

INTENTIONAL TORTS

I. BATTERY

A. Elements – 3x

1. T acts
 - a. Volitional act → minimal level of control
 - b. NOT accidental
2. T has intent to cause contact of a type that is harmful or offensive
 - a. Types – 2x
 - i. Actual Intent
 (A) T's purpose to cause contact
 (B) NOT intent to cause harmful or offensive contact
OR
 - ii. Substantial Certainty of Knowledge → subjective standard
 (A) T knows that act will cause contact
 (1) *Ex. – shooting gun into crowd (with no specific target in mind)*
 (2) *Counter-Ex. – shooting gun into desert and random person far away gets hit*
3. T's act causes contact
 - a. Character of Contact – 2x
 - i. Harmful
OR
 - ii. Offensive
 (A) Subjective Standard
 (1) V has predisposition about certain contact OR is unduly sensitive
AND
 (2) T knows about this predisposition and takes advantage
 (B) Objective Standard
 (1) Whether reasonable person would find contact offensive
 (a) Contact violates socially acceptable standards of touching
 (2) Based on circumstances
 (a) Who is doing the touching
 i. T's behavior leading up to contact
 (b) Who is being touched
 i. V is unreasonably sensitive
 (c) Relationship b/w T and V
 i. Prior interactions
 (d) Setting in which touching occurs
 i. Time and place
 - b. Scope of Contact
 - i. Causation
 (A) T's act sets a force in motion which ultimately produces result
 (1) *Ex. // Nelson v. Carroll (p. 558)*
 (a) *Intent to commit battery → striking w/ gun led to gun accidentally discharging*
 - ii. Direct Contact
 (A) Flesh-on-flesh OR flesh-on-clothes
 - iii. Indirect Contact → Extended Personality
 (A) Object or anything that person has control over that is so connected to body that it is regarded as extension of body
 (1) *Ex. – shooting gun, stabbing, filling room w/ gas, shooting bullets into air*
 (2) *Ex. – T grabs plate from V → offensive touching*

II. ASSAULT

A. Elements – 3x

1. T acts
2. T has intent to cause apprehension of imminent harmful or offensive contact
 - a. Types – 2x
 - i. Actual Intent
(A)T's purpose to cause apprehension
OR
 - ii. Substantial Certainty of Knowledge
(A)T knows that act will cause apprehension
3. T's act causes apprehension in V
 - a. Subjective Standard
 - i. V is highly susceptible to fear OR is unduly sensitive
AND
 - ii. T knows about this fear and takes advantage
 - b. Objective Standard
 - i. Reasonable Apprehension
(A) Whether reasonable person would experience apprehension
 - (1) Ex. // Beach v. Hancock (p. 579)
(a) *No difference whether gun was loaded or not when aimed in threatening way*
 - (2) Counter-Ex. // Brooker v. Silverthorne (p. 580)
(a) *Words alone over the phone*
 - (3) Ex. // Vetter v. Morgan (p. 583)
(a) *Words along with other acts and circumstances*
 - (B) Based on circumstances
 - (1) Apparent ability to carry out act
 - (a) Physical distance
 - (b) Barriers b/w T and V
 - (2) Imminent harm (not instant)
 - (a) No significant delay
 - (3) Other circumstances
 - (a) Who is assaulting
 - i. Tone of voice
 - ii. Gestures
 - iii. Physical size difference
 - (b) Who is being assaulted
 - i. V is unreasonable sensitive
 - (c) Setting
 - i. Time and place
 - (d) Relationship b/w T and V
 - i. Pattern of behavior

B. Fear vs. Apprehension

1. V must apprehend or be aware that contact is coming toward
 - a. NOT required to experience fear
2. If V experiences fear → more damages (pain and suffering)

III. INTENT (Redux)

A. Types – 2x

1. Actual Intent

- a. T acted with purpose of causing contact or causing apprehension
 - i. NOT intent to cause harmful or offensive contact

2. Substantial Certainty of Knowledge

- a. T acted with knowledge that contact or apprehension is substantially certain to result from act
 - i. NOT knowledge that act poses risk of contact → foreseeability = negligence
 - b. Ex. // Garratt v. Dailey (p. 617)
 - i. T was substantially certain that aunt would fall if moved the chair
 - ii. T attempted to move chair back but failed
 - c. Counter-Ex. // German v. Yeager (p. 619)
 - i. T was not substantially certain that friend would be hit by shrapnel from homemade bomb
 - ii. T acted with belief that no one would get hurt
 - d. Knowledge → courts split
 - i. Majority Rule → knowledge establishes intent
 - ii. Minority Rule → knowledge used as circumstantial evidence to establish purpose
 - e. Statistical Knowledge / Ongoing Activities → courts split
 - i. Ex. – T knows that 1 of 1000 customers will suffer burns from coffee
 - ii. Less applicable to battery → products liability
3. Unintended consequences → Eggshell Skull Rule

B. Transferred Intent

1. Across Torts

- a. Intent
 - i. T has intent to cause contact of a type that is harmful or offensive
OR
 - ii. T has intent to cause apprehension of imminent harmful or offensive contact
- b. Assault → Battery
 - i. Ex. // Nelson v. Carroll (p. 558)
(A) T intended to scare by raising hand but “accidentally” shot
- c. Battery → Assault
 - i. Ex. – T intends to shoot V but misses causing apprehension

2. Across Victims

- a. Ex. // In re White (p. 621)
 - i. T still has intent to cause contact even though T shot wrong person

3. Across Torts and Victims

4. From Things to Persons [??]

- a. Ex. // Corn v. Sheppard (p. 625)
 - i.
- b. Ex. // Lynn v. Burnette (p. 625)

IV. AFFIRMATIVE DEFENSES

A. Excuses (Lack of)

1. Mistake → “on accident”
2. T’s Condition or Circumstance
 - a. Minor
 - b. Mental incapacity
 - i. *Ex. // Wagner v. State (p. 566)*
(A) *T is mentally disabled man but still had intent to cause contact*

B. Consent

1. Types – 2x
 - a. Express Consent (explicit)
 - i. Writing
 - (A) *Ex.* – cannot force medical care on person who doesn’t explicitly consent
 - (1) **EXCEPTION** → emergency room (patient is NOT expressly NOT consenting)
 - (a) Assumed implied consent if
 - i. Patient is unconscious
AND
 - ii. Patient requires emergency medical care
 - (b) If patient is unconscious → assumed implied consent
 - ii. Oral statement
 - b. Implied Consent
 - i. Mistaken Perception → Subjective + Objective Standard
 - (A) T actually AND reasonably believes that V has consented to bodily contact or apprehension
 - (1) Based on conduct or behavior of V → NOT third-party’s conduct
 - (a) *Ex.* – *voluntary participation in contact sports*
 - (b) *Ex.* – *entering a crowded buses*
 - (B) Hypothetical Consent → NOT Implied Consent
 - (1) V “would have” or “should have” consented
 - ii. Scope of Consent
 - (A) Factors
 - (1) Ordinary, everyday contact
 - (2) Age
 - (3) Gender
 - (4) Sophistication of parties
 - (5) Relationship b/w parties
 - (a) History of dealings b/w parties
 - (B) *Ex. // Koffman v. Garnett (p. 588)*
 - (1) *V consented to contact with players “of like age and experience” → NOT coach*

