

Final Review

Last night, a friend from law school reminded me of this text I sent him back when we were in law school were studying for finals...

Colin

Today is the 79th anniversary of Erie

I'm going to celebrate by getting hit by a train so I don't have to take this fed courts exam

**I forgot something important in
my mushy speech at the end of last
class!**

You can use laptops today

Final Exam Info:

Four-hour in-class exam

Parts I, II, III, and IV are essay questions that involve the same fact pattern. Part V has a separate fact pattern and essay question.

Each part has a character limit of 5,000 characters.

Questions: General Questions

When talking about parties, can we say "P" or "D" or will that work against us in the character count?

What rules/case law do we use for IRACing the "harm" element of a negligence cause of action?

Can you go over burden-shifting between plaintiffs and defendants? As I'm reviewing, I'm confused when the courts holding only means the burden should shift, and when it is enough to prove/disapprove liability.

In the burnt refrigerator case, the plaintiff had the burden of proof that the defective wiring was the but for cause of the fire. But when the defendant also shows an alternative cause, then the burden shifts again? How does the burden move around in absence of evidence?

For a couple of our cases (Hood v Ryobi and the vaccine one off the top of my head) you've mentioned "alternate holdings." Can alternate holdings be treated as persuasive in the same way that dissents are for the purpose of the exam?

Are there instances where we should use the actual term, "crushing liability"?

Now that we have studied all the elements of negligence as a cause of action, what should we do with negligence as a concept? It's not just an abstract concept anymore!

I'm getting confused on where reasonable care and foreseeability factors into everything we've learned beyond negligence. I feel like we talk about it in terms of each topic, but I am confused on when it is or is not a factor we should/can use to determining liability.

I'm also getting confused on what things are decided as a matter of law v. a matter of fact. Will you tell us within the text of the exam question whether something is to be determined as a matter of law or a matter of fact?

I'm also getting tripped up on what a Judge needs to rule on in order to send a case to a jury. For instance, in the scratch pad exercise about factual cause from 1/24 you note: "If the plaintiff has made out a prima facie case, then the question should go to the jury, and the motion for summary judgment should not be granted."

Would the appropriate answer to a question like that on the final, when analyzed from the judge's perspective, be that from the facts presented a reasonable jury could find either way on whether the hotel was the factual cause and thus the case should go to a jury?

I guess what gets me confused is that seems like kind of an 'easy way out' answer, so I would be nervous to deploy it on an exam.

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.

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: Negligence

Can please review the Hand Formula again? For some reason I'm having difficulty applying it to a fact pattern.

I know that we have the Rowland factors as an affirmative duty exception, but I'm not sure how I would apply them in a case.

Especially seeing that the last Rowland factor is insurance.. If possible can you please touch on how to apply the factors tomorrow during our review?

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”

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

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
-

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.

