

# Midterm Review

Office hours today at 12pm.

# Goals for outlining

Creating and studying an outline should help you to:

1. Spot issues on the exam
2. Resolve issues methodically and comprehensively

# The Exam Itself

# Questions

Will we be tested on dissenting opinions?

How important are addressing policy grounds in a court's majority in our answers?

Do we need to discuss a case's facts, reasoning, and holding every time we use analogical reasoning? Or does it depend on the situation?

# Questions

May we reference class hypotheticals in our exam responses? If so, should we approach our analysis the same way that we would for a case?

Just as a confirmation, does both contributory negligence and strict liability not matter for our midterm?

In the sample midterm, you wrote “With regard to *res ipsa loquitur*, the state of Loyola is a “presumption” jurisdiction, not an “inference” jurisdiction.” What are the differences between “presumption” and “inference” jurisdiction?

# Damages

# Two separate legal inquiries:

1. Liability
2. Damages



Compensatory

Damages

and punitive damages

# Compensatory Damages

## The Objective:

To restore the plaintiff to the state they were in before the harm caused by the defendant.

# Questions

Is cognitive awareness a pre requisite for all non pecuniary damages or just loss of enjoyment of life/pain and suffering?

Are there any other non pecuniary damages besides pain and suffering and loss of enjoyment?

Do negative feelings like depression or embarrassment fall under *pain and suffering* or *loss of enjoyment* (assuming they are being treated as separate categories)? Or both?

# Punitive Damages

## BMW v. Gore Guideposts

1. Degree of reprehensibility
2. Ratio of punitive damages to harm inflicted on plaintiff
3. Comparison with civil or criminal penalties

## State Farm

Excess of single digit ratio is presumptively unconstitutional

# Questions

Why do excessive damages violate due process?

Is there a situation where punitive damages are not allowed? If a state statute does not mention if plaintiff can recover punitive damages, do we assume that punitive damages in that state is not allowed?

In the case *BMW v. Gore*, the court was worried about the jurisdiction. Was the court saying that the punishment (damages) should deter these actions in the state that it happened in?

In *State Farm v. Campbell*, what did the court mean when it said the defendant cannot be punished for “dissimilar conduct?”

# Negligence

# Negligence as a Cause of Action

Plaintiff must prove four elements:

1. Duty

2. Breach

3. Causation

4. Harm

# Negligence as a Concept

Relates to the elements of duty and breach

The “fault” principle

Defined as a failure to exercise “reasonable care”



# Questions

Can you clarify the difference between being negligent and being liable? Can you be negligent but not liable, or the other way around?

Negligence as a cause of action vs. prima facie negligence, how are they different?

Prima facie negligence - what do you do next after you show it on its face? I'm confused about next steps

# How does a plaintiff normally prove duty and breach?

D was legally obligated to do X.

D failed to do X.

Therefore, D breached their legal duty.

# Detailed version

D had a duty (to the plaintiff) to exercise reasonable care under the circumstances. Reasonable care under the circumstances was X, because of

- foreseeability,
- reasonable person standard,
- custom,
- statute,
- or hand formula.

D failed to do X.

Therefore D acted negligently / breached their legal duty to plaintiff.

# Reasonable Person Standard

Objective standard

**Exceptions to objective standard:**

- Physical disability
- Children
- Expertise

**Not exceptions to objective standard**

- Mental disability
- Children engaged in adult activity
- Old age & infirmity

# Question

Should a factfinder ever take a defendant's own physical characteristics, intelligence, or skill? Is there a subjective element to this standard?

# Foreseeability

Foreseeability is a flexible concept.

Define any event in general enough terms and it is foreseeable.

Define any event in narrow enough terms and it is unforeseeable.

# How to use customs and statutes

## Sword for proving negligence

Prove two things:

- Custom or statute = reasonable care
  - Defendant failed to comply with custom or statute
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## Shield for disproving negligence

Prove two things:

- Custom or statute = reasonable care
- Defendant complied with custom or statute

# Negligence per se

- Actor violates a statute that is designed to protect against this type of accident and harm

AND

- the accident victim is within the class of persons the statute is designed to protect.



# Question

Negligence per se as a “short cut” – If we have a negligence per se case, do we not have to do the reasonable care analysis?

From *Robinson v. D.C.*, is the rule that you can't rebut negligence per se unless you tried to follow the rule?

