

TORTS

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I. Intentional Torts

Chapter 1 Intentional Torts

A. Intent

1. **Intent:** plaintiff must show that defendant acted with the intent to **cause a particular consequence**.
 - It is never enough simply that defendant intended.
2. Defendant “intends” the consequences of his conduct if
 1. his or her **purpose** is to bring about those consequences; OR
 2. he or she **knows with substantial certainty** (KSC) that the consequences **will** result from his actions.
 - For KSC, it is that defendant knew that it *would* happen--not just that it “might” happen or even that there was a “high risk that it would” happen--and he did it anyway, even if plaintiff can’t prove that that was *why* he did it.
3. In many states, young children are deemed incapable of having the intent to commit intentional torts until a certain age.
 - No majority rules
 - (justification: unable to have “intent”; too many law suits.)
4. **Mistake** does not vitiate intent.
 - If someone had intent, the fact that it was based on mistaken pretenses is irrelevant.
 - Don't take this too far--not everyone who makes a mistake has **intent**.
 - You still need to show either the requisite purpose or knowledge to a substantial certainty.
 - Intent means intent to do alleged tort, not intent to hurt someone.
 - But if you can show intent, then mistake doesn't change it.
 - Mistake (shot a dog though he thought that's a wolf) v. Accident (accidentally trigger the gun)
5. **Insanity** does not vitiate intent.
 - So long as defendant had **intent** (the requisite purpose or knowledge to a substantial certainty) --> it does not matter that he acted based on some insane perception of the world.
 - This does not mean that insane people always have intent; it just means that people with intent might be **basing it on something insane(irrelevant)**, and if so we don't care.
6. **Transfers** (transferred intent)
 - Normal Pattern:
 - If defendant intended to commit one of the five classic intentional torts (battery, assault, false imprisonment, trespass to land, and trespass to chattels) against A, and ended up committing it against B ==> *Defendant will be liable to B*.
 - e.g. tried to hurt A, but hurt B
 - Even D did not intend to against B, the **intent** to commit it against A **transfers**.
 - Varieties:
 - If defendant intended to commit one of the five classic intentional torts, but ended up committing a different one of the five ==> he will be liable for committing the other tort
 - The intent to commit the first tort **transfers**.
 - Note that some statements of this rule only mention transfer between assault and battery.
 - e.g. A assaulted B, but due to some accidents, he actually hurt B (battery)

B. Battery

1. The **elements** of battery:
 - Intention: defendant acted with an intent to cause a harmful or offensive touching to plaintiff's person; **AND**
 - Result: that intentional act caused a **harmful or offensive touching to plaintiff's person**.
2. Actual Damage v. "intended damage"
 - Once there is battery (intention and result), D is liable for the full extent of damages, no matter whether the **actual damage** is far more serious than the intended.
 - The fact that the actual damages are far more serious than defendant intended is irrelevant.
 - Because defendant meets the elements of the tort, he is liable for **the full extent of damages** that he ended up causing.
 - Determining what defendant "caused" will be clarified in Chapters 5 and 6.
3. Touching:
 - Does not necessarily need to be directly on plaintiff's person; it might include something that plaintiff is holding or wearing.
 - The touching must be offensive to an **ordinary person** not unduly sensitive as to personal dignity **based on the circumstances** when the touching happened. (sometimes the touching is inevitable)
 - If your friend told you not to tap him or her, you still did it → liable

C. Assault

1. The elements of assault are that
 - acted with an intent to cause a reasonable apprehension in plaintiff of an imminent battery; **AND**
 - intentional act caused plaintiff to suffer a reasonable apprehension of an imminent battery.
2. **Reasonable**: lots of other questions
 - If P was not actually in danger of suffering a battery, it might still be an assault if plaintiff reasonably thought otherwise.
 - e.g. **unloaded gun**: even though P may not have known whether a gun pointing at her was loaded or not.
 - If P did not **see the actor**, she couldn't reasonably believe she was in danger
3. **Imminent** means imminent.
 - Plaintiff must be "**in range**" and defendant must be **overtly acting**.
 - **general future** battery, or is merely **preparing** to, or is **on his way** to commit it, is not enough.
 - **Word** in themselves, no matter how threatening, **do not constitute** an assault.
4. **Apprehension**
 - P expected the imminent battery, not necessarily that she feared it.

D. False Imprisonment

1. The elements
 - (1) D acted with **an intent to confine or restrain P in a bounded area**;
 - (2) that act **caused P to knowingly be confined or restrained** in a bounded area; and
 - (3) D **lacked legal authority** to do this (without legal justification)
2. **Confinement or restraint**:
 - **Means**:
 - physical barriers,
 - force or threat of force,

- (invalid) use of legal authority,
- and maybe even threat of damage or loss to reputation or property.
- Case notes
 - **Mere refusal to admit** not false imprisonment
 - Wrongfully arrest into a car is FI
 - **Moral persuasion** (fear of losing his or her job): may or may not be relevant
- The point at which D's actions amount to actual restraint may be hard to pin down
 - Threat of force or physical barriers are easy;
 - threat of damage to reputation or property is tougher but at some points may rise to the level of FI
 - → This leaves lots of **discretion** to the jury.
- P is not confined if he or she **knows or reasonably should know** of a **reasonable means of escape**.
 - Even if P doesn't know about the escape opportunity, D might think he or she does → no **intent** to D.
 - If plaintiff stayed in the space of her own volition → No confinement
- 3. **Knowledge** of confinement or restraint
 - Some states (no majority): actual injury to substitute for knowledge of confinement.
 - P were harmed + you don't know/remember → P could still win
 - Whether P **remember** the process doesn't necessarily matter → as long as P were aware at the time the FI happened.
- 4. **Lack Legal Authority**
 - False arrest is a subset of false imprisonment.
 - if D mistakenly take P imprison without legal justification, D is liable. For he only needs the intent to retrain, whether his intent at that time was justified is irrelevant.
 - D can show that an arrest was proper
 - if D had lawful authority to arrest and P was later convicted of the offense for which he was arrested.
 - many reasons why P might not be guilty of the crime even if the arrest was proper.
 - D can show he had warrant or probable cause to arrest.
 - Probable cause: whether that is **reasonable**. e.g. suspect looks exactly like someone else and etc.
 - If P was arrest willing, he or she cannot win FI, like P willingly come with police to police station. But if resisting arrest is not a reasonable means, then the element of confinement is satisfied → no defense.
- 5. Note:
 - For close call cases, the court has to look at the whole circumstance.

E. Intentional Infliction of Emotional Distress

1. Elements:
 - 1) extreme and outrageous conduct by the defendant;
 - 2) with **intent** to cause plaintiff to suffer severe emotional distress;
 - In some jurisdictions, **recklessness**, a lower standard than intent, **suffices** for the intent element of IIED. There is no majority rule on this point.
 - 3) **causing** plaintiff severe emotional distress.
 - Scrambled factors:
 - Causation: foreseeability (pre-existing condition?)
 - Intent or KSC:
2. Note: **hard to prove**

- Courts set the bar for this tort high—not just by requiring extreme and outrageous conduct and severe emotional distress, but also by being much more likely **to take cases away from juries**.
 - “A certain toughness of the mental hid is a better protection than the law could ever be.”
 - Development:
 - Assault: requires threat of force not mere verbal threat
 - Battery: requires touching not just verbal saying → IIED
3. Transfer: does not apply
- Defendant must have intent to commit **this** tort against **this** plaintiff.
 - e.g. A daughter cannot sue for IIED for observing his father being beaten by Ds. (battery cannot transfer into IIED, and from her father to her.)

F. Trespass to Land

1. Elements
 - a. **intent** by defendant to invade real property;
 - b. **invading** plaintiff's **real property**;
 - c. **without** plaintiff's **authorization**.
2. Note:
 - Whose land?
 - **possessor** of the property; if there is no other possessor, the owner of the property → see the definition of “landlord” in chapter 9
 - that's why the tenant could sue his landlord for trespass.
 - How to invade?
 - by defendant's **person** or by any other person or object that defendant causes to go onto the property.
 - No damage is needed: every unauthorized entry into the close of another is a trespass.
 - Why bother to bring a suit?
 - 1) establish ownership; 2) it may lead to subsequent cases, causing punitive damage or injunction; 3) it may contain compensatory damage and consequential damage.
 - Even emotional distress could be recovered in absence of physical injury.
3. Above the land:
 - **invasion of small zones of air above the land and ground below**.
 - How far above or below this goes is subject to balancing that turns on the extent of the interference with plaintiff's use or enjoyment of the land.
 - Note:
 - Old rule used to be “whose is in the soil, his it is also unto the sky and the depths.”
 - After invention of flight, the remedy for ground damage as the airline crashes are considered as negligence and/or strict liability.

G. Trespass to Chattels

4. Elements:
 - (1) **intent** by defendant to use or intermeddle with a chattel;
 - (2) chattel was **in possession of another**;
 - (3) this results in either (OR)
 - (a) **impairing** the chattel's condition, quality, or value;
 - (b) depriving plaintiff of the use of the chattel for a substantial period of time or **completely dispossessing** plaintiff of the chattel; or
 - (c) harm to **plaintiff** or a legally protected interest of plaintiff's.
 - hurt does not necessarily mean actual huge damage.

