAL ENTITIES: MUNICIPAL AND STATE LIABILITY

1. The courts are moving away from the no duty rule of sovereign immunity in which government could not be held liable for the negligence of their employees.
2. Standard of reasonable care is used to determine whether to impose liability on a municipal entity: (1) Were reasonable assurances given? (2) Did Π reasonably rely?
3. MUNICIPAL IMMUNITY: City agencies are held to a standard of REASONABLE care if they had reason to KNOW of the risk and the Π RELIED on them.
4. Riss v. City of New York (NY 1968, p.188) Rule: The police do not have an affirmative duty to protect members of the community who specifically ask for protection.

a) Facts: Pugach threatened his ex-girlfriend saying that if he couldn't have her, he would make it so that no one would want her. Victim was scared and called police for help but was refused twice. The next day, a criminal hired by Δ threw lye in victim's face making her disfigured and partially blind.

b) Rationale: (1) Court distinguished this case from the duty imposed on hospitals saying that hospitals are for the direct use of the public whereas the police are for the benefit of the general public. (2) To impose liability would determine how the city's limited resources would be allocated without foreseeable limit. (3) Π had no reason to rely on the police which may have made a difference. (4) Policy: the Court is concerned with unlimited calls for help and ergo, unlimited liability.

5. QUALIFIED IMMUNITY: (1) State gov't cannot be held liable for "reasonable public policy." To do so might chill gov't agencies, i.e. increase inefficiency because of worry of liability. Also, the court does not want the jury to second guess gov't decisions. (2) However, gov't can be held liable for the unreasonable or negligent implementation of a plan once adopted.

6. Friedman v. State of New York (NY 1986) Held: Gov't not liable for failure to erect bridge median based on expert opinion. However, once the state made the decision that the median was necessary, they were required to act reasonably to implement the plan.

F. FEDERAL TORT CLAIMS ACT

1. The 1946 act allowed the federal gov't to be held liable in tort. Restrictions include no liability for: strict liability cases, punitive damages, prejudgment interest, discretionary functions, exercise of due care in the execution of a statute, mishandling of mail, war wounds, claims arising in another country.

2. DISCRETIONARY FUNCTION EXCEPTION: The gov't cannot be found liable for adhering to an unreasonable policy but would be liable for implementing a policy unreasonably.

3. Discretionary function test: conduct cannot be discretionary unless it involves an element of judgment or choice.

a) Berkowitz v. U.S. (S.Ct. 1988) Held: The gov't could be held liable if the official who released the noncomplying lot of polio vaccines did not do so based on a policy decision, but rather on a negligent mistake.

V. THE DUTY REQUIREMENT: NON-PHYSICAL HARM

A. EMOTIONAL HARM

1. FEAR CASES: Some courts only allow recovery if Πs are (1) in the "zone of danger," i.e. actually exposed to the danger of physical impact, (2) reasonably feared for their safety and, (3) suffered severe emotional distress with attendant physical manifestations.

2. "Zone of danger" is an objective inquiry as to whether it was abundantly clear that Π was in grave personal peril for some

specifically defined period of time. This objectivity is necessary for the predictability of emotional distress claims.

a) *Battalla v. SNY (NY 1961) Held: Π child left on improperly secured ski lift could recover for emotional distress because she was in the zone of danger, despite absence of physical impact.*

3. K.A.C. v. Benson (MN 1995) Held: Π who failed to establish actual exposure to HIV was not in the zone of danger because there was no personal physical peril as a matter of law, and therefore could not recover.

a) *Rationale: (1) Floodgates, i.e. without meaningful restrictions in fear of AIDS claims, the availability and affordability of medical tx would be compromised. (2) Juries would otherwise reach inconsistent results. (3) The Δ's coffers would be bled by fear cases, perhaps leaving no room for legitimate transmission cases.*

4. FORESEEABILITY CASES: Δ Is liable if Π's emotional harm was a foreseeable consequence and if an ordinarily sensitive person would have had the same response. No physical impact or zone of danger requirement since there would only be a low possibility of fraud.

a) *Gannon v. Osteopathic Hospital of Maine (ME 1987) Held: Π could recover for emotional harm of opening a bag which was believed to contain his recently deceased father's personal effects but instead held a severed leg.*

5. Some jurisdictions limit Gannon by only allowing recovery if: (1) Death or physical injury caused by Δ. (2) Intimate familial relationship. (3) Π observed the incident at the scene. (4)Severe emotional distress resultant.

a) *Portee v. Jaffee (NJ 1980) Held: Mother could recover for the emotional harm of watching her son be killed in a negligently maintained elevator.*

6. Unless otherwise noted, Π cannot recover for emotional distress from injuries sustained by another through breach of duty. The exception include: (1) wrongful handling of a dead body, and (2) negligent transmittal of information regarding death.

a) *Johnson v. Jamaica Hospital (NY 1984) Held: Π parents could not recover for emotional harm when their child was abducted form the hospital for four months.*

B. WRONGFUL BIRTH AND WRONGFUL LIFE

1. These cases differ from typical medical malpractice cases since parents are not suing for harm to the child, but for damages incurred for the birth of the child that would have been avoided.

2. WRONGFUL BIRTH is an action that can be sustained against a prenatal physician for the negligent failure to detect birth defects thereby not giving the mother the opportunity to abort the pregnancy.

3. Even though the physician would not have been a cause of the defect, Δ would have deprived the parents of the option either not to get pregnant or in the case of pregnancy, to make an informed decision whether to abort.

4. One of the most compelling arguments against these actions is the creation of "emotional bastard," i.e. the children at the center of these suits would likely feel unwanted simply by the nature of the suit.

a) Keel v. Banach (AL 1993) Πs won a suit for damages against physician for negligently failing to notice abnormalities during a sonogram. Πs could recover medical/hospital expenses, physical pain suffered by the wife, loss of consortium, Πs emotional anguish.

5. WRONGFUL LIFE is an action brought by parents who did not want to have anymore children, but because of procedures negligently performed by physicians, got pregnant and were thereby forced to have a child and bear the cost of that child.

6. Although some may not view the birth of a normal child a harm for which recovery should be allowed, courts have held that it is the right of the Πs to present evidence to prove that the outcome was a harm to them.

a) Zehr v. Haugen (OR 1994) Held: Δ physician was liable for medical expenses, loss of wages, child care costs and pain and suffering of the pregnancy when the negligently performed tubal ligation resulted in pregnancy.

C. *ECONOMIC HARM*

1. Δ NEGLIGENTLY PERFORMS SERVICE: One type of economic harm results when Δ negligently performs a service and a third party Π suffers economic loss as a result.

2. However, the policy the court is concerned with is maintaining fair and manageable bounds to liability. A duty only exists to a foreseeable group of Πs, not an indeterminate class.

3. A party has a duty to another when they cause an economic harm through negligent misrepresentation if: 1)Δ was aware statement was to be used for a particular purpose, 2)reliance by a known party on the statement and 3)conduct on the part of the Δ evincing understanding of the reliance.

4. Criticism: It is generally easier for a potential Π to protect themselves against economic rather than emotional harm. For

instance, Π could have had the papers reviewed by another party or purchased insurance in case of such a circumstance.

a) *Prudential Ins. Co. V. Dewey Ballantine, Bushby, Palmer & Wood (NY 1992) Held: Δ law firm had a duty to Π lender for a letter they produced on behalf of their client that contained a misrepresentation which they knew would be relied upon by Π; there was a relationship approaching privity.*

5. Δ NEGLIGENTLY CREATES DANGEROUS CONDITION: Another type of economic harm results when Δ's negligence causes a dangerous condition that leads to economic loss.

6. Again, the courts want to limit liability and restrict duty to an *identifiable* or *particularly foreseeable* class of Πs, i.e. likelihood that if something goes wrong, Π would likely be effected.

a) *People Express Airlines, Inc. V. Consolidated Rail Corp. (NJ 1985) Held: Δ railroad had a duty to a nearby airline that had to evacuate when Δ's negligence caused a potentially dangerous gas fire because Π was a particularly foreseeable victim.*

7. Δ does not have a duty when an intervening cause could have averted the damage.

a) *In People's, the airline employees would not be able to recover from the railroad because the airline itself is an intervening factor.*

8. Δ would have no duty in general denied access cases because the Πs typically would not be a particularly foreseeable class.

a) *In People's, the concessionaires that worked in the airline terminal would not be able to recover since they were not a particularly foreseeable group.*

9. LOSS OF PROSPECTIVE ECONOMIC ADVANTAGE: The courts have recognized a tort for loss of prospective economic advantage when the Δ's negligence precludes another from making money.

a) *J'aire Corp. V. Gregory (CA 1979) Held: Δ contractor had a duty to Π restaurant when Δ's negligent renovation delays caused Π's restaurant to stay closed resulting in loss of profits.*

10. LEGAL MALPRACTICE: The duty of attorneys generally does not reach that far since usually the attorney is only addressing the client, as opposed to auditors that produce reports which may be relied upon by a large group of particularly foreseeable investors.

VI. CAUSATION

A. *CAUSE IN FACT: INTRODUCTION*

1. **Judicial decisions have accepted some need for a connection between the Δ's negligent conduct and Π's harm, i.e. cause in fact.**

2. **"BUT FOR" TEST**

   a) ***Would Π have been injured if Δ had not done what she did?***

   b) ***Did Δ do everything that the law requires but the Π was injured anyway?***

   c) ***Had Δ done everything required by law, would Π still have been injured?***

3. **ALL OR NOTHING: Π who can prove Δ's causation more likely than not collects all of their damages with no discount for the uncertainty. However, if Π cannot present a preponderance of the evidence, no damages will be awarded.**

4. **Criticism: this policy allows for the Δ to be overdeterred since Δ will be paying for damages that Δ did not cause. The liability will be more than the amount of social harm created by Δ. Also, Πs will be overcompensated since some of them will be awarded damages even if the Δ did not actually cause their injuries.**

5. **To prove causation, Π has the burden of proof to show that Δ was more likely than not the cause by a preponderance of the evidence. However, Π need not rule out all other possible causes.**

   a) ***Stubbs v. City of Rochester (NY 1919) Held: Π did not have to disprove the Δs contention that Π may have contracted typhoid from a source other than Δ's negligently contaminated water since the evidence showed, more likely than not that the water was the cause.***

   b) ***Wolf v. Kaufmann (NY 1929) Held: Π would need more evidence to prove by a preponderance of the evidence that Δ's negligently allowing a stairway to remain without light was the cause of Π's fatal fall down stairs. Some of this evidence might include: lack of intoxication, good health, good condition of the stairs.***

   c) ***Bendectin cases Although the Π has the burden of proof, the jury found for the Π because the Δ could not adequately explain the connection between their drug and birth defects even when Π did not have sufficient medical evidence to prove the connection.***

6. **LOSS OF OPPORTUNITY FOR LIFE: In the case of death, if Π can prove that more likely than not, Δ caused Π to lose a substantial opportunity for life, Π should be able to collect the percentage lost of the damages. (If Π proved that more likely than**

not Π would have survived, Π could recover in a wrongful death action).

7. In terms of negligence, Δ will have to pay if the risk is high but the burden is low.

8. Where there is a special relationship between Π and Δ, the court will be more likely to hold Δ liable since the delay of death and the amelioration of life are the very reasons why a patient goes to a doctor.

