

Torts Outline

Duty

- I. Generally, P has a legal obligation to act reasonably
 - A. Standard of care: rpp must use special skills/acuity?
- II. History of duty
 - A. Duty used to be privity (contract)
 - B. Imminent danger (Thomas, manuf resp for mislabeled poison)
 - C. Inherently dangerous (Statler, coffee urn dangerous if negligently constructed)
 - D. General duty of care irrespective of K (manufacturer duty to ultimate user)
 - E. Actor owes a duty of **reasonable care** under the circumstances to those persons who are **foreseeably** exposed to **physical risks arising from** the actor's conduct.
- III. Limited Duty
 - A. Landowner & Occupiers
 1. Status Trichotomy: minority; TX standard
 - a) Invitee: business purpose (building open to public, mutual business benefit)
 - (1) Default Duty (includes a duty inspect & make safe)
 - b) Licensee: with permission, but non-business purposes
 - (1) If actual knowledge, duty to warn (not to inspect)
 - (2) No willful or wanton behavior (between intentional & gross negligence)
 - (3) No gross negligence
 - c) Trespasser: no permission
 - (1) No willful or wanton behavior
 - (2) No gross negligence
 2. Act as an RPP under the circumstances: majority; CA standard
 - a) Proper test: in the management of his property, he acted as a reasonable man
 - (1) Status is a factor, but is not determinative
 3. Child Trespassers ("Attractive Nuisance")
 - a) cts imply a duty of care if it's fairly easy to fix
 - B. Recreational Sports
 1. Have to show more than negligence: majority
 - a) CA--Knight v Jewett, touch football, tackler not liable, injury w/in scope of risks
 2. Mere negligence: minority
 - a) Wisconsin --Lestina, soccer game, slidetackler could be liable
 - C. Guest Statutes
 1. Traditionally, applied licensee status: have to show more than negligence

Torts Outline

2. Being overturned
- D. Common Carrier
 1. duty to exercise utmost care
 2. something about paying money for the service
- E. Generally, no duty to Take Affirmative Action
 1. Rescue: No duty generally
 - a) Why no duty?
 - (1) legislating morality
 - (2) individual autonomy
 - (3) impossible to draw principled lines
 - b) Misfeasance
 - (1) Good Samaritan Laws: immunity from liability if you choose to rescue someone
 2. EXCEPTIONS
 - a) Special Relationship: implied reliance
 - (1) Co-venturers, student/teacher, parent/child
 - (2) Contractual (professional psychologist, doctor)
 - b) Voluntary Assumption of Duty (RR assumed duty to warn & must comply)
 - (1) Reduces chances of another to find the person
 - (2) Can't leave the person worse off
 - (3) Act as a rpp
 - c) Non-negligent infliction of harm—duty to help (RR hypo)
 - (1) Caused *risk* of harm, even if not negligent-- duty to warn (car wreck H)
 - d) Reliance on gratuitous promise
 - e) Intentional prevention of aid by others
 - f) Statute
 - (1) Find an implied right of action in the statute
 - (a) Legislature doesn't create the duty, but the court can
 - (b) Negative: court may argue that if the legislature wanted it there, they would've put it there
 - (2) Use a policy analysis & include the statute as part of the analysis
- F. Controlling conduct of third parties
 1. Triangle: where a 3rd party generally is not liable for the actions of others unless there's enhanced foreseeability.
 2. When there's a specific threat to an identifiable person, a professional (w/ special relationship) must take reasonable steps to warn (Tarasoff)
 - a) When there's an identifiable person, foreseeability is higher
 - b) Not statistical probability of hurting someone

Torts Outline

- c) Court worried about creating unbounded liability (Thompson, killed kid in neighborhood, no duty to warn b/c not specifically identifiable)
- 3. If there is a threat of **physical** harm that provides a substantial risk, then there is a duty not to misrepresent (OK to non-represent, you must be truthful)
- 4. A landowner has a duty to take reasonable care to prevent criminal acts on premises if he has enhanced foreseeability. Based on any of these four tests:
 - a) Specific Harm—owner knew (or should've known) the harm was occurring
 - a. Too narrow—very few states do this
 - b) Prior Similar Incidents--# of prior incidents, proximity in time & location
 - (1) 1st victim has no recourse, no prevention incentive (wait til first injury)
 - (a) focuses on crime, not general risk
 - c) Totality of Circumstances—look at previous similar incidents + location, condition of land, etc.
 - (1) Definition of “similar” is a tricky situation
 - (2) Incorporates (1) & (2)
 - d) Balancing—foreseeability of harm against the burden to be imposed
 - (1) Too much like breach
 - e) No clear majority of states that employ a specific rule
- 5. Hostages: No duty to patron to comply with an armed robber's demand for money in order to avoid increasing the risk of harm to patrons
 - a) Consider bright-line rule versus value standards
 - b) Court in *KFC* favored a bright-line rule
- 6. Negligent Entrustment: 3rd party can be liable for conduct of another if s/he:
 - a) Requires:
 - (1) D furnishes dangerous instrumentality
 - (2) has reason to know person poses risk
 - (3) risk materializes
 - b) Dram Shop: Bar liable if they serve someone obviously intoxicated, person drives, & hurts someone
 - (1) Must use reasonable measures to prevent the person from driving
 - (2) If an adult, social activities aren't included
 - (3) If a child, social activities are included

