Prof Theresa Glennon using Torts by Ellen Wertheimer Outline

I. MOTIONS AND SUMMARY JUDGEMENT

a. Motion to dismiss like summary judgment

   i. The question is: are there enough facts for a jury to reasonably find for the Plaintiff on each claim

II. INTENTIONAL TORTS

a. **Vicarious Liability** – Employers can held liable for the intentional torts of employees in certain categories.

   i. Ex. Bouncers or security guards

b. **Policy Objectives of Intentional Torts**

   i. Deter people from taking actions that are risky

   ii. Justice/Fairness

   iii. Wedged between criminal law and contract law – it is immoral to intend to hurt someone, even if you use an unlikely method

c. **Intent** - Restatement, Torts, 29, §13: "(a) the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person."

   i. *Garratt v Dailey* – child removes chair as old lady attempts to sit down

      1. must be substantially certain that contact would occur

      2. Don't need to intend to harm, just need to foresee that touch will occur.

      3. Need to examine what a reasonable child of his age would know

   ii. *Wallace v Rosen* – R taps W on back during fire drill, cuz W didn't respond to instruction to move

      1. The knowledge and appreciation of risk is not intent. Bright line where the danger stops being a foreseeable risk and becomes in the mind of the actor a substantial certainty.

      2. Furthermore, beyond intent the evidence must prove that the touching was done in a rude, insolent, or angry manner, as we live in a crowded world certain contact is necessary and customary. Thus not all contact is battery.

         a. Crowded world theory not an affirmative defense but goes toward proof of intent

         b. It is implied consent:you're implying consent to touching by going to crowded place

      3. Not reckless (disregard to life and safety) as Rosen excercised reasonable care to protect student lives and keep traffic flowing away from danger

   iii. *Vosburg v Putney* – Putney tapped Vosburg with his foot, didn't feel at first, but then extreme pain

1. liable for all injuries resulting directly from the unlawful contact, even if not likely or reasonably foreseeable because all injuries were direct

2. Contributory negligence – contributing to the damage through negligence. In this case, the parents sent the kid to school but he shouldn't have been there (claimed by Putney's attny)

3. Judge says "boys will be boys" (advanced by Putney) ok on playground, but there is the law of the classroom, which takes effect when teacher starts class.

d. **Battery**

i. Elements of Battery

1. Directly or Indirectly harmful contact (can be dignity harm)
2. Intent to bring about the contact
    a. Want to make contact
    b. Must know to a substantial certainty contact would happen

ii. *Mink v. University of Chicago* – hospital experimented on patients in for prenatal care; didn't inform

1. Harmful intent is not required, only intent for contact (contact can be via an object)
2. Informed consent – people consented to procedures commonly and reasonably performed for prenatal care
    a. Mod. Tort Theory – treat informed consent cases as negligence.
    b. Trad. Tort Theory – battery or assault & battery liability imposed when doctors perform non-emergency treatment without consent.
        i. Used here because patients didn't consent to be tested upon
        ii. Emergency Med Care – assume people would consent to life being saved
3. Charitable Immunity – want medical to try and save lives in good faith, esp. if unconscious
    a. If person expressly states they do not consent, must stop

iii. *Fisher v. Carrousel* – manager of restaurant grabs plate and yells a negro can't be served in the club

1. contact includes things closely connected or identified w/ body
2. P's dignity was harmed (rude &offensive removal) and had exclusive control over his plate
3. Contact interfered with ability to do something
4. Contact does not equal apprehension so not assault (P offended, not scared so no assault)

iv. *Lambertson v. US* – USDA inspector scares P, pulls hat over eyes, jumps on back, P hits meat hook

1. a joke which involves harmful or offensive contact is battery
2. US government consents to some suits via FTCA; no consent to battery
    a. Similar to nongovernment employees, criminal/wrong acts aren't part of the job so employers are not responsible.

e. **Assault**

i. *Conley v. Doe* – student makes list of people he wants to kill, teacher finds it; 2nd list has her name

1. Defendant must engage in intentional conduct that creates in the plaintiff reasonable apprehension of imminent harmful or offensive contact

2. Court looks at totality of conduct to determine if apprehension reasonable

    a. Communication, context of words, action to indicate follow through

ii. *Bouton v. Allstate* – B shoots a kid trick or treating in army fatigues and carry plastic assault rifle

1. Context is important, must reasonably apprehend battery

2. Kid in fatigues holding plastic AR on Halloween; Halloween bright context

f. **<u>Consent as a Defense to Battery</u>**

i. *Mohr v. Williams* – Dr to operate on right ear, examines left & finds it more serious;operates on left

1. failure to obtain consent for a non-emergency medical procedure may constitute battery

    a. Also, left ear problem not discovered in course of operation, but independent exam

2. Difference between "technical battery" (without malice) and battery (with malice) is irrelevant because intent to harm not an element of tort battery.

ii. *Ashcraft v King* – patient wanted family blood only; got general supply blood which was HIV tainted

1. doctor willfully disregarded the family's wishes, which were a condition to consent, this establishes intent element of battery

2. If a Dr performs a treatment different from the type a patient consents to, it shows "willfull disregard of the plaintiffs rights." This fulfills the element of deliberate intent for battery.

iii. *Marchetti v*. *Kalish* – 13yo injured by 15yo while playing kick the can

1. plaintiff stated in deposition act not reckless or intentional

2. Acts in frustration are potentially allowable

3. Negligence not applicable because contact sports = apparent consent

4. Court rejects Restatement §50 (which says there is a contract with the rules of the game to make the game more about skill and protect participants)

iv. *Hackbart v. Cincinatti Bengals* – P hit in back of head while down, against the rules of the game

1. intentional, prohibited contact in sport can = battery (Restatement 50)

2. football has clear codified rules as opposed to Marchetti

3. Rules prohibit actions that could lead to serious injury

v. *Teolis v. Moscatelli* – T agreed to have fight in street with M; claims consent to fist, not knife fight

1. consent to unlawful conduct (agreement to break the peace) is void and has no legal effect

vi. *Thomas v*. Bedford – Student shoots rubberband at teacher; 10-15min later teacher beats kid

1. Aggressor doctrine: can respond to aggression w/ physical force in heat of the moment

a. Can't be unreasonable or excessive, more critical after cool down period

b. Self-defense argument; corporal punishment is an assumed privilege to hit children

2. Common law doctrine – "in loco parentis": physical punishment in absence of parent

a. Limited to reasonable punishment; parents have constitutional right to hit kids

g. **<u>IIED</u>** - intentional or reckless conduct that is extreme & outrageous that it causes severe ED

i. *Harris v. Jones* – boss verbally and physically mimicked stuttering ability; P had nervous condition

1. ED must be severe that no reasonable person should endure it

a. Must consider conduct in context; personality of the victim should be considered

2. Standards used by states for IIED

a. Conduct must be intentional/reckless

b. Conduct must be extreme and outrageous

c. Causal connection between conduct and distress

d. Distress must be severe

ii. *Hustler v. Falwell* – ad parody published about first time being incest in an outhouse

1. public figures cannot recover for IIED where parody is concerned; must be actual malice

2. Right to free speech is fundamental to democratic discourse, thus outweighs interest in protecting public figures from IIED.

