OUTLINE

II. Unintentional Injuries Inflicted in Situations in which There Is No Pre-existing Relationship Between the Parties.

This second volume of the syllabus is concerned with unintentional injuries inflicted in situations in which there is no pre-existing relationship between the parties. There are three issues that pervade this general area of the law:

1. The choice between strict liability and negligence in those situations where it is clear that the defendant is under some duty to look out for the interests of the plaintiff.

2. The definition of those situations in which the defendant will be exempt from liability in spite of the fact that she has acted negligently and her negligence caused injury to the plaintiff.

3. The choice within a negligence regime whether to adopt definitions of negligence that amount to strict liability, in name if not in fact; and the choice within a regime of strict liability whether to adopt definitions of the standard of care that amount to negligence in name if not in fact.

The organization of the materials reflects, on the one hand, the goal of presenting the total corpus of rules about unintentional torts (in the absence of pre-existing relationship) and, on the other, the goal of facilitating discussion of these three issues.

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BRIEF OUTLINE

A. Negligence

1. History and Definitions
2. The Reasonable Person
3. The Calculus of Risk
4. Custom and Statutes
5. Res Ipsa Loquitur

B. Causation

1. Cause in Fact
2. Proximate Cause

C. Cases in which there is no liability in spite of behavior by the defendant that was negligent under the Hand formula and caused harm to the plaintiff's legally protected interest.

1. Contributory negligence, last clear chance and comparative negligence
2. Owners and occupiers of land
3. Negligent infliction of emotional harm
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[5. No Duty to Act (see first syllabus)]

D. Strict Liability

[1. Animals & Defamation]

2. Nuisance
3. Rylands v. Fletcher
4. Ultrahazardous Activities
5. Limits on strict liability

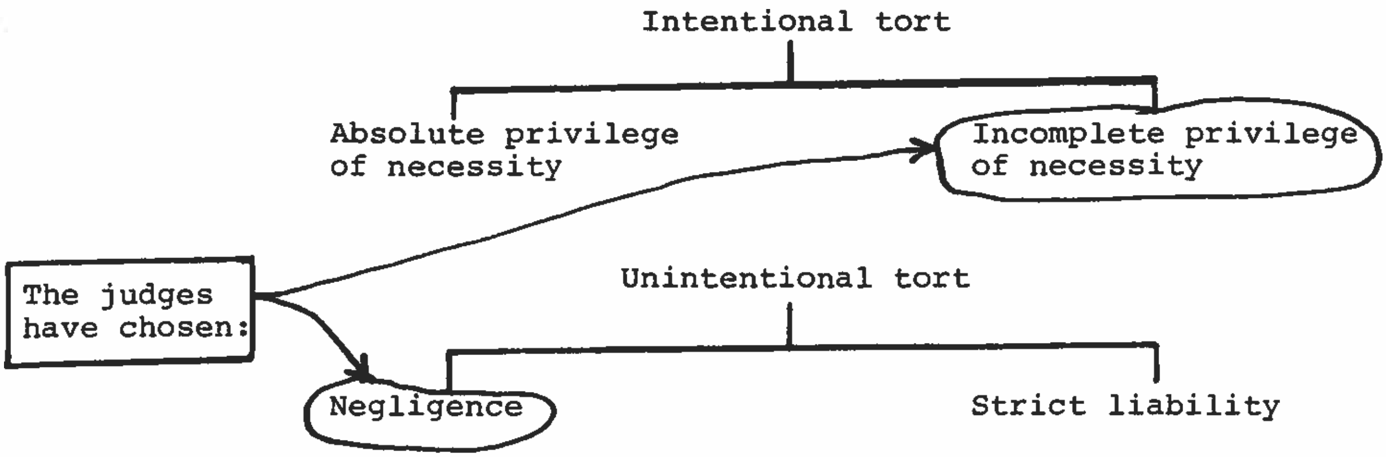
FULLER OUTLINE

A. Negligence

The two doctrinal goals of this section are to introduce you to the history and possible definitions of the negligence concept, and to acquaint you with judicial responses to a set of gaps, ambiguities and conflicts that appear as soon as we try to apply the definitions to practical problems. The first assignment deals with the rise of negligence and its meaning; the next three deal with applications: the reasonable person, statutes and res ipsa loquitur.

1. History and Definition of Negligence. These materials merely introductory. The two important things for you to grasp are:

   (a) The analogy between the issue of negligence vs. strict liability in unintentional tort and the issue of absolute vs. incomplete privilege of necessity in intentional tort. If negligence is the rule and strict liability the exception (an assertion that is open to question, as we will see presently), we can diagram the situation as follows:



(i) The readings should make it clear that the basic repertoire of arguments about the negligence/strict liability choice is exactly the same as that lawyers and judges use in discussing intentional tort issues of mistake and necessity.

(ii) Moreover, the argument about what precautions defendants will take that we developed in the Vincent situation applies with equal force to the negligence/SL choice. Briefly put, it is by no means obvious, or necessarily true that defendants will invest more in safety under strict liability than under a negligence regime. (On the consistency with one another of the intentional and unintentional tort approaches, see Syllabus Vol. I, section C-4-b and Assignment #13.)

(b) The second thing it is important to grasp is the distinction between the fault and the cost/benefit definitions of negligence. You should be able to tell one approach from the other and also to formulate an argument for a given result first in terms of one and then in terms of the other.

(i) Note that the fault approach is most closely tied to the moralistic mode of arguing, but that, especially when linked to the notion of reasonableness, it is also supported by notions of community expectations, and that it is sometimes formulated in terms of a right of freedom action that would be violated by strict liability.

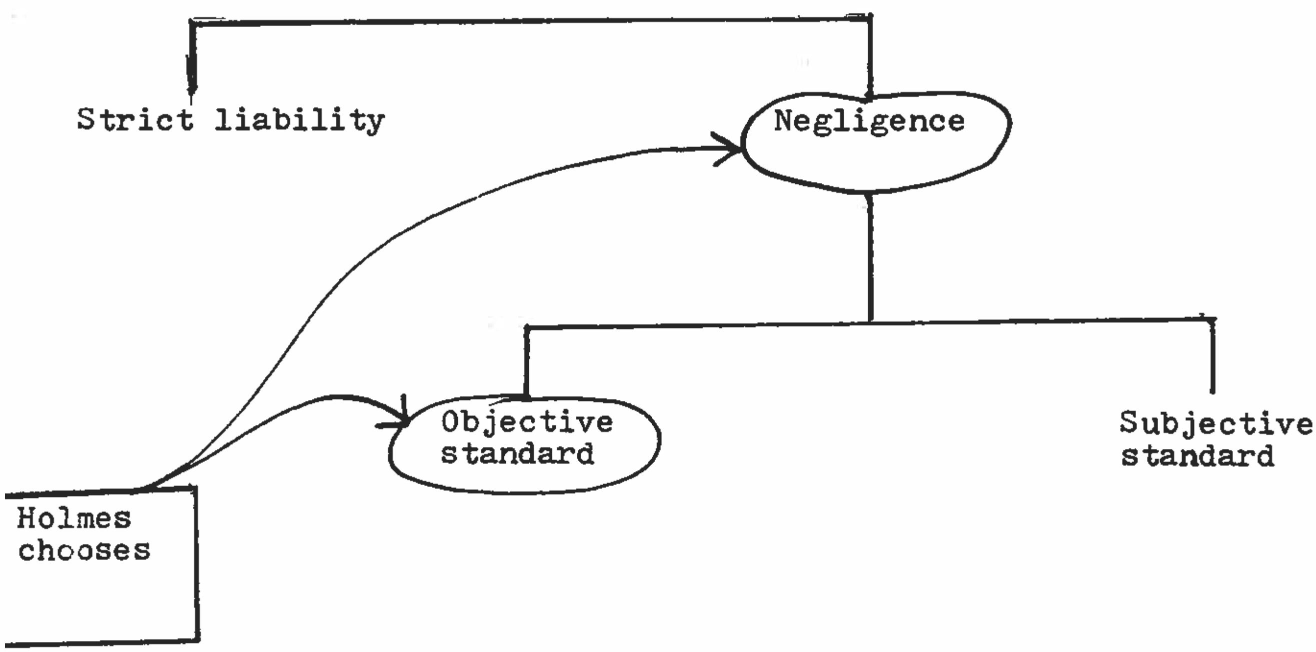
(ii) The cost/benefit approach represented by Terry, the Hand formula, Posner and Calabresi is a typical example of the social utility perspective, which is often formulated in ways we might call utilitarian, "economic," or efficiency-oriented.

(iii) It is possible to formulate arguments that appeal in a blurred way to several different sources of legitimacy, as when it is asserted that morality consists in doing what is most socially useful, etc.

2. Three Problems in Applying the Negligence Concept. Each of the three doctrinal subareas we take up here is fairly complicated, and will take you time and energy to master. But it is important that the work of memorizing doctrinal detail and picking up particular threads of doctrinal analysis should not obscure the larger purpose. The argument of this part of the materials is that all three doctrinal puzzles involve the same set of pro and con arguments, that this set is the same as that involved in the more abstract issue of strict liability vs. negligence, and that within each of these doctrinal subareas the same issues arise yet again...and again... and again.

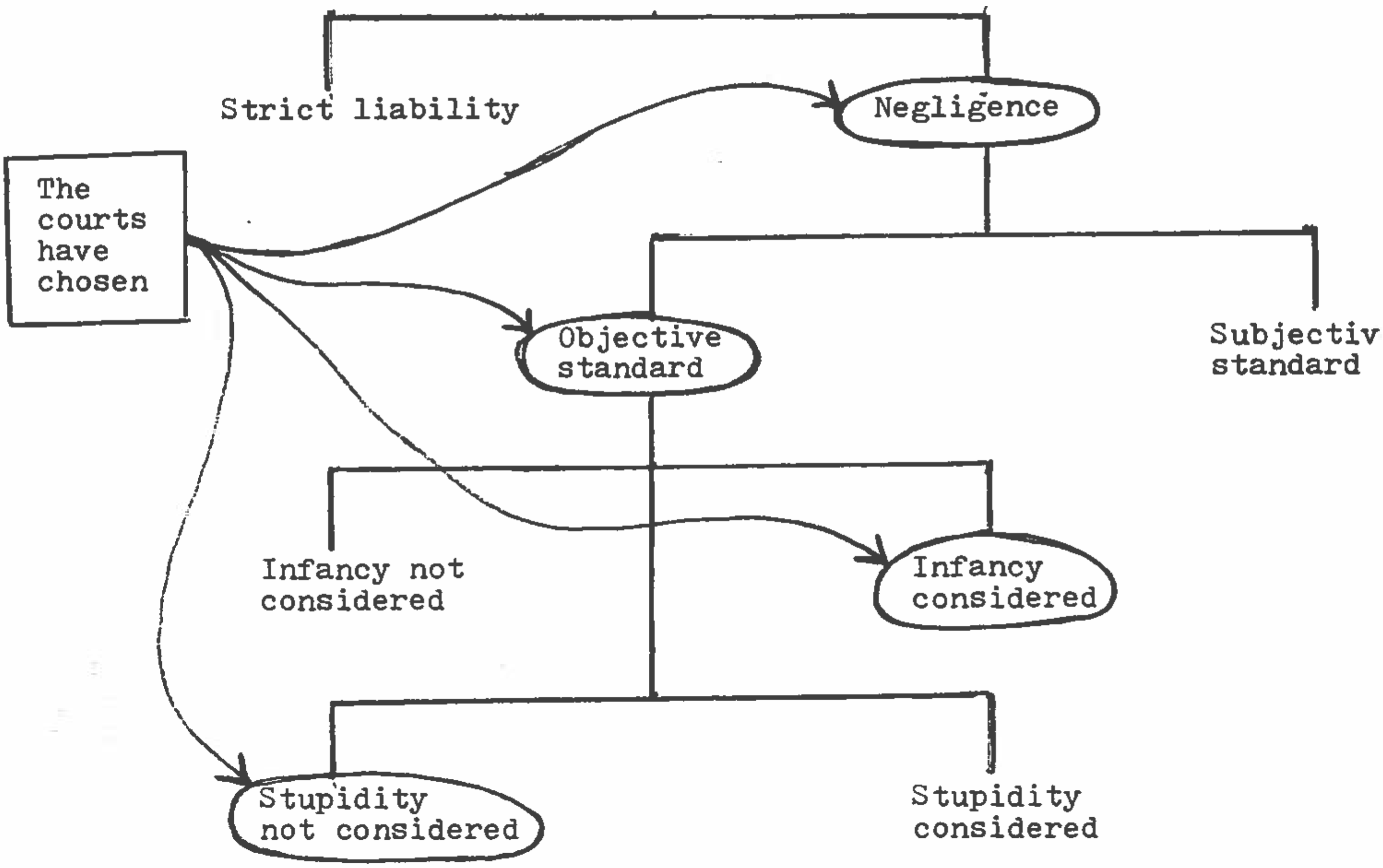
(a) The reasonable person standard. The first task here is to memorize the rules about what can and what cannot be taken into account in defining the reasonable person. The second task is to sort out the arguments that are used for and against the inclusion of some particular aspect of individuality.

(i) Begin by asking yourself about the relationship between what Holmes has to say about strict liability vs. negligence on p. 71-74 of the casebook, and what he has to say about subjective vs. objective standards of negligence, on p. 130-31 of the casebook. Are his positions consistent with one another? The following diagram may or may not accurately portray the difficulty:



(ii) Once an objective standard is chosen, there remain dozens of particular applications each of which poses many of the same interpretative problems posed by the initial choice. The excerpt from Prosser is an attempt to rationalize these choices. You should be able to categorize the series of arguments he proposes to justify the different rules, and be ready to express an opinion on the question whether he is successful in explaining how each makes sense.