H. Conversion

1. Definition: Conversion is an **intentional** exercise of **dominion** over a chattel that **so seriously interferes** with the right of the owner to control it that the defendant may justly be required to pay the plaintiff the **full (prior) value of the chattel**.
 - Note: it only applies to tangible object and could be stolen → secret does not apply here
2. If D purchased in good faith, this may defeat P's conversion claim. (i.e., having no good reason to think that it was rightfully plaintiff's)
 - D has to show either P did not lose it through theft, or D just brought it from (formal) business of selling chattels.
 - But if the chattel was stolen, and if good faith purchasers bought it from less formally (like on Craigslist) → D will lose regardless of his good faith.
 - Note that none of this prevents plaintiff from suing the first person who got it away from him.
3. Difference from trespass to chattels:
 - It could be both trespass to chattels and conversion at the same time → analyze separately

	Nature	Category	Remedy	
Trespass to Chattels	encompass less-than-complete dispossession or destruction	Classic intentional torts → transferred intent	1. Amount of diminution in value 2. <u>more easily give rise</u> to other damages (emotional harm)	Same remedy: For completely dispossesses or completely destroys → <u>full value of the chattel</u>
Conversion	complete dispossession or complete or near-complete damage	Not classic → no transfer	Force sale	

- Conversion is distinct from trespass to chattels because of the remedy: forced sale instead of just recovering the amount of the diminution in value. Conversion is also not a classic intentional tort, so transferred intent does not apply. Note that in several sorts of cases, the remedy will be the same for trespass to chattels as it is for conversion. If defendant completely dispossesses plaintiff of the chattel and there are no other damages, for instance, the remedy in both cases will be for the full value of the chattel. The same is true if defendant completely destroys the chattel. The difference is that trespass to chattels can encompass less-than-complete dispossession or destruction as well, and it can more easily give rise to other damages (emotional harm, etc.) that result from the tort. Conversion will always involve complete dispossession or complete or near-complete damage to the chattel.

Chapter 2 (Affirmative) Defense

A. Consent

1. Meaning:
 - a. if plaintiff consent to defendant's act. → whether **defendant reasonably** thought plaintiff consented.
 - b. Consent can be expressly spoken or written, but it can also be implied by context.
2. Application / Case Note:

- a. Objective and reasonable standard to decide if there is a consent → if P did or said nothing, it could be considered as consent
 - b. Football Game itself did not render a **consent** to team fight (there is usually an intent, since one party may act with KSC to hurt) → jury question
 - c. Local custom: unless the P expressively his rejection towards an “intentional tort action.”
 - d. Medical Emergency: Doctor can operate without consent from patient. **Four elements (AND)**
 - Patient is unable to give consent (unconscious, intoxicated, mentally ill, incompetent), and
 - Risk of serious bodily harm if it's delayed, and
 - A reasonable person would consent to treatment, and
 - Physician has no reason to believe this patient will refuse treatment under the circumstances
3. **Mistake** Consent:
- a. Consent given by mistake is valid,
 - b. Exception: unless defendant induced the mistake (e.g., through misrepresentation, fraud, or duress) or otherwise **knew or should have known** that plaintiff was giving consent based on a false pretense.
 - E.g. A had sex with B; A later knew B had STD → B has to have **intent** and **knowledge**
4. **Criminal** Consent:
- a. In most states, consent to a criminal act is not valid.
 - b. Some states disagree and allow consent to be pled by defendant
 - Exception for them: criminal statute was intended to **protect** people in **plaintiff's** position
 - e.g., statutory rape, in which case it is less appropriate to use the victim's consent to prevent her recovery in tort.
 - c. Note: for illegal activities like boxing
 - Maj.: not a valid defense → P wins; (minor is on the opposite)

B. Defense

1. Self-defense: (usually battery)
 - Elements
 - it was performed under a **reasonable belief** by defendant that he or she is being attacked or is about to be attacked; and
 - it constituted **reasonable force**.
 - that it was reasonable to **use** force,
 - and that the **amount of force** used was reasonable.
 - Exception:
 - Retaliation is not allowed, for the action that retaliation towards **has done**, not present;
 - (Verbal) provocation is irrelevant → it's about defend personal physical safety, not honor;
 - This is about a reasonable response to **an imminent physical danger**.
 - **Reasonable mistake** does **not vitiate** the privilege.
 - Retreat:
 - (minor) some states require retreat when doing so is reasonably safe, though even these states typically don't require defendant to retreat from his or her **home**.
 - Maj.: Even this requirement is not a formal/automatic, a jury might still find defendant acted **unreasonably** in a particular case by failing to retreat.

- Deadly force:
 - When there is alternative or you are not receiving deadly threat → not reasonable
 - It depends on the situation
- 2. Defense of others:
 - If a third party would have been **privileged to use self-defense**, D is privileged to use reasonable force on the third party's **behalf**.
- 3. Defense of property:
 - Defendant **is privileged to use reasonable force to prevent the commission of a tort** against his property
 - Once the tort is **complete**, the rules for recovery of property apply instead.
 - The amount of force is **less than self-defense**; **deadly force** will almost never be reasonable.
- 4. Recovery of property:
 - Defendant may be privileged to use reasonable force to recover a chattel, as opposed to relying on legal process.
 - Defendant must be in an **uninterrupted "fresh pursuit"** of plaintiff.
 - **Mistake**--even a reasonable one--vitiates the privilege, **except** for **shopkeepers** who reasonably suspect shoplifting.
- 5. Force Hierarchy
 - more things are reasonable to **defend a person** (including yourself and third party) than are reasonable to **defend property**. **Recovering property** allows for even less force, all other things being equal.
 - Defend a person > defend property > recovery property

C. Necessity

1. If reasonably necessary to avoid injury or damage.
2. The threatened damage must be
 - (1) natural/external;
 - (2) substantially more serious than the interference with plaintiff's interests; and
 - (3) sudden, unexpected, and temporary
 - if it weren't all of these things, the parties would be able to just negotiate.
3. Public Necessity:
 - If defendant is acting to prevent threatened damage to the public at large,
 - the privilege is an **absolute one**; and
 - defendant need not pay for damages caused to plaintiff's property.
 - The executor of public necessity does not have to be officials, it could be private citizen.
4. Personal Necessity:
 - If defendant is acting to protect a **personal interest**, he must compensate plaintiff for **actual** damage to plaintiff's **property**, but he is still "privileged" to **act** as he did.
 - Any **privilege that plaintiff** would otherwise have had to **eject** defendant will be **trumped by defendant's necessity**.

D. Authority of Law

1. if performed pursuant to **legal authority** (such as by police or wardens), D's tortious acts may be rendered non-tortious. → the performance should be reasonable, in good faith and with due diligence.
2. **Parents, teachers**, etc., to use reasonable force to discipline their **children, students**, etc., without being liable for intentional torts. → it also applies to someone who is temporarily responsible, like babysitter.

II. Negligence

Chapter 4 Negligence (Duty and Breach)

A. Intro

- Negligence:
 - 1) duty to exercise some level of care, and → what level of care the law requires
 - 2) breached that duty → factual show
 - 3) causing damage to plaintiff → causation-in-fact and proximate cause
- The most common duty is the duty to exercise the level of care that **a reasonable prudent person** would use, duty of ordinary care / duty of reasonable care.
- Duty:
 - Reasonable Prudent Person (reasonable or ordinary care) - child
 - Professionals/specialty
 - Negligence Per Se
 - Chapter 8 and 9: LL, Failure to Act, Emotional Distress, Privity of Contract, Unborn Children

B. Reasonable Prudent Person

1. Learned Hand Test

- Conduct falls below reasonable cares when $B < PL$
 - The burden of avoiding a risk of harm was **less than** risk itself → party is negligent in undertaking that burden.
 - B: burdens equals both 1) the **cost of taking steps** to avoid the risk, and 2) **benefits sacrificed** as a result → if there are other way to substitute the benefit, this will reduce B.
 - PL: risk of harm = the product of 1) magnitude of harm if it occurs (L) **times** 2) the possibility of it occurring (P).
- Note:
 - Not about precise numerical quantification: too many are impossible to quantify, the best way is to compare costs to benefits.
 - This not the only way to prove it.
- **Customary Practice**: evidence of the care exercised by a reasonable person in that context. It does not form the standard itself, it is neither necessary nor sufficient evidence as a matter of law. But it can be **persuasive** evidence. The inquiry shall always be what a RPP would have done.
 - People could be wrong/bad at accessing → just because you did not follow the local custom does not mean you are negligent.
- **Objectiveness**: objective with some subjective components.
 - A person of ordinary intelligence, perception and memory, with the **physical characteristics**, abilities, and disabilities of the actor, and **relevant additional specialized knowledge skills**.
 - Physical Characteristics:
 - a) If someone is stronger than usual, he or she is required to exercise a higher standard of action → Like superior knowledge

- b) **Intoxication:** if P is intoxicated, D is required to exercise a higher level of care.
 - “A drunken man is as much entitled to a safe street as a sober one, and much more in need of it.”
 - c) **Voluntarily Intoxication:** not a defense, not a physical characteristic.
 - **Relevant specialized knowledge skills:**
 - People are required to exercise these superior skills or knowledge to avoid harm to others.
 - e.g., if D’s hobby is auto mechanics, D should be judged by a higher standard of care or inspection.
 - the actor’s **general mental characteristics** are not taken into account, and neither are any deficiencies in the actor’s specific knowledge and experience.
 - **Not by how smart or dumb you are** → if D argued that was based on his or her best judgement, yet it still caused the accident, D cannot win by arguing this way.
 - **Not by your own experience** → if you never see a mule or the frozen lake, D should be judged by RPP, not his or her own experience.
 - **Constructive knowledge:** what you should have known → P could argue “this is what you should have known.”
- **Context of the specific situation** in which D found must be considered as well → **Emergency**
 - *Law does not hold one in an emergency to the exercise of that mature judgment required of him under circumstances where he has an opportunity for deliberate action. It found defendant's actions **reasonable under the circumstances**.*
 - (not P’s fault; P did something involuntarily; P faced emergency.)

