PRODUCTS LIABILITY

- **DUTY**
  - **"Product"** must be **"Sold or otherwise distributed"** by one **"In the business of selling or distributing"**
  - **Component Parts Manufacturers**
    - **Liability depends on involvement.** Nondefective component with no design defect = no liability, involvement with design or manufacturing = liability for whole thing.
    -
- **BREACH**
  - **MALFUNCTION/MANUFACTURING DEFECT** -> STRICT LIABILITY
    - "incident that harmed the plaintiff (a) was of a kind that ordinarily occurs as a result of product defect; and (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution."
  - **DESIGN DEFECT**
    - **RAD Method –** Must prove RAD.
      - "defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller . . . and the omission of the alternative design renders the product not reasonably safe;"
      - **Avoid Category Liability**
        - **100% Unreasonable Design** may mean auto-liability, VERY LIMITED
      - **Time dimension –** Increases in relative danger irrelevant, subsequent remedial measures inadmissible, future increase in wariness of risk unpreventable.
      - **Cannot be warned into reasonableness**
      - **Probably requires expert testimony.**
    - **Consumer Expectations** (Of [1] Purchaser, [2] User, [3] Society, or whatever)
      - **Sword or shield.** Can use to prevent liability (got what you expected) or create it (did not live up to standards)
      - **Very limited use.** Variable, wild, etc.
      - **Two prong approach (**RAD if complex, Cons Exp. If simple**) may apply**
    - **Special Issues**
      - **Modification** may preclude finding of design defect in NY, probably means nothing elsewhere (design defect = liability regardless of tinkering insofar as causation met)
      -
      - **Consumer Choice.** Where RAD exists but not taken, probably deference
      - **Federal standards.** Failure to meet = prima facie violation
  - **FAILURE TO WARN**
    - "Foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller . . . and the omission of the instructions or warnings renders the product not reasonably safe."
    - **No liability for unknown risks and obvious/patent dangers.**
      - **BUT informed choice concept**
    - **Sufficiency of warning always at issue**, factors include (1) design of actual warning, (2) language given in relation to risks, (3) counterbalanced against expenses of warning.
      - **Reasonable Alternate Warning (RAW) seemingly implied**
    - **POST-SALE WARNINGS -** Liable if RPP in seller's position would provide such a warning.
      - Hinges on (1) seller knowing substantial risk, (2) id of people, (3) warning can be communicated, (4) risk of harm justifies warning
    - **FAILURE TO RECALL -** Liable for failing to recall due to gov't requirement OR if attempts and is not reasonable
    - **NEGLIGENCE –** Always available.

- **CAUSATION**
  - **(1) WAS THE PRODUCT A NECESSARY CONDITION TO A HARM?**
    - **(A) General (Capacity) AND (B) Specific (Actuality) Causation**
  - **(2) DID D SUPPLY THE PRODUCT?**
    - **Issues:** Market share liability (guessing), Floor Wax Problem (Imputed Responsibility)
  - **(3) DID THE DEFECT CONTRIBUTE TO THE HARM?**
    - **Must be proven.** Defect must be necessary condition to harm.
    - **Increased harm** allows recovery.
      - **COMPARATIVE FAULT APPLIES.**
    - **Heeding presumption for warnings**
  - **(4) DEFECT PROXIMATELY CAUSE HARM? (HARM WITHIN THE RISK)**
    - **Not foreseeability alone.** Consider lack of attenuation in causal chain.
    - **P's burden, finding of defect probably enough.**
    - **Terrorist hypo** always breaks chain
- **HARM/COMPENSATION**
  - **Compensatory damages** always allowable
  - **Punitive damages** usually hinge on some form of gross or wanton malice/negligence, depends on jurisdiction
  - **Pure economic harm** *possibly* allowable with harm to other persons or property, not for mere contract-based harm
- **ASSIGNING FAULT**
  - **Pure comparative fault applies.** Percentage can be allocated to multiple Ds, P, etc.
    - **Comp fault even applies to second-crash,** but disputed.
  - **Indemnity and other bars, such as the sealed container doctrine,** may prevent liability
  - **Worker's Comp** may apply if workplace accident
- **DEFENSES**
  - **Governmental immunity**
  - **Workers Comp**

- **EXPRESS WARRANTY**
  - Promise made basis of bargain, recovery in Contract

- **FEDERAL PREEMPTION**
  - **(1) Express, (2) Implied, or (3) Conflicting Preemption**
  - **Hinges on actual conflict,** with degree of explicit congressional action relevant
  - **Floor/ceiling concept disputed, problematic**

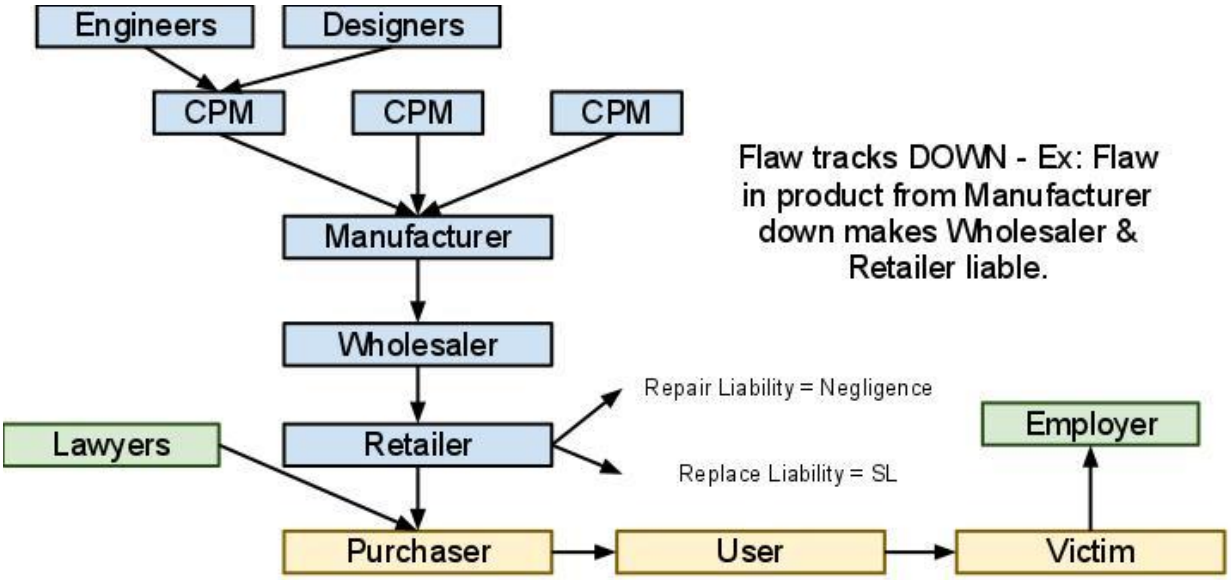
- **Special Issues**
  - **PRESCRIPTION DRUGS**
    - **Special Reasonable Healthcare Provider standard**
    - **Warnings** similar, but issue with FDA regs, question of whether or not liability extends to direct warnings.

HISTORY AND BOUNDARY ISSUES

Transition: (1) *Winterbottom* reqs privity, (2) *MacPherson* kills privity, (3) *Escola* empowers res ipsa, (4) *Henningsen* kills privity and disclaimer in merchantability, (5) *Greenman* establishes strict tort, (6) Rest 402(A) applies Strict Liability with "Unreasonably Dangerous", (7) Rest 402(a) 3d Kills "Unreasonably Dangerous", adopts RAD-based liability

Negligence-Based Liability for Products

- ***Carroll Towing* formula** - B < PL
  - **Residual Accident Costs** -- Accidents where B > PL; remain where they have fallen because of due care
  - **Burden costs are prevention costs** distinguished from insurance costs
- **Fall of the Privity Citadel**
  - **Privity Rule** - Established in *Winterbottom v. Wright*, required contractual liability
    - **Exceptions:** That which "put human life in imminent danger" *Thomas v. Winchester*
  - **Death of Privity:** *MacPherson v. Buick Motor Co* holds knowledge of the danger to ultimate user created liability irrespective of contract. Requires (1) knowledge danger will involve those other than the immediate buyer and (2) knowledge of a danger
- ***Res Ipsa* and the death of proof**
  - ***Brannon v. Wood*:** "The test is not whether a particular injury rarely occurs, but rather, when it occurs, is it ordinarily the result of negligence"
  - ***Escola*:** *Res Ipsa* where (1) D had exclusive control and (2) the accident is of such a nature that it ordinarily would not occur in the absence of negligence by the D. *Requires* (3) the P prove that the condition of the instrumentality had not been changed after it left Ds hands.
    - **Due Care** a defense. **Traynor disagrees**, moves for a strict liability effort.