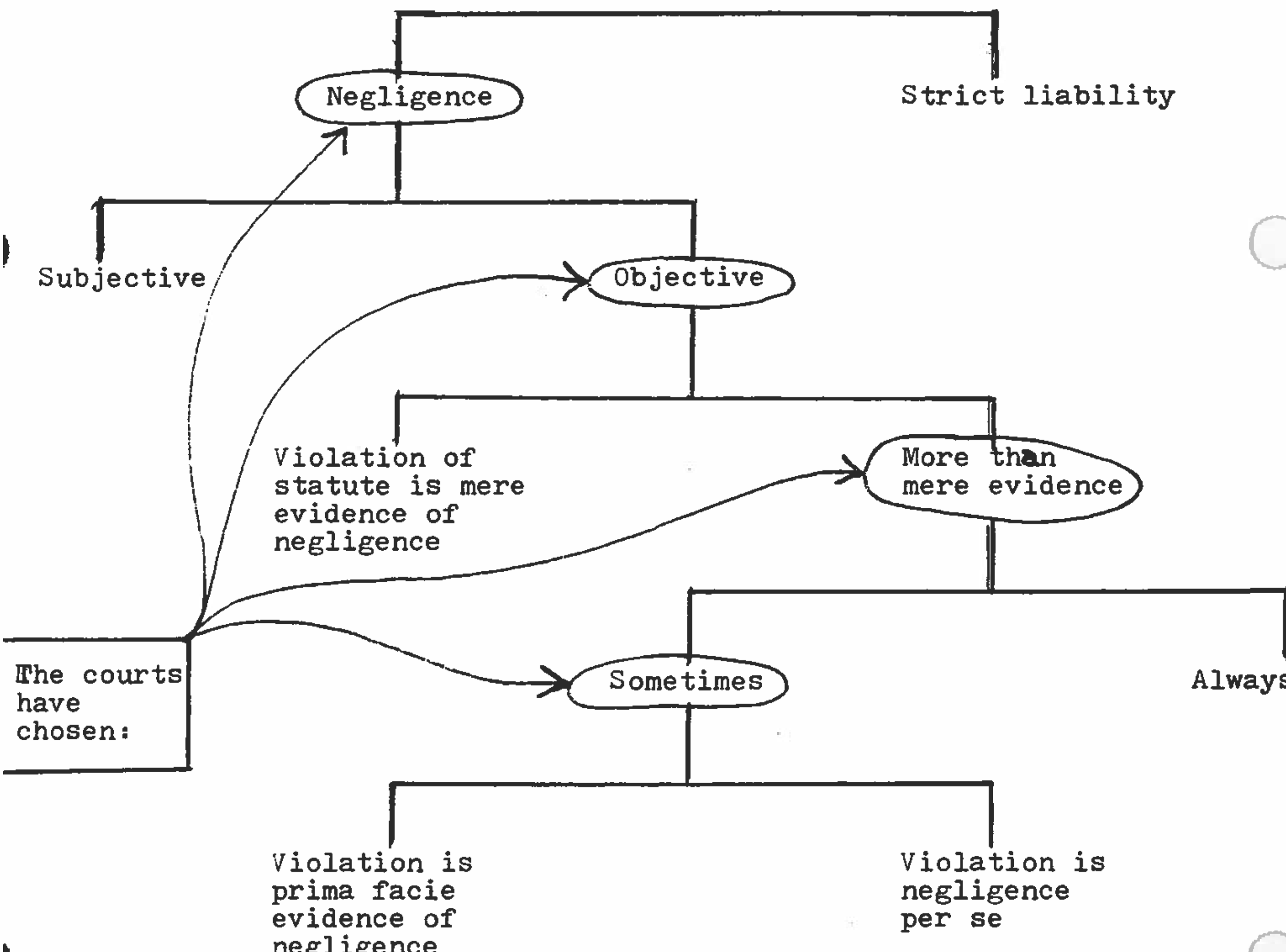
(iii) The basic point I am arguing here is that the use of an "objective" standard is a species of, or at least analogous to strict liability, while the reassertion <u>within</u> the objective standard of the importance of all kinds of particular characteristics represents a reversion toward negligence. The application of objective standards illustrates the coexistence of opposites within a single doctrinal field. In the next two sections, on statutes and res ipsas, the materials are arranged to suggest similar patterns.



(iv.) I want to concede in passing that there are circumstances in which it is plausible that we choose an objective standard because violation of that standard seems to us to be morally blameworthy, rather than for one of the reasons usually associated with strict liability.

(b) The role of violation of a statute in the determination of negligence.

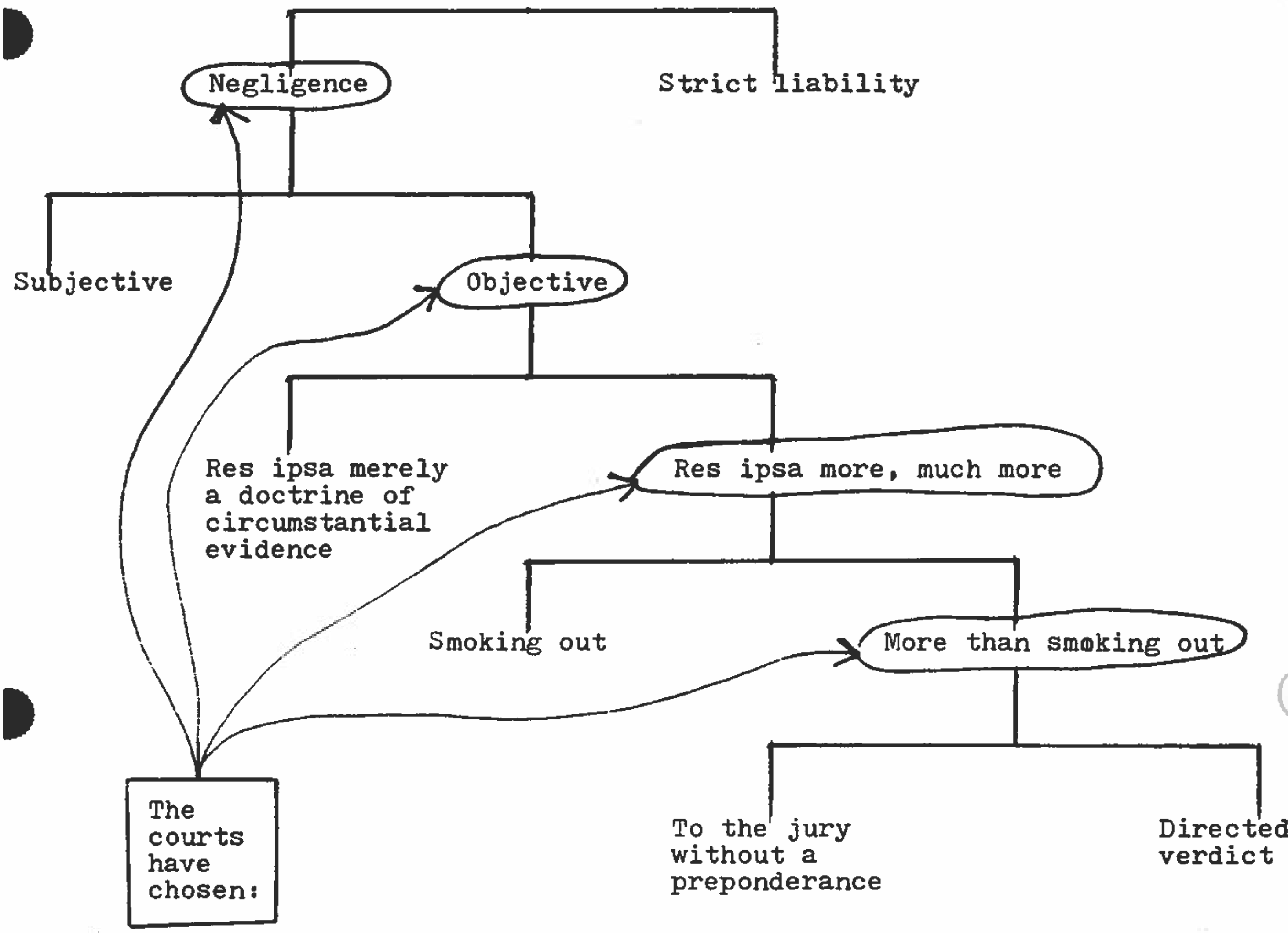
(i) The first difficulty here is in deciding exactly what rules the courts are talking about. In conjunction with the cases, read carefully Fletcher's treatment in his Outline of Negligence. It may be helpful to think about this using one of our familiar diadic structures, representing the series of choices the courts have made:



(ii) Even after all these choices have been made, and criteria developed to answer questions about exactly when violation would be relevant and what are the implications of a prima facie showing of negligence, there remains the further doctrinal subissue of whether the courts, in civil actions, should treat violation of statute as excused only if the violator would be excused in a criminal action, or rather should employ a broader (or, conceivably, a narrower) doctrine of excuse.

(iii) Arguments that support counting statutory violation as a major factor in determining tort liability are similar to the arguments for an objective reasonable person standard. Arguments for treating statutory violation as at most mere evidence of negligence ressemble arguments for a more subjective version of the reasonable person standard.

(c) Res Ipsa Loquitur. Like the doctrines about statutory violation, res ipsa loquitur is hard to understand, and subject to considerable ambiguity in practice. Moreover, the doctrine is still expanding. See Fletcher. Here is another diagram. Note that, as with the statutes issue, even after we have exhausted all the issues represented in the diagram there are others left, such as the significance of causation and control in establishing res ipsa.



(i) The fundamental question about this doctrine is one which doesn't seem to be answered by the case law (though I should admit that I am only familiar with the case law as it is reflected in the three casebooks I have consulted on this point. The question is whether the doctrine of res ipsa is a "smoking out" doctrine merely, or rather a disguised form of strict liability. It seems to me (this may be wrong) that this in turn depends on whether, under the doctrine, it is possible for a plaintiff to get to the jury on something less than a showing of a preponderance of the evidence--i.e. of the evidence for the existence of negligence. (If the plaintiff can get to the jury on less than a preponderance, it follows that the plaintiff can recover on less than a preponderance. If the doctrine allows a recovery for an injury caused by the defendant but which has not been shown by a preponderance to have been caused by the defendant's negligence, then it is a species of strict liability, however limited by the other requirements of the doctrine, such as that the instrumentality be under the defendant's "sole" control).

(ii) The cases in the casebooks seem to me ambiguous as to which way to interpret the doctrine. All we know is that cases sometimes go to the jury, despite the absence of evidence from which a reasonable jury could conclude there was negligence, where the defendant remains silent. This is consistent either with a smoking out or with a strict liability interpretation. In order to answer my question, we would need cases in which the defendant came back with an account of what happened. If the doctrine were merely one of smoking out, the judge might then determine whether the defendant had made a good faith effort to cooperate in the elucidation of the facts. If he concluded that the defendant was hiding nothing, he would decide, as though res ipsa had never been invoked, whether plaintiff had put on enough evidence to permit a reasonable jury to find negligence. If not, there would be a directed verdict for defendant. Such a treatment would strongly suggest that res ipsa is a doctrine of circumstantial evidence plus smoking out, and not a doctrine of strict liability.

(iii) The opposite treatment would not be as strong evidence for the opposite conclusion. Suppose that we found cases in which the plaintiff failed to provide evidence from which a reasonable jury could find negligence, and in which the judge threatened to send the case to the jury or direct a plaintiff's verdict unless the defendant offered an explanation. Suppose the defendant did offer an explanation and the judge nonetheless sent the case to the jury, invoking res ipsa. It _might_ be under these circumstances that the judge was still motivated by smoking out, and had simply concluded that a rule requiring a case by case determination of the defendant's good faith would be unworkable, and that the only way to force defendants to be honest was put them before the jury no matter how they responded to the initial threat. To really establish strict liability as the motive, we would need a directed verdict for the plaintiff in spite of defendant's alternative explanation.

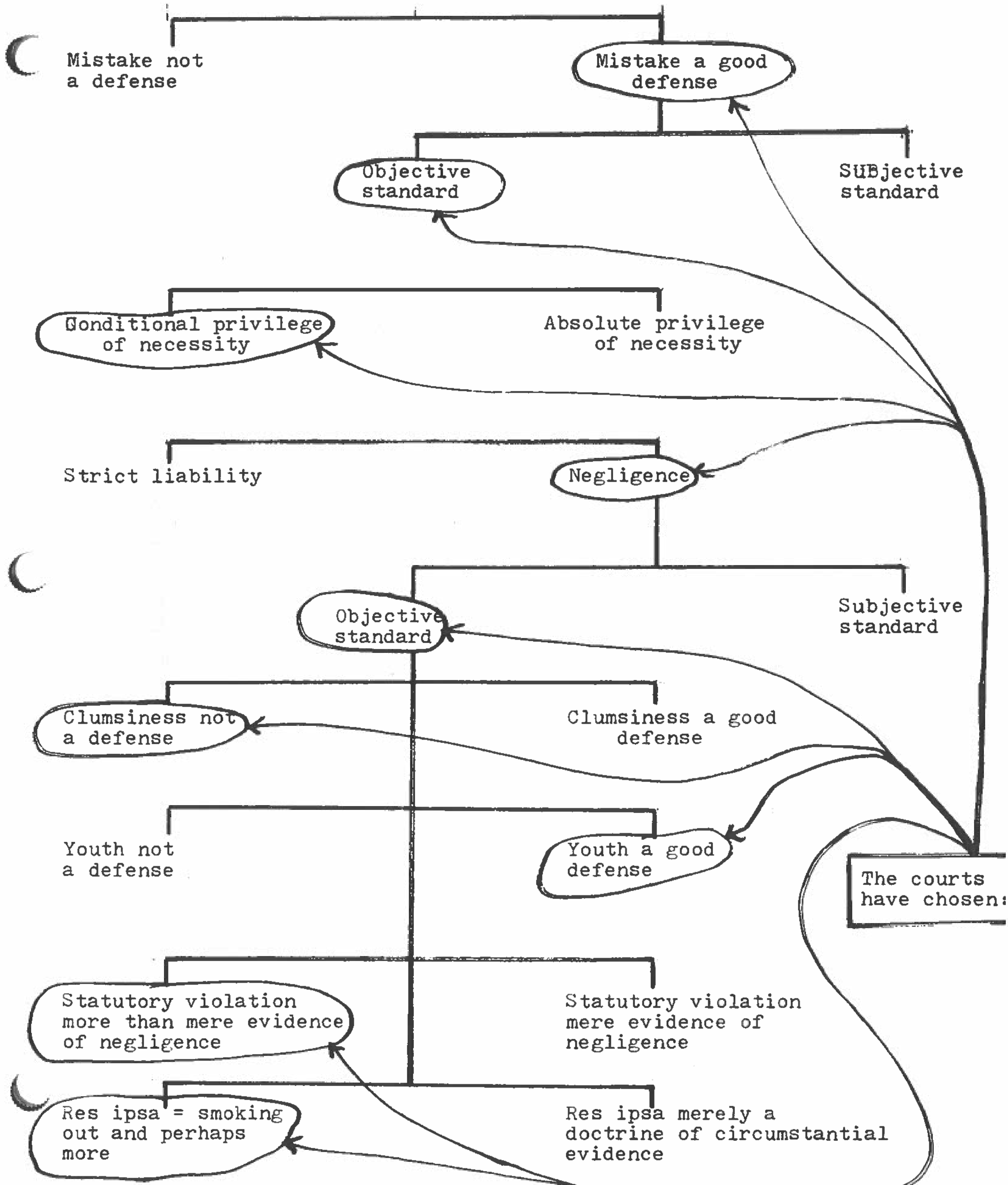
(d) _Relating the reasonable person, statutory violation and res ipsa loquitur_. The task of formulating in a clear way the various analogies between the three doctrinal areas is a difficult one. If I had a formulation I was satisfied with, I'd put it in here, but I don't. A picture is not worth a thousand words, but here's one anyway:

B. Causation

In both intentional and unintentional tort, the plaintiff has the burden of showing that the defendant's behavior was the "legal cause" of his injury. This is a requirement independent of that of showing negligence or intent. Sometimes the judge gives the causation issue to the jury; sometimes he keeps it for himself, and attempts to apply, or formulate and apply, rules of law about when behavior has "legally caused" injury. The resulting systems of rules have to be learned more or less by heart; once learned, they provide another occasion for the type of analysis we have been carrying out all along. Indeed, the causation area provides a kind of final test of our familiar techniques of categorizing arguments, since there are a very large number of subrules and the arguments appear lightly disguised, rather than in their usual bald form.