III. NEGLIGENCE

a. Elements:

i. Duty: take an action with reasonable care (not necessarily perfect care)

ii. Breach of Duty

iii. Cause-in-Fact

iv. Proximate Cause

v. Damages

b. **Duty** – requirement to act with reasonable care

i. Consider: When is the defendant responsible to this plaintiff for this injury (Dean Lee Green)?

1. Who can best obtain insurance
2. Administrative – are courts able to deal with the problems in case w/o opening floodgates
3. Whether the harm was foreseeable
4. How certain the court is the Plaintiff suffered injury
5. How close connection between defendant's conduct and plaintiff's injury
6. Moral Blameworthiness of defendant's conduct
7. Policy to prevent future harm
8. Loss-shifting: extent of burden on D and consequence to community of imputing duty

ii. *Yania v. Bigan* – while at Bigan's business, Yania jumps from 16-18 into flooded cut and drowns

1. there is no duty to rescue when there is risk to yourself & Bigan didn't cause death, can't be held liable for death.

iii. *Farwell v. Keaton* – friends chased by 6 guys, F beaten up and other gives him ice; F dies

1. special relationships exist that create a duty to assist; no special relationship=just strangers
2. If you start providing care & take control of situation, duty to continue w reasonable care

iv. *Soldano v. O'Daniels* – good Samaritan denied ability to call the policy about death threat at a bar

1. if a person is trying to get aid you can't stop them(acting by interfering with aid; a statement can be an action) as it is only a minor burden.
2. R.2d of Torts: If one knows that a 3rd party is ready to give aid to another and negligently prevents the 3rd party from doing so, he subject to liability for harm from the absence of aid

v. *H.R. Moch Co. v. Renesalaer Water Co.* – Water co didn't supply enough pressure to fire hydrant

1. no duty to the beneficiary of a contract

vi. *Strauss v. Belle Realty Co.* – S fell down stairs during a blackout, when went to basement for water

1. more direct relationship than Moch (Strauss had contract w/ Con. Ed.) but extending duty would unreasonably increase liability. Also Moch not in apartment at the time he fell

vii. *Lucas v. Hamm* – attny negligently draws will re perpetuity, prevents beneficiary from obtaining it

1. although a beneficiary, the beneficiary is the whole purpose of representation. Extending liability doesn't overburden the profession

2. To do otherwise would cause the innocent beneficiary to bear the loss
    a. However, Cal. Perp. law so complex, even well informed attny struggle. Not guilty

viii. *Tarasoff v the Regents of UCA* – patient threatens T, his Dr calls police but doesn't warn T

1. a psychiatrist has a duty to control patient; T was also a student Univ DR worked at = duty
2. if patient states intent to injure, doctor has duty to notify potential victims
3. Cost of false alarms worth saving the life of the threatened victim
4. Therapists need to exercise the reasonable level of skill, knowledge and care typical of pros
5. Police not liable because based on the info they gathered, didn't determine he was violent

ix. *Vince v. Wilson* – W bought car for grandnephew she knew failed driving tests and abused drugs

1. defendant <u>negligently entrusted</u> nephew with means to harm;
    a. Difference between control of the car itself and means to buy is negligible
2. Knowing nephew was bad driver and abused alcohol and drugs, she had a duty not to act (ie not to give him the car)

NIED – you generally don't have to worry about people's feelings, but can't negligently create ED

x. *Quill v TWA* – plane nosedives for 40sec; ecovery exerted 6Gs wrinkling fuselage and bending wings

1. Courts normally use physical symptoms/injury to filter real cases, but this is unique trauma
    a. Physical symptoms while less than prior cases, sufficient for this extreme case
2. zone of danger: being in immediate proximity to extreme danger

xi. *Potter v. Firestone* – Firestone statutorily barred from dumping carcinogens in class II dump

1. emotional distress is based on physical injury (parasitic claim)
2. Negligence because state imposed duty not to dump via statute
3. Preponderance of scientific risk (>50%) of future injury plus required to support ED
4. Just have to prove significant risk to be awarded medical monitoring; which is reasaonble
    a. Considering the toxicity of the chemicals
    b. The relative increase in risk from exposure when compared with the chances of the plaintiffs and the public at large from developing the disease without exposure
    c. The seriousness of the disease the plaintiff is a risk for
    d. The clinical value of early detection and diagnosis.
5. Comparative fault –negligently adding to harm, damages reduce accordingly

xii. *Thing v. La Chusa* – mother told of son being hit by car, goes to scene and thinks he is dead

1. created bright-line law for NIED for injury to another, need:
    a. To be closely related by blood or marriage
    b. Personally observe the injury causing event
    c. Suffer serious emotional distress beyond what objective individual would

xiii. *Boyles v. Kerr* – Kerr covertly tapes couple having sex, shows it on three occasions to friends

1. some actions cannot be negligent (here: intentionally show sex tape)
2. There is no independent duty not to inflict NIED, NIED must be connected to other breach

c. **Breaching the Standard of Care**–reasonable person except for certain groups (child, professional, disabled)

i. *Brown v. Kendall* – Kendall separating dogs by beating with stick, hits brown on backswing

1. standard is ordinary care under all of the circumstances
2. Burden of proof is on the plaintiff to show lack of ordinary care

ii. *Hammontree v. Jenner* – J had 1st epileptic seizure in 12 years while driving, and drove through wall

1. reasonable care used (took medicine, gave yearly reports) = causing harm not liable
2. Strict liability improper: not a mfg or seller who profits & can spread costs

iii. *Blyth v. Birmingham Waterworks* – pipes burst during one of worst frosts in history

1. providing for historical conditions is reasonable for the expected

iv. *Adams v Bullock* – kid walks over train trestle while swinging wire which contacts trolley line

1. If no other precautions could be taken, then reasonable care used

v. *US v Carroll Towing* – Bargee off barge when line adjusted improperly, barge broke free and sunk

