Torts – Basic Final Outline

INTENTIONAL TORTS

1. Battery
   a. Voluntary act (note: muscular reaction counts unless purely reflexive reaction).
   b. Intent to cause (based on purpose or knowledge with substantial certainty that it will result) harmful or offensive contact.
   c. Harmful or offensive contact results (offensive contact can still result if victim is unconscious).

   - Rules:
     o Extended person rule – touch something attached to person, counts as act directly on the person.
     o Transferred Intent – transfer intention regarding a) person targeted vs person actually harmed, and/or b) tort intended and tort accomplished (only applicable to the following):
       ▪ Assault
       ▪ Battery
       ▪ False Imprisonment
       ▪ Trespass to Land
       ▪ Trespass to Chattels
     o Extended Liability Rule – intentional tortfeasor is liable for all damages caused (NOT limited to those intended or those that were foreseeable).

*Battery is actionable no matter how trivial the incident.

2. Assault
   a. Act (words apply but are not enough – look at context. Act must establish apprehension of imminent harm).
   b. Intent (purpose or substantial certainty)
   c. Apprehension of imminent harmful or offensive contact results
      i. Not just fear in general.
      ii. Must be aware/conscious for it to result

3. False Imprisonment
   a. Intentionally and without lawful privilege (arrest/detention)
   b. Confine another against his consent (possible ways):
      i. Threats/demands
      ii. Assertion of authority
      iii. Duress of goods
   c. Within limited area, for appreciable time
   d. NO ACTUAL HARM required for recovery (unless II was not aware of confinement of time it took place).

4. Trespass to Land
   a. Intentional entry on land of another (or if unintentional/lawful but refusal to leave) – purpose is to enter OR substantial certainty that entry will take place (NOT necessary that the intent is to “trespass”).
      i. Personal entry
      ii. Causing object to enter

   - Extended Liability applies.
*Liable for damages even if no physical or economic harm is done.
*May get punitive if trespass is deliberate/malicious (but usually damage required)

Note – NUISANCE – Substantial and unreasonable interference with another’s use and enjoyment of his property. (note: could also be something like halfway house for convicts in residential area).
- Defendant’s nuisance could be intentional, negligent or strictly liable.
  o If illegal thing → nuisance “per se” (as matter of law).
- II can recover damages or injunction to stop nuisance.
- Two kinds:
  o Private
  o Public – interference with right held in common (individual can only bring claim if he’s affected in different way from others).

5. Trespass to Chattels
   a. Intentional interference
   b. With another’s personal property.
   c. Interference results in form of “legal harm”
      i. Dispossession of the property
      ii. Loss of use for appreciable time
      iii. Damage to item
      iv. Harm to II

6. Conversion of Chattels
   a. Act with substantial dominion/control (do not need to be conscious of wrongdoing).
   b. Over someone else’s personal property.
   c. Substantial dominion/control of the property results.
- Note Serial conversions – steal and sell → purchaser is also a converter.
- Remedies:
  o Forced sale – keep it and pay value at time of conversion.
  o Replevin – demand the item back.

7. Intentional Infliction of Emotional Distress (can always recover as parasitic damage riding on the back of trespassory tort – below = stand alone claim).
   a. Act intentionally or recklessly (insult NOT sufficient unless common carrier).
   b. Emotional distress/harm is the intended or primary consequence
   c. Extreme or outrageous conduct
      i. Test = would reasonable person (with characteristics of II accounted for) have suffered ED?
      ii. Emphasis on repetition of conduct.
      iii. Also take into account any abuse of power (▲’s knowledge of II’s vulnerability).
   d. Severe emotional distress results from ▲’s conduct.
- If ▲’s conduct is directed at third party he is subject to liability if he intentionally or recklessly caused severe ED to:
  o A member of the victim’s immediate family who is present at the time. OR
  o Any person present at time if distress results in bodily harm.
8. **Strict Liability**
   a. Liability *without fault* for:
      i. Animals (*Wild* if injured in expected way - not tripping on tiger but bitten by tiger, and *Domestic* if owner knew about pets vicious propensity).
      ii. Vicarious Liability – *Respondeat Superior* – employers liable for non-intentional torts (or intentional if II can argue that she relied on the employer/that job completely encompassed the tort - bouncer) of employees acting *in scope of employment*.
      iii. Abnormally Dangerous Activity
   iv. Defective Products

