Torts Outline

TORTS

I. Generally
   A. Tort law = system of law the provides civil remedies for wrongs other than breach of contract (Tort = wrong in French)
   B. Predominantly common law, created by judges; changing/evolving; on-going discussion
   C. Remedies are usually, but not exclusively, money damages
      1. Three categories of money damages in tort cases:
         a. Nominal
            i. available in intentional tort cases to establish as a matter of public record that the defendant has wronged the plaintiff even if no actual harm occurred
         b. Compensatory
            ii. reflect the harm actually suffered, include doctor’s bills…
         c. Punitive
            iii. designed to punish the defendant for wrongdoing, typically only available if the defendant acted with malice or reckless indifference to the rights of the plaintiff
            NB Burden/standard for punitive damages = clear and convincing evidence of def.’s malicious conduct (actual malice instead of implied malice) (Owens-Illinois v. Zenobia)
               (a) Criticism = unfair/retribution, no deterrence
               (b) Must be reasonable
   D. Tort law shifts losses

II. 3 major headings
   A. Intentional
   B. Negligence
      1. Acting without taking reasonable precautions for the safety of others
   C. Strict Liability
      1. Liability without intent or negligence b/c of harmful/ultrahazardous conduct/act

III. Elemental causes of action
   A. Pl. MUST prove all elements to establish prima facie tort
   B. Then, def. has opportunity to assert affirmative defense
   C. TO WIN, pl. MUST prove prima facie case AND causal connection btw the harm incurred and def.’s conduct AND def. can’t assert affirmative defense

IV. Aims of Tort law
   A. Compensate injured people
   B. Deter undesirable behavior
   C. Justice
   NB. NOT concerned with redistribution of property

V. Policy underlying Tort law
   A. Corrective justice = compensation from the wrongdoer
   B. A perception that the def. is significantly at fault; a wrongdoer
INTENTIONAL TORTS

Battery – a person is liable to another for batter if:

I. Intent to contact
   - Purpose or desire
   - If an act is unlawful, the intent must necessarily be unlawful (Vosburg v. Putney)
     - Unlawful = violation of order and decorum (time and place) of situation
   - Knowledge with substantial certainty of harmful or offensive contact satisfies intent (Garrett v. Dailey)
   - Transferred intent to a third party = try to hit one person, but miss, and his another (Carnes v. Thompson)

II. Harmful or Offensive contact
   - Contact
     - Direct - physically touching someone (Fisher v. Carrousel Motor Hotel)
     - Intimate possession - Snatching an object intimately connected with a person that is offensive to a reasonable person’s sense of dignity (Fisher v. Carrousel)
     - Indirect – throw a baseball at someone
   - Offensive
     - Contact is offensive if it offends a reasonable sense of personal dignity (Leichtman v. WLW Jacor Communications)
   - Harmful = detrimental to the person

III. Causal connection between harm incurred and defendant’s action (p. 12)

IV. Absence of privilege
   - Affirmative defense that is up to the defendant to assert
     - Because privilege is too difficult for pl. to disprove
   - Implied license of the situation (Vosburg v. Putney) – does not include malice, wanton or willful, negligent conduct
   - Consent
     - Willingness for conduct to occur; need not be communicated to def. (Rstmt 2d § 892(1))
     - Determined by a reasonable person in the position of the actor and the subjective belief of the actor that the other person consents (O’Brien v. Cunard Steamship Co.)
   - Self-Defense

NB: Pl.’s prima facie battery case is I, II, and III (Intent, H/O contact, causal connection)

NB: Liability – “Thin Skull” Rule – tortfeasor who commits a wrongful act is liable for all damages resulting directly from the wrongful act, foreseeable or not

1. Deterrence; social policy of allocating loss to non-innocent party; easier to apply – don’t have to determine foreseeability

Assault – a person is liable to another for assault if:

I. Intent to cause H/O contact or cause imminent apprehension of H/O contact (Read v. Coker)
• If act is unlawful, intent is unlawful (Vosberg v. Putney)
• Knowledge with substantial certainty of H/O contact (Garrett v. Dailey)
• Purpose or desire

II. Present ability to carry the threat into execution (Read v. Coker)
• Viewed from the point of view of the assaulted person (Beach v. Hancock)
• Reasonable person would be put in apprehensive of imminent harmful bodily contact (Bouton v. Allstate Ins. Co.)
• No action or gesture is required (Read v. Coker)