1. Hand formula Burden < (Probability x Loss)
2. Use formula to decide when there is burden and custom should be changed
3. Foreseeable that things wouldn't be done properly during the busy working day period

vi. *Rivera v. NY Trans. Auth.* – man falls in front of subway train coming into the station, is hit and dies

1. <u>emergency doctrine:</u> actor might not be negligent if action was taken in face of sudden, unexpected emergency circumstances
2. Leaves emergency circumstances as a decision for the jury.

vii. *Widmyer v Southeast Skyways* –trial court denies "utmost care" for common carriers instruction

1. common carriers must use utmost care because people are at the carrier's mercy and have no control over danger to their lives.
2. Don't want utmost care in everything, cuz life would be more expensive.
3. Want utmost care for carriers because they have profit motive (cut corners)

<u>*Professional Standard of Care*</u> – higher standard because of faith and trust in profession, knowledge and skills are not ordinary, small decisions can lead to big consequences, high expectations)

viii. *Boyce v. Brown* –woman has ankle pain, sees Dr for months; goes to 2nd Dr, Xray→screw removed

1. Professional standard for doctors:
    a. must possess and apply sufficient degree of skill & care within the med community
        i. Med Comm: today, means pro community more than geograph community
    b. The standard of medical practice in the community must be shown by aff evidence
    c. Expert testimony unless in layman's knowledge (operate on wrong leg)

d. Lack of success does not mean negligence

ix. *Jones v O'Young* – P wants to use infectious disease expert to testify about surgeon's practices

1. Expert from different field than defendant ok as long as two hurdle requirements met:

a. Physician licensed by the proposed school of medicine he will testify about

b. Familiary with methods, procedures, and treatments observed by other DRs

2. After these requirements, it is still up to judge's discretion if Dr qualified and competent

x. *Heath v. Swift Wings* –jury instruction:deg of care of a prudent pilot w/same skill & training as this 1

1. standard should be objective(not this pilot, but reasonable and ordinary pilot in profession)

xi. *Pauscher v Iowa Methodist Med* – patient given treatment, not told of risk of death, dies

1. Rejects professional rule (Dr's judgement to disclose potential danger) in favor of patient rule (patient needs all material info to make decision) but allows materiality exception

a. Materiality exception because some risks so diminutive wouldn't effect reasonable person's decision and too much information leads to patient overload

2. Doctors usually get sued in malpractice. Hospitals don't practice medicine, physicians do

a. Nurses usually work for hospitals, hence why they were let out of the case

xii. *Fredericks v Castora* - P hit by D, while D was driving work truck; D drove trucks as career for 20yr

1. just because it's a career doesn't mean it has professional standard

2. some jobs (truck driver) aren't a profession (no special education, no rigorous licensing, people don't put trust or faith in job)

<u>*The Reasonable Person*</u>

xiii. *Vaughan v. Menlove*-M warned that hay rick would ignite,but chanced it.Fire spread to V's cottages

1. Vaughan wanted subjective test(what was his honest belief and level of intelligence)

2. Subjective test unfair to smarter people, injured, has proof problem

xiv. *Roberts v. Louisiana* – Blind man knocks over elderly P while walking through workplace w/o cane

1. Ordinary care a reasonable person would take if blind

a. custom of no cane in familiar place, plus here person had special mobility training

xv. *Robinson v*. *Lindsay* –13yo driving snowmobile,11yo injured; jury instruction: child standard of care

1. Normally adjust care level for children based on age (reasonable care for child of that age)

a. There is a great difference in knowledge and experience between ages

2. Higher care than normal for children when operating dangerous vehicle (applied here)

Custom

xvi. *TJ Hooper I* – barges sank while being tugged in unprotected waters when storm arose; no radios

1. lack of radio breached custom, reasonability(captains feel they're imp) and safety practice

2. Everybody is doing it (90% have radios) means there is a violation of reasonable care

xvii. *TJ Hooper II* –custom relevant but not enough,dthere can be a duty to a standard of care w/o custom

1. If they had radios, they would have heard reports & gotten to safety (Hand Formula B<PL)

Relationship between judge and jury

xviii. *B&O RR v. Goodman* – man hit and killed crossing tracks, didn't see train cuz view was obstructed

1. A man has a duty to stop and look (or get out) when crossing tracks

a. Normally duty question for jury, but if standard clear should be laid down by court

2. Contributory negligence – if plaintiff contributes to accident, no damages

a. Not available any more

3. Comparative negligence – reduce recovery based on comparative deg fault

xix. *Pokora v Wabash Rw* – stopped truck, but couldn't see. Listened as crossed, heard nothing but hit

1. Key: specific rules about reasonable care might not always apply; they can be a bad idea

a. Overturns Goodman: getting out doesn't always help, can change by time back in

2. Key: Reasonable care requires knowledge of totality of circumstances

Violation of a statute

xx. *Hetherton v Sears, Roebuck* – negligence by violating statute, resulting in gun sale with .22 rounds

1. Unlikely the Leg intended to allow evasion of licensing/recording reqs. by different labels

2. Plaintiff must be in a group the statute intends to protect

3. Negligence per se: negligence as a matter of law, such that breach of duty not jury question

xxi. *Telda v Ellman* – walking on right side of road when statute says must walk on left; hit by Ellman

1. if there is good reason to violate statute, might not be liable (= Legal Realism:func matters)

a. violating statute wasn't reason they were hit, driver would assume someone would be walking on the road even if in the other direction

2. Standard of care and required safeguards defined in statute are not inflexible command that must be observed even under conditions that might cause accidents.

xxii. Weight of Statutory Violation

1. Violation as a Rebuttable Presumption (most states adopted in reaction to negli. per se)

a. Only a prima facie case of negligence; legitimate reasons for violation can exist

b. Leaves determination of negligence for the jury

2. Violation of Statute as Negligence Per Se (Basically strict liability, not negligence)

3. Violation of Statute as Evidence of Negligence (parallel development w/rebut presumption)

a. Violations of statutes amount only to evidence of negligence

<u>Res Ipsa Loquitor</u> – can draw inference that the accident/injury is caused by negligence

xxiii. <u>Elements</u>

1. Defendant has exclusive control of the instrument that caused the injury

2. Ordinarily wouldn't happen without negligence (based on everyday exp.)

3. Plaintiff didn't contribute and no other reasonable explanation available

xxiv. Most states approach RIL as an inference of negligence from the evidence

xxv. *Escola v. Coca Cola Bottling Co.*- Coke bottle exploded in hand seconds after removed from case

1. if negligent act at time of manufacturing, then the manufacturer is responsible
2. Requires leap of faith: jury must say that it is most likely because of negligence (just most likely cuz can't prove negligence).

