CHAPTER 1: INTRODUCTION TO TORT LIABILITY

When Should Unintended Injury Result in Liability?

Page 1-9

Hammontree v. Jenner

Facts: Δ was driving home when he suffered an epileptic seizure and he lost control of his car and crashed through the wall of ∏'s bike shop. He caused personal injuries and damage to the shop. Δ testified that he had a history of epilepsy and that he was on medication that controlled his seizures. 12 years before the accident, the DMV found out about his condition and put him on probation—he had to report to the doctor every 6 months. Four years later he was asked to check in with a doctor once a year. The doctor testified that he thought it was safe for Δ to drive. ∏ contends that the trial court erred in refusing to grant her a motion for summary judgment and also contends that the trial court committed prejudicial error in refusing to give a jury instruction on absolute liability.

Procedural History: Jury found in favor of Δ and the ∏ appeals.

Issue: Does the doctrine of strict liability apply to automobile drivers?

Holding: No.

Reasoning:

- Precedent has held that liability of a driver suddenly stricken by an illness rendering him unconscious rests on the principle of negligence
- In this case, the Δ withdrew her claim of negligence and after both parties rested, she objected to the giving of negligence instructions and wanted to stand solely on the theory of absolute liability
- Only the legislature can decide to use strict liability for auto drivers, because there would be many problems if the court did so…such as:
    - Without substantial detail about how the rule should operate, there would be a lot of confusion about the auto accident problem
        - Settlement and claims adjustment procedures would become chaotic until new rules were worked out on a case by case basis
        - Hardships of delayed compensation would be seriously intensified
- In *Hammontree*, the court was unwilling to treat this like a products liability case

Book Notes

Note 9: (p. 8) *Washek*: case of old man given a driver's license after passing test very well. Hits a pedestrian. DMV only liable if they had concluded the driver was unqualified and gave him a license anyway.

*If a driver were held liable for conduct that would otherwise be negligent (like running a red light) and no account were taken of the fact that he had an epileptic seizure, then this would not be a true negligence standard at all and would begin to look like strict liability—liable even if it was not his fault. Apparently, no court has been willing to impose such a standard.

Class Notes

Strict liability: even if someone does something that is not intentional and even though the person did nothing wrong, he should be liable
Negligence: carelessness or fault based system
Example: Lady wants to blast rock out of a quarry and she asks you when she will be liable:
-If negligence rule: if she was careful, then she will not be liable
-If strict liability rule: she will be liable even if she was really careful

When no one is careless who bears the consequences of the risk? The person who got injured—have to let the loss lie where it falls
The court is saying that even though the Hammontrees did nothing, they have to bear the consequences

Goals of tort law:

1. want to deter but not to over deter—optimal deterrence
2. compensation/spreading (one person has a huge loss and instead of making them bear the whole loss, everyone bears a little bit of the loss)—problem= how much more do we allow to spend on insurance just to compensate those who suffer a huge loss

**Note that these two goals might conflict

<u>4 Goals of Tort System</u>
1. Optimal Deterrence (Strict liability would over-deter, but from plaintiff's point of view, we want Zero accidents)
2. Fairness (Injured plaintiff should be compensated, but unfair to hold defendant liable when defendant is not negligent).
3. Compensation (Plaintiff should be compensated for injuries by the defendant, or defendant's insurance company. Defense will argue that even if Plaintiff should be compensated, compensation should not come from Defendant alone.)
4. Administrative costs

NOTE: In this case, they could have sued pharmaceutical companies, the doctor, DMV, etc. but they did not do that and that makes it quite certain that they were trying to change it to a strict liability standard—the attorney actually admitted this
Hammontree (stuff to take away)

1. Generally speaking a defendant is not liable unless it can be shown to some degree that it is the defendant's fault—fault has to do with the idea of negligence; What do we compensate for?
2. The big picture moral and policy issues; Why do we compensate?
3. Legal institutions—How or through what process?

CHAPTER 2: THE NEGLIGENCE PRINCIPLE

Historical Development of Tort Liability

Page 29-37

- Under early common law (15th century), courts often imposed strict liability.
- A distinction developed between the action of trespass (direct invasion of plaintiff's person or property), and trespass on the case (an indirect invasion of these interests)
    - Example: A log falls on the road. If it falls on the plaintiff this is trespass. If it falls and then the plaintiff trips on it once it had already fallen, this is trespass on the case
    - The importance of this distinction is that for trespass, strict liability was imposed; on the other hand, for trespass on the case, it was normally necessary to show some fault on the defendant's part.
- The rule of strict liability for trespass began to break down with respect to certain kinds of trespass
    - However, in these cases, the burden of proof was typically on the defendant to show that he was not at fault.
    - Later, courts began to say that the burden for showing that the defendant was at fault was on the plaintiff. (See *Brown v. Kendall*)

Tort Law and Economy in 19th century America: A reinterpretation

By: Gary T. Schwartz

This article basically says that the strict liability strands in traditional English Law seem ambivalent and confused and the negligence strands are both more distinct and more capable of extended application.

Fault Principle &

Burden of Proof is on the person who is trying to recover:

Brown v. Kendall

Facts: ∏ and Δ dogs were fighting, and the Δ was hitting dogs with stick to break up the fight. ∏ was looking on at a distance, and then the dogs approached where the ∏ was standing. Δ with his back facing ∏ raised stick over his head to hit the dogs, and accidentally hit the ∏ in the eye causing great injury. The court instructed the jury that if parting the dogs was not a necessary act, then the defendant was responsible for the consequences of the blow unless he was in the exercise of extraordinary care. The judge instructed the jury that the burden of showing extraordinary care on the part of the defendant or want of ordinary care on the part of the plaintiff was on the defendant. The jury returned a verdict for the plaintiff.

Issue: Whether the burden to show extraordinary care or lack of ordinary care is on the defendant (Was the court's instructions to the jury regarding burden of proof correct?)

Holding: No.

Reasoning:

1. The plaintiff takes the burden of proving those facts that are essential to enable the plaintiff to recover

Book Notes

Reasonable Person Test:

- *Brown v. Kendall* talks of the reasonable person standard: Each person owes a duty to behave as a reasonable person would under the same or similar circumstances
- The reasonable person test is an objective standard—it does not matter whether the defendant believed in good faith (subjectively) that he was being careful
    - Not what the defendant believes but what a reasonable person of ordinary prudence would have done

*Note: The reasonable person test is not based on how any specific individual or group would have acted—it is improper to instruct the jurors in a negligence trial to decide the case by asking themselves how they as individuals would have acted under the circumstances—rather, the question is how a reasonable person would have acted in the situation

Class Notes:

Note that if the burden of proof was on the defendant, then this would look a lot like strict liability—defendant has to prove that he acted with extraordinary care, and most of the time this will be hard to do

What does due care mean? (Also, ordinary care) The kind and degree of care which prudent and cautious men would use such as is required by the exigency of the case, and such as is necessary to guard against probable danger

The Central Concept
The standard of care:
Page 37-41

Ordinary Caution Does not Involve Forethought of Extraordinary Peril
Adams v. Bullock

Facts: There was a boy who swung a wire off of a bridge and it hit the trolley lines that the defendant ran and it electrocuted the boy. The trial court returned a verdict for the boy, and the appellate court affirmed.
Issue: Was the defendant negligent and thus responsible for the boy's electrocution?
Holding: No. Reversed.
Reasoning:

1. The defendant is using a trolley system lawfully
2. There was a duty to adopt all reasonable precautions to minimize the resulting perils and there is no evidence that this duty was ignored—no one standing on the bridge or bending over it could reach the wire
3. no vigilance could have predicted the point upon the route where such an accident would occur
4. no like accident had occurred before
5. this accident was not in the range of prudent foresight

6. insulating the wires is impossible in the case of trolleys—so the Δ would have had to put the wires underground and abandoned the overhead system for this not to have occurred

Book Notes

Note 2 (p. 39): *Braun*: Electric wires above an empty lot. Insulation was expected to last 3 years. 15 years later, the wire insulation was not changed and a person was shocked. What is the difference between this case and *Adams*?

- In this case, the accident was well within the bounds of prudent foresight
- Also, electrical wires can be insulated while trolley wires cannot

Class Notes

In this case, Cardozo establishes that it is not always good to send a case to the jury—in this case, no reasonable jury could find that the Δ acted in a negligent manner

Learned Hand Formula
Reasonable Steps to Prevent Unreasonable Risk
Page 41-47

US v. Carroll Towing Co.

Facts: A barge broke away form a tug boat, and it rammed against a tanker and the propeller of the tanker made a hole in the barge, and the barge lost its cargo and sank. Connors is trying to recover the value of his barge form Carrol, and Caroll is trying to reduce the damages because Connor's bargee was absent. The trial court reduced Connor's damage recovery, because the barge would have remained afloat if the bargee had been aboard to sound a warning.
Issue: Whether the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings
Holding: Yes.
Reasoning: The owner's duty to provide against resulting injuries is a function of 3 variables:

1. the probability that she will break away (P)
2. the gravity of the resulting injury if she does (L)
3. the burden of adequate precautions (B)

liability depends on whether B<PL (b= burden, L=injury, p=probability)
if B<PL, then liability attaches
Bargee does not have to be aboard all the time, but has to be there at reasonable times
In this case, the bargee was gone from 5 the previous evening and he still was not back when the barge broke free at 2 pm the next day—the bargee should have been aboard during the daylight hours during the short January days and during a time when there was a full tide of war activity

Handout pages 6-12 GM cases: See Lecture Notes

Book Notes:

Note 3 (p. 44): In *Chicago, Burlington, and Quincy*, kids were playing on a railroad's unlocked turntable and they rotated it and ∏'s leg was cut off. The court determined that the burden of putting a lock on was less than PL, so liability attaches.

Note 7 (p. 46): Lord Reid in *Bolton v. Stone*: cricket ball goes beyond the boundaries and into the road and injures someone—Lord Reid says that it is not proper to create a substantial risk no matter what the benefits—is this approach a negligence test? NO…it looks more like a strict liability test—because it does not take into account the burdens or benefits—if they cannot do it without a risk, then they can't do it at all

The Learned Hand test is a balancing test used as a rough guide as to whether the defendant's conduct is so risky as to involve an unreasonable threat of harm to others. Liability exists if: B<PL

Class Notes:

Learned Hand Formula Example:
RR in the late 19th century: Trains emit sparks—and they usually burn farmland, but there was no way to make it so that they do not emit sparks—so there is no negligence, because the burden of fixing it so that it does not emit sparks is greater than PL

This case was significant, because it purports to formalize negligence in the algebraic formula that the judge talks about.

- *the formula also shows that we are really putting a price on life—we are not going to take certain kinds of precautions even if they will save lives, because those precautions are too expensive
- *in the book it said that juries are never charged in the learned hand formula—most likely because the juries might find fault with the law; also, it might be hard for the jury to apply

The Learned Hand formula is not binding—it is just useful and helpful, but there will not be holdings based on it—it is just a way to get a hold of the idea of negligence

The Reasonable Person

Page 47-58

Bethel v. New York City Transit Authority

Facts: ∏ was hurt on Δ's bus when the wheelchair accessible seat collapsed under him. ∏ could not prove that the defendant actually knew of the defect, but he said that the Δ should have had constructive notice of the defect evidenced by a computer printouot repair record that said that 11 days before the accident, repairs, including adjustment and alignment, were made to a lift wheelchair. ∏ contends that a proper inspection during those repairs would have revealed the defect causing the seat to collapse 11 days later.
History: The lower court told the jury that as a common carrier, the bus company had a duty to use the **highest degree of care** that human prudence and foresight can suggest in

the maintenance of its vehicles and equipment for the safety of its passengers, and the court said that it was up to the jury to decide whether, CONSIDERING THE DUTY OF CARE IMPOSED ON COMMON CARRIERS WITH RESPECT TO THIS EQUIPMENT, a reasonable inspection would have led to the discovery of the condition and its repair before the accident. (Court tells the jury to decide whether the bus company would have found out about the defect if they had used the highest degree of care in an inspection of the equipment)
*Jury found for the ∏ on the constructive notice theory and the appellate court affirmed without addressing the issue of standard of care
Issue: Whether the court should impose on common carriers the duty of utmost care so far as human skill and foresight can go for the safety of their passengers in transit. (Whether duty of highest care should continue to be applied)
Holding: NO. The court realigns the standard to be the standard that any other potential tortfeasor is subject to—reasonable care under all of the circumstances of the particular case.
Reasoning:

1. Extraordinary care was used as the standard for common carriers initially, because there were primitive safety features when steam rr's were still new. Now, public conveyances have become at least as safe as private modes of travel, so the standard of care does not have to be so high.
2. There is an inconsistency between the carrier's duty of extraordinary care and the fundamental concept of negligence in tort doctrine (the reasonable person). Reasonable person standard is good because:
    a. It is flexible
    b. It takes into account all the circumstances that the actor was confronted with when the accident occurred
3. There are various criticisms of the extraordinary care standard

Constructive notice: Notice that is implied by law—in this case because it is part of a record

Book Notes:

Exceptions to the Reasonable Standard of Care:

Note 2 (p. 49): *Stewart*: In this case, there was the handling of gasoline—the court said that when a reasonable man is presented with circumstances involving the use of dangerous instrumentalities, he must necessarily exercise a higher degree of care proportional to the danger.

Note 5 (p.51): Posner says that the law does not take into account a man's temperament, intellect, and education because

1. it is impossible to ascertain a mans knowledge of law
2. when man lives in society, a certain average of conduct is necessary to the general welfare

a. exception: when a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible he will not be held answerable for not taking them:
    i. blind man is not required to see at his peril
    ii. infant is only bound to take precautions that an infant is capable of
    iii. insanity is a hard one

Note 7 (p. 53): *Vaughan*: a man makes an argument about intelligence—he says that he should not be held responsible for the misfortune of not possessing the highest order of intelligence—and the court stuck this reasoning down. The court said that this would leave so vague a line as to afford no rule at all.

Note 8 (p. 8): *Ramsbottom*: A man suffered a stroke right before he set out to drive. The court said that since the man still knew what he was doing, he should not be exculpated from liability—one cannot accept as exculpation anything less than total loss of consciousness.

Note 9 (p. 55): The court makes a distinction between mental and physical illness—physical but not mental illness can be an exception.

Restatement Section 283B & C: Standard of Reasonable Man (page 55):
B: Unless the actor is a child, his insanity or other mental defect does not relieve the actor of liability for conduct that does not conform to the standard of a reasonable man under like circumstances.
C: If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under the like disability

Note 11 (p. 56): This note tells about the reasonable person standard for children. There is first a subjective analysis and later an objective analysis.

Class Notes:

The reasonable Person:
What if it is someone who has a learning disability? It does not matter, because if you cannot measure up to that standard, you will be held liable—this begins to look like strict liability when it comes to these people

The Roles of Judge and Jury

Judicial Standard of Care

Baltimore & Ohio RR Co. v. Goodman

Facts: Goodman was driving a truck and he was hit and killed by a train. His widow brought suit and said that he had no practical view of the train and the RR says that it was Goodman's negligence that caused his death. The court refused a DV for the RR and entered a judgment for Goodman and the court of appeals affirmed.

Issue: Did the lower court err in saying that the RR was responsible for Goodman's death?
Holding: Yes.
Reasoning: The court says that a man must take precaution when he is going to go upon a RR track, and he cannot just rely upon the fact that he has not heard the train or that there is no signal that the train is coming. The court says that in such circumstances, it seems to the court that if a driver cannot be sure if a train is dangerously near, then he should stop and get out of his vehicle to see. If he does not take any other precautions, then he crosses at his own risk.

Leave it for the Jury

Pokora v. Wabash Railway Co.

Facts: In this case, a guy was driving his truck and a string of boxcars cut off his view of the tracks. He moved past the track and heard no bell or whistle and as he reached the main track, he was hit by a train. The evidence showed that the guy had no view of the train until it was so close that he could not escape.
History: Directed verdict given, and relying on *Goodman*, the court of appeals upheld the verdict.
Issue: Did the court err in directing a verdict in favor of the plaintiff?
Holding: YES.
Reasoning:

1. The question of whether reasonable caution forbade his going forward in reliance on the sense of hearing unaided by sight should have been left for the jury to decide.
2. If a person cannot use both his faculties of sight and hearing due to the circumstances, that does not automatically make him negligent.
3. Court comments of the unnecessary nature of the remark that a driver must get out of his car and look if he is unsure.

Reversed and remanded

Book Notes:

Note 2 (p. 62): In this case, a lady got hit by a foul ball and the court as a matter of law decided that the school in installing a backstop that was x feet high fulfilled its duty of reasonable care. The dissent compared this to *Goodman* where the court said that the guy had to get out of the car—dissent said that this was designating something that the court did not really know about as a sufficient protection as a matter of law.

JUDGE MADE STANDARDS: Courts formulate rules that other courts abide by. However, when a court attempts to regulate standards of behavior by issuing strict rules, these standards are likely to prove too inflexible and other courts are not likely to apply them in every situation.

Goodman rule was too inflexible to apply in all situations—in *Pokora*, the court held that the jury could have found that the plaintiff was not negligent even though he did not get out of his car to look for a train.

Class Notes:

Why Judges Should Set Standard of Care	Why Juries Should Determine Standard of Care
• Certainty and predictability. Defendants will know what the standard is, what to do to be protected from lawsuits. • Explicit rules make it easier to adjudicate cases. • Judges have experience and expertise in deciding if standard of care is met. • More consistent results. Judges will apply precedents from higher courts and rule similarly. • Judicial economy: more pre-trial adjudication means less time and resources spent.	• Judicial standards become inflexible as technology and situations change. Legal standards will not change as quickly to keep up. • Jurors are the parties' peers, experiencing the same situations. Arguably they have a better common sense understanding than the judges. • Jury represents the people: more legitimate as "the voice of society." • Parties may not feel that they received a fair trial and that justice was done.

Summary Judgment is Inappropriate where a Jury could make a Rational Decision Either Way on the Record Presented

Andrews v. United Airlines

(This case also talks about the duty of utmost care for common carriers and this case is in CA whereas Bethel was in NY)

Facts: After a plane landed, someone opened the overhead bin and a briefcase fell on Billie's head and seriously injured him. Billie claims that this kind of injury is foreseeable and the airline did not prevent it.
History: District court dismissed the case. Plaintiff appealed.
Issue: Should the court have granted summary judgment?
Holding: NO. There is a sufficient case to overcome summary judgment.
Reasoning:

1. A jury may be able to find that United has a duty to do more than warn passengers about the possibility of falling baggage.
2. There is a heightened duty of care for common carriers.

Note that there is a different standard of care for common carriers in this state. Given the heightened duty of a common carrier, even a small risk of serious injury to passengers may form the basis of liability if that risk could easily be eliminated.

Class Notes:

Significance: What is the point of this case then? The word extraordinary might have an effect on the jury

The Role Of Custom

Trimarco v. Klein

Facts: The plaintiff fell through the glass door that enclosed his tub, and he presented evidence that showed that at least since the 50s, the practice of using shatterproof glass in bathroom enclosures was common and that by the date of the accident in 1976, the glass door on his tub no longer conformed to safety standards. Defendant's managing agent admitted that at least since 1965, it was customary for landlords, who had to install glass for shower enclosures, to use safety glass or plastic.
Procedural history:

Trial court: jury awarded plaintiff damages
Appellate court: Even if there was a custom and usage at the time to substitute for shatterproof glass, there was no common law duty on the defendant to replace the glass unless prior notice of the danger had come to the defendants either from the plaintiff or by reason of a similar accident in the building.
Issue: Do customary safeguards establish a standard of care?
Holding: Yes.
Reasoning:

1. When proof of an accepted practice is accompanied by evidence that the defendant conformed to it, this may establish due care
2. When proof of a customary practice is coupled with a showing that it was ignored and that this departure was a proximate cause of the accident, it may serve to establish liability.
3. Customary practice and usage is not universal—but if it is fairly well defined and in the same business a person either has knowledge of it or negligent ignorance
4. Even if there is a common practice or usage, the jury still has to determine that it is reasonable before it is a conclusive or compelling test for negligence
5. The case that the ∏ presented was enough to sustain the verdict that the jury reached
    a. The jurors in this case had to determine whether or not the evidence provided in this case established a general custom or practice

*Note: The court reversed the dismissal but ordered a new trial because the trial judge had erroneously admitted certain evidence that had hurt the defense.

Book Notes:

Note 2 (p. 70): Two tugboats owned by Δ are towing cargo towed by ∏. Most tugboats have not installed radio receiving sets and Δ's boats do not have these sets. They are unable to get a message that there is a storm and they sink. The occur said that the fact that most tugboats do not have installed sets does not conclusively establish that the Δ was not negligent in not having installed them. **Custom is not dispositive on the issue of negligence**. In the end, courts must say what is required, because there are precautions so imperative that even their universal disregard will not excuse their omission. Custom is merely evidence, and sometimes it is enough evidence to make the ∏ or Δ win. In this case, the tug owner was liable.

Note 3 (p. 70): Proof alerts the trial court to three main points about custom:

1. if an industry adheres to a single way of doing something, the court may be wary of plaintiff's assertion that there are sager ways to do that thing and may insist that the ∏ clearly demonstrate the feasibility of the asserted alternative
2. even if the plaintiff can show a feasible alternative, the fact that it may not have been in use anywhere may suggest that it was not unreasonable for the defendant to be unaware of the possibility
3. the existence of a custom that involves large fixed costs may warn the court of the social impact of a jury or court decision that determines the custom to be unreasonable

In certain cases, the plaintiff might try to show that the defendant did not follow the safety motivated custom that other s in the same business follow, or the defendant may try to show that he exercised due care by using the same procedures as everyone else in the trade.

Most courts allow the introduction of evidence of custom for the purpose of showing the presence or absence of duty of care.

Class Notes:

How is this case different from a typical tort case with a custom?
He violated some other custom and the plaintiff is trying to use this as the general negligence of the defendant
What this case is really about is evidence of negligence—how does this evidence actually work?
In this case the court says that the case that the plaintiff presented was enough to send it to the jury and to sustain the verdict reached—there was no custom violated, but the evidence could be used to make an inference that the defendant was negligent
The Hand Formula: If the burden of following the custom is way greater than the PL, then the custom might not be reasonable according to the jury

**Note that if someone wants to bring in evidence of a custom, the custom's purpose has to relate to the injury:
Example: (note 5 page 71): ∏ cut hand on rope. To introduce evidence of a custom of using smooth rope, the ∏ would have to show that the purpose of the customary use of smooth rope was to avoid injuries such as his.

The Role of Statutes:

Sometimes the legislature passes statutes that appear to define reasonable conduct in a certain kind of situation. Mostly these are safety standards. A substantial body of case law has arisen about the extent to which a court is required to treat the violation of a statute as negligence per se.

Martin v. Herzog

Facts: A man and his wife were in a buggy and there was a bend in the road and a car coming from the opposite direction hit them and killed the man. The defendant is charged with negligence for not keeping to the right of the center of the highway and negligence is charged against the plaintiff for driving without lights on. The jury was instructed to treat the omission of lights as either innocent or as culpable.
Procedural History: The jury entered a judgment for the plaintiff (blameless) against the defendant (negligent). Appellate court reversed and ordered a new trial.
Issue: Is the violation of a statute requiring lights negligence?
Holding: Yes.
Reasoning:

1. In this case the jury was told that absence of light does not necessarily make the driver of the buggy negligent and when the defendant requested instructions to the

jury saying that absence of light was evidence of contributory negligence, the court denied this request.
2. There is a statute that says that lights need to be on
3. Omission of the statutory signals is negligence in itself

Book Notes:

Section 286 of Restatement on page 76: about statutes
Martin tells us that there has to be a causal link between the act constituting a violation and the resulting injury for there to be negligence per se.

Class Notes:

NEGLIGENCE PER SE
When the judge can say what the standard of care is and charge the jury on it:

1. class of plaintiffs (see book notes in next section)
2. causation
3. unexcused

When is violation of a statute negligence?

1. If the statute intended to protect the plaintiff, then it is negligence to not obey the statute
2. The violation of the statute has to be unexcused
3. The violation has to have caused the accident

One of the things that the majority view (having the judge tell the jury what the standard of care is) does is:
*provides a prima facie case for the plaintiff—the plaintiff does not have to worry about a judge getting rid of the case on summary judgment
A lot of times the plaintiff will not have an idea why things happened the way they did—there is usually not a lot of evidence that the plaintiff can use—like if a car hits a person—but if it violates a law, this means at the very least that the plaintiff can get to a jury—and this makes it very easy for the plaintiff to settle the case
*Jury instruction of negligence per se shifts the burden to the defendant to show that they acted with reasonable care—if the jury is not sure, the plaintiff wins, but if it was not a prima facie case, then if there was any question the Δ would win
*the jury instruction tells the jury: if the defendant violated the statute, then you will have to find the defendant negligent—they do not have to follow the instruction, but they generally do

Minority view: breaking a statute does not result in negligence per se; rather it is just evidence of negligence.

