

# Review

# In-Class Exercise

You are a wise federal trial judge with experience managing multidistrict litigation for toxic harms. Policymakers are considering establishing a compensation fund for victims of toxic harms. You have been asked to advise the group that is drafting the proposal.

Here are some features of the current plan. To receive compensation, the plaintiff must prove that she was sufficiently exposed to a toxic substance such that the toxic substance could have caused her injury. If there are multiple possible defendants, the plaintiff is not required to prove which defendants are responsible for her injuries. The plaintiff is not required to prove that the defendant was at fault. The plaintiff can receive unlimited compensation for medical expenses (including medical monitoring) in installments over time, but the plaintiff cannot be compensated for other losses. If the plaintiff receives compensation from this fund, the plaintiff is barred from pursuing any common law tort action related to the injury.

What are the strengths and weaknesses of this plan? What are your suggestions for revision?

# Torts Speedrun

# Damages

# Compensatory Damages

To restore the plaintiff to the position they were in before the accident occurred.

Two types:

- Economic / Pecuniary
- Noneconomic / Nonpecuniary

# When are damages excessive?

When they “shock the conscience”

- passion
- prejudice
- whim
- caprice

# Single Judgment Rule

# Punitive Damages

Due process issues:

- proportionality
- notice
- actions, not identity of defendant

*BMW v. Gore* Guideposts

- reprehensibility
- disparity between harm and punitive damages awards
- difference between punitive damages and civil penalties

*State Farm*

In general, should not have more than a single digit ratio of compensatory to punitive damages



# How much does each defendant pay?

Order of operations (after establishing multiple liable defendants)

## **First step:**

Separate injuries based on factual cause (if possible)

## **Second step:**

For injuries that multiple defendants caused, sort out who owes what based on the jurisdictional rules.

# How much does each defendant pay?

## Common Law Approach

Divide up damages by number of liable defendants

Doctrine of contribution:

1. Joint and several liability, or
2. Several liability

# How much does each defendant pay?

## Modern Approach

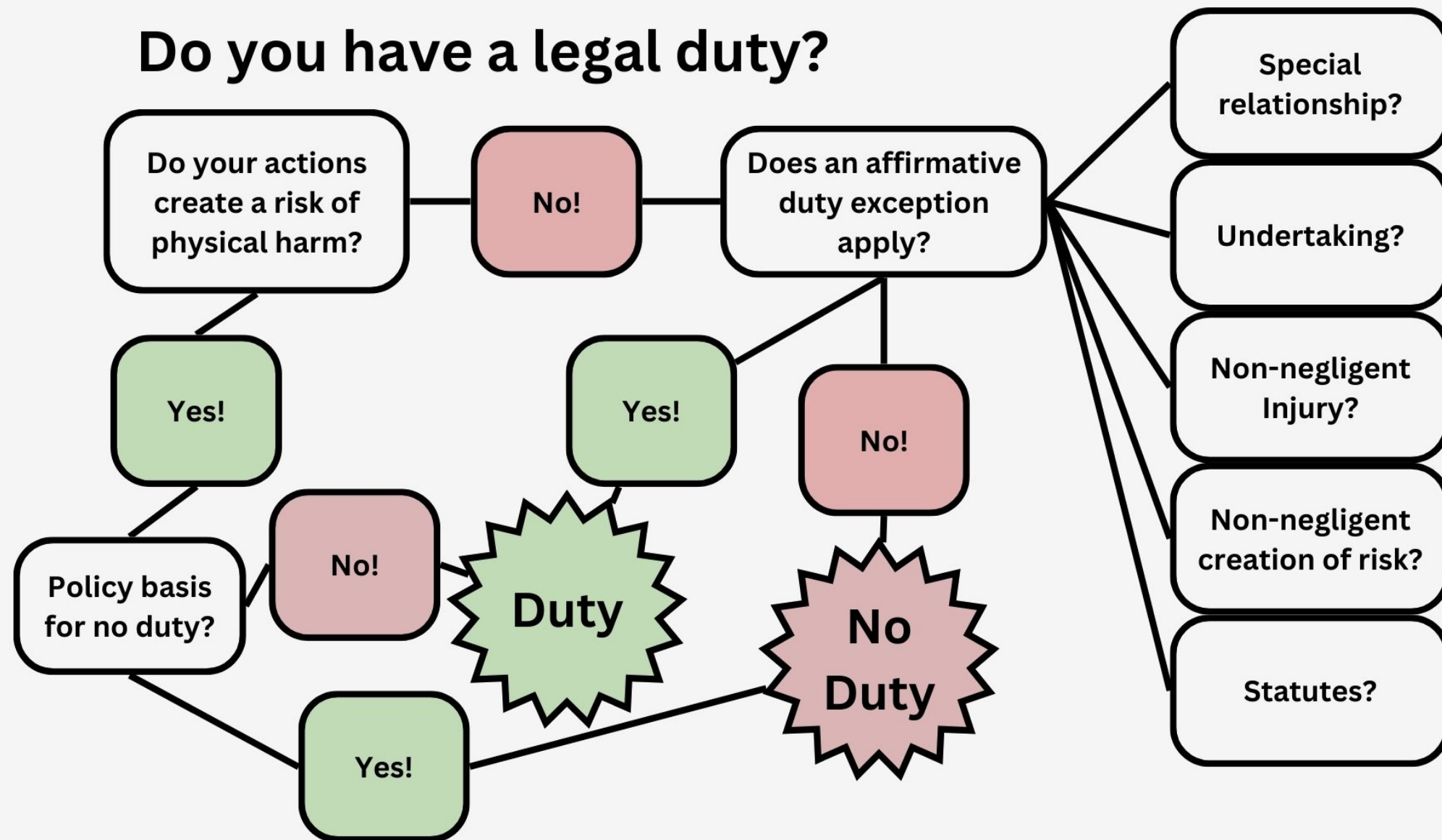
Divide up damages based on comparative fault