1. _Cause in fact._ There is no outline on cause in fact, just two remarks in passing:

N.B.: This diagram does not purport to be an accurate summary of the doctrines it arranges. It is no more than suggestive.



(a) The basic analogue to our earlier discussions lies in that some interpretations of cause-in-fact tend toward the expansion of liability while others tend to contract it. When the parties have finished giving their "definitional" arguments about the "nature" of cause, they turn to "policy" arguments about the consequences of a pro-plaintiff or pro-defendant approach to the issue. These policy arguments are the familiar ones about rights, morality, social welfare, expectations, institutional competence and formal realizability.

(b) The Malone article is a classic example of a particular moment--an advance--in American legal thought, sometimes called Legal Realism. Malone's attitude toward the doctrinal area is typical of what the Realists did to every important doctrinal area, and it is important for you to learn to do it too:

(i) You critique the definitional approach (which is sometimes called formalism, sometimes "conceptualism," sometimes a mistaken belief that abstractions can decide concrete cases). You show both that the definitions (say, of cause-in-fact) are wrong and outmoded, and that they are so vague, ambiguous, or internally self-contradictory that it's easy to manipulate them to produce any result you want.

(ii) You propose that, given the uselessness of the abstract categories, the best thing to do is to proceed.

x. case-by-case, in an ad hoc way, eschewing generalizations,

xx. using all the moral and social welfare policies that are relevant to the particular facts of the case.

(iii) You carry out your individual instances of this kind of analysis as though there were an apolitical, rational technique for doing it, without either defining that technique or trying to differentiate it from what legislators or administrative agencies do, and you thereby maintain at least an appearance of judicial neutrality and of the necessary character of conclusions reached by legal reasoning.

2. Proximate Cause.

(a) Learn to identify the two tests--directness and foreseeability--and to formulate arguments alternatively in one form or the other.

(b) Learn the rules that are supposedly in force to cover different particular fact situations.

(i) There are two ways to categorize the rules:

x. By listing the different areas of tort law, and the different kinds of interests involved, and the different patterns of injury. Such an approach leads to a picture like that on the opposite page.

xx. By listing "typical" cases of causation that give rise to dispute, as Epstein has done in the casebook.

(ii) This set of rules for different situations poses exactly the same questions as were posed by the set of rules about mistake in intentional tort or the set of rules about what characteristics count in defining the reasonable person.

x. are the rules consistent with one another, in the sense that you can give a satisfying explanation of why we have eggshell skull in intentional battery but a restrictive foreseeability test in Palsgraf?

xx. if the pattern of rule choices looks like a crazy quilt, you can at least work out the set of arguments that are used to push things one way or the other, and relate these arguments to the ones we've seen before.

(c) Learn the techniques for manipulating each of the basic rules to make it appear to reach very far down the chain of causation, or to require us to stop very close to the actor's act.

(i) Foreseeability is manipulable because there is a sense in which almost anything is foreseeable, so long as it's not physically impossible, and another sense in which even the most ordinary events are unforseeable because they always occur under slightly different circumstances.

(ii) Directness is manipulable because the concepts of intervening cause, condition, remoteness and naturalness are all vague

D's negligence consists of taking an unreasonable risk of harm to interest A of P-1. As it turns out, a different, unforeseeable harm ensues to:

- Interest A of P-1 (thin skull rule)
  - Condition of P-1 (thin skull rule)
  - Bizarre chain of causation (Polemis, Wagon Mound)
- Interest B of P-1
  - Condition of P-1 (Steinhouser, p.)
  - Bizarre chain of causation (owner of package in Palsgraf)
- Some interest of P-2
  - Condition of P-2
  - Bizarre chain of causation (Palsgraf, Kinsman)

D intentionally invades interest A of P-1. The harm that actually occurs is an unforeseeable injury to:

- Interest A of P-1
  - Condition of P-1 (Vosburg)
  - Bizarre chain of causation (So. Counties?)
- Interest B of P-1
  - Condition of P-1 (diamond merchant suicide)
  - Bizarre chain of causation
- Some interest of P-2
  - Condition of P-2
  - Bizarre chain of causation

  (transferred intent cases)

if not wholly meaningless.

(iii) Given this critique (which is another instance of the Malone approach disussed above with regard to cause-in-fact), it would be wrong to say either that foreseeability is more plaintiff oriented than directness, or the reverse. In the contrast between Polemis and Palsgraf, it looks as though directness leads to more liability than foreseeability, but if you then contrast Weirum v. RKO with a case like _______________, it is clear that it can go the other way too.

(d) Given the manipulability of the two definitional approaches, it is not surprising that the opinions bolster their interpretations of the rules by appeals to all kinds of policies. Note that these are the same policies we have seen over and over again, with a few new variants, of which the most important is the following pair: activities should bear their full costs vs. it's a bad idea to overburden productive activity.

(e) The Palsgraf case is a staple of legal education because it neatly illustrates just about every single one of the above points, and throws in some others to boot:

(i) Not just the foreseeability and directness tests but also an ad hoc "policy" test is invoked, so that all doctrinal alternatives strut their stuff.

(ii) the crazy quilt character of the rule system, and the simultaneously very limited group of arguments used to justify the rules, come through when we try to decide just what Cardozo meant the narrow holding of the case to be. This most famous foreeseability case does not overrule Polemis, the most famous directness case. If not, are the rules perhaps consistent after all?

(iii) Cardozo approaches the issues through the concept of "duty" rather than through that of proximate cause. What difference does it make how he goes about it?

C. Cases in which there is no liability in spite of behavior by the defendant that is negligent under the Hand formula and causes harm to the plaintiff's legally protected interest.

The doctrines collected here all permit a defendant to escape liability despite conduct that a jury could find was negligent under the Hand formula because involving a risk of loss to the plaintiff, which might have been avoided at small cost to the defendant. But the collection does not include all such cases. It excludes cases where the defendant escapes because the injury was to an interest of the plaintiff that is not legally protected, or because the defendant's conduct was not legally causal. [The section includes some rules that cover both intentional and unintentional injuries, such as the "no duty to act" rule.] Another large class of excluded cases is that in which the defendant escapes liability because the courts interpret the parties' contractual or semi-contractual relationship to include a valid disclaimer of liability for negligence. We will take up this set of cases in Part III of the Syllabus Outline.

The set that remains after these exclusions consists of contributory negligence, limited liability of landowners to trespassers, limited liability for negligent infliction of emotional harm and no duty to act. As you will see, each of these doctrines has been significantly cut back over the last 20 years, as courts have increased the protection of plaintiffs' security at the expense of defendants' freedom of action. One of the issues posed by the materials is whether this historical evolution has been a good or bad thing, and (a distinct question) whether it should continue.

Treating these four doctrines together provides another occasion to test the reductionist approach to legal argument I have been developing throughout the materials. Success in reductionism seems to me to involve the following. (a) Selecting a very small number of categories or causal elements from the great mass that are always available for describing and explaining complex phenomena. (b) Generating many small causal schemas in order to deal with the plethora of particular cases. The twin dangers are (a) reducing the theory to such a small number of elements that they are unpersuasively abstract or general when applied to particular cases, and (b) using so many variants of the basic elements (or keeping so many elements in the reductionist formula) that the theory is not appreciably more economical than the eclectic approach it replaces. What follows is an attempt to slip between Scylla and Charybdis, modifying or varying our small set of categories of argument to bring them to bear on a new set of particular cases.

1. Reverse formal realisability arguments.

There are two distinct developments or variants of the formal realisability argument that appear in all four of these doctrinal areas.

(a) The formal realisability of the state of nature. Up to now, we have repeatedly found the formal realisability argument operating in favor of the plaintiff and only occasionally for defendant (e.g., no LPI at all is often more FR than any rule of liability; limited doctrines of causation sometimes seem more FR than ones that go way down the causal chain, etc). All of the four doctrines here involve the claim that the way to certainty is through the elimination of legal intervention rather than by carrying it to extremes.

(b) But all four doctrines also introduce an important counter--a reverse FR argument in favor of a rather vague standard ("due care," "reasonableness") and against the use of rules. The argument works this way:

(i) Point out that the attempt to achieve certainty has led either

(x) to an intricate set of very specific rules covering many cases that are hard to tell apart, with many "exceptions" and fine distinctions, or

(xx) to the formulation of very general, simplifying rules that achieve certainty only by accepting a very large measure of what most people see as unfairness.

(ii) Attack the success of the attempt to achieve FR through this kind of use of rules, at least as it has worked out in the area under consideration: The basic point is that rules turn out to be incredibly uncertain.

(x) The intricate system of specific rules leaves a lot of room for sub rosa manipulation of cases into and out of particular categories. The system gets so complicated that no one understands it, and it therefore has only a minimal effect on behavior. The administration of justice is disgraced by the use of intricate and incomprehensible arguments to decide standard cases.

(xx) The simple but brutal general rule will bring in its wake all kinds of attempts at evasion. There is likely to be jury nullification, judicial complicity in the mis-stating of the facts, and the torturing of what exceptions do exist in order to avoid manifest injustice--all at the cost of the honor of the system and the integrity of legal discourse.

(iii) Given that they are uncertain and arbitrary in practice, it is a real drawback of these rule-bound approaches that they make everything appear mechanical.

(x) People who rely on the plain meaning of the brutal rule, or in their hard-won knowledge of the intricate rules system, will be severely dissappointed by the realities of the system; those who learn to manipulate the arbitrariness can get away with murder behind the smokescreen of legalism.

(xx) Because the judges have to keep up the charade of mechanically applying rules to facts, they can't openly consider the policy issues, and especially the policy <u>conflicts</u>, that generate the problems of arbitrariness. The system is stuck in a static condition of malfunction, and can't evolve to improved solutions, or just plain new solutions to meet new conditions.

(iv) Given all of the above, it would be a good idea to replace the old system of rules with a much simpler, though also much vaguer, system of general standards. Such a system would evolve by the case-by-case application of the standard, gradually building up a body of precedent, but would not try for hasty middle-level generalizations. In applying the general standard to new typical cases, the judges would and should take into account the full range of conflicting arguments pro and con, rather than maintaining the pretense of neutral mechanicalness.

2. Social welfare: deterrence by the denial of compensation. In most of the cases we've considered up to now, the issue was whether or not to deter dependants from doing something, and the focus of social welfare argument was on their response to liability. (Again, it's easy to think of exceptions, such as the impact on plaintiffs of the rule in Thurston v. Hancock about lateral support of land.) In the four doctrinal areas we are considering, the focus is rather on the way plaintiffs will respond to knowledge that they can't recover. When the focus is on the defendant, there is likely to be much more awareness of the desirable aspects of his activity that seem inseparable from his undesirable neglect of plaintiff's safety. In particular, these doctrines respond to some extent to fear of "burdening productive activity" unnecessarily.

(a) Deterring behavior considered undesirable. This is most obviously a motive in the doctrines of contributory negligence and no duty to trespassers.

(b) Encouraging toughness and self-reliance. These policies are often urged in support of the "no duty to act" rule and limited liability for negligent infliction of emotional harm.

(c) The "burden" argument is that if we want to avoid the injuries involved in these cases, there are really only two ways to go about it: by making defendants invest in precautions and shoulder burdensome duties of care, or by eliminating the plaintiff behavior that created the possibility of injury. The argument is that comparing these makes it obvious that it's better to deter plaintiffs than to force defendants into unnecessary sacrifices.

(d) Since you know that each of the four defendants' doctrines we are talking about has been quite sharply cut back, you should expect to find judges elaborating more or less convincing responses to these social welfare arguments. What are they?

3. Rights arguments: forfeiture and causation. In most respects, these four doctrinal situations evoke the standard rights arguments, with their standard responses. By this time you should be able to make them up in your sleep. But there are some variants worth noting.

(a) Forfeiture: One way to resolve the dilemma of apparently exactly symmetrical rights arguments (freedom of action vs. security) is to invoke the notion of forfeiture, so that one of the parties' rights disappear from the equation. In both contributory negligence and no duty to trespassers this is often a highly effective argument for defendant. (Cf. self-defense in intentional tort situations.)

(b) Causation: In all four situations, there is at least the possibility of claiming that the defendant wasn't "really" responsible for plaintiff's injury, even though he was negligent and couldn't escape under the standard interpretations of proximate cause.

(i) In contributory negligence, plaintiff's conduct was also a proximate cause, so he's "really" responsible.

(ii) In no duty to trespassers cases, it was "really" the trespass that caused the injury.

(iii) In negligent infliction of emotional harm, there is usually no claim of physical causation from the defendant's act to the plaintiff's condition, so you can argue that it was "really" the plaintiff's peculiar sensitivities that were responsible.

(iv) How can you say I caused the harm when I did nothing at all? Note that some of the early exceptions to the doctrine involve cases where defendant was involved--even non-negligently--in bringing about the situation of the helpless plaintiff.

4. Morality arguments: community vs. autonomy. The classic tort law morality arguments are "no liability without fault" and "as between two innocents..." These cases point beyond these to two more complex variants.

(a) People should

x. take care of themselves

xx. respect the rights of others

xxx. not ask others for help if they fail to avoid injury when following the above maxims.

(b) People should

x. look out for one another

xx. not insist on their rights in the face of human weakness

xxx. share the burdens of disaster

5. Social expectations and institutional competence arguments don't seem any different here than in the earlier cases.

D. Strict Liability

There is no outline on strict liability.

E. Choosing between strict liability, negligence and no duty.

The draft outline reproduced below was done in 1977. I have some reservations about it, but it may be helpful nonetheless.

