Proving Negligence

Once you show **standard of care** (what reasonable person would have done in circumstances)

Must then show **DEF deviated** from that

Pleading	Plead sufficient facts
Directed verdict	Sufficient evidence from which reasonable juror could find
Jury	Persuade jury probable

Establish with a preponderance

Breach > 50%

You must carefully consider the evidence presented by both [*plaintiff*] and [*defendant*] before you make your decision. You should not decide in favor of [*plaintiff*] unless you believe, after weighing all of the evidence,

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that it is **more probable than not** that [*defendant*] was negligent and that [his/her] negligence was a substantial factor in causing [*plaintiff*]'s harm.
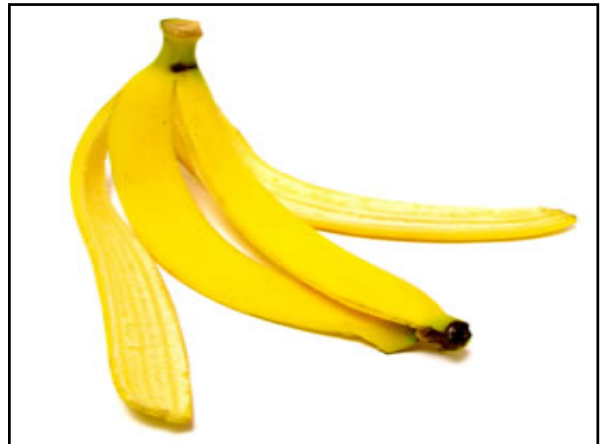
Direct evidence

Circumstantial evidence

Res ipsa

"Warning: Slipping on this banana peel may be hazardous to your health."

"YOUR HONOR, I INTRODUCE INTO EVIDENCE THIS BANANA PEEL..."

Theory of negligence

What should RPP do that DEF failed to do in these cases

PEEL-FREE BANANAS

THE SAFER CHOICE

Goddard
v.
Boston & Maine

Breach < 50%

Anjou
v.
Boston RR

Infer

To derive as a conclusion from facts or premises

We see smoke and infer fire

Joye
v.
Great
Atlantic

Ortega
v.
Kmart

Torts

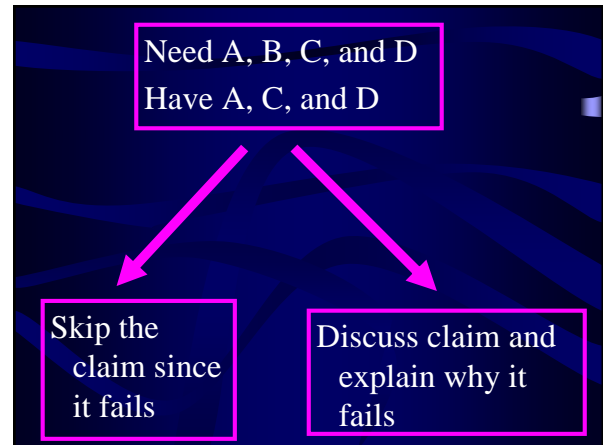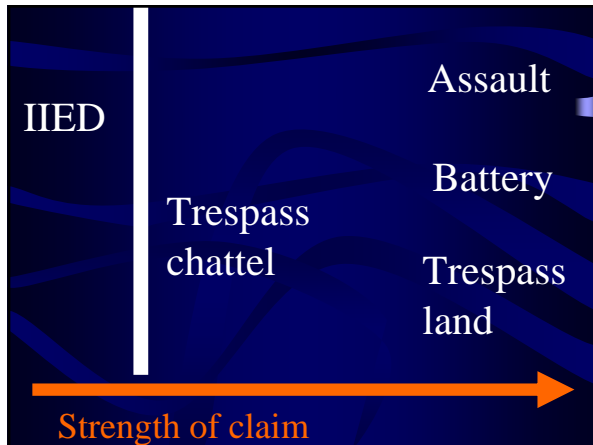**Professor Pope**

