

## Intentional Torts

### **Battery**

A person is subject to liability for battery when he acts intending to cause a harmful or offensive contact, and when a harmful or offensive contact results. Contact which is offensive to a reasonable sense of personal dignity is offensive contact.

#### **1. Prima Facie case**

A prima facie case has been made IF a person (*all elements*)

##### **a. Acted**

An act has actually resulted if the person acted (*all elements*)

##### **i. Consciously**

1. Acts committed while unconscious do not constitute an intentional tort  
Hammontree v Jenner (*epileptic driver*)

##### **ii. Voluntarily**

1. Reflexive acts - A muscular reaction is always an act unless it is a purely reflexive reaction in which the mind and will have no share.

##### **b. With Intent**

Intent exists if person acts with (*any element*)

##### **i. actual intent to harm or offend**

1. Actual intent to harm or offend exists if a person's goal in acting is to bring about harm or offense. Snyder v. Turk (*surgeon pulled nurse down to open wound*).

##### **ii. Substantial certainty that the harmful or offensive contact will occur.**

1. A person "intends" harm or offense if he knows with substantial certainty that harm or offense will occur. Garratt v. Dailey (*5 year old pulls chair out from woman*)
2. **Recklessness, wantonness, willfulness**  
If the action is not intentional, shows an utter indifference to or conscious disregard for a person's own safety.

##### **iii. Transferred intent**

Exists if a person intended to commit a tort against one person but (*any element*)

1. **commits a different tort**
2. **commits against another person**

a. Intending to put others in apprehension of harmful or offensive contact is transferable to another who is not the object of the intention, leading to battery to that person.

b. An actor who intends a battery against one person but unintentionally commits a battery against another is liable for the battery that occurred.

Hall v. McBride (*Youth fires gun towards car and bullet hits neighbor*)

##### **iv. Exceptions**

##### **1. Insanity**

An insane person is except from liability ONLY IF (*all elements*)

a. He/she has no sane reason for the action

b. He/she does not understand harm will result

White v. Muniz (*83 year old punches nurse when trying to change diaper*)

**But** an insane person is **NOT** exempt from liability if he/she intends to do harm  
Polmatier v. Russ (*Insane man kills another with .22*)

- a. It is not necessary for someone's reasons and motives for forming an intention to be rational in order for them to have the intent to invade the interests of another.

## 2. Age

A child is not strictly liable for childish acts which he/she commits.

Van Camp v. McAfoos (3 year old hit woman with tricycle)

- a. Parents are not generally vicariously liable for the acts of their child, unless the parent is an employer using the child as a "servant."
- b. In the absence of a statute, the parents' liability for the acts of their child must be founded not on vicarious liability but on the parents' own fault.
- c. A number of states impose liability upon the parents for certain limited acts of their children, often acts that are willful, or acts that are directed against certain persons.

## 3. Motive

Motive is distinguished from intent and is **not** considered

- a. Malicious motive will not yield intent
- b. Virtuous motive will not prevent intent

## c. To cause a harmful or offensive contact

Contact is considered offensive for liability IF (*any element*)

### i. Contact is **considered by that person to be offensive AND DF knows this**

1. Contact is deemed offensive if a person has not expressly or impliedly consented to it Cohen v. Smith (*Male nurse touched naked, religious pregnant woman*)
2. **Egg-Shell Skull Rule** – DF **must know** of PL's egg shell skull
3. **EXCEPTION**
  - a. **If DF knows contact is acceptable DF not liable**

### ii. Contact is offensive to **a reasonable sense of personal dignity.**

1. Snyder v. Turk (*surgeon pulled nurse down to open wound*).

### 2. **Even if trivial**

Leichtman v. WLW Jacor Communications Inc. → (*blowing cigar smoke in radio talk show guest's face*).

## d. Which actually resulted in harm or offense

Actual harm or offense will occur **regardless of** (*all elements*)

### i. **Actual Damages**

PL does not have to prove actual damages.

1. PL can recover at least *nominal damages*
2. *Punitive damages* possibility if malice

### ii. **Apprehension**

PL may recover even though he is not conscious of the harmful or offensive contact when it occurs

### iii. **Immediate Awareness**

PL may learn later that harmful or offensive contact occurred and may recover

### iv. **Direct Contact**

#### 1. **Extended Personality**

Leichtman v. WLW Jackson (*blew cigar smoke repeatedly in face*). Particulate matter (smoke) that is intentionally made to contact a person lends itself to liability in the same way as a physical object.

## 2. Damages

DF is liable for all injuries resulting from the consequences of battery, regardless of foreseeability

- a. Intentional tort law has purpose to deter unauthorized contacts from the outset, imposing costs of all resulting injuries on the actor

## Assault

An actor is subject to liability to another for assault if he acts intending to cause a harmful or offensive contact or an imminent apprehension of such a contact, and the person is thereby put in such imminent apprehension.

### 3. Prima Facie case

A prima facie case has been made IF a person (*all elements*)

#### a. Acted

An act has actually resulted if the person acted (*all elements*)

##### i. Consciously

1. Acts committed while unconscious do not constitute an intentional tort  
Hammontree v Jenner (*epileptic driver*)

##### ii. Voluntarily

1. Reflexive acts - A muscular reaction is always an act unless it is a purely reflexive reaction in which the mind and will have no share.

#### b. With Intent

Intent exists if a person acts with (*any element*)

##### i. any intent to cause a battery

##### ii. actual intent to cause an imminent apprehension of such contact

##### iii. substantial certainty that imminent apprehension of such contact will occur

##### iv. Transferred Intent

#### c. To Cause Either (*any element*)

##### i. Harmful or offensive contact

##### ii. Imminent apprehension of such contact

#### d. Imminent apprehension of harm or offense actually occurred

Imminent apprehension is said to have occurred IF (*all elements*)

##### i. Awareness or knowledge of the act

To be aware of an act a person must have sufficient time to have an apprehension of contact Koffman v Garnett (*Teenage football player slammed by coach*)

##### 1. Knowledge of DF's identity NOT REQUIRED

##### ii. Expected imminent contact

1. **Immediate** threat of contact, with no significant delay, is necessary
  - a. If a person is too far away to do any harm or merely preparing for future harmful acts, there is no possible imminent contact

2. **Words alone**

- a. **Overt act required**

Words alone do not constitute an assault, but must be accompanied by acts to create a reasonable apprehension Cullison v Medley (*Family surrounds man in trailer*)

- b. **Words may negate an assault**

Words that make it unreasonable to assume any apprehension of immediate contact, even accompanied by acts, may negate an assault.

##### iii. Such apprehension was reasonable

##### iv. Imminent apprehension may result **regardless of** (*all elements*)

1. **Actual Damages**

- a. PL does not have to prove actual damages.

- i. PL can recover at least *nominal damages*
  - ii. *Punitive damages* possibility if malice
2. **Person's ability to defend oneself or avoid harm**
  - a. One may reasonably apprehend an imminent contact although he believes he can defend himself or otherwise avoid it.
3. **Person's actual ability to act**
  - a. A person's **Apparent ability to act is sufficient**
  - b. Even though a DF may not be *actually capable* of immediate contact, apprehension may be reasonable if the DF has the apparent ability to bring about such contact.
4. **Awareness or knowledge of the DF's identity**
  - a. While the PL must be aware of the act, PL does NOT need to be aware of the identity of the person who directs the act.