5. <u>Bases for Choosing Between No Duty, Negligence and Strict Liability</u>

a. <u>Compensation as in Itself the Goal of Tort Law</u>: By this is usually meant shifting the costs of accidents from the victims to some other person or group, with a view to "making the victim whole."

i. <u>Difficulties</u> with compensation as a goal in itself.

x. This is not in fact the goal of the existing system, and if it were adopted would involve a vast expansion of liability. It is a premise both of the existing system and of the strict liability alternative that <u>sometimes</u> we want to compensate; sometimes <u>not</u>.

xx. Many victims are compensated by third parties (welfare, family, insurance, customers to whom costs can be passed along) yet we still want to compensate them.

ii. <u>Compensation as a Means to Other Ends:</u>

x. Modifying the behavior of injurors so as to minimize the combined costs of accidents and accident avoidance (=an efficient allocation of resources to the economic good of safety).

xx. <u>Protecting the rights of the injured</u> (=enforcing a communitarian duty of the actor to internalize the costs of his action to the injured).

xxx. <u>Loss spreading</u> by forcing the injuror, or the purchasers of a commodity, or society, to pay the cost of insuring the injured in cases where they are unwilling to insure themselves (=paternalism).

xxxx. <u>Income redistribution</u> by forcing rich injurors to pay costs of accidents that would be borne by poor victims if the parties were allowed to make full use of the bargaining power that attaches to their respective endowments of rights (=regulation).

<u>iii. Reasons not to compensate:</u>

x. Any one of the above objectives, or many or all of them, may be <u>disserved</u> by compensation.

xx. The transfer costs of compensation may be greater than the value of moving toward the above goals.

iv. Organization of the Materials: We will deal here with behavior modification and rights as goals of compensation systems. We will take up paternalism and regulation in Part III of the materials (Tort Liability as Affected by Pre-existing Relationships).

b. Behavior Modification as a Goal

i. False issue: internalization vs. subsidy

x. "internalization of costs" or "putting the cost on the person who benefits from it" are not neutral economic or efficiency criteria of choice, since

xx. in the absence of transaction costs there will be an efficient allocation of resources no matter who bears the cost initially.

xxx. But the choice of a liability rule will affect wealth, and also the long run patterns of consumptio and economic development.

xxxx. There are no economic or efficiency criteria for deciding between different distributions of wealth or patterns of development. These choices are inherently moral or political or "philosophical."

ii. Thus there is a real issue, which is "who to subsidize," rather than "whether to subsidize." This choice must be a function of other goals of the system than efficiency (e.g., rights, paternalism, regulation).

iii. Second real issue: transaction costs: We will deal with the impact of transaction costs on situations in which the parties have some kind of relationship that permits allocation of liability by contract, but only in Part III below. Here we are concerned with the situation in which contractual allocation is impossible or very costly, as in the auto-pedestrian and polluter-pollutee cases.

x. The excerpts from Calabresi and Posner illustrate the ways in which the choice between no duty, negligence and strict liability will affect resource allocation in these circumstances.

xx. where both parties can affect safety: There are a number of possible ways to deal with this problem, ranging from trying to control victim negligence through criminal sanctions or administrative regulation or civil fines, through contributory negligence or comparative negligence, to "comparative causation," each of which could be adopted in either a strict liability or a negligence system.

c. The Protection of Rights (Community vs. Autonomy)

i. False issue: confiscation vs. unfair punishment:

x. A low level of duty (the fault system) permits defendants to inflict damage without paying compensation, and plaintiffs charaterize this as confiscatory. If it is justified in terms of the public good, they call it a "taking of private property for public purposes without payment of just compensation." Conversely, under a regime where there is a high level of duty (strict liability defendants complain that, when they have to pay damages for "blameless" behavior, they are being "punished" without having committed an offense.

xx. Neither of these arguments has any meaning at all unless we have a pre-existing theory of rights that tells us what is "property." If we adopt a broad theory of what protection should go along with ownership, then the fault system is confiscatory, and strict liability merely protects rights. If we adopt a narrow theory of property, the fault system involves no confiscation, and strict liability violates minimal notions of fair punishment.

ii. Real issue: <u>What theory of rights?</u>

x. What follows is an attempt to identify the two major approaches to the problem of defining rights that dominate <u>common law</u> thinking about the matter. Since it is my own scheme, though made up of thoroughly familiar elements, I advance it tentatively. Criticism is welcome. The only problem is to keep in mind that all the elements are arguments that pervade judicial opinions. Even if you reject the scheme as a whole, you can't afford to reject the component arguments, since you would then be left with little if anything to say in a torts case of first impression.

xx. <u>no duty--negligence--contributory negligence</u>: these three are parts of a <u>whole</u>, sharing the same premises, the same rationale and the same contradictions. The premise is that <u>causation alone is inadequate to create even a presumption of a duty to compensate</u>. The rationale is a mixture of the following elements:

-- individualism and self-reliance

-- rights as freedom of action rather than security

-- economic development through high profits and high volume for entrepreneurs, at the expense of unorganized victims of innovation.

-- control of victim behavior by total denial of compensation where the victim has misbehaved.

The contradictions of this system are:

-- that it operates against an inconsistent background of high duties in particular situations combined with pervasive state intervention both through the welfare state and through indirect controls of the economy (e.g. fiscal policy)

-- that in situations where there are no transaction costs it can with difficulty if at all justify imposing even the minimal obligations involved in the Hand formula

-- that it paradoxically involves a high level of government interventionism and arbitrariness, first in administering the vagaries of the negligence standard, and second in governmental activities that are necessary to care for the victims it itself creates.

xxx. <u>affirmative duty--strict liability--comparative causation</u>: these also form a <u>whole</u>, in the same ambiguous sense as the previous model. The premise is that <u>the causation of an injury without more creates a presumption of an obligation to compensate.</u> The rationale of the system is a mixture of:

-- altruism and sharing notions

-- rights as security rather than as freedom of action

-- economic development based on a wide distribution of the social costs

-- control of victim behavior through the adjustment of compensation rather than through its total denial.

The contradictions of the system are:

-- that it operates against an inconsistent background of rules that permit the <u>intentional</u> infliction of great injury without any compensation at all (limitations on legally protected interests)

-- that making everyone liable to everyone else for every injur they caused would lead to an absurdly complex and cumbersome system that could never be operated through the common law system of private law suits against individual defendants.

xxxx. There is a third major attitude toward rights, which is to <u>socialize the costs of accidents</u>. We will take it up at the end of the course, after dealing with the problem of pre-existing relationships.

<u>d. Can Rights and Efficiency Conflict?</u>

i. If there are no transaction costs, all systems of rights are equally efficient (supposing freedom of contract).

ii. If there are transaction costs, then there is the possibility of conflict under either system, since the theory of rights may not lead to the allocation of liability to the person who can avoid the accident at least cost.

iii. In theory, all of these conflicts could be overcome by

x. changing the liability rule so as to negate the impact of transaction costs, and then

xx. compensating those whose wealth has been decreased through a government subsidy levied on those who gained by the change in the rule.

xxx. but this is obviously absurd as a practical matter, even for an omnipotent legislature; it is also outside the power of the courts to raise and distribute a subsidy.

Outline of Negligence

George P. Fletcher

Negligence is a general category of tort liability that makes up the bulk of litigation today. It is a form of liability based on fault (as compared with strict liability). Note that "negligence" is not only the name of category of liability but the name of one of the elements making up the prima facie case.

Prima facie case:
1. a negligent risk created by defendant
2. Causation
   a. Actual and
   b. Proximate
3. Damage to the plaintiff
4. When there is a legal duty to avoid negligence risks to the plaintiff.

I. A Negligent Risk Created by Defendant

A. Negligence is liability for the consequences of wrongful risk-taking. Risks may be wrongful even if no accident occurs. E.g., defendant drives without lights on a dark night. He thereby endangers many people. The risk might be "negligent" even if no accident occurs.

B. Risks are negligent when they are unreasonable.

1. Earlier commentators defined negligent risks as those that "breached a duty of care." Many people pointed out that this definition was circular. The reason was that the duty was defined as the duty not to be negligent. Negligence was then defined as a breach of duty. Thus negligence was nothing more than the breach of a duty not to be negligent.

2. To avoid this circularity, the problem of duty is treated below as a separate element of the prima facie case. In the typical case duty is not a problem. It becomes an issue only in the few types of case discussed below.

C. Unreasonable risks are those that a reasonable person would not take.

1. The opposite of an unreasonable risk is reasonable

conduct or "due care." Due care is the care shown by a reasonable person.

2. Note that this definition is useful in instructing juries, for it informs the jury that the defendant's conduct should be measured against a hypothetical reasonable and prudent person. It advises the jury not to rely on their judgment of what *they* would have done under the circumstances.

3. Note also that the definition does not supply us with much useful information. How do we know what a reasonable person would do under the circumstances?

D. The modern approach toward negligence requires a *balancing* of the *benefits* and *costs* of taking the risk. Unreasonable risks are those whose costs outweigh their benefits. Reasonable risks are those whose benefits outweigh the costs. This approach has various names and it relies on many different algebraic symbols to express the same underlying idea. The important thing is to get the idea. Worry about the algebraic symbols later.

1. The test is frequently called the Learned Hand test. In *U.S. v. Carroll Towing Company*, 147 F.2d 169 (1947), Judge Larned Hand defined negligent risks as those as to which "PL" exceeded "B." "PL" represents the cost of taking the risk. "B," which Learned Hand defines as the "burden of adequate precautions" is the same as the benefit of running the risk (*i.e.*, not paying to eliminate the risk). The idea is the same as balancing costs and benefits.

2. The RESTATEMENT 2d relies on the terms "magnitude" and "utility" of the risk. REST. 2d § 291. The magnitude of the risks is its cost (or burden). The utility of the risk is the benefit of taking the risk. Unreasonable risks are those of "such magnitude as to outweigh what the law regards as the utility of the act. . . ." RESTATEMENT 2d § 291.

E. Applying this modern approach to negligent risks requires the following steps:

1. Defining the risk. What was the risk that the defendant took? Here are some examples:

   a. The risk that children would play with the golf club that defendant left in the backyard. Lubitz v. Wells, 113 A.2d 147 (1955).

   b. The risk that enough water in defendant's water mains would freeze over to cause a leak at the surface and the flooding of neighboring houses. Blyth v. Birmingham Waterworks, 11 Exch. 781 (1856).

   c. The risk that defendant's hayrick would spontaneously ignite. Vaughan v. Menlove, 3 Bing. N.C. 468 (1837).

   d. The risk in using a stick to break up a dog fight would injure a bystander. Brown v. Kendall, 6 Cush. (Mass.) 292 (1850).

2. Assessing the costs of the risk. The costs consist of two factors: (a) the damage that might occur, and (b) the probability that the damage would occur. For examples, in the Lubitz case above, the possible damage is that someone would be hit by the golf club and injured. The probability is the likelihood that children would pick up the club, start swinging it and hit someone. If the possible damage is $100,000, and the probability of damage is 15 percent, then the cost of the risk is .15 x $100,000, or $15,000. On the other hand, if the probability is only .001 percent, then the cost of the risk is .00001 x $100,000 or $1.00. As the probability of damage goes up, the cost goes up; as the probability goes down, the cost goes down. If the cost goes down, the risk is less likely to be regarded as negligent. This explains why it would be negligent to shoot a gun in the city, but not in the middle of the forest. See comment by Justice Shaw in Brown v. Kendall, 6 Cush. (Mass.) 292 (1850).

3. Assessing the benefit of running the risk. The benefit of running the risk is usually the expense spared in not taking safety precautions. In order to assess this cost, we have to determine what precautions would be necessary to avoid the risk. For example, if the risk is that a barge will break away from her moorings and injure others, the preventive measure might be to station a guard (a "a bargee") on the barge. U.S. v. Carroll Towing Company, 159 F.2d 169 (1974). Not hiring a bargee creates a risk. The benefit of the risk is avoiding the the expense of hiring the bargee. Whether that risk is negligent depends on the relative costs and benefits of the risk under the circumstances.
   a. Sometimes the benefit of the risk is not saving money, but sparing the effort necessary to avoid the danger. In the Lubitz case above, the benefit was being able to leave golf clubs in the backyard. The benefit in Vaughan v. Menlove was presumably being able to leave the hayrick as it was without going to the trouble of taking preventive measures.
   b. Sometimes the benefit is simply convenience. Is it unreasonable and negligent to drive 55 mph where the posted speed limit permits? It is not, even though driving 55 mph rather than 40 mph increases the risk of accident and death on the highway. If there is a reason why this is not negligent, it is because there is a high degree of convenience attached to driving 55 mph.
   c. Sometimes the benefit consists in avoiding a greater cost. For example, a power company's using uninsulated lines may create risks of contact with other wires, but insulating the wires would create even more costly risks of electrocution. See Cooley v. Public Service Co., 10 A.2d 673 (1940).
4. Balancing the Costs and Benefits of the Risk. There is no automatic way of determining whether the costs or the benefits are greater. The balancing requires a

value judgment. Unless the issue is so clear that reasonable men could not disagree, the issue is one for the jury. Nonetheless, the use of cost/benefit analysis helps to explain many of the cases.

a. If the risk of injury is very low, the cost of the risk will be low and therefore the risk is likely to be regarded as reasonable. Examples:

(1) Blyth v. Birmingham, 11 Exch. 781 (1856). The frost causing the damage was unexpected and worse than those that "ordinarily occur south of the polar regions." Therefore, the cost of risking the frost was low and the risk not negligent.

(2) Hauser v. Chicago Ry, 219 N.W. 60 (1928). Passenger in D's train slipped in restroom and burned her face against an uninsulated steam pipe on the floor. Court argued that the risk of injury was so low that the failure to insulate was not negligent.

Cross reference: the issue whether the accident is remote and unlikely arises again in the discussion of proximate cause. See p.   below.

b. If the benefit of running the risk is low and the cost of the risk substantial, the risk might well be regarded as negligent. This is particularly true whether the benefit consists in merely avoiding the the burden of providing warning. Examples:

(1) Pease v. Sinclair Refining Co., 104 F.2d 183 (1939). D provided a demonstration kit with kerosene in bottles labelled "water." There was no warning of the substitution. P used the chemical thinking it was water and thereby caused an explosion. A simple warning would have avoided the accident.