NB Damages are awarded on the basis of harm done; goal = deterrence

False Imprisonment – A person is liable to another for false imprisonment if:

I. Actor intends to confine another with boundaries set by that actor

II. Actual physical restraint
• Either actively locking a person in a room OR
• Denying the use of the only means of escape (Whitaker v. Sanford)
• Moral restraint does not qualify (Notes to Whitaker)

III. No implicit or explicit consent
• A person must reveal their desire to leave, otherwise they give implicit consent (Rougeau v. Firestone)
• A person can negate prior consent by asking to be let free (Faniel v. Chesapeake & Potomac Tele.)
• A person gives implied consent by not objected to action when you reasonably know what is going to happen (O’Brien v. Cunard Steamship Co.)

IV. Imprisoned person must be either:
• Aware of confinement, OR
• Harmed by confinement (Restatement, 2d of Torts, § 35)

V. No justification
• Affirmative defense
• Restraint of detention that is reasonable under the circumstances and is imposed to prevent a person from inflicting injuries or interfering with or damaging real or personal property is lawful (Sindle v. NYC Transit Authority)
• A parent, guardian, or teacher entrusted with the care or supervision of a child may use physical force, reasonably necessary, to maintain discipline or promote the welfare of the child (Sindle v. NYC Transit Authority)

VI. Escaping person can only recover damages incurred while exercising reasonable care
• Damages for false imprisonment only include injuries suffered during escape in which the imprisoned person exercises reasonable care (Sindle v. NYC Transit Authority)

VII. Detention/Restraint/Imprisonment is allowable by merchants who suspect larceny if:
• Detention/Restraint/Imprisonment is:
  o Done in a reasonable manner,
  o For not more than a reasonable amount of time, AND
  o For reasonable grounds (Coblyn v. Kennedy’s Inc.)

Intentional Infliction of Emotional Distress – A person is liable for IIED if:
I. Intentional (Samms) OR reckless (Taylor) conduct:
   a. With the purpose of infliction emotional distress, OR
   b. i) Any reasonable person would’ve known emotional distress would result (Samms)
      ii) Sufficiently severe to cause genuine and substantial emotional distress or mental harm to average persons (Taylor)
         A) Cannot recover for idiosyncratic emotional distress (Taylor)
         B) If the distress arises out of conduct relating to race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, familial status, military service, or nationality, the average person standard must be adapted to reflect those characteristics of the pl. that are the focus of the alleged discrimination (Taylor)
         C) In Logan v. Sears Roebuck the standard is a person of ordinary sensibilities – no change for race, creed, etc…

II. Actions or conduct are: outrageous and intolerable (Samms) extreme and outrageous (Taylor)
   a. Because the act offends the generally accepted standards of decency (Samms)
      i. A single racial slur by a stranger on the street is insufficient
      ii. A single racial slur by a superior could be sufficient
   b. Conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society (Logan v. Sears Roebuck; Jones v. Clinton)
      i. Determined by: (Jones v. Clinton)
         A) The conduct at issue
         B) The period of time over which the conduct took place
         C) The relationship between pl. and def.
         D) Def.’s knowledge that pl. is particularly susceptible to emotional distress by reason of some physical or mental peculiarity
   c. The law does not recognize recovery for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities (Logan v. Sears Roebuck)

III. Actions or conduct caused severe emotional distress (Ford v. Revlon; Jones v. Clinton)

IV. Conduct caused emotional distress so severe that no reasonable person could/should be expected to endure it (Taylor v. Metzger; Jones v. Clinton)

Privileges
I. If an act is privileged, the actor owes no legal duty to refrain from such conduct
II. 2 types
   A. Consensual – depend on the pl. agreeing to the def.’s otherwise tortious conduct
      1. Consent
         a. = willingness for the conduct to occur
         b. Need not be communicated to the def.
         c. Additional meanings for consent in Battery (O’Brien v. Cunard Steamship)
         d. Doctor must get consent if it is feasible/reasonable to do so, if patient incapable of giving consent, doctor can proceed if
procedure is dictated by good medical practice = surgeon standard (Bang v. Charles T. Miller & Kennedy v. Parrott)
i. Doctor must disclose relevant information to get informed consent
ii. Test for how much to detail = what information would a reasonable patient want to know
e. Consent procured through fraud or duress = invalid

