TORTS OUTLINE

1) INTRO
   a) You’re NOT going to look at fact pattern incorporating 1 lawsuit; about 4 separate lawsuits incorporated into one → find them. What lawsuits are there to discuss?
   b) Who’s the P? Who’s the D? What are they suing for?
      i) Is D going to be liable to P? ask these questions IN ORDER
         (1) Can P make out his/her prima facie case requirements for that tort?
             (a) NO → that lawsuit is OVER. NO LIABILITY. It’s that simple
             (b) YES →
         (2) Are there any good affirmative defenses? Consent, self defense, defense of others, contrib.?
             (a) NO → there WILL be liability in tort!
         (3) General consideration items (applicable to all torts, but usually vicarious liability here - where you’re liable for someone else’s tort)
             (a) Employers for employees if committed within scope of employment
             (b) No matter what tort, you need to make sure you cover this
   c) Keep each lawsuit completely compartmentalized, each part 1-3 compartmentalized too – DO NOT MISHMASH!
      i) Think about readings
         (1) Prima facie cases → defenses → other considerations- STRUCTURE EVERYTHING THIS WAY!

2) INTENTIONAL TORT LIABILITY
   a) Understand the super-sensitive plaintiff
      i) We are NOT taking these into account. Consider the plaintiff the average person.
      ii) Exception: where D in fact knows sensitivities
   b) Everybody is liable for intentional torts!
      i) Children
         (1) Suing parents for children’s torts depends on jurisdiction – usually requirements = willful, wanton tort from kid; there are also very low damage caps & parents’ insurance pays for kids’ judgments
      ii) Drunks are liable too
      iii) Mentally insane
         (1) An insane person does not need to be rational in order for intent to be present – it may not have a rational basis, but it’s there
         (2) Watch for JD statutes requiring appreciation, etc.
   c) Transferred intent doctrine
      i) The point: it operates in 2 ways.
         (1) Intent can be transferred from person to person –
         (2) ** intent can be transferred from tort to tort – you have to fall within the 5 torts
ii) EX – A throw a baseball at B to scare him, strikes C who’s standing behind B. transfer from B to C, but also since there was an ASSAULT attempted on B, it transfers to BATTERY to C.

d) Vicarious Liability for Employers
   i) Employers are generally not responsible through vicarious liability for their employees’ intentional torts (of course there are exceptions)
   ii) If employees are facilitating/promoting business, then MAYBE.

e) Damages
   i) You should automatically get nominal damages upon proof of battery/assault – medically diagnosable injury is NOT REQUIRED.

f) Extended Liability
   i) Assigns liability if an intentional tort is committed for all damages caused, not just those foreseen or intended
   ii) This is unlike negligence. With INTENTIONAL TORTS, you’re liable for WHATEVER INJURY RESULTS, not just the foreseeable (like in negligence) or intended

3) THE 7 INTENTIONAL TORTS
   a) BATTERY → voluntary harmful/offensive contact with plaintiff’s person
      i) If you were in an epileptic seizure, your contact would not be f
      ii) You need a harmful or offensive contact
         (1) Harmful contact = easy to deal with.
         (2) Usually you’ll get an offensive contact
             (a) Includes UNPERMITTED. But keep an eye out for super sensitive plaintiffs! Would the AVERAGE PERSON have permitted the contact? (unless D knows)
             (b) Contact which is offensive to a reasonable sense of personal dignity is offensive conduct
             (c) “disagreeable or nauseating or painful because of outrage to taste & sensibilities, or affronting insultingness” (Leichtman)
      iii) Contact must be WITH Plaintiff’s person
          (1) EXTENDED PERSONALITY RULE: It’s more than the body, anything connected @ all with P’s person – ripping a plate out of P’s hand. What you have is an extension of your person.
   iv) Elements for Prima Facie Case
       (1) An act
       (2) An intent to cause [harmful/offensive contact] or [imminent apprehension of a harmful/offensive contact]
           (a) OR substantial certainty that harmful contact will occur!!
           (b) Intent = desire, want, purpose OR substantial certainty that it will occur
           (c) to really find intent, look @ the average, ordinary person in P & D’s respective positions – ex) butt biting would usually be done to cause an offensive contact...
exception = if P has an idiosyncrasy (like not wanting to be touched naked by male nurse), and D knows about it
(e) use NORMAL intelligence, SAME age & physical ability, don’t go down in mental capacity, but do go down for PHYSICAL CAPACITY
(3) Harmful/offensive bodily contact must occur
v) Battery can take place on an unconscious person – assault cannot.
b) ASSAULT ⇒ apprehension of an immediate battery
i) An apprehension (reasonable)
   (1) Make sure it’s reasonable – get all the facts. Again remember the supersensitive P! Use the average reasonable person
   (2) Don’t confuse apprehension with FEAR/INTIMIDATION – you don’t necessarily have to be afraid or intimidated – just remember the word APPREHENSION (of an unpermitted contact)
   (a) EX. Little A starts throwing punches @ Mike Tyson, ALMOST lands them – Tyson was surely NOT AFRAID or INTIMIDATED – but there was an apprehension that one would have landed & it would have been unpermitted
   (3) Apparent ability to make the contact is ALL THAT’S NECESSARY
   (a) A points unloaded gun @ B, B didn’t know it was unloaded. The tort is NOT ABOUT whether D has the actual ability to do it, it’s about whether P has a reasonable apprehension. B wins. A clearly had an apparent ability to create a reasonable apprehension. Apparent ability is enough TO CREATE A REASONABLE APPREHENSION, so P wins. Make sure to finish that sentence.
   ii) Of an immediate battery
   (1) Immediacy needs to be there – guys throwing punches @ you from 25 ft. away WON’T WORK
   (a) Words rules
   (i) WORDS ALONE ARE NOT ENOUGH. If A says, if you don’t hire me I’m going to punch you. You can’t win!
   (ii) WORDS COUPLED WITH CONDUCT ARE ENOUGH. If he’s threatening & shaking his fist under your chin while he’s doing it, you are in business.
   (iii) What about where words undue conduct and reasonable apprehension? ⇒ shaking your fist under my chin but saying “if you weren’t my best friend, I’d punch you in the mouth” there is NO ASSAULT. Words have undone conduct and taken away any reasonable apprehension

iii) Assault Elements
   (1) An act
   (2) Intent
   (3) Apprehension results
c) **FALSE IMPRISONMENT** = when a person confines another intentionally, without lawful privilege, against his consent within a limited area for any appreciable time, however short. Usually said that P must have been aware of confinement @ time or else sustained actual harm → Bad motive is NOT an element, but intent is.

i) **A sufficient act of restraint**
   (1) What’s sufficient? → common sense, gut reaction. Go with it. Fact conclusions aren’t really what it’s all about.
   (a) Threats are enough. You don’t need actual application of force – you try to leave this room I’ll blow you away. That works.
   (b) An “act” of restraint can be **inaction**. If you can find that D has obligation to act to help P and doesn’t, they can be held liable

   1. **EX** = woman in religious colony & wants to come back to US - guy in charge says he’ll give her a ride, he didn’t give her a boat to put her ashore - there was a clear understanding that they would have a boat to get ashore once you’re on the other side. That’s FI

   (2) **RULE**: one has to **know of confinement @ that time**. If you find out later you were confined, YOU WILL NOT WIN! ***Note exceptions***

ii) **A bounded area**
   (1) What’s bounded?
   (a) Inconvenience is NOT false imprisonment, there’s a threshold. You need more than **mere inconvenience**.
   (b) An area is NOT BOUNDED if there’s a **reasonable means of escape**

   (i) **REASONABLE** → crawling out through a sewage pipe is NOT REASONABLE. Jumping out a window? NO
   (ii) P has to **know about means** – a secret escape P isn’t aware of DOES NOT WORK.

d) **INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS** – severe emotional distress must either be **INTENDED or PRIMARY CONSEQUENCE** of D’s conduct → AKA **TORT OF OUTRAGE**!