F. Negligence is defined as the taking of an unreasonable risk (one whose costs exceed its benefits). This is an objective and not a subjective standard. This implies:

1. The defendant's good faith belief that the risk is reasonable is no defense. Vaughan v. Menlove, 3 Bing. N.C. 468 (1837) (the hayrick case). To rely upon the good faith of the defendant would be to use a "standard as variable as the length of the foot of each individual." Vaughan v. Menlove, 3 Bing. N.C. 468 (1837) (the hayrick case).
2. Some particular features of the defendant are ignored. These are features that might otherwise excuse his risk-taking.
   a. The most hotly contested of these features is the defendant being a teenager. Later cases hold that the defendant's being a teenager is relevant in assessing the negligence of his risk only if he is engaged in activities "commensurate with his age, experience and wisdom." This does not include driving a car, airplane or motorboat. Daniel v. Evans, 224 A.2d 63 (1966). If he is engaged in an activity "which is normally undertaken only by adults, and for which adult qualifications are required," he is held to the same adult standard of care. RESTAT. 2d § 283A, Comment c.
   b. It is well-established that the defendant's mental illness or insanity are irrelevant to assessing the reasonableness of his risk. Johnson v. Lambotte, 363 P.2d 165 (1961). RESTAT. 2d § 283B.
   c. It is commonly said that it is irrelevant whether the defendant is a moron. But apparently all the cases raising the point deal with contributory negligence of the plaintiff, rather than negligence of the defendant. See Prosser, Casebook 201 (1971).

G. The objectivity of the standard should not be exaggerated. The standard contains many subjective elements. The standard is always stated as "the care of a reasonable person under like circumstances." The "circumstances" include such facts as the defendant's blindness, his physical (but not mental) illness, involuntary intoxication and physical disabilities. RESTAT. 2d § 283C.

1. Note that recognizing these special features does not always help the defendant. The special feature might impose a burden of additional precautions. For example, it is not negligent for a man simply to ride a bicycle in traffic, but it would be for a blind man to do so. RESTAT. 2d § 283C, Comment C.

H. Where the defendant does not know of the unreasonable risk, but a reasonable person would have known of it, his failure to know is negligent. But in these cases, the issue of negligence is not resolved by comparing the costs and benefits of the risk. One has to ask simply whether a reasonable person under the circumstances would have known of the risk.

1. Suppose the defendant's employees open a crate with mallet and chisel. It turns out that the crate contains nitroglycerine and their pounding causes it to explode, injuring several persons nearby. The question is whether a reasonable person would have known that opening a crate of unknown contents with mallet and chisel might detonate an explosion. See The Nitroglycerine Case, 82 U.S. 524 (1872).

2. In this type of case--where the issue is whether the defendant should have known of the risk--he is held to a higher standard if his superior training or intelligence should make it easier for him to perceive the risk. For example, the ordinary parent might not be negligent if he or she fails to recognize the symptoms of scarlet fever and sends a child to school; but a physician would be negligent if he made the same mistake. The standard would be whether the ordinary reasonable physician would have recognized the symptoms as scarlet fever. RESTAT. 2d § 289, illustration 12.

I. Emergency situations pose a special problem. The risk might be unreasonable under ordinary circumstances, but not in the context of an emergency. Suppose an escaping robber boards the defendant's cab and pokes a gun in his ribs; the defendant leaps from the cab while it is still in motion. The abandoned cab hits plaintiff on the sidewalk. Under ordinary circumstances, the defendant's conduct would be clearly negligent, but not in the face of a gunman. Cordas v. Peerless Trans. Co., 27 N.Y.W.2d 108 (1941).

II. Proof of Negligence

Note: the above section merely lays out the principles defining the standard of negligence in various cases. In this section, we turn to the problem of proving that a risk is unreasonable. The three most common methods of proof are (1) custom, (2) violation of a statute prescribing a more precise standard of care, and (3) res ipsa loquitor. Every hypothetical problem in negligence should be scrutinized for these three factors of proof.

A. Custom. The argument for relying on custom is that the reasonable man is the statistically ordinary man. Therefore what people ordinarily or customarily do should be regarded as reasonable.

1. This argument is usually not successful. The reason is that negligence is a normative standard, not a statistical standard. The reasonable man might be better than the ordinary man. Even if every tugboat owner fails to equip his boat with a radio receiving set, the failure of the whole industry might be negligent. The T. J. Hooper, 60 F.2d 737 (1932); RESTAT. 2d § 295A.

2. Although custom is not controlling, it is nonetheless admissible evidence on the issue of negligence. RESTAT. 2d § 295A.

3. Exception: There is one critically important field where custom is virtually controlling, namely MALPRACTICE. In the case of those who hold themselves out as practitioners of a trade or profession, the controlling standard is: "the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." RESTAT. 2d § 299A. The way to prove medical malpractice cases is to show

that other physicians "in similar communities" would not have taken the same risk in treating the patient. In other words, the plaintiff has to show that the defendant violated the prevailing custom of the profession.

a. There has been considerable dispute about the community whose customs are controlling. Is a small town physician held to the standards applicable in New York City? Note that the modern rule refers to customary practice "in similar communities." Expert testimony is not limited to the particular community in which defendant practices. Wiggins v. Piver, 171 S.E.2d 393 (1970).

B. Violation of Statute. The most powerful weapon that the plaintiff can have is proof that the defendant's conduct violates a criminal statute or safety ordinance. If the plaintiff can get past all the hurdles, he is entitled to a directed verdict that the defendant is liable. This is called Negligence Per Se. These are the hurdles:

1. It must be established that the purpose of the statute is to protect people from accidents. One area of dispute is the effect of statutes and ordinances prohibiting drivers from leaving their keys in the ignition switch. Suppose a thief steals a car left with the keys in it and injures a pedestrian in the course of his get-away. If the statute is interpreted as an anti-theft measure, it is irrelevant in the tort suit. Richards v. Stanley, 271 P.2d 23 (1954). If it is interpreted as a measure designed to protect the public from escaping car thieves, the statute might be controlling on the issue of negligence (if all other hurdles are passed). Ross v. Hartman, 139 F.2d 14 (1943).

2. It must be established that the plaintiff is among the class of people protected by the statute. Suppose D makes an illegal left-hand turn, collides with an oncoming car and crashes into P's building on the side of the road. If the applicable provision of the

Vehicle Code is designed to protect other drivers and passengers, D's violation would not be relevant in an action brought by an abutting landowner. Erickson v. Kongsli, 240 P.2d 1209 (1952). It all depends on the interpretation of the particular statute.

3. If the first two hurdles are passed, it must also be established that the injury was of the sort that the statute was designed to prevent. Example: D shipped sheep in violation of a statute requiring that sheep in transit be kept in pens of a certain size. The sheep were swept overboard in a storm. The statute was designed to protect sheep, but, according to the court, not against the risk of being washing overboard. It was rather a measure designed to prevent the transmission of contagious diseases. Therefore, the statute was irrelevant in P's action for damages. Gorris v. Scott, 9 Exch. 125 (1874).

4. If the first three hurdles are passed and the defendant's violation caused the injury, the next issue is whether the defendant's violation is excused. Suppose D violates the Vehicle Code by driving with a defective taillight and thereby causes another car to crash into his rear end. This violation might be excused (even though D would be liable in traffic court) if a reasonable person under the circumstances would not have known that the taillight was defective. Only unexcused violations are negligence per se. Martin v. Herzog, 126 N.E. 814 (1920). RESTAT. 2d § 288A.

5. The last hurdle is the problem of causation.

This is considered below at p. . Note that if the plaintiff passes all five of these hurdles, he is in a very strong position. The general rule is that he is entitled to a directed verdict. The theory is that the legislature sets the standard of care in these cases.

1. A minority view holds that the violation of the statute merely raises a presumption of negligence. Satterlee

v. Orange Glenn School District, 177 P.2d 279 (1947). But cf. RESTAT. 2d 288B (holding that if all the requirements are satisfied, the violation of the statute is negligence in itself).

2. In some unusual situations, the courts might refuse to to enforce a criminal statute in a tort case--if, for example, a statute still on the books prescribed a speed limit of six miles per hour. RESTAT. 2d § 286, Comment c.

3. In one important case, the court refused to apply a statute requiring pedestrians to walk on the right side of the highway. P's walking on the left side was deemed safer under the circumstances and therefore was faithful to the purpose of the statute. Tedla v. Ellman, 19 N.E.2d 987 (1939) (note the issue in this case was contributory negligence).

It is important to remember two points:

1. If the plaintiff fails to surmount all the burdens in relying on this mode of establishing negligence, it does not follow that he loses the case. This is only one way to establish negligence.

2. If the defendant complies with all statutory safety requirements, he may still be negligent. The reason is that the reasonable prudent person may do more than the statutory law requires.

C. Res Ipsa Loquitor. This Latin phrase means simply that the "thing speaks for itself." The "thing" that speaks or screams negligence is the accident. Sometimes the occurrence of the accident is such good proof of negligence that the plaintiff needs show no more in order to recover.

1. Example: Plaintiff is walking down the street next to D's warehouse. A barrel falls out the window and hits P on the head. It is unlikely that the barrel came from any source but D's warehouse and it is unlikely that it could have fallen out the window without the negligence of D or his employees. (Note D is liable for the negligence of his employees under the doctrine

of respondeat superior. See p.   below). Therefore if D does not come forward and explain the accident, P's showing the barrel hit him on the head is sufficient for recovery. Byrne v. Boadle, Exchequer Chamber (1863) (originating phrase res ipsa loquitor).

2. It is the judge and not the jury who decides that the case is a res ipsa case. Yet the judg'e conclusion carries different procedural weight in different jurisdictions.

   a. The general rule is that if the case is a res ipsa case and the defendant offers no rebuttal, the case must go to the jury. It is then up to the jury to decide whether the defendant was negligent or not. This rule is expressed by saying that res ipsa creates an inference of negligence (or prima facie case of negligence).

   b. Occasionally, courts hold that if the defendant does not offer a rebuttal to a res ipsa case, the plaintiff is entitled to a directed verdict of negligence (i.e., the case should not go to the jury on the issue of negligence). This version of the rule is expressed by saying that res ipsa creates a presumption of negligence.

   c. A middle version of the rule holds that the case should go to the jury but under instructions that the burden of persuasion is on the defendant to disprove negligence.

3. In addition to the problem of procedural effect, it is important to distinguish among three different versions of res ipsa.

   a. One version is that res ipsa is simply a "common sense appraisal of the probative value of circumstantial evidence." Galbraith v. Busch, 196 N.E. 36 (1935). As a common-sense rule, it is not defined by any technical or formal rules. It is simply up to the judge to decide whether in the particular case, the accident itself provides enough evidence of negligence to take the case to the jury.

b. The dominant version of res ipsa requires the application of technical rules rather than a simple common-sense judgment. Yet there is some disagreement about what these rules are.

(1) The first rule in everyone's book is that the "event is of a kind which ordinarily does not occur in the absence of negligence." RESTAT. 2d § 328D. Note that this rule does refer to the defendant. It merely says that the event or accident bespeaks someone's negligence.

(a) The best way to prove that the accident indicates negligence is to show that the activity is generally safe. Storing barrels in a warehouse is generally safe; therefore, if one of them falls out of a window, the accident indicates that someone was negligent. Airplane travel has become sufficiently safe that now the courts treat airplane crashes under normal flying conditions as an indication that someone was negligent. U.S. v. Kesinger, 190 F.2d 529 (1951).

(b) Some routine medical procedures are sufficiently safe that if they go awry and cause harm, the harm is a sufficient indication that someone was negligent. Bardessono v. Michels, 478 P.2d 480 (1971) (injection in arm).

(c) Example: P enters hospital for surgery and awakes from anesthesia with an externally caused injury to his shoulder. Common sense indicates that this kind of injury does not occur unless someone has been negligent. Ybarra v. Spangard, 154 P.2d 687 (1944). Proof that someone has been negligent, of course, does not show that the defendant has been negligent.

(d) Note: This first rule should be read as holding that the accident would not ordinarily occur in the absence of fault (not merely negligence). Suppose P is hit by a chair thrown from a window in D's hotel. It is no defense against res ipsa to argue that P was hit intentionally (and not negligently). The point is that he would not be hit from a chair thrown from the hotel window unless someone was at fault (negligently or intentionally).

(e) This first rule has been relaxed in the case of some dangerous activities like hunting accidents. We might reason that hunting accidents would occur even though the hunters act reasonably. Yet recently, the courts have applied res ipsa in the case of hunting accidents. Sutor v. Rogotske, 194 N.W.2d 283 (1972). In cases of dangerous activities, res ipsa is probably applied as a matter of policy to facilitate recovery for injured victims. Some courts would rather interpret res ipsa in this way rather than extend the doctrine of strict liability for extra-hazardous activities.

(2) The remainder of the technical rules of res ipsa are designed to justify the inference from a negligent accident to the conclusion that defendant was negligent. At an earlier stage, this inference was thought to be justified if the instrumentality causing the injury was under the exclusive control of the defendant. It is true of many if not most res ipsa cases that the test of "exclusive control" is satisfied. Examples: If a barrel falls out of D's window, it was under his control before

it fell out. If D's plane crashes, it was under the control of D's employees at the time of crash. Yet many courts have expanded res ipsa to include cases where D is not in exclusive control immediately before the accident. The theory is that the test of control is only one way of making the inference from a negligent accident to defendant's negligence.

(a) Example: Res ipsa was applied against a tire manufacturer D in case of which a consumer P was mounting a tire for the first time when it exploded. The tire had been purchased a year previously and therefore D was no longer in control. Baker v. B. F. Goodrich Co., 252 P.2d 24 (19).

(b) Example: P received a folding chair from D's employee, took it into another room and sat down on it; some time thereafter the chair collapsed. Res ipsa was applied even though P had at least joint control of the chair when she sat down in it. Benedict v. Eppley Hotel Co., 65 N.W. 2d 224 (1954).

(3) Instead of relying on the issue of control, the modern trend is to require the plaintiff to prove that apparently negligent accident was not caused by "other responsible causes including the conduct of the plaintiff." RESTAT. 2d § 328C. In other words, the test is negative. D is subject to liability if no other possible causes appear to be likely under the circumstances.

(a) The rolling car cases. If D leaves a car on a hill and the car starts rolling and injures P, res ipsa will apply. A time lapse of four hours is not enough to refute the inference of negligence. Hill v. Thompson, 484 P.2d 513 (1971). Yet after a certain lapse of time (two weeks?) other causes--for which the defendant was not responsible--would appear to be likely.

(b) The defendant can effectively defeat the assertion of res ipsa if several causes appear to be possible, including some for which D is not responsible.

(i) If P is hit by chair thrown from D's hotel, res ipsa does not apply. It might well have been one of the guests who threw the chair and under ordinary circumstances D is responsible for the behavior of guests in the hotel. Larson v. St. Francis Hotel, 188 P.2d 513 (1948).

