Torts outline, Spring 2004. Professor Goble.

I. Negligence: scope of responsibility

A. Underlying theories

1. **Fairness:** scope of responsibility questions are questions of fairness. That is, they are line-drawing questions: when has Pf. returned to the normal course of her life? At what point should Df. no longer be liable for something that wouldn't have happened but for something he did?

B. Unexpected harm: the extent of harm does not have to be forseeable.

1. **Standards**

   a) **Unbroken chain:** there must be an unbroken sequence between Df.'s conduct and Pf.'s injury, without intervening causes, such that Df.'s conduct is the "natural and proximate" cause of Pf.'s injury. Df. will be liable under this standard even if he couldn't have forseen the the particular results that followed. See *Christianson* (¶7p401).

      (1) *Wagner* (n10p404): Df. broke Pf.'s leg. During recovery, Pf. slipped (without fault) and rebroke his leg. Df. held liable.

   b) **The eggshell plaintiff:** generally, defendants will have to take their victims as they find them.

      (1) ***Benn*:** Pf. had a history of coronary disease and died six days after a car wreck that Df. caused. Df. held liable.

         (a) The prima facie case (a review):

            i) Duty: yes--Df. has a duty to the decedent's heirs, arising from the wrongful death statute, and that duty is the same as Df.'s duty was to the decedent, which arose from the general rule. The scope of the duty is, of course, to exercise due care under the circumstances. The beneficiaries of the wrongful death duty are the heirs; of the original duty, highway users.

            ii) Breach: the jury could so find.

            iii) Cause in fact: yes--a medical expert testified that the wreck was "the straw that broke the camel's back" re: the decedent's health.

   c) **Reasonably required aid:** Df. is liable for injuries to the Pf. resulting from the "normal effects of third persons in rendering aid" that Pf.'s injury reasonably required--even if the aid is given negligently.

      (1) *Pridham* (n9p404): Df. injured Pf., who died when he was being carried away in an ambulance and the driver had a heart attack and swerved into a tree. Df. held liable.

      (2) *Anaya* (n9p404): Pf. killed when the medivac helicopter she was in crashed. Original tortfeasor held liable.

   d) **Emotional harm:** see *Steinhauser* (n4p402) and *Bartolone* (n5p402).

2. **Defenses:** if Pf. would have been injured regardless of Df.'s conduct, Df. may have a defense. See *Dillon* (n3p402).

C. Unexpected manner: the manner of harm does not have to be forseeable.

1. **Standards**

   a) **Highly extraordinary:**

b) Ex post forseeability:

2. Cases

a) *Dewey v. Keller* (Idaho): Pf. dies when he runs into Df.'s parked house. Df.'s argues that a sheriff's intervention--setting out flares--was a superseding cause that shields Df.'s own liability. The SoR standard makes the Df. liable only if the injury <u>followed</u> naturally and probably from the original cause.

b) *Lundy v. Hazen* (Idaho): Pf. infant wounds himself with a pistol that Df. sold to him without the parental consent required by statute. Df. argues that the mom's consent to the kid owning the gun--evidence to her acquiescence--was a superseding cause. The SoR standard relieve Df. of liability if the superseding cause was extraordinary (it's not extraordinary enough itc., as the court wouldn't disturb the jury verdict for Pf.).

(1) Restatement 2d §§ 442(c) and 447: an ex post forseeability test. Applying it here--looking retrospectively--Df. created a situation where the mom had no good choice.

c) *McLaughlin*: Df. argues that the fireman's conduct was gross misconduct. Restatement 2d § 445 highly extraordinary test. See *Kosmos Cement, Addis, Hines v. Morrow*.

D. Unexpected type: the type of harm <u>does</u> have to be forseeable to some extent

1. Standards

a) Prosser's Magic Circles: outside of the "magic circle" there is no liability. We don't know the exact boundaries of the circles--that's why we have judges; we just know that they do, in fact, have boundaries.

(1) Personal injury: a big circle--only limited forseeability is required.

(2) Property damage: a small circle.

(3) Relational injury: tiny circle.

2. Cases

a) *In re Polemis*: Df.'s stevedore dropped a board into the Thrasyvoulos's hold, where there was benzine; fire broke out and destroyed the ship. The SoR standard makes Df. liabile as long as any kind of damage is forseeable. The harm that actually occurred was of the same <u>type</u> that made Df.'s conduct a breach.

