

III. NEGLIGENCE

A. OVERVIEW- the plaintiff must establish each of the following by more than 50% to establish liability:

1. **Duty by the Δ to conform to-** a legally recognized relationship between the parties- whether the Δ has an obligation to the plaintiff to conform to a minimum standard of reasonable conduct.
2. **a Standard of care-** the required level of expected conduct necessary to avoid liability- the minimum required conduct.
3. **Breach by the Δ of the standard of care-** failure to meet the standard of care, i.e. carelessness.
4. **Cause-in-fact-** plaintiff's harm must have the required nexus to the Δ's breach of duty- Δ's wrongful conduct must be a "but for" cause of the plaintiff's injury.
5. **Proximate cause-** there are no policy reasons to relieve the Δ of liability- whether damage is sufficiently foreseeable.
6. **Damages-** the plaintiff suffered a cognizable injury- what losses are compensable.
7. **Cases:**

- a. ***Pitre v. Employers Liability Assurance Corporation-*** the probability of the occurrence of being hit by a wind-up in a baseball game was not so great as to render the operators negligent for failing to take measures to prevent its happening.
- b. ***US Fidelity & Guaranty Co. v. Plovodba-*** "Hand formula"- $B < P \times L$ where B is burden of precautions, P is probability of an accident if the precautions that would avert it were not taken, L is the magnitude of the loss if the accident occurred. **If burden is less than probability times loss, then there is negligence.**

B. STANDARD OF CONDUCT

1. **Reasonable person standard:** "unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances." (Restatement definition- this is an objective standard.) Reasonable person possesses those attributes that a jury decides represent the community norms; also possesses the weaknesses and frailties acknowledged in others in the community. Includes knowledge and understanding generally held by members of the community that is relevant.

a. **emergency doctrine:** "the fact that the actor is confronted with a sudden emergency which requires a rapid decision is a factor in determining the reasonable character of his choice of action." (Restatement) Δ acting in an emergency is not expected to employ the same level of judgment and reflection as would a reasonable person not in an emergency.

i. ***Cordas v. Peerless Transp. Co-*** cab driver not liable for damages to pedestrians as he was under great danger from a passenger with a gun.

b. **physical conditions:** "if the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability." (Restatement) The voluntarily intoxicated Δ will be required to perform as well as a sober person, not as well as a reasonable person at that level of intoxication.

c. **mental conditions:** in most jurisdictions, the insane are to be held to a standard of sanity, because the reasonable person is deemed sane. Similarly, people with cognitive disabilities are held to a level of normal intelligence.

i. ***Breunig v. American Family Insurance Co.-*** woman who was insane and caused an accident after a delusion found liable, as jury could have found that she had notice of prior insane delusions.

d. **child standard:** "if the actor is a child, the standard of conduct to which he must conform...is that of a **reasonable person of like age, intelligence, and experience** under like circumstances." (Restatement) Exception is when a child engages in adult activities requiring adult qualifications, usually driving motorized vehicles.

i. ***Neumann v. Shlansky-*** child playing golf held to the standard of a reasonable man, not child, because of the specialized nature of golf.

2. Standard of conduct of professionals: one who undertakes to render services in the practice of a profession or trade is **required to exercise the skill and knowledge normally possessed by members of that profession** or trade in similar communities. (Restatement). This professional standard limits the jury's discretion. SPLIT- different states hold a local community standard v. similar communities v. state v. national standard.

i. for doctors, if a general practitioner, the local community is the standard; for specialists it is the national standard.

ii. **Melville v. Southward-** to establish professional negligence, a qualified expert witness must provide evidence that the Δ did not meet the minimum applicable professional standard.

iii. **informed consent:** physician's failure to inform a patient of **material risks** entailed in treatment can subject Δ to negligence liability. Plaintiff must prove that the failure to inform caused the patient harm. In extreme cases such behavior can be characterized as intentional battery. **SPLIT-**

(a) **physician rule:** the medical profession in the community determines when a competent physician should inform the patient.