i) **EXTREME, Outrageous conduct**
   (1) It must be **OUTRAGEOUS!!!** – nothing you would expected to have to live with, this tolerance is HIGH. Keep floodgates of litigation closed. Remember the type of plaintiff!
   (a) Insults are NOT ENOUGH. Watch the facts though, watch the Plaintiff! → you can’t yell crazy @ a little kid… it’s a question of FACT.
   (i) If it’s **REALLY BAD** though, it should get to a jury to determine if it’s a mere insult or something outrageous
   (b) But you don’t have to live with harassment of your customers
   (c) **CONTINUOUS** insult all day every day crosses a line
An abuse of power on one hand/abuse of a person known to be especially vulnerable works too

ii) **Damage resulting**
(1) Damage WAS NOT REQUIRED for battery, assault or Fl - but **you need it here**.
   (a) Some JDs require physical impact (clear minority – like blood spattering on you); some require physical manifestation/symptom that you have a mental injury that’s manifesting in a physically visible way
(2) Emotional distress must be **substantial → severe**.
   (a) Sleepless nights are not enough
   (b) Again watch for D knowing special info on P
(3) Public humiliation can work

iii) **Intent**
(1) Required intent to cause severe/emotional distress OR distress was primary consequence of D’s conduct
(2) @ least reckless conduct in risking that distress/recklessly causing P to suffer the severe distress
(3) FACTORS = abuse of power, known vulnerability, repeated conduct, acts/threats of physical violence

iv) **Recovery/Third Parties**
(1) If a third person is recovering, it usually requires that person’s presence @ the act and the knowledge that that person is present - but when the action is directed @ you, **you don’t need to be there, even if a 3rd person is involved**
(2) 3rd parties need to be PHYSICALLY and MENTALLY PRESENT to recover – a link to show D knew others were in the house can help…
(3) **HOSTAGE SITUATIONS** = presence NOT required – but only immediate family members can recover (parents, kids & siblings, not nephews, etc)
(4) **ROMANTIC RELATIONSHIPS** are usually exempt

v) If you can’t make a prima facie case for another intentional tort but D’s conduct has been outrageous, people sue here. Always remember this. It’s kind of like a fallback position
(1) Like example if you don’t give me a job I’ll punch you in a mouth - P should be thinking about IIED - if he can show that was outrageous & he has substantial damages, he has a case

**e) TRESPASS TO LAND → requires intentional entry upon land of another**

i) D has **invaded Ps land**.
   (1) You don’t need to personally go onto property – you can throw a rock, push another person on

ii) **Still, some physical object** must go onto D’s property
   (1) Loud music does not cut it
iii) “Land” includes more than just the surface; reasonably the spaces up & down from surface are included, too. Watch statutes.

iv) **Intent is required**
   - (1) Purpose to enter, OR substantial certainty that entry will take place
   - (2) Doesn’t require specific intent to trespass, make sure to apply **rules of transferred intent**
   - (3) Thinking you have the right to be on the land does not excuse liability
   - (4) Once you are AWARE of an invasion and you then refuse to remove it/keep allowing it to happen, you ARE LIABLE – like if you did not intentionally wind up on someone’s land, but you then refused to leave, it is trespass! If you refused to fix your sewer line draining on to your neighbor’s property, it’s trespass!

v) **Damages**
   - (1) Extend even when no physical/economic harm is done – either in repair cost/diminution of value for physical, or parasitic damages resulting from noise pollution, etc
   - (2) Watch extended liability here too!! → even if harm was never foreseen/intended, you will be responsible for damages
     - (a) EXCEPTIONS: thinking you’re on your own land... damages need to be related to security of possession
   - (3) POSSESSION is important – you can get trespass damages even if you’re leasing, since you’re in possession – but you can’t protect non-possessory interests like easements, rights-of-way

vi) “Visible to Naked Eye” rule:
   - (1) D intentionally engaged in an act (had a party, turned on a spotlight)
   - (2) Reasonably foreseeable that act would result in an invasion of plaintiff’s interests
   - (3) Entry occurs
   - (4) Visible to naked eye is irrelevant if substantial harm/damage results

f) **TRESPASS TO CHATTELS & CONVERSION** = interference w/P’s personal property
   - i) **LOTS OF DAMAGE = CONVERSION; less damage = T to C. ALWAYS BRING BOTH CLAIMS!!!!!!!!!!!!!!!!!!**
   - ii) 2 types of damage
     - (1) Physical – someone scratches leather on your briefcase = T to C; destroyed briefcase = conversion
     - (2) Dispossession – someone took your briefcase, had it for a day → T to C; kept it for 10 months → C conversion
   - iii) **ELEMENTS of CONVERSION**
     - (a) Intent – this doesn’t need to be intent to steal; rather, it should be intent to exercise dominion & control over the object – D may
not be conscious of wrongdoing, but TOO BAD. MISTAKE IS NO DEFENSE.

(b) Substantial dominion & control over item should result;
CONSIDERATIONS:
(i) Extent/duration of dominion
(ii) Intent to assert right to property
(iii) Good faith
(iv) Ham done (expense/inconvenience caused)

(2) REMEDIES
(a) Ultimate = forced sale, make D buy what he took
(b) Pay for value of replacement
(c) Usually = do value of chattel @ time of conversion; but
sometimes it’s highest market value
(d) Equitable = replevin. Give it back to me.

(3) Serial Conversions → If A steals from B and sells it to C, B can sue either A or C but collect only once. BOTH ARE CONVERTERS, EVEN THOUGH C IS A BONA FIDE PURCHASER
(a) UCC: if goods are entrusted to the possession of merchant dealing in goods of that kind, the merchant has legal power to transfer all the rights of the entrustor = you’re OK if you bought a bike from the bike shop even if the shop owner stole the bike

iv) TRESPASS TO CHATTLES – involves intermeddling with the chattel of another person – maybe some dispossession but it stops short of conversion; could be intentional interference w/P’s personal property, and interference results
(1) It’s imposed only if the possessor is harmed – liability based on actual damage, not market value of chattel, so it could be a complete accident...
(2) POSSIBLE FORMS OF T TO C
(a) Dispossession – actually taking something from another
(b) Loss of Use – for an appreciable amount of time (Joyride)
(c) Damage to Item
(d) Ham to P (this has the toughest requirements)
(e) Recently, we’ve seen E-communication claims here – unwanted E-mails clogging systems has rejuvenated this claim

(g) NUISANCE – involves interference not with possession, but with use and enjoyment INVASION IS NOT REQUIRED (and is usually small, like noise pollution, odor, light)
i) Hinges on unreasonableness of interference, substantial invasion proven
(1) Interference goes for NORMAL PEOPLE w/NORMAL LAND USE (not noise-sensitive exotic animals or unique allergies)
(2) Coming to the nuisance doesn’t bar the claim, it’s just 1 factor to be weighed
(3) Weigh **public need & private interest** - if public need wins out, P can likely get damages; if private interests win, there’s an injunction

**ii)** **Nuisance Per Se** = it is illegal as a matter of law, like a crack house

**iii)** **Nuisance in fact** (“by accident”) = it is circumstantial, like a loud party or a halfway house in a neighborhood

**iv)** **Private Nuisance** = a nontrespassory interference with P’s interest in use/enjoyment of her property

**v)** **Public Nuisance** = an act that obstructs or causes inconvenience or damage to the public in the exercise of rights common to all, or in the enjoyment or use of common property

(1) **This claim can usually only be brought by the state/public officials,** **UNLESS a private individual suffers injury “peculiar in kind” - apart from that common to the public** (ex: obstruction on a public road is a public nuisance, but an individual can bring the claim if it’s also blocking her driveway - commercial fishermen harmed differently by water pollution)

**vi)** **Intent**

(1) **D knows that conduct causes nontrespassory invasion & that it causes substantial/significant annoyance**

(2) **D knows only that conduct is a nontrespassory invasion & doesn’t know that the invasion is serious (like burning leave)**

(3) **D knows only that conduct risks an invasion of P’s interests, but doesn’t know that any invasion is certain (polluted water seeps through ground & fouls well some distance away)**

(4) **D causes no physical invasion at all, even by microscopic particles (i.e., operating funeral house/halfway house in residential area)**

(5) **Actor: STRICTLY LIABLE, without fault/negligent for abnormally dangerous activities**

(6) **FACTORS** - if they balance in P’s favor, he wins $$ damages and/or injunction

(a) **Home vs. business** → homeowners get more protection/deference

(b) **Utility of D’s conduct** → is it socially useful/something we want?