Torts Outline

- c) Social host is usually not liable for giving alcohol to person who hurts another
 - (1) Depends on jurisdiction & age of the drunk person
 - (2) Minor: probably liable
- d) Guns
 - (1) Need a limited class of plaintiffs
 - (2) compare *Beretta* to *McPherson* (defective product)
- 7. Police protection: police do not have unless they voluntarily assume the duty
 - a) Test for voluntary assumption of duty:
 - (1) Victim's direct contact w/ cop
 - (a) Protective order establishes a duty (*Sorichetti*)
 - (b) Mom can act as an agent for child
 - (c) 3rd party w/ no special relationship isn't an agent (*Kircher*)
 - (2) Victim's justifiable reliance on cop (*DeLong*: 911 call)
 - (a) Once you know cops are coming, you may act differently
 - (3) Cop's knowledge that inaction will result in harm
 - b) Limited resources—so cops decide their own priorities
- IV. Emotional harm without physical injury to P – NIED
 - A. Primary harm caused= emotional injury
 - B. Emotional integrity interests are just as strong as physical integrity interests
 - C. Bystander Claims—Indirect Injury; P suffered because witnessed someone's pain
 - 1. Impact Rule (not used anymore)
 - a) Any impact will do
 - 2. Zone of physical Risk/ Zone of Danger
 - a) If bystander could've been hit, too (*Clohessy*—mom & kid crossing street)
 - b) Requires:
 - (1) Serious emotional injury &
 - (2) Closely related to victim
 - c) Minority of JXNs (includes NY)
 - 3. *Dillon/Thing*—Bystander Emotional Harm Rule
 - a) Reasonable foreseeability w/ limiting reqs (*Dillon*: sis & bro, mom watching)
 - b) Requires (limitations to class of Ps) *all* elements to be met:
 - (1) Close relationship to victim &
 - (a) CA: marriage
 - (2) & emotional injury from contemporaneous sensory perception &
 - (3) & victim's injury is substantial &

Torts Outline

- (4) & serious emotional harm to P (Ochoa; juvie kid, no K w/ hall—indirect)
- D. Direct Injury Claims—no physical injury to anyone; P feared for her life
1. Independent Duty
 - a) Special relationship (ie: K—telegraph, funeral home)
 - b) Imposed by law – statute, other duty (Potter v Firestone, fear of cancer)
 - c) Assumption of duty
 - d) Once duty est, res ipsa for breach (Johnson; baby kidnapped from hosp)
 2. Zone of Danger (near miss) Like other?
 - a) Must suffer serious emotional harm
 3. Zone of Foreseeable Emotional Risk (Camper, not widely followed since '96)
 - a) Foreseeability of emotional harm
 - b) Prove all negligence elements, strongly prove emotional harm
 4. Fear of Disease
 - a) Must show MLTN, P will get the thing he's afraid of—ie: bright line
 - (1) Except if: oppression, fraud, malice or
 - (2) Except if: physical symptoms
 - b) Increased risk—only if 50% likelihood
 - c) Medical monitoring damages
 - (1) No double-dip; but damages later for things you didn't claim earlier
- V. Economic loss without Physical injury: generally, no duty except:
- A. Particularly foreseeable class of Ps
 1. so close as to approach privity
 - B. Aim of transaction is to benefit P & actual reliance by P
- VI. Vicarious Liability
- a) Employer responsible if: EE acting within the scope of his job

Duty Skills:

- I. 2 ways to use statute to create duty:
 1. find an implied right of action in the statute itself
 2. or, use a policy analysis & use the statute as part of the analysis
- II. If you can't find a case on point, analogize
- III. If you can't make an exact analogy, the same kinds of policy concerns that were present in ---- are present here.
& in addition, here are the good reasons why applying the analysis is good ...