9. Criticism: (1)Physicians may begin to practice very costly defensive medicine in order to avoid patient from missing any chance, even if unreasonable (cost : likelihood). (2)Overdeterrence results because doctors will have to pay: (100% when their negligence more likely than not caused Π's death) + (the substantial percentage to those who can prove more likely than not loss of a substantial opportunity) = necessarily>100%.

   a) *Falcon v. Memorial Hospital (MI 1990) Held: Π decedent was awarded 37.5% of wrongful death damages after proving more likely than not that the negligence of Δ deprived her of the substantial 37.5% opportunity for life.*

10. ENHANCED RISK: The courts have not recognized suits for the enhanced risk of developing a disease caused by Δ's negligence. Enhanced risk is the chance of the resultant harm if the chance is less than 50%. (However, if evidence presented shows that more likely than not Π will develop the disease, Π can collect 100%).

11. Δ should not be forced to pay the percentage of risk to every Π and deplete their coffers when a majority of the Πs will not become ill. Those funds should be reserved for the Πs who contract the disease so that they will be taken care of.

12. However, Π can still recover for the cost of medical surveillance/monitoring and emotional distress as long as both are reasonable.

13. In order not to bar Π from recovery should the disease develop, the courts remove the statute of limitations and single-controversy doctrine, so that Πs can come back to court.

14. Criticism: Π will run into some proof problems if forced to wait years down the road because Δ will allege that there were intervening causes that brought on Π's condition. However, similar proof problems exist from the outset

   a) *Mauro v. Raymark Industries, Inc. (NJ 1989) Held: Π developed asbestosis but could not collect for the enhanced risk of developing cancer which was <50%.*

B. CAUSE IN FACT: MULTIPLE DEFENDANTS

1. JOINT AND SEVERAL LIABILITY: This theory is based on the idea that all Π's are entitled to full recovery. Π can collect a total of the damages from any Δ. The burden is then on the Δ to go after the co-Δs for their portion of the liability. The court decides to put the burden on the negligent tortfeasors instead of the innocent Π.

2. The burden of proof is shifted from Π to Δs because both were negligent and Δs would be in a better position to exonerate themselves.

3. Criticism: Δs can be held liable for more than their share of liability. Therefore, courts have begun to apportion among joint tortfeasors.

a) Summers v. Tice (CA 1948) Held: Two negligent hunters found jointly and severally liable for Π's injuries even though only one of their bullets hit Π in the eye.

4. CONCERTED ACTION Δs have a common purpose and mutual aid in carrying it out. All those who in prusuance of a common plan or design to commit a tortious act , actively take aprt in it , or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable.

a) Express agreement is not necessary. All that is required is a tactit understanding.

b) Example if two cars are drag racing one of which strikes an innocent bystander. Both equally liable.

5. SUCCESSIVE TORTFEASORS

a) SUCCESSIVE AND INDEPENDENT: The first tort feasor is responsible for the injuries he caused. The second tort feasor is responsible for the injuries she caused if the two are separable. So if Δ1 strikes Π and breaks his arm and when he gets to the hospital, Δ2 an employee negligently drops Π breaking his leg, Δ1 is liable only for the arm and Δ2 only for the leg.

b) SEQUENTIAL, I.E. SUCCESSIVE AND NON-INDEPENDENT: The example is if Δ1 struck Π's car and then Δ2 struck Π's at about the same rate of speed as Δ1. It likely will not be clear which of the Δs caused which injuries so they will be held joint and severally liable.

6. MARKET SHARE LIABILITY: When Π cannot identify the manufacturer of the instrument of harm, all those on the market who created the same risk (fungibility) are held liable to the extent of their creation of risk on the national market.

7. Liability is therefore a function of risk creation, not causation.

8. Because the Δs cannot exculpate themselves, the court refuses to hold them responsible for more than their market share.

a) Hymowitz v. Eli Lilly & Co. (NY 1989) Held: Π daughters of mothers who took DES could recover from any Δ manufacturer of DES to the extent of their market share since Π could not determine which manufacturer made the particular pill she took and each company made DES according to exactly the same chemical formula.

9. SUBSTANTIAL FACTOR Ordinarily the "but for" test is used. However, when there are more than one sufficient forces, the "substantial factor" test is applied.

C. *ENVIRONMENTAL HARM*

1. Problems of identification
   - *a) mostly disease from toxins these days*
   - *b) time frame, i.e. time lag with toxins*
   - *c) other factors may come into play so causation is a question.*
2. Boundaries
   - *a) harm in successive generations*
   - *b) victims of exposure are not yet ill so it is difficult to know how many Πs there may be*
   - *c) aggregate risk*
3. Problems with Source
   - *a) multiple defendants*
   - *b) environmental is oftena collective harm*

D. *PROXIMATE CAUSE: UNEXPECTED HARM*

1. When the Π alleges that Δ caused the injuries, Δ's defense is that Δ was not the proximate cause.
2. EXTENT OF HARM Δ is liable for all resultant damage even though the extent of injuries is much greater than would have been expected to result from the negligent act.
3. The "Thin Skulled Rule" is based on the idea that you "take your victim as you find her."

a) Steinhauser v. Hertz Corp. (U.S. 1970) Held: Negligent Δ driver was liable for precipitating Π's schizophrenia after minor car accident because it was foreseeable that anyone in the car would get hurt.

4. TYPE OF HARM Δ is responsible for reasonably FORESEEABLE damages, not all direct damages.
5. If Δ is not aware of the risk then there would be know way for Δ to take reasonable precautions.

a) Overseas Tankship Ltd. V. Wagon Mound (Privy Council 1961) Held: Δ was not liable for Π's ship being burned from a fire that resulted from Δ spilling oil onto the

water because it was not foreseeable that the oil would burn on water.

b) Wagon Mound overruled Polemis (Eng. 1921) which held that Δ was liable for Π's ship burning down as a result of a plank being dropped into the hold because it was a direct result of Δ's actions. However, Polemis could be argued as an extent of harm case.

E. PROXIMATE CAUSE: UNEXPECTED MANNER

1. INTERVENING SUPERSEDING CAUSE is one which it was reasonable for the Δ not to have foreseen.
2. I/s/c is one in which the culpability of one exceeds the negligence of another.

a) Mclaughlin v. Mine Safety Appliance Co. (NY 1962) Held: Δ mfr. was not liable because trained fireman's willful silence regarding the proper use of heating blocks was an intervening, superseding cause to Π's injuries which could not have reasonably been foreseen. MSA was negligent, but Traxlerr's actions superceded.

F. PROXIMATE CAUSE: UNEXPECTED VICTIM

1. Δ is only liable for foreseeable Πs who are in the ZONE OF RISK.

a) Palsgraf v. LIRR (NY 1928) Rule: Δ is only liable for injuries to a foreseeable Π who was in the "zone of risk". She could have recovered if she had been only a few feet away from where the package fell because she then could have been struck by a shattering package.

b) Kinsman Transit Co. (U.S. 1964) Rule: Δ is responsible to all foreseeable victims injured as a result of Δ's negligence regardless of what type of injury was sustained by Π.

2. "Danger invites rescue. The cry of distress is the summons to relief." Cardozo wrote in Wagner that a wrong to a victim is a wrong to the victim's rescuer. He would not require that the rescue be impulsive. It can be deliberate but just must arise from the occaision. (p.370)

VII. DEFENSES

A. THE PLAINTIFF'S FAULT: CONTRIBUTORY NEGLIGENCE

1. Strongly held to from 1820-1970.
2. Π was contributorily negligent if they knew or should have known of the risk but failed to take reasonable steps for their own safety.
3. Contributory negligence was a complete bar to recovery.
4. Which ever party had the burden of proof would have to prove or disprove contributory negligence.

5. Contributory negligence is the mirror image of Π's case.

6. According to statute, Π's negligence must have been a proximate cause to their injuries.

7. ARGUMENTS FOR THE ABSOLUTE BAR:

a) Floodgates because many cases that were not so clear cut would have a chance at winning something.

b) Encouraged carefulness in Π's conduct. However, this may not be such a persuasive argument because people are careful anyway, i.e. fears of injury, being caught and not recovering.

c) Π'S behavior was a cause in fact, i.e. without it the accident would not have happened.

d) In a sense, contributory neg., is like a proximate cause defense because Δ would argue that Π's contrib. neg. was an intervening, superseding cause of Π's injuries.

e) If your hands are dirty, you should not come to court seeking remedy.

8. PAST ATTEMPTS TO AMELIORATE CONTRIBUTORY NEGLIGENCE

a) Subjective capacity based standard for Π, i.e. judging Π's behavior for the particular characteristics of the Π instead of the objective reasonable person standard.

b) Contributory negligence was not a defense if Δ's actions were reckless or willful.

c) LAST CLEAR CHANCE DOCTRINE allow Π to recover if Π was helpless or inattentive and Δ knew of Π's situation. Some courts allowed recovery even if Δ should have known of Π's position.

d) Limits were placed on the imputation of contributory negligence. Therefore in a case where Δ's vehicle gets damaged when being driven by someone else who was contributorily negligence, Π owner can still recover the repair cost of the car from the other Δ driver. (Exception: contrib. neg. was imputed for loss of consortium claims).

B. THE PLAINTIFF'S FAULT: COMPARATIVE NEGLIGENCE

1. Why should we allow compensation for negligent Πs?

a) Deterrence of the Δ who was not without fault.

b) Δ will more likely be able to spread the costs.

c) Eliminates the harshness of the contributory system.

C. UNIFORM COMPARATIVE FAULT ACT

1. 1975 NY adopted pure form of comparative negligence which entails apportionment among all involved. In the pure form, no matter how negligent Π is, Π can still recover something.

a) Modified comparative (1) Π can recover as long as is fault is not as great as Δs (<50%), (2) Π can recover if her fault is no greater than Δ (50% or less)

$10M total damages	Π neg	Δ neg
	20%	80%
pure	$8M	
modified I	$8M	
modified II	$8M	

b) Sometimes the jury cannot decide so the come back 50-50 which in MI jurisdictions make a difference. Should juries be instructed about this?

$10M total damages	Π neg	Δ neg
	50%	50%
pure	$5M	
modified I	0	
modified II	$5M	

2. Claim and counterclaims are not set off against each other unless so agreed. This is so that A and C will both have Money to pay there bills since there is likely an insurance company involved.

3. Settlement with one Δ does not discharge the other under UCFA.

4. Π has $50k loss against B&C. B settles before trial for $30k. At trial B is found 80% liable and C 20%. C gets a joint and several judgment and pays A $20k so A has full recovery. Can C recover the extra $10k that B is liable for from B?

a) CA: no, b/c no contribution from a party that settled in order to encourage settlement.

b) NY HOWEVER: A would only get $10k from C which was the amount for which C was liable. In NY C pays for A's damages minus the amount B settled for or B's equitable share.

c) UCFA: C is liable for A;s damages minus B's equitable share.

5. Duncan There is no unjust enrichment for Π when the co-Δ is not held to more than his fair share and the Π profits just because the other Δ made a bad bargain by settling at a higher amount than was comesurate for his iability.

6. Jury verdicts are no more accurate than the percentages of fault also decided by the jury.

7. Spear Π liable as a matter of law for not using available seatbelt. Aggravation of injuries taken off the top.

D. ASSUMPTION OF RISK: EXPRESS AGREEMENTS

1. Δ cannot disclaim liability by an express agreement. The only times the courts are going to allow a disclaimer to stand is in things like bungee jumping.

