I. Battery
   a. Prima Facie Case – Intent, Contact, Harm, Absence of Privilege
      i. Intent -
         1. *Vosburgh v. Putney* - Rule: If intent of the defendant is unlawful, or if the defendant is at fault, then the act is unlawful, and defendant has committed battery.
            a. Could be an intent to do an act.
            b. Could be a motive or desire to do harm.
         2. *Garratt v. Dailey* - Rule: Knowledge that harm MIGHT result would be negligent, while knowledge that harm WOULD result goes to the intent for battery.
            a. A defendant must have known with Substantial Certainty that the harm would result.
            b. Regardless of age, someone can commit battery if they are able to form intent.
         3. *Carnes v. Thompson* – Rule: Intent to injure one person can result in liability for harm to a second person.
      ii. Contact
         1. *Fisher v. Carrousel Motor Hotel* – Rule: The elements of Battery can also be satisfied if the contact is offensive (and/or insulting).
            a. The plate snatching was closely associated with the body and does constitute contact.
            b. This is also a case of vicarious liability - where a tort is committed by an employee acting in the course of his or her employment, the employer would be considered liable.
         2. *Leichtman v. WLW Jacor Communications* – Rule: Contact may be established indirectly, as by smoke, and harm may be established through offense, and particular offense to a certain individual can be considered for intent.
      iii. Harm – Can be physical harm or merely offensive to a person of ordinary sensibilities (Glass Cage rule)
      iv. Absence of Privilege/Affirmative Defenses
         1. *O’Brien v. Cunard Steamship Co.* – Rule: If the physician reasonably believed that the plaintiff had given her consent to the vaccination, then the plaintiff lacks a cause of action for battery on the grounds of implied consent.
         2. *Barton v. Bee Line* – Rule: If the court finds that a plaintiff has given consent to the action later brought for battery, then the plaintiff cannot recover. (In this case, the statutory rape provision did not protect a fifteen year old girl).
            a. This case would probably turn out differently today.
b. Consent to a criminal act prevents a plaintiff from recovering tort damages for injuries incurred as a result thereof.

3. *Bang v. Charles T. Miller Hospitals* – Rule: If a defendant-physician performs an operation substantially different from the one to which the plaintiff has consented, then the plaintiff has a cause of action for battery. (They say implied consent)

4. *Kennedy v. Parrott* – If a defendant-physician is performing surgery and discovers an unrelated but dangerous condition, then the plaintiff has no cause of action for complications resulting from the second (even if unauthorized) procedure because the surgeon has implied consent.

5. *Courvoisier v. Raymond* - If a defendant can demonstrate that he reasonably believed his actions were necessary for self-defense, then a plaintiff may not have a cause of action due to license on the part of the defendant.

6. *Katko v. Briney* – Rule: If a defendant employs a spring-gun or other non-discriminating method for protection of his property, then he is liable for all injuries resulting from it, even if the parties injured were trespassing at the time. (It is a trap.)
   a. This is the spring gun case – see also Trespass
   b. Warning of the presence of a deadly trap is NOT a bar to liability. However, warning of a non-deadly deterrent (such as barbed wire) would absolve the owner of liability.

b. Damages – Either punitive or compensatory, or both.

II. Assault

a. Prima Facie Case – Present ability to cause harm, Intent to cause harm or apprehension of harm, and suffering of apprehension

i. Present ability to cause harm

   a. This was the case of the guy who didn’t pay his landlord who then sent some thugs to beat him up if he didn’t vacate the premises.
   b. Plaintiff need not prove the defendant’s state of mind

ii. Intent to cause harm or apprehension of harm

1. *Beach v. Hancock* – Rule: Absent present ability to cause harm, appearance of present ability is sufficient to constitute assault. Further, assault doctrine is beneficial to public policy.
a. This is the case of the unloaded gun that a guy believed was loaded.

iii. Suffering of apprehension
   1. *State Rubbish Collectors Association v. Siliznoff* – Rule: If a defendant has made extreme and outrageous threats (possibly including) physical violence to a plaintiff (which a plaintiff has reason to believe will be carried out), resulting in suffering of emotional distress resulting in physical illness or other injury, then the plaintiff has a cause of action for assault or perhaps for intentional infliction of emotional distress.
      a. If trying this case under emotional distress tort, elements and jury instructions would be different.

b. Damages – May be nominal if no real harm has occurred.