Strict Liability for Products

- **Code Warranties**
  - **Implied Warranties** used for personal injury, but limitations on contractual privity, disclaimers (2-316), statute of limitations (2-725)., and general contract doctrine inhibited.
    - ***Henningsen v. Bloomfield Motors*** kills privity/disclaimer in implied warranties -> SL.
    - UCC 2-318 (with the alts) would have been a privity problem here as well.
  - ***Greenman v. Yuba Power Prods.*** enforces damages in tort, essentially killing Code-based personal injury litigation and circumventing Code-based statute limitations
    - "The remedies of injured customers ought to not to be made to depend on the intricacies of the law of sales"
- **Restatement 402A:** (1) One who sells product in a defective condition **unreasonably dangerous [dead in 3d]** to user or consumer or property is liable for physical harm to user, customer, or his property, IF (a) seller engaged in the business of selling such a product and (b) it is expected to and does reach user or consumer without a substantial change. (2) applies despite (a) due care and (b) lack of privity.

- **RESTATEMENT 3d** – Drops "Unreasonably dangerous", any defect that causes harm creates liability insofar as causation is met.

- **Proffered benefits of SL:** (1) Encouraging risk control, (2) Discouraging consumption of dangerous products, (3) Reducing transaction costs, and (4) Promoting loss spreading, (5) Fairness (a) Disappointment of safety presumptions (b) risk-creation by manufacturer (c) forces beneficiaries to bear accident costs
  - **Requires** (1) Adjusticiable liability disputes and (2) Insurable risks
  - **Insurance** requires (1) Transfer of risk to a risk-neutral or risk-preferring actor; (2) Pooling of risk to create a risk-neutral group, and (3) Classification of risk to prevent abuse.
- **Ex:** Bottling methods that tended to show high improbability [but not impossibility] irrelevant to SL finding of defect in coke. *Pulley v. Pacific Coca-Cola Bottling Co.*

(ORIGINAL) DEFECT

- **Rest. 2d 402A –** "Any product in a defective condition unreasonably dangerous [removed] to the user or consumer".
  - **Com. i** – Unreasonably dangerous – "the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics".
- **Rest. 3d 3 –** It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff (a) was of a kind that ordinarily occurs as a result of product defect; and (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.
  - **P gets benefit of *res ipsa*-like inference,** but must refute D's proffered reasons.
  - **Applies to design as well. Negligence still available with or without design issue.**
  - **P's Fault** always matters in inference.
  - ***Physical Facts Doctrine*** – Possible explanation for *Rutledge*, where facts disproving testimony outright may kill testimony.
- **Contradictory evidence** does not kill potential finding of general defect.
- **Courts vary on standard to allow circumstantial presumptions.**
- **Spoliation factors:** (1) Degree of culpability, (2) Degree of prejudice suffered by opposing party, (3) Whether a lesser sanction will avoid unfairness to the opposing party and deter future wrongdoing.
  - **Independent Torts** may be available for bad faith destruction of evidence.
- **Ex:** U.E. requirement need not be proven to show hasps holding bread racks were defective. *Cronin v. J.B.E. Olson Corp.* Circumstantial evidence shown well enough withstands contradictory evidence proffered by defense re: fridge fire. *Speller v. Sears, Roebuck & Co.* The mere indication that a product defect could have occurred is insufficient, proof must go beyond pleadings. *Rutledge v. Harley-Davidson Motor Corp*. Destruction of airbag invoked spoliation sanctions. *Lawson v. Mitsubishi Motor Sales of Am.* Spoliation included destruction of tangentially related lighter documents. *BIC Pen Corp*. Even without any reason, a defect is findable. *Bradley*.

BOUNDARY ISSUES

- **"Product"**
  - **Rest. 19 –** (a) A product is tangible personal property distributed commercially for use or consumption. [Electricity, real estate, etc are property when distribution and use is sufficiently analogous to use of tangible personal property]. (b) Services not products. (c) Human blood and tissue no-go.
  - **Information** withheld, stupid differentiation between "Parts within" and "Navigational charts"
- **Activities constituting "Selling or Otherwise Distributing"**
  - **Rest. 20 –** (a) One sells when one transfers ownership thereto either for use or consumption or for resale leading to ultimate use or consumption. Manufacturers, wholesalers, and retailers included. (b) One otherwise distributes when one provides the product for use or consumption … Includes lessors, bailers, &c. (c) One also sells or otherwise distributes when … one provides a combination of products and services.
    - **Rebuilding** may sufficiently constitute providing a good.
    - **Medical providers** are almost invariably "service providers"

        - **Restaurants** now goods sellers of a sense
            - **Employees of restaurants** generally bailees.
    - **Included:** Commercial bailers, merchants, etc.
    - **Excluded:** Good Housekeeping, Auctioneers, etc.
- **Being "In the business of Selling or Distributing"**
    - **Generally:** Includes, for example, movie theaters and popcorn, excludes occasional sellers of food like housewives.
    - **Two categories of exclusion:** (1) Those who supply unsafe and defective products in the noncommercial context, and (2) Those who supply unsafe and defective products in the commercial context but are not in the business of selling the product in question.
    - **Justifications:** (1) Most in the position to exert pressure for improvement, (2) Assumption of responsibility (fairness).
- **Ex:** Books are both actual products and info, only the former subject to prods liability. *Winter v. GP Putnam's Sons*. Doctor not seller of needle that broke in jaw. *Magrine v. Krasnica*. Seller of used machine it previously used not regular seller. *Jaramillo v. Weyerhaeuser Co.*

JOINT LIABILITY

ALLOCATING RESPONSIBILITY IN CHAIN

- **Joint and Several Liability**
  - **History:** Originally only (1) In concert -> Joint and several. (2) If independent for indivisible tort, no joinder [now allowed].
  - **Modern Approaches with Comparative Fault**
    - **(1) Abolished.** Several liability only.
      - **(a) Abolition for noneconomic damages.** Like pain and suffering.
      - **"Several Liability"** – Arguably more preferred system, prevents Ds from "holding the bag" but simultaneously can make some funds unrecoverable.
    - **(2) Limiting recovery to percentage of fault.** Ex: Requiring a D to be more than 50% at fault in order to force that D to initially pay full amount.
    - **(3) Common law system.** Where no concert of action, no joint.
    - **Fault to nonparties** also an issue.
- **Letting Retailers/Wholesalers off the Hook**
  - **"Sealed Container" Exception –** Letting retailers/wholesalers off the hook for "sealed containers" they couldn't inspect within, etc.
  - **"Apparent Manufacturer Doctrine"** – If seller appears to be manufacturer, liability created.
  - **MUPLA 105 –** (a) A product seller, other than a manufacturer, is subject to liability to a claimant who proves by a preponderance of the evidence that the claimant's harm was proximately caused by such product seller's failure to use reasonable care with respect to the product [NEGLIGENCE]. [Court must find sufficient evidence]. [In determining,] the trier of fact shall consider the effect of such product seller's own conduct with respect to the design, construction, inspection, or conduct of the product, and any failure of such product seller to transmit adequate warnings or instructions about the dangers and proper use of the product. Product sellers shall not be subject to liability in which they did not have a reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition.
    - **(b)** [Express warranties created -> Liability]
    - **(c)** Also subject to liability if (1) Manufacturer not subject to service (2) Manufacturer judicially deemed insolvent or (3) Court determines high improbability of recovery against manufacturer. [LIMITED AOPTION]
  - **N.J.S.A. 2A:58C-8 Definitions**
    - **"Manufacturer"** means (1) any person who designs, formulates, produces, creates, makes, packages, labels or constructs any product or component of a product; (2) a product seller with respect to a given product to the extent the product seller designs, formulates, produces, creates, makes, packages, labels or constructs the product before its sale; (3) any product seller not described in paragraph (2) which holds itself out as a manufacturer to the user of the product; or (4) a United States domestic sales subsidiary of a foreign manufacturer if the foreign manufacturer has a controlling interest in the domestic sales subsidiary.
    - **"Product seller"** means any person who, in the course of a business conducted for that purpose: sells; distributes; leases; installs; prepares or assembles a manufacturer's product according to the manufacturer's plan, intention, design, specifications or formulations; blends; packages; labels; markets; repairs; maintains or otherwise is involved in placing a product in the line of commerce. The term "product seller" does not include: (1) [seller of real property] (2) [Prof'l services where product is incidental] or (3) [person acting only in financial capacity]
- **Contribution**
  - **Common Law:** Joint tortfeasor without legal recourse for overpaid moneys
  - **Modern:** Contribution actions allowed.
    - **Overpaying party "conferred a benefit" – does not apply** where one discharged liability early via settlement, thus settling party arguably doesn't have to contrib.
    - **Strict Liability** seems to apply, **fault may not apply?**

- **Rest 3d Sec 23** – (a) Where two or more persons liable and one discharges or settles, person discharging is entitled to recover contribution unless the other has a previously valid settlement. (b) Person entitled can recover no more than excess of comp share. (c) Person with right of indemnity does not need to contribute.
- **1955 Uniform Act Sec 1 –** (a) [Where J&S liability for same injury to person or property, right of contribution]. (b) Right of contribution exists only in favor of someone who has spent more than pro rata share. (c) No right of contribution for intentional tortfeasors. (d) Settlement means no entitlement to contribution.
  - **Equitable allocation** now focused, not pro rata.
- **Contribution + Settlement and Release**
  - **Common Law:** Once one party settled, all others were released
  - **Modern Law:** Dispute between fully closing that party's settlement or keeping it "open"
    - **If overpaid settlement** – Can demand contribution
    - **If underpaid settlement –** Done, no worries.
  - **Approaches**
    - **Rest 3d/Uniform Comparative Fault Act –** Claim against all other parties reduced by settlement amount + percentage – no sweetheart settlements
    - **Contribution** also an issue – should settling party be open to contribute? Prob. Not.

