TORTS OUTLINE: NEGLIGENCE

HISTORY

A. Origins and Development
   1. Brown v. Kendall (MA, 1850) → dog fight
      a. “Ordinary care” → care that a prudent and cautious person would exercise in the same circumstances
      b. Rule: BOP of lack of due care on P
      c. Rule: For P to collect
         i. If D has duty to “do action” – D no use ordinary care
         ii. If D has no duty – D no use extraordinary care
         iii. P must always use ordinary care
      d. P only recover if P use ord care and D is negl

THE PRIMA FACIE CASE

I. DUTY

A. The General Standard
   1. Obj std → Degree of care a reasonable man would use under like circumstances
      --Exceptions:
         a. Mental deficiency
            -- no consideration
         b. Children
            -- what is expected of similar age and exp (subj)
            -- under 4, not liable for negl’
            -- children in adult activity, hold them as adult
         c. Physical disability – subj (i.e. reas prudent blind man under the circumstances)
         d. Common Carriers/Innkeepers – high standard (even if slight negl’)
         e. Doctors
            -- reasonable professional in same/similar community
         f. Voluntary intoxication is no exception
         g. Owners/Occupiers/In Privity of Land
         h. Stat. Standard (Per Se)
            --P must be part of protected class
            --Stat must be designed to prot type of harm
            --exception: compliance results in greater danger

B. The Hand Formula
      a. “HAND FORMULA” → negligence when Burden < Probability x Loss
      b. Bargee should not be absent for 21 straight hours
      c. Might want to ask: Can you break this down?
         i. Having bargee on board 24/7 will cost $250/week…
ii. Without bargee, prob of loss will be $300/week
iii. No bargee 24/7 = negligence
d. B<PD → PD could be higher (punitive damages) or lower (transaction costs) than PL

2. Problem 11 (p. 181)
a. Actor can stop taking precautions when total social cost (actor’s costs plus liability) is at its lowest point
   i. Have to ask: What would the actor do under strict liability?

   a. One of a few cases to explicitly apply Hand formula
   b. (B=protection of all wires) > (PL=prob loss of all losses)
      i. Why B = total burden? → Ex Ante (predictive): Loss must be focused on anyone coming into contact
      ii. P is low for decedent when all circumstances taken together
   c. Who is the cheaper cost avoider?
d. Hand formula → Wealth Maximization/Direction of Resources

4. Weirum v. RKO General, Inc. (CA, 1975) → radio promo, car crash
   a. Foreseeability of the risk is a primary consideration in establishing the element of duty.
   b. Rule: Must ask jury whether a reas person would have FORESEEN a high prob of harm; Forseeability for duty and then Hand formula.
   c. Just because accident not happened before, does not show it might not reasonably have been anticipated.
   d. (B=stop promos, 1st Amend) < (PL=foreseeability of risk of grave harm)

C. Sudden Emergency Doctrine
   1. Young v. Clark (CO, 1991) → Driver hit bumper due to “weaver”
   a. Rule: Emergency conditions are added to the circumstances for considering how reas person would act in the situation

D. Modification of Duty for Special Relationships
   1. Land Owners to Entrants
      a. Type of P controls the standard of care (Rstmnt 2nd):
         --Unknown adult trespasser: Duty to refrain from wanton and willful misconduct.
         --Child trespasser (“attractive nuisance”): Duty to take reasonable care to eliminate artificial conditions involving the risk of serious injury that the owner knows/has reason to know children are likely to trespass on, children too immature to realize danger, and the utility of maintaining and burden to eliminate is slight compared to the potential harm.
         --Constant/Known trespasser: Duty to warn of artificial condition involving the risk of serious injury that the owner/occupier knows of
         --Licensee (privileged to enter only by virtue of owner’s consent, purpose of his/her own, social guests): must warn of dangerous conditions that the owner/occupier knows of; no duty to inspect
         --Invitees (public invitee – “lot open free to all children” – or business visitor): must warn of dangerous conditions that owner/occupier should (through reasonable care) know of
---Owner must exercise her power of control over the conduct of third persons to prevent the injury to an invitee who may be injured by such conduct.

b. In most states, no liability for very obvious dangerous conditions

   --Court rejects common law categories of duty → ordinary care for all
   --Most courts today retain the traditional categories

2. Common Carrier to Passengers (higher than reas care)

3. Driver of Auto to Guest Passengers
   a. Analagous to duty owed to licensees on land
      --Reas care to warn and operate vehicle safely
   b. Fewer than 10 states retain guest statutes (duty only against wanton)