Class 28: Oct. 27, 2011
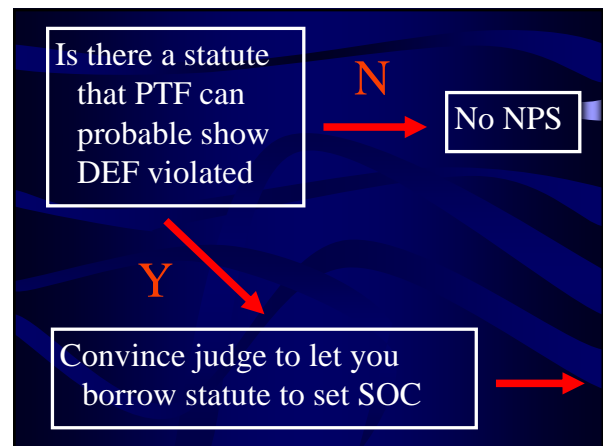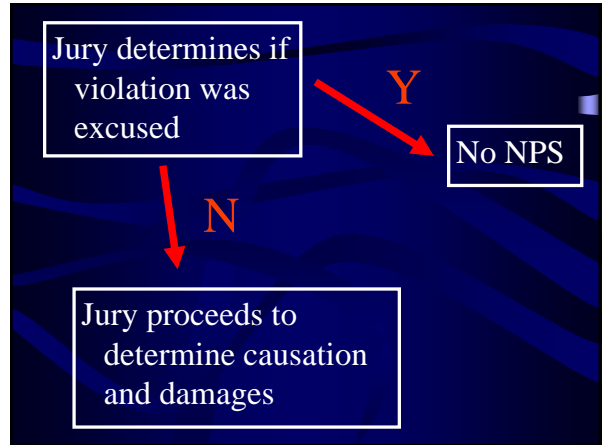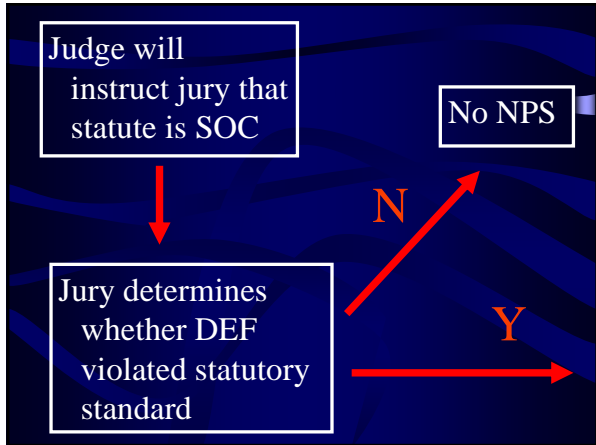

Anchor appropriateness
   of questions
      NYSB
      BarBri
      MBE
      Your very class

IIED

Trespass
chattel

Assault

Battery

Trespass
land

Strength of claim

Need A, B, C, and D
Have A, C, and D

Skip the
claim since
it fails

Discuss claim and
explain why it
fails

Negligence per se

Is there a statute
that PTF can
probable show
DEF violated

N → No NPS

Y

Convince judge to let you
  borrow statute to set SOC

Slide 1:

Did statute intend to protect person like PTF

N → No NPS

Y ↓

Did statute intend to protect type of harm PTF suffered

N ↗ No NPS

Y →

Slide 2:

Is it otherwise appropriate to borrow

N → No NPS

Y ↓

Judge will let PTF borrow the statute to set SOC

Y →

Slide 3:

Judge will instruct jury that statute is SOC

↓

Jury determines whether DEF violated statutory standard

N ↗ No NPS

Y →

Slide 4:

Jury determines if violation was excused

Y ↘ No NPS

N ↓

Jury proceeds to determine causation and damages

Slide 5:

Slide 6:

Ortega v. Kmart

Jasko v. Wollworth

HE Butt v. Resendez

Res ipsa

Introduction

Rule of evidence

Inference instead of proof

The factfinder may **infer** that DEF has been negligent when the accident . . . is a type . . . that **ordinarily happens** as a result of the negligence of a class of actors of which DEF is the **relevant member**.

WTF

PTF does not know and cannot find out what happened

Negligence derived from knowledge of the causes of the **type or category** of accident involved.

DEF can introduce evidence not at fault

"I checked the lights every week."