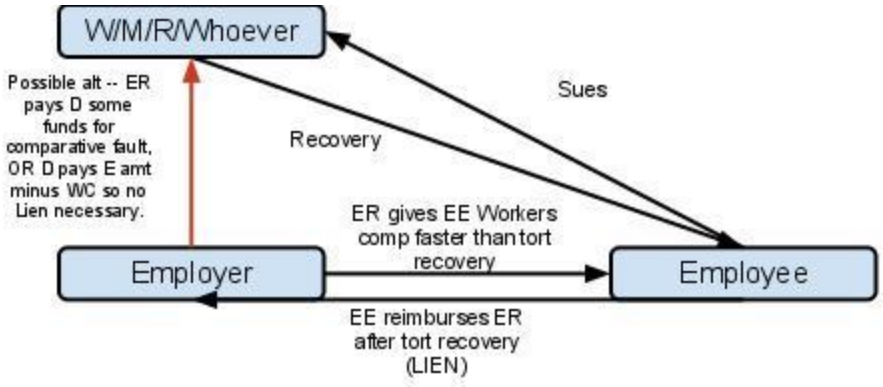
- **Indemnity Rights**
  - If free from fault, sellers can get indemnity up the distributive chain
    - **Effect of negligence** disputed. Some consider this a bar to indemnity
  - **Rest 3d Torts Apportionment 22 --** (a) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, if: (1) the indemnitor has agreed by contract to indemnify the indemnitee, or (2) the indemnitee (i) was not liable except vicariously for the tort (ii) was not liable except as a seller of a product supplied to the indemnitee by the indemnitor and the indemnitee was not independently culpable. (b) [Indemnity available even if indemnitor not independently liable]
- **Ex:** Packager who put meds in boxes a "manufacturer" under NJ statute, liable, despite independent contractor-esque nature. *Smith v. Alza Corp.*

ASSIGNING RESPONSBILITY COLLECTIVELY

- **Generally**
  - **Design Defects** usually a minor issue – obvious who designed it
  - **Manufacturing Defects** much more difficult, though R usually easily sued.
  - **Many states allow *res ipsa*-esque inferences of fault.**
- **"In the Normal Course of Events"** – Interpretation to allow collective joinder of entire chain
- **Special Circumstances**
  - ***Anderson* –** Some party joined must be liable, lest miscarriage of justice.
    - ***Presumptions:*** (1) All parties joined [or at least enough of them], (2) relative weakness of client, (3) Generally highly desireable.
  - **Other courts –** Limit *Anderson* heavily to specific case, generally don't allow 100% burden-shifting.
- **Ex:** Where (allegedly) all Ds joined to suit and some defect shown, at least one D must be found guilty lest a misjustice take place. Dissent indicates other third parties, issues with proof. *Anderson*.

WORKPLACE ACCIDENTS

- **Workers Comp** – Idea of trade-off between worker and place of employment, allowing an immediate fixed payout



in return for no liability for workplace, pending no exceptions apply.

- **D-ER Interface**
  - **Lien** – Amt EE owes ER from recovery – implied as part of WC deal
  - **Approaches**
    - **(1) No contribution.** Majority rule, disallows and keeps entirely separate, but harms manufacturers and likely subject to change.
    - **(2) Total contribution.** Old NY approach, now only applies where a "grave injury" occurred or where expressly listed in statute.
    - **(3) Limited Contribution.** Amount can reflect fault but cannot exceed workers comp amt.
    - **(4) Severing systems.** Apportion fault and treat workers comp like settlement cap.
    - **(5) Dollar for dollar reduction. MUPLA approach.** Subtract full tort recovery with workers comp amt.
- **Intentional Tort Exception**
  - **Generally:** (1) Intent or substantial certainty and (2) Resulting injury and circumstances must be (a) more than a fact of life of industrial employment and (b) plainly beyond what workers comp was meant to handle **(*Laidlow*)**
    - **Issue of definition – Particularized or Generalized?**
      - **Generalized (*Laidlow*):** Harm in terms of *inevitability given percentage.*
        - **Problem:** Tort system *encourages this behavior.* Problem?
        - **Concept:** Judiciary interprets scope of legislature's "W.C. contract"
      - **Particularized (Tort):** Harm in terms of *specific victim.*
    - **Second prong determined by judge alone.** Judicial control over definition?
  - Any "intentional tort" by employer invalidates workers comp, allows litigation
  - **Defining intent** – split between intent, substantial certainty, actual knowledge or somewhere in that realm.
    - **Failure to follow OSHA, etc** may be *prima facie* intent.
- **Dual Capacity Doctrine**
  - **Ability to sue employer not as employer, but as manufacturer of product.**
  - Controversial, some states allow when division clearly proven, etc. HIGH HESITATION TO APPLY
  - **Dual Persona Doctrine** – similar, but focused on legal entities.
- **Ex**: Failure to install/use safety guards intentional enough to allow liability, second prong met where damage could have been avoided. *Laidlow*

CAUSATION

- **PURE COMPARATIVE FAULT ON EXAM**
- **Rest. Torts Prod. L. 15** -- Whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort.
- **4 Major Questions:**
  - **Cause-In-Fact: {(1)** Did the Product Actually Harm the Plaintiff? **(2)** Defendant Supply product?
  - **Proximate Cause: {(3)** Did the Defect Contribute to Harming the Plaintiff? **(4)** Did the Defective Product Proximately Cause P's Harm?**}**
  - **Torts questions:** (1) Cause-in-fact (but-for) [General], (2) Negligent aspect necessary condition? [Specific] (3) Outcome type of outcome torts intended to prevent? (Policy/Proximate Cause)
- **Did the Product Actually Cause P'S Harm?**
  - **But-For Causation**
    - **(1) WAS THE PRODUCT A NECESSARY CONDITION TO A HARM?**
      - **(A) General causation** – Whether the product is inherently capable of issuing the sort of harm caused by the P. ***(CAPAICTY)***
      - **(B) Specific causation –** Did the product in question actually harm the P? ***(ACTUALITY)***
      - **Circumstantial Evidence** – Whether a jury may draw a reasonable inference of causation.
        - **(1) "Frequency, regularity, and proximity" test** – whether P was dealing with the product with sufficient frequency, regularity, and in sufficient proximity.
        - **(2) More stringent tests**. To avoid such vague definitions.
      - **Safety Equipment –** Generally difficult, esp. with helmets where injury would have to happen anyway. Similar to failure to rescue.
      - **Reliance on Experts**
        - **General Causation** – Proving general capacity brings issues of expert testimony.
        - **Specific Causation** – Usually non-expert-issue, but experts usually okay.
      - **Approaches to Experts**
        - ***Frye* standard** – Admission of testimony "deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have general acceptance in the particular field in which it belongs"
        - ***Daubert* standard** – "General acceptance" not necessary.
          - **Considerations:** (1) Theory has been tested, (2) Subjected to peer review, (3) known or potential error rate, (4) General acceptance. ***Flexible standard***
          - **Judicial discretion.** *Daubert* hearings pre-admission.
            - ***Joiner*** – Abuse of discretion standard.
            - ***Kumho* –** Testimony alone inadmissible, must be connected to some science. Extends to general science.
        - ***Rider* interpretation –** Requiring near scientific certainty.
          - ***Cf. King* interpretation –** Flexible
          - **Why not allow all evidence?** Possible jury confusion, etc.
        - **Methods**
          - **Epidemiology – for general causation (but helps specific) --** Field concerning itself with the causal nexus between factors and disease, looking at wide swaths of cases.
            - **Little *Daubert* issue.** Generally verifiable, but contestable.
            - **Relative Risk –** Ratio of likelihood of exposure based on study.
          - **Standard of scientific certainty in sciences –** *Allegedly* 1/20 (.05%), but this is contestable.
      - **OTHER MANUFACTURER PROBLEM** (Floor buffer problem)
        - **Solutions:** Market Share? Loss of Chance? Imputation? Reverse successor liability?