2. Children: most subjective standard

- **Children:** the level of care of a reasonable child of the similar **age, intelligence, maturity and experience**. (many states children under a certain age cannot be held negligence at all)
 - i.e., if the child is smarter → higher standard; if he is dumb → lower standard.
- **Children engaged in adult activities** are held to the more objective adult standard.
 - e.g. motorized vehicles or heavy equipment
 - Not adult activities: **bicycle riding, building a fire** outdoor, downhill **skiing**.
- **Rationale:** 1) protect children; 2) P could sue their parents anyway.
- **Insanity or involving general mental conditions** is not a defense to negligence, too → the same standard of a person of ordinary intelligence, perception, and memory.
 - **Exception:**
 - **A sudden mental incapacity** should be treated alike and not under the general rule of insanity.
 - **a sudden heart attack, epileptic seizure stroke, or fainting.**
 - If it’s an all-time “insanity” → physical characteristics, applies special standard.
 - Like a long-time Alzheimer's Disease.

3. Professional/Specialty

- **Professionals** are governed by detailed and coherent internal standards, or objective standard that dispenses with the usual language of reasonableness, **standard of an ordinary member of the profession**. They are expected to **exercise the skill**,

knowledge, and care normally possessed and exercised by other members of their profession.

- Doctors, nurses, pharmacists, lawyers, **accountants, pilots, architects, clergy, teachers** and others in jobs that requires lots of training and education.
- Application standard:
 - NOT an ordinary prudent pilot having the same training as Fred Health(D)
 - Just an ordinary prudent pilot.
- Note:
 - **Doctors**:
 - a) In an emergency situation, a **doctor** may be negligent for taking a patient without health insurance card → since he might be liable anyway, just choose a lighter one → statute protect: cap protection.
 - b) Best Judgement:
 - If a doctor made his best judgement, the procedure's result is not what he expected → not liable for negligence.
 - If a doctor made a decision that no other doctor will make, like not collecting some date → he is liable.
 - **Lawyers**:
 - a) If it's custom for a lawyer to do so, it might not comply with law, but the lawyer might not be liable.
 - b) This standard also applies to pro bono case.
- **Specialists**: subject to the standards of other ordinary members of their specialty, **if the specialty is relevant to the case → partially subjective standard**.
- **Custom of profession is dispositive** of the duty of a professional, **regardless of its reasonableness** → defendants who comply with the professional customs are not negligent, vice versa → **purely objective (expert witness)**

4. Malpractice/Informed Consent

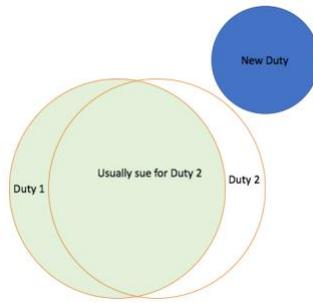
- Not mere disagreement or failure over technique or tactics.
- Professional standard as ordinary doctors in the same or similar locality do.
 - **Similar community in similar circumstances**
 - Lansing doctors as defendant, doctors from Chicago/St. Louis could testify.
 - Rationale: if just same community, no expert witness will testify against D.
- Modern Rule: **Diversity** in practice
 - allows lower standard of in areas with fewer medical resources
 - or national standard.
- **Informed Consent**: a patient may sue if she is not told of a risk of injury from a medical procedure (she has the procedure, and she then suffers that injury)
 - **Baseline professional duty**: show that ordinary level of professional care (i.e. the customary practice) mandates disclosure → failure to disclose the risk → breach
 - **Reasonable patient rule (Canterbury rule)**: disclose **material risk** → what a reasonable patient would want to know and would carefully consider.
 - No Majority Rule.
- **Causation for IC**
 - Whether the disclosure would have changed a patient's decision
 - **Objective showing** (other person) AND subjective showing (the patient his or

herself)

- What a **reasonable patient in plaintiff's position**, upon learning of the risk, would have changed her mind and not had the procedure.
- Patient herself would have changed her mind had the disclosure occurred.
- e.g. If the possibility of the harm is 1 out of 100,000, will a reasonable person change her mind?
- Others: duty to disclose **any profit or research interest** of their underlying their treatment.
 - For even if it's not relevant, a reasonable patient is likely to change her mind.
 - A lot of states limit on what recovery you could get from physician.

C. Negligence Per Se

- Definition: **violation** of criminal or regulatory statute or an administrative regulation → may establish the duty and breach elements of negligence (aka the breach of duty)
 - It is usually an easier way to establish; but not an exclusive way (**separate**)



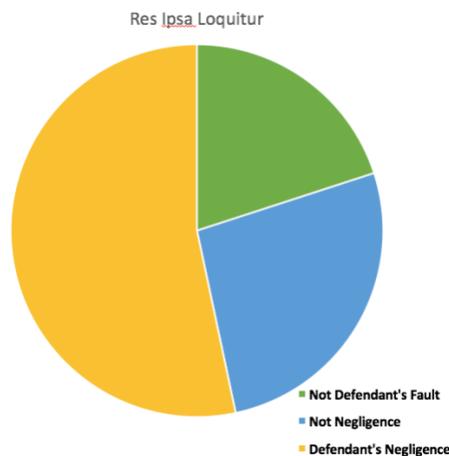
- Duty 1 and duty 2 overlaps --> go for duty 2
- Duty 1 not duty 2: what a RPP would do, but no statute. (dog as a dangerous weapon)
- Duty 2 not duty 1: a RPP might not do this, but technically violate the statute.
 - The transportation regulation says that you cannot drive over 45m/hr. Everyone in this community drive 70m/hr.
 - a) If you want to sue, sue for negligence per se (duty 2)
 - b) This is probably or not what a RPP would drive (duty 1).
- Inquiry:
 - 1) Is the sort of injury and victim the statute aimed to prevent/protect?
 - 2) Does the statute “fit” as a negligence duty?
 - Causation not an inherent problems / creating a new duty is bad/ vague (not clearly defined) is bad / strict liability is bad/ disproportionate liability is bad.
- Elements:
 - 1) **Injury** at issue is of the sort that statute meant to **prevent**;
 - 2) The **victim** is of the sort that statute meant to **protect**.
 - a. if a poison's bottle hurt your feet → not prevented.
 - b. The victim does not have to be the one who directly brought the poison.
 - c. A statute could have more than one purposes, like the car should not be unattached without stopping → depends on whether the statute aims at anti-theft or anti-traffic jam.
 - 3) If the statute is appropriate for translation into a civil duty:
 - a. Whether it creates difficulty in proving causation;
 - P sued D for selling him alcohol, for he was obviously drunk → hard

- to prove causation →
 - it's hard for P to prove it's the 19th shot that the bar sold to someone that caused the injury or accident
 - b. Whether it creates a new duty; [**important**]
 - being specific is not new, it only redeems not being careful enough; e.g. Perry, there's no duty to protect other persons
 - E.g. Under RPP, you cannot drive too fast, causing accident. A statute says you cannot go over 45 m/hr. --> not new one
 - D's friends have no duty to protect or rescue P's children
 - c. Whether it provides liability that is too strict (i.e. too detached from D's level of care);
 - leads negligence even when you're careful enough.
 - liability that does not depend on actual negligence or intent to harm.
 - d. Whether it provides for disproportionate liability;
 - small criminal open doors for eminent tort duty
 - e. Whether it represents too vague of a duty.
 - 4) Note: even if a negligence per se claim failed, the violation of statute could still be relevant to the duty argument.
- Application:
 - Majority: **provide excuse**
 - **duty and breach** are established **automatically** for unexcused violations of a usable statute → **duty shifted to D**
 - an unexcused violation is negligence per se, unless you could provide with a lawful excuse.
 - Minority: **rebuttal the presumption**
 - burden shifts to D to show more generally that he exercised reasonable care
 - → in practice, it does not lead to all that different.
 - A small minority: NPS only the evidence of unreasonableness.
- Lawful Excuse
 - 1) Actor's incapacity;
 - 2) Reasonable lack of knowledge of violation: **ignorance of facts**, not law
 - A driver drove without tail light on. He did not know it went out
 - the driver was concealed from the view of intersection and there was no sign at the intersection
 - → neither knew or should have known.
 - 3) Reasonable inability to comply – unable after reasonable diligence or care to comply
 - A child who is too young to know or appreciate the statute violate the statute
 - But does not work for an adult, for ignorance of law is not an excuse
 - 4) Emergence – confronted by an emergency not due to his own misconduct
 - the driver drove left and induced an accident, but he did so to avoid a child on the road
 - 5) Greater harm from compliance than violation – **Learned Hand Test**
- No “non-negligence per se” defense, just because of compliance with statute.

