

**NEGLIGENCE**

(Elements: Duty, Breach, Causation, Scope of Liability, Damages)

**Duty**

1. General Duty of Reasonable Care
  - a. Imposed on all persons not to place others at foreseeable risk of harm through conduct
  - b. Adults → Reasonable person standard (objective)
  - c. Children → Child standard of care
    - i. Same age, experience, and intelligence
  - d. Physically disabled persons → reasonable person with same abilities
2. Manufacturers General Duty
  - a. MacPherson v. Buick Motor Co. (1916)
    - i. Duty to act reasonably to protect persons who may come in contact with the product if:
      1. Knowledge of probable danger arising from product
      2. Knowledge that danger will be shared by others than buyer
      3. Proximity or remoteness of the relation is a factor to consider (scope of liability is expanded)
3. **Limited Duty Rules**
  - a. No duty to assist, act, or rescue
    - i. Exceptions
      1. Misfeasance – where you've caused harm through your actions
      2. Special Relationship (special dependency, working relationships, business relationships)
      3. Voluntary Assumption of duty
        - a. Must rescue in a reasonable manner
        - b. If have special skill set, standard of care is reasonable person with the same skills
        - c. If Δ's negligence places good Samaritan rescuer in harm's way, Δ is also liable to rescuer
      4. Innocent prior conduct – (Misfeasance) where Δ has created a risk of harm
        - a. Duty to act to prevent the harm from occurring
        - b. Duty to assist if harm does occur
      5. Reliance on a gratuitous promise
      6. Intentional prevention of aid by others
      7. Statute
      8. Others
    - ii. Trespassers: (no authority to enter, no permission, no invitation)
      1. Duty owed = not to cause injury willfully, wantonly, or through gross negligence
      2. Artificial condition – something that a person has placed on its property
      3. Risk of serious injury
      4. Owner has to know of the condition
    - iii. No duty to undiscovered trespassers – they always lose no matter what injury
    - iv. Licensee: Duty owed = not to injure willfully, wantonly, or through gross negligence. In cases where owner has actual knowledge of danger, duty is to warn or make safe the dangerous condition.
      1. Dangerous conditions – artificial + natural conditions. All dangerous conditions
  - b. Owners/Occupiers of Land
    - i. If no status Trichotomy analyze under general duty of reasonable care
    - ii. Trespassers: (no authority to enter, no permission, no invitation)
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      1. Dangerous conditions – artificial + natural conditions. All dangerous conditions

2. As long as owner knows of them
- v. Invitee: On land for purpose of owner/occupier. Business dealer. Owner responsible for dangerous conditions that the owner *should* or has reason to know of.
  1. Dangerous condition – all dangerous conditions
  2. Owner can be held liable if he *should* have known of them
    - a. Places a burden on owner to inspect property
- vi. Public Invitee
  1. Where business premises are held open to public in such a way that there is an implied assurance that the premises are reasonably safe for entry
  2. Duty is same as invitee status
- vii. Discharge of duties
  1. Warn
  2. Make safe
- viii. No liability for very obvious dangerous conditions
- ix. Traps → illegal. Can't have any traps. Considered willful or wantonly causing injury
- c. Attractive Nuisance Doctrine:
  - i. Owner/occupier owes duty trespassing children as if they were invitees
  - ii. If something is generally manmade that attracts children to the land where there is a risk of harm, then the  $\Delta$  has a duty of care to get rid of unsafe condition or protect children.
  - iii. In order for child to recover,  $\pi$  must be able to show that they simply did not understand the risk involved in the dangerous condition
- d. Emotional Harm without Physical Injury – no harm has occurred
  - i. IMPACT RULE: allow recovery with slightest touch – as long as there was *some* impact whatsoever. Courts require physical manifestation of injury relating to emotional distress.
  - ii. FEAR FOR ONE'S OWN WELL BEING: recover for pure emotional distress if the  $\pi$  was in the foreseeable zone of physical danger but escaped without physical harm
  - iii. FEAR FOR PHYSICAL WELL-BEING OF ANOTHER: recover if  $\pi$  was in the zone of physical danger and was not harmed physically but saw a close relative injured.
- e. Bystander Emotional Harm – some harm has occurred
  - i. Dillon/Legg Standard – the victim and bystander are related
    1. Bystander must be closely related to victim
    2. Emotional injury must be caused by the contemporaneous sensory perception of the event or arriving soon after the injury has occurred, but before any substantial change has occurred in the victim's condition or location.
    3. Injury to victim must be substantial
    4. Bystander must have suffered serious emotional injury
      - a. Physical manifestation not necessary
      - b. Can be proven with medical and psychiatric evidence
      - c. Only allow recovery where emotional injury is both severe and debilitating
- f. Emotional Harm – Independent Duty Context
  - i. No physical injury, no risk of physical injury
  - ii. Bodily Remains & Death Notification Cases
    1. Pure emotional distress recovery allowed by relatives where negligent mishandling of a dead body
    2. Where  $\Delta$  has assumed a delicate duty
    3. Likelihood that emotional distress will be readily accepted
    4. Duty is to  $\pi$ 's emotional well-being
- g. Direct Victim – breach of duty owed the  $\pi$  that is assumed by the  $\Delta$  or imposed on the  $\Delta$  as a matter of law, or that arises out of a **relationship between the two**. Risk of harm must be **reasonably foreseeable**. Two elements: direct relationship, foreseeability of harm.

