

Outline

Wednesday, October 04, 2006

7:30 PM

I. Vicarious Liability

1. Respondeat Superior -
 - A. **Was employee acting within scope of employment?** (Christenson v. Swenson)
 1. Employee **about the employer's business** and the duties assigned by the employer vs. involved in a personal endeavor
 2. Employee's conduct must occur substantially within **hours and ordinary spatial boundaries of the employment**
 3. Employee's conduct must be at least partially motivated by the purpose of **servicing the employer's interest**
 - B. Liability for Intentional Torts (divided courts):
 1. Intentional tort in order to serve employer's interest
 2. Brawls that arise in the course of the work
 3. Sexual contacts in the course of medical care or psychotherapy
2. Apparent Agency -
 - A. **Was there a representation by the principal causing a reliance when led to a change in position?** (Roessler v. Novak)
 1. **Representation** by the purported principal
 2. **Reliance** on that representation by a third party
 3. **Change in position** by the third party in reliance on the representation
 - B. Apparent authority exists only where the principal creates the appearance of an agency relationship.
 - Some discussion in note cases suggesting all that matters is that patient reasonably believed the relationship existed

II. Negligence

1. **Did the defendant owe a DUTY of care to the plaintiff?** (Judge decides as typically a matter of law, but jury can get involved if there are questions of fact) - cases where duty is problematic
 - A. **Was there a clear duty of care owed to plaintiff due to an affirmative act?** (Where duty is not problematic)
 - If you are affirmatively acting, you have duty regardless of whether or not negligent
 - D's choice to engage in risk-creating conduct for his own benefit imposes the reciprocal duty to exercise due care to others who may foreseeably be injured by that conduct
 - B. **Is there an affirmative obligation to act?**
 1. **Is there a special relationship?**
 - a. Duty exists (from Restatements mentioned in Harper)
 - i. Common carriers
 - ii. Innkeepers

- iii. Possessors of land who hold it open to the public
 - iv. Custodial relationships in which that other person is deprived of normal opportunities of self-protection
 - v. Start of voluntary assistance (Farwell)
 - Once assistance is started, duty has been assumed not to leave them worse off
 - 2 approaches
 1. Once you start you have a duty
 2. If you start and leave them no worse off than you started, you no longer have a duty
 - vi. Companions on a joint social venture + person in peril (Farwell)
 - vii. Affirmative duty to control 3rd parties
 - Right and ability to control the person
 - Know (Mosk) or should know (Tarasoff) facts which should get you to exercise control
 - Balancing considerations (Tarasoff)
 - FOS
 - Insurance
 - Moral Blame
 - Prevent Further Harm
 - Burden to D
 - Consequences to community
 - Closeness of connection
conduct + harm
- b. Duty does not exist:
- i. Social host (Harper - dive off side of boat)
 - Perhaps if Herman affirmatively made promises of reliance, Harper would have had better case

2. Misfeasance vs. Nonfeasance (Commission vs. Omission)

- Difference between acting and withholding a benefit, or not acting
 - Courts are more likely to say there is a duty when misfeasance is involved rather than omission
- Moch case
 - "we have no duty to provide water to you"
 - Bad Cardozo reasoning
 - He tries to say it was nonfeasance

- Set against Strauss
 - Takes more honest approach
 - We don't want unlimited liability for utilities
 - Note, this brings breach analysis into duty question
 - If court says "no duty" they resolve issue up front and it never has to go to jury
 - If want to argue policy grounds for no duty, compare to Strauss or Reynolds
 - Don't pull policy like this everytime, but if you can relate to this, do it

C. Are there any policy basis for no duty?

1. Contract cases - limit to parties in contractual relationship (Strauss)
 2. Social Host vs. Commercial Host - no duty to third persons injured by an intoxicated minor (Reynolds)
- Policy reasons
 - Avoid unlimited liability
 - Extend liability to foreseeable plaintiffs, but contain liability to manageable limits
 - Ability of defendants
 - Profitability of defendants
 - Encourage/Discourage behavior

D. Does this duty involve Landowners or Occupiers?

1. **Which category would the plaintiff fall under (Carter):**
 1. Trespassers
 - a. Duty owed: no duty to undiscovered trespasser (duty to avoid willful or wanton conduct)
 - b. Who: all entrants to land until given permission to enter
 2. Licensees
 - a. Duty owed: duty to make safe dangers of which the possessor is aware
 - b. Who: all person who enter with permission
 - c. Duty: warn about known dangers, do not have to inspect
 3. Invitees
 - a. Duty owed: duty to exercise reasonable care to protect them against both known dangers and those that would be revealed by inspection
 - b. Who: all persons who enter with permission in cases where the possess has an interest in the visit such that the visitor

