Tort = A civil wrong for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on everyone in the same relation to one another as those involved in a given transaction. (*Black’s Law Dictionary 7th*)

Prima Facie Case

**Intentional Torts**

- **Battery**
  1) Intent
     a. Purpose to cause (Desire) or
     b. Doctrine of Constructive Intent = Knowledge of substantial certainty will cause
  2) Contact = physical contact or contact with clothing or an object closely identified with the body (P’s person)
     a. Harmful = the existence of loss or detriment in fact of any kind to a person resulting from any cause (*Restatement 2d of Torts, SECT 7*); physical changes or alterations that have a detrimental effect on a person
     b. Offensive [affront to reasonable sense of personal dignity, non-customary] – “unlawful” [no implied license (no consent) and contrary to customary order & decorum]
        i. Ordinary person (not one unduly sensitive)
        ii. Unpermitted – Objective standard = if ordinary person doesn’t mind, then neither should P
  3) Causal connection
     a. Direct – time dependant; closest to time with the injury
        i. One is liable for all injuries resulting **directly** from the wrongful act, whether these injuries could or could not have been foreseen by the one who committed said act.
     b. Indirect - Foreseeability
  4) Transferred intent – if one intends to batter one person and batters another accidentally it’s still a battery (“to the other or a third person”); if one intends assault but contact occurs, then battery occurs (pps. 24-25)

- **Assault**
  o Intent {purpose to cause or knowledge of substantial certainty of} to cause harmful or offensive contact or apprehension (no consent) of that contact
  o Causal connection = Apparent Ability to
    - Create the contact OR
    - Cause imminent apprehension of the contact
    - Apparent ability is all that’s necessary to create a reasonable apprehension. – viewed always from the perspective of the P
  o P is put in **imminent** apprehension of a contact {harmful or offensive}
    - Apprehension must be reasonable to average person
    - Apprehension is NOT fear or intimidation
• Words alone are not enough
  • Words coupled with conduct are enough
  • Words can undo the conduct – “if you weren’t my friend, I’d punch you in the mouth” while shaking fist

- **False Imprisonment**
  o D’s act + intent
    ▪ Sufficient Act of restraint
      • Threats of force are enough
      • Inaction can be regarded as act, if affirmative duty on D to act – not giving the woman a boat to get to the shore
      • Physical not moral influence
      • Shoplifter’s rule
        o Reasonable belief that something is being stolen
        o Reasonable manner of detention
        o Reasonable time
    ▪ Bounded area = freedom of movement is restricted
      • Inconvenience is not false imprisonment
      • No reasonable means of escape that P knows about
  o Causal connection
  o P’s confinement {harmful or conscious} (no consent)
    ▪ P must reasonably be aware of imprisonment at that time

- **I or RISED §46**
  o By extreme [quantity] and outrageous [quality] conduct (no consent) – (d) more than a mere insult; (e) abuse of a position of authority – Taylor (f) known special susceptibility [children, pregnant women, known mental disability]
    ▪ Take normally not outrageous conduct and make it outrageous
      • Continuous
      • Type of P – known special susceptibility
      • Type of D – abuse of position of authority, common carriers and innkeepers - **Gross insults** by common carriers/servants on their patrons §48 – Fischer hypo.
  o Intentionally or recklessly causes
  o P’s **severe** emotional distress – more than just having feelings hurt [intensity {threats of future physical harm} and duration {sexual harassment}] – disabling
    ▪ Better to look at outrageousness of D’s intent than violence of P’s response b/c it is more authentic – more outrageous the conduct, the less needs to be shown in the way of damages

- **Trespass to land** (things that don’t move)
  o Act of physical invasion by D of
    ▪ This does not require D to personally go onto land
    ▪ However, some physical object must go on the land
  o P’s land – this includes more than simply the surface of the property – also includes the space above and below the property for a reasonable distance
- **Trespass to chattel** (things that move) – intermeddling which law will award damages for just the damage caused by the intermeddling
  - Some damage (physical and dispossession)
- **Conversion** – sufficiently serious interference with chattel of another to make for a forced purchase of the chattel
  - A lot of damage (physical and dispossession)