D. Evidence and Res Ipsa Loquitur

- Direct Evidence: not required (for if there is any, there will be no case or trial)

- *someone could point out at what time and how long time this banana peel has been dropped, yet the company did take reasonable care to it.*
- Circumstantial evidence: proves through inference.
 - If a **reasonable jury could draw the inference** (or chain of inference) that a party is trying to establish, then it is **permissible** for the jury to rest its decision on evidence that produced those inferences, no matter how **circumstantial that evidence may be.**
- Application:
 - Failure to take action or notice:
 - Lack of evidence: being “possible” is not enough, has to be “**likely.**”
 - No one saw the banana until after P fell on it → not enough
 - P could show D "never inspect" the floor → enough to show negligence
 - *"if the plaintiff could show an inspection was not made within a particular period of time prior to an accident, they may raise an inference the condition did exist long enough for the owner to have discovered it."*
 - Continuous and systematic condition:
 - *when the operating method of a proprietor are such that dangerous conditions are **continuous or easily foreseeable,** the logical basis for the notice requirement dissolves.*
 - If D had taken a reasonable care of notice to prevent the accident, P has to show manner of display create such a risk.
- **Res Ipsa Loquitur:** extreme circumstantial evidence
 - If a plaintiff cannot allege what exactly D has done, it may suffice to allege D’s negligence through **negative inference** that
 - a. The accident is of a type that normally would not occur unless someone was negligent; → cannot happen in absence of negligence
 - b. D exercise **substantial control over** whatever caused the injury, so it wasn’t someone else’s negligence here
 - a) don’t have to be exclusive control;
 - c. Therefore, the accident **more likely than not** was caused by D’s negligence.
 - b) it’s **Defendant’s** negligence, not others.
 - c) The possibility is more than 50% (equals 50% is not enough)



- The Green and Blue slices could overlap.
- **If the green + blue slices are less than 50% (equal is not enough) --> Res Ipsa Loquitur**
- Proof:
 - Usually need expert witness: to establish that event does not ordinarily happen in the absence of negligence
 - But if that is within the range of common sense, no need of expert witness.
- Application:
 - When a heavy tool falls off a shelf at a store and injures a shopper's foot, a store employee was negligent. → No. P must show it happened due to negligence AND it's due to defendant's negligence.
 - P's airbag was deployed, P sued dealership → it could be others' fault.
 - When an automobile leaves the travelled portion of a highway and overturns or crashes into a stationary object, the driver was at fault → Yes, but still needs to look at the context.
 - EXCEPTION:
 - a) Two cars collided each other, injuring a passenger;
 - b) Neither of the drivers are RIL, for the defendant's fault are happened to be 50%. (You don't know who is in control, driver A or B) → Concurrent Cause will discharge both D's liability, unless P could show any of them is substantial cause of the accident (Yet that will probably not RIL)
 - D (doctor) found a wire was dislodged during the surgery. After a 20-minuutes' searching yet failing to find the wire, D intentionally left the wire inside P's body, for he thought that was for the P's best interest.
 - a) If D intentionally left the wire --> not RIL, applies general malpractice standard (within his best judgement/discretion) --> P needs **expert witness** to show it was derived from normal standard + proximate causation.
 - b) If D unintentionally left the wire --> applies RIL --> P needs to show it would not happened without negligence + it was defendant's negligence --> there're **too many people** in the surgery.
- This will help P survive a motion to dismiss or summary judgement, when P has so little evidence, but not **trial or directed verdict**. Once the evidence will not be viewed in the light most favorable to P, a jury may decide that D should win.

Chapter 8 and 9: Duty to Care

A. Privity of Contract

- **General:** Plaintiff C could recover from the negligence of A when A breached only a contractual duty it owed to B → You owes duty to those who might **foreseeably be injured** by your negligent affirmative acts.
 - general negligence conception, but also applies to contract case that you are not directly responsible
 - Exceptions: lawyer owes a duty only to their clients
 - Even though P might pay the lawyer directly → still not his attorney.
 - **unless** he and his client's interest are allied → intended beneficiary.
 - For MacPherson v. Buick
 - Fact: Buick did not inspect their product when part of it was manufactured by others → P was injured.

- This case could be sued by negligence, for manufacture owes duty to anyone who may foreseeably buy the product regardless of contract relationship.
 - This case could be sued by product liability, for manufacture is liable once P could prove defect when the product left manufacture.
- **Nonfeasance:** not performing the contract → sue only in contract, not tort.
- **Misfeasance:** performing contract improperly, but also **fraud or partial performance**, can be addressed in a tort action, too.
 - Lying about nonfeasance, or entering a contract with no intention of performing
 - Torts have consequential and punitive damage
 - No cannot break the misfeasance into pieces and then claimed there were only nonfeasance.

B. Failure to Act

- Failure to act: **take no action at all.**
- **Duty to rescue:** no general duty, except:
 - 1) **When to rescue?**
 1. Person **creating** the harm (even if the D is innocent);
 - E.g. You don't owe a duty to rescue someone in the trap, but owes a duty when you are the one who made the trap.
 - Rationale: (for innocent party) to **induce the cost** and get more help from others
 2. (Special Relationship) Business toward their customers;
 3. (Special Relationship) Bosses and their helpless employees;
 4. (Special Relationship) Person controlling the instrumentality of harm;
 - Another way to say you create the risk but just the **aggravated part.**
 5. Person who has **undertaken** a rescue (once you started the rescue, you have to perform it non-negligently)
 - 2) **What is the duty?** reasonable or ordinary care (RPP)
- **Duty to protect or warn:** no general duty, except:
 - 1) When to warn:
 1. A special relationship between D and P → **legal responsibility**
 - e.g., D is a common carrier, custodian(kids), parent, employer;
 2. A special relationship of control or responsibility between D and third party → **foreseeability**
 - **Actual knowledge of risk** rising out of relationship;
 - **Special reason to know (or foresee)** rising out of relationship.
 - e.g., psychiatrist and patient who kills P, boss and worker who hurts customers.
 - 2) What is the duty: duty to warn **a known or reasonably foreseeable danger.**
- Application for **school:**
 - 1) Moral supervision: P's mother sued university for letting her child pair with D.
 - 2) Facilities provided: University is responsible for a rape happened in dormitory.
 1. Once univ. provides facilities, they need to provide it **unnegligently.**
 - 3) Rationale: who is in the best position to protect?
 1. First case: the student herself.

2. Second case: the university.

C. Emotional Distress: NIED

- General, to recover from emotional distress, there needs to have physical injury. Now, P could recover from emotional distress but no physical injury
 - P no longer need to have a contemporaneous physical impact from the thing that upset them.
- If there **IS** contemporary physical harm, P can recover for the concomitant emotional harm without extra showing.
- If there is **NO** contemporary physical harm: (like causation of Informed Consent)
 - 1) Direct Cause:
 1. the emotional reaction must **manifest itself** with **definite and objective physical effects** before P can recover
 - (subjective showing with objective evidence – by myself)
 2. it must be shown that a **normal person** would suffer an emotion reaction passing that same threshold → **cross the same threshold**
 - Though once that is shown, P can recover for the **entirety** of his emotional reaction to D's tort.
 - (Objective showing with subjective evidence – by myself)
 - 2) **Bystander** Plaintiff (extra showing):
 1. The one **witnessing an injury to another** caused by D's negligence
 2. **Zone of Danger**: zone of danger of physical injury.
 - **Nearness**: close enough to be “it's almost me” + survival guilty
 3. **Dillon Factors** (trend):
 - P witness the actual impact on the victim;
 - A close family member of the victim;
 - Suffer **more distress** than a typical bystander would.
 4. **Rationale**:
 - To prove the damage, P needs to maintain his or her damage at the time of trial (at least after half a year) → affect P's ability to recover
 - But if that's a family member, he or she will not easily recover easily anyway.
 5. No majority rules.

D. Unborn Child

- If the child is **born alive**: it could recover for injuries suffered in utero;
- If the fetus is **NOT born alive**: it could recover for post-viability injuries, and maybe pre-viability injuries if there is sufficient evidence of causation.
 - **Viability**: if you are developed enough and born at that time, you could be alive.
 - **Rationale**:
 - P could have greater incentive for greater harm.
 - **Line drawing**: have difficulty in damage and proximate cause.
 - Parents could recover for the damage that they suffer in **either** case.
 - Do not impose duty to pregnant mother: for she has **immunity** and **abortion** right.
- Claims:
 - 1) Wrongful birth: to **parents**

1. If the child is born **alive**, but for D's negligence, parents would have aborted him or her because of defect → parents could sue for wrongful birth
 2. **Damage**: emotional injury, extra cost of child-rearing caused by the defect, or in some places, the entire cost of child-rearing.
 3. But the "plusses of parenting" should be subtracted from any of these damage
- 2) Wrongful life: **only small minority**
1. "but for" D's negligence, P's parents would have aborted him or her.
 2. Damage:
 - limit damages to the medical expenses presented by the defect;
 - not for recovery for the existential torment of a traumatic life, because the alternative of non-existence is considered to be even more worse (or at least incommensurable) as a matter of law.
- 3) Wrongful pregnancy to **parents**: majority rule
1. Usually from informed consent (IC) violations or botched sterilization.
 2. Damage:
 - cost from pregnancy and labor, including pain and suffering
 - some allows for child rearing cost, only when the parents' reason for not wanting a child was economic.

E. Landlord

- **Landlord** means the **occupier of the land** to whom these standards apply in most cases.
 1. Outside the Premises:
- **Natural occurrences** on or from D's land, Landlord has no duty to protect P off of the premises.
- For things **involving human agency**, LL owes a duty of reasonable care.
 - Exception: **trees** → duty of human agency
 - If LL has actual or constructive knowledge that a tree may cause damage, LL owes an ordinary care.
 - Note from cases: sometimes D is not liable for even after reasonable care, he cannot prevent the accident → e.g., he cannot chop down every possible tree to check.

2. On the Premises

1) *Trespasser*

- **Duty of wanton or r. care**:
 - for **known or anticipated trespassers**, LL owes a duty not to wantonly injure – reasonable care; or some kind of duties in between.
- **Duty of ordinary care**:
 - A majority require a duty of **ordinary care** for **active operations** to **actually-known** trespasser.
- **Duty of rescue**: for every trespasser as the one who create the risk.

2) *Licensee*

- Definition: someone on D's property for **his own purpose**, including social guests, solicitors, and basically anyone who is not an invitee.
 - A social guest could become invitee, but not mere by providing an incidental service.