E. *IMPLIED ASSUMPTION OF RISK*

1. Assumption of risk can be a complete bar to recovery. However, in many jurisdictions the doctrine has merged with contributory negligence into comparative negligence.

2. Often Δ can argue an effective defense even without the assumption of risk defense. When Π claims negligence on the part of the Δ, Δ can argue either "no duty" or "contributory negligence".

3. There are some instances where it could make a difference whether Δ argued A/R or C/N: (A)under comparative negligence, recovery would not be barred although damages would be diminished. (B) Pleadings and proof: if Δ responds "no duty," the burden switches back to Π to prove that there was a duty that was breached; whereas if Δ argues A/R, Δ would have to prove that Π voluntarily exposed herself to the risk. (C) Duty is a question for the court; A/R is a question for the jury. (D) C/N is no defense to strict liability where A/R may be. (E) C/N no defense to the traditional "last clear chance" rule where A/R may be.

4. Δ accepts the dangers and assumes the risk of injury when choosing to take part in an activity in which the dangers are apparent, barring Δ from recovery.

5. VOLENTI NON FIT INJURIA-one accepts obvious danger upon participation.

6. Courts consider whether the danger was obscured or the injuries numerous.

   a) *Murphy v. Steeplechase Amusement Co. (NY 1929)*
   Held: Δ was not liable to Π for injuries sustained on the "Flopper" because the ride did as it was supposed to and Π claims injury from the very harm he invited.

7. Stadium management is not liable for injuries because spectators at a baseball stadium assume a natural risk of being hit by an errant ball.

8. The Π would be considered an invitee and BB fans are invitees and property owners are not required to inform invitees of dangers that are obvious or should have been observed in the exercise of reasonable care.

9. Fenced in seats cannot be guaranteed as there are only as many as might be reasonably requested.

10. Not all seats can be fenced as some patrons may want an unobstructed view.

11. To impose liability would either force ballparks to place all spectators behind protective screens, obstructing everyone's view, or force the ballparks to raise the ticket prices thereby pricing some would-be spectators out of the "great American pastime"

12.

*a) Brown v. San Francisco Ball Club, Inc. (CA 1950) Held: 46 yr. old*E *who had previously attended a bb game, could not recover when struck with a ball b/c the ballpark provided seats that were behind a fence and she was or should have been aware of the risk.*

b) Neinstein v. LA Dodgers (CA 1986) Rule: No duty owed to spectators for the "natural hazard" of baseball.

13. Liability may be imposed when Π is injured by a risk that is not widely known or common knowledge.

a) Thurman v. Ice Palace (CA 1939) Π *recovered when struck by hockey puck within 10 minutes of watching the game, having never seen the game played before.*

F. *A/O/R merges with CONTRIBUTORY*

1. Contributory neg. and assumption of risk merge, in that the same factors must be taken into consideration.

2. To prove assumption of risk: did Π know of the risk of injury and voluntarily exposed herself to it anyway, a subjective standard.

3. Whether Π was contributorily negligent, i.e. did the Π do what a reasonably prudent person would have done-an objective standard.

a) Verduce v. Board of Higher Education (NY 1959) Held: Π *actress barred from recovery for "assumption of risk", i.e. voluntary exposure to a known risk, when she walked off stage without looking at the direction of the director. BUT, this decision was overturned with the higher court agreeing with the dissents conclusion that the* Π *should be able to recover if a jury found that she had acted reasonably.*

4. Police and firefighters cannot recover in tort for injuries sustained while in the course of duty because of someone's negligence.

a) This group is trained and compensated to take these special risks.

b) Δ *may have already paid for injuries in the form of taxes.*

c) They have no compensation for pain and suffering, but the money they would have won for that would go to their attorney anyway so they save that money by not having to sue

for damages since they automatically are covered through their employer.

d) There is also some mention of the assumption of risk, but Martin would rather we frame the rationale in terms of policy

e) Santangelo v. State of New York (NY 1988) Held: Negligent mental hospital was not liable for injuries to Π police officers who were injured while trying to capture a mental patient that escaped.

5. When Π's contributory negligence and assumption of risk overlap in face of Δ's negligence, the doctrines are merged into comparative negligence.

6. Obviously the main objective under comparative negligence is to allow the Π to recover at least a portion of her damages even if she was partially at fault. This rule allows what use to be assumption of risk and contributory negligence to act as factors in the analysis of recovery instead of complete bars.

a) Gonzalez v. Garcia (CA 1977) Held: Π allowed to recover a portion of his damages even though he knew Δ was drunk, but decided to drive with him anyway and was injured when Δ got into an accident.

G. CHARITABLE IMMUNITY

1. Charitable organizations are liable in tort to the same extent as individuals and corporations; i.e. charitable immunity doctrine abolished.

a) An injury hurts Π just as much no matter who caused it.

b) Since charity for the Π's injuries would have to come from some organization, it might as well be the charity that caused the injury.

c) Δs are in a position to protect themselves with insurance and in practice, the imposition of liability for charities did not seem to make a difference as to the existence of charities in the jurisdictions that already did away with the immunity

d) Legislature can act to retain the immunity.

e) Albritton v. Neighborhood Centers Assoc. For Child Dev. (Ohio 1984)

H. FAMILY IMMUNITY

1. Parents should not be automatically immune from liability, but rather an inquiry should be made as to whether the behavior causing injury was tortious or privileged.

2. State is reluctant to step in and tell parents how to raise their children.

3. Although law suits may disturb "family harmony", there very likely would already be stress if someone was injured.

4. Unfair redistribution of family funds is a poor excuse for immunity since insurance would make that amount very small.

   a) Winn v. Gilroy *(OR 1984) Held:* Π *mother sues father for killing their two children while negligently driving and the court will make an inquiry into the nature of the father's behavior.*

5. NEW YORK: Court applies the standard of reasonable care generally, but finds no liability for failure to supervise.

6. CALIFORNIA: Δ parent is judge against a reasonable parent standard.

7. Some jurisdictions have spousal immunity since there is concern about collusion. However, NY has no spousal immunity but insurance companies may exclude spouses from coverage as matter of contract.

I. STRICT LIABILITY

A. Negligence is quite recent, S/L has been around for much longer. The theory allows recovery for plaintiffs even if the defendants are not negligent.

B. *ARGUMENTS FOR S/L*

1. Δ is generally in a better position to protect Π simply by knowing about the activity, the Δ can better assess the risk.
2. Δ can obtain the appropriate amount of insurance to protect against the risk.
3. Δ is in a better position to spread the cost of the damaged caused by its product.
4. By imposing strict liability, we are encouraging the Δ to take the activity elsewhere.
5. Moral: Because Δ caused injuries, he should pay. (Epstein, p.480)
6. Moral: If there is non-reciprocity of risk, then the Δ should pay for a risk that he creates and profits from alone. (Fletcher, p.479)
7. Δ is benefiting from the activity.
8. S/L in a sense is a conclusive presumption of negligence or a strong case of res ipsa.
9. S/L allows Π to sue up and down the stream, making it easier for Π to get compensation. Π can sue the local retailer, or in some jurisdictions the wholesaler, instead of having to go all the way back to the beginning and sue the mfr.
10. Agian, good for the Π because suing in S/L does not preclude the Π from also suing in negligence and/or warranty

C. *ARGUMENTS AGAINST S/L*

1. Potential Πs may also benefit from the activity.
2. If the activity creates a reciprocity of risk, then the argument for S/L goes down, e.g. many people in society either drive or benefit from driving, therefore we will not impose S/L unless we can prove negligence on the part of the driver. Δ is only liable for voluntary acts.
3. Unfair for all consumers to pay for misfortune to Π. BUT with regard to product liability, society is getting the benefit of cheaper, massed produced products for which they can pay a little bit extra to cover their unfortunate fellow consumer.

D. *DOCTRINAL DEVELOPMENT*

1. There is some discord as to whether s/l should entail :
   a) UNNATURAL COLLECTION on the land, i.e. the owner of cows that escaped from a pasture would always be liable for the harm they caused b/c they are not naturally found on that land, and the owner would be liable for all

natural/foreseeable consequences. A human accumulation that would cause mischief if it got out. This is a much broader definition of S/L.

b) The other view asks if one should take into consideration what is the NATURAL USE of the land, i.e. cows that got loose from a pasture would be OK if it was farm country, but not in a suburb.

2. Fletcher v. Rylands (Eng. 1966) Held: Δ was liable under either theory. The underground reservoir was an unnatural collection that would cause mischief if it escaped. Also, the collection of water for a mill/mfg. was an unnatural use of the land in mining territory.

3. Losee v. Buchanan (NY 1873, n.4, p.448) Held: NY court rejected strict liability when Δ's boiler exploded accidentally causing property damage because we all benefit from living in a technological society.

E. DANGEROUS ACTIVITIES

1. Safety of property is generally more important than Δ's single use. One's lawful possession of property is a higher right.

2. Δ should be strictly liable for direct, immediate, necessary consequences of their actions.

a) Sullivan v. Dunham (NY 1900, p.451) Held: Δ blaster was liable when a fragment of the tree they were blasting flew off the property, struck and killed Π who was walking on the road.

b) In Boothe v. Rome (NY, 1893, p.454) the court held that the Δ could not be held strictly liable for damage sustained by the Π from concussion from blasting. The court explained that there was no technical trespass and that Δ should not be precluded from engaging in lawful activities on his own property

c) HOWEVER, Boothe was overruled in 1969 by Spano v. Perini because this court explained that the true question was not about the right to land use, but who should compensate the Π for his loss. Therefore, in NY Δs are S/L for concussion damage. Martin thinks Spano makes more sense b/c Δ knows when the activity will occur and is better able to protect by obtaining insurance or by making the decision not to engage in the activity.

3. The First Restatement allowed absolute liability for ultra-hazardous activities defined as:

a) necessarily involving a serious risk of harm with cannot be eliminated by exercising utmost care, and

b) is not a matter of common usage.

4. HOWEVER, the Second Restatement stated that there was not per se absolute liability for activities like explosives, but rather replaced the "ultra-hazardous" test for a balancing test to determine whether an activity was "abnormally dangerous":

a) existence of a high degree of risk of harm,

b) likelihood that the harm to result will be great, inability to eliminate the risk by the exercise of reasonable care,

c) the extent to which the activity is not a matter of common usage,

d) inappropriateness of the activity to the place where it is carried on,

e) extent to which its value to the community is outweighed by its dangerous attributes.

5. Indiana Harbor V. American Cyanamid (US 7th Cir., 1990): Held: The court applied the 6 factor balancing test of the 2d Restat. And found that Δ shipper/mfr. of a hazardous chemical was not strictly liable when the chemical spilled.

6. *We first must determine whether the harm could have been avoided by the use of due care, because if so then we would evaluate the claim from the perspective of the negligence doctrine.

a) In Cyanamid, the court remanded the case because they seemed to think that it could be decided on a negligence theory. Also, the cost to reroute all chemicals so that they do not go through large cities would be prohibitive. The court mentions that those who lived around the railroad made a poor choice and exposed themselves to hazards.

