TORTS OUTLINE

Unintentional Torts

I. Strict Liability
   A. responsibility based on causation w/o regard to whether conduct involves fault
   B. abnormally dangerous activities
   C. harm by dangerous animals
   D. some product liability
   E. when special criminal statutes have been violated

II. Recklessness
   A. Conscious disregard for high risk of harm
   B. Possible punitive damages
   C. Btwn. negligence and intentional tort

III. Negligence
   A. unreasonable conduct creating a foreseeable risk of harm
   B. based on what a reasonable person would have foreseen/done
   C. Plaintiff must prove she sustained harm that is legally protected
   D. Plaintiff must prove defendant’s actions caused the harm
   E. Damages compensate all harm (physical, emotional, economical)
   F. No punitive damages are possible

NEGLIGENCE LAW

I. Breach of Duty
   A. General Characteristics
      1. Reasonable Care Standard – reasonably prudent person under the same or similar circumstances
      2. Rudolph v. Arizona BASS Federation – all kinds of breaches of all kinds of duties
   B. Emergency situations
      1. Foster v. Strutz – should emergency jury instruction be given? Court says no
         emergency instruction: Defendants accidentally back over plaintiff when attacked inside their truck and quickly try to escape. Court says they had time to assess the situation – reaction was not instantaneous (10-15 seconds is too much) Court doesn’t want to give instruction and overemphasize this point
         a. emergency situation – requires instantaneous response
         b. emphasis by jury instruction is only needed in the most extreme and instantaneous examples of emergency
   D. Reasonable Woman v. Reasonable Man
      1. no special standard – sex, age, strength are included in surrounding circumstances
   E. Mentally Disabled Individuals
      1. Mental illness is not a defense
         a. easily faked
         b. indistinguishable from personality nuances
- difficult to determine the nature, degree, effect  
- courts don’t want to deal with it!

2. Mentally ill must learn to live like the rest of us

3. Mentally ill must have someone with capacity to ensure they do no harm

4. Bashi v. Wodarz - Defendant rear-ends 3rd party then drives away and hits plaintiff’s car. Defendant claims sudden mental illness, stating family history of such. Mental illness is not a defense - It is easily faked and often indistinguishable from personality nuances, emotional imbalance. It is difficult to determine nature, degree, and effect of mental illness and courts are afraid to deal with it. If the mentally ill want to live in this world they have to live by our rules. Those with mental illness should have someone with capacity to ensure they do no harm

5. Different from physical illness – this is a defense!

E. Children

1. Child Standard – reasonably careful child of same age, intelligence, maturity, training and experience

2. Adult Standard – applies when child’s activities are generally reserved for adults or are inherently dangerous

3. Robinson v. Lindsay – snowmobile accident – generally adult activity and inherently dangerous when immature persons drive it – adult standard

F. Balancing Risk v. Untaken Precautions

1. Hand’s Liability – B < PL (burden of lowering risk < probability injury will occur x the level of injury/seriousness of harm)

2. U.S. v. Carroll Towing Co. – Bargee is off the boat and boat gets away and sinks. Court holds bargee had no excuse for 21 hour absence from barge – holds it is a fair requirement that a bargee should be on board unless there is an excuse, during working hours of daylight. The burden of lowering the risk was less than the type of harm x the probability of the harm occurring. Bargee should have been on board the ship.

3. McCarty v. Pheasant – woman attacked in hotel room – attacker comes in through locked door leading out back of room – court uses Hand’s Liability – Plaintiff wants better locks, more security, notice to lock doors, etc. Court says better locks wouldn’t matter if door is unlocked (Plaintiff didn’t lock her door), no efficient plan for more security is produced by plaintiff, notice to lock doors would be cheap but ineffective since most people have common sense anyway. P fails to establish burden of proof – Court finds for defendant

G. Custom

1. Industry customs help define reasonableness in the situation

   a. Hagerman v. Copeland – construction worker falls through hole – court allows evidence that the custom is to cover holes - helps define reasonableness in the situation, causation, breach

2. Customs aren’t standard of care, but they do inform jurors about reasonability

   a. Trimarco v. Klien – shattering glass door – custom in place to promote safety

3. Courts sometimes go against custom

   a. T.J. Hooper – boats without radios (custom) SHOULD have radios!
H. Special Judicial Standards – 2 train cases
   1. *Baltimore v. Goodman* – driver should have gotten out and looked as necessary
   2. *Pokora v. Wabash* – court examines what conduct is really reasonable and customary

I. Safety Statutes and Regulations as standards
   1. 2-part test:
      a. Is plaintiff in the protected class under the statute?
      b. Does the statute attempt to prevent type of harm plaintiff has suffered?
   2. Negligence Per Se
      a. Statute becomes the standard of care and a violation of it = breach
      b. most courts allow physical impairment as an excuse
   3. Excuses
      a. incapacity of violator
      b. violator neither knows nor should have known of occasion for compliance
      c. violator is unable after reasonable diligence to comply
      d. violator encounters an emergency not due to his own conduct
      e. compliance involves a greater risk of harm

   ~ *Ferrell v. Baxter* – plaintiff is passenger in icy road crash and defendant is the driver
      crashing into a mack truck – no excuse here – driver breached a duty to not speed and drive carefully

   ~ *Wright v. Brown* – dogbite – statute about keeping dogs locked up for 14 days after
      biting someone intended to protect public, intended to prevent contracting a disease, not just incurring bite – no negligence per se!