## 1. Damages

DF is liable for all injuries resulting from the consequences of assault, regardless of foreseeability

- i. Intentional tort law has purpose to deter unauthorized contacts from the outset, imposing costs of all resulting injuries on the actor

## False Imprisonment

An actor is subject to liability to another for false imprisonment if he acts intending to confine a person within boundaries fixed by the actor, his act directly or indirectly results in such confinement, and the person is conscious of the confinement or is harmed by it.

### 1. Prima Facie case

A prima facie case has been made IF a person (*all elements*)

#### a. Acted

An act has actually resulted if the person acted (*all elements*)

##### i. Consciously

1. Acts committed while unconscious do not constitute an intentional tort  
Hammontree v Jenner (*epileptic driver*)

##### ii. Voluntarily

1. Reflexive acts - A muscular reaction is always an act unless it is a purely reflexive reaction in which the mind and will have no share.

#### b. With Intent to confine a person to a bounded area defined by the actor

Intent exists if person acts with: (*at least one*)

- i. **actual intent** to confine a person to a bounded area
- ii. **substantial certainty** that confinement to a bounded area will occur
- iii. **Transferred Intent**

#### c. Actual confinement to a bounded area

Confinement results if **limited freedom of movement in all directions such that there is no reasonable means of escape** results from (*at least one*)

##### i. Physical Barriers

##### ii. Physical Force

1. Directed at person, property, or immediate family

##### iii. Threats of Force

###### 1. Direct

- a. Direct threats of force to person, property, or immediate family

###### 2. Indirect

- a. Acts or words that **reasonably** imply a person will use force directed at person, property, or immediate family.

McCann v Wal-Mart (*Woman's children accused of stealing and confined to stand at register*)

###### 3. Duress of Goods

- a. Form of threat of force directed toward property
- b. Person is confined to the boundary adjacent to the property being held in duress AND is **reasonable** in doing so.

##### iv. Assertion of Authority

1. Invalid use of legal authority results in false imprisonment if PL confined AND if it is not privileged (see below)

##### v. Failure to provide means of escape

1. A person may be liable for failure to provide a means of escape IF (*all elements*)
  - a. a person is lawfully under their control
  - b. a person is unable to leave without their assistance
  - c. they withhold their assistance with intent to detain

##### vi. NOT

1. Exclusion of person from some place
2. Moral pressure

### 3. Future Threats

#### d. Person is conscious of the confinement OR harmed by it

Confinement may result **regardless of** (*all elements*)

##### i. Actual Damages

1. PL does not have to prove actual damages.
  - a. PL can recover at least *nominal damages*
  - b. *Punitive damages* possibility if malice

##### ii. Resist

1. PL does not have to resist confinement.

##### iii. Time of confinement

1. PL merely has to be confined for an appreciable time.
2. Any time which is considered appreciable to a **reasonable** person constitutes sufficient time to establish false imprisonment.

### 2. Damages

DF is liable for all injuries resulting from the consequences of false imprisonment, regardless of foreseeability

- a. Intentional tort law has purpose to deter unauthorized contacts from the outset, imposing costs of all resulting injuries on the actor

## Defenses to Intentional Torts

A Defendant may raise an *affirmative defense* with the exception of consent

### 1. Self Defense

A person may be privileged to self defense IF he has (*all elements*)

- a. **reasonable grounds to believe** he must prevent **impending or future injuries** IF (*all elements*)
  - i. **Apparent necessity**
    1. A person may make a reasonable mistake
  - ii. **More than provocation**
    1. Insults and arguments do not justify physical attack
  - iii. **Regardless of Retreat**
    1. Majority – attempt to escape is not necessary
    2. Modern trend – Duty to retreat before using deadly force, **unless** actor is at home
  - iv. **Without Retaliation**
    1. Defense is not privileged for past injuries
  - v. **NOT an aggressor**
    1. Initial aggressor is not privileged unless the other party uses deadly force
- b. **force that is reasonably necessary**
  - i. **Deadly force**

Available only IF (*any element*)

    1. a reasonable belief of danger of serious bodily injury
- c. Other considerations for Self-Defense
  - i. **3<sup>rd</sup> party injuries**

If actor is privileged **but accidentally** injures a bystander, actor is protected by the defense.

### 2. Defense of Others

A person may be privileged to defense of others if (*all elements*)

- a. **reasonable belief** that the **other person** would have the privilege of self-defense
  - i. Even if the other person has no defense, a person is not liable as long as he **reasonably believed** that the other person could have used self-defense.
- b. **force that is reasonably necessary**
  - i. As much force as the person could have used in self-defense if the injury were threatened to him

### 3. Defense of Property

A person may be privileged to defense of property IF (*all elements*)

- a. **Reasonable force**
  - i. **Deadly force**

Use of deadly force is **NOT** privileged where only property is threatened  
Brown v Martinez (boy shot when stealing watermelon)  
The law has always placed a higher value upon human life than rights in property.  
A person may **NOT** use a trap, spring gun, vicious dog, etc. when such force would not be privileged directly against a mere trespasser. Katko v Briney (spring shotgun set up to protect house from burglary)

### 4. Repossession of Property

A person, who has been tortiously dispossessed from his property, may be privileged IF (*all elements*)

- a. **Common Law**

- i. **Act promptly**  
A person must act promptly upon discovering the dispossession.
- ii. **Reasonable Force**  
Reasonable force could be used to regain possession
- b. **Modern Statutes**  
Self-help is no longer allowed and must seek recovery in the courts, **NOT use force**

## 5. Repossession of Chattels

A person may regain possession of a chattel lawfully IF (*all elements*)

- a. **Hot pursuit**
- b. **Timely demand**
  - i. A demand to return the chattel must precede the use of force
  - ii. **Unless clear that such demand would be futile or dangerous**
- c. **Reasonable Force**
  - i. **NOT deadly force**
  - ii. **Exception**
    - 1. **Innocent parties in which the chattel falls into the hands of → no force allowed**

## 6. Consent

(**NOT an affirmative defense**)

A person may NOT be liable for an otherwise tortious act IF (*all elements*)

- a. **Express Consent**  
Where a person has expressly shown a willingness to submit to another person's conduct, express consent relieves that person of liability
  - i. **Consent by mistake**  
Consent by mistake is valid consent **unless**
    - 1. **person caused the mistake**
    - 2. **person knows of the mistake and takes advantage of it**
  - ii. **Exceptions**
    - 1. **consent induced by fraud**
      - a. fraud must be material to the consent
    - 2. **consent obtained by duress**
      - a. Threats of future action or future economic deprivation don't constitute legal duress sufficient to invalidate consent.
- b. **Implied Consent**  
A person may impliedly consent to an otherwise tortious act IF (*all elements*)
  - i. **Apparent Consent**  
A person's conduct implies consent IF (*any element*)
    - 1. **A reasonable person**
    - 2. **Usage and custom**  
Consent may be inferred as a matter of usage and custom (e.g. ordinary contacts of daily life)
  - ii. **Consent implied by law**  
A person's situation implies consent IF (*all elements*)
    - 1. **Emergency situation**
    - 2. **Person is incapable of consenting**
    - 3. **A reasonable person would consent**
- c. **Exceptions**

i. **Lack of capacity**

A person's lack of capacity renders consent ineffective IF (*all elements*)

1. **Condition substantially impairs capacity** to understand and weigh the harm and risks of harm against the benefits flowing from the proposed conduct
2. **Defendant knows of incapacity**  
Reavis v Slominski (employee lacked capacity to consent to sex with employer)

ii. **Exceeding scope of consent**

If a person does something substantially different from the consent given, he is liable

1. Ashcraft v King (woman's consent to transfusions exceeded – given AIDS)
2. Consent given for an operation extends to additional needs during surgery  
Kennedy

iii. **Criminal acts**

1. **Majority** – a person cannot consent to a criminal act
2. **Minority** – consent to a criminal act is a valid defense to intentional tort

iv. **Revocation of consent**

A person may revoke consent at any time by communicating such to the defendant.