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 $B > PL$

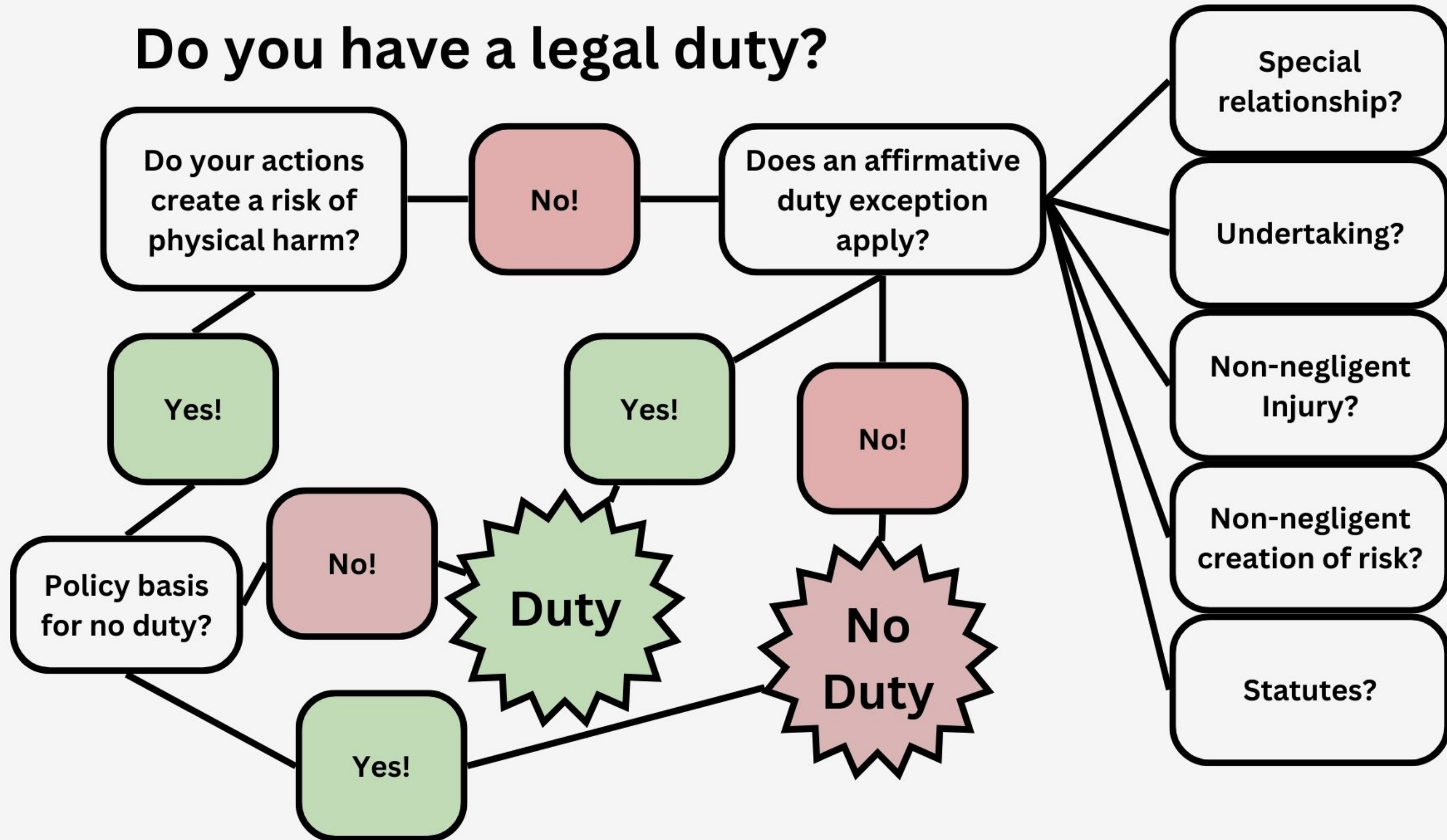
AND defendant did not take on B

THEN defendant was NOT negligent

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

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

Duties of Landowners and Occupiers

Traditional View

Type of Visitor

Definition

Trespasser

Intruder

Licensee

Social guest

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

Duties Owed — 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

Questions: Duty of Landowners and Occupiers

More examples of Licensee v invitee?

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

Causation

Two parts:

1. Factual cause

2. Proximate cause

Questions: Factual Cause

Could you come back a little on the differences between the possible alternatives for factual causation: how do we differentiate between concert liability from alternate, and from enterprise to market share?

I am having trouble understanding the difference between applying multiple defendants and alternative liability. Is “Multiple Defendants” just the main topic that covers alternative liability and toxic harm?

Can you please go over multiple sufficient causes and multiple possible causes and how each handles alternative liability for causation again?

What is the appropriate definition for a toxic harm? Is toxic harm only applicable in class action/MDL cases?

Factual Cause

Two different tests for factual causation

1. “But for”

2. Substantial factor

"But for"
test for
factual cause

Substantial
factor test
for factual cause

Corporate needs you to find the differences
between this picture and this picture.

They're the same picture.

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

Possible alternatives for factual causation

1. Concert liability
2. Alternative liability
3. Enterprise liability
4. Market share liability

Marketshare liability

Variations:

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

Toxic Harms

Three frequent problems:

1. Identification of the cause: Can't be certain that the toxin was a "but for" cause
2. Boundaries of the harm: Can't be certain of the extent of the harm
3. Source of the cause: Can't be certain who in particular is responsible

Questions: Proximate Cause

For Polemis, I just don't really understand why the spark that blew up the ship was not sufficiently remote to get the defendants off the hook. The rule I have for Polemis seems to directly contradict my rule from Palsgraf regarding the importance of foreseeability. I don't have anything in my notes saying Polemis is an outdated rule or was overruled though, so I'm not sure.

Can you go over how damages are awarded for eggshell plaintiff cases?

For eggshell plaintiffs and additional harm situations under proximate cause, does the specific injury have to be foreseeable?

How should we bring in foreseeability for proximate cause analysis?