"has reason to believe that the premises have been made safe to receive him"

c. Duty owed: duty to inspect

2. Was the plaintiff a lawful or unlawful visitor? (Heins) (modern trend)

- Standard of reasonable care for all lawful visitors
- Factors to be considered under new "reasonable care" standard for lawful visitors
 1. Foreseeability/possibility of harm
 2. Purpose for entering
 3. Time, manner, and circumstances
 4. Use or expected use of premises
 5. Reasonableness of the inspection, repair, warning
 6. Opportunity and ease of repair or correction or giving warning
 7. Burden on landowner/community

3. Is defendant a business?

- a. Business owners have a duty to implement reasonable measures to protect their patrons from criminal acts when those acts are foreseeable. (Posecai)
- Balancing Test to be used in this court
 - The foreseeability of the crime risk and the gravity of the risk determine the existence and the extent of the defendant's duty
 - Most important factors: Existence; Frequency; Similarity of prior incidents of crime on the premises
 - Also should take into account: Location; Nature; Condition of the property

E. Is this a duty among family members?

- Parental Immunity
 - Duty to World (no parental immunity) vs. Duty to Child (parental immunity)
 - Modern Trend (Broadbent)
 - "reasonable prudent parent" standard
 - Contemporary courts divided
 - Many retain parental immunity for areas that deal with parenting
 - Most do not allow parental immunity with respect to intentional harms
 - But may be negligent for failing to provide clothing
 - Broadbent - reasonable parent test to capture cultural difference
 - No parental immunity

- New York - parental immunity for negligent supervision
- Maryland - parental immunity for everything
- Arizona - duty to the world

F. Is there a duty to avoid emotional harm?

a. Is Plaintiff the direct victim?

1. Impact Rule (original rule)
2. **Was plaintiff in the Zone of Danger?** (Falzone - witness husband hit in car accident) (tied to physical risk)
 - Reasonable: Try to tie reasonable to foreseeability and notice
 - Fear for safety
 - Immediate
 - Resulting in Physical Harm ("substantial bodily injury or sickness" - enough that could recover normally from damages)

3. Was plaintiff a foreseeable plaintiff?

(Gammon - severed leg)

- i. A defendant is bound to foresee psychic harm only when such harm reasonably could be expected to befall the ordinarily sensitive person
 - Eggshell plaintiffs cannot recover here, "reasonably ... ordinarily sensitive person"
- ii. Eliminates "physical symptom" requirement for SED in some special cases
 - "recognize the elimination of some barriers to recovery for negligent infliction of severe emotional distress"

b. Is Plaintiff an indirect victim or bystander? (must show D-Br-Cx-Dam for direct victim first, for negl.)

1. Does plaintiff meet the Portee factors?

(Portee - elevator)

- In order to be held liable for negligent infliction of emotional distress (only) must prove
 1. Death or serious physical injury of another caused by defendant's negligence
 2. A marital or intimate familial relationship between plaintiff and the injured person
 3. Observation of the death or injury at the scene of the accident
 4. Resulting severe emotional distress

2. **Was the plaintiff in the Zone of Danger where victim was in immediate family?** (New York Rule pg. 294 Bovsun v. Sanperi)

- "Allows one who is himself threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress resulting from viewing the death or serious physical injury of a member of his or her immediate family."
 - Basically like the Direct Victim "Zone of Danger" rule except for bystander action when actual victim was member of immediate family

c. **Loss of Consortium**

- Historically only husband can claim, but today both spouses can claim it.
- Parents/children – courts allow parents to recover
 - Both cases are rooted in economic services.
 - Courts divided if child can sue for loss of consortium

2. **Did the defendant BREACH the duty of care owed to the plaintiff?** (Jury decides as typically a matter of reasonableness)

A. **Is there a custom involved?**

- Custom DOES NOT set the standard of care, but it some evidence (Trimarco -)
 - Has to be related to preventing the specific kind of harm
 - Aggregate wisdom of industry can give evidence to B and PL
 - Can provide evidence to whether defendant "should have known"
- Custom is some evidence of negligence, not definitive proof
- Gets to foreseeability and feasibility
- Defendants can also use it to show standard of care --- I'm doing what most people in the industry do, so it's not foreseeable
 - Something also doesn't have to reach level of custom to help this factors of feasibility and foreseeability

B. **Is a statute involved?**

1. **Was the statute designed to prevent this particular harm?**
2. **Was plaintiff in protected class?**
3. **What kind of statute is this?**
 - a. **Is it a "rules of the road" kind of statute?** (Tedla - is it safer to walk on the other side of the road)

- **Rebuttable presumption** (or at least some evidence)
- Legislature just trying to capture what is reasonable; more like guidelines
- Jury question
- Even if no excuse -> goes to jury

b. Is it a "standard of care" or "safety statute"? (Martin - never safer to drive with lights off; is there a good reason?)