III. False Imprisonment
a. Prima Facie Case – Intent, Confinement, Knowledge of Confinement (or Harm), Absence of License
   i. Intent
   ii. Confinement
      1. *Whittaker v. Sanford* – Rule: If a defendant unlawfully restrains a plaintiff, even if it is without physical touching, then plaintiff has a cause of action.
      2. *Rougeau v. Firestone* – Rule: If a plaintiff does not express a will to leave then he does not have a cause of action (if not completely restrained, he might have been set free).
   iii. Knowledge of Confinement (or Harm)
   iv. Absence of License
      1. *Sindle v. New York Transit Authority* – Rule: If a defendant confines plaintiff against plaintiff’s will, even if harm results, plaintiff may not recover if the defendant had license to execute the confinement or if the plaintiff’s efforts to escape were unreasonable.
      2. *Coblyn v. Kennedy’s* – Rule: If a statute permits confinement under reasonable circumstances, then the confinement must be executed within bounds of the statute or it will be considered false imprisonment.

b. Damages – Damages will be greater if there has been humiliation or actual physical harm. Otherwise, nominal damage only.

IV. Intentional Infliction of Emotional Distress - often other Intentional torts are meant to cover this. If there are no physical manifestations of the distress, a plaintiff must try to collect under another tort.
   a. See Fisher under Battery
   b. See Siliznoff under Assault

V. Trespass
a. Prima Facie Case – physical entry on plaintiff’s land that is unauthorized, intentional, caused by recklessness or negligence or “ultra-hazardous activity” without license
   i. Physical entry – can also be dust or smoke, or planes flying overhead causing nuisance.
   ii. Unauthorized
      1. *Vincent v. Lake Erie Transportation Co.* – Rule: If, due to dire circumstances, a defendant takes proactive measures to occupy plaintiff’s property, and the defendant’s property inflicts damage on plaintiff’s property, then defendant is liable for the damage even though it was a trespass by necessity.
         a. Defendant would not have been liable if the original lines had held because they had been authorized by the plaintiffs to moor their boat the first time.
   iii. Intent – there is action for trespass even if the intrusion was by mistaken intent, but not if by accident (slip and fall). Or if there is a branch over a sidewalk.
   iv. Recklessness, Negligence, or “Ultra-hazardous” activity
      1. In a case of a chemical plant dumping, for example, there would be strict liability for trespass (this is ultra-hazardous).
   v. Lack of license
      1. See also Katko v. Briney (spring gun)
      2. *Ploof v. Putnam* – Rule: Entry upon the land of another may be justified by necessity of the circumstances. If a plaintiff, who was trespassing due to dire circumstances, suffers damage due to a defendant’s refusal to permit the trespass, the plaintiff may recover for his damages.

b. Damages – If no harm has occurred, plaintiff may recover only nominal damages for intentional trespass. Otherwise, plaintiff may recover compensatory damages and/or punitive damages.

Nonintentional infliction of harm -
I. Negligence
   a. Prima Facie Case – duty, breach of duty, causation, harm
      i. Duty in general cases
         1. *Brown v. Kendall* – Rule: If the defendant was doing a necessary act, and was exercising ordinary care as would be used by a prudent and cautious man, then he is not liable (burden on the plaintiff). But if a defendant was not acting out of necessity or duty, then he must have been using extraordinary care in order to avoid liability (burden on the defendant).

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<th>Plaintiff Care</th>
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2. *United States v. Carroll Towing Co.* – Rule: If a situation is peculiar to a particular line of work, then the industry standard of care may be considered the standard of care when determining negligence.
   
   a. This case also contains the Hand Formula: $B < PL$. One should take all precautions such that the burden of taking on those precautions is less than the probability of the event occurring times the liability incurred if the event does occur.
   
   b. In other words, balance the cost and the risk.

3. *Washington v. Louisiana Power and Light Co.* – Rule: If the defendant knew or should have known of the risk, they have a duty to mitigate the risk up to the level where the burden of precautions equals the probability times liability for the accidents being prevented.
   
   a. In this case, the cost of insulating all the power lines in order to mitigate the risk was high, so the power company did not have a duty, though they did know of the risk.
   
   b. Reasonable care is care that is less burdensome to society than the expected loss that will come out of failure to exercise the care.