Jury can still infer negligence

Get past directed verdict and get to jury

Typically where PTF has **no evidence** of negligence

1. PTF harm ordinarily would not have happened unless someone was negligent

2. It was probably DEF who was negligent (harm was caused by something DEF controlled)

Judge determines if PTF makes sufficient showing on these elements

If you decide that [PTF] proved [these 2] things, you **may, but are not required** to, find that [DEF] was negligent

If you decide that [PTF] did **not prove** one or more of these [2] things, then

[your verdict must be for [DEF].]

[you must decide whether [DEF] was negligent in light of the other instructions]

Res ipsa
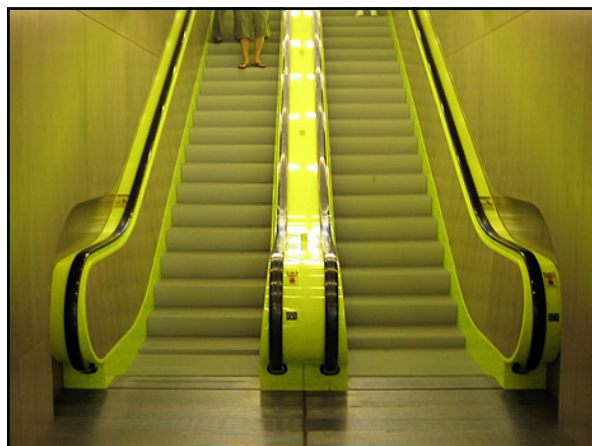## Cases

Byrne
v.
Boadle

McDougal
v.
Perry

PTF harm ordinarily would not have happened unless someone was negligent

Can establish   n.4

without expert A-C

with expert D-G

Larson
v.
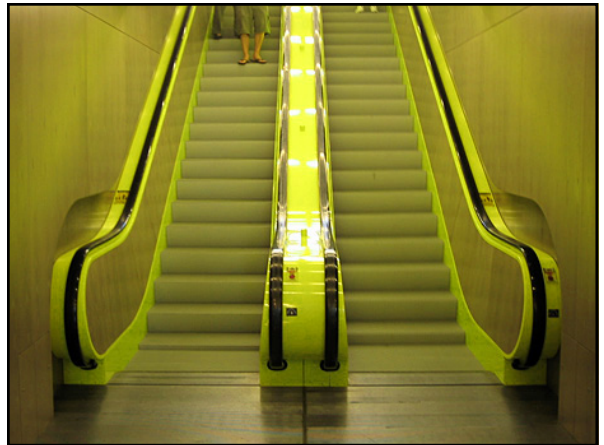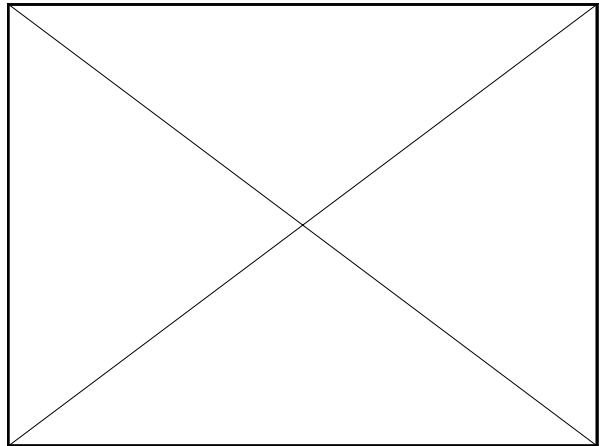St. Francis
Hotel

Ybarra
v.
Spangard

Sullivan
v.
Crabtree

Torts

Professor Pope

Class 29: Oct. 28, 2011

Ybarra
v.
Spangard

Sullivan
v.
Crabtree

Causation
Introduction

Chapter 5

Factual cause

Did DEF negligence cause PTF injury?

If DEF had not been negligent would PTF still be injured?

Chapter 6

Proximate causation

Legal cause

Policy question:

Factual cause

But was injury within "scope of risk"?