B. Non-consensual – shield the def. from liability for otherwise tortious conduct even if the pl. objects to the def.’s conduct
1. Self defense (Courvoisier v. Raymond)
a. Def. must show these 3 to use self defense justification
   i. Acted honestly/in good faith in using force
   ii. Fear was reasonable under the circumstances
   iii. Means used were reasonable
2. Defense of others (see #1)
a. An intervenor can use equal or lesser force to repel an attack as the force used by the attacker
3. Defense of property
a. Can only use reasonable force, cannot use force that will kill or inflict great bodily harm (avoid mortal traps) (Katko v. Briney)
b. Some exception for protection of dwelling – depends on jurisdict.
4. Necessity
a. Emergency Doctrine/Necessity can justify entry upon land and interferences with personal property that would otherwise be trespass (Ploof v. Putnam)
b. Trespass still exists, there is just an exception
c. The taking party is liable to the owner for property taken or damaged to avoid unjustly enriching the taker (Vincent v. Lake Erie Transportation Co)
   i. Efficiency perspective – the taker is in a better position to make cost/benefit analysis
   ii. Noninstrumentalist/fairness perspective – takes has to pay to avoid unjust enrichment of taker
5. Discipline
a. Parents can use force to control children (intrafamily immunity)
b. Teachers stand in loco parentis during school hours
6. Recovery of Property
7. Arrest/Prevention of crime
a. Shopkeeper’s privilege (detention for investigation)

C. Generally, touchstones of privilege availability:
1. Reasonableness of the actor’s perception of the need to use force AND
2. Reasonableness of harm actually inflicted

UNINTENTIONAL TORTS

Negligence
I. Duty
   A. Reasonable care under the circumstances for everyone (Rowland v. Christian)
   B. Modification of duty for different classifications of people on property (Rstmt = majority rule)
      1. Invitee
         a. Duty owed = reasonable care under the circumstances
         b. People covered = business visitor and public invitee (land held open)
      2. Licensee
         a. Duty owed = know or have reason to know of dangerous condition and person will not discover it, duty to warn and avoid traps
         b. People covered = social guest and person licensed to come onto land
      3. Trespasser
         a. Duty owed = refrain from wanton and willful conduct
            i. Exception = if person is on land to commit a crime, possessor is only liable for intentionally injuring the trespasser (Katko v. Briney), then liable only for harm exceeding matching force
            ii. Attractive nuisance = higher duty owed to younger trespassers
         b. People covered = everyone who is not an invitee and licensee
   C. Duty is a matter of law for the court to decide
   D. Reasonable care is a question of fact for the finder of fact
   E. Foreseeability of the risk is a primary consideration in establishing duty – matter of fact (Weirum v. RKO General & Tarasoff v. Regents of U of Cal)
   F. If you establish a higher standard of care and then people rely on that standard, the standard becomes your duty (Erie Railroad Company v. Stewart)
      1. Not a permanent change in duty, if you give notice/warning of discontinuance you can return to lower duty
      2. Only people that have relied on the new higher standard are covered by it
   G. Exception to reasonable care = No duty to rescue
      1. Exception to no duty to rescue
         a. If you are in control of instrument that causes harm or have special relationship with injured person, you have a reasonable duty to rescue (Tubbs v. Argus)
         b. If actor knows or has reason to know there is a causal relationship btw actor’s conduct and bodily harm, and failure to help results in additional injuries (Tubbs v. Argus & Restatement)
         c. Under some circumstances, moral and humanitarian considerations may require one to render assistance (Ayres & Co. v. Hicks)
         d. Special relationship, specifically for doctors, once a doctor knows or has reason to know patient poses a serious threat to others (murder, infect), doctor bears a duty to exercise reasonable care to protect the foreseeable victim of that danger (Tarasoff v. Regents of U of Cal)
2. No duty to rescue b/c hard to enforce, hard to define standards of performance, rescuer can expose himself to liability, law’s difficulty in creating an affirmative duty

II. Breach of Duty

A. Hand formula; B = burden, P = probability of injurious act, L = loss (US v. Carroll Towing)
   a. Problem = Difficult to monetize B and L, easier to monetize P