Can we review proximate cause for Gibson v. Garcia "Rotten Telephone Pole" and Berry v. Sugar Notch Borough?

Can you explain intervening causes and unexpected victims?

Proximate Cause

Not about causation

Unexpected harm

Additional harm

Intervening causes

Unexpected victim

Questions: Vicarious Liability

When looking at *Miller v. Reiman* and *Christensen v. Swenson*, why is it that we can not apply the ruling/reasoning from *Miller* to *Christensen*?

Vicarious Liability

Scope of employment:

- 1) Employee's conduct must be of the general kind the employee is hired to perform.
- 2) Employee's conduct must occur substantially within the hours and ordinary spatial boundaries of the employment.
- 3) Employee's conduct must be motivated, at least in part, by the purpose of serving the employer's interest.

Defenses to Negligence

Questions: Contributory & Comparative Negligence

Can you provide definitions and examples for the contributory negligence affirmative defense exceptions of last chance, recklessness or willfulness, and statute?

Can we review the different negligence regimes?

Non-negligent injury: Does affirmative duty exception of non-negligent injury not apply if the plaintiff's injury was caused by their own negligence?

In the Li Yellow taxi case the court mentioned that in some situations the assumption of risk doctrine would be subsumed into the comparative negligence doctrine, and in other cases it would not be appropriate to do so. I'm a little confused on when that would apply and when it wouldn't.