**Affirmative Defenses** – D proves its conduct was reasonable:
- P’s conduct {consensual misconduct – consent is most troublesome defense}
- Privilege
  - Consent [willingness for an act to occur may be manifested by action or inaction and need not be communicated to actor]
    - P must have had capacity
      - Child’s consent = not usually consent
      - Very drunk
    - Actual {substantive rule [meaning or effect] or exceptions
      - Consent to Crime
        - Majority - consent to a crime is no consent, tort law should as a matter of policy adopt the same laws that the criminal law has in order to further policy of criminal law
        - Minority – consent to a crime is still consent
        - Barton – in the middle, consent to a crime is consent if consenter knows the nature and quality of the act
      - Consent in emergency
        - Bang - where a physician or surgeon can ascertain in advance of an operation alternative situations and no immediate emergency exists, a patient should be informed of the alternative possibilities and given a chance to decide before the doctor proceeds with the operation.
        - Kennedy - patient’s responsibility to censor her conduct so that it’s not implying consent
          - Express – words were used “do it, I dare you”
            - Not good if obtained through fraud or duress
          - Implied – conduct that indicates consent [in fact or as a matter of law]
            - Apparent = conduct reasonably understood by another to be intended as consent, usually a mistake is made about the other’s consent
              - Custom and Usage- Limited by Custom = Hackbart
            - Boundaries of consent must not be exceeded
      - Non-consensual – Justification - Always Affirmative Defenses (D has the burden of proof)
- Timing requirement must be satisfied – Tort defended against is either
  - Now occurring OR
  - Just about to occur
  - Retaliation is a no-no = only recourse is to go to court
- Reasonable belief test – must have been reasonable belief that tort was occurring (does not have to be right)
- Defendant must stay within its boundaries – boundary exceeded by using too much force; Proper force rules:
  - Self-defense and defense of others – reasonable force including even deadly force
  - Defense of property – reasonable force never to include serious bodily injury force
- Self Defense - P’s misconduct is not a necessary condition to create a privilege of self-defense (room for mistakes in self-defense) - D acted honestly in using force and fears were reasonable and actions were reasonable
  - Reasonable force = force proportionate to threat
  - Force NOT threatening {death or serious bodily harm}
  - Force threatening {death or serious bodily harm}
- Defense of others- only applies as far as the privilege to self-defense that the defended would have had – mistakes, even reasonable ones, are no excuse.
  - Majority – mistakes aren’t ok
  - Minority – mistakes are ok
- Defense of property - Requirement to use words before you use force. Not allowed to use deadly force to defend strictly property at all. Deadly force only when you are defending yourself.
- Necessity –Private = Not an absolute privilege (incomplete privilege = bad joke) – only if property tort
  - **Public** Necessity = absolute privilege, not required to pay for damages caused; unless government takes property, then they have to pay you
    - Done for benefit of a lot of people
  - Necessity as a sword not a shield – preemptively raising issue of privilege of necessity to strip D of defense of property defense.
  - **Private** = One is liable for intentional intrusions of land not only when one enters but when one stays, removes anything or breaks anything on the land. Permission to enter land only extends as far as specifically laid out by the consenter
    - Done for the benefit of a small # of people
  - Defense against an outside force, not the P. No recognition of P’s misconduct.
Discipline – requires reasonableness; Restatement §§ 146-155
Recovery of property – You can use force to recover property when:
  • It has been wrongfully taken from you – no privilege for mistake
  • You are in hot pursuit of the person who has taken property
  • You use only enough force to retake property and never force threatening death or serious bodily harm
  • no privilege to make a mistake unless… - Restatement §§ 88-111
    o Shopkeeper’s Privilege (Detention for investigation) – allows for mistake in recovery of property under reasonable suspicion of robbery- Coblyn
Arrest/prevention of crime – citizens can NOT make a mistake, if they do, then it’s false arrest – Restatement §§ 112-145
- Immunities
  o Government – Legislature must say that it can be sued in certain cases – 28 USC §2674 - 2680
    ▪ Sovereign – protecting public fiche
    ▪ Official – protecting private savings - public officials sued for what they’ve done in their positions as public officials have immunity
      • Judges can’t be sued for anything ever as a judge – can only be impeached
  o Family – no lawsuits to promote family harmony; courts shouldn’t solve family disputes – some states have no negligence immunity, some have no intentional tort immunity
    ▪ Interspousal
    ▪ Parent – Child
  o Charitable – don’t want people biting the hand that feeds them b/c it discourages charitable acts
    ▪ Liability insurance has all but erased this immunity
  o Acting under court order
- Insanity itself is not a defense.