- **Negligence per se with an excuse** (very narrow, unavoidable, not willful, not heedless)
- Failing to follow endangers the public
- Judge question (although most courts these days send to jury)
- Statutes which seems hardly ever safer to violate - causing risk to public at large
- No excuse == negligent (judge)

A. Defendants might say "I complied with statute, I acted reasonably"

- Some evidence, maybe statute did not set standard high enough

B. Licensing standard

- What does no (drivers) license say about how you drove at time of accident? (not much)
- In some medical cases, acting without license is prima facie negligence

C. Excuses

- Incapacity
- Lack of knowledge (burned out tail light)
- Inability to comply
- Emergency
- Compliance poses greater risk than violation

C. Is this a medical malpractice case?

- Custom does set standard of care here

1. **Is this a matter of standard of care?** (Sheeley)

- Expert witness in medical malpractice showing "custom" of standard of care
 - It IS the evidence
 - Unless we don't find the witness credible
 - So in this case, the industry establishes their own standard of care, because it is difficult for us laypeople to define it here
- Eliminating the "same or similar locality" rule (majority approach)
- Generally if expert witness have knowledge of specialty, he can testify about it

2. **Is this a matter of informed consent?** (Matthies)

- Physician should explain:
 - Medically reasonable invasive and noninvasive alternatives
 - Material risks and likely outcomes
- Reasonable Patient vs. Reasonable Professional
 1. Reasonable Patient for determining "material risks"
 2. Reasonable Professional

Informed consent

- Duty - dr to patient, affirmative act
- Breach (scope)
 - Reasonable Professional standard, reasonable patient
 - Almost evenly divided among jurisdictions
- Cause
 - Would a reasonable patient decide differently
 - A few say "would THIS patient decide differently"
- Damages
 - Must be some physical harm (not dignitary)

D. **Was the Reasonable Person Standard Breached?**

1. Factors and Considerations to assess reasonableness

i. Adams Approach (Cardozo)

- Feasibility
- FOS
- Danger
- Social Value/Utility
- Example: Feasibility – insulation if wire is impossible/costly; FOS – freak accident; Magnitude of danger – apparently it can be high; Social benefit – don't shut down RRs -> leads to non-N for RR.
 - Braun (wire/vacant lot) – liability found
 - Greene (kneeling mechanic) – no liability found – warning for all movements may be too burdensome

ii. Carroll Towing (Learned Hand Test)

- $B < PL$ (economic terms)
- B (Burden)
 - Feasibility
 - Social Value?
- P (Predictability)
 - Foreseeability

- L (Loss)
 - Danger (Magnitude of Harm)

2. Concept of the reasonable person

- The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor
- Reasonable person standard takes into account the circumstances with which the actor was actually confronted when the accident occurred
- Reasonable person of average mental ability and knowledge of average community member under like circumstances

a. **What was the standard of care?**

i. **Does this involve a Common Carrier?**

- Modern Trend: Hold common carriers to a reasonable person standard (Bethel)
- Andrews - still retain heightened standard
 - Just trying to emphasize that even if held to higher standard of care, there is still an upper limit

ii. **Does this involve children?**

- Standard includes that of like age, education, intelligence, and experience
- EXCEPTION: unless engaged in adult activity such as driving a car

iii. **Does this involve physical handicapped**

- Reasonable person under like handicap

iv. **Does this involve a professional?**

- Skill, knowledge, and care of a practitioner in a similar community
 - Although modern trend is to remove "same or similar community" requirement

E. **How to prove negligence?**

1. **What is the evidence?**

a. Role of **Circumstantial Evidence**

- i. Negri - circumstantial evidence of constructive notice enough to get to jury
- Constructive notice - defendant should be reasonably aware of this situation, "should have known"

- ii. Gordon - circumstantial evidence of "clean waxy paper" not enough (no actual or constructive notice)
 - "No reasonable jury could find on this evidence that there was negligence"
- b. **Res Ipsa Loquitur** - "the thing speaks for itself"
 -> enough to get to a jury
- i. Elements:
 1. Accident not ordinary without negligence
 2. Caused by agency or instrumentality within exclusive control of defendant
 3. Must not have been due to any action on part of plaintiff
 - ii. What does it show?
 - In some jurisdictions it puts up a rebuttable presumption
 - Most say you can "infer negligence"
 - iii. Other considerations
 - When you don't know what the defendant did
 - Infer negligence from the circumstances
 - Some jurisdictions require no negligence on behalf of plaintiff
 - Instrumentality in exclusive control, more likely than not due to negligence, then we can infer its more likely than not defendant's negligence
 - Some Js say this is rebuttable presumptions, other say "you may infer negligence"
 - Byrne, McDougal
 - Ybarra is a large extensions, think of whole team of dr's and nurses as one instrumentality