4. *Weirum v. RKO General, Inc.* – Rule: If the defendant should have known of a risk that others would have behaved negligently due to the defendant’s actions, then the defendant may be liable for these foreseeable risks.

ii. Duty to land entrants

1. Invitee – someone who comes on land that is held open to the public, or as a business visitor. Duty owed the invitee is the highest standard: reasonable care under the circumstances, whereby possessor that knows or should know of dangerous conditions and take reasonable care to protect the invitees if the invitees will not likely discover the danger or protect themselves against it.

2. Licensee – someone only on the land by privilege of the possessor’s consent. Duty owed the licensee: knows or has reason to know of the condition and either exercises reasonable care to fix the problem or warns the licensee if the licensee does not know or have reason to know of the condition.
3. Trespasser – someone on the land not by privilege. If the trespasser is an adult, all you really need to do is refrain from wanton and willful conduct.
   a. Constant Trespasser – If the possessor knows or should know of the condition, has created or maintained the condition, and is, to his knowledge, likely to cause death or serious bodily harm, and if trespassers will not discover it, and if he has failed to exercise reasonable care to warn trespassers then the possessor is liable.
   b. Known Trespasser – If the possessor maintains an artificial condition which involves a risk then the possessor is liable by failure to warn if the possessor knows or has reason to know about the trespassers, or if the trespasser will not discover the risk.
   c. Trespassing Children – If the possessor knows that children come on the land or are likely to trespass, and knows or should know of the condition which he knows or should know is dangerous to children, and the children aren’t likely to know about the risk, and the cost of eliminating the danger is slight when compared with the risk, then he is liable for failure to exercise reasonable care to eliminate the danger.

4. *Rowland v. Christian* (bathroom faucet case) – Rule: The standard of care should be the same for all land entrants:
   a. Forseeability of harm to the plaintiff;
   b. Degree of certainty that plaintiff actually suffered injury;
   c. The closeness of connection between defendant’s conduct and the injury suffered;
   d. Moral blame attached to defendant’s conduct;
   e. Policy of preventing future harm (if this was your goal, it would be strict liability);
   f. Extent of burden to the defendant;
   g. Consequences to the community of imposing a duty to exercise care; and
   h. Availability, cost, and prevalence of insurance.

iii. Modification of Duty: duty to aid, special relationships, self-imposed standards.

1. *Erie Railroad Co. v. Stewart* – Rule: A common carrier may impose on itself a higher standard of care which, if it fails to observe, may result in liability for accidents caused by people’s knowledge of and reliance upon the practice. (A contract carrier simply has a “Reasonable care” standard).
2. **Tubbs v. Argus** – Rule: If a special relationship (such as having caused the plaintiff’s injury) exists between plaintiff and defendant, then a defendant may be held liable for injuries incurred as a result of his failure to aid.

3. **Tarasoff v. Regents of the University of Calif.** – Rule: If a therapist (as a person with a special relationship) determined, or should have determined, that a patient desired to kill or harm someone, the therapist has a duty to exercise reasonable care to protect the foreseeable (identifiable) victim by warning the victim or a third party.

iv. Breach of Duty

1. Violation of a statute

   a. **Martin v. Herzog** – Rule: Violation of a safety statute constitutes negligence per se, and if a plaintiff has suffered an injury due in any part to his violation of a statute, then he may not recover for damages caused by additional negligence of another party. (Violation constitutes negligence per se)

   b. **Tedla v. Ellman** – Rule: Violation of a safety statute does not constitute negligence per se, if compliance with the statute would have put the plaintiff in more danger. A plaintiff may recover for damages caused by another party’s negligence even if he suffered the injury while violating such a statute. (No evidence of negligence)

   c. **Brown v. Shyne** – Rule: The violation of a statute (in this case, regarding licensing of physicians) is unimportant to determining negligence, and does not constitute negligence per se. If a defendant’s care does not meet appropriate professional standards, whether or not the defendant has a license, then he is liable for injuries to the plaintiff resulting from his negligent treatment. (Violation as negligence is rebuttable by defendant, or the appellate court had ruled that it could be some evidence of negligence)