## 7. Necessity

A person may be privileged by necessity IF (*all elements*)

- a. **reasonably and apparently necessary** to avoid threatened injury which is substantially more serious than the invasion that is undertaken to avert it.

i. **Public Necessity**

One is privileged to damage or destroy property when the actor reasonably believes it to be necessary for the purpose of avoiding an imminent public disaster.

1. If act is for the public good, the defense is absolute  
Surocco v Geary (blow up house to prevent spread of fire)
2. **Even if mistaken that a public necessity exists**
3. **Most states without compensation for loss**
4. **Exception**
  - a. **There exists a better alternative and a decision against such alternative**

ii. **Private Necessity**

One is privileged to damage or destroy or remain on or enter private property of another when the actor reasonably believes it to be necessary to prevent serious harm to the actor or his land or chattels of the land or chattels of another.

1. If act is solely to benefit **any person** or to protect **any property**, the defense is qualified as the **actor must pay for any injury he causes**.
2. **Privilege of private necessity trumps privilege to defend property**  
Ploof v Putnam (moored boat to dock during storm)
3. Although a person may be privileged to enter another's land in order to protect self, others, or property, actor is still liable for damages if he benefits from entrance of land Vincent v Lake Erie (boat slammed against dock when storm arose as it was being unloaded)
4. **Restatement**: One is privileged to enter or remain on land in the possession of another if it is or reasonably appears necessary to prevent serious injury to the actor, his land or his chattels. Where the entry is for the benefit of the actor or a third person, the actor is liable for damage.

## 8. Arrest and Detention

A person may be privileged by arrest and detention IF (*all elements*)

- a. **Reasonable belief**
  - i. Any property owner, including a storekeeper, has a common law privilege to detain against his will any person he believes has tortiously taken his property.  
Great Atlantic & Pacific Tea Co. v Paul (old man accused of stealing can of tick spray)
  - ii. **Statutory privilege over common law**  
If a storekeeper is privileged to detain, and the tortfeasor attempts to escape from the store, he is allowed to use force to keep him in. Harley Davidson Store
- b. **Reasonable manner**
  - i. Only non-deadly force may be used
  - ii. **Only for the purpose to make an investigation**
    1. **Invasion of land**  
Privilege of arrest includes the privilege to enter another's land to effect the arrest
    2. **Subsequent Misconduct**  
Even if the arrest is privileged, the actor may still be liable for subsequent misconduct
- c. **Reasonable period of time**
  - i. Only for the period of time to make a short investigation (e.g. until the police arrive)
- d. **Mistake**  
One who makes an arrest under the mistaken belief that it is privileged may be liable for false imprisonment

## 9. Discipline

A person may be privileged by discipline IF (*all elements*)

- a. **Parent OR** in charge of a child not their own
- b. **Reasonable Force**
  - i. Taking into account age, sex, and seriousness of behavior

## Negligence

Negligence is conduct that imposes unreasonable risks of harm. The risk of harm is unreasonable when a reasonable and prudent person would foresee that harm might result **and** would avoid conduct that creates the risk.

### 10. Prima Facie Case

A PL may establish a prima facie case for negligence IF (*all elements*)

#### a. DF owed PL a legal duty

A DF owes the PL a legal duty to act with (*all elements*)

##### i. General Duty of Care

The duty owed to a PL by a DF is always to act as a reasonable and prudent person in the same or similar circumstances Stewart v Motts (fuel tank explodes when turn ignition)

##### ii. Level of reasonable care

The standard of reasonable care never varies, but the care which is reasonable to require of the actor varies with the circumstances.

#### 1. Emergency Situations

- a. A person in an emergency must act as a reasonable person would under the same emergency, with the same amount of time for reflection, **unless the emergency is of the DF's own making.** Wilson v Sibert (superfluous emergency jury instruction not error because repetitious of 'under the circumstances')

#### 2. Rescuer

- a. A rescuer is a foreseeable plaintiff as long as the rescue is not wanton

#### 3. Physical Handicaps

- a. A person with physical handicap is held to the same standard of care as that of a reasonable person under the same circumstances **with regard to their infirmity** Shepherd v Gardner Wholesale Inc (Woman with impaired vision trips)
  - i. (e.g. "consider all the circumstances, including the PL's lack of sight, in determining what precautions a reasonably prudent person would have taken)
- b. NOT held to a higher degree of care to avoid injury than is required of a person under no disability
- c. **Exceptions**
  - i. **Intoxication**  
An intoxicated person is held to the same standard of care as a sober person.
  - ii. **Memory**  
A person must exercise the memory of a reasonable person in recognizing a risk

#### 4. Mental Handicaps

- a. A person with mental handicap is held to the same standard of care as that of a reasonable person under the same circumstances **without regard to their capacity** to control or understand the consequences of their actions Creasy v Rusk (Alzheimer patient kicks caregiver)
- b. Do not take into account a person's lack of intelligence, ignorance, excitability, or proneness to accident.

c. **Rationale**

- i. Allocate loss between two innocent parties with causing party
- ii. Incentive for restraint of disabled
- iii. Remove incentive to face mental disabilities
- iv. Avoid difficulty in identifying and assessing disability

d. **Intoxication**

An intoxicated person is held to the same standard of care as a sober person

e. **Memory**

A person must exercise the memory of a reasonable person in recognizing a risk

f. **Exception**

- i. Where a mentally impaired person has a caretaker employed to care for them, there is no duty of care (see professional / experience)

5. **Children**

a. Children are held to the standard of care of a reasonably careful child of the same age, intelligence, and experience.

b. **Exception**

- i. **3 years old and under**  
Incapable of negligence as a matter of law
- ii. **7-14 years old**  
Some courts still presume incapable
- iii. **Inherently dangerous activities**  
When a child engages in an inherently dangerous activity, the child is held to an adult standard of care  
Robinson v Lindsay (child operates snowmobile)  
Hudson-Connor v Putney (golf-cart NOT inherently dangerous – 12 mph without adult skill)

6. **Professional / Experience**

a. A person is held to the standard of care of a reasonable person, *with this expertise*

Creasy v Rusk (Alzheimer patient kicks caregiver)

Hill v Sparks (Experienced operator of machinery)

7. **Statutory Standards of Care – Negligence Per Se**

Unexcused violation of a statute is negligent per se (as a matter of law) IF (*all elements*)

a. **Statute clearly sets the standard of care**

- i. What standard is, where and when expected, whom expected of

b. **PL is within the class the statute was designed to protect**

c. **Type of harm is the type the statute was designed to prevent**

d. **Other considerations** Rains v Bend of the River

- i. Clear definition of the prohibited or required conduct?
- ii. Sole source of duty to plaintiff?
- iii. Imposes liability without fault?
- iv. Results in damages disproportionate to the statutory violation?

v. Injury direct or indirect result of violation of statute?