2. Invalid Forms of Consent

- a. Fraud or misrepresentation or other forms of deceit
 - i. Ex. - failure to disclose information relevant to V's decision to consent
- b. Coercion
 - i. Ex. – physical violence or threat of violence
- c. Lack of capacity
 - i. V lacks ability OR lacks judgment necessary to give meaningful consent
AND
 - ii. Reasonable person in position of T would perceive this lack of capacity
 - (A) Ex. – youth
 - (B) Ex. – mental incompetence
 - (C) Ex. – other condition or circumstance
- d. Consent to illegal activities / against public policy
 - i. Ex. – trespasser cannot consent to being shot if guns are illegal in that state

C. SELF-DEFENSE / DEFENSE OF OTHERS

1. Elements – 2x

- a. V actually AND reasonably believes it is necessary to injure another to avoid imminent injuries to himself OR others → subjective + objective standard
AND
- b. Force used was reasonable → objective standard
 - i. Proportionality
 - (A) Reasonable response to perceived threat
- c. NO right to self-defense if
 - i. T initiates confrontation
AND
 - ii. V uses defensive force
(A) EXCEPTION
 - (1) T disengages OR manifests intent to disengage
- d. NO right to defend others if
 - i. Other had no privilege to use self-defense
- e. “reasonable” + “necessary”
 - i. Surrounding Circumstances
 - (A) Ex. – *emergency situation* → *more reasonable*
 - (B) Ex. – *situation requiring exercise of prudence* → *less reasonable*
 - (C) Ex. // **Haeussler v. De Loretto** (p. 599)
 - (1) *T knew that V had beat up others before and V was advancing threateningly*
- f. “injury” threatened
 - i. Applicable
 - (A) Physical harm
 - (B) Inappropriate touching
 - (C) Confinement
 - ii. NOT applicable
 - (A) Defamation
 - (B) Distress
 - (C) Nonthreatening provocation
 - (1) Taunting OR teasing

- g. “imminent” injury
 - i. Without significant delay
- 2. “Reasonable” Degree of Force
 - a. General
 - i. T may use deadly force if
 - (A) V threatens T with serious bodily injury or death
 - ii. T may NOT use deadly force if
 - (A) V threatens
 - (1) Non-serious injury
 - (2) Non-harmful yet offensive battery
 - (3) Nonviolent confinement
 - b. Conditional Threats (Ex. – “give me your money and you won’t get hurt”)
 - i. T may use non-deadly force
 - OR
 - ii. T may use deadly force
 - (A) **UNLESS**
 - (1) T actually AND reasonably believes that he could secure personal safety by complying with V’s demands
 - c. Dwelling
 - i. T may use deadly force if
 - (A) T is being attacked in his “dwelling”
 - d. Safe Retreat
 - i. T may use non-deadly force
 - OR
 - ii. T may NOT use deadly force if
 - (A) T actually believes that he can safely retreat OR flee from confrontation that would otherwise justify use of deadly force
 - (B) **EXCEPTIONS**
 - (1) T is attacked in his dwelling
 - iii. Minority Rule → “Stand Your Ground” Laws (Florida)
 - (1) No obligation to retreat → privilege to use deadly force

D. DEFENSE OF PROPERTY / RECAPTURE OF PROPERTY

- 1. T can use reasonable force to defend or recapture property
 - a. Remove trespassers
 - b. NOT forcibly evict someone who’s enjoying land peaceably
- 2. “Reasonable” Force
 - a. NOT excessive force → causing death or serious bodily injury
 - i. **UNLESS**
 - (A) T is protecting lives AND property
- 3. “Property”
 - a. Real property
 - b. Personal property (chattels)
- 4. Ex. // Katko v. Briney (p. 603) [????????????????]

NEGLIGENCE

I. PRIMA FACIE CASE FOR NEGLIGENCE

A. Elements (4x)

1. Harm or Injury
 - a. V suffered injury
2. Duty
 - a. T owed duty of care to class of persons including V to avoid causing injury
3. Breach
 - a. T breached duty of care
4. Causation → Actual Cause + Proximate Cause
 - a. T's breach was an actual and proximate cause of V's injury

II. INJURY →

A. Types – 4x

1. Physical bodily harm or death
2. Damage or destruction of tangible property
3. Loss of wealth
4. Emotional distress

III. **DUTY** → Question of Law (Judge)

A. Issue

1. Whether T owed duty not to cause injury to V or duty to protect V from harm

B. General Duty of Reasonable Care

1. T owes duty of care to wide class of persons who stand to suffer an injury at T's hands if T conducts himself careless
 - a. To whom? → reasonably foreseeable persons
 - i. Duty owed to all reasonably foreseeable individuals who might be harmed by carelessness regardless of what kind of relationship T has with them

(A) Ex. // **Mussivand v. David** (p. 67)

 - (1) *T gave V's wife a venereal disease through sexual intercourse and did not tell V's wife*
 - (2) *V (husband) is a foreseeable sexual partner*
 - b. What do we owe them → ordinary prudence
 - i. T must exercise degree of care that average, reasonably prudent person would exercise under similar circumstances to avoid harm to others
 - c. For what?
 - i. Conduct that without wrongdoing by others can lead to physical harm

C. Nonfeasance vs. Misfeasance

1. Nonfeasance → No Duty
 - a. T did NOT create situation that led to harm
AND
 - b. T did nothing to prevent harm
2. Misfeasance → Duty
 - a. T created situation that led to harm
 - i. May be omission of act that led to harm

D. No Duty to Others (Outside of General Duty of Reasonable Care)

1. Even if T knows that V needs assistance
 - a. Ex. // **Osterlind v. Hill** (p. 76)
 - i. *T did nothing as drunk V drowned*

E. **EXCEPTIONS** → Qualified Duties of Reasonable Care

1. Limited duty of care to specific persons under specific circumstances
 - a. Absence or presence of pre-existing relationship
2. Duty to Rescue or Protect / Affirmative Duty
 - a. Special Relationship
 - i. Duty to make reasonable efforts to rescue or protect under the circumstances

(A) Duty exists until relationship ends

(1) Ex. – *once V leaves T's premises → no more duty*
 - ii. Types

(A) Common Carrier / Passenger

(B) Business / Invited Customer

(1) Ex. // **Baker v. Fenneman & Brown** (p. 77)

(a) *If T knows or has reason to know that V is injured → duty to give first aid until V can be cared for by others*

 - i. *Duty STILL exists if injury caused by natural causes, pure accident, acts of third party, or V's own negligence*

(C) School / Student (Minor)

(D) Employer / Employee

- (E) Hospital Patient
- (F) Prison / Prisoner
- (G) Guardian / Ward
- (H) SOMETIMES established friendship → “companions on a social venture”
- (I) NOT school / student who becomes voluntarily intoxicated
- (J) NOT driver / passenger who does not wear seatbelts

b. Peril Created by T

- i. Duty to make reasonable efforts to prevent V from further injury or prevent risk of injury from being realized
 - (A) If T knows or should have known that own conduct caused injury to V or put V at risk of further injury or in imminent danger of injury
 - (1) T’s conduct → wrongful OR innocent act

c. Voluntary Undertaking

- i. Duty to perform rescue with reasonable care
 - (A) If T has volunteered to protect or rescue V
 - (1) Through K promise OR informal undertaking
- ii. **EXCEPTION** → Good Samaritan Statutes
 - (A) Duty to perform rescue without being grossly negligent
 - (1) *Ex. – off-duty professionals, lay rescuers, volunteer firefighters*