Think about the reasons cts use to limit duty:

Torts Outline

- Unlimited liability
- No cap for liability
- Need for assurances that it's fair to hold the D responsible

Torts Outline

Breach of Duty

- 1) Breach= unreasonable conduct in light of the foreseeable risk
 - a) Foresight of risk: would a RPP have foreseen the risks?
 - b) & Unreasonable conduct: did D act unreasonably?
 - i) Not what ppl *should* do, but what they *would* do
 - ii) Infallibility not required—ppl allowed to make a mistake a rpp would
 - iii) Reasonableness is in the scope of jury's discretion
 - (1) If person acts on a reasonable instinct, s/he not liable (Lussan v Grain)
 - iv) Appropriateness of standard depends on jury pool & case (car v Ellison)
 - c) Jury represents community as a whole
 - i) When considering jury instruction, consider whether hypothetical rpp std reflects diversity (Edwards v Johnson)
 - ii) Jury decides the truth of the facts
- 2) Exceptions to Reasonable Person Standard
 - a) Emergency Rule
 - i) D can be held to the std of acting in an emergency if:
 - (1) D doesn't create the emergency
 - (2) & D conduct can be excused by the emergency
 - (3) & D ordinarily acted as a rpp
 - ii) Response must be instantaneous or close (S Ct—Foster, w/in 10-15 sec)
 - iii) Jury can conclude that
 - (1) It wasn't an emergency
 - (2) D acted unreasonably given the emergency
 - b) Physical Disability
 - i) Standard: Reasonable person with that disability
 - c) Mental Disability (no exception for majority)
 - i) Majority Standard: Reasonable Person unless mental capacity so impaired that he can't understand and avoid danger (Cooper v. Florence County)
 - (1) Hard to test & can fake
 - (2) But now, science is capable of identifying
 - ii) Minority: care consonant w/ diminished mental capacity
 - iii) Sudden Onset:
 - (1) Majority: analogy to sudden physical illness
 - (2) Minority: reasonable person standard (Bashi v Woodarz)
 - d) Children
 - i) Standard: reasonable kid of the same age, intelligence, maturity, & exp

Torts Outline

- (1) Need expert (teacher, psychologist)
- (2) Why?
 - (a) Kids aren't reasonable
 - (b) Ordinary fun
 - (c) Everyone's been a kid & can understand
- ii) Minimum age for negligence: common law → 7 years old
- iii) Inherently Dangerous/ Adult Activities: reasonable person standard
 - (1) Consequences are more severe
 - (2) People need to depend on the capability of people doing this type of behavior (ie: driving)
- 3) Determining Reasonable Behavior
 - a) RPP under the circumstances (harder to prove)= risk versus untaken precaution
 - b) Hand's risk calculus—a measure of a RPP
 - i) (Probability of Risk)(Seriousness of Risk)>Burden (Carroll Towing)
 - (1) sum of risks mitigated by that specific burden
 - ii) If burden costs *more* than the risks & seriousness, then not liable
 - iii) If burden costs *less*, then liable
 - iv) Problems:
 - (1) When the risk is non-trivial, the calculus is moot
 - (2) Cost is also the social cost
 - v) Punitive damages are to prevent companies from undervaluing social costs
 - c) Untaken Precaution (ie: Hand's "burden")
 - i) P has burden of proof for precaution (McCarty v Pheasant Run Inn)
 - (1) P will focus on strongest precaution
 - (2) Usually, P doesn't have all the info D does
 - (3) Power disparity is a problem
 - ii) Anticipate rebuttal of causal relationship, social cost, etc.
 - iii) Weigh SAFety:
 - (1) Safer
 - (2) Alternative
 - (3) Feasible
 - (4) Cost
 - (5) Utility
 - iv) Also highlight the heightened foreseeability if there's a history
 - d) Custom (easier to prove)
 - i) Used as a factor, but not determinative
 - ii) Showing what other companies do under the circumstances helps:
 - (1) jury set the standard for the circumstances