Causation

Cause-in-fact

Rest. 3d 26

Tortious conduct must be a **factual cause** of harm for liability to be imposed.
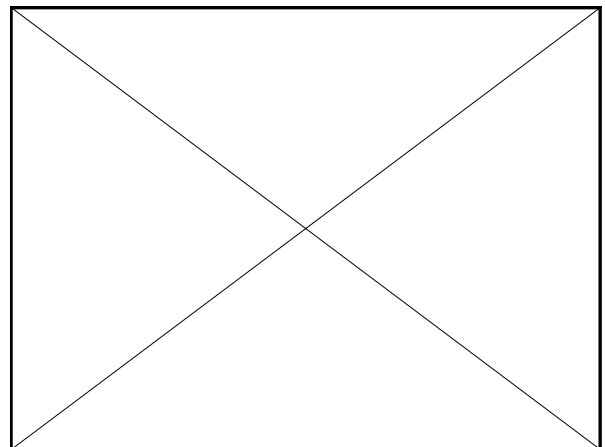
Negligence
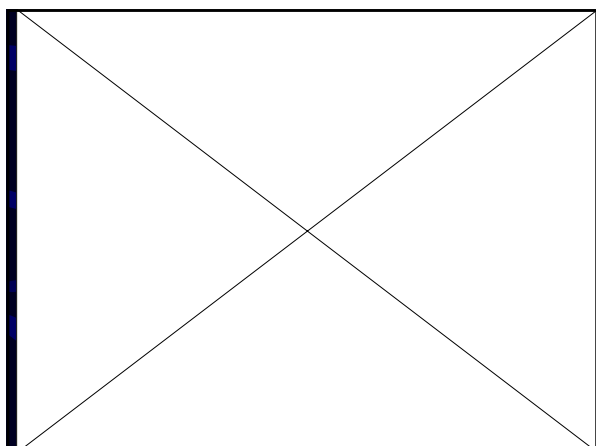
Negligence + Causation + Damages

Need Damages

No nominal damages for negligence

Contrast intentional torts
– Except IIED
– Except trespass chattel
– Except conversion

Causation (But for)

Conduct is a factual cause . . . when the harm would not have occurred absent the conduct.

AKA

More likely than not

Sine qua non

Not enough that DEF negligence **increased** the risk

DEF negligence must be the **most likely cause** of the harm

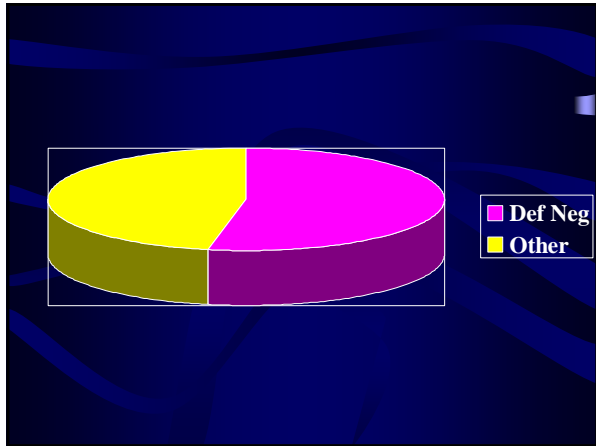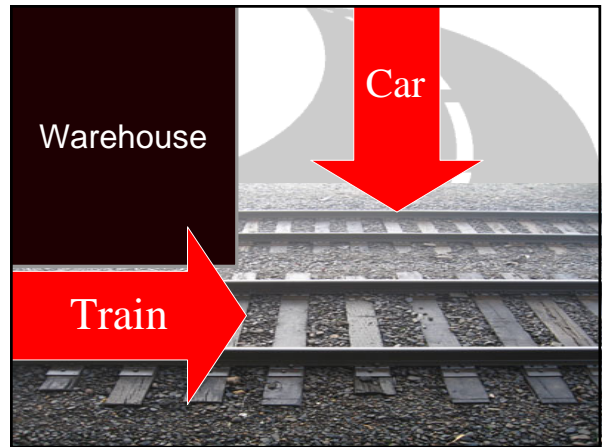## Alternatives

Lost chance
Multiple sufficient
Alternative liability
Market share

Perkins
v.
Tex. RR

Torts

Professor Pope

Class 30: Nov. 1, 2011

Causation
(but for)

Perkins
v.
Tex. RR

Car

Warehouse

Train

Duty / standard care	
Breach	
Injury	
Cause in fact	

Reynolds
v.
TX Pac. RR

Duty / standard of care	
Breach	
Cause in fact	

Other

PTF careless

DEF negligence

Gentry
v.
Herford
Ranch

Duty / standard care	
Breach	
Injury	
Cause in fact	

Kramer v. Wilkins

Duty / standard care	
Breach	
Injury	
Cause in fact	

Injury might have happened anyway

But negligence **did increase** chances of injury

Causation
(for informed consent)

Patient claims doc failed to disclose X

Duty standard in this jurisdiction?