**e. Exceptions**

Violation of a statute may be excused IF (*any element*)

**i. Actor's incapacity**

**1. Violation by minors**

Children who violate a statute are not held to negligence per se, but may be used as evidence of negligence.

Bauman v Crawford

**ii. Actor doesn't know AND shouldn't know of occasion for compliance**

**iii. Actor, after reasonable diligence, is unable to comply**

**iv. Actor is confronted by emergency not due to own misconduct**

**v. Compliance would cause more risk of harm to actor or others**

1. e.g. drives on wrong side of road to avoid hitting children

**iii. No duty to take affirmative action**

1. **There is no duty to act** → nonfeasance

2. **Exceptions** → misfeasance

**a. Entire course of conduct as misfeasance**

i. But if an entire course of conduct is misfeasance, the nonfeasance involved within the misfeasance course of conduct doesn't shift the conduct to nonfeasance Newton v Ellis (lighting of hole)

**b. Conduct causing harm or unreasonable risk of harm**

i. Where a DF constructs the risk, DF's failing to act to prevent harm is misfeasance Yania v Bigan (co-worker watches as drowns)  
ii. If a person knows or has reason to know that his conduct has caused harm to another person, duty to render assistance to prevent further harm

**c. Middle of Undertaking Rescue**

i. Can't leave the person you seek to rescue in worse position  
ii. But if have acted with reasonable care up to the point of leaving midstream AND don't leave in a worse position, not liable  
iii. Wakulich v Mraz (girl drunk on couch, pace pillow under head but don't call 911)

**d. Prevention of 3<sup>rd</sup> person from assisting**

**e. Special Relationship** - -duty of reasonable care

i. Carrier-passenger  
ii. Innkeeper-guest  
iii. Landowner-lawful entrant  
iv. Employer-employee  
v. School-student  
vi. Landlord-tenant  
vii. Custodian-person in custody

**iv. Duty to protect from 3<sup>rd</sup> persons**

Generally, there is no duty to protect from 3<sup>rd</sup> persons, but exceptions based on special relationships

1. **Based on DF's relationship with PL**

**a. Landowner Duties**

**i. Specific harm rule**

1. No duty unless aware of specific imminent harm

2. No states use this
  - ii. **Prior similar incidents test**
    1. Foreseeability is established by evidence of previous crimes on or near the premises
    2. Must exercise due care to discover harm that is likely
    3. Restatement
  - iii. **Totality of the circumstances test**
    1. Look at nature, condition, and location of land
    2. Lack of prior similar incidents will NOT preclude a claim where the landowner knew or should have known that the criminal act was foreseeable
    3. Most states
  - iv. **Balancing test**
    1. Balances the foreseeability of the harm against the burden of imposing a duty to protect against the criminal acts of 3<sup>rd</sup> persons
      - a. Goes to judge
- b. **School Duties**
- i. Duty of reasonable care extends to anyone who has supervisor responsibility over a student and he or she recognizes or should recognize that there's some problem act school
  - ii. During certain times of the day
  - iii. **Colleges** – no duty to supervise, but can be liable if accept criminal student
2. **Based on DF's relationship with dangerous person**
- a. **Common Law** – if DF had control over dangerous person, DF then was expected to take reasonable care to prevent harm from 3<sup>rd</sup> parties
  - b. **Lessor of property**
    - i. If lessor has control over a dangerous tenant, under duty of care
  - c. **Family members**
    - i. Courts split on control issue
  - d. **Therapists**
    - i. Assessment of danger → professional standard
      1. In cases where its not obvious where doctor should have recognized the danger, need expert testimony
    - ii. Protection from danger → reasonable care standard
      1. Duty to act with reasonable care, assessed by jury
    - iii. Reasonable care to protect the foreseeable victim of danger
  - e. **Negligent Entrustment**
    - i. Duty not to create an unreasonable risk to other persons by entrusting their chattels to them
    - ii. Liability for negligent entrustment results when an owner, having actual or constructive knowledge of a person's incompetency, inexperience, or recklessness, entrusts his chattel to another with permission to use it
    - iii. **Tavern Liability**
      1. One who sells intoxicating beverages for on the premises consumption has a duty to exercise reasonable care not to sell liquor to noticeably intoxicated person
- v. **Negligent Infliction of Emotional Distress**

## 1. Common Law Rules

### No bystander liability

#### a. Impact Rule

- i. No recovery for fright alone without physical harm

#### b. Parasitic damages rule

- i. Recovery for fright when accompanied by physical harm
- ii. Tort → impact/direct physical harm → emotional harm

## 2. New Rules

### Possible bystander liability

#### a. Direct victim

##### i. Physical manifestations

1. Recovery where some sort of physical injury resulting from emotional injury
2. Tort → emotional harm → physical harm

##### ii. Diagnosable Emotional disorder

1. NC and WA
2. No physical injury necessary
3. Tort → emotional harm → diagnosed by medical prof.

##### iii. No physical injury requirement altogether

1. Just have to meet requirements of negligence

#### b. Bystander

##### i. Zone of danger

1. If have a little fear for your own welfare, can pick up damages for reaction to harm done to someone else
2. Need to
  - a. Be in zone of danger
  - b. Fear for own injury

##### ii. Dillon test

1. Liable to those that might foreseeably suffer emotion harm because of injury. Consider
  - a. PL located near scene
  - b. Sensory and contemporaneous observance of accident
  - c. PL and victim closely relate

##### iii. Thing Test

1. Require Dillon factors
2. Apply when PL is bystander with no preexisting relationship with DF

#### c. Can recover without physical injury for

- i. Incorrectly and negligently transmission of message of loss of loved one
- ii. Mishandling close relative dead body

## vi. Special Duties

### 1. Common Carriers

- a. Common carriers are those in the business of carrying passengers and goods who hold themselves out for hire *by the public*
- b. Must exercise more than ordinary care (**higher standard**)
  - i. Liable for any negligence at all
- c. Many courts reject this, but some still retain (including NC)  
Doser v Interstate Power Co. (bus collides with automobile)

## 2. Automobile driver to guest

- a. Most jurisdictions – exercise ordinary care
- b. Few states have guest statutes
  - i. Refrain from gross negligence (willful or wanton misconduct)  
(lower standard)
  - ii. Speed alone insufficient
  - iii. Speed plus knowledge of specific danger often sufficient
- c. Does NOT include “passengers” who contribute toward the expense of the ride
  - i. Less of an information balance when not paying
  - ii. Fairness, if going to mooch, shut up if get injured

## 3. Owners/Occupiers of Land

With regard to conditions on the land (not intentional acts of the landowner)

### a. Common Law

In about half of the states

#### i. Invitee

1. People who rightfully come on the premises of another by express or implied invitation, usually for the benefit of the landowner
  - a. hold premises open to the general public
    - i. store owner open to public
  - b. Invite someone on premises to do work
    - i. business visitor
2. Ordinary Reasonable Care
3. Hidden and dangerous conditions
  - a. Duty to eliminate dangerous with reasonable inspection of land to ensure premises are safe before inviting on premises