   4. Negligence per se and the Child Standard
      a. *Bauman v. Crawford* – kid violates statute with bike w/out headlight – court holds that most courts will not apply negligence per se to a minor
      b. you can’t use both standards at once
      c. it depends on the jurisdiction – Bauman uses the Child Standard

J. Proof of Negligence
   1. Circumstantial Proof
      a. *Clark v. Kmart* – grapes on the floor had been there long enough for D to
         know and clean it up (lane had been closed for over an hour and grapes had been stepped on – someone knew about it at least an hour ago)
   2. Res Ipsa Loquitur – the thing speaks for itself
      a. *Byrne v. Boadles* – falling flour barrel - no other explanation since it occurs
         right next to a flour barrel warehouse - accident alone is prima facie evidence of negligence
      b. *Eaton v. Eaton* – mom/daughter car crash – court establishes elements (1st three) and says a res ipsa instruction should have been given
      c. 3 elements – sometimes 4
         i. accident doesn’t normally occur without negligence
         ii. agent causing the accident was under D’s exclusive control
iii. circumstances indicate that the accident was not caused or contributed to by the injured party

iv. info about the accident is more accessible to D than P

\[ \text{Harder v. Clinton} \] – nursing home overdose – P establishes all four elements of res ipsa and should have gone to the jury

d. \[ \text{Ybarra v. Spangard} \] – P goes into surgery for appendix and comes out with shoulder probs. – was unconscious so sues all possible defendants and P establishes the elements of res ipsa

~ there are many possible defendants

~ rule becomes whoever had the right of control rather than actual exclusive control – P was unconscious and can’t know, so sues all who had access to him

K. Standard for Professional Malpractice

1. Negligent Medical Performance – deviation from accepted practice

a. \[ \text{Velaquez v. Portadin} \] - controversy over doctor monitoring strips during birth or the legibility of the strips or the negligence if they were read – baby is born w/cerebral palsy

~ court says New Trial because jury was given instructions on judgment instead of deviation from standard practice

~ whether or not a doctor did something is a fact the jury must find and if they find he did those things negligently then he is liable

~ instructions must be tailored to the facts and differentiate btwn. judgment charges and standard practice deviations

2. Doctrine of Informed Consent

a. \[ \text{Phillips v. Hall} \] – sterilization procedure

~ P was not informed of continued pregnancy risks

~ medical experts testify D did everything right

~ no issue on negligent performance – P had no experts

~ Court institutes an objective test for lack of informed consent – would a reasonably prudent patient, fully advised of the material known risks, would have consented to the suggested treatment?

~ Jury must find facts and determine under this test if Dr. properly informed the patient of all relevant information

b. Two Standards of Informed Consent:

i. professional medical standard: requirement to disclose those risks which a reasonable medical practitioner of like training would disclose under the same or similar circumstances

~ requires expert testimony

ii. lay standard: measured by a patient’s need for info: would a reasonable person in patient’s position have considered the
risk significant in making their decision? Would they still have consented
to the proposed treatment? – jury decides this

~ no experts required

c. General list of facts requiring disclosure:
   i. diagnosis
   ii. nature/purpose of proposed treatment
   iii. probability treatment will be successful
   iv. feasible alternatives
   v. risks/consequences of treatment
   vi. prognosis of treatment is not given

d. Attorney Malpractice – Smith v. Lewis – atty. didn’t do research

II. Duty

A. General duty of reasonable care

   1. MacPherson v. Buick – Privity issues!!
      ~ manufacturer sold to dealer who sold to plaintiff
      ~ wheel was defective – manufacturer is liable because they knew 3rd party
        would be actually using car
      ~ breaks precedent and says manufacturer is liable to someone other than
        immediate vendee – also because they knew car could go 50mph and a defective
        wheel would render the car inherently dangerous

   2. Precedent confined liability to immediate vendees unless item is inherently dangerous

B. Limited Duty to act, assist, or rescue

   ~ misfeasance: party’s actions caused risk = you have a claim
   ~ nonfeasance: refusal to act – not a cause = no claim

1. exceptions where duty does exist:
   i. dependency/interdependency relationships
   ii. contractual relationships including agreement to aid
   iii. when party voluntarily begins to assist
   iv. where a statute imposes a duty to assist
   v. active prevention of getting aid
      ~ Yania v. Bigan – guy jumps in a hole and drowns – other guy has no duty to
        help him even though he dared him to jump – court says he is a competent adult and
        was not forced but jumped voluntarily-- plaintiff incurred the risk on his own
      ~ Farwell v. Keaton – guy helps his friend after seeing him get beat up –
        assumed duty by volunteering his help and not finishing it

2. Arguments for No Duty
   i. interferes with liberty to live as we choose
   ii. contradicts basic principles of causation
   iii. undercuts morals by depriving us of choice to make moral choices
      voluntarily
   iv. creates serious process problems for judicial administration
C. Owners and Occupiers of Land

1. American v. Ruvalcaba – employee’s son falls off defective stairs – court says he is a licensee (no invitation, no mutual benefit, no pecuniary profit to D) and that owner didn’t have actual knowledge of the defective staircase – D said they never had a safety inspection and so were never made actually aware of danger even though it was a blatant violation of safety codes

a. liability depends on injured party’s status (Status Trichotomy)
   i. invitee – enters land with owner’s knowledge and for the mutual benefit of both
      ~ owner has a duty not to protect from harm
   ii. licensee – enters with owner’s consent and for his own convenience or on business with another party (not the owner)
      ~ owner has a duty not to harm on purpose or with gross negligence and to warn of any dangerous condition owner has ACTUAL knowledge of
   iii. trespasser – enters without lawful authority, permission, or invitation
      ~ owner has duty not to harm on purpose or through gross neg.