(1) Two theories:

(a) Forseeability is relevant only to breach. The court chooses this one (the same standard as in *Benn*).

(b) Forseeability is relevant to limiting liability.

b) ***Wagon Mound I*:** Df. caused oil to escape, which fouled Pf.'s slips and then caught fire. The SoR standard makes Df. liable <u>only</u> for harm resulting from a forseeable risk.

(1) Trial court: why is it relevant that oil fouled Pf.'s slips? Because of the risks--fire and fouling--fouling was the forseeable one. Because at least one of the risks was forseeable, the court sees fit to make Df. liable for <u>all</u> the harm to Pf.

(2) Privy council: reverses the trial, based on three arguments.

(a) <u>Ethical</u>: Dfs. should be responsible only for <u>probable</u> consequences--"to

demand more is too harsh a rule."

i) Goble's counterargument: is it less harsh, or more moral, to impose the cost of the harm on the completely innocent party? Goble's rebuttal: everyone benefits from being free from strict liability.

(b) Administrative: *Polemis*-type liability would subject the courts to a maze of tricky causation issues.

i) Goble's counterargument: the causation issues are simply forseeability issues--which aren't hard at all and are already part of the breach analysis.

(c) Doctrinal: (¶¶10-11pp407-408).

c) *Leech Brain* (n4p409): SoR standard involves a line between the extent of damage, which does not have to have been forseeable, and the type of damage, which has to be forseeable.

E. Unexpected plaintiff

1. Cases

a) ***Palsgraf*:** Df. owes a duty, but the beneficiary class does not include this Pf.

(1) We would probably get a different result if the package had been labeled "Explosives."

(2) Isn't Pf. an invitee?? And so Df. had a duty to disclose hidden dangers, such as the unstable scales??

(3) Dissent: itc. should turn on a SoR analysis, not a duty analysis.

b) *Walmsley* (cited in text of *Ferroggiaro*, n3cp430): it's enough for liability if the type of harm is forseeable. Goble says itc. may be his favorite case.

c) ***Kinsman Transit*:** a ship gets loose and ends up blocking the river and flooding the area.

(1) The Pfs. downstream: a straightforward analysis. (Was the type of harm forseeable? Sure--it was property damage. We don't care that it occurred as a result of flooding rather than by (more forseeable) direct contact with the ship.)

(2) The Pfs. upstream: this calls for a *Palsgraf* analysis because loose ships don't go upstream.

(3) Recurrence: what if this same thing happened again? I.e., how forseeable does the harm have to be? Well, note that the result as to the upstream Pfs. might be different if there hadn't been any ice in the river, like there was itc., because flooding would have been more forseeable.

(4) ***Kinsman II*:** Pfs. are the owners of ships stuck because the river is blocked. They can't recover because their damages are purely economic, which are basically not recoverable in tort.

F. To be filed

1. Is negligence about anything besides forseeability??

a) Duty: forseeability + risk.

b) Breach: unreasonable conduct in light of a forseeable risk.

c) SoR: ex post forseeability.

II. Negligence: privileges

A. Assumption of risk

1. Express assumption

a) Cases

(1) *Dalury*: Pf. skier runs into a metal pole on Df.'s slopes. Pf. had signed a release when he bought his season pass. Pf. argues that his case should be decided on tort principles for two reasons: (1) the release contained ambiguous language, and so shouldn't be valid as a contract--the court rejected this argument; (2) the release is invalid as against public policy. The court agrees with the latter argument, because (1) Df.'s advertises and invites the public, and thus a public interest arises; (2) all business owners have an active, general duty of care to customers; (3) Df. is in a better position than the Pf. to control the premises, and thus keep accidents to a minimum; and (4) if Df. was allowed to use these kind of waivers, they would lose an incentive to manage risk well. Once the release is voided, Df.'s duty in tort arises from the landowner-invitee relationship.

