I. Intentional Torts

A. Battery

Prima Facie Case: P must prove:

- Intent
- Harmful/Offensive Contact
- Causal connection b/t D’s conduct and harm
- No need to prove absence of privilege – privilege is an affirmative defense!
  
This was a change from Restatement I to Restatement II.

1. Intent:
   - Subjective intent: purpose to bring harmful/offensive contact or apprehension of such contact
     - For offensive battery, only subjective intent applies! *(Leichtman)*,
   - Intent to commit unlawful act / disrupt order *(Vosburg)*, or
   - Constructive intent: Knowledge with substantial certainty (more than just grave risk!) that harmful/offensive contact or apprehension of such contact will occur *(Garratt)*.

2. Contact:
   - Harmful Contact:
     - *Thin Skull rule*: D liable for all injuries resulting from even the lightest touch, no matter if foreseeable or not *(Vosburg)*.
     - Contact may indirectly result – i.e. pulling chair out indirectly causes contact with ground *(Garratt)*.
   - Offensive Contact:
     - No actual contact necessary – enough to contact object closely associated with the body – i.e. object from hand *(Fisher)*
     - Particulate matters such as smoke have physical properties to make contact *(Leichtman)*
     - *No thin skull rule for offense!*: Offense requires both subjective (to P) and objective (to reasonable person) offense – unwarranted by social usages of time *(Fisher / Leichtman)*.

3. Causation: “But for” test

B. Assault

Prima Facie Case:

1. **Subjective Intent** to cause harmful/offensive contact or imminent apprehension
2. **Threat of violence** exhibited
3. **Apparent present ability to execute** *(Beach v. Hancock)*
4. **Causation** (But-for)
5. **Apprehension of immediate harmful/offensive contact** – no conditional threats – i.e. “were it not assize time …” *(Read)*

C. Intentional Infliction of Emotional Distress (IIED)

Prima Facie Case: *(Siliznoff)*

1. **Extreme and outrageous conduct**: reasonable person would think outrageous
2. **Intentionally or recklessly caused**: subjective desire or objectively should have known would cause

3. **Severe emotional distress**: to decide look to *conduct first, not injury!*
   - whether reasonable person would believe it could cause severe emotional distress (*no thin skull rule!*)
   - D liable for distress and any physical injury resulting from distress

D. **False Imprisonment**

Prima Facie Case:

1. **Subjective intent to confine** other or third person in boundary fixed by D
2. **Directly or indirectly results in confinement**
   - May not need physical force – physical restraint can be established if D simply denies P necessary means of escape (*Whittaker*)
   - No total restraint unless *express objection* to confinement (*Rougeau*)
     - Restraint by fear of personal difficulty (b/c of D’s demonstration of physical power) (*Coblyn*).
3. **P conscious of confinement or harmed by it**
   - Note: person falsely imprisoned (even apparently unlawfully so) is *not* relieved of duty to exercise reasonable care for own safety in escaping – i.e. can’t jump from moving vehicle (*Sindle*).

E. **Trespass to Land**

II. **Defenses to Intentional Torts**

A. General Denial: call all facts and elements into dispute (summary judgment)
B. Failure to allege claim upon which relief may be granted (motion to dismiss)
C. **Affirmative Defenses / Privileges**

1. **Statutes**
   - a. **Shopkeeper’s Privilege** (*Coblyn*) – defense to false imprisonment for merchants
      - i. Says detention of suspected shoplifters OK if reasonable manner, reasonable period of time, and reasonable grounds to belief P was shoplifting.
      - ii. Says if goods had not been purchased and were concealed on amongst belongings of person, enough for prima facie determination of “reasonable grounds” and shifts burden to P to prove unreasonable.
      - iii. At common law, already defense of probable cause to false imprisonment as measured by “prudent and cautious man standard.” Stat broadened this to a “reasonable grounds” standard but *Coblyn* effectively nullifies statute and says it still means “prudent and cautious man.”
   - b. Look to intent of statute by comparing language to old common law rule and seeing what has changed
      - i. Also look at statute from pt of view of both P & D.