b. 2 types of liability
   i. injury due to defect in premises (Ruvalcaba)
   ii. injury due to activity/instrumentality of the owner

1. Rowland v Christian – social guest cuts hand on sink
   ~ court overrules trichotomy and uses regular negligence to say owner owed a duty
   ~ court says trichotomy doesn’t alter owner’s behavior anyway

2. Attractive nuisance elements:
   a. location of condition is one upon which the possessor knows or has reason to know that children are likely to trespass
   b. possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious injury to such children
   c. children, because of youth, do not discovery condition or realize the risk of harm involved in messing with it or coming within the area
   d. the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to kids
   e. possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect children

D. Duty to protect against emotional harm

1. 3 Rules
   a. Impact rule – old requirement that P must suffer physical impact
      ~ Mitchell v. Rochester – woman ALMOST hit by cart can’t recover
even though she claimed emotional trauma and even physical repercussions (miscarriage)

b. Zone of danger – old rule that P must fear for her own life
c. Zone of danger – current rule about witnessing harm to a relative

2. Current Zone of Danger – reasonable foreseeability
   a. claimant must be located near accident
   b. claimant must suffer shock resulting from direct emotional impact
      contemporaneous with incident – must see or hear it!
c. claimant must be closely related to victim
d. injury to victim must be SEVERE or even death
   ~ Clohessy v. Bachelor – mother and son witness death of other son hit by car
      and sue for emotional damages – court says they can if they satisfy 4 requirements
      of reasonable foreseeability above
      - this is the Bystander theory of recovery

E. Independent Duty for Emotional Well-being
   1. Recovery is for pure emotional distress unaccompanied by physical injury or even risk thereof
   2. Bodily remains and (erroneous) death notification –
      a. limited to persons who contracted for the disposition of the body and their immediate relatives
   3. Other types:
      ~ medical malpractice
      ~ misdiagnosis
      ~ theft of a dog
      ~ negligence of a lawyer affecting a custody battle
   4. 2 Theories of Recovery
      a. Bystander – P seeks to recover as precipitant witness of harm to another
      b. Direct Victim – damages sought as result of breach of duty owed to P that is assumed by D as a matter of law, or because of a relationship between them
         i. Burgess v. Superior – Dr. owed preexisting duty to P (mom) and child to deliver baby without negligence due to doctor/patient relationship
         ~ damage to baby caused emotional distress
         ii. Huggins v. Longs Drug Stores
            ~ Pharmacist didn’t owe duty to infant’s parents (not patients)
            ~ too much liability = bad policy
            ~ 2 dissents – controversial case – policy issues may not be that important and the lack of duty to infant’s parents is probably crap – pharmacist knew infant wouldn’t be administering the drug to itself – instructions were for parents!!!
         iii. Boyles v. Kerr – P wins against D who showed P’s sex tapes
~ direct victim theory – what relationship?
~ Rule – claim must be in connection with some other breach
so she may not recover for emotional distress – no preexisting
duty or relationship to qualify

F. Duty to protect against Future Disease
1. [Majca v. Beekie] 1st case – possible AIDS exposure from scalpel used by HIV positive
doctor
   a. no evidence of actual exposure so no claim
      ~ actual exposure is an objective standard to measure fear
      ~ actual exposure requirement prevents fear based on ignorance
         or bad info
2. 2nd case – HIV positive dentist – no actual exposure evidence
   ~ likelihood for contracting AIDS if exposed need not be demonstrated to state a
      claim for fear of contracting AIDS
3. Rulings – you must have evidence of actual exposure of disease!!
4. P can only claim for time betw. actual exposure and test results – after results any
   emotional distress is unreasonable
5. [Potter] case rule – P must prove she is more likely than not to contract disease
   ~ court awards $ for cost of extra monitoring and preventative care

G. Responsibility for the Conduct of Others
1. Mental Health professionals’ duty to 3rd parties based on their special relationship
   with the person posing a risk
   ~ [Tarasoff v. Regents] of U. of Cali – patient kills girl, dr. had predicted violence
   a. Factors imposing a duty
      i. foreseeability of harm
      ii. degree of certainty that P suffered an injury
      iii. moral blame
      iv. closeness of connection betw. D’s conduct and injury suffered
      v. extent of burden to D
      vi. consequences to community
      vii. availability/cost of insurance
   b. Dr. had predicted harm and should have warned plaintiff’
   c. No duty where no particular individual is threatened
   d. unnecessary warnings are a reasonable price to pay to save lives

H. Duty to protect against criminal activity
1. Certain relationships include this duty:
   a. landlord/tenant
   b. business owner/patron
   c. hotel/guest
   d. employer/employee
   e. school/student
f. property owner/invitee (enhanced foresight requirement)

2. **DTD v. Johnson** – woman assaulted by alumnus at fraternity party –

landowner/invitee duty possibility – most courts say a landowner has a duty to take
reasonable care to protect an invitee from the criminal acts of a 3rd party

a. Four foreseeability tests

i. Specific Harm – did owner known/should have known the specific
harm was occurring or about to occur

ii. Prior Similar Incidents Test – duty of reasonable care if evidence of
prior similar incidents of crime on/near property shows the crime in
question was foreseeable

iii. Totality of Circumstances Test – examine all circumstances
including nature, condition, and location of land, prior similar events
~ this may be too broad!
~ court in DTD case uses this approach and finds that Sexual
assault was extremely foreseeable in a fraternity

iv. Balancing Test – balance the degree of foreseeability of harm
against burden of duty to be imposed – as foreseeability goes up, so does
duty