2. Idaho: in Idaho, the courts call this primary assumption of risk.

3. Implied assumption

a) Idaho: in Idaho, the courts call this secondary assumption of risk. Pf. will be barred from recovery only if he was unreasonable in deliberately encountering the risk; if Pf. was reasonable in deliberately encountering the risk, a comparative fault approach will be used.

b) Reasonable plaintiff: ordinarily, if there is full disclosure of the risks to the Pf., Pf. will be said to have assumed those risks.

(1) Cases

(a) *Murphy* (The Flopper):

c) Unreasonable plaintiff: if Df. can show that (1) Pf. knew the facts of the risk, (2) Pf. appreciated that risk, and (3) Pf. voluntarily chose to assume the risk anyhow, then this Df. can use this defense. This defense may mean either Pf. is totally barred from recovery, or that a comparative fault approach will be used.

B. To be filed

1. Assumption of risk analysis: (1) did Pf. assume the risk? (2) If he did, does comparative fault apply?

III. Intentional torts

A. The template prima facie case: (1) intentional (2) invasion of a protected interest, plus, in some case, additional elements specific to the particular torts. "Intent" is either (a) desire or (b) substantial certainty that something will happen (here, the invasion of the interest). All the Df. has to have done is intend to invade the interest--he doesn't have to intend any harm. Intent is determined subjectively--what a reasonable person would do is irrelevant.

1. Negativing intent: generally, you won't be able to negative your intent--neither (a) infancy, (b) insanity, nor (c) mistake will presumptively negative it. However, those things (especially infancy) might be at least somewhat relevant to the subjective determination of your intent.

B. Taxonomy of intentional torts

1. Battery: an invasion of your right to not be touched. Pf. must suffer (1) some harm

as a result of (2) Df.'s making contact with him. Emotional harm is enough. Contact with things in close proximity to Pf. is enough, too (e.g., Pf.'s jacket). Remember that implied consent is a defense (so, e.g., jostling on the subway and contact on the playground will usually defeat a battery case).

2. **Assault:** an invasion of your right to not worry about being touched. That is, your right to be free of (1) apprehension of (2) imminent (3) harmful or offensive contact. You must have actually perceived the imminent contact (so, e.g., if you're approached from behind, that's not assault). Assault usually comes up only in two contexts: (1) assault that precedes a completed battery, (2) assault because the battery failed.
   a) **Imminence:** the Df. must have had the present capability to carry out the threat; but the question is whether the Pf. had a basis for apprehension (so, e.g., if Df. had an unloaded gun but Pf. didn't know that, that's assault). Words alone are not enough.
   b) **Apprehension:** this does not mean "apprehensive"--fear is not required. Still, Pf. must have had a well-founded belief that there was harmful or offensive contact was imminent.
   c) **Conditioned threats:** these are still assaults (so, e.g., if Df. says "give me $20 or I'll brain you," that's assault).
3. **False imprisonment:** an invasion of your right to move around. Pf. must be (1) completely confined and (2) conscious of that.
   a) **Complete confinement:** e.g., physical barriers, force or threat of force directed at Pf. or his family, friends, or property. Omissions might be enough in some situations (e.g., A takes B out on a boat, telling her he'll bring her back whenever she wants; if A won't take B ashore when she wants, that might be false imprisonment). However, moral pressure is not enough--but note that the line between force and moral persuasion is a pretty thin one.
   b) **Consciousness:** so, e.g., if Pf. was asleep throughout the entire confinement, and finds out about it later, that's not false imprisonment.
   c) **False arrest:** an special type of invasion of your right to move around. Pf. is falsely arrested as soon as he's (1) touched by Df. claiming to (2) arrest with (3) legal authority. Most false arrest suits are about whether the Df. was privileged to arrest or not.
4. **Outrage:** an invasion of your right to not be emotionally hurt. Pf. must suffer (1) severe emotional injury as a result of Df.'s (2) extreme and outrageous conduct. Pf. need not show apprehension of any physical contract--words are enough (unlike in assault). Df.'s identity can play a role in determining the outrageousness of his conduct (e.g., if Df. is engaged in a public calling, the outrageousness threshold might be significantly lower than otherwise).