9. **Post-Death Claims**
   a. **Wrongful Death** – purpose is *to compensate family* for pecuniary losses resulting from tortious conduct of another that resulted in wrongful death.
      - **Must prove:**
         ▲ intentionally or negligently caused the death
      • Acquire losses the deceased would have contributed to the person/family (not pooled).
   b. **Survival Statute** – deceased person’s legal claims survive by means of the estate’s *personal representative* (need not be related to the death).
      - Collect whatever damages deceased would have recovered.
      - Damages recovered are pooled and distributed through those left in will of the estate.

**AFFIRMATIVE DEFENSES TO INTENTIONAL TORTS**
   *I did it but I was justified because...*

1. **Self Defense/Defense of Others**
   a. Privileged to use *reasonable force* to defend against harmful or offensive bodily contact and confinement (battery, assault, false imprisonment).
      i. Force likely to cause death or serious bodily harm is only justified if that is the harm threatened (in that case, *not required to retreat*).
      ii. Provocation is NOT sufficient.
   b. Based on *apparent necessity* for self-defense (not actual reality) but must show that you *reasonably believed*.
      i. NOT liable for unforeseen consequences of reasonable self defense.
      - *Privileged to defend others on same basis that one may defend self.
      - NOTE: Defense can transfer (if attempting to defend self and innocent bystander is hurt – however may get sued for negligence).

2. **Arrest and Detention**
   a. **Private person** is privileged to arrest without warrant if:
      i. *Felony* being committed in person’s presence, or felony was committed and person has reasonable grounds to believe the arrested person is responsible. OR
      ii. *Misdemeanor* committed in person’s presence *amounting to breach of peace* (disorderly, disruptive, dangerous - *shoplifting doesn’t qualify).*
b. **Property owner** is privileged to detain person against his will if:
   i. Owner *believes person has tortiously taken his property*
   ii. In order to *prevent theft/recapture property* (NOT to punish)
   iii. Only detain long enough for *short investigation/police arrival*.

- *Owner exercises privilege to detain at own peril* – if detained person didn’t have owner’s property → owner liable for false imprisonment.

3. **Defense of Property**
   a. Can use *reasonable force* to defend property *but NEVER* deadly force.
   - *Can threaten force not allowed to actually use BUT at own peril* (liable for consequential injuries that accidentally result).
   - Can use reasonable force to reclaim chattels, but once possession has been lost, cannot take it upon oneself to use force to reclaim it later (must seek legal action).

4. **Discipline**
   a. Parents are privileged to discipline their children (including force and confinement – limits are ill-defined).
      i. Non-parents in charge of children have similar privilege but to lesser degree.
      ii. Note: Some states, children are not permitted to sue their parents.

5. **Consent**
   a. **Willingness in fact**
      b. *Knowing* (all material facts) and *voluntary* (not under duress) *agreement expressed by*
         i. Words, writing, or implied through conduct.
   - **Plaintiff is incapacitated from consenting if:**
      o **Mental disability** and:
         • Condition substantially impairs capacity to understand and weigh harm against benefit.
         • Defendant knows of the incapacity.
      o **Intoxication/Drugs**
      o **Put under for operation**
         • Common Law Rule – Need consent if non-emergency.
         • *Kennedy* – consent implied in procedures where something new arises in the same area doc already working in
      o **Minor**
   - *Can knock out defense of consent if person constantly said no in past and then gave in → other party aware that they’re taking advantage without genuine consent.*

6. **Necessity**
   a. Act in **good faith**
   b. **For the public good**
   c. With **reasonable belief** that action was **necessary**
   - *Necessity is incomplete defense.* May still be liable for other consequential damages intentionally caused based on the necessity (case where was necessary to dock during storm and owner of boat was liable for damage to owner of dock – wouldn’t be liable for heart attack of bystander as result of boat crashing dock).
NEGLIGENCE

1. Duty
   - Reasonable Person Standard
     a. Exercise care that a reasonable person would exercise
     b. Under same or similar circumstances
     c. To avoid or minimize risks of harm to others.
   - For duty to be imposed: Injury and plaintiff must have been foreseeable.