(b) **patient rule:** allows jurors to determine when the "reasonable" physician should inform, regardless of current medical practice. Based on an ambiguous standard of "materiality."

iv. **Cobbs v. Grant-** there must be a causal relationship between the physician's failure to inform and the injury to the plaintiff.

C. RULES OF LAW

1. Overview: Courts may on occasion adopt a rule of law establishing the required standard of conduct- certain situations recur with such frequency that it is possible to find a fairly definite expression of judicial opinion as to the manner in which persons who find themselves in such situations should conduct themselves. Disadvantage to this approach- this does not allow any special circumstances to enter into a judgment.

a. **Akins v. Glens Falls City School District-** rule of law established that an owner of a baseball field is not negligent as long as the most dangerous areas at the park are screened.

D. NEGLIGENCE PER SE

1. Overview: adoption of a legislative standard of conduct. The jury no longer determines the standard of conduct by deciding what a "reasonable person" would do; instead, the conduct required by the criminal law or regulation is used by the judge to determine the proper conduct that the Δ should have followed.

a. **type of harm:** the statute must have been designed to protect against the type of harm suffered by the plaintiff. Judge uses great discretion to determine this.

b. **plaintiff in protected class:** class of persons designed to be protected by the statute must include the plaintiff.

2. Cases

a. **Stachniewicz v. Mar-Cam Corp.-** regulation was that no bar should allow disorderly conduct; bar had violated this provision and so was found negligent.

b. **Wawanese Mutual Insurance Co. v. Matlock-** teenager who bought cigarettes that started a fire not negligent per se because the type of harm that the statute prohibiting sales of tobacco to minors was not intended to prevent harm by fire.

E. CAUSE-IN-FACT

- 1. Overview: the plaintiff must prove by more than 50% that “more likely than not” the Δ’s conduct was a “but for” cause of the plaintiff’s injury.** This rule is supplemented and sometimes replaced by the “substantial factor” test.
- 2. “but for” test:** plaintiff must establish that but for the Δ’s culpable conduct or activity the plaintiff would not have been injured. Determines causation based on what hypothetically would occur in the absence of the Δ’s negligence.
 - a. *East Texas Theatres, Inc. v. Rutledge 1970-*** plaintiff couldn’t prove but for causation; evicting the rowdy patrons wouldn’t have guaranteed that she wouldn’t have been hit by a bottle.
- 3. substantial factor test:** requires that the Δ materially contributed to the plaintiff’s injury- Δ’s conduct must be a substantial factor in bringing about the harm. This can be used as a supplement to but for test when redundant multiple causes would preclude liability under the but for analysis. Frequently used in medical malpractice claims.
 - a. causation in medical malpractice cases:**
 - i. but for:** negligence of the medical professional must be a “but for” cause of the plaintiff’s injury.
 - ii. relaxed but for:** jury allowed to decide whether malpractice “caused” the death.
 - iii. lost opportunity:** Δ compensates the plaintiff for the so-called “lost opportunity” occasioned by the Δ’s negligence.
 - b. cases**
 - i. *Anderson v. Minneapolis 1920-*** Δ liable for fire due to joint liability. Wouldn’t be found liable under but for test, so substantial factor test used, requiring the Δ materially contributed to the plaintiff’s injury.
 - ii. *Northington v. Marin 1996-*** Δ prison guard liable for beating by telling other inmates plaintiff was a snitch; his act was a substantial fact. Used when there are redundant factors.
 - iii. *Herskovits v. Group Health Coop. of Puget Sound 1983-*** plaintiff allowed recovery under sub. Factor test against doctor who significantly reduced victim’s chance of survival (from 39% to 25%) even when plaintiff failed to prove malpractice was “but for” cause of patient’s death.
- 4. Summers rule- Burden shifting:** in some cases, courts will shift the burden of proof by **requiring Δ’s to prove they were not the actual cause.** “When the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.” (Restatement) If Δ’s are unable to exculpate themselves, both Δ’s will be liable as joint tortfeasors. **IMPORTANT-** the plaintiff still has to prove both/all Δ’s breached a duty of care.
 - a. *Summers v. Tice 1948-*** two hunters negligently fired while the plaintiff stood in the line of fire. He was injured, but it was impossible to establish which hunter had fired the shot which hit him. Both were liable as joint tortfeasors.
- 5. Market share liability:** pertains to suppliers of defective products where the plaintiff cannot prove which brand of the product she used. Each Δ pays the damages its culpable conduct has inflicted proportional to its share of the market. **SPLIT-**
 - a.** CA/NY utilize a national market share; FL uses local market shares where the plaintiffs reside.
 - b.** NY further disallows exculpation of a Δ who proves they are not a member of the market causing a particular plaintiff’s injury.
 - c. *Sindell v. Abbott Laboratories 1980-*** market share liability used for DES pregnancy drug which causes pre-cancerous growths. Manufacturers found jointly liable.
- 6. Toxic torts:** problems arise when trying to prove causation in cases involving exposure to carcinogens or toxins. Problems include identifying injury, the dispersion of the parties geographically and chronologically, and difficulties of determining who is responsible for harm.