3. Duty to Maintain a Safe Premises / Premises Liability

a. V’s Status – 3x

- i. Invitee → person who enters property with invitation from possessor for mutual benefits or purposes
 - (A) Invitation → possessor desires invitee to enter property
- ii. Licensee → person who enters property with permission from possessor for own benefit or purpose
 - (A) Permission → possessor is willing for licensee to enter property if licensee desires
- iii. Trespasser → person who enters property without permission or invitation from possessor for own benefit or purposes or out of curiosity
 - (A) WITHOUT any enticement or inducement from possessor
 - (1) *Ex. // **Leffler v. Sharp** (p. 88)*
 - (a) *V was invitee BUT went beyond bounds of invitation → became trespasser*

b. T’s Status

- i. Owner / Possessor / Occupier
 - (A) Tenant, lawful or unlawful occupier, one who is entitled to occupy land but does not exercise entitlement

c. T’s Duty

- i. Majority
 - (A) To Invitee
 - (1) Duty to keep premises reasonably safe for ordinary use
 - (B) To Licensee
 - (1) Duty to warn of hidden dangerous conditions that T knows or should have known of
 - (a) Hidden → not in plain and open view
 - (C) To Trespasser
 - (1) Duty to refrain from willfully or wantonly injuring V
 - (a) Extremely reckless + conscious disregard of known serious danger

ii. CA

(A) To Any Status

(1) Duty to exercise reasonable care to ensure safety of all persons on premises

(a) **EXCEPTION**

i. V willfully or carelessly brought injury upon himself

(2) Duty to warn or repair if

(a) T is aware of concealed condition that presents unreasonable risk of harm to those coming in contact with it

AND

(b) T is aware that a person on the premises is about to come in contact with it

d. Scope of Duty

i. Conditions vs. Activities

(A) Duty limited to dangerous conditions on property

(1) Ex. – traps, holes, uneven surfaces

(2) Artificial Conditions → man-made structures

(3) Natural Conditions → ex. – trees on property

(B) NOT dangerous activities that take place on property

(1) **EXCEPTION** → criminal activities

(a) Duty to exercise reasonable care to protect users of property

ii. To Child Trespassers

(A) Duty to exercise reasonable care to avoid causing injuries

(1) Attractive Nuisance

iii. To Adult Trespassers

(A) Duty to warn of risk of physical harm by artificial conditions on property

(1) T knew or should have known that V constantly intrudes upon limited part of premises as to be exposed to risk

iv. To Non-Entrants

(A) Natural Conditions → NO duty

(1) **EXCEPTION**

(a) Duty to ensure that trees do not injure travelers on public roads where traffic is frequent, land is less heavily wooded, and acreage is small

(B) Artificial Conditions + Activities → duty

v. Recreational Use Statutes

(A) Immunity for property owners that use property for recreational purposes

(1) Limited to negligence liability

F. Duties for Certain Tortfeasors

1. Manufacturers and Suppliers of Goods

a. General Duty of Manufacturers and Suppliers of Goods [????????????????????]

i. Duty to make product carefully if

(A) Nature of thing is reasonably certain to place life and limb in peril if negligently made

(1) Knowledge of probable danger → NOT possible danger

(B) Knowledge that product will be used by persons other than purchaser

(C) Product used without new tests

(1) Considerations → proximity and remoteness

(D) Ex. // MacPherson v. Buick Motor

2. General Rule
 - a. No duty to control conduct of another

3. Parents / Guardians
 - a. Negligent Supervision
 - i. Elements – 2x
 - (A) Parents were aware of specific instances of prior conduct sufficient to put them on notice that act complained of was likely to occur
 - (B) Parents had opportunity to control child [and failed to exercise reasonable means to control child]
 - b. Negligent Entrustment
 - i. Elements – 2x
 - (A) Parent gave child access to dangerous instrumentality
 - (1) Ex. – gun or car
 - (B) Child was not equipped to handle such instrumentality safely

4. Commercial Sellers of Alcohol
 - a. Dram Shop Laws
 - i. Duty to third parties to monitor or control patrons' drinking
 - (A) Ex. – victims of drunk driving
 - ii. Breached duty by serving alcohol to driver
 - (A) Not of drinking age
 - OR
 - (B) Already visibly intoxicated when served

5. Non-Commercial Providers of Alcohol
 - a. Social Host Liability
 - i. No duty to third parties to monitor or control (adult) guests' drinking
 - ii. **EXCEPTION**
 - (A) Minors engaged in drunk driving

6. Mental Health Professionals (Therapists, Psychologists, Psychiatrists)
 - a. Duty to Warn Third Parties
 - i. T has determined OR should have determined under applicable professional standards that patient poses serious danger of violence to third parties
 - AND
 - ii. V is an readily identifiable (foreseeable) third party
 - b. Special relationship → to dangerous person OR to potential victim
 - i. Warn V or others who can warn V
 - ii. Notify police and detain dangerous person
 - iii. Take any other necessary steps
 - c. Ex. // Tarasoff v. Regents (p. 119)
 - i. Crazy told Dr that he intended to kill V two months prior to killing → Dr didn't warn

7. Professionals (Physicians, Lawyers, Accountants)
 - a. Professional Duty of Care
 - i. Duty to exercise degree of skill, knowledge, and care that a reasonably prudent member of that profession would under similar circumstances

G. CA

1. General Duty of Reasonable Care
 - a. Owed to everyone regardless of foreseeability
 - b. In any situation where risk of harm to another exists
 - c. **EXCEPTIONS** → based on public policy considerations

2. Balancing Factors – 7x
 - a. Foreseeability of harm to V → MOST SIGNIFICANT FACTOR
 - b. Degree of certainty that V suffered injury
 - i. Injury actually occurred
 - c. Closeness of connection b/w T's conduct and V's injury
 - i. Proximate cause
 - d. Moral blame attached to T's conduct
 - i. T's moral culpability → ex. – T is trespasser
 - e. Policy of preventing future harm
 - i. Efficiency → lowest cost avoider
 - f. Extent of burden to T and consequences to community of imposing duty
 - i. Balancing interests → benefits and costs
 - g. Availability, cost, and prevalence of insurance for risk involved
 - i. Cost spreading throughout society → V made whole w/o harming T

IV. **BREACH** (Question of Fact → Jury)

A. Issue

1. Whether T acted with degree of care that T was duty-bound to exercise

B. Features of Standard Breach Instruction – 4x

1. “Breach” defined as failure to use ordinary care
2. “Ordinary care” defined by reference to conduct of an ordinary reasonably prudent person
3. Consider whether T breached duty in doing something OR in failing to do something
4. Consider circumstances in which T acted

C. Standard of Ordinary Care → Reasonably Prudent Person

1. Subjective Reasonableness Standard → T’s state of mind
 - a. Whether T did his best to avoid causing harm to others
2. Objective Reasonableness Standard → T’s conduct
 - a. Whether T exercised degree of care that reasonably prudent person would under the same or similar circumstances to avoid causing injury to others
3. Fixed and generalized objective standard → NOT adjusted for T’s characteristics or capacities
 - a. **EXCEPTIONS** – 4x

i. Physical Disability

- (A) Reasonable person with similar disability
(1) Ex. – blind, deaf, crippled

ii. Children

- (A) Reasonable Child Rule (Majority / MA)