- A social guest assumes the risk associated with their visit, though they are usually invited.
- **Duty:**
 - 1) **not be willful or wanton**, and
 - 2) warn of **hidden dangers** that are unknown to the licensee but actually known to LL
 - 3) when the licensee conducts active operations on LL's property, LL owes a duty of **ordinary care**.
 - a. "active operations:" injury from some **activity**
 - b. usual "conditions:" e.g., injury from **stuff lying around**, like a puck.

3) Invitee

- Definition: business visitors: customers, employees, delivery, repair, etc.
 - "business" is not the common use: homeowner have invitee like delivery and repair; some persons for "business" purposes are licensees like solicitors.
 - **Transfer:** If you past the basis of your invitee status, or go past the physical areas of your invitee status, you may become **a licensee or even a trespasser**.
- Duty: ordinary care duty.
- Business Visitors:
 - **Rationale:** affirmative care to make the premises safe is the price for prospective economic benefit.
 - Business visitors are invitee regardless of whether they buy anything.
 - Someone at the premises of business who solicits is still licensee.
- Invitee at Public Land:
 - Government owes duty to all persons coming upon the land, even for their own purpose, a duty to **reasonable care** to keep it safe.
 - **E.g.** free public meeting, visitors in national park.
- **Natural/Obviousness:** snow or rain
 - Most states will at the environment → takes everything into consideration
 - But inviter owes not duty to any invitee who slips or falls because of the obvious hazard.
 - **Duty to recues:** to anyone who is on LL's premises.

4) People outside the categories

- **Attractive Nuisance:** For **children**, LL's duty to trespasser may be heightened if:
 - 1) The dangerous condition is **artificial**;
 - 2) D/LL had actual or constructive knowledge that:
 - a. Children are likely to be on the premises attracted by the attractive nuisance, which is not necessarily the thing that is dangerous;
 - b. The dangerous condition must prevent a very unreasonable risk of serious bodily harm.
 - 3) The child must be unaware of the hazard or the level of risk it presents because of his or her youth. → LL should exercise the **ordinary care**, P still need to prove breach and causation.
- **Rejection or Merging:** Difference between invitee and licensee

- Some abolish the categories of licensee versus invitee, some trespasser/non-trespasser distinction, too.
- Majority: Trespasser v. Non-trespasser (**trespasser** does have different duty)
- No majority:
 - Non-trespasser might all applies to ordinary care (no distinction between invitee and licensee)
 - Non-trespasser might have two different cares, set by the distinction between invitee and licensee.
- Governmental Officials:
 - Fireman/Police: **licensee** (comes at sudden)
 - If defendant knows they are present, D needs to warn hidden danger.
 - Sanitary/Safety Inspector: **invitee** (not at sudden)
 - For a purpose connected with D's business and is essential to D's interest.

5) Lessor and Lessee

- Majority: LL owes no duty to guests of its tenants, other than 6 exceptions.
 - When to take the duty?
 1. LL knows or should have known the hazard, which is not disclosed to T (knowledge)
 2. Danger outside the land, LL knows the risk yet does not tell T and shift the possession; (knowledge)
 - The **liability is the same** regardless whether the danger is inside or outside the premise → T might be liable, too
 3. Admission to the public: LL should **inspect and repair before shift**.
 4. Common area that LL controls and T is entitled to use (control)
 5. LL contract to repair yet does not repair (control)
 6. LL negligently repair regardless of contract and T doesn't know (control + knowledge).
- Minority: this doctrine has been largely swept away; LL owes the general duty of reasonable care.

6) Coase Theorem

- Assuming no transaction costs, the same final result in a system will occur regardless of the initial allocation of rights/duties/liability;
- In the real world, there are transaction cost, so it makes sense to impose liability on the "least cost avoider", the party with the lower transaction costs associated with it.
- E.g., if the LL does not have a burglar system and spread the cost to its tenants, the tenants will eventually make it by their own. Yet the cost will be tremendously high.

Chapter 5 Causation in Fact

1. Sina Qua Non: "but for" causation, 99%

- Definition:
 - A showing but for the party's tort, the damages at issue would not have occurred.
 - Opposing: there is no causation-in-fact because even if the party had not committed the tort, the damage will would have occurred.
- More than one causations:

- It could be more than one causations → proving one does not prevent proving another causation → proving one is just **necessary, not sufficient**.
- If it's mere coincidence, a "but for" cause will not be enough to establish causation-in-fact → **causal link** is not a "but for" cause or causation-in-fact.
- Case Note:
 - "if the collision was the causation in fact of P's death, why D is not liable?"
 - Wrong question, the collision is not the issue. The question should be whether D's over-speeding cause P's death.
 - Note 4: **TEST** is "if D did not commit that act, would the accident happen?"
 - If D dug a hole on the ground, P fell --> Yes
 - If D dug a hole, a third party negligently bumps P into the hole? --> Yes
 - If the third party intentionally bumps P into the hole --> No.
 - Note 6/8: P cut ice on a lake. P did not put fence, not put notice, and not rescue. D's horse ran into it, but the horse was uncontrollable.
 - Not liable --> such a fence would have been totally inadequate to prevent the accident.
 - Note 2: Driver was driving cars at 30 mph at a 25-mph zone. A tree fell down. If he drove faster or slower, the fallen tree would not fall on Driver's car
 - Not causation in fact --> **coincident, no causation link**

2. Proof of Causation:

- **"Preponderance of Evidence"**: P must produce evidence to argue that D more likely than not caused the injury
 - **More than 50%** possibility that it was D who caused the accident.
 - D's tort could possibly have caused the injury will not suffice by itself to get the case to a jury. → more likely than not.
 - To fight P's causation argument, D can try to use any evidence of possibility, probability, or what have you, that casts doubt on P's explanations.
- Case Note:
 - Causation can be proven even if it is not known how the harm occurred, but only if there is **sufficiently compelling proof** that the defendant must have caused the harm somehow.
 - If the evidence shows that exposure to certain drug will increase the chance of some disease, it's unfair for both P and D to prove.
 - The original chance is 4 out of 1,000; after the exposure is 6 out of 1,000.
 - P: hard to prove that she is the 2
 - D: unfair for him to compensate all P, it triples D's opportunities (2 for 6)
 - Note 4: P fell off when she was getting out of a bathtub, and she claimed it was due to space between anti-skid strips on the ground (her feet could fit into that space)
 - Holding: even if the court need to infer in P's favor, her feet could fit between strips is not an appropriate inference to be drawn. The possibility does not tend to prove its probability.
 - (Expert Testimony: (1) the testability of the theory/methodology, (2) whether the theory has been published and subject to peer review, (3) any potential rate of error and (4) whether the knowledge has reached general acceptance in the field.)

3. Concurrent Cause → Material Fact Test

- Exception: if there are two causes, both of which are sufficient causes of the injury → **cancel** each other out as but-for case; both defendants would avoid liability.
- **(Only) Under this exception:** causation can be based instead on whether an individual cause was a **substantial factor** in causing the harm
 - An alternative to the but-for test, and it avoids allowing a defendant who otherwise would be liable from getting out of it just because another defendant did something negligent too (and vice versa).
 - Case Note: joint and severe liability
 - **Substantial Factor Test:** two or more actively operating forces combine to bring about the harm, while each alone would have been sufficient to bring about the harm → **each is liable for the entire case.**
 - If I did not commit tort, the other D's tort will cause the accident → he is not sufficient

4. Burden of Proof: shift to Ds

- (Summer v. Tice exception: if P cannot prove which D is liable → shift the burden to D to prove he is not liable, or he will be liable.)
- Sindell exceptions: extension of Summer
 - Multiple possible tortious causes and no possible way for plaintiff to pinpoint which it was. The inability to sort out which it was will not necessarily deprive P of the ability to recover. The court may simply **shift the burden of proof** on causation to the multiple negligent Ds.
 - Sindell use market share to apportion liability, if the D cannot prove he is not liable → this is **not common** and is **limited to Sindell-like contexts** → not majority

Chapter 6 Proximate Cause

- Proximate cause: **scope of liability**
 - Less a matter of fact and logic
 - A matter of how broadly the court wishes to allow a D to be held responsible for damages that he or she cause-in-fact: scope of liability
 - Note: some courts express such limitation on liability **in terms of duty.**

A. Foreseeability

- **Definition:** whether the injury was a foreseeable result of D's negligence / was it within the scope of the risk that D created
- **Type of accident** is what must be foreseeable, rather than the precise method of its occurrence or the magnitude of the injury.
 - The **more foreseeable** it is, the more likely D was the **proximate cause**
 - The **precise method:** a stray match; a running mouse with gasoline.
 - *If you drive negligently, there will be damage* -- too general
 - *If you drive negligently, you will hit the pedestrian and hit someone happened pass by and bleeding to death* -- too specific
 - *Physical harm for people involved in an accident* -- in the middle
 - **Magnitude** of injury: minor burns v. fatal burns (so does intentional tort)

- “**eggshell skull:**” as long as you prove duty, breach, causation and damage. The magnitude of injury / pre-existing condition is irrelevant.
 - The harm needs to be **its own way**, not an accidental way.
 - Serving awful shrimp → it will cause someone **ill**, not cause sb. **slip on it**.
 - Defective dog collar → Owner **lost** his dog, not someone was **bitten by dog**.
 - Sign of not swimming to prevent disease → it will cause someone **ill**, not someone will be **drowned**.
- Positional Sense: **sliding scale**
 - If D negligently crashes his car into another car, a pedestrian who gets mangled on the sidewalk next to the accident is within the scope of the risk
 - A pedestrian who is three blocks away and gets injured by shattering glass is less likely to be within the scope of risk.
 - These cases could go to either way → don’t be so sure.
- Question of Fact, not law:
 - Summary judgment is usually not appropriate.
 - e.g. Manufacture is **probably liable** for its unattached tire → someone might be killed on his or her way to get that unattached tire.
 - Doctor is liable for failure to prevent **pregnancy**, not for a **defective child** (if he did not negligent in diagnosis)
 - (Duty) Unborn Child: **wrongful pregnancy NOT wrongful birth(defect)**.
 - (Causation) proximate cause
 - (Duty) Professional