Violating Statute not Negligence Per Se

Tedla v. Ellman

Facts: There was a brother and a sister who were junk collectors and they were carrying junk in baby carriages and they could not walk in the center grass thing because the wheels would have gotten stuck so they walked on the road. There was a law that said

that people walking on the road had to walk facing oncoming traffic, but the oncoming traffic on that particular night was way heavy while the other side was not, so they walked on the other side in violation of the statute and they were hit by a car.
Procedural History: The trial court entered judgment in favor of the ∏s and the defendant appealed and the appeals court affirmed and then the defendant appealed again saying that the pair was contributorily negligent because they violated the statute.
Issue: Is the violation of a statute always negligence?
Holding: NO. Judgment affirmed.
Reasoning:

1. Negligence is the failure to exercise the care required by law.
2. Some statutes do not fix a definite standard of care that would protect life, limb, or property but merely supplement a common law rule that has always been subject to exceptions and limitations
    a. These kinds of statutes should not be seen as wiping out the limitations and exceptions in the absence of clear language to the contrary
    b. It should not be seen that this general rule of conduct has to be followed even when it would pose more of a danger than disobeying the rule

Book Notes:

Note 7 (p. 80): Courts have been unwilling to use statutory violations in cases in which the harm that occurred was different form the harm that the legislature apparently was seeking to prevent. In *Platz*, there was a statute designed to promote public order not safety. In *De Haen*, the objective of the statute was to protect workmen form falling into the shaft, not to keep things from falling.

Note 9 (p. 82): The statute to build pens for sheep on ship was in order to keep sheep separated and stop spread of disease. Not to keep them from falling overboard.

Class Notes:

Statute does not apply if it is less harmful to violate than to obey
Excuses for not following statute:

1. compliance will cause more danger
2. physical circumstances beyond actor's control
3. innocent lack of knowledge
4. emergency situation
5. incapacity (i.e. if it is a child)

Proof Of Negligence

Negri v. Stop and Shop, Inc.

Facts: This was a slip and fall case and the trial court entered a verdict for the plaintiff and the court of appeals reversed. Then, this court reversed the court of appeals.
In this case the plaintiff fell backward and hit her head on the floor not the shelves that were behind her. She fell on lots of broken bottles of baby food.
Issue: Did the court of appeals make an error when they reversed the case?
Holding: Yes.

Reasoning:

1. There is evidence that the store had constructive notice of a dangerous condition that allegedly caused the plaintiff's injuries—a witness said that the baby food was dirty and messy all over the floor and that in the 20 or 30 minutes during which she was shopping, there was no loud crash—there is evidence that the aisle was not cleaned or inspected anywhere from 50 minutes to 2 hours after the incident.
2. Viewing the evidence in the light most favorable to the plaintiffs it cannot be said that the circumstantial evidence was insufficient to permit the jury to decide that the slippery floor was created by the baby food that had fallen and broken a sufficient length of time prior to the accident to permit the defendants to discover and remedy the condition.
3. It was an error on the part of the appellate division to dismiss the complaint—if they thought it was against the weight of the evidence the most they could do was order a new trial

Gordon v. American Museum of Natural History

Facts: In this case, a guy was leaving the museum and he was going down the steps and he slipped on the 3rd stair and saw a piece of wax paper that came from the concession stand outside of the museum that the museum had contracted to have present. The plaintiff says that the defendant should have had constructive notice or actual notice of the dangerous condition presented by the paper on the steps. The case went to the jury on the theory that the defendant had actual or constructive notice of the dangerous condition presented by the paper on the step.

Procedural History: The jury found for the plaintiff and the appellate level affirmed.

Issue: Did the appellate level err?

Holding: Yes. Order is reversed and the certified question is answered in the negative (no constructive or actual notice)

Reasoning:

1. There is no evidence in the record that the Δ had actual or constructive notice of the paper and the case should not have gone to the jury on that theory.
    a. Constructive notice—a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it.
    b. Record contains no evidence that anyone including plaintiff observed the piece of paper before the accident.
    c. Plaintiff did not describe the paper as dirty or worn which would have provided some indication that it was there for a while
    d. On the evidence presented, the piece of paper could have been deposited there only minutes or seconds prior to the plaintiff's fall.

Book Notes:

Reasons why people might not provide proof of negligence:

1. the evidence was known but not favorable
2. the plaintiff simply did not bother to conduct an investigation

Note 4 (p. 88): the fact that a banana peel someone slipped on was blackened is not enough to establish constructive notice.

Note 5 (p. 89): In self service type things like fruit, etc. the defendant should reasonably foresee that there is likely to be debris on the ground and thus a risk of harm. So, the defendant should take steps to mitigate that danger.

Class Notes:

Maybe of the paper was dirty and looked like it had been there for a long time, the jury could have found for the plaintiff.

Carrie Snodgrass Example: See Lecture Notes

Res Ipsa Loquitur—the thing speaks for itself

Byrne v. Boadle

Facts: A man was walking outside on the sidewalk and a barrel of flour fell on him and knocked him down. He doesn't really remember much, but there were a couple of witnesses. Witness 1 said: barrel fell form a window above in defendant's house and shop and a horse and cart came opposite the defendant's door and barrels of flour were in the cart. Witness 2 said: he saw a barrel falling from the defendant's place
Procedural History: The jury found in favor of the plaintiff, and the assessor nonsuited the plaintiff. The plaintiff's counsel got a verdict entered for the plaintiff saying that the assessor erred in ruling that there was no evidence of negligence against the defendant.
Issue: When the defendant has control of the thing that causes the accident and must have been negligent for the accident to have occurred, can the burden of proof shift to the defendant?
Holding: YES.
Reasoning: A barrel could not just roll out the window without someone being negligent and it should not be up to the plaintiff to find witnesses to support his case. This accident alone is prima facie evidence of negligence. Some accidents in and of themselves show that there must have been negligence for them to occur.

McDougald v. Perry

Facts: ∏ was driving behind a tractor driven by the Δ. Δ rode over RR tracks, and a large spare tire came out of the cradle underneath the trailer and fell to the ground. Then it bounced up to the windshield of ∏'s car. Spare tire was secured by a chain wrapped around the tire. Chain was attached to the trailer with a nut and bolt. Δ testified that he inspected the chain but admitted that he did not inspect every link in the chain.
Issue: Is it proper to assert that a particular accident could not have occurred in the absence of some negligence?
Holding: Yes.
Reasoning:

1. The trial court correctly instructed the jury on the doctrine of res ipsa loquitur—inference of negligence when the accident is the type that does not occur without negligence and the defendant is in control of the circumstances
2. This doctrine can provide an injured plaintiff with an inference of negligence where there is no direct proof of negligence.
3. The plaintiff must show that the instrumentality causing the injury was under the defendant's exclusive control, and that the accident is one that would not ordinarily occur without the negligence of the one in control.
4. Plaintiff has to show that it was more likely than not that there was negligence on the part of the defendant.
5. Reinstate jury verdict for the plaintiff.

Concurrence talked about the Byrne v. Boadle case.

Book Notes:

Restatement section 328D deals with res ipsa loquitur and is found on page 96.

Note 3 (p. 93): In one case the hotel is found not to have exclusive control, so res ipsa does not apply. In the second case, with the thrown objects in the hotel, this was not a res ipsa case; just a standard negligence case.

Class Notes:

Res Ipsa Loquitur—standard for this=

1. accident does not *ordinarily* occur unless there is negligence
2. the instrumentality that caused the accident was in exclusive control of the defendant

Important Point: (add to outline)
The court does not say that the plaintiff automatically wins the case when there is res ipsa loquitur—instead, because of this inference, as a matter of law, the jury may say that there is some evidence of negligence, and since there is some evidence of negligence, the plaintiff does not have to worry about summary judgment

Restatement has come up with a different formulation of what res ipsa is:
Restatement standard:

1. Accident does not ordinarily occur unless there is negligence
2. other responsible causes including the conduct of the plaintiff and 3rd parties are *sufficiently* eliminated by the evidence

More Res Ipsa Loquitur: Multiple Defendants

Ybarra v. Spangard

Facts: ∏ went into the hospital to get an appendectomy and when he comes out, his shoulder is hurting and it turns out that he suffered serious injury to his shoulder during the operation. He sues the surgeon, the attending physician, the owner of the hospital, and the anesthesiologist. He demonstrates that at least one of them or the nurse under the

control of one of them must have been negligent, but he does not have evidence of which one of them was negligent.
Procedural History: The trial court held that res ipsa loquitur could not be be invoked against several defendants or instrumentalities.
Issue: Did the trial court err?
Holding: Yes.
Reasoning:
The doctors provided a defense:

1. where there are several defendants and there is a division of responsibility in the use of an instrumentality that causes the injury and the injury might hace resulted from the separate act of either one or more of them, the ruel of res opsa cannot be invoked against any one of them
    a. The court said that this rational would make the unconscious patient totally unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. Res ipsa should apply in this case

2. where there are several instrumentalities and no showing is made as to which caused the injury or as to the particular defendant in control of it, the doctrine cannot apply.
    a. The court says that this is unreasonable, because Ybarra would not be able to point at anyone since he was unconscious

The court holds that where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants whi had any control over his body or the instrumentalities which may have caused the injury may properly be called upon to meet the inference of negligence by giving an explanation of their conduct.

Book Notes

Special relationships: the result in this case seems to be at least in part due to the fact that all the defendants all bore an integrated relationship as professional colleagues and that all had responsibility for the patient's safety. Where multiple plaintiffs are strangers, and only have an ordinary duty of care to the plaintiff, res ipsa has generally not been allowed merely upon a showing that at least one of them must have been negligent.

Class Notes

Res Ipsa Questions 1-5: See Lecture Notes

The Special Case of Medical Malpractice
Same Locality and Same Medical Field?
Sheeley v. Memorial Hospital

Facts: In this case a woman had an incision to facilitate a birth and it caused complications and she sued the doctor and the hospital. She sought to establish the standard of care through an expert witness, Dr. Leslie. The defense objected on the ground that a rule says that a testifying expert must be in the same field as the defendant

physician. Court agreed with the defense and entered directed verdict in favor of the defense.
Procedural History: Trial court entered a directed verdict for the defendant and the plaintiff appeals.
Issue: Did the trial court err in excluding the testimony of the ∏'s expert witness?
Holding: Yes.
Reasoning:
The trial court relied on *Soares* that said that testifying doctor has to be in the same medical field as the defendant physician, but this court says that there are a couple of other cases that distinguished this holding and limited it:

- *Soares* is limited to the cases in which the physician expert lacks knowledge, skill or experience or education in the same medical field as the alleged malpractice.
- Nothing in the language of 9-19-41 says that the expert has to practice in the same specialty as the defendant

Defense says that Dr. Leslie is overqualified:
Defense says that his practices are clearly outdated.
Defense says Leslie must be disqualified, because he lacks knowledge about the applicable standard of care for a doctor in RI

- Court says that the similar locality rule should not be used anymore (rule saying that expert testifying must be from the same location as the defendant)
- Court says that any doctor with knowledge of or familiarity with the procedure, acquired through experience, observation, association, or education is competent to testify concerning the requisite standard of care and whether the care in any given case deviated from that standard
    - Legislature never mentioned similar locality rule, and the court thinks that this was not a mistake but an intentional decision

Class Notes:

All kinds of professionals get to set their own standard of care

1. since we hold physicians to a higher standard, they get to set it
2. there is an assumption of adherence when it comes to professionals, because they set their own standard

Why is the local standard of care so important?
"same locality"—old rule, until the 1960s (not a good rule, because who would testify against another doctor in their town)
same or similar locality rule—the same locality rule was broadened to this (the problem with this rule is that there was a lot of litigation about what qualified as a similar community)

This court does away with the same or similar rule and they say that any doctor who has knowledge of or familiarity with the procedure is competent to testify
What are the effects of getting rid of this rule?

1. will make the standard of care go up in areas where it was lagging behind
2. will make doctors in smaller communities charge more for medical care
3. will make doctors in the smaller communities do every possible test and procedure (defensive medicine) and this will make the cost of medical procedures go up

Res Ipsa When there is an Expert Witness?

Connors v. University Associates in Obstetrics and Gynecology

Facts: A woman went in for surgery and came out with no function in her left leg. Her expert testified about the care required when using the instrument used in the operation. Experts on both sides agreed that the instrument had to be used carefully, but the defense said that the plaintiff's nerve was abnormally positioned and the physicians could not have anticipated this and also that nerve injuries in operations of this type were sometimes unavoidable complications not attributable to negligence. The defendants argue that res ipsa should not apply to medical malpractice cases in which expert testimony is presented. Basis for this contention is that res ipsa is a doctrine traditionally grounded on the theory that jurors share a common experience that allows them to make certain inferences of negligence. If expert testimony is needed to support the inference, then the inference does not come from common knowledge but from uncommon experience.

Procedural History: At the first trial the judge refused to charge res ipsa, and after a defense verdict, the judge granted a new trial on the ground that he had erred in refusing to charge res ipsa. At the second trial, res ipsa was charged and the jury returned a verdict for the plaintiff. Δs move for a new trial because they contest that res ipsa instruction was an error. That motion was denied. Defendant appeals.

Issue: Whether the court erred in instructing the jury on res ipsa where expert testimony on causation was given and there was direct evidence on the cause of the injury.

Holding: NO.

Reasoning:

1. District court was correct in predicting that Vermont would allow an expert witness to bridge the gap between the jury's common knowledge and the uncommon knowledge of experts.
2. restrictive view of res ipsa overstates the common knowledge element
3. The key question is still whether the accident would normally occur in the ordinary course of events.
4. The res ipsa instruction in this case was important guidance for the jurors, since it told them that if they credited the expert, then they could infer that the physicians were negligent simply because the injury occurred.

Class Notes:

If an expert says that 3 out of 5 failures in surgery are due to malpractice, then we might well have the jury in all 5 cases finding negligence (preponderance of the evidence)
If we do not allow res ipsa, then the plaintiff might not have evidence

In some states res ipsa is allowed where experts are testifying (CA allows it; oftentimes blue states allow it and red states do not)

Matthies v. Mastromonaco

Facts: An old woman broke her hip and the doctor prescribed bed rest, because he did not want to put pins in her hip for several reasons—she was old, her bones were brittle, she was frail, she was weak, and she had a stroke not long before. Before her fall, she had an independent lifestyle and while she was resting in bed, she displaced her femur. An expert for the ∏ said that bedrest was an inappropriate treatment, and even Δ's expert said that pinning would have reduced risk of displacement but said that bed rest was a better treatment. ∏ says that she would not have consented to bed rest if she knew that it could change her life like this. There was conflicting evidence about whether the doctor told her about the possibility of surgery.

Procedural History: Jury found in favor of defendant and appeals reversed. Defendant appeals.

Issue: Does the doctrine of implied consent require a physician to obtain the patient's consent before implementing a nonsurgical course of treatment and must the physician discuss medically reasonable alternatives that he does not recommend?

Holding: Yes.

Reasoning:

Informed consent=whether the physician adequately presents the material facts so that the patient can make an informed decision. That does not mean that a physician must explain every option in every case. A physician can choose a method of treatment but not one that the patient would not have selected if informed of alternatives.

Alternatives=must be discussed and the patient has the ultimate choice

Book Notes:

Note 2 (p. 126): battery vs. negligence

Class Notes:

Question #6 in packet

There is a distinction between battery and negligence theory in this case

CHAPTER V: CAUSATION

Did the defendant's negligence cause the harm for which the plaintiff is suing?

1. Has a cause in fact (actual cause) been established?
2. Granted that the defendant's negligence has been an actual cause of the plaintiff's harm, did the injury occur under circumstances that allow the defendant to argue plausibly against being required to compensate the plaintiff for that harm (proximate or legal causation)?

Cause in Fact:
Basic Doctrine

There has to be a connection between the defendant's negligence and the plaintiff's harm before liability attaches.

Plaintiff Does not have to Exclude all other potential Causes

Stubbs v. City of Rochester

Facts: Stubbs is a resident and employee of the city of Rochester and he filed suit against the city after he contracted typhoid fever, and he claimed that the city was negligent in maintaining the water system so that it became contaminated with sewage and this caused the typhoid. There were many causes of typhoid, but at trial there were expert witnesses that said that he contracted it from the water, and Stubbs provided evidence that he never drank from another water supply. Also, there was a lot of statistical evidence that showed that there were a lot of cases of typhoid and that 58 of the cases came from the district that had contaminated water. The city said that Stubbs did not establish that he contracted the disease as a result of any of the other potential causes.
Procedural History: The trial court sided with the city and granted a nonsuit against Stubbs.
Issue: Does the plaintiff have to exclude the possibility that his disease was the result of causes other than the City's conduct where there exists a possibility of more than one cause?
Holding: NO.
Reasoning:

1. The plaintiff has to produce evidence that would lead to a reasonable inference that the defendant's conduct was a more likely cause of his disease than the other possibilities.
2. Does not have to eliminate all other cause of typhoid, even though the law requires the plaintiff to prove his injury was caused wholly or in part by the defendant's conduct.
3. If he had to eliminate all the other possibilities, then it would be impossible for a plaintiff to recover under these facts
4. It would be impossible to meet the burden of showing that it was not caused by anything else
5. This is a matter for the jury—the jury must decide whether based on the evidence there is a reasonable inference of causation

Class Notes:

In all torts, causation must be shown for recovery to occur. Just a reasonable certainty (Stubbs).

Inferring Causation

Zuchowicz v. United States

Facts: A hospital instructed the ∏ to take double the maximum dosage of Danocrine and this caused her to develop primary pulmonary hypertension and she died. The evidence at trial court not establish a link between the excessive dose of the drug and PPH, because no studies had been done where women were given such high doses. An expert said that based on her history, the temporal relationship between the overdose and the onset of PPH and other possible causes, he believed that the overdose was responsible for the disease. Another expert testified that the hormonal changes that the overdose caused likely cased the PPH.

Issue: Must a plaintiff produce direct evidence that her harm was caused by the defendant's negligence?

Holding: No.

Reasoning:

- A reasonable inference of causation can be made when the defendant's conduct is deemed negligent because it creates the particular risk of harm suffered by the plaintiff.
- CN law of causation requires that the defendant's conduct have been a **substantial factor** in bringing about the plaintiff's injury
- To meet substantial factor requirement, ∏ must prove:
    - Defendant's negligence was a but for cause of the injury
    - The negligence was causally linked to the injury
    - The defendant's negligence was proximate to the injury
- Issue here is whether it has been shown that the negligence was a but for cause:
    - Expert testimony makes the court believe that it is more likely than not that the drug was a but for cause of the injury
    - Hospital challenges the admission of the expert testimony
        - Proper standard was applied, so it will be allowed
    - Causation does not have to be proved by direct evidence anymore
        - The FDA does not approve prescription of dosages higher than those that have been subject to extensive study because there is the risk of unknown side effects
        - Where the negative side effect is because of the drug and the drug was over prescribed, then the plaintiff has shown enough to permit the jury to conclude that the excessive dosage was a substantial factor in producing the harm.

Book Notes:

- Sometimes even without but/for causation, the defendant can be liable. **substantial factor causation**. Substantial factor causation is broader than but/for. "The

defendant should not be allowed to escape through the holes of a logical net." (Learned Hand) It may not have been a but/for cause, but it would have been a substantial factor. it would have gotten there anyway. The example of the two fires burning down the plaintiff's crops, or the two defendants revving their motorcycles simultaneously and causing the horses to run away. Defendant was a but not the cause of injury. Deterrence recommends imposing liability.

- **Three requirements of substantial factor:**

1. but for causation.
2. negligence is causally linked to the harm.
3. defendant's act was proximate to the injury.

- But/for cause is when something is necessary but not sufficient.
- Traditional substantial factor cause is when something is sufficient but not necessary. If it had not existed, the accident would still have happened (it wasn't necessary), but since it did exist, it was sufficient to cause the accident.
- the traditional rule is that the but/for cause has to cause it.
- but Hand decided that there was something wrong with that... some defendants would get away.
- California always charges on substantial factor causation. Critics charge that if you don't have but/for causation or even traditional substantial factor causation, then you are allowing almost anything.
- Some advocate a proportional recovery when causation cannot be absolutely established. Especially in mass torts cases. If only 4/5 of plaintiffs cause of injury is really the defendant's negligence, defendant will pay all of them 4/5 of their damages. Argument is that defendant will thus pay all its liability that it should, and all the plaintiffs will recover for their injuries.
- Plaintiffs cannot sue for potential and undetermined damage. Unfair in mass torts, because early plaintiffs would recoup for all losses and drain the fund: later plaintiffs would not be recompensed. Also a concern that they would spend the money now instead of saving it for when the disease or damage does occur. Counter-argument is that the passage of time results in spoilation of evidence, making causation difficult to prove. There would also be a diminished deterrent effect; deterrence after the negligence is delayed.

Expert Witnesses

1. Must rest on reliable foundation:
    i. scientifically tested theory
    ii. subject to peer review/publication
    iii. rate of error (or potential rate) must be known, for scientific technique
    iv. general acceptance

2. Must be relevant.

Class Notes:

This case relaxes the standard of causation.
In regard to causation, the jury is allowed to make common sense inferences.

In this case, they had to show that the overdose (not just taking the drug) was a but for cause in the PPH.

NOTE:::

1. "But for" is the standard test for causation: "but for" A, B would not have happened.
2. "Substantial factor" occurs in two ways: 1) in those rare situations where you have two sufficient causes, making neither necessary (e.g. two motorcyclists rev their engines, causing animals to run away--neither is a but/for cause), and 2) in California, where the phrase "substantial factor" is always used, in order to describe traditional but/for causation and all the strange cases where it appears just to use a relaxed standard. (There is some dicta in Zuchowitz conflating substantial factor with but/for: that's a Connecticut quirk.).
3. "Causal link" is trickier and quite murky: in Zuchowitz, Calabresi appears to be using it to describe a situation of A enhancing the chance of B occurring, but he is not quite clear on the matter. Essentially, Calabresi suggests in the case that if the defendant's action increased the chance of something happening, and that thing does in fact happen, then it is appropriate to shift the burden of persuasion to the defendant to show that it ***didn't*** cause the injury.

Under *Daubert*, in order to tell whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can properly be applied to the facts in issue, the court is supposed to inquire:

1. whether the theory can or has been tested according to the scientific method
2. whether the theory or technique has been subjected to peer review and publication
3. in the case of a particular scientific technique, the known or potential rate of error
4. whether the theory is generally accepted

Loss of Chance

Alberts v. Schultz

Facts: ∏ went to the defendant saying that he had a pain in his leg even when he did not move. The Δ did not order an arteriogram and he did not conduct other tests, and he also did not make ∏ see a specialist right away. 2 weeks later, ∏ saw a specialist, and the specialist immediately ordered an arteriogram and tried to perform bypass surgery—unsuccessful. His leg had to be amputated. There was expert testimony that said that Δ was negligent in not ordering an arteriogram and promptly referring ∏ to a specialist and that specialist was negligent in waiting for a day to perform surgery. Even the passage of a short amount of time could mean the difference between success and failure in a case like the ∏'s. However, the success of a bypass surgery that would make amputation not necessary could only be performed if ∏ had arteries suitable for bypass. This information was not in the patient's record. The expert also testified that the Drs. negligence significantly decreased the chances of saving the ∏'s leg, but the expert could not conclude to a reasonable degree of medical certainty that, in the absence of negligence, Mr. Albert's leg could have been saved.

Issue: In a lost chance cause of action, must a plaintiff show, to a reasonable degree of medical probability that the doctor's negligence caused a diminution in the chance of recovery?
Holding: Yes.
Reasoning: The court decided that, in this case, the ∏ did not show to a reasonable degree of medical probability that the doctor's negligence cause a diminution in the chance of recovery:

1. The negligence of the doctors could have only reduced the ∏'s chances of recovery if the ∏ actually had a chance at recovery
    a. In order to have had a chance at recover, the ∏ must have had suitable artery for bypass
        i. ∏ did not establish that a successful bypass would have precluded amputation
        ii. ∏ did not establish that arteries were suitable for bypass at the time he went to see the first doctor or the day before the specialist performed the failed attempt at bypass.

Book Notes:

Loss of Chance: **Example**: Suppose a person is suffering from cancer and currently has a 30% chance of survival but would have had a 50% chance of survival if his doctor had not negligently missed the proper diagnosis. If the plaintiff does not get better/recover, he may file a suit against his doctor for 20% loss of chance.

In these types of cases, the defendant is usually liable for a percentage of damages equal to the percent of chance lost due to his negligence

Rationale:

1. *Hicks* (note 5 page 366): court reasons that loss of chance should be allowed, because it is the defendant through his negligence that has made it impossible for the plaintiff to prove how things would have turned out in the absence of such negligence.
2. *Fennel* (note 6 page 366): court rejects loss of chance approach as unwisely basing liability on statistical rather than actual cause.