C. Privileges

1. **Consent:** sometimes, Pf. was willing for the conduct to occur--i.e., he consented to it.
   a) **Express consent:** an objective standard is used in determining consent (so, e.g., although an unconscious Pf. who was rescued by Df. probably didn't consent, he probably didn't object either--but a reasonable person would have consented). Also, the Pf.'s consent (like the Df.'s intent) only has to go to the invasion of the interest, not the harm.

b) Implied consent: the courts will imply consent in many situations (e.g., jostling on the subway).

2. Nonconsensual privileges

a) Conditional privileges: these are based on the interest meant to be protected. Df. will sometimes be protected--only if he meets certain conditions.

(1) Self-defense: you may use reasonable force to defend yourself. The central idea is reciprocity. The restatement outlines two contexts of self-defense, each with its own set of rules: (1) situations where the force used against you is likely to cause death or serious harm, and (2) all the other situations where force is used against you.

(2) Defense of property or other people: this is approximately the same as self-defense--you may use reasonable force to defend your property and other people.

(3) Private necessity: ordinarily, the Df. will bear the loss (so, usually, this isn't a privilege).

b) Absolute privileges: these are based on the status of the Df. Df. will always be privileged to commit certain torts in specific situations.

(1) Public necessity: the private person who's harmed when something is done for public necessity will always bear the loss (e.g., if the city dynamites Pf.'s house in order to prevent the spread of fire).

IV. Torts against property

A. Trespass: an invasion of your exclusive possession of your land.

B. Nuisance: an invasion of your use and enjoyment of your land.

1. Three approaches to the nuisance problem

a) The libertarian (propertarian) approach: protect private property in all cases by granting injunction against nuisances.

b) The communist (utilitarian) approach: balance the costs and benefits of allowing the conduct, and if the benefits outweigh the costs, allow it to continue.

c) The moderate (law and economics) approach: balance the costs and benefits of possible remedies and select one of them or synthesize a hybrid of them. This is the Restatement 2d's approach.

(1) Cases

(a) *Boomer* ():

V. Ultrahazardous activities

A. Cases

1. ***Rylands v. Fletcher*:** if you (1) bring something on your land that (2) poses an extraordinary (i.e., nonnatural) harm, and (2) it escapes an causes harm, then you're subject to strict liability.

a) Court of Exchequer: Df. wins--the court says water is like wagons, where there is no liability without fault.

b) Exchequer chamber: Pf. wins--the court says water is like animals, where there is strict liability. In other words, if you bring something on your land and it escapes and causes injury, you're subject to strict liability. Water is like animals because (1) it is not naturally present, (2) it is not ordinarily unlawful to keep, and

(3) there is a small but significant probability of it getting loose. It is not like wagons because in collision cases, Pfs. assume the risk.

(1) Defenses: Df. can defeat his liability if either (a) the Pf. was at fault, or (b) an "act of God" caused the problem.

c) House of Lords: Pf. wins. The court follows the holding of the Exchequer Chamber, but adds a confusion: a line between natural risks (no liability without fault) and nonnatural risks (strict liability if harm occurs).

2. *Dunham* ():

3. *Koos* ():

VI. Products liability

A. History

1. The first revolution--privity to negligence: this revolution tracks the rise of industrialization (from hand-made to mass-produced) and advertising (from face-to-face representations to public representations). The courts fight two dichotomies: (1) privity versus no privity, and (2) inherent danger versus not inherent danger.

a) *Langridge v. Levy* (Eng. 1837): defective gun. The court opens a tiny exception to the no-privity rule--intentional misrepresentation.

b) *Winterbottom v. Wright* (Eng. 1842): wagon wheel. The court denies recovery because no privity, no fraud. It suggests two other exceptions to the no-privity rule, though: public duty and public nuisance.

c) *Longmeid v. Holliday* (Eng. 1851): exploding lantern. The court suggests two exceptions to the no-privity rule: assumed duty (like the doctor and the apothecary) and "in its nature dangerous" products (like guns). It notes, however, that latent defects of things that are not in their nature dangerous will not fall in the exception.

d) *Thomas v. Winchester* (N.Y. 1852): mislabeled poison. The court redefines "in its nature dangerous" to "imminently dangerous"--something that has a ring of "forseeability" to it.

e) *Loop v. Litchfield* (N.Y. 1870): lent machine. The court steps back from the *Thomas* "imminently dangerous" exception--retreating to "in its nature dangerous." It's worried about what *Thomas* could lead to.