xxvi. *Cox v. Northwest* – plane advised on weather and took normal pre-flight prep, later crashed

1. even though everything was done right up until last radio transmission can't say it's not negligence cuz planes don't just crash(different view today w/ black box and terrorism)

xxvii. *Ybarra v Spangard* –hard objects against shoulder on operating table; shoulder and neck pain since

1. Uses RIL because multiple people were in control and contact
    a. Doesn't use malpractice because doesn't know whose fault it is
2. It doesn't matter many involved & only some responsible, someone is liable

xxviii. *Anderson v. Somberg* – device tip broke during surgery; sued doc, hospital, distributor, supplier

1. anyone who had duty to provide medical care and not to furnish defective instrument can be held liable for the defective instrument; if one can't show not liable, then action against

xxix. *Connolly v. Nicolet Hotel* – P hit in face with dirt outside hotel where convention was; lost sight

1. hotel liable for guests actions when not taking reasonable care to prevent harm to the public (ex. Controlling alcohol and providing security)
2. *Prima facie RIL*:dirt had to come from somewhere, jury must decide if from the hotel or not

xxx. <u>Approaches to Res Ipsa Loquitor (Weight of Evidence)</u>

1. Inference of negligence (view of the majority of states)
    a. Least evidence required
2. Rebuttal of Presumptions (burden on D unless there is a good reason to do what was done)
3. Shift burden to show P not negligent by a preponderance of evidence that D was negligent
    a. This requires most evidence

d. **<u>Cause in fact</u>** – a combinantion of science and policy (did this scientifically cause the harm)

i. *N.Y. Central RR v Grimstad* – man knocked off of tug boat couldn't swim, no life preserver onboard

1. court required proof that individual could be saved if safety equipment had been provided.

ii. *Reyes v Vantage Steamship* – man overboard, there is no preserver onboard (statutory violation)

1. Widow doesn't need to prove preserver would have saved life cuz of statutory violation

iii. *Anderson v. Minneapolis,et al RW* – engine set fire on near west side of property, other fires in area

1. action/source must be material and substantial factor to impose liability
2. Multiple sufficient causes: each would have been enough to cause harm

iv. *Summers v Tice* – quail goes up between P and group of 2, both shoot at quail, one hits P in face

1. Each defendant liable when both act negligently & can't determine which one caused injury
    a. Up to defendants to prove their innocence, unfair to make plaintiff show fault
2. Joint and several: may not be liable for whole harm, but liable for whole damage

v. *Hymowitz v Eli Lilly*–DES effects known for years after ingestion; don't know which manufacturer

1. use market share to assign damage based on harm to market; req majority be before court
2. Rationale: impossible to know who caused harm, still limits liability, and is manageable
    a. Also defendants can better bear the burden than innocent plaintiff

vi. *Falcon v. Memorial Hosp* – Falcon died from embolism during pregnancy; didn't have IV

1. Falcon was supposed to have IV due to anesthesia she was given, 37.5% survival rate w/ IV
    a. 37.5% is significant; reasonable person would expect such level of care be used
2. was negligence,should be compensated for lost chance of survival
    a. Wrongful death: loss of life when absent negligence at least 50% chance of survival
3. Odds of surviving x wrongful death comp = recoverable damages
4. Standards used to determine this ruling
    a. Administribility
    b. Regulatory – who is in the best position to prevent harm
    c. Economic – who is best to bear the cost and what is the cost
    d. Moral – we deserve a chance to live;
        i. People undergo cancer treatments that have much lower chance of survival
    e. Balancing/Decision Calculus –37.5% chance of life > 62.5% being wrongly held liable

vii. *Richardson v. Richardson-Merell* – alleged drug cause birth defects; P's expert recalculated data

1. under 703 fed. Rules ev., judge can determine if the experts evidence is adequate to support a jury verdict
    a. Expert's evidence must be consistent with experts field
    b. If body of literature supports different claim than expert, expert must make his unique basis known
2. However, in *Daubert*, the S.C. said it's not required that studies supporting expert be pub

e. **<u>Proximate Cause:</u>** could be thought of as similar to duty and cause in fact; in real world can challenge one or both. Also known as <u>efficient cause:</u> a cause that produces the result

i. *Polemis* – servant knocks a plank into a hold, containing benzene, which sparks; ship destroyed

1. A disjuncture occurs between the wrong and the injury; disjunctures considered prox cause
2. Prox cause can be something that is the direct and immediate cause although unexpected.
    a. Directness could be a concept of foreseeability

ii. *Ryan v NY Central RR* – sparks from engine ignited woodshed, which spread to P's house 130ft away

1. Not liable for damage to house because the damage and fire spreading wasn't foreseeable

iii. *Bartolone v Jeckovich* –car crash resulted in minor physical injuries but caused psychotic breakdown

1. Possibility of harm not relevant because harm occurring could be foreseen

    a. Foreseeability is shifting concept, more hesitant to impose affirmative duties(Yania)

2. The defendant must take the plaintiff as the defendant finds the plaintiff(eggshell)

    a. Plaintiff shouldn't be denied recover because a less severe condition existed prior to the accident or that the condition might have occurred without the accident

iv. *Wagon Mound I* – D's servant spills oil into harbor, congests around P's wharf, catches fire

1. The court rejects Polemis, states one isn't liable for consequences not reasonably foreseen

2. Doesn't bring up foreseeability, likely because afraid of contributory negligence

    a. Directness isn't enough, but if really indirect it's probably not foreseeable

v. *Wagon Mound II* – owner of ship burned at the wharf sues D

1. Alleges foreseeability: reasonable that oil would catch on fire, causing great damage

    a. A small risk but with catastrophic consequences should have precautions taken

vi. *Palsgraf* v L.I. RR – guard knocks fireworks wrapped in newspaper, explosion knocks scale onto P

1. Cardozo: guard had a duty to man getting on train and to those in close physical proximity
    a. Risk that is reasonably perceived defines duty; Explosives were unforeseeable
    b. Says before negligence matters, it has to be meaningfully connected to the result
    c. Green: supports Cardozo cuz he says prox cause often confused with cause in fact
        i. Must evaluate each case separately: Does D's duty extend to this P/injury
2. Dissent Andrews: directness; duty not restricted to negligence/lack of reasonable care,
    a. If not reasonable care, duty to anyone harmed; explosions result in lots of harm
    b. PC: something w/o which event wouldn't happen;natural and continuous sequence between cause & effect(each subst. factor to next),is cause likely to produce result

vii. *Kinsman Transit* – ship breaks free, knock other ship free, caught up at unraised bridge; dams river