Doctrine of contribution:

Variety of rules across jurisdictions, including several liability, joint-and-several liability, and a variety of hybrids.

# Negligence

# Duty



# Landowners and Occupiers

## Traditional view:

### Trespasser

- duty not to intentionally or wantonly cause injury
- *no duty* of reasonable care (with handful of exceptions)

### Licensee

- *no duty* to inspect or discover dangerous conditions
- duty to warn or make known conditions safe

### Invitee

- duty to inspect and discover dangerous conditions
- duty to warn or make conditions safe

# Landowners and Occupiers

**Modern view:**

**Trespasser<sup>1</sup>**

- duty not to intentionally or wantonly cause injury
- *no duty* of reasonable care (with handful of exceptions)

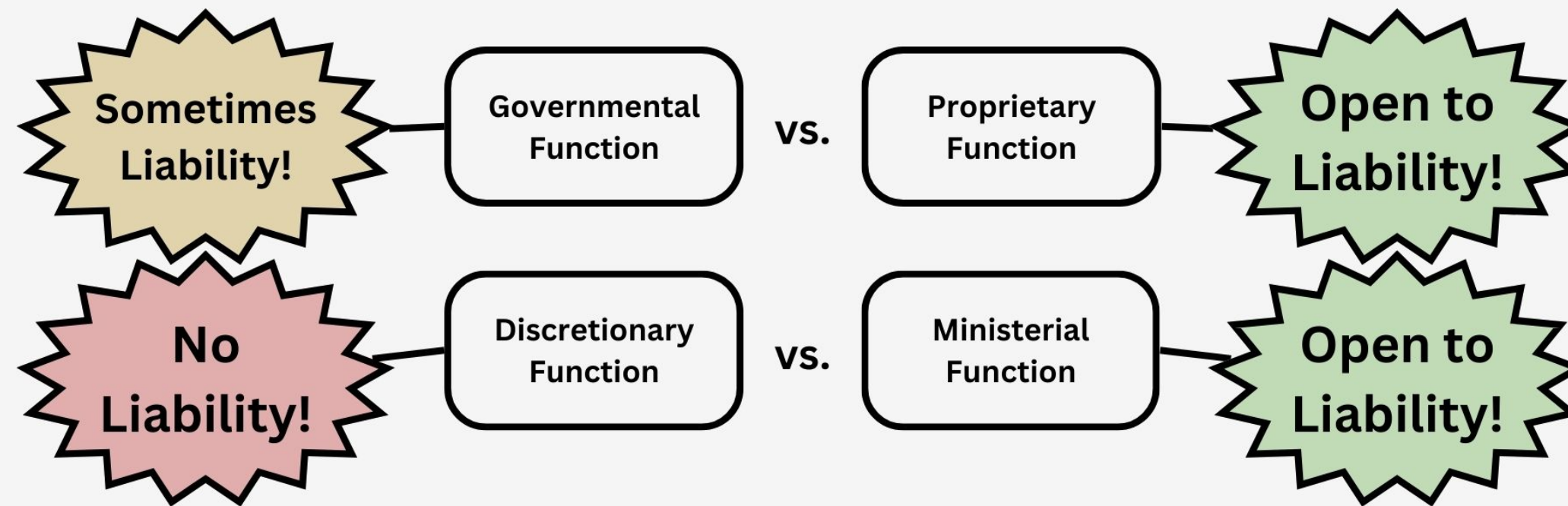
**Everybody Else**

- duty of reasonable care

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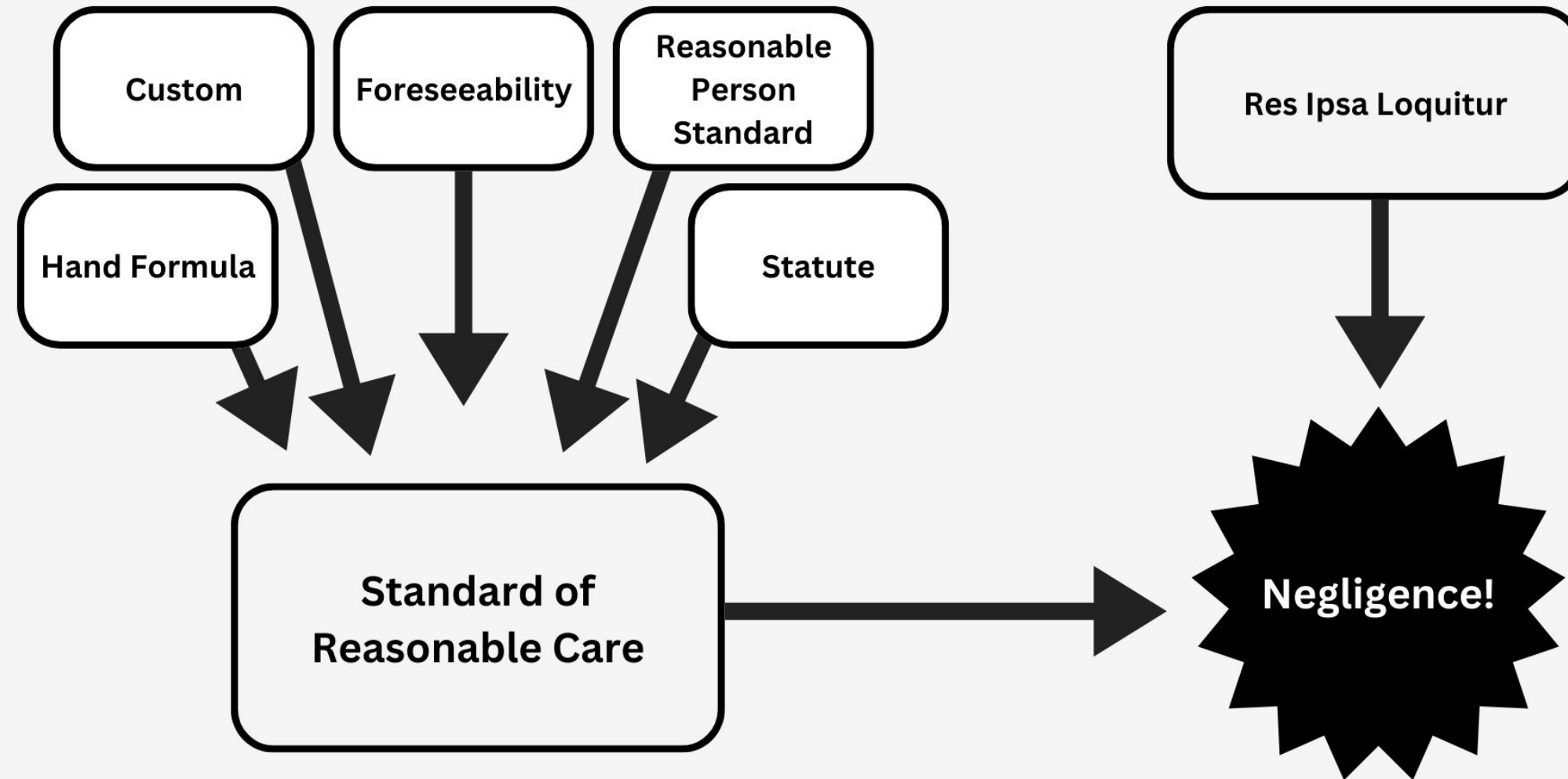
<sup>1</sup> Or in California and the Third Restatement, a “flagrant” trespasser rather than just a plain old trespasser