B. Safety statute
   1. Jury/court has no authority to relax duty owed to another by statute (Martin v. Herzog)
   2. Violation of a statutory duty = negligence per se (Martin v. Herzog)
   3. Violation of safety statute without excuse or good cause is prima facie evidence of negligence (Tedla v. Ellman)
      a. Prima facie evidence shifts burden to other party to show excuse
   4. Violation of a safety statute is only evidence of negligence, to actually be negligence the violation has to cause injury (Brown v. Shyne)
   5. Violation of safety statute without excuse that results in injury within scope of statute, only, is negligence (Gorris v. Scott)
   6. An actor is negligent if without excuse the actor violates a statute designed to protect against the type of accident the actor’s conduct causes and if the accident victim is within the class of persons the statute is designed to protect (Restatement)

C. Custom
   1. Proof of a reasonable customary practice, need not be universal, and proof that the custom was ignored and that this departure was the proximate cause of injury, failure to follow custom may establish liability (Trimarco v. Klein)
   2. Even if there is not a custom, the courts can decide is a precaution is so imperative that even universal disregard will not excuse omission (T.J. Hooper)
   3. Generally, professional custom is the standard of care (Helling v. Carey – aberration)
   4. Why look to custom?
      a. Reflects the collective judgment and experience of an industry; direct bearing on feasibility/practicality (Trimarco v. Klein)
   5. Custom may be sword and shield
      a. Sword – in most cases, def.’s breach of custom that relates to safety will create at least a presumption of liability
      b. Shield – the custom of the industry will typically help the def.
   6. In most cases the court doesn’t know what is feasible, practical, and what produces the maximum safety, but there may be circumstances when the court disregards the custom (T. J. Hooper);
   7. Following custom ≠ proof of reasonable care, but = evidence of reasonable care

D. Res Ipsa Loquitur (Boyer v. Iowa HS Ath. Assoc.)
1. Finder of fact may make inference (permission) of presumption (finding) of negligence from the occurrence of injury if:
   a. Instrumentality is in exclusive control of the def.
   b. Injury would not ordinarily occur without negligence
2. Res ipsa only available if pl. does not have the means necessary to directly establish negligence (Shutt v. Kaufman’s Inc)
3. Court is hesitant to extend idea of instrumentality to a person’s body; pl. was not in exclusive control of def. (City of Louisville v. Humphrey)
4. If the condition didn’t change after it left the exclusive control of def., res ipsa still applies (Escola v. Coca Cola Bottling)
   a. Beginnings of strict liability which eliminated burden or proof of negligence (Escola v. Coca Cola Bottling)
5. Burden shifts to the def. once you can invoke res ipsa loquitur to bring evidence of other reasons for the collapse, to show def. not negligent (Boyer v. Iowa HS Ath. Assoc.)
   a. Def. in a much better position to have knowledge of the system and to explain what happened and how this injury is one that would not normally occur
6. In industries with higher technology/precaution (airlines) courts are more willing to allow res ipsa b/c of the high level of precautions, if something went wrong it was probably the result of someone’s negligence

III. Causation
   A. Direct evidence that duty existed, duty was breached, breach led to injury
   B. Draws the line for liability at foreseeability
   C. Danger zone persists until the waters have settled (Marshall v. Nugent)
   C. [1] Cause in fact causation
      1. Question of law for court
      2. General causation (instrumentality capable of causing such harm) (Hoyt v. Jeffers)
         a. General causation can be sufficient to establish causation
      3. Specific causation (whether this instrumentality caused this harm) (Hoyt v. Jeffers)
         a. Can be a defense – this spark didn’t actually start the fire
         b. Def. tries to undermine this inference
      4. Circumstantial evidence can be sufficient to est causation (Hoyt v. Jeffers)
      5. Mathematical probabilities are insufficient to create a jury question, need more (Smith v. Rapid Transit)
      6. Actual causation = did negligent conduct actually cause injury, but for defendant’s negligent conduct the injury wouldn’t have occurred
      7. If no, use substantial factor test = def.’s conduct was a substantial factor in injury
         a. Each of many multiple wrongdoers whose concurring acts of negligence result in injury are individual responsible for the entire damage resulting from the joint or concurrent acts of negligence (Kingson v. Chicago Ry.)
8. If no, alternative cause test = 2 people did same action, injury, don’t know who did it (Summers v. Tice)
   a. Burden shifts to def. to show which def. negligence caused harm (Summers v. Tice & Ybarra v. Spangard)
   b. Joint and severally liable
      1. Right of contribution
9. IF you establish actual causation, then move to proximate causation
10. IF you cannot establish actual causation, suit ends