E. Limitations on Duty/Liability (Exceptions)
   1. **No duty to come to the aid of another (nonfeasance), but...beginning aid and doing it unreasonably (misfeasance) is actionable.**
      *Exceptions to no duty to aid: Reliance, Instrumentality, Special Relationships*
   2. Est Duty from Reliance
      a. **Erie R. Co. v. Stewart** (6th, 1930) → Railroad watchman left post
         --No statute for watchman... Only reason for duty = Public’s reliance
         --Eliminate Reliance → Eliminate Duty
         -- Not liable if P did not know (no reliance)
      b. When is it reas to leave? → Hand formula (bargee)
   3. Instrumentality
      a. Rstmt 2nd: “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 future harm, the actor is under a duty to exercise reasonable care to prevent such future harm.”
         --**Tubbs v. Argus** (IN, 1967) → Driver not help passenger in own accident
   4. Special Relationships
      a. Liability for failure to warn only if special relationship, ability to control, and unique position to do it.
         i. Parents/kids, doctors/patients
         ii. No priests, police officers
      b. **Tarasoff v. Univ. of California** (CA, 1976)
         --Rule: When prevention of foreseeable harm requires D to control conduct or warn of conduct, liability only if D bears some special relationship to dangerous person or potential victim
         --If a psych predicts (or SHP – objective, dicta) violence, then they must warn target or help
            --Does B (Dr./patient relationship) out weigh PL (possible risk of violence)?
            --Dissent: reduces ability of psych to treat
            --APA: pysch over-predict violence
            --How far? Dental student/HIV?, Roommate/HIV?
II. BREACH

A. Violation of a Criminal Statute (As Proof of Breach)

1. Maj view: Violation of a statute is negl’ per se
   a. Min view: Merely evidence of negl’

2. Martin v. Herzog (NY, 1920) ➔ P driving buggy w/o lights, D car on wrong side of road
   a. Adopts Maj view
   b. Rule: Unexcused violation of a safety statute (head lights to protect others) may be contributory negl’ (sent for new trial)

3. Tedla v. Ellman (NY, 1939) ➔ Walking on wrong side of road
   a. Rule: Violation of a safety statute is negl’ unless adherence is less safe than non-adherence

   a. Rule: Statute violation did not cause injury, possible negl (exercise care and skill of qualified practitioner) did
      --P must prove this on remand

5. Gorris v. Scott (1874) ➔ Unsecured animals lost overboard but statute designed to protect from disease
   a. Represents min rule: Act no negl’ if violation of statute not lead to intended results
   b. Problem 20: Read statute ➔ Look at all interpretations (pro-D v. pro-P)

B. Non-Adherence to Custom/Expert Testimony (As Proof of Breach)

1. Trimarco v. Klein (NY, 1982) ➔ LL/T Shatterproof shower door
   a. P claimed custom as a “sword”
   b. Rule: Industry standard is evidence of negl’
   c. If industry had std, must be at least as good (low bar)
   d. P’s evidence was sufficient to sustain jury verdict

2. The TJ Hooper (U.S. 2nd, 1932) ➔ Radios on tug boats
   a. Rule: Adherence to custom is NOT an absolute defense
      --Ct determines “reass prudence” of D’s actions (with or w/o std)
      --Hand formula: B (small $ of radio) < PL (risk of barge loss)
   b. D claimed custom as a “shield”

3. Helling v. Carey (WA, 1974) ➔ Ophthalmologist: 1 in 25,000 glaucoma
   a. Maj op: Even with custom, action not “reass prudent” (everyone deserves same care);
      Diss: Should impose strict liability (distribution of costs to patients & Dr.)
   b. Rule: Court may set a higher std of care for medical professionals
      --Ordinarily test is that of physician in good stdning. If issues are complex, expert testimony relied on to det what phy SHD
      --B (simple, inexpensive procedure) < P(very low)L(serious injury and illness)

C. Res Ipsa Loquitur (“The Thing Speaks for Itself”) ➔ NO CAN TELL IF BREACH

1. Requirements
   a. Accident not normally occur w/o someone negl’
   b. Cause/Instrumentality in complete control of D
   c. P not voluntarily contribute to harm

   a. D arg: Not RIL since P had access too (RIL not method of lazy lawyer)
   b. Ct: Not necessary for P to show evidence peculiarly avail to D
--P access not avail (injured) and not matter, neither does some speculation, RIL applies

3. **Shutt v. Kaufman’s Inc.** (CO, 1968) → buying shoes, rack fell
   a. Rule: If P has means to prove D was responsible, no RIL (no substitute for P finding facts)

4. **City of Louisville v. Humphry** (KY, 1970) → drunk in jail cell
   a. Ct: RIL will NOT apply when injury might caused by someone outside D’s control
      --Too many possibilities to establish D’s control of instrumentality
      --Could have been fellow prisoner → P need to show knowledge of violent propensities to make city liable

5. **Escola v. CocaCola** (CA, 1944) → busted bottle
   a. Maj:  
      --D give up control of instr prior to injury no prohibit RIL
      --RIL no apply if accident might ord occur w/o negl’
      --Injury either from overcharge of gas (D) or bottle defect → ct says new bottles not defect (1/600 test) and D responsible for inspect used bottles
   b. Concur: Absolute liability

### III. CAUSATION (Actual & Proximate)

#### A. Actual Cause (In Fact) – Question for Jury

1. Generally:
   a. Actual cause before proximate cause
   b. If no “but-for” causation, let the D go!! (foggy conditions + no signal = accident; even with signal accident happens)
   c. Exceptions  
      --Substantial Factor: 2 negl’ conduct Ds (hot rods) both are subst factor in injury to horse (no but-for) → ea liable
      --Alt. Liability: (Summers) 2 negl’ conduct Ds, one cause → Burden to Ds, no resolve then both liable