# Hand Formula (BPL)

B = Burden of precautionary measures

P = Probability of loss/harm

L = Magnitude of loss/harm

IF  $B < PL$

AND defendant did not take on B

THEN defendant was negligent

IF  $B > PL$

AND defendant did not take on B

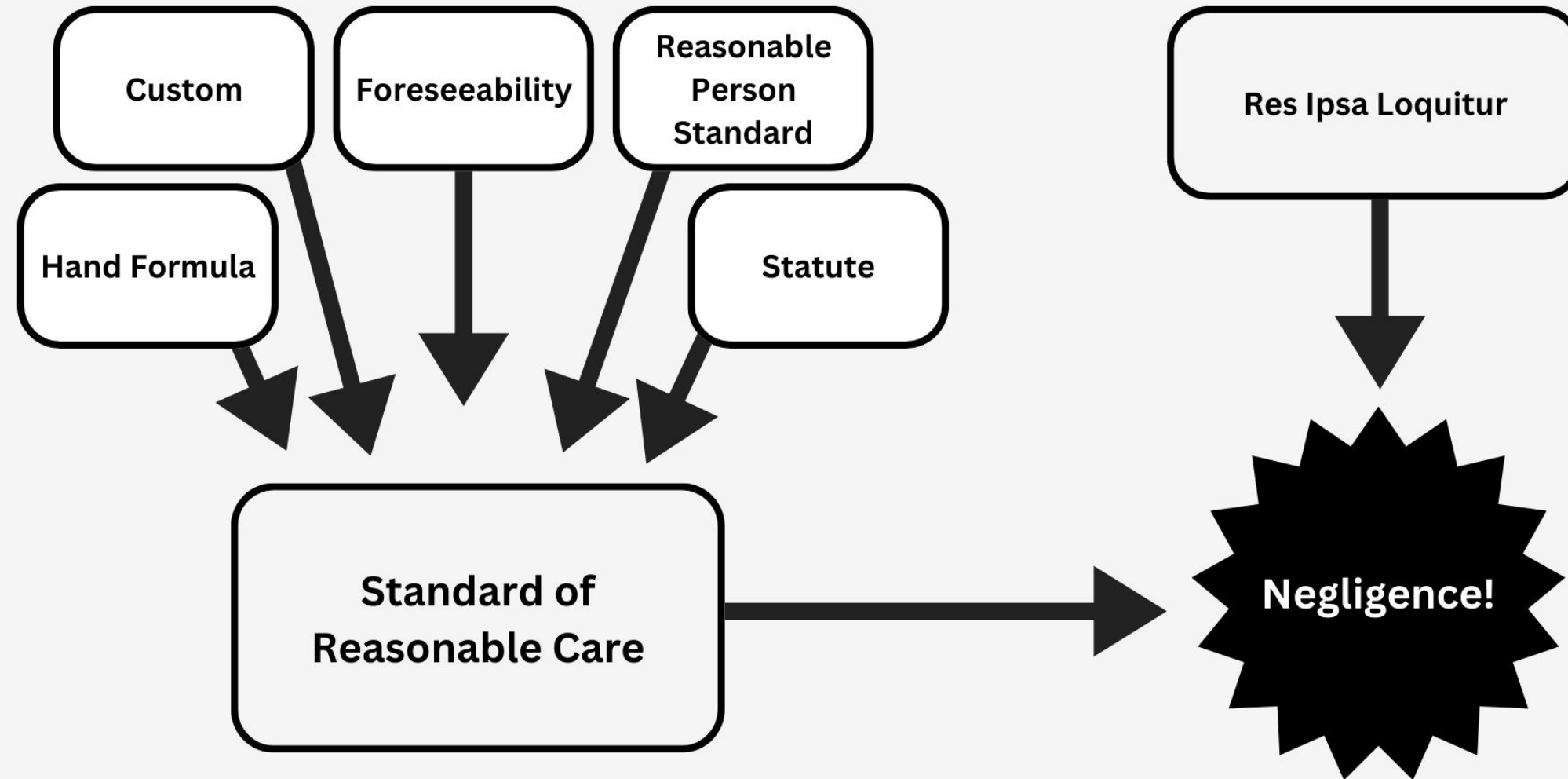
THEN defendant was NOT negligent

# Questions: Role of Judge & Jury

How should I integrate into my outline. Baltimore and Ohio R.R. v. Goodman, Pokora v. Wabash Railway Co., and Akins v. Glens Falls City School District? I'm still confused on the difference between the train cases (Baltimore and Pakora), if we could go over how they differentiate again that would be great.

