

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

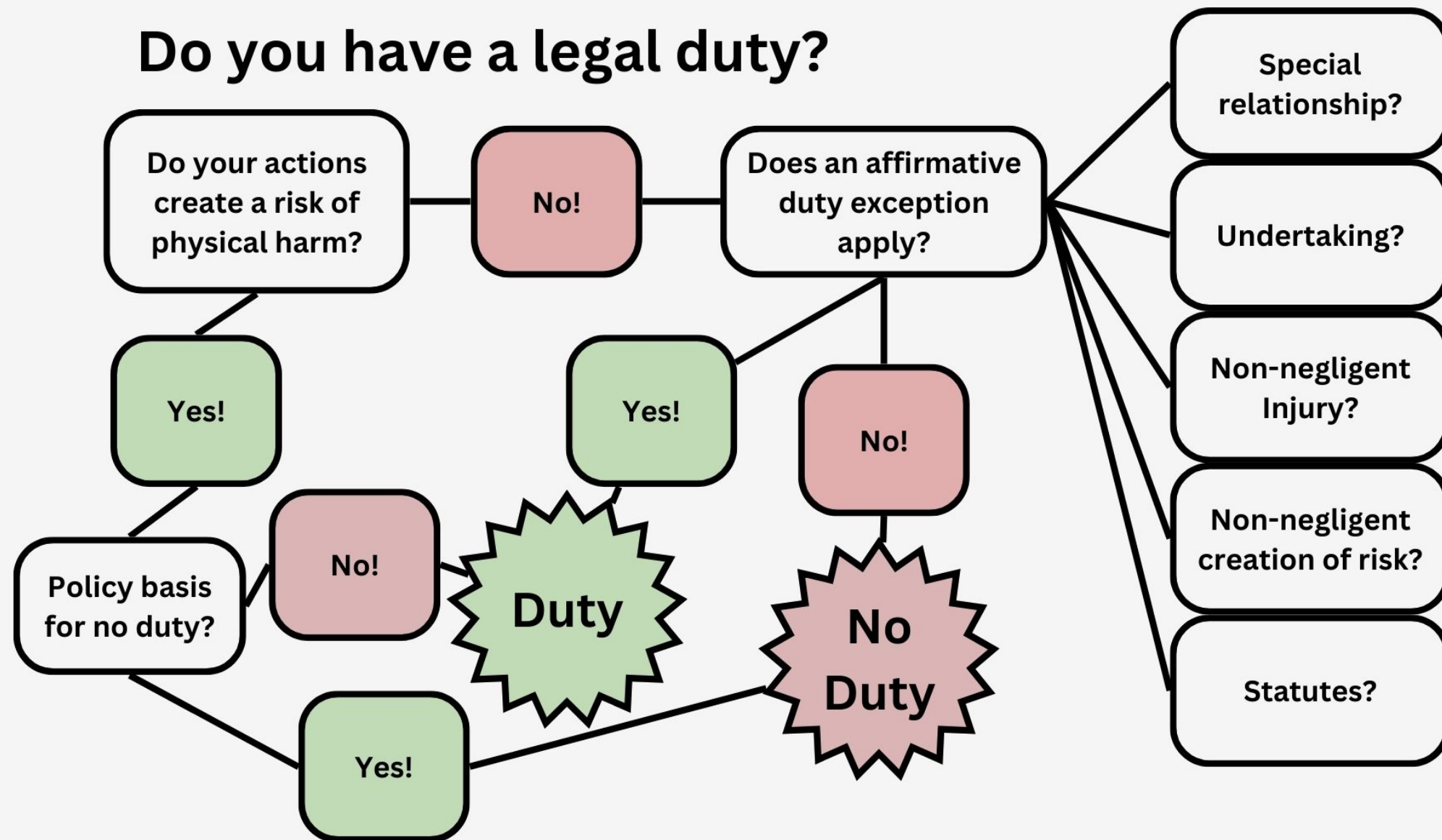
Divide up damages based on comparative fault

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:

Trespasser¹

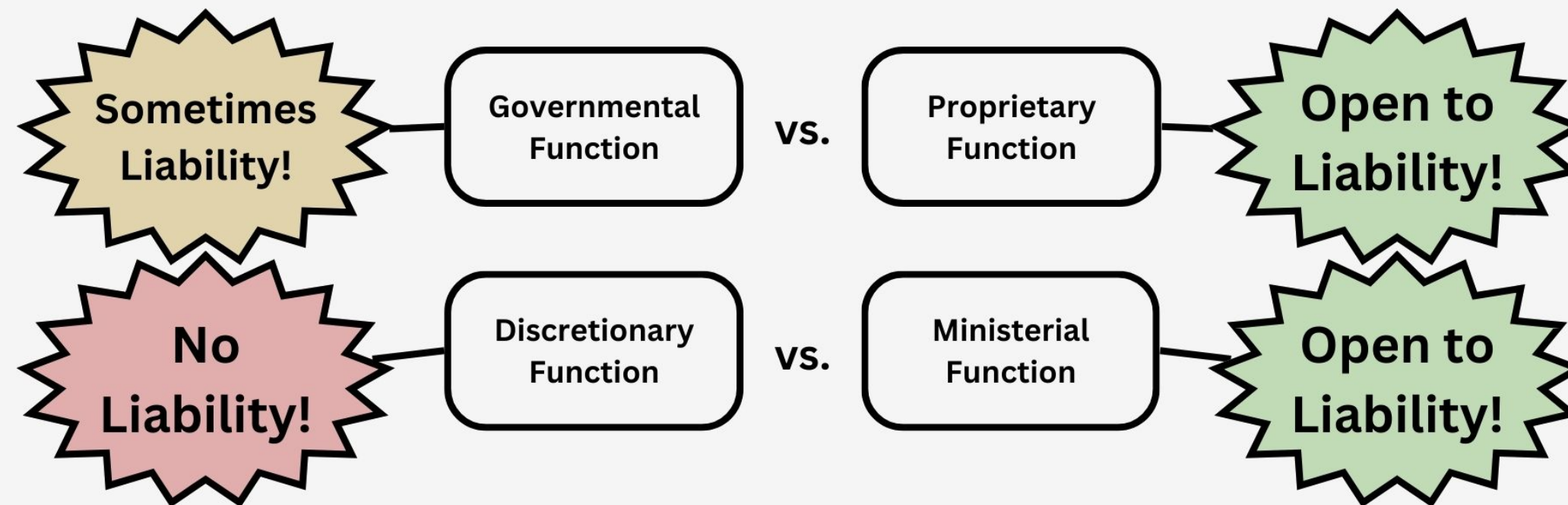
- duty not to intentionally or wantonly cause injury
- *no duty* of reasonable care (with handful of exceptions)