- **(2) DID D SUPPLY THE PRODUCT?**
  - **Easy cases:** Trademarks, insignia, logos, etc.
  - **Market Share Approach** for unknown goods
    - **Division upon <u>market share</u> at time of injury** (DES cases)
      - **"Substantial Share" required.** May be liberalized by courts like *Collins v. Eli Lilly*, putting refutation burden on Ds.
      - **DOES NOT APPLY for specific manuf'g defect.** Implication that <u>all products were equally bad.</u>
        - **May also be limited to DES-esque cases.**
      - **(1) What market?**
        - **National** vs. **State/Loc.** Vs. **Store or method**
      - **(2) Should D be able to disprove liability?**
        - **Several liability** favored to avoid unfairness, but this harms P somewhat.
      - **(3) Who bears loss for missing market shares?**
        - **Several liability** = P, but this is harmful to case.
    - **Public nuisance** may also be available.
- **(3) DID THE DEFECT CONTRIBUTE TO THE HARM?**
  - **!- FACTOR INVOLVED WITH FAILURE TO USE.** Ex: Failure to use protective methods precludes flaws in protective methods from relevance
  - **(1) All-Or-Nothing Causation**
    - ***Midwestern V.W.*** requirement of absolute proof of causation
    - ***Gigus*** – Where product actually not used (or used properly), no causation
  - **(2) Increased Harm/Enhanced Injury**
    - **Rest Torts Prods Liability 16 --** (a) When a product is defective at the time of commercial sale or other distribution and the defect is a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes, the product seller is subject to liability for the increased harm. (b) [If harm divisible, liability limited to divised unit]. (c) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes. (d) [J&S liability]
    - <u>Enhancement</u> of injury that would have already happened.
    - **Apportionment –** Generally small percentage for increasing party, raising several liability problems. ***Original tortfeasor liable for whole cost, usually.***
      - **Should there be a second-collision liability exception?** Duty for deep pocketed manufacturers to cover insolvent primary tortfeasors?
      - **If P is primary tortfeasor,** major issue of payment. Sometimes D will be held more responsible in that circumstance.
    - ***Lahocki*** – <u>Some</u> enhancement required, but percentile proof not required. Proffer of evidence sufficient, esp. in S.L. scheme.
    -
  - **(3) Loss of Chance**
    - **Loss of opportunity in medical situation, etc.**
- **(4) DEFECT PROXIMATELY CAUSE HARM? (HARM WITHIN THE RISK)**
  - ***Is the negligence too attenuated in the causal chain?***
    - **Factor:** Dangerous forces coming to rest
    - **Completely breaks liability.**
  - **Marshall v. Nugent –** Assault when stranded by car too attenuated to create liability with manufacturer.

    - **Foreseeability –** Too weak , NOT SUFFICIENT BY ITSELF
- ***Union Pump* standard –** Degree of attenuation on causal chain
- **Second Accident Liability**
    - **3 Stabs:** (1) Lack of a "defect" per se, (2) Proximate Causation destroying chain, and (3) Reduction of percentage in comparative fault system.

- **Ex:** Heavily limited admission of connection between lactation drug and strokes, rejecting what court considers "leap[s] of faith". *Rider v. Sandoz Pharm. Corp.* Epidemiological studies admitted without strict 2.0 relative risk finding. *King v. Burlington N. Santa Fe Rwy. Co.* Vaguely equivocal statements of possibility of brake failure killed case where in all-or-nothing causation req. *Midwestern V.W. Corp. v. Ringley*. Failure to use Lexan protective shield on excavator precluded finding of causation for alleged defect even if shield was used. *Gigus v. Giles & Ransome, Inc.* Jury could find the enhancement of harm by roof welding defect. *Lahocki v. Contee Sand & Gravel Co.*

DESIGN DEFECT

Preliminary Issues

- **Is review of design defect necessary?** Arguably fixed by economy itself. Many risks obvious and courts had a "patent danger rule" prohibiting recovery for damages for patent dangers.
    - **Similar factors with strict in manufacturing defect.**
        - **Factors needed for market:** (1) Adequate info and (2) Position to Act
        - **Market for products:** (1) Lack of info and (2) Lack of acting power
    - **Patent danger rule gone.** Buyers not always able to protect selves
    - **Rest. PL 2 Com. D** – Rejects patent danger rule, allows obviousness of defect only as factor
- **Why not admin review**? Inefficient, overbroad, fear of capture. Blanket rules cause trouble/inefficiency.
- **Why not enterprise liability**? (1) Creation of un-adjudicateable disputes where the reason to limit the system to products would vanish, (2) Risks would be uninsurable because no predictability.
    - **USER CONTROL OF [PL]**. Allows for rampant abuse, moral hazard

MALFUNCTION – THE SECTION 3 APPROACH

- **Rest. 3d 3 –** It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff (a) was of a kind that ordinarily occurs as a result of product defect; and (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.
    - **FAILURE TO PERFORM MANIFESTLY INTENDED FUNCTION.**
    - **Same *res ipsa* inference as with strict liability.**
    - **Comment b** outlines instances where defects are outright, such as wings of an airplane falling off due to design.
    - **ABSOLUTE SYSTEM.** No variability, no guessing. Must be manifest purpose.
    - **Alternate:** *McSwain* req. of Malfunction + RAD.
- **CONFORMITY IS IRRELEVANT.** All about acting beneath standard floor.
- **CANNOT WARN AWAY.**
- **Ex:** Jury could conclude machine that caught fire was not turned off in order to find design defect, hinging on Section 3. *Hartford Fire Ins. Co. v. Dent-X*.

THE RISK-UTILITY (REASONABLE ALTERNATIVE DESIGN) STANDARD

- **Focus on product type liability, *not* product category liability**
- **Risk-Utility Balancing + Availability of RAD:**
    - **BOTH needed.** Without R-U, RAD alone is insufficient. Without RAD, R-U insufficient.
    - **NEGLIGENCE VS. STRICT**
        - **NEGLIGENCE OF MANUFACTURER IRRELEVANT IN DESIGN.**
        - **"Strict Liability" Design Defect –** No need to prove negligence, only defect (per risk/utility?). Might just mean ignoring due care.
            - May just be a vetige of Rest.2 402(A) language
            - But some courts seem to think it is inherently limiting, RADs only apply for strict, Negligence being independent claim, etc.
        - **"Negligence" Design Defect –** Must prove negligence in risk/utility
            - **NEGLIGENCE ALONE POSSIBLE.** Specifically, if defect not cause in fact.
        - **Product Category Liability (Usually disallowed)**
            - **Rest. . Cmt D –** [Admin and government law best to manage category liability]
            - **Rest.2nd 520 –** Factors in determining **abnormally dangerous activities** include (a) high degree of risk (b) likelihood harm will be great (c) inability to eliminate risk by reasonable care (d) extent the activity is not of common usage (e) inappropriateness of the activity to the place it happens and (f) extent to which value < dangerousness.
            - **Ellen Wertheimer Theory –** Category liability where abnormally dangerous. Strict liability for part of item that makes it abnormally dangerous (i.e. slippery floor), but not for usual risks. Etc.

- **ISSUE OF <u>SUBSTITUTEABILITY</u>.** The line between category liability and defect is difficult. Issue of substitutability.

- ***Seratim* problem –** Design RAD defective either way, ultimately making manufacturer liable both directions
  - **Collateral estoppel** could be used offensively here for great damage.
  - **Insurance** works (as this basically becomes category liability)

- **Rest.3 PL 2 -** A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. [...] **(b)** is **<u>defective in design</u>** when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
  - **Ind. Code 34-20-4-1 – [CONSUMER EXPECTATIONS]** Defective product one sold in condition (1) not contemplated by reasonable persons among those considered expected users or consumers of the product and (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.
    - **Cost-benefit analysis still implicit.** Court in *Bourne* confused?
- **UNREASONABLE DANGER/RISK:** (1) Social utility, (2) Desirability
  - **Rest.3 PL 2 Com.f – <u>NO PROTOTYPE IMMEDIATELY NECESSARY.</u>** Broad range of factors including magnitude and probability of foreseeable risks of harm, instructions and warnings, and the nature and strength of consumer expectations regarding the product including those from portrayal. **No requirement of proof of all factors, case-to-case.** <u>Expert testimony</u> not always required, qualified expert testimony OK. **Corporate earnings/employment never factors.**
  - **"Patent/Obvious Danger Rule" abrogated.**
- **UTILITY:** Public as a whole and importance of the product, including whether the risk could have been reduced without significant impact on product effectiveness and manufacturing cost.
- **Reasonable Alternative Design (RAD)**
  - **Required to prove defect.** Without, no case, though JMOL rare, <u>for jury</u>.
  - **Rest.3 PL 1 -** One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.
  - **Texas Civil Practice & Remedies 82.005(b)** – Means a product design other than the one actually used would in reasonable probability **(1)** prevented or significantly reduced the risk of the claimant's [injury/damage] without substantially impairing the utility, ***and*** **(2)** was economically and technologically feasible at the time the product left the control of the manuf'r or seller by the app. of existing or reasonably achievable scientific knowledge.
  - ***Balancing* various RAD factors vs *requiring* some quantum of info.** Dispute especially for *res ipsa* esque inferences.
  - **Some courts may not require.** Adopting consumer expectations test,etc.
  - **Multiple RADs** probably slipshod, but can be used.
  - **<u>Kysar Issue:</u>** Multiple RADs with gender or other factors implicit – too technical/statistically focused.
  - **Warnings alone insufficient.** See below.
  - **Patented tech counts even if unobtainable.** But should cost of acquisition count?
- **SPECIAL ISSUES**
  - **Time Dimension – Post-Sale Increases in Risk**
    - **Focus:** <u>Negligence</u> of the manufacturer <u>at the time of distribution/sale</u>.
    - **Rest.3 PL 2 Com. M –** Most courts reject claims based on risks whose existence became known only after sale.
  - **Time Dimension – Post-Sale Increases in Risk-Avoidance Techniques**
    - **(1) STATE OF THE ART**
      - **Issue of <u>knowledge of risk</u> and <u>risk-avoidance</u>**