When should a judge decide negligence as a matter of law? When are rules better than standards? From my understanding, negligence as a matter of law is when it's so obvious that it doesn't require a jury, HOWEVER, we also know that judges can overreach in their abilities and that sometimes it *should* have gone to a jury. Is negligence as a matter of law hardline or does it depend on the judge?

# Proving negligence



# Res ipsa requirements:

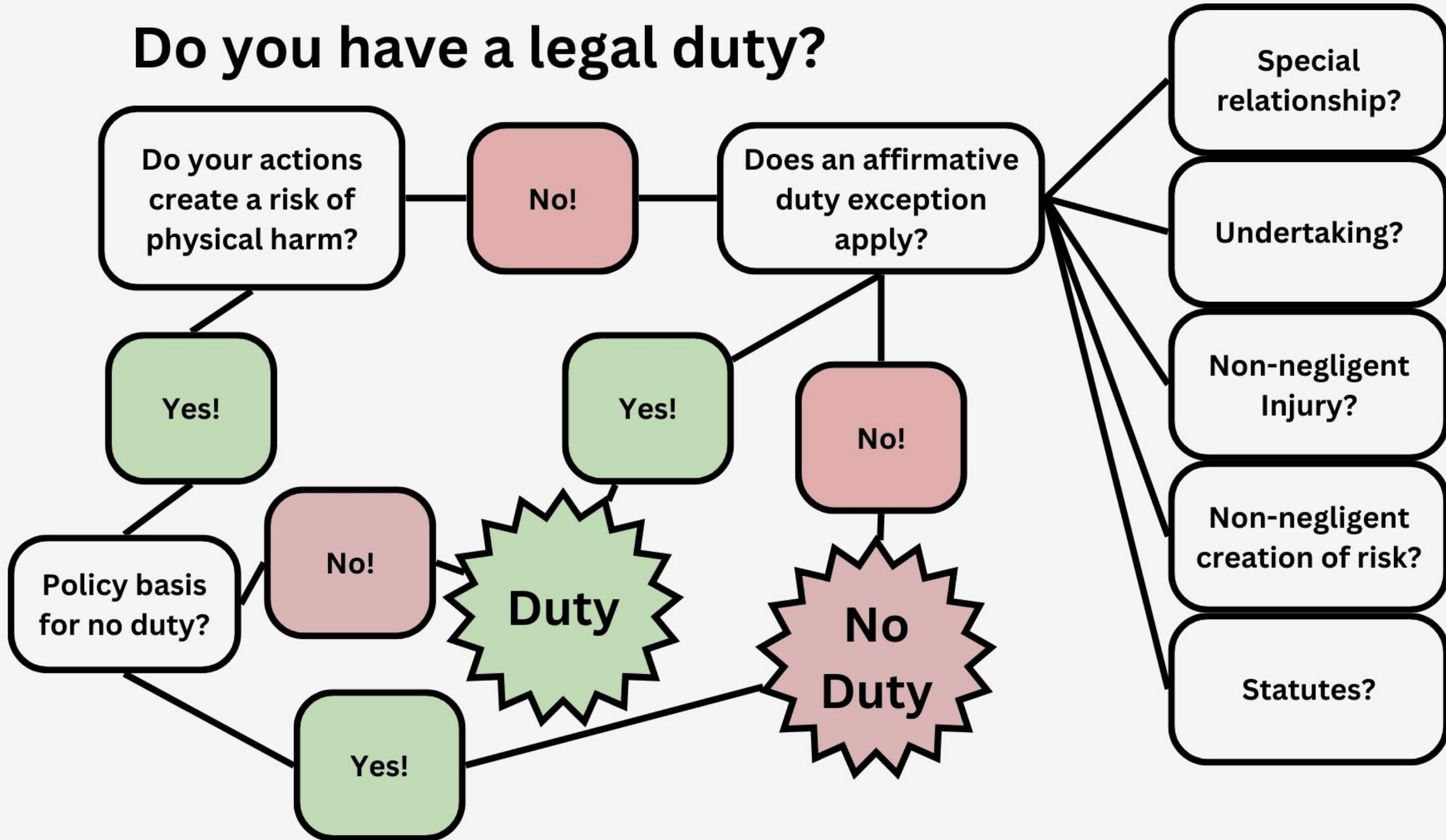
1. Harm results from the kind of situation in which negligence can be inferred
2. Defendant was responsible for the instrument of harm

# Questions: Res Ipsa

In terms of the steps of "Do you have a legal duty?" where exactly does res ipsa stand? Does it bypass the steps completely or does it come after "Do your actions create a risk of physical harm?" or after "Does an affirmative duty exception apply?"