(c) **Did P come to the nuisance?**

(d) **Normal to Area** → Is P engaging in something typical of area

(e) **D’s interest** → are they making $$

Remember: if P can’t make prima facie case, they LOSE. If they can make the case out, go to DEFENSES

4) **DEFENSES to intentional torts** (Use regular defenses/motions to attack elements; lack of intent; affirmative defense)

a) **Consent** - go in this order. Was there willingness in fact?
i) P must have **capacity** to consent (watch WHAT was consented to [**material facts**], voluntariness of consent, incapacitation, mental disability, intoxication, minors)

   (1) Mental incapacity \( \rightarrow \) no valid consent
      
      (a) This entails that P did not understand harm/risk vs. benefit of proposed conduct
      
      (b) If D knew/should have known of this incapacity, consent is **INVALID**
      
      (c) If actor knows he can overpower rejection/lack of consent, then there is no consent
      
      (d) For an adult, it usually requires proof that adult couldn’t manage own affairs or didn’t understand nature/character of his act

   (2) **Kids CAN consent** – they do it all the time in sports!
      
      (a) Judgment call: are they mature enough to consent to the type of act? Watch for statutes

   (3) Fear of losing your job **almost NEVER works**

   (4) Drunk/drugged/intoxicated (if they can’t understand nature/effects of proposed act)

ii) P needs to have consented, can be done in 2 ways

   (1) **Express consent** \( \rightarrow \) words were used

   (2) **Implied consent** \( \rightarrow \) implied by law b/c of emergencies, but we usually see...
      
      (a) Apparent implied consent
         
         (i) **Custom & usage** – playing touch football & gets tagged \( \rightarrow \) NO BATTERY! It’s how you play the game!
         
         (ii) **P’s conduct** \( \rightarrow \) P was playing the game, you can assume he has consented!

      (b) **Doctors/Hospitals**
         
         (i) No clear rule: Doctors used to have right to remedy any abnormal/diseased condition in the area, but b/c of contract issues, it’s going toward **emergency**. Don’t do anything patient hasn’t consented to unless:
            1. It’s an EMERGENCY
            2. Patient cannot consent
            3. There’s no one who can be reached on his behalf
         
         (ii) **Informed consent** = species of negligence for med-mal; when patient consents to operation or procedure but is not adequately informed about its risks
         
         (iii) In **life or death** situations, the State will usually yank parents’ rights over DNR for kids. If it’s not an emergency, we START with parents’ preferences and move from there

      (iv) **Substituted Consent**

iii) Has D exceeded boundaries of consent given?
(1) Ex) football COACH tackling little kid PLAYER – the kid has consented to being tackled by other kids, not by adults.
(2) Ex2) girl consenting to blood transfusions ONLY from family members, then getting one from someone else.
(3) Ex3) since Magic Johnson knew he had VD & that his sex partner didn’t know, he committed a battery by having sexual intercourse, because she wasn’t informed enough to consent.
(4) Courts are divided as to whether you can consent to a crime.
(5) You CAN REVOKE your consent by communicating it @ anytime preceding act!!!

b) Defense Privileges (Self-Defense, Defense of Others, Defense of Property)
   i) Timing requirement must be satisfied
      (1) The tort against which you’re defending is NOW OCCURRING or JUST ABOUT TO OCCUR – if it’s already happened, NO DEFENSE!
         (a) Keep retaliation out!
   ii) Defense Test is satisfied – was there a reasonable belief that a tort was being committed? (you can be wrong if reasonable)
      (1) If I reasonably believed I was being assaulted, battered or falsely imprisoned, I can use physical force to defend myself
         (reasonable/non-deadly)
      (2) There IS ROOM FOR MISTAKES HERE – if reasonable person would have believed self-defense was necessary
      (3) Is there a duty to retreat? → NO. you may stand your ground & defend yourself
         (a) EXCEPTION = before you use SERIOUS force, you should retreat if you can do it safely and are not in your own home (in SOME states)
   iii) Did you use too much force? – if you did, you don’t have a defense for that which went beyond self-defense force
      (1) for self defense & defense of others - you can defend another on the same basis that you can defend yourself
         (a) you can use reasonable force to include deadly force – if someone’s trying to shoot you, you can shoot back to save yourself.
            (i) Unless the oncoming harm was death or serious bodily harm, you CANNOT use deadly force; if it was, you’re fine.
            (ii) Sexual attacks CAN merit deadly force if reasonable
      (2) For defense of property, you can use reasonable force never to include serious bodily injury/deadly force – when YOU ARE IN YOUR OWN HOME, you’re protecting yourself!! So it’s fine!!
         (a) The uninhabited farmhouse w/the spring gun booby trap? Too much!
(b) If you used **reasonable force** that turns out to be deadly/cause
serious harm, it doesn’t matter – as long as force was
reasonable.

iv) PROVOCATION is NOT A DEFENSE
v) Resisting unlawful arrest → goes both ways

c) PRIVILEGES

i) **ARREST & DETAINMENT** - is OK for a merchant/security guard with
reasonable suspicion that a person has tortuously taken a chattel
(1) A private citizen has the same right as a cop to detain with
**probable cause**, but if he was mistaken, he doesn’t get the
protection that a cop would – private person cannot effect an
arrest for a misdemeanor that was not a breach of the peace. So if
P committed the felony for which he’s arrested or SOMEONE has
committed a felony and it’s reasonable to believe it was P; OR if P
committed a breach of the peace in front of D, then the arrest is
**OK**.

(2) For Cops, it’s ok to enter land to execute a warrant, but they
cannot invite the media

(3) everywhere but FL, the media cannot cover news on your property
without your consent

(4) if a **MERCHANT/SECURITY** has probable cause/reasonable belief that X
has his property, he can detain **for a reasonable time & in a reasonable
manner**. THIS IS A TOTAL DEFENSE – so mistake doesn’t matter!!!

ii) Public Rights

(1) User of public utility is entitled to its use, but right to enter for that
purpose is allowed too

(2) There **IS** a privilege to enter land to reclaim goods of one’s own

iii) **REPOSSESSION**

(1) Of chattels → privilege to recapture is present immediately/in hot
pursuit – not like going over to his house the next week & stealing it
back; reasonable force can be used to recover – thereafter, a store
must use criminal processes

(2) Of consumer goods → force CANNOT be used, and a buyer may
defend his possession with reasonable force

(3) Of **land** → no force can be used to recover surrendered land,
recovery must come in the courts – however, courts divided as to
owner using reasonable force to defend his possession, but you
**cannot use force to cause severe bodily harm/death to defend
property no matter what**

iv) **Discipline** – kids usually can’t sue parents; where they can, parents still
have privilege to use reasonable force to discipline kids as deemed
necessary – **also applies to those in charge of kids**

**d) Necessity** – requires GOOD FAITH & apparent necessity, the 4 torts are
allowable if...
(1) **Public necessity** = If you’re benefitting a lot of people w/trespass, it’s **public necessity**, an **UNLIMITED PRIVILEGE**, no liability!

(a) There’s a takings issue here though – MN court held that innocent party’s damages should be compensated when damaged by cops in pursuit because of **fairess & justice** – city should incur cost as it incurs benefit of having the suspect in custody

(2) **Private necessity** = trespassing to benefit a limited # of people

(a) You are NOT a tortfeasor, you did NOT commit a wrong if you do this, but if you do it for yourself, it’s private necessity, and privilege is **limited**

(b) **You ARE LIABLE FOR DAMAGE DONE!** A tort has NOT BEEN COMMITTED though. You’re liable only for actual damages - not emotional damages, etc.

5) **NEGLIGENCE** (Duty + breach = negligence... actual + proximate causes + injury = liability) Prima Facie Case Elements...

a) **Duty** (1st place in exam)

i) **Foreseeable Plaintiff**

(1) Duties of care are only owed to foreseeable plaintiffs! Palsgraf!