2. Did D do it?
   a. **Hoyt v. Jeffer** (MI, 1874) → Hotel burned from spewing sparks of plant
      --Rule: Circumstantial evidence admiss in negl’ action to show cause; weight of it is question for jury
      --If old evidence, conditions must be same (chimney/operation same at time of old fires)
      --While must be evidence of some dir connect, need not be eyewitness
      --Numerous examples has effect on jury (Judgment for P affmd)
   b. **Smith v. Rapid Transit** (MA, 1945) → Bus @ 1AM
      --Rule: Math prob ALONE not suffice for actual cause (get to jury)
      --Dir verdict sustained
      --Could have been private or chartered bus
      --People v. Collins (CA, 1968) → classic statistical error, overlap of categories

3. Does D’s activity cause this sort of injury as a general matter?
a. Scientific Test
   --Problem 6: Birth defect from power lines
   --Too small sample to determine/cluster
   --Even if general cause, then must establish specific cause

4. But-for wrongful quality of D’s conduct, would P suffered same harm?
   a. “But-for”
      --Ford v. Trident Fisheries (MA, 1919) \(\rightarrow\) Even if proper rescue, P still drown
      --Even though rescue was poor (boat lashed, 1 oar), would not have made diff
      --Lyons v. Midnight Sun (AR, 1996) \(\rightarrow\) P’s wife pulled out in front of speeder/swerver
         --D not liable if negl’ was not a contrib factor in injury
         -- Jury: But-for speeding (negl’), accident still happens (expert)
         -- Jury: But-for swerve, accident no happens, but swerve not negl’ act (expert says proper reaction)
   b. Exceptions to but-for
      --Loss of Chance Doctrine (For med.?, only when can’t be 100% sure of cause)
         --Hamil v. Bashline (PA, 1978) \(\rightarrow\) If EKG, 75% chance to survive
            --SupCt: increase risk = causation for P’s lost life (PD<PL)
         --Rstmt Sec. 323: Only for render services (not Ford)
         --Maj rule: No jury w/o 50% loss of survival
            --Problem: Corrective justice falls short, could neglect methods under 50%
         --Some courts use “substantial possibility” (PD>PL)
            --Problem: Defensive medicine/worry re: lawsuit
         --Falcon v. Mem. Hospt. (MI, 1990) \(\rightarrow\) Death after giving birth, fluids = 37.5 % chance to survive
            --SupCt: Multiply .375 by wrongful death
         --Weymers v. Khera (MI, 1997) \(\rightarrow\) P lost liver and life expectancy; NO LOSE LIFE
            --Rule: Loss of chance doctrine NOT apply if no lose life (Caus = bedrock of torts)
      --Alternative Liability (Multiple Ds, can’t id)
         --Summers v. Tice (CA, 1948) \(\rightarrow\) 2 quail hunters shoot at third
            --Rule: When one of 1) multiple 2) negl’ parties 3) did cause injury THEN, all liable and burden on Ds to show was/was not cause (NOT J&S liable)
            --100% that one of Ds did it
         --Ybarra v. Spangard (CA, 1944) \(\rightarrow\) uncon patient, unexplained injury, part of body not subject of treatment
            --Rule: When (via RIL) one of 1) multiple 2) all present parties 3) did cause injury, then all liable and burden on parties to show indiv cause (control of instrumentality? -- point finger)
            --Every D in care of P had a duty
      --Market Share Liability (Multiple Ds, can’t id)
         --Doe v. Cutter Biological (Fed, 1994) \(\rightarrow\) Factor 8 gave him HIV
--Rule: When one of 1) multiple manufacturers 2) did cause injury 3) only 1 acted negligently, then neither liable for lack of cause  
--NOT all liability: NOT Summers, only 1 negligent Defendant
--NOT market share: Factor 8 manufacturer differently, can’t hold % of market liable
--NOT enterprise: Industry standard not right, but government sets standard
--NOT concert in action: ID statute abolishes J&S

5. Concurrent and Successive Causation
   a. **Dillon v. Twin State Gas & Electric** (NH, 1923) ➔ boy electrocuted on bridge
      --Rule: Plaintiff was killed, if Plaintiff would have been killed anyway = no recovery
      --Rule: Plaintiff was killed, if Plaintiff would have been severely injured = Defendant liable for life – injury (earning capacity)

6. Joint Tortfeasors
   a. **Kingston v. Chicago & NW Ry** (WI, 1927) ➔ Two fires, both human/negligence
      --Rule: 2 negligence (human) acts create 1 indivisible injury: Both (or either) liable
      --Dicta: 1 negligence act, 1 non-negligence (natural) create 1 indivisible injury: Negligent actor not liable
      --If natural, cannot say “but-for,” but who best to bear costs? Deterrence? Co.?