f) *Devlin v. Smith* (N.Y. 1882): scaffolding. The court goes back to the "imminently dangerous" doctrine, and even farther; it focuses now not on the product, but the defect itself--does the defect make the product imminently dangerous? If so, third parties can be liable.

g) *Torgesen v. Schultz* (N.Y. 1908): exploding bottle. The court outlines the growing "danger" exception to the no-privity rule: if you are in the business of manufacturing products that are either (a) in their nature dangerous or (b) such that defects could make them dangerous, then you have a duty to either (a) warn the potential user or (b) prevent harm to the potential user by using reasonable care.

h) *MacPherson v. Buick Motor Co.* (N.Y. 1916): auto wheel. The court selects *Thomas*'s "imminently dangerous" exception as the general rule, instead of the no-privity requirement; it then looks at all the prior cases and resynthesizes them to point towards negligence; finally, it selects *Heaven,* a recent English case

employing negligence, as the new general rule. The court ultimately holds that if the manufacturer (1) knows that the product will be used by someone other than who they've contracted with and (2) knows that the product will be used without further testing, then parties out of privity may recover for harm caused by the product.

2. **The second revolution: negligence to strict liability:** the courts start with a negligence standard, start pulling strict liability ideas in from contract law, and eventually end up with an independent strict liability doctrine exclusively in tort law.
   - **a)** *MacPherson v. Buick Motor Co.* (N.Y. 1916): auto wheel. The case that sets up negligence as the general rule in products liability situations.
   - **b)** *Escola v. Coca Cola Bottling Co.* (Cal. 1944): exploding Coke bottle. The majority employs a very lenient negligence analysis to allow Pf. to recover. The important part, though, is Traynor's dissent; like Cardozo in *MacPherson*, he takes the prior cases and resynthesizes them to point towards strict liability; he argues that strict liability for defective products is good for two reasons: (1) it solves Pf.'s proof problems (which the majority here worked hard to see past), (2) it's good public policy (loss spreading, better cost-avoider and risk-bearer, deterrence of bad products, ethics, changing times). Essentially, Traynor wants to import the warranty idea from contract into torts.
   - **c)** *Henningsen v. Bloomfield Motors, Inc.* (N.J. 1960): defective auto. The court straddles the line between contracts and torts to allow Pf. to recover--it looks to an "implied warranty" (merchantability) and includes advertising campaigns in the Df.'s express warranties.
   - **d)** *Greenman v. Yuba Power Products, Inc.* (Cal. 1962): defective Shopsmith. The court drags warranty entirely into torts--it finds express warranties in Df.'s ads, brochures, and user manuals, and says these warranties arise in tort and so Pf. need not notify Df. of their breach. Ultimately, the court abandons Df.'s warranty language and holds it to strict liability in tort. The court holds that Pf. can recover as long as he can show that the manufacturer (1) placed an article on the market (2) that is defective and (3) physically injures a human being, (4) knowing that it would be used without inspection for defects.

B. Theories

1. **Fault-based theories**
   - **a) Fraud:** fraud has a bunch of elements because courts don't like it much.
     - **(1)** A representation
     - **(2)** that's false
     - **(3)** and material;
     - **(4)** the speaker must either (a) know it was false, or (b) be ignorant wrt. its truth;
     - **(5)** the speaker must have intended that the hearer act on the representation in a way "reasonably contemplated";
     - **(6)** the hearer must be ignorant of the representation's falsity
     - **(7)** and rely on its truth,
     - **(8)** and have a right to rely on it.
     - **(9)** And the hearer must suffer causally related injury.
   - **b) Negligence**

2. No-fault theories

a) Strict liability in tort

(1) 402A (standard SLiT)

Comment: (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engages in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

CAVEAT: no opinion as to whether this may not apply
(1) to harm to persons other than users or consumers;
(2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the consumer; or
(3) to the seller of a component of a product to be assembled.

(a) Who: sellers who are in the business of selling the product in question.

(b) Whom: users and consumers. It doesn't matter if they didn't buy the product from or have a contract with the seller.

(c) What: (1) defective products that are (2) unreasonably dangerous to their users, <u>if</u> they are (3) expected to and (4) actually do reach the user without substantial change in condition.