- (1) Reasonable child of similar age, experience, and intelligence under like circumstances
 - (a) Ex. – infants (< 4 years old) → usually incapable of negligence
- (2) **EXCEPTION** – Adult Activity → inherently dangerous activity
 - (a) Reasonable prudent person under the circumstances
 - i. Ex. – driving a car or snowmobile
 - ii. Counter-Ex – hunting → debatable

- (B) Tender Years Doctrine (Minority / CL)

- (1) < 7 years old
 - (a) Conclusive Presumption → incapable of negligence
- (2) 7 to 14 years old
 - (a) Rebuttable Presumption → incapable of negligence
 - i. Considerations → age, capacity, intelligence, experience of child
- (3) > 14 years old
 - (a) Rebuttable Presumption → capable of negligence
 - i. Considerations → age, capacity, intelligence, experience of child

iii. Professionals (acting within domain of profession)

- (A) Higher than average reasonable person

iv. Mental Disability (rarely)

- (A) Reasonable person without disability

D. Spectrum → Standards of Care

1. Duty to Avoid Causing Injury through Recklessness (to Trespassers)
 - a. Ex. // *Beausoleil v. National R.R. Passenger Corp.* (p. 155)
 - i. Standard of Care for Willful or Wanton Behavior
 - (A) T intentionally or unreasonably disregarded a risk that presented high degree of probability that substantial harm would result to another
 - (B) Risk of death or serious bodily injury must have been known or reasonably apparent
2. Duty to Avoid Causing Injury through Gross Negligence
 - a. Ex. – Good Samaritan Statutes
3. Duty of Ordinary Care to Avoid Causing Injury
 - a. Reasonably Prudent Person
4. Duty of Extraordinary Care to Avoid Causing Injury (Common Carriers)
 - a. Ex. // *Jones v. Port Authority of Allegheny County* (p. 148)
 - i. T must exercise highest degree of diligence and care in operation and maintenance of equipment and facilities → for the safety of its passengers
5. Strict Liability
 - i. Ex. // *Pingaro v. Rossi* (p. 147)
 - (A) *Dog Bite Statute* → NJ
 - (1) *Regardless of former viciousness or knowledge thereof*
 - (B) CL → allows one bite
 - (1) T is owner of dog
 - (2) Dog bites a person in public place or lawfully in a private place
 - (3) T knows or has reason to know that dog is prone to be vicious or otherwise abnormally dangerous

E. Businesses

1. Industry Custom / T.J. Hooper Rule
 - a. Standard of care → reasonable prudence NOT industry custom
2. Proof of Standard of Care
 - a. Adherence to customary business practices → relevant BUT NOT determinative
 - i. Custom → widespread or common practice
 - b. Ex. // *The T.J. Hooper* (p. 171)
 - i. T's boats were unseaworthy → no radios
 - ii. Whether should have had custom → Factors – 5x
 - (A) *Hard to maneuver / difficulty of avoiding harm*
 - (B) *Cheap or easy to avoid harm with precaution*
 - (C) *Reliability of precaution*
 - (D) *Probability of loss*
 - (E) *Extent of likely harm*

F. Professionals

1. Professional Custom / Per Se Rule / Anti-T.J. Hooper Rule

- a. Professional → physicians, lawyers, accountants, etc.
 - i. Professional decisions or actions → NOT administrative
(A) *Ex. – medical malpractice → treatment or care-related decisions*
- b. Standard of Care → professional custom → per se reasonable
 - i. Duty to exercise same level of knowledge, skill, or care that is considered standard (custom) by reasonable prudent members of the profession in like or similar circumstances
(A) Members of profession in general → NOT one individual professional
(1) *Ex. // **Johnson v. Riverdale Anesthesia Association** (p. 173)*
(a) Differing procedures are still standard as long as they are used by others
(2) *Counter-Ex. // **Helling v. Carey** (p. 186) → reasonably prudent person standard*
(a) T failed to administer T → unreasonable on its face
(b) Test for high risk patients and V was not high risk patient

2. Proof of Professional Standard of Care

a. Expert Testimony

- i. V required to present expert testimony to determine standard of care for professionals
(A) Specialized knowledge, skill, training → lay person not equipped

b. **EXCEPTION**

- i. T's carelessness is straightforward enough for a lay person to assess breach
(A) Based on common knowledge and experience

3. Informed Consent

a. Physician-Based Standard

- i. Duty to disclose to patient that information that a reasonably prudent physician would disclose in like or similar circumstances

b. Patient-Based Standard

- i. Duty to disclose all information that a reasonably prudent patient would find material to make a treatment decision
(A) Materiality → risk is material if
(1) It would change patient's decision OR patient would attach significance in deciding whether to undergo procedure

c. **EXCEPTIONS** – 2x

- i. Informed consent is NOT required if
(A) Emergency Exception
(1) Patient is unconscious or incapacitated
AND
(2) In need of immediate surgery
(B) Therapeutic Privilege
(1) Disclosing information would jeopardize patient's health
(a) Ex. – information would increase stress to unhealthy levels

G. Determining Breach → Balancing Reasonableness of Precautions

1. **Adams v. Bullock** → Factors (7x)
 - a. Lawfulness of T's Activity
 - b. Lack of Feasible Precautions
 - c. Inspection of Environment
 - i. Reasonable precautions taken to avoid potential risks
 - d. Foreseeability of Harm
 - e. Prior Similar Incident
 - i. Provides notice
 - f. T's Conformity with Custom
 - i. Reasonable prudence
 - g. Ease of Protection
 - i. Difficulty in eliminating or reducing risk → costs to T

2. Breach → T's failure to take reasonable precautions
 - a. Balancing
 - i. Harm that is expected to flow from conduct
AGAINST
 - ii. Burden of preventing that harm

3. Hand Formula
 - a. $B < P \times L$
 - i. T's conduct is unreasonable
 - b. $B > P \times L$
 - i. T's conduct is reasonable
 - c. Variables
 - i. $P \times L =$ expected value of harm → calculated before harm occurs
(A) P = probability that harm will occur
(B) L = gravity of the harm
 - ii. B = burden of adequate precautions (costs)
 - d. Ex. // United States v. Carroll Towing (p. 189)
 - i.
 - e. Ex. // Rhode Island Hospital Trust National Bank v. Zapata (p. 194)

4. Posner's Version of Hand Formula
 - a. T not required to take precautions if
 - i. Dollar cost of precaution > dollar value of expected harm
 - b. Maximize aggregate social wealth

5. Lord Reed's Disproportionate Cost Test
 - a. If risk exceeding small
 - i. NO obligation to take precaution
 - b. If risk is foreseeable BUT small
 - i. Obligation to take precaution UNLESS burden disproportionate
 - c. If risk is material OR substantial
 - i. Obligation to do everything possible
 - d. R = expected value of harm

