Torts Outline

Generally:
Thin Skull Rule - pl≠supersensitivities do not matter (unless known by df) in determining liability, but they do matter in assessing damages (except possibly in ED)
Justice may be harder for a pl to obtain if he is required to use medical experts

Value tension - teleological (rightness judged by results) v. deontological (rightness is inherent)
Policy backing for torts - instrumentality (efficient outcomes) v. corrective justice (enforce morality)
Levels of evidence - perponderance of the evidence (civil) B clear & convincing (pun damages) B beyond a reasonable doubt (criminal)
• higher std when errors are less acceptable
Actual malice is required for punitive damages
• any ratio between pun & comp damages above 9:1 is suspect
Type 1 error - innocent people are punished
Type 2 error - guilty people are not punished
Loss should be shifted from A to B when:
• B caused the loss (by acting wrongly)
• people like B are better able to avoid the loss in future
• B can better bare/spread the cost
• B benefits from the loss producing activity
• it≠necessary to preserve the public peace

Three step analysis:
8. Can pl make a prima facie case?
9. Are any affirmative defenses available?
10. Do any general consideration items apply?

Intentional Torts
Anyone can be liable for intentional torts (capacity (inc age) doesn≠matter)
Intention requirement is satisfied if df acts for the purpose of causing harm or knows harm is substantially certain to result from his act

Battery
1. intentional infliction of
   • df must act for the purpose of causing harm or know to a substantial certainty that harm will occur
   • df is liable even if he had noble intentions
   • intent to harm can be transferred
   • df doesn≠have to intend consequences, just the contact
2. harmful/offensive contact
   • offensive = unpermitted
• judged by RP std
• particulate matter can qualify as contact

3. with pl= person
• or item closely (loosely) associated w/ pl= person

Assault
1. intentional
• can be shown by a threat of violence w/ the apparent ability to act it out (also for 3.)
2. creation of a reasonable apprehension
• not necessarily fear (David assaults Goliath)
3. of an immediate battery
• a conditional threat is no defense (otherwise we don’t encourage coercion)
• no immediate battery if the words undo the effect of the conduct
4. (where the pl is actually placed in such apprehension)

False Imprisonment
If pl escapes, he must take reasonable care in doing so
Statute - merchants presumed to have reasonable grounds if detainee is found to have unpaid for goods
1. intentional
2. restraint of pl (against his will)
• a restraint can constitute false imprisonment when it= a demonstration of physical power that can only be avoided by submission (threats are enough)
• inaction is enough if there was an understanding that df wld act
• e.g. no boat to go ashore
• length of time is irrelevant
• pl must know that he= imprisoned at the time
3. within a bounded area
• serious limitation on freedom
• mere inconvenience is not enough
• pl can= know of a reasonable escape route

Intentional Infliction of Emotional Distress
1. intentional
• df intends to cause upset
2. extreme & outrageous conduct
• insults only qualify if continuous or
• if pl is protected (children, elderly people, customers of common carriers/inkeepers)
3. that causes pl to suffer substantial emotional distress
• more outrageous conduct requires less severe emotional distress
4. when a RP wld have suffered such distress

Trespass to land
1. intentional
2. physical invasion (by an object controlled by df)
doesn’t include odors, loud noises, etc.

3. of pl’s land
   • includes airspace & dirt/minerals to a reasonable distance
4. that causes damage
   • cld be nominal

Nuisance
1. intentional
2. use of land that
3. substantially and
4. unreasonably interferes w/ pl’s use of his land
• pl doesn’t have to be first in time to be successful

Defenses to Intentional Torts

Consent - pl allowed it
Pl must have capacity to give consent (no kids or drunks)
• girls can consent to sex if they know what they’re doing (stat rape still applies)
Express consent doesn’t count if a mistake or induced by fraud or coercion
• consent to surgery must be detailed, contain possible side effects & be understandable to a lay person
Implied consent is determined from Custom, Usage & pl’s Conduct
• as interpreted by a RP - can’t be subjective
Df must stay within the boundaries of the consent given
• limits are defined by rules & norms of the situation (NFL in Hackbart)
• doctors can extend an operation when it’s difficult to get patient’s additional consent &
  a good surgery demands @ R Dr. Std (medical experts needed)

Self defense/defense of others/defense of property
6. tort must have been immanent
   • retaliation is not allowed
2. df must have had a reasonable belief that the tort was immanent
3. force must be reasonable
   • serious force is never reasonable for defense of property

Necessity
Judged by RP under the circumstances std
Only applies to property torts
Actor will be held strictly liable for any damage caused (internalizes externalities)
Necessity trumps defense of property

Negligence
Duty - Breach - Causation - Damages
**Duty**

Duty is owed to a foreseeable plaintiff:

- *Palsgraf* (Cardozo) - actor owes a duty of care only to foreseeable plaintiffs; bystanders are only foreseeable plaintiffs if they are in the danger zone.
- even though an injury may have been foreseeable, a negligent actor will not be held liable for it if the duty of care he breached was not owed to the victim.