Contributory negligence

The defendant is not liable

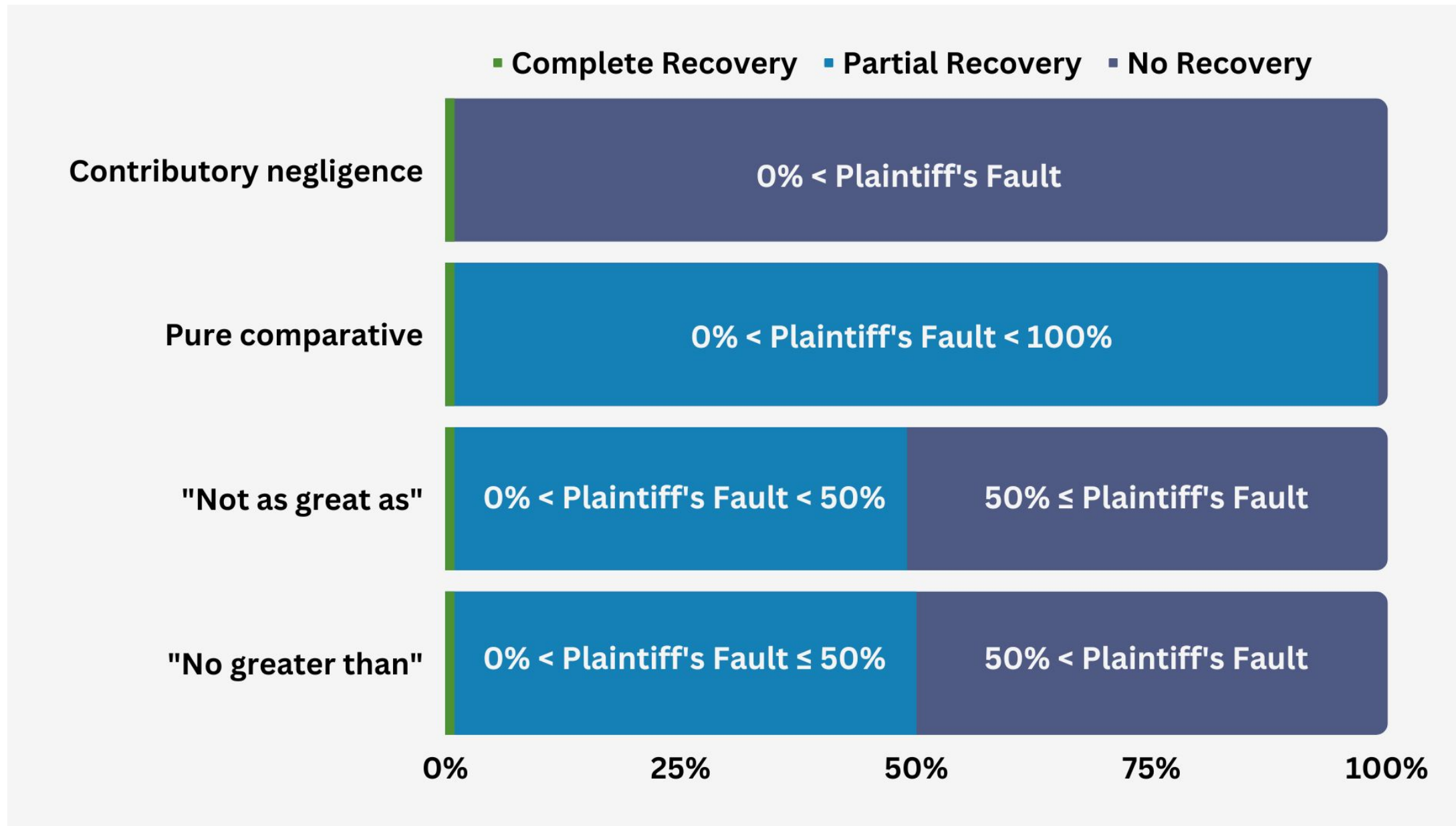
If the plaintiff was also negligent

- Duty,
- Breach,
- Causation, and
- Harm

Unless an exception applies:

- Last clear chance,
- Recklessness or willfulness of defendant, or
- Statute

Comparative negligence



Questions: Doctrine of Contribution

What is the difference between the traditional and modern doctrine of contribution?

If the employer does not have money under comparative negligence, does the employee step in and he owes \$ or do the other parties pick up his share?

Doctrine of Contribution

Traditional Common Law Approach

Two versions:

1. Joint and several liability
2. Several liability

Questions: Assumption of Risk

Would you want us to discuss both assumption of risk and comparative negligence defenses regardless of whether a fact pattern indicates a recreational activity?

When talking about The Flopper case in class, we talked about how a plaintiff may assume risk, but we want to look at what types of risk they were assuming. If we see a fact pattern similar to The Flopper, could we argue that the plaintiff did not assume the specific types of risk that caused their harm and thus the assumption of risk defense does not apply?

Do we need to know what the Tunkl factors are or just that they are used sometimes?

In *Li v. Yellow Cab* they cited *Knight v Jewett* and differentiate between primary assumption of risk and secondary. I don't understand the concept of primary assumption of risk that should impose no duty from D to P and that would completely bars P's recovery ?

Assumption of Risk

volenti non fit injuria

- Explicit / Express
- Implicit

Should assumption of risk persist in a comparative fault world?

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

Questions: Strict Liability

Because we looked at a few different RST rules, want to confirm that SL applies to ultrahazardous activity, abnormally dangerous activity and Rylands situations. Just these 3 categories.

From the chemical spill in Chicago case, we discussed how negligence analysis on an “activity” is too burdensome, so we focus on an “act.” In strict liability analysis, we focus on an activity. Is that how I should frame my analysis on the exam, too?

Strict Liability

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

----- PWFOPBOHL&C&KTALDMIIE

----- PWFOPBOHL&C&KTA “non-natural” and LDMIIE

----- “ultrahazardous activity”

----- “abnormally dangerous activity”

- Products

Questions: Products Liability

Is *Speller v. Sears* a design defect or manufacturing defect case? Does the restatement rule for proving product defect without specific evidence apply for both design defect and manufacturing defect cases?

Anderson v. Nissei and *Jones v. Ryobi* and 3p modifications to a product relieves a manufacturer of liability (just want to make sure I have the right take-away for these two).

In a product liability defense claim, what would be an example for P's comparative negligence on the manufacturing and failure to warn side if there is any ? Can a plaintiff be negligent for failure to discover defect?

Design defects: all we need to know are the 2 tests and 2 cases?

Is it correct that reasonable alternative design is not always required for the risk utility test, and that a product may be just defective, and manufacturers can be held liable for it if causation and harm are proven?

What does implied assumption of risk look like as an affirmative defense for strict liability/ products liability? Is there an example or case that illustrates this?

In the Anderson case, the court briefly touches on the express warnings defense. They mention that Anderson was aware of the dangers of putting his hand there. In the opinion, they acknowledge this, but they equate it more with a comparative negligence standard. When I reread it just now, it sounded more like an implicit assumption of risk to me. Why did they decide this was comparative negligence when he knowingly took the risk?

In the warning part of PL, you talked about a couple of nuances, including the "heeding presumption". Can you come back on when to use that ?

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.

Questions: Intentional Torts

If we're analyzing an intentional tort claim and conclude that we cannot prove a required element, should we wrap up our analysis for that claim?