   d. **Gorris v. Scott** – Rule: If defendant’s violation of a statute results in a completely unrelated harm to the plaintiff, then the plaintiff may not recover on the grounds of negligence per se by defendant’s violation of the statute. (If the statute says to tie up your sheep to prevent disease, and the sheep are washed overboard because they weren’t tied up, then you can’t collect under the statute where you could have if they had gotten sick.) (Violation is no evidence of negligence)
2. Industry standard as a determinant of duty –
   a. *Trimarco v. Klein* – Rule: If a certain precaution is taken as a matter of custom, then a defendant’s failure to adhere to the custom and subsequent injury to the plaintiff provides evidence of a breach of duty. (glass shower door case)
   b. *The T.J. Hooper* – Rule: If a simple, feasible precaution exists, even if it is not established custom in the industry, a defendant may be liable for failure to employ the precaution.
   c. *Helling v. Carey* – Rule: In general, medical custom constitutes reasonable care, and if a physician adheres to that standard he will not normally be found liable for negligence. However, if the cost of a given precaution (test) is less than or equal to the damages likely to be awarded a plaintiff (when considering the cost of testing everyone, not just the plaintiff) then the standard of care should be modified to include such a test.

v. Res Ipsa Loquitur
   1. *Boyer v. Iowa High School Athletic Association* – Rule: If an injury satisfies the criteria for res ipsa loquitur, then a defendant may be held liable even if there is no evidence for specific negligence. (Res Ipsa Loquitur looks like a doctrine but it is not).
      a. Defendant must have had exclusive control and management of the instrumentality that caused the injury.
      b. The occurrence is such as in the ordinary course of things would not happen if reasonable care had been used.
      c. Burden shifts to defendant to determine that something else caused the injury if plaintiff does not have ability to inspect.
   2. *Shutt v. Kaufman’s* – Rule: If a plaintiff has failed to produce evidence of specific negligence where there were plenty of opportunities to do so, she may not plead res ipsa loquitur. (Shoe rack on lady’s head)
   3. *City of Louisville v. Humphrey* – Rule: If a plaintiff has failed to demonstrate either that the defendant had exclusive control of the instrumentality or that the occurrence would not have happened even if reasonable care had been used, then she cannot recover under res ipsa loquitur. The burden might shift to the defendant in this case, but this is difficult if the defendant’s witnesses have an interest. (Drunken guy who died in jail)
4. *Escola v. Coca Cola Bottling Co.* – Rule: If a defendant fails to show that a product was not defective while in defendant’s control, then they will be liable for plaintiff’s injuries, if plaintiff and any third parties are able to show that the bottle was not damaged or defective at any other time than when it was in defendant’s control.

vi. Causation in Fact (But-For the Defendant’s actions, would the injury have occurred?)

1. *Ford v. Trident Industries* – Rule: If a defendant is negligent, but defendant’s negligence was not the cause of the injury, then a plaintiff cannot recover. (guy washed overboard & rowboat had only one oar)

2. *Lyons v. Midnight Sun Transportation Services* – Rule: If a defendant’s actions were negligent but not the legal cause of an accident, then the defendant is not liable. This is a question for the jury.

   a. Pure lost chance – full recovery when lost chance < 50%
   b. Proportional – pro-rated recovery when lost chance <50%
   c. Substantial possibility – “Plaintiff must show that there is a substantial possibility that the defendants negligence caused his injury.”

4. *Hoyt v. Jeffers* – If the evidence of defendant’s causation of the injury can only be demonstrated under certain circumstances, then the presence of those circumstances is a question of fact for the jury. (nobody saw the spark fly out, but people had seen sparks in the past.)

5. *Smith v. Rapid Transi* – If a plaintiff alleges negligence by a defendant that can only be demonstrated by circumstantial evidence, the defendant must be clearly identifiable in order to be held liable. (could have been any of a number of bus companies)

vii. Shared and Alternate liability

1. *Summers v. Tice* – If multiple defendants were acting negligently, and it cannot be determined whose actions specifically caused the injury, then the defendants can be held *alternatively liable* and bear the burden of distributing liability between themselves.

2. *Yberra v. Spangard* – Rule: If there are multiple possible defendants for an injury brought in res ipsa loquitur, and the precise negligent parties are not known, then all the parties may be held *jointly and severally liable*, whereby
you can collect the whole sum from any defendant who can pay.

3. *Sindell v. Abbott Laboratories* – If it’s impossible to identify a single defendant out of a group that could each be responsible for the injury, then *market share liability* may be used to determine damages.