(ii) D can defeat res ipsa by showing that the victim's conduct was a responsible cause of the accident. Note that the victim must be legally responsible for his contribution to the harm. In Vistica v. Presbyterian Hospital 432 P.2d 193 (1967), the court applied res ipsa is a case in which a mentally disturbed patient committed suicide while under D's care and D was on notice that the patient was suicidal. The victim's contribution was not a responsible cause.

(iii) In cases of exploding soft drink bottles, D can defeat res ipsa by showing that P's handling of the bottle caused the explosion. Therefore, it is important for P to be able to prove that his manner of handling the bottles was ordinarily safe. See Honea v. Coca Cola Bottling Co., 183 S.W. 2d 968 (1944)

(iv) Note the issue of P's causal contribution is different from the problem of contributory negligence (*infra* p.). *E.g.*, where pedestrian P is injured by material falling from D's construction site, *res ipsa* may apply because P is no way contributed or caused his own injuries . . . even though under the circumstances P may have been contributorily negligent in walking close to the construction work.

(4) The analysis of *res ipsa* is affected by any special duty that D owes P. For example, if D is a common carrier and owes P a duty of extraordinary care, it will be easier to apply *res ipsa*. If P is a licensee on D's premises and therefore D's duty to P is limited, *res ipsa* will be harder to apply. These special duties are discussed *infra* pp. .

(5) Leaving aside the problem of special duties, the following steps should be taken in assessing whether *res ipsa* applies:

(a) Ask whether the accident is likely to occur without someone's being negligent.

(b) Isolate the causes of the accident that appear to be likely.

(c) Determine the extent to which D is legally accountable for these apparent likely causes. (E.g., D is liable for the conduct of his employees, but not of guests in his hotel.) If D is accountable for a sufficient number of these likely causes, then an inference of D's negligence is warranted and *res ipsa* will apply.

c. A third aspect of *res ipsa* is that it used to ease the plaintiff's burden of proving his case where the defendant has special access to the evidence.

(1) The leading case is Ybarra v. Spangard, 154 P.2d 687 (1944): P entered a hospital and came under the care of six defendants, including the owner of the hospital, a nurse and four attending physicians. P awoke from the operation with a sharp pain in his shoulder. The pain was due to an external blow unrelated to the operation. The first rule of res ipsa is satisfied, namely that an accident like this would not occur without someone's being negligent. The problem is inferring that any particular defendant was responsible. Yet the court held that the burden was on the defendant to explain the accident; if they did not provide an explanation, res ipsa would justify a verdict for P.

(2) This case has been criticized for confusing assessment of the evidence with the policy of helping plaintiffs who have limited access to the evidence and who seem under the facts to have a good claim to recover from someone. Yet this use of the doctrine may be defended on the ground that it avoids the extension of strict liability to hospital accidents. Compare the extension of res ipsa to hunting accidents, supra p. .

(3) Res ipsa may be used to force the defendant(s) to explain the accident as in Ybarra. But the doctrine of res ipsa takes no note of the likelihood that D will actually be able to offer illuminating evidence. If the other elements of res ipsa are satisfied, it is immaterial whether D has died before the trial or swears at trial that he does not know what happened. 38 A.L.R.2d 905. On the retrial in Ybarra, five of the

six defendants testified that they didn't know how the accident occurred. They were held liable nonetheless. 208 P.2d 445 (1949).

Summary: The preceding discussion covers the three primary doctrines that assist the plaintiff in proving negligence: (1) custom, (2) breach of statute, (3) res ipsa loquitor. A complete treatment of the problems of proof would include other topics, such as the use of expert witnesses and the rules of admissibility at trial. These more general problems of proof are treated in the Outline on Evidence.

III. Causation

The basic rule is that the defendant's negligent risk must cause the plaintiff's injuries. No causation, no liability. For purposes of analysis, the law distinguishes between two dimensions of causation. The first is called Cause-in-fact or Actual Cause. The second is called Proximate or Legal Causation. The first is a question of act; the second, of policy. It is important to distinguish between the two questions and treat each separately in the analysis of a torts problem. Remember, P must establish both Cause-in-Fact and Proximate Cause. D wins if he shows that either was absent.

IV. Cause-in-Fact [well-treated in the present edition].

V. Proximate Cause

If the defendant's negligent act has caused the damage (in fact), the damage might still be so remote or so bizarre in its relationship to D's negligence that D will not be liable. This problem of remote injuries or bizarre occurrences is the problem of proximate cause.

A. General Theory.

The older approach to proximate cause treated the issue as one subject to resolution by applying a set of fixed rules. The most important ideas in these rules were (1) "direct causes," (2) "intervening causes," and (3) "dependent" vs. "independent" intervening causes. The central rule of this system was that if D was negligent, he was liable for all consequences directly caused. There would be no liability if the result was brought about by an independent intervening cause. See 33 Harv. L. Rev. 633 (1920). It is important to know these terms for they are still used in legal opinions, even though the courts have long since abandoned the view that problems of proximate cause can or ought to be solved by applying the concepts of "direct" and "intervening" cause.

1. The leading case of the "old school" was In re Polemis, 3 K.B. 560 (1921). D's employees negligently dropped a plank in the hold of P's ship. This act was negligent, for it risked injury to property or someone in the hold. As it turned out, the fall of the plank struck a spark which ignited vapor in the hold, causing the ship to go up in flames. However unexpected the first might have been, D was held liable on the theory that the fire was "the direct consequence of the act." Polemis was overruled in The Wagon Mound (no. 1), [1961] 2 Weekly L. Rep. 126, discussed below.

2. The modern approach to proximate cause concedes that no set of "automatic" rules is going to solve the problem of remote damages. The issue is ultimately one of policy. This means two things: First, that there is an irreducible question of value (a question of "ought" rather than "is") in asking whether the damage is too remote or bizarre as to be excluded from the scope of D's liability. Secondly, to say that proximate cause is a matter of policy means that the courts should consider access to insurance and risk-distribution in deciding whether D is liable.

    a. The policy of "risk-distribution" is based on the principle that it is socially useful for the risk of loss to be borne by a large number of people rather than to fall on a single individual. This policy is furthered if the defendant carries insurance or can "pass on" the liability costs to his customers by charging higher prices.

b. The hallmark of the modern approach is that there are no easy answers and that above all, nothing can be solved by using "mechanical" terms like "direct" and "intervening cause."

3. There is no single modern approach, but one major trend is to limit liability to "foreseeable" consequences. When consequences are unforeseeable, they are too remote to be included within the scope of liability.

   a. Example: D negligently discharged furnace oil on the water 600 feet from P's wharf. The furnace oil came in contact with the wharf and ignited when molten metal was dropped from the wharf. The trial court found that D could not have been expected to know that the furnace oil was inflammable on water. The court held that D was not liable because the damage was not reasonably foreseeable. The Wagon Mound (no. 1), [1961] 2 Weekly Law Reporter 126.

   b. Note that the limitation of liability to foreseeable damages was sharply criticized in Petition of Kinsman Transit Co., 338 F.2d 708 (1964). D negligently moored a ship which came loose under pressure of floating ice in the river. The first ship forced another ship loose and together they crashed into a bridge, blocking the river and forcing the ice to back up and the river to overflow, flooding P's property. The court held that the principle of foreseeability did not apply when the damage was "direct" and of the "same general sort that was risked."

   c. The argument for the principle of foreseeability is that only foreseeable damages are considered in assessing D's negligence. If damages are unforeseeable, they are not part of the cost/benefit balancing process (see supra p. 2). Therefore, if negligence is the basis of liability, it is only just that D's liability be limited to the risks that make his conduct negligent.

d. Note that the principle of foreseeability does not apply in assessing the extent of liability once it is established that D is liable to P. D "takes his victim as he finds him." If D's negligent auto collision with P is the "precipitating cause" of schizophrenia, D is liable for the full amount of the damage. Steinhauser v. Hertz Corp., 421 F.2d 1169 (1970). It is irrelevant whether D could have foreseen that his victim would become schizophrenic.

(1) the problem is more complicated where the aggravation of P's injury is due to subsequent acts, either of P or third parties. See discussion infra at p. 29.

e. Compare the rule in cases of intentional torts, which rejects the standard of foreseeability. Cauverein v. De Metz, 118 N.Y.S.2d 627 (1959), and favors more extensive liability.

4. A significant modern trend is to collapse the issue of proximate cause into the issues of duty and negligence.

a. In the famous case of Palsgraf v. Long Island R.R., 162 N.E. 99 (1928), Justice Andrews' dissent favored the traditional view that negligence and duty are the first stage of analysis and proximate cause--a distinct issue subject to different criteria. Cardozo, J, writing for the majority, reduced the question of proximate cause to the question of duty. The question for Cardozo was whether there was a duty to the particular plaintiff. The test of duty was the range of "reasonable apprehension" (equivalent to the test of "foreseeability"). It follows that where the problem is whether the particular victim was foreseeable, the issues of duty and proximate cause are interrelated. The single magic test of "foreseeability" controls both issues.

(1) In contrast to Cardozo, Andrews held that issue of negligence could be resolved without first identifying the victim and deciding whether there

a duty to that particular person. For Andrews, negligence is the breach of a duty to the public at large; for Cardozo, it is the breach of a duty to a particular person.

(2) Cardozo's reply to this argument was that "proof of negligence in the air will not do." This argument was repeated in the English version of Palsgraf, namely The Wagon Mound, discussed supra p. 20.

(3) The influence of Palsgraf has more to do with arguments of the judges than with the facts and outcome of the case, but the facts are worth remembering: P was standing next to a scale in D's railroad station. D's employee assisted a man carrying a package in boarding a moving train. The employee negligently hit the package from the passenger's hand. Unexpectedly, the package contained fireworks which exploded upon falling under the train. The explosion caused the scale to fall, injuring P. Applying Cardozo's test to these facts, we should ask whether P, standing at the other end of the platform, was a "foreseeable" victim of negligently helping a passenger on a moving train. The answer seems to be "no." Applying Andrew's test, the question is whether given the employee's negligence, the employee's act was the proximate cause of the injury. Note that Andrews does not supply a test of proximate cause. In the end, he says, it is a matter of "practical politics." Yet he would have applied his vaguer test on behalf of a plaintiff who was at the scene of the explosion and who was injured immediately.

5. Another modern trend related to Palsgraf is the merger of the issues of proximate cause and negligence. This is the test that limits liability to the scope of the risk (or ambit of the risk).

a. <u>Example</u>: D negligently placed a can of rat poison near a shelf of food. The shelf was located next to a coffee burner and the poison happened to contain phosphorus, an explosive substance (which D did not know). The can of poison exploded when an employee lit the coffee burner. Is D liable to people injured in the explosion? (Facts based on <u>Larrimore v. Amer. Nat. Ins. Co.</u>, 89 P.2d 340 (1939))

(1) The first step in analyzing this problem is to ask: what was the risk that made the handling of the poison negligent? Was it the risk of food-poisoning? Or the risk of explosion? Notice that the risk must be defined before we can weigh the costs and benefits of taking the risk. See the analysis above at p. 3 . Let us suppose the risk that made D negligent was the risk of food-poisoning in placing the rat poison near other foodstuffs.

(2) The next step is to ask whether the result is within the scope of the risk. It is clear that in this case, the explosion is not within the scope of the risk and therefore there is no liability.

b. <u>The darting-out cases</u>. The scope-of-the-risk test explains why D might be speeding and yet <u>not</u> be liable if a child suddenly darts out in front of his car and is killed. One could argue that if D had been driving more slowly, he would not have been at that spot when the child darted out in front of his car. Therefore, his speeding arguably caused the accident. Yet this argument merely proves cause-in-fact (namely that it would not have happened if D had not been speeding). For purposes of proximate cause, the question is: what is the risk that renders D's speeding negligent? Does that risk include being at a certain intersection at a certain time of day? Certainly not, for there was no way of knowing that the child would dart out precisely at that moment of time. The risk of speeding is that it will be harder to control the car in an emergency, etc. Therefore, the question in the darting out cases should be: <u>if</u> D was at the same point in his journey and <u>if</u> he was not driving negligently, could he have avoided hitting the child? <u>Nett v. Zellars</u>, 353 S.W.2d 379 (1961). If he could not have avoided the accident at a reasonable speed there is no liability.

(c) Note that this test also explains why driving without a license or practicing medicine without a license is not enough to establish a case of <u>negligence per se</u> (see analysis <u>supra</u> p. 13). What is the risk that a 15-year-old takes when he drives without a license? Suppose he causes an accident, is the accident within the scope of the risk? The answer is that merely doing something without a license does not in itself create a risk of harm. It all depends on whether one does the task carefully or negligently. Therefore, the courts hold that if someone practices medicine (or does anything else) without a license and causes injury, the violation of the statute is not the proximate cause of the injury. <u>Brown v. Shyne</u>, 151 N.E. 197 (1926)

(d) The advocates of the scope-of-the-risk approach maintain that it solves all problems of proximate cause. For example, <u>Palsgraf</u> is easily solved under this approach. The risk that rendered the railroad negligent was the risk of injury to the person or property of the person boarding the train. This risk did not encompass the possibility of injury to someone standing at the other end of the loading platform. Therfore, the injury to Mrs. Palsgraf was outside the scope of the risk.

(e) The scope-or-the-risk is merely a way of explaining what we mean by "foreseeability." It is essentially the same test as "foreseeability." Yet the important thing to see about the scope-of-the-risk test is that it merges proximate cause with negligence. Another way to state the test is simply to ask: Did the negligence cause the injury (i.e. was the injury within the scope of the negligent risk)?

(a) Note that from the point of view of this test, the difference between cause-in-fact and proximate cause can be stated very neatly: When the issue is cause-in-fact, the question is whether D's act caused the injury. (D's putting the poison near the coffee burner caused the explosion). When the issue is proximate cause, the question is whether D's negligence caused the injury (D's negligence was risking contamination of the food. This risk did not include the risk of explosion).

6. Though many courts favor the merger of negligence with proximate cause (scope-of-the-risk) test, there is much opposition. The argument for the merger is essentially an argument of justice. D ought to be liable only for those risks that render his conduct negligent. It is not just to hold him liable for a result outside the scope of his negligence (e.g. the can of rat poison exploding near the coffee burner is outside the scope of his negligence; therefore, it is unjust to hold D liable for this risk). The argument on the other side is a mixture of considerations of justice and policy. Some courts argue that it is just to hold D liabile if his negligent conduct results in injury to an innocent, unsuspecting plaintiff (regardless of foreseeability and scope-of-the-risk). Dellwo v. Pearson, 107 N.W.2d 859 (1961); Petition of Kinsman Transit Co., 338 P.2d 708 (1964). This conclusion is supported by policy considerations such as risk-distribution (see p. 23 supra). It conforms to Andrew's opinion in Palsgraf.