I. Public Agency Duty to Protect Citizens

1. **Cuffy v. New York** – police called to prevent tenants and landlords from fighting –
police told father they would come and didn’t – serious injuries to P’s resulted

2. General Rule – municipalities may not be held liable for injuries resulting from a
simple failure to provide police protection

3. Exception to General Rule includes:

a. assumption of duty by municipality to act on behalf of injured party
b. municipality’s knowledge that inaction could lead to harm
c. direct contact btwn. Municipality and injured party
d. party’s justifiable reliance on municipality’s affirmative undertaking – P
must be aware of protection

~ Cuffy’s lose – son had no contact and was not aware of protection, mother and
other son did not rely on promise of protection (went about their day as normal and
time had gone by so Cuffys knew police weren’t coming)

III. CAUSATION

A. But-For Causation – but for D’s negligence, P’s injury wouldn’t have happened

1. **Sowles v. Moore** – horses fall through ice and drown – no barriers put up by D
~ Court finds negligence but says horses would have drowned anyway!
~ no but-for causation = no cause in fact

2. **NY Central RR v. Grimstad** – man falls off barge with no life preservers and drowns
~ Court says he couldn’t swim – could have been the cause
~ even if life preservers had been there, no way to say wife would have gotten
one to him in time or if it would have made a difference – no causation
B. Substantial Factor Test – D’s negligence must be a substantial factor affecting P’s injury
   ~ this test is more appropriate than but-for in multiple cause situations
   ~ delineates the adequacy of proof by preponderance of the evidence
1.  [Corey v. Havener] – 2 motorcycles scare P’s horse
   ~ court says both Ds are wrongdoers and both must pay
   ~ each D is a substantial factor, if not the but-for cause in fact
2.  [Mitchell v. Gonzales] – boy who can’t swim drowns in lake under poor supervision
   ~ court said jury needed a substantial factor instruction
   ~ but-for instruction causes too much focus on inability to swim, not enough on
     D’s negligence
3.  [Smith v. JC Penney] – fake fur coat catches on fire in a gas station – coat was supposed
to be inflammable
   ~ Gas station D said it was mostly the coat manufacturers’ fault
   ~ Court says no – gas station provided substantial factor contributing to injuries
     and are also liable

C. Proof of Causation
1.  Cumulating proof to identify cause in fact
   a.  [Ingersoll v. Liberty Bank] – husband w/package falls on old stairs
      ~ P says stairs were defective, D says man had heart attack
      ~ Court looks at all evidence (stairs, bruising, weight, etc.)
      ~ P’s theory is more likely – P has burden of proof to say theory is
        most likely cause, not the ONLY cause
2.  Untaken Precautions – Proving the Counterfactual
   a.  [Saelzler v. Advanced Group 401] – FedEx woman is attacked in apartment
      complex with open security gate and no daytime security guards
      ~ Court says D breached a duty to P but breaches weren’t cause
      ~ security gates are for keeping out unauthorized people – P can’t
        prove assailants were unauthorized
      ~ 24 hour security guards are expensive (policy concern!) and there is
        no evidence that their presence would have stopped attack
      ~ P’s claim is not more probable than not
      ~ Dissent: court mistakenly uses a but-for test – P’s evidence shows
        presence of substantial factors and should go to a jury
   b.  [Zuchowicz v. United States] – woman dies from disease due to prescribed
      overdose
      ~ expert testimony ruled out other causes
      ~ evidence that medicine doesn’t cause disease, but OVERDOSE does
      ~ Court says the exact purpose of prescribing drugs in limited amounts
        is to prevent this very type of harm
      ~ Where D’s negligence greatly multiplies P’s risk of injury, and
would naturally lead to it, the mere possibility that injury might have happened without negligence is not enough to destroy causation

3. Multiple Parties – Apportionment of Damages or Joint Liability
   a. *Fugere v. Pierce* – P’s car hit from front and then behind – can’t tell who caused the most serious injury
      ~ Ds will be held jointly and severally liable for full amount
      ~ if good testimony exists of who did what, it becomes a question for the jury

D. Proving Who Caused the Harm
   1. Alternative Liability – burden-shifting rule
      a. *Summers v. Tice* – 2 Ds negligently shoot P while hunting
         ~ injury to eye is worse – who did it? Can’t really tell
         ~ Court says both are wrongdoers and can work it out btwn. themselves who pays what amount
         ~ By both firing at same time, Ds deprive P of evidence of who caused and thus both Ds are said to have caused
      b. *Barron v. Martin-Marietta Corp* – leaky missile canisters
         ~ morning crew exposed to 1 leaky MMC canister – no problem
         ~ afternoon crew exposed to 6 MMC and IMI canisters – can’t tell which canister was leaking
         ~ not all possible Ds are tortious and not all possible Ds are sued!
         ~ By both firing at same time, Ds deprive P of evidence of who caused and thus both Ds are said to have caused

   2. Market Share Liability
      a. *Hymnowitz v. Eli Lilly Co.* – 500+ claims for injuries sustained due to drug taken during mothers’ pregnancies
         ~ two problems – statute of lims ran (legislation fixed this) and finding particular manufacturers for particular plaintiffs is impossible (300+ Ds, some no longer in business)
         ~ Ds can’t battle out damages (too many and they don’t know anything), Ds did not act in concert, but Ps should still recover
         ~ Market Share approach – only substantial number of Ds must be present (not all), and each D who cannot prove not liable is liable for % of damages = to their mkt. share
         ~ liability is several only and is based on overall risk produced in national market – not individual plaintiffs
IV. SCOPE OF LIABILITY