7. The Cyanamid court applied the 2d Restat. Test when explaining the outcome of Guille v. Swan (NY 1822) where a hot air balloonist was held strictly liable for the damage done to Π's land when a crowd trampled through Π's property to rescue the balloonist who had inadvertently landed there.

8. The court in Yukon Equipment v. Fireman's Fund (Alaska, 1978, p.455) rejected the 2d Restat. approach: Held: After discussing the 2d Restat. about "abnormally dangerous activities," they declined to apply the test to explosives, instead deciding to hold Δ dynamite storage company absolutely liable for creating an unusual risk to others even though Δ was not negligent and the explosion was set off intentionally by two thieves.

9. AIRPLANES: Most courts refuse to hold airplane owners s/l for damage caused to things on the ground when planes fall from the sky.

a) However, the 2d Restat. would impose s/l since safety records are not adequate to apply the negligence standard

and there is no place to hide on the ground from falling planes and no way to figure out where to move to avoid the risk no matter how minimal.

b) The court imposed S/L on the owner of a stolen plane that crashed causing damage in Torchia v. Fisher (NJ, 1983, p.460) they would rather place the burden on the owner who got some use out of owning the plane, than the unsuspecting homeowner.

10. Even thought the 2d Restat. would not impose s/l when a common carrier was not permitted to reject the transportation of "abnormally dangerous" materials, the court in Chavez v. Southern Pacific RR Co. (CA, 1976, p461) did not allow the exception because it saw the primary rationale for imposing absolute liability as the most effective means of cost distribution.

11. The Federal Tort Claims Act does not allow Πs to recover from the federal gov't on a S/L theory. (Laird v. Nelms, US, 1972, p.462: Gov't was not liable for damage caused by the sonic boom from military planes)

12. HANDGUNS There is some disagreement as to whether the mfrs. of guns should be held strictly liable for deaths caused by their products.

a) Burkett v. Freedom (OR, 1985, p.463) held that s/l for abnormally dangerous activities did not extend to handguns.

b) The court in Kelly v. R.G. Industries (MD, 1985) found that to impose strict liability on the mfrs. of "Saturday night specials" would be consistent with public policy since the guns fill no legitimate purpose of law enforcement, sport or protection. They are only attractive to criminals.

c) Wash. DC adopted an initiative in 1991 holding mfrs. of assault weapons strictly liable in tort for the damages caused by the discharge of assault weapons in the District of Columbia.

13. DEFENSES

a) NO DUTY

b) NOT THE PROXIMATE CAUSE

c) ASSUMPTION OF RISK The Π would not be barred if they merely knew of the existence of a potential hazard, e.g. the location of a storage warehouse for dynamite but drove by it anyway. However, Π would be barred from recovery where they are expressly told of an imminent risk, but disregard the warning, e.g. Π would not recover where he disregards the warning of an impending explosion but decides to continue down the road anyway.

d) CONTRIBUTORY NEGLIGENCE is not a bar to recovery unless the Π's conduct involves "knowingly and unreasonably subjecting himself to the risk of harm from the activity", e.g. if Π saw a sign on a truck warning of danger of explosive cargo, but passed dangerously anyway, causing an explosion, Π would be barred. However, Π would not be barred if he had not seen the sign.

14. ABSOLUTE LIABILITY is rare but when it applies there is NO defense.

F. THEORETICAL PERSPECTIVES

1. Calabresi: The goal of accident law is to reduce the costs of accidents and the cost of avoiding accidents.

a) "Primary reduction" can be achieved either by forbidding types of activities, or by making the activities more expensive and thus less attractive.

b) "Secondary" reducing the societal costs resulting from accidents. It is easier for 1000 people to pay $1 than it is for 1 person to pay $1000. Also, there is the deep pocket theory, i.e. $1000 means much less to GM than it does to Π.

c) The third goal is to reduce the cost of accident administration.

d) There are two basic approaches. The first is SPECIFIC DETERRENCE, i.e. society collectively decides what activities are valuable, who and how they should be performed and imposes penalties an those who violate those decisions. Examples: speeding prohibited, licensing requirements.

e) The second is GENERAL MARKET DETERRENCE, i.e. since no one knows better than the individual what is best for her, assuming that she is informed of the alternatives, the consumer is the best one to decided whether an activity is desired based on the accident costs involved.

2. Michelman: Who is the best party to bear the cost of the loss? Who is the cheapest cost avoider?

3. Posner

II. LIABILITY FOR DEFECTIVE PRODUCTS

A. DESIGN DEFECTS

1. MacPherson v. Buick Motor Co. (NY, 1916, 482) This is actually a negligence case. It is in this section by means of introduction because, the court did away with the privity requirement. Cardozo held that the Δ mfr. was liable for Π's injuries even though Δ sold the vehicle to the dealer.

a) The argument for the privity requirement is that the Π could purchase her own insurance or require that the dealer insure her during negotiations when buying the car. In the

latter case, the dealer would raise the price of the car and petition the mfr. to make the cars safer.

b) However, if the Π had to sue the dealer, the dealer would turn around and sue the mfr. to recoup losses for $ paid out to Π. Therefore, allowing Π to sue mfr. directly cuts down on the amount of litigation.

c) Cardozo points out that privity should not be required because a defective car is imminently dangerous if defectively made.

d) "We have put the source of the obligation where it ought to be. We have placed it in the law." -Cardozo (p.485)

B. *IMPLIED WARRANTY*

1. Food cases: Mazetti (1913) Implied promise of wholesome food. Π did not have to show that the retailer or mfr. was negligent. This implied warranty without privity requirement has been expanded to animal food and cosmetics.

2. The implied warranty remained limited to food cases until Henningsen v. Bloomfield Motors (NJ, 1960, p.493). The Δ was found S/L based on an implied warranty that an automobile placed in the stream of commerce is reasonably suitable for use when it reaches its ultimate purchaser. The court also struck down express disclaimers imposed on consumers in the form of standardized forms.

3. Therefore, the warrant of merchantability extends downstream to members of the purchasers household and upstream to the mfr.

C. *EXPRESS WARRANTY*

1. There are proof problems with express warranties because the Δ had to have made a positive assertion and the Π must have relied on that assertion.

2. Π did not have to be in privity with the Δ mfr. when glass advertised as shatterproof by the mfr. shattered, injuring Π. Δ advertised the claim and Δ bought vehicle in reliance of the ad. (Baxter v. Ford Motor Co.)

D. *U.C.C.*

1. U.C.C. §2-318 extends the implied warranty at least to the mfr. and the purchaser's household.

2. U.C.C. §2-213 eliminated the privity requirement for express warranties .

E. Then why talk about these claims in terms of S/L if warranty recovery is available? What is wrong with warranty?

1. Warranty usually relates to people who know each other.

2. Usually in warranty, mfr. has to be informed of the problem and the parties would decide how long to allow for notice of breach.

3. To allow disclaimer of warranties as are usually allowed with warranties, would undermine the goals and reasoning of S/L.

4. Escola v. Coca Cola Bottling Co. (CA, 1944, p.490) The majority thought this was a res ipsa case and held for the Π who was injured by a shattering bottle because there was a very effective test available used to detect defects in bottles. However, Traynor concurred in judgment but said that the mfr. should be held S/L because Coke placed an item on the market, knowing that it was to be used without inspection and it proved to have a defect that caused injury to Π.

a) Liability should rest with the party who could best reduce the hazard,

b) The mfr. is much better suited to spread the cost than the Π,

c) Δ mfr. is responsible for placing the defective product on the market and it is in the interest of the public to discourage the marketing of dangerous products,

d) There should be general and constant protection that the mfr. is best able to afford, against the general and constant risk created by their product.

5. Enterprise Liability: Mfr. is S/L in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. (Escola, J.Traynor, CA, 1944, p.490)

6. Warranty is not necessary to hold Δ strictly liable in tort. It is unfair to require that a Π not in privity give notice of a claim within the time limits of the express warranty because they are likely to not be aware of the limits. (Greenman, Traynor, CA, 1963. P494)

7. Bystanders are in great need of protection against defective products that cause injury because they have no way of protecting themselves. Therefore, S/L should be extended to include them. (Elmore, CA, 1969, p.496)

8. Δ retailer of cars was strictly liable in tort because it was in the business on selling automobiles, on of which proved to be defective and caused injury to human beings. (Vandermark, J.Traynor, CA, 1964, p.495)

F. *THE ROLE OF WARNINGS*

1. §402A Restatement Second: One who sells a product in an unreasonably dangerous condition is liable for the physical harm caused thereby if :

a) *The seller is engaged in selling such a product, and*

b) *it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.*

c) *Liability applies even if seller exercised all possible care and if there is no contractual relationship.*

2. The Cronin court took unreasonably dangerous to mean that the Π had to prove that the Δ acted unreasonably, in fact prove negligence. However, the ALI did not mean for the Π to prove negligence, only that the product did not perform as expected. (P.505)

G. TESTS TO PROVE WHETHER A PRODUCT IS UNREASONABLY DANGEROUS: which test is a question for the judge.

1. ORDINARY CONSUMER TEST (1st prong of Barker [p.507]) is used when the allegedly defective product is one of common usage and experience that jurors could have formed an opinion as to what was the minimum safety performance that they would expect.

2. So a finding of defect would result where the jury found that a product did not perform as well as it reasonably should have performed.

3. Under this test, the Δ could not submit expert testimony because the court was only concerned with the opinion of the reasonable average consumer. THE TEST:

a) *The product failed to perform as safely as an ordinary consumer would expect.*

b) *The defect existed when the product left the mfr's possession.*

c) *The defect was the proximate cause of the Π's injuries or enhanced injuries.*

d) *The product was used in a reasonably foreseeable manner.*

4. COMPLEX-PRODUCT TEST/RISK-BENEFITS ANALYSIS (2d prong of Barker [p.507]) is an alternative design defect test that is used when the product is so complex that the average consumer cannot know what the minimum safety requirements that could safely be assumed are.

5. The jury is asked to decide post facto whether the design benefits outweigh the risks based on expert testimony presented by both sides.

6. This determination involves an unavoidable calculation of technical questions of feasibility, cost, practicality, risk, benefit:

a) *Gravity of the danger posed by the design.*

b) *The likelihood that the danger will occur.*

c) Mechanical feasibility of a safer alternative design.

d) Financial cost of a new and improved design.

e) Adverse consequences to the consumer that would result from the alternative design.

f) The usefulness, desirability and utility of the product to the public as a whole.

g) The user's ability to avoid danger by the exercise of care in the use of the product.

h) The user's anticipated awareness of the dangers of the product.

i) The existence of suitable warnings and/or instructions.

j) The ability of the mfr to spread the cost.

7. Soule v. General Motors Corp. (CA, 1994, insert) The court held that the trial court committed harmless error in instructing the jury to apply the consumer expectancy test because whether the car was defective was a very technical question that need to be analyzed in light of expert testimony.

8. CRASHWORTHINESS DOCTRINE: Δ liable for damages from an m.v.a. when a manufacturing or design defect , though not the cause of the accident, caused or enhanced the injuries. The product is not defective because it causees injuries, but because it cannot minimize highly foreseeable injuries.

9. The mfr of a product owes a duty of reasonable care to minimize the effects of a foreseeable collision by employing common sense safety features.

10. The crashworthiness doctrine does not require that a mfr provide absolute safety, only some measure of reasonable, cost-efficient safety features in the mfr of all products toward the end of encouraging maximum development of reasonable safety features.