- **i) Modern trend:** many jurisdictions have dropped the "unreasonably dangerous" requirement.

(d) Consequences: the seller is strictly liable if the product <u>physically</u> harms the user.

(e) Disclaimers: you have to use specific language to exclude or modify the IWoM: "merchantability" must be mentioned, and if the disclaimer is in writing, the disclaimer must be conspicuous. But remember that things like "as is" always work; and that if the buyer examined or refused to examine the goods, the IWoM doesn't extend to what he should have found.

(f) Idaho: the 402A-like theory in Idaho has four elements: (1) Df. must be a merchant wrt. the product involved; (2) the product, when it left Df.'s hands, must have been (a) defective and (b) unreasonably dangerous to people or property; (3) causation; (4) damages.

(2) 402B (misrepresentation SLiT)

Comment: One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though
(a) it is not made fraudulently or negligently, and
(b) the consumer has not bought the chattel from or entered into any contractual relation

with the seller.

CAVEAT: no opinion as to whether this may apply either
(1) where the representation is not made to the public, but to an individual, or
(2) where physical harm is caused to one who is not a consumer of the chattel.

(a) Who: sellers who are in the business of selling chattels.

(b) Whom: consumers. It doesn't matter if they didn't buy the product from or have a contract with the seller.

(c) What: a (1) misrepresentation of (2) material fact (3) about the character or quality of the chattel that the consumer. The misrepresentation can be made in advertising, on labels, or otherwise; and it doesn't matter if it wasn't made fraudulently or negligently.

(d) Consequences: the seller is strictly liable for any physical harm caused to the user by justifiable reliance on the misrepresentation.

(e) Disclaimers: you can use general language to exclude or modify the IWoF, but the disclaimer must be in writing and conspicuous. (E.g., "There are no warranties which extend beyond the description on the face hereof" will do to disclaim the IWoF, whereas that wouldn't be enough to disclaim the IWoM.) But remember that things like "as is" always work; and that if the buyer examined or refused to examine the goods, the IWoM doesn't extend to what he should have found.

b) Strict liability in contract

(1) Express warranties

(a) Who: sellers.

(b) Whom: buyers.

(c) What: there are three kinds of express warranties.

i) Affirmations: any (1) affirmation of fact or promise that (2) relates to the goods and (3) becomes part of the basis of the bargain.

ii) Descriptions: any (1) description of the goods that (2) becomes part of the basis of the bargain.

iii) Samples: any (1) sample or model that (2) becomes part of the basis of the bargain.

(d) Consequences: the seller is strictly liable if the goods don't conform to the express warranty.

(2) Implied warranty of merchantability

(a) Who: sellers who a merchants of the kind of goods in question.

(b) Whom: buyers.

(c) What: an implied warranty that goes with every sale--the goods must be merchantable.

i) They must pass without objection in the trade.

ii) They must be of fair average quality.

iii) They must be fit for the ordinary purposes that kind of goods is used for.

iv) They must be of even kind, quality, and quantity.

v) They must be adequately contained, packaged, and labeled.

vi) They must conform to the promises or affirmations of fact made on the container.

(d) Consequences: the seller is strictly liable if the goods aren't merchantable.

(3) Implied warranty of fitness

(a) Who: sellers who have a reason to know (1) any particular purpose that the goods are going to be used for and (2) that the buyer is relying on the their skill or judgment about getting the right goods.

(b) Whom: buyers.

(c) What: an implied warranty that goes with every sale--the goods must be fit for the particular purpose the seller has a reason to know about.

(d) Consequences: the seller is strictly liable if the goods aren't fit for the purpose.

C. Defects

1. Manufacturing defects: a product is defective if it's aberrational.

2. Design defects: a product is defective if it's like it was intended but should have been designed differently.

a) *Self*-type design defects: the gas tank case. These are design defects because the product would be too unsafe no matter how it was designed. The evaluative standard used here is: "ex post, was the design decision an excessive, preventable danger?"

b) *Buccery*-type design defects: the headrest case. These are design defects because something could be changed to make the product safe without adding any risk. The evaluative standard used here is: "is this too unsafe to the ordinary consumer?"

c) Design tradeoffs: a risk/utility comparison standard is appropriate here. Custom and state of the art may be probative. Evidence that the product was state of the art is <u>not</u> conclusive on liability, though--the product could have very little utility or very high risk; the jury gets to determine that.