D. [2] Proximate causation = way to limit liability
1. Question of fact for fact finder
   a. Asking, was def.’s act a cause of the event?, in order to determine if the def. will ultimately be held liable
   b. Not “the cause” just “a cause”
2. Law’s attempt to circumscribe the extent of liability, zone of danger, (how far out in the ripples in the pond will the law impose liability) draw the line based on foreseeability (Palsgraf v. Long Island RR)
   a. Cardozo’s touchstone = foreseeability at the time of the negligence
3. Proximate cause covers all harm from a negligent act that occurs until the situation that was mixed-up settles down BUT is limited to reasonably foreseeable consequences (Marshall v. Nugent)
4. Some dispute as to whether the harm must be directly foreseeable (Wagon Mound 1) or if indirectly foreseeable harm suffices (Polemis & Wagon Mound 2)
5. An intentional/malicious intervening act breaks causal chain, not foreseeable, no liability (Watson v. Ky. & In. Bridge and R. Co.)
   a. If not intentional/malicious intervening act, still liable
      1. But if the person would have been seriously injured anyway, the court will limit liability, to abnormal life of limited earning potential (Dillon v. Twin State Gas & Elc.)
      (a) Injury would have occurred anyway, even without the electricity therefore the court only hold the electric co. liability for the loss of a handicapped life
6. Res ipsa can satisfy proximate cause (Ybarra v. Spangard)

E. Exceptions
1. If pl. would have suffered injury even without def.’s negligence, no causation and therefore no liability (Ford v. Trident Fisheries)
2. If the accident could not have been avoid, regardless of the negligence, no causation and therefore liability (Lyons v. Midnight Sun Transportation Services)
3. Only for doctors, if failure to diagnose results in a decrease in chance of survival and patient dies, doctor is liable only for percentage of chance of survival lost (Cahoon v. Cummings)
   a. Only applied for chances of survival under 50%
   b. Damages = full liability * % chance lost

F. Contributory Negligence – old rule = complete defense
1. If other person is negligent and that negligence leads to injury, no recovery (Martin v. Herzog & Butterfield v. Forrester)
2. Was a complete defense up until 1960s, now no longer a complete defense
3. Pl.’s duty to take reasonable care to protect himself, if the pl. breaches that duty and that breach is the proximate cause of the injury, the pl. cannot recover, even though there is a def. that breached his duty to the pl. that is the proximate cause of the injury
4. All came from the law’s problem of having 2 causes, but the law can’t distinguish btw them
   a. Can’t use the but for test to eliminate one proximate causes of the injury
   b. Each breach is proximate cause
   c. Therefore, the pl.’s contribution to the injury was a complete defense
5. To successfully assert contributory negligence as a defense, the def. must show the pl. could have avoided the consequences of def.’s negligence by exercising reasonable care (Davies v. Mann)
5. Exception
   a. Rescue doctrine – a tortfeasor whose negligence puts a victim in danger owes a duty, independent of the duty owed to the victim, of reasonable care to the rescuer (Solomon v. Shuell)
      1. Rescue doctrine applies even if the victim never was in actual danger
      2. Another example of the law using fairness and common sense to make a decision
G. Comparative Negligence – new rule = reduces liability proportionally
   1. = a flexible, commonsense concept, under which a jury may consider and evaluate the relative responsibilities of various parties for an injury and arrive at an “equitable apportionment or allocation of loss” (Knight v. Jewett)
   2. There are many different forms in which you can have comparative negligence
      a. Pure = no matter what the degree of negligence of the pl., the pl. can still recover
         i. If pl. is 99% neg’l and def. 1%, pl. can recover the 1%
      b. 50% rule = Pl. can recover def.’s share of damages if the pl.’s share of damages does not exceed the share of the def.
         i. If pl.’s share is greater than or equal to, no recovery
      c. 51% rule = Pl. cannot recover if pl.’s neg’l exceeds the def.’s neg’l
   3. Seems to work when there are 2 actors, but what about multiple people?
      a. We usually go with joint and severally liable, but what are the %s?
   4. How do you come up with the percentages?
      a. Juries allocate fault in percentages
      b. Fault line – line from 0% to 100%
i. 50% negligence → gross negligence → reckless → willful and wanton → intent
c. Rank (relative weighting) the actors vis-à-vis each other
5. Problem = don’t get uniform, replicable results
   H. Assumption of risk – separate defense than contributory negligence
      1. Primary = situation where there is no duty
         a. Vosberg v. Putney – boyish sports on the playground
         b. No duty to take whatever care alleged not to have been taken
         c. Knight v. Jewell – operates as bar to recovery b/c the element of duty is not met, b/c there is not duty
         d. Primary assumption of the risk is not merged into comparative negligence system (Knight v. Jewett)
      2. Secondary = looks a lot like contributory negligence, situation where pl. entered into situation where pl. understands the risk and negligently/unreasonably encounters the risk
         a. Bear hallmarks of contributory negligence
         b. Pl. unreasonably encounters a known risk or should have know
         c. Drawing the line is very difficult
         d. Secondary assumption of the risk is merged into the comparative negligence system (Knight v. Jewett)