# Government duties





# Breach



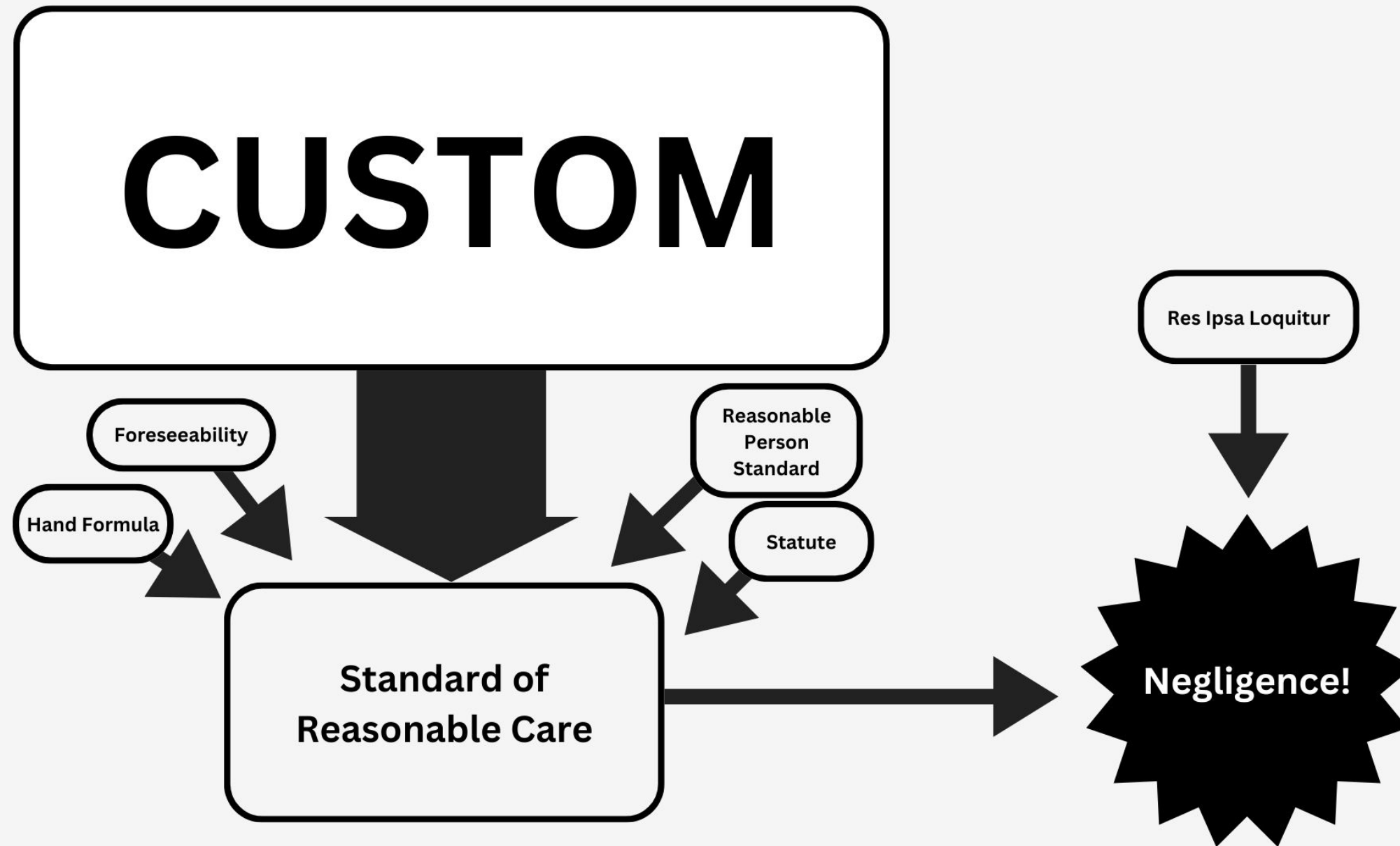
# Proving negligence

Constructive notice

Negligence per se

Res ipsa

# Medical Malpractice



# Causation

# Factual Cause

# Four tricky factual cause scenarios

1. Toxic exposure
2. No idea what happened
3. Know what happened, but don't know that it wouldn't have happened if defendant had behaved reasonably
4. Know what happened, but don't know who to blame