2. **Justification**
a. May have defense of justification for false imprisonment if restraint is imposed to prevent P from inflicting personal injuries or damaging real/personal prop in one’s lawful custody. \textit{(Sindle)}

b. Self Defense
   
   i. **With force not threatening D/BH** (Restatement II):
      - Privileged when D reasonably believes P is about to inflict unprivileged battery, even if can avoid by:
        i. retreating,
        ii. giving up rt or priv
        iii. complying w/ command
   
   ii. **With force threatening D/BH** (Restatement II):
      - Privileged when D reasonably believes in peril of D/BH which can be prevented \textit{only} by immediate use of D/BH force, even if can safely avoid by:
        i. Retreating \textit{if} attacked w/in dwelling place
        ii. Permitting intrusion upon dwelling place
        iii. Abandoning attempt to effect lawful arrest
      \textit{But not} when can safely avoid by:
        i. Retreating if attacked outside dwelling place
        ii. Giving up rt or priv (besides intrusion of dwelling)
   
   iii. **Character and Extent of Force Permissible** (Restatement II):
      - Not privileged to use force in excess of that which D correctly or reasonably believes is necessary for self protection.
   
   iv. **When D is mistaken & P actually innocent** \textit{(Courvousier)}:
      - Three-part test:
        i. Subjective belief D in danger of D/BH
        ii. Objective belief reasonable person in D’s position would believe danger of D/BH
        iii. Objective determination D used reasonable means under circumstances (could not have reasonably avoided using force)

3. Consent

a. **Subjective consent** (Restatement II) – willingness in fact for conduct to occur. Need not be communicated to D.

b. **Manifested consent** \textit{(O’Brien)} - Despite no express consent given by P, in light of the circumstances, if:
   
   i. Objective - reasonable person in D’s position would believe that P’s conduct manifested consent to being vaccinated and
   
   ii. Subjective - D believed P manifested consent

c. **Knowledge of nature and quality of act** \textit{(Barton)} – for minors and disabled
i. Even if manifested or subjective consent, this may not be a sufficient defense if b/c of age or disability P does not know the nature and quality of the act consented to.

d. **Informed consent** (*Bang*) - mostly with medical:
   i. Where physician can ascertain in advance of operation alternative solutions and no immediate emergency exists, D should inform P of alternatives and give chance to consent to one he chooses.

c. **Implied consent** – like assumption of risk
   i. *(Kennedy)* - for medical:
      - Consent will be construed as general in nature and surgeon may extend operation with sound judgment (diff from *Bang* where if no emergency, need informed consent).
      - May prove consent by concluding P would have consented had she been asked. Consent is more strongly implied if we see P really complaining about result (neg) than act (battery)
   ii. *(Hackbart)* – for voluntary sports:
      - No implied consent to an intentional injury prohibited by rules and custom of game
      - Does injury go beyond custom to be entirely outside scope of game? If not, implied consent.

4. **Defense of Others (including strangers)**
   a. Same standards as self-defense
   b. When D mistaken (other not really in danger)
      i. Still privileged as long as reasonably believes other is in harm/would have priv (Restatement II)
      ii. Minority of cts say intervenor is held to priv of other (even if reasonably believes, if wrong no priv).

5. **Defense of Property**
   i. **With force not D/BH**
      - If intrusion not privileged,
      - D reasonably believes can prevent *only* by force, and
      - D first requests P desist and P refuses or D reasonably believes request will be useless
   ii. **With force D/BH**
      - *Only* if D reasonably believes P likely to cause D/BH to D or third person whom D priv to protect unless P expelled or excluded.
      - *(Katco)* Use of spring P in uninhabited dwelling is not a lawful means to defend property
- Even if post signs about gun and could say P implied consent / assumed risk, spring gun still unlawful b/c no judgment to distinguish trespasser from child, etc.

6. **Necessity** (*Ploof* and *Vincent*) – defense to trespass
   i. Trespass privileged when needed to protect person or prop – applies with special force to protect human life (*Ploof*)
      - Necessity trumps rt to protect prop (can’t kick off)
      - If both P and D have necessity, landowner’s necessity is superior
   ii. While P must allow trespass, where D takes *deliberate action* to preserve own prop at expense of P’s prop, D must compensate P for dmgs (*Vincent*).