(2) Watch for the unforeseeable plaintiff fact pattern ➔ Palsgraf: guy running for train, people working for RR negligently helped him on the train, his package fell & exploded, injured a woman down the platform

(a) Facts contain clearly foreseeable plaintiff – like the guy the train folks are helping board the train – they needed to do that carefully

(b) D will act negligently toward clearly foreseeable P – they didn’t help him on quite right

(c) Does the other person involved make for a foreseeable P?

(i) Deal w/both Andrews & Cardozo ➔ by a small margin, majority view is holding of the case (Cardozo), but note the other side too

1. **ANDREWS**: everyone is a foreseeable P! if a duty toward 1 person is breached which injures a 2nd person, that person is also a foreseeable P to whom a duty is owed... unless something would be UNBELIEVABLY FORESEEABLE

2. **CARDOZO**: the issue is whether or not P#2 was within the **foreseeable zone of danger**. If so, they’re foreseeable, if not—they’re not. It’s a fact issue

(d) Someone seeing an accident is NOT a foreseeable plaintiff
ii) **Applicable Standard of Care** - THIS IS THE MOST IMPORTANT THING!
Watch for different defendants owing different duties. Choose a standard; know what it is to apply it to facts.

1. **Reasonable Person Standard** -- exercise care that would be exercised by a reasonable & prudent person under the same/similar circumstances to avoid/minimize risk of harm to others
   (a) So **extended liability** doesn’t function here like it does w/intentional torts – only foreseeable risks for reasonable people require precautions
   (b) It’s not about **probability**, though – it’s about what’s likely enough in modern setting that a reasonable person would take it into account to guide conduct.
   (c) A reasonable person **has a memory**: if you KNEW an intersection was dangerous, you would be EXPECTED to remember that and act accordingly.
   (d) Reasonable Person takes on heightened qualities of reflex, memory, intelligence, perception of D; takes on diminished physical BUT NOT MENTAL capacities
   (e) It is an **objective** test standard, not subjective.
      (i) We INVENT a hypothetical reasonable person
      (ii) We assign him traits & characteristics (IQ, experience etc)
      (iii) We measure what D did AGAINST what we would have expected from our hypothetical, invented reasonable person. **DO NOT LOOK @ D’s OWN TRAITS/CHARACTERISTICS!**

1. NOTABLE EXCEPTION = **physical characteristics**: blindness, wheelchair bound, etc. **BE CAREFUL**
   a. To the extent you are aware of your disability, you’re still supposed to act as reasonable person would have
   b. **You STILL may not have acted reasonably given your disability!!!** Hold him liable.

   (f) It is a **standard** – so the level raises & lowers w/the circumstances – generally don’t instruct jury to consider the level of caution needed when doing something – it’s for them to see what the reasonable standard is given those circumstances

2. **Sudden Emergency Doctrine**: essentially same thing as regular standard – it’s what the reasonable person of ordinary prudence would do under emergency circumstances – some courts see it as a useless appendage
   (i) If you **cause the emergency** by speeding, etc., it’s not useable – the reasonable person wouldn’t be doing that.

2. **Children** – kids under 4 are deemed incapable of negligence. BUT WATCH – what are you suing the kid for? If it’s an intentional tort, keep him liable.
   (a) Reasonable Child standard is **SUBJECTIVE**
(i) What would be done of a child with like age, intelligence and experience! → the dumbest kid on the block is taken into account

(ii) Exception = where child is engaged in an adult activity – like a kid driving a car → USE REASONABLE PERSON STANDARD, NOT REASONABLE KID!
1. Make sure kid is doing the activity IN THE WAY AN ADULT WOULD – playing in a parked car is NOT like driving in a car like an adult would.

(iii) Exception 2 = where child is engaged in an inherently dangerous activity

(3) Mentally Incapacitated - they are responsible for public policy reasons
(a) EXCEPTION → duty of care between caretakers & mentally incapacitated is a one way street – patients owe no duty of care to their caretakers
(b) Rationale: discourage faking mental incapacity, allocate losses, equal treatment

(4) Professionals – a REASONABLE PROFESSIONAL standard in the SAME or SIMILAR COMMUNITIES
(a) DOCTORS
(i) It means looking @ doctors in large urban centers w/huge facilities vs. those practicing in remote areas w/o facilities
(ii) Doctor is SPECIALIST – take the expertise into account to raise the standard of care!! If a heart specialist is working on a heart problem, higher duty than a general practitioner working on same problem
(b) If you’re a beginner, do NOT LOWER THE STANDARD OF CARE!
(c) Superior experience
(i) Like guy who tells his sister to hop on the ladder of a machine, if you have superior knowledge/experience with equipment, you’re required to exercise superior qualities in a manner reasonable under the circumstances

(5) Common Carriers/Innkeepers
(a) They’re held to different, higher standards than the regular reasonable person
(b) You just need slight negligence to hold them liable
(c) THEY ONLY OWE THESE ELEVATED STANDARDS TO CERTAIN PEOPLE – passengers & guests! – like a bus wrecking a car. Bus passenger & car passenger sue bus. Bus passenger only needs to show slight negligence, common carrier rule wins it for them. For car passengers, it doesn’t apply – use reasonable person standard
IT IS NOT ENOUGH to find that you just have one of these people – you MUST ALSO FIND you have the RIGHT TYPE OF PLAINTIFF – a passenger/guest.

(6) OWNERS/ OCCUPIERS OF LAND DEFENDANTS

(a) Don’t use this rule unless you have the right kind of defendant!
An OWNER or OCCUPIER – people who are in privity with them ARE ALSO INCLUDED (family members, employees)

(i) Guy crossing property, a negligently driven laundry delivery truck backs over him – he sues laundry co., driver, but it’s NOT an owner/occupier standard case. Sue driver w/reasonable person standard

(ii) The D NEEDS TO BE AN OWNER/ OCCUPIER

(b) WHERE DID THE INJURY OCCUR?

(i) On the land

1. Is P an undiscovered trespasser?
   a. If so, no duty owing, so NO STANDARD OF CARE \(\Rightarrow\) NO NEGLIGENCE! THEY ALWAYS LOSE!!
2. If P is ANY OTHER kind of plaintiff, ASK: what caused the injury?
   a. An activity D was doing on the land = anything owner/occupier is doing on the land – running a machine, playing baseball, waiting on tables, etc. = ordinary negligence case w/reasonable person standard – status of P is totally irrelevant unless it’s a an undiscovered trespasser!
   b. A dangerous condition – a hole in the ground, a defect in the building wall, etc. = depends on status of P

(ii) Off the land \(\Rightarrow\) reasonable person... DO NOT assign P a status of trespasser, invitee, etc. – THESE are IMPOSSIBLE! Since you’re not on the land. This is an ordinary negligence case

(c) ASSUMING A DANGEROUS CONDITION CAUSED THE INJURY...

(i) If P is a discovered trespasser, owner/occupier is responsible for artificial conditions involving a risk of serious injury that owner/occupier knows of

1. Artificial conditions = not natural (pond trees); they’re something a person has put there
2. Risk of serious injury, not just dangerous conditions
3. Owner occupier HAS TO KNOW ABOUT RISK!

(ii) If P is a licensee, on the land for some purpose of his/her own – door to door salesperson, SOCIAL GUESTS!!!, you’re responsible for

1. Dangerous conditions that owner/occupier knows of (NOT JUST ARTIFICIAL ONES! NOT JUST THOSE CAUSING RISK OF
SERIOUS INJURY – IT'S ALL OF THEM) but make sure D has knowledge

(iii) If P is an invitee, on premises for purposes of owner – patrons of stores are invitees! You’re responsible for

1. Dangerous conditions the owner/occupier should know about (all dangers no matter seriousness – and SHOULD KNOW OF is important. Knowledge in fact is NOT RELEVANT if they SHOULD HAVE KNOWN)
   a. This implies duty of reasonable inspection of premises for benefit of invitees

(iv) Modern trend does away w/restrictions on type of P – placing this the same as activities...