F. Historical Development of Fault

- Writ of trespass used to be primarily strict liability
- Cases started to slip in negligence analysis and place burden on plaintiff that defendant was not exercising due care (Brown)

G. Role of Judge and Jury

- Holmes approach in Goodman - setting standard of care to get out and look when crossing railroads
 Repeated facts, when inconsistent jury trials happen time and time again
 -> go to judge to resolve conflict

If there is a repeated ruling in the jury, time and time again and no conflict

-> go to judge to lay it down once and for all

If there are policy issues

-> for the judge, jury should not be concerned with policy

The key is REPEATED FACTS, Holmes isn't saying that everything should go to judge, but when there are repeated facts (doesn't happen very often) judge is in good position to lay down the law

- Cardozo in Pokora
 - Holmes went too far in Goodman - standard was just to stop
 - Saying when there is a set standard, but you are dealing with an extraordinary set of circumstances, it should go to jury

Judge v. Jury

- Do we want a rule set (judge)? Or a case by case analysis (jury)?
- Think about large policy implications

Judge:

- predictability
- Cost savings (efficiency)
- Experience (with system and overarching goals)

Jury:

- Want to encourage participation
- Represent community
- Less likely to be overruled
- Subjective?
- Technologies

3. Cause

A. **Actual Cause** (But-For Cause) - But for this negligent act, would the harm still have occurred?

1. **Reasonable certainty** = preponderance of the evidence, more likely than not, > 50% (Stubbs)
 - a. Probabilistic evidence
 - i. In Stubbs, defendants as a whole had > 50% chance of contracting typhoid fever, court would allow all to recover even without "particularistic proof"
 - Alternate approach: **Proportional recovery** (minority)
 - if 75% chance of contracting, allow everybody 75% recovery

2. Was there a **loss of chance**? (Alberts v. Schultz)

- Plaintiff can recover proportionately based on loss of chance
- Court says damage is really lost chance (not really lost leg)

- But, if this was case, courts would let people recover even when they didn't lose leg
- So really a way for people to recover for lost leg when wouldn't be able to under traditional tort law

3. Were there **multiple tortfeasors** or **alternate liability**?

a. **Concert in action?**

- Really only one causes harm, but all can be held jointly & severally liable: "but for all of them drag racing, plaintiff wouldn't have been injured"

b. **Alternate liability?** (Summers v. Tice)

- Where two defendants breach a duty to the plaintiff but there is uncertainty regarding which one caused the injury, "the burden is upon each such actor to prove that he has not caused the harm"

c. **Single & indivisible injury?**

- Multiple Ds contribute to singly harm, which cannot be causally apportioned among them
 - Can occur either concurrently or successively

d. **Substantial factor** - two merging fires example

- Fairness suggests that P should recover given both Ds are N, and P is innocent
- Negligent of each Defendant was a "substantial factor"

e. Is this a **market share liability** case? (Hymowitz)

- Seems harsh to hold 300 (or lots) of defendants all jointly & severally liable
- Majority: Apportion liability based on national market share
 - NOTE: deviation from traditional tort law: don't care if this particular D harmed this particular P
 - Question is: what particular **risk** did you cause to a **plaintiff like this one?**
 - But this gets screwed up when you know one particular def. caused harm to one trad. Plaintiff

- Plaintiff can recover fully from this one defendant (**Plaintiff can "inculpate"**)
- **Defendant's cannot "exculpate"** themselves (even if sold wrong color pill)

- Dissent: optimal compensation
 - Want joint & several liability so plaintiff can fully recover
 - Defendants can exculpate themselves
 - "a plaintiff may not recover from his or her injuries from a defendant who could not have caused those injuries"
 - All jointly & severally liable, but they can split responsibility based on their market share (contribution)

B. **Proximate Cause** (Legal Cause) - Are we going to legally hold this person liable for this result?

1. Was the **harm foreseeable**?

a. Extent of Harm:

- Eggshell Plaintiff:** Foreseeable some harm -> liable to full extent even if un FOS (Benn v. Thomas)
 - Heart attack 6 days after rear-ended in collision

b. Type of Harm

- In re Polemis approach: Defendant liable for **all direct consequences**, so long as
 1. Some harm foreseeable,
 2. Direct cause, and
 3. No intervening causes
- Wagon Mound approach: Defendant liable only for **foreseeable** type of injury
 - Rationale: that's what made his act negligent in the first place --> foreseeable consequences

c. Foreseeable victim

2. Was this **close in time and space**?

3. Were there any **Superseding/Intervening Causes**?

- Was harm within **scope of the risk**? (Doe v. Manheimer) - 3rd Restatements Approach