A. Conceptual Basis:

1. Direct Consequences Test – this rule is hardly used anymore
   a. In Re Arbitration btwn. Polemis…
      ~ sailor drops planks into cargo of ship – sparks fire and destroys ship
      ~ sparks were unforeseeable – intervening forces can cut off liability
         under this test, but only if they were foreseeable
      ~ Sailor was held liable because his actions directly caused destruction

2. Foresight Test
   a. limits liability basd on the risks that made the conduct unreasonable/negligent
      in the first place
      i. giving child a gun is negligent due to risk of hurting herself
      ii. if the child hurts herself by dropping the gun on her foot – outside
         scope of liability – unforeseeable injury
   b. may be a scope of liability issue if:
      i. arguably an unforeseeable plaintiff
      ii. arguably unforeseeable consequences
      iii. arguably intervening conduct

B. Applications to the Foresight Rule

1. Unforeseeable Plaintiffs
   a. Palsgraf v. Long Island RR Co
      ~ P injured at RR when another patron drops fireworks on tracks –
         court says it is completely unforeseeable that a guard helping the guy
         would knock out a box of fireworks
      ~ no evidence that guard could have known of the danger in package
      ~ no evidence that guard’s actions would foreseeably harm P on other
         side of the RR station – P loses on scope of liability

2. Unforeseeable Consequences
   a. Juisti v. Hyatt Hotel Corp or Maryland
      ~ hotel’s false fire alarm – P is short of breath trying to exit – has a
         collapsed lung
      ~ cleaning crew had negligently cleaned an oven – setting off alarm
      ~ P’s injury was outside the “general danger area” or “general class of
         harm” from what could reasonably be expected to result from negligence
      ~ defendant doesn’t have to anticipate this EXACT injury, just the
         general field of harm – they might have, so it goes to a jury
   b. general rule: as long as D’s negligence creates a reasonably foreseeable risk
      of the general kind of harm that befell the P, the exact way or precise manner in
      which the harm occurs doesn’t matter for scope of liability
   c. risk standard: an actor should be held liable only for harm that was among the
      potential harms/risks that made the actor’s conduct tortious
i. excludes liability for harms sufficiently unforeseeable at the time of
the tortious conduct so that they were not among the risks/potential harms
that made the actor negligent
ii. this standard adapts better to defendants with different standards of
care – doctors, children, etc.
d. Three Types of Cases:
i. harm is typical result of negligence – plaintiff wins
ii. harm is so freakish and strange that it must be unforeseeable–D wins
iii. harm is arguably foreseeable-some freakish but insignificant facts

3. Intervening Forces
a. criminal conduct of a 3rd person
i. [McClenahan v. Cooley]
   ~ D leaves keys in the car, thief steals car and crashes into another car
   ~ court uses 3-pronged test:
      1) D’s conduct must have been a substantial factor affecting
         P’s harm
      2) no rule or policy should relieve D from liability because of
         the manner in which the negligence resulted in the harm (statute
         about not leaving keys in the car – D was law enforcement
         personnel)
      3) harm was reasonably foreseeable or anticipated by a person
         of ordinary intelligence and prudence
   ~ D didn’t have to foresee exact harm – just general type
   ~ An intervening act doesn’t supercede as to relieve original wrongdoer
      of liability as long as the intervening act could have been reasonably
      foreseen and the conduct was a substantial factor
   ~ statute to protect from this very type of harm suggests foreseeability
ii. [Price v. Blaine Kern Artista, Inc.] – court says jury should decide
   ~ P injured when pushed while wearing Bush mask
   ~ P and D (mask maker) both say exact harm is unforeseeable, but that
      D should have foreseen a performer becoming imbalanced or tripping –
      politically controversial mask around drunk people

b. shifting responsibility issue
i. [McLaughlin v. Mine Safety Appliances]
   ~ child nearly drowns – nurse improperly uses “heating blocks” while
      fireman looks on even though his training told him how to properly use
      them
   ~ bad instruction: D is liable if it was reasonably foreseeable that the
      blocks (w/o containers w/warning labels) would find their way from
      firemen to an unwarned 3rd party
   ~ court says it is unforeseeable that a trained fireman would be so
grossly negligent and fail to warn of harm – D gets new trial

ii. *Bigbee v. Pacific Telephone and Telegraph*
~P in telephone booth hit by drunk driver – door jammed trapping P
~ booth in location where many people speed
~ court says due to previous incident, it’s not entirely unforeseeable so
~ a jury must decide – possibly foreseeable that defective booth on
dangerous road poses risk

C. Exceptions to the Foresight Rule

1. Medical Malpractice complications
   a. *Association for Retarded Citizens v. Fletcher*
   ~ boy dies under negligent supervision at camp – camp says poor medical
treatment also caused wrongful death – court says it only aggravated, not caused the
injury
   ~ type of injury was specifically that which this type of negligence would have
foreseeably caused – seizure in water resulting in respiratory disorder
   ~ experts say he wasn’t more likely to survive w/different care

2. Eggshell Plaintiffs – take the plaintiff as you find him
   a. *Pace v. Ohio Department of Transportation*
   ~ P is car accident victim – swollen finger complicated by diabetes and finger is
amputated – P’s disability doesn’t relieve D of liability
   ~ Eggshell rules also apply when D’s negligence physically injures a P with a
preexisting mental condition and the physical harm aggravates the mental condition