Transferred intent – a legal fiction; constructed intent - B to B, A to A, A to B, B to A; only counts for battery and assault

Negligence – No rules, instead very general legal principles
- Statistically relevant to 3 fact patterns:
  o Vehicular Accidents (ships, airplanes, bicycles)
  o Premises liability
  o Professional Malpractice
- Strict Liability now, but used to be negligence:
  o Product liability
Industrial Accidents – Worker’s compensation legislation

- Prima Facie Case - P must prove D’s conduct was unreasonable. Duty + Breach = D’s “n”egligence (negligent conduct not negligence liability)

- Duty - Policy (? of law) – P owes itself – Exceptions to standard of care and no duty rule are the most important thing b/c they can get you out of court w/out trial; the other two questions are questions of fact

  - Of Care
    - General Standard
      - Ordinary (Brown v. Kendall) OR Reasonable (Restatement) care under the circumstances
        - Utility or Burden > Magnitude of risk = reasonable care – Instructions to the jury/ objective test
          - Gravity => Social value = life and value; Number of persons whose interests are likely to be imperiled
          - Probability => Spectrum with foreseeable on low end and substantially certain on high end
      - Mental Deficiency §283B – insane or mentally deficient judged against reasonable man
      - Physical Disability §283C – ill or otherwise physically disabled must act according to reasonable man under like circumstances
      - Emergency §296 – emergency is a circumstance to reasonable action

  - Exceptions
    - Children § 283A – Child’s reasonable care judged against reasonable person of like age, intelligence, and experience under like circumstances (subjective test) not reasonable man – except when they are acting as adults
    - Land occupiers with respect to entrants – distinction in Restatement, no distinction between classes in Rowland v. Christianson (at least not between licensees and invitees):
      - Only if D owns land or is in privity with owner (privity = family member, etc.)
      - Injury has to have occurred on the land.
      - Injury must have been caused by dangerous condition not activity
        - Activity = anything done on property
        - Dangerous condition = hole in ground, defect in building
Licensees – social guest; 1) D must know or have reason to know of the dangerous condition; 2) failure to fix or warn; 3) licensee doesn’t know of the condition or risk of condition

Discovered Trespassers – no duty to undiscovered trespassers

- Liable for artificial conditions involving risk of serious injury the owner knows of.
- Attractive Nuisance = child must be able to show that they did not understand risk involved in this dangerous condition

Invitee – D liable for dangerous conditions D should have known about

Liability insurance companies benefit.

Discharge duty by warning or by making it safe

No liability for very obvious dangerous conditions

- Common Carriers with respect to patrons – higher duty – one of “extraordinary” care.
  - Close to no fault liability – amount of care owed should be distinguished from standard of care owed.
  - Actually ordinary care in a situation where a great deal of care is required.

- Motorists with respect to guest passengers – lower duty through statutes not common law.
  - Cal. Code §17158 – extending limited duty of landowner’s rule to guests in a car.
  - Liability insurance companies benefit.

- Professional Custom = duty of care; doctors’ medical practices are the duty of care for doctors
  - Expert testimony requirement - Must present medical professional who will testify on the professional custom

To Aid

- No duty to aid
- Exceptions – Special relationship
  - Special relation (Control) with instrumentality causing the harm – Tippecanoe v. Cleveland; Tubbs v. Argus
Restatement - any control over any instrumentality that causes any injury = special relationship
  - *Tubbs v. Argus*
  - Duty to control dangerous instrumentality = Tarasof

  Special Relation with the victim – Restatement §322 = if you know you caused the harm to the other person by your conduct, you owe a duty to aid
  - Family Members
  - Employers/Employees
  - Common Carriers/Passengers
  - Owner of land/Invitee

Duty to care when volunteering aid – *Erie R. Co. v. Stewart*
  - In aiding = problem 17 – When does one begin aiding?
  - In terminating aid – can’t terminate when one is relying on the aid
    - Volunteer can’t leave victim worse off than when he found him