1. Each event lead immediately to the next thing,there was no intervening cause or time delay
    a. Key: Shows shift toward proximate cause from direct cause
2. Foreseeable an improperly secured ship could come loose, drift, get stuck, and dam river

<u>Intervening Causes</u> (see also Yukon v. Firemans under SL)

viii. *Weirum v. RKO General* – radio station has contest in which people must find a moving DJ

1. Key: duty not to encourage reckless acts that could cause reasonably foreseeable injuries
    a. The fact a particular accident hasn't happened yet doesn't mean not foreseeable
2. Liability is predicated on Defendant's creation of unreasonable risk of harm to decedent, not failure to intervene for decedent's benefit

ix. Kelly v. Gwinnell – Zak served Gwinnell alcohol at his home, Gwinnell left and hit Kelly

1. Key: duty to people at risk from person social host provided with intoxicants
    a. Directly served a person who was already visibly drunk (like negligent entrustment)
2. Social goal (almost unanimously accepted)of reducing drunk driving, prompts this policy
3. Dissent: this decision unfair as it has limitless implications (serve 1 drink→accident→liable)

x. Fuller v Preis – Dr gets hit, starts having seizures, retracts from prof and personal life; ends suicide

1. Irresistable impulse test: whether suicide was the rational act of a sound mind or the irrational act or irresistible impulse of a deranged mind evidenced by physical brain damage
    a. Accident was the proximate cause if there was no choice, but irresistible impulse
2. Suicide, as a matter of law, isn't a superseding cause in negligence that precludes liability

xi. *Watson v Kentucky & Indiana* – train spills gas, Watson says lets set it on fire, lights match

1. Key: intentional or criminal acts break the causal chain of proximate cause
    a. Could argue criminal act is foreseeable(someone sees gas & wants to light it on fire)
    b. However, there is no instigation of criminal act and didn't invite people to ignite it

xii. *Braun v. SOF* – Savage publishes mercenary for hire ad in magazine, hired as part of hit squad

1. Key: duty not to create a clearly identifiable foreseeable risk
    a. Magazine knew setting in motion something that would lead to mayhem & violence
2. Key: events in between were criminal acts (conspiracy) which were foreseeable
    a. Thus causal chain between conduct and injury is not broken, so proximate cause
3. Key: can't use 1st amendment as shield when there is substantial, foreseeable risk to public

xiii. *Wagner v. Int'l RW* – conductor didn't close doors, P's cousin thrown out; P goes to rescue and falls

1. It's foreseeable that there will be a rescuer, thus there is a duty (danger invites rescue)
    a. The wrong that imperils life is wrong to the victim and his rescuer
2. Key: Plaintiff must be responding to peril and do so in a reasonable manner (not foolhardy)

xiv. *Yukon v. Firemans* – If the intervening cause produces the same result as the pre-existing harm, IC doesn't absolve P (see Strict Liability)

1. Little bit of added risk doesn't outweigh high pre-existing risk & only D can take precautions

xv. *Enright v. Eli Lilly* – granddaughter of woman taking DES born with birth defects

1. Key no duty to a plaintiff that didn't exist when tort happened
2. This injury was foreseeable, but case didn't turn on foreseeability, it turned on public policy
    a. DES already treated in exceptional way(didn't want to be too exceptional)
    b. Over deterrence might harm the pharmaceutical industry
3. Doesn't bring up intervening cause (pregnancy) cuz would bias a jury to say this woman shouldn't have children, can't really control getting pregnant, reproduction key to humanity

f. **<u>Damages</u>**

i. *Calva-Cerquiera* – bus hits good student in good shape; now wheelchair bound & brain damaged

1. <u>Collateral Source Rule</u>: payments to the injured party from a collateral source do not diminish damages recoverable from the tortfeasor. Applies when (1) source of benefit is independent of the tortfeasor or (2) P contracted for the possibility of double recovery
2. Damages claimed for recovery
    a. Pain & Suffering (emotional, cognitive, daily physical pain, decreased quality of life)
        i. Category with biggest degree of flexibility; look at awards in similar cases
    b. Past and Future Medical Expenses
        i. Experts testify to extent of injuries and what patient will need in future
            1. Compute what present value of expenses would be
    c. Future Wages (normally expected wages from vocation)
        i. As he hasn't established a vocation, need expert to speak of job potential
3. Damages limited to what's requested in original claim, unless there's newly discovered ev.
    a. This case involved <u>Bifurcation</u> (trying liability before damages)

ii. *State Farm v. Campbell* – SF says will pay, then says it won't; C brings bad faith action against SF

1. Kennedy for the majority: bulk of punitive damages are unrelated to Campbell's case
2. From *Gore:* Three guideposts must be considered in awarding punitive damages
    a. The degree of reprehensibility of defendant's misconduct
        i. SF was reprehensible, but just economic duress, so more modest award would've satisfied. Instead, case used to punish operations throughout US.
            1. These claims are outside the sope of this case

b. Disparity between the actual or potential harm suffered and the punitive damages

i. No bright-line ratio, but few awards exceed single digit Punitive-Comp ratio

c. Difference between the jury's awarded penalties and penalties in comparable cases

3. Dissent

a. Scalia: due process clause provides no substantive protection against excessive punitive damages

b. Thomas: constitution doesn't constrain the size of punitive damage awards

c. Ginsburg: this is a nationwide practice, this case is just one instance.

i. Can't get at widespread practice without huge awards

ii. Measure is whole wrongful conduct,many instances of fraud=reprehensible

IV. AFFIRMATIVE DEFENSES

a. **Contributory Negligence**: P fails to use reasonable care in own conduct, thus contributing to own injury

i. One of two historical affirmative defenses; proven by preponderance that the defense is valid

1. Rejected in modern times because a slightly culpable plaintiff gets no recovery

b. **Mitigation of Damages**: taking steps to reduce the extent of your damages (classic ex: seeking medical help)

i. You don't have to see medical help that violates your religious belief

c. **Last Clear Chance Doctrine**: P was negligent, D was negligent; D had last clear chance to prevent so D liable

i. Applies in Alabama, NC, Marland, and DC. Requires D to have had time to act reasonably to prevent

d. **Comparative Negligence**:

i. Three Types

1. Pure Comp Negligence: P recovers whatever percentage P is not responsible for (Lee v Yellow Cab)

a. Even if responsible for 99%, can still recover 1%

b. 12 states follow this

2. Plaintiff *less than 50%* responsible can recover person not responsible for (20+ states follow this)

3. Plaintiff *less than or equal to 50%* responsible can recover percent not responsible for (15 states)

ii. *Ridley v. Safety Kleen*- Safety Kleen truck runs stop at intersection, hits Ridley not wearing seatbelt