a. *Ayers v. Township of Jackson 1987*- plaintiffs couldn't collect based on enhanced risk of injury that they did not already have after well water was contaminated by toxic pollutants.

F. DUTY AND PROXIMATE CAUSE

1. Overview: even when Δ 's negligence is the actual "but for" cause of the plaintiff's injury, courts may find that the injury is too remotely connected to the Δ 's wrongdoing to fairly impose responsibility on the Δ .

a. example: **spilling grape juice on the floor**. You would be responsible for staining the carpet, but not responsible if the building next door exploded due to faulty wiring being shorted by the juice on the floor.

b. *Atlantic Coast Line v. Daniels 1911*- established this principle; courts must ask if the wrongful act was the proximate cause.

2. Duty v. proximate cause- duty: focuses on "to whom" the Δ owes an obligation to conform to a prescribed standard of reasonable conduct. Duty is a relational concept whereby a Δ owes a duty to refrain from negligent conduct only to foreseeable victims. **Proximate cause:** limits the "type" or "kind" of harm the Δ can be liable for.

3. Proximate cause tests

a. **Foreseeability:** whether the Δ should have reasonably foreseen, as a risk of her conduct, the general consequences or type of harm suffered by the plaintiff. **SPLIT-** Majority view holds that Δ only owes a duty of care to foreseeable plaintiffs within the zone of danger. Minority view allows recovery to any person thereby harmed due to breach of Δ 's duty of care.

i. *Palsgraf v. LIRR 1928*- woman injured after a scale fell on her due to an explosion not allowed to recover for railroad's negligence as she was not in the foreseeable zone of danger.

ii. **requirement of reasonably foreseeable consequences-** liability depends on the reasonable foreseeability of the consequent damages.

(1) *Wagon Mound No. 1 1961*- court found the Δ could not reasonably have been expected to know that spilled oil was capable of being set on fire on water and so was not responsible for dock destroyed by fire.

(2) *Bigbee v. Pacific Telephone & Telegraph Co. 1983*- foreseeability not to be measured by what is more probable than not, but includes whatever is likely enough that a reasonably thoughtful person would take account of it in guiding practical conduct. Drunk driver who crashed into a phone booth was foreseeable.

iii. **type of harm vs. manner and extent-** precise manner in which harm occurs and the extent of the harm need not be foreseeable. Ex., if A negligently keeps a flame next to a gas outlet, an explosion is a foreseeable type of harm. That a rat's fur might become ignited and the rat might cause the explosion doesn't need to be foreseeable under this rule.

(1) *Hamilton v. Accu-Tek 1999*- relatives of victims killed by handguns sued gun manufacturer for negligence. The consequences must have been foreseeable but the manner or scenario did not have to be. The intervening criminal act was foreseeable so there was liability.

iv. **superseding intervening forces-** new forces which join with the Δ 's negligence to injure the plaintiff. There cannot be a superseding intervening force- any highly improbable and extraordinary intervening forces preclude liability. Criminal acts need not be characterized as superseding.

b. **Eggshell plaintiff rule:** the type of personal injury suffered by a victim does not have to be foreseeable. The Δ takes the plaintiff as he finds him.