B. Proximate Cause
   1. D’s last good shot to get out of causation
   2. 2 Basic Rules:
      a. If the result is unforeseeable, let the Defendant go!!
      --Exception: In an indirect cause case (After negligence act and before the injury, there is an intervening act of God or affirmative act by third person), if the intervening act was an unforeseeable intentional tort or crime, let the first Defendant go even though the result was foreseeable.
      --ex ➔ Guy left the keys in his rental car. Crime wave recently in the news. Someone steals the car. Guy is not let off the hook because it was foreseeable crime.
      b. If the result is foreseeable hold the Defendant liable.
      --In direct cause cases, the result is foreseeable almost always
      --Eggshell/thin skull pattern ➔ could have foreseen some injuries, but Plaintiff has poor bone structure and suffers terrible injuries; Defendant is liable for all injuries.
      --Rule: All you have to foresee is an injury, you do not have to anticipate its extent

3. Was any harm at all to the Plaintiff “reasonably foreseeable” when Defendant acted?
   a. **Palsgraf v. Long Island RR** (NY, 1928) ➔ Lady at train station, fireworks explode
      --CARDOZO: Duty: “Eye of ordinary vigilance”/”Orbit of danger”
      --Links duty to foreseeability: Duty only to those in orbit of danger
      --Those in “orbit of danger” are those who could be foreseeably harmed through “eye of ordinary vigilance.”
      --If there was a wrong, it was to the safety of the package
      --ANDREWS: Proximate Cause: Owe DUTY TO ALL who are injured from actions
      --BUT cut off liability if not (from factor) a proximate cause
      --Factors: 1) but-for 2) without too many intervene. 3) substance factor 4) not too attenuated 5) foreseeable 6) too remote . . . time & space
--Ultimately a matter of expediency
b. Solomon v. Shuell (MI, 1990) ➔ shot policeman trying to rescue
   --Rescuers as a class are foreseeable
   --Rule: Rescue Doctrine: No contr negl’ when person “reas believes” victim was in danger
   --Rescue Doctrine – 2 part inquiry: Jury must det 1) reas person would attempt rescue in sim circum and 2) manner rescue carried out was reas
4. Was particular nature and circum of P’s harm “reasonably foreseeable” when the D acted?
      --Liable for negl creating dangerous situation in which foreseeable intervene act results in injury
      --Cardozo (Palsgraf): Foreseeable ➔ duty
      Magruder (Marshall): Foreseeable ➔ prox cause (one factor in Andrews)
      --Poss 2 negl’ act (swerve & park) – Magruder: borderline prox cause ’’s for jury
   b. Watson v. Kent & Ind. Ry (KY, 1910) ➔ light match to ignite spilled fuel
      --Rule: Negl party not liable for intentional/malicious intervene act because not foreseeable
      --Jury: Intentional or unintentional act? (unintentional = liable)
5. Look at prox cause approaches:
   a. Multiple Factors? (Palsgraf – Andrews Diss)
   b. Foreseeability? (Wagon Mound 1)
   d. Direct cause is proximate cause (even if not foresee)? (Polemis – dropped plank)
   e. Sequence of Event Not to Rest? Expedience? (Kingsman – boats/bridge/flood)
   f. Intervening Cause? (Watson)
   g. So wrongful, overwhelms/supervenes?
C. Other Foreseeable Conseq. Issues (like prox cause)
1. Negligent Infliction of Emotional Distress (NIED)
   a. Bystander Evolve: Waube: zone of danger, P must be put in peril ➔ Dillon (curb/mom): Factors: 1) Present and knows its happening 2) Serious emotional impact from observ, more than disinterested witness 3) Closely related—blood/marriage (“reas” person foresee with these factors/Like Cardozo, duty owed to foreseeable P) ➔ Thing v. LaChusa (nearby mom told of child’s accident, saw bloody/unconscious): Draw line/Clear NIED – MUST have 3 Dillon factors; Concur: Reinstate zone of danger; Diss: flexible Dillon rule ➔ TODAY: Still continual struggle, but Waube is majority position (?)
   b. Burgess v. Superior Ct (CA, 1992) ➔ C-section, told baby was hurt
      --May recover when a “direct victim” (not “bystander”) ➔ pre-existing duty and special relationship
      --Patient-physician understand duty to preg woman as to fetus. If negl’ causes fetus injury and result ED to mother, phys breaches duty directly to mother.
2. Loss of Consortium
   a. Feliciano v. Rosemar Silver (MA, 1987) ➔ cohabit couple held out as married
      --No LOC claim outside legally sanctioned marriage
      --Integrity of institution must not be jep
   --No LOC for children
   --too many claims, to diff to calculate, no sex, consist with tort trend
   --Diss: children suffer loss and should recover
3. Wrongful Death
   a. Werling v. Sandy (OH, 1985) → fetus born dead
      --Wrongful death for stillborn if viable fetus (foreseeable P) at time of injury
      --Fetus born alive and then dies, also wrongful death
      --Roe v. Wade consideration
4. Wrongful Birth
   a. Fassoulas v. Ramey (FL, 1984) → negl vasectomy, one “mental” child, one
      “normal” child
      --Rule: No collect: normal child raising expenses (benefits outweigh, could adopt, abort)
      --Rule: May collect: special upbringing costs of mental child (overwhelming, can’t adopt)

IV. INJURY
   A. P must have been injured
   B. Take property as find it (thin skull/eggshell)

AFFIRMATIVE DEFENSES

I. ASSUMPTION OF RISK (Complete Bar)
   A. Elements:
      1. P must know that the risk is present and
      2. must understand its nature.
      3. P’s choice to incur (the risk) must be free and voluntary
   B. Found in contrib negl’ states; out of most compar negl’ states
      1. Same as “knowing” contrib negl
   C. Express Consent Perspective
      1. Person assuming the risk expressly K, w/action indicating aware of risk
      2. Similar to consent in intentional torts
      3. Due to vagueness of negl’ → Cts often refuse to enforce (esp broad: employee A.R.)
   D. Meistrich v. Casino Arena → A.R. is not a separate defense from contrib negl’