# ***Alternative liability***

# Marketshare liability

Variations:

- size of market
- time of market
- defenses in individual cases
- several or joint-and-several liability



# Proximate Cause

Not about causation

Unexpected harm

Additional harm

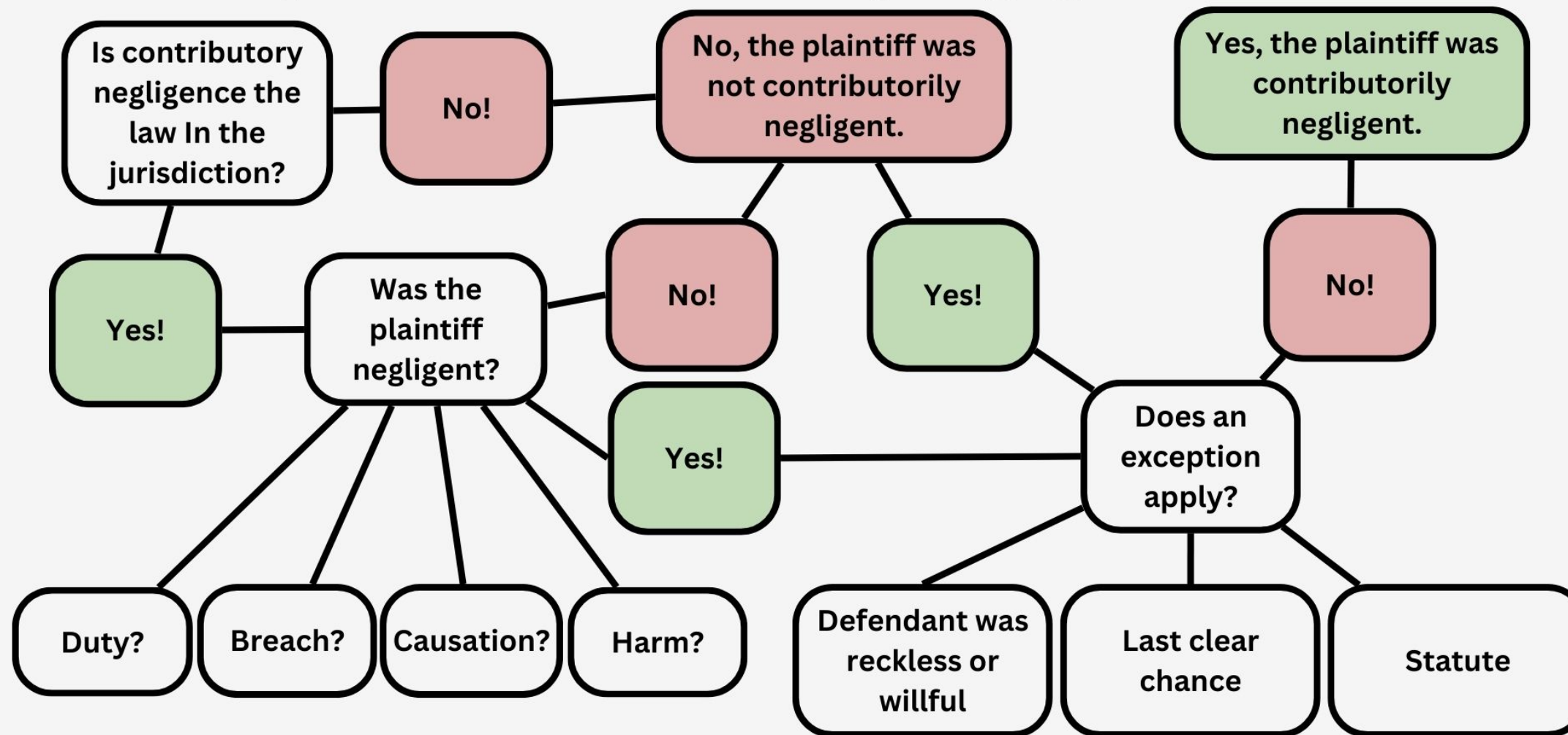
Intervening causes

Unexpected victim

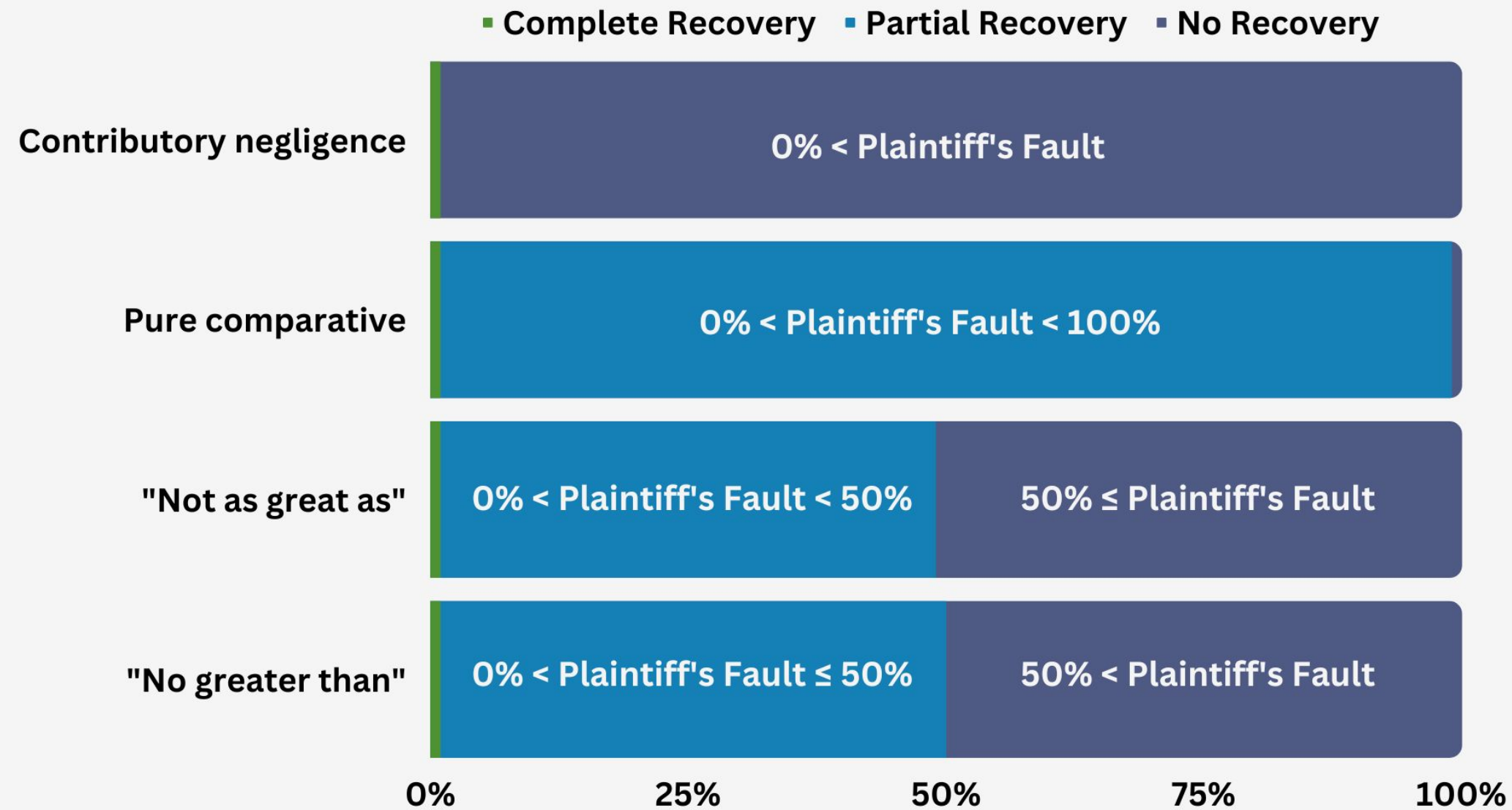
# Defenses to Negligence

# Contributory negligence

## Was the plaintiff contributorily negligent?



# Comparative negligence



# Assumption of Risk

*volenti non fit injuria*

- Explicit / Express
- Implicit
  - Primary
  - Secondary

# Should assumption of risk persist in a comparative fault world?

- Explicit / Express → Duty
- Implicit
  - Primary → Duty
  - Secondary → Comparative Fault