        - **TIME OF SALE GOVERNS.**
        - ***TJ Hooper*** – Custom comes in, but doesn't govern
        - **Common Law:** Not allowed, **Rest:** Allows for R-U
        - **Rest.3 PL 2 Com. d –** Evidence of state of art admissible, but real focus is on the RAD, and evidence is mainly aimed at that. Can be defective even if alt was not in commercial use.
        - **Availability of alternatives not always definitive.** Commercial feasibility and the like matter. Contra: Defect alone sufficient.
    - **(2) SUBSEQUENT REMEDIAL MEASURES**
        - **FRE 407 - Generally prohibited** to prove negligence, culpable conduct, defect in product, defect in design, or need for warning.
        - **Past dispute over S.L. admissibility.** Now fixed by revised 407.
        - **Fundamentally different products exempt.** Different model cars, etc.
        - **Time accrues at time of injury.** Pre-injury warnings, etc admissible.
        - **Admissible to prove feasibility.** Mich. Comp. Laws. Ann., etc.
    - **(3) CHANGES IN PUBLIC ATTITUDE TOWARDS RISK**
        - **Issues:** (1) Change in legal doctrines, (2) Change in public attitude towards risk. Possible shift towards more product focus.
- **Interface with Warning**
    - **Generally, warnings alone do not make something reasonable.** Courts do not like the idea that one can warn away otherwise mendable defects.
        - **Warning a factor.** That's all.
    - **Balance question.** How much should be devoted to warning?
    - **Rest.3 PL 2 Cmt. L –** Reasonable designs and instructions important. However, where a safer design can be adopted and a warning leaves a *significant residuum of risk*, it must be. Warnings are not a substitute for a RAD. [FACTORS ONLY]
        - **Middle-ground problem.** Restatement indicates warnings ineffective <u>when they live significant residuum of risk</u>
        - **Former: (Rest.2 402A cmt j) –** Allows presumption warning would be read, warning can make something reasonable.

- **Ex:** Finding requirement of RAD for otherwise unreasonable finding requirement of RAD for otherwise unreasonable dangerous product. *Wright v. Brooke Group*. In jurisdiction with consumer expectations test boiling down to negligence, football goals not proven to be defective, not enough proof and not balanced enough. *Bourne v. Marty Gilman*. No finding of defect where P failed to prove kill switch for boat was feasible and available despite possible availability on racing boats. *Boatland of Houston v. Bailey*. Fundamentally different re-released vehicle exempt from FRE 407 prohibition. *Griffin v. Suzuki Motor Corp*. Warning decal issued after sale but before accident was not sub remedial measure. *Tucker v. Caterpiller*. Finding no [strict] design defect in port side of pilot house precluded finding of negligence for product liability, dual instruction to jury dangerous and pointless, 2(b) governs. *Lecy v. Bayliner Marine Corp*. Warnings on tires that were misused were not enough. *Uniroyal Goodrich Tire v. Martinez*. | Jury may have found that pool was so unreasonably dangerous that manufacturers should bear all costs. *O'Brien v. Muskin Corp.* "Fun ring" and trampoline did not create such a risk as to obviate RAD requirement, etc. *Prish v. Jumpking, Inc* Strict liability applies to car where header design could have been stronger even though ultimate re-design would almost entirely change car – creates *seriatim* problem. *Dawson v. Chrysler*.

THE CONSUMER EXPECTATIONS STANDARD

- **Rest. 2nd 402A cmt i --** The article sold must be dangerous to an extent **beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics**.
    - **REJECTED BY THIRD RESTATEMENT.** 3rd Restatement has comment 2[b] indicating nonexclusivity, so hypothetically *laissez-faire*.

- **Possible Approaches:** (1) Rest. 3-esque definition of malfunction or the 402A consumer test (*Soule* theory). [CLASS OF CONSUMERS MODIFIERS: 2) Disappointment of the user of the product. (3) Plaintiff's expectations. (4) Expectation of general class of consumers.]
- **Guns and other ostensibly dangerous products** often used with this.

- **AS A SWORD**
  - **Base-floor esque liability where consumer expectations of products fail.**
  - **UCC APPROACH:** Implied Warranty of Merchantability roughly similar.
    - ***Denny v. Ford Motor Co* –** Defect and Unmerchantable different standards
    - **PLR wants to merge.**
- **AS A SHIELD (MORE POPULAR**
  - **Consumer expectation of *lack* of safety relevant.** Basically something like the patent danger rule.
  - **GENERAL CONSUMER KNOWLEDGE** is the key here. **Contrast to fault in proximate cause:** Former acts as determinative factor of liability, latter as % etc.
- **Ex:** Judgment for D affirmed where truck that hit rock with tire coming loose too speculative for jury to apply consumer expectations standard. *Heaton v. Ford Motor Co.* RAD requirement unreasonable, R-U balance should be used only when consumer expectations fail (i.e. complex products). *Potter v. Chicago Pneumatic Tool Co.* Where experienced wheelchair user knew wheelchair lacked front casters, falling over was expected and did not give rise to liability. *McSwain v. Sunrise Medical.* Guns to be judged by consumer expectations, not risk-utility. *Halliday*.

THE TWO PRONG APPROACH

- **CONSUMER EXPECTATIONS** (Like a section 3 sort of test for simple products for consumer *everyday experience*) **-> RISK-UTILITY** (For complex products)
- **Hypothesis:** Basically Sec. 3 → RAD approach. BUT *Campbell* with bus design defect precludes finding, as failure to have hand rails was not "defect" per se.
- **CALIFORNIA AND ALASKA BURDEN-SHIFT WITH RAD.**

	CE (Noncomplex)	RAD (Complex)
Proven	P	P
Not Proven	D	D

- **Ex:** Establishes two-prong test. Finds that issue of crashworthiness involving front tire involved R-U balancing given complexity, but no error because it was unlikely jury used consumer expectations text. *Soule v. GM corp.* No "unreasonably dangerous" in consumer expectation lest it become patent danger rule. *Barker*. Adopts PLR approach to test, encompassing consumer expectations into risk-utility test. *Mikolajczyk v. Ford Motor Co.*

STRANGE DEVIATIONS

- ***Azarello* (PA, very unsupported):** "The jury may find a defect where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use". *Will likely die.*
- **Public Nuisance:** Such as in the marketing of firearms, etc. Very disfavored.
  - **Emerged against fast food, etc.** Category e allowed, but useless.

SPECIAL DUTY PROBLEMS

- **MARKET DEFERMENT ("Consumer Choice")**
  - **WHERE A RAD MAY EXIST, BUT IT WAS NOT PURCHASED.**
    - **Something like patent danger.**
    - **Becomes something like category liability if liability found**
      - **Cmt. E –** Exception for ridiculously harmful things like armor piercing rounds
  - **Issues of determination by intelligent entities.** Intentionally purchasing cheaper or otherwise more valuable but unsafe products, etc.