Torts Outline

- (2) show other alternatives & their feasibility
- iii) P must show:
 - (1) There's a custom
 - (2) D deviated from it
 - (3) Custom is reasonable
- iv) P must be among the class of people custom is designed to protect
- v) Harm & hazard must be the type the custom is designed to protect
- vi) Defenses:
 - (1) What D did was equally reasonable
 - (2) Different industry (little landlord v big landlord)
 - (3) Custom isn't safety-related
 - (4) No custom—find others who don't do it
- vii) If D uses custom:
 - (1) There is a custom & D complied
 - (2) There isn't a custom & D complied with the lack of custom
- viii) If no custom:
 - (1) Std of care is unchanged (TJ Cooper)
 - (2) We don't want to let industry create unreasonable risks b/c cheaper
- 4) Alternatives to RPP std (ie: if they're there, no need to prove RPP)
 - a) Judge-made Standard
 - i) + Makes predictable outcome
 - (1) lower courts can still misunderstand the precedent (Goodman)
 - ii) – infinitely variable facts (Pokara)
 - iii) – technology changes & holds safety technology back
 - b) Statutory Negligence/ Negligence Per Se (easiest to prove)
 - i) Violation of statute
 - (1) RPPs comply with the statute
 - (2) If person doesn't follow the statute, then they're not a RPP
 - ii) & Causal connection-- Look to statute's purpose (Ferrell v Baxter, snowy rd)
 - (1) Who: is P in protected class? (Wright v Brown: yes, no)
 - (2) What: is harm the protected type? (quarantine for rabies, not bites)
 - (3) Why: why did legislature pass this?
 - (a) Language
 - (b) Placement
 - (c) Canons
 - (d) Legislative history
 - (e) Policy (ie: what should they have *wanted* to do?)

Torts Outline

- iii) Excuse
 - (1) D's burden to prove excuse
 - (2) Ignorance, Inability, incapacity, emergency
 - (3) "compliance involves greater risks" = most useful
 - (4) "otherwise reasonable under the circumstances" – minority allow it
- iv) Why use statutes for std of care?
 - (1) Efficiency (flexibility built-in, easy rules)
 - (2) Developed by legislature (expressing the standards of the community)
- v) Courts can choose to use or not to use the statute as reasonableness
 - (1) Majority: strict negligence per se (judge)
 - (2) Minority: evidence of negligence (jury)
 - (3) Very few: presumption of negligence, D's burden for evidence (jury)
- 5) Proof of Negligence
 - a) Evidence
 - i) Direct
 - ii) circumstantial
 - b) Slip & Fall-- requires D's:
 - (1) ACTUAL knowledge: D knew
 - (2) or CONSTRUCTIVE knowledge: D should've known (Kmart grapes)
 - c) Res Ipsa Loquitur ("the thing speaks for itself")
 - i) Requires:
 - (1) Inference that someone was negligent
 - (a) MLTN, accident doesn't happen w/out someone's negligence
 - (2) & Inference that D was negligent (MLTN)
 - (a) Exclusive control over instrumentality (hot water bottle burn)
 - (b) Negligent act occurred while in D's control (Escola v Coca Cola)
 - (c) Negligent act did not occur while in a 3rd party's control
 - (d) P less than 49% negligent
 - (e) (optional) Information disparity
 - ii) Gets past summary judgment to jury, where D may have an excuse
 - (1) Majority: can allege Res Ipsa & a theory
 - (2) Minority: have to pick only one (2 bites of the apple)
 - iii) Instruction: If (i) & (ii), you are *free to find* (but don't have to) D responsible

Torts Outline

- iv) Defenses:
 - (1) If res ipsa & excuse are equally plausible, jury rejects res ipsa
 - (2) Contest elements of RIL--not exclusive control, P negligent (Ybarra)
 - (3) Prove due care was exercised (might blow up & strengthen claim that this sort of thing doesn't happen w/out negligence)
- 6) Professional Standard of Care
 - a) Standard: degree of skill, care, & proficiency of ordinary professional in similar circumstances
 - i) Not just RPP, but includes skill
 - ii) Industry custom is determinative
 - b) Doctor
 - i) Medical malpractice
 - (1) Res ipsa still applies here (Ybarra)
 - (a) Sometimes, need an expert translator (Mireles, numb arm)
 - (b) 1 in 10,000 chance of harm from negligence takes out res ipsa
 - (2) With inherent risks, case is hard to win (Phillips, tubal ligation & preg)
 - ii) Informed Consent, 2 standards:
 - (1) Professional standard: what would a reasonable doc disclose?
 - (2) Patient standard: what would a reasonable patient want to know?
 - (a) Gender differences push most states to patient standard
 - (3) Exceptions:
 - (a) Unconscious in emergency dept & procedure is medically necessary
 - (b) Medically unwise to tell patient all the risks (ie: it risks a heart attack)

Sequence of proof (make a map, first stop is #1):

- 1. Statutory negligence /negligence per se Goes to judge→
Directed verdict
- 2. Res Ipsa (here? Or, equal to custom?) Goes to jury (gets past prima facie)
- 3. Custom Goes to jury
- 4. RPP Goes to jury