Class Notes:

Policy: Allowing loss of chance is good because it would promote deterrence, but it is also bad, because it might flood the court with people trying to make really insignificant claims.

Increased risk of harm to patient as a result of doctor's negligence. Compensation is for the lost chance of recovery. Damage recovery: % of chance lost multiplied by total value of injured life/limb.
Alberts v. Schultz

- The causation between the negligence and the loss of chance must be established. Causation must be **medically probable**.
- The loss of chance must be manifested by actual physical harm. cannot take about it

in the abstract. it requires proof. must be manifested by actual physical harm. That the presenting problem was made worse by the lost chance.

- Compensation does not need to be solely for loss. Compensation for aggravation is also possible.
- Plaintiff does not have to demonstrate absolute certainty of causation, as physician's malpractice has made it impossible to know how the patient would have fared in the absence of malpractice or negligence.
- Court rules that damages should be awarded proportionally to the value of the patient's chance for recovery before the negligence.
- The probabilistic recovery notion is very problematic. It makes the tort system into an insurance policy. If causation goes to loss of chance, you could accuse people of all kinds of acts causing loss of chance.
- Lost chance modifies the traditional notions of causation and proving to a preponderance of the evidence. It bases recovery on probabilities.
- Under a loss of chance theory, if the plaintiff proved that the defendant's negligence was 51% responsible for the plaintiff's injury, the plaintiff only gets 51% of the damages, and not the whole amount.
- Similarly if plaintiff only proves that defendant was 10% liable, plaintiff still gets 10% of the damages (e.g. from 90% to 80%).
- The principle seems to require recovery even without injury: compensation for the lost chance, not for the injury.
- If extended outside of medical torts, it seems to become an insurance system, a compensation scheme.

Intro to Joint and Several Liability
Multiple Defendants

Summers v. Tice

Facts: Two defendants fired shotguns negligently in the direction of the plaintiff and the plaintiff was hit in the lip and the eye. Both men used the same gun and the same size shot, so it was impossible to prove which man caused the injury.

Procedural History: Judge awarded judgment to the plaintiff

Issue: Where one of 2 defendants causes the plaintiff's injury, does the plaintiff's case fail if it is impossible to prove who caused his injury?

Holding: NO.

Reasoning: In a case like this, the burden of identifying who caused the injury is on the defendants. There is a need to shift the burden, because the defendants are the wrongdoers and it is unfair to put the plaintiff in a position to prove causation where causation cannot be proven. Defendants are in a better position to say who caused the injury and there is no reason to leave the plaintiff without a remedy. The court held that they were both jointly and severally liable for the whole of the loss.

*alternative liability: rule that shifts the burden of proving who caused the ∏'s injury to the defendants where multiple defendants are negligent and any one of them could have caused the plaintiff's injury, but the identity of the exact defendant who caused the in jury is unascertainable

Book Notes

Note 1 (p. 376): Under today's practice, the fact finder would have had to assess the fault percentages on the defendants and then follow the state statute (even if the fact finder were unable to determine causation)

Note 7 (p. 377): Hawaii—said that if the jury could not determine how to make a rough apportionment, it must apportion the damages equally among the various accidents. FL did not use this approach.

Class Notes

Joint and Several Liability
What is it?

1. Joint liability: the theory of concerted action—2 people do or plan things at the same time (like a conspiracy); there is an agreement to take a certain action—plaintiff can recover from either tortfeasor for 100%
2. Several Liability: two tortfeasors committing the same tort separately against the same plaintiff; only liable for the portion of damages that they are deemed responsible for—liable for their percentage of negligence
3. Joint and several liability: when there are 2 + tortfeasors who injure the plaintiff—plaintiff can sue and get 100% of the damages out of any defendant—general common law rule is joint and several liability

Joint and several liability: Proposition 51 is an initiative in CA that banned joint and several liability for non economic damages if a tortfeasor is less than 50% liable
The reason behind this is that people will normally go after the person with the deep pockets in the case—not necessarily the person who was the most negligent
Ex. Drunk driver=95% liable
General Motors=5% liable

More reading on Joint and Several Liability on pages 368-373—policy reasons, five different current plans, complications, etc.

Joint	**Several**	**Joint&Several**
When: D's are working together in a joint action	When: D's commit tort in same action	When: 2 D's and 1 tort; causation cannot be proved
Rule: You can get 100% damages from any of them because they are working together.	Rule: Each D is responsible for his proportionate share.	Rule: You can get 100% from either one of them, whoever is solvent.
		Summers v. Tice

Hymowitz v. Eli Lilly

Facts: A lot of manufacturers made DES, and there were some who sold it before for a range of maladies and some sold it later during pregnancy to prevent miscarriages. Several people sued for injuries from DES that their mothers had ingested while pregnant, but no plaintiff in any case could identify the exact manufacturer of DES pill taken by his or her mother.

Identification problem reasons:

1. same chemical composition
2. druggists filled prescriptions from whatever was on hand
3. drug companies continuously entered and left the DES market
4. women did not remember who manufactured because injuries occurred many years later

Procedural History: The trial court denied motion for summary judgment made by defendants, despite the inability of the plaintiffs to identify which company manufactured the exact pill that caused the injury

Issue: May a plaintiff recover against several drug manufacturers where the identification of the producer of the specific drug that caused the injury is impossible?

Holding: YES

Reasoning:

1. if the plaintiffs can prove that all the manufacturers produced a defective product, then all of the manufacturers will be liable for the plaintiff's injuries in proportion to each manufacturer's market share of that product at the time of the injury
2. Alternative liability would not work in this case, because
    a. Unlike the 50% probability in the other case, the fact that there are so many defendants makes the likelihood that any one caused the ∏'s injury significantly diminished
    b. This doctrine is based on the premise that the defendants have better info than the ∏, but that is not true in this case
3. Concerted action won't work
    a. This doctrine provides for joint and several liability in cases where the defendants have a tacit or express understanding to commit a tortuous act —no evidence of that in this case
4. The injured should get some relief (other courts have not agreed with this)
    a. Should not get away with it, just because the bad effects do not show up for years or because so many parties contributed to the harm
    b. These companies that profited from this drug should bear the loss suffered by injured plaintiffs
5. Jusificationof the market share approach is that a manufacturer's liability will approximate the number of injuries it actually caused
    a. Use national market share
6. Manufacturer can get off if he can prove that he did not market the drug for use during pregnancy
    a. Can't get off if he can show that his drug did not cause the plaintiff's injury, because this is liability based on market share and risk produced rather than actual causation.

Book Notes:

Note 6 (p. 388): In the wake of the DES cases, plaintiffs have tried to extend the market share liability to other products, like:

1. asbestos—essential condition required for market share treatment is fungibility—all the products made pursuant to a single formula—asbestos is not a product but a family of minerals—used in many products, so can't really hold the whole market responsible because there are so many markets; exception=brake pad with asbestos case
2. lead paint—there are a lot of sources for lead, and some companies that make lead might not put it in paint
3. childhood vaccines
4. blood clotting factors
5. paint shop products

Class Notes:

What are the court's options?

1. deny liability (a lot of states do this because the plaintiffs cannot prove who did it, because there is no evidence that any particular manufacturer made it
2. market share—this was pioneered by CA in the *Sindell* case
    a. have to show that the defendant marketed DES for pregnancy purposes
    b. plaintiff had to have ingested DES
    c. plaintiff's injuries have to be shown to be caused by DES
    d. in CA the burden is shifted to the defendant to show that it did not cause the injury—if it can prove that it did not manufacture the pill, then they are not liable
    e. in this case, it does not matter if a particular defendant can show that they did not manufacture the pill that the plaintiff took—in NY it gets away from causation altogether—no exculpation
        i. NY does this because they want to give liability that will correspond with the overall damage and this accounts for the overall damage better

Proximate Cause

The purpose of proximate cause is to reasonably and fairly limit the defendant's liability to only certain harms

Unexpected Harm/Eggshell Plaintiff (Unforeseeable Extent of Injury)

Benn v. Thomas

Facts: In this case, defendant rear ended the decedent's van and caused him injuries and he died 6 days later of a heart attack.

*eggshell plaintiff rule: requires the defendant to take his plaintiff as he finds him, even if that means that the defendant must compensate the plaintiff for harm an ordinary person would not have suffered.

∏ requested the eggshell ∏ charge, and the trial court denied the request and gave a general charge
The jury determined that the Δ was not a proximate cause in the ∏'s death and gave only damages for the injuries sustained
Procedural History: Court of appeals said that this failure to instruct was a reversible error.
Issue: Whether the trial court erred in refusing to instruct the jury on the "eggshell plaintiff" rule in view of the fact that the ∏'s decedent who has a history of coronary artery disease, died of a heart attack 6 days after suffering a bruised chest and fractured ankle in a motor vehicle accident caused by defendant's negligence
Holding: Yes. It is a reversible error. Remand for new trial consistent with this verdict.
Reasoning:

1. the defendant argues that the ∏'s proposed instruction was inappropriate because it concerned damages and not proximate cause
    a. the court says that even though this rule is incorporated in the damages section, it is equally a rule of proximate cause
2. defendant says that the instructions that the court gave sufficiently conveyed the applicable law
    a. the court says that the instructions would have made it possible for the jury to find the defendant liable, but they did not adequately convey to the jury the eggshell plaintiff rule
    b. see **restatement 2nd of torts 461**: The negligent actor is subject to liability for harm to another although a physical condition of the other makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct
3. defendant says that since there was extensive heart disease already, and since ∏ was at risk for heart attack at any time, this is not sufficient for an instruction on the eggshell plaintiff rule
    a. the court says that adequate medical testimony was introduced that says that the accident was responsible for the heart attack and death—even though the evidence was conflicting, it was sufficient for the jury to find whether the heart attack and death were a direct result of the injury that was fairly chargeable to the defendant's negligence

Book Notes

Note 4 (p. 402): Girl got minor bodily injury in car accident and then became schizo. The court said that the lower court should have instructed that of the schizo resulted form accident then Δ liable for schizo.

Note 9 (p. 404): man injured in accident and being take to the hospital and driver of ambulance suffered heart attack and swerved into tree. Court said that defendant was liable for further injuries resulting from normal efforts of third persons in rendering aid.

Class Notes

Eggshell plaintiff jury instructions: if the jury finds that the ∏'s death was a result of the accident, then the defendant can be liable for the death even though ∏ was susceptible to heart attack.

Unforeseeable Results

Polemis

This case is the old rule about foreseeability of risk. In this case, while unloading ∏'s ship, Δ knocked a plank into the hold (this is negligence because of danger posed to cargo, people working below, and to ship's hull), and this started a fire because (unknown to Δ) there were gas fumes in the hold. Δ was held liable on the theory that a negligent defendant should be held liable for all harm he has directly caused. The fact that the fire was not foreseeable was deemed immaterial.

Emphasis on Forseeability

Overseas Tankship v. Morts Dock (Wagon Mound)

Facts: Morts (∏) was refitting a ship at a wharf and a ship owned by Overseas (Δ) was taking on oil at a wharf that was close by. Some of the oil spilled and it concentrated at ∏'s wharf. ∏ stopped welding activities and assessed the danger. He talked to others and based on this and his own understanding of furnace oil, he though that it was safe to resume work with necessary precautions. 2 days later the oil lit on fire and damaged ∏'s equipment and the wharf. The trial judge found that the ∏ could not have reasonable known that this oil would ignite when spread on water. The evidence established that there was a piece of cotton supported by some debris that lay underneath the wharf and this lit when molten metal from the wharf came into contact with it.

Procedural History: Plaintiff's appeal was dismissed by the Supreme Court of South Wales.

Issue: Is a negligent defendant responsible for all the consequences of his actions whether reasonably foreseeable or not?

Holding: No. Case dismissed.

Reasoning:

1. only liable for the consequences of his actions that are reasonably foreseeable at the time that he acts.
    a. *Polemis* is no longer good law (it held that a defendant was responsible for actions that were unforeseeable consequences of his negligence)
2. It is a principle of civil liability that a defendant's liability should be limited to those acts that are natural and probable consequences of his act
    a. What are natural and probable consequences of the act? Those acts that are foreseeable.
3. TO follow *Polemis* and make the test hinge on a determination of what causes are direct would be to invite the never ending problem of causation.
    a. Thus the question should be: was the damage caused by something that a reasonable man should have foreseen?

Book Notes:

Wagon Mound and *Benn* seem to be at odds. Maybe the distinction is between the type of harm and the extent of harm.

Unexpected Manner

McLaughlin v. Mine Safety Appliances

Facts: A man was taken out of a lake and he almost drowned. He was too cold, so he needed to be warmed up a little bit. They decided to use heating blocks manufactured by the defendant. The blocks said "always ready for use" in bigger letters and directions were written in smaller letters—one of the instructions, the last one, said wrap in insulation medium. A fireman recalls being told that the blocks had to be insulated, and he told the nurse to wrap them before using them. He handed the blocks to the nurse. The nurse applied the blocks directly to the ∏'s body while the fireman watched. The plaintiff's aunt did not recall hearing any warning about insulation form the fireman to the nurse. The plaintiff received 3rd degree burns. During deliberations the jury asked the judge whether the defendant could be held liable if the jury found that the company was negligent in failing to place warnings on the blocks themselves even if they did give proper instructions up to the point that the nurse used the blocks.

Procedural History: judgment for plaintiff at trial court level; defendant appeals and appellate division affirms

Issue: Was the defendant (marketer of the blocks) the proximate cause of the burns that the plaintiff received?

Holding: NO. Judgment reversed and new trial granted.

Reasoning:

1. The judge's instructions to the jury after their question (that the defendant could still be liable even though the fireman had knowledge of the need for further insulation, if it was reasonably foreseeable that the blocks, absent the containers, would find their way from the fireman to unwarned third persons) was incorrect
2. The jury obviously believed that the fireman knew of the need for further insulation and the jury was preoccupied with the effect of his failure to warn the nurse
3. The jury could have also believed that the fireman removed the blocks form the containers thereby depriving the nurse of any opportunity to read the instructions on the container, that he activated the blocks and then handed them to the nurse and watched idly
4. Under the circumstances, the court should have charged that if the fireman did conduct himself in this way, then his negligence was so gross as to supercede the negligence of the defendant and thus insulate the defendant from liability

DISSENT: Restatement of torts 449 and 447 (page 416)

Unexpected manner: defendant contends that although the harm that occurred was of the sort that might have been expected, the manner of its occurrence justifies exculpating the defendant

Book Notes:

Note 2 (p. 416): *Cohen*: worker killed by dry ice and the manufacturer is sued for not putting warnings of the dangers. Court found that even though the employer knew of the danger and did not warn the worker, the manufacturer could still be liable, because unlike *McLaughlin*, in this case the warnings were not removed and the remover did not stand by idly while the decedent was exposed to danger.

Note 5 (p. 417):
i. Second Rest. 435 (1): If actor's conduct is substantial factor in harm, the fact that he neither foresaw or should've foreseen extent of harm or manner of harm doesn't prevent him from being liable. (supports dissent)
ii. Second Rest. 435 (2): May not be liable if it seems highly extraordinary that it should have brought about the harm—will not impose liability on the negligent defendant where the result, although foreseeable has come about in a highly extraordinary manner (supports majority)

Note 8 (p. 418): defendant's counsel characterized the injury very differently than plaintiff's counsel would have--Δ's counsel went into detail about falling in the hole, the rope wrapping around the leg, etc. to show that the accident was unforeseeable. However, Π's attorney could have said simply—there was a hole in the road, Π fell and injured himself, so this can be argued as being foreseeable—CHARACTERIZATION PROBLEM!

In an exam question that has the problem of characterization, state very clearly that this is a characterization problem. Then offer the best characterizations that the plaintiff and defendant will put forward. Suggest why one of them is better than the other. You may submit policy arguments, etc. But if you have a previous case with a very similar fact pattern, analogize to it and use that previous case as precedent. This is where individual facts matter. don't try and solve the theoretical problem. you don't have the time to do so in an exam, and a solution might just be impossible.

Class Notes:

- The exact sequence of events leading up to the injury does not need to be foreseeable to D in order to hold him liable, so long as the harm caused to P was of a foreseeable type.
- In this case, even though the defendant was negligent in not putting a warning on the blocks, the firefighter's negligence was so gross that it superseded that of the Δ and relieved Δ of liability.

Unexpected Victim:

Palsgraf v. Long Island RR

Facts: Plaintiff was standing on a platform of RR. A man was trying to get on a train, and he ran to get on. A guard held the door open for him, and the man looked like he was about to fall. Another guard pushed him from behind to help him not fall, and the guard

on the train reached to help him. In the process of trying to help, the package that the man was holding fell and it was a package of fireworks and they exploded. It was not evident that they were fireworks from the outward appearance of the package. The explosion made some scales at the other end of the platform fall down and then they hit the plaintiff and injured her. ∏ sues.

Procedural History: The trial court and court of appeals find for the plaintiff and defendant appeals.

Issue: Does a defendant owe a duty of care only to those plaintiffs who are in the reasonably foreseeable zone of danger?

Holding: Yes.

Reasoning:

1. The conduct of the RR employee was not negligent at all in respect to Palsgraf.
2. No one knew that there were fireworks in the package.
3. Before negligence can be determined, it must be determined whether there was a duty of care to the plaintiff and if the injury could have been avoided if the duty had been observed.
4. The package was packed in such a way that no one would really know what was in there—so even if the guard had thrown down the package purposely, as far as the package appeared, he would not have threatened the plaintiff's safety
5. So, liability can be no greater where the act is inadvertent.

DISSENT:

Justice Andrews thinks that the defendant's duty of due care is owed to anyone in the world who suffers injuries as a proximate result of the defendant's breach of duty. Δ is liable regardless of whether injury was foreseeable or not as long as the injuries were proximately caused by the defendant's negligence toward someone.

Book Notes:

There are notes about rescue cases:

Note 11 (p. 429): *Moore*: relative who donates a kidney cannot recover, because his act was deliberate and reflective and not made in an emergency situation

Class Notes:

The reason that the court is unwilling to find the defendant liable against Palsgraf in this case is that the injury is so far fetched that the courts administering a system based on fault feel it unfair to hold the defendant liable.

If a reasonable person would not have foreseen injury to anyone or a particular person by the conduct, there is no duty owed to any person who is unexpectedly hurt by the defendant's actions.

Cardozo's view is that duty only extends to foreseeable plaintiffs. Foreseeability limits the orbit of duty and hence of liability. Because negligence is a matter of relation.
This damage done to this plaintiff was not foreseeable, hence there was no duty towards her. Who are the foreseeable plaintiffs of a tort? Those upon whom the tort is directly perpetrated.

no duty where the damage to that plaintiff was not foreseeable to begin with.
"The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."
"one who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person."

Dissent (Andrews):
negligence is not a relationship between a man and those whom he might reasonably expect to injure, but a relationship between him and those whom he does in fact injure.
negligence is a matter of results. we have a duty to everyone. Depends on there being a natural and continuous sequence between cause and effect (Polemis). if it was a substantial factor in producing the effects.
Not just the one who might reasonably expect to be harmed who is wronged, but in fact, everyone who is harmed, is wronged.
People are still liable for the consequences resulting from their unlawful acts, regardless of their unusualness, unexpectedness, unforeseeability or being unforeseen.

"What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."

CHAPTER IV: DEFENSES

Contributory Negligence

- The initial rule was contributory negligence. And it exculpated defendants if plaintiffs were negligent at all.
- Contributory negligence is only the rule in Alabama, Maryland, Tennessee, North Carolina.
- Comparative negligence is the rule in 46 out of the 50 states.
- Contributory negligence was encountered in *Brown*, *Goodman*, and *Pokora*
- If the plaintiff was found to be contributorily negligent, then this acted as a total bar to recovery.

Comparative Negligence

There are three principle versions of comparative negligence:

1. pure: plaintiff who is 90% to blame for accident can recover 10% of the damages from the defendant who was 10% at fault, and defendant could recover 90% from the plaintiff; about a dozen states use this version
2. modified: (the remaining states split on which of these modified systems they use)
    a. plaintiff who is at fault can recover as under the pure system but only as long as the negligence is "not as great as the defendant's" (can't recover if negligence is 50/50)
    b. plaintiff can recover as under the pure system but only as long as the negligence is no greater than the defendant's (can recover in 50/50 case, but if plaintiff is 51% responsible, cannot recover)

UNIFORM COMPARATIVE FAULT ACT

*This is a model statute and it is more elaborate than the state statutes

- UCFA is a pure comparative negligence system.
- UCFA imposes joint-and-several liability on each party.
- Each party is to pay a share of the damages based on their respective % of fault.
- The contribution of insolvent parties is to be reallocated among the other parties (including plaintiff) according to their percentage of liability. Insolvent party is still subject to contribution and to any continuing liability to the claimant.
- No setting off of claims and counterclaims. This is so both parties can fully recover from insurance companies, and ins. companies do not get a windfall and benefit unduly (not have to pay out awards). For example of one person owes $10 and another owes $15, the one who owes $15 can't just give $5 to the person who owes $10. This is because, the insurance company of the person who owes $10 won't have to pay a thing.
- The court can however require parties to pay the court, and the court will disburse the money.

- Right of contribution exists between J&S liable parties - party who is recovered against has a right to ask other parties to recompense him or her.
- Modified system can result in unfairness to plaintiff - plaintiff may not be able to recover against liable defendants who were not as negligent as him.
- The pure system can be hard to assess precisely (exact breakdown of %s). Insolvent defendants will also shift the burden, causing other defendants to bear disproportionate liability.
- In setting fault percentages, the trier of fact should consider:
    - Whether the conduct was mere inadvertence or engaged in with an awareness of the danger involved
    - The magnitude of the risk created by the conduct, including the number of people endangered and the potential seriousness of the injury
    - The significance of what the actor was seeking to attain by his conduct
    - The actor's superior or inferior capacities
    - The particular circumstances such as the existence of an emergency requiring hasty decision

Note 3 (page 445): courts have been willing to NOT entertain a suit when the plaintiff's conduct constituted a serious violation of the law and the injuries for which he seeks recovery were the direct result of that violation (making a pipe bomb); another court relied on the Restatement section 889 that said that one is not barred from recovery because he was committing a tort or a crime.

For answers to examples on page 441, see lecture notes page 30.

Note 5 (page 446): in states that use the modified comparative negligence system a question they face is whether to aggregate the fault of the defendants or whether to compare the plaintiff's negligence with each individual defendant. When there is aggregation, there is more of a chance that the plaintiff will not recover.

Assumption of Risk:

The basic idea behind assumption of risk is that the plaintiff was aware of the risks and made a knowing choice. When the plaintiff is said to have assumed the risk of certain harm, then the plaintiff, under traditional common law, is completely barred form recovery (note that noe most courts who have adopted comparative negligence don't see this as a complete bar to recovery).
You need actual knowledge of the risks involved, and make an actual voluntary choice.
There are two kinds of risks involved in assumption of risk.

- Inherent.
- Negligence of the convenor.

Assumption of risk does not cover gross negligence or recklessness.
This is really a matter of contract.
We are looking for voluntariness, informedness, and agreement.
There are arguments against enforcing all contracts:

- public policy. parties attempting to waive too much tort liability. generally in important areas, e.g. housing, health care, etc.

or the contracts that are just plainly egregious, i.e. offensive, unfair, etc.

Express Agreements

Parties sometimes agree in advance that the defendant need not exercise due care for the safety of the plaintiff. This is generally done in a formal written contract like an exculpatory agreement or a hold harmless agreement. If the plaintiff is later hurt by what is claimed to be the defendant's negligence, the contract is usually at the center of any ensuing litigation. Such litigation typically raises two types of questions:

1. will the courts enforce even the most clearly drafted contract given the type of activity involved?
2. if so, is the contract in question sufficiently clear?

Dalury v. SKI, Ltd.

Facts: Dalury was injured when skiing at the resort—he collided with a metal pole that made up part of the control maze for the ski lift line. Before this the ∏ had purchased a season pass, and he signed a release form that said that he would assume risks of injury and damage and his photo ID had the same stuff on it.

Procedural History: The trial court gave summary judgment to the defendant and the plaintiff appealed.

Issue: Does a skier's assumption of inherent risks of skiing abrogate the ski area's duty to correct danger that could have been corrected?

Holding: NO.

Reasoning:

The court first said that the release was not ambiguous as to whose liability was waived. However, the court said that this exculpatory agreement is void, because it goes against public policy.

Restatement 496(b) comment e says that an exculpatory agreement should be upheld if:

1. it is freely and fairly made
2. it is between parties in an equal bargaining position
3. there is no social interest with which it interferes

#3 is most important in this case, and CA says that such an agreement is invalid if it has some or all of the following characteristics (*Tunkl*):

1. concerns a business suitable for public relation
2. service engaged in is of great importance to the public
3. party holds itself out as willing to perform the service for the public
4. party invoking agreement has decisive advantage of bargaining strength
5. party gives the public a standard adhesion contract with no option to get additional protection against negligence
6. the purchaser is under the control of the seller subject to carelessness by the seller or its agents

The Vermont Court says that their test is: determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against a backdrop of current societal expectations.