7. Sometimes courts solve the problem of proximate cause simply by holding that the damages are too "remote." Examples:
   a. The New York fire rule holds that D is liable for negligent destruction by fire of his neighbor's house, but not of houses beyond that. Ryan v. N.Y.C.R.R., 31 N.Y. 210 (1866) (damages to the second and subsequent houses "remote" rather than a natural and expected result.)
   b. If D's negligence prevents P from fulfilling his contractual obligations in the anticipated manner and he therefore must incur additional expenses, the court might well regard these expenses as "too remote." Petition of Kinsman (no. 2), 388 F.2d 821 (1968) (but note that this accident was bizarre to begin with, see description under Kinsman (no. 1) supra at p. 21).
8. Another "test" that sometimes appears in legal opinions is the "substantial factor" test advocated by RESTAT. 2d § 431. D's conduct is the legal or proximate cause of damage if it is a "substantial factor" in bringing it about. Veseley v. Sager, 468 P.2d 151 (1971).

B. The recurrent factual situations.

Comment: the entire section A supra is devoted to the general theory of proximate cause. This theory is very important in acquiring a sense for the different ways of approaching a concrete case. For purposes of solving concrete problems, it is more important to have a sense for the types of factual problems that arise. These are some of them:

1. Type 1: Rescue cases. D negligently places X in danger. P comes to the rescue and P is injured. Generally, there is no problem in finding liability to P. This result can be explained on the ground either that the risk to the rescuer is foreseeable or that it is within the scope of the original risk. "Danger

invites rescue." Wagner v. International R.R. Co., 133 N.E. 437 (1921). Note that technically these cases pose a problem both of duty and proximate cause (like Palsgraf).

a. A variation of the problem arises where D tries to commit suicide and a rescuer P intervenes, injuring himself in the attempt to save D. Talbert v. Talbert, 199 N.Y.S.2d 212 (1960) (defendant liable).

2. Type 2: D negligently creates a condition of danger. The danger materializes in an unexpected way. These are cases in which D is generally liable.

   a. D negligently maintains a wooden pole rotten with termites. A negligent driver X runs into the pole, knocking it over and injuring P, a bystander. D would be liable on these facts. Gibson v. Garcia, 216 P.2d 119 (1950). This result is easily explained by using the scope-of-the-risk test. The risk that made D negligent was the risk that the pole would fall and injure the bystander. That is what happened.

      (1) Note that it does not add anything to the analysis to label X's running into the pole "an independent intervening cause." The question remains whether the "intervening cause" was foreseeable or within the scope of defendant's negligent risk.

      (2) Note that it is immaterial whether X might also be liable to P. There is no problem in holding both D and X liable as joint tortfeasors.

   b. D negligently set P to work cleaning a gas machine with a fire burning in the room. The gas vapors in the machine ignited when a rat ran from the machine to the flame, caught fire and ran back toward the gas vapors. The bizarre occurrence of the explosion did not preclude liability. United Novelty Co. v. Daniels, 42 So.2d 935 (1949). This result is easily explained by using the scope-of-the-risk test. The risk that made D negligent was that the flame would cause the vapors to ignite. That is what happened. The bizarre manner of the occurrence is irrelevant.

c. Note that the only time the manner in which the risk materializes can defeat liability is when a third party intentionally causes the injury. E.g., suppose that in the United Novelty Co. case supra, an arsonist caused the vapors to explode. This might be a different case. See type 5 infra.

3. Type 3: D negligently injures P and then a subsequent event occurs to aggravate the original injury. Generally, D is liable for the aggravated injuries if the aggravating accident was part of the normal process of rehabilitation.

   a. Note that difference between this type of case and second category supra is that here D is liable to P for the initial injury. In the second type supra, there is no necessary liability to P.

   b. Example: D negligently injured P's leg in an automobile collision. Nine months later, D was exercising his leg when he slipped and fell, breaking the leg in a different place. D was held liable. Squires v. Reynolds, 5 A.2d 877 (1939).

   c. Example: If D negligently injures P and then X, a physician, negligently treats P so as to complicate the injuries, D is liable for the aggravated injury. Aggravated injuries in the course of medical treatment are treated like incidents in the normal course of recuperation. Thompson v. Fox, 192 A. 107 (1937).

   d. Compare: If on the above facts, P became depressed and then committed suicide, D would not be liable for wrongful death. McMahon v. City of New York, 141 N.Y.S.2d 190 (1955). The assumption is that suicide is not one of the risks incurred in injuring another in an automobile accident. The only exception is suicide in a frenzy in which the element of P's voluntariness is minimal.

4. Type 4: D negligently creates a disaster (fire, explosion, etc.) that threatens many people and P is injured in an effort to get away. Here, liability depends on what P did in his effort to escape and the extent to which the effort was a reaction rather than a voluntary choice.

   a. Liability was affirmed where P slipped and fell in an effort to escape from a derailed railroad car bearing down on her. Tuttle v. Atlantic City R.R., 49 A. 450 (1901). It was immaterial that P would not have been injured had she stayed where she was.

   b. Liability was denied where P heard shouting of a fire and impending explosion and then turned to pick up her baby; in the hurry, she tripped over a misplaced chair. Mauney v. Gulf Refining Co., 9 So.2d 780 (1942). If this case is distinguishable, it is because P's response in this case was relatively more voluntary and less reactive.

5. Type 5: If D creates a dangerous condition and X, a third party, injures P by intentionally causing the danger to materialize, liability depends on the circumstances and the kind of intentional intermeddling by the third party.

   a. D negligently collided with P's wagon and caused the contents to spill into the street. Neighborhood thieves stole the things lying in the street. D was liable on the theory that the loss of the contents to thieves was included within D's negligent risk. It was a foreseeable result. Brower v. New York Central, 103 A. 166 (1918). It was no bar to recovery that the thieves were intentional intervening actors.

   b. D, a railroad, negligently left P off a mile past her requested stop, forcing her to walk back at night in an unsettled area. She was raped twice enroute. D was liable, because its negligent risk clearly encompassed this kind of personal assault against P. Hines v. Garret, 108 S.E. 690 (1921).

c. Compare. In the cases in which the negligence consists in the risk that gasoline or gas vapors will ignite, the risk is generally thought not to include the risk of arson. The arsonist is thought to be an independent intervening cause that breaks the "chain of causation." Watson v. Kentucky & Indiana Bridge & R.R. Co., 126 S.W. 146 (1910). The result would be similar if D negligently injured P and while P was recuperating at home, a third party murdered P. The arsonist and the murderer are in sufficient control of their criminal plans that their conduct is treated as a new cause--not part of the unfolding of the harm done by D.

(1) But note it is difficult to distinguish arsonists and murderers from thieves and rapists, whose intentional conduct in Brower and Hines, supra, does not break "the causal chain." There is no general rule for this category of case.

6. Type 6: D negligently facilitates the negligent or dangerous conduct of another.

Comment: This is the type of case that is now subject to the most litigation. There are no clear rules in this uncharted field. Also these are cases in which the problem of proximate cause becomes intertwined with the issue of duty. However, if the issue of proximate cause is resolved, the issue of duty never seems to stand in the way. Again, it is useful to break down this general category into different types of case:

a. Subtype a: facilitating criminal acts. P was mugged when he entered the vestibule of his apartment house in a high crime area of Detroit. P sued the building owner D for damages on the theory that D should have provided better lighting in the vestibule and provided a lock to the front door. The court held the complaint stated a cause of action. Johnston v. Harris, 198 N.W.2d 409 (1972). The theory was that the owner should have known that in a high crime district the circumstances of the vestibule would lure muggers. See RESTAT. 2d § 302B.

(1) The intervening criminal act by the mugger is no bar to liability. Compare analysis supra under type 5.

b. Subtype b: key in the ignition cases. Generally, D is not liable for common law negligence if he leaves his keys in his car, a thief steals it and injures P in the course of his get-away. Yet under special circumstances he will be liable for facilitating the dangerous conduct of the car thief. In Hergenrether v. East, 393 P.2d 164 (1964), the "special circumstances" were that D left his truck in a recognized "skid-row area" with a high crime rate. These circumstances should have put D on notice of the special risk of thievery.

(1) Compare the treatment of this problem as a matter of negligence per se, supra p. 7.

c. Subtype c: negligently inducing dangerous intoxicated behavior. At common law, this type of case was treated under the heading of a tavernkeeper's liability. If a tavernkeeper served drinks to a noticeably intoxicated customer and the customer thereupon caused injury to another, there was no liability at common law. The rule was that the act of serving drinks was not the proximate cause of damage done by the customer after he left the bar. This rule is now being changed.

(1) Many jurisdictions have imposed liability on the tavernkeeper under so-called Dram Shop Acts (e.g. Wisconsin Statutes § 176.35).

(2) The tendency today is to reinterpret the issue of proximate cause and impose liability on the tavernkeeper on the theory that dangerous conduct

by the intoxicated customer is foreseeable. Veseley v. Sager, 468 P.2d 151 (1971).

(3) There is no apparent reason why this principle of liability should be limited to tavernkeepers. It may well extend to anyone who provides drinks to others where subsequent dangerous conduct is foreseeable. Walters v. Sloan, ___ P.2d ___ (1975).

d. Subtype d: negligent supervision of firearms. D's son took his Swedish Mauser military gun and in wanton sniping killed three persons. One of the victims sued D for negligently making the firearm available to the boy. Held, there was a cause of action and an issue of the injury with respect to D's precautions in securing the rifle against improper use. Reida v. Lund, 96 Cal. Rptr. 102 (1971).

(1) Note that in this case the parents bore no liability for the acts of the son unless they had notice of the boy's dangerous propensities. Apparently in this case there was no indication that the boy was about to go berserk. Distinguish between liability based on negligent supervision of the rifle and liability based on the parent's negligent supervision of the boy. In this case, there appeared to be the former without the latter.

e. Subtype e: negligently releasing a dangerous patient A growing body of case law supports liability against a hospital or public institution that negligently releases a dangerous mental patient who thereafter harms P. Homere v. State, 361 N.Y.S.2d 820 (1974).

The frontiers of liability. There seems to be no limit to the potential expansion of liability under this general category of negligently facilitating the dangerous conduct of another. The California Supreme Court recently upheld liability against a radio station for scheduling a contest requiring contestants to locate a traveling disk jockey. Two teenage contestants were speeding in an effort to find the disk jockey when they forced P off the road. The theory of liability was that broadcast induced the negligent driving by the teenagers. Weirum v. RKO General, Inc., 539 P.2d 36 (1975).

Summary. The outline has broken down the types of proximate cases into six categories: the last category in turn is analyzed into five subtypes. These types and categories do not provide the student with an exhaustive list of the possible categories. In facing a new problem, the student is advised not to think about "direct" and "intervening causes," but rather to try to relate the new problem to one of these recurrent types of case. If the case does not conform to any of these types or subtypes, the student should try to reason from the general principles of negligence and proximate cause outlined in preceding sections.

V. Damage to the Plaintiff

Even if P establishes that (1) D's negligent risk, (2) caused harm (actually and proximately) to P, P cannot recover unless the harm caused qualifies as legal damage. Compare the less stringent requirement of "harm" in the law of intentional torts, supra p. .

A. When is the harm caused "damage" for the purposes of liability for negligence?

1. In the typical case, it is obvious that the injury to P is a form of "damage" sufficient for a prima facie case. The form of damage is usually a noticeable injury to P's person or property, e.g., a bruise, broken bone, dent in a car fender, etc.

   a. But note if all D does is touch P or knock over his bicycle (without leaving a noticeable mark or scratch), there is no damage.

2. There are some forms of harm that are compensable under intentional torts but not under the law of

negligent torts. For example, the deprivation of privacy is a tort (<u>infra</u> p.), but not the <u>negligent</u> deprivation of privacy. If P's privacy is negligently encroached upon, there is no <u>damage</u> and no liability. Imposing involuntary confinement on another is a sufficient harm for the intentional tort of false imprisonment (<u>supra</u> p.) but it is not "damage" under the law of negligence.

3. If an attorney negligently draws a defective will and an intended beneficiary fails to inherit, the failure to inherit is legal damage sufficient for liability. <u>Lucas v. Hamm</u>, 364 P.2d 685 (1961).

4. The area of greatest controversy is liability for mental injuries, referred to under the various labels of "emotional trauma," "mental distress," "shock," "fright," etc. Suffering apprehension is compensable under the law of intentional assault, but comparable liability under negligence is disputed.

   a. The usual situation is that of a mother who witnesses her child being run down by D's negligent driving. Is D liable for the mother's resulting "shock" and "trauma"? In <u>Dillon v. Legg</u>, 441 P.2d 912 (1968), the court held that D was so liable, but only in a situation in which (as alleged in that case) the trauma engendered physical injuries (<u>e.g</u>. damage to the central nervous system).

      (1) The argument against conpemsating emotional injuries is that they can be easily falsified. This argument is rejected in <u>Dillon</u>.

   b. The problem of compensating this form of injuring is usually conceptualized as a question of "duty" or "proximate cause." The courts rarely treat the issue of "damage" as a distinct element of the prima facie case. Note that the issue of damage is easily translated into a question of duty. If the harm is not compensable under the law of negligence, there is no <u>duty</u> to avoid inflicting it.

Yet for purposes of analyzing new problems, the student should see that the reason there is a problem of "duty" or "proximate cause" in a case like Dillon v. Legg is that the injury to P is not clearly a form of compensable damage.

5. Unwanted pregnancies ("wrongful life"). This is another area where the law is in the process of development. Some cases that hold if D negligently performs a surgical sterilization, "damage" is established by the proof of an unwanted pregnancy. Coleman v. Garrison, 218 A.2d 616 (1971).

6. Note that "pain and suffering" is not itself sufficient to constitute "damage" and establish liability. If there is legal damage, then there is also liability for pain and suffering.

7. Accrual of Actions [insert p. 48 part "a"]

B. Assessing Damages [insert material on pp. 48-49 from part "b" to the end]

IV. Duty. Even if all the other elements of the prima facie (negligent risk, causation, damage) are satisfied, D might not be liable to P if D does not owe P a duty to avoid the injury. Duty is the all-pervasive issue of tort law. The task for the student is to try not to be confused by the concept. Here are some guidelines.