3. Rescuer Rule - an actor is usually liable for injuries sustained by a rescuer attempting
to help another person placed in danger by the actor’s negligent conduct
   ~ also when rescuing actor from actor’s negligence
   a. *Sears v. Morrison* – woman injured while helping man who dropped a cooler
on himself
   ~ where a person has negligently managed his own person, he is liable for the
   FOSEEABLE CONSEQUENCES
   ~ when put in danger it is foreseeable that someone else will try and help you
   ~ though a rescuer has willingly helped – the actor is not excused from liability
   ~ P(rescuer) can recover unless their attempt was reckless or rash
   ~ assumption of risk bad (deters rescuing) good public policy to protect rescuers
   b. *Oscar Klein Plumbing and Heating v. Boyd*
   ~ Boyd had to work around the clock to clean jewelry – dust from construction
   ~ Boyd developed carpal tunnel and sued for property damage and injuries
   ~ Trial court found for Boyd and allowed an instruction on the rescue doctrine
   ~ no rescue doctrine! Boyd’s property wasn’t in imminent danger – rash action
   ~ no proximate cause
   c. Suicide
Courts will usually not hold someone liable for another’s suicide:
~ exception – negligence caused victim to become insane and the mental
disorder created an irresistible impulse to commit suicide
~ Normally courts deny recovery because they consider the suicide to be an
intentional act that breaks the causal chain – but insanity-based suicide does not
break the chain because the decedent lacked self-control and could not have acted
intentionally

D. Framework for Analyzing Scope of Liability
~ Is there a scope issue?
~ Analysis of scope of liability
  1. Foresight Analysis
     a. unforeseeable plaintiffs and unforeseeable consequences
        ~ is plaintiff or class of persons she is a member of, within the scope of
the risks created by the defendant’s negligent conduct
        ~ is the result within the scope of the risks created – is it a foreseeable
general kind of incident and harm to plaintiff
        ~ need only foresee general type of harm and type of person likely to
be injured
     b. intervening forces and shifting responsibility
        ~ is the intervening act a foreseeable risk of the original negligence
        ~ D may assert reliance on due care of another party to shift responsibility
  2. Existing exceptions to the foresight test
     a. ~ eggshell skull rule
        ~ medical malpractice complications rule
        ~ rescuer rule
     b. [Allen v. Shiroma]
        ~ 2 defendants in car accident – P gets out to direct traffic and is later hit by
his own car when a minor tries to move it for him – P blames original defendant
(cause initial accident)
        ~ court thinks this is too freakishly unforeseeable – two unlikely events combine

V. DEFENSES AND IMMUNITIES:
A. Contributory Negligence
  1. [Butterfield v. Forrester] - Plaintiff ran his horse into obstruction left by Defendant
     ~ if both parties were at fault, recovery by either is barred
  2. This defense arises after plaintiff has established a prima facie case of negligence
     against D
     ~ bars recovery due to P’s conduct, not a flaw in the prima facie case
  3. Burdens of production and persuasion lie with the defendant
     ~ by preponderance of the evidence
     ~ show that P fell below relevant standard of care
     ~ show P’s breach of duty was a cause in fact and proximate cause of P’s injury
4. Everyone has a duty to exercise reasonable care for her own well-being under this defense, if P is 1% at fault, P cannot recover anything.

5. Only allowed when D is negligent (not reckless or intentional).

6. Last Clear Chance – P can still recover fully against D upon proof that D was more culpable because he had the last opportunity to prevent the harm.

7. Not permitted as a defense in contexts where P’s fault was based on a statute (i.e. child labor law enacted to protect a class of persons from their own inability to exercise self-protective care).

B. Comparative Fault - both a P and D are at fault, they share responsibility rather than have it fall all on one or other.

~ Pure - negligent P recovers some damages from negligent D no matter how much at fault the P is.
   - if P is 98% at fault, P can still recover 2% of damages.

~ Modified – P’s damages are barred if P’s fault is greater than D’s or = to D’s.
   - P 40% at fault can recover 60% of damages.
   - P 60% at fault recovers nothing.

1. Basic Policy
   a. [Hoffman v. Jones] - court replaces contributory negligence with pure comparative fault – says it is most fair.

b. Doctrine of Avoidable Consequences:
   ~ D need no pay for any additional harm that P could have avoided through reasonable care.

2. Factors in assigning percentages of fault
   a. [Wassell v. Adams]
   ~ court says rape victim was 97% at fault because she opened the door to the rapist and let him come in and didn’t run away when she had the chance.

C. Assumption of Risk

1. Express assumption of risk
   a. usually in the form of Waivers – bar plaintiffs from recovery if language is clear and D was not grossly neg, reckless, etc., or against public policy.
   ~ used often by charitable research hospitals, school district for athletics, university sponsored club sports, etc.