7. **Miscellaneous Privileges**
   a. Privileges of parents/teachers/guardians - battery claims for *reasonable* force used to discipline children.
   b. Intrafamily tort immunity – usually no claims b/t spouses and parent/child but some cts let child sue for intentional torts (not neg).
   c. Government immunity
   d. Charitable immunity

**III. Negligence**

**Prima Facie Case:**
- Duty
- Breach
- Cause-in-fact
- Proximate Cause
- Injury

**A. Duty + Breach**

a. **General Standard:** *reasonable care to avoid injury to others*
   i. Reasonable care = care prudent/cautious man would use in circumstances (*Brown v. Kendall*).
   ii. Courts take into acct physical disabilities / age (reasonably prudent child), but not mental disabilities.
   iii. Up to jury unless judge believes reasonable minds could not differ (directed verdict).
   iv. **Hand Formula:** B<PL to determine *reasonable care* (*Carroll Towing*)
      1. To determine duty, consider whether burden of taking the precaution is less than expected loss if precaution not taken
      2. But rather than expected loss, rational actors look at expected damages (including costs of litigation)
      3. And rather than total costs, look at each extra precaution and determine whether incremental savings are higher than incremental costs (Prob 11).
      4. For corporations: may differ depending on whether looking at burden of taking precaution for P alone or for all (*Washington*).
5. Also cts may relate burden to utility of activity – if utility is low, burden of foregoing is low (Macy’s White Sale hypo).

b. Foreseeability can create duty
   i. Foreseeability for duty: whether D’s conduct foreseeably created broader zone of risk that posed general threat of harm to others - minimal threshold legal req decided as matter of law. (Herrera)
   ii. Duty to exercise reasonable care to protect foreseeable victims, even if third parties / harmed by another’s neg. (Weirum radio contest)
   iii. For professionals (therapists) – when know or under applicable professional standards reasonably should know that patient/client poses a serious danger of violence to others, duty to exercise reasonable care to protect foreseeable victim of danger. (Tarasoff)
      1. Some cts say duty only exists when particular, identifiable victim
   iv. No duty when injury to P not foreseeable result of conduct (Palsgraf Cardozo majority – most courts see duty more generally)

c. General Standard may be modified by Special Relationship b/t Parties
   i. Duty to trespassers, licensees, invitees (Restatement II)
      1. Invites (public places or business visitors): reasonable care
         a. D liable only if:
            i. Knows/reason to know condition and realize unreasonable risk to invitees,
            ii. Should expect they will not discover danger, and
            iii. Fails to use reasonable care to protect them.
      2. Licensees (social guests, emergency workers, solicitors):
         a. D liable only if:
            i. Knows/reason to know condition and realize unreasonable risk to licensee,
            ii. Should expect they will not discover danger,
            iii. Fails to use reasonable care to make condition safe or warn licensee, and
            iv. Licensee does not know/reason to know danger
      3. Trespassers (lowest duty)
         a. Duty to warn of hazardous/highly dangerous artificial conditions if
            i. Condition created/maintained by D and knows likely to cause D/BH to trespassers,
            ii. Should expect trespasser won’t discover, and
            iii. Fails to use reasonable care to warn trespasser.
         b. If Children (higher duty): Attractive Nuisance Doctrine
            i. Knows children likely to trespass,
            ii. Knows/reason to know condition has unreasonable risk of D/BH to children,
            iii. Children b/c of youth don’t discover danger,
iv. Benefit of condition and burden of eliminating risk to children, and
v. Fails to use reasonable care to eliminate danger or protect children

ii. Most courts have abolished invitee/licensee distinction
iii. Few courts have removed all distinctions *(Rowland)*
   1. For these, D must exercise reasonable care to avoid injury to all.
      a. Status of visitor may still be factor for reasonable care, but other factors are foreseeability of harm, moral blame, and availability of insurance (ability of D to spread cost).