   - Specification for:
     o Children – reasonably careful child of same age, intelligence, experience.
       • Exception – children held to adult standard when engaging in inherently dangerous or adult activities.
       • Very young children – Age 3 under incapable of negligence.
     o Mental – normal reasonable person standard (sane and sober) – mental disability not accounted for.
       • Exception – if involuntarily drugged – court usually applies that disability.
     o Physical – reasonable person with a like infirmity.
     o Better than average person – If more experience, etc then reasonable person takes that on for standard of care.

   - Majority rules:
     o Standard of care remains the same whether danger is low or high or emergency situation.
       • Minority – standard changes to extraordinary care when danger is great.

   - NEGLIGENCE PER SE – renders conduct negligent “as a matter of law.”
     o Court uses other rule/law to define reasonably prudent person’s standard of care when statute establishes a specific standard of conduct (if non-tort statute, judge’s discretion whether or not to apply it).
       Doctrine triggered when...
       • Π belongs to class of persons statute designed to protect
       • Injury is type statute was designed to prevent
     o Excusable situations
       • Incapacity (heart attack, child)
       • Neither know nor should know of occasion for compliance
       • Unable after reasonable diligence to comply
       • Emergency not due to own conduct
       • Compliance would involve greater risk of harm.

*Note: Compliance with statute/regulation is not a defense, only reflects a minimum standard of care.

- GENERAL “NO DUTY TO ACT” RULE – no duty to take affirmative steps for another’s protection (Nonfeasance = failure to act – not liable for this).

- Exceptions:
Knows/reason to know that conduct (tortious or innocent) has caused harm to person → duty to render assistance to prevent further harm.

- Created unreasonable risk of harm (tortious or innocent) → duty to use reasonable care to prevent harm from occurring.

- Voluntarily begin to take charge → assumed a duty to take charge in reasonable manner/use reasonable care (liable for failure to perform services with competence and skill he possesses).

- Start to aid → duty not to stop if it will leave him in a worse position.

- Statute or ordinance requires affirmative action

Special Relationship → reasonable care for Π’s safety even if ▲ did not create or increase the risk of harm (but should be in the same context of the relationship). Non-exclusive list:

- Carrier – passenger
- Inkeeper – guest
- Landowner – lawful entrant
- Employer – employee
- School – student
- Landlord – tenant
- Custodian – person in custody

*Encouraging another to engage in dangerous activity does NOT give rise to duty.

2. GENERAL “NO DUTY TO PROTECT FROM THIRD PERSONS” RULE

- Exceptions:
  - ▲ has special relationship with Π (and danger/risk of injury is reasonably foreseeable).
    - Majority Rule Test (for landowner’s duty to foresee) = Totality of the Circumstances Test – accounts for previous crimes near premises (nature, extent, recency, frequency) and other factors like location, condition, etc.
  - ▲ has special relationship with dangerous person (and risk of that person harming a third party is reasonably foreseeable and ▲ has ability/right to control).
    - General rule – parents are not liable for child’s tort on parental relationship alone, or merely because he is known to have dangerous propensity. Only liable if:
      - fail to control specific dangerous habit
      - that the parent knows/should know (given reasonable care)
      - requires present need to restrain child
      - to prevent imminently foreseeable harm.

2. Breach – Hand’s formula = B < PL … if burden of adequate precaution is less than severity of the injury and probability of injury occurring together → liable.

- CUSTOM EVIDENCE – if violated, usually sufficient to get Π to the jury because it establishes standard by which ordinary care can be judged, even where it exceeds minimum safety requirement set by ordinance.
  * Custom/practice is only applicable to prove negligence if its purpose is safety.

- STORE POLICIES/MANUALS – admissible but not conclusive on standard care.
RES IPSA LOQUITUR – proves breach when there’s no actual proof. Doctrine allows it to be inferred that harm to II was caused by negligence of ▲ when:
  o Event is kind that doesn’t ordinary occur in absence of negligence.
  o Other responsible causes are sufficiently eliminated (some jurisid.
    require ▲’s exclusive control of instrumentality, but now in
    comparative responsibility jurisdiction II’s contributory negligence
    won’t bar res ipsa from being applied).
  o The negligence is within scope of ▲’s duty to II.