Breach - Proof (? of fact) – Duty + Breach = D’s Fault
  - General rule: *U.S. v. Carroll Towing Co.* – Cost benefit analysis – if B<LP then there’s breach and liability; where B = Burden of adequate precaution, P = Probability that event will occur, L = Gravity of resulting injury – Evaluates sufficiency of proof
  - Special rules
    - Criminal statute
      - Violation
        - Relevance – Restatement §14 – without excuse = foreseeable consequences test
          - Class to be protected must include P and (Restatement §286) interest must include that which has been violated
          - Type of harm to be prevented must have been performed by D and (Restatement §286) hazard to the interest protected had to happen b/c of D’s action
        - Evidentiary Effect – negligence per se (*Martin v. Herzog*) unless there is an excuse Restatement § 288 A
• Emergency
  o Compliance does not prevent a finding of negligence where a reasonable man would take additional precautions – Restatement § 288 C
• Custom – to deduce risk or not to reduce risk – “need not be universal but needs to be fairly well defined and in the same calling or business so that the actor may be charged with knowledge of it or negligent ignorance” – Trimarco v. Klein
  o Adherence
  o Departure
  o Relevance
  o Evidentiary Effect
  o General
  o Medical Custom = standard of care
    ▪ Expert testimony is not required on clear departures from customary care
    ▪ Foreign Objects
    ▪ Unrelated Injuries
  ▪ Expert testimony is not required on matters of informed consent
  ▪ Abolition of locality rule = used to not be able to sue a doctor without bringing one of his direct colleagues to testify against him
• Expert Testimony
  o Relevance
  o Evidentiary effect
• Res ipsa loquitur (“the thing speaks for itself”) = proof that the injury occurred is sufficient evidence to prove negligence
  o Applicable– only when there is a gap in evidence
    ▪ Accident is such that does not ordinarily occur unless there is negligence – Probably some negligence by someone
    ▪ Instrumentality causing injury is under exclusive management of defendant or servants – D is probably responsible for accident
  o Evidentiary Effect
    ▪ Weak case RIL = permits but does not compel finding of negligence; permissible inference – enables P to survive D’s MDV
- Strong case RIL = Shifts the burden of production and persuasion = presents rebuttable presumption of negligence – sets stage for P to win as a matter of law

- Causation
  - Factual (? of fact - proof) AND
    - General Rules
      - But/for (sine qua non) - But for the wrongful quality of defendant’s conduct, would the plaintiff have suffered the same harm? – Jury must be convinced that it is more probable than not that but for… => not certainty
      - Substantial factor = Restatement
        - But/For Except when
          - 2 forces are actively operating, one b/c of the actor’s negligence, the other not b/c of any misconduct on his part, and each of itself is sufficient to bring about harm to another = causation => 2 motorcycles pass a horse at the same time causing injury. They argue that the injury would have occurred anyway b/c of the other driver. Still liable.
      - Concurrent negligence = both fires are substantial factors in the P’s injury
      - Successive negligence = second act of negligence is dependant on the first
  - Exceptions
    - Loss of chance – Cahoon v. Cummings
    - Alternative Liability = Summers – only one of the two caused a single, indivisible injury by their negligence but we don’t know which one
      - Shifts burden of proof to the 2 D’s to prove that they didn’t do it, otherwise, they are both liable.
    - Market Share Liability = one is ONLY liable for the percentage of market that one receives from the negligent party; does NOT allow P to sue only 1 D for all of the money
    - Joint and several liability = 2 or more parties can be jointly liable for the same injury; applied in 2 situations:
      - 2 or more parties act in concert – joint tortfeasors or joint venture with just one as the wrongdoer.
2 or more both independently cause a single, indivisible harm

- Contribution = 1 person sued for everything can sue the other wrongdoer in restitution for compensation; limited by D’s pro rata share or D’s fault