B. Intervening Cause/Directness

- **Intervening Cause:** causes-in-fact of an injury that arise subsequent in time to D’s negligence; may or may not supersede D’s negligence.
- **Superseding Cause:** an intervening cause that cuts off D’s responsibility or forces a conclusion that D’s **negligence was not a proximate cause** of the injury.
- **Factors:**
 - 1) An intervening cause is more likely to be superseding if it’s **foreseeable**
 - Whether the occurrence of the intervening cause is within the **scope of risk** of D’s negligence
 - Define foreseeability with enough generality- not specific way that something occurred, but the type of harm it → only **type matters**.
 - gasoline-soaked rat catching on fire v. something igniting gasoline fumes in a room with an open flame.
 - 2) An intervening cause is more likely to be superseding if it’s **independent** of D’s negligence **as opposed to flowing from it** → more like act of God.
 - least weighty of the factors
 - Independent: something would have happened regardless of D’s negligence;
 - Dependent: D’s negligence is the cause in fact of the intervening cause.
 - Battery in which the intended target ducked and P was hit instead → because the ducking was caused by D’s initial tortious act, the duck is a dependent intervening cause.
 - Even an act of God does not necessarily make IC be SC → P did not check his telephone pole for 14 years. Due to a 12-inch snowfall, it fell and injured D

- → it is still foreseeable.
 - *the test was whether the company did all that it could have been expected to do to avoid the event that was the cause of the driver's injuries.*
- 3) An intervening cause is more likely to be superseding if it's an **intentional tort or criminal act** → very likely to be superseding
- There is plenty **interplay** between these categories
 - Criminal act could be **dependent** (e.g., criminal of opportunity)
 - D's affirmative act destroys or defeat a protection that P has placed around his person or property to guard them against crime.
 - There is so much **foreseeability** that the act is not superseding; this is generally when the crime is squarely within the scope of risk.
 - D negligently abandons passenger in a known high-crime area; passenger is mugged by third party; mugging does not supersede D's negligence as proximate.
- 4) Note:
- "More likely" does not mean "certain." → foreseeable and dependent intervening causes may turn out to be superseding; extraordinary and independent ones may not.
 - There may be other possible proximate cause
- 5) Rescue Exception: it is never a superseding cause that a **reasonable** rescuer will attempt to save D's victim, or that the victim will attempt a reasonable **escape**.
- The rescuer of the victim of the first accident could sue original tortfeasor → the case cannot be dismissed by SJ or superseding cause
 - **Statute** says that is not SC → Res Ipsa Loquitur
 - **Utterly foolish** rescuer cannot use this doctrine as a defense
 - Professional Rescuer cannot use this doctrine to sue.
 - **Reasonable escape**: There is a car accident. P, on the sidewalk, ran from the car, fell and injured her knee. P can sue the original tortfeasor.
- 6) (Mitigation Exception):
- Victim seeks medical treatment and suffers **malpractice** → not superseding
 - The original tortfeasor is still liable for the expanded damage.
 - P will suffer a subsequent injury as a result of his **D-caused weakened state**.
 - The original tortfeasor is still liable for second injury.

C. Public Policy Exception

- There might be otherwise proximate cause but the courts declare that there is not, as a matter of policy.
 - 1) **Social hosts**: Social hosts cannot be a proximate cause of harms to be the victims of their drunk-driving guests;
 - Rationale: 1) lack of expertise and knowledge; 2) inability to spread the cost (no way to get insurance); 3) if it applies, there will be no party – another version of Learned Hand Test (risk v. benefit)
 - Exception:
 - unless the social host is serving a **minor**.

- *The act of leaving a dangerous article (such as a gun or car) with a person who the lender knows or should know is likely to use it in an unreasonably risky manner.*
 - 2) D cannot proximately cause harm to P who had not been conceived when the **operative injury was inflicted**.
 - Original Tortfeasor is not liable for the victim's grandchild.
 - Others:
 - The boyfriend could sue the doctor who did not tell his girlfriend that she had AIDS.
 - If P could show that movie company intended to provoke people, P could sue the movie company and probably win.
 - 3) These could be understood as a matter of duty, but for this class or test, treat it as **proximate cause** problem.
- Tips for the exam:
 - 1) Unless there are either of the two exceptions, don't talk about public policy;
 - 2) If there is only problem of foreseeability, just talk about foreseeability;
 - 3) If there are foreseeability + **apparent Intervening Cause**, talk about both.

Chapter 12 Defense

A. P's Negligence

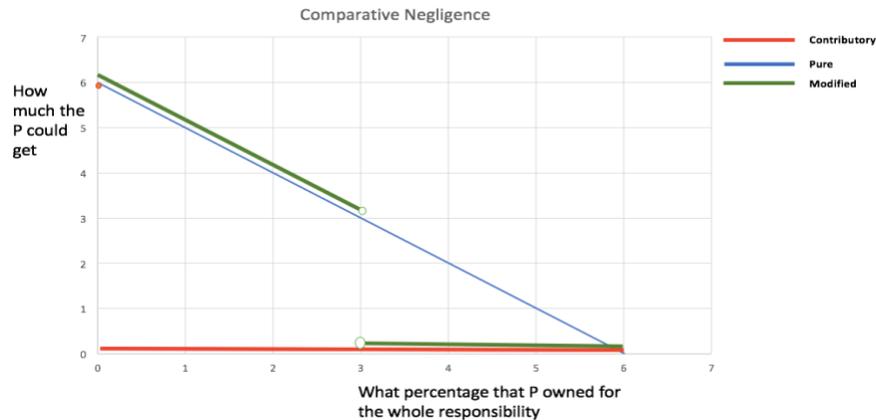
1. Contributory Negligence

- Contributory negligence precludes P from prevailing, if he was at all a negligent cause of the injury, regardless of the extent of D's negligence.
- **Exceptions:**
 - 1) allowing P to recover if D had the **last clear chance** to prevent the injury;
 - Whether D should be liable for P's negligent riding of his donkey
 - If D had the opportunity to avoid the accident after opportunity was no longer available to the P
 - 2) treating P more forgivingly when determining if he or she was a proximate cause of his or her injury.

2. Comparative Negligence

- P still recover if she is negligent, but has her award reduced by the percentage of her fault.
- **Pure Comparative Negligence**: in which P can recover something even if she is 99% responsible.
- **(Maj) Modified Comparative Negligence**: P's recovery is reduced according to her percentage of fault to a point; he or she cannot recover anything if she or he is mostly at fault. States varies regarding the point of 50%.
 - Modified Comparative Negligence does not function precisely like contributory negligence at that point, for it does not use exceptions like last clear chance.
- Application: P's negligence applies to Strict Liability, but not Intentional Tort.
- Note:
 - Percentage is hard to decide: two possible consideration

- Percentage for causing **harm**; percentage for causing the **accident**
- Forgetting to fasten your seat belt → great to your damage, not for harm

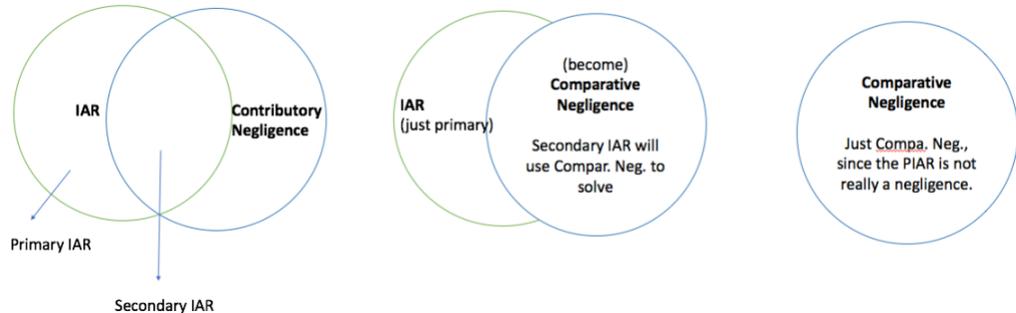


- **Mitigation:** If P unreasonably fails to mitigate damages, e.g. P does not seek medical treatment, he or she cannot recover for the resulting incremental increase in damages.
 - Comparison:
 - D is **probably liable** for malpractice or second injury (not superseding cause)
 - D is **NOT liable** for the incremental increase in damage (as a defense)

3. Assumption of Risk

- **Express Assumption of Risk:** majority rule
 - If P is injured but had contracted not to hold D responsible for such injuries, the **contract** will be enforced to bar suit, **unless**:
 1. the contract **contravenes public policy**: this mainly includes contract for
 - essential services and no alternative: open to all people
 - P had not real bargaining power, contract of adhesion
 - D's tort was an intentional or wanton-and-willful one.
 2. The injury was medical malpractice;
 1. An exculpatory clause **before** accident is not enforceable
 2. But if you sign the contract **after** the accident, it is enforceable.
 3. The contract waived application of a safety statute.
- **Implied Assumption of Risk:**
 - The jurisdiction must still adopt contributory negligence;
 - Elements:
 1. P have **actual knowledge** of the risk: as contrasted with constructive knowledge
 2. Have an appreciation of its **magnitude**
 3. Must **voluntarily** encounter the risk → If P encounters the risk for reasonable necessity, then it is NOT voluntary.
 - Application:
 - P voluntarily teaches a beginner to drive a car --> not negligent (reasonable necessity)

- P knows some danger involved, but still reasonably concluded that he can survive --> it is **reasonable**, not negligently.
- P consented to ride with a drunk driver --> unreasonable risk --> negligence
- P was in a swimming pool for half an hour, and thought she could make a safe head strike --> **no actual knowledge**.
- Note:
 - Once it applies, P's claim is completely barred.
 - Almost all states have rejected this doctrine: it either says that D breached no duty (primary IAR), or they subsume the question into the general comparative negligence analysis (second IAR).