        - **Public entities** may play a factor
    - **Factors:** (1) Buyer is thoroughly knowledgeable, (2) Normal circumstances where **product is not unreasonably dangerous without safety equipment**, and (3) buyer is in a position to balance risks and benefits of not having safety device.
        - **Major factor:** Workers being forced into using dangerous/bad equipment. Distrust of employers making cheap decisions.
        - **Contrast:** Punch press cases where knowledge of employer malfeasance precluded liability finding where changes made.
        - **NORMAL CIRCUMSTANCES RULE:** Product without safety standards must be generally safe and have a function that is not unreasonably dangerous.
    - **Knowledge of parties** key. Where users are educated, low worry. Where unknowing users might be involved, deferment less attractive.
    - ***Voss* Factors:** Likelihood product will cause injury, ability of the P to avoid injury, the degree of awareness of the product's dangers which reasonably could be attributed to the plaintiff, the usefulness of the product to the consumer as designed compared toa safer design, and the functional/monetary cost of using the RAD.
- **FEDERAL/ADMIN PREEMPTION**
    - **Rest. PL 4 --** In connection with liability for defective design or inadequate instructions or warnings: **(a)** a product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation; and **(b)** a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.
    - **Generally, violation is a problem, but following doesn't preclude alt designs, etc.**
- **BEYOND THE PALE**
    - **Rest. PL 2 Cmt n** – [N]egligence retains its vitality as an independent theory of recovery for a wide range of product-related, harm-causing behavior not involving defects at time of sale. This Restatement includes several such topics in later Chapters, including post-sale failure to warn (see § 10); post-sale failure to recall (see § 11); and a successor's liability for its own failure to warn (see § 13). Other topics are covered in the Restatement, Second, of Torts. Thus, for example, negligent entrustment is treated in § 390. Liability for negligent service, maintenance, or repair, or negligent over promotion of a product, is governed by the rules set forth in §§ 291 et seq.
- **Ex:** No liability where police station purchased bullet proof vests that only protected part of the body and cop shot where not protected. *Linegar v. Armour of America*. No liability for bus where school intentionally purchased without backup alarm. *Scarangella v. Thomas Built Buses*. No deferment where danger existed with dock leveler, as users weren't fully knowledgeable. *Passante v. Agway Consumer Prods.* No liability imposed for general marketability of guns, even with some semblance of foreseeability. Market share liability inappropriate, given specificity of findings. *Hamilton v. Beretta*. Record sufficient to support argument that Boeing's cockpit doors were unsafe given easy ability to open, foreseeability present and no third party superseding causes.that were not met by foreseeability. *In re September 11 Litigation*.

EXPERT TESTIMONY THROUGH *DAUBERT*

- **RAD requirement all but demands expert testimony.**
- **Prototypes** not explicitly required per cmt f, but probably help.

MISUSE, ALTERATION, AND MODIFICATION

- **Fold into issues:**
    - **(1) DEECTIVE DESIGN (Duty-Breach)**
        - **P has burden to make the case of design defect**
        - ***Jurado* issue –** Where user stupidity is irrelevant to a finding of defect, essentially inferring that products should be idiot-free.
            - **Third party victims** probably weaken this connection, given that they have less of a quasi-contractual relationship with seller.
        - **Finding precludes horseplay.**

        - **NY SPECIAL RULE:** Modification -> NO LIABILITY, *unless* meets *Lopez* "design for modification" concept
    - **(2) PROXIMATE CAUSATION**
        - **P's burden.**
        - **Finding of defect precludes proximate cause refutation.** A defect requires some underlying harm, thus connecting the two.
        - **"Terrorist Hypo" –** Scenario where behavior so egregious that it destroys the chain. Terrorists on planes, horrible nurses, etc.
    - **(3) CONTRIBUTORY FAULT**
        - **Relevant to amount that a defect caused a harm.**
        - **Something like a last-ditch way to lessen damages.**
        - **Ps like to raise.** Avoids all-or-nothing-ness of (1) and (2). Some courts disallow P raising it.
- **Ex:** Mis-assembly of 3M perfusion system for heart tubing precluded finding of liability, given that misassembly was not foreseeable and, even if it was, numerous measures in place to prevent it were thwarted by nurse lies. *Morguson v. 3M Co.* Duty does not extend to making impossible to abuse machines, esp. where company tries to convince purchaser to re-use safety devices. *Robinson v. Reed-Prentice Plastic Jewel Parts Co.* Ease by which guard was removed from forklift tied with various other factors indicated jury question regarding reasonable safety. *Lopez v. Precision Papers, Inc.*

WARNING – DUTY AND FAILURE

GENERALLY

- **Warning for non-obvious OR not generally known risks the person of average intelligence and experience may not know of**
  - **Knowledge of specific user** almost always relevant if specialized field
  - **Cleans up where design fails.** Much easier to meet than design.
- **Theories**
  - **"Risk Reduction" –** Cases where modifying use can lessen risk.
  - **"Informed Choice"** – Cases where users can either buy or not buy (unavoidable risk). Twerski supports, prof has issues with (more danger than helpful)
- **APPROACHES**
  - **Negligence –** Conduct of D in marketing product without warning
  - **Strict –** Mere fact of product marketing, though this usually implicates some fault, thus making it negligence in fact.
  - **Negligence language tends to result in higher damages.**
- **CAUSATION**
  - **Presumption that a party heeds warnings.** Thus, causation virtually irrelevant.
  - **Contributory fault** (for being heedless with warning, etc) largely irrelevant, *but* **at some point snaps back in where warning simply too attenuated**

THE BASIC DUTY TO WARN

- **Rest. PL 2(c) --** is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.
  - **Rest. PL 1 –** ALL parties down the chain liable.
    - **Failure to pass through warning** counts, such as when product changed
    - **Duty to retailer** may snap in if retailer learns of special harms
    - **"Negligent Marketing"** sometimes used, but not often
  - **NO RAW REQUIRED.** Essentially allows P to infer alternative is available
    - **Still may be necessary in fact.** D can disprove possibility, P can prove for strength
      - **P raising the issue = adding ammo for D**
    - **Lack of space, etc can disprove.** Thus, D has an advantage for bringing up the impossibility of a RAW when it fits.
- **Unknowable Risks**
  - **Generally:** No liability where reasonable testing would not have revealed. (**Com. m**).
  - **Limited courts hold companies liable.** Time-of-trial imputation, etc.
  - **BAD RESEARCH doesn't make a failure to warn.**
  - **Old strict idea:** Essentially enterprise liability for failure to warn. Old, Pre-Restatement approach.
- **Obvious Risks/Patent Danger Rule**
  - **Rest. 2 Cmt. J -- Warnings: obvious and generally known risks.** In general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users. When a risk is obvious or generally known, the prospective addressee of a warning will or should already know of its existence. Warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety. Furthermore, warnings that deal with obvious or generally known risks may be ignored by users and consumers and may diminish the significance of warnings about non-obvious, not-generally-known risks . . .
  - **Generally a question for the trier of fact.**
  - **Expertise of users a factor.** The "sophisticated user doctrine" snaps in where product marketed to specific class of professionals who know risk, etc.
    - **Specificity of harm** a question in *Greene*, but probably generalized
    - **Duty, Proximate cause both used as basis for rejection. "Assumption of the risk"** also used.

        - **Alcoholic beverages** an issue of contention. Dispute over obviousness of danger.
- **"Informed Choice" Warnings**
    - ***Irreducible* risk** warned against to induce caution, advise against use.
        - **Rest. 2 cmt i –** […] Warnings alert users and consumers to the existence and nature of product risks so that they can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume. […]
        - **Why not strict?** Treads into enterprise liability.
    - **Causation difficult,** given that RX cases typically are dispersed and vague
    - **Warnings can alert users to *alternative methods* (i.e. nonuse or safer methods) even when obvious.** Thus, warnings can be applied even when "be careful" isn't enough.
- **Who warns who?**
    - **Bulk suppliers and parts suppliers** can generally presume the manufacturer/seller will give better, more individualized warnings.
    - **Courts differ on scope of this exception.** Some may nonetheless require individual parts warnings.
        - **RX drugs** an issue of contention.
- **Special issues**
    - **Over-warning.** If too many obvious risks warned against, confusion, blurring effect.
    - **Warning of special users.** No need to warn docs of special medical diagnoses, etc.
- **Ex:** No practical significance in distinguishing between strict and negligence in failure to warn. *Olson v. Prosoco*. Risk of harm re elastic rope exerciser sufficiently obvious to preclude liability, though dissent argues that marketing indicated safety to a degree that warning would have been necessary. *Jamieson v. Woodward & Lothrop*. A reasonably prudent user would not have ingested a hair spray, and though a child did no warning was needed, especially where the ingredients were so arcane. Dissent points to ambiguity and strange logic of majority. *Greene v. A.P. Products, Ltd.* Failure to warn about safety of meat grinder would probably not have prevented given substantial modification, warning would have given informed choice of alternate path and thus was needed. *Liriano v. Hobart Corp.*

SUFFICIENCY OF WARNING

- **Defect <u>in the warning</u>.**
    - **Generally:** (1) Designed to reasonably catch consumer's attention [size, location, intensity of language or symbol], (2) language comprehensible and give fair indication of specific risks, and (3) warnings be of sufficient intensity justified by the magnitude of the risk.
    - **Counterbalanced against cost, feasibility, etc.**
- **P wants to prove he read but did not understand (or otherwise misinterpreted) warning.**
    - **Not reading** probably hurts P more than helps
- **Reasonable Alternative Warning (RAW)** likely required, though some courts (like the *Tesmer* court) seem to not care.
    - **Inadequate warning argument probably requires proffered alternative.**
- **Ex:** Jury finding of negligence regarding overly specific degree warning upheld, not unreasonable given evidence. *Tesmer v. Rich Ladder Co.* Instruction of sufficiency of warning inadequate, gives factors. *Lewis v. Sea Ray Boats.* Proffered warnings on drill unrealistic and foolish. *Broussard v. Continental Oil*.