#### ii. Licensee

1. People permitted to be on the land by the owner’s consent or some kind of privilege (necessity)
  - a. Includes social guests
2. Discovered Invitee
  - a. Ordinary reasonable care
  - b. Hidden and dangerous conditions
    - i. Duty to warn of dangers, at least when invitee is believed to be in impending danger
    - ii. No duty to inspect premises
    - iii. Duty to make property as safe as would for self
3. Undiscovered Invitee
  - a. No duty of reasonable care to discover invitee
  - b. Duty against willful and wanton negligence
  - c. Hidden and dangerous conditions
    - i. No duty to inspect premises

#### iii. Trespasser

1. No privilege to be on land and no consent
2. Discovered Trespasser

- a. Ordinary reasonable care
- b. Hidden and dangerous conditions
  - i. Slightly less duty to warn than discovered invitee
  - ii. No duty to inspect premises

### 3. Undiscovered Trespasser

- a. No duty of reasonable care to discover trespasser
- b. Duty against willful and wanton negligence
- c. Hidden and dangerous conditions
  - i. No duty to inspect premises

## iv. Exceptions

### 1. Foreseeable trespasser

- a. If a landowner knows that trespassers are frequent in the area, even without discovering a particular trespasser, duty of care to warn of known dangers and sometimes to eliminate known dangers
  - i. NOT duty to inspect

### 2. Attractive Nuisance

- a. ONLY applies to children, who because of their tender years, are foreseeably unlikely to appreciate the dangers and to avoid them.
  - i. Grade school and less
- b. Standard of care is reasonable care
  - i. Sometimes warning, often times landowner's affirmative action to take into account children
- c. Subject to liability IF (*all elements*)
  - i. Landowner knows or should know children likely to trespass
  - ii. Condition is one in which landowner knows or should know will involve unreasonable risk of serious harm to children
  - iii. Children may not discover the condition or realize risk involved
  - iv. Eliminating the danger is less burdensome than the risk
  - v. Landowner fails to exercise reasonable care to eliminate the danger / protect children
- d. Bennet v Stanley (child/mother die in pool)
- e. **Adult rescuers** are owed a duty of reasonable care
- f. Some courts say DF can't argue contributory negligence defense, when DF's duty was to specifically protect PL from PL's own negligence
- g. Some courts allow reduction

### 3. Open and Obvious Danger

- a. A landowner owes no duty to protect from open and obvious dangers

- i. unless it is foreseeable that an open and obvious danger is reasonably going to be missed

O'Sullivan v Shaw (boy dives head first in shallow end)

b. **Modern Reasonable Care**

- i. About half of the states have eliminated the common law categories and substitute a general duty of reasonable care
  - 1. Some say that licensees and invitees are given standard regardless of status and retain trespassers
  - 2. Others have eliminated all categories, but category may be considered in assessing the landowner's duty to use reasonable care

Rowland v Christian (porcelain handle in apartment breaks)

c. **Exceeding the scope of invitation**

A person may exceed the scope of invitation by (*any element*)

- i. **Going beyond physical boundaries**
- ii. **Going beyond invitation's purpose**

4. **Lessors**

a. **Traditional**

- i. Landowner is not liable for tenant's injuries
- ii. No duty to inspect
- iii. Only duty to warn of known dangers
- iv. **Exceptions**

Exceptions apply IF (*any element*)

1. **Landlord**

- a. Contracts to repair defects
- b. Conceals a known defect at a time of transfer that couldn't be reasonably discovered
- c. Negligently makes repairs

2. **Premises**

- a. For public use
- b. Under landlord's controls

b. **Modern**

- i. Landlord has duty of reasonable care and merely evidenced by
  - 1. Notice of defect
  - 2. Obviousness
  - 3. Control of premises

Pagelsdorf v Safeco Insurance Co. (movers fall from rotten rail)

5. **Medical / Other Professionals**

a. **General Standard of Care**

- i. The general standard of care is the standard method of care given by expert testimony who must testify to
  - 1. **Traditional Locality** – what the practice is of doctors in a particular area
  - 2. **If dropped locality** – generally in the profession
  - 3. **Except** where common knowledge of laymen is sufficient to recognize or infer negligence → RPP

- ii. **Multiple standard**  
Where competent and medical authority is divided, a physician will not be held responsible if in the exercise of his judgment he followed a treatment advocated by a considerable number of recognized and respected professionals in his given area of expertise.
    - 1. Issue of law
- b. **Strict Locality / Common Law Rule**
  - i. Look to relevant medical standards in DF's own community
  - ii. **Large variation between practices**
  - iii. **Scarcity of experts**
  - iv. Modernly, avoids inequities of holding small town to same standard as large town
  - v. Transportation advances
- c. **Modified Locality**
  - i. Establish standard of care by looking at similar localities
  - ii. NC
- d. **National Standards**
  - i. Most states
  - ii. A physician must exercise that degree of care, skill, and proficiency exercised by a reasonably careful, skillful, and prudent practitioners in the same class to which he belongs, acting under the same or similar circumstances.
- e. **Specialists**
  - i. Specialists are held to their standard of specialty in all states
- f. **Non-medical practitioners**
  - i. Look to school of belief
  - ii. **Exception – bizarre cases**
  - iii. Adults can submit themselves to bizarre, but children differently
- g. **Referral**
  - i. **Medical Practitioners**
    - 1. must refer their patients to specialist when standard of care requires
  - ii. **Non-medical practitioners**
    - 1. some courts – when recognizes or should recognize that patient has medical problem, must refer to doctor
- h. **Good Samaritan Statutes**
  - i. Someone who in good faith renders emergency care at the scene of the emergency shall **NOT** be held liable for any civil damages
    - 1. NC – applies to anyone, not just medical
    - 2. Some states – leaves open gross negligence
  - ii. **Immunity encompasses**
    - 1. Some include hospitals, some don't
    - 2. **Velazquez v Jiminez** (baby delivered wrongly)  
only those situations in which someone comes, by chance, upon a victim who requires immediate emergency medical care, at a location compromised by lack of adequate facilities, equipment, expertise, sanitation, and staff.
- i. **Treatises and hearsay**
  - i. Common law excluded
  - ii. Federal Rules of evidence allows
- j. **Res Ipsa**

**i. Incident doesn't usually occur in absence of negligence**

1. An expert can testify to give "bridge testimony" that helps the jury with the calculation that the injury normally doesn't occur in the absence of negligence  
States v Lourides Hospital (after cyst removal patient pain shoulder)
2. Not needed in all cases, like sponge left inside

**ii. DF's exclusive control**

1. In medical malpractice, may be able to bypass this if PL unconscious
2. As long as the group of DF's is more likely than not to be negligent, res ipsa can be used to smoke out DF's  
Ybarra v Spangard

**k. Informed Consent**

Some harm occurs due to the doctor's failure to inform the patient of the risks of a procedure, not the doctor's negligent performance of it

**i. Standard of disclosure**

**1. Reasonable Patient Standard**

- a. A physician owes his patient the duty to disclose in a reasonable manner, all significant medical information that the physician possesses or reasonably should possess that is *material to an intelligent decision by the patient whether to undergo a proposed procedure*
- b. Jury decision about what would be material to reasonable person without expert  
Harnish v Children's Medical Center (nerve severed in operation to remove tumor in neck)

**2. Reasonable Physician Standard**

- a. The standard disclosure is that of the reasonable medical practitioner
- b. Always requires expert medical testimony
- c. Might be reasons for withholding information
- d. Adds little burden to PL

**3. No duty to disclose statistical evidence**

**ii. Causation**

1. Most courts require both subjective (I would not have gone ahead with procedure) and objective (a reasonable person wouldn't have gone ahead)
2. Some courts take into account particular characteristics of PL such as fears, age, medical conditions, and religious beliefs → a reasonable person with the PL's characteristics and subjective fears would not have gone ahead

b. **Breach of that duty by the DF**

When the DF's conduct falls short of that level required by the applicable standard of care owed to the PL, a DF has breached his or her duty.