H. Proof of Breach

1. Res Ipsa Loquitur (“thing speaks for itself”) → burden shifts to T
 - a. Lack evidence of particular acts or omissions on part of T that might constitute carelessness
 - i. Against multiple Ts → Res Ipsa used to establish carelessness of each
(A) Ex. // Ybarra v. Spangard (p. 212)
(1) *V’s injury could have been caused by acts of several nurses or doctors*
 - b. Elements – 3x
 - i. Injury is of a kind that does not ordinarily occur in absence of someone’s negligence
(A) Ex. // Kambat v St. Francis Hospital (p. 206)
(1) *Laparotomy pad discovered in abdomen*
 - ii. Instrument of harm that caused injury was in exclusive control of T or its agents
(A) NOT strict requirement → T is likely the only one to have acted
 - iii. V did not act negligently or contributed significantly to own injury
2. Negligence Per Se → burden shifts to T
 - a. Elements – 4x
 - i. T violated statute
(A) Statute governed T’s conduct
 - ii. Statute is designed to protect class that included V
 - iii. Statute is designed to protect against V’s particular injury
(A) *Counter-Ex. – failure to have license → purpose of record keeping NOT driving standard*
 - iv. Violation of statute caused V’s injury
 - b. Excuses – 4x
 - i. More prudent (safer) course of conduct under the circumstances than following statute
(A) Alternatives → less beneficial
 - ii. Impossible to follow statute
(A) Ex. – third party
 - iii. T was unable to comply despite T’s due diligence
 - iv. Children
(A) Reasonable Child Standard

V. CAUSATION

A. Issue

1. Actual Cause
 - a. Whether T's carelessness played some role in bringing about V's injury
2. Proximate Cause
 - a. Whether T's carelessness brought about V's injury in such a fortuitous manner that it is inappropriate to hold T liable for an injury that his carelessness helped to cause

B. Actual Cause

1. "But For" Test (Majority)
 - a. T's breach is actual cause of V's injury if
 - i. V's injury would not have occurred but for T's breach
2. Substantial Factor Test
 - a. T's breach is actual cause of V's injury if
 - i. T's breach was a substantial factor in bringing about V's injury
 - b. Minority → plaintiff-friendly standard
 - c. CA → same substantive test as "but for" test
 - i. If T's breach is not "but for" cause, then T's breach is not substantial factor
 - ii. Clarification for jury

C. Tortious Aspect Causation (p. 286)

1. Tortious aspect of T's conduct played a part in bringing about V's injury
 - a. Ex. – driver backs up and hits kneeling boy → not checking rear view mirror is careless but not but for cause of injury

D. Proof of Actual Cause

1. Preponderance of the Evidence Standard (> 50%)
 - a. Circumstantial Evidence
 - i. Reasonable inference of causation → NOT mere speculation
 - (A) Conjecture → explanation consistent with known facts BUT not deducible as reasonable inference
 - (B) Reasonable Inference → explanation made from evidence that points to one theory of causation that indicates logical sequence of cause and effect, notwithstanding the existence of other plausible theories
 - (1) Counter-Ex. // *Skinner v. Square D* (p. 221)
 - (a)
2. Loss-of-Chance Doctrine (< 50%) → death + medical malpractice
 - a. T's breach is actual cause of V's injury if
 - i. < 50% chance of survival for V
 - (A) Harm → shifts from death to lost chance of survival
 - ii. T's careless act caused reduction in chance
 - (A) Damages → % chance
 - b. Ex. // *Falcon v. Memorial Hospital* (p. 231)
 - i. 37.5% survival rate if intravenous line was connected to V before onset of embolism

3. Admissibility of Expert Testimony → Toxic Torts

a. Elements – 2x

i. Expert testimony based on “scientific knowledge”

(A) Grounded on reliable data

(1) Factors – 4x

(a) Theory or technique can be or has been tested

(b) Theory or technique has been subjected to peer review and publication

(c) Known or potential rate of error of method used

(d) Degree of method’s or conclusion’s acceptance within relevant scientific community

ii. Expert testimony is relevant

(A) Will assist the trier-of-fact

E. Multiple Tortfeasors

1. Multiple Necessary Causes

a. Multiple Ts’ breaches are actual causes of V’s injury if

i. V would not have suffered single “indivisible” injury but for the concurrence of Ts’ independent careless acts

(1) Both Ts’ careless acts must be “but for” causes

(a) NOT possible for one or the other to be sole cause → BOTH required

(B) Ex. // McDonald v. Robinson (p. 239)

(1) *Cars collided and became interlocked and struck V*

2. Multiple Sufficient Causes → Substantial Factor Test

a. Multiple Ts’ breaches are actual causes of V’s injury if

i. Each T’s independent careless act would have been sufficient to cause V’s injury AND

ii. It is impossible to divide or isolate their conduct

b. None can be “but for” cause

i. Ex. – two floods or two fires combine

c. *Counter-Ex.* // Aldridge v. Goodyear (p. 242)

i. *T supplied only three of 28 chemicals capable of causing cancer → but T’s chemicals was only small fraction of chemicals that may have caused illnesses*

3. Alternative Liability → burden shifts to Ts

a. Rebuttable Presumption of actual causation if

i. Multiple Ts engaged in independent careless acts

(A) Ts’ acts were nearly identical

ii. Only one T’s careless act actually caused V’s injury

(A) Ts’ acts were equally likely to cause V’s injury

(B) No suggestion that others were involved

iii. Failure to prove actual cause was not due to lack of diligence

b. Burden Shifts to Ts → prove that his careless act was NOT actual cause

i. Ex. // Summer v. Tice (p. 259)

(A) *Two hunters shot at quail → V got struck by bird shot from someone’s gun*

c. Market Share Liability → Ex. - *DES generic drugs* // Sindell v. Abbott Labs (p. 263)

i. Ts liable even in absence of all possible tortious parties

(A) Burden shifts to each T to prove that its careless act was NOT actual cause

(B) If cannot disprove → V recovers % of damages equal to T’s share of relevant market

4. Conspiracy
 - a. Multiple Ts caused V's injury if
 - i. Ts acted together in planned effort to injure V
 - ii. Only one T's act caused V's injury
 - (A) One act → but for cause
 - (B) Other act → aiding and abetting

5. Concert of Action
 - a. Multiple Ts jointly caused V's injury if
 - i. Ts acted together BUT not in planned effort to injure V
 - ii. Only act T's careless act caused V's injury
 - b. *Ex. – two Ts are drag racing and one T hits V*
 - i. Separate acts fuse into single coordinated course of conduct

VI. ALIGNMENT OF THE ELEMENTS

A. Proximate Cause → Alignment of Breach and Injury

1. Issue

- a. Whether T's carelessness brought about V's injury in such a fortuitous manner that it is inappropriate to hold T liable for an injury that his carelessness helped to cause
- b. Whether T's breach caused V's injury in a relatively direct way as opposed to some haphazard way
- c. Whether T's breach caused injury too attenuated or remote

2. Types – 4x

- a. Natural and Ordinary Way (Outdated)
 - i. Whether harm from breach came in natural and ordinary way
- b. Directness (Outdated)
 - i. How direct a connection b/w T's breach and V's injury
(A) Spatially and temporally proximate → not separated by many steps (intervening forces)
- c. Foreseeability (Most Common)
 - i. Whether P's injury was reasonably foreseeable to a person in T's position at time of action
- d. Scope of the Risk / Risk Rule
 - i. Whether P's injury was among the types of harm that D risked through careless actions toward P

3. Reasonable Foreseeability

- a. General Consequence
 - i. *Ex. // Wagon Mound (No. 2) (p. 276)*
(A) *Spilling furnace oil into harbor → risk of fire damage to ship is foreseeable*
- b. Type of Injury → NOT precise injury
 - i. Nature of risk → “not as to the particulars but the genus”
(A) *Ex. // Jolley v. Sutton London Borough Council (p. 277)*
(1) *Children will play with the abandoned boat with risk of injury*
- c. NOT manner in which injury came about
- d. NOT extent of injury → Eggshell Skull Rule