Everybody Else

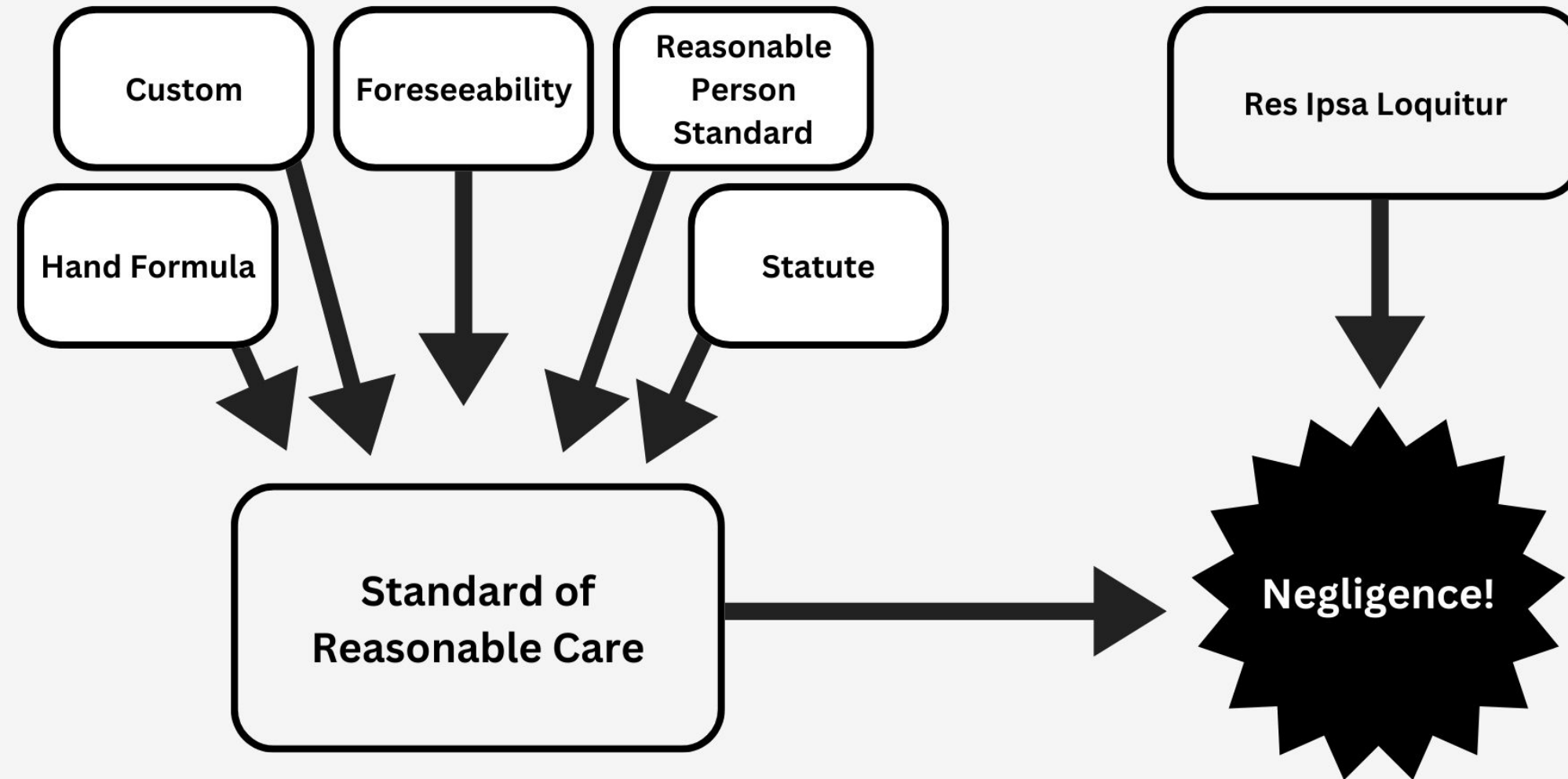
- duty of reasonable care

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

Government duties



Breach



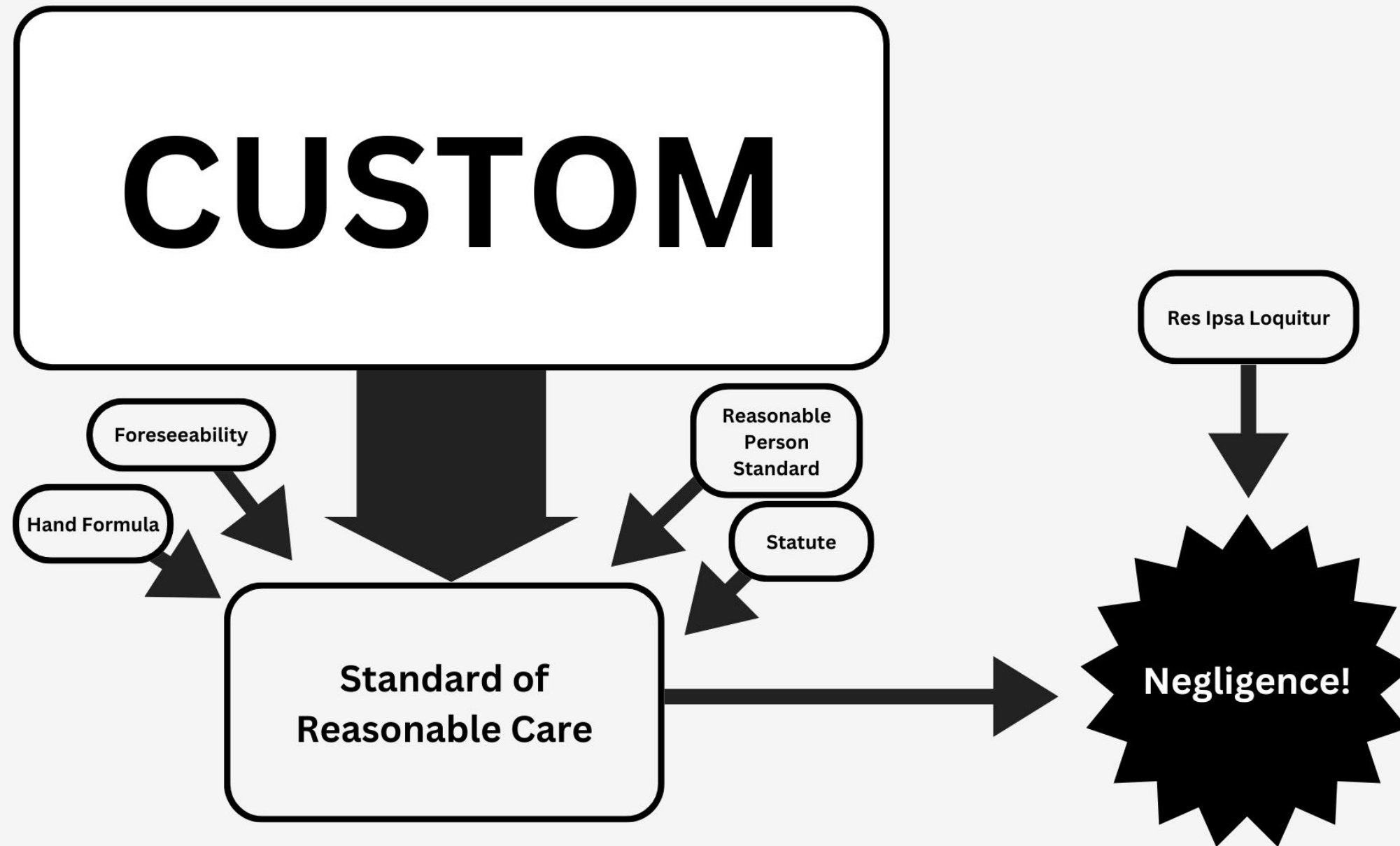
Proving negligence