11. To automatically dismiss all claims when the danger is open and obvious (such as with motorcycles) does not encourage the important public policy of encouraging the development of safety design features.

a) Camacho v. Honda Motor Co. (CO, 1987, p.517) The court held that the summary judgment for the Δ was inappropriate because whether Honda's design strategies were reasonable was a question for the jury.

12. DEFENSE: In order for the Δ to use assumption of risk as a total defense, they must prove that the Π had actual knowledge of the danger. A/O/R would be a defense in that case because the Π would be able to protect herself.

H. WARNINGS THAT REDUCE THE RISK

1. Where do we draw the line about what mfrs have to warn of?

2. It is for the jury to decide whether a warning label is adequate, given the unsafe nature of the product.

3. A negligence standard is used to determine whether a warning is defective. Once defect is established, then S/L is imposed, allowing the Π to sue up and down the stream.

   a) *Hahn v. Sterling Drug (11th Cir., 1986) Held: The court disallowed the directed verdict for the Δ ordered by the trial court, holding that a jury could find that the warning label was inadequate even though it mentioned poison control.*

4. The standard applied is whether it was REASONABLY FORESEEABLE for the mfr that the product would be used in a dangerous manner.

5. If it is not a reasonably foreseeable alteration, the mfr has no duty to Π when a purchaser unforeseeably alters a safe product to make it dangerous, thus causing the injury.

   a) *Huber v. Niagra Machine and Tool Works (MN, 1988. p.531). Mfr had no duty to foresee that the Π's employer would remove a protective safety foot guard and therefore was not liable for Π's injuries.*

I. *WARNING OF INTRINSIC RISK*

1. MacDonald v. Ortho Pharmaceutical Δ mfr found s/l because their warning label did not mention the risk of stroke and they could not rely on the learned intermediary rule.

2. FDA not enough: The court allowed mfr to be s/l even though their label met FDA standards b/c the FDA does a different cost-benefits analysis. They do not want to clog the system with info to desensitize people which would have a negative effect on safety. Also, woman may choose safer but less effective products. Perhaps they are concerned with the mfr's lobby that want to protect their profits by not habing to tell the consumers about every danger.

3. LEARNED INTERMEDIARY: Mfr has a duty to warn the ultimate user of the nature, gravity and likelihood of known or knowable (should have known) risks UNLESS the mfr relies on a learned intermediary.

4. The following arguments were made in the MacDonald case as to why the rule should not apply, meaning that the mfr had a duty to warn the patient of the dangers directly:

   a) *high patint participation in the decision whether or not to take the drug,*

   b) *low contact between the doctor and Π,*

c) elective drug with relatively high risk,

d) high feasibility of mfr warning Π directly.

5. UNAVOIDABLY UNSAFE PRODUCTS: **reasonably safe. A product is unavoidably unsafe if it is properly manufactured with an adequate label and the unavoidable high degree of risk does not make it unreasonably dangerous because the usefulness and desirability of the benefits outweigh the negatives.**

a) Restatement 2d §402A defines unavoidably unsafe products as "in the present state of human knowledge, the product is quite incapable of being made safe for its intended and ordinary use."

b) Comment k: no liability if the product is incapable of being made safe (availability of alternatives), the product is useful and desirable (critical need), mfr warned of unavoidable risks.

6. GOOD LABEL: **lay language, informs of danger and alerts reader to danger with the degree of intensity demanded by the nature of the risk. A resonableness standard is applied either by a judge or a jury.**

7. White v. Wyeth Laboratories **(OH, 1988, 546) No S/L for mfr of vaccine because it was founds to be unavoidably unsafe.**

8. NATIONAL CHILDHOOD VACCINE INJURY ACT **was a legislative decision to shield vaccine mfrs from S/L because they are so vital that society could not afford it if they decided to no longer produce vaccines.**

9. CASES BY CASE METHOD **has been** WIDELY REJECTED:

a) whether when distributed the product was intended to confer an exceptionally important benefit that made its availability highly desirable.

b) was the then existing risk substantial and unavoidable.

c) Whether the then interest in availability outweighed promoting enhanced accountability through S/L design defect review.

d) CA rejected the case method and will treat all prescription drugs as unavoidably unsafe. (p.554)

10. O'Brien v. Muskin

J. *UNDISCOVERED DANGER*

1. Beshada **MINORITY (553) case Asbestos company found strictly liable for injury even though the Δ did not know of the danger at the time of marketing because:**

a) cost spreading,

b) encourage safety research, BUT is this realistic since one would not invest money to look for a risk that would not be reasonable to expect,

c) control of administrative costs,

d) sense of fairness because mfr should not get a windfall when their product proves to be defective when they did not adequately invest in safety.

2. Feldman v. Laderle Laboratories (NJ, 1984, p.558) makes the pont that the Beshada decision is unfair because of the moral reason that how can we hold a mfr liable for not discovering a risk that was reasonable to not know about? Martin seems to lean toward this view. Tort liability is made a type of insurance for Πs which is very expensive for mfrs and Δ are in no better a position to anticipate the risks than the Πs.

a) Δ is only liable to warn of risks that were known or reasonably knowable at the time the product was distibuted.

b) It is the Δ's burden to prove that the risk was not reasonably knowable.

3. "STATE OF THE ART"Defense: New technology can avoid the risksonly after the product is designed and out on the market. Mfr will argue the they used the technology of the time, BUT the judge could find that the custom was unreasonable. Ex ante for both.

4. Mfr that finds out about a risk after it leaves her hands has a duty to warn.

5. The emphasis of strict liability is usually on the safety of the product, not the reasonableness of the mfr's conduct.

a) EXCEPTIONS: adequacy of warning labels, unknown risks, "state of the art" defense.

6. In S/L the mfr is assumed to know the dangerous propensities of the product while in negligence Π must prove that the Δ knew or should have known of the danger.

7. A mfr is held to the standard of an expert in the field because a mfr would be expected to be informed an affirmatively to seek out information concerning the public's use of it's own product.

8. The burden in S/L cases should be on the Δ mfr to prove that it lacked actual or constructive knowledge of the defect.

K. BEYOND PRODUCTS? SERVICES

1. Hoven v. Kelble (WI, 1977, p.564) The court held that Π's doctor could not be found S/L when he suffered cardiac arrest while undergoing a lung biopsy, but that Π had to show negligence.

2. Arguments for strict liability:

a) most purchasers cannot evaluate the medical services offered because they are complex and infrequently bought,

b) the medical community give purchasers little assistance in evaluating the services,

c) generally it is the physician that determines what type of tx is rendered,

d) the dr is the one that prescribes the services to supplement the tx,

e) the dr is in a better position to determine and improve the quality of the services so the patient relies on the dr,

f) there is a heavy burden on the patient to prove negligence of the dr,

g) the dr and hospital are in a better position to distribute the loss.

3. Arguments against strict liability:

a) many procedures are experimental and uncertain in nature,

b) medical services are an absolute necessity and vital that they are readily available,

c) to impose strict liability would increase the cost of medical services perhaps pricing out some members of society,

d) the imposition of S/L may hamper progress in developing new medicines and medical techniques.

4. Π may prove that physicians services were defective by proving that Π got worse did not get better fast enough.

5. Bloodbanks: special services no S/L.

6. PHARMACISTS (p.569): Although the pharmacist is linked to the patient by a sale which would further the goals of S/L, the plurality refused to impose S/L because:

a) the pharmacist was little more than a technician because she has no say over what medicine gets prescribed to the patient,

b) pharmacists may refuse to stock drugs that have even a remote risk,

c) they may only stock expensive drugs to ensure indemnification by large pharmaceutical companies.

7. BEAUTY SALONS V. DOCTORS AND DENTISTS:

a) The professional status, the nature of medicine and the importance to the health, survival and well-being of society outweigh the policy scale for the imposition of S/L. No S/L for a dentist whose defective needle broke inside of a patient. (Hoven, 570).

b) On the otherhand, beauty service is not a profession but a service. Their application of products is a mechanical and routine luxury. The court held beauty salon liable for defective hair solution. (Newmark, 570).

L. *DEFENSES*

1. Prior to the development of comparative fault:

a) Contributory negligence was no defense to S/L when the negligence was the P's failure to notice the defect.

b) However, if the Π discovered the product and proceed unreasonably to use the product, getting injured, then Π was totally barred from recovery.

2. NOW, however, COMPARATIVE FAULT can be apportioned in a strict liability action. Also under this decision, assumption of risk as a type of contributory negligence is no longer a complete bar to recovery, but rather, merges with comparative negligence. Daly v. General Motors Corp. (CA, 1978, p.575)

a) The goals of S/L will not be defeated by allowing comparative fault since mfrs will not be any less careful. (P.578)

b) This court felt that jurors would be able to fairly apportion fault.

c) However, the dissent said to compare plaintiff's comparative negligence with S/L for the Δ would be like trying to compare a glass of milk with a 3' metal bar.

3. DAMAGES: Π's comparative damages are taken off the top of the total damages and then the remainder of the damages that were caused by Δ's defect are apportioned between Δ and Π according to fault.

a) So in the Daly case, imagine that Π would have had $1k of damage had the seatbelt been worn, but suffered $100k of damage instead. If Δ was found to be 50% responsible and Π the other half, the $99k that was due to Π's actions is taken off the top and Δ will only have to pay 50% of $1k, or $500.

M. *Personal Injury and the U.C.C.*

1. Hauter v. Zogarts (CA, 1975, p.586) Held: The Π could recover based on an express warranty because the golf gizmo did not reach standards of merchantability set by the U.C.C.

2. §2-313: The seller's statements must become part of the basis for the bargain.

3. §2-314: MERCHANTABILITY. The product must conform to the promises or affirmations of fact made on the container or label. The product must be fit for the ordinary purposes for which the goods are normally used.

4. §2-315: There is an implied warranty that the goods shall be fit for any purpose that the seller has reason to know that the goods are required and that the buyer is relying on the seller's skill or judgment to furnish the suitable goods.

5. §2-316: Allows the seller to disclaim implied warranties by clearly drawing the buyers attention to the fact that there are no implied warranties.

6. §2-607(3)(A): requires that the buyer notify the seller of any breach of warranty within a reasonable amount of time or be barred from recovery. Courts have not upheld this requirement for Πs who did not buy the product.

7. DEFENSES: The UCC implies that once a Π discovers a defect, there can no longer be reasonable reliance on the warranty and thus no recovery. However, other courts have allowed comparative fault in warranty cases to avoid the anomaly of reducing Δ's liability in negligence cases but not allowing the reduction for a potentially innocent Δ in a warranty suit.

8. STATUTE OF LIMITATIONS: The UCC statute of limitations runs for four years from the time of delivery of the goods. The time for a tort claim is usually shorter but generally only runs from the injury or discovery of the injury.

9. MAGNUSON-MOSS ACT: 1975 Congressional act stating that although a seller is not required to give warranties, any warranties given must be full or limited. Most cases brought under the Act do not allow recovery for personal injury arising out of breach of implied warranty.