3. Failure to warn: a product is defective it it does not include sufficient warnings or instructions.

a) Cases

(1) *Borel*: the seller must warn of all defects either (1) reasonably forseeable or (2) scientifically knowable. This is kind of like a negligence standard--the court imposes a duty on the manufacturer to keep up with scientific advances and otherwise be an expert on its products. That is, if the product is as safe as it can be, the manufacturer must warn.

(2) *Beshada*: if a warning would have made the product safer while maintaining its utility, the manufacturer must warn. So, the court, essentially, holds the manufacturer liable for not warning about things it couldn't know about--this is a market-based solution, looking to the best cost-avoider to bear the loss and to simplify the fact-finding process for the jury.

D. Parties

1. Manufacturers

2. **Assemblers**
3. **Retailers**
4. **Purchasers**
5. **Bystanders**
6. **Others**

E. Defenses

1. **Plaintiff's conduct**
   a) **Contributory/comparative fault**
      (1) Negligence
      (2) IPLRA: if the claimant knew of the defect, or if it was open and obvious, then comparative fault is a general defense to products liability claims.
   b) **Misuse**
      (1) Negligence
      (2) SLiT
   c) **Assumption of risk:** in products liability actions, the assumption defense has three elements: claimant must have (1) knowingly and (2) voluntarily made an (3) unreasonable decision to use the product despite the risk. There's a small exception for employees--courts recognize that there is always a degree of compulsion in employment situations, so sometimes it's reasonable for an employee to continue working in unsafe conditions.
      (1) Intentional torts
      (2) Negligence
      (3) SLiT
      (4) SLiK
2. **Defendant's conduct**
   a) **Disclaimers**
      (1) Cases
         (a) ***Clark v. International Harvester***
         (b) ***Idaho Power*****:** the court holds that (1) conflicting contract terms will not cancel unless there is a direct conflict, and (2) corporate parties above the "purchaser" level will be limited to their contract remedies--the should not be allowed to avail themselves of tort remedies, due to their status.
         (c) ***Steiner*****:** freedom of contract prevails to permit warranty disclaimers except in two cases: (1) where there are obvious bargaining inequalities, or (2) where there is a public duty involved.
   b) **Warnings**
      (1) Cases
         (a) ***Solna Corp.*****:** the court rejects Pf.'s adequate warnings defense for two reasons: (1) even if the warnings had been better, it wouldn't have helped the Pf., and (2) the adequacy of warnings is a question for the jury to decide.

F. The Idaho Products Liability Reform Act

1. **6-1401, Scope:** IPLRA modifies existing Idaho PL law "only to the extent set forth

in this act."

2. **6-1402, Definitions**
   a) **Product seller:** anybody in the business of selling products. It doesn't matter if they're selling them for resale or for consumption--manufacturers, wholesalers, distributors, and retailers are all product sellers. So are people in the business of leasing and bailing products.
      (1) Who is <u>not</u> a product seller: (1) people who provide services, even though they utilize or sell products within the scope of their services; (2) people who are in the business of selling used products (that are in essentially the same condition as when they were acquired); and (3) finance lessors.
   b) **Manufacturer:** any product seller who designs, produces, makes, fabricates, constructs, or remanufactures products before their sale to consumers. Also, if you hold yourself out as a manufacturer, you're a manufacturer. You <u>can</u> be a manufacturer only in part--to the extent that you design, produce, etc., the product, but not in other respects.
   c) **Product:** any object (1) of intrinsic value (2) capable of delivery as a whole or in component parts, that's (3) produced for introduction into commerce.
      (1) What is <u>not</u> a product: human tissue, organs, and blood are not products.
   d) **Claimant:** anybody asserting a products liability claim.
   e) **Reasonably anticipated conduct:** the conduct that would be expected of (1) an ordinary reasonably prudent person who is (2) likely to use the product (3) in the same or similar circumstances.
3. **6-1403, Length of time product sellers are subject to liability:** ordinarily, a product seller isn't liable for harm caused after the product's "useful safe life"--the "useful safe life" runs from delivery to the first consumer onwards, for as long as the product would normally be likely to perform or be stored safely. However, if the product seller warrants the product beyond the useful safe life, he might be liable beyond the useful safe life.
   a) **Useful safe life is presumed to be 10 years:** ordinarily, if the harm was caused more than 10 years after delivery to the first consumer, the court will presume it occurred after the useful safe life; there are five exceptions though. (Also note that this presumption doesn't affect the ability to seek contribution or indemnity from another responsible party.)
      (1) <u>Warranty beyond 10 years</u>: if the product seller warranted safety for more than 10 years, the USL presumption will be for the warranted period.
      (2) <u>Intentional misrepresentation</u>: there will be no 10 year USL presumption if the product seller intentionally misrepresented the product or concealed information about it.
      (3) <u>Prolonged exposure</u>: there will be no 10 year USL presumption if the harm was caused by prolonged exposure to the product.
      (4) <u>No discoverable in 10 years</u>: there will be no 10 year USL presumption if the defect wasn't discoverable by an ordinary reasonably prudent person within 10 years of delivery to the first consumer.
      (5) <u>Manifestation of harm after 10 years</u>: there will be no 10 year USL presumption if the harm was caused before 10 years but didn't manifest itself