Generally judged by a RP std - objective

- plaintiff's supersensitivities don't count unless known by defendant
- professionals are held to a reasonable professional standard
  - but inexperience doesn't count
- innkeepers & common carriers only require slight negligence

Landowner's duty of care (for injuries that occur on the land & were caused by a dangerous artificial condition):

- Trespasser - O must refrain from willful & wanton disregard of duty to warn of artificial conditions O actually knows of.
  1. Higher std of care to constant trespassers
- Licensee (social guest) - O owes a reasonable care to protect or warn of artificial conditions O knows/hkt of.
- Invitee (business guest) - O owes a reasonable care to protect (knows/hkt of)
  - visitors are presumed to be invitees (slight presumption)
- no liability for obviously dangerous conditions (provide their own notice)
- Attractive Nuisance: O must know/hkt that:
  1. kids are likely to trespass,
  2. the condition involves an unreasonable risk of death/GBH
  3. that kids won't appreciate due to their age, and
  4. O must fail to exercise reasonable care to warn/eliminate the danger

Higher std of care can be established through reliance (*Erie Ry. Co. v. Stewart*):

Breach of a (safety) statute is negligence per se (a presumption that must be defended against by defendant):

- plaintiff must fall within the class protected by the statute
- statute *must be* designed to directly prevent this kind of harm
- noncompliance is excused when compliance would be less safe or impossible

Failure to adhere to common practice is evidence of negligence:

- the reasonable care standard trumps
- medical malpractice is usually defined by common practice

No duty to act unless there is an established relationship (that involves taking care of or being in a position of superior knowledge and ability to warn/rescue):

- doctors (psychotherapists also have a duty to warn 3rd parties), common carrier/innkeepers, family members, injuror to injuree after the injury

**Breach**

Breach of duty is negligent conduct (not nec negligence liability)

**Res Ipsa Locutur** - substitutes for direct proof of negligence

11. Instrumentality was under defendant's exclusive control at the time of injury/negligence
  - other potentially negligent acts must be explained away
12. injury (probably) wld\text{\textemdash}have happened absent negligence
   • lack of access to information is an underlying reason for RIL, but not a dispositive element
   • shifts burden to df to prove that no negligence occurred
   • pl still has to prove causation & damages
   • RIL is more applicable when the incident is complicated, when there are many safety
     measures, and when there aren\text{\textemdash}t other non-negligence explanations
   • can be used against multiple dfs under an alternative cause test if inst was under multiple
     dfs control at the time of neg/injury & pl is in no position to prove who actually caused it

\textbf{Causation}

\textbf{Actual causation} - df\text{\textemdash}negligence \textbf{must} have been an actual cause of the injury
   • but for test - injury wld\text{\textemdash}have happened but for df\text{\textemdash}negligence
   • substantial factor test - neg of each df was a substantial factor even though injury wld have
     happened but for either df\text{\textemdash}neg (\textit{Kingston v. Chicago & NW Ry})
   • alternative cause test - one of dfs\text{\textemdash}neg caused the injury (\textit{Summers v. Tice})
     • burden shifts to dfs to prove who actually caused the injury
     • doesn\text{\textemdash}apply if one df wasn\text{\textemdash}neg

\textbf{Proximate Cause} - allows a jury to let df off even though he actually caused the injury
   • Palsgraf (Andrews) - every actually injured pl is foreseeable (if an injury is foreseeable, it
     doesn\text{\textemdash}matter who was injured), df is only liable if he proximately caused the injury
   • proximate cause determined by:
     • Foreseeability
     • Intervening causes
     • concerns of Fairness
     • Attenuation (remoteness in time & space)
     • viewed ex-post
   • if injury was unforeseeable, df is not liable
   • if injury was foreseeable (not just \textit{likely}), df is liable unless
     • there was an unforeseeable intervening crime or intentional tort
   • an injury may be foreseeable even though extent of damage is not (thin skull rule)
   • rescuers are foreseeable (s/t they are owed a duty of care) if a RP wld have performed the
     rescue \textbf{and} if it was done in a reasonable manner
     • Firefighter\textemdash}rule - rescue personell assume the risk of injury due to rescue when they
     enter the profession