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

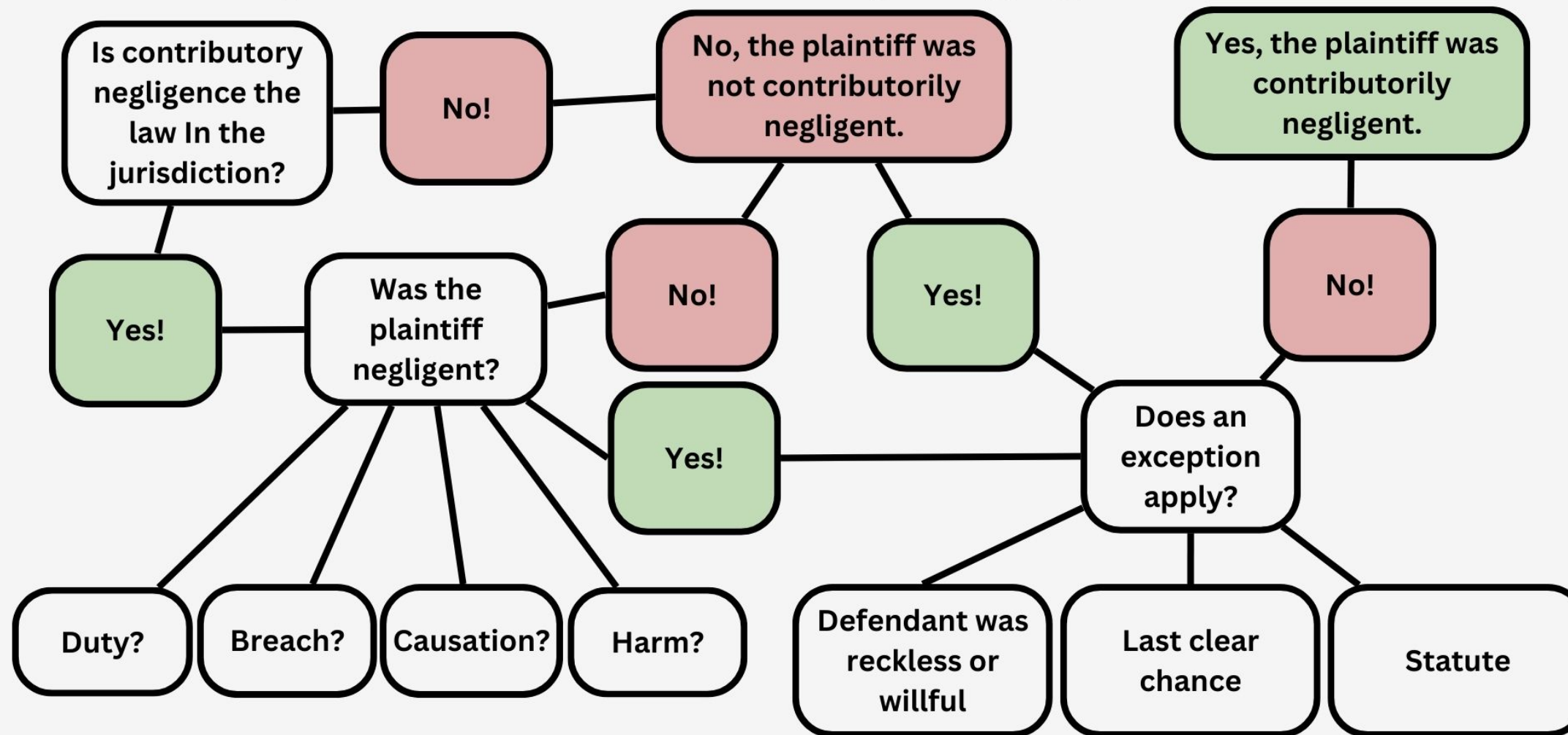
Intervening causes

Unexpected victim

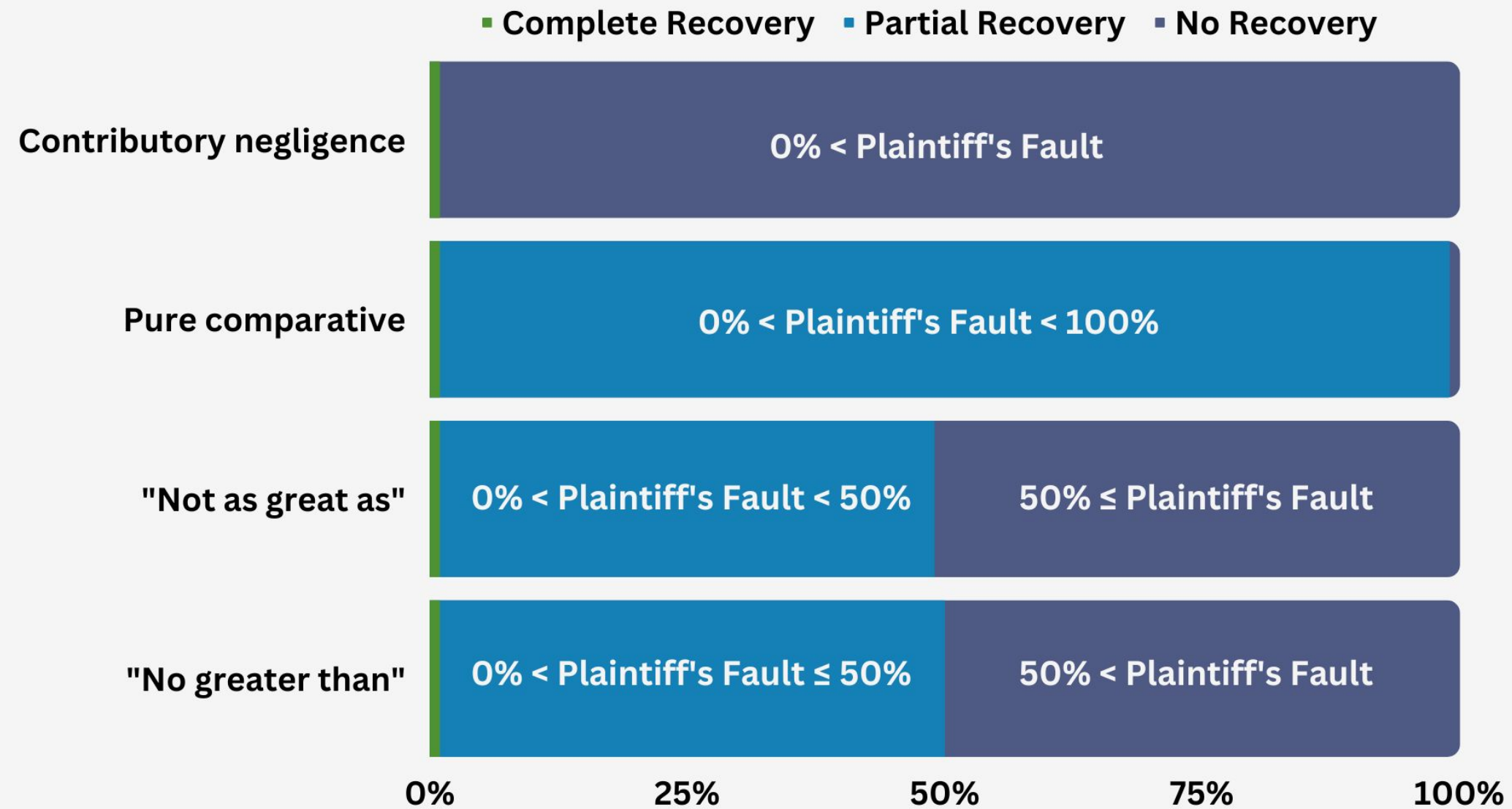
Defenses to Negligence

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

Review (cont'd.)