(d) You can discharge the duty by WARNING SOMEONE of danger or MAKING IT SAFE.
   (i) Look for adequate warning of P by D
   (e) A very obvious dangerous condition DISCHARGES ALL DUTY – NO LIABILITY! It is its own warning so P can take care of themselves
   (f) INFANT TRESPASSERS – watch for attractiveness doctrine, requirement imposed on kid – they must show they did NOT understand risk involved.
   (i) Like kid playing with a rusty ragged car door, that’d work for attractive nuisance

(7) Statutory Standard of Care [negligence per se] – you’ll see there’s a statute! They have to say it!
   (a) If it can apply, it will apply over the reasonable person standard
   (b) Does it apply? DON’T JUMP THE GUN & APPLY IT! – don’t forget to APPLY ANOTHER STANDARD if the statute doesn’t – usually the reasonable person standard!!!!!!
   (i) P must fall with protected class statute was designed to protect
   (ii) Statute must be designed to prevent this kind of harm – was this the harm that was envisioned when statute was drafted?
      1. Same result would have happened without prohibited conduct with a similar conduct? Explosion from lighting a joint/lighting a candle = statute DOES NOT APPLY
      2. Look @ gun control laws: are they meant to protect the public of the self?
   (c) If statute DOES APPLY, it’s negligence per se – if an applicable statute has been violated, there is a conclusive presumption of negligent conduct
   (i) EXCEPTIONS: where compliance would be more dangerous, non-compliance is excused; impossibility – blind person violating red-light statute
(d) If it’s a **tort statute**, prescribing when we can sue in tort, then courts **HAVE TO USE IT**; if it’s a **non-tort statute**, court can choose whether or not it wants to use it (like judge doesn’t have to look @ BAC reading b/c that’s criminal statute)

iii) **Affirmative Duty to Act Rule** – **THERE IS NO AFFIRMATIVE DUTY TO ACT!**
Don’t love/hate...
(1) EXCEPTIONS:
(a) We will impose a duty because of a **special relationship** that imputes a duty (family members, employers/employees, common carriers & passengers—there’s **an affirmative duty to aid passengers!**, innkeepers & guests, school-student, landlord-tenant, etc)
(b) Where there’s a duty to control the conduct of 3rd persons
   (i) You have the right & ability to control third persons (parents over children, employers over employees - you can control them)
   (ii) You know of facts which should get you to do that ➔ like parents telling other kid’s parents to stop him from bullying, they do nothing, they lose
   (iii) Make sure that D DID have the RIGHT to control that third person
(c) Where a person **knows** or has reason to know that HIS CONDUCT (tortious or innocent) caused harm to another person he has a duty to **render assistance to prevent further harm**.
   (i) If a person has created unreasonable risk of harm (even if done innocently), then a duty of reasonable care arises to employ such care to prevent the harm from occurring
   (ii) If you’ve made the other guy helpless, it’s up to you to prevent further harm
   (iii) EX – if you hit a horse in the road, if you don’t warn others or try to remove it, you’re responsible for the injuries it causes
   (iv) **Once you undertake a duty to help, you cannot stop if you will leave the victim in a worse condition than they were in when you started helping.**

iv) **DEFENDANT’S RELATIONSHIPS WITH OTHERS**
   (1) General rule: COLLEGES have NO DUTY to guide/protect new students with respect to drugs, drinking, sex or over-study
   (2) Landlords
      (a) To protect **common areas**, even guests of tenants, IS A DUTY
      (b) If lessor has control over danger from tenant, he **has a duty of care b/c he has control** – the duty is to ALL THIRD PERSONS to do all that he legally can to get rid of a dangerous condition on the leased premises, even if he has to get rid of the tenant
(3) **HALFWAY HOUSE**: private house *did* have duty to control conduct for 3rd persons – it had a **special relationship to D** (special relationship to 3rd person could work here too), and as custodian in charge, they got the duty to all those who are directly/foreseeably exposed to bodily harm risk.

(4) **DOCTOR/PSYCH** – if you know that a patient is likely to harm a **specific third party**, you have a duty to use care to warn intended victim or police of the danger.
   
   (a) When there’s no identifiable victim, there’s no duty.

**v) Negligent Infliction of Emotional Distress**

(1) P must suffer some physical injury manifestation (shock would do it) – contrast this with IIED of course—you didn’t have to show any physical injury, remember we are in negligence here!

   (a) You have a claim if: there was assault, defamation, misrepresentation or IIED

   (b) Also have a claim if there was physical injury, NIED is **parasitic** (it rides on the back of physical harm)

   (c) Goes hand in hand w/loss of consortium

(2) P must be within the **zone of danger** of D’s negligent conduct – modern trend (though not majority rule) says they can still recover if they are in a close relative & perceived the injury.

   (a) ZONE OF DANGER = immediate zone of physical impact, you CAN recover for emotional injury caused by the fear of physical injury to oneself.

      (i) Like here, a botched embalming case doesn’t stand b/c family isn’t within the zone of danger (another case worked citing duty owed to family)

      (ii) Death Notices are often treated

   (b) **Special Relationship ELEMENTS** (this is a minority JD standpoint)

      (i) If P is closely related to victim by blood, marriage, relatives living in the same household, siblings, children, grandchildren

      (ii) If P IS **PRESENT @ THE SCENE** of the injury producing event at the time it occurs and is aware that harm is being caused to victim

         1. This is really 2 elements: you need to be @ THE SCENE, and there @ THE TIME IT HAPPENS, you can’t arrive on the scene later, even if you find your bloody kid there, no recovery

      (iii) As a result suffers serious emotional distress, a reaction beyond that which would be anticipated in a disinterested witness and which is NOT an abnormal response to the circumstances
(c) Make sure if there’s an exception governing your answer, still note the general rule.
(d) P needs severe emotional distress → SEVERE may need medical/scientific evidence in some JDs.
(e) Needle Stick Cases
   (i) The physical impact is NOT ENOUGH HERE. You need to prove a detrimental effect to the body = sufficient channel, and you can recover for the ED from the window of anxiety (usually 6 mos.)
   (ii) Most courts require ACTUAL EXPOSURE, a recognized channel, fear, medically provable AIDS.
(f) Cancer Exposure Cases
   (i) If D negligently exposed you to the toxin, the fear must stem from a knowledge corroborated by a medical opinion that you’re MORE LIKELY THAN NOT to get cancer, contract disease, etc.
   (ii) You WILL get medical monitoring damages
   (iii) FALSE CANCER REPORT - if you start treatment, you get physical parasitic injury, but if you don’t start treatment, some courts say no NIED
(g) ORDER = zone of danger → close relationship → pre-existing duty → ..........?

(3) Loss of Consortium = I suffered loss of society, guidance, counsel, love, support, sexual relations, etc... usually for spouses - NOT parent←→kid (SOME JDs let minor children recover)
   (a) Claim is available for negligent & intentional torts
   (b) 3 ELEMENTS:
       (i) X committed a tort. NAME AND PROVE THE TORT.
       (ii) P is the spouse. Prove it.
       (iii) P lost (...society, etc.) - again requires testimony/proof
   (c) Being engaged probably isn’t going to do it
   (d) This is directly related to the tort - so if victim was contributorily negligent, you’re going to get less; if you can’t sue on tort b/c of statute of limitations, you can’t get anything here.