To prove a DF breached his or her duty, it must be shown (*all elements*)

i. **What actually happened**

1. **Direct evidence**

2. **Circumstantial evidence**

Evidence of one fact is inferred from evidence of another fact and most is admissible

3. **Opinion Evidence**

a. **Experts**

i. Experts may testify to opinion, **but not ultimate opinion**

ii. Where the appropriate care is within the common knowledge and everyday experience, no expert testimony is needed to establish the right amount of care. District of Columbia v Shannon

iii. **Problems**

1. May differ

2. May not be expert

3. May overwhelm the jury

b. **NOT witnesses**

i. Witnesses may only testify to facts within their knowledge, based on their experiences with the party.

ii. **Constitutes negligence**

What actually happened may constitute negligence IF (*any element*)

1. **Violation of statute**

a. Negligence per se

2. **Products Manufacturer**

a. The maker or distributor of a product must anticipate the environment in which the product will be used

Bernier v Boston Edison Co. (pole falls down upon car collision)

3. **Custom**

a. **DF's own custom**

A party's own rules of conduct **do NOT** serve as a legal standard and failure to follow such rules may only be relevant as evidence, not failure to exercise ordinary care. Wal-Mart v Wright

i. Rules may be for reasons other than safety or ordinary care

ii. Employers that have a high standard of care would be more susceptible to negligence

iii. Loss of incentive to adopt high standards

b. **General Custom**

In addition, following customs of the community **do NOT** establish compliance with ordinary care, but may be relevant only for evidence

The T.J. Hooper (custom not to include radios on boat)

i. **Statutory standard**

1. General custom higher than statutory standard

a. Duncan v Corbetta (common practice to use nonpressure-treated lumber)

2. General custom lower than statutory standard

- a. Even if statute is routinely violated by custom, policy implications set standard at statutory
- c. What custom proves
  - i. Harm was foreseeable
  - ii. DF knew or should have known of risk

#### 4. Slip & Fall

Negligence may be shown by proving (*any element*)

- a. The defendant created the dangerous condition
- b. The defendant discovered (actual notice) or should have discovered (constructive notice) a condition created by others and should have taken precautions to prevent injury
  - i. Constructive notice is shown by proving that the substance had been there for a relatively long time.
- c. The defendant's mode or method of business operations made it likely that others would create a dangerous condition

Thoma v Cracker Barrel Old Country Store, Inc.

#### 5. Res Ipsa Loquitur

Res Ipsa loquitur may be used to establish a breach of duty owed IF (*all elements*)

##### a. There is NO circumstantial evidence

If there exists circumstantial evidence about how a particular fact occurred, have how a particular fact occurred

- i. **Possibly incomplete explanation does NOT bar RIL**  
Widmyer v Southeast Skyways (No survivors in plane crash)
- ii. **Complete explanation DOES**

##### b. Accident doesn't normally occur without negligence

Experience indicates that the injury is of a type that was probably the result of negligence.

##### i. Expert testimony

When common knowledge would not suffice to conclude that the event doesn't usually occur without negligence, expert testimony may be presented. Lowrey v Montgomery Kone, Inc.

##### c. Negligence attributable to DF

Negligence may be attributable to the DF IF (*any element*)

##### i. Exclusive control by DF

1. Instrumentality or agent which caused accident was under the exclusive control of DF.

Eaton v Eaton (mother wrecked car)

##### ii. DF more likely than not negligent

1. Other responsible causes besides DF's are sufficiently eliminated, such that negligence by DF is more likely than not Restatement
2. Even in the absence of proof of absolute exclusivity and control over the instrumentality by DF, if DF's control was sufficient to warrant an inference that the DF was more likely responsible than someone else Giles v City of New Haven (PL operated elevator)
3. Courts do NOT apply Res Ipsa to slip and fall cases

##### iii. Multiple DF's

1. Generally Res Ipsa cannot be used to establish a case against an individual party  
Collins v Superior Air-Ground Ambulance (probably decided wrong - woman comes back from hospital / transport injured)

d. **PL free from negligence**

A ruling that res ipsa applies means that (*all elements*)

a. **No directed verdict for DF**

The case will get to the jury (prima facie case)

i. **Exception – abnormally strong inferences of negligence**

De Leon Lopez v Corporacion Insular de Seguros

Hospital mixed up twins and received directed verdict

b. **Does not change the burden of proof / persuasion**

Inference of negligence is merely permissive

ii. **Exception**

1. A small number of courts apply the presumption of negligence and either

a. Shift the burden of persuasion to the DF

b. Shift the burden of production to DF

6. **Hand Formula** Carroll Towing Co. **Risk-Utility Assessment**

a. **B ? PL**

i. B = burden of precaution

ii. P = possibility of harm

iii. L = cost of loss

1. Cost of memory, information

b. Doesn't work well when a person's attention drifted for a moment

c. **Actual Cause**

i. **Actual cause tests**

1. **But-For Cause Test**

An act is a cause in fact of an injury when the injury wouldn't have occurred but for the act

A person is a but-for cause of an injury IF (*all elements*)

- a. What actually happened
- b. Differs from what might have happened had DF behaved non-negligently

2. **Substantial Factor Test**

If DF's conduct was a substantial factor in causing the injury, liable.

ii. **Apportionment of liability**

1. **Causal Apportionment**

- a. Apportionment based on what defendant caused

2. **Fault Apportionment**

- a. All DF's but-for cause, apportionment based on level of defendant's fault

b. **Joint and several liability**

- i. **Traditional** – both DF's are individually liable for full damages and up to the DF's to apportion out damages
- ii. **Modern Contribution** – allow a DF to obtain contribution from other DF to make its payment proportional to its fault
  1. If one of the DF's immune, other DF gets stuck paying

c. **Several Liability with comparative fault**

- i. No DF is liable for more than his proportionate share
- ii. No contribution needed
  1. If one of the DF's immune, PL gets stuck with loss