- i. **Steinhauser v. Hertz Corp. 1970-** court held that a 14 year old girl with a predisposition to schizophrenia may recover when slight auto accident causing no bodily injuries was precipitating factor in causing her to suffer schizophrenia.
- c. **Direct causation test:** precludes any intervening force. Plaintiff must prove the absence of any intervening forces. This test is not usually viable today because the foreseeability test is more viable- developed from *Wagon Mound 1*.

G. PROOF OF NEGLIGENCE: RES IPSA LOQUITUR

1. **Overview:** “the thing speaks for itself”- allows the jury to infer from circumstantial evidence that the Δ was negligent. It is ordinarily used where the plaintiff is unable to make specific allegations as to how the Δ was negligent.
2. **Requirements:** plaintiff must demonstrate
 - a. the harm-causing event was probably due to negligence;
 - b. the Δ was probably the culpable party- and the plaintiff was not at fault. Exclusive control is not essential.
3. **Cases**
 - a. **Krebs v. Corrigan 1974-** Δ , fixing a dent in an artist’s studio- artist returns to find a sculpture destroyed. Δ obviously responsible as no one else was there.
 - b. **Ybarra v. Spangard 1944-** plaintiff injured while undergoing surgery. He was permitted to use res ipsa loquitur against the team of physicians and nurses. Court found that each doctor and nurse should be called upon to explain their conduct. Most jurisdictions do not extend the doctrine this far to groups of Δ s.

H. LIMITATIONS ON DUTY

1. **Failure to act-** nonfeasance is the Δ ’s failure to intervene. Generally, there is no duty to act, except in the following situations:
 - a. **special relationships:** Restatement includes common carriers, innkeepers, property owner/client, parent/child, teacher/student, employer/employee.
 - i. **LS Ayres & Co. v. Hicks 1942-** employees of a department store had a duty to help a child whose fingers got stuck in the escalator, as there was a relationship between the customer and the store.
 - ii. **duty to control-** requires some relationship between the Δ and the 3rd party, combined with knowledge of the need for control.
 - (1) **Wells v. Hickman 1995-** mother of child who killed a playmate not liable for the child’s act, even though she had a duty to control him. Indiana narrows the restatement so that the harm must be foreseeable. The child had never killed anyone else so it was not foreseeable he would kill.
 - (2) **Tarasoff v. Regents of Univ. of CA 1976-** plaintiffs asserted that the Δ therapist had a duty to warn them or their daughter of threats made by the therapist’s patient. Court held that a therapist has an obligation to take reasonable steps to protect a 3rd party where the therapist knows or should know that the patient presents a serious risk of physical harm. **SPLIT-** in some jurisdictions, the duty to warn extends only to “readily identifiable victims;” in others all foreseeable victims must be warned.
 - (3) **-serving alcohol-** in some jurisdictions, business establishments that serve alcohol have a duty to prevent intoxicated patrons from driving home drunk and injuring someone. Some courts have extended a duty to control to social hosts who know the intoxicated plan on driving.
 - iii. **duty to protect-** when the Δ and the plaintiff stand in a relationship in which the latter has ceded the ability for self-protection, the former has duty to make reasonable efforts to protect. Jailor/prisoner, innkeeper/guest, parent/child, school/student, hospital/patient, common carrier/passenger, employer/employee.

(1) Police depts.- typically not liable for failing to protect individual citizens. Most courts have limited police duty to act to situations where the police undertook to act and created reliance, enlisted the aid of the plaintiff, or increased the risk of harm to the plaintiff.

(2) Davidson v. City of Westminster 1982- Δ police who did not warn a woman that there was a possible stabber in a laundromat before she went in did not have a duty to her after he did stab her.

b. creating the peril: the need for rescue arises because of the Δ's negligence. Δ has a duty to plaintiff to make reasonable rescue efforts. Sometimes extended to a person whose fault-free conduct gives rise to the need to rescue.

c. duty created by voluntary undertaking- if a victim has been put in a worse position by relying on aid and possibly ignoring other options, the rescuer is liable. Promise creating reliance may give rise to a tort duty.

i. Miller v. Arnal Corp. 1981- owner/operator of a ski lift not liable for the injuries suffered by two people when they did not rescue them, since they were not placed in a worse situation by relying on them to rescue. They had no other options.

ii. Good Samaritan statutes- most states have adopted, exempt rescuers from liability for ordinary negligence; applies to rescuers acting outside the course of their employment and in some states, to pro rescuers only (i.e. doctors, nurses, paramedics).