- i. Intervening acts of third party raping lady behind bushes was not within scope of the risk
 - ii. Doe is a reflection of how courts are changing to look at whether ultimate harm is the kind of harm that made your act negligent, regardless of intervening conduct (despite severity)
 - Look instead to scope of risk and foreseeability
 - So intentional tort that is foreseeable (in scope of risk) does NOT cut off liability
 - iii. Other factors: Independent? FOS? More egregious? Highly extraordinary?
4. Was there an **unexpected victim**?
- a. Two approaches outlined in Palsgraf
 1. Majority (**Cardozo**) approach: treat as **duty** issue and cut off from beginning
 2. Dissent (**Andrews**) approach: treat as **proximate cause** issue and leave to jury
 - Factors to consider:
 - But-for
 - Time/space
 - Natural continuous
 - Substantial factor (remember, don't think of prox cause as substantial factor, this is always troublesome)
 - Directness
 - Intervening Cause
 - Likely (FOS)
 - Policy
 - b. Was this a **rescue situation**?
 - Cardozo is making an exception for rescuers (rather than extending circle of duty to encompass them)
 - Some little kind of stretch here to make consistent
 - c. Was the damages caused by an **intentional tort**?
 - Prox cause is still important, but less restrictive than Negligence

C. Contribution

4. What are the **Damages** the plaintiff can recover?
 1. **Compensatory Damages** - damages that "make P whole" or "return P to pre-injury" condition
 - a. **Economic Losses** - actual dollar amount can be calculated
 - i. **Medical expenses**
 1. Surgery
 2. Drugs
 3. Therapy (physical, psycho, etc.)
 4. For how long?
 - ii. **Lost income and earnings**
 1. Lost income - earnings between injury and trial
 2. Future lost earnings
 - a. Expected duration of injury/disability
 - b. Type of work P would have done if no injury
 - c. How long P would have worked if no injury (life expectancy, state of health prior to injury, nature of work)
 - d. Fringe benefits, such as insurance, stock options, etc.
 - iii. **Property damage**
 - b. **Non-economic losses** - jury has no mathematical or accounting basis for valuing, highly subjective
 - i. **Pain & Suffering** - physical pain from injury, recovery, and/or disability
 - ii. **Emotional Distress** - humiliation, anguish, embarrassment from disfigurement, fear associated with trauma, depression, etc.
 - iii. **Loss of enjoyment of life** - loss of ability to enjoy experiences enjoyed prior to injury
 - Example: violinist loses finger and can't play violin
2. **Survival Action and Wrongful Death** - based on injuries that cause death, statutorily based
 - a. **Survival Actions** - damages **decedent could have claimed** before death if still alive
 - i. Ends common law rule that decedent's cause of action ends with death, allows decedent's action to "survive" his death
 - ii. Includes economic & non-economic losses suffered PRIOR to death

- Open to public
- Standard adhesion K
- Unequal barg. Power
- P under control D

2. Implied

- Primary Implied** - assume open & obvious inherent risks (classic example is with sports)
 - A plaintiff can not hold defendant liable for a foreseeable and invited risk. (Murphy - "Flopper")
 - Not a true defense, actually just **removes duty**, therefore, no negligence
- Secondary Implied** - plaintiff knowingly encounters a risk created by the defendant's **negligence** (Davenport)
 - Then go on to reasonableness analysis:
 - Plaintiff reasonable: no defense
 - Plaintiff unreasonable: treat like comparative negligence

III. Intentional Torts - Did the defendant act with intent?

A. Actions

- Assault** - Was there a reasonable apprehension of imminent harm?
 - Protecting the right to be free from fear or apprehension of unwarranted contact
 - **Intent** - can be intent to cause assault OR battery (transferred intent)
 - Actual
 - Legal
 - **Reasonable Apprehension** - perception or anticipation of a blow, rather than fright
 - Reasonable (objective) apprehension of imminent harm
 - Intent to commit battery or assault
 - Eggshell cannot recover
 - In a minority, a known eggshell can (a little less sympathy here for "emotional eggshell")
 - Offensive contact battery must be evaluated as to whether an ordinary person, not unduly sensitive as to his personal dignity, would be offended. (Wishnatsky)
 - Unwarranted by social usages prevalent at the time and place at which it is inflicted
 - **Imminent Harm**
 - Mere words are usually not enough (words + circumstances may be)
 - Conditional threats (assault so long as D has no right to impose the condition)

- Shouldn't have to comply with handing over wallet to avoid harm
- Would have to be about imminent harm
- Future threats NOT assault