1. Comp Neg: Wearing the seatbelt would;ve reduced injuries, so reduce damages accordingly

    a. Not mitigation of damages, because mitigation of damages occurs after the fact

2. Key: violation of a statute is evidence of negligence in Florida

3. Increased bodily injury is more comparative negligence and less mitigation of damages in FL

e. **Attributive/Assumption of Risk**:

i. Some comparative negligence states have kept implied assumption of risk

1. Many states have gotten rid of implied assumption of risk

2. Every state still has express assumption of risk

ii. *Blackburn v Dorta* – says two types of assumption of risk (use these if on exam, say which one)

1. Express assumption of risk:writen or orally say you won't hold the other person responsible

    a. Two bases for finding these waivers invalid

        i. Lack of acceptance from uneven bargaining (court protective of safety)

        ii. Against Pub policy (don't want entities thinking can get away w/extra risks)

2. Implied assumption of risk: 2 types

    a. Primary assumption of risk: defendant not negligent cuz no duty or no breach

    b. Secondary assumption of risk: defendant is negligent

        i. If plaintiff unreasonable in taking risk, then contributory/ comp negligence

        ii. If plaintiff reasonable in taking risk,then this defense is against public policy

iii. Goepfert v Filler –in car w/ friends, told "if you want to get out, get out"; gets out as car accelerates

1. Falls under implied primary assumption of risk

2. Normally it's a question for the jury; court treats as a matter of law cuz elements are met

    a. Actual or constructive knowledge of particular risk that causes the accident

        i. Goepfert had competent faculties as an adult and in college

    b. Appreciate character of particular risk that causes the accident

        i. Dangers of getting out of a moving car commonly known

    c. Voluntarily accepted particular risk that causes the accident

i. Nothing forced him out of car; he had several moments to consider first

iv. Ray v. Downes – helped position auger using hand signals; signals and "stop" ignored; leg run over

1. Affirmative defense: assumption of risk

a. knew truck was hard to control and its risky to be by the wheels, knew the location was fairly noisy, and knew some windows were up;

b. worked as farm hand and driver of heavy trucks for many years, so appreciated risk

c. freely offered to help

2. Court says no AR: there is no voluntary acceptance that defendant would be negligent

a. Ray didn't Consent to Waldner ignoring him

3. Dissent: Looking at all facts together,Ray was consented to driver not hearing or seeing him

V. JOINT AND SEVERAL LIABILITY

a. *Bierczynksi v Rogers*-cars race, one lost control, hit R's stopped car.B says right lane & no hit=not prox cause

i. Although Bierczynski stayed in proper lane & didn't hit Rogers,both parties involved in road race JSL

1. Jointly liable cuz they were acting in concert; all engagee in such a race do so at own peril

ii. Jury verdict held there was sufficient evidence to support verdict

1. But for Bierczynski, there wouldn't have been a road race & Race wouldn't have hit Rogers

a. Going 2x legal speed, driving in such a way as to prevent being passed

b. *Ravo v. Rogatnick*–a Dr erred during delivery, other erred treating condition after birth; can't separate harm

i. When Ds don't act concurrently or in concert, their wrongs are independent and successive

1. Initial tort-feasor may be liable for all damage incl injury caused by successive tort-feasor

2. Successive tort-feasor only liable for separate injury caused by his conduct

ii. However, when separate and independent acts cause a single, inseparable injury, each party is JSL

iii. Prior to trial, lawyer had to determine whether to argue no liability or argue a division of injury

1. Could've asked for bifurcation (trying liability before damages), but judges don't like it

c. *Walt Disney v Wood*- Wood is injured on grand prix attraction; fault: 14% Wood, 85% fiancé, 1% Disney

i. Kansas SC: not fair for a defendant 10% at fault to pay 100% of loss; there no social policy that should compel defendants to pay more than their fair share of the loss

1. Powerful argument when applied to individuals, not as strong when regarding corporations

a. Disney in a position to make changes that no one else can to prevent injuries

ii. Illinois Supreme court gives four reasons for justifying JSL

1. Allocating fault doesn't make indivisible injury divisibl; each negligence could be prox cause
2. Innocent plaintiff might bear part of the loss without JSL
3. You're more morally culpable when negligent to others than when negligent to yourself
4. JSL insures injured plaintiff gets adequate compensation.

d. Can have JSL along with comparative negligence in a jurisdiction

i. Risk not allocated to the plaintiff is then JSL for the defendants

ii. Some states have gotten rid of JSL, but none have gotten rid of concerted effort

e. **JSL Damages** – each party responsible for whole amount of damages

i. Contribution: plaintiff goes after one defendant; that defendant goes after the others

ii. What if one defendant can't pay? Reallocation

1. Pro Rata: split that parties fault between the other two
2. Proportionate liability: keep the proportionate amount of fault between the other parties

f. **Several Liability** - Can only get the percentage of fault the person contributed

g. **Release** – in past if one signed a release, all were off the hook

i. In modern usage,

1. if settle with one defendant for his share

a. If settle one for less than their share, others can go after that defendant

2. Proportionate Fault (favored by courts)

a. Plaintiff bears the risk of the short fall from release

3. ProTanto–Other Ds make up shortfall; if a D settles > than fair share, can't go after others

VI. **VICARIOUS LIABILITY** – a hybrid between vicarious and strict liability, unlike SL has to have underlying tort

a. **Enterprise Liability** – comes down to whether employee working/did employee provide incidental benefit

i. *O'Toole v Carr* – lawyer driving to judgeship; makes phone calls for private firm prior to accident

1. California uses enterprise theory and says it includes coming and going; NJ court rejects this

2. NJ court uses scope of employment test; coming and going isn't usually included in scope

a. Four steps for whether act is within scope of employment (R.2d of Agency)

i. Kind of action employed to perform

ii. Occurs within authorized time and space limits

iii. Purpose is to serve master, at least in part

iv. Servant intentionally uses force against another, not unexpected by master

b. Exceptions to the rule that ordinary travel commute isn't within scope

i. Employee serves dual purpose (serving employer and private interest

ii. When employee is on a special errand for the employer

iii. When the employee must have vehicle for work (ex off-cite client visits)

iv. When the employee is on call and travelling to the worksite.

c. NJ court holds that when engaged in private affairs, where work is conducted incidentally and not at the time of the accident, there is no liability

ii. Miller v. Keating – Pres conspires with employees to kill former VP, to get insurance money for co.