2. Mental distress (negligent infliction of emotional distress): includes direct impact on the plaintiff, and bystander recovery.

a. direct actions- actions where the plaintiff sues for emotional harm occasioned by the Δ's tortious conduct directed toward the plaintiff.

i. impact rule: very few states retain the requirement that the victim must suffer physical contact by the Δ's negligent to recover for mental distress. Derived from "parasitic" to a physical injury limitations.

ii. "zone of danger:" majority of states allow recovery for mental distress if the plaintiff was at risk of physical impact and suffered a physical manifestation of the distress- caused by near misses.

iii. special cases: in limited situations, limitations relaxed. Ex, negligent handling of a close relative's corpse, or erroneous notification of a close relative's death, situations lacking either impact or threat of physical danger to the plaintiff.

iv. broadest direct recovery: a few jurisdictions permit recovery for mental distress to all foreseeable plaintiffs.

v. fear of future physical harm: arises in toxic tort or defective product context. Most jurisdictions wary of permitting recovery.

(1) Potter v. Firestone 1993- plaintiffs not allowed to recover for fear of cancer since they did not already have it. Plaintiff must prove that is it probable (more than 50%) that they will develop cancer in the future due to the toxic exposure.

b. bystander actions- difficult to balance recovery for most worthy plaintiffs without unduly burdening the negligent Δ's, who are already liable to the victim.

i. "zone of danger:" majority rule, plaintiff can recover for emotional harm suffered from witnessing negligently inflicted harm causing death or serious injury to another when she is in a position to fear for her own safety. Requires that the mental distress be evidenced by physical manifestations.

- ii. **Dillon v. Legg 1968:** minority rule, extending potential recovery to bystanders of an accident who were not at risk themselves. Requires that the mental distress be evidenced by physical manifestations. 3 factors for a judge to consider:
 - (1) whether plaintiff was located near the scene of the accident;
 - (2) whether there was direct sensory perception of the accident;
 - (3) whether plaintiff and the victim were closely related.
 - (4) **Thing v. La Chusa 1989-** narrowed Dillon guidelines to the following in CA: plaintiff must be closely related to the victim; must be present at the scene of the event at the time it occurs and is aware that it is causing injury to the victim; and as a result suffers serious emotional distress.
- iii. **Restatement approach:** requires the plaintiff be in the zone of danger, and suffer bodily harm or other compensable damage.

3. Wrongful death and survival actions: by statute, if a person dies of Δ 's negligence, all jurisdictions permit victim's spouse and children to act against Δ for the negligently inflicted wrongful death of the victim. Under common law, there was no action for a family member, so it was to the benefit of a Δ to kill someone rather than injure them.

a. who may recover: an action may be brought only by those permitted to do so in the statute. You must be on the list to recover.

b. recoverable damages:

i. pecuniary losses- initially limited to concrete monetary losses that the plaintiff would have received from the deceased.

(1) **Gary v. Schwartz 1972 (NY)-** death of a widow's promising son; damages limited to pecuniary loss, but this was substantial as he was planning to become a dentist and would have provided a lot of support to his mother/brother.

ii. lost support and other benefits- today most jurisdictions permit this to be recovered; cost of replacement value of the services provided by the decedent.

iii. companionship loss and grief- few jurisdictions allow recovery for this.

(1) **Selders v. Armentrout 1974 (NE)-** 3 of the plaintiffs 5 children killed; parents recovered pecuniary damages and loss of companionship, but it was very small (about \$266/child after expenses).