Is a proximate/factual cause analysis required for intentional torts?

When thinking about intent, do we solely analyze the defendant's intended action and not the result of that action?

For a battery claim, because there is no imminence requirement, could we have a touching that would harm later? Like a medication that would take some time to kick-in?

Are Garratt, Alcorn, Picard, and Wishnatsky applicable for both assault and battery? Or should I be categorizing these cases as falling under separate torts?

Should O'Brien be categorized as a defense (consent) or should I put it under assault?

For defining "outrageous" conduct, is the actual rule that "the conduct would make someone literally say 'outrageous'"?

Are there defenses to IIED?

In the in-class exercise, we did the whole assault analysis for Sara's spitting but not necessarily her screaming. Would there have been a case for battery for Sara screaming in Bob's face, as an intentional act resulting in offensive harm? While not physically touching him, screaming does involve hurting the eardrums and while it might not be physical harm if it didn't damage Bob's ears, would it have been an offensive harm?

My friends and I had a tricky question where we disagreed ... For false imprisonment, what about P was showering and D wanted to haze him by stealing his clothes ? We can argue that there was no reasonable way to escape (under the circumstances) because that would be shameful. But can P assert that his intent was exactly to have D going outside? But for me, P still had substantial knowledge that D could not go out without embarrassing himself, therefore was falsely imprisoned ? And of course, he could assert a IIED claim as well ?

Intentional torts

Intentional Torts:

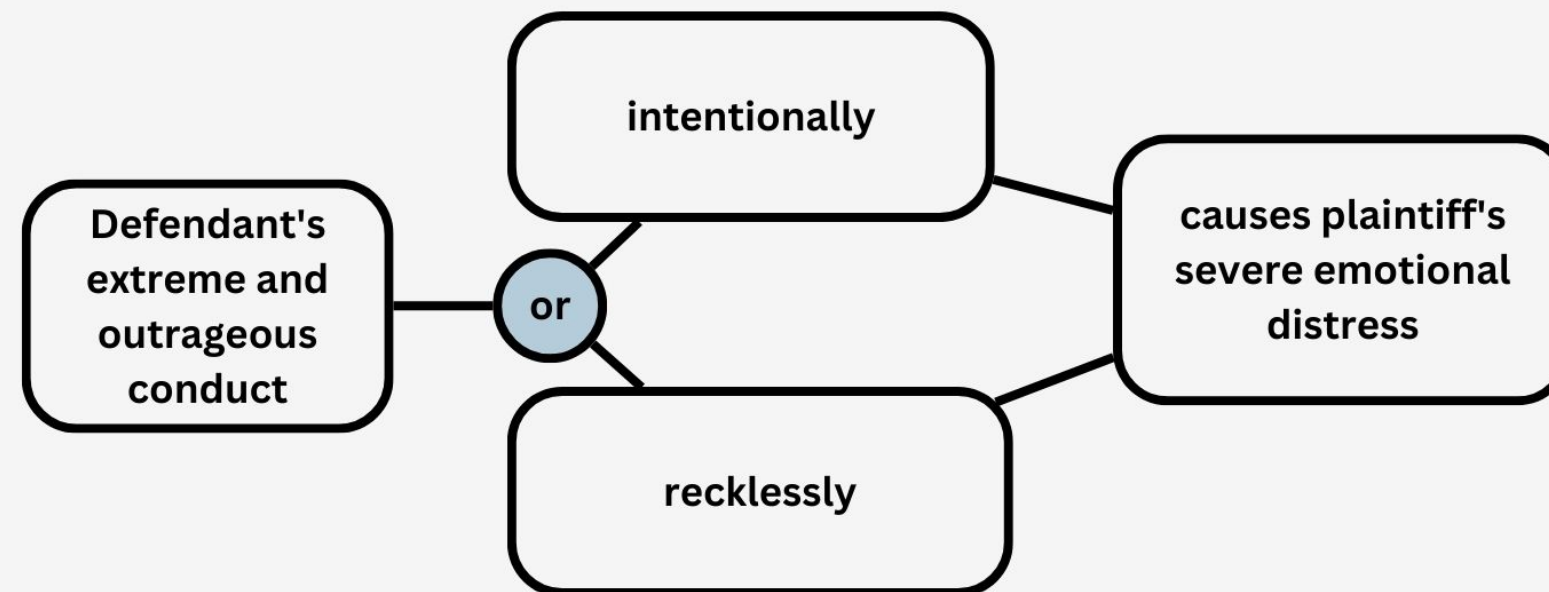
- Battery
- Assault
- False imprisonment
- Intentional infliction of emotional distress