- i. Damages may be recovered for negligently inflicted emotional distress in the absence of physical injury when emotional injury is a direct result of negligent actions arising where there is a duty of care imposed by law.
- ii. Duty of care → when doctor helping mother give birth, duty of care imposed between doctor and mother as well.
  - 1. Mother and psychiatrist of son, psychiatrist was abusing son
  - 2. Where doctor tells A to tell A's husband about a disease that he may have contracted, the doctor establishes a direct relationship with A's husband as well = liable for emotional harm resulting from breach of duty of care (Molien)
- h. Loss of Consortium - "loss of services," companionship, sexual relations, conversation – can be husbands OR wife's claim. Children can bring claim now. Parents can bring for loss of child. Loss to society and companionship.
  - i. Family affair – most states suggest that it is only a family matter, unmarried coinhabitants are not covered
  - ii. Derivative of the original complaint. Consortium loser adds their claim onto the big claim. If the larger claim loses, then the consortium claim loses. If bigger claim damages are dropped for contributory neg... consortium damages dropped same amount
  - iii. All you have to prove that there has been a loss of consortium.
- i. Duty to Protect against Fear of Future Disease
  - i. Requires showing of actual exposure to disease
  - ii. Type of illness determines what kind of recovery allowed
    - 1. Once the gestation period for the disease has passed, no more recovery
    - 2. Recover for stress during period of uncertainty
    - 3. Recover for enhanced risk of getting a disease
  - iii. Recovery for increased monitoring if: (Ayers v. Jackson Township test)
    - 1. Likelihood of future disease
    - 2. Degree of exposure
    - 3. Seriousness of the disease
    - 4. Value of early diagnosis
  - iv. Boryla v. Pash: adopts the position that where the emotional distress is based on a *reasonable* concern that there is an enhanced risk of future disease, recovery is appropriate.
- j. Duty to 3<sup>rd</sup> Parties
  - i. Duty To Protect 3<sup>rd</sup> party: If there's a foreseeable risk that a π is going to be injured by a party with whom a professional has a special relationship and the professional has explicit reason to know that the victim is actually in danger according to their special knowledge, then there is a duty to exercise reasonable care to protect that 3<sup>rd</sup> person. ELEMENTS:
    - 1. Professional relationship with person whose conduct needs to be controlled
    - 2. Victim is readily foreseeable and identifiable
    - 3. Foreseeable that victim will actually be harmed
    - 4. Professional has special knowledge
  - ii. One can protect in two ways:
    - 1. Warn party at risk
    - 2. Restrain violent party – higher standard
  - iii. Duty To Protect against Sexual Abuse
    - 1. Failure to protect – when family members are being molested
  - iv. Duty to Protect 3<sup>rd</sup> parties against Criminal Activity
    - 1. Where criminal acts are foreseeable & special relationship is created
    - 2. Under the totality of the circumstances test
    - 3. Foreseeable risk – duty to protect or warn
  - v. Public Agency Duty to Protect Citizens

1. Special relationship arises and an affirmative duty to act arises when:
  - a. Municipality directly promises to act on behalf of a specific party
  - b. Knowledge by municipality that inaction could lead to harm
  - c. Party's justifiable reliance on municipality's affirmative undertaking
2. Generally police are still immune