- ii. **Battery** - Was there intentional harmful or offensive contact with the plaintiff's person?
1. **Intent** - can be intent to cause assault OR battery (transferred intent)
 - a. Actual
 - b. Legal (constructive)
 2. **Harmful or Offensive contact**
 - Offensive Contact through object attached to or identified with body can count (Picard)
 - Offensive is usually in terms of reasonable person
 - Some jurisdictions have "unconsented" contact
 - Some division here if it does not meet reasonable person test
 - P need not be aware at the time
 - D liable for renting hotel room known to be infested w/bedbugs - offensive contact = bedbugs
 - Division on known eggshell (pure eggshell does not)
 - Might in some J's
 - Goes to intent
 3. **Plaintiff's person**
- iii. **False Imprisonment** - Was there an unlawful act of restraint against plaintiff's will?
1. **Intent**
 - a. Actual
 - b. Legal (constructive)
 2. **Unlawful restraint** (Lopez - donut shop)
 - It is not enough for the plaintiff to have felt "compelled" to remain in the baking room in order to protect her reputation; evidence must establish: restraint against the plaintiff's will, as where she yields:
 - to force;
 - to the threat of force; or
 - to the assertion of authority
 - Confinement for false imprisonment
 - Actual or apparent physical barriers
 - Overpowering physical force, or submission to physical force
 - Threats of physical force
 - Other duress
 - Threats to loved ones probably enough
 - Must be imminent threats
 - Loss of job probably not enough

- pure economic loss courts typically don't treat as grounds for duress
 - Asserted legal authority (reasonable belief)
3. **Awareness or harm**
- Even if not aware, you may recover if you are harmed as a result
- iv. **Intentional Infliction of Emotional Distress**
1. **Intent** (or reckless - Womack)
- a. Actual
- b. Legal (constructive)
- Reckless added by Womack - "grave risk"
- Negligence (Probably)
- Moderate risk
 - (objective)
- Recklessness (High Probability)
- Serious/grave risk
 - (*subjective)
- Intentional
- Substantially certain
 - (subjective)
2. **Extreme and Outrageous Conduct**
- Known eggshells
 - Pretty good case for extreme & outrageous
 - Sympathetic here
3. **Causing**
4. **Severe Emotional Distress**

B. Defenses

1. **Consent**

- Fights of anger
 1. Majority
 - Mutual combat in anger, each is civilly liable -- (voluntarily engaging is not a defense)
 2. Minority
 - Mutual combat in anger, when unlawful, without excessive force or malicious intent, means nobody can recover
- Prize fights
 - Hart - allowed consent as a defense here
 - Policy reasons (do not want to encourage prize fights)
 - His right to the control of his person and to determine by whom and how it shall be touched has not been invaded

2. **Self - defense**

Elements:

- Reasonable fear under the circumstance - objective

- Honest fear/belief you are at risk - subjective
 - Belief that the other tends to harm you; AND
 - Belief that you will suffer harm
- Reasonableness of the means used

3. Defense of property

- Has to be proportional
- Has to be reasonable
- Do you have to show reasonable belief? (Katko is unclear)
 - Some ambiguity here, restatement says there has to be belief
 - Even if you are in your bedroom, and have spring gun, you won't know before it goes off

4. Hemophiliac question (self-defense)

- Buried in restatement
- Privilege to use self-defense
 - Exists even if other does not have intent to hurt
- Hemophiliac can have reasonable belief even if other does not intend harm, have you belief BOTH
 - That other intends harm
 - That you will suffer harm (even if unknown harm from attacker's view)

C. Miscellaneous

i. Intent

1. Actual - purpose
2. Legal (Constructive) - knew with substantial certainty (Garratt - boy pulling chair out)

ii. Eggshell

- Assault
 - Reasonable apprehension (majority)
 - If KNOWN eggshell (minority) -> may show intent
- Offensive Contact
 - Reasonable sense of dignity (Wishnatsky & most Jurisdictions) (mostly objective)
 - Unwanted/unconsented (a lot of jurisdictions as well) (more subjective)
 - Interference with physical space
 - If KNOWN - stronger case -> no clear stance in restatements
- Harmful Contact
 - If KNOWN - that's enough
 - Take your victim as you find them -> eggshell or not, it's irrelevant
- IIED
 - If KNOWN
 - Pretty good case for extreme & outrageous
 - Sympathetic here

- iii. **Doctrine of Mistake**
 - Liable even if mistaken about identity (generally)
- iv. **Doctrine of Transferred Intent**
 - Intend assault cause battery -> liable for battery
 - Intend battery cause assault -> liable for assault
 - Intend to hit Joe, hit Suzy -> liable to Suzy