A person is a cause in fact of the injury IF (*any element*)

i. **Single Tortfeasor**

3. **But-For Cause Test**

4. **Responsible for all**

ii. **Multiple Tortfeasors**

5. **Separate, divisible injuries**

- a. **But-For Cause Test**
- b. **Causal Apportionment**

6. **Single, indivisible injury**

a. **But-For Cause Test**

Both DF's are but-for causes

- i. **Exception** – either of which could have independently caused the injury  
Anderson (fires combine)
  1. **Substantial Factor Test**

b. **Apportionment**

- i. **Traditional** – Joint and Several Liability
  1. Landers v East Texas Salt Water Disposal Co. (salt water kills fish)
- ii. **Modern** – Comparative Fault
  1. Joint and Several liability with contribution
  2. Several Liability with comparative fault

iii. **Exception** – may be able to do causal apportionment

1. Burden of proof on DF to show appropriate

7. **Indeterminate causation**

a. **But-For Cause Test**

- i. If **Both DF's** had duty and breach, burden of proof with DF's Summers v Tice (both DF's shot at PL, but only one injured)
- ii. If only **one DF actually breached**, burden of proof with PL

b. **Apportionment**

i. **Traditional** – Joint and Several Liability

1. Landers v East Texas Salt Water Disposal Co. (salt water kills fish)

ii. **Modern** – Comparative Fault

1. Joint and Several liability with contribution
2. Several Liability with comparative fault

8. **Preemptive causation**

- a. **But-For Cause Test** – Neither DF's are but-for causes because harm would have occurred anyway

iii. **Increased Risk & Causation**

1. **But-For Cause Test**

Must show that more likely than not, the accident wouldn't have occurred but for negligence

- a. Act increased the chances that a particular type of accident would occur
- b. Accident of same type occurs

Constructing stairs too high

2. **See above for apportionment**

iv. **Foreshortened or disabled lives**

When force has already been released

1. **But-For cause** of damages accounting for disability / foreshortening

- a. Dillon v Twin State Gas & Electric (boy grabs wires before bridge)

2. **DF responsible only for part of injury that actually caused injury**

v. **Loss of Chance**

Loss of chance is a medical malpractice form of recovery which allows the PL to recover for her lost opportunity to obtain a better degree of recovery.

1. **Traditional – Preponderance Test**

- a. But-For Cause Test - PL must prove was deprived of at least 51% chance of a more favorable outcome than received
- b. Doesn't allow for recovery based on loss of chance
- c. All or nothing result
- d. Most courts have moved away from this test

2. **Relaxed Causation Tests**

- a. A PL may recover if can prove either (*any element*)
  - i. More likely than not increased the harm to PL
  - ii. Destroyed substantial possibility of achieving more favorable result
- b. PL entitled to recover for entire injury

3. **Risk of Loss**

- a. PL must establish a causal link between the DF's negligence and the lost opportunity

- b. PL entitled to recover for that portion of damages actually attributable to the DF's negligence
  - i. Percentage of damages
- c. Lord v Lovett (misdiagnosis of spinal injury caused residual paralysis)

d. **Proximate Cause**

Liability for negligence is liability for the unreasonable risks the defendant created, **NOT for reasonable risks or for those that were unforeseeable.**

A defendant is not liable unless a reasonable person should have foreseen injuries of the same general type that occurred and the general class of persons who would suffer them  
Palsgraf (woman far away injured by fireworks in paper box)

i. **Scope of the Risk**

DF is liable only

1. **for types of injuries risked by his negligence**

a. **Type of harm foreseeable**

i. **Occurs in unforeseeable manner**

1. Foreseeability of the type of injury is sufficient, even when the exact manner in which it occurs is unforeseeable  
Hughes v Lord Advocate (burned by explosion instead of flame from kerosene lantern)

2. **Dobbs' View**

a. **Big force**

i. Given broad leeway as to what kind of mechanism is counted within the scope of the risk

b. **Small force**

i. Confine the manner or mechanism more narrowly Doughty v Turner Manufacturing Co. (molten liquid erupts instead of splash)

ii. **Extent of harm unforeseeable**

1. **Eggshell Skull Doctrine**

Once a DF has a duty and breaches that duty such that harm would result to a normal person or the defendant knew or should have known of the PL's condition, the defendant does not escape liability for the unforeseeable personal reactions of the PL.

a. The DF takes the PL as he found him, including any pre-existing conditions.

iii. **Intervening Persons or Force**

An intervening act of a second person relieves the defendant of liability when the harm that occurred is outside the scope of the risk created by the defendant's negligence. Fancyboy v Alaska

1. **Criminal Interventions**

a. A negligent DF is NOT relieved from liability **except** where the harm is

i. Intentionally caused by a 3<sup>rd</sup> person

ii. Not within the scope of the risk created by the DF's conduct

b. If the DF's negligence created a foreseeable risk that a 3<sup>rd</sup> person would commit a crime or intentional tort, DF's liability will not be cut off by

the crime or tort.

**2. Forces of Nature**

- a. A DF can escape liability only if the harm done is different from the harm that was risked by the DF's conduct in the first place.

**3. Failure to take safety measures**

- a. An intervening act may **NOT** serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent. [Derdarian v Felix Contracting Corp.](#) (employer didn't provide barrier to construction worker)

**4. Plight of PL (Safe Harbor Principle)**

- a. Until the situation has stabilized, the PL is still in a position of risk [Marshall v Nugent](#) (after car accident, driver hit by oncoming car on hill)
- b. [Ventricelli v Kinney System Rent a Car](#) (parked car with defective trunk hit from behind)
- c. An original tortfeasor is liable for injuries suffered during transportation to a medical facility for treatment of the injuries resulting from the original tortfeasor's negligence. [Anaya v Superior Court](#)

**2. to classes of persons risked by his negligence**

**a. Rescuers**

- i. Rescuers can recover from the DF whose negligence prompts the rescue, such that if it is foreseeable that someone will be put in peril, it is also foreseeable that someone would rescue them.

e. **Damage**

A person must suffer a legally cognizable harm, or actual damages, to recover from a negligence cause of action.

i. **Damages Recoverable**

1. **Personal Injury**

a. **Foreseeability irrelevant**

Extent of injury is not necessary to foresee

2. **Property Damage**

a. Reasonable cost of repair or the fair market value at the time of accident

3. **Punitive Damages**

a. If DF's act was wanton and willful, reckless, or malicious

4. **Non-recoverable**

a. **Interest from date of damage in personal injury action**

b. **Attorney's fees**

ii. **Duty to Mitigate Damages**

1. PL has a duty to mitigate damages and failure to do so precludes recovery of any additional damages caused by aggravation of the injury

1. **Defenses to Negligence Claims**

a. DF argues that PL is negligent

b. DF's possible responses

i. Contributory negligence

ii. PL's illegal activity

iii. PL's duty to minimize damages / avoidable consequences

iv. Assumption of the Risk

1. Express

2. Implied

c. PL's possible responses to DF's defenses

i. Response to Contributory Negligence

1. Last clear chance

2. Rescue

3. DF's reckless or intentional misconduct

4. DF's responsibility to protect PL from own fault

5. PL's right to use own entitlements

ii. Response to Assumption of the Risk

1. Agreement void as against public policy (*Tunkl*)

## Negligence Defenses

### 11. Contributory and Comparative Fault

#### a. **Contributory Negligence**

Expose yourself negligently to risk that should've recognized but didn't

If the PL is at all negligent, PL collects nothing from DF

Butterfield v Forrester (PL didn't use ordinary care in keeping safe lookout for pole on horse)