3. Injury – II must suffer legally cognizable harm/actual damages.
   - MUST be proven for negligence action to succeed.
   - Damages Recoverable:
     o Past/future medical expenses
     o Loss of wages/earning capacity
     o Pain and suffering (emotional harm)
     o Other specifically identifiable harm.

4. Cause in Fact – proving that the harm was in fact caused by the defendant.
   - But-for Rule – show that “but for ▲’s conduct, II would have avoided injury.”
     o Exceptions – liable even if not but-for cause of harm based on
       responsibility for another person’s direct “but-for” act:
       ▪ Respondeat superior (employers liable for employees)
       ▪ Partners jointly liable for each other’s actions
       ▪ Conspirators all liable even if only one is direct cause
     o Many courts apply Increased Risk Showing Causation – if negligent
       act was wrongful because it increased chances of particular accident
       and that particular accident occurred → strong enough causal link to
       make the negligent party bring in evidence denying but-for causes or
       substantial factor.
   - When there are multiple liable actors...
     o Parties cause separate/divisible injuries → apportioned by causation.
     o Parties cause single/indivisible injury → fault apportionment rules
       ▪ Joint and Several Jurisdiction – II can proceed for judgment
         against any one of the parties or all in one suit (one may have
         to pay all and recover from other responsible parties on own).
       ▪ Several (aka Proportionate Fault) Jurisdiction – no defendant
         is liable for more than his proportionate share as determined
         based on comparative fault apportionment by trier of fact.
         ▪ If duplicative causes (separate concurrent causes each
           sufficient to lead to the result independently and would
           have done so regardless) → use substantial factor test
           (if both substantial, then use J&S in most jurisdictions.)
         ▪ If two (or a few) actors are each negligent and acting in
           concert → (Summers) alternative liability applies,
           shifting burden to ▲’s to prove “it wasn’t me…but-for
           the other guy.” Application requires:
           • ▲’s have better access to info than II
           • All possible tortfeasors before the court.
5. **Proximate Cause** – establishes reasonable *connection* between act/omission of ▲ and harm suffered by Π (an actual cause that is a *substantial factor* in the resulting harm).

- **Scope of the Risk Test** (Majority) – liable if the harm caused was *reasonably foreseeable* (injury and Π).
  - **Rescue Doctrine** – rescuers are foreseeable as a matter of law (so ▲ who negligently puts self or third party at risk is liable if rescuer is injured in attempt to help).
    - *Exception* – Firefighter’s Rule – public professional rescuers cannot recover from person whose negligence caused the problem that brought prof. rescuer there.
  - **Thin Skull Rule** – ▲ takes Π as he finds her (pregnant, hemophilia, etc). If ▲ does something that would cause any harm to normal person OR if ▲ knows of Π’s susceptible condition ⇒ liable for whatever personal reactions occur even if they were unforeseeable.
  - **Rule about manner in which harm occurs** – If accident was *variant of foreseeable* then the act/omission falls under scope of the risk.
    - If *new and unexpected factor* comes into play causing the accident, then accident was *not a variant of the foreseeable*.
  - **If intervening cause → Superseding Cause Test** – Intervening cause only becomes the sole person liable if it was new/unexpected/unanticipated/intentional
    - If IC is the very *reason* first ▲ is negligent and IC is part of the risk he created ⇒ first ▲ is liable.
  - Tortfeasor responsible for accident is responsible for injuries of death occurring during course of medical treatment (medical is NOT superseding).
  - **Second Injury Scenarios** – ▲ liable for any foreseeable second injury sustained by Π in dealing with first injury caused by ▲’s negligence.
- **Direct Cause Test** (Minority) – liable if not too many intervening causes (regardless of foreseeability).

6. **Negligent Infliction of Emotional Distress**
- Rule of “*parasitic damages*” still applies – if ▲ *negligently* causes physical injury ⇒ Π can recover for pain/suffering/emotional as well.
- Stand Alone NIED claims
  A. **Liability for Fright:**
    - Traditional (now Minority) *Impact Rule* – required physical impact to precede emotional harm.
    - *Modern (Majority) Rule* – Impact not required. If no impact then plaintiff can recover only if:
      - Evidence of *physical harm resulting* from the shock, OR
      - Objective *physical manifestation of the shock/fright* occurring after the event.
• SOME jurisdictions – abolish rule, or allow emotional injury without any physical if medically diagnosed.