Logistics

Office hours

Today, in this classroom

11am - ???

Questions over email

I will respond to substantive questions submitted before Wednesday, May 3.

On Wednesday, I will email the whole class my responses to all questions that I have received.

Torts Speedrun

Where we left off last class

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:

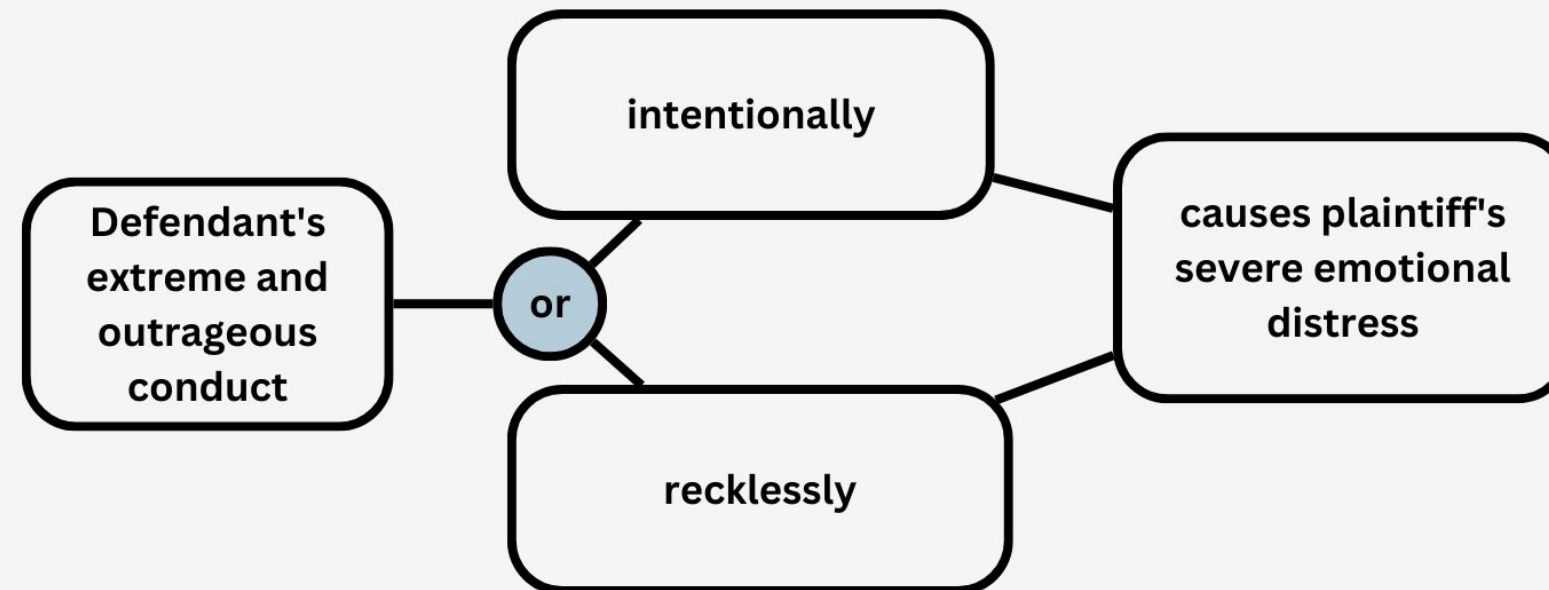
- Battery
- Assault
- False imprisonment
- Intentional infliction of emotional distress