1. App court finds 4 scope of employment elements in LaBrane (man. fights fired employee)

a. Is the action employment rooted

b. Violence is incidental to employee's duties

c. On employer's premises

d. Occurs during hours of employment

2. This court creates new rule: anything a top company official (CEO, Pres, etc) does to help the company, the company is liable for

b. **<u>For whom do you work</u>**

i. *Kavanaugh v. Nussbaum*–Drs share office space & cover on-call; pregnancy complication w/ 2nd DR

1. <u>Vicarious Liability Doctrine:</u> based on notion of control, one in controlling posit responsible

a. VL for medical malpractice general turn on agency or control in fact; which focuses on the relationship between the two doctors.

b. No evidence Caypinar controls Swenson or had anything to do with Swenson's care

2. These agreements promotes coverage; since no fee sharing or control, not partners

a. Policy: want Drs to make agreements to always have Dr available in emergency

i. If Dr liable for covering DR, it'd discourage some from making agreements, those who did would insure themselves;either event pub interest disserved

3. Patient & public not at risk by denying VL in such circumstances;Drs liable for own negligenc

a. Apportionment not important to P cuz JSL;but for Ds to determine what each liable

ii. *Schlotfeldt v Charter Hosp* – indep Dr not assigned by Charter,asked to exam P by busy Charter Dr

1. P assigned to independant Dr, thinks DR works for hospital (only evidence agency existed)

a. So this is a question for the jury to decide, not a matter of law

2. <u>Ostensible Agency Theory</u>:hospital selects Dr, who's apparently authorized to bind hospital, P reasonably believed Dr employed by hospital, no notice give that Dr isn't agent of hospital

a. Similar to California's Enterprise Theory – hospital gets benefit of the doctor

3. How does this reconcile with Kavanaugh

a. This court uses the patient's perspective, Kavanaugh looks at doctor's perspective

b. This court (similar to Kavanaugh) thinks it's better to assign liability to hosp than Dr

c. Less likely for Kavanaugh to see employer-employee relationship: Dr-Dr v Dr-Hosp

d. Here patient has less control over Dr (hosp decides), vs Kavanaugh picking own Dr.

VII. **<u>STRICT LIABILITY:</u>** when there's someone's negligence, but it can't be proven. SL to allow recovery (see Sternhagen)

a. *Fletcher v Rylands* – D builds reservoir on land w/filled in mine shaft; water floods mine under P's property

i. Rule: D who brings something onto his property, even if lawfully, is responsible if it escapes

1. Not absolute liability because there are defenses: plaintiff's negligence or act of god

b. Rylands v Fletcher – adds-on to first ruling

   i. Holding: SL if defendant brings a dangerous substance onto his land that doesn't naturally occur on the land, and it escapes causing harm to the plaintiff (so not SL if land naturally floods)

c. *Turner v Big Lake Oil*–run-off from pools of salt water(oil by-product)damage's P's turf & cattle water supply

   i. Court holds Texas is unlike England; Rejects Rylands v. Fletcher, which is predicated on different conditions

      1. As Tex is a dry, arid climate, water storage natural or necessary and common

      2. Also natural cuz of oil wells (a primary business), for which salt water needs to be stored

d. *Cities Service Oil v Fl* – dam on phosphate settling pond broke, 1bil gal of slimes escape into creek and river

   i. Originally community encouraged industrial development, but now tourism is a big industry

   ii. Court rules against Cities Service, citing factors similar to Restatement (Second) 520 (case pre-R.2)

      1. Value of ponds doesn't outweigh the risk (need clean waterway important for tourism)

      2. Not a common usage (creeks are not commonly used for phosphate storage ponds)

      3. Inappropriate place

      4. High risk of harm (dams subject to breaking even with best of care)

e. *Yukon v. Fireman's* – thieves break into explosives storage; detonate 80k of explosives to cover tracks

   i. R.2d of Torts 520: factors used to determine if activity is "abnormally dangerous" and subject to AL

      1. High degree of risk

      2. Likelihood that harm that results from it will be great

      3. Inability to eliminate the risk by reasonable care

      4. Not a matter of common usage

      5. Inappropriateness of the activity

      6. Value of the community is outweighed by its dangerous attributes

   ii. Applying restatement to this case

      1. First three factors are obvious

      2. #4: all though explosives are necessary, a small number of people use them so not common

      3. #5:arguably appropriate as designated for this use by Fed Gov (however before a suburb)

      4. #6 for value to community to outweigh dangerousness, whole comm. must rely on industry

iii. R.3d of Torts 520: Abnormally dangerous if (1) creates a foreseeable and highly significant risk of harm, even if reasonable care is used, and (2) Not a common usage

VIII. PRODUCTS LIABILITY

a. A brief history:

i. 18th Cent: you would buy items directly from the maker (blacksmith, butcher, etc)

ii. 19th Cent: manufacturers no privity of contract (there was middleman) & we wanted them to grow

iii. 20th Cent:started to feel they should be liable somehow. At first negligence, but felt should be more

b. **Manufacturing Defect Products Liability** (can still use negligence and Res Ipsa Loquitor)

i. *Pillars v RJ Reynolds* – toe in chewing tobacco pouch, P got really sick

1. At time, general rule that manufacture wasn't liable to consumer cuz of privity of contract

a. Manufacturer had a contract with retailer, consumer not in this contract

b. Retailer had a contract with consumer, manufacturer not in this contract

2. At time, privity of K rejected and exception made for food, drinks, drugs, and confections

a. Chewing tobacco like food or drink cuz you put mouth and swallow; effects health

3. If mfg liable for intention giving consumers poison, logically liable negligently doing same

ii. R.2d of Torts §402A: Special Liability of Seller of Product for Physical Harm to User of Consumer

1. One who sells any prod in defective condition unreasonably dangerous is liable for harm if

a. The seller is engaged in business of selling such a product, and

b. It is expected to and does reach the consumer without substantial change in the condition in which it is sold

2. Rule in subsection (1) applies although

a. Seller exercised all possible(reasonable) care in the preparation of his product, and

b. the user/consumer has not bought the product from or entered a contract w/ seller

iii. *Matthews v Campell* – P's teeth and bums injured by a small, irregularly shaped oyster pearl in soup

1. For a food product to be found defective or unreasonably dangerous, the P must prove

a. The product in question was defective

b. The defect existed at the time the product left the defendant's control

c. That because of the defect, the product was unreasonably dangerous to P

d. That the consumer was injured or suffered damages

e. That the defect, if proved, was the proximate cause of the injury

2. Foreign-Natural doctrine: not liable if natural substances to food served are left therein

a. Rej. here: only consistent w 402A if consumer always contemplated what is natural

b. Andrews in *Zabner*:problem isn't theory, but courts applying it to prelim production

3. Reasonable expectation: what consumer might reasonably expect; applied by this court

a. Naturalness of the substance relevant for determining reasonable expectation

iv. *Escola v Coca-Cola* – key: if there is a defect in the product & product is the but for cause then liable

1. If defects can develop defects undiscoverable visually, duty to make appropriate tests

a. If such tests are commercially impracticable, then bottles shouldn't be reused.