What are the differences between res ipsa and prima facie negligence? If I (plaintiff) prove the two elements of res ipsa, do I have a prima facie case of negligence? If I have duty, breach, causation, and harm, do I also have prima facie case of negligence?

# Do you have a legal duty?



# Rowland Factors

- foreseeability of harm
- certainty of plaintiff's injury
- connection between defendant's conduct and plaintiff's injury
- moral blame
- policy of preventing harm
- burden to defendant
- consequences to community
- availability of insurance



# Questions: Affirmative Duty Exceptions

Can we please also go over in more detail the “creation of harm” aspect for determination of duty?

Appendix A lists *Maldonado v. Southern Pacific Transp. Co.* but I don't think that case was ever assigned for reading?

What is the difference between undertaking and non-negligent injury? It seems that they both require reasonable care to be exercised when rendering aid.

Could you please provide examples of non-negligent injury and non-negligent creation of risk as an affirmative duty exception?

# The modern rule for non-negligent creation of injury

**Maldonado v. Southern Pacific Transp. Co. (Ariz. App. 1981)**

Issue: Whether the railroad owed the plaintiff a duty to render aid after he was seriously injured by the train.

Court adopts rule from Restatement (Second) of Torts :

If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

# Questions: Duty to Third Parties

For Tarasoff, did the court say NO special relationship but there is a duty to a third party under the Rowland factors, or did it say there is a special relationship under the Rowland factors?

When and how do we apply the Rowland factors? Should I be thinking of the Rowland Factors as another step in the Duty flowchart? If I do not find an exception, should I always then look to the Rowland Factors? Or are there only some certain circumstances that merit an analysis of the Rowland factors?

# Duties of Landowners and Occupiers

# Traditional View

**Type of Visitor**

**Definition**

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Trespasser

Intruder

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Licensee

Social guest

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Invitee

Business guest or general public  
(if land opened to public)

# Duties Owed — 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

# Modern View

Type of Visitor

Definition

---

Trespasser

Intruder

---

Everybody else

Not a trespasser

# Duties Owed — 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



# Questions: Duty of Landowners and Occupiers

Will we need to know the traditional view of duties owed to different types of visitors or will the modern view suffice?