B. Emotional Harm from Injury to Third Person:
  o Traditional (no Minority) Rule – No recovery for emotional harm resulting from injury to another person (courts that still use impact might still deny this claim today).
  o Modern Majority Rule – Zone of Danger Test – Π can recover for NIED based on injury to third person if Π:
    ▪ Was within zone of danger of the physical impact
    ▪ And, emotional injury was caused by fear of physical injury to self.
  o Test in many jurisdictions – Close Relationship Test – permits recovery for emotional harm by bystanders (not in zone of danger/fearing physical injury to self) if person is one who would foreseeably suffer emotional harm because of the injury. Consider…
    ▪ Whether Π was located near the scene at time of accident.
    ▪ Whether Π’s shock resulted from direct emotional impact upon observing the accident.
    ▪ Whether Π was closely related to victim.
      ▪ Usually denied recovery if non-family member even one who participated in events or attempted rescuer (if zone of danger doesn’t apply).
      ▪ If unwilling trigger of harm because of ▲’s negligence some courts will allow recovery.
  o Direct Victim Test – If Π is not bystander but “direct victim” because of preexisting relationship between Π and ▲ liable based on breach of duty that arises out of that relationship.

C. Liability for Fear of Illness
  - Misdiagnosis – No recovery because no direct risk of physical harm results.
  - Fear of Cancer – To recover, must prove:
    o Negligently exposed
    o More likely than not based on medical/science to contract cancer.
    o Fear results
  - HIV – To recover, must prove:
    o Actual exposure (evidence of infected thing you came in contact with)
    o Entered body through a recognized medical channel
    o Fear results
  *Note – can only recover for fear during the window of anxiety that it takes to get test results (6 months).
  - LOSS OF CONSORTIUM – recovery for intangible loss suffered (support, love, society, etc) because of another person’s injury. Must prove:
    o Tort committed (intentional or negligent)
    o Relationship
    o Whatever is allegedly lost.
  *Allow claim if: spouse, maybe child, rarely unmarried or parent (if so very young child)
AFFIRMATIVE DEFENSES FOR NEGLIGENCE

1. **Comparative Responsibility** – plaintiff’s contributory negligence will diminish the amount which he is able to recover in proportion to his own fault (remember, Π’s negligence must be cause in fact and pc of own harm for this to apply).
   - **Pure Comparative Fault** – Π can recover for proportion of ▲’s fault no matter what (even if 99% responsible).
   - **Modified Comparative Fault** – Π can only recover if own negligence was not greater than ▲’s (or multiple ▲’s combined)(50% responsible max)...a few modify even more and say if not equal to or greater than ▲’s (49% max).
     o Note: This changed the traditional rule (now only small minority) of contributory negligence – complete all or nothing bar (if Π 1% at fault then no recovery).
       ▪ **Exceptions** to contributory negligence bar = *Last Clear Chance/Discovered Peril Doctrine* (Π in helpless position, ▲ did (or should have for LCC) discovered Π’s peril, and could have reasonably avoided it. ALSO, wasn’t a defense for willful/wanton/reckless torts. NOT applicable to rescuers

2. **Assumption of Risk**
   - Determine whether Π objectively had knowledge of the danger (if it was open and obvious ⇒ no duty to make it safe), appreciated the risk, and voluntarily exposed himself.
   - **Majority Rule** – no longer complete bar in most jurisdictions (merged with or treat like comparative responsibility to reduce recovery).
     o Note: Employer CANNOT allege that employee assumed risk because he was aware of dangerous conditions if employer negligently fails to furnish safe work place.
   - **Contractual Assumption of the Risk** – If Π is retained by, or for the special purpose of aiding negligent ▲ in dealing with known danger then he contractually assumed and ▲ is not liable.
   - **Primary Assumption v. Secondary Assumption of Risk**
     o **Primary Assumption** – complete bar – Due to the nature of the activity ▲ owes no duty to protect Π from harm suffered because risk is inherent in the activity.
     o **Secondary Assumption** - reduced recovery – ▲ owes duty but Π encountered a known risk imposed by ▲’s breach of duty.
   - **Rule for Competitive Athletic Event** – personal injury must be predicated on willful, reckless disregard of safety by ▲ (competitor) for Π to recover.