A. In the typical case, duty is not a problem. Unless there are special reasons to the contrary, you may assume that D owes P a duty to act reasonably under the circumstances and that the limits of this duty are defined by the range of foreseeability. This is the standard duty of due care. Dillon v. Legg, 441 P.2d 912 (1968). Do not ask: are there reasons in this case for finding a duty? But ask: Are there reasons in this case for denying the standard duty of due care? In other words, the presumption today is that there is a duty unless there are special reasons to the contrary. Learn what those special reasons are. The special reasons are of two sorts:

1. Reasons for holding that D's duty to P is greater or lesser than the standard duty of due care.
2. Reasons for denying D's duty altogether.

Remember: The question of duty is important only if it is already established that D created a negligent risk of P's injury and that the risk caused the injury (actually and proximately).

B. Reasons for holding that D's duty to P is greater or lesser than the standard duty.

1. Common Carriers. It is commonly held that carriers owe a special duty to their passengers. They must exercise the "highest degree of care." Peck v. Fanion, 1 A.2d 143 (1938). This higher standard of care would make carriers liable for "slight" rather than ordinary negligence. This way of putting the issue has been criticized on the ground that the special situation of the carrier relative to its passengers can be considered in assessing the reasonableness of the risk. There is no need to state a special standard of care.
   a. Yet one practical effect of the carrier's special duty to its passengers is that it is easier to make out a case of res ipsa loquitor (see supra p. 11) against a defendant carrier. If a bus collides with a car, a passenger in the bus might have a res ipsa case against the bus company but not against the driver of the other car. Capitol Transit v. Jackson, 149 F.2d 839 (1945).
2. Automobile Guests. As to guests (non-paying passengers) in D's automobile, the common law rule of due care has been changed by statute in most jurisdictions. These guest statutes subject D to liability only for gross negligence. Negligence is gross when D's conduct is gross departure from the conduct of a reasonable man under the circumstances. Sometimes the statutes limit liability to willfull and wanton misconduct. Both of these standards mean that a driver D owes his guests a lower standard of care.

a. The purpose of these guest statutes is to prevent collusive lawsuits between friends and to encourage hospitality by protecting the driver transporting guests.

b. Guest statutes are extremely unpopular in the courts. Here are some of the ways to circumvent a guest statute in a case in which P looks more or less like a guest.

(1) Perhaps P is not really a guest. All it takes to reclassify P as ordinary passenger is some motivating tangible incentive for D. Bozanich v. Kenney, 477 P.2d 142 (1970).

(2) Typically, the statute applies only if the injury occurred during "the trip." If the vehicle was stationary, ordinary rules of negligence apply. Boyd v. Cress, 293 P.2d 37 (1956).

(3) Typically, the statutes apply to accidents "on the highway." Accidents on private roads are exempt.

c. Judicial hostility to guest statutes is now expressed in a growing trend to hold such statutes unconstitutional as a violation of the "equal protection of the laws" required by the fourteenth amendment. The theory is that there is no rational basis for discriminating against guests. Brown v. Merlo, 506 P.2d 212 (1973).

3. Social Guests and Trespassers. As an analogue to guest statutes, note the limited duty of the occupier of the land to social guests and the extreme restriction of duty in the case of trespassers.

a. The ordinary duty of due care is owed to invitees --namely people who are on the land for a pecuniary purpose. A limited duty is owed to licensees (including social guests). The distinction between invitees and licensees is analagous to the distinction between regular automotive passengers and guests.

b. The duty of D to social guests in his home is restricted primarily relative to the duty to make the premises safe and to inspect for defects. The details of this restricted duty are explored *infra* at p. 42. Note that the distinction between invitee and licensee is a common law, not a statutory distinction.

c. As the courts are beginning to rule that guest statutes are unconstitutional, there may also be a trend toward abolishing the common law distinction between invitee and social guest. The first case to so hold is *Rowland v. Christian*, 443 P.2d 561 (1968). This case abolished all distinctions upon the status of the entrant to the land (*i.e.* licensee, invitee, trespasser, etc.) and held that the standard duty of due care applies in this relationship as well.

d. See section VII *infra* for details.

4. Note that all of these departures from the standard duty of due care--common carriers, automotive guests, social guests--presuppose a relationship between D and P before the accident occurs. Sometimes the relationship strengthens the duty (as common carriers); sometimes it reduces it (as with guests in cars and on land).

C. Reasons for Denying D's duty altogether.

1. Historically, one of the major reasons for denying D's duty to P is that there was no "privity" between D and P. This restriction is virtually dead today. Its impact was felt primarily in cases of *products liability* and therefore it is discussed in that section *infra*.

2. Another principle for denying duty--and one that is still important--is that there is no duty to prevent harm occurring as a result of D's *passive conduct*. This means if the harm occurred because D *failed to act* there is no liability unless there is a special basis for finding a duty to act.

a. This is a clear case where D might act unreasonably and even immorally and yet not be liable. Example: D dares P to dive in pool of water on a construction site. P does so and D stands by and watches P drown. In the absence of a basis for imposing a duty to act, there is no liability. Yania v. Bigan, 155 A.2d 343 (1959). RESTAT. 2d § 314.

b. Note that in some situations it is not clear whether D's conduct is active of passive. Example: If D's truck stalls on the highway and the driver fails to put out a flare where it would be reasonable to do so, is the driver using the highway negligently (acting) or is he merely failing to warn (omitting to act)?

c. Assuming that the conduct is passive and not active (omission rather than action, nonfeasance rather than misfeasance), the problem is finding a basis for finding a duty to act. There are these possibilities:

   (1) A special relationship between D and P. Examples: if D is a common carrier, it has a duty to render reasonable aid to passengers. RESTAT. § 314A. If P is injured while an invitee in D's store or a guest in D's home, D has a duty to render reasonable aid. L.S. Ayres & Co. v. Hicks, 41 N.E.2d 195 (1942).

   (2) If D is not initially under a duty to render aid, he will acquire a duty if he undertakes to aid P. Zelenko v. Gimbel Bros., 287 N.Y.S.2d 134 (1935). The theory is that D's undertaking induces others to forbear; as a result P might often be worse off if D begins and fails to act reasonably than if D did nothing at all.

   (3) D may also acquire a duty if he is the author of P's predicament. If D injures P in an automobile collision, local statutes may impose a duty on D even if he was not at fault in causing

the collision. Summers v. Dominguez, 84 P.2d 237 (1938). RESTAT. 2d § 322.

(4) D may also acquire a duty if he promises to aid P and P relies on the promise. Example: D's cat bit P, D promised to keep the cat under supervision in order to determine whether the cat had rabies. P relied on this promise and forewent possible legal measures. D failed to keep the cat under supervision, as a result of which P had to undergo a painful treatment against rabies. Under these circumstances, D was under a duty to exercise due care toward P. Marsalis v. LaSalle, 94 So. 2d 120 (1957).

Note: This latter case is one among several that portends the demise of the traditional rule that reliance on a gratuitous promise is insufficient to justify liability for nonfeasance. The traditional rule is based on Thorne v. Deas, 4 Johns, N.Y. 84 (1809) (D promised to buy insurance for P's ships, P relied on the promise, but D did nothing. The ships were lost. No liability). This problem is treated in the Contracts Summary under the topic of Reliance as a Substitute for Consideration (RESTAT. CONTRACTS § 90)

d. Even if there is a duty on the basis of one of the foregoing categories, a local Good Samaritan statute may confer immunity on D from negligence liability. These statutes are typically available to doctors and nurses who, in good faith, render aid in an emergency. 64 Col. L. R. 1301

e. Duty to Control Acts of Another

1. Parents are under a duty to control their minor children. Yet parents are liable for the unreasonable conduct of their children only if they have reason to know of the danger. RESTAT. 2d § 316. Reida v. Lund, 96 Cal. Rptr. 102 (1971). Absent local statutes to the contrary, parents are not vicariously liable for their childrens' torts.

f. Other duties to control the dangerous acts of others. There are other cases of liability based on the negligent supervision of potentially dangerous persons. But these are instances of negligence in the context of a larger undertaking, such as operating a business, managing an insane asylum, etc. They are not cases of purely passive conduct and therefore are better analyzed under the general duty of due care.

Summary: This section brings home the point that in the typical case the issue of duty is not a problem. It becomes a problem only in two situations: (A) where a special relationship induces a departure from the ordinary standard of care, and (B) where D's conduct is purely passive. The primary instance of category (A) are the duties based on occupying land or transferring an interest in land. Though discussed briefly above, these duties are so complicated that they have singled far more intensive treatment in the following section.

VII. Duties based on Occupying Land and Transferring Interests in Land (this section should include all the material from p. 61, pt. 6 to the top of p. 73 (excluding pt. 9).

VIII. Vicarious Liability

The foregoing sections treat the elements of the prima facie case. If all of these elements are properly alleged and proven, D is prima facie liable to P. That is, D is liable unless P alleges and proves a good defense. Defenses are treated below in Section IX. In this section, we explore the techniques for expanding the net of liability by imputing the liability of D_1 (who actually was negligent and caused the harm) to D_2 (who did nothing but who stands in a responsible relationship to D_1). Liability that is so imputed is called vicarious liability (note the liability is not shifted, for D_1 is still liable).

A. Respondeat Superior [insert the material under b(1) on p. 54].

B. Partners, joint ventures [insert material under (d) on p. 56].

C. Independent Contractor Cases. The general rule is that the principle of vicarious liability does not apply as between an independent contractor and his employer. The difference between a servant and an independent contractor is that the latter enjoys a greater deal of autonomy and control over the job. The employer's lack of control provides a rationale for denying vicarious liability.

1. This general rule is subject to a long list of exceptions. Many of these exceptions do not involve vicarious liability. They are based on the employer's own duty and negligence.
   a. Example: D's railroad was required by statute to maintain fences along its tracks. D held liable for destruction of cattle straying onto tracks where fence not built. It was irrelevant that an independent contractor was at fault in building the fence. Chicago, K & W. R.R. Co. v. Hutchinson, 25 P. 576 (1891). This is an example of a non-delagable duty.
2. Other exceptions are based on vicarious liability.
   a. Example: D is vicariously liable for the torts of his independent contractor if D has reason to know that the work involves abnormally dangerous activity. RESTAT. 2d § 427A.

D. Automobile Owner's Liability. The law of automobile accidents is motivated by the desire to impose liability on the party most likely to be insured. This has led to a number of doctrines imposing liability on the car owner for the negligence of others.

1. Family purpose doctrine. In about half the jurisdictions, the owner is liable for the negligence of anyone (a) who is a member of the owner's immediate family or household and (b) who causes an accident while driving with the express or implied permission of the owner. Sale v. Atkins, 267 S.W. 223 (1924).
2. Permissive Use Statutes. Legislation in some states renders the owner liable for damages caused by anyone (not just family members) driving the automobile with his express or implied consent. See Calif. Vehicle Code § 17150.

3. Liability for a mechnic's negligent repairs. The owner ha a duty to maintain his car in a safe condition. If a mechanic negligently repairs the brakes, the owner is accountable for this negligence. Note: this is simply another way of saying that the owner if strictly liable for maintenance of his car. Maloney v. Rath, 445 P.2d 513 (1968).

4. Rationale: The policy furthered by these special rules is risk-distribution through insurance. The owner (not the user or the mechanic) is the party likely to be insured. Therefore it helps distribute the risk to attach liability to the insured owner.

IX. Defenses to Negligence

Introduction: It is important to distinguish two entirely distinct systems of defenses to negligence. The traditional system was based on two all-or-nothing defenses: (a) contributory negligence and (b) assumption of risk. To counteract the defense of contributory negligence, D could invoke the doctrine of "last clear chance." The modern system--now fast becoming the majority rule--rejects the all-or-nothing rule and adopts the principle of apportioned damages based on comparative negligence. The modern system abolishes the question of "last clear chance" and sharply curtails the scope of assumption of risk. First, we describe the traditional system. Keep in mind that this traditional system is slowly (some would say quickly) dying.

A. The Traditional System [insert material from p. 73 c. 1 to the top of p. 80.d.2 (excluding the section on comparative negligence). Note: Make minor change in re seat belt defense; material attached].

B. The Modern System

1. The central point of the modern approach to defenses is that P's contributing fault should not bar recovery entirely. It should not be an all-or-nothing game. The modern approach applies the principle of apportionment of damages. If P and D are jointly at fault in causing the accident, P's recovery should be diminished

by the extent to which P's fault contributed to the accident.

2. This is the principle of comparative negligence, now adopted either legislatively or judicially in a majority of jurisdictions. Li v. Yellow Cab, 119 Ca. Rptr. 858 (1975); Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).
   a. The favored form of comparative negligence is called the "pure" system, according to which P's recovery is diminished by the extent to which he is found negligent. If he is 20 percent negligent, his recovery will be reduced 20 percent; if 80 percent negligent, his recovery will be reduced 80 percent.
   b. According to the qualified or partial system, applicable in some states (*e.g.* Wisconsin), P cannot recover at all if he is more than 50 percent negligent.
   c. Under either system, litigation involving third parties becomes complicated. D might be liable for 50 percent of P_1's injuries and 90 percent of P_2's injuries.
3. The impact of comparative negligence is to abolish doctrines, such as last clear chance, that were designed primarily to circumvent the strict rule of contributory negligence. Li v. Yellow Cab, *supra*.
4. The effect of comparative negligence on assumption of risk is disputed. One leading case holds that so far as assumption of risk overlaps with contributory negligence, the defense of assumption of risk is abolished. Li v. Yellow Cab, *supra*.
   a. This conclusion is based on a theory of assumption of risk advanced by many scholars. That theory was that *all* cases of assumption of risk could be analyzed either (1) as a question of D's duty or (2) as a question of Pś contributory negligence. Express assumption of risk is interpreted as a contractual alteration of D's duty. Most cases of

implied assumption of risk are treated as matters of contributory negligence in disguise. McGrath v. American Cyanamid Co., 196 A.2d 238 (1963). The subtle differences between contributory negligence and assumption of risk are ignored (see supra).

b. The only elements of assumption of risk that clearly survive are those that are reinterpreted as alterations of D's duty.

Compare. There is a general tendency, particularly in the influential California Supreme Court, toward simplifying the rules of negligence. Rowland v. Christian (1968) abolished the distinctions among trespassers, licensees and invitees and thus greatly simplified the analysis of landowner's liability. Brown v. Merlo (1973) declared unconstitutional the guest statute and thus simplified the analysis of the liability to automotive passengers. Li v. Yellow Cab (1975) enacted the rule of comparative negligence, thus abolishing the technicalities of "last clear chance." Despite this tendency toward simplification, the student is well-advised to learn the details of the traditional rules--if only to appreciate the motivation for simplification.