b) Breach = negligent conduct. Once you have standard of care governing, see if it’s been met. If so, NO BREACH; if they did NOT, there is breach. Negligent conduct.
   i) Popular issue = RES IPSA LOQUITUR
      (1) In the facts, it’ll be clear that P does not have good, solid, hard evidence of negligent conduct - breach can’t be shown [EX an airplane crashing out of the sky... no reason can be found] obviously duty of care was owed to passengers; there is no proof of negligent conduct
The mere fact of the accident having occurred is evidence of negligence...
(a) Use Res Ipsa!
(b) Test → it is a probability test, can’t be shown with hard evidence
   (i) **This usually does not happen** unless SOMEONE was
       negligent [planes don’t just fall out of the sky on clear sunny days]
   (ii) Probably it was THIS DEFENDANT who was negligent – facts
       need to tie event to defendant. **Show D had exclusive control of instrumentality & its agents**
       1. This has been somewhat relaxed, that D was “probably one of the persons negligent” has been enough in some cases – giving P RIL for bleachers & chairs, etc...
   (iii) P must be free from contributory negligence
   (iv) Indicated negligence is within D’s scope of duty to P
(3) It DOES NOT MEAN you’ve won – just means you’ve shown you can defeat a motion for directed verdict and get you to a jury. Jury can absolutely still hold for D if they like their argument better than the Res Ipsa inference
(4) RIL is **NOT MANDATORY**, absent some ridiculously strong evidence that negligence HAD to have caused the injury (swapped twins)
(5) D CAN rebut this & prove it wasn’t negligence
(6) A few JDs use presumption for RIL
(7) Specific Cases
   (a) **Public Instrumentalities** – sometimes P is blamed, like elevators
   (b) **Exploding Bottles** – absent some unusual treatment by P or store, manufacturer takes blame
   (c) **Slip & Fall** – NO RES IPSA!!
   (d) **Runaway Cars** – Yes Res Ipsa!
(8) * Some courts STILL allow res ipsa w/P’s contributory negligence
   ii) P needs to prove elements by a preponderance of the evidence – it’s more probable than not that negligence occurred, according to trier of fact
   iii) Risk/utility analysis: B(burden) < P(probability) x L(injury); so like if it would cost 30,000 to keep bargee on board to avoid 25,000 of damages there is NO NEGLIGENCE
   1) Problems: this is too much $$ centered
   iv) What should have been done?
   v) **Manuals** → never conclusive, but can be evidence
      1) Shouldn’t be consulted to hold D to an elevated standard of reasonable care – let’s not discourage companies from heightening their care
      2) “The door of objectivity swings both ways” – a person’s belief that he’s acting with reasonable care isn’t OK when society demands
higher, so when society demands lower, objectivity shouldn’t be foregone.

(3) Safety manuals are not THE STANDARD for absolute care...

(4) Use the law as a minimum → this isn’t conclusive that reasonable care was exercised, either.

vi) **CUSTOM** → never conclusive but can be evidence

(1) Where custom of industry is totally behind, what do we do? Still look @ reasonable standard

(2) Custom can also indicate there’s no better way to perform the task, though.

c) Causation (2nd place in exam) – you MUST HANDLE CAUSE IN FACT FIRST

i) **Cause in Fact** – without it, PLAINTIFF LOSES! = THE true causation part of the analysis: did D’s negligent conduct ACTUALLY CAUSE THE INJURY?

(1) But-For Test: but for D’s negligent conduct, would this injury have occurred? If the response doesn’t work in P’s favor, it means P will almost always lose. Without actual causation, that’s it. If it is in P’s favor, P wins that issue but is NOT OUT OF THE WOODS

(2) Issues w/multiple persons causing the injury, then we need fault apportionment rule (joint & several liability or proportionate fault liability)

(3) Also doesn’t work with **conspiracy, vicarious liability**, where though 1 person causes the actual harm, multiple are responsible

(4) Alternative Tests:

(a) **Substantial Factor test** – example of hot rods scaring horse – But-For doesn’t work b/c 1 car would have done the same thing. But each one’s conduct was a substantial factor in what happened. EACH negligent D HELPED CAUSE INJURY

(b) **Causal Potency** – if 1 cause is WAY MORE LIKELY to cause the injury than the other, we can apportion accordingly

(c) **Alternative Causes test** – Summers v. Tice = 2 hunters fire simultaneously, P is hit by 1 & we can’t show which gun it came from. ONE D caused it, THE OTHER DID NOT – we don’t know which is which! This works where asking P to pin the injury undeniably on 1 D is an unfair shift of the burden

(i) So, **shift the burden of proof to the 2 negligent D**; if they can’t they can BOTH be held liable. Both Ds were @ fault in their conduct, so it’s right for them to bear the burden.

(ii) Bring all possible tortfeasors into court – if you can prove “not me” then you’re free to go – if not, you’re going to pay

(iii) You must FIRST PROVE NEGLIGENCE (duty + breach), then prove YOUR INJURY, then we go on

(iv) 1 D typically pays & goes after contribution (this is NOT fault apportionment)
(v) Still, a clear majority of the JDs say P loses if he can't meet the burden of proving who did what - you have to show that who injured you, more likely than not, was D - THIS IS A MINORITY TEST!

ii) Proximate Cause - doesn’t really refer to causation technically. P has already shown that D's conduct was negligent thru evidence or Res Ipsa (Duty & Breach); also shown that negligent conduct actually caused the injury. This is D's last shot on the prima facie. PC = a way for the jury to let a negligent defendant who actually caused an injury off based on lack of foreseeability

(1) Was the harm that occurred of the same general nature as the foreseeable risk created by D's negligence? D is not liable for harm different from the harms whose risks made D's conduct tortious

(2) D: come on, look @ that injury - the injury was so unforeseeable, it wouldn't be fair to hold me liable!

(a) Direct cause case: an uninterrupted chain of events. Negligent conduct causes injury directly if nothing intervenes in the line of causation from D's negligence, this is RARELY USED today

(b) Indirect cause case: there's some intervening act or event that combines with the negligent act to cause the resulting injury (could be 3\(^{rd}\) party, intervening act of god)

(i) EX - Neg. D allowed gas to accumulate in a factory; lightning strikes warehouse & factory explodes

(3) SCOPE OF RISK: it's important how something happens. If the injury doesn't occur in the way that the duty is meant to protect, then it's not within the scope of risk and there's no proximate cause; type of crime matters when a crime is committed

(4) PC Rule #1 = If the result was unforeseeable, let the D go! No exceptions, ever.

(5) Rule #2 = if the result was foreseeable, hold D liable.

(a) EXCEPTION: if, in an indirect cause case, the intervening act was an unforeseeable, intentional tort or crime, let D go even though result was foreseeable. BE CAREFUL! → make SURE that crime/tort was UNFORESEEABLE!!!!

(b) Ex) lady having baby, hospital won’t send ambulance & her friend collides w/ a drunk driver on the drive there → NO liability because city COULD NOT HAVE ANTICIPATED that failure to send ambulance → driving car → @ very same intersection as a speeding drunk...

(6) THE RESCUE DOCTRINE (DOES NOT APPLY TO PROFESSIONAL RESCUERS): D negligently creates a risk to A. B, not subject to (or escaped) the risk, attempts to rescue A (OR A is just in a risky
situation), and is hurt in the process. D, having created the risk to A, is liable to A, but is he also liable to B? YES!
(a) **Rescuers are foreseeable plaintiffs as a matter of law** - regardless of scope of risk/comparative negligence
(b) BUT if a rescuer causes harm to a victim, then the victim can sue the rescuer even though they could have prevented another injury (in **absence of good Samaritan law**)
(c) Rescuers cannot be charged with contributory negligence unless they act recklessly

(7) **VIOLATION OF STATUTE** → it’s NOT ENOUGH to get past proximate cause - you still must show that this injury was caused by exposure to a hazard from which it was the purpose of the statute to protect you.

(8) **Firefighter’s Rule** = firefighters/public officers cannot recover against a D whose negligence caused the firefighter’s being brought to the scene - you CAN bring regular negligence case for further negligence resulting in injury
(a) Rationale → workers’ comp., assumed risk, we pay to train them → multiple penalties
(b) This **does not apply to private individuals undertaking assistance** @ a fire, these people are heroic instead, under rescue doctrine they don’t have contributory negligence OR assumed risk

(9) **TIPS:**
(a) In direct cause cases, there’s almost ALWAYS a foreseeable result; so when you get here, D is liable (EXCEPTION IS INAPPLICABLE b/c it’s in an indirect cause case)
(b) Eggshell-thin skull fact pattern → some injury foreseeable, but where injuries wind up being MUCH, MUCH worse than anyone could have envisioned. **Generally foreseeable result**. Take P’s person as you find it.
   (i) It is only necessary to foresee an **injury**, not the **extent of the injury**. Ex - rare blood disease causes huge consequences from small cut. You could clearly see an **injury**, so it is foreseeable, regardless of **extent**. D is liable for ALL OF THE DAMAGES CAUSED.
   (ii) Make sure you keep an eye on FAULT though - this doesn’t assign fault - merely means that D doesn’t escape liability for unforeseeable personal reactions of P once negligence/intentional fault is established

d) **Damages** (to P’s person, to property → take property & person AS YOU FIND THEM)
e) **ASSESSING LIABILITY**
   i) **Joint & Several Liability** - where multiple actors’ torts produce an **indivisible injury**, where the nature of the injury makes it such that it
can’t be apportioned with reasonable certainty to individual wrongdoers, all of them will be held joint and severally liable.