II. CONTRIBUTORY NEGLIGENCE (Complete Bar)
   A. Two kinds:
      1. “Knowing” → 1) Sees risk and 2) “unreas” and vol takes on
         a. Only knowing cn is a defense to strict liability
      2. “Unknowing” → No see risk (careless)
   B. Contrib negl’ not a good defense to wanton/malicious conduct
   C. Standard
1. Conduct on part of P: 1) subst factor in bringing about his injury and 2) falls below standard (duty of ord care) to which he is req’d to perform for his own protection
2. From Butterfield v. Forrester → P rode “extremely hard” (not ord care) into pole D put in street
3. Different from doctrine of “avoidable conseq”: P fails to act as reas person to mitigate his damages; barred from recovering avoidable damages

D. Last Clear Chance Doctrine
1. Found in most contrib negl’ states, but out in most compar negl’ states (but taken into account)
2. Davies v. Mann → P left ass in road
   a. If D has last clear chance to avoid harm, P’s negl’ not “prox cause” of accident

III. COMPARATIVE NEGLIGENCE (Percent by fault, Maj Rule)
A. “Pure”
   1. Uniform Comparative Fault Act (step-by-step)
      a. Step 1: Determine percentage of fault by…
         --Nature of conduct → 3 approaches: 1) assign a percentage; 2) scale of 1-10 (no fault, ord negl’, intent), then %; 3) rank the fault of parties, then %
         --Extent of cause: Each 100% negl’ if but-for each one’s conduct, the accident wouldn’t have happened
      b. Step 2: Allocate damages based on percentage of fault
         --Section 3 → no set offs absent agreement of the parties (insurance companies are paying)
         --Section 2c → court enters judgment on basis of joint and several liability (each one liable for entire judgment)
         --Sections 4 and 5 → seek contribution
            --sec 5 – reallocating if one D cannot pay
   B. “Modified”
      1. P can only recover if P’s negl’ is less than (or in some states, no greater than) D’s negl’
      2. If P’s negl is greater than D’s negl’ (i.e. 60%), then recovery is barred
   C. Knight v. Jewett → touch football
      1. Primary assumption of risk cases not merged into compar negl’ systems
         --PAR: D has no duty to protect P from particular risk
         --Here, D breached no duty because he did not intentionally injure or engage in behavior totally outside norm activity of sport
      2. Secondary assumption of risk cases are merged into compar fault
         --SAR: D owes a duty of care but P knowingly encounters risk of injury caused by D’s breach of duty

MISCELLANEOUS

I. JOINT & SEVERAL LIABILITY
   A. Joint Liability
      i. Ds who are jointly liable can be joined in a single suit, although they need not be
   B. Several Liability
i. Ds who are severally liable are **liable in full** for the P’s damages, although the P is entitled to **only one full recovery**

C. When J&SL

   i. Ds acted in concert to cause the harm
      --ex → A and B engage in an auto race on public street and A runs over P. B will be just as liable as A, even though B did not actually hit P.

   ii. Ds acted individually, but caused an indivisible harm
      --ex → P is a passenger in A’s auto which collides with B’s auto due to fault of both drivers. A and B are J&SL.

D. Contribution

   i. Most states today provide that joint tort feasor who has paid more than his pro rata share of the damages can recover the excess from the other joint tort feasors.

II. **VICARIOUS LIABILITY**

   A. Masters, Servants, and Independent Contractors

   • **Respondeat superior**: M/S relationship is consensual → one person performs services on behalf of the other, and the other has the right to control the conduct. With control of the actions, comes the liability. However, the actions must be w/in the scope of employment.

      i. Scope of employment: Generally of the same general nature as that authorized.
         1. Is the action normally done by the employee?
         2. What is the employment relationship between the employer and the employee?
         3. Did the employer expect the employee’s actions?
         4. What was the extent of the injury?
         5. Was the employee’s act criminal in nature?

      ii. Intentional torts
         1. Intentional torts not usually applicable, but movement to include if the employment involved use of force (e.g., bouncer).

      iii. Independent contractors: Generally NO, with 3 exceptions below…
         1. Neg’l in instructing, selecting or supervising
         2. Liability for certain duties stay with general contractor (ex. Excavation)
         3. Inherently dangerous activities.