Causation

Torts Outline

- 1) CAUSATION:
 - a) Does causal connection exist between P's unreasonable conduct & the harm?
 - b) When D's negligence didn't make a difference, no cause (Grimstad, boat)
- 2) "But for"
 - a) "but for" D's negligence, injury wouldn't have occurred
 - i) Zuchowicz: overdose script—prove OD causes problems for doc to be liable; otherwise, manuf is liable
 - b) Problem: when multiple D's, they can point at each other; then, neither is liable
 - i) Summers: gunshot; Corey: motorcycles; Fugere: 2 cars, 1 accident
- 3) Substantial Factor
 - a) More likely than not (MLTN)= preponderance of the evidence
 - i) Normal & reasonable inference
 - ii) P burden of proof
 - iii) P must show most likely explanation (but not dispose of all others)
 - iv) If 2 explanations are equally likely (& D is resp for only 1 of them), D wins
 - b) Can have more than 1 substantial factor (Smith: fake fur, heater, door open)
 - c) + Concurrent causes
 - d) + Multiple causes
 - i) Contributing to single result
 - ii) Don't let jury think only about the last (most recent) cause
 - e) CA courts
- 4) Proof of Causation
 - a) Circumstantial Evidence (Phillips; assailants would've been deterred)
 - b) Expert Testimony
 - i) Once P's experts allowed into court, settlement comes quickly
 - ii) How much scientific finding is good enough? (see (7))
 - c) Eyewitnesses (Phillips, neighbors knew of incidents)
 - d) Custom (Phillips; nearby restaurant, valet service, no problems)
 - e) Connect theory of breach to theory of causation
- 5) Multiple Defendants who caused harm
 - a) Independent tortfeasors, 1 injury; can you apportion?
 - i) Yes: Separate Liability
(1) Ds liable only for the injuries they caused
 - ii) No: Joint & Several Liability (Fugere; car accident, liver torn, who did it?)

Torts Outline

- (1) All Ds are responsible for full damages, but P collects only once
 - (a) Can you do lead paint manuf here, if only 2 brands in 5 years?
- (2) As you acquire more D's, policy justifications gets more strained
- iii) D's burden to prove apportionment
- b) Concerted Action Liability
 - i) working together (in a parallel fashion) to commit tortious acts (Drag races)
 - ii) If "no," go to (c) or (d), Market Share
- c) Alternative Liability –(here, no but for or substantial factor) cite summers factors!
 - i) Can shift burden to D's to exculpate if:
 - (1) (optional) Ds in better position to know who's negligent
 - (2) (optional) some sort of relationship between them
 - (3) Can't tell which D inflicted the injury but only one can be liable (Summers; shot once, 2 Ds)
 - (4) Both Ds are negligent
 - (5) All of them must be before the court (Barron; toluene cans, only 1 D, but 2 manuf)
 - (6) Relatively concurrent actions
 - (7) Potential of similar harm by each
 - (8) If "no" to any factor, go to (d) Market Share
- d) Market Share Liability
 - i) Can't tell which D inflicted the injury
 - ii) Can't get all Ds before the court
 - iii) Need:
 - (1) National market (some JXNs)
 - (2) Substantial portion of market before the court (before opt out)
 - (a) Opt-out or no opt-out (ex: not sold in state, no red pills)
 - (i) If more than 50% opt-out, then NO #2
 - iv) Helpful:
 - (1) Fungible product (not lead paint)
 - (2) Signature injury
 - (a) (prof doesn't like this, cuz no indication of another cause w/ lead)
 - (3) Legislative signal
 - (4) Discrete time period (house painted sometime in 20 yrs isn't enough)
 - v) Several versus joint & several liability

Torts Outline

(1) Several: NY, CA-- P can only recover up to market share, thus <100%

(2) Ds should re-allocate so P recovers whole damages (some JXNs)

6) General Causation

a) Product/Activity can cause this type of injury (drugs, car accident, overboard)

b) Well-litigated: asbestos, Dalkon Shield (agent orange?)

c) Scientific techniques:

i) Similar chemical structure

(1) Increases odds, but can't get to certainty

ii) Animal testing

(1) Only testing certain substances & certain responses

iii) Epidemiological ("we like these")

(1) + Exposure level similar to P

(2) - can't test fatal substances; have to wait for harm to happen

(3) 2.0= 50% likely that disease was caused by that substance

d) Daubert

i) Factors to help judges assess soundness of methodology

(1) Claims tested & replicated or disproven?

(2) Conclusions subject to scrutiny of scientific community?