4. *Doe v. Cutter Biological* – Rule: If the defendant cannot sufficiently be identified by joint and several liability, concert of action, alternative liability, market share liability, or enterprise liability, and not all possible defendants could have caused the injury, then plaintiff has no cause of action.
   a. *Enterprise liability* – the blasting cap case. The standards for blasting cap manufacturers were set collectively, and therefore if the caps aren’t safe even though they are made to specification the manufacturers will all still be liable.
   b. *Concert of Action* – all the manufacturers would have to have been working together for a common purpose, but we don’t have that here. In Summers we rejected this because the plaintiff would have been in concert of action as well.

viii. Proximate Causation – some factors are: remoteness with respect to time, space, come to rest, foreseeability, direct/indirect cause, substantial factor (as in the Restatement)

1. *Dillon v. Twin State Gas & Electric Co.* – If, but for the defendant’s actions which killed the plaintiff, the plaintiff would still have suffered serious injury or death, then the plaintiff may only recover for the difference in condition caused by the defendant’s actions.
   a. If plaintiff would have died anyway, no recovery.
   b. If plaintiff would have been crippled, then recovery of difference between death and life as a cripple.

2. *Kingston v. Chicago & NW Railway* – Rule: But for the defendant’s negligence, the second fire might have still destroyed the property (cause-in-fact). However, the fires were equal and either could have done the damage alone (proximate cause). So hold defendants jointly and severally liable with anyone that they can show caused the second fire.

3. *Palsgraf v. Long Island Railroad* – Rule: But for the defendant’s actions, the scales would not have tipped over (cause in fact). However, the defendant’s actions did not proximately breach any *duty* to the plaintiff, because the two events are too far removed from each other, and there
must be duty if there is to be a charge of negligence (no proximate cause).

4. *Marshall v. Nugent* – Rule: But for the defendant’s actions, the plaintiff would not have suffered the injury (cause in fact). However, the second accident is related to the first because events had not yet *come to rest* from the defendant’s negligence (proximate cause).

5. *Polemis* (dropping the plank) – Rule: The dropping of the plank was a *direct cause*, even though it wasn’t foreseeable. There were no independent causes, so defendant was liable.

6. *Watson v. Kentucky & Ind. Bridge & Railway* – Rule: If the intervening factor was unforeseeable (in this case caused by the malicious tossing of a match into a pool of gasoline), then the defendant will not be liable. However, if it was foreseeable that an accident could occur (given the condition of the spilled gasoline) then the defendant will be liable for failure to exercise sufficient precautions in the transport of gasoline.

7. *Thing v. La Chusa* – Rule: This is a question of unforeseeable plaintiffs. Potential plaintiffs have a cause of action for negligent infliction of emotional distress even if they were not in the zone of danger and did not suffer physical harm. The plaintiff must satisfy the three-part test: close relationship to the victim, present at the time of the accident, and suffering of emotional distress beyond that of a disinterested witness (thin-skull rule for other torts does not apply here?).

ix. Harm – Can a plaintiff suffer indirectly from harm done to another victim?

1. *Borer v. American Airlines* – Rule: Minor children cannot recover for the loss of parental consortium caused by a defendant’s injury of their parent. They say there is no way to determine the damages caused by the loss of a mother’s parenting.

2. *Werling v. Sandy* – Rule: In the case of the fetus that was damaged and subsequently died, past the point of viability, the court said that a viable fetus could be the basis for a wrongful death action.

   a. Possible standards for recovery for fatal harm to a fetus:
      
      i. No recovery unless live birth (except if stillbirth is related to the injury)
      ii. No recovery unless live birth at all
      iii. No recovery until point of viability
      iv. Recovery from point of conception
b. Or some judges might say that no fetus could recover because it was “part of the mother until birth and had no existence in law.” But if you say this, then you could include the death of the fetus in the mother’s recovery.

c. If you don’t say it’s part of the mother then you could have cases where a fetus could sue the mother for negligence.