   B. Joint Enterprise

      i. Basic elements:
         1. Contract in which parties enter into an undertaking together
         2. Common purpose
         3. Community of interests
         4. Equality of rights and control over the agents employed

   C. Family Purpose

      i. Liability on owner of family car
         1. Auto owned by D sought to be held VL
         2. Auto is family car
         3. Driver that caused accident is family member
         4. Auto used for family purpose
         5. Auto used with owner’s permission
III. DAMAGES

A. Personal Injury
   i. Medical Expenses
      1. In order to seek recovery for medical expenses, the expenses must be reasonably related to the injury caused by the D and must be reasonable in amount.
   ii. Lost earnings and impairment of earning capacity
      1. Along with bodily injury, usually is P’s largest loss.
   iii. Pain, suffering, and other intangible elements
      1. Past and future mental and physical pain and suffering
   iv. Most tort disputes are resolved by out-of-court settlements

B. Wrongful Death
   i. Loss to beneficiaries: measure of damages is amount of harm to decedent’s family
   ii. Pecuniary loss to the estate of the deceased → 3 approaches
      1. Net earnings: Present value of future earnings minus normal expenditures
      2. Gross earnings: Present value of future earnings
      3. Net accumulations: Amount decedent might be expected to save and would be left to the estate

C. Damage to Personal Property
   i. Irreparable damage
      1. When completely destroyed = Difference between fair market value before and after (salvage)
   ii. Repairable damage → 3 approaches
      1. Cost of repairs
      2. Cost of repairs + decrease in value even after repairs
      3. Loss of use – rental value or lost profits

D. Punitive Damages
   i. Use when tort feasor’s actions are of an aggravated nature (e.g., intentional, reckless, willful or wanton). Courts require more than mere negligence.
TORTS OUTLINE: INTENTIONAL (NOMINATE)

PRIMA FACIE CASES

I. BATTERY:

- **Definition**: Intentional, unprivileged harmful or offensive contact by the D with the person of another.
- Prima Facie Case: 1) Intent 2) Contact

A. Intent Clarification (subjective test)

1. **Vosburg v. Putney** (WI, 1891) → D kicked P in school, while class in order, aggravating a former injury
   --Battery if:
   --No “implied license” exists (classroom vs. playground)
   --If playground, P could have assumed contact (could have not gone out)
   --In classroom, D’s action was not expected
   --Act was “unlawful” (violated order and decorum of classroom)
   --Kick should not occur within class
   --Battery damages: Wrong-doer responsible for all injuries regardless if couldn’t have been reasonably foreseen (aggravated injury)

2. **Garratt v. Daley** (WA, 1955) → D moved chair, P sat where chair was, P fell and injured self
   --Battery if:
   --D “knew with substantial certainty” that P would sit (perform action)
   --Generally, D has intent when a reas person in D’s position would believe that a particular result was certain to follow his acts
   --D’s age only a factor in what he knew (experience)
   --P did fall (not that D knew she would, only that she did)

3. Transferred Intent → If A attempts to strike B and hits C. A is liable for damages to C.

B. Harmful or offensive contact

1. Usually exam gives you an offensive contact → key is “unpermitted” to the average person, i.e. not tap on shoulder (super-sensitivity not relevant unless D knew)

2. **Leichtman v. WLW Jacor Communications** (OH, 1994) → DJ int. blew smoke in anti-smoker’s face
   --Battery if:
   --action is deliberate (Intent)
   --contact (offensive to a reasonable sense of personal dignity) → disagreeable or nauseating, painful due to outrage to taste & senses; cigar smoke = particulate matter to contact P with

C. With P’s person

1. Doesn’t have to be the P’s body, just connected (very liberally construed)
2. **Fisher v. Carrousel Motor Hotel** (TX, 1967) → D’s employee snatched plate from P, told “Negro” could not be served
   --Just intentional contact with “object closely identified with body”
   --Physical contact not needed
--Damages for *mental suffering* recoverable even with no physical injury

--Vicarious liability:

--Club/Hotel liable for actual & punitive damages for Flynn

--Flynn (employee):

--Not an independent contractor

--Within scope of employment

--Within managerial capacity (punitive damages)

3. Body connected to car can be contact with person

II. ASSAULT

• **Elements:** 1. **Act by D** (not just reflex, drugs, unconscious) 2. **Intent** (can be transferred intent) 3. **Apprehension of an immediate battery** (objective test) 4. **Causation** (P’s apprehension must be caused by D’s act) 5. **Damages** (P must be able to establish some form of damages)

A. Apprehension

1. Must be reasonable (would the average person thought he was going for the gun in his holster?)

2. Don’t confuse with fear or intimidation

   --Professors confuse with David and Goliath routine; all you need is a reasonable apprehension of an immediate offensive contact, doesn’t have to be extremely harmful (Giant P with smallish D Æ P wins)

3. Apparent ability to harm Æ Unloaded gun can create reasonable apprehension on P’s part if P doesn’t know if gun is loaded

B. Of an immediate battery

1. Throwing punches at you from the other side of the room is not immediate

2. Words alone are not enough (don’t represent immediacy)

3. Words coupled with conduct is enough

   --Words may undue the conduct Æ Shaking my fist, I say “if you weren’t my best friend, I’d punch you in the mouth”

C. Original Definition

1. **Read v. Coker** (C.B., 1853) Æ D threatened P with group of big men (rolled up sleeves)

   --Assault if:

   --Threat of violence exhibiting intention to assault

   --Present ability to carry out threat

D. Modified Definition

1. **Beach v. Hancock** (NH, 1853) Æ same year as Read, but modified rule

   --Threatened with non-loaded gun

   --Assault if:

   --Threat of violence exhibiting intention to assault

   --**APPARENT** (not need actual) Present ability to carry out threat

E. Intent within assault

1. Objective Intent: What a “reasonable” person would infer from the situation

   --Beach – had gun pointed, assumed loaded and would use

III. FALSE IMPRISONMENT

• **Prima Facie Case:** 1. **Act by D** 2. **Obstruction or detention of P** (sufficient act of restraint and bounded area) 3. **Intent** (may be transferred intent) 4. **Causal relationship**