(2) **Compania Dominicana de Aviacion v. Knapp 1971 (FL)-** parents of two children recovered when their sons died after a plane crashed into the building they were working in. Damages included pecuniary, loss of companionship, and grief (very rare). Mom had been on the phone with one of her sons, father was outside and watched the crash.

c. survival actions: the continuation of the decedent's action against the tortfeasor; continues a pre-existing claim. **The representative of the decedent's estate can recover any damages the decedent would have recovered if they had lived.** When the tortious conduct contributes to the victim's death, the survivor can bring both survival actions AND wrongful death actions. The survival actions can include medical expenses, lost wages, property damages (ex. loss of clothing etc.), pain and suffering of the victim. In CA cannot recover for pain and suffering of the victim; this tort **does not** survive the victim's death.

i. Murphy v. Martin Oil Co. 1974 (IL)- husband was burned, lived for 9 days then died. Wife brought suit for loss of wages, destruction of his clothing, and pain and suffering of her husband. She could collect for the first two but not the pain and suffering.

4. Loss of consortium and society: loss of companionship, affection, and society, including sexual relations. Limited to spouses. Plaintiff must show that the tortious harm to his or her spouse has led

to an impairment of what was a fulfilling and strong relationship. No amount of time is too short to recover.

a. *Borer v. American Airlines 1977*- court refused to extend loss of consortium to a victim's nine children; reasoning that policy issues and difficulties of measuring loss prohibit its extension.

5. Wrongful life, birth & conception- must first prove Δ 's negligence. Not included within these- if a Δ 's negligence injures an otherwise healthy fetus, upon birth the infant may pursue a tort action against the Δ .

a. wrongful life- child's own claim for being born with medical disability. Difficulty in calculating damages has led to most jurisdictions rejecting the claim; plaintiff's pre-injury state would have been non-existence. Some courts allow limited recovery for the extraordinary expenses the child may incur associated with the disability, if not recovered by the parents in their wrongful birth claim.

i. *Turpin v. Sortini 1982*- plaintiff born with severe hearing defect not allowed to collect damages for wrongful life; only can collect for expenses related to the defect.

b. wrongful birth- parents' claim for damages due to the negligently caused birth of an **unhealthy child**. Due to negligent genetic counseling or a misdiagnosis about the condition of a fetus, an infant is born with a severe medical disability. Most jurisdictions allow plaintiff to recover extraordinary expenses associated with the birth defect.

c. wrongful conception- parents' action for the negligently caused birth of a **healthy child**. Some recovery possible; damages directly associated with the pregnancy and birth are universally compensable. Most courts do not allow parents to recover the cost of raising the child.

6. Landowners and occupiers

a. Common law status approach: status of the person entering the land determines the measure of the duty owed by the owner/occupier (tenants included).

i. trespassers: one who enters or remains on the property in the possession of another without the permission (express or implied) of the land occupier. If undiscovered and unanticipated, you owe no duty but cannot intentionally harm or trap them.

(1) frequent or known trespassers: limited duty- you must make safe OR warn about all known concealed artificial conditions which risk death or serious bodily injury. This does not impose a duty to inspect for hazards or to repair them, just to warn of them.

(2) child trespassers: used to be attractive nuisance doctrine; now, judge balances several factors and if they support providing the plaintiff special treatment, the trespasser will be owed a duty of ordinary care. Landowner will be liable if the owner knows children are likely to trespass, the condition of the land may involve an unreasonable risk of death or serious bodily harm to children, the children because of their youth do not realize the risk of the area, and the burden of eliminating the danger is slight as compared to the risk involved, and the landowner fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

(A) *United Zinc & Chemical Co. v. Britt 1922*- no recovery for child killed by swimming in toxic pool because the child had not been enticed onto the property by the pool, he was already a trespasser when he saw the pool.

ii. licensees: Someone who enters the land with the express or implied consent of the land possessor, i.e. social guests or those visiting for their own personal business. Landowner may be liable to a licensee where the land possessor knows of a dangerous condition on the property, fails to make the condition safe or to warn the licensee

about the risk involved, and the licensee does not know about the danger nor would be expected to discover the dangerous condition. Warnings need only be given about hidden dangers known to the possessor; doesn't need to take steps to inspect the property to discover dangers. Firefighters and police considered licensees.