# Strict Liability

- Very dangerous activity that cannot be made safe by exercising reasonable care
- Products

# Products liability

- Manufacturing defect
- Design defect
  - Two tests:
    - 1) Consumer expectations
    - 2) Excessive preventable danger
- Failure to warn



# Defenses

- Contributory and comparative negligence
- Disclaimers and waivers (basically assumption of risk)
- Not a valid defense in most jurisdictions! But a handful do allow it.

# Intentional torts

## Intentional Torts:

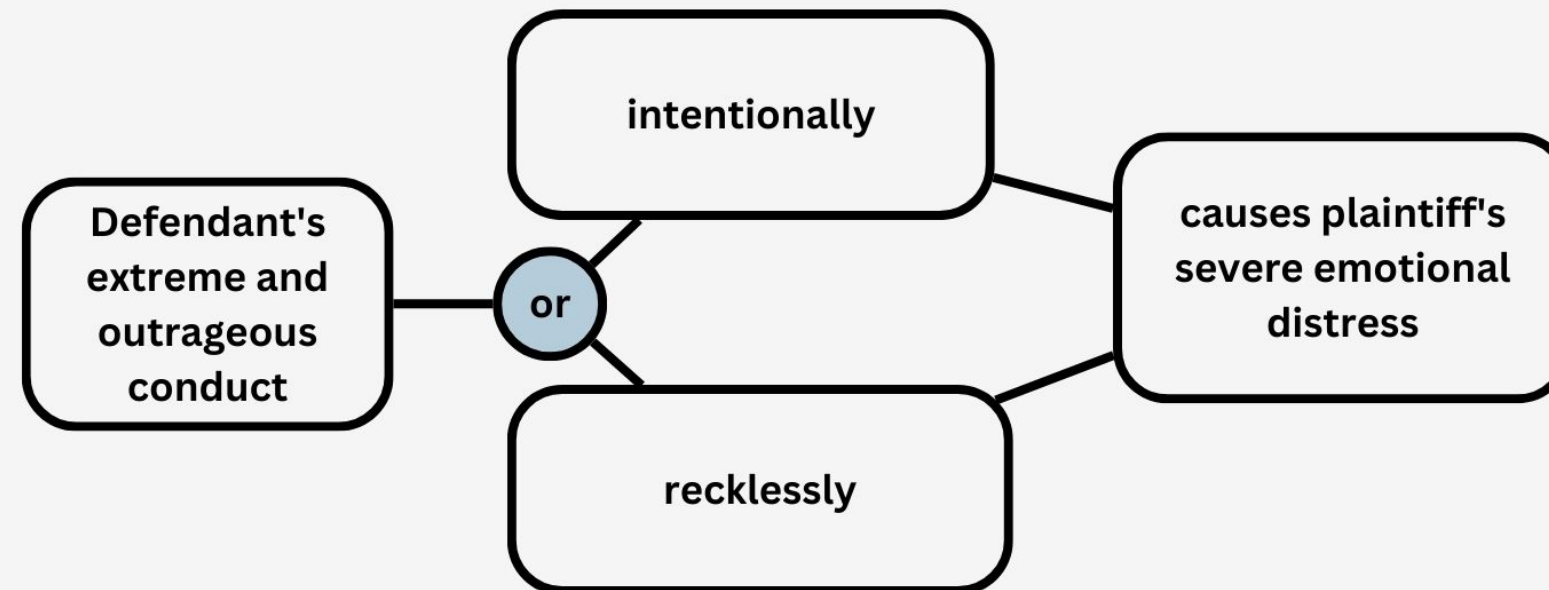
- Battery
- Assault
- False imprisonment
- Intentional infliction of emotional distress