(1) Exception example = fire case: where 1 fire (started by negligence) unites with the other (naturally started) and either one independently would have done the same damage, there’s no liability for fire starter

(2) Also look @ preemptive causation - where 1 man poisons a woman’s tea, but the other shoots her before she can drink it, the tea poisoning guy is NOT LIABLE

(3) Damages can be collected separately or from 1 party, who then gets contribution from the others
   (a) If the others are insolvent, TOO BAD! The 1 D is stuck with the loss.

ii) **Comparative Fault**
   (1) If P has some fault, recovery is ordinarily reduced to reflect this → P can sometimes recover nothing, even when D is guilty of negligence
   (2) NOT for use in cases of **intentional torts**
   (3) This is **UNLIKE** joint & severable, NO tortfeasor is liable for MORE than his proportionate share- what can’t be collected is **NOT** picked up by another party, it’s not collected @ all
   (4) Factors are **IRRELEVANT** where they are not causally connected to P’s injuries
   (5) Remember that a P charged with contributory negligence can allow full recovery against a reckless or wanton defendant
   (6) Ways around Contributory Negligence **do not apply here**
      (a) LAST CLEAR CHANCE = just one factor in determining D’s negligence as a whole.
      (b) Reckless/wanton D does not necessarily mean a win for P
      (c) ILLEGAL CONDUCT → when it’s involved it bars complaint where P seeks to impose a duty out of an illegal act - but if not, like VW car crumpling in a wreck even though the driver was drunk → no bar.
         (i) **Reckless conduct by P may bar his claim though** - like 15 year old building the pipe bomb... you cannot benefit from illegal/immoral conduct by bringing a lawsuit

6) **DEFENSES**
   a) **Sudden Medical Emergency**: FAINTING/momentary loss of consciousness while driving is a COMPLETE DEFENSE to actions based on negligence if such a loss of consciousness while driving was **NOT** FORESEEABLE
   b) Plaintiff’s Contributory Negligence – used to be the clear law of the land, now it’s only a handful
      i) How to determine if they’ve been contributorily negligent? → reason through same as negligent. LET’S **COMPARE THEM**. CONDUCT is referred to as contributory negligence.
Effect on result

(1) In a contributory negligence state, P’s contributory negligence (ANY AT ALL!) completely bars recovery = 0 recovery. This harsh result has brought it down

(2) In a comparative negligence state, P’s contributory negligence lowers the amount of the recovery [if A was 20% negligent, B 80; reduce A’s award by 20%]

(a) Majority rule → pure comparative negligence: you can achieve a recovery even if you were more negligent than other party [if B sues, he gets award reduced by 80%]

(b) Used to be partial comparative negligence: you will NOT achieve an award if you were more negligent than the other party [B can NOT get an award from A if he sues]

Knowing Contributory Negligence

(a) KNOWING → Ex.) Dufus sees car on street being driven way too fast, thinks he can beat it & steps out – he’s struck & injured

(i) Can dufus recover? → NO! Not in a Contributory Negligence state, he was NOT exercising due care

(ii) You need to discuss implied assumption of the risk - most support application of both contributory negligence & implied assumption of risk (where P unreasonably, voluntarily takes on a known risk)

1. Injured party KNEW OF THE RISK
2. And voluntarily proceeded in the face of it

Unknowing Contributory Negligence

(a) Dufus didn’t even see the car, daydreaming & walked in the middle of the street – so contributory negligence—but it’s more passive, unknowing

(i) There was no assumption of the risk because he didn’t even know about risk, let alone take it on

Implied Assumption of Risk

(1) It’s OUT in comparative negligence states!! It is ONLY FOUND in general in CONTRIBUTORY NEGLIGENCE STATES

Last Clear Chance Doctrine: Facts → P is contributorily negligent. After that, D still has the last clear chance to prevent injury and DOES NOT

(1) P is forgiven earlier contributory negligence if D had last clear chance @ discovering P, then exercising reasonable care to prevent/stop further injury

(2) Rationale: a way for judges to get around contributory negligent barring any recovery

(3) It’s found only in contributory negligence states as kind of an escape device – it’s just not needed for comparative negligence states but facts are still important

(a) Trier of fact will still use the facts when they assign fault still
v) **Discovered Peril** = if D discovered/should have discovered P’s peril, and could reasonably have avoided it, P’s earlier negligence would not bar or reduce P’s recovery (Think RR accidents – if operator failed to keep lookout, blow whistle or attempt to stop, D was fully liable despite P’s contributory negligence)

vi) **Contrib. is not a good defense to reckless conduct in a contrib. neg. state**; it will be offset in a comparative negligence state

1) Contributory negligence does not count as a defense for reckless conduct – if D was being wanton, willful, the disparity is unjust
   a) In contributory negligence state, where choice is all or nothing, P gets EVERYTHING
   b) In comparative negligence state, it’s not an issue, the jury will assign responsibility with respect to that

c) **Implied Assumption of Risk**

i) ELEMENTS
   1) **P knew of the danger**
   2) **P appreciated the risks**
   3) **P proceeded (voluntarily) anyway’**

ii) Make sure P was aware of the particular risk involved, not just of danger in general

iii) Courts generally don’t allow “I had to do it or I’d lose my job”

iv) Confronting a known risk = imputing to P an agreement to accept full responsibility for D’s fault

v) It merges into comparative negligence when you’re in such a JD

vi) There’s also a separate complete defense associated w/ consent forms, contractual assumption of risk

vii) Make sure we keep an eye on employers for policy – don’t let them get away with keeping unsafe working conditions

viii) **PRIMARY ASSUMPTION OF RISK**

1) NO or LIMITED duty is owed P

2) Implied primary = you go skiing, etc. By virtue of your participation you have limited the amount of care that D owes you. **No duty for injuries sustained as a result of dangers inherent in the activity**

ix) **SECONDARY ASSUMPTION OF RISK**

1) ELEMENTS
   a) You proceed voluntarily (you had other reasonable choices)
   b) You know (as reasonable person) the risk
   c) You Appreciate the risk (As RP)

   2) Activity may or may not be negligent (like jaywalking)

7) **Strict Liability in tort** = liability imposed on D without fault on defendant’s part. Based on policy considerations. The injury though needs to be the type of injury

   a) **Ultra-hazardous activity**
i) If you’re engaged in an ultra hazardous activity, YOU ARE LIABLE. So what if D has been ridiculously careful – you wouldn’t have to use strict liability if you could have found a harsher claim.

ii) DO NOT DISCUSS CONDUCT OF DEFENDANT! Irrelevant! This is policy-based.

b) Animals
i) ONE FREE BITE RULE – you’re not liable the first time your dog bites someone; this works only for domestic pets, not animals with dangerous propensities.

ii) The injury alleged has to have occurred in the way we would have anticipated: if my tiger mauls Gretchen to death, I have a party, but I’m liable. If she trips over its tail or runs over it in her car, I’m not!!! If it libels her, I’m NOT!!

c) Prima facie case
i) Negligence standard of care is REMOVED & replaced with an absolute duty to make safe. → the rest is THE SAME as NEGLIGENCE
   (1) Still show causation, actual & proximate cause, damages

ii) Defenses
   (1) Contributory Negligence state: Knowing contributory negligence = complete defense = NO RECOVERY for P; unknowing contributory negligence = NO DEFENSE AT ALL; COMPLETE RECOVERY
   (2) Comparative Negligence state: apply that state’s system to offset award for contributory negligence
   (3) EX) guy buys machine, reads instructions that say to warm it up 3 mins. And he doesn’t, gets injured → KNOWING = total defense; if he didn’t read it then it’s NO DEFENSE

d) Products liability → an umbrella tort. You sue either on negligence or on strict liability
i) Keep them separated – first attack D on negligence prima facie & defenses; then go on to do strict liability & distinction with defenses
   (1) W/NEGLIGENCE, watch D’s CONDUCT; DO NOT TALK ABOUT IT IN STRICT LIABILITY

ii) Who can be a plaintiff?
   (1) Anyone within foreseeable zone of risk

iii) Who can be a defendant in a successful claim?
   (1) For Negligence →
      (a) Retailers, wholesaler – ALMOST NEVER
      (b) Manufacturers -- ALMOST ALWAYS.