A. Sufficient act of restraint
1. Look at the facts and common sense analyze them to reach a conclusion
2. However, verbal threats are enough (don’t need the actual application of force) and inaction is enough (doing nothing can be restraint if there is an understanding between the parties that the D should or would do something).
   --Whittaker v. Sanford (ME, 1912) → No let P have boat take children and luggage off D’s yacht (inaction is sufficient)
   --The sea is a physical impediment
3. Irrelevant how short the time period is → even a very short period can qualify
4. P must know of the obstruction or detention at the time
5. Exclusion: Generally, not sufficient that P is not allowed to go where wishes if he can go somewhere else. However, exclusion from one’s home may be sufficient.

B. Bounded area
1. Freedom of movement is limited, but there is a threshold level → mere inconvenience will not do (but a lot of inconvenience will do)
2. Area is not bounded if there is a reasonable means of escape that P knows of.
   --Not reasonable if: (i) Unknown to P, or (ii) requires the P to take risks to escape, is dangerous, or is simply uncomfortable
3. Total restraint required
   --Rougeau v. Firestone (LA, 1973) → No let P out of guard house
   --P was not totally restrained
   --Implied consent – P never told anyone that he did not want to stay in the guardhouse

IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (IIED)

• Exam Favorite
• Elements: (1) Damages (Physical injury or severe mental suffering by the P resulting from emotional disturbance without physical impact), (2) caused by outrageous conduct (highly aggravated words or acts of the D), (3) done with intent to cause mental suffering or with substantial certainty to result (in most jurisdictions, with recklessness as to this result).
• Differs from NIED in that it is done with a more culpable state of mind
1. Outrageous Conduct
   a. Must be OUTRAGEOUS!!
   b. An insult will not qualify, unless…see c.
   c. Profs love to give you a pattern where the conduct is normally not outrageous, but will throw in a fact to make it so
      --they’ll make it continuous
      --they’ll give a specific P (young child, very old person, pregnant woman, or supersensitive adult where the sensitivities are known)
      --they’ll give you a common carrier or innkeeper D with the right kind of P (busdriver/innkeeper insulting a passenger or guest is outrageous)
2. Damages
   a. Clear showing of substantial emotional distress
   b. The more outrageous the conduct, the less you need in damages
   c. Modern view: No physical injury required
      --State Rubbish Collectors v. Siliznoff (CA, 1952) → Suffered physical illness, but no physical injury
--IIMU if: 1) No privilege 2) Intentionally subjects to mental suffering 3) Incidents of threat to well being

3. Restatement 2\textsuperscript{nd}
   a. One who by 1) extreme and outrageous conduct 2) intentionally OR recklessly causes 3) severe emotional distress
      --Directed at 3\textsuperscript{rd} party, can collect IF intentionally OR recklessly to, 1) immediate family who is present OR 2) anyone present at time

4. Comment: Adopted by the courts as a fall-back tort to nab a bad D
   a. Write about assault and then write about intentional infliction…

V. TRESPASS
1. D must physically invade
   a. Not nec to personally go on the land
   b. It is req’d in most states that at least some physical object go on the land (not loud noises from next door \(\rightarrow\) nuisance tort)

2. The P’s land
   a. Do not have to touch the surface of land
   b. Space going up and down from that surface
      --Teenage kid hits a ball over P’s land, but it never touches the surface \(\rightarrow\) tort can still succeed

VI. TRESPASS TO CHATELS AND CONVERSION
1. Which one? If some damage, chattels. (scratch briefcase) If a lot of damage, conversion. (destroy briefcase)
   a. All conversions are also trespasses, but all trespasses are not conversions
   b. Trover: YOU get property back; Conversion: THEY get property, YOU get $$

2. Damage includes not only physical damage, but also interference with possessory rights.

DEFENSES

I. CONSENT
   • 3 steps to determine (chronological)
     o Determine that the P had \textbf{capacity} (child, mental ability)
     o \textbf{Express} (words used) \textbf{or}
     o Apparent \textbf{implied} consent (understood by reasonable person)
        --Custom (in touch football, touch)
        --P’s conduct (carrying the ball to goal)
   • \textbf{Exceptions} to consent = mistake (P was mistaken on facts), fraud, coercion

1. Boundaries
   a. Has D stayed within the boundaries of consent given?
      --Kick in groin at football game

2. Failure to Object
   a. \textit{O’Brien v. Cunard Steamship Co.} (MA, 1891) \(\rightarrow\) Dr. vaccinated P on boat
      --P expressed no verbal/objective consent, only subjectively unwanted
      --Rule: Consent must be objectively perceived (D not mind reader)
--Context/circumstances important
--Not enough that P did not want contact
--Must be appearance of consent to reasonable outside observer

3. Criminal Consent (Split authority)
   a. Barton v. Bee Line, Inc. (NY, 1933)
      --Consensual sex with minor female is criminal
      --Rule (minority view on statutory rape cases): No cause against man, if girl:
         --Willingly consorts &
         --Knew nature and quality of act
      --Rule: Act may be criminally liable & not tortuously liable
         --If consent was clear, privilege exists
         --Consent is a defense in tort, not a defense against criminal stat
      --Vicarious liability: Common carrier “strictly liable” for acts of employees