(3) Known/potential error rates

(4) General acceptance of the conclusions is a factor, but not determinative

ii) Fed JXN, but influential on states

iii) Judges can twist this anyway they want (Globetti & Gaston: same drug, diff outcome)

iv) - doesn't catch torts before there's too many/ not preventative enough

v) - accentuates the power disparity betw Ps & Ds

7) Specific Causation

a) D's breach caused the harm (OD script, rear-ending, no hand rail or PFD)

Market Share Liability Chart, by State--Just remember that states have diff procedures

Issues	CA	NY	WI	WA
Joinder of Defendants	Sub share, national market	Sub share, national market	All that create risk (case-by-case)	All those not exculpated
Burden of Proof on	Ds can exculpate	No (messes up national	Yes	Yes- Ds left have = shares;

Torts Outline

Causation	Burden on Ds	market shares)		show mkt shres of others
J/S Liability	No	No		Yes -Those left

Torts Outline

Scope of Liability

Does the D's duty extend to the P, the general type of incident that occurred, & the harm P suffered?

SOL is the foreseeability of D's conduct causing the extent of harm to the P that could be expected by the rsble person

Scope of Liability—aka: Proximate Cause

“how far out do we follow the ripples caused by the pebble?”

- 1) Duty= judge question
- 2) SOL= something judge controls, but jury decides
- 3) Red Flags for SOL:
 - a) unexpected group of ppl; unforeseeable Ps
 - b) unexpected type of harm ; unforeseeable consequences
 - c) intervening cause; intervening forces
 - i) Independent of D's conduct: outside SOL
 - ii) Dependent on D's conduct: within SOL
 - (1) Some add: unless highly extraordinary
- 4) 2 Tests
 - a) Direct consequences / Remoteness (Polemis, chartered boat) – minority
 - i) Was damage a direct consequence of D's negligence?
 - ii) Was there foreseeable harm?
 - (1) Need some, but not a lot (exact accident unforeseeable; damage wasn't)
 - iii) Limits:
 - (1) Was it too remote?
 - (2) Were there intervening causes?
 - b) Foreseeable consequences *only* (Palsgraf, firecracker train) – majority approach
 - i) Harm must be in the scope of the risk
 - ii) Duty owed specific class; any damage they suffer b/c of the risk= actionable
 - iii) *Judges like this, b/c they can kick out a case for lack of duty*
 - iv) Don't need to foresee the exact manner of harm, just need to see the general risk
 - v) Minority= Hindsight; knowing what we know now, it was foreseeable
- 5) Framing the issue
 - a) Frame breach so there isn't an SOL issue
 - i) Details v bare minimum
 - (1) P: Stress the normalness of the situation

Torts Outline

- (a) Re-focus: not on firecracker, ask why scale wasn't secured (Palsgraf)
- (2) D: highlight the weirdness
- b) Differences using each SOL theory:
 - i) Foreseeable: Start with a small circle of ppl, then get bigger
 - (1) Within the risk, any & all consequences w/in the danger are actionable
 - ii) Direct Consequences: Start with a big circle, then get smaller
 - iii) *End up with the same size circle*
- c) Statute
 - i) If violated but not negligence per se, look at reasoning for statute
 - (1) Points to foreseeability (McClenahan, keys in ignition)
- 6) Exceptions to Foresight Rule:
 - a) Subsequent medical malpractice complications
 - i) Except if egregious → shifting responsibility
 - ii) Or if apportionable
 - iii) The first tortfeasor pays all damages (ARC can later sue for malpractice)
 - (1) As far as P is concerned, docs aren't responsible
 - (2) As far as D is concerned, docs could be responsible
 - b) Eggshell Skull Rule: "you take the Plaintiff as you find him"
 - i) D liable for *all* damages, regardless of foreseeability (Pace, diabetic)
 - ii) Burden on D to prove he's not liable (ie: the accident didn't cause it)
 - (1) But can't clearly draw the comparative fault line here
 - (2) Cts worried about impinging on peoples' rights to be out in the world
 - c) Rescuer Rule
 - i) If you're negligent & a rescuer is harmed rescuing you, you're responsible
 - ii) Danger invites rescue (of D or 3rd party)
 - (1) ie: it's foreseeable, whether you think it is or not
 - (2) Non-professionals only
 - i) Limited to imminent peril (ie: person needs immediate help)
 - ii) Can't rescue property, unless it's a dog
 - iii) Tries not to discourage people from rescuing others
 - b) Criminal conduct of 3rd parties
 - i) 3rd Party's intentional act must be *reasonably foreseeable* (Bush mask)
 - ii) (& D facilitated the damage caused by 3rd party)? (gun store w/ bad security--overruled)

Torts Outline

- c) Suicide as a result of D's act
 - i) D liable if:
 - (1) P susceptible to mental problem & foreseeable emotional distress
 - (2) & bereft of reason (impulsively killed herself)
 - ii) Limited by time, but 3 months isn't necessarily too much
- 7) Shifting Responsibility
 - a) Intervening act
 - i) Highly extraordinary—gross v regular negligence
 - ii) Unforeseeable independent intervening act
 - b) 3rd party's actions superseded the negligent conduct of the initial actor (McLaughlin, heating blocks in ER)