Causation can be proven by circumstantial/statistical evidence, especially when there\textemdash}a history
of negligence
Negligence can induce a third party to negligently cause an injury
Market share liability - if the actual causer of the injury is unknowable, pl can recover against all
manufacturers based on their respective market shares at the time of negligence

\textbf{Damages}

The extent of the injury doesn\textemdash}matter, only the fact that there was an injury
Damages will be limited if pl wld have died of other causes
Most cts will not limit damages if pl actually dies b/f trial of other causes
   • \textbf{wl} go by df\textemdash}expectation when he weighted B & PL
Loss of chance - df shld be liable for % increase in pl\^{}s chance of getting sick/dying

**Loss of Consortium** - recovery for denial of spouse\^{}s services (or companionship)
- *rarely* applied to other relatives

**Punitive Damages** - requires gross negligence (neg) or actual malice (int)

### Negligent Infliction of Emotional Distress
The Rules as they developed:
- **Impact Rule** - bystander can recover if also suffered a direct physical injury
- **Danger Zone Rule** - bystander must have been at risk of direct physical injury himself
- **Dillon Rule** - to decide if df is liable for physical injuries resulting from ED, consider whether pl:
  - was close to the Scene,
  - directly Observed the accident, and
  - was closely Related to the victim
- **Thing Rule** - to recover for ED (not physical injury resulting from ED), pl must have:
  1. been closely Related to the victim
  2. Present at the accident & Aware of the injury, and
  3. suffered emotional distress Typical of a close relative as a result

Pl can recover for NIED regardless of the above rules if df owed him a direct duty of care not to inflict ED
- such duties exist with: obstetricians, funeral homes, deliverers of news of a relative\^{}s death

### The Hand Formula (df is negligent if B < PL)
- actor should spend $ on precautions as long as marginal value is less than the losses it saves
- same results under strict liability - more reliable b/c actor is sure of having to pay L
- magnitude of loss shld be amt of damages to be paid by actor
- difficult to quantify, doesn\^{}t consider non-economic elements, doesn\^{}t consider TC (assumes all injured people will sue & have a fair trial)
- notice can increase an actors evaluation of P (Washington v. La Pwr)

**Wrongful death** - pl\^{}s estate sues for loss to estate due to df\^{}s negligence
- applies to stillborn children that cld have been viable & liveborn children who then die

**Survival statutes** - claims survive death of either party

### Defenses

**Contributory Negligence** - if pl helped to cause the injury, he can be held fully liable for it
Acts as a complete defense
Based on joint & several liability
Comparative Negligence - reduces the amt of recovery by plʻs % of fault
Pure comp - pl can recover if he was less than 100% at fault
50% rule - pl can recover if his neg doesnʻt exceed dfʻs
51% rule - pl can recover if his neg is less than dfʻs
Plʻs neg usually compared to the combined neg of all dfs

Implied Assumption of the Risk - the equivalent of consent for intentional torts
Express - contained in a contract - not usually enforced due to unequal barganing (adhesion)
Primary - thereʻs no duty b/c pl has reasonably assumed the risk
  • pl has to prove as an element of the prima facie case (not technically a defense)
Secondary - pl unreasonably assumed the risk
  • counts as neg on plʻs part - wl reduce or eliminate recovery
Grew out of cont neg, may not be applied in comp neg states
Doesnʻt apply in emergencies or when thereʻs no other viable alternative

Strict Liability - no fault liability
Donʻt have to prove manu breached a duty, only that the action caused the harm
Justified by deterrence, ability to prevent, absorb/spread the loss
High B, P & L, but somebodyʻs got to pay
Applies to:
  • (abnormal) ultrahazardous activities
  • uncommon things that must be contained to remain safe
  • defective products placed on the market by a manu knowing they will be used w/o
    inspection that cause injury to a human
Only applies to the kind of harm caused by the activity that makes the activity hazardous
Secondary assumption of risk is a complete defense in cont neg states (may reduce % award in
comp neg states)
  • cont/comp neg is not a defense

General Considerations

Vicarious Liability -
Employers are liable for employees torts *within the scope of employment* - respondeat superior
Doesnʻt apply to general contractors
Usually doesnʻt apply to intentional torts
Employers are entitled to indemnity (full reimbursement) from their employees
Employer may be negligent in its own right - negligent practices/policies
Has to be egregious for employer to be liable for punitive damages (*Fisher v. Carrousel Motor
Hotel*)

Joint Tortfeasors - usually all dfs will be jointly & severally liable (all are responsible for the
entire judgement)
Must have been working in concert to be joint tortfeasors
Dfs can seek contribution after the judgment has been paid (possibly on comp neg principles)
Dfs can implead another party in hopes of contribution