2. Implied assumption of risk
   ~ can be inferred from a party’s conduct and the surrounding circumstances.
   ~ it is subjective – courts look to the plaintiff’s state of mind.
   ~ 3-part test:
     - knowledge of the risk
     - appreciation of the risk
     - voluntary exposure to the risk.
   a. [Bowen v. Cochran]
~ guy lit his grill improperly even though he had been expressly instructed not to do it that way – grill explodes in his face
~ court finds definitely contributory negligence, and implied assumption of risk
b. [Murray v. Ramada Inns, Inc]
~ man dives into pool headfirst – dies from injuries – no lifeguard on duty
~ court uses: implied secondary assumption of risk - a form of contributory negligence/comparative fault
- P knew of risk of D’s negligence and assumed risk and was also negligent himself
~ express assumption of risk – not affected by contributory fault – still complete bar to recovery
~ implied primary assumption of risk – D has no duty w/respect to inherent risks or limited duty situation ~ a party enters into a relationship with another knowing and expecting that the other will not offer protection against certain risks arising out of the relationship
- spectator at a baseball game knows he might be hit with a baseball
- arena owners have a limited duty to screen high-risk areas and nothing more

3. Primary Assumption of Risk – limited duty – operates to bar Plaintiffs’ action
   a. Cheong v. Antablin
      ~ two skiers collide–neither acting recklessly, parties are coparticipants
      ~ nature of the sport helps define any duty owed
      ~ too much liability discourages sports competition – not good!
      ~ general duty just not to increase risk to others
      ~ concurring opinion says this is just duty – not assumption of risk

INTENTIONAL TORTS!

I. OVERVIEW
   A. The Meaning of Intent
      1. [Villa v. Derouen]
         ~ D points welding gun at P’s groin – he didn’t intend “harm” but he did intend offensive contact - this counts as battery – D knew his conduct was substantially certain to result in offensive or unwanted contact – doesn’t matter he didn’t intend to cause the serious harm
      2. [White v. Muniz]
         ~ P (employee of assisted living facility) sues elderly woman w/alzheimers for hitting her when she was trying to change her diaper
         ~ does intentional tort require that tortfeasor intend harmful contact or just contact?
         - Duel Intent Rule - actor had to understand that his contact would be harmful or offensive and need not have intended the harm that actually resulted from the action (court uses this one)
- White v. U of Idaho Rule - victim need only prove that a voluntary movement by the tortfeasor resulted in a contract which a reasonable person would find offensive or to which the victim did not consent

~ jury could find either way on intent – jury verdict stands for D

3. Ailiff v. Mar-Bal, Inc

~ employer uses harmful chemical in daily procedure – employees get very ill

~ 3 step Van Fossen intent test:

1) knowledge of existence of dangerous condition
2) knowledge condition would cause substantial certainty of harm, not just risk
3) employer knowing all this requires employee to perform dangerous task/condition anyway

~ Restatement levels of intent:

- Direct intent – actor does something which brings about the exact result desired
- Inferred intent – actor does something which he believes is substantially certain to cause a particular result, even if the actor doesn’t desire that result (most employer torts fall here)

~ employee has the burden of proving by a preponderance of the evidence that the employer had actual knowledge of the exact dangers which ultimately caused the injury when demonstrating inferred intent

4. Leightman v. WLW Jacor Communications, Inc.

~ D blows smoke in P (anti-smoking activist)’s face on purpose

~ this counts as battery

5. Hall v. McBride

~ D is being shot at, so he shoots at the car intending only to hit the car

~ D accidentally hits P – court says this is at least assault, probably battery because of transferred intent

II. ASSAULT and BATTERY and II of ED

A. Definitions:

1. Battery– harmful or offensive contact to your person - protects these interests:
   - physical integrity
   - dignitary interest

2. Assault– reasonable apprehension of imminent harm or offensive contact to your person - protects mental state of individuals – freedom of wrongful apprehension
   - threats of harmful or offensive contact/false imprisonment
   - unavailable when mixed with aggressive conduct
   - unavailable when verbal abuse is unrelated to physical contacts
   (offensive, insulting, uncivilized conduct doesn’t count)

3. Transferred Intent– intention to hit X with rock, but rock hits Y instead – still counts!
   - intent to scare X but instead you hit X and scare Y – both X and Y have claims
   - intent to kick – results in unforeseeable infection – you are liable for infection anyway because you intended the harm
B. Cases:

1. **Dickens v. Peryear**
   ~ D beats up P, threatens with castration, death, and says if P doesn’t leave the state D will kill him – statute of limitations barred assault and battery – P claimed intentional infliction of emotional distress
   ~ outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm as well
   ~ physical injury is not necessary and foreseeability doesn’t matter with intentional tort
   ~ evidence of battery and assault lent merit to claims that threat to kill really had a serious impact on P’s emotional state

2. **Vetter v. Morgan**
   ~ P is in her van when D comes to her window and acts like he’s going to hurt her, made threats, had ability (dark, with male friends, P was lone female) to hurt her – she later swerved to avoid him and crashed
   ~ P could have gotten away, but the ability to avoid future harm doesn’t preclude the assault

C. IIofED in Discrimination Cases

1. **Brandon v. County of Richardson**
   ~ transsexual is raped and later killed – sheriff interviews her harassingly (Boys Don’t Cry case)
   ~ Court says P must show 3 elements for IIED:
     1) intentional or reckless conduct
     2) conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community
     3) conduct caused emotional distress so severe that no reasonable person should be expected to endure it – all are found satisfied and D pays bigtime!

2. **Alcorn v. Anbro Engineering, Inc.**
   ~ Employer yelled racial slurs and fired P in front of other workers
   ~ P suffered physical ailments as a result of the emotional harm
   ~ Court says P was especially susceptible, D’s conduct was intentional (D knew P would be especially susceptible – minority subjected to racial slurs)
   ~ this counts as IIED!