IV. Injury

Negligent Infliction of Emotional Distress
I. 3 requirements (Thing v. La Chusa)
   A. Pl. is closely related to the injury victim
   B. Pl. is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim
   C. Pl. suffers emotional distress beyond that which would be anticipated in a disinterested witness
   D. Fear alone not compensable, must have physical manifestation (recent S. Ct. case)

II. General progression of NIED
   A. Never recover
   B. Impact rule
   C. Danger zone (Waube v. Warrington)
   D. Foreseeability and 3 factors (Dillon v. Legg)
   E. Dillon factor → elements (Thing v. La Chusa)
   NB Outside of CA, zone of danger survives as a stand alone cause of action

III. Reason for all this case law when we already have IIED:
   A. The court is less comfortable to give recovery for this
      a. People need to deal with the hard knocks of life
      b. Worry about false/exaggerated claims – how to separate real from false
      c. Concern about limitless liability – analogous to Andrews chauffeur’s hypo

III. Distinction btw bystander and direct victim (Burgess v. Superior Court)
   A. Distinction btw bystander and direct victim = source of the duty owed to pl. by def.
   B. Point is that the Thing bystander requirements don’t apply
C. Therefore, any negligence during delivery with causes injury to the fetus and resultant emotional anguish to the mother breaches a duty owed directly to the mother

Negligence
I. Generally
   A. Basis of liability = creation of an unreasonable risk of harm to another person
   B. An actor who causes harm is not liable in negligence simple b/c the activity involves a risk of harm to other; not “negligence in the air”
      1. Exception: Dissent (Andrews, J.) in Palsgraf
   C. Negligence = conduct that involves a risk of harm greater than society is willing to accept in light of the benefits to be derived from that activity; unreasonable risk
   D. Ordinary care = foreseeable to a person of ordinary sensibility that they are creating a substantial risk of injury (Brown v. Kendall)
   E. General standard = reasonable care under the circumstances
   F. 2 goals of negligence standard:
      1. Guiding future behavior – requires the law to be understandable to normal people
      2. Giving the courts an objective standard to determine liability
   G. Modification of general standard
      1. If the def. has a physical disability, the standard is modified to reflect that
         a. def. = blind, standard = reasonable care of a blind man under the circumstances
         b. Applies to physical disabilities, not to mental deficiencies, except for children
   H. Assuming a rational actor acting under the Hand Formula and precautions are not lumpy, an actor will incur costs of precaution up to the point where the incremental cost precaution = incremental loss reduction
   I. Foreseeability = the connection (causal chain) btw people to determine what duty is owed (Weirum v. RKO General)
   J. Instrumentalist goal of negligence law = achieve the optimal level of accident prevention so that the total costs of accidents and accident prevention will be minimized
   K. Non-instrumentalist goal of negligence law = zero injury, follows from the natural duty people have not to injure others and the natural right people have not be injured
   L. Cause of action for loss of consortium
      1. Only for marital situation; goes both ways

Strict Liability
I. Generally
   A. = main alternative to negligence
   B. Should reach the same result in terms of precautions taken
   C. Actor bears all liability for harm stemming from this act, regardless of negligence
   D. A person who brings an abnormally dangerous instrumentality onto his land is prima facie liable for all damages from its escape (Fletcher v. Rylands)
1. Interpretation: rule as only applying to abnormal, non-conforming, unharmonious uses (Turner v. Big Lake Oil Co.)
2. No strict liability for natural uses (Turner v. Big Lake Oil Co)

E. Strict liability applies if the act is uniquely hazardous = abnormally dangerous = ultrahazardous (Siegler v. Kuhlman)
   1. Blasting is the quintessential ultrahazardous activity
   2. Wild animals
   3. Domestic livestock (ferret, boa constrictor)
   4. Where you can characterize the situation where something unnatural has been brought to the land and the thing will be hazardous will cause harm if it escapes
      a. Holding tank of pollution/sewage