The defendants say that they do not provide an essential public service. However, the court does not agree. The court says that:

1. Whether or not defendants provide an essential public service does not resolve the issue of public policy
2. Defendant's facility is open to the public

3. Defendants invite skiers of all levels to come and ski there and thousands of skiers do so
    a. This makes a legitimate public interest arise
4. Vermont business owner has a duty of care to keep its premises in safe and suitable condition for the customers
    a. Duty increases proportionally with foreseeable risks of operations involved
5. Skiers are not in the position to discover and correct risks of harm—the defendants are

Class Notes:

What kind of public policy arguments could the dissent make in this case:
Dissent:

1. make cost of skiing too high
2. will exclude people
3. less litigation that goes through to trial if can use agreement
4. might deter people from starting their own businesses if these agreements are against public policy
5. might drive the small ski businesses out (if these agreements are against public policy)
6. takes away the right of freedom to contract (will make people decide for themselves what they want to do)
7. safety standards should be left up to the legislation
8. people will not go to the unsafe ski resorts, so there will be self correction—the dangerous ones will have to make changes or go out of business—the market will take care of things
9. personal responsibility on the plaintiff (put the liability on the plaintiff t take care of things)
10. it is hard to know what societal expectations are, so when people make free choice, then we know what the societal expectations are

Implied Assumption of Risk

In this section, no express language or agreement indicates the intentions or understandings of the parties.

You knowingly and voluntarily assume the risks of an activity by engaging in that activity.

Assumption of risk generally does not apply to rescue. Policy reasons - wish to encourage people to engage in rescue. Also causation issues - defendant is "but for" and proximate cause of plaintiff's injury.

Obviousness of risk can negate recovery against defendant: swimming pools.

Assumption of risk does not annul need to show defendant owed a duty. Defendant owes no duty when the risk was open and obvious.

For there to be implied assumption of risk, it has to be shown that:

1. there was knowledge of risk
    a. the particular risk in question was known to the defendant
    b. the risk must be one which was actually known to the plaintiff, not

merely one that ought to have been known to the plaintiff
    i. Plaintiff's actual knowledge may be proved by circumstantial evidence
2. There was a voluntary assumption of the risk

Murphy v. Steeplechase Amusement Co.

Facts: The Flopper
Procedural History: Jury verdict for the plaintiff, affirmed by court of appeals, defendant appeals.
Issue: Does a person who takes part in a sport accept the dangers that inhere in so far as they are obvious and necessary?
Holding: Yes. Reversing judgment.
Reasoning:

1. A fall was foreseen as one of the risks of the adventure
    a. The name of the ride was a warning
    b. The witnessing of other patrons on the ride was a warning
2. Going on the ride was a chance that the ∏ took
3. it would be different if the dangers inherent in a sport were obscure or unobserved or so serious as to justify the belief that precautions of some king must have been taken to avert them
4. Nothing happened to ∏ that was out of the ordinary for a fall.

Book Notes:

Note 6 (p. 472): *Knight*: played an informal game of touch football and the ∏ was hurt when another team member knocked her down and stepped on her hand. Crucial analysis was on the duty owed to the plaintiff. In this case, the court said that liability would only flow if the participant intentionally injures another player or the conduct is so reckless as to be outside the ordinary activity of the sport. Here the defendant's conduct was at most careless. No duty to exercise more care, so no liability.

Policy reasons not to subject people to legal liability in sport conduct:

- This will alter the nature of the sport by deterring people from vigorous participation

Lestina court disagreed and said that negligence should be the governing principle and a lot of factors about the sport should be looked at.
Crawn: the duty of care applicable to participants in informal recreational sports is to avoid the infliction of injury caused by reckless or intentional conduct—this serves the purpose of:

1. promoting vigorous participation in athletic activities
2. avoiding a flood of litigation

Freeman: Drunk skier collides with other skier and the court says that the drunk did not have a duty to avoid an inadvertent collision with the skier but he did have a duty to avoid increasing the risk of such a collision.

Note 7 (p. 475): Person hit by foul ball. The court says that the only duty owed to the person was that there be a safety screen and that there be seats available behind the screen.

Neinstein: court said that imposing a duty to protect all spectators would require owners either to:

1. place all spectators behind a protective screen thus reducing the quality of everyone's view
2. continue the way things are and increase ticket prices to compensate those who are hurt.

Class Notes:

- In this case assumption of risk does not really enter into the analysis—there is a lot of talk about it, but, in this case, there was no duty on the part of the amusement park to make the ride safer.
- If there is no duty to make it safer, then there is no negligence.

Packet ski problem

Davenport v. Cotton Hope Plantation Horizontal Property Regime

Facts: ∏ was injured while going down a flight of stairs in his apartment complex. There were 3 stairwells that offered access, but ∏ used the middle stairs because they were closest to his apartment. For 2 months before his fall he had been reporting to Δ that the floodlights in the stairwell were not working, but he still used the stairs. The night he fell, he thought he was stepping on a stair but it was actually a shadow caused by the broken light.

Procedural history: trial court entered verdict for Δ based on assumed risk and also held that if comparative negligence applied, the ∏ would be more negligent than the Δ. Court of appeals reversed both points, and Δ appealed.

Issue: Does assumption of risk act as a complete bar to recovery where a state has adopted a modified comparative negligence system?

Holding: No, unless the degree of fault arising therefrom is greater than the defendant's negligence.

Reasoning:

Four requirements to establishing a defense of assumption of risk:

1. ∏ must have knowledge of the facts constituting a dangerous condition
2. ∏ must know the condition is dangerous
3. ∏ must appreciate the nature and extent of the danger
4. ∏ must voluntarily expose himself to the danger

- Some comparative fault jurisdictions have abolished assumption of risk as a complete bar to recovery
- However, even in these jxs, express assumption of risk continues as an absolute defense because this deals with contract not tort law
- When implied assumption of risk occurs, have to consider the type of implied assumption of risk before determining whether there is a complete bar to recovery

    - Primary—when a ∏ implicitly assumes those risks inherent in the activity and the determination is whether the Δ's legal duty to the ∏ encompasses the risk encountered by the ∏
        - If no, the ∏ has failed to establish a prima facie case of negligence by failing to establish the existence of a duty
    - Secondary—when ∏ knowingly encounters a risk created by Δ's negligence.
        - Since express and primary assumption of risk are compatible with comparative negligence, we will refer secondary implied assumption of risk as "assumption of risk"
- Some states have retained assumption of risk as an absolute defense
- Other states have said that assumption of risk is not a total bar to recovery and let the jury consider the ∏'s negligence in assuming the risk
    - In these states, if the ∏'s total negligence equals or exceeds the Δ's, then the ∏ is completely barred from recovery
    - This court adopts this view and remands the case

Book Notes:

Hat and fire example

Class Notes:

- Note that primary assumption of risk is not a true affirmative defense—it is just asking whether the defendant had a duty to do anything differently. (Good example of this is *Murphy*)
- Primary implied assumption of risk (risk inherent to the activity) is not a true affirmative defense. It only serves to differentiate risks that are the defendant's legal duty to avoid, from those that are not. The former would be risks resulting from negligence, the latter would be inherent risks (primary implied).
- Secondary implied assumption would therefore be risks resulting from negligence, that the plaintiff knowingly encounters. This is a true affirmative defense to be raised only after the plaintiff has established prima facie negligence on the defendant's part. Such assumption of risk need not be reasonable. (kind of like *Dalury*)

CHAPTER X: DAMAGES AND INSURANCE

- The tort system is evolving from a liability system to an economic approach.
- We choose between risk groups: who will do the compensating?
    - "A basic policy orientation whether accident losses generally, or any particular accident loss, should be absorbed by the tortfeasor or by a collateral source, whether in accordance with the regime of tort law or the regime of private or social insurance."

Three criteria to consider

1. reprehensibility of defendant's conduct (FAIRNESS)
2. desirability of attributing the cost to the loss-causing enterprise for reasons of accident prevention and cost-allocation (DETERRENCE)
3. function of, and economic base, of the particular collateral compensation regime. (what's the purpose of the system, and who's paying for it) (COMPENSATION/ SPREADING)

Fleming argues that the tort system will shift... as insurance takes on the task of compensating people. Ultimately perhaps shifting to a social insurance scheme? He argues that tortfeasors no longer bear the burden: the burden is collectivized through insurance, i.e. everyone takes on a share of the burden. Loss allocation is thus shared amongst everyone.

The Chicago fire example. The cow kicked over a lamp while it was being milked. We can't hold the person milking the cow responsible for the loss of the entire city of Chicago - that would be too extreme a burden to bear. It makes more sense for everyone to have their own insurance.

Compensatory Damages:

Two kinds of Compensatory Damages:

1. Economic damages (pecuniary)
2. Non-economic damages (pain and suffering)

Economic Damages

1. Lost wages. Resulting from accident and time spent on trial.
2. Future earnings, lost earning capacity. Career plans. Not so much what he wanted to do, but what were his **options**. Lost potential.
3. Medical expenses.

Lost Wages

- loss resulting from accident
- loss resulting from time invested in the trial.

Future earnings

- this comes up often in the case of homemakers. They may not have been doing anything remunerative (defense argument), but they had the potential to enter the workforce and earn (plaintiff's argument), the option to do so.
- Consider how well he was doing in career.
- We estimate, based on all these factors, what his annual earnings would be, multiply by how much longer we could expect him to work until.
- Defense would argue for a reduction of damages based on what he actually can do in his injured state. So we deduct this from his damages.
- Defense would also want to contest his life expectancy. How long can we expect him to live. This would affect our calculation of lost future earning capacity.
- Plaintiff would argue that this means a loss of potential life and should be compensated.
- Defense counsel would argue that therefore he would not need as much. That the loss of potential future life, means lower living expenses, etc.

Medical expenses

- not just physical. Mental expenses too, e.g. psychiatrist visits, counseling, etc.

External issues to consider

Taxes - Compensatory awards for personal physical injuries are not taxable. Plaintiffs would argue that the jury need not be informed of this. But this would affect the awards given. The current rule is that juries need to be told. This will help reduce awards and keep them reasonable.

How much should we be taking into account future lost earning capacity? The traditional rule was that juries should not take this into account. This has changed.

Future considerations: if he would get married, if he would have children, etc. Future tax rate, etc.

Traditional rule was that you tell the jury as little as they need to know. Contemporary rule is that you tell the jury everything, and let them figure it out.

Inflation - we should also make predictions about the effect of future inflation on the award. Traditionally not figured in, but this changed in the 1970s when inflation started escalating. Now juries are instructed about the rate of inflation and the effect on the awards.

- Present value of award. (see BAJI handout) Reflects the rental value of money.
- The present value will be dependent on the interest rate and inflation. Things that affect the growth of the money and the value of the money.
- So winning a million bucks today isn't really winning a million bucks when

you think about what it's worth.
- Sports contracts are usually calculated in terms of present value.

Attorney's fees are inadmissible evidence for determination of damages. But in certain cases involving public interests, attorneys may recover fees from the defendant. Theoretically economic damages are easy to calculate, although practically it's quite complicated.

But non-economic damages are harder to calculate.

Shocks the Conscience?

Seffert v. Los Angeles Transit Lines

Facts: Lady was getting into the bus, and the door closed on her leg and the bus dragged her for a little while. Lady went through lots of operations, and her leg is messed up pretty badly. There is lots of pain and the procedures are painful as well. The jury awarded her the compensatory damages that she wanted for pecuniary and actual damages—over $53,000—and she was granted $134,000 in pain and suffering damages. The Δ says that these damages are excessive.

Issue: Was the amount of damages excessive?

Holding: No.

Reasoning:

- An appellate court can only interfere and say that a judgment is too much if the amount of damages shocks the conscience and suggests passion or corruption on the part of the jury
- The non pecuniary damages given here cover stuff like this:
    - Pain
    - Suffering
    - Humiliation as a result of being disfigured
    - Constant fear and anxiety that leg will have to be amputated

Considering all of this, the court cannot say that the award is too high as a matter of law.

DISSENT:

The award is excessive:

- This award exceeds the pecuniary damages
- Exceeds any award given in the state for pain and suffering
- ∏'s counsel asked for $100 a day for pain and suffering form the time of the accident to the time of the trial and for $2000 a year—this argument should not be allowed, because there is no way of translating pain and suffering into money, and thus, these estimations are opinions and conclusions on matters not disclosed by the evidence.
- Pain and suffering awards are punitive not compensatory

Book Notes:

Note 4 (p. 690): Arguments for and against pain and suffering awards:

1. Justification: even though there is no way to measure the loss in question, plaintiff has in fact lost something and the wrongdoer should not escape liability because of the difficulty of valuation

    a. Response: the award cannot return to the plaintiff what was lost
2. Money serves as a consolation for the pain and suffering a person went through
    a. Response: it is doubtful that past pain figures strongly as present outrage
3. Without pain and suffering damages, there would be more negligence because the cost of negligence would be less to tortfeasors (deterrence), there would be more accidents, more pain and suffering, and thus higher social costs.

Class Notes:

POLICY

<u>P&S damages in view of the goals of the tort system</u>

1. Optimal deterrence-- The vast disparity in P&S damages makes it hard for a class of defendants to know how much they should be investing in health and safety. The wide variance negatively affects optimal deterrence. No consistency in P&S awards. How will we calculate B, P, and L?\

2. Spreading (via insurance)--It also makes it difficult for an insurer to know how much they should charge to insure someone - they have no idea how much they have to pay out.

3. Administrative costs-- It isn't conducive to settlement too. No agreement about what the case is worth because of the wide variance in how much juries might offer. So this will affect the ability of both sides to come to a settlement.

<u>P&S as Insurance</u>

Some argue that P&S damages are a form of unpaid insurance. People do not insure against P&S themselves, but collect it from defendant. Therefore we should stop awarding P&S. It should be handled by insurance directly.

Counter-arguments:

Insurance companies cannot insure against P&S because it's hard to calculate. Market failure.

It is not that people choose not to insure against P&S. But they ignore the risk of it.

P&S damages serve a moral function too - expressive function of community.

P&S help increase deterrence effect.

P&S help pay lawyer's fees.

Some argue that P&S damages should be capped. (MICRA)

Others advocate basing P&S damages on a range determined by prior awards. Juries would need to offer special explanations for giving awards in the top or bottom quartile of this range. And would not be allowed to exceed it.

Pain and Suffering?

McDougald v. Garber

Facts: In this case a woman was left in a comatose state after a physician's malpractice. The parties agree about the pecuniary damages that would attach if liability were established and they agree that if she were conscious and aware of her pain and suffering she would be entitled to pain and suffering damages. Δ argued that she was so injured that she was not in pain and $\prod$ said she was aware

of her circumstances. Judge instructed jury that they could award loss of enjoyment of life in addition to pain and suffering regardless of whether she was conscious or not. Jury awarded $1 million to pain and suffering and $3.5 million to loss of enjoyment of life. Judge reduced to $2 million in total.
Issue: Is the loss of enjoyment of life damage separate element of damage and distinct from pain and suffering?
Holding: No.
Reasoning:

- Recovery for nonpecuniary loss rests on the legal fiction that money can compensate for a victim's injury
- Fiction is accepted by the court
- Willingness to indulge in this fiction comes to an end when it ceases to serve the compensatory goal of tort recovery.
- When a person is unaware of the loss of enjoyment of life, then tehse damages have no meaning or utility to the injured person
  - Cognitive awareness is a prerequisite for recovering for loss of enjoyment of life
  - For pain and suffering there has to be some awareness on the part of the injured
  - Loss of enjoyment of life should be factored in to the pain and suffering award

DISSENT: The loss of enjoyment of life is an objective fact like the loss of a limb, etc. Injured party is entitled to a monetary award as a substitute. The impairment exists independent of the victims ability to comprehend it.

Book Notes:

Note 4 (p. 705): note is about responses to the majority position from the dissent (omitted from case reproduction)

Note 7 (p. 706): *Sander*: misread pap smear leads to cervical cancer diagnosis and diagnosis of death to follow because cancer was so far along. The court upheld pain and suffering award for the anguish she must have gone though knowing her death was soon.

By statute CA has barred the award for pain and suffering in cases in which the victim dies before judgment.

Jones: Baby Andrew born with lots of problems and died at 18 months—all due to negligence of defendant—the court upheld large monetary judgment on survival claim and wrongful death claim—baby went through a lot and the family lost chance to know him like families generally know each other.
Note 9 (p. 708): Doomed Decedent Distress
Two kinds of actions on behalf of deceased parties: wrongful death and survival. Survival actions allow decedent's estate to proceed with claims that decedent might have brought but for the death. Usually fact-specific (decedent must have been aware of

impending death) and centering on emotional harm before death. Even for scant seconds and short periods of time.

Wrongful death is a statutory cause of action, damages usually limited to the economic harm suffered by survivors. This is not much, especially in the death of a young child. So the survivors have to try and establish emotional damages to get more justly compensated, e.g. by a survival action.

Class Notes:

This case seems paradoxical: a person who suffers less injury might recover more than someone who suffered injury serious enough to cause a coma, just because if you're unconscious you don't get P&S, or at least loss of enjoyment of life.

Does this send the wrong message—it seems as though it is better to injure someone really badly in some situations so that pain and suffering will not get factored in…is this bad policy?

Arambula v. Wells

Facts: ∏ was injured in a car accident and he worked at a family owned business and despite missing work because of his injuries, he continued to receive his weekly salary. Δ brought a motion to not give him lost wages, because he was still getting wages. ∏ said that his brother wanted to be reimbursed for the salary ∏ was given but there was no contract stating this. Trial judge ordered jury not to award lost wages.
Issue: Will the tortfeasor be let off the hook when damages are paid by another source?
Holding: No.
Reasoning:
Under the collateral source rule, plaintiffs in personal injury cases can still recover full damages even though they have already received compensation for their injuries form collateral sources such as medical insurance.

- Tortfeasors should not get a windfall from the thrift and foresight of people who have insurance, pension, etc.
- A contrary rule would misallocate liability and discourage people from getting benefits from independent collateral sources
- *Helfend* case judge rejected defense efforts to introduce evidence that most medical bills had been paid by insurance carrier.
    - Δ in this case convinced trial court that this only applied to cases in which plaintiffs have incurred an expense in order to get a benefit (paying insurance)
    - said that collateral source rule did not apply to benefits that were gratuitous
    - Court in this case says there are reasons why this is a wrong reading of case
        - Law on collateral source rule prior to precedent case makes no special distinction for gratuitous services

- Precedent also rejected the Δ's reading of this case
- Majority of jxs hold that gratuitous payments falls under the collateral source rule
- Public policy concerns—future tortfeasors will suffer because family members won't give money if a tortfeasor gets its benefit
- Collateral source rule partially serves to compensate for the victim's attorney fees and pain and suffering and it will serve to inspire victims to pay back their benefactors or to act similarly in charity
    - So there is no real risk for double recovery

Book Notes

Note 1 (p. 715): *Peterson*: refused to permit plaintiff to recover for value of medical services he had received—say that the purpose of compensatory damages is not to punish

Note 5 (p. 716): Defendant's malpractice case in which the child needed special education for life. ∏ proved what this private education would cost. Court held that Δ was improperly prevented from arguing that public education was available for that need. Said that giving money for private education in this case would make damages punitive not compensatory.

Class Notes

Collateral source rule. Tortfeasors should not not have to pay, just because the plaintiff or his employers have insurance that covers for lost wages, or receives other benefits. Otherwise we misallocate liability for tortious losses and discourage people from obtaining benefits from independent sources. It would underdeter tortfeasors.
Policy arguments apply to. Without the rule, we would discourage private charity, people from helping each other. Families would cease to offer assistance, knowing that it would just get the tortfeasor off the hook. This would result in the state bearing a greater burden of providing for the injured parties.

Donors should not have to consult with a lawyer to make sure their generosity and largesse is not hijacked by tortfeasors. The donors and those who help, do not help in order to benefit the tortfeasor, but the injured party (the plaintiff). If people know that helping people will mean that those liable won't have to pay, they will cease to help people as much.

The collateral source rule primarily covers insurance payments. Because under insurance,
a. You pay premiums to be insured. So there is no double recovery. you have already paid something out.
b. Subrogation. You subrogate your right to recovery. Any recovery goes to the insurance companies anyway. Justified because it's a contract, and if the insurance company gets its money back, it replenishes the pool of money available to pay injured and insured parties.

Collateral source rule justified by:

1. Insurance considerations (no double recovery, see above).
2. Fairness. Don't want the tortfeasor to escape liability.
3. Charitableness. We don't want other people's generosity to benefit the tortfeasors, when it's meant to benefit the plaintiffs.
4. Deterrence. We want to ensure that potential tortfeasors, and this particular tortfeasor, are deterred.
5. Paying attorneys. A substantial portion of the P's award goes to the attorney.

Punitive Damages

Almost all states have concluded that sometimes damages may be awarded to punish the defendant or to make an example of that defendant so that others will avoid this serious kind of misconduct.

Under California Civil Code 3294,
"where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to actual damages, may recover for the sake of example and by way of punishing the defendant."

Taylor v. Superior Court

Facts: ∏ sued for compensatory and punitive damages for a car collision. He says that there should be punitive damages, because the Δ had many DUIs and had one pending now and he was driving an alcohol truck and was drinking alcohol while driving.
Issue: Is the absence of an intent to harm on the defendant's part fatal to the plaintiff's claim for punitive damages?
Holding: No.
Reasoning:

- Court looks at CA Civ. Code section cited above
- Court says that malice implies an act conceived in a spirit of mischief or with criminal indifference to the obligations owed to others.
- Regardless of intent, a conscious disregard for the safety of others is sufficient to support an award for punitive damages
- There are sufficient allegations to reasonably conclude that Δ consciously disregarded the safety of others
- Punitive damages in this context serve to deter similar future conduct

Concurrence: Should not allow for punitive damages in every case of drunk driving. In this case it is okay though because he did it so many times
Dissent: This will not reduce the number of drink driving accidents. Punitive damages are unjust enrichment. Lots of other policy arguments in the dissent.

Book Notes

Note 4 (p. 723): Several years after this case, section 3294 was amended to say that oppression, fraud, or malice had to be proved by clear and convincing evidence. The three terms were also defined. (see note)

Note 9 (p.724): Restatement section dealing with employer liability for punitive damages. CA applies a different rule (see note if needed).

Note 10 (p.735): only a small minority of states allow punitive damages to be sought from a deceased tortfeasor.

Note 11 (p. 735): government and punitive damages

Class Notes

- Punitive damages are purely meant to deter.
- Punitive damages can be awarded when tortfeasor is willful. Although the *Taylor* court allowed it for recklessness.
- Punitive damages are taxed
- Punitive damages cannot be too high, because this violates due process (have to know what your punishment could be); anything more than 9.99 times the other damages is said to be too much

Arguments against punitive damages:

- Plaintiff has already been fully compensated. Additional award may be over-compensation.*
- It should be the criminal law that punishes wrongdoers and deters them. (assumption is that the criminal law's sanction is meant to deter. And that he would be prosecuted. Dubious for the time. Even today, is the criminal sanction adequate? Consider the sentencing limits, etc. Furthermore in this case, he has already been criminally sanctioned, and obviously it didn't work.)
- Punitive award is double punishment, if the D may also be subject to criminal prosecution.

4. A counter argument might be that compensation is adequate deterrence for a negligent tort. But a reckless or willful tort requires greater deterrence (more severe tort), and so punitive damages are allowed. In the case of repeat offenders, punitive damages can be imposed because other sanctions have failed?

The US Supreme Court has held that too high a ratio between the compensatory and punitive damages violates the due process clause of the Constitution. The rule set down was that if the punitive damages were more than 9.99% (double digits) of the compensatory, they ran the risk of being excessive.

Govt isn't liable for punitive damages. Why?
1. well, they make the rules.
2. separation of powers: you can't allow the judiciary to hold other areas of government liable for punitive damages. Giving them too much power.
3. it may not work very well. Because the specific official who committed the tort, will not have to pay a cent.
4. the cost ultimately comes back to the taxpayers.

Introduction to Insurance

1. first party insurance: protection of the insured or the insured's family from the direct adverse economic effects of a particular event (loss insurance)
2. Third party insurance: taken out to protect the insured against the economic impact of having to pay damages to another person (liability insurance)

Loss Insurance, Collateral Sources and Subrogation

Frost v. Porter Leasing Corporation

Facts: ∏ was injured in a car accident and he sued the other driver for medical expenses, pain and suffering, impaired earning capacity, and future expenses. His wife sued for loss of consortium. While case was pending, insurance plan paid for by his employer gave him medical expense benefits of $22700. ∏ settled claim for lump sum of $250,000. Insurance company intervened saying that they had a right of subrogation as to any damages that ∏ recovered for medical expenses. Trial court said that insurance company had right to recover the amount that it paid minus a share of the costs that the ∏ had incurred in obtaining a settlement.

Procedural History: Trial court said that insurer has the right to subrogation.