3. **Swenson v. Northern Crop Insurance, Inc.**
   ~ Female P harassed by male boss – court looks at two factors
     1) D’s position of authority over P
     2) D’s knowledge of P’s condition (recovering alcoholic – susceptible to stress)

4. **Logan v. Sears, Roebuck & Co.**
   ~ Homosexual man overhears “queer” remark over the phone w/D
   ~ court uses BAD reasoning to say this doesn’t count as IIED, could have said:
- non intentional (maybe reckless)
- not so outrageously offensive in a decent community
- didn’t cause emotional distress!!!!!!!!!
- No imbalance of power
- No course of conduct – this was a one-time incident
- No Knowledge of susceptibility or vulnerability (maybe)

5. NO TRANSFERRED INTENT WITH IIED!!

III. FALSE IMPRISONMENT AND TRESPASS TO CHATTELS/CONVERSION
A. False Imprisonment – Wal-Mart v. Cockrell
   1. Elements:
      1) willful detention
      2) without consent
      3) without authority of law
      - Shopkeeper’s Privilege: when a person reasonably believes that another has stolen or is attempting to steal property, that person has legal justification to detain the other in a reasonable manner and for a reasonable time to investigate ownership of the property
   2. Customer is called into back for search – security guard makes him remove a bandage covering a surgical wound – court says first two elements are fulfilled, 3\textsuperscript{rd} is fulfilled because checking under the bandage was unreasonable – search was ok

B. Trespass to Chattels & Conversion – United States v. Arora
   1. D tampers with P’s cell cultures – trespass to chattels or conversion?
      ~ Restatement Factors:
      - Extent and duration of the actor’s exercise of dominion or control,
      - actor’s intent to assert a right in fact inconsistent with other’s right of control,
      - the actor’s good faith,
      - extent and duration of the resulting interference with other’s right of control,
      - harm done to the chattel, the inconvenience and expense caused to the other
   2. Cell culture was destroyed, seriously inconveniencing an important project=conversion

IV. DEFENSES AND PRIVILEGES
A. Consent
   1. Hogan v. Tavzel
      ~ D husband infects P wife during “consensual” sex – D knew of disease and didn’t warn
      ~ Consent to sex doesn’t equal consent to risk of disease
      ~ lack of knowledge = no consent
   2. Hellriegel v. Toll
      ~ boys are horsing around – D falls on P and breaks his neck during play
      ~ insufficient evidence of battery prima facie case because:
      - D’s actions did not constitute offensive touching
      - Ds’ actions were consented to by P in horseplay “you can’t throw me in”
      - D had no intent to cause harmful or offensive contact
- P assumed the risk of injury associated with horseplay

3. \textit{Reavis v. Slominsky} – remanded back to trial on bad consent instruction

~ P sues for sexual harassment and IIED by her dentist boss – D says was all consensual
~ actual or apparent consent – P’s words and actions conflicted and she gave neither kind
~ ineffective consent - no capacity to say no – minority or special circumstance

- adults can give effective consent unless 1) D knows or has reason to know of 2) some special circumstances inhibiting this
- childhood abuse = ineffective consent in this case (but D said he didn’t know)

**B. Self Defense and Defense of Others** - complete defense to an intentional tort if defendant used \textit{reasonable force that she reasonably believed was necessary} to prevent immediate harm

1. \textit{Bradley v. Hunter}

~ man with violent reputation harasses (threatens and curses) D in her restaurant and won’t leave her Alone (D had had previous trouble with this guy) – so D (old lady) shoots him as he is coming toward her – her actions were reasonable!

2. \textit{Juarez-Martinez v. Deans}

~ D pours beer on P while he sleeps and is holding a tractor pin (weapon)
~ P gets up and they fight – D started it by assaulting (maybe battering) P
~ D won’t get self-defense because he started it and entered P’s home uninvited

3. Defense of Others – same rules as self-defense, must be reasonable and if you protect the instigator of an altercation, it doesn’t count under this defense – instigators can’t claim self-defense or defense of others

**C. Defense of Property**

1. \textit{Katko v. Briney}

a. general rule–you may not inflict death or great bodily harm to protect property
b. D set up spring-gun in boarded up house to shoot anyone entering the room – shoots P as he enters (trying to steal)
c. no indication from outside that gun existed
d. P wins – harm was too great for protection of property alone – nobody lived in the house or was home at the time

**D. Necessity**

1. \textit{Eilers v. Coy}

a. Elements of Necessity:

1) D must have acted under the reasonable belief that there was a danger of imminent injury to the P or others
~ social worker said P was not dangerous, but court assumes he is in light most favorable to D

2) the right to confine a person in order to prevent harm to that person lasts only as long as is necessary to get the person to the proper lawful authorities (didn’t attempt to get authorities)

3) the actor must use the least restrictive means of preventing the apprehended harm (D handcuffed P to a bed)
b. P is falsely imprisoned by family trying to deprogram him – family says they have a necessity defense because P was suicidal – but D doesn’t satisfy the last two elements – P wins

2. Rossi v. DelDuca
   ~ child runs into D’s yard to avoid a dog, but then is attacked by D’s two dogs
   ~ Statute says owner is liable unless victim was committing trespass
   ~ court says she trespasses out of necessity and eliminates D’s immunity

   ~ D’s boat stays docked at P’s dock during terrible storm-causes damage to dock
   ~ court says no necessity because D chose to preserve the boat at the expense of the dock and should pay for the damages (trespass to chattels)

V. TRESPASS TO LAND - interference with the exclusive right of possession of another regardless of fault or willfulness

A. Creel v. Crim
   1. Creel cut down trees because Lovelady represented that they were hers and hired him to cut them down – in which case she is responsible for the damages – court makes her pay it all!!
   ~ Intent to harm is not necessary – just intent to enter property…