POST-SALE WARNINGS

- **Way to punish for post-sale "Negligence Plus"**
    - **DO NOT UN-DEFECT FAILURE TO WARN.** Both could be charged.
    - **"Pavlides Structure" –** Anchor -> Criterion format of sttute. Possibly invites addition of factors/exemptions
    - **Helps avoid statutes of repose** (which apply to time of sale instead of time of discovery)
- **Rest. PL 10**
    - **(a)** One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's **failure to provide a warning after the time of sale or distribution** of a product if a reasonable person in the seller's position would provide such a warning.

  - **(b)** A reasonable person in the seller's position **would provide a warning after the time of sale if**: **(1)** the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and **(2)** those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and **(3)** a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and **(4)** the risk of harm is sufficiently great to justify the burden of providing a warning.
    - **All required.** Cannot be individually broken up.
  - **Cmt J –** When a product is defective at the time of sale, liability applies regardless of post-sale duty (via defect, etc)
- **Rest. PL 11 --** One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's **failure to recall** a product after the time of sale or distribution if: **(a)(1)** a governmental directive issued pursuant to a statute or administrative regulation specifically requires the seller or distributor to recall the product; or **(a)(2)** the seller or distributor, in the absence of a recall requirement under Subsection (a)(1), undertakes to recall the product; and **(b)** the seller or distributor fails to act as a reasonable person in recalling the product.
- **Ex:** Point-of-sale and post-sale duties differ in terms of scope, where latter is much more relaxed and considers many more factors. *Lovick v. Wil-Rich.*

SPECIAL PROBLEMS WITH PROXIMATE CAUSE

- **But-For Causation**
  - **Heeding Presumption** that party would have followed warning if given
    - **Shifts burden of production, not burden of persuasion.** Thus, the D can introduce evidence refuting, creating an issue for P to refute.
  - **Still, rebuttable and but-for causation at issue.** Kids, blind users, etc can refute.
  - **Warning for <u>other</u> products might apply here.**
    - Not the same product = warning would have done nothing.
    - **Workarounds:** Market share liability, successor liability, review of warnings, concert of action, alternative liability, etc. Brand Name/Generic approach?
- **Presumption that warning would have avoided harm**
  - **D can always prove heeding would not have reduced injuries.**
- **Failure to Warm for *another* product**
  - **Generally, no duty to warn about other products**
    - **Exception:** *Possibly* when so similar that warnings apply universally
- **Proximate Cause**
- **Ex:** Heeding presumption applicable, issue may have borne on mis-shift issue. *Golonka v. GM Corp.* No duty to warn regarding other products that are similar, possible exception re: same products with same risks. *Powell v. Standard Brands Paint*.

OTHER FORMS OF DEFECTIVE MARKETING

- **"Mismatch" cases –** Cases where wrong users use product not intended for them, causing harms. Cases usually involve negligent allowance of kids getting guns, etc.
- **Negligent Marketing –** Generally, with advertisements encouraging use of products in dangerous ways, etc.
- **"Over-promotion"** also possible.

EXPRESS WARRANTY

EXPRESS WARRANTY

- **2-312 --** (1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model. (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.
    - **Covers:** (1) Statements at or before time of sale, (2) Statements packaged with good, and (3) sometimes statements directed to the public at large (i.e. through advertising)
    - **Reliance** once required, "basis of the bargain" considered requiring only proof statement heard or read where D can rebut. *Limited other jurisdictions* hold it to be reliance or nothing at all.
- **Causation**
    - **(1)** Necessary condition to harm?
    - **(2)** D contribute the product?
    - **(3)** *If the product conformed, would the injury have happened?*
    - **(4)** Harm within the risk? Almost always present.
- **Ex:** Express warranty claim made where Ford promised shatterproof glass that shattered. *Baxter v. Ford Motor Co.* Basis of the bargain test only requires proof that consumer saw and read, other reliance aspects presumed. *Cipollone v. Liggett Group*. JMOL for D inappropriate where evidence showed that user of broken helmet did in fact read and rely upon manual. *Yarusso v. International Sport Marketing*.

FEDERAL PREEMPTION

GENERALLY

- **General Outlay**
    - ***Cipollone* –** Express preemption clearly manifested will pre-empt, period.
    - ***Wyeth*** – Where a floor, not a ceiling and there is no clear evidence of impossibility, no preemption.
    - ***Riegel, Geier, Pliva* –** Where congressional intent seems to imply dominance over state law claims, inconsistent claims fall out. Hinges again on impossibility.'
    - **DEGREE OF PREEMPTION MAY HINGE ON DEGREE OF FORESEEABILITY.** *Bic Pen* regulation foresaw type of use, speed limit type regulations don't
- **Supremacy clause** operates in three ways: (1) Congress expressly preempting state law, (2) Congress legislating such that courts find no remaining place where state law can operate, and (3) situations where parties can't comply with both, and thus fed law governs.
- **Preemption clauses and savings clauses "knock each other out"**
- **NOT COMPLIANCE.** Compliance is evidence but doesn't control. Federal preemption determines *what* can be complied with.

OF WARNING CLAIMS

- **"Clear Evidence" standard** of *Wyeth* to prove impossibility (to comply)
- **Fraud on the FDA** always an option
- **Cigarette Labeling Act and Federal Insecticide, Fungicide and Rodenticide Act claims** are almost always preempted.
- Cigarette acts, for example, expressly overrule state attempts to regulate smoking.
- **Ex:** 1969 successor to 1965 cigarette act broadened preemption of cigarette ads, preempting a FTW claim, an express warranty claim, and a fraudulent misrepresentation claim that utilized state law. However, a fraudulent misrepresentation claim via common law as to other statements was upheld. *Cipollone v. Liggett Group*. Where a pharmaceutical group failed to prove FDA floor acted as a ceiling, no preemption of state tort law claims. *Wyeth v. Levine*.

OF DESIGN DEFECT CLAIMS

- **NHTSA and MDA regulations** usually preempt where Congress acts deliberately to set standards
- **Ex:** Design claims on Class III medical devices precluded where MDA controlled. *Riegel v. Medtronic*. Seat belt and safety based design claim for cars preempted where Congressional goal was to slowly roll-out safety devices. *Geier v. American Honda Motor Co.* Because generics cannot appeal to FDA to change labeling mandated that they have to copy, no liability for warning. Dissent notes administrative appeals method. *Pliva*

AFFIRMATIVE DEFENSES

CONDUCT-BASED DEFENSES

- **Comparative fault generally APPLIES for second-crash cases.** Idea: liability for <u>increased harm</u>
  - **PLR 16(d) –** J&S Liability
  - **PLR 16 cmt f –** Allows for the reduction of plaintiff's recovery in crashworthiness cases.
  - **Alt:** Comparative fault doesn't apply, EI system controls
  - **PURE COMPARATIVE FAULT ON EXAM, so no absolute bar.**
  - **COMPARE WITH NO DUTY AND PROX CAUSE.** No duty (i.e. the floor wax case) and no proximate cause versus *partial* duty/resp.
  - **Recall** probably doesn't create assumption of the risk – no destruction of defect, idea that manufacturers should "eat" such costs.
    - **Third parties** probably involved less duty, but dispute.
- **Comparative fault also applies to breach-of-warranty cases.** Courts hesitant, but Restatement of Liability applies.
- **P's Conduct as a Total Bar = Kinda dead.** Could be re-cast as lack of duty to avoid causation issues.
- **P *might* be able to raise comparative fault as gambit.**
- **Ex:** Comparative fault system not considered, rejects position by Restatement. D'Amario. Where farmhand "assumed" risk by leaving mule boy on and inspecting whirring chains, liability barred (statute based. *Green v. Allendale Planting Co.*

NON-CONDUCT BASED DEFENSES

- **Workers Comp** usually a defense, bearing full brunt of accidents.
- **Governmental Immunity** applies
  - ***Feres* doctrine**: NO LIABILITY FOR MILITARY GENERALLY
- **Government Contractor Defense**
  - ***Boyle* doctrine:** No liability where (1) US approved reasonably precise specifications, (2) equipment conformed to those specifications, and (3) Supplier warned the US about the dangers of the use of the equipment that were known to the supplier but not the US
    - **Applies to FTW *and* Design Defect**
    - **"Reasonably precise specifications" must be more than rubber-stamp approval**