## BREACH

1. Foreseeable risk of harm
2. Unreasonable conduct in light of the foreseeable risks
  - a. Standards of Care
    - i. Reasonable Person Standard
      1. Objective
      2. Reasonably prudent person under the same or similar circumstances
      3. Error in judgment is not conclusive proof of breach
    - ii. Child Standard of Care
      1. Like age, intelligence, maturity, and experience
      2. Subjective standard
      3. Minimum age for negligence → under certain age, no negligence
      4. Inherently Dangerous Activity / **Adult Activities**
        - a. Analyze as reasonable adult standard of care
    - iii. Mentally Handicapped → analyzed as regular reasonable people
    - iv. Physically Handicapped → Reasonable person with similar disabilities
    - v. Statutory Standard of Care (Negligence per se)
      1. Where a statute exists to govern behavior – provides the standard of care
      2. Statute must be designed to *prevent the type of harm that has occurred*
      3. Statute meant to *protect the class of persons* that have been harmed.
      4. Statutory violation creates a presumption of breach, but  $\Delta$  may try to show reasonable care notwithstanding statutory violation
      5. Excuses:
        - a. Incapacity
        - b. No knowledge of occasion for compliance – when  $\Delta$  believes he is complying but for unknown reasons it turns out that  $\Delta$  was not complying
        - c. Inability after reasonable diligence to comply
        - d. Emergency
        - e. Compliance involves greater risk
        - f. Reasonableness under all the circumstances
  - b. Sudden Emergency Doctrine (Jury Instruction)
    - i. Would a reasonable person have acted this way under the circumstances
    - ii. Sudden emergency → combo of circumstances that calls for immediate action or a sudden or unexpected occasion for action.
    - iii. Under this doctrine →  $\pi$  is not chargeable with negligence if he exercised a degree of care that a reasonably careful person would have exercised under the same or similar circumstances
  - c. Learned Hand Formula
    - i. A person's conduct lacks reasonable care where the burden to take a precaution to mitigate harm is less than the probability of the harm occurring combined with the probable severity of the harm.
  - d. Custom Evidence → relevant to determining whether or not a  $\Delta$ 's conduct was reasonable
    - i. Can be used to suggest what a reasonable person would do in certain circumstances
    - ii. Alerts fact-finder to the impact on business institutions of a finding of negligence
    - iii. Addresses the feasibility and practicality of alternatives

- iv. Demonstrates the opportunity or lack thereof to learn of other safeguards
- v. *Not conclusive in determining that conduct was reasonable*

## PROOF OF NEGLIGENCE

1. Circumstantial Proof → evidence from which a reasonable inference can be drawn
2. Burdens
  - a.  $\pi$  has burden of pleading, production, and persuasion unless res ipsa
3. Res Ipsa Loquitur
  - a. Form of circumstantial evidence
  - b. Three elements:
    - i. Accident which produces harm is not one that ordinarily happens without neg.
    - ii. Instrumentality is under exclusive control of  $\Delta$ 
      1. Restatement gets rid of “exclusive control” –  $\Delta$  needs to be the responsible cause of the injury, does the  $\Delta$  have “power of control” and opportunity to exercise it
        - a. Bottle bursting in someone’s hand, shopkeep doesn’t necessarily have “control” of the bottle – it’s shipped many times, but it originated with the maker who had the power of control
    - iii. No contributory neg by  $\pi$
  - c. Covers duty, breach, and causation → burden shifts to  $\Delta$  to prove that neg was not cause
  - d. Effect of Res Ipsa Loquitur → raise a rebuttable inference which allows  $\pi$  to take case to jury and thus avoid directed verdict for  $\Delta$ .
  - e. Shows inference of negligence. Does NOT mean negligence automatically
  - f. Doctrine of respondeat superior can be invoked here
    - i. Someone in operating room caused accident, but we don’t know who → respondeat superior allows head doctor to be the target of the lawsuit as per Ybarra
    - ii. Exclusive Control = Constructive Control where instrumentality is separated