4. Determining Proximate Cause → Factors

- a. Public policy considerations
- b. Foreseeability of risk or harm
 - i. What actors in T's position should anticipate in terms of risk
(A) Requires ordinary attention to interests of others → NOT “extraordinary prevision”
- c. Breach and injury were too remote given common experience or practice
- d. T's careless act was substantial factor in bringing about V's injury → NOT actively contribute
 - i. T's act was complete or had run its course
 - ii. T's act did no more than create condition that made V's injury possible
(A) *Ex. // Union Pump v. Allbritton (p. 269)*
(1) *Pump fire had been extinguished at time V was walking away and slipped due to wet pipe rack (because of fire)*

B. Intervening Acts

1. Concurrent Causes → NOT break chain of causation
 - a. Both Ts' careless acts or effect of both Ts' careless acts contribute to single injury
 - i. *Ex. – two drivers are careless but one is careless a minute later than the other*
2. Intervening Cause
 - a. Third party's subsequent act that occurs after T's negligent conduct has completely occurred
3. Superseding Cause
 - a. Intervening act that breaks chain of causation → T is NOT proximate cause
 - i. *Ex. – acts of God*
 - ii. *Ex. – criminal acts by competent third parties*
 - iii. *Ex. – intentional acts by competent third parties*
 - iv. *Ex. – negligent acts (sometimes)*
 - b. Factors
 - i. Harm was within scope of risk created by T's act
 - (A) Third party's act increases danger or harm
 - (1) *Ex. // Pollard v. Oklahoma City (p. 288)*
 - (a) *Not within scope that boy would collect so much powder*
 - ii. Type of act was foreseeable to T
 - (A) Following ordinary course of events → T could anticipate and provide against
 - (1) NOT extraordinary or highly improbable
 - (B) General type of foreseeable intervention even though could not have been anticipated
 - (1) *Ex. // Clark v. Du Pont (p. 292)*
 - (a) *Foreseeable that someone w/o knowledge would try to do something safe*
 - (2) *Counter-Ex. // Pollard v. Oklahoma City (p. 288)*
 - (a) *Unforeseeable that competent adults disregarded the harm*
 - iii. Intervening act was independent or dependent
 - (A) T's negligent act sets in motion other third-party acts → foreseeable
 - (B) Dependent act is foreseeable → act was in response or reaction to situation created by T
 - iv. Character and connection b/w harm and T's act
 - (A) Probable consequences → NOT number of intervening acts
 4. **EXCEPTIONS** → NOT superseding cause
 - a. Intervening act that occurs concurrently with primary wrong OR that is primary wrong
 - b. Medical Intervention
 - i. Ordinary negligence of medical persons occurs during course of treating injuries caused by T's negligence
 - c. Rescue
 - i. Danger Invites Rescue Doctrine
 - (A) T creates circumstance that places V in danger
 - (1) T is liable for injuries to V
 - AND
 - (2) T is liable for injuries to rescuer during rescue effort
 - (a) Rescue effort carried out reasonably and contemporaneously with carelessly created peril
 - (B) *Ex. // Wagner v. International Railway (p. 313)*
 - d. Affirmative Duties
 - i. T owes affirmative duty to protect V from (foreseeable) kind of harms caused by third party
 - (A) *Counter-Ex. // Fast Eddie's v. Hall (p. 324)*
 - (1) NOT foreseeable → *malicious criminal act (rape and murder)*
 - (a) UNLESS prior actions of criminal in the past
 - (B) *Ex. – if V got sick in bar or V got attacked in bar → affirmative duty*

C. Relationship Aspect of Duty → Alignment of Duty and Breach

1. Issue

- a. Whether T's breach consisted of carelessness toward her rather than carelessness toward other persons situated differently than her

2. *Ex. // Palsgraf v. Long Island Railroad (p. 299)*

- a. *Duty* → T (common carrier) owed to V (customer)
- b. *BUT no breach of duty* → V is *NOT foreseeable victim*
 - i. *NOT foreseeable that package contains fireworks*
 - ii. *Duty to those in close proximity*

3. Cardozo (Majority Opinion) → Duty to Foreseeable Persons

- a. Focus → T's carelessness as to particular persons
- b. Rationale → Redress for those who have been wronged OR had their rights infringed upon (A) NOT those who are injured or harmed

4. Andrews (Dissenting Opinion) → Duty to All Persons (Foreseeable or Not)

- a. "All Things Considered" Approach → Proximate Cause Analysis
 - i. Public Policy Considerations → Foreseeability of Harm

5. Hybrid (CA) → Duty to All Persons (Foreseeable or Not)

- a. "All Things Considered" Approach → Duty Analysis
 - i. Public Policy Considerations → Rowland Factors

6. *Ex. // Petitions of the Kinsman Transit (p. 314)*

- a.

VII. AFFIRMATIVE DEFENSES

A. Contributory Negligence (Minority Rule → Four States)

1. No claim of negligence against D if
 - a. P's negligence contributed AT ALL to his injury
AND
 - b. D's wrongdoing was NOT reckless OR intentional
2. **EXCEPTION** → Last Clear Chance Doctrine
 - a. D has no defense if
 - i. D had last opportunity to prevent harm resulting from both D's and P's negligence

B. Comparative Fault

1. Elements – 2x
 - a. Breach of “Duty”
 - i. Reasonableness of V's conduct → exercise reasonable care for own safety
 - b. Causation
 - i. V's negligence played a role in bringing about own injury
2. Divided Damages (Admiralty Rule of)
 - a. Liability will be allocated equally among all parties who contributed to P's injury
 - i. Ex. // U.S. v. Reliable Transfer (p. 393)
(A) If extremely difficult or impossible to fairly measure comparative fault of each party
3. Pure Comparative Fault
 - a. P can recover % of damages caused by D's negligence (or not caused by P's negligence)
 - i. Ex. – P recovers 1% of damages if P is 99% negligent
 - b. Ex. // Hunt v. Ohio Department of Rehabilitation (p. 395)
4. Modified Comparative Fault (Majority Rule)
 - a. P CANNOT recover any damages if
 - i. P's negligence was a greater cause of P's injuries than D's negligence
(A) No recovery if P's negligence is >50%
OR
 - ii. P's negligence was an equal OR greater cause of P's injuries than D's negligence
(A) No recovery if P's negligence = 50%
 - b. Ex. // Baldwin v. City of Omaha (p. 400)

C. Assumption of Risk

1. General Rule

- a. P is completely barred from recovery if
 - i. V adequately appreciates risk of given activity
 - (A) “appreciate” → subjective standard
 - (1) P is aware of OR knows risk
 - (a) Specific type of risk
 - (b) Magnitude and implications of risk
 - AND
 - ii. V voluntarily chooses to accept risk
 - (A) NOT involuntary → coerced or unreasonably difficult to avoid
 - AND
 - iii. Risk is realized