Issue: Does an insurer who pays health benefits to the insured have a non-contractual implied right of subrogation in any damage award that the injured party recovers?

Holding: No.

Reasoning:

Right of subrogation can come form:

1. contractual agreement
2. implication in common law

No contract in this case, so going under theory of implied subrogation.

1. Policy purpose: to prevent double recovery by the insured
    a. Returns any excess to the insurer who can recycle it in the form of lower insurance costs
2. This right does not arise automatically:
    a. Depends on the type of coverage involved
        i. Property damage recognizes right to subrogation—insurer can be fully compensated by the wrongdoer for the destruction of property and the actual loss can be determined with certainty.
        ii. Personal insurance is less of a contract than a form of investment
            1. the insured's receipt of damages and insurance benefits may not be duplicative, because the insured is likely to have suffered intangible losses that are unsusceptible to precise measurement and the two sources of recovery could cover very different losses
        iii. it is unlikely that all of the accident victim's damages will be offset much less duplicated by the payment of both damages and insurance proceeds
            1. insured may face multiple different damages

2. costs of litigation or settlement might reduce his overall recovery

Concurrence: In fairness to the insured, the policy must talk about subrogation. He does not agree with the court that subrogation for payment of medical expenses presents any greater problems than for any other type of injury. Subrogation is a reasonable method of assisting in holding down the costs of health insurance. There is no justification for denying subrogation because the claimant may not have been made whole on all elements of the damages. Health insurer should not be forced to assist in making the claimant whole on some other aspect of his damages such as lost wages and pain and suffering for which the insured has not purchased coverage form the health insurer.

Book Notes

Note 6 (p. 752): talks a lot about insurance stuff—read it again if needed on exam.

The Collateral Source Rule and Loss Allocation in Tort Law
By: Fleming

He is questioning whether or not the tortfeasor is the one we want to hold responsible—should we be compensating people through third party plaintiffs or through their own insurance—he says that that there are a few factors to look at

1. how reprehensible the conduct of the defendant is
2. moral justice—is this going to be effective—so you force the person who is causing the accident to pay for it—deterrence
3. is there enough money in the compensation pool so that people can get compensated?

Fleming does not like the tort system—
He says that we have moral ideas that we want to punish the wrongdoer—he says that it is inefficient and he says that there is no moral justice coming out of this (he is saying that now the tort system only functions if someone has insurance, and so we are punishing the people insuring the tortfeasor)
Fleming's implicit solution is: have everyone rely on their first party insurance payments
If we rely on insurance, then you can't get payment for pain and suffering damages

CHAPTER III: THE DUTY REQUIREMENT: PHYSICAL INJURIES

In the cases that follow, the defendant makes the claim that he had no duty to exercise due care in the particular situation.
Note that in the cases in the Chapter II (the negligence chapter), if there was found to be negligence, then there was definitely a duty, because some duty must exist before a defendant can be said to have committed actionable negligence (otherwise called breach of duty)

Why do people like the duty question? Because if it is established that there was no duty, then the defendant can prevail on summary judgment. In the case where a duty is established, the defendant might still win, but he will have to go to trial and the jury will have to decide whether there was negligence (breach of duty).

First question to ask is whether there is a duty (or whether a general duty of due care exists unless the defendant can invoke an exception)

Affirmative creation of risk? If yes, then there is a duty.
An undertaking? Consider Harper v. Herman
No affirmative act? Then consider omission cases – was there a special relationship?
Special relationship? Commercial activity, custody, deprived of opportunity to fend for oneself, expectation of protection.
a landowner? If so, then it creates special relationships in certain cases.
government or a government official? If so, is there total immunity (excluded from liability), qualified immunity (discretionary activity), or no immunity?

Obligations to Others

Harper v. Herman

Facts: ∏ went of Δ's boat on a boating trip. Decided to go swimming, and ∏ dove off the side of the boat into 2-3 foot water, and he became a quadriplegic. ∏ brought suit saying that the defendant had a duty to warn him that the water was too shallow for diving.
Procedural History: Trial court gave summary judgment to the defendant and the court of appeals reversed. Defendant appealed.
Issue: Whether the boat owner who was the social host had a duty of care to warn a guest on the boat that that water is too shallow for diving.
Holding: No.
Reasoning:
The court says that the ∏ must show that there was a special relationship between him and the Δ that placed an affirmative duty to act on the part of the Δ.
There are certain situations in which there is a duty to warn (see page 133): Restatement of Torts 314A

1. common carriers
2. innkeepers
3. possessors of land who hold it open to the public
4. people who have custody over other people under circumstances in which that other person is deprived of normal opportunities of self protection

- Court says that there would be a special relationship only if Δ had custody of ∏ under circumstances in which ∏ was deprived of normal opportunities to protect himself.
    - Not present here
    - Record does not establish that ∏ was particularly vulnerable or that he lacked the ability to protect himself
    - Record does not establish that Δ had considerable power over ∏'s welfare or that Δ was getting financial gain by having ∏ on his boat
    - Nothing to show that ∏ wanted special protection from Δ
- Superior knowledge of a dangerous condition by itself in absence of a duty to provide protection is insufficient to establish liability in negligence

Book Notes

Note 1 (p. 134): Ames says that the appropriate rule should be that one who fails to save another from impending death or great bodily injury, when he might do so with little or no inconvenience to himself, and the death or great bodily harm follows as a consequence of his inaction, shall be punished criminally and shall make compensation to the party injured or to his widow or children in the case of his death.

Note 6 (p. 136): Lady was injured from a device inserted in her by a doctor. The doctor found out that the device was dangerous a couple years later and she was not notified and did not find out for another year and she suffered injury because of the delay. The court said that she stated a cause of action against the defendant for failure to warn her about the newly discovered dangers.

Restatement § 321: When an actor does an act and subsequently realizes that the act has created an unreasonable risk of causing harm to another, he is under a duty to exercise reasonable care to prevent the risk from occurring. This is the creation of risk resulting in a duty.

Note 4 (p. 135): In this case, a person fell off a train and under one of the wheels and sustained injury. He alleged that the defendant's employees knew about the plight but did nothing to help him. The court imposed a duty recognized by this section of the restatement:

Restatement § 322: When an actor's conduct has caused bodily harm, whether tortious or innocent (negligent or non-negligent), the actor has a duty to prevent further harm.

Note 7 (p. 137): situations in which it can be argued that people expected protection from the defendants.

Class Notes

A social host-guest relationship. No duty is imposed, because:

- Herman didn't voluntarily assume a duty to protect Harper.
- An affirmative duty to act only arises when there is a special relationship between the parties.

Herman did not profit or gain from Harper being on his boat. So no special relationship creating a duty.

- Harper did not expect any protection from Herman (e.g. didn't say he couldn't swim, was prone to being rash, etc.)
- Harper was fully able to take care of himself.
- Herman did not hold considerable power over Harper's welfare (Harper's well-being was not dependent on Herman).
- Harper was not deprived of normal opportunities to protect himself (was not drunk, disabled, etc.)
- Superior knowledge without a duty of care does not establish liability.

Profit, or a gross inequality of power, are grounds for establishing the existence of a duty.

Farwell v. Keaton

Facts: Two friends were hanging out and they were drinking and then one of them got beaten up, and his friend applied ice to his head and then they drove around a little more for a couple of hours. At some point during the drive the beaten up guy went into the backseat and fell asleep. The friend went to the beaten boy's grandparent's house and tried to wake him up but couldn't, so he just left him to sleep in the back of the car. Grandparents found him in the car and took him to the hospital and he died three days later due to the injuries. Father sued the friend saying that he would not have died if he was taken care of or if someone was notified of his condition. Doctor testified that he would have had a much better chance of recovery if he was taken to the hospital sooner. Jury awarded father damages and the court of appeals reversed saying that the friend assumed no duty to obtain medical treatment for the beaten boy.
Issue: In a situation in which a person tries to aid an injured victim does a duty to take affirmative action arise where the individual and the victim were friends spending time together socially?
Holding: Yes.
Reasoning:
Every person is subject to the legal duty to avoid any affirmative actions that could worsen a situation involving a person in distress.
Jury must first determine whether the defendant tried to help the victim
If he tried to help the victim, he is required to act as a reasonable person
In this case, he helped by
Ice pack to head
Tried to wake him up
Friend said he did not have a special relationship that would give rise to such a duty
However, courts will find a duty where reasonable men would agree that one exists
Spending time together socially

Implicit in any social undertaking is the idea that if one of the people is endangered, the other will help him if by doing so he will not put himself in danger
Finding that there was no duty to help him would be shocking to humanitarian considerations
In this case, the social nature of the undertaking gave rise to a social relationship and there was an affirmative duty to come to his aid
Dissent: There is no legal authority to support that there was a special relationship in this case—should be seen as co-adventurers not a made up special relationship of social relationship.

Book Notes

Note 1 (p.141): The court notes that there are two separate grounds for obligation of due care in this case:
friend voluntarily came to assistance of beaten friend
there was a duty to assist based on a preexisting relationship
What if a passerby had discovered the beaten boy?
Restatement § 324 states that liability is only incurred when the actor fails to exercise reasonable care to secure the other's safety while within the actor's charge, or the actor leaves the victim in a worse-off condition when aid is discontinued. Once you begin an undertaking, you cannot abandon it.

Note 6 (p. 142): Stopping other people from giving aid:
Restatement § 326: The intentional prevention of aid creates liability.
Restatement § 327: The negligent prevention of assistance or aid, can create liability. If you negligently prevent someone from helping someone else.

Note 6 (p. 143):
There is a water company and the water company failed to provide water, and there was a fire and the plaintiff wants to sue the water company for not providing water to put the fire out
Cardozo says that there is no duty—action/no action distinction—in this case, they just failed to act is what he is saying—there is a good argument that this is like the driver who fails to step on the breaks
Why did Cardozo decide this way? It probably has to do with crushing liability
Posner tries to justify this decision—maybe what is really happening here is that the problem is the fire starting, not the water being needed to out the fire—water company cannot ask that people equip there places with fire alarms, etc., so in this sense, it might be making people not take precautions themselves if the water company is liable
Also, whenever there are mass tort issues, it is very difficult to have insurance handle it
If everyone has claims, then there is not enough in the insurance pool to handle everyone in that claim
To put a mass tort liability on one party is not going to be good, because, no insurance company will be able to pay for it

Class Notes

Note that the affirmative step rule that the court relies on is valid law—the special relationship between the two is questionable though.

Strauss v. Belle Realty Co.

Facts: A failure at a power system left the city in darkness. A tenant at a building suffered an injury in a common area due to the power outage, and the tenant says that the power company had a duty of care to him. The power company had a contractual agreement with the tenant in regard to the tenant's space and a contractual agreement with the landlord as to the common areas. (tenant went to fetch water form the basement and fell)

Procedural History: The lower court granted collateral estoppel against the power company regarding gross negligence and denied the power company's cross motion to dismiss the complaint, because the court though that there was a question of fact as to whether the company owed a duty of care to the plaintiff. Court of Appeals reversed and dismissed the complaint against the power company.

Issue: Whether the power company owed a duty to ∏ whose injuries from a fall on a darkened staircase may have conceivably been foreseeable, but with whom there was no contractual relationship for lighting in the building's common areas.

Holding: No. Judgment affirmed.

Reasoning:

- Although a contractual duty is not a prerequisite to finding that a duty of care exists, the courts have a duty to protect a defendant from "crushing liability"
- A utility company's liability in a case where it failed to provide services would be enormous if not limited only to ∏s with a contractual relationship with the company
- Moch: water company's liability would be unduly extended if it allowed a company whose warehouse burned down to sue the water company
- The court reserved the question of what remedy would apply in a case where the utility company was guilty of reckless or wanton indifference
- Because the power company in this case was guilty of a lower level of misconduct (gross negligence) than contemplated by the Moch court, Moch controls this case
- There is an argument that the injuries were foreseeable and that the ∏ was part of a specific, limited, and circumscribed class with a close relationship to the power company
- This does not alter the outcome of the case, because the power company provides electricity to millions of customers, and this would do nothing to limit the power company's exposure to liability to reasonable levels
- Also, this argument would not prevent a landlord's invitees or people making deliveries from suing the power company

DISSENT: Majority does not look at public policy from all angles—may not lead to crushing liability—it may be able to pass the burden of financing damage awards on to its stockholders and customers. Majority has ignored the burdens placed on the injured parties and seems to be making the argument that the more people injured through a tortfeasor's gross negligence, the less liable the tortfeasor is.

Class Notes

ConEd was found liable and grossly negligent.
They had a duty to provide electricity (by contract) and failed in performance of their duty.
There was duty, there was breach, there was causation, and there were damages.
But ConEd not liable.
Because the court felt that they had to protect against excess liability.
Public policy dictated that the plaintiff could not be characterized as belonging to a narrowly defined class: residents of the apartment complex.
(if plaintiff did belong to a defined and identifiable class, then liability could be found)
And therefore allowing the plaintiff to recover would extend the orbit of duty too far: ConEd would be liable to too many people (the public at large).

Dissent disagreed because majority's reasoning meant that the more persons injured through ConEd's gross negligence, the less responsibility ConEd would incur.
It punishes the victims for the defendant's negligence, and not the defendant.

Court's decision on whether to allow liability for parties not in privity or not directly involved in the special relationship depends on:

- type of harm caused (economic, non-economic, etc.)
- nature of the information (in accounting situations)
- whether the harm is self-inflicted. Nature of the harm.
- the culpability of the defendant
- egregiousness of the conduct: negligence, gross negligence, etc. The more negligent it is, the more the court is willing to extend liability.

Obligations to Protect a 3rd Party

Tarasoff v. Regents of the University of California

Facts: Proddar confided his intention to kill Tarasoff to his psychologist. The campus police briefly detained Proddar, but released him when he appeared rational. No one warned Tarasoff of the threats made on her life and 2 months later, Poddar killed her. Tarasoff's parents brought suit against the therapists, the campus police, and the regents of UC.
Procedural History: Superior court decided that facts did not set forth causes of action against the defendants and sustained the Δ's demurrers to the Tarasoff's second amended complaints without leave to amend. The ∏s appealed.
Issue: Does a therapist have a duty to protect a foreseeable victim from dangers posed by their patients?
Holding: YES.
Reasoning:

- There is a special relationship between Proddar and psychologist.
- Such a relationship may support affirmative duties for the benefit of third persons.
- Δ contends that imposition of a duty to exercise reasonable care to protect third persons is unworkable, because therapists cannot accurately predict whether or not a patient will resort to violence.

- The court recognizes that this is a difficulty, but the court just asks that the therapist act with reasonable degree of skill, knowledge, etc. that is exercised by members of that professional specialty under similar circumstances
- Δ contend that even if the therapist does in fact predict that a patient poses a threat, the therapist should be absolved from any responsibility for failing to act to protect a potential victim.
- The court says that after a therapist does in fact determine that that a patient poses a serious danger of violence to others he has a duty to exercise reasonable care to protect the foreseeable victim of that duty.
- The court decides that Tarasoff can amend complaint, but police defendant did not have a special duty to either Proddar or the victim

Concurrence: There are no professional standards regarding the prediction of violent behavior, and there is a lot of evidence that shows that psychiatric predictions of violence are inherently unpredictable

Dissent: General principles of tort law favor nondisclosure in cases like this one.
Confidentiality is important for 3 reasons:
prevents those in need of therapy from being deterred
promotes effective treatment by encouraging patients to confide in their doctors
allows patients to maintain trust in their doctors.

Book Notes

Note 2 (p. 164): If a passenger is riding in the car with the driver and the driver is going to hit someone and the passenger knows that the driver does not see the person and all the passenger has to do is tell the driver of the person on the road, and the passenger fails to warn the driver, there is no liability on the part of the passenger—because in a situation like this, even calling the driver's attention to the person could well be negligence itself, so the passenger is in a terrible position to choose between action and inaction.

Note 3 (p. 164): In this case, a girl was known by the doctor but she did not know that she was HIV positive. Three years later the girl became intimate with the Π. Two years later, the doctor told the girl that she had HIV and she died a month later. The court said that even though there was no patient/doctor relationship between the Π and the doctor, the doctor had a duty to plaintiff.

Class Notes

fundamental principle: when one person is in a position where the lack of ordinary care and skill in his conduct would cause danger of injury to another person or property, a duty arises to use ordinary care and skill.

Factors to Consider

1. foreseeability of harm to plaintiff
2. degree of certainty that plaintiff suffered injury as result of breach
3. closeness of connection between defendant's conduct and injury suffered
4. moral blame attached to defendant's conduct
5. policy of preventing future harm (deterrence or incapacitation)
6. burden to defendant and consequences to community of imposing duty to exercise care

7. availability, cost, and prevalence of insurance for risk involved

A special relationship between a doctor and his patient, creates a duty to third parties. Doctor in Tarasoff who treated Poddar had a duty to warn Tarasoff.

Restatement § 315: Duty of care arises from (a) special relation between actor and third person which imposes a duty upon actor to control third person's conduct, or (b) special relation between actor and other which gives to the other a right of protection.
§ 316 to 319 define these special relations:
- parent-child
- master-servant
- possessor of land/chattel-user of land/chattel
- one who takes charge of a third person who he knows/should know is likely to cause bodily harm if uncontrolled, has a duty to exercise reasonable care to control third person and prevent such harm

In a lot of the cases where we say that there is a responsibility to someone to prevent them from being injured, they are incapacitated. Either too young, or impaired in some way. People lacking rational judgment, mentally impaired (psychopaths, sociopaths). The law is more willing to assert that these people are owed responsibilities of care.

Hospitals must exercise reasonable care to control patients' conduct to protect third persons. Similarly, doctor must warn patient if patient's condition or medication renders certain activities dangerous.

In absence of such special relationship, inaction is not a breach of duty. But if the actor is hurt by the breach, the actor's inaction can constitute contributory negligence.

Note: This case is very different from special relationship cases we have seen thus far. In this case the special relationship contemplated is not between the doctor and the plaintiff it is between the doctor and a third party.

Note how this case will affect the relationship between patients and doctors—will refrain from talking openly with the doctor

Duty to Control Conduct of Others is not Necessarily limited to Business and Professional Relationships/NEGLIGENT ENTRUSTMENT

Vince v. Wilson

Facts: Wilson bought her grandnephew a car. Gardner was the salesman and at the time she bought the car, she knew that grandnephew had no license and that he failed several times and she informed Gardner and Ace Auto Sales about this several times. Wilson also knew that he used drugs and drank. Grandnephew got into accident that injured his passenger and passenger sued Wilson, Ace and Gardner for negligently entrusting an auto to an incompetent driver.

Procedural History: Trial court directed verdict for Ace and Gardner and the jury returned a verdict against Wilson. Passenger (∏) appealed the directed verdicts and Wilson appealed the jury verdict against her.
Issue: Does doctrine of negligent entrustment apply to people that knowingly provide funding to incompetent drivers and to persons that knowignly sell autos to incompetent drivers?
Holding: Yes.
Reasoning:
General rule is that negligent entrustment applies to combined negligence of incompetent driver and car owner who lends car to incompetent driver. ∏ says it should include those who provide funding to incompetent driver and those who sell cars to incompetent drivers. The Δs argue that it should be limited to car owners who lend their cars. Courts in other states have interpreted the rule more broadly than the Δs in this case. Restatement rule covers sellers, lessors, donors and lenders. The cases that Δs use to support their position is highly criticized by legal scholars. The trial court erred in directing a verdict for Ace and Gardner.

Book Notes:

Note 6 (p. 183): There is a statute against leaving car in ignition. If a thief steals car with key in ignition and gets into an accident, some courts will extend liability to car owner for violation of statute. Other states realize that the purpose of the statute is to avoid time consuming and expensive police searches for cars and payments by insurers for their loss, so they will not extend liability to the owner.

Class Notes:

Restatement § 390: Liability when actor supplies directly or through third party, a chattel to a person who the supplier knows or should know is likely to use it in a way creating unreasonable risk of harm to the person or others that will foreseeably share in or be endangered by its youth, due to youth, inexperience, or otherwise.

Reynolds v. Hicks

Facts: Hicks got married and there were a lot of people at the reception including underage nephew Steven. Steven consumed alcohol at the reception and then drove his sister's car. He then got into a car accident with Reynolds and Reynolds sued the Hicks claiming that they were negligent in knowingly serving alcohol to under age guests. Hicks moved for summary judgement on the grounds that WA did not extend social hist liability to situations where intoxicated under age guest s harm third parties.
Procedural History: Trial court granted Hick's motion and the appellate court certified the case directly to the Washington Supreme Court.
Issue: Does a social host who serves alcohol to an underage driver owe a duty of care to a third person injured by the intoxicated minor?
Holding: No.

Reasoning:

- Hanson v. Friend—held that minor that is injured from intoxication has a cause of action against the social host that supplied him with the alcohol.
- Reynolds argues that this should be extended to a cause of action for third persons.
- Such an expansion is not warranted by WA law.
- This court has been reluctant to extend the same kind of liability to social hosts that is extended to commercial vendors
- Social host liability will have more far reaching implications because there are only a limited number of bars, liquor stores, etc., but there are a lot of adult residents that throw parties.
- It is unrealistic to expect a couple like the one in this case to monitor their guests on their wedding day

Class Notes

Dissent argued that imposition of liability was at point of supplying the alcohol to the minor guest: a criminal violation.
In both social host and commercial vendor cases, a crime is committed. Dissent argues that it does not make sense to let the social hosts get away with civil liability for committing a crime when the vendors would not.

Landowners and Occupiers

Carter v. Kinney

Facts: Carter went to the Kinney's house for a Bible Study. He slipped and fell on the driveway, because there was ice there. He sued the Kinneys. Kinneys were not aware that the ice had formed overnight. They were receiving no material benefit form having people over at their houses, and they did not invite the public. Carter says that he was an invitee and Kinneys say that he was a licensee.
Procedural History: Trial court held that he was a licensee and granted Kinney's motion for summary judgment.
Issue: Did the trial court err in determining that he was a licensee and thus granting summary judgment?
Holding: No.
Reasoning:

- There are 3 kinds of people plaintiffs in premise liability cases:
    - trespasser—no permission to be on the property; no duty of care owed
    - licensee—has permission to be on the premises; owes duty to make safe dangers of which the possessor is aware
- In MO, social guest is a type of licensee
- invitee—has permission to be on the premises and the possessor of the premises has an interest in having them there such that the visitor believes that premises have been made safe to receive him
- owes duty to exercise reasonable care to protect the invitee against both known dangers and those that would be revealed by inspection

- entrant becomes an invitee when
    - possessor invites with the expectation of a material benefit form the visit
    - possessor extends invitation to the general public

In this case, Carter was a licensee because there was no material benefit and the invitation was not extended to the public

Book Notes:

Note 1 (p. 193): Justification for treating social guests as licensees:
Restatement 330 comment h:
Social guests are expected to take the premises as the possessor himself uses them

Note 5 (p. 194); **Restatement section 342**: provides times in which the occupier is subject to liability to invitee

Note 8 (p. 196): **Restatement section 339**: tells when the possessor of land is subject to liability for physical harm to children trespassing on their property if the physical harm is created by an artificial condition upon the land

Class Notes:

The traditional view of duty to trespassers, came about in the context of rural areas and large plots of land, an agrarian community. where most natural dangers on land were naturally created, and it would impose too much of a burden on landowners to guard these.

Traditional CL had distinction b/w 3 types of occupiers: trespassers, licensees, invitees.
*Trespassers: enter the land w/o permission.
*Licensees: enter the land with permission.
*Invitees: landowner has interest in the visit (material benefit) such that visitor has reason to believe that premises have been made safe for him. Or if premises opened to the public.

*Trespassers: no duty of care. Duty is just to not willfully or wantonly cause hurt to them (i.e. rigging a shotgun to blast anyone who walks onto your land).
*Licensees: duty of care as to dangers of which landowner is aware. Licensee is to take the land as the landowner and his/her family would. No special treatment.
*Invitees: duty of reasonable care both as to dangers of which landowner is aware, and as to dangers which would be revealed by inspection.

Heins v. Webster County

Facts: Man goes to visit his daughter at the hospital she works at. He says he is there to arrange him playing the part of Santa Clause. He is about to go out to lunch and he opens the main entrance door for his wife and then he slips and falls on the ice and snow that accumulated by the door.
Procedural History: The court found that he was a licensee not an invitee, because he went to see his daughter, and so they entered judgment in favor of the hospital.
Issue: Should the court abolish the common law classification of licensee and invitee and require a duty of care to all nontresspassers?

Holding: Yes.
Reasoning:

- A number of jurisdictions have abandoned this common law classification.
- MA and CA supreme courts have abandoned the distinction for the policy reason that a visitor's status should not determine the duty that a landowner owes him
- This case exemplifies the kind of frustration the common law distinction raises
- If Heins had been visiting a patient, he would be an invitee
- Because he was visiting daughter who worked there, he was a licensee
- The common law distinction should not be able to protect a landowner from liability when he would otherwise be held to a standard of reasonable care
- There are 7 factors for determining whether a landowner has exercised reasonable care: they are in the case (see below)

Dissent: It is not the court's function to create liability where the law does not…in this case, a landowner owes a duty of care to an individual who may be engaging in activities on the property without the landowners knowledge or express permission.