Defenses:

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

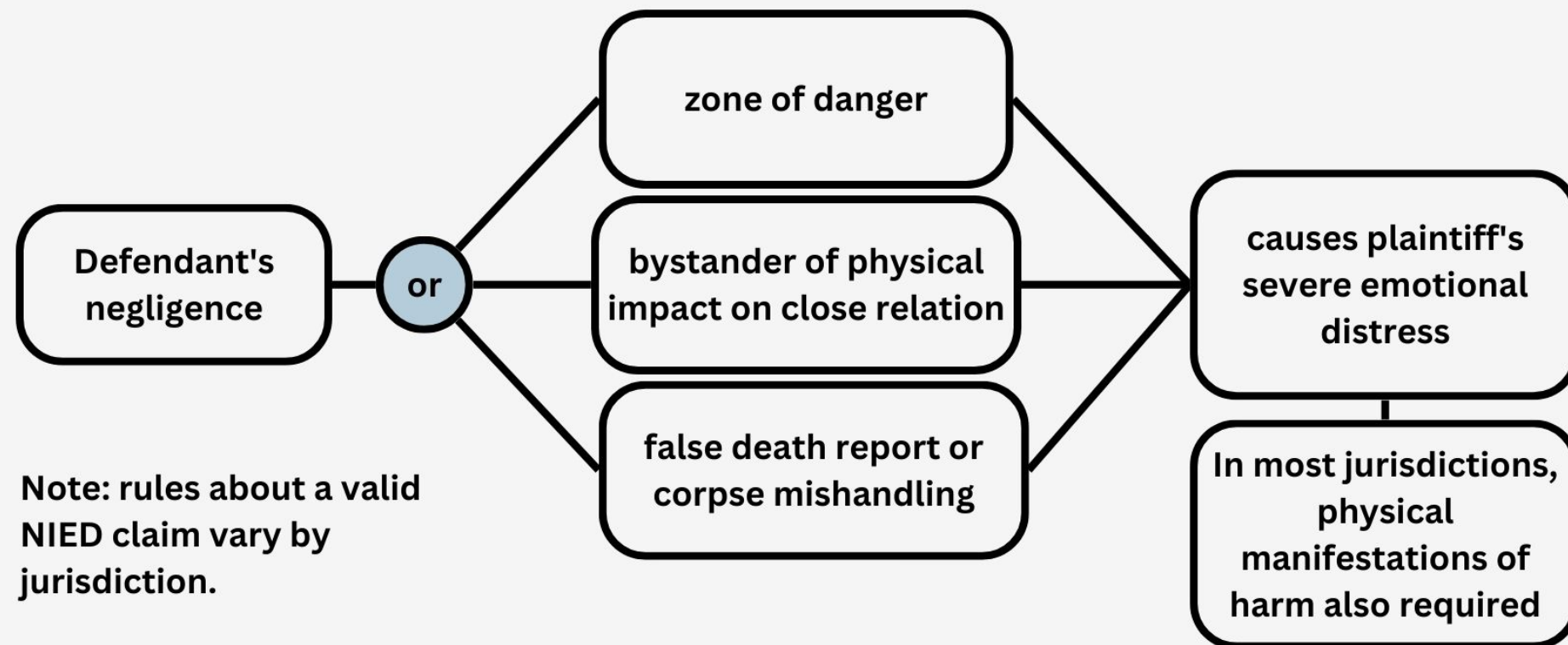
IIED

Intentional Infliction of Emotional Distress



NIED

Negligent Infliction of Emotional Distress



Questions: Insurance

How do the collateral source rule and subrogation interact?

Can you quickly come back on the Rowland factor and why insurance liability is a factor in determining a duty ?

Insurance

First party insurance

Third party (liability insurance)

Collateral source rule

Subrogation

Questions: Workers' Compensation

Can we please go over this idea that WC is about preventing total wipeout/
liability for employers?

How should we reconcile old cases like *Christen v. Swenson* with the new information on WC? Is it just that if these injuries definitively happened within the scope of employment, the P would bring them under WC and not negligence? Does the scope of employment analysis remain the same? So no vicarious liability analysis, just a WC claim?

Can we please go over the situations where the WC fund would begin issuing payment installments and then stop?

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?