(1) *Younce v. Ferguson 1986 (WA)*- plaintiff was hit by a car on a farm at a keg party. She was classified as a licensee and therefore the Δ owed her no extra duty of care as the dangerous condition was unknown by the owner of the land.

iii. **invitees:** those who enter land for the business interest of the landowner, or those on land open to the public at large, i.e. customers, business guests, museum patrons, etc. Landowner owes a duty of reasonable care; must try to discover any dangers (unlike licensee), and must remedy or warn the entrant of any danger she knows of or should know of, when its risk is not known or obvious. When the danger can be eliminated with little effort or poses sufficiently grave harm, a warning may be inadequate.

b. **Unitary standard:** replaced the status approach to land possessor liability with a generalized reasonable person standard. Substantial minority of jurisdictions follow this, including CA and NY.

i. *Rowland v. Christian 1968*- plaintiff cut his hand on a broken faucet handle while on the Δ 's property for a social call. Δ was aware of the danger but gave him no warning. CA rejected the status approach and she was held liable.

7. Landowners' liability to plaintiffs off land

a. **SPLIT**- common law rule is a land possessor owes no duty to those outside the land for natural conditions on the land, even when the possessor realizes that the condition creates a significant risk of serious harm. When the harm is caused by an **artificial** condition or the possessor's activity, there is a duty. Some jurisdictions reject this no-duty rule and require a general duty of reasonable care.

b. **exception for trees:** in urban areas, land possessor is required to exercise care to see that trees on the property do not pose a risk to those off the property. Some jurisdictions have extended this to trees in rural areas as well.

a. *Spears v. Blackwell 1996*- plaintiff injured when his car hit another car because weeds growing on the Δ 's land obstructed the view. Weeds were considered an artificial condition because they were a result of vegetation that humans had planted and so weren't natural growth.

8. **Negligent misrepresentation:** generally accepted exception to the rule that the negligent Δ is not liable for pure economic loss. Accountants and investment advisors are typical of those professionals potentially liable for the economic consequence of their malpractice.

a. **Restatement/CA approach:** includes those who in the course of his business, profession or employment supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss if he fails to exercise reasonable care or competence in obtaining or communicating the info. Liability limited to loss suffered by the person for whose benefit he intends to supply the info, and/or through reliance on it in a transaction that he intends the information to influence, or knows that the recipient so intends. Intent to benefit third persons.

b. **NY approach-** privity of relationship; accountant must have been aware that the report was to be used for a particular purpose, known that they would rely on it, and the accountant must have understood that parties' reliance.

c. **NJ approach-** duty to foreseeable users.

d. *Bily v. Arthur Young & Co. 1992 (CA)*- in this case, accounting firm ruled to have a limited duty, not liable. Follows Restatement approach which narrowly defines a class of

persons for whom representations were made. Because plaintiffs were not clients of the accounting firm, no negligence.

9. Economic Loss: generally accepted that negligent Δ 's are not liable for pure economic loss. Some jurisdictions do extend duty to "particularly" foreseeable plaintiffs.

a. *J'Aire Corp. v. Gregory 1979 (CA)*- restaurant suffered economic damages when a contractor, under contract to the lessor, failed to complete a project in a timely manner. Court held the restaurant was a foreseeable enough victim that the contractor owed a duty to.

I. DEFENSES TO NEGLIGENCE

1. Contributory and comparative negligence

a. contributory negligence: bars all recovery when the plaintiff's negligent conduct contributed in any way to the harm suffered. Now, only about 4 states use this.

b. comparative negligence: converts contributory negligence into a potentially partial defense. **SPLIT-**

i. pure comparative negligence: plaintiff can be 99% at fault and still recover 1% of the damages. Minority approach.

(1) *Li v. Yellow Cab Co. 1975 (CA)*- woman who was partially negligent in a car crash was able to get damages in a jury trial. This case established the pure doctrine in CA absent a statute.

ii. modified comparative negligence: if plaintiff is over 50% at fault as determined by a jury, completely barred from any recovery. Majority approach.

c. for a plaintiff's conduct to preclude her recovery altogether, her negligence towards her own protection must be a cause-in-fact and a proximate cause of the accident resulting in injury.