Book Notes:

Note 8 (p. 204):
Landlord and Tenant
Landlord was traditionally liable only if:
1. injury attributable to hidden danger in premises of which landlord but not tenant is aware
2. injury attributable to premises leased for public use (a foreseeable plaintiff argument)
3. injury attributable to premises retained under landlord's control
4. injury attributable to premises negligently repaired by landlord (but liability less likely if landlord only promised but never did. again, the omission/commission distinction. It is, however, disappearing)

Now, duty is imposed where promise has been made. Landlors now also held to a reasonable standard of care, using foreseeability and reasonableness of harm. Traditional standard of care considerations.

Notes From Previous Case:
Open and obvious dangers
One view is implied assumption of risk. If the danger is obvious, the landowner is not liable. Alternate view is that the courts should discourage unreasonably dangerous conditions, and not just let them lie. Implied assumption of risk has already been overruled in many jurisdictions. Anomalous to ask defendant to provide reasonably safe premises, and also deny plaintiff recovery from breach of that duty. Therefore comparative negligence should apply.

In swimming pool diving cases (plaintiff recklessly dives into a shallow pool), courts have often held that because the danger is obvious, the landowner has no duty to plaintiff. An implied assumption of risk.

Activities
traditional notion - you can do whatever you want on your land, and guests and other people

on your property should be careful. You are not liable for injuries to them resulting from your activities on your land.

This has been eroded. Courts now hold that you need to be reasonably careful. If the dangers are obvious and the licensee should realize it, then the landowner is not liable. Failure to carry out affirmative acts with due care is, however, grounds for liability when the danger is not obvious or it is not reasonable to expect licensee to know it.

Class Notes:

Reasonable Standard of Care Approach (abolishment of common law distinctions)

CA was the first to abolish the common law distinctions between licensee, invitee, etc. Held that all people on a landowner's land, could hold the landowner liable.

The legislature was alarmed and later passed legislation exempting landowners from duty to people hurt while committing or attempting to commit any one of 25 enumerated offenses, usually more serious felonies. So certain categories of trespassers were still owed no duty of care.

7 factors for juries to consider in determining if landowner exercised reasonable care for the protection of lawful visitors:

1. the foreseeability or possibility of harm
2. purpose for which the entrant entered the premises
3. time, manner, and circumstances under which the entrant entered the premises
4. the use to which the premises are put or are expected to be put
5. reasonableness of the inspection, repair or warning
6. opportunity and ease of repair or correction or giving of the warning
7. burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection

Criminal Activity

Plaintiffs began to sue for harms caused by criminal conduct occurring on the premises. Most commonly, tenants sued landlords for providing inadequate protection against criminal activity.

Posecai v. Wal-Mart Stores

Facts: Lady went shopping at Sam's club. Around 7 pm she was going back to her car in the parking lot and a man robbed her at gunpoint—she was wearing $19,000 dollars worth of jewelry and he took it. Robber never found and she never got jewelry back. A security guard had been stationed inside the store, but there was no security guard outside. Security guard testified that in the 9 years he had been working there, there was no similar crime. Police testified that the area behind the store was a high crime area. Sam's club was not a high crime location though. Security expert said that crime could have been prevented if a security guard were stationed outside. In the past six years there had been 3 crimes in this parking lot. Lady said that lack of security guards in parking lot was negligent. Trial court said that Sam's club had a duty to put security guards in parking lot.

Issue: Does a landowner owe a duty to protect an invitee from the criminal acts of a third person?
Holding: Yes, in some situations, but not this one.
Reasoning:

- Although there is no general duty to protect others form the criminal activity of third persons, business owners have a duty to take reasonable precautions to protect their customers form criminal acts of third persons.
- This duty only arises under a limited set of circumstances in which the criminal act was reasonably foreseeable to the owner
- There are four different approaches to the foreseeability issue:
- Specific harm rule: landowner owes a duty to protect customers from criminal acts only when he is aware of the specific imminent harm about to occur
- Similar incidents test: a plaintiff can establish foreseeability form presenting evidence of similar crimes on or near the property
- Totality of circumstances: (most widely used) takes into account, similar incidents, nature, condition and location of the land, level of crime in surrounding area, any other relevant factual circumstances.
- Balancing test: (CA and TN use this) court weighs the foreseeability and gravity of the harm against the burden imposed on business to protect its customers from that harm.
- A will adopt the balancing test:
- The greater the foreseeability and gravity of the harm, the higher the duty of care imposed upon businesses.
- Most important factor will be the existence, frequency, and similarty of other crimes committed on the property.
- In this case the degree of foreseeability was not sufficient to support a duty on Sam's Club's part to provide a security guard in the parking lot.

Concurrence: Likes the totality of the circumstances test.

Class Notes

Think about the broader implications here:

1. it would put a great burden on places in high crime areas
2. it would put a burden on smaller stores

Governmental Entities

Governmental Immunity to tort law was imported and became firmly established in this country

Riss v. City of New York

Facts: Riss sued the City of New York for negligence alleging that the police failed to provide police protection. She was terrorized for months by an old boyfriend, and he threatened to kill or maim her. After that she received a phone call saying it was her last chance. The next day a thug hired by the exboyfriend threw lye in her face causing

blindness in one eye, and loss of a portion of vision in the other eye and permanent face scarring. She had asked for police protection many times.
Procedural History: Trial court dismissed her complaint and the appeals court affirmed.
Issue: Is a municipality liable for failure to provide special police protection to a member of the public who was repeatedly threatened with personal harm and eventually suffered injuries for lack of protection?
Holding: No.
Reasoning:

- When the municipality might be subject to liability: In cases involving:
    - Activities that displace or supplement traditionally private enterprises like rapid transit systems, hospitals, and places of public assembly
    - Activities that provide services and facilities for the use of the public like highways, public buildings, etc.
    - Reasoning: Because these services and facilities are for the direct use of members of the public
    - This case involves governmental protection services from external hazards (such as controlling the activities of criminal wrongdoers
    - if we were to permit tort liability for those who seek police protection based on specific hazards, then this would cause a determination as to how the limited resources of the community should be allocated and without predictable limits
    - It should be left up to the legislature to determine how to use the resources and the scope of public responsibility
    - Imposing liability in this case would not sure the problem of crime and it would bankrupt the city

DISSENT
The crushing liability that the majority thinks this will impose on the city is not true: astronomical financial burden would not exist—no municipality has ever gone bankrupt because it has had to respond in damages
there is an argument that the city will be sued for everything, but there are things like fault, proximate cause and foreseeability that limit liability
Government immunity has been removed form other areas, and this has not led to disaster
Also, the judicial interference argument is flawed, because it ignores the fact that courts indirectly review the administrative activity of states and municipalities in every tort case brought against the government.
In municipal negligence cases, the courts are accomplishing 2 things
Applying the principle of vicarious liability to government activity
Presenting govt. officials with 2 alternatives in cases where insufficient allocation of public funds has resulted in injury
Officials can either improve public administration or
Accept the cost of paying damages to injured people

Book Notes

Note 1 (p.230): Man provided info to the police that allowed them to capture another man and his life was threatened and then he was killed. There was an active relationship

between the police and the informant in this case, because the police ask the public for any information they have, and this man gave information. Thus, the police had a legal duty to reasonably respond to his request for protection.

Note 2 (p.230): Child badly mutilated after visitation with her father. Mother had a protective order against father. This gave the police broad discretion to take him into custody. After the man indicated that he would harm the child, the mother went to the police and asked for intervention to get the child several times and they did nothing. The court said there was a duty in this case, because this is different from Riss because of the protective orders. The police already allocated money/resources to this problem.

Note 3 (p. 231): Court said that there was a general rule of no tort duty to provide police protection, but said that there was an exception in cases where there was a special relationship determined by looking at 4 factors:
assumption by the municipality through promises or action of an affirmative duty to act on behalf of the party who was injured
knowledge that inaction could lead to danger
some form of direct contact between municipalities agents and injured party
party's justified reliance on the municipality's undertaking

Class Notes

Municipal and State Liability

Three types of municipal functions:

1. External Protection (police, fire): **No liability** unless there is an undertaking or a special relationship or affirmative creation of risk. Problem of resource allocation, left up to the executive branch. (see Riss)
2. Public facilities (highways, public spaces, etc.): **Qualified immunity**. No liability unless clearly unreasonable or plainly inadequate. Depends on evidence in the record. Was the government aware? Why did it not act? For good reason or no? An unjustifiable delay in acting is grounds for liability.
3. Traditionally proprietary functions (education, health care, transport): Government is **fully liable** just as a private citizen (not always: in NY, Court declined to allow MTA to be sued in the past, because they were government-run).

Friedman v. State of New York

Facts: Friedman: sued the state of NY after her car was sideswiped on a viaduct, which caused her to swerve into oncoming traffic where she was hit head on. The department of Transportation had studied the issue of whether to construct a median barrier on the stretch of road 5 years before this accident and decided to build it but still hadn't at the time of this accident. The trial court ruled in ∏'s favor and appellate court affirmed. Cataldo and Muller: Both involve crossover collisions on a bridge and govt. studies earlier had revealed that the risks (stranded cars and bounce back collisions) of making a median along the bridge outweighed the benefits. Catalado's accident happened shortly after the study and appellate court rejected her claim that the study reached the wrong conclusion. Muller's accident happened after they changed their minds and decided to

build a median. 3 years had gone by without the state making one though. Appellate court held that the three year delay was not unreasonable and dismissed Muller's claim.
Issue: When the govt, has decided to take action to remedy a dangerous condition can it be held liable when its failure to take action within a reasonable time causes injury?
Holding: Yes.
Reasoning:

- Municipality should keep its streets in safe condition—owes the public a duty
- Courts are concerned with limiting their intrusion onto the govt.'s planning and decision making roles
- As a result, the government is grated qualified immunity from liability arising from highway planning decisions
- Government may only be held liable where its study of a traffic condition is plainly inadequate or unreasonable
- When govt. is informed of a dangerous condition, it is under the obligation to conduct a study and to when it decides to undertake a traffic plan, it is required to review the plan in light of its actual operation
- In Friedman and Muller, there is adequate evidence to support a finding that the state's delay in taking action to remedy a dangerous traffic condition was unreasonable

Book Notes

Federal Government
The Federal Tort Claims Act
§ 1346(b) excludes government from strict liability. Negligent or wrongful acts or omissions only. If no negligence, no liability. And only heard in federal court.
§ 2402 No jury trials.
§ 2674 Furthermore, no punitive damages. Treated as a private individual.
§ 2678 Regulates the lawyer's contingency fee - 25% cap.
§ 2679(b) Employees are protected from suit. Any claims against employee or estate are precluded.
§ 2680(a) excludes discretionary functions of the government from suit. The government must pass certain requirements though (see Cope v. Scott).

Class Notes

- in an area of total immunity, the government cannot be sued. Judges, e.g., are totally immune for their decisions. Judge cannot be sued for incompetence. This presumably lets them carry out their function if judging without fear of consequences.
- The government has qualified immunity in certain areas, depending on whether or not it meets the requirements. In Friedman, "when its study of a traffic condition is plainly inadequate or there is no reasonable reason for its traffic plan.
- Decisions made rationally cannot be attacked in lawsuits. Even if the decision is bad or the results are adverse.
- The government needs to justify its immunity under qualified immunity. Qualified immunity relates to discretionary function, not operational function.

Cope v. Scott

Facts: Cope was driving on a road and collided with another driver on a sharp turn. He sued the national park service and the other driver, claiming that the service failed to maintain the road adequately and failed to put up warning signs. This place where the collision occurred was recorded as a high accident area and recommended that the road be repaved using coarse aggregate to prevent skidding. It was listed as the 33rd thing on the priority sheet to be fixed out of 80. There were 2 slippery when wet signs near the accident but we don't know how close and the service moved for summary judgment arguing that its inaction was discretionary and therefore exempt from suit under the FTCA.

Issue: Is failure to maintain roadway discretionary and exempt from suit under FTCA and is its failure to post warning signs discretionary and exempt under FTCA?

Holding: Yes and No.

Reasoning:

- There is a two step test that the court uses to determine whether an action is exempt from suit under the discretionary function exemption of the FTCA.
    - Is there a federal statute or regulation or policy specifically prescribing a course of action for the employee to follow? If so, then an employee has no choice. The only question to ask is if the employee followed the directive—if so, exempt form suit under FTCA. If not, then opens the govt. up to suit.
    - In this case, there was no specific prescription
    - If the activity does involve choice, the question is: Is the challenged discretionary act of a government employee of the nature and quality that congress intended to shield from tort liability? If they involve the exercise of political, social, or economic judgment, then they are exempt from suit under FTCA.
    - Can't just have a hint of policy considerations, must be fraught with them to be exempt from suit under FTCA.
    - With regard to the claim that the road was not adequately maintained, the two step test shows that this is exempt from suit—there are policy considerations and there are no specific prescriptions
    - In terms of the sign argument, there is no specific prescription and the discretion involved in posting signs is not the kind of discretion protected by the discretionary function exemption to the FTCA—not fraught with policy considerations

Class Notes

Two step test to see if fed. Government can be liable, or if it has qualified immunity.
1. if the employee has a choice, or is just carrying out a statute or regulation. If they are just obeying orders, then there is no discretionary function being exercised. But the court will not allow a challenge to it, due to the separation of powers.
2. But if there is a discretionary function, then the nature of the choice must be examined. If it is grounded in some significant social, economic, or political goal (which means it is a policy judgment and qualifies under the exemption), or if it does not (in which case

government does not have qualified immunity). **Does the nature of the decision involve an exercise of policy judgment?** Courts reject imposing a "mechanistic framework of analysis."

Overall sovereign immunity framework:

1. First we have to determine if these are decisions that are being made or if this is just something that happened in the course of business (ex. If a cop hits someone with his car, none of this comes into play—mere fact that someone working for the govt. is involved does not mean that this applies)
2. ask which government is involved:
    a. state/local➔
        i. proprietary—normal tort rules apply
        ii. public service—qualified immunity
        iii. external protection—CUFFY(4 part test)
    b. federal➔look at FTCA
        i. DFE (discretionary function exception—apply the 2 part test)
            1. statute
            2. fraught with policy concerns

CHAPTER IV: THE DUTY REQUIREMENT: NONPHYSICAL HARM

Emotional Harm
Reasonable Fear of Imminent Injury
Falzone v. Busch

Facts: ∏ was in a parked car, and her husband was struck by a car. ∏ claimed that the car came so close to her that it put her in fear for her safety. As a result, she became ill and required medical attention. Trial court dismissed claim on the grounds that there had to be some physical impact before a L could recover for negligently induced fright.
Issue: Can a ∏ recover for bodily injury or sickness caused by the defendant's negligence even though the plaintiff was not physically struck?
Holding: Yes.
Reasoning:
There were 3 reasons that courts gave for not giving recovery for physical impact unless it resulted from physical impact. The court no longer finds these reasons tenable:

1. it was thought that emotional injury was not a natural and proximate result of a negligent act
    a. this is better left to medical evidence
    b. the court has allowed recovery for physical ailments in which there was minor physical impact and in cases in which there was willfully inflicted emotional harm
    c. even though the connection may be hard to find, causation is difficult to show in many other types of cases
2. courts concluded that no liability exists without physical impact
    a. this court does not agree
    b. just because there might be fraudulent claims does not mean that the court should deny recovery to someone who is injured
3. courts feared that allowing recovery in these cases would result in a flood of litigation
    a. there is no evidence that there is an excessive number of actions of this type
    b. if there was an excessive number of cases of this type, it should not be resolved by precluding this claim but by expanding judicial machinery

Book Notes:

Note 7 (p.266): people afraid that the airplane would crash on them—denied recovery—see case for more reasoning; this note also talks about eggshell psyche

Class Notes:

traditional justifications for not allowing nonphysical damage recovery

1. Psychological damage is not the natural and proximate result of the negligent act, unlike physical damage. (But this was an empirical question for medicine); causation problem
2. Precedent did not permit it (lousy reason).
3. Public policy of dissuading feigned psychological injuries. Because they are hard to prove, supposedly. To disallow speculative claims. (but causality is difficult to prove in many cases involving physical damage too. Difficulty of proof should not bar plaintiff from being allowed to try to convince trier of fact); difficult to tell who is injured and who is not

Ordinary Sensitive Person

Gammon v. Osteopathic Hospital of Maine

Facts: When his father died at a hospital, ∏ made arrangements for the funeral home to make arrangements. ∏ opened a bag that was supposedly filled with his father's personal effects but saw a bloodied severed leg in the bag. He suffered an immediate traumatic reaction. He began to have nightmares and his relationship with his family took a turn for the worse. After several months his emotional state improved, but he still had nightmares. He never sought treatment and he did not present medical evidence at trial.

Procedural History: The trial court granted a directed verdict on the plaintiff's negligence claim for severe emotional distress.

Issue: May a ∏ recover for emotional or psychic injuries negligently inflicted by the defendant without any evidence of physical injury?

Holding: Yes.

Reasoning:

- A defendant may be liable for any foreseeable emotional or psychic harms he negligently causes
- A person's psychic wellbeing is as much entitled to legal protection as his physical wellbeing
- In the past, courts have limited recovery for emotional harms to certain categories of cases, usually involving physical harm
- In cases with no physical injury, the court required a showing of
    - Physical impact
    - Objective manifestation
    - Underlying or accompanying tort
    - Or special circumstances
- The court finds that these limitations are arbitrary and should not bar the ∏'s recovery
- These are artificial devices employed by courts to protect against fraudulent claims and undue burden on the defendant
- This court thinks that the trial process is well suited to protect against fraudulent claims
- Furthermore, the concept of foreseeability imposes an adequate limit on the defendant's liability

- A defendant is bound to foresee emotional harm only when such harm reasonably could be expected to befall the ordinary sensitive person
- The high probability that a person will suffer emotional harm from the mishandling of a family member's corpse should allay any fears of fraudulent claims

Book Notes

Note 5 (p. 276): Most courts have adopted a zone of danger analysis that requires that a needle be shown to have been infected with HIV before the plaintiff can recover for emotional harm arising out of being exposed to the needle.

Williamson failed to require zone of danger analysis—asked what a reasonable well informed citizen might have feared. Said that this would help reduce ignorance about AIDS.

Portee v. Jaffee

Facts: A boy lived with his mother in an apartment complex. The boy got trapped in the elevator between the elevator door and the wall of the elevator shaft. The elevator was activated and the boy was dragged up to the third floor. Police came and ∏ came and the police worked for 4 ½ hours to free the boy. His mother was there and watched as the boy moaned and cried and flailed his arms and she was restrained from touching him and he died while still trapped. ∏ became severely depressed and self destructive. She slashed her wrist and required physical therapy and extensive counseling and psychotherapy.
Procedural History: The trial court granted summary judgment for defendants on claims by plaintiff for mental and emotional distress. The Supreme Court reviewed the dismissal.
Issue: May a plaintiff maintain a cause of action for NIED caused by witnessing the death of a close relative?
Holding: YES.
Reasoning:

- This case requires the court to remedy a violation of a duty of care while avoiding speculative results or punitive liability
- The focus is on the injured personal interest—in this case the emotional tranquility that comes with the knowledge that one's child is safe
- CA identified 3 factors that would determine whether an emotional injury would be compensable because foreseeable (Dillon):
    - Whether the plaintiff was located near the scene of the accident
        - The court says that this will generally follow if the second factor is met
    - Whether shock resulted form the direct and contemporaneous sensory observation of the accident as opposed to learning from 3rd parties
        - It is necessary that the victim witnessed the accident because this acts to limit the defendant's liability for emotional harm inflicted upon his victim's close relatives

        - When a plaintiff witnesses the accident at the scene it is likely that he has suffered a traumatic sense of loss that will cause severe emotional distress
    - Whether the plaintiff and the victim were closely related
        - This is essential, because the genuine suffering that flows from harm to close relatives starkly contrasts with everyday emotional setbacks
    - The court agrees that these three factors support a cause of action
    - The court says that an additional factor is the severity of the injury—it has to be death or serious injury
        - The risk of an extraordinary reaction to a slight injury does not justify the imposition of liability

Book Notes

Note that there is the Dillon, Portee, and the Boysun rule:

Note 5 (p. 288): New York in Boysun, said that they reject the element tests—instead they go by the zone of danger rule.

Note 8 (p. 289): Elevator decapitating man case: should there be recovery for non family members?

Johnson v. Jamaica Hospital

Facts: In this case, ∏'s daughter was born and kept in the hospital for further treatment. ∏ came to see her a week later, and the baby was discovered missing. When she was missing, ∏ brought suit for the emotional distress brought about by the defendant's negligence. The baby was recovered by the police 4 months later.
Procedural History: Trial court denied the Δ's motion to dismiss the parents' action for failure to state a cause of action. Appellate court affirmed.
Issue: Is there a cause of action in this case?
Holding: No.
Reasoning:
No cause of action was stated in this case for the following reasons:

- According to Bovsun, damages may be recovered for indirect psychic injuries in limited circumstances
- Can recover if they were in the zone of danger, and their injuries result from contemporaneous observation of serious physical injury or death caused by defendant's negligence.
- Parents in this case did not establish this
- ∏'s say that the hospital had a direct duty to them—but there is not a direct duty to them.
- See Kalina in which the court held that parents were interested bystanders to whom no direct duty was owed (circumcision on the wrong day case)
- Court summarized Palsgraf saying that if it was a wrong to the son it was not a wrong in relation to the plaintiffs far removed
- Direct injury was sustained by the infant

- In the absence of such a duty, there cannot be liability
- Policy reason: allowing recovery in this case would invite open ended liability for indirect emotional injury suffered by families in every instance where their relative experiences negligent care
- The Johnson and Lando exceptions do not apply either
    - In Johnson: exception was there because there is a duty to transmit truthfully information concerning a relative's death or funeral
    - In Lando: exception for the mishandling of or failure to deliver a dead body with the consequent denial of access to the family

Dissent: A flood of litigation here is unlikely, because this is not a common occurrence, and the burden on the defendants in this case is not so great as to foreclose liability altogether.

Book Notes

Note 12 (p. 296): cases in HI have been particularly receptive to claims for emotional distress; see examples
Class Notes

This case was categorized as indirect—there was no direct injury to the plaintiffs
The way we determine whether there is recovery has a lot to do with whether the injury is thought of as being direct or indirect.
Keep in mind that this is a NY case

Negligent interference with Consortium:

Loss of consortium: why is this even considered in this section—it is a type of emotional harm claim—loss of companionship and relationship as well as sex
The excerpt explains that it used to be that only husbands could claim it—now women can claim it too in virtually all states
If there is an injury to the spouse that deprives the other spouse of companionship, etc.
In the common law, there was a loss of consortium for criminal conversation—when someone tries to seduce one's spouse—does not exist anymore
There does not seem to be the same kind of skepticism about the loss of consortium—don't have to be in the zone of danger or anything like that—because the class of plaintiffs is so much lower
Elden case (page 289-290) says that this is restricted to husbands and wives—there are the three reasons that the court gives based on policy
In a dissent for this case, we could think about the broader implications like how it precludes recovery for gay couples, we can also say that it is a small class of plaintiffs, we could say that no one is going to get married for this reason
California has overturned Elden by statute—anyone who is a domestic partner gets all the benefits of marriage even though they are not technically married

CHAPTER VII: STRICT LIABILITY

Ultrahazardous, Abnormally Dangerous Behavior

Fletcher v. Rylands

Facts: ∏ was a tenant mining coal under agreement with the landowner. Δ was a tenant operating a cotton mill on nearby land. Δ hired independent contractors to make a resovoir on the land and the land rented by the Δ had been previously mined for coal and the old mineshafts were filled with soil. The builders of the reservoir knew about the old mineshafts, but they did not know or suspect that the old mineshafts were connected to the ∏'s mineshafts. When the reservoir was filled, the water leaked through the old shafts and into the working shafts.

Issue: Is one who brings something onto his land (water) liable for the damage caused if that thing escapes, even if that escape is not due to his fault or the fault of any of his employees?

Holding: Yes.