SPECIAL ISSUES

COMPONENT PARTS AND RAW MATERIALS

- **Generally:** Liable only if independently defective or if component manufacturer sufficiently involved into integration to make defective. **Post-sale warnings** are a rare exception, jacked up in degree.
- **Rest. PL 19 Cmt b** – […] **Component parts are products, whether sold or distributed separately or assembled with other component parts.** An assemblage of component parts is also, itself, a product. Raw materials are products, whether manufactured, such as sheet metal; processed, such as lumber; or gathered and sold or distributed in raw condition, such as unwashed gravel and farm produce. For treatment of the special problems presented when plaintiffs join sellers of component parts and raw materials in actions against those who subsequently combined those materials to create defective products, see § 10.
- **Rest. PL 5 --** One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is **subject to liability for harm to persons or property caused by a product into which the component is integrated** if:
  - **(a)** the component is defective in itself, as defined in this Chapter, and the defect causes the harm; **or**
  - **(b)(1)** the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and
  - **(b)(2)** the integration of the component causes the product to be defective, as defined in this Chapter; and
  - **(b)(3)** the defect in the product causes the harm.
  - **[5] – Duty to warn** governed by principles of negligent entrustment, generally no duty where buyer puts component part to unsuited use.
    - **FLEXIBLE.** Depends on degrees of expertise, relative knowledge, nature of sale, etc.
    - ***Gomez* six Factors:** (1) Dangerous condition of product, (2) purpose of product, (3) form of any warnings, (3) reliability of third party as conduit of necessary info, (5) magnitude of risk involved, and (6) burdens imposed on supplier by imposing warning req
- **HIGH LEVEL OF DESIGN INVOLVEMENT -> HIGH LEVEL OF LIABILITY (*Zaza* rule)**
  - **NO INVOLVEMENT -> NO LIABILITY**
  - (1) CPM given extensive specs, involved in implementing design and sole M -> LIABILITY
  - (2) Designer hired -> LIABILITY
  - (3) Repairing -> NEGLIGENCE ONLY (UNLESS SELLING COMPONENT)
  - (4) CPM makes good part, M stupidly assembles -> NO LIABILITY
- **Responsibility for installing a safety device**: References (1) trade custom indicating party would normally install safety device, (2) relative experience of the parties, looking to who is best acquainted with the design problems and safety tech issues, and (3) practically, focusing on what stage safety mechanisms can be installed.
  - **Majority**: Component manufacturer cannot be held liable so long as
- **Ex:** Small component manufacturer of sheet metal not liable for damage caused where Maxwell House's boiler didn't have safety mechanisms and Maxwell House was responsible for installing and crafting such safety products. *Zaza v. Marquess & Nell.*

PRESCRIPTION DRUGS AND MEDICAL DEVICES

- **Generally:** LID governs, warning doctor necessary. *Lots* of deference to industry, very difficult to prove defect or failure to warn. Warning to consumers rarely adopted, limited to mass inoculations or rarely to mass advertised devices.
- **Rest. 2nd Torts 402A Cmt. K -- k. Unavoidably unsafe products.** There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. […] Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for

it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

- Rest 3d PL 6 – **Prescription Drugs**
  - **(a)** A manufacturer of a prescription drug or medical device who sells or otherwise distributes a defective drug or medical device is subject to liability for harm to persons caused by the defect. A prescription drug or medical device is one that may be legally sold or otherwise distributed only pursuant to a health-care provider's prescription.
  - **(b)** For purposes of liability under Subsection (a), a prescription drug or medical device is **defective if at the time of sale or other distributio**n the drug or medical device: (1) contains a manufacturing defect as defined in § 2(a); or (2) is not reasonably safe due to defective design as defined in Subsection (c); or (3) is not reasonably safe due to inadequate instructions or warnings as defined in Subsection (d).
  - **(c)** A prescription drug or medical device is not reasonably safe due to **defective design** if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that **reasonable health-care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients.**
    - **Disputed v. RAD.** Generally, a RAD would be bad – system already accounts for better RX available, and presumes FDA approval.
    - **RAD focuses on small defects creating defectiveness, RX system focuses on alt having to exist,** meaning small defects largely irrelevant if no alternative exists.
  - **(d)** A prescription drug or medical device is not reasonably safe due **to inadequate instructions or warnings if** reasonable instructions or warnings regarding foreseeable risks of harm are not provided to: (1) prescribing and other health-care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings; **or (2) the patient when the manufacturer knows or has reason to know that health-care providers will not be in a position to reduce the risks of harm in accordance with the instructions or warnings.**
  - **(e)** A **retail seller** or other distributor of a prescription drug or medical device is subject to liability for harm caused by the drug or device if: (1) at the time of sale or other distribution the drug or medical device contains a manufacturing defect as defined in § 2(a); or (2) at or before the time of sale or other distribution of the drug or medical device the retail seller or other distributor fails to exercise reasonable care and such failure causes harm to persons.
- **WARNING THE DOCTOR**
  - **Learned Intermediary Rule** – No liability where (doctor) acts as learned intermediary to warn of relevant risks. However, duty to warn doctor.
  - **FTW, generally**
- **WARNING THE PATIENT (DIRECT WARNING)**
  - **Courts reluctant to adopt.** Considered abandonment of LID.
  - **Degree of marketing to public -> Degree of duty to warn public**
  - **Warning generally must occur, and presumptively to FDA standards**
  - Rest 3d PL 6(d)(2) **seems to support.**
  - **Proximate cause issue.** If doctor always involved, doctor can always be blamed, etc.
- **Ex:** Ample evidence to support that manufacturer of drug could have further warned docs with more emphasis of newly discovered dangers of drug, no ability to presume docs will stay on top of medical world. *Sterling Drug v. Yarrow.* | Where Wyeth advertised directly to consumers for birth control implant and complications arose, court finds duty to warn directly to consumers, with presumptive deference to FDA standards. *Perez v. Wyeth*.

RECOVERY FOR PURE ECONOMIC LOSS

- ***Harm to the product itself.*** Anything close to it cannot be recovered.
- **§ 21. Definition Of "Harm To Persons Or Property": Recovery For Economic Loss.** For purposes of this Restatement, harm to persons or property includes economic loss if caused by harm to:
  - (a) the plaintiff's person; or
  - (b) the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law; or
  - (c) the plaintiff's property other than the defective product itself.
  - **[e]. Harm to the plaintiff's property other than the defective product itself.** A defective product that causes harm to property other than the defective product itself is governed by the rules of this Restatement. … A product

that nondangerously fails to function due to a product defect has clearly caused harm only to itself. A product that fails to function and causes harm to surrounding property has clearly caused harm to other property. However, when a component part of a machine or a system destroys the rest of the machine or system, the characterization process becomes more difficult. When the **product or system is deemed to be an integrated whole**, courts treat such damage as harm to the product itself. When so characterized, the damage is excluded from the coverage of this Restatement. A contrary holding would require a finding of property damage in virtually every case in which a product harms itself and would prevent contractual rules from serving their legitimate function in governing commercial transactions.

- **No Pure Economic Loss Recovery without Contract.** Idea that Tort should be limited to harm to <u>persons or other property</u>, internalized harm (i.e. to product itself, lessening value, etc) not recoverable in tort.
    - **"Integrated products" governed by contract when harmed**
    - **Avoidance of Code:** Limited SoL, Disclaimer, Privity
- **Ex:** Where harm is purely economic via harm to "product itself" no recovery in tort. *East River Steamship Corp v. Transamerica.* Added property to purchased product = other property. *Saratoga Fishing v. JM Martinac*. Cows harmed by bad milk something of an "integrated product", thus governed in Contract. *Grams v. Milk Products.*

RECOVERY OF PUNITIVE DAMAGES

- **Gross Negligence/Willful Negligence/Indifference v. Intent to Injure**
    - **Compensatory *must* exist**
- **Standard to trigger varies.** Usually some form of malice, maybe reckless disregard-esque gross negligence.
    - **Standard of proof varies.** Beyond a reasonable doubt, clear and convincing evidence, etc.
- **Federal Constitutional Control**
    - ***Gore* Guideposts:** (1) Degree of reprehensibility of D's misconduct, (2) Disparity between actual or potential harm suffered by the P and the punitive damages award, and (3) Difference between punitive damages by the jury and civil penalties authorized or imposed in comparable cases.
    - **Dispute over ratio, out-of-state conduct.**
    - **Open question:** Letting jury know of *other* awards. Denial of DP otherwise?
- **Ex:** *Actual* malice proven by clear and convincing evidence the standard for punitive damages. Dissent argues for wanton or reckless disregard (i.e. gross negligence bordering on actual malice) as well. *Owens-Illinois v. Zenobia*. 145:1 punitive:compensatory ratio in case excessive, clearly attempted to punish for out-of-state behavior. Dissent argues that state should be allowed to charge for out-of-state relevant conduct, Thomas argues that constitution doesn't limit at all. *State Farm v. Campbell*. Punitive damage awards improper where the damages are not connected to punishing for conduct D made against P, despite dissent arguing that punitives operate independently. *Phillip Morris USA v. Williams*.