2. Assumption of risk:

a. plaintiff must:

i. know a particular risk and- subjective standard; plaintiff must have actual and conscious knowledge of the particular risk. Other risks unknown that are incidental to the first risk are not assumed if the plaintiff doesn't know of them.

ii. voluntarily

iii. assume it- by voluntarily exposing herself, the plaintiff is deemed to consent to the risk.

b. assumption of risk and comparative negligence- 3 approaches

i. assumption of risk remains a complete defense to negligence.

ii. assumption of risk should be divided into **reasonable and unreasonable** assumptions of risk. Unreasonable is absorbed into comparative negligence as a partial defense. Reasonable does not overlap with contributory, and so is a complete defense- if you assume a reasonable risk, you are completely barred from recovery.

iii. allows **both unreasonable and reasonable assumption** of risk to be absorbed into comparative negligence. For unreasonable assumption, there would be an appropriate deduction in recovery.

c. Firefighter's Rule: precludes firefighters from suing for injuries sustained fighting negligent fires, because they are compensated to address the negligence.

d. *Murphy v. Steeplechase Amusement Co. 1929-* plaintiff sued after riding an amusement park ride that threw riders down and breaking his knee. Court held that he had seen the ride before he got on and assumed the risks inherent in it.

e. *Woodall v. Wayne Steffner Productions, Inc. 1962-* the Human Kite, a stunt flyer who flew while strapped to a makeshift kite attached to a moving automobile, was injured when an inexperienced driver went too fast. Court found for the plaintiff, holding that while he did assume the risk of falling, he did not assume the risk of being driven by an incompetent driver.

f. *Rush v. Commercial Realty Co. 1929*- plaintiff injured when she fell through the weak floor of an outhouse into the accumulation below. Court held that although she knew the floor was in bad order, she had no choice but to use the toilet, so her encounter with the known risk was involuntary.

J. IMMUNITIES: protects a Δ from tort liability; not dependent on the plaintiff's behavior, but on the Δ 's status or relationship to the plaintiff.

1. **charities:** historically immune; now the Restatement and most states have abolished this. The remaining states have only partially retained it- ex, NJ prohibits suits brought by beneficiaries of specified charities.

2. **spousal immunity:** majority of states have eliminated this.

3. **parent child:** some states have completely abolished; some have eliminated it for intentional torts, some allow tort actions but not allegations of negligent parenting.

4. **governmental:** common law immunity was complete. Now, one general provision allows immunity for discretionary functions but not ministerial acts.

a. **discretionary functions:** immunity; policy-making decisions.

b. **ministerial functions:** no immunity; govt. conduct which implements or executes policy decisions, i.e. maintenance of a govt. building or automobile.

c. *Tarasoff v. Regents of UC 1976*- court held the university was not immune for the therapist's failure to warn about the homicidal patient; failure to warn constituted ministerial rather than discretionary conduct under the immunity statute.

K. JOINT AND SEVERAL LIABILITY- all liable Δ 's are each fully responsible for the entire injury. Each individual is fully liable to the plaintiff for the entire damage award. Multiple tortfeasors are joint tortfeasors.

1. 3 Theories to determine:

a. **acting in concert-** if one person gives aid or encouragement to another person to commit a tort; does not have to be a but for cause of the tort. The aid must be tortious.

b. **independent torts causing indivisible injury-** if multiple Δ 's committed separate torts which combined to produce a single, indivisible injury to the plaintiff. The plaintiff's entire injury cannot be separately allocated to A or B.

c. **vicarious liability-** a Δ may be jointly liable for the actions of another through vicarious liability; ex. employers held liable for the actions of employees within the scope of their employment.

2. **Allocations of liability:**

a. **approach 1:** allows the settling Δ 's payment to be deducted from the final total damages owed to the plaintiff. This results in remaining tortfeasors paying the full damage amount minus that payment. That may increase the % for which they were originally liable.

i. *American Motorcycle Assn. v. Superior Court 1978*- adopted this approach when the Δ impleaded the victim's parents as tortfeasors.

b. **approach 2:** the settling Δ 's % of fault deducted from the damages awarded the plaintiff regardless of the actual payment by the settling Δ to the plaintiff. This may decrease the total amount the plaintiff will collect.