## Defenses:

- Consent
- Self-defense
- Defense of property
- Necessity

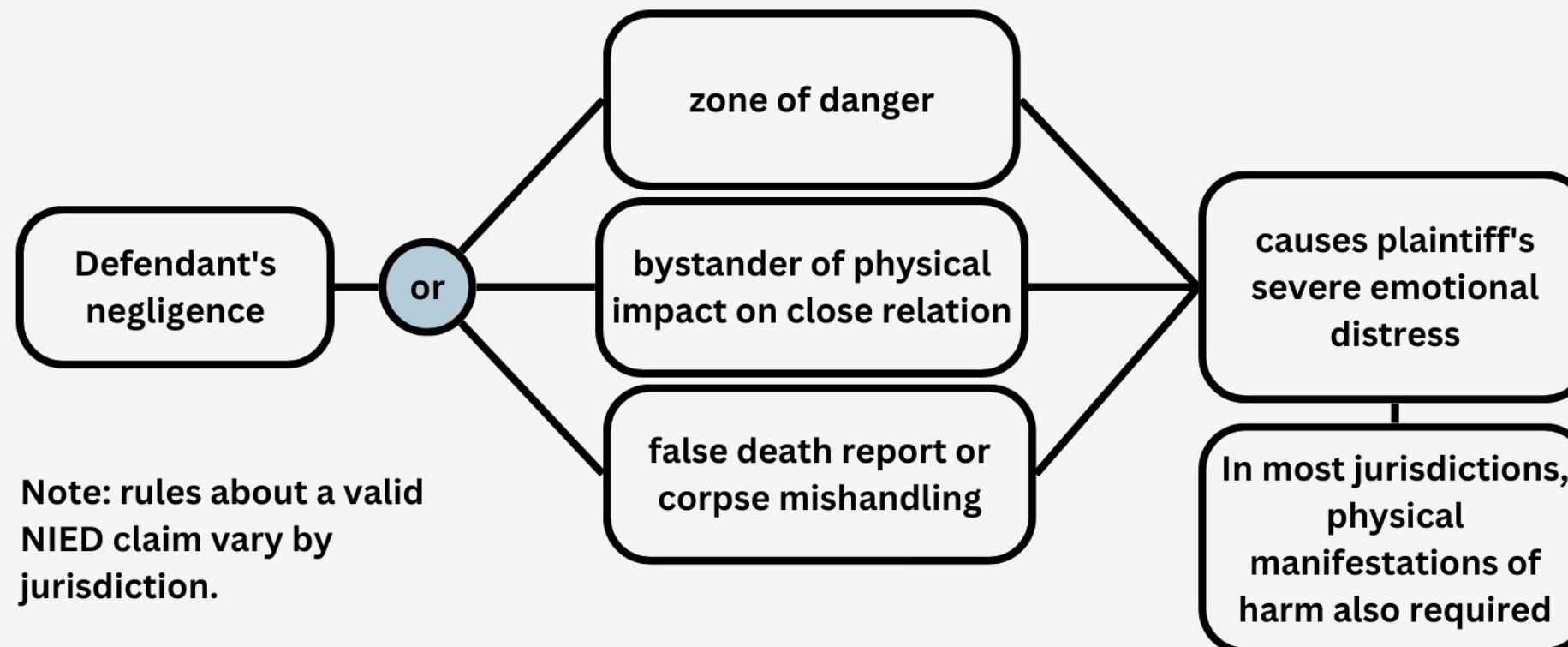
# IIED

## Intentional Infliction of Emotional Distress



# NIED

## Negligent Infliction of Emotional Distress



# Insurance

First party insurance

Third party (liability insurance)

Collateral source rule

Subrogation

# Workers Comp

- No fault
- Exclusive remedy for work-related injuries

Benefits include:

- Medical coverage
- Percent of lost wages
- Vocational rehabilitation
- Survivor benefits

# No-Fault and Beyond

Common features:

- Narrow category of injury
- Reduced fact-finding and proof requirements
- Fixed recovery amounts
- Insurance-like funding rather than individual defendant-to-plaintiff payouts

9-11 fund's unique characteristics:

- created after the harm, not in anticipation of harm
- individualized approach to economic loss
- tort-like awards for noneconomic loss
- low administrative costs

# Big Picture

What is tort law about?

What values should guide this part of our legal system?

--- Corrective justice?

--- Optimal deterrence?

--- Distributive justice?