4. Surgical Consent
   a. Unauthorized operation
      --Bang v. Charles T. Miller Hospital (MN, 1958) → Dr. severed P’s spermatic cords (now sterile)
      --Rule: Dr. must inform patient of consequences/alternatives if: 1) the Dr. can ascertain consequences beforehand; and 2) No immediate danger (what a reas person would desire)
   b. Lawful extension of an operation
      --Kennedy v. Parrott (NC, 1956) → Dr. punctured P’s cyst during different (consented) surgery – Injury not puncture, but error resulting in leg injury
      --Rule: Dr. may perform non-germane actions to patient if: 1) Patient is unable to give consent; 2) Action is emergency or would save another surgery (not all states); and 3) Dr. acted in best judgment and w/proper procedure
   c.Usu four req’ments to find implied consent:
      --patient not able to consider the matter
      --immediate decision is necessary
      --no reason to believe that patient would not give consent
      --reasonable person in same condition would consent

II. PRIVILEGES
   • Self Defense, Defense of Others, Defense of Property (Exception of Necessity), Other Privileges
   1. Timing req’ment
      a. Happening right now or any second now (can’t defend self after the fact, i.e. retaliation)
      b. Hot pursuit doctrine: If you were in hot pursuit of someone who has stolen your chattel, brings you within the timing req’ment
   2. Reas Test
      a. Self Defense: Reasonable belief that tort is being committed on you
         --Maj rule: No duty to retreat before you defend yourself
         --Min rule: Duty to retreat, except when in home, retreat is danger, or actor is arresting
         --Courvoisier v. Raymond (CO, 1869) → D shot P, thinking he was part of robbers
         --Rule: In order to claim self-defense, need:
            --Objective belief: “Reas person” would believe danger
            --Subjective belief: Acted honestly in using force
            --Objective means: Deadly force only to deadly force (See Boundaries)
b. **Defense of Others**: (Maj rule) Must be right about tort being committed
   --Reasonable belief is not enough
   --other person would be privileged to defend himself
   --force reas under the circumstances (See Boundaries)
   --intervention is nec to protect 3rd person
   --Modern trend: Half states say reas belief is enough

c. **Defense of Property**: Reas belief is enough
   --Actor may use force to defend property:
   "Demand he leave first"
   "Reas believe it won’t stop (apply reas force, not deadly force, to overcome resistance)"

3. **Boundaries**
   a. You exceed boundaries by using *too much force*
   b. How much force?
      i. **Self-Defense and Defense of Others** → you can use reasonable force including even deadly force;
      ii. **Defense of Property** → never can use force that will cause serious injury (unless in your own home, protecting your family or other residents)

c. **Defense of Property**: Mechanical Devices/Reas Force
   --Katko v. Briney (IA, 1971) → installed spring gun that shot burglar
   --Rule: May not use deadly/serious injury force to defend property if: No threat to human life (unoccupied dwelling)
   --Use of deadly device is privileged if actor would have same privilege *if present*

4. **Necessity**: Exception to Property Defense
   a. Only for a property tort (i.e. trespass to land)
   b. **Private necessity** → emergency situation of sufficient gravity
      --Ploof v. Putnam (VT, 1908) → P caught in storm, tied to D’s dock, D rejects and P prop and body inj
      --Rule: Owner is liable for expelling trespasser if: 1) Trespasser acting to protect property or life; 2) Protecting from independent cause not connected with P or D; 3) Trespasser could not find shelter elsewhere with equal safety.
      --Vincent v. Lake Erie Trans. Co. (MN, 1910) → D finished unloading, storm comes, can’t leave and D’s boat damages P’s dock
      --Rule: Trespasser liable for damage to owner if damage is from a deliberate act (replaced the lines)
      --But, does have right to trespass (can’t be expelled)
      --No punitive damages (due to privilege)

c. **Public necessity** → (i) an immediate and imperative necessity and not just one that is expedient or utilitarian; and (ii) an act that is in good faith, for the public good.

5. **Other Privileges**
   a. Parental, Interfamily, Teachers, Etc. Immunity (Def to Prop/FI)
      --Sindel v. NYC Transit Auth. (NY, 1973) → false imprisonment, kid jumps out of bus window
      --Dicta *Rule: People of resp.* (parents, teachers, bus drivers) are justified to use “reas” actions to prevent damage to prop or life
      --Dicta *Rule: If escape from FI is “unreasonable”* then can’t collect from phys injury resulting from escape
   b. Merchant Immunity (Shoplifting Statute; Def to Prof/FI)
--**Coblyn v. Kennedy’s Inc.** (MA, 1971)

--Rule: If (statutory) privilege allows for “reasonable” action, then “reasonable” stands for objective “prudent/cautious man” test. (nothing in P’s conduct to justify a reasonably prudent person in believing that P was a shoplifter).

--FI Rule: Demonstration of physical power, which apparently can only be avoided by submission, constitutes imprisonment.

c. Charitable Immunity

--Eroding with institutionalization of charities

d. Governmental Immunity

--General rule: Cannot recover from Govt (Fed. Torts Act)

--Now, exception = that you can sue govt