Defenses:

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

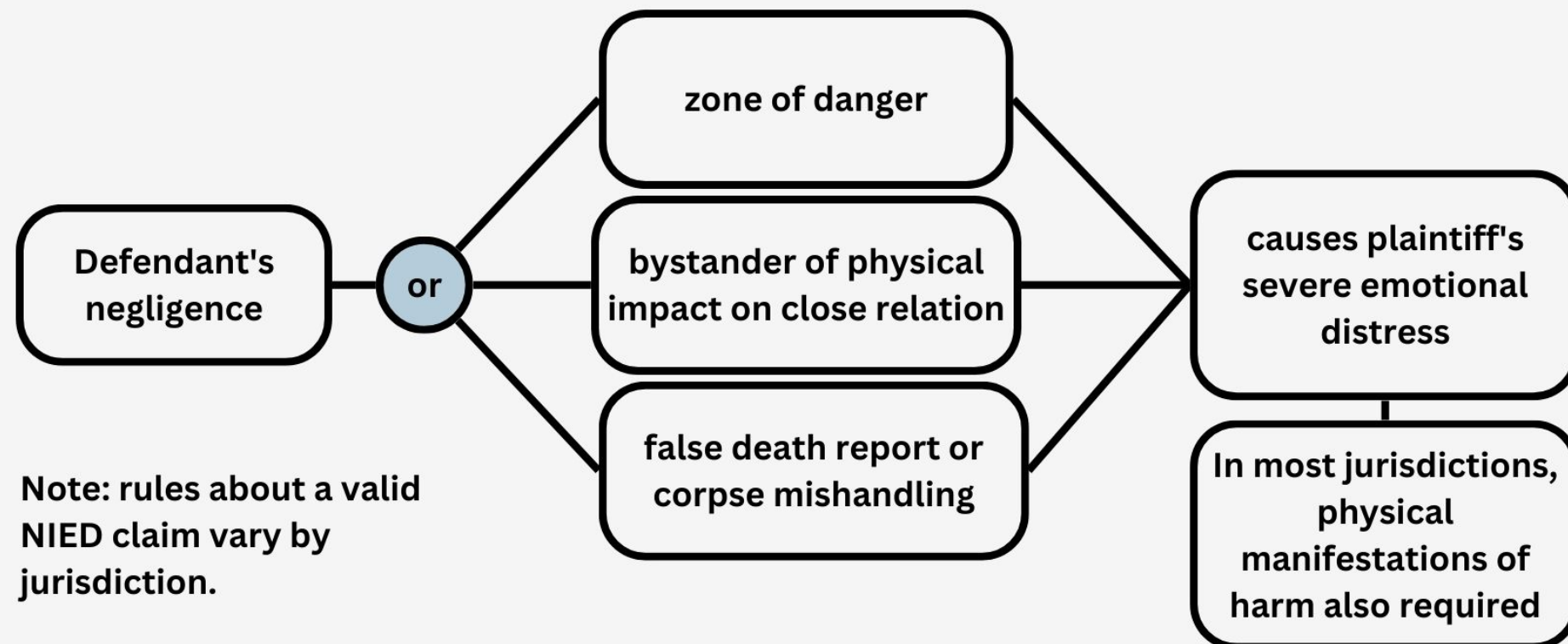
IIED

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?