N. *ECONOMIC HARM*

1. When a defective product causes economic damage to the owner of the product, the majority of courts have ruled that there is no recovery in tort since it is the specific function of warranty to cover damage to the item itself. The arguments for S/L are weak and those for enforcing contractual remedies are strong.

a) Damage to the item itself is a loss that can easily be insured against.

b) Imposing the cost on the public by allowing tort liability is not justified.

c) Keeping such claims in warranty allows the seller to disclaim warranty within the UCC guidelines in exchange for a lower price of the product for the buyer.

d) Warranty allows the Π to recover for economic harm, but limits mfr liability to the terms of the agreement between the parties.

e) Π knows better how to protect herself.

2. However, some courts have allowed endangered Πs to recover in tort, but not simply "disappointed" Πs. The small minority of courts have allowed recovery in tort for economic harm caused by defective products arguing that the goals of S/L apply equally well when the loss is purely economic.

a) East River Steamship v. Transamerica Delaval (US, 1986, p.594) Π could not recover in tort for the economic harm caused by the defectiveness of the turbines that came with the supertankers. The proper remedy would have been in warranty, but the Π had already gotten a cheaper price by allowing the seller to disclaim responsibility for necessary repairs at the time of the sale.

III. TRESPASS

A. Introduction: Exclusive possession, usually sporadic mischief.

1. At early common law, every unauthorized entry onto anthers land either by a person or object that resulted from a voluntary act was subject to trespass liability.

a) The focus of the action was the breaking of the "close" and no harm had to be demonstrated for the Π to at least win nominal damages.

b) The strict liability of trespass was considered necessary because any breach of the close could result in a major breach of the peace.

2. There is a tort of trespass because society values the ability to feel a sense of ownership, that such a sense should not be interfered with and that it is entitled to protection through the law.

3. Today, Πs cannot recover for unintentional trespass unless actual damages are proven.

4. However, the strict liability aspect of trespass remains in place today. Δ is liable for intentionally entering Π's land or intentionally causing something to enter Π's land regardless of damage. Δ need not intend to invade Π's interest in the exclusive possession of the land, only intentionally enter. Δ liable at least for nominal damages.

5. Martin v. Reynolds Metals Co. (OR, 1959, p.603) Held: The fluoride particulates that entered Π's land from Δ's aluminum reduction plant rendering the area unfit for grazing was considered trespass.

a) The objects energy or force should be considered, not its size.

b) Trespass has been recognized for concussion which is nothing more than the vibration of molecules.

c) Science has shown that small can be powerful.

d) If the Δ's actions are likely to lead to a conflict, then the trespass shall constitute a tort provided the other elements of the tort are fulfilled.

e) Δ is only liable if Π's sense of ownership is violated.

f) The intrusion was direct and though the damage was consequential, such damages may be proven in a trespass action.

6. Whether something is nuisance or trespass may depend on its ability to accumulate.

IV. NUISANCE

A. *PUBLIC NUISANCE*

1. Historically, nuisance began as minor criminal offenses against the right of the general public:

a) These included rights of public: health (diseased animals), safety (hoarding explosives in town), morals (prostitution), peace (loud noises), comfort (odors, dust, smoke) and convenience (obstruction of a public way).

2. 2d Restatement §821(b)(1) eliminated the criminality requirement. Public nuisance is defined as the unreasonable interference with a right common to the general public.

3. Unreasonable interferences include:

a) a significant interference with the public health, safety, peace, comfort or convenience,

b) the existence of a statute or ordinance proscribing the conduct,

c) conduct of a continuing nature or long-lasting effect the actor has reason to believe will have a significant effect upon the public right.

4. §821(C)(2) requires that the individual demonstrate that they have suffered special harm or that they could stand as a member of a class in a class action. This requirement may be relaxed if the Π is seeking injunctive action. Also, the requirement may be relaxed with respect to environmental pollution.

B. *PRIVATE NUISANCE*

1. §822 LIABILITY for the invasion of anthers interest in the private use and enjoyment of the land if the invasion is either:

a) intentional and unreasonable,

b) unintentional and arising out of negligent and reckless conduct or abnormally dangerous conditions or activities.

2. §825 defines expands the meaning of INTENTIONAL to include situations where there is knowledge that the conduct is invading or is substantially certain to invade another's interest in the use or enjoyment of their property.

a) *This makes most types of ongoing invasion intentional after the initial invasion.*

3. §826 defines UNREASONABLE as either:
   a) *the gravity of the harm outweighs the utility of the actors conduct, or*
   b) *the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.*
4. However, under, §826(b) Δ could still be liable even if the utility of the nuisance outweighed the gravity of the harm if the harm is serious and the Δ could afford to compensate the victims.
5. §827 GRAVITY OF THE HARM from an intentional invasion is decided by considering:
   a) *the extent of the harm,*
   b) *the character of the harm,*
   c) *the social value that society attaches to the type of use or enjoyment invaded,*
   d) *the suitability of the particular use or enjoyment invaded to the character of the locality,*
   e) *the burden on the person harmed to avoid the harm.*
6. §828 the UTILITY OF THE HARM is determined by considering the following factors:
   a) *the social value that society places on the primary purpose of the conduct.*
   b) *the suitability of the conduct to the character of the locality,*
   c) *the impracticality of preventing or avoiding the invasion.*
7. Boomer v. Atlantic Cement Co. (NY, 1970, p.611) Although the state usually granted injunctive relief as long as the nuisance was not insubstantial, this court decided only to grant the injunction temporarily until Δ paid permanent damages to the Π.
   a) *The court argue that there was a great disparity between the economic consequences to Δ as well as the local economy and the consequences to the Π if it was allowed to continue.*
8. In NY Boomer the Δ must act intentionally and unreasonably, harm>utility OR serious harm and the Δ would not be put out of business if held liable.
9. Why did the NY court allow a recovery when Δ was not unreasonable?
   a) *Provide public improvement, decreased pollution,*
   b) *sanctity of the use of land,*

c) *unidirectional causation.*

10. "SERVITUDE ON THE LAND" of the Π placed there by the Δ allows for the collection of permanent damages and precludes the collection of further damages by Π or their grantees.

a) *The dissent argues that the majority should have granted the injunction and that they are essentially licensing a continuing wrong. Also, once the damages are paid their incentive to find a safer alternative will disappear.*

11. RECIPROCITY OF RISK (p.623) A Π has the right to recover for non-reciprocal risk that is greater in degree and different in order than that risk imposed on the Δ by the Π. (Prof. Fletcher)

a) *Coase presents another view of the theory...meat or crops. That the real question is not how should we restrain Δ from harming Π because to restrain Δ, harms Δ. The question is really: should Δ be allowed Π or, should Π be allowed to harm Δ?*

12. Coase also says that in an economically perfect world, it would not matter who was liable because who ever had to pay would take the least expensive route to repair the damage.

a) *However, in the hypo with the factory's smoke causing damage to the neighbors' paint jobs they could not be expected to pay for the smoke converter even if it was cheaper because: they may not know about the machine, Δ is not obligated to put in the smoke controller, transaction costs, "free-rider" problem, b/c some who benefit will not want to kick in, making it more expensive for everyone.*

b) *Coase says, even so, liablity should go to the party with the least cost problems.*

13. A/O/R: Second Restatement: If Π knew of the risk but exposed herself to it anyway, it is not a total bar, only a factor to be taken into account.

a) *However, the lower cost of the property may have been built into the price and Δ was not doing anything wrong.*

14. AIR QUALITY: Tort law requires a Π so its usually dealt with by legislation. Finding a Π is difficult, harm is not easily identified and Δs are difficult to identify since there are so many causes to air pollution.

V. DAMAGES AND INSURANCE

A. *Damages*

1. The fundamental goal in awarding damages for unintentional torts is to return the plaintiff to her position as closely as possible before the accident.

a) *Medical expenses [special damages]*

b) *Lost Earnings [special damages]*

c) *Pain and Suffering [general damages]*

2. We have a single recovery system where the Π recovers all past and present losses in one suit. This cuts down on administrative costs because there would be a one time dispute. The single recovery helps people recover faster because as soon as they win their judgment there is nothing holding them back from recovery.

a) *In a periodic recovery suit, the administrative costs are high in periodic claims where Π would come back every few years to demonstrate that they were still not whole. Although Δ would may not have to pay for tx that may not be needed, the drawback is that Πs may slow down their recovery on purpose.*

3. GENERAL FACTORS IN DETERMINING DAMAGES:
   a) *health of the Π prior to the accident,*
   b) *age of the Π,*
   c) *Π's life expectancy,*
   d) *work history,*
   e) *earning potential,*
   f) *existence of dependents,*
   g) *permanence of the injury,*
   h) *pain and suffering.*
4. MEDICAL EXPENSES:
   a) *bills,*
   b) *basis for P/S, sometimes a multiple,*
   c) *reasonableness with respect to necissity and amount of bills,*
   d) *future medicals testified to by expert,*
5. PROBLEMS:
   a) *Π can collect for aggravation of prior injury, but not for all prior injuries,*
   b) *no real check on reasonableness of the bills.*
6. FUTURE LOST WAGES:
   a) *Π's normal earning power,*
   b) *promotions, merit raises, overall raise in wages, cost of living adjustments, fringe benefits,*
   c) *BUT: no commuting expenses, no business clothes,*
   d) *work/life expectancy,*
   e) *plus tax free lump sum award.*
7. More problems:
   a) *What about people in career changes?*
   b) *What about sole proprietors? Net profits, cost of hiring someone else?*

c) Independently wealthy who had no plans to work probably could not recover for lost wages.

d) Someone currently working at less that their earning potential.

8. NON-PECUNIARY LOSSES:

a) pain and suffering, past and future,

b) humiliation of disability or disfigurement,

c) anxiety about further necessary tx,

9. The AMOUNT OF DAMAGES is left to he discretion of the jury and then to the discretion of the trial court judge who acts as a thirteenth juror, i.e. would the judge join in the verdict. If the answer is no then the trial court grants the Δ another trial. So, reviewing courts give a lot of weight to the decisions of the trial court because they saw all of the evidence. (Seffert v. LA Transit)

a) Traynor dissenting noted that "at that time" the p/s were usually not larger than the specials, practically an injustice to treat similiar cases dissimiliarly and predictability is desirable because it impacts on the settlement process.

b) Some jurisdictions have caps on P/S to help out predictability.

10. A reviewing court will reduce a damage award if the verdict "is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury."

11. PER DIEM ALLOWANCES: As a way to rationalize the amount of the damage award for the Π, attorneys will sometimes break down how much the plaintiff is owed for each day. There are people who argue that this is arbitrary and leads to inflated awards, although proponents argue that it is as good of an arbitrary means of arriving at non-pecuniary damages as any.

12. TAXES: Congress decided that compensatory damage awards are not taxable. However, the interest on the award is taxable.

13. PRESENT VALUE DISCOUNT: If the Π were to invest the lump sum upon receipt, she will earn interest on that money and end up being over-compensated. She will argue that the interest she earns will off set the amount of inflation. Some courts will agree, but, others take the estimates as to interest rate and award the Π the amount that will reach the full amount when the Π is supposed to need it provided that it remains safely invested

a) NY: Jury instructions ask that they take into consideration: lost earnings, amount of time to be covered, amount earnings will be diminished each year and interest earned.