2. Express Assumption of Risk

- a. P waives right to sue D for negligence
 - i. Usually by written waiver b/w P and D
- b. Validity of Exculpatory Agreements → Elements – 3x
 - i. Whether intention of parties expressed in sufficiently clear and unequivocal language
 - ii. Whether K was fairly entered into
 - (A) Adhesion K → Factors
 - (1) “Take it or leave it” basis
 - (a) Counter-Ex. – purchaser may pay additional reasonable fee to reserve right to sue
 - (2) Boilerplate agreement
 - (3) Disparity in bargaining power
 - (a) No opportunity to negotiate
 - (4) Services can be obtained elsewhere
 - (5) Nature of services
 - (a) Ex. – hospital services → necessity
 - iii. Whether duty to public exists
 - (A) Social interests → Current Societal Expectations
 - (1) Ex. – ski resort affects substantial amount of people // **Dalury v. S-K-I** (p. 409)
 - (2) Counter-Ex. – skydiving is less common // **Jones v. Dressel** (p. 404)
 - (B) Tunkl Factors – 6x
 - (1) D is engaged in business of a type generally thought suitable for public regulation
 - (2) D is engaged in business of performing service of great importance to public
 - (a) Practical necessity for some members of public
 - (3) D is willing to provide services to all members of public within reasonable guidelines
 - (4) D has decisive advantage of bargaining strength against any member of public who seeks services
 - (5) D presents standardized adhesion K of exculpation
 - (a) No provision where purchaser (P) may pay additional reasonable fee and obtain protection against negligence
 - (6) After transaction, purchaser (P) is placed under control of seller (D)

3. Implied Assumption of Risk
 - a. P forfeits right to sue D
 - i. Inferred from P's conduct
(A) Words and actions → subjective standard
 - b. Majority → NO Implied Assumption of Risk
 - i. V acted unreasonably
(A) Comparative Fault
 - ii. V acted reasonably
(A) Standard Negligence Claim
 - (1) Whether T had duty to V
 - (2) Whether T breached its duty to V
 - c. Minority
 - i. V acted unreasonably
(A) Comparative Fault → reduction of damages for V
 - ii. V acted reasonably
(A) Implied Assumption of Risk → no damages for V
(B)
 - d. CA
 - i. “Primary” Assumption of Risk → no damages for V
(A) T has NO duty of reasonable care to P to prevent harm from risks if
 - (1) P voluntarily participates in certain kind of activity
 - (a) Recreational sport or activity
AND
 - (2) Risk realized is inherent in activity
(B) D's duty → not to recklessly or intentionally injure
(C) P is NOT required to know risk
 - ii. “Secondary” Assumption of Risk
(A) V acted unreasonably
 - (1) Comparative Fault → reduced damages for V
(B) V acted reasonably
 - (1) Implied Assumption of Risk → no damages for V
 - (a) Elements – 4x
 - i. T knew the risk
 - ii. T appreciated character (specific type) of risk
 - iii. T voluntarily chose to accept risk
 - iv. T's conduct in accepting risk was reasonable

VIII. DAMAGES AND APPORTIONMENT

A. Damages

1. Forms of Redress

- a. Monetary Damages
- b. Nominal Damages → D pays \$1
 - i. Acknowledges tort BUT absence of any compensable losses
- c. Injunction → D stops engaging in particular activity

2. Compensatory Damages

a. General Rule

- i. P is entitled to fair AND reasonable compensation from D
- ii. In light of losses P suffered as result of tort

(A) Economic Losses (Out-of-Pocket)

- (1) Lost wages
- (2) Past and future medical bills
- (3) Repair costs

(B) Non-Economic Losses

- (1) Pain and suffering
- (2) Depression and anxiety
- (3) Loss of enjoyment of life

b. Eggshell Skull Rule / Unintended Consequences

- i. “D takes his P as he finds him”
- ii. T is liable for all injuries directly resulting from wrongful acts regardless if foreseeable or not
 - (A) *Ex. // Vosburg v. Putney (p. 610)*
 - (1) *Kick to the leg led to disease*

c. Eggshell Psyche Rule

i.

d. Avoidable Consequences

- i. V has duty to take reasonable steps to avoid exacerbating his injury
 - (A) AFTER accident in which V suffers injury caused by T’s negligence
 - (1) EXCEPTION → seatbelt (Minority)
- ii. Failure to Mitigate Damages
 - (A) T is NOT responsible for increase in damages associated with extent of injury that reasonably could have been avoided

e. Collateral Source Rule

i.

f. Limitations of Compensatory Damages

- i. Statutes → caps
 - (A) Ex. – medical malpractice
- ii. Judge → overturning jury’s award
 - (A) “shocks the conscience” standard

3. Punitive Damages

- a. T's unreasonable conduct → Reckless Indifference
 - i. Wanton Disregard (for others' well-being)
 - (A) Unreasonable conduct poses grave danger of harm to others
 - (B) T has reasonable to know of facts which would lead a reasonable man to realize that those dangers attend his conduct
 - (1) NOT actually aware of dangers posed by conduct at time of acting → fails to appreciate dangers of his actions
 - ii. Deliberate Indifference (to others' well-being)
 - (A) Unreasonable conduct undertaken by T who is aware both that his conduct creates an unreasonable risk of physical harm to another AND risk is substantially greater than that which is necessary to make his conduct careless
 - (1) Conscious choice of course of action with knowledge of serious danger to others
- b. *Counter-Ex. // National By-Products v. Searcy House Moving (p. 485)*
 - i. *T had no knowledge that brakes were faulty when ran truck into car*
- c. *Ex. // Mathias v. Accor Economy Lodging (p. 489)*
 - i. *T knew risk and failed to take reasonable steps to eliminate bed bugs or warn motel guests*

B. Apportionment of Damages

1. Direct Liability

- a. *Ex. - Employers*
 - i. *Screening or hiring employees*
 - ii. *Monitoring or supervising employees*
 - iii. *Maintaining policies*
 - (A) *Title VII Complaint Process*

2. Vicarious Liability

- a. One person or entity is held responsible for tortious acts of another who is acting on his or its behalf
 - i. *Ex. – general partners in partnership*
 - ii. *Counter-Ex. – parents → not vicariously liable for children's careless acts*
 - (A) **EXCEPTION**
 - (1) When parents permit children to drive their cars for business or pleasure
 - (a) Even if decision to permit children to drive was not unreasonable
 - (b) Parents → car owners
- b. Respondeat Superior → most common
 - i. Employer is liable for tortious acts of its employee that occur within
 - (A) Scope of Employment
 - (1) Benefit Test (Old)
 - (a) Activity for purpose of advancing interests of employer
 - (2) Characteristic Activities Test (Modern)
 - (a) Activity is customary incident of employment relationship
 - i. Acts that may be fairly regarded as risks of business, whether committed in furthering business or not
 - (b) Employee Detour – slight deviation from expected course or route that an employee would take in course of doing job
 - (c) Employee Frolic – substantial deviation from his employment obligations that he is deemed to be on his own business
 - (d) *Ex. // Taber v. Maine (p. 502)*
 - i. *Drinking on base during off-duty hours was commonplace or officially condoned activity → reasonably obvious risk of business*
 - ii. *If off base → employer NOT liable*

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(e) SOME intentional wrongful acts → *ex. – bouncer beats up patron*

i. *Courts split - schools + churches → sexual assaults by teachers + clergy*

ii. Independent Contractor → NO respondeat superior

(A) Independent entity contracted to provide service to principal

(1) Factors

(a) Extent of control that principal may exercise over details of work

(b) Agent engaged in distinct occupation or business

(c) Type of work done by agent is customarily done with or without supervision

(d) Skill required in agent's occupation

(e) Agent or principal supplies tools and place required for work

(f) Length of time that agent is engaged

(g) Agent is paid by the job or by time worked

(h) Agent's work is part of principal's regular business

(i) Agent or principal believe they are creating employment relationship

(2) *Ex. – physicians at hospital → NOT hospital employees*

(B) Non-Delegable Duty Doctrine

(1) Employer cannot avoid liability by hiring independent contractor to perform employer's duty that is non-delegable → *ex. - premises liability*