The End

Student Questions

Technical Questions about the Exam

Will we be told in the jurisdictional rules whether we should use contributory or comparative negligence or what form of comparative negligence?

Should we only focus on using the Second Restatement's definition for strict liability?

Negligence

How does duty vary from an affirmative duty?

How can I define non-negligent injury and non-negligent creation of risk?

How do we differentiate when to analyze using the negligence framework and when to separately analyze duty and breach?

When we're analyzing harm for the elements of negligence, do we need to do a full IRAC to prove harm or can we just say there was an injury so harm occurred?

Factual Cause

What's the deal with the but-for test and the substantial factor test?

Can you explain alternative liability and how it differs from defendants acting in concert?

In *Summers v Tice* if they can't figure out which defendant was liable would you apportion the liability 50/50 between the defendants?

Should we apply market share liability when facts show that there are several others injured or is one plaintiff sufficient? Should we discuss it with products liability as well?

For Toxic Harms, do we have to know about Mass Torts and multidistrict litigations, or should we only know the three frequent problems that toxic harm cases raise?

Proximate Cause

Is intervening cause used in strict/product liability case and in intentional harm cases?

What am I supposed to understand from Palsgraf exactly?

Defenses

What is the difference between comparative negligence, comparative fault, and comparative responsibility?

Even if a plaintiff's actions can't be an intervening cause for the defendant to escape liability, is there still the possibility they can be found comparatively/contributorily negligent?

Are comparative and contributory negligence the same or are they different, and are applicable only depending on the jdx that we are in?

Can you explain the key difference between not as great as and no greater than?

If we are in a comparative negligence jurisdiction do we even mention assumption of risk, or should we do the analysis within duty and comparative negligence?

Strict Liability

It seems like we have 4 standards (1) a person who for his own purposes bring onto his land and collects and keeps there anything likely to do mischief if it escapes; 2) same thing but adds non-natural; 3) ultrahazardous activity and 4) abnormally dangerous activity. I am confused if they all work together or which to apply to see if strict liability applies?

What's the difference between "ultrahazardous activity" and "abnormally dangerous activity"?

How am I supposed to incorporate American Cyanamid's reasoning that strict liability applies for behavior that is 1) very risky and that risk cannot be avoided at a reasonable cost and 2) not susceptible to due care analysis?

Products Liability

Is the rule of privity relevant?

For reasonable alternative design, I have in my notes that there are two issues that come up in this space. The first one is at what point are we just in a different category of product. What is the second issue?

When proving design defect, should we always present a reasonable alternative design? At what point does the design of a product become too complex for the court to apply the consumer-expectation test?

What do you mean that warnings cannot overcome design defects?

Can you explain the heeding presumption and how that plays a part in warnings?

Can you explain comparative responsibility and the difference between the two restatements with products liability?

Intentional Torts

Are causation and harm built into the elements we have for intentional torts? Or is that something we have to address separately?

For battery, does a physical touch necessarily mean that the defendant themselves physically touched the defendant?

Can there be an assault if it was an attempted battery but the plaintiff was not put into reasonable fear or apprehension?

When a defendant says something conditional, can it still be assault?

For intent for false imprisonment: does the intent need to be intent to confine or intent to confine by threat, assertion of legal authority or barriers?

Is the first amendment a defense to IIED claims?

Damages

When there is an exacerbation of a previous injury, do we find the defendant who exacerbated the injury liable for the initial harm of the accident and then responsible for the unforeseen magnitude of the harm through the eggshell plaintiff rule?

How is the unpaid portion from an insolvent defendant divided among the other defendants in a modern joint-and-several liability jurisdiction?

What are the differences between alternative liability, joint & several liability, and several liability?

Some unsolicited advice...

Befriend anxiety

Care for each other

Kick some ass