#### i. **PL's case for negligence**

##### 1. **Res Ipsa**

PL unable to use Res Ipsa when PL at fault

##### 2. **Superseding Cause**

If PL's action was superseding cause, PL recovers nothing

#### ii. **DF's responses**

##### 1. **Contributory Negligence**

#### iii. **PL's responses to contributory negligence**

##### 1. **Rescue Doctrine**

Don't consider rescuer's contributory negligence

##### 2. **Last Clear Chance**

If a DF discovered or should have discovered the PL's peril (PL helpless), and could have reasonably avoided it, PL's earlier negligence would neither bar nor reduce the PL's recovery. Drunk asleep on track

##### 3. **Reckless or Intentional Misconduct**

Complete defense to contributory negligence

##### 4. **Responsibility to protect PL from own misconduct**

a. Responsibility to protect PL from fault in punch press

Bexiga v Havir Manufacturing

b. Responsibility to protect jailed person from suicide

McNamara v Honeyman

##### 5. **PL's right to use own entitlements**

Use with respect to PL's own property

a. Leroy Fibre Co. v Chicago

Don't have a duty to protect injury by the wrongs of another on property

#### iv. **NOT a valid defense to an intentional tort**

#### b. **Comparative Negligence**

Instead of barring PL's recovery all together, reduce recovery

#### i. **Types**

##### 1. **Pure**

a. PL's recovery is reduced by his percentage of fault, regardless if PL's percentage of fault is greater than DF's

##### b. **Advantages**

i. More effective in discouraging extended litigation over the percentage fault of each party

ii. More effective in discouraging frivolous claims

##### 2. **Modified**

a. PL's recovery is reduced by his percentage of fault, **only** if his fault is equal to or less than the DF's

## b. Types

A PL cannot recover when his fault is

### i. Not as great as DF's

PL can recover if PL's fault is not as great as DF's

1. Can't recover at 50%
2. The Court should give an ultimate-outcome instruction in a comparative fault case if it is properly requested and the court determines the instruction will not confuse or mislead the jury. Sollin v Wangler (bale of hay dropped on PL)

### ii. Not greater than DF's

PL can recover if PL's fault is not greater than DF's

1. Can recover at 50%

## c. Aggregation

i. **Most states** allow aggregation of separate DF's faults

ii. **Some states** don't allow aggregation

## d. Advantages

- i. More effective in apportioning liability on the basis of fault
- ii. More effective in achieving the compensation goal
- iii. More likely to be adopted by state legislature
- iv. Fairer

## e. Disadvantages

- i. More expensive

## ii. Assessing Fault

Suggestions for assessing fault include

### 1. Restatement

Apportioning based on responsibility Restatement

- a. Nature of risk-creating conduct
  - i. how unreasonable the conduct was under the circumstances
  - ii. extent to which conduct failed to meet the applicable legal standard
- b. Individual's state of mind
  - i. awareness, intent, or indifference with respect to risk
- c. Strength of causal connection
  - i. timing of each person's conduct in causing harm

### 2. Compare costs

Compare respective costs to PL and to DF of avoiding the injury  
Wassell v Adams (woman raped in hotel without phones)

## iii. PL's case for negligence

### 1. Res Ipsa

Some courts have allowed PL to use Res Ipsa and comparing of faults, but difficult to do since don't know what DF's negligent act was

### 2. Superseding Cause

If PL's action was superseding cause, PL recovers partially

## iv. DF's responses

### 1. Comparative Negligence

## v. PL's responses to comparative negligence

### 1. Rescue Doctrine

Courts are split between

- a. **Not** considering rescuer's negligence (Same as contributory)

- i. Quellette v Carde (rescuer lifted electric garage door and ignited)
  - b. Consider rescuer's negligence
    - i. Govich v North American (hearing impaired rescuer of dog)
- 2. **Last Clear Chance**  
No longer a complete bar, but may reduce recovery
- 3. **Reckless or Intentional Misconduct**  
Courts are split between
  - a. **Can compare**
    - i. Negligence less fault than intentional conduct
    - ii. Allows some decrease in PL's damages
  - b. **Can't compare**
- 4. **PL's right to use own entitlements**  
Use with respect to PL's own property

## 12. PL's illegal activity

- a. When the PL's injury is a direct result of his knowing and intentional participation in a criminal act, he cannot seek compensation for the loss

## 13. PL's duty to minimize damages (Avoidable consequences)

- a. If the injured party doesn't make reasonable efforts to minimize damages, liable for all extra harm
- b. **3<sup>rd</sup> parties**
  - i. When aggravation is done by 3<sup>rd</sup> parties, consider it foreseeable and within the scope of risk, but when done by PL, don't consider it within the scope of risk

## 14. Assumption of the risk

A person may be denied recovery if he assumed the risk of any damage caused by the DF's acts.

### a. **Express Assumption**

An express assumption of the risk may be assumed by (*any element*)

- i. **Express agreement** (exculpatory clause)  
Exculpatory clauses are valid IF (*all elements*)

#### 1. **NOT against public policy**

An agreement is void against public policy IF (*any element*)

##### a. **Unequal bargaining power**

An unequal bargaining power results from services that each member of the public may find essential to him – compulsory assumption.

Tunkl v Regents of University of CA (admitted to hospital after release)

- i. **Doctor/patient**

- ii. **Landlord/tenant**

##### b. **Demand and supply**

Gavin v YMCA (demand of child care exceeds supply)

##### c. **Coercion**

#### 2. **Within scope of consent**

- 3. Doesn't have to be in writing

#### 4. **Complete bar on recovery in both regimes**

### b. **Implied Assumption**

An implied assumption of the risk may be assumed IF the PL (*all elements*)

- i. **Traditional Rule**

1. **Knowledge of the risk**

- a. PL must have known of the risk
- b. objective standard – knowledge may be implied where the risk is one that the average person would clearly appreciate

2. **Appreciated the risk**

- a. objective standard

3. **Voluntarily exposed to the risk**

Crews v Hollenbach (gas leak fixed by gas company employee and explodes)

ii. **Modern Rule**

- 1. Merges assumed risk into comparative negligence system
- 2. If the PL is reasonable in facing a risk, she is not negligent (jaywalker), but when she unreasonably confronts a known risk, her negligence in doing so reduces her recovery of damages
- 3. If the DF reasonably believes that the PL has accepted the risk, the DF may not be negligent at all in relying on the PL to achieve safety.

4. **DF negligent in exposing PL to risk**

a. **PL negligent in dealing with it**

- i. **Contributory** – complete defense
- ii. **Comparative** – partial defense

Siragusa v Swedish Hospital (nurse hits head on hook on door)

b. **PL NOT negligent in dealing with it**

- i. **NO defense**

5. **DF not negligent because dangers inherent in situation (no breach)**

- a. **NO duty** – PL doesn't recover (destroys prima facie case)
- b. As long as PL knows about inherent risks, DF doesn't have a duty to abate risk Sunday v Stratton Corp (bush on ski trail)
- c. Turcotte v Fell (jockey clipped on horse)

c. **Difference from contributory negligence**

i. **Contributory negligence**

- 1. Exposed yourself to risk that you should've recognized but didn't

ii. **Assumption of the risk**

- 1. Exposed yourself to risk and took it on

**15. Compliance with statute**

- a. **NOT a defense**
- b. Merely evidence of reasonable care
- c. Sets minimum standard
- d. Miller v Warren (fire code)
- e. **Federal preemption IS defense**
  - i. If comply with, negligence doesn't even get to jury Railroad crossings