SOL Analysis in 4 Steps:

1. Existing exceptions to foresight
2. Shifting responsibility
3. Policy
4. Foresight analysis

Torts Outline

Defenses

D's burden to disprove MLTN via raising a defense

Rebuttals to possible defenses should be included in P's prima facie case

- 1) Assumption of Risk: can be duty or breach (ex: diver in hotel pool, baseball seats)
 - a) Express
 - i) Waiver
 - ii) Public policy concerns (prob: no treatment at hospital w/out signing waiver)
 - (1) Necessity
 - (2) Availability of insurance (can you buy your way out of it?)
 - (3) Is it open to the public
 - (4) Does it cover inherent or non-inherent risks? (painting a ski pole white=no)
 - (5) Equal bargaining power (unconscionability)
 - iii) Firefighter's rule: *public servant, paid* to assume a risk
 - (1) Inherent risks: recover
 - (2) Ancillary risks: no recovery
 - b) Implied (voluntarily choosing to confront a known risk)
 - i) Subjective standard
 - (1) Knowledge of the risk
 - (2) Voluntarily chose to confront the risk
 - ii) 2 types of Implied Assumption of Risk:
 - (1) Primary: D has no duty or hasn't breached it (foul ball, baseball game)
 - (2) Secondary: Overlap of assumption of risk & comparative fault
 - (a) P's behavior unreasonable + voluntarily confronted a known risk
 - iii) Traditionally, this was enough to completely bar recovery
 - (1) What is CA's rule now—only in overlap? ie: knowing & having no choice?
 - (2) Some cts threw this out, b/c it's an inquiry into P's subj state of mind
- 2) Comparative fault
 - a) P doesn't act per standard of care (usually, rpp)
 - b) Objective standard
 - i) We don't care what they were thinking, we just compare to a rpp
 - a) Analyzed like negligence, assuming a duty to yourself
 - b) Reduces recovery, but doesn't bar recovery—3 systems
 - i) Pure: just a percentage (CA)

Torts Outline

- ii) Cutoff
 - (1) Modified 50%
 - (2) Modified 51%
 - iii) Every state except 2 has a version of (i) & (ii); JXN nuances all over the map
 - iv) Problems (resolved differently in different JXNs)
 - (1) Both injured, both at fault
 - (a) Each should pay for their own part
 - (b) Net difference gives insurance companies a windfall
 - (2) Absent or insolvent Ds; depends on JXN:
 - (a) Reallocate among all Ds
 - (b) **Reallocate among Ps & P takes a hit**
 - (c) Take absent/insolvent's share off the top
 - (i) Some states include/exclude absent intentional tortfeasors
 - (ii) - If you allow absent int'l tortfeasor, P usually doesn't collect
 - (3) Economic v non-economic
 - (a) CA: treats P&S differently
 - (4) What do you tell the jury?
 - (a) Do you tell them what happens if they find a P 50% at fault?
 - (b) Do you want it to influence what the jury will do?
- 3) Immunities
- a) Parent/child, spousal—**fallen together or modified**
 - b) Government Discretionary function
 - i) Is there discretion?
 - (1) Previously-made decision (statute, regulation, etc.): discretionary
 - (2) Day-to-day decision: not discretionary
 - (3) Decision that takes effect in the future: generally, discretionary
 - ii) Is it a result of policy, planning, etc.?
 - (1) Involve economic, social, political factors that legis wanted to immunize?
 - (a) This question helps to draw the line between choices
 - iii) Don't want to immunize the choices that don't involve socioeconomic plans
 - iv) Want to immunize policymakers
 - (1) B/c don't want to step on the toes of other branches of gov't
 - (2) Imposing liability may chill gov't decision-making process
- 4) Major categories of damages for personal injury