3. *Fassoulas v. Ramey* – Rule: Parents can recover only the costs for the deformed child, not the costs for the normal child. We think this case comes out wrong, because the physician was doing the couple no favor by “giving” them the fourth child.

   a. Options for recovery in a Wrongful Birth case
      
      |   |   |
      |---|---|
      | i. No recovery | ii. Cost of raising a deformed child |
      | iii. Cost of raising a normal child | iv. Expenses of birth |
      | v. Pain and suffering/Emotional distress (for parents and child) |

b. Affirmative Defenses

   i. Contributory Negligence – precludes plaintiffs from recovering for an injury if the plaintiff shares any of the fault for the injury.

      1. *Butterfield v. Forrester* – Rule: If a plaintiff has suffered injury due to defendant’s negligence, he can’t recover if he himself has not exercised due care to avoid injury.

      2. *Davies v. Mann* – If a plaintiff is the one with the last clear chance to avoid an injury due to defendant’s negligence, then he cannot recover for injury resulting from failure to use due care to avoid the injury.

         a. Under the Restatement, a plaintiff can still recover for failure to take the “last clear chance” if he is helpless, or if the defendant knows that the plaintiff is not paying attention.

   ii. Assumption of Risk

      1. Elements:

         a. Plaintiff understands risk of harm;
         b. Voluntarily chooses to enter, remain or permit;
         c. Is not entitled to recover for harm within that risk; and
         d. Does not apply if an express agreement to accept the risk would be contrary to public policy.

      2. Assumptions:

         a. Primary - the “No duty” rule. The defendant had no duty to take care to avoid injury to the plaintiff, which might arise in the case of an injured adult
participating in a dangerous but socially acceptable sport as skydiving. Say that plaintiff, by skydiving, assumed the risk.

b. Secondary - Plaintiff failed to act as a reasonable person would have acted and voluntarily contributed to his own risk.

3. *Meistrich v. Casino Arena Attractions, Inc.* – Rule: Assumption of risk by a plaintiff is an affirmative defense to a defendant’s negligence, and the burden of proving that the plaintiff has assumed the risk is on the defendant. (ice-skating)

iii. Comparative Fault – Has largely replaced contributory negligence because it allows plaintiffs to make some recovery even if they have been somewhat negligent in incurring an injury.

1. *Knight v. Jewett* – Rule: Even if a plaintiff has assumed the usual risks of participating in a potentially injuring activity, the plaintiff may still recover if the defendant’s conduct causing the injury was intentional or reckless and outside the range of ordinary activity of the sport.

c. Damages

i. Types of distribution of damages – Assume a liability of $1,000,000 and two defendants with 25% fault each.

1. Uniform Comparative Fault Act – Plaintiff recovers $500,000, half from each defendant

2. Pure Comparative Fault – Same result

3. Modified Comparative Fault – If plaintiff’s fault equals or exceeds defendant’s fault, plaintiff can’t collect at all

a. Why would a state adopt modified comparative fault as opposed to pure comparative fault? If we have, say 51% negligence on the part of the plaintiff, and multiple defendants, you have an incongruity that someone that was mostly at fault is going to recover damages from someone that was only twenty percent negligent.

ii. See Owens Illinois case re: damages

II. Strict Liability – There has been no lack of care by the defendant, but the defendant is liable anyway.

a. Abnormally Dangerous Activities

i. *Fletcher v. Rylands* – Rule: If a defendant brings something on his land that could do damage if it escapes, and it does escape causing damage, then the defendant is liable even though he may have exercised due care.

ii. *Turner v. Big Lake Oil* – Rule: In a case where the parties impose reciprocal costs on each other, the parties should work out the damages between themselves, and they will not be held strictly liable.
b. Animals – Strict liability applies only to livestock; pet owners are held liable only if they know about the pet’s vicious tendencies (not strictly liable).

c. Ultra-Hazardous Activities
   i. *Siegler v. Kuhlman* – If the parties not place equivalent reciprocal costs on each other, although they may both be participating (in some degree) in a dangerous activity, the ultra-hazardous activity will cause the defendant to be held strictly liable.
   ii. Mink Case – Defendants are liable only for the direct consequences of their hazardous activity. They are not strictly liable for indirect consequences which they have already taken precautions to prevent.

III. Additional Topics:
   a. Vicarious Liability –
      i. Must be acting within the scope of employment
      ii. Actor must be an employee (not independent contractor)
   b. Liability Insurance
   c. Functions of Tort Law
      i. Deterrence
      ii. Compensation of Victims
      iii. Loss allocation
      iv. Punishment