until after 10 years.

b) Statute of limitations: two years from the time the cause of action accrued.

4. **6-1404, Comparative responsibility:** no total bar for comparative fault, unless it was ≥ the other person's; but the damages will be reduced proportionately.
   - **a) 6-1405, Conduct affecting comparative responsibility:** things that do and don't affect the claimant's comparative fault.
     - **(1)** Failure to inspect: does not affect claimant's comparative fault. It doesn't matter whether he didn't inspect or a nonclaimant didn't inspect--neither is required to inspect for defects.
     - **(2)** Failure to observe: this does affect claimant's comparative fault, but only if Df. can show that the claimant didn't observe a defective condition that would have been obvious to an ordinary reasonably prudent person.
     - **(3)** Knowledge of defect: this does affect claimant's comparative fault, but only if Df. can show that the claimant voluntarily used or assumed the risk of the product, knowing about the defect. If a nonclaimant voluntarily and unreasonably used the product, knowing about the defect, the claimant's damages will be apportioned.
     - **(4)** Misuse: this does affect claimant's comparative fault, but only if Df. can show that the claimant used the product in a way that wouldn't be expected of an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances.
     - **(5)** Alteration: this does affect the claimant's comparative fault, but only if Df. can show that someone modified the product or removed warnings, and that that modification proximately caused the harm. But, this doesn't apply if either (1) the modification was per the instructions, (2) the seller expressly or implicitly consented to the modification, or (3) the modification was reasonably anticipated conduct.
5. **6-1405, Relevance of custom, standards, and feasibility:** evidence about design changes, warning changes, technological feasibility, and state of the art are not admissible wrt. design or warning defects, unless the court thinks that (1) its probative value outweighs the prejudicial effect of admitting it and (2)there is no other proof available.
6. **6-1407, Non-manufacturers:** non-manufacturers are not liable if (1) they didn't have a reasonable opportunity to inspect the product (in a way that they could reasonably have found the defect) or (2) they acquired the product in a sealed package and sold it that way. There are eight exceptions though.
   - **a)** Knowledge: they are liable if they knew or had reason to know of the defect.
   - **b)** Alteration: they are liable if (1) they altered, modified, or installed the product, (2) that alteration proximately caused the harm, (3) that alteration wasn't authorized by the manufacturer, and (4) that alteration wasn't performed per the manufacturer's specifications.
   - **c)** Provided plans: they are liable if (1) they provided the plans to the manufacturer and (2) the plans were a substantial cause of the defect.
   - **d)** Wholly-owned subsidiary: they are liable if they are a wholly-owned subsidiary of the manufacturer.

e) Sold after expiration: they are liable if they sold the product after the expiration date put on the product by the manufacturer.

f) Manufacturer is judgment-proof: they are liable if the manufacturer is (1) not subject to service, (2) declared insolvent, or (3) it's highly unlikely that the claimant could enforce a judgment against it.

7. **6-1408, Amount of recovery:** no dollar amount should be in the complaint--the claimant just prays for reasonable damages.