F. Strict liability only extends to those consequences/risk that make the activity ultrahazardous (Foster v. Preston Mill Co)

G. Only defenses = contributory neg'l (pl. cannot recover b/c he caused the escape) and Act of God (Fletcher v. Rylands)

H. If a 3d person’s neg’l had caused the harm, no strict liability (Siegler v. Kuhlman)

I. Same policy arguments as strict product liability in Traynor’s concurring opinion in Escola v. Coca Cola Bottling Co.

J. Question is really how to allocate external costs
   1. Smacks of Coase Theorem – in absence of transaction costs, parties will bargain around the rule to come to the most allocatively efficient private result

K. Strict liability moves P*D closer to P*L b/c victim doesn’t need to prove causation
   1. Reduces friction
      a. More people will sue and win
   2. Instead of increasing the precaution, actor bears the increased cost of P*L
   3. This has a deterrent effect on the actor in his decision to enter into the action in the first place or to what extent to act

Vicarious Liability

I. Vicarious Liability = when liability for tortious acts is extended beyond the actor to included people who did not commit the act, but for whom the act was committed (Doctrine of “respondeat superior” = “let the master pay”)

II. Applies when:
   A. The servant must be acting within the scope of their employment, AND
   B. The servant’s conduct must be tortious, AND
   C. The master must control or have right to control the servant’s harmful behavior

III. Important b/c it give pl. a way to find a def. who can pay (deeper pockets)

IV. Master - Servant
   A. “a consensual relationship in which one person, the servant, performs services on behalf of another person, the master, and in which the master controls or has the right to control the conduct of the servant.”
   B. Servant = one who performs services on behalf of another person
   C. Master = person who controls or has the right to control the conduct of the servant
D. Master is liable for actions of servant if:
   1. The master authorized the doing and the manner of the acts, OR
   2. The agent was unfit and the principle was reckless in employing him, OR
   3. The agent was employed in a managerial capacity and was acting within the scope of employment, OR
   4. The employer or a manager of the employer ratified or approved the act

V. Independent Contractors
   A. Generally, an employer is not vicariously liable for the harm caused by an independent contractor’s wrongful conduct.
   B. Exception:
      1. The employer is negligent in selecting, instructing, or supervising the independent contractor
      2. The duty of the employer, arising out of some relation to the public or to the particular plaintiff, is nondelegable
      3. The work is specifically, peculiarly, or inherently dangerous
   C. Master’s Right of Indemnity Against the Servant
      1. Generally, under common law, the master enjoys a right of full indemnification against the servant when the master (absent fault on his personal part) was held vicariously liable for the wrongs of the servant.
      2. Indemnity = a duty to make good any loss, damages, or liability incurred by another
      3. Weird b/c seems to defeat the social policies underlying vicarious liability
   D. Social policy
      1. Masters are held vicariously liable in order to create the strongest possible incentive for them to be appropriately careful in the selection and supervision of their servants.
      2. Vicarious liability pressures the master to optimize, in the broader social perspective, not only how servants act, but also whether and to what extent they act.

Procedure Posture
I. Important because:
   A. Procedural posture influences a case’s outcome
II. Pleading
   A. Motion to dismiss
      1. Def. effectively saying the pl. has “failed to state an actionable claim,” even accepting all pl.’s evidence
   B. Motion for summary judgment
      1. Pl. or def. saying no real or genuine dispute exists in the facts and the moving party would like the court to proceed to a judgment
      2. Different from motion to dismiss b/c the court is allowed to consider facts
   C. Motion for directed verdict
      1. Either party motions that after all pl.’s evidence has been presented no reasonable jury could find for pl. or def., even if they were to believe all the testimony favorable to the pl., judge directs jury to find for pl. or def.
2. A judge is authorized to direct a verdict for the def. only after concluding that no reasonable juror, believing all the pl.’s witnesses and drawing every reasonable inference in favor of the pl., could have found otherwise than for the def.