14. PAIN AND SUFFERING: A cross between compensation to the Π and retribution for the Δ. Judge Posner (p.638) thought the pain and suffering damages added to the deterrent effect. Also, pain and suffering money often goes toward covering attorney's fees. How could money begin to compensate the Π for non-pecuniary losses?

a) Our society places a very high value on money,

b) reestablish the Π's self confidence,

c) wipe out Π's sense of outrage,

d) though money may not be an equivalent, it may be a comfort.

e) Consumers do not buy pain and suffering insurance so Δs do not want to pay for it. Δ become the insurers for Π's P/S.

15. Survival Actions: Whatever actions decedent had at the time of death becomes an asset of the estate

16. The special damages are dealt with in the same manner.

17. However, decedent may also recover for the conscious pain and suffering experienced by the deceased while they were alive.

a) By conscious, that means that there is no recovery if the deceased was in a coma.

b) Plaintiffs who died in a plane crash were awarded damages for the mental anguish experienced from the time the plane broke-up to the time they hit the ground. (Yowell, p.641).

18. Loss of enjoyment of life is not an item separately compensable from pain and suffering. (McDougald v. Garber, NY, 1989, p.644)

19. Wrongful Death Cases: the main damages are the economic loss to the family unit. The amount of money that the deceased would have used from her lost wages must be deducted from the award.

a) For a woman who did not work outside of the home, the court awarded the amount that it would cost to hire people to do everything she did, i.e. cook, clean, chauffeur, bookkeeping. (DeLong, NY, p. 642)

b) Generally only pecuniary losses are available for recovery in wrongful death suits and so there was no recovery allowed for loss of consortium. (Liff, NY, 1980, p.642)

20. Children: The recoverable damages should not be limited to the basic pecuniary loss, but also to be included should be the parents' loss of the child's companionship as they grow older when it would be most needed and valuable, as well as advice and guidance. (Green v. Bittner, NJ, 1980, p.643)

B. *Punitive Damages: Exemplary Damages*

1. Traditionally these damages are for willful, intentional conduct especially when the compensatory damages are small, or despite large compensatory when outrage is high.

2. Taylor v. Superior Court, CA, 1979, p.652: The court held that punitive damages could be imposed on an alcoholic with a history of causing serious car accidents in the past.

a) Punitive damages are allowed in CA when the spite or malice on the part of the Δ is a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton. (p.654)

b) The majority wanted to use him as an example toward the end of public safety. DWI has become a huge problem that is responsible for incalculable loss.

c) The arguments against allowing punitive damages in this situation include: unjust enrichment for the Π, double punishment for the Δ since he will be held accountable criminally, the insurance factor, deterrent effect questionable, (p.656)

3. In some courts the Π must establish Δ's economic situation. But if the Δ is found to have a lot of money then it could be prejudicial. A Bifurcated trial where liability and damages are dealt with separately would help reduce the prejudicial effect. 656.

a) S.Ct. case M mentioned in class. Π won $19k in a slander suit for compensatory damages and $10M in punitive damages. The plurality said the award was okay because the potential harm was equal to $10M.

b) The Oregon Constitution was found by the S.Ct. to violate the Due Process Clause because it only allowed reversal of punitive damages if there was NO evidence to support the verdict.

4. Malice, Oppression or Fraud proven by clear and convincing evidence. (The terms defined, p.658

5. Comparative fault, according to the majority view, should reduce the amount of compensatory damages, but not the amount of punitive damages. P.658.

6. Employers: Restatement 2d §909: Π can recover from employer punitive damages if:

a) the employer authorized the act or

b) the employer was reckless in employing an unfit employee, or

c) the agent was in a managerial position and was acting in the scope of his employment, or

d) the employer ratified the act.

7. DEATH, 659

a) NY: death has no effect on the Δ's liability for punitive damages.

b) CA: no punitive damages are available if the Π dies.

8. LIMITS, 660: There seems to be no constitutional limit as to the size of permissible punitive damages. Ferris v. Kelco (1989, US) ruled that the 8th amendment's prohibition on excessive fines did not apply to punitive awards in civil cases.

9. Insurance coverage of punitive damages are either a matter of contract or statutorily disallowed. 661

10. A Company should not be able to market a dangerous product after a cost-benefits analysis.

a) ΔS are liable for compensatory and punitive damages if a jury decides that it was an excessive, preventable danger.

11. Fischer v. Johns-Manville (NJ, 1986, 661) Held: Punitive damages are available in strict products liability cases where a mfr is aware of or culpably indifferent to an unnecessary risk of injury and refuses to take steps to reduce that danger to an acceptable level. Π contracted lung disease from exposure to ASBESTOS.

12. Should the Δ be liable for punitive damages?

a) Seriousness of the hazard to the public,

b) the degree of the Δ's awareness of the hazard and its excessiveness,

c) cost of correcting or reducing the risk,

d) duration of the improper marketing and the cover-up,

e) attitude and conduct of the Δ upon realizing the problem, and

f) Δ's reasons for failing to act,

13. The number of potential Πs may be an issue, because if too much of Δ's money is eaten up in punitive damages, there may not be enough left for the compensatory damages of others. The Δ feels it unfair to be forced to pay punitive damages more than once for the same conduct with different Δs.

a) Punitive damages may serve an overdeterrent effect and come Δs may get out of the market instead of being open to punitive liability.

14. The court likes to deal with this problem with mass litigation in the form of class actions and bankruptcy court where everyone comes in together.

C. INSURANCE

1. Most tort suits are brought because 1st party insurance is not full compensation. Π would be less economically concerned if there was full compensation.

2. ΠS anticipate that the Δ has insurance and most cases are litigated by attorneys for the insurance companies.

3. Life Insurance

   a) *Term: Specific insurance for the life of the policy.*

   b) *Whole: As long as the policy is in force, the insurance company will pay out. Kind of savings account also.*

4. First Party

   a) *Spreads the risk of loss.*

   b) *I buy insurance for a risk to me, ex. Fire ins., Medical ins., Auto ins. (tort payments are only 22% of auto policy)*

   c) *Disability protection if you cannot do your own work.*

5. Auto and Homeowners has first and third party coverage.

6. Collateral Source: Tort law treats 1st party benefits as collateral source. That is, any 1st party benefits should not be deducted from the damages which would otherwise be collected from the tort-feasor. The court does not want the Δ to benefit from the fact that Π got other coverage as a result of Δ's tort. So Π essentially gets a double payment, BUT:

   a) *we should not punish the Π for being prudent,*

   b) *it is not really double payment because so much money goes to the attorney,*

   c) *"extra" pays for non-compensatory damages like the time it takes to prosecute the tort.*

7. If on the otherhand medical tort award were reduced by the amount of first party coverage, the deterrent effect is lessened, BUT:

8. ex ante, the Δ does not know whether Π has first party coverage or not so he is not realistically going to change behavior.

9. However, to the extent that Δs do not have to pay for the full effect of their actions, the deterrent effect may indeed be diminished.

10. Subrogation: a means to prevent double recovery but still maintain the deterrent effect. Π gets $ from insurance company. Insurance company then goes to recover the $ from the tort-feasor.

11. If Δ burned down Π's house, Π's fire policy would pay Π the $100k, but insurance company would sue Δ to recover the $ paid out. Π required to cooperate with the suit because of the policy.

12. Conard (682, n.7) subrogation is too expensive because the transaction costs are too high. However, the litigation costs are going to occur anyway so either way the costs will be spread.

13. In NY Π's judgment is usually reduced by their first party benefits.

D. *Fleming article:*

1. Tort law should take a backseat to 1st party insurance or gov't social welfare.
   a) *Multiplicity of insurance,*
   b) *Π knows better what type of insurance is needed,*
   c) *extraordinary cost of litigation,*
2. fault concept expanded to provide compensation,retribution, vengence and deterrent ideas that tort law may have been based on are mitigated by insurance companies
3. THIRD PARTY
   a) *Began as indemnity companies where they would pay the Δ back the money Δ had to lay out for the judgment.*
   b) *Liability companies cover the claim from the start and pay on behalf of the Δ.*
   c) *Examples: malpractice, pollution, worker's compensation.*
4. Expansion of liability:
   a) *vicarious liability*
   b) *family purpose doctrine*
   c) *joint enterprise*
   d) *owner consent statutes: owner liable for everyone allowed to use the car.*
5. Mandatory car insurance now. In NY it will be 25/50 as of 1/1/96.
6. The arguments for immunities for charities and families are weakened because charities will be able to spread the costs and the financial bnurden will be taken outside of the family unit so the litigation is less likely to harm the family although there is still a strong collusion argument.
7. LALOMIA case: roles of different types of insurance. Kid on bike collides with car, he and driver die.
8. PAVIA case: Insurance company only responsible for not settling a case before it goes to trial if it "grossly disregarded" the insured's interests. A conscious or knoeing that insured would be held personally liable. More than negligence is required on behalf of the insurance company, but not as much as dishonest.

VI. A SURVEY OF ALTERNATIVES

1. Med Mal: Lost earnings taxed. CPLR 4546
2. Collateral source reduces judgement. CPLR 4545
3. Structured payments instead of lump sums for P/I judgments. CPLR 50
4. Δ <50% liable, only responsible for that percentage of non-economic loss.

a) Exceptions: mvas Δs still liable joint and severally for pain and suffering.

b) Also, if the mfr cannot be brought in in product liability cases, dealer is held 100% liable.

c) Also, knowledge and concerted action intentional tarts.

B. *ALTERNATIVES*

1. worker's compensation
2. non-auto no-fault
3. social insurance

C. *No-Fault: New York*

1. Broad displacement of tort law. Now relatively few auto cases get litigated.
2. No recovery in tort for non-economic and basic loss unless it is a serios injury.

a) Serious injuries include: death, dismemberment, fracture, serious disfigurement, etc...§5102(d)

b) The significant limitation of use of a body function does not have to be permanent, just significant. Licari, p.765

c) Pain is not sufficient.

d) Scars must be visible and a reasonable person viewing the injury in its altered state would regard the injury as unattractive, objectionable or the subject of pity or scorn. Savage, p.765

3. Problem on page 750. Woman was a pedestrian struck by Δ. Whether she owned a car or not, her no-fault benefits would be covered by Δ's policy.

real	basic	1st party	tort
med 4000	4000	4000	
1st mo. l/w 3000	2000	2000	1000
1/2 mo. l/w 1500	1500	-20%offset=1200	
total 8500	7500	7200	
P/S 20000		-any deductible	20000

4. Deductibles are only applied with respect to policy holder and those in their household. Deductibles up to $200 by statute.
5. An insurance company that pays out no-fault benefits can only the amount paid out from the insurance company of the party at fault if the at-fault party was a livery car or truck, i.e. a vehicle over 6,000 lbs.
6. All disputes about coverage, including subrogation rights are handled by arbitration.

7. Why not go with a 1st party system completely with auto accidents and get rid of tort completely?

a) Pros: we do not lose deterrent effect because criminal sanctions are in place, higher litigation costs with 3rd party cases, we want to tie the cost of auto accidents to cars.

b) Con: 1st party carriers have to pay all the time while 3d party carriers only pay when they are liable.

c) Martin suggests that maybe we should raise the coverage in no-fault from $50k to $500k since it would cut down even further in tort litigation and it probably would not raise premiums that much.

VII. INTENTIONAL HARM

1. Least important part of tort law.
2. Most Δs are judgment proof.
3. Most frequent intentional torts are employment discrimination and civil rights cases because:

a) these defendants have a lot of time on their hands,

b) often represented by organizations,

c) $ is available b/c although ins. policies may be voided, there are attorney's fees in civil rights cases, punitive damages, contributory negligence is usually not available for the Δ.