## MEDICAL MALPRACTICE

1. Standard of care is derived from custom
2. Custom evidence plays a huge role
3. Negligence in Medical Malpractice = all forms of carelessness arising in the care of patients, such as mistakes in diagnoses, surgery, office treatment, prescriptions, testing, surgical procedures, etc.
4. Negligence → actions represent a departure from the requirements of accepted medical practice.
5. Judgment Call Rule → where two schools of thought are acceptable practices the doctor has a judgment call. Here, if the doctor chooses between these two schools of thought, and picks one, even if it turns out to be the wrong judgment call it is *not* called negligence.
6. Locality Rule → doctors in rural areas are held to a different standard.
  - a. Custom is compared only to similar sized towns nearby
  - b. Not to Urban hospitals
7. Informed Consent → whether or not a reasonably prudent patient, fully advised of the material known risks, would have consented to the suggested treatment
  - a.  $\pi$  must prove that they *would have done something different* had they had that certain type of information
  - b. Medical Standard (ie. Professional standard, or Traditional Standard): Physician is required to disclose those risks which a reasonable medical practitioner of like training would disclose under the same or similar circumstances.
    - i.  $\pi$  has duty to present testimony of expert to establish what info is customarily disclosed
  - c. Lay Standard (ie. Prudent Patient Standard): Physician’s disclosure duty is to be measured by the patient’s need for information rather than by the standards of the medical profession.
    - i.  $\pi$  *Burden of Proof* in lay standard
    - ii. Existence of a material risk unknown to patient

- iii. Failure to disclose the risk on the part of physician
- iv. Disclosure of the risk would have led a **reasonable patient** in  $\pi$ 's position to reject the medical procedure or choose a different course of treatment
- d. Exceptions
  - i. Emergency – patient could not give consent, (unconscious, etc.)
  - ii. Transferability – with child, transferred to parent
  - iii. Simple procedure with a remote risk
  - iv. Basic knowledge of risk – risk of being sore after an incision

## LEGAL MALPRACTICE

1. Test for Malpractice (*Smith v. Lewis*): Failure to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.
2. Burdens:
  - a.  $\Pi$  must prove:
    - i. Lawyer erred
    - ii. Had lawyer not erred, the court would have found the other way

## CAUSATION

1. But For Test → “but for the actions of the  $\Delta$  the harm would not have occurred”
2. Substantial Factor Test →  $\Delta$ 's negligent conduct was a substantial factor in contributing to the  $\pi$ 's injuries.
  - a. Case where two (or more) defendants and each contributed to the harm = enough to bind both  $\Delta$ s
  - b. Establish causation by *preponderance of the evidence*
    - i. Evidence → eyewitness, expert testimony, circumstantial evidence
  - c.  $\pi$  has a burden to show  $\Delta$ s contributed substantially to the harm
3. Joint & Several Liability
  - a. Where two or more  $\Delta$ s are substantial factors in causing harm, hold all jointly and severally liable for the harm → go after one  $\Delta$  for the entire amount, and let that  $\Delta$  go after the rest of the  $\Delta$ s to recover whatever they owe him
  - b. Three Situations where joint & several liability is appropriate:
    - i. Vicarious Liability
    - ii. Joint tortfeasors =  $\Delta$ s act together and cause harm
    - iii. Independent tortfeasors =  $\Delta$ s act independently but nonetheless cause one harm
      1. Single Indivisible Injury Rule: Negligent driver of an auto in the successive impact has been held jointly and severally liable for all  $\pi$ 's injuries if injuries are “indivisible” and the liability therefore cannot be allocated with reasonable certainty to the successive collisions.
4. Alternative Liability
  - a. Where there's harm, and it's obvious that only one tortfeasor caused the harm, but  $\pi$  doesn't know which tortfeasor caused the harm → **burden shifts** to  $\Delta$  to prove who caused harm
    - i. If  $\Delta$ s can prove who actually caused harm → that  $\Delta$  is liable for damages
    - ii. If  $\Delta$ s can NOT prove who caused harm → hold jointly liable for harm
5. Products Liability (Market Share Theory)
  - a. Where many tortfeasor product manufacturers develop a negligent product, and the product causes harm, but where the  $\pi$  can't determine which manufacturer actually made the product that caused the harm: → several liability (not joint) (3 steps)
    - i.  $\Delta$  may attempt to prove that they were not part of the market at all (didn't market to anyone)
    - ii. IF can't prove → owe same % of market share as every other  $\Delta$
    - iii. Burden shifts to  $\Delta$  to prove that they had less of a market share than everyone else

6. Loss of Chance (prob not on test)
  - a. Two choices:
    - i. Only recover for loss of chance if  $\Delta$  has been a substantial factor in your death = caused a loss of more than 50% chance of survival
    - ii. Court uses any loss of chance and awards percentage based on loss  $\rightarrow$  new trend