- Proximate (responsible) (? of law - policy) – assumes factual cause – **To whom is the duty owed?**
  - Never even address the issue of proximate cause until 1) D being sued is negligent AND 2) D’s negligence is the factual cause of the injury
  - Limits the liability of a negligent D that in fact caused an injury to P based on lack of foreseeability
  - Primarily invoked in 2 cases:
    - Bizarre Consequences – foreseeable?
    - Intervening Causes – proximity/directness?
      - Criminal intervention – **unforeseeable** intentional tort or crime let D go
      - Negligent intervention
      - Innocent intervention
  - Foreseeable consequences test = foreseeable plaintiff, foreseeable type of harm => same test employed in determining relevance of a statute
    - Foreseeable P? = Was any harm to the plaintiff foreseeable when the defendant acted?
      - Was P in foreseeable zone of danger?
    - Foreseeable Harm? = Were the nature and circumstances of the plaintiff’s harm foreseeable? **Type** not:
      - Extent – Eggshell/ Thin Skull P (take P as you find them)
      - Manner
      - Some types are limited:
        - Mental and Emotional Upset
        - Injury to Personal Relationships – loss of consortium brought by non-injured spouse
        - Prenatal Harm
        - Purely Consequential Economic Loss
  - Proximity/directness = physics used to decide moral matters – effect can’t be too remote in time and space from cause
    - P is always foreseeable unless foreseeability facts are extreme
Uninterrupted chain of events – nothing between negligent act and injury

California proximate cause “rule” - 7 part factor test for negligence – Rowland v. Christian & Tarasoff v. Regents of University of Cal.:

- Foreseeability
- Degree of certainty that P suffer injury
- Closeness of connection between D’s conduct and P’s injury
- Moral blame attached to D’s conduct
- Policy of preventing harm
- Extent of burden
- Availability, cost and prevalence of insurance

Policy Considerations

- Promoting Insurance = Who is the better cost bearer/spreader?
  - Law should choose to impose or not impose liability based on whether D or P is the better cost bearer.
- Promoting Rescue = if you put someone in peril, you are liable for his rescuer so long as the rescuer’s actions are not wanton
  - Emergency situation – rescuer doesn’t have to calculate like a normal person

Injury

- Cognizable injury/measure of damages (?) of law
  - Types
    - Physical
      - To person
        - Out of pocket losses
        - Lost earning capacity
        - Pain & suffering
      - To property
  - Economic
  - Emotional – loss of chance

- Extent of damages (?) of fact
  - Measures
    - Survival Statute = person who died can sue post mortum
    - Wrongful Death = suit brought by surviving family member for loss of dead person
  - Apportionment
    - Causal = only liable for damages you caused
      - Apportion damage among both causes if
        - Among 2 or more causes where there
are distinct harms or there is a reasonable basis for determining the contribution of each cause to a single harm
  - Joint and several liability
  - Alternative Liability
  - Market Share
- Other

**Affirmative Defenses** – P also acted unreasonably
    Power and Light*
    - Express
      - Contractual
      - Consent
    - Implied – if affirmative defense, D bears burden of proving P assumed the risk; if no duty, P bears burden of proof
      - Primary (reasonable) – D owed no duty b/c P was as aware of the risk as D
        - Knowing = assumer has to know of specific risk they are encountering in order to bar liability &
        - Voluntary = choice must be present
      - Secondary (unreasonable) = contributory negligence
  - Contributory fault = P is constructive D – No longer a complete defense
    - Contributory Negligence - *Butterfield* / last clear chance limitation – *Davies* = D had last clear chance to fix the problem regardless of P’s activity
      - D must be Conscious if P is inattentive
      - D can be Unconscious if P is helpless
    - Comparative – P’s fault contributes to its own injury that proportionately limits D’s liability but does not bar recovery.
      - Negligence
        - Pure – doesn’t matter what relative percentages are you’re going to compare relative fault regardless of percentages
          - Takes care of problem of more faulty Ps recovering against less faulty Ds - %s are always compared
        - Modified – P can only recover against D if P’s fault < or = D’s fault
          - Fault = includes acts or omissions that are in measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability?
            - Does not apply to intentional torts.

**Vicarious Liability**
Nuisance
- Mixed tort – all faults
  o Intentional
  o Negligent
  o Strict Liability
- Public Nuisance = unreasonable interference with a right common to the general public thereby injuring a person in a distinguishable way from the public at large.
  o Factory pollutes public waterways and consequently does damage to a fishery business
  o Quite common to seek injunctive relief here.
- Private Nuisance = nontrespassory invasion of another’s interest in the private use and enjoyment of land
  o Dog barking all night and keeping the neighbor up.
  o Intentional nuisance requires intentional and unreasonable interference.