Reasoning:

- ∏, who is free from all blame, must bear the loss, unless he can establish under some theory, that Δ, also free from blame is liable
- The question is: what obligation does the law cast on a person who lawfully brings something on his land that, though harmless if it remains there, will naturally do mischief if it escapes
- It is undisputed that he must take care to keep what was brought on his land from escaping and damaging his neighbors.
- The real question is whether he has absolute liability or whether he merely has a duty to take all reasonable and prudent precautions to keep it in
- This court thinks that absolute liability should be imposed
- The only way he can excuse himself is by saying that the escape was caused by the fault of the complaining neighbor or an act of God although that is not the case here
- This rule seems just, because in this case, the ∏ is not at fault and have sustained loss due to something the Δ brought onto the land that was not naturally present
- There are cases in which a negligence analysis is more appropriate
- Those cases are distinguishable, because people who travel on the highway or go near warehouses take upon themselves some known risk of injury.
- In this case the ∏ did not take upon himself the risk of any injury.
- He did not know about the reservoir and he could not have stopped the Δ from building it anyway

Note 2 (p. 502): In the court of the Exchequer, the defendant prevailed, because the court found that traditional actions for interference with real property (trespass and nuisance) were inapplicable.
Class Notes

If you bring something onto your land that will do mischief if it escapes, you keep it at your peril. And you are answerable for all the damage which is the natural consequence of its escape. The historical antecedent of this would be the rearing of wild animals. If you kept a wild animal and it got out, you are responsible for what it does. **This is still true today. Owners are responsible for the damage caused by their wild animals.** Rules are different for domestic animals: In the CL, "Every dog should have one bite." If the owner knows, the owner is strictly liable.

Rylands v. Fletcher

Facts: See above facts in *Fletcher v. Rylands*.
Issue: Is a person who puts his land to a nonnatural use liable for damages to a neighbors land that is caused by the use
Holding: Yes.
Reasoning:
If in the course of natural use of land, water accumulates and floods the neighbors land, then the neighbor cannot complain of the water. However, of the owner of the land puts the land to nonnatural use (by putting water on the land), then he introduces the water onto his land at this own peril--Δ is held liable.

Book Notes:

Note 4 (p. 504): There are modern cases that reject the strict liability view that comes up in *Rylands*. See *Losee, Brown*. (an obstacle in the way of progress)

Note 5 (p. 505): *Rylands* applied to a case in which phosphate slime escaped and caused a lot of damage—even non negligent use of one's land can cause extensive damage to his neighbor's land.

Note 6 (p. 506): *Rylands* may have gained new life as an environmental harm principle. See case about mercury in this note.

Note 5 (p. 510):
Restatement section 520: In this section, the restatement says that one who carries on an abnormally dangerous activity is subject to liability for harm resulting from the activity although he has exercised the utmost care to prevent the harm. In determining whether an activity is "abnormally dangerous", section 52o lists 6 factors for consideration:
existence of a high degree of risk of some harm to the person, land, or chattels of others
likelihood that the harm that results from it will be great
inability to eliminate the risk by the exercise of reasonable care
extent to which the activity is not a matter of common usage

inappropriateness of the activity to the place where it was carried on; and
extent to which its value to the community is outweighed by its dangerous attributes
(This section of the Restatement is central to Cyanamid)

Indiana Harbor Belt v. American Cyanamid

Facts: Δ loaded a railway car with a toxic chemical and shipped it to NJ. The car stopped at Indiana for the purpose of switching the car to another train. While parked there, the car began to leak and 4000 of the 20000 gallons of the chemical spilled. Concerned that there was contamination in the soil, the Indiana department of environmental protection ordered Indiana Harbor to take decontamination measures costing almost a million dollars. Indiana Harbor is suing Δ for this money.
Issue: Is the manufacture and shipping, as opposed to carrying, of toxic chemicals an abnormally dangerous activity?
Holding: No.
Reasoning: Posner:

- Posner said that in IL the supreme court would look to the restatement to see if something is an abnormally dangerous activity:
- the restatement imposes strict liability in any case that meets this test because the common law doctrine of negligence is inadequate in such cases.
- For example, the negligence doctrine is inadequate to deter accidents if due care will not prevent such accidents.
- The elements of the restatement test are designed to mitigate this by imposing strict liability on defendants who, for example, fail to move such activities to less populated or more appropriate areas.
- The district court said that the manufacturing and shipping of this chemical was abnormally dangerous merely because it was on a certain list of hazardous materials
- This is too broad of a definition because it would make shippers and carriers of many chemicals strictly liable
- Moreover, there is no reason that why a negligence test will not work here—due care would have prevented this accident
- It was not the inherent dangerousness of the chemical that caused the accident, but someone's negligence that caused a leak.
- ∏ says strict liability should be imposed because the potential harm was great—for instance if all of it spilled out
- The plaintiff overlooks the fact that shipping of chemicals is very valuable to the community.
- Thus, manufacturing this chemical is not abnormally dangerous.

Book Notes

<u>Posner—defender of negligence</u>

- Distinguishes b/w level of care and level of activity.
- Negligence appropriate so long as changing level of care will change incidence of injuries and accident costs - comparative negligence.
- Strict liability however should apply when changing the level of care is ineffective, and only changing the level of activity can change incidence of injuries and accident

costs. i.e. when comparative negligence is ineffective in reducing costs.

- Posner argues that the judicial system is too shortsighted and deficient to make determinations of optimal activity on such a wide scale. They can do it in simple cases, but not ones like these.
- Strict liability causes defendant to bear burden of figuring out most optimal way of carrying out activity, instead of the judge. Posner argues that the defendant will do a better job of figuring out more efficient way to do it. Because they have to bear the costs and consequences.

Note 2(p. 517): Example of keeping a tiger—Posner says that this should be strict liability—will make the owner of the tiger seriously consider getting rid of the tiger if he will be strictly liable for any injuries caused by the tiger—will make him want to change activity. Maybe the most optimal way to carry out the activity would be not carrying out the activity at all.

Note 8 (p. 519): **Restatement section 523:** says that plaintiff's assumption of risk of harm from the activity bars his recovery for the harm
Restatement section 524: contributory negligence is not a defense except when the plaintiff's conduct involves knowingly and unreasonably subjecting himself to the risk of harm from the activity.

Class Notes

Posner sets up a distinction between levels of care of and activity.

a. Due care would've prevented this accident (negligence).
b. SL only when you need to change levels of activity, not level of care.
c. Like building your home between the runways at O'Hare.
d. There are many times when P can avoid accident more cheaply than D. Instead of putting enormous burden on D to change his activity, there might be a way in which P can avoid accidents cheaply. "Conversely, if there is a class of activities in which activity level changes by potential victims are the most efficient method of accident prevention, there is a strong argument for no liability."

2. Strict liability only when you're pretty sure that D can avoid accident most cheaply.
3. P argues that there should be SL b/c potential harm was huge; but for an activity to be deemed abnormally dangerous, must examine all Restatement factors, and chemical shipping is valuable to community.

Economic Analysis of Law: If B<PL, strictly liable D will take precautions to avoid accident to reduce net costs. If B>PL, strictly liable D won't take precautions and will have to pay V's damages. But those damages are less than B. So avoidance doesn't pay. Changes in activity level by V are also a method of accident avoidance and one that is encouraged by negligence system but discouraged by strict liability. If a class of activities can be identified where changing activity level by D is most efficient method of accident prevention, then strong argument for SL. Explosives: best way to minimize accidents may be for D to change activity to less dangerous one. SL is incentive to consider such alternatives. Best method of accident control may be to cut back on scale of activity.

If SL makes accident rate fall, b/c cheaper to avoid than to pay damages, then fewer claims altogether. Reduces admin costs. However, if accidents unavoidable with activity change, then SL will increase admin costs b/c more damages claims.
SL insures Vs of unavoidable accidents: if cost of insurance thru tort system less than cost of buying 1st person accident insurance policy, then good, but usually tort too expensive.

Posner = Wealth maximization, not utility maximization.

1) **Use SL where**
    a. dangerous activity
    b. you can't fix it w/ increased level of care and
    c. Dift activity levels will reduce dangerousness
2) **Negl v. SL**
    a. if injurer activity-level changes are most efficient, then SL (ex. Abnormally dang activities)
    b. if victims activity-level changes are the most efficient, then Neg (ex. AssumptionOfRisk in dang sports)
        i. SL discourages changes in victim activity level
    c. Admin costs are less under SL (simplified issues) but may be a larger number of claims under SL
        i. if accidents are unavoidable (cannot reduce level of care or amount) there will be *more* claims if you switch from negl to SL
        ii. if accident rate will fall under SL because accident costs exceed the costs of avoiding them, there will be *fewer* claims
    d. Insurance – SL insures victims of unavoidable accidents. Is this less costly than cost of potential victims buying insurance? NO.
    e. Judicial mistakes – a mistaken ascription of causation or an overestimation of damages under SL is a huge cost. Over-deterrence: charging an activity w/ costs it didn't cause

The Cost of Mistakes
Calabresi

The principle function of accident law is to reduce the sum of the cost of accidents and the cost of avoiding accidents. There are three sub goals to the reduction goal:

1. primary: reduction of the number and severity of accidents—can be attempted by:
    a. forbid certain acts of activities thought to cause accidents—specific deterrence
    b. make activities more expensive and thereby less attractive to the extent of the accident costs they cause—general deterrence
        i. under this method, accident costs would be treated as one of the many costs that we face whenever we want to do something—attempts to force the individual to consider accident costs in choosing among activities
        ii. this approach would let the free market or price system tally the choices

iii. based on the notion that no one knows what is best for the individual than the individuals themselves do
iv. if all activities reflect the accident costs they cause, each individual will be able to choose for himself whether an activity is worth the accident costs it causes
v. Sparta v. Athens example
vi. General deterrence creates two ways to reduce accident costs:
1. creates incentives to engage in safer activities
a. see above reasoning
2. encourages us to make activities safer
a. ex. Taney owns a car and it causes $200 in accident cost a year and if a different kind of brake were used, his accident costs per year would be reduced to $100. The brakes cost $50. If the government taxes paid for accident costs, then Taney would have no incentive to change the brakes. However, if Taney had to pay the accident costs, he would put the new brake in, because this would save him $50 in the end.

2. secondary: reduction of the societal costs resulting from accidents—can be accomplished by:
a. risk or loss spreading method
b. deep pocket method
3. tertiary: reduction of the costs of administering our treatment of accidents

Pollution as a Tort: a Non-Accidental Perspective on Calabresi's Costs
Michelman

Assignment of Liability—cheapest cost avoiders and externalization
Says that Calabresi's position is that rules should be set so that liability comes to rest on the cheapest cost avoider
Hard to determine the cheapest cost avoider
Assignment of Liability: The Need for Prospective Rules

Economic Analysis of Law
Posner

- Strict liability means that someone who causes an accident is liable for the victim's damages even of the injury could not have been avoided by the exercise of due care
- PL might be $150 and B $300
- Strict liability and negligence operate in the same way
- If B is smaller than PL, the strictly liable defendant will take precuasetions to avoid the accident just as the defendant in the negligence system will—in order to reduce net costs
- If B is larger than PL, the strictly liable defendant will not take precautions just as under the negligence system—he will have to pay the victim's damages, but those

damages, discounted by the probability of the accident, are less than the cost avoidance; expected cost of liability (PL) is less than the cost of avoidance, so avoidance does not pay

- There are differences in the systems though
- Strict liability encourages activity level changes by potential injurers but discourages them by potential victims
- Negligence liability encourages activity level changes by potential victims but discourages them by potential injurers
- Litigation costs are lower under strict liability—don't have to prove negligence
- But, if most of the accidents that occur in some activity are unavoidable in an economic sense either by taking greater care or by reducing the amount of the activity (because the cost of greater care or less activity exceed any savings in reduced accident costs), the main effect of switching form negligence to strict liability system will be to increase the number of damages claims
- Also, even though strict liability operates to insure victims of unavoidable costs, this is only a gain if the cost of insurance through the tort system (for accidentally doing something) is less than the cost to potential victims of buying accident insurance policies (insurance in case an accident happens to you) in the insurance market, and it almost certainly is greater.

CHAPTER VIII: LIABILITY FOR DEFECTIVE PRODUCTS

Tension between Negligence and Strict Liability

Escola v. Coca Cola Bottling Co.

Facts: Even though she handled it carefully, a soda bottle that a waitress was taking from the case to the fridge exploded in her hand. Coca Cola Bottling CO. had used pressure to bottle carbonated beverages. An engineer from the bottle manufacturer testified about how bottles are tested and referred to the tests as pretty near infallible. ∏ sued the bottling Co. for negligence and obtained a judgment benefiting from res ipsa loquitur. The matter was appealed.

Issue: Can a non-manufacturer bottling company that has exclusive control over bottles be held liable in negligence for an exploding bottle even though it is not clear why the bottle exploded?

Holding: Yes.

Reasoning:

- based on res ipsa loquitur, the bottling company can be held liable in negligence for an exploding bottle even though it is not know why the bottle exploded
- because of the almost infallible tests that the bottles are subjected t by the manufacturer, it is not likely that they contain defects when delivered to the bottler that are not discoverable by visual inspection
- both new and used bottles are filled and distributed by Δ and the used bottles are not again subjected to tests and it may be inferred that defects not discoverable by visual inspection do not develop in bottles after they are manufactured
- If such defects do occur in used bottles, it is up to Δ to make appropriate tests before they are refilled
- Even though it is not clear whether the explosion was caused by an excessive charge or a defect in the glass, there is a sufficient showing that neither cause would ordinarily have been present if due care had been used
- Further, Δ has exclusive control over both the charging and inspection of bottles
- Thus, all the requirements necessary to entitle ∏ to rely on the doctrine of res ipsa loquitur to supply an inference of negligence are present.

Concurrence: Traynor:

- In his opinion, it should be recognized that a manufacture incurs strict liability when an article that he had placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to humans.
- In Mcpherson, the principle that, irrespective of privity of contract, the manufacturer is responsible for an injury caused by such an article to any person who comes in lawful contact with it.

- It is to the public interest to discourage the marketing of products having defects that are a menace to the public.
- If such products find there way into the market, it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market
- in Mcpherson, it was recognized that the injured person was the real party in interest an disposed of the theory that the manufacturer's liability should apply only to the immediate purchaser
- There is no reason to distinguish the dangers in defective consumer goods form the dangers in defective food products
- The manufacturer's obligation cannot be escaped because the marketing of a product has become so complicates that intermediaries are required
- There is greater reason to impose liability on the manufacturer than on the retailer who is but the conduit of a product that he is not himself able to test

Book Notes

Note 7 (p. 545): In Ryan, the plaintiff's husband swallowed a pin embedded in a slice of bread that the plaintiff had bought form the defendant storekeeper. The retailer was held liable for breach of the implied warranty of merchantability, since a loaf of bread with a pin in it is not of merchantable quality. The lack of privity between the husband and the retailer was solved by the court holding that the wife acted as the husband's agent in buying the loaf of bread.

Note 5 (p. 551): Greenman: Plaintiff's wife bought a power tool for plaintiff and while he used it a piece of wood flew up and hit him in the forehead. The court held that manufacturers are strictly liable for their defective products based upon tort law rather than an implied warranty based on contract.

Vandermark: court held that manufacturers cannot insulate themselves from liability by delegating final inspection and adjustment of the product to the retailer and the retailer is strictly liable in tort for the defective products it sells

Elmore: The court concluded that the manufacturer was strictly liable to bystanders as well as consumers. In this case, bystanders (people in other car) were hurt because of a defect in the other car that collided with them. The court held that the defectively constructed car manufacturer was liable to the people who bought the car and the people who were hit by the car.

Note 7 (p. 553): most courts have declined to impose strict liability on the sellers of used goods.

Note 8 (p. 554): liability for design defects in military equipment

Class Notes

While products liability is mostly strict liability, not everything in products liability is strict liability.

Traditionally products liability was based on warranties, contracts. The buyer would contract with the seller, and the warranty only extended to parties in privity.

In *Escola*, Traynor argued that products liability should drop any notion of warranties, etc., and work on the basis of strict liability.

"Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."

Accident law is about reducing accidents. Calabresi agreed, but said the cheapest cost avoider should be held responsible. Traynor says that the manufacturer should face liability, not the consuming public. Why? Because the manufacturer is the one who can anticipate hazards and prevent against them. The public cannot. The costs incurred by the manufacturer, can in turn be spread out over the public through the price of the product (**spreading**).

Traynor addresses primary accident costs too - even if defective products are intermittent and haphazard in their occurrence, the risk of their occurrence is constant and general. "Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection." (anticipatory of Posner's argument that producers should absorb the costs if no one else can do anything to avoid the accident)

Traynor says that the consumer no longer can investigate the soundness of a product. Even when it's not packaged, "erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices." The consumer now accepts products on faith. This is asymmetrical risk, non-reciprocal risk. The poor helpless consumer!!!

Traynor rejects both the warranty and res ipsa loquitur bases of product liability.

Warranty: First we have to figure out if there really was a warranty, really was a contract. Traynor pointed out that we're just engaging in legal fictions, to try and affix liability. It spawns wasteful litigation. The point isn't to try and find a pre-existing theory that will justify what we want to do. Secondly, a party could put in a disclaimer absolving itself of liability. Thirdly, contract remedies are less than tort remedies. Traditionally you get whatever you put into the contract.

Res Ipsa: It won't do the job. Because it doesn't win the case for the plaintiff. It just gets the case to a jury. The defendant can overcome the presumption of negligence. The defendant can still win because of all the evidence that they have. And if the jury ignores the evidence anyway, then the jury too engages in a legal fiction.

Traynor says we should just stop dancing around the issue and just impose strict liability.

<u>Kinds of defects</u>: Restatement (3rd) Products Liability: (page 556)
One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.
Manufacturing defect - product departs from its intended design even though all possible care exercised in preparation and marketing.
Design defect - when the foreseeable risks of harm posed by the product could've been reduced or avoided by the adoption of a reasonable alternative design (RAD).
Inadequate instructions or warnings - can also make a product "defective." When foreseeable risks of harm posed by product could have been reduced or avoided by providing better instructions or warnings.

Manufacturing Defects

- The most common and straightforward cases of defective products involve the aberrational mass produced item that has come off the assembly line different from (and more dangerous than) the intended product.
- The defect is generally apparent in the flawed unit by the time of trial, and courts have concluded that strict liability should follow
- These dangers are almost always latent
- There are not many open and obvious (patent) manufacturing defect cases because
- Modern manufacturing processes can identify incipient problems
- Retailers who find them while preparing goods for sale will take them off the shelves
- Planter's peanut example: jar burst into fragments, and the manufacturer said it must be because of something the consumer did after purchase—the consumer said that nothing weird had happened to the jar after purchase, and this was enough to make summary judgment against the plaintiff inappropriate—the court said that it did not matter where in the stream of commerce the defect happened—subject to strict liability
- There is a causation problem though
- Example of car that swerved—said it was a manufacturing defect—the car was not present at trial—was destroyed—the court upheld summary judgment for the defendant—said that the fact that the car was 10 years old shows that the leak could have been the product of inadequate maintenance on the consumer's part, etc. There was no evidence offered about such matters, so this served as a defense for the manufacturing defect claim

Design Defects

Definition = **Design** is defective when foreseeable risks of harm posed by product could've been reduced or avoided by adoption of reasonable alternative

design, and the omission of the alternative design renders product not reasonably safe.

Note that this is not strict liability—it is a way of getting negligence principles into product's liability law.

For instance: if a drug company made a drug that has a bad side effect, but there is no other way to make the drug or no other drug that can cure the same thing without the side effect, then there is no reasonable alternative, and the drug company is not liable.

- In Cronin, the truck driver was injured when the bakery trays crashed into him and made him fly through the windshield. The defendant appealed from the trial court's judgment for plaintiff on the grounds that the trial judge's charge on strict liability omitted the requirement that any defect be unreasonably dangerous. The appeals court disagreed and said that "unreasonably dangerous" sounded like negligence and they said that there was already enough protection for the designer, because the plaintiff still had to prove that there was a defect in the manufacture or design and that that defect was a proximate cause of the injuries. Thus, the court excised the word "unreasonably dangerous" from the restatement.
- (Note that this case was in 1972—so the second restatement was used—in 1999 the products restatement came out—think about the dates during the exam)
- Barker: In this case, the appeals court reversed the trial court's judgment for the defendant, because the court decided based on the unreasonably dangerous language in the restatement. Also, the court noted that the judge limited liability to situations where a product was used in its intended manner. The appeals court said that the appropriate limiting phrase would require the product to be used in the "intended or reasonably foreseeable manner" (using a chair to stand on to reach something is foreseeable).
- From Barker came two tests that the plaintiff could use to show that a product was defectively designed:
    - consumer expectation test: a product may be found defective in design if it can be shown that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.
        - Criticism: in many situations, consumers have no idea how safe a product should be made
        - This is to be used in cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions and is thus defective regardless of expert testimony about the merits of the design
    - risk-utility test: a product may be found defective if its design embodies excessive preventable danger—in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such a design. The jury was supposed to consider:
        - the gravity of the danger posed by the challenged design

- the likelihood that such danger would occur
- the mechanical feasibility of a safer alternative design
- the financial cost of an improved design
- the adverse consequences to the product and to the consumer that would result from an alternative design
- criticism: this looks a lot like a negligence

Soule v. General Motors Co.

Facts: ∏'s ankles were badly injured when her GM car collided with another vehicle. She sued asserting a defectively designed product. GM denied a design defect and said that the force of the collision was the sole cause of the injuries. At trial the court instructed the jury on the consumer expectation test and the jury found for the plaintiff and awarded her $1.65 million. Court of appeals affirmed. GM petitioned supreme court of CA for review.

Issue: Is the use of the consumer expectation test appropriate where the evidence does not permit an inference that the product's performance did not meet the minimum safety expectations of its ordinary users?

Holding: No.

Reasoning:

- The jury should have been instructed to use the risk-utility test.
- Consumer expectation test should be used when certain products are commonly understood—in theses cases, ordinary knowledge may permit an inference that the product did not perform as safely as it should
- No expert evidence can be introduced in these cases
- The risk utility test is used when there is a complex product that ordinary customers will have no real clue about the performance expected
- In these cases, the jury has to weigh several factors
- The jury must consider manufacturer's evidence about competing design considerations
- Note that unless the facts actually permit an inference that the product's performance did not meet the minimum safety expectations of its ordinary users, the jury must engage in balancing of risks and benefits required by the second prong of Barker
- Don't have to engage in both prongs only if as a matter of law it could be determined that the evidence would support a verdict on the consumer expectations prong
- When it can't be decided as a matter of law that the evidence supports a verdict based on the consumer expectations prong, the jury must be instructed solely on the risk utility test
- GM has many objections to the consumer expectation test: see case page 563.
- CA does not think that consumer expectation test should be abolished
- This case involved complex questions about technical and mechanical detail—the risk utility test is appropriate

- Because of all the evidence introduced about the strengths, shortcomings, risks, and benefits of the challenged design it is not fair to say that the jury solely reached their decision by way of an independent assessment of what an ordinary customer would expect—so this error in jury instruction did not really have a bearing on the case and is harmless

Book Notes

Note 7 (p.567): In deciding how risk utility factors apply in a particular case, much attention has been given to the feasibility of alternatives (looks like negligence)

Note 8 (p. 567): Reasonable Alternative Design (RAD): **Products Restatement 2 comment f**: plaintiff must prove that a reasonable alternative design would have reduced the foreseeable risk of harm.

Note 9 (p.568): comparisons amongst products must consider only comparable products

Note 10 (p. 568): plaintiffs hurt in a microbus, but the court ruled that the design of the bus was uniquely developed for several reasons—see case—so there was no way to say that it should have been designed more like a standard American made vehicle

Note 12 (p. 570): O'Brien: man dives into shallow pool—the court said that there was no RAD in this case and the dangers are known and often great—the court said that if there was no reasonable alternative, then recourse to a unique design was more defensible. This case basically held that if there was no RAD, no excessive preventable danger, but product's risk still exceeded utility, manufacturer could be liable. i.e., product should not even be on the market. Irreducibly unsafe products. Reminiscent of Posner's levels of activity vs. levels of care..

NJ legislature sought to restrict this ruling by saying that there is no liability when there is no practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product. But an exception was made where the court found clear and convincing evidence that:
the product is egregiously unsafe or ultra hazardous
the ordinary user or consumer of the product cannot be reasonably expected to have knowledge of the product's risks or the product poses a risk of serious injury to persons other than the user or consumer
the product has little or no usefulness

The products restatement says that liability can floe even if a product has no RAD if its value is deemed to be minimal

Note 13 (p. 572): manufacturer should have foreseen a violent reaction by a political foe to President Bush mask so he should have made a safety harness to support the head and neck in the case of a fall.

Class Notes

The trial court's jury instructions regarding the consumer expectations test were: the plaintiff was required to show that:
the manufacturer's product failed to perform as safely as an ordinary customer would expect
the defect existed when the product left the manufacturer's possession
the defect was the legal cause of the plaintiff's enhanced injury
the product was used in a reasonably foreseeable manner

Consumer Expectations Test.
A product can be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer might expect when used in a reasonable or reasonably foreseeable manner. Manufacturer cannot defend against such a claim by presenting expert evidence of the design's relative risks and benefits. **Expert evidence not admissible if the test applied is a consumer expectations test.**

Criticisms of Consumer Expectations Test:
The test is vague. Who is the ordinary, reasonable consumer?
Incredibly useful products might be judged liable even if they are incredibly beneficial. When the consequences were not expected. Is this fair? If the social benefit was incredibly high, almost infinite. Yet one out of a million consumers will suffer side effects. Should we allow these consumers to recover?
Incredibly dangerous products probably wouldn't fail this test too. People expect them to be dangerous. E.g. guns. Grenades. **Open and obvious dangers**.