d. No General Duty to Rescue - but many exceptions:
   i. Special Relationship to victim: innkeepers, common carriers, landowners/invitees, drivers/passengers
   ii. Special Relationship to harmer *(Tarasoff)* – for professionals, this duty to rescue victim can conflict with duty of confidentiality to harmer.
   iii. Affirmative Precautions *(Erie R.R.)*: Once D voluntarily takes affirmative precaution which induces P’s reliance, may not discontinue without reasonable warning – if does, negligence as matter of law.
   iv. Injury is caused by instrumentality under D’s control *(Tubbs)* -even when D operating with reasonable care
   v. Rescue Doctrine *(Solomon)*: D whose neg endangers third party owes rescuer of third party independent duty of care.

e. Special Rules Governing Proof of Duty + Breach
   i. Res Ipsa Loquitur: when gap in evidence prevents P from making detailed claim of specific act of negligence:
      1. Two-part test to see if RIL can go to jury *(Boyer)*:
         a. Whether D had exclusive control and mgmt of instrumentality and
         b. Absent D’s neg, the accident would not ordinarily happen.
      2. No RIL if evidence was readily accessible to P / P had means to prove specific negligence *(Shutt)*
      3. Jury may infer breach of duty (lack of reasonable care) from accident itself.
      4. Shifts burden to D to rebut inference / offer other explanation.
      5. For defective products – if not using strict liability: P need not eliminate every remote possibility of intervening neg after D lost control, RIL is satisfied if D was last person in control to have duty to inspect. *(Escola)*
         a. Traynor concurrence said should just be strict liability when 1) manufacturer 2) puts product on (consumer) mkt 3) knowing it will be used w/out inspection, and 4) product has defect 5) which causes injuries to person.
6. Note: Court may use policy arg to avoid #2 of test – accident would not ordinarily happen with D’s reasonable care – i.e. don’t want to make govt/city responsible for prisoner’s safety (Humphrey).

ii. Violation of Statutes
1. Violation of Statute designed to protect human life without excuse = Negligence as matter of law but only when violation is the cause of the injury. (Martin v. Herzog)
2. Violation of other statutes is ordinarily evidence of neg but not absolutely so if circumstances make adherence to stat more dangerous than violation. (Telda).
3. Violation of statute is not evidence of neg if it is not the cause of neg / no logical connection b/t violation and injury (Brown v. Shyne unlicensed medical practitioner).
4. When regulation being violated was not enacted to protect against damage in question, the violation alone is not evidence of neg. (Gorris sheep in pens).

iii. Custom
1. Evidence of custom in an industry can be used both to establish and negate neg- but not if custom itself unreasonable (Trimarco)
2. But D may be liable even when following custom – the whole calling may be neg by disregarding easy/cheap or otherwise imperative precaution (TJ Hooper)
   a. But industry members/custom usually in better position to determine proper level of due care for industry.
3. For professions (especially medical), duty = standard of profession.
   a. Standard established by calling experts.
   b. Generally standard is based on national standards not locality b/c of probs of conspiracy of silence.
   c. One case as exception said as matter of law reasonable standard of care was not necessarily standard of medical profession (Helling - glaucoma test was so cheap/easy).

B. Actual Causation / Cause-in-fact: required for neg and intentional torts
   a. But for D’s having acted, would P nevertheless suffer same harm? – if yes, usually no causation

i. Two components (must have both):
   1. General Causation: Whether D’s activity is inherently capable of causing sort of harm suffered by P. If no – no causation as matter of law.
      a. Usually only issue in alleged exposure to toxic substance before injury – cts rely on scientific expert evidence to show correlation is >51% to show general causation.
   2. Specific Causation: Whether D’s conduct was actual cause of P’s harm – usually the bigger issue.
a. **Circumstantial evidence** (past similar events, etc) can be shown in absence of direct evidence of actual causation to prove that injury happened this way on this occasion (*Hoyt*)
   i. *But if only circumstantial evidence is a mathematical probability, not sufficient to go to jury* (*Smith*)

b. **Alternative Liability**: When one of several Ds did it but we can’t tell which one and can’t hold jointly liable.
   i. When P can prove two or more Ds breached duty of reasonable care but impossible to tell which caused harm or impossible to say each produced distinct injury, Ds have burden of absolving self of liability (*Summers*).
   ii. When P can’t prove all Ds were neg b/c no access to evidence of time or instrumentality of injury (b/c unconscious, say) and Ds had complete access to info, ct may still place burden on all Ds to absolve selves to overcome conspiracy of silence. (*Ybarra*).