C. Joint Liability and Contribution

1. Concurrent Acts

a. Multiple Ts cause single injury concurrently or in concert → Joint and Several Liability

2. Successive and Independent Acts

a. Initial T → liable to P for all injuries proximately resulting from T's acts AND aggravation of injuries by successive T

b. Successive T → liable only for separate injuries OR aggravation of injuries resulting from T's act

i. **EXCEPTION**

(A) Injuries cannot be reasonably or practicably divided or allocated → Joint and Several Liability

(1) *Ex. // Ravo v. Rogatnick (p. 513)*

(a) *Medical malpractice → no way to tell which T caused which portion of harm*

3. Contribution → T brings claim against other T

a. Cross Claim

i. 2nd T already party to suit

b. Impleader

i. Brings 2nd T as party to suit

D. Wrongful Death Acts

1. Survival Actions

a. Relatives can sue for anything decedent could have sued for

i. Recovery → any harm that decedent suffered up to moment of death

(A) Pain and Suffering

(B) NOT loss of future income → V not deprived of future gains

2. Wrongful Death Actions

a. Relatives can sue for loss of a loved one

i. Recovery → Economic Loss + Bereavement

(A) Pecuniary Losses → % of decedent's expected future income that would have been devoted to support surviving spouse and minor children

INFLICTION OF EMOTIONAL DISTRESS

I. Intentional Infliction of Emotional Distress (IIED)

A. Elements – 3x

1. T's conduct is outrageous (beyond all bounds of decency)
2. T's conduct is undertaken for the purpose of causing emotional distress so severe that it could be expected to adversely affect V's physical health
3. T's conduct causes such emotional distress
 - a. Even if it did NOT lead to expected physical harms

B. Intent – 3x

1. Purpose
 - a. T desires to inflict severe emotional distress
2. Recklessness
 - a. T acts recklessly in deliberate disregard of a high degree of risk that emotional distress will follow
3. Substantial Certainty of Knowledge
 - a. T knows that emotional distress is substantially certain to result from his conduct

C. Ex. // Dickens v. Puryear (p. 650)

1. T's intentional act → threat of future harm
 - a. NOT imminent or immediate harm
2. Outrageousness of conduct → assaults and batteries added to ultimate threat
 - a. BUT cannot recover for damages from assault and batteries (statute of limitations)

II. Negligent Infliction of Emotional Distress (NIED)

A. General Rule

1. NO duty to avoid causing emotional distress to another person

B. CAVEATS – 2x

1. V has IIED claim if
 - a. T's conduct goes beyond carelessness to intentionality or recklessness or substantial certainty
2. V has negligence claim if
 - a. V's emotional harm stems from physical injury caused by T's negligence

C. EXCEPTIONS – 3x

1. Special Relationship
 - a. Special relationship exists that requires T to be vigilant with V's emotional well-being
 - i. Ex. – psychiatrist → abuse of patient with repressed memories
 - ii. Ex. – mortician → careful with emotions of deceased's family
2. Zone of Danger
 - a. T's carelessness subjects V to a risk of imminent bodily harm of which V is aware
 - i. Elements – 3x
 - (A) V's fear is reasonable
 - (B) T's endangerment of V causes V's fear
 - (C) V has physical manifestations of emotional distress

- b. T “misses” → V suffers no bodily harm
 - i. Ex. // **Robb v. Pennsylvania R.R.** (p. 701)
 - (A) V jumps out of a car that gets hit by train → car is “stuck in a rut”
 - c. **Impact Rule (Minority)**
- 3. Bystander Claims (Outside the Zone of Danger)
 - a. T carelessly causes a traumatic physical injury to a victim in V’s presence
 - i. Elements – 3x
 - (A) V is physically present at the scene
 - (B) V is aware of the victim’s injury during its occurrence
 - (C) V is close relative of victim
 - ii. CA → Additional Element
 - (A) V suffers emotional distress more severe than the sort suffered by disinterested witness

STRICT LIABILITY

I. Strict Liability

A. T is liable without proof or presumption of carelessness, recklessness or intentional wrongdoing

1. Reasonable if risky or unfavorable conduct

B. Types – 3x

1. Property Torts

a. Conduct that interferes with a person's interest in possession, use, enjoyment of land or personal possession

2. Ultra-Hazardous Activities

a. Ex. // Rylands v. Fletcher (p. 825)

i.

3. Products Liability

a. Ex. // Gower v. Savage Arms (p. 876)

i.

II. Products Liability

A. Elements – 5x

1. V has suffered an injury

2. T sold a product

3. T is commercial seller of such products

4. At time product sold or marketed by T, product was in defective condition

5. Defect functioned as actual and proximate cause of V's injury

B. "defect"

1. Types – 3x

a. Manufacturing Defects

i. Defective product diverges from manufacturer's own design and specifications for product

(A) Ex. – lemons

AND

ii. Product becomes defective while in manufacturer's control and possession

b. Design Defects

i. Defect in the plan or specifications for product

(A) Factors – 3x

(1) Significance of risk of physical injury posed by particular design

(a)

(2) How ordinary consumers would expect product to function

(a)

(3) Whether there is feasible, safer, and affordable alternative design

(a)

c. Failure to Warn or Instruct (Omission of Language)

i. Safety requires that product be sold with warning or instruction

ii. Product is sold without a warning or without adequate warning

(A) Ex. – mislabeled product

2. Other Causes of Action
 - a. Breach of Implied Warranty
 - b. Breach of Express Warranty
 - c. Misrepresentation
 - d. Negligence
 - i. Negligent Design
 - ii. Negligent Manufacturer
 - iii. Negligent Failure to Warn
 - e. Products Liability → NOT required to prove T's lack of reasonable care
 - i. Negligence → reckless conduct
(A) T knew and disregarded
3. "injury" suffered
 - a. Physical injury
 - b. Tangible property damage caused by product defect other than defective product itself
 - i. Economic Loss Rule
(A) NOT damage or destruction to defective product itself
(1) Covered by implied or express warranty
 - c. Intangible economic loss
 - d. Emotional distress
4. "product"
 - a. NOT services
 - b. NOT real property
 - i. Ex. – parcels of land, individual buildings and houses
 - ii. Counter-Ex. – mass-produced or prefabricated houses
 - c. NOT human body parts
 - i. Ex. – blood, tissues, cells
 - ii. Counter-Ex. – modified cells
 - d. NOT live animals
 - i. Ex. – pets or livestock
 - ii. Counter-Ex. – dog that carried disease when sold
 - e. NOT textual materials
 - i. Ex. – encyclopedias, guides, books
 - ii. Counter-Ex. – maps and charts
 - f. NOT intangibles
 - i. Electricity, x-rays
 - g. NOT used products
 - h. EXCEPTIONS → product that is not "product"
 - i. Ex. – prescription drugs, vaccines
5. Who can sue → Buyers + Users + Bystander
6. Who can be sued → Manufacturers + Retailers + Distributors
 - i. NOT required to be involved in design, manufacture or inspection of product
 - ii. "seller" → in the business or selling or marketing such products
 - iii. "sell" → places product in stream of commerce
 - (A) Actual sale or transfer
 - (B) V's contact with product is sufficiently close to normal domain of marketplace
(1) Ex. – V injured by defect in "demo" or "loaner" car
 - iv. Engaged in sale over service