IV. **Strict Liability**

A. **Ultrahazardous Activities** (Doctrinal Development)

- i. Are there **non-reciprocal risks**? (Fletcher v. Rylands, 1866)
 - Limitations: bring dangerous **thing** on your land vs. have it come on naturally (rain fill up reservoir)
- ii. Is this a **non-natural use**? (Rylands v. Fletcher, 1868)
 - Shift towards looking at **activity** itself rather than the thing
- iii. Balancing of **right to use vs. right to safety** (Sullivan)
 - Dynamite blast throws splinter from tree killing woman on highway
- iv. Is there an **ability to lower the risk with due care**? (Indiana Harbor Belt Railroad Co.)
 - If so, stick with negligence. In this case, rerouting railroad perhaps more dangerous
 - Abnormally Dangerous **Activity** (2d Rest)
 - High Degree Risk -> Probability (how likely that something will happen)
 - Likelihood harm great -> Magnitude of harm
 - Inability to lower risk of due care <---- THIS IS THE CRUCIAL FACTOR HERE
 - Extent to which activity is not common usage
 - Inappropriateness activity to locale
 - Extent to which hazard greater than value to community
- v. Evolution of **Restatement Approach** to strict liability:
 - Suter Scale: AL ---- Rest 1 ----- Rest 3 ----- Rest 2 -- -- N
 - Rest 1st (Ultrahazard)
 - Risk of serious harm
 - Can't eliminate by utmost care
 - No common usage
 - Rest 2d - (See above)
 - Rest 3d - abnormally dangerous activity - Page 526
 - FOS highly/sig risk physical harm
 - Even w/due care
 - NOTE: may consider location & value

B. **Theoretical Perspectives**

1. **Loss Spreading**

- Rationale: a way of helping one person not bear the whole cost and be out of commission

- Does every dollar feel the same?
 - \$100 on one person, or \$100 spread across everybody -> same net, but these feel different
 - Take \$1 from 100 people, that dollar isn't worth very much
 - But \$100 from 1 person, each extra dollar beyond that first one is a further burden
- Primary Costs -> cost of people not getting compensated for direct loss
 - Immediate cost of the injury & avoidance costs
- Secondary Costs
 - Ex: being out of work, not being able to cover medical expenses
- Alternatives
 - Social Insurance
 - Insurance
 - Efficiency of tort system?
 - Other systems might work better
 - But then again, most insurance companies deny claims, lots of waste. Inefficient in themselves
 - Could end up losing coverage after something happens once
- What are we really talking about here, who do we want to spread risk among? Who bears the loss?

2. Loss Avoidance/Risk Reduction

- Rationale: This is mainly about deterrence & goes to primary accident costs
- If $B > PL$?
 - Under SL, do you create any incentives to parties to help reduce dangerous activities then?
 - Are they going to spend more money on storing dynamite if they are going to be liable anyways?
 - If you have strict liability, the defendant will NOT change the quality of activity
 - They will either change amount of activity; or
 - They will change the activity itself
 - KEY HERE: If $B > PL$ and in SL scheme, you will encourage defendants to change the level or activity itself
 - Whereas in N they would not change anything
- Alternatives
 - Specific deterrence
 - Statutes, prohibit activity
 - General deterrence
 - Tax

- Tort system

3. **Loss Allocation/Internalization**

- Rationale: Getting the party to realize the true cost of the activity
- **Loss Allocation/Internalization vs. Loss Spreading**
 - Kind of opposed to each other, in some sense
 - Loss Spreading: less incentive to reduce activity because you won't feel pain
 - Internalization: makes the risk taker feel it a bit more
- Who should internalize the risks?
 - Who can avoid the accident best?
 - Who is the cheapest cost avoider
- Allocation / Internalization
 - Who is the cheapest cost avoider?
 - If business is cheapest cost avoider, and they spread the loss, then what?
 - Purchasers will take that into account -> start to make choices to reduce accident if costs go too high
 - Business will have to be careful not to lose competitive edge
- Effects of internalization
 - Inhibit growth & development
 - May not be able to compete internationally

4. **Administrative Efficiency**

- 3rd level costs
- Costs of deciding who pays
 - If in torts, then we need to determine if we are in N or SL, and costs depend on that as well
 - N is more expensive, expert testimony
 - SL is cheaper litigation, encourages settlement
 - But, if use SL, more plaintiffs will sue
 - So you get an easier claim, but more claims
 - You also then have to decide whether SL applies or not, which may be just as complicated as N