4. Π must prove that a protected interest has been invaded and that the Δ had an intent to invade that right.
5. INTENT is purpose, or acting with substantial certainty of the result.

a) Ex: Coke was not acting intentionally b/c there was no substantial certainty with respect to a particular bottle or a particular Π.

b) Δ would have been liable if he said he was playing a prank when he took the chair away from his aunt. (Garratt v. Dailey, p.796) However, he may be negligent, but that would be judged by the standard of a reasonable 5 year old.

B. BATTERY

1. Battery: Offensive intentional touching, direct or indirect, of a person or their appurtenance.

a) Intent to touch a PERSON is necessary.

b) Transferred intent applies except with emotional harm.

c) Offensive contact can be broadly defined. In TX a Δ was liable when a plate was snatched from Π's hand.

2. Defenses: consent, self-defense, defense of property, necessity.

C. ASSAULT

1. Assault: putting one in fear of an offensive touching, mental upset, the immediate apprehension of danger.
2. This action protects the Π's dignity.
3. The focus is on what the Π believes. So if Δ points a gun that he knows to be unloaded at Π, Δ is still liable for assault because Π was afraid.

D. *Governmental Liability*

1. Title 42§1983 (p.850): solvent Δ, attorney's fees recoverable.
   a) *Subjects to tort liability "Every person who under color of STATE law or custom subjects or causes to be subjected, any citizen of the US to the deprivation of any rights, privileges secured by the Constitution and laws."*
2. Under the statute "Every Person" includes municipalities.
3. But a municipality is not liable because of vicarious liability but because it has a policy, ex. chokeholds or billyclubs, i.e. a prescribed way of doing things.
4. Another way a municipality can be liable is for failure to train or defficient supervision.
5. These policies can be unspoken.
6. "Under Color of State Law" that is that actor must act as a state agent since individual actions are not included under §1983.
7. The right must be obtained under Federal law.
8. IMMUNITIES: No mention of immunities on the face of the statute but they are very important:
   a) *it is unfair to subject someone to liability for good faith decisions that their job makes them make.*
   b) *If officers were held personally liable, their actions would be chilled so we need to give them some breathing room.*
   c) *Judges are given absolute immunity while performing their duties.*
   d) *Executive officers have a qualified immunity while they are acting in good faith.*
   e) *Prosecutors cannot be found liable. They are covered by judicial review and they need room to do their job.*
9. Owen court said if the legislature wanted to get rid of all immunities, they would have said so. But they take away immunity for municipalities to spread the risk, chilling effect is not going to happen and other reasons on page 855-857.
   a) *Dissent said that municipality in effect was being held strictly liable because it did not know that what it did was was not constitutional because it was at the time.*

b) *MARTIN: there probably is some deterrent effect. The fact the attorney's fees are available has allowed an opportunity to clear up subtle civil procedure cases. However, federal courts are denying subtle cases because they say they come under state rights to cut down on their heavy case load.*

10. Horta No liability for police officer who caused accident on motorcycle because there was no evidence that there was intentionality.

11. BIVENS Action: S.Ct. allows these actions because it is a Constitutional right for which a remedy should be provided.

12. It allows federal officers to be sued for violating federal law.

a) *However, if there is an alternative remedy under the statute then the Π cannot sue. (866)*

13. Immunities

a) *Judges immune.*

b) *President absolutely immune BUT presidential aides only get qualified immunity.*

E. *Intentional Infliction of Emotional Distress*

1. Hustler Magazine v. Falwell Δ not liable b/c everyone would know that the comic was not a true statement of facts. In this VA court Π had to prove:

a) *Δ must intend to cause the harm or be substantially certain that harm would result.*

b) *The conduct must offend the general standards of decency and morality.*

c) *The severe emotional distress must be causally related to Δ's action.*

2. However, under the Restatement Π must show that Δ was extreme and outrageous outside of all reasonable bounds.

3. NY Times v. Sullivan (S.Ct.) actual malice was required, i.e. that the Δ had knowledge that the statement was false or reckless with regard to its veracity.

a) *NY Times did not apply in Hustler because there was no statement of fact.*

b) *NY Times places a very high value on Free Speech Rights.*

4. Extreme words are sufficient today to maintain an action.

5. Conditional words do not make an assault because they do not present an immediate threat.

F. *Employment Discrimination*

1. Title VII: Employment discrimination statute.

2. Two major types of employment discrimination: quid pro quo, i.e. sexual favors for advancement and hostile environment.

3. Hostile environment, i.e. injurious to psychological well being:

a) objectively hostile/abusive environment, that a reasonable person would find so, and

b) that the Π had such a subjective perception.

c) No need to prove emotional damage.

d) Factors: frequency, severity, physically threatening, humiliating, interfering with work.

G. *FALSE IMPRISONMENT*

1. Protects freedom of movement.

2. Lopez v. Winchell's Donut House Π was not falsely imprisoned because she was not restrained against her will. There was no threat or use of force and no assertion of authority.

3. Π must be conscious of or harmed by the confinement.

4. Confinement must be unjustified.

a) However, NY General Bus. Law protects shop owners and officers because it only requires that they have a reasonable belief that Π was shoplifting.

H. *DEFENSES*

1. CONSENT vitiates the tort.]

2. §892: indicates a willingness on the part of the Π for the action to occur and can be manifest by action or inaction and need not be communicated to the actor. The words or actions must be reasonably understood to mean consent.

I. *EXCEPTIONS:*

1. CONSENT to an unlawful act is no consent at all which allows deterrence on both sides because Δ has to pay and Π does not recover everything.

2. FRAUD: if Δ gets consent by way of fraud, it is no defense.

3. DURESS consent is no defense.

4. Self-defense: reasonable force is allowed to resist the force.

5. Defese of property: any force to wound or kill solely for the protection of property is not allowed.

a) Some force can be used but only when Π would not leave the property.

b) Burglars are different bacause Δ may also be protecting an interest of bodily injury.

c) Spring guns are not allowed (838, n.5).

6. Defense of another: may be employed as a defense if the defense would have been available for the actor in the same circumstances.

a) Majority: if Δ does not have the right to protect herself, then Δ does not have the right to defend another.

b) Minority: actor need only have a reasonable belief.

7. NECESSITY

a) Ploof, p.839, n.7. Δ's force was not reasonable.

b) Vincent v. Lake Erie, p.840.

c) Cordas, p.843. No liability fo taxi driver acting out of necessity.

VIII. DEFAMATION

A. Prima facie case: protected interest of REPUTATION:

PUBLICATION OF A DEFAMATORY STATEMENT OF OR CONCERNING THE Π

1. S/L because there is no first party coverage and the one who injures your reputation should pay.

2. Publication

a) Seen or heard by someone other than the Π.

b) Comment must be understood and the defamatory aspects perceived.

c) If the Δ just made the statement to the Π it is not defamation if the Π tells others of the comment except in very limited circumstances, i.e. blindness and job interviews.

d) Repeaters are liable and are said to have published the statement.

e) Publication must be either intentional or negligent.

f) Π must prove that a third party heard it.

g) Talking on a cellular phone might be negligent.

3. Defamatory statement

a) Defamatory statements have a tendency to harm the reputation.

b) Can the words reasonably bear the meaning Π places on them?

c) Would the meaning injure the Π's reputation?

d) The audience need not have believed the statement.

e) Although there need not be actual injury to reputation, the statement must have been able to be viewed as disgraceful to at least a "respectable" significant minority.

f) On it's face: typography, punctuation, common usage, dictionary definition.

g) Inducement: additional facts known by the audience.

h) Innuendo: suggestive.

4. Of or Concerning the Π

a) Statement must be shown to have been reasonably interpreted by at least one recipient to have referred to the Π

b) Δ did not have to intend that the audience think of the Π.

c) *Π must be ALIVE. DEAD Π's cannot sue.*

d) *Extrinsic evidence, interpretive aides can be used by the Π.*

e) *Some defamed groups could be too large to allow recovery, ex. the Neiman Marcus sales women.*

B. *Truth: Defense*

1. Δ must show the substantial truth of the statement, or the "sting" of the statement.

a) *This does not mean proof that you quoted someone else accurately, but that the underlying statement is substantially true.*

b) *To be a defense, the statement does not have to be literally true in all respects*

2. Δ of absolute priveledge: elected officials in gov't proceedings, judicial session, legislative proceedings, marriage.

C. *Defenses*

1. Fair Comment/OPINION: pure expressions of opinion can never be defamatory. Gertz

2. Is it fact or opinion?

a) *The more precision and specificity, the more likely it is fact.*

b) *If it is not verifiable, it's more likely opinion.*

c) *Literary context, i.e. article on the oped page are more likely opinion.*

d) *Comments in the public or political arena are more likely to found to be opinion because they are at the core of our First Amendment Rights.*

3. Fair and Accurate Reports: If a reporter does what is usual to get and check a story prior to publication, there is no liability because the press is an agent for the people and public supervision of official prodceedings.

a) *This defense can be lost if the press is acting with sole purpose of causing harm, but this does not really happen so it acts as an absolute defense.*

4. Retraction: Does not act as an absolute defense but rather may go to limiting damages.

5. Single Publication/Statute of Limitations: The short statute of limitations begins running with the first publication.

6. Disclaimers: Not absolute outs, although they speak to whether the audience could reasonably believe the statement was of or concerning to Π.

D. *Constitututional*

1. S.Ct wants to protect some false statements for "breathing room" for the press. Some false statements are inevitable in free debate.

2. PUBLIC OFFICIAL must prove that the Δ had actual malice in order to recover. Actual malice is when a statement is made with knowledge that it was false or with reckless disregard as to whether it was false or not.

3. Who is a public official?

4. Public Interest Matters: Both Public and Private figures bear the burden of proving falsity of the statement.

5. New York Times v. Sullivan (S.Ct.) The court determines actual malice by examining the publishers attitude about the truth, whereas, common law, malice was the publisher's attitude about the Π. NYT provides procedural protection for Δs by requiring:

   a) *actual malice,*

   b) *prove with clear and convincing clarity which is a higher standard than preponderance,*

   c) *appellate courts may independently review, so there is not as much weight given to the juries finding of fact.*

6. IMPLICATIONS: NYT treats implications as statements of fact. Was the publisher aware of the falsity of the implication, or reckless or was it intended?

7. ALTERATIONS. Masson v. New Yorker (944). S.Ct. ruled that the "material change in meaning test" was to be used when there was an alteration of statement in quotations.

E. *Private Figures*

1. Who is a private figure? Gertz v. Robert Welsh (S.Ct., 1974) A private figure that gains media attention on an issue of public interest does not automatically become a public figure. Here the court held that an attorney who worked on a high profile case was a private figure.

2. In order for a private person to recover, strict liability is not enough, i.e. no liability without fault. Π has to prove either that the Δ knew the statement was false or at least that the Δ was negligent in determining the falsity. It was left up to the states whether they would require the Π to prove that the Δ was negligent, reckless or intentional.

   a) *Negligence should be fairly easy for the Π to prove.*

   b) *Gertz did not allow presumed or punitive damages, only special damages with competent evidence.*

3. Rationale: Private people have less access to media and would have greater difficulty than public figures to rebut defamatory statements on their own. There are competing