- If material risk (NJ), duty, if reasonable patient in circumstances would consider X material
- If prudent physician (DE), duty, if through expert testimony, patient establishes reasonable physician would have disclosed X

Doc can argue there was **no duty**

On PP, she can get her own experts

On MR, she can explain why X would not be material

She can also show application of an exception

PTF must show breach

Show failure to disclose X

Doc can argue X was disclosed

PTF must show undisclosed risk, X, actually materialized (injury)

There are no nominal damages

This is not dignitary tort

PTF must show causation

(2 but for parts)

Unrevealed, materialized risk

Must have been caused by the intervention

Disclosure of risk would have prevented its occurrence

Reasonable person in circs would not have consented

Torts

Professor Pope

Class 32: Nov. 8, 2011

Cause in fact

Proximate cause

Defenses p587

Causation
(for informed consent)

Patient claims doc failed to disclose X

Duty standard in this jurisdiction?

- If material risk (NJ), duty, if reasonable patient in circumstances would consider X material
- If prudent physician (DE), duty, if through expert testimony, patient establishes reasonable physician would have disclosed X

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  Show failure to disclose X

  Doc can argue X was
    disclosed

PTF must show undisclosed
  risk, X, actually materialized
  (injury)

    There are no nominal
      damages

    This is not dignitary tort

PTF must show
causation

(**2 but for** parts)

Unrevealed,
materialized risk

  Must have been
  caused by the
  intervention

Disclosure of risk
would have prevented
its occurrence

  Reasonable person in
  circs would not have
  consented

Causation
Variation #1
Lost Chance

But for

PTF must show **more likely than not** would have had more favorable recovery without DEF negligence

---

"But for" causation is always **sufficient**

In most states, it is also **necessary**

Baseline risk
death   **5%**

After DEF
negligence
risk of death   **25%**

Negligence **increases** risk of adverse outcome

10% → 30%

1% → 3%

30% → 70%

Negligence **increases** risk of adverse outcome

30% → 50%

66% → 99%

40% → 70%

Suing for an injury that was **probably** going to happen **anyway** – even without DEF negligence

DEF just made a probable outcome **even more** probable

50% chance that injury from
   DEF negligence
       = 100% damages

50% or < 50% chance
       = $0 damages, no liability

DEF negligence = 51%
   responsible → ___% damages

DEF negligence = 49%
   responsible → ___% damages

Only for med mal

The injury **IS** the lost
chance itself

Lost chance

PTF must show more likely
than not would have had
greater chance of recovery
without DEF negligence

Loss of chance: over 25 states

Malpractice PTF often start out sick.
- Bad baseline.
- Hard to show BUT FOR
  causation

Herskovits
v.
Group Health

Duty / standard care	
Breach	
Injury	
Cause in fact	

Negligence does not change probable outcome

With negligence
Probably dead

Without negligence
Probably dead

	Chance survive	Chance death
Without negligence	**39%**	**61%**
With negligence	**25%**	**75%**

Valadez
v.
Newstart

Meningomyelocele

w/o negligence	w/ negligence
___ % in prenatal surgery group	___ % in prenatal surgery group

Wendland

v.

Sparks

Hospital cancer patient codes – but doc says: **no CPR** "I just can't do it to her"

Defendants response to the suit is _____

---

w/o negligence	w/ negligence
___ % death	___ % death
___ % survival	___ % survival

Causation
Variation #2
Multiple sufficient

Rest. 3d 27

If multiple acts occur, each of which . . . alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), **each act** is regarded as a factual cause . . .

Acts of 2 concurrent tortfeasors combine to produce **indivisible harm**

Either act **alone** would have been sufficient by itself to produce the harm

Sufficient

Both are true
  F1 → burn
  F2 → burn

Not Necessary

Only one is true
  Burn → F1
  Burn → F2

Hill

v.