B. Statute of Limitation and Repose

1. Statute of Limitation: **procedural**

- **Definition:** Statute of Limitation are procedural rules limiting the time P has to file a lawsuit → it is subject to waiver and equitable tolling.
 - i.e., it is a “use it or lose it” argument for defendants; like personal jurisdiction.
- When the clock starts ticking:



- For **short** injuries: the time that actual injury happened == negligence knowing
- For **latent** injuries
 - 1) **Discovery Rule:** Upon P's constructive knowledge of the injury AND enough facts that would start a reasonable plaintiff toward discovering D's apparent tortious causation of it.
 - 2) Other uses of tolling are where the victim is a minor child: wait until 18.
 - 3) Where defendant has fraudulently concealed the injury or his own conduct.
- For **continuing** injuries:
 - The continuing tort doctrine allows suit for an entire continuous tort, starting the SOL count only when the tort ends.
 - E.g. just one year SOL for pollution, but it does not start until the pollution ends
- Note:

- If the damage changes, your claim cannot change → issue preclusion, unless that's the difference between cancer and non-malignant disease.

2. Statute of Repose: **Substantive**

- Statutes of repose give a firm outer bound for the timing of suits.
- They not subject to waiver and substantive; SOL is subjective to waiver and procedural → like subject matter jurisdiction.
- The clock **starts** when D **performs the tortious action** in question, regardless of when the injury occurs or is discovered.

C. Immunities: best defense, for you cannot even be sued.

1. Spouses Immunities

- Most states have **complete abrogated** spousal immunity
- Minority keeps it, yet still eliminate it at least partially: for things like intentional torts, car accidents, or obvious exceptions where the beneficial relationship that immunity purports to protect is absent.
 - Not applicable for lawsuits 1) before marriage; 2) intentional tort; 3) pending divorce; 4) coincidence (the driver and the victim happens to be married couple)

2. Parents and Children Immunities

- **(Maj.)** Most states have partial abrogated parent/child immunity. Most keep the immunity (or alternatively limit any duty) for actions that are **core parental activities**.
 - No sibling immunity
 - Kids cannot sue parents; parents cannot sue their children
 - If there is no immunity, it is **really hard to define a parent's duty** → no duty no breach.
- **(Min.)** Others eliminate immunity only for things like intentional torts, car accidents, and obvious exception where the beneficial relationship that immunity purports to protect is absent.
- Note:
 - But even for the jurisdiction where the immunity has been abrogated, spouses and parents may face a lighter duty in negligence cases.

3. Governmental Immunities

- Waiver:
 - In most states, governmental immunity has been voluntarily waived, at least partially, by the government → federal government has a general waiver of immunity but with numerous exceptions.
 - Where it applies, it allows suits against the government for **negligence by public officials** → under these waivers, the suit is against the government, and the official becomes immune.
 - One's ability to sue the government usually comes attached to an inability to sue the employee.
- Proprietary duty: subjective to governmental immunity. (One common context in which most states waive immunity is for proprietary actions.)

- **Discretionary duties:** when immunities are retained, governmental immunity and governmental-employee immunity are generally limited to discretionary duties;
 - **Rationale:** separation of power → within that department's discretion
 - **Absolute immunity:** legislature and judges (president) get absolute immunity for torts committed in the scope of their positions.
 - **Good faith immunity:** other officials typically only get qualified "good faith" immunity, though a minority of states give total immunity to these officials.
 - **Note:** this immunity only extends to discretionary actions, not ministerial actions.
- Immunity as to **ministerial duties** is rare.
 - Rationale: there is an expressive **procedure** to follow, not discretion. If the official fails to follow the procedure, he or she is negligent.
- General public: a government may not owe a duty to a particular citizen
 - There is no duty for the police to protect every single person who feels unsafe.
 - Separation of power: not within the court's discretion
 - Limited source.
 - Yet when it undertakes a duty, however, it must perform it non-negligently.
- Test of Governmental Immunity:
 - 1) Did the government waive its immunity?
 - 2) If yes, is it a discretionary or ministerial function?
 - 3) If discretionary, is it in **bad faith** (and does not have absolute immunity)? → if yes, then the government is liable.

III. Negligence (Part II)

Chapter 7 Joint and Several Liability

1. Definition: Joint and several liability means that each D is liable for all the damage.
 - a. In other words, it means that liability overlaps
 - b. That defendants are liable for more than just their particular individual “fair share” of the liability.
2. Three typical contexts, if the jurisdiction has not decreed otherwise
 - a. **Defendants acting in concert**
 - b. **Vicarious liability**
 - c. **An indivisible harm**
 - joint and several liability makes more sense when D has a right to contribute → the two are typically found together
 - the most important policy issue in J&S liability is who bears the risk of an insolvent defendant.
3. Rationale: comparative negligence has led to a scaling back of J&S liability for **indivisible harm**.
4. Adoption: no majority rule as for indivisible harm
 - a. Some states limit indivisible harm to 1) non-economic damage; 2) defendant with less than a certain amount of fault; 3) for certain torts.
 - b. Most states adopt J&S liability for act in concert and vicarious liability
5. Satisfaction:
 - a. Full satisfaction: if a plaintiff has already collect full payment from one tortfeasor through judgement or settlement, there is a full satisfaction. P cannot proceed against any other of the joint tortfeasor.
 - 1) The **settler** may proceed against them to obtain contribution.
 - b. Partial Satisfaction:
 - 1) Definition: PS does not preclude P’s suit or collection against remaining joint tortfeasors, but the partial satisfaction is subtracted from any judgement against them.
 - 2) Pro tanto: dollar for dollar → puts it on the other defendant’s shoulder
 - 3) Pro rata: by percentage → put the risk of the initial settlement being good or bad on P’s shoulder;
 - c. Collateral Resource Rule:
 - 1) If plaintiff has received a “collateral source” from the injury (e.g., life insurance or a benefactor not involved in the accident),
 - 2) in most states, this will be subtracted from judgement as a partial satisfaction would be.
6. Contribution:
 - a. Defendant who is J&S liable and paid more than his fair share may seek contribution from other tortfeasor who paid less than his fair share;
 - b. It is not required that P have sued those other tortfeasors, but it is required that P could have done so at that time → i.e. If a party is immune from P’s suit, D cannot seek contribution from that party.

- c. **Exception:**
 - 1) **intentional tortfeasors** cannot seek contribution from each other.
 - 2) In most states, a good faith settlement renders immune from contribution action brought by other joint-tortfeasors.

Chapter 13 Vicarious Liability: “in the scope of”

1. “Respondeat superior”:
 - a. *An employer is liable for the tort of its employee committed in the scope of employment, regardless of whether the employer is free from tortious itself.*
 - b. **Employee:** direct tortious action
 - c. **Employer:** an employer may be directly liable for an ordinary negligence theory instead of/in addition to vicarious liability → negligent hiring and supervision.
2. **In the scope of employment:**
 - a. **Frolic:** during work hours, but too far outside the scope of the enterprise → not liable
 - b. **Detour:** minor detour of a sort that the employer expects or tolerates (a slight deviation) → liable
 - c. **Direct scope of employment:** for intentional tort under respondeat superior
 - i. e.g., battery by a bouncer at a bar
3. Independent Contractor
 - a. Employer is not liable for tort committed by its independent contract
 - b. **Unless** the tort was in the scope of independent contractor doing something that is “**non-delegable.**” → inherently dangerous activities and crimes, car repair, property maintenance, building design.
 - c. (Employee: pursuant to rules and code; IC: paid by employer, but subject to its own employer)
4. Joint Enterprise:
 - a. A participant in a “joint enterprise” is vicariously liable for the torts of other participants, assuming the tortious act is **within the scope of joint enterprise.**
 - b. Requirement:
 - i. The vicariously liable participant must have some control over the negligent party’s action, as opposed to being a merely “silent” partner in the enterprise.
 - ii. The joint enterprise must also be a **commercial** one.
5. Bailment: In most states, the owner of a car is vicariously liable for the tort committed by someone to whom he or she lent it, assuming within the scope of lending.
6. Imputed Comparative Negligence
 - a. Vicarious liability not only imputes negligence but also may impute comparative negligence.
 - b. Comparative negligence and vicarious liability applies to P. If X is vicariously liable for Y’s negligence were X a defendant, then X is also vicariously for Y’s negligence as X is P. Thus, it will have X’s recovery limited or eliminated → X stands in Y’s shoe anyway.
 - c. It is generally limited to vicarious liability relationship involving control (i.e., respondeat superior, non-delegable duty, joint enterprise, but not bailment (car owner/lender))