   (2) For Strict Liability →

8) General Consideration Items
a) Vicarious liability → most common = Respondiat Superior doctrine
i) Employers are liable for torts of employees committed within the scope of employment

ii) Anytime you see an employee, address it
iii) Hit scope of employment hard.
iv) Victim needs to prove:
   (1) X was an employee of employer
   (2) Employee committed a [non-intentional] tort
       (a) Look @ context though: bus drivers, delivery guys → we trust these people because they’re “from the company”
   (3) Tort occurred within course & scope of employment
v) Driving to & from work is usually not considered scope of employment
vi) If employee is 100% @ fault, employer gets indemnification, can seek all $$ damages; if employer is @ some fault, they get contribution for whatever % employee was liable
b) Workers' Comp. bars ALL tort claims except where employer commits INTENTIONAL TORTS
c) PUNITIVE DAMAGES
   i) Awarded only for misconduct + bad state of mind involving malice/reckless disregard for rights of others
   ii) Stated Purposes should always include:
       (1) Punishment/retribution
       (2) Deterrence
       (3) SOMETIMES includes desire to assist in financing useful litigation as a source for paying fees/costs
   iii) If jury gets issue, they decide whether to award damages at all, and how much as limited by purposes. Subject only to review as other awards are
   iv) Punitive damages don’t violate constitution for double jeopardy, excessive fines, or due process (DP is violated though if judge doesn’t instruct jury properly or review award)
   v) Some states limit awards or can direct them; double/treble damages can preclude ordinary ones
   vi) Some courts now demand clear & convincing evidence (beyond ordinary civil standard of proof)
   vii) Jury can hear about defendant’s wealth, income & profits to determine damages
   viii) P.D.’s may be either only leveled against individual defendants or employers of defendants if they were participating/encouraging tort
   ix) Insurance policies that cover punitive damages are sometimes allowed, sometimes not
   x) Defendant who has harmed different people is subject to multiple P.D. Liability
   xi) Actual Harm/collection of actual damages may be necessary for P.D. recovery, but at least plaintiff needs cause of action.
   xii) Guidelines may exist to keep P.D. in line with actual damages, but this may conflict w/other rules
   xiii) Almost always denied against suits against public entities, seldom granted for breach of contract w/o tort
   xiv) Conduct test may be no more than awareness that conduct might violate fed law
xv) State of Mind: reckless disregard can include just extreme negligence; wanton & malice require more
xvi) Today’s P.D. Think ENRON. Defendants that are getting profit from tort acts need deterrence through P.D. awards – sometimes compensatory damages just don’t make a difference to big corporations
xvii) Strict liability doesn’t matter- state of mind is still important
xviii) Again in the problem of ATTORNEY FEES. Punitive damages help lawyers devote time to clients & take on noble cases since they’ll be able to afford it.
d) DEATH
i) Wrongful death action – fundamentally to compensate survivors for pecuniary losses they suffer because of others’ torts
   (1) ELEMENTS
      (a) Was the death related to D’s conduct?
      (b) Alleged & prove that D wrongfully caused the death (tort – intentional or negligent)
      (c) The damages go to dependents, spouse, kids, children etc. (but only certain people can bring this action & recover)
   (2) Meant as a replacement for what the decedent would likely have provided, and NO MORE
   (3) Based on contributions reduced to monetary terms which decedent would might reasonably have been expected to make to his survivors
   (4) Permits ONLY recovery of a calculable economic loss, does NOT support punitive damages
   (5) Loss-to-estate measure might allow damage recovery even if decedent wasn’t supporting others (i.e., if a person earned more than self-sustaining required)
   (6) For non-working beneficiaries, non-pecuniary damages become really important
   (7) Punitive damages can be sought, damages for mental anguish/grief of survivors
   (8) Loss of consortium (loss of companionship & services usually don’t hold up in court, but consortium does – mutual benefits of family members)
   (9) Non-custodial parents are handled differently
   (10) When kids support parents, parents can’t normally get recovery
   (11) General rule: wrongful death suits can be brought only if decedent could have sued had he lived → D isn’t liable unless he committed a TORT!
   (12) Wrongful death awards are reduced by a % in comparative responsibility jurisdictions
ii) Survivor’s Act – when a person dies, his representative can bring suit (or if he dies during suit, it can continue) and proceeds go to his estate – can be ANY cause of action had he survived
   (1) Primary damages recovered through this are for pain & suffering (MUST BE CONSCIOUS) between injury & death (can include lost wages, medical expenses)
   (2) Can also include funeral expenses
   (3) Punitive Damages are permissible here too, but need a compensatory
(4) Some states have ‘loss of life’ damages designed to compensate for the loss of the value a decedent would have placed on her life. 
(5) **Damages accruing up to the death of the decedent go to the estate** 
(6) Statutes tell you who can bring these claims

Mass Torts – William Ohlemeyer Guest Lecture
1) Volume
2) Dispersion
3) Management

Asbestos: 750,000 suits
Dalkon Shield = IUD → 350,000
Phen-fen → 135,000; settlement looked like $2B, but people kept opting out & filing new lawsuits, they spent 25B to settle the cases
Tobacco – there have been less than 5,000 cases since 1955, Co.s win 80%

So how do we handle this? → special management techniques; everyone needs these

**Aggregation** is important: why? → it’s efficient.
- Rule 23 (Federal) Class Actions: big, powerful aggregation allowing representative (group) to decide legal question if certain requirements are met → adequate representative needed to protect your interest b/c you are NOT involved. Does this encourage lawyers to find lawsuits?
- key issues have to **predominate** – a common issue determines liability before you can use the class action – you have to have seen the commercial, been on the bridge, etc...
  -issue: diseases, people get them anyway
- Rule 42 → consolidation of individual cases. You have to be there, it’s combining individual lawsuits already on file, finding commonalities... it’s mainly for pre-trial cases, but also works @ trial. WATCH OUT: jury can get confused though, some evidence applies only to this guy, some to that guy, some common issues... courts usually allow only 5 cases consolidated
- multi-district litigation = venue rule. Let’s take every case in the country involving same kind of claim in federal court, and move it to 1 federal judge – consolidates motions, etc., and if cases don’t settle, they go back to home districts. Problem = federal law. Many tort cases are filed in state court, b/c torts are a state law creature.
- **bankruptcy**: but lots of unintended consequences, you pay a high price, sending negative message to your shareholders, etc. this is a last resort

... gets us to...

**Dispersion** - a disconnect in time & place b/n the product development, sold, & injury occurring: asbestos illnesses came 20 years later
We need general & specific causation for latent injuries.
<table>
<thead>
<tr>
<th>Type</th>
<th>Type</th>
<th>time &amp; place</th>
<th>Cause</th>
<th></th>
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<td>1</td>
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<td>Clear</td>
<td>Prox.</td>
<td>Known</td>
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<td>Fairly Prox.</td>
<td>Known</td>
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<tr>
<td>3</td>
<td>Multiple</td>
<td>Unclear → background (asbestos, tobacco, etc.) → some people get sick same way w/o exposure</td>
<td>Not Prox.</td>
<td>Known; indeterminate, we don’t know who they are</td>
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<tr>
<td>4</td>
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