Edmonds

Truck negligent
  AND
Driver negligent

A **substantial factor** in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

A person's negligence may combine with another factor to cause harm. If you find that [*DEF*]'s negligence was a **substantial factor** in causing [*PTF*]'s harm, then [*DEF*] is responsible for the harm.

[*DEF*] cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [*PTF*]'s harm.

Anderson
v.
Minn. RR

The 2 causes must be **concurrent**

If one fire already came through, the harm, is already done

You cannot kill a dead man

In such cases, the two acts are not concurrent

The first cause is **preemptive**

Causation
Variation #3
Only one sufficient

Alternative liability

Multiple concurrent tortfeasors

Each DEF is negligent

Only 1 actually caused the harm

PTF cannot tell which one

PTF must join all concurrent tortfeasors as DEFS

All DEF must produce a similar risk of harm to PTF

Effect

Burden of proof, including both production and persuasion, on factual causation is shifted to the defendants.
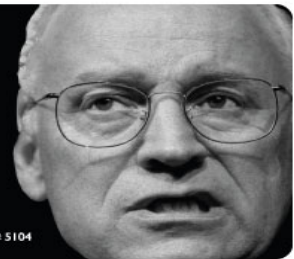

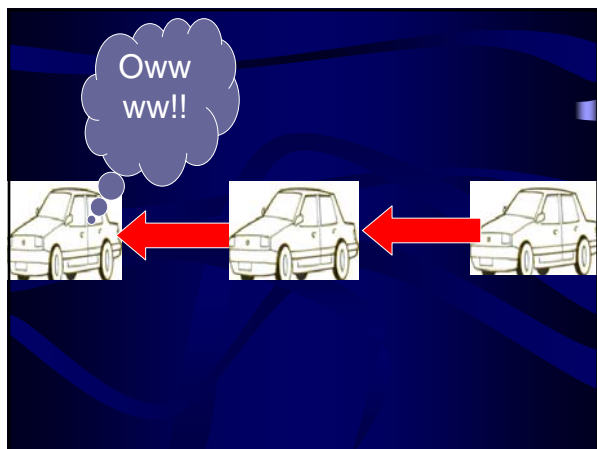# Summers v. Tice

---

Duty / standard care	
Breach	
Injury	
Cause in fact	

DEFs have better access to information

Small number of tortfeasors, so, high probability wrongdoer will pay

Oww ww!!

Burke v. Schaffner (Ohio App. 1996)

- Martin driving pickup, sudden acceleration
- Pinned Burke between it and parked car
- Burke settles with Martin
- Burke sues Schaffner, alleging stepped in accelerator as scooted into front seat
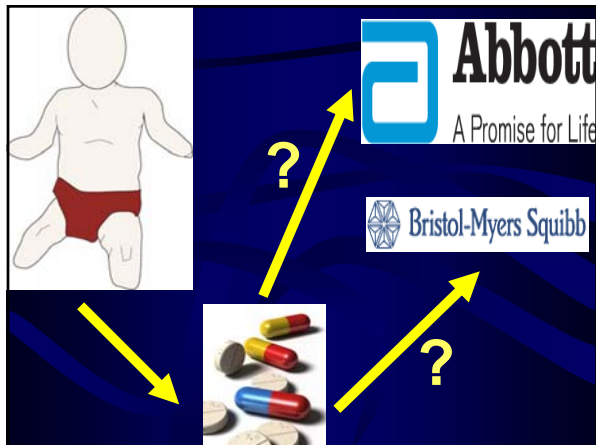- Jury found her not negligent

Causation

Variation #4
Market share

Sindell
v.
Abbott Labs

Injury caused by **identical** product made by all DEFs

PTF unable to identify specific DEF

Could not succeed under *Summers*

More than 2 tortfeasors

Not all wrongdoers before court
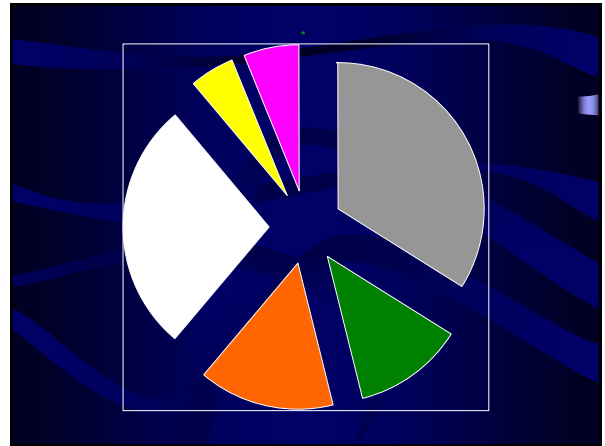Only 5 defendants
195 other mfrs