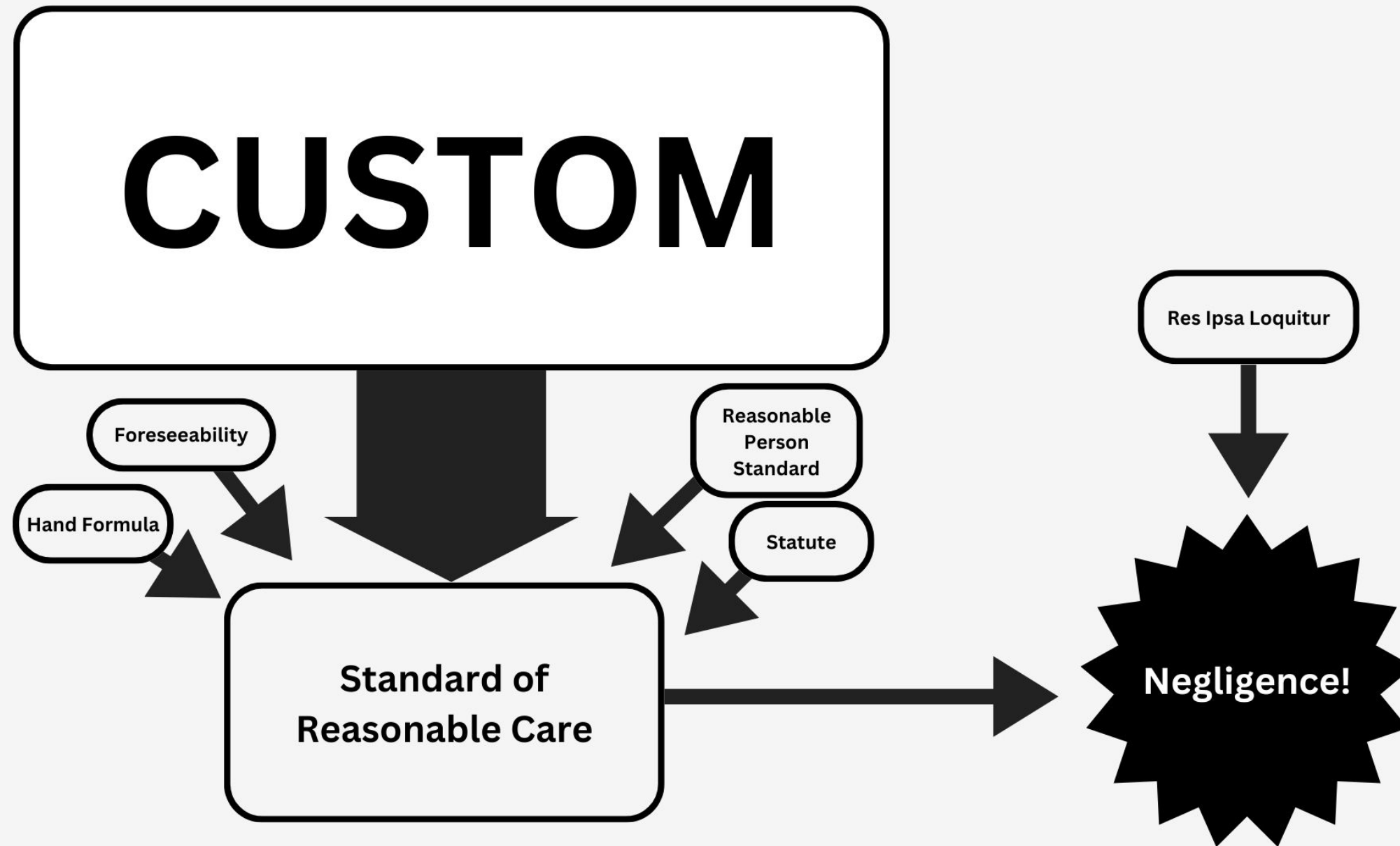
On the exam, if we are asked about landowners and occupiers, would you give us an instruction on whether to follow the traditional view or the modern view?

Can you please clarify the difference between a licensee and invitee and what a "material benefit" would be? Regarding invitee and licensee: I understand a major distinction is that an invitee provides a material benefit to the property owner whereas a licensee does not, but where does the idea of open to the general public come in? Is it a characteristic that falls under one of the categories?

# Questions: Duty of Landowners and Occupiers

About the **distinction between invitee and licensee**, we learnt that the Heins case overruled the traditional classification and that now a duty of care should be determined based on foreseeability. Therefore, I wonder: won't foreseeability always impose a duty? Would this mean that a landowner will be responsible for the failure to warn about every known danger that might be on the entrant of the land way? And that a landowner will often be held responsible for failure to inspect and warn the entrant (for example in the Carter v. Kinney it is foreseeable that more snow can form over a long period, like during the night and make the ground slippery)?

# Medical Malpractice



# Two types of medical malpractice claims:

Medical operation was negligently performed

Medical professional failed to obtain patient's informed consent

## **NIED rules varies across jurisdictions. Examples include:**

“Impact” Rule

Zone of Danger

requires a reasonable fear of immediate physical injury

Bystander Liability

- (1) the death or serious physical injury of another caused by defendant’s negligence;
- (2) a marital or intimate, familial relationship between plaintiff and the injured person;
- (3) observation of the death or injury at the scene of the accident; and
- (4) resulting severe emotional distress

Special Circumstances (like corpse mishandling)

# Questions: NIED

From the Falzone v Busch case, we got a list of policy reasons for the impact rule and were told New Jersey rejected these rules, should we know the policy reasons for the impact rule? Will it count or do they not matter, as New Jersey rejected it along with other states?

How does foreseeability tie into the Bystander Liability rule from *Portee v. Jaffee*?

With bystander liability, some cases use three factors and some use four, which should we use?

What about reasonable fear? If one witness an accident, reasonably believes that a closed related has died and eventually emerges with only minor injuries, can the witness who would suffer physical consequences or illness due to this trauma recover? Can we establish a parallel based on Falzone where reasonable fear that you could have died was enough?