Risk Utility/ Excessive Preventable Danger Test.

- In some cases, consumers may not have any expectations of the product. You wouldn't have any specific expectations of how safe a particular part (a 'toe pan') might be. Consumers wouldn't have expectations of highly technical products.
- **If the benefits of the design outweigh the risks, or there is a reasonable, feasible, alternative design, then there was no design defect.** If no RAD, or benefits outweigh risks, then no design defect.
- In CA and some other states, burden is on manufacturer to show that there is no RAD.
- **Is there excessive preventable danger?** Similar to Hand formula: B<PL. Risk Utility Test basically asks if manufacturer properly balanced the costs and benefits.

Camacho v. Honda Motor Co.

Facts: A man bought a Honda motorcycle in March 1978 and got in an accident with a car and suffered severe leg injury. He sued claiming that the absence of crash bars to protect the legs made the product defective under a strict liability analysis. Two mechanical engineers said that effective leg protection devices were available in March 1978 and that the crash bars that were available from manufacturers other than Honda would have reduced or completely avoided the injuries that the man suffered.

Procedural History: Trial court granted summary judgment for Honda, and court of appeals affirmed saying that the danger would have been fully anticipated by or within the contemplation of the ordinary user or consumer.
Issue: Did the trial court and the court of appeals apply the right test in determining whether a product has a design defect that causes it to be in a defective condition that is unreasonably dangerous?
Holding: No.
Reasoning:

- This court adopts the **crashworthiness doctrine** that says—a motor vehicle manufacturer may be liable in negligence or strict liability for injuries sustained in a motor vehicle accident where a manufacturing or design defect though not the cause of the accident, caused or enhanced the injuries.
- Honda's argument that motorcycle manufacturers should be exempt from liability under the crashworthiness doctrine because serious injury to users of that product is foreseeable must be rejected.
- The court, in determining the extent of the liability of a product manufacturer for a defective product adopted the doctrine of strict products liability set forth in 402A.
- Honda says that comment i shows that they are not strictly lilable, because that comment says that the rule that the court uses only applies when the defective condition of the product makes it unreasonably dangerous to the user or consumer —the trial and court of appeals applied this consumer contemplation test in dismissing the ∏'s claims.
- This court says that in Pust the court recognized that requiring a party who seeks recovery on the basis of an alleged defective product to establish that the product is unreasonably dangerous appropriately places reasonable limits on the potential liability of manufacturers
- However, the court also notes that in Pust, it was held that the fact that the dangers of a product are open and obvious does not constitute a defense to a claim alleging that the product is unreasonably dangerous—the approach that the trial and appeals court used is similar to the open and obvious test that was rejected in Pust
- The court says that a test the balances the risks and benefits of a product to determine whether the product design is unreasonably dangerous should be used.
- Danger-Utility Test: balance the following factors:
    - the usefulness and desirability of the product—its utility to the user and the public as a whole
    - the safety aspects of the product—the likelihood that it will cause injury and the probable seriousness of the injury
    - the availability of a substitute product what would meet the same need and not be as unsafe
    - the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility
    - the user's ability to avoid danger by the exercise of care in the use of the product

- the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or the existence of suitable warnings or instructions
- the feasibility on the part of the manufacturer of spreading the loss by setting the price of the product or carrying liability insurance
- The court determined that there was not enough info to make a determination and said that there was competing information about certain things—the court remanded to the trial court for a determination consistent with this opinion.

DISSENT: This justice thought that the court of appeals correctly affirmed the trial court's order.
This justice thinks that the test applied by the trial and court of appeals should be used (the **consumer contemplation test)**
Consumer Contemplation Test:
Is the article sold dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics?
If YES, then it is unreasonably dangerous.
This justice thinks that the test employed by the majority is more useful in drug cases.

Book Notes

Note 7 (p. 580): food: section 7 of products restatement holds that a harm causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.

Class Notes

- Latent defects: Some courts protect manufacturers from latent defects because it would not make sense to punish them for dangers they could not have known about; not reasonably foreseeable. No deterrence possible. Other courts hold them liable anyway, because they are in the best position to know; the victims should be compensated; it provides extra incentive (or disincentive) for them to do as much research into safety as possible.
- Misuse does not absolve manufacturer of liability: it depends on whether the misuse was foreseeable. If foreseeable, manufacturer arguably had a duty to prevent it from happening.
- When to use which test? If the experience is uncommon, courts are more likely to apply risk utility than consumer expectation test. R3d only uses risk utility. National trend seems to be moving away from consumer expectations test.
- O'Brien: NJ SC ruled that even if there was no RAD, no excessive preventable danger, but product's risk still exceeded utility, manufacturer could be liable. i.e., product should not even be on the market. Irreducibly unsafe products. Reminiscent of Posner's levels of activity vs. levels of care. (O'Brien rule was later overturned by NJ legislature).
- Argument against O'Brien is that people should be allowed to freely choose the

risks of what they do. E.g. tobacco.

- Another argument is that allowing the judiciary to make such rules is giving them too much power. An institutional qn: who is the better regulator?
- Risk utility tests probably more expensive than consumer expectation tests because of need for expert testimony.

Defenses

Comparative negligence can apply as well. Comparative negligence is a defense to a products liability action, even in a manufacturing defect action. This doesn't make sense if traditionally products liability is strict liability.

Assumption of risk is another defense in a strict products liability action. Neither one really syncs well with a strict liability system. Yet courts are willing to allow such defenses to lessen the defendant's liability.

Safety Instructions and Warnings:

The first question that should be analyzed is whether any warnings or instructions are needed at all.

The second question to ask is, if there needs to be a warning and if a warning is provided, is the warning adequate?

This case looks at the adequacy of the warning provided:

Hood v. Ryobi American Corporation

Facts: A man bought a power saw and there were a lot of warnings in the manual and on the saw that said to always keep the blade guards in place. The ∏ was cutting a piece of wood and saw that the blade guards prevented the saw blade from passing completely through the wood, so he removed the blade guards from the saw. After he was done cutting that wood, he continued working on other things without butting the guards back on. In the middle of another cut, the blade flew off the saw and toward the ∏ and partially amputated his left thumb and lacerated his right leg. ∏ admits that he read the warnings but says that he thought that the blade guards were only intended to prevent the user's clothing or fingers form contacting the blade. He says he did not know that removing the guards could make the blades detach from the saw. He says that the manufacturer was aware of this though because it happened to another customer years before.

Procedural History: The trial court entered judgment for the defendants on all claims, because they say that in the face of adequate warnings, Hood altered the saw and caused his own injury. Hood appeals.

Issue: Did the trial court err in its determination?

Holding: No.

Reasoning:

- A manufacturer may be liable for placing a product on the market that bears inadequate instructions and warnings or that is defective in design.
- Hood says that he warnings in place were insufficiently specific—he said that the consequences of taking the guards off should have been explained

- The court said that a warning need only be one that is reasonable under the circumstances—in deciding whether a warning is adequate, MD law asks whether the benefits of a more detailed warning outweigh the costs
- Don't just have to look at the monetary costs—also look a the costs it poses to the actual warning—commentators say that the proliferation of label detail threatens to undermine the effectiveness of warnings altogether
- Court says that the warnings provided were sufficient—about 7 warnings in the manual and on the saw combined
- Hood says that the accident happened before, so Ryobi should have changed warning
- The court says that this was only one incident that happened over a decade before, and Ryobi sold thousand of these saws—so basically ∏ cannot prove that a different warning would bring any net social benefit
- The court held that the warnings provided were adequate as a matter of law.

Book Notes

Note 1 (p. 586): Even though the question of adequacy is normally on of fact, courts recognize that in clear cases it may become a matter of law.

Note 1 (p. 585): TN—factors to consider to determine whether a warning is adequate:
the warning must adequately indicate the scope of the danger
the warning must reasonably communicate the extent or seriousness of the harm that could result from misuse of the drug
the physical aspects of the warning must be adequate to alert a reasonably prudent person to the danger
a simple directive warning may be inadequate when it fails to indicate the consequences that might result from failure to follow it
the means to convey the warning must be adequate

Note 2 (p. 586): some courts shave invoked a heeding presumption—requiring the party responsible for the inadequate warning to show that the user would not h ave heeded an adequate warning

Note 3 (p. 587): cologne on candle case—even though not foreseeable for it to happen this way, it is foreseeable that a woman might accidentally spill perfume on candle and this gives rise to necessity for warning

Note 9 (p. 591): Uniroyal: court held that if there was a safer way to make a product, the manufacturer could be held liable even though the injury could have been avoided if the user had followed the warnings

Note 10 (p. 591): misuse of a product foes not serve as a complete defense if the misuse or unintended use was reasonably foreseeable.

Class Notes

Failure to Warn

Standard for Adequate Warning:
Reasonable under the circumstances. Would the benefits of a more detailed warning outweigh the costs of giving it? Seems like B < PL. Cost-benefit analysis. And so negligence comes up in products liability again, a strict liability category.

N1: *Pittman v. Upjohn*. The warning must reasonably indicate the scope and seriousness of the harm. The physical aspects of the warning must adequately alert a reasonably prudent person to the danger. It should indicate the consequences of not heeding the warning. Means of conveying the warning must be adequate.

Johnson v. Johnson Chemical. The intensity of the warning matters. "harmful if swallowed" vs "death may result"

The cost of increased warnings is the increase in time. Information overload. The increase in number of warnings will dilute the effect of other warnings.

Adequacy of warning may be a jury question, not a matter of law: *Moran v. Faberge* held that 1 accident in the last 27 years was sufficient to require manufacturer to have put a warning on perfume bottle. *Hood v. Ryobi* held that 1 in the last 15 was insufficient. Reasonable people can disagree.

Heeding Presumption

Heeding presumption changes the burden of proof in some states; it presumes that the plaintiff would have heeded the better warning had it been given. Defendant has the burden of disproving this.

Rel. b/w warnings and design defects

Warnings probably will not absolve manufacturer of liability if there is a design defect, a dangerous product.
But if there is no RAD, having warnings can help absolve manufacturer of liability. No design defect, and adequate warnings given.

Tokai: Imposing excessive liability may hurt consumer choice: manufacturers would bring fewer products onto the market.

Vasallo v. Baxter Helathcare Corp.

Facts: ∏ claims that silicone breast implants had been negligently designed, accompanied by negligent warnings and that they breached the implied warranty of merchantability with the consequence that she was injured. Her husband claimed loss of consortium.
Procedural History: Jury returned verdicts on the negligence and warranty counts in favor of the ∏s. On appeal, the court upheld the judgment entered on the negligence verdict.

Issue: Did the trial court apply the right standard regarding the duty to warn under the implied warranty of merchantability?
Holding: NO, because that is what MA used up until this case—this case changes the standard but will not be made applicable to this case.
Reasoning:

- The current standard the court uses is (strict liability standard):
- There is a presumption that the manufacturer is fully informed of all of the risks associated with the product at issue regardless of the state of the art at the time of the sale and strict liability is applied for failure to warn about these risks.
- Defendant wanted this jury charge:
- A manufacturer need only warn of risks known or reasonably known in light of the generally accepted scientific knowledge available at the time of the manufacture and distribution of the device.
- The court says that the judge's instruction (the current standard) was correct, but the court notes that they are part of a minority that applies a hindsight analysis to duty to warn. Judge refused to instruct way that Δ wanted.
- The court notes that a majority rejects the analysis that this court uses because it is impossible to warn against unforeseeable risks arising form foreseeable product use
- The court says that a majority of states uses the principle expressed in the Restatement (2^{nd}) of Torts 402A comment j:
- Seller is required to give a warning against a danger if he has knowledge or by the application of reasonable developed human skill and foresight should have knowledge of the danger
- Note that comment M says that a seller is charged with the knowledge that reasonable product testing would reveal
- The court decides to apply the majority test from now on: the court says that
- A defendant will not be held liable under an implied warranty of merchantability for failure to warn or provide instructions about risks that were not reasonably foreseeable at the time of sale or could not have been discovered by way of reasonable testing prior to marketing the product

Book Notes

Note 2 (p. 600): The court says that strict liability focuses on the product not the fault of the manufacturer. Three main reasons the court has adopted strict liability:
risk spreading
accident avoidance
reducing administrative costs by avoiding complicated, costly, confusing, and time consuming trials about the distant past

Note 5 (p. 603): duty to warn: according to the **Products restatement 10**, need to warn when:
the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property

those who would benefit from the warning can be unidentified and are likely unaware of the risk
a warning can effectively be communicated to and acted upon by recipients
that the risk of harm is sufficiently great to justify the burden of providing a warning
This is a negligence standard

Class Notes

Liability for Dangers that could not have been known
Restatement Third of Products Liability: p. 599. the goal of the law is to induce conduct that can be performed. This is not achieved when we impose liability for things that can't be known.
Vassallo holds that manufacturers are only liable for dangers that they knew of or should have known of; dangers that were not reasonably foreseeable are not covered.
But manufacturers are held to standard of an expert, and have a continuing duty to warn of risks discovered after sale.

Beshada: NJ court held manufacturer of asbestos strictly liable. Risk spreading, reduced administrative, costs, internalizing costs, incentive for innovation, etc. Why should the consumer have to suffer totally uncompensated injuries simply because technology wasn't good enough at the time? Calabresi would say they should just internalize the costs.

Availability of insurance also matters. Possibility of spreading the costs.

Ferayorni: manufacturer has duty to warn of risks that are discoverable in the light of the best knowledge available - "state of the art." If the knowledge was available to the industry, you have to warn even if the cost-benefit analysis would weigh against it. This is the implication of *Ferayorni*.

Work Related Injuries

Workers covered by Workman's comp are usually barred from bringing suit against their employer. However, they can bring suit against third parties.

Jones v. Ryobi

Facts: ∏ was employed at a business cards company and she was injured when she was using the small printing press. She alleged negligence and strict product liability. The press had a plastic guard and an electric interlock switch that automatically shut off the press if the guard was opened. However, the guard was removed, and the interlock switch was disabled, because it saved time and this was a common practice in the printing business. ∏ says she knew this was dangerous but did not want to be fired for using machine correctly.
Procedural History: Trial court granted the defendants judgment as a matter of law. ∏ appeals.
Issue: Did the trial court err in granting JMAL?
Holding: No.
Reasoning:

The court does not affirm on the same ground that the district court used to grant JMAL. Since the court is reviewing the grant of JMAL de novo, the court can affirm on another ground (the district court relied on restatement section 402A that is the consumer expectation test)
∏ must prove that she was injured as a direct result of a defect that existed when the press was sold.
The press was modified by a third party though
When a third party's modification makes a safe product unsafe, the seller is relieved of liability even if the modification is foreseeable

Class Notes

This case differs from the CA cases, because in this one, even if the change m ade to the product is totally foreseeable by the manufacturer, the manufacturer is not held liable (page 63 of packet is the majority/CA rule)

Two rules:

Missouri Rule (Jones)
Arizona Rule (Anderson)(majority)

Jones: In Missouri, if the product is misused, even if the misuse is foreseeable, the manufacturer is not liable. **An intervening cause**. It can be characterized as proximate cause. Or as a duty question: manufacturer only has a duty to release a non-defective product into the stream of commerce. Beyond that, it has no duty towards people injured by a misused product.

Anderson: if the modification is foreseeable, then the manufacturer is liable anyway. The manufacturer releases a product that is easy to modify, knowing that it will be modified, which will make it more dangerous. And the manufacturer, in not taking steps to counter it, is negligent. There is a defect in the design. Manufacturer is in better position to manage risk, deal with it. Manufacturer has a duty to release a product that would not reasonably foreseeably be misused.

Worker's Compensation

It is a strict liability system. Compensation provided injury occurred during employment.
Worker's compensation was a bargain between labor and capital: you won't be able to claim as much in tort, but recovery will be more certain.
Labor agreed to it because of contributory negligence and assumption of risk: they barred a lot of workers' suits.
Capital agreed to it because they would save more, as opposed to cracking down on strikes, etc.

Generally a state-run program. Workers get 2/3 of gross wages if they're totally disabled either temporarily or permanently. Less if they are partially disabled.

Worker's comp also has a damages limitation. It saves a lot of administrative costs.

Worker's comp has to deal with new claims though: soft-tissue injury, Carpal Tunnel Syndrome, mental stress, etc. WC deals easily with direct and obvious causation issues. But more subtle ones are harder - were they injured typing at work or at home? Mental diseases and occupational disease cases are feared to overwhelm the workers' comp system. Chemical substances, latent defects, etc.

There is a limited pool from which WC is drawn, made up of employer's contributions, etc. But there is a fear that it will be overdrawn due to mental and occupational diseases, latent diseases.

On one hand, it can be argued that WC is unfair because no P&S damages, only 2/3 of salary, etc. workers not fully compensated. On the other hand, feared that it will be overwhelmed.

Theoretically, why just limit it to workplace injuries? The limitation can force manufacturers to pay for injuries they didn't cause: see Liariano or Jones.

- Currently, the great majority of the states still deny the third party manufacturer any contribution at all from the negligent employer toward the tort damages awarded to the injured employee
- Policy reason: want to protect the employer who has been promised full immunity in exchange for the WC benefits—don't want to erode this legal protection
- However this means that the employer gets off scot-free when the employer was negligent and the third party (who has to pay the employee damages) gives him the money that he already compensated the worker via worker comp payments
- In terms of compensation, this is neutral, because the worker gets full tort damages and no more
- Administrative costs—economical because there is no need for litigation to resolve responsibility of employer compared to worker and manufacturer
- But, in these cases, the employer faces no legal impact of its misuse of defective products—all incentives are trained on the manufacturer
- In response to this concern, courts in a few jxs are ignoring the WC exclusivity principle
- The problem with this is that if employers were to pay for an employee with a valid tort claim, the employer will be paying too much, because under the current WC system, an employer pays for accidents on the job regardless of negligence
- Other states have tried to solve this problem by making the employer pay to the 3rd party manufacturer, etc. that which would have been pain in WC benefits for the injury
- The problem with this is that it introduces complications about the employer's liability in an area that used to be a straightforward dispute between the manufacturer and the employee

- Another possibility is barring all tort suits against 3rd parties in on the job injury cases

Occupational Injuries—Worker's Compensation

Worker's Compensation: Strengthening the Social Compact

- Employers have to provide workers with compensation when they have suffered on the job injuries regardless of whether the employee or employer was at fault
- Employees, in turn, must treat worker's comp as their exclusive remedy against the employer and give up tort claim. Two concerns:
- Fault should not be relevant, because business should not bear the burden of work related accidents
- No fault provides greater efficiency
- Origins of Worker's comp= industrial revolution
- Under the common law, employers were supposed to provide a reasonably safe environment to work in—so in theory they were subject to liability for work related accidents—there were a few reasons that employers were widely immunized though:
- Fellow servant rule
- Contributory negligence
- Assumption of risk
- Problems with bringing claims against ones employer—see page 794
- Adoption of worker's comp: first effective law passed in WI in 1911—made worker's comp elective to get past the constitutional issue
- This spread rapidly to the other states
- Changes made to the doctrine
- Expanding to cover more workers and more employers
- Expansion of the definition of compensable injury:
- Has to be a work related cause
- Conceptually difficult area is injury that occurs out of a result of repeated activity —like straining, lifting, etc.
- Almost a majority of the injuries claimed are of this type
- Occupational Disease
- Often illness will not occur until years after employment
- Initially, states did not cover these things
- Now all states expanded coverage to include work caused illness
- Disease must be a result of factors peculiar to the trade or occupation and not an ordinary disease of life
- Mental stress
- Hard to prove or disprove
- Lack of determinate standards
- Expansion of benefits
- Modernization of benefit levels
- Continuing increases

- Benefit levels and benefit utilization
- vocational rehabilitation: growth of a new benefit

Focused No Fault Schemes

No Fault Systems
Some people argue that since WC is so problematic, we should move to a no fault system.

Hazardous wastes (Superfund), the Anderson act, are examples of no fault systems.

objectives of the tort system
Deterring dangerous behavior
Spreading costs
Reducing system's admin. Cost
Compensating victims

Problem with the tort system is that it does a lousy job with all these goals.
Vast majority of tort victims never get compensated.
It especially discriminates against the poor, who lack resources to determine if there has been a tort.
Less than 4% of tort victims receive compensation, if MedMal is any indication.

Judgment proof defendants w/o insurance.
High administrative costs.

Establishing causation and damages are the hardest and costliest part of the tort system.

Deterrence: is reduced under the tort system. Not as effective.
Because tortfeasors need to know what the law is to be deterred. And most of them don't.
Changes in law are rarely reflected in changes in operations. Products liability is treated as random noise, a distraction.
Most workers and employers know little or nothing about employment law, trespass rules, etc.
Doctrinal complexity, lottery-like nature of jury verdicts, etc.
People don't know and so they don't change.

Can tortious behavior really be avoided? Accidents happen. Mistakes will happen. The Gowanda excerpt. Even if workers knew they couldn't' change their behavior.

Lack of publicity. Inadequacy of damages.

Assumptions underlying tort deterrence:
Perfect knowledge
People with identical injuries get identical damages
No administrative costs (friction of the system)

Insurance companies cannot possibly hope to assess each company and firm individually to determine how much of a liability they are. They work by aggregating. Premiums also reflect firms' safety records very loosely.

Argument is that the market and other factors affect deterrence. Not the tort system. Potential tortfeasors are deterred by government regulation and other social forces.

What about justice? Well, most companies have insurance and they're not really hurt. And most plaintiffs don't get compensated. Where's the justice in that?

How would no fault work? It's a first party insurance system. A bargain: higher taxes in exchange for no liability.

Considerable differences about where to get the $$ from. The firms and companies? The riskier their activities the more they pay. Kind of like how insurance does it now, but better.

Others argue that there is too much difficulty involved in making these assessments.

Most no fault systems argue for severe curtailment of P&S damages. Some have graduated P&S damage schemes.

People however do not like no fault. Corrective justice runs deep in our society. And people think P&S damages should be given. While tort law does not deter perfectly, it deters adequately.

No fault system offers much but gives little.
Compensation, deterrence, and moral fairness: it is hard to balance these considerations. They are irreconciliable?
Competing goals and values. Strict liability v. negligence, causation v. RIL, etc.
Law reflects but does not determine the moral worth of society. The better society the less law.

this section look at areas other than workplace and motor vehicle injuries in which either the federal government or a state has decided to replace or to supplement the tort system with a no fault system
Price-Anderson Act: This act imposes a set of statutory limitations on possible catastrophic tort liability in the event of a nuclear accident and has essentially established a hybrid system that combines components of both tort and no fault compensation models
Financed through private insurance and mandatory contributions to a common fund
Sets a limit on total liability for any nuclear incident
All claims are consolidated in the federal court for the district in which the incident has occurred.
See Allen for example of how causation and damages issues under this act are resolved

National focused no fault: the national childhood vaccine injury act of 1986
Affords relief to children injured by exposure to certain government mandated vaccines
Fund financed by an excise tax on each dose of vaccine disbursed
There is a two tier system
Proceed under a no fault approach
If not satisfied with the special master's award, can seek tort relief instead
there are disincentives to this second tier—
appropriate warning can serve as a defense against strict liability
learned intermediary doctrine
manufacturer is protected against punitive damages if it complies with the federal Food, drug, cosmetic act and the public health act
Expansive no fault for toxic harms
No fault victim compensation schemes for toxic related harms
Can pursue tort remedies if dissatisfied with no fault determinations
Neither proposal has been legislatively adopted
Page 846: initial no fault determination under the Superfund schme addresses causation by a statutory rebuttable presumption triggered when the claimant establishes 3 things
Damages include medical expenses, 2/3 of lost income,
There are disincentives for using the tort remedies in this system as well

Comprehensive No Fault and Beyond

NZ adopted a comprehensive no fault system that covered all types of accidental injuries.
Based on these 5 factors:
all citizens must be protected against income loss and permanent disability
compensation should be related to the nature of the injury not its cause
the scheme must stress physical and vocational recovery along with compensation
benefits should be paid for the duration of the incapacity
plan must be expedious

The emphasis was to be on accident prevention, rehabilitation, with compensation as the third consideration

Compensation provided by three compensation schemes—earner's scheme, general treasury, etc.

1992 revisions limited the types of injuries covered under the act—accident must be a separate cause of the injury in order for the injury to be compensable

It also excludes coverage for mental distress no associated with physical injury

Sugarman:
Would eliminate personal injury law across the board—sole exception is limited punitive damages for intentional torts
Says that the tort system is a failure in terms of deterrence and compensation:
Money would come from insurance and Social Security system

Pain and suffering damages would be abolished

Blum and Kavlen:
Say that the corrective justice deals in large part with satisfying the victims' feelings of indignation, not with deterring the wrongdoer