## SCOPE OF LIABILITY

1. Foresight Test – limits recovery to harms that were foreseeable and natural consequences of the negligence
  - a. **Unforeseeable  $\pi$ ?**  $\rightarrow$  can be analyzed as duty also (Cardozo analyzes this way in Palsgraf)
  - b. **Unforeseeable consequences?**
    - i. Different type of harm than what was foreseen  $\rightarrow$  cuts off liability
    - ii. Extent of harm / specific harm greater than foreseen  $\rightarrow$  does not cut off liability
  - c. **Intervening conduct?**
    - i. Supervening act  $\rightarrow$  unforeseeable  $\rightarrow$   $\Delta$ 's liability is cutoff.
    - ii. Supervening act's result  $\rightarrow$  foreseeable  $\rightarrow$   $\Delta$ 's liability not cutoff.
      1. If the harm is within the risk, negligently created by  $\Delta$ , then it is foreseeable risk and if they fail to mitigate the harm then  $\Delta$  will be found liable. (Failure to place neck braces on large masks)
2. Child standard  $\rightarrow$  child's foreseeability
3. Shifting Responsibility
  - a. Intervening conduct  $\rightarrow$  foreseeable but very egregious  $\rightarrow$  may insulate  $\Delta$  from liability
  - b. Factors to examine:
    - i. Culpability of intervenor-intentional, criminal, reckless, negligent, innocent?
    - ii. Competence and reliability of person upon whom reliance is placed
    - iii. Intervenor's understanding of situation
    - iv. Seriousness of danger
    - v. Number of parties at risk
    - vi. Length of time between conduct of parties
    - vii. Likelihood that proper care will not be used
    - viii. Ease with which parties can take precautions
4. EXCEPTIONS TO FORESIGHT RULE
  - a. Medical Malpractice Complications Rule
    - i. Medical malpractice will not be an intervening cause to the harm because as a matter of public policy the courts have decided that the  $\Delta$  should have the burden of suing the medical malpracticioners
  - b. Eggshell Plaintiff Rule  $\rightarrow$  take  $\pi$  as you find them
    - i. Even though harm is not foreseeable because you didn't know that the  $\pi$  had some weird ailment, it does not excuse liability
  - c. Rescuer Rule  $\rightarrow$  if  $\Delta$  creates a situation that invites rescue, they will liable for harm to that rescuer
    - i. Exception: *if rescue is performed recklessly*  $\rightarrow$  not foreseeable that rescue would be reckless
    - ii. When a person negligently manages his own person he is liable for the foreseeable consequences, danger invites rescue – therefore rescuers can recover.
  - d. Suicide Rule  $\rightarrow$  Courts don't normally find  $\Delta$  liable for  $\pi$ 's suicide after an accident which causes physical and mental distress, but when the accident causes the  $\pi$  to actually become INSANE – courts view this as the accident creating an irresistible impulse to commit suicide and therefore find proximate causation and reasonable foreseeability.