Chapter 10 Damage and Wrongful Death

- A. Nominal Damage:
- B. Compensatory Damage:
 - a. Personal Injuries: 1) **Economic Damage**: Past damage + Future Damage; 2) non-economic damage; 3) remittitur; 4) collateral source rule
 - b. Damage to Property
- C. Punitive Damage:
 - 1. Lump-sum money: Tort law attempts to redress injury only through rough method of lump-sum money damage.
 - 2. Future Damage:
 - a. Expert Witness:
 - 1) future damage, counterfactual career paths, discount rates, etc.
 - 2) reasonable value of service, for both past and future damages
 - b. Discount Rate:
 - 1) some states fix the discount rate, usually between 0%-3%
 - 2) others calculate it ad hoc, at least for special categories of damages where price changes vary from the whole economy.
 - c. e.g., $80(\text{today})=100(\text{next year})$
 - 3. Tax:
 - a. Personal injury damage are not taxable → other compensatory damage is taxable
 - b. Punitive Damage is taxable
 - 4. Remittitur:
 - a. Upon an arguably excessive damage award, upon D's motion, a court may order a new trial or remittitur, giving P options of
 - 1) (A) accepting a lower, reasonable award
 - 2) (B) or rejecting it and **opting instead for a new trial**.
 - b. The standard for excessiveness in damage is that whether a reasonable jury could have awarded this amount of damage
 - 1) → or court might put it this way whether the amount of damage would shock judicial conscience
 - 2) → if the award was a result of prejudice or passion on the part of jury.
 - 5. Damage to property:
 - a. Damage for physical harm to property are based on **fair market share** at the time and place of injury.
 - 1) That is an open market, voluntary sale, leisurely seller, willing buyer
 - b. A reasonable additional amount is allowed for sensitive value for some items
 - 6. Punitive Damage:
 - a. Purpose: the purpose of punitive damage is to punish defendant and deter defendant and others from similar actions.
 - b. (rationale: 1) some did give it to government; 2) some give to P for compensating attorney fee)
 - c. Prove:
 - 1) In some states, it requires P to prove wanton and willful conduct by D by **clear and convincing evidence**.

- 2) The jury usually weigh how bad the conduct was, and how effective a deterrent punitive would be.
- 3) (Note: reckless for negligence and SL; more easy for intentional tort)
- d. Review:
 - 1) In reviewing punitive damage, courts use the same standard for excessiveness of compensatory damage;
 - 2) But also look at the proportionality between punitives and compensatories.
 - a) (4:1 or 1:1 → richness is relevant to punitive damage, like 1m for Bill Gates is small number, but not for normal people)
 - e. Many states do not allow insurance for punitive damage.
- 1. Wrongful Death:
 - a. Every state now allows suit for wrongful death.
 - b. Personal representative of the estate: damage may be measured from decedent's perspective, **mainly lost earnings and funeral expense**.
 - c. Next of kin: from the survivors: mainly **lost support and services, and (some) emotional damage** + funeral expense → majority rule.
 - d. (Note: does not change anything if P dies)
- 2. Survival Statute:
 - a. Most states no longer terminate cause of action upon the death of one of the parties.
 - b. This applies both to cases in which death is related to the issue of the suit, or not.
 - c. In some states, they combine survival and wrongful death to allow decedent to recover in a **single claim for losses and suffering** before as well as post-mortem damage.

IV. Strict Liability

Chapter 14 Strict Liability

1. Animals:
 - a. Generally, owners of **wild animals** are strictly liable for damage the animals do.
 - b. There is also strict liability for domesticated animals of **known (or constructively known) dangerous tendencies**.
 - c. Note: In both cases, though, the damages must **not** be from something collateral, like tripping over the animal. They must be from something dangerously “animal” about the animal.
2. Abnormally Dangerous Activities
 - a. **Definition:** Conducting abnormally dangerous activities subjects the performer to strict liability for damages they cause.
 - b. **Standard:**
 - 1) The determination of abnormal danger is generally based on Restatement § 520, which looks to
 - a) the risk and magnitude of harm,
 - b) location, commonness, value to the community, and
 - c) **most importantly:** whether there would be serious risk of harm even after the exercise of reasonable care.
 - 2) In other words, we perform a society-wide cost-benefit analysis for the activity in question
 - a) if the **benefits are significant** but the **costs are great and hard to avoid**, we impose strict liability for the activity.
 - b) Rationale: This is because we want the activity to continue, but we also want it to cover the costs it inflicts on others.
3. Theoretical Explanation:
 - a. If serious damages would occur even with the exercise of reasonable care, then the negligence standard is not adequate.
 - b. This gives the legislature and the courts two possible courses of action:
 - 1) They can ban the activity in question (leading to criminal liability and perhaps “negligence per se” civil liability);
 - 2) They can impose strict liability, which guarantees that all victims will be compensated (not just victims of unreasonable carelessness), but also allows the activity to continue.
 - c. In other words, like negligence, strict liability allows defendant to choose whether or not it is “**worth it**” to engage in an activity.
 - 1) Under negligence, though, if an activity is “worth it” and defendant is careful enough, the victims of any accidents will be saddled with their own losses.
 - 2) Under strict liability, by contrast, the victims will be compensated regardless.
4. Prove:
 - a. (Elements: ADA + causation + damage → SL liable; wild animal + C + D; DA + dangerous tendency + C + D)
 - b. even if defendant is subject to strict liability for engaging in an activity, plaintiff still must establish **causation in fact, proximate cause, and damages** before defendant will be liable.

- c. **Proximate cause** is harder to establish for strict liability than it is for negligence (just as it is harder to establish proximate cause for negligence than it is for intentional torts).
5. **Defense:**
- a. Comparative negligence and
 - b. (in the rare places where it has not been abolished) implied assumption of the risk;
 - c. Contributory negligence (in the rare places where it has not been abolished) is NOT.

Chapter 15 Product Liability

1. **Claims:**
 - a. Liability for **dangerously defective products** might be under 1) a plain negligence theory, 2) a warranty theory, or 3) strict liability.
 - b. Not all states allow all methods in all cases, but negligence is always available as a possibility.
2. **Negligence:** The negligence standard for products liability is that the manufacturer owes
 - a. a duty of care to foreseeable users of the product, **regardless of privity of contract**,
 - b. if the product would be likely to cause injury if negligently made.
 - c. If that duty is breached, causing damages, defendant is liable. (This doesn't really vary from our existing understanding of negligence.)
3. **Express Warranty:** Manufacturers making material representations about their products that turn out to be false are strictly liable for damages caused by **reasonable reliance** on those representations. **Privity is irrelevant**.
4. Under **implied warranty**, a seller or manufacturer impliedly warrants that an item sold is reasonably fit for the general purpose for which it is manufactured and sold. The manufacturer is strictly liable for damages caused when this warranty is broken. **Privity is irrelevant**.
 - a. A consumer can bargain away this implied warranty (such as by buying a product with a very limited express warranty),
 - b. but it must really be bargained away (that is, there must be some choice).
 - c. In most states, though, implied warranty is not available anymore in tort.
5. **Strict Liability**
 - a. The Second Restatement (§ 402A) simplified strict liability for defective products by eliminating all vestiges of contract theory.
 - b. Under 402A, manufacturers were **strictly liable for defective conditions** in their products that were **not materially altered after leaving manufacturer's control** (i.e., the defect must have been present when the product left the manufacturer's hands).
 - c. **The Third Restatement**—the majority approach, for our purposes—distinguishes between manufacturing, design, and warning defects.
 - 1) It maintains strict liability for **manufacturing defects** (which are defects in which there is a **material deviation** from the **intended design** of a product),
 - 2) but not for design or warning defects.
 - d. Negligence is available for all three types of defects, though.
6. **Design Defect:**

- a. Design defects are those that stem from the manufacturing specifications; the inherent design of the product gives it dangerous propensities.
 - b. Some states purport to apply strict liability to design defects as well as negligence, but this generally **becomes a negligence standard anyway**. In any case, most follow reflect the Third Restatement and only purport to apply a negligence standard.
 - c. **Proof:**
 - 1) Design defect can be proven by the “**risk/utility balancing**” test--a defective design is one that fails that test → Most states use R/U.
 - 2) Some states use instead, or in addition, the “consumer expectation” test: there is a defect only if consumer has a reasonable expectation as to use or performance or safety therein of product, which the product fails to meet.
 - 3) Most states require, before a design can be ruled defective, that there be a **practically and economically feasible alternative design** that would have avoided the injury in this case.
7. Warning Defect:
- a. There is liability for inadequate warnings or instructions
 - 1) if there is a **foreseeable risk** of harm
 - 2) that could have been reduced or avoided
 - 3) by an **adequate** warning.
 - b. Some states follow the Second Restatement (strict liability and negligence available) but most reflect the Third (negligence only).
8. Proof:
- a. **Adequacy** of a warning is based on the warning: 1) getting people’s attention, 2) informing them of the risk, and 3) informing them how to avoid it.
 - b. Risks that are **obvious** do not require an additional warning—the obviousness of the danger is its own warning, by definition
 - c. **Hypersensitive** plaintiffs may still be entitled to warning, based on 1) how widespread the hypersensitivity is, and 2) how serious it is.
 - d. For an **individual plaintiff** to establish causation:
 - 1) he or she must be able to show that an adequate warning would have prevented his or her damages.
 - 2) This means that a sophisticated user may not need as much warning. It also means that someone who doesn’t follow directions may not be able to establish causation, though plaintiff is entitled to a (rebuttable) presumption that he or she would have **heeded** an adequate warning. (pay attention to)
9. Defense:
- a. Lack of constructive knowledge of the risk is generally a defense for failure to warn of it.
 - b. Conversely, though, there is a continuing duty to warn of **subsequently discovered dangers**, subject only to a negligence standard (even in jurisdictions that allow strict liability in warning cases).