c. **Concurrent and Successive Causation**: When 2 or more causal agents would independently have caused P’s harm.
   i. When two or more causal agents exist, fact-finder must decide “But for D’s neg, what injury would P have received?” and D must only be liable for excess injury (*Dillon v. Twin State Gas & Elec*).
   ii. But when one causal agent unknown, burden on known D, and he can only prevail by showing other agent caused by natural force – if by human agency, D still liable for whole by joint and several liability (*Kingston*).
      1. Note: the “two causes” rule does not apply when time separates the causes – D not liable if dmgs exacerbated by later second cause.

C. **Proximate Cause**: allows D to escape liability even if P proves all other prima facie elements
   a. **But for Wrongfulness of D’s conduct, would P have suffered same harm?**
      i. **Turns on Foreseeability of 1) P as potential victim and 2) P’s actual injury**
      ii. Foreseeability for prox cause: whether and to what extent D’s conduct foreseeably and substantially caused specific injury that occurred - specific factual req to win case. (*Herrera*)
         1. Prox cause is generally issue for jury unless connection b/t D’s neg and resulting injuries so tenuous that warrants decision as matter of law that there was no prox cause.
      iii. Because cause-in-fact alone can lead to unlimited liability, we must draw line somewhere: prox cause– what are the foreseeable consequences of the *result* of D’s act (*Palsgraf* Andrews dissent – foreseeable consequences of *explosion*)
      iv. Rescue doctrine establishes prox cause when D’s neg which endangers third party and P who comes to rescue is injured. (*Solomon*).
v. In traffic mix-up due to D’s neg, before disturbed waters have become placid again, D is liable for results of unfolding events, no matter how bizarre. 

*(Marshall v. Nugent)*

1. To decide if too remote: ask how many and how significant intervening acts are there b/t D’s neg and P’s injury?

b. **Special Instances of Nonliability for Foreseeable Consequences:**

i. Though foreseeable, mental upset resulting from D’s neg but without physical injury may not be recoverable by following rules:

ii. **Impact Rule:** Without impact, no recovery for fright alone or physical injury resulting from fright.

iii. **Zone of Danger Rule:** Even without impact, P can recover for emotional distress but only if in zone of danger – fear for personal safety.

1. Neg drivers have no duty to those outside zone of danger, even if foreseeable they would suffer emotional distress (mother near child in street) b/c of policy arg to avoid unlimited liability for drivers *(Waube)*

iv. **Bystander Liability:** Only some courts NIED liability for bystanders – using either *Thing* elements or *Dillon v. Legg* factors.

1. For bystanders suffering emotional distress causing physical injury: D may be liable for NIED if emotional distress to bystander was foreseeable *(Dillon)* – determined case by case by following factors:
   a. was P near scene of accident?
   b. direct emotional distress and physical injury resulting?
   c. closely related to victim?
   d. Note: if D not liable for primary injuries (by contributory neg, etc), not liable to bystanders.

2. Factors too arbitrary -  
   New Rule *(Thing)*: NIED for bystanders only when following elements met:
   a. P closely related to injured,
   b. present at scene and aware its causing injury, and
   c. as result suffers emotional distress beyond that anticipated in a disinterested witness

v. **Direct Victims:** special class of liability for mother/fetus injuries

1. Any neg injury to fetus during delivery is a direct injury to mother and D liable for NIED – diff from bystander liability *(Burgess)*.

vi. **Loss of Consortium:** special claim based on legal marriage. Period.