## DEFENSES & IMMUNITIES

1. Contributory Negligence
  - a. Cuts off any recovery by the  $\pi$  if  $\Delta$  can prove that  $\pi$  contributed to the harm in any way
  - b. Danger is foreseeable  $\rightarrow$   $\pi$  fails to see specific risk = contributory negligence (acting neg.)
2. Comparative Fault  $\rightarrow$  Apportions the damages
  - a. Pure Comparative Fault (Jurisdiction)
    - i. Negligent  $\pi$  recovers *some* damages from negligent  $\Delta$ , no matter how much at fault  $\pi$  is – even if  $\pi$  only recovers 2% of the damages
  - b. Modified Comparative Fault (Jurisdiction)
    - i. Recovery is barred if  $\pi$ 's fault is greater than  $\Delta$ s or as great as  $\Delta$ s depending on jurisdiction.
      1. If  $\pi$  is 40% at fault  $\rightarrow$   $\pi$  recovers 60% of damages from  $\Delta$
      2. If  $\pi$  is 60% at fault  $\rightarrow$  recovers nothing
      3. Some jurisdictions: if 50-50,  $\pi$  can still recover
      4. Some jurisdictions: if 50-50,  $\pi$  has to prove that  $\Delta$  is actually 51% to recover
    - ii. Where 2  $\Delta$ s and each is less than 50%, the  $\Delta$ s are usually added together to create one fault percentage
    - iii. Where 2  $\Delta$ s and one is insolvent – some states say there is no joint and several liability and if one has no money there is no recovery. Some states say that joint and several liability is ok and the  $\pi$  can recover from one  $\Delta$  and make the  $\Delta$  go after the insolvent one for recovery
3. Assumption of the Risk
  - a. Express Assumption of the Risk  $\rightarrow$  gives explicit/oral permission to release  $\Delta$  from an obligation of reasonable care.
    - i. In contract must be clear and unambiguous
    - ii. Courts look to context of activity to determine whether risk should be void as a matter of public policy
    - iii. Express Waivers do not release  $\Delta$ s of liability for reckless or intentional wrongdoings
    - iv. Trunkl Factors – basic public policy arguments for why an exculpatory clause should be valid
  - b. Implied Assumption of the Risk  $\rightarrow$  inferred from  $\pi$ 's conduct and circumstances
    - i. Three part test
      1. Knowledge of the risk
      2. Appreciation of the risk
      3. Voluntary exposure to the risk
    - ii.  $\Delta$  bears burden of proof
    - iii. Subjective standard  $\rightarrow$  courts look to the  $\pi$ 's state of mind
  - c. Primary Assumption of the Risk
    - i. A party enters into a relationship with another, knowing and expecting that the other person will not offer protection from certain risks arising out of the relationship
      1. Example: patron at baseball game getting hit by fly ball
      2. No duty analysis
  - d. Secondary Assumption of the Risk
    - i. Merged into comparative fault scheme  $\rightarrow$  jury determines relative responsibility of the two parties and apportions damages thusly
    - ii. Whether primary or secondary turns on the nature of the activity and whether  $\Delta$ 's conduct breached a legal duty of care to the  $\pi$
    - iii.  $\Delta$  can not bar liability if reckless
4. Immunities
  - a. Sovereign Immunity
  - b. Charitable immunity  $\rightarrow$  abolished in most jurisdictions. Cuts off vicarious liability

- c. Parent/Child immunity → if activity is in the process of normal household parenting
- d. Statute of Limitations → absolute defense

## GENERAL CONSIDERATIONS

1. Vicarious Liability (Doctrine of Respondeat Superior)
  - a. Employer/Employee relationship
  - b. Employee acting in the scope of their employment
    - i. Does the employer have control over the details of employee's work?
    - ii. Is actor engaged in specific "business"?
    - iii. Whether tort is performed under direct supervision
    - iv. Length of time of tortfeasor?
  - c. Intentional torts are not included in scope of employment

## INTENTIONAL TORTS

**Intent** → A person acts with intent to produce a consequence if:

- a) Person has **purpose / desire** of producing that consequence
- b) Person knows to a **substantial certainty** that the consequence will occur from his conduct

Intent is measured by a subjective standard ( $\Delta$ 's state of mind)

Malice → not necessary

Three components to intent:

- a) State of mind that occurs at the time of the event
- b) Consequences of the act, not necessarily the act itself
- c) Have in mind purpose or desire to bring about consequence, but also have belief that damage is substantially to occur

**Transferred Intent** → any intentional tort can be transferred from:

- a) tort to tort
- b) person to person

**Scope of Liability in Intentional Torts** → courts are less willing to cut off liability due to intent

## Reckless v. Intent

1. Reckless → knowledge to a substantial degree of certainty that something could happen and a disregard for whether or not it actually happens
2. Intent → knowledge to a substantial degree of certainty that something could happen and a distinct action made to produce that something

### 1. Battery

- a. Intentional contact that is harmful or offensive to a person
  - i. Must be with  $\pi$ 's body or something closely associated
  - ii. Offensive test → reasonable
  - iii.  $\Delta$  must know that contact is substantially certain to occur

**Dual Intent Rule** → for mentally deficient & young children → can't form necessary intent

- a) Must prove two elements two actually constitute intent:
  - i. Intended the contact AND
  - ii. Intended it to be harmful or offensive