C. **Products Liability**

1. Emergences of Doctrine

1. First step: **remove contractual basis** for liability in tort law (MacPherson)

- Rule: Knowledge of probable danger (negligently made); Know used by somebody other than buyer; No inspection
2. Second step: shift from **negligence to strict liability** (Escola)
 - Rule: Defective product; Normal and proper use (to limit to best risk avoiders)
 3. **Who can be sued?** - See Restatements Page 566
 - Restatement 2nd: Claims against sellers: Business of selling & Expect & does reach consumers/users w/o change
 - Restatement 3rd: Whoever is victim of defective product can sue
2. **Manufacturing Defects** - Does the product clearly **deviate from the expected design?**
 - Strict Liability
 3. **Design Defects**
 - a. Two approaches:
 1. **Consumer Expectations Test** - simple products; permits an inference of a defect
 - Ordinary knowledge may permit inference: No further proof necessary; Manuf. may not defend w/ experts
 2. **Ortho Factors/Risk Utility** - highly technical, rely on experts
 - i. Usefulness & desirability of the product (utility to user & public as a whole)
 - ii. Safety aspects of the product
 - iii. Availability of a substitute product
 - iv. Manufacturer's ability to eliminate the unsafe character of the product
 - v. User's ability to avoid danger by exercising care in use of product
 - vi. User's anticipated awareness of inherent dangers
 - vii. Feasibility (for manufacturer) of spreading the loss by setting the price or carrying liability insurance
 3. Who wants which test?
 - i. Patent (open) defect vs. Latent (hidden) defect
 - Patent defect
 - Camacho: plaintiff wants R/U; defendant wants CE
 - Latent defect
 - Soule: plaintiff wants CE; defendant wants R/U

- b. Must be presence of a **Reasonable Alternative Design (RAD)**:

Irreducibly Unsafe: Utility; Open & Obvious/warning;
RAD

New Jersey says so liability if no RAD, unless (O'Brien - page 583)

- i. Egregiously unsafe or ultra-hazardous
- ii. Ordinary consumer cannot reasonably be expected to have knowledge of risks
- iii. Product has little or no usefulness

Inferred Existence UnID'd Defect (No RAD requirement - only case in 3d Rest) PAGE 594

- i. Ordinarily occurs due to defect; and ii) Not solely the result other causes at time of distribution

4. **Warning Defects** (Hood)

- Generally 2 kinds: 1) Warnings failed to make safe (Hood); or 2) Failed to notify inherent risks

1. **Is a warning needed?**

- Was this risk within the **common knowledge**?
If yes, then no warning required.

2. Was there an **adequate warning**?

- whether the benefits of a more detailed warning outweigh the costs of requiring the change
 - Reasonable cost/benefit analysis

3. Restatements (3d) Approach: FOS could be lowered; With reasonable instruction/warnings; The omission of which makes it unsafe

- a. If you can design away the risk, you will not get off the hook by putting a warning on it

4. What was **known or should have been known** by manufacturer **at the time of manufacture**?

- a. SL vs. N: What is our test for negligence? At the time the injury occurred
 - N - what ordinary person would do
 - HERE - what other manufacturers are doing at that time
- b. Vassallo - not reasonably FOS/not discoverable through reasonable testing (objective test - note: this test can be very open ended, but reasonable probably acts like a constraint)
 - **Knowledge of an expert**
 - Duty to perform reasonable testing: charged with knowledge of what reasonable testing would reveal

- c. Ferayorni - discoverable in light generally
 - Recognized/prevailing best knowledge
5. Was the **danger found after distribution**? - 3d
 Restatement have to meet all of these:
- i. KOSK substantial risk
 - ii. Could benefit, id'able & not likley to discover
 - iii. Warning can convey risk to be acted on
 - iv. Risk justifies burden

D. Causation/Damages Concerns

- i. Design Defects:
 - 1. Prox cause - FOS misuse
 - 2. Enhanced injuries
 - If this is separate from accident injuries, plaintiff can only recover for enhanced injuries
 - If same injuries (ankles in Soule), then burden is on defendant to separate it out
- ii. Warning Defects:
 - 1. Heeding presumption: a rebuttable presumption that the plaintiff would have followed the warning

E. Defenses to strict products liability

- 1. **Comparative Negligence** - plaintiffs negligence can lower damages
 - 1. **Failure to discover**
 - In most cases, we would not think you are negligent in failing to discover defect, but you can be and if so, damages will be reduced (3rd Restatement Approach)
 - No duty to discover (Sanchez)
 - 2. **Assumption of Risk** - must show awareness of particular risk
 - Sometimes lower damages
 - Sometimes bars recovery
 - Sometimes shows no defect
 - Prevents plaintiff from making prima facie case because you can show there is no defect
 - Think about Camacho case, plaintiff had to have known that those bars weren't there, and he chose to use it
 - If you are in jurisdiction where "open and obvious" risks are not defects, then you could argue there is no defect
- 3. Other <--- this is how damages were reduced in Sanchez
 - a. **Misuse** - "is your misuse related to knowledge of the defect"

- Com N: Plaintiff may have damages reduced because they acted in an unforeseeable way
- Proximate cause: foreseeable - if it's a foreseeable misuse it does not cut off liability

b. **Disclaimers generally don't bar recovery**

- More like contracts theory, you do not get to decide "we can't be held liable" just because you put a disclaimer