Strict Liability
Prima Facia Case = strict liability producing activity substitutes for fault
- D’s Strict Liability Producing Activity – not negligent b/c it is valuable to society
  o Animals
    ▪ Trespassing Livestock = owner of livestock is strictly liable for any damage to land that trespassing livestock cause
    ▪ Wild Animals = liable only for harm caused by the dangerous propensities associated with a wild animal of that class, or by dangerous characteristics of which the possessor knows or has reason to know.
    ▪ Abnormally Dangerous Domestic Animals = only strictly liable if it’s more dangerous than the average member of its class
  o Ultrahazardous or Abnormally Dangerous Activities = not defined simply by how dangerous it is, but by its unpreventability or unpredictability
    ▪ Strict liability for escaping things - Nonreciprocal risks = if you expose people to risk that they don’t expose you to, you are liable for their injury absolutely.
    ▪ Unnatural = uncommon use of land (common to have reservoirs in Texas)
    ▪ Unpreventable = Activity that cannot be eliminated by exercise of reasonable or utmost care.
  o Product Defects = most important area
- Causal Connection
  o Factual
    o Proximate – strict liability is limited to the kind of harm, the risk of which makes the activity abnormally (unpreventably) dangerous - Foster v. Preston Mill
- A type of harm that happens here, minks eating their young, is not the kind of harm that makes dynamiting unpreventably dangerous (debris hitting people on the heads)
- P’s injury

**Affirmative Defenses**
- Assumption of Risk
- Comparative Fault

**Procedure – Motions**
- Pretrial
  a. Pleadings
    i. Complaint – MDC
    ii. Answer
  b. Discovery – can’t really get the facts before this point – MSJ
  c. Pretrial rulings
- Trial
  d. Opening Statement
  e. Proof
    i. Burden {production and persuasion}
    ii. Sufficiency – Is proof sufficient for claim? – MDV
      (Just to Judge)
    iii. Closing Arguments – Made with knowledge of both Facts & Law (Jury instructions are known by both lawyers)
    iv. Relevance
    v. Conclusiveness
      1. Presumption
        a. irrebuttable
        b. rebuttable
      2. Inference
  f. Instructions
  g. Verdict/Judgment – MJNOV, MNT

**Remedies**
- Damages
  - Punitive (exemplary)
  - Compensatory
    o General
    o Special
      - Medical expenses
      - Lost earning capacity
      - Pain & suffering
- Equitable Relief

**Some policy Arguments:**
- Protection of interest in peace of mind and basic human dignity
- Restore P to where P was before injury
- Punish/Deter acts like D’s
- Human life is more valuable than property
- Economic Efficiency = encourage productivity by allocating costs efficiently
- Instrumentalists (Distributive Justice)(Reasonableness) v. Non-Instrumentalists (Corrective Justice)(Fairness)
  o Fault to Instrumentalists = Efficient allocation of injury costs – Posner
  o Fault to Non-instrumentalists = Right the moral wrongs – Holmes
  o Strict Liability to Instrumentalists = Allocate injury costs to the more able cost bearer – Calabresi
  o Strict Liability to Non-instrumentalists = Should be held liable for any damage you cause regardless of fault – Epstein
  o Fault + Strict Liability to Non-Instrumentalists = Fletcher

Video
Whether there is even liability in Tort?
2 questions:
1) Whether P can make out prima facie case for that tort?
   a. If no – answer = P cannot make out prima facie case.
   b. If yes – go to 2
2) Are there any good defenses to the p.f.c?
   a. If no – answer = P is liable for the tort.

General considerations items:
- Vicarious liability = someone is responsible for tort of another person
  o Employer liable for tort of employee committed in scope of employment?

Spot all the torts:
- Who is the P and D for each tort?
  o A is suing B for battery – p.f.c.?
    • If no = no lawsuit
    • If yes = defenses?
      • General consideration items

Tricks:
- Supersensitive P = don’t take them into account unless D knows about the sensitivity
- Incapacitated D = Everybody is liable for intentional torts
  o Note incapacitation, but D is still liable
- Transferred Intent = that intent can be transferred from person to person and from tort to tort (intentional torts)