2. Traynor concurring: when you put something on the market and know it isn't inspected for defects, you're liable for any injury from a defect

a. Dangers to life & health inherent in other goods, no need to distinguish from food

3. Justification for transition from negligence to strict liability (from Traynor)

a. Manufacturer can anticipate and prevent, consumer can't which is unfair

b. Manufacture can spread costs

c. Plaintiff has an evidence problem – all information is in defendant's hand

d. Criminal Statutes – willingly attach liability without fault

e. Lots of middlemen and consumers can't inspect

f. Marketing and advertising done by mfgr builds consumer confidence, not retailer

4. Con strict liability (not from case)

a. Market will produce as safe of products as consumers demand

b. Discourages innovation (worried a defect may be found later)

c. If danger is not foreseeable, it is unfair burden

d. Raises the prices for consumers because manufactures will spread cost to everyone

e. Inconsistent with the theory behind other torts

f. How can you insure if its unbounded risk

v. *Greenman v. Yuba* – P uses lathe function, wood flies out; screw came loose from normal vibration

1. Court says that a defect is evidenced when you use product as intended and it injures
    a. If design defect, should use proper components (non-faulty screw)
    b. If manufacturing defect, should have installed screw properly
2. Until injured consumer has legal advice, won't know to notify mfg he hasn't dealt with

c. **<u>Design Defect Products Liability</u>** (can be implied warranty from contract theory)

i. Reasonable Manufacturer Case (mostly rejected aside from Phillips; mainly Risk/Utility in hindsight)

1. Defined: knowing what is now known, would a reasonable mfg have put this on the market
2. *Phillips v Kimwood* – thin wood ejected from machine (manual v auto) set for thick wood
    a. SL for design defect deals with dangerousness of a products design, negligence is about the manufacturer's actions in designing and selling the product as he did
        i. Greater burden under design defect because the law imputes knowledge of the dangers, which mfg may not reasonably be expected to have under neg
    b. Not AL,the chances of injury may be so remote, selling is reasonable despite danger
        i. If change to prevent danger impairs utility, it's reasonable to market as-is
    c. Failure to warn may make a product unreasonably danger. Test dangerousness by assuming if seller knew, would he have been negligent to sell it without warning
        i. Court: ev sufficient for jury finding reasonably prudent mfg would warned

ii. Consumer Expectations Test (from R.2d, but most states have moved on Risk/Utility)

iii. Risk/Utility Test (from R.3d of Product liability §2(a), used by every state in some form)

1. Factors from *Barker* (all similar to Hand Formula, B<PL)
    a. Cost to use an alternate design
    b. Feasibility (can the modification be done)
    c. Adverse consequence to product/consumer(don't want new probs from alt design)
    d. Gravity of danger
    e. Likelihood that the danger would occur
    f. What instructions and warnings came with the product
    g. The nature & strength of consumer expectations influenced by marketing
    h. Effects of alt design on longevity, maintenance, repair, and aesthetics

i. Range of consumer choice, sometimes consumers know trading off cost for safety

2. Must consider factors similar to Dean Lee Green (under duty)

iv. Hybrid Test (use either Consumer Expectations or Risk/Utility Test, many states use this)

1. *Barker v. Lull* – high lift loader tipped during use, plaintiff struck by falling lumber

a. Barker's test to prove design defect

i. Product failed to perform as safely as an ordinary consumer would expect

ii. P proves the design caused the harm and D didn't prove benefits outweigh

b. Barker says design could be changed:other mfgrs include outriggers (goes to cost and feasibility) & could incl seatbelt(double edge sword-safe but can't get out fast)

d. **<u>Failure to Warn/Inadequate Warning or Instruction Products Liability</u>**

i. R.3d §2(c): foreseeable risk could have been avoided/reduced by reasonable warning or instruction;

1. lack of such warning or instruction makes the product not reasonably safe

a. Factors of inadequacy

i. Is it explicit (does it actually say it)

ii. Is it comprehensible to the user (said so the audience can understand it)

iii. Is it conspicuous such that people see it and actually read it

b. Causation

i. Product Causes injury

ii. If the warning or instruction was proper, P would have altered behavior

e. **<u>Defining Defect When the Basis for Product Liability is Failure to Warn</u>**

i. *Sternhagen v. Dow* (1997) – when P used herbicide, it wasn't known that it caused cancer

1. <u>state-of-the-art defense</u>: couldn't have known harm at the time given state of knowledge

2. This court imputes knowledge to the manufacturer (Hindsight Standard, opposite of SOTA)

a. Lumps product design, mfg defect and failure to warn together under strict liability

3. Policy considerations supporting the adoption of SL (enumerated in *Brandenburger*)

a. Mfgr can anticipate some hazard and guard against the recurrence, consumer can't

b. Cost overwhelming to injured individual, mfg can insure & distribute among public

c. It's in the public interest to discourage marketing of defective products

d. It's in the public interest to make mfgr responsible for product they bring to market

e. Retail & wholesaler should be responsible so they act as conduit for liability to mfg

f. Because of the complexity of the mfg process, it's almost impossible to prove negl

g. Consumer doesn't have the ability to investigate the soundness of the product

4. Three essential element to establish a prima facie §402A strict liability case (from *Brown*)

a. Product was in defective condition, unreasonably dangerous to the user/consumer

b. The defect caused the accident and the injuries complained of

c. The defect is traceable to the defendant

5. SL not AL, because doesn't relieve the P from proving the prod was defective & cause injury

ii. *Vassallo v Baxter*(1998)–mfg knew implants likely to and dangerous if rupture(d);no proper warning

1. State-of-the-art (SOTA)defense applies to what mfg knows & what mfg should have known

a. Before putting product on the market, should test & gather info to ensure safety

2. Implied warranty of merchantability revised so D isn't liable for failure to warn of risk that wasn't reasonably foreseeable at sale time or testing couldn't discover prior to marketing

a. Up until this point, law imputed knowledge to the manufacturer, regardless SOTA

3. R.3d explains that unforeseeable risks from foreseeable prod use can't be warned against

a. From now on, mfg held to standard of knowledge of expert in the appropriate field

b. Foreseeability test because SL's purpose to encourage mfg to make safe products