Summers	Abbott
2 DEF	
Each DEF negligent	
One DEF did cause	
PTF cannot tell which	
Shift burden to DEF	

Abbott	Daubert
Know DES caused injury	Not know if Bendectin caused
PTF not know who made DES taken	PTF know who made

Access to evidence

Blameworthy

Need for compensation

You may decide that more than one of the DEFs was negligent, but that the negligence of **only one** of them could have actually caused [*PTF*]'s harm. If you cannot decide which DEF caused [*PTF*]'s harm, you must decide that **each** DEF is responsible

However, if a DEF proves that [it] did not cause [*PTF*]'s harm, then you must conclude that DEF is not responsible.

5 defendants
80% of the market

(Market share %)
x
(PTF damages)

PTF gets only 80% damages

(Market share %)

x

(PTF damages)

x

1.20

Torts

Professor Pope
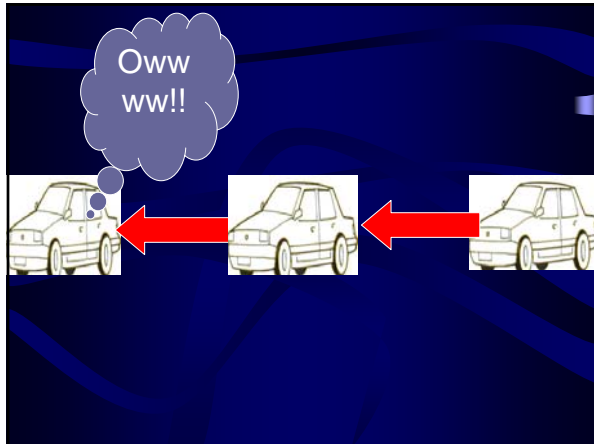
Class 33: Nov. 10, 2011

Summers
v.
Tice

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Breach	
Injury	
Cause in fact	

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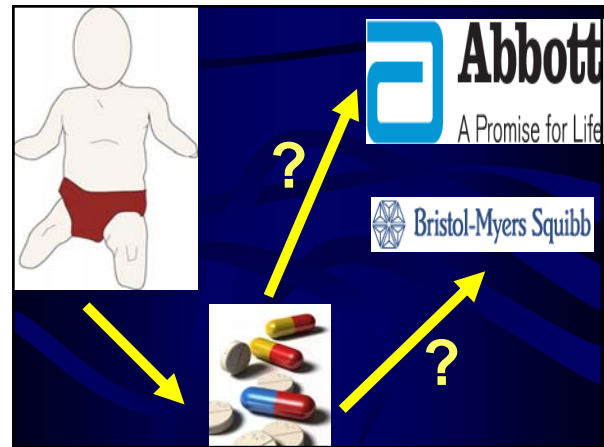Small number of tortfeasors, so, high probability wrongdoer will pay

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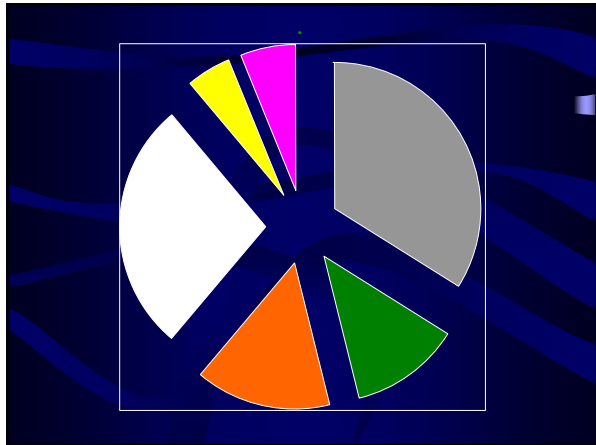Could not succeed under *Summers*

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