D. Motion for judgment notwithstanding the verdict (JNOV)
1. If a party made a motion for directed verdict and lost, the same moving party can, after the jury has come to a verdict, motion for the judge to rule notwithstanding, contrary to the verdict
2. Useful to allow an issue to go to a jury, but still allows the judge to serve justice; done to help trial court record standup better on appeal

E. Motion for a new trial
1. Either party may request; judge will grant if:
   a. the verdict is against the clear weight of the evidence, OR
   b. the damages awarded are excessive, OR
   c. procedural errors damaging the moving party were committed, OR
   d. entering a judgment on the verdict would cause a manifest injustice

III. Other
1. Rule Nisi = Order to show cause
2. Remittitur = conditional affirmance; give back some money to get affirmance
3. On appeal, must view all evidence in the light most favorable to the non-moving party
4. Demurrer – legal “so what,” modern equivalent of motion to dismiss; def. effectively says, “for the purpose of this motion, I admit to all pl.’s alleged facts but even so, pl. fails to state a cause of action”
5. Prima facie = case is proven in the absence of some showing that would change one’s mind – substitutes for the other party having to introduce other evidence that the person was negligence – because the “def.” has to produce an explanation for conduct (affirmative defense, AKA privilege)
6. Per se = the actions are negligence in itself – from the facts, the claim is proved – no defense can be used, because the act is what is alleged

III. Scope of Movement of an Appellate Court
A. Affirm
1. No procedural error, no error of law, below, judgment stands
B. Reverse
1. Procedural error or error of law below, justice demands opposite result
C. Reverse and Remand
1. Procedural error or error of law below, case is remanded to trial court for further proceedings consistent with the appellate decision

IV. Error
A. Type I Error – including innocent people
B. Type II Error – excluding guilty people
C. Type I is much worse than Type II

History
I. Writ of Trespass
A. Used in a variety of cases where one person harmed another
B. Significant b/c the injured recovered his actual damages, not prescribed amounts
C. Three common forms
   1. Trespass vi et armis (with force and arms) = assault, battery, false imprison
   2. Trespass de bonis asportatis (taking goods) = trespass to chattels, stealing
   3. Trespass quare clausum fregit (breach of the close) = trespass to land
D. The writ of trespass was very specific and the fact pattern of the instant case had to fit substantially into the normal writ, otherwise had to sue on the case
E. Essence = def. committed some affirmative act which caused a direct and immediate injury to pl.
F. Intentional wrongdoing was not a required part of a trespass claim

II. Trespass on the Case
   A. Used when facts didn’t fit into a writ of trespass
   B. Generic form of action
   C. Injury could be indirect or consequential
   D. Developed to deal with negligence
   E. Pl. had to prove physical injury or monetary loss
   F. Required allegation and proof of a breach of duty – normally proof of def.’s fault

III. Basic differences between trespass and case:
   A. Direct and immediate v. indirect
      1. Trespass was applicable when the injury was direct and immediate.
      Case was the remedy for indirect or consequential harm.
   B. Proof of actual damage
      2. Trespass did not require proof of actual damage.
      Case actions required proof of actual damage.
   C. Proof of def.’s fault
      3. Trespass did not require proof of def.’s fault.
      Case did require proof of def.’s fault.

2 sets of values – tension in Tort law

I. Teleological
   A. Act is right because the results goods
      Act is wrong because results bad
      (right or wrong depends on the results produced)
   B. Morality; Utilitarian = Jeremy Bentham
   C. Hand formula

II. Deontological
   A. Matters of principle, questions of justice, rightness or wrongness is inherent in the act, you don’t separate the right from the good, don’t look to results, just the act; similar to many religions;
   B. Don’t look to results, just look to see if act is right or wrong
   C. Kant
   D. Looking at tort law as producing corrective justice;

III. These two different perspectives may push you in different directions/ to diff. outcomes
Intentional Torts – Generally:

I. Prima Facie case
   A. Torts to people
      i. Assault and Battery
      ii. False Imprisonment
      iii. Intentional Infliction of Emotional Distress
         1. Def.’s
            a. Extreme and Outrageous
               i. Conduct
               1. Intentionally OR Recklessly
         2. causing
         3. Pl.’s severe emotional distress
   B. Torts to property

II. Affirmative Defenses
   A. Pl.’s conduct
      i. Consent
      ii. Misconduct
   B. Privileges
      i. Consent
      ii. Non-consensual (justifications)
         1. Self defense
         2. Defense of others
         3. Defense of property
         4. Necessity
         5. Discipline
         6. Recovery of Property
         7. Arrest/Prevention of crime
            a. Shopkeeper’s privilege (detention for investigation)
   C. Immunities
      i. Governmental
         1. Sovereign
         2. Official – Federal Torts Claims Act
      ii. Family
         1. Inter-spousal
         2. Parent/child
         1. Charitable