### 2. Battery in context of employment → *Van Fossen* test

- a. Knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation

- b. Knowledge by the employer that if the employee is subjected by employer to such dangerous process, procedure, instrumentality, or condition, the harm to the employee will be a substantial certainty and not just a high risk
  - c. That the employer under such circumstances, and with such knowledge, did act to *require* the employee to continue to perform the dangerous task
3. **Assault**
- a. **Reasonable apprehension**
  - b. **Of a harmful or offensive contact**
  - c.  $\Delta$  must have intent to cause apprehension of a harmful or offensive contact
  - d. Fear  $\rightarrow$  not necessary
  - e.  $\pi$  given grounds for believing that it's time for self-defense or flight
  - f. Threats to injury in the future or insults are not an assault
  - g. Must have more than words
  - h. Awareness of assault before its happening not necessary  $\rightarrow$  bomb situation
4. **IIED**  $\rightarrow$
- a. 3 elements:
    - i. Extreme & outrageous conduct
    - ii. Which is intended to cause and *does cause* severe emotional distress to another
    - iii. Tort may also exist where  $\Delta$ 's actions indicate a reckless indifference to the likelihood of causing severe emotional distress
  - b. Judged by community standards
  - c.  $\Delta$  doesn't necessarily have to be able to foresee the emotional distress
  - d. General go-to tort if no other tort will stick, especially if a threat is not imminent
  - e. Exceptions
    - i. Where  $\Delta$  knows of a special susceptibility  $\rightarrow$  lowers the behavior necessary for IIED
5. **Conversion**
- a. Intentionally exercising dominion or control over another's property which seriously interferes with the owner's rights
    - i. Long period of time
    - ii.  $\Delta$  liable for fair market value of the property
    - iii. Losing/destroying someone's property
6. **Trespass to Chattels**
- a. Interference with someone else's personal property
    - i. Depriving  $\pi$  of his property for a shorter period of time
    - ii. Damaging property
    - iii.  $\Delta$  liable for temporary loss of use and repair costs
7. **False Imprisonment**
- a. Three Elements:
    - i. Willful/Intentional detention
    - ii. Performed without consent
    - iii. Without the authority of law
  - b. Confinement definition
    - i. Actual or apparent barriers
    - ii. No reasonable means of escape
    - iii. Only a brief time required
    - iv. Knowledge by  $\pi$  usually necessary
      - 1. Courts have challenged this rule where the  $\pi$  is injured
    - v. Words alone may be sufficient for confinement
  - c. **Shopkeeper's Privilege**
    - i. A shopkeeper, or security, has ability to detain someone for investigation if:
      - 1. Reasonable belief of shoplifting

2. Hold for a reasonable amount of time
  3. Force = least amount necessary (reasonable)
- d. **Malicious Prosecution**
- i. Improper purpose
  - ii.  $\Delta$  helps in improper prosecution for no reason

## DEFENSES TO INTENTIONAL TORTS

1. Consent
  - a. Expressed
    - i. Words
  - b. Implied
    - i. Acts
    - ii. Customs
  - c. Exceptions (vitiation of defense)  $\rightarrow$  can't give consent when:
    - i. Underage
    - ii. Drunk
    - iii. Development disorder
    - iv. Coercive behavior
    - v. Mistaken consent  $\rightarrow$  consented to one thing, but not to another
  - d. Emergency  $\rightarrow$  consent not necessary
2. Self-Defense  $\rightarrow$  complete defense where:
  - a. Elements
    - i.  $\Delta$  used reasonable force
    - ii. Reasonably believed necessary (objective & subjective standard)
    - iii. To prevent immediate harm
  - b. Exception  $\rightarrow$ 
    - i. Where a reasonable person would know the danger is passed, can't use self-defense
      1. Aggressor withdraws from fight
      2. Gives notice in some way that he has done so
    - ii. Lawful Arrest  $\rightarrow$  can't use self defense
    - iii. Where person invoking defense *started the fight*
  - c. Factors to consider:
    - i. Size, age, strength of parties
    - ii. Reputations for violence
    - iii. Degree of physical harm feared
    - iv. Presence of weapons
3. Defense of Others  $\rightarrow$  complete defense where:
  - a.  $\Delta$  used reasonable force
  - b. Danger has to be *actual* (not just reasonable)
  - c. Some courts say this defense is only good where 3<sup>rd</sup> party can't defend himself
4. Defense of Property
  - a. Reasonable force
  - b. Deadly force  $\rightarrow$  NEVER
  - c. Traps  $\rightarrow$  NEVER (i.e. spring gun)
5. Necessity  $\rightarrow$  incomplete privilege
  - a. Three elements:
    - i. Reasonable belief of imminent harm to  $\pi$  or others
    - ii. Can only prevent harmful actor as long as necessary to get person to proper authorities
    - iii. Can only restrain using least restrictive means necessary
  - b. Damages  $\rightarrow$  only those that you actually caused (incomplete privilege)