1. No loss of consortium for cohabitating couples who are pretty much married *(Feliciano)*

2. No loss of consortium for parent/child relationships *(Borer)*.

**IV. Defenses to Negligence**

A. **Fellow Servant Rule:** in employment cases, employer not liable if P injured by fellow servant.

B. **Assumption of Risk:** may involve no fault or neg by P but entails undertaking of risk or known danger.

i. **Two meanings *(Meistrich)*:
1. Goes to deny D’s breach of duty – burden on P to prove otherwise
2. Treated as contributory neg - Affirmative defense

C. Contributory Negligence (replaced by Comparative neg now almost everywhere): complete bar to P’s recovery.
   i. P’s conduct judged by same standard as D – must satisfy all elements.
   ii. Last Clear Chance Doctrine: applies only to contributory neg to blunt force:
       1. Even if P contributorily neg, may still recover if D had last clear chance to avoid harm.
   iii. Application of Rescue Doctrine (Solomon): if rescue attempt is reasonable, recovery not barred by contributory neg just b/c P assumed increased risk of injury – if unreasonable, P liable for comparative neg.
       1. Rescue attempt reasonable when
          a. reasonable person would believe danger and act to rescue (objective),
          b. P believed danger (subjective), and
          c. P rescued in reasonable manner (not reckless)

D. Comparative Negligence: recovery diminished but not necessarily eliminated.
   i. Difficult to calculate share of fault – ask jury to consider nature of each’s conduct and extent of causal relation b/t conduct and dmgs claimed (Uniform Comp Fault Act / UCFA)
   ii. States either allocate fault by direct proportion (pure comp neg) or as long as P < or ≤ 50% neg (hybrid comp neg)
   iii. Can also be used for Joint and Several Liability’s doctrine of contribution to apportion fault among Ds (though usually based on who has more $, not fault)

V. Strict Liability: automatically establishes duty and breach – P must still prove causation/injury, D can still assert defenses

A. Ultrahazardous Activities: Old Eng rule for strict liability was non-natural use of land. This changed in US to hold D’s strictly liable only for ultrahazardous activities.
   i. Definitions- Judge decides as matter of law by:
      1. Restatement II: Factors:
         a. High degree of risk of harm
         b. Gravity of harm
         c. Risk can’t be eliminated through reasonable care
         d. Activity is not common usage
         e. Activity is inappropriate to place carried on
         f. Value of activity to community
      2. Restatement III: Elements
         a. Creates foreseeable and highly significant risk of harm
         b. Even when reasonable care is exercised by all actors, and
         c. Activity is not one of common usage
   ii. Cts disagree about what is ultrahazardous but most hold that use of toxic agricultural chemicals and storage/transport of explosives are
       1. Storage/transport of gasoline and manf/sale of guns are not

VI. Vicarious Liability
A. **Respondeat Superior**
   i. Masters are liable for torts of servants (not ind contractors) acting within scope of employment.
      1. **Servants vs. Ind. Contractors**
         a. Ind contractors contract with D to do something, but not controlled by him.
      2. Generally masters not liable for intentional torts of servants.
         a. Exceptions:
            i. Duty of employer is non-delegable (i.e. common carrier)
            ii. Servant acting under instructions / authority of master
            iii. Servant is managerial employee (*Fisher*)
            iv. Master is neg in hiring servant (not really exception but separate claim for neg of master)

B. **Joint and Several Liability**
   i. If Ds acting in concert, P can hold Ds joint and severally liable as joint tortfeasors and each would be responsible for all (more straightforward than alternative liability). Ds could then seek right of contribution from each other.

C. **Family Purpose Doctrine**
   i. Extends master-servant liability to family in that owner of fam car can be liable for neg of family members driving it.

D. **Captain of Ship doctrine**
   i. In medicine, chief of surgery liable for everyone in OR’s conduct, whether employee or ind contractor. (*Ybarra*).

VII. **Damages**
A. **Nominal**: small, only for intentional torts.
B. **Compensatory**: reflect actual harm suffered
   i. May include medical expenses, lost earnings and earning capacity, pain and suffering, loss of enjoyment of life (these last two can ensure attorney’s fees are covered)
C. **Punitive**: designed to punish D – may be big. If jury awards this, likely means found D acted with malice.
D. **Exemplary**: designed to deter future wrongdoers. May be given for torts like assault and