Torts Outline

Strict Liability

- 1) Abnormally dangerous activities
 - a) Certain activities that, by their nature, cannot be made safe
 - b) Those activities are subject to strict liability (ie: dynamite)
 - c) Not many activities fall into this
- 2) Products Liability
 - a) If there's a negligence action, bring that; if there's both, bring both
 - b) Why?
 - i) Burden-sharing: cost-spreading (more sense than putting it all on victim)
 - ii) Deterrence: builds market incentive for making safe products
 - iii) Administrative ease: shifts decision from ct to manufacture
 - iv) Ds have better access to info about the relative safety of their product
 - c) Warranty
 - i) Implied: things have to be of normal quality/ not defective
 - ii) Express (ie: "safe & non-toxic") violation = actionable
 - iii) -limited, privity limitations, manuf defines terms of warranty
 - d) Hindsight (not foresight) det. liability—based on product & what manuf knew
 - i) Assume manuf knows the state of the art (most cts do this)
 - ii) Not many cts have pushed this so far as to not care what manuf knew
 - iii) Where ct suspect manuf knows, but can't prove, may allow design defect case in strict liability
 - e) Doesn't require fault, b/c its based on cost-spreading rationale
 - f) Prescription Drugs: can only use strict liability for manufacturing defect
 - i) For design or warning defect, you must sue in negligence
 - g) Duty: "is D a seller of the good in question?"
 - h) Breach: Defective= unreasonably dangerous
 - i) Manufacturing: deviation from manuf's specs (easiest to prove; settlement)
 - ii) Design
 - (1) Consumer expectations test (not good for when you need an expert)
 - (a) Would an ordinary consumer expect product to... (Kutzler)
 - (b) -when defect is open & obvious, D wins
 - (c) - when ordinary ppl don't know about a part, D wins (toe pan)
 - (2) Risk-utility test (like negligence/Hand formula) (CA uses this)
 - (a) Balance:

Torts Outline

- (i) Cost
- (ii) Effectiveness: probability & severity
- (iii) Adverse effects on utility & safety
- (b) Burden on D
- (c) Focuses on the product, not the manuf's conduct
 - (i) Can have evidence of a redesign—b/c not concerned about fault
 - (ii) Presumes manuf knows everything they should know
- (d) Majority of cts use Feldman Standard:
 - (i) D's burden
 - (ii) state of the art knowledge at the time of product sale to P
- (3) Reasonable alternative design (RAD)—only in restatement 3d
 - (a) P's burden to show it's reasonably possible
 - (b) – implies product should be on mkt (if unsafe, what's it doin there?)
 - (c) don't need RAD when: res ipsa, statutory violation, no social utility to the thing this is so dangerous, nothing can be done to make it less
 - (d) assumption of risk is viable defense, although may be warning prob
- (4) Exception: custom orders
 - (a) If manuf is given specs & can't comment: not liable
 - (b) If manuf has opportunity to suggest changes: liable
- iii) Inadequate warning
 - (1) Necessity
 - (a) Should there be a warning? Misuse must be foreseeable
 - (b) Cannot fix design defect by using a warning!
 - (c) If risk is serious & the cost of warning is slight: there should be a warning
 - (i) Don't risk the "overwarning" scenario
 - (ii) Don't want warning so unique it hinders social utility of product
 - (d) Unknowable risks
 - (i) Test at time of distribution
 - (ii) *Presume* D knows state of art (=scientific + tech know, best pract)
 - (iii) D bears burden of showing state of art
 - (2) Adequacy
 - (a) Explicitness/intensity, comprehensibility, clarity, conspicuousness, means, intended/foreseeable audience (Faberger)

Torts Outline

- (b) Learned Intermediary: enough to adequately warn doc
(eg: drugs)
 - (i) Aka: "Bulk Supplier Rule"
- i) Causation
 - i) Defect linked to injury (general & specific)
 - ii) Defective when marketed (Feldman; state of the art at the time of sale)
 - (1) Manuf must know state of art (generally recognize & best information)
 - (2) CA exception: not for prescription drugs; only manuf defects actionable
- j) SOL
 - i) Frsble use
 - ii) Frsble user
- k) Punitive Damage Standard: must have malice (Grimshaw)
 - i) For deterrence, you need punitive damages that company can't anticipate & work into a "recall formula" that values human lives
 - ii) "Gross disproportionality": S.Ct. said shouldn't be more than a factor of 10
- l) California:
 - i) All products (except drugs): manuf must know state of the art
 - ii) Prescription drugs: only manuf defects strictly liable
 - (1) Unknowable risks, design, & warning must be sued under negligence
- m) What's covered:
 - i) Sale or lease
 - ii) Sales promo giveaway
 - iii) Courtesy loan of equipment
 - iv) Rebuilding or redesign of equipment
 - v) Certification of the safety of a product
 - vi) Trademark license
 - vii) Building development (followed once, questioned once)
- n) What's not covered:
 - i) Defective installation of a tire
 - ii) Endorsement of a product (but questioned)
 - iii) Medical services (surgery, optometry, dentist)
 - iv) LL & hotel owners
 - v) Financing of purchases
 - vi) Used good sales (b/c inspection expected?)
- o) Types of harm covered
 - i) Personal injury to users or consumers
 - ii) Crashworthiness

Torts Outline

- iii) Damage to other property
- iv) Damage to product itself
- 3) Intentional Torts
 - a) Differences from negligence:
 - i) Looks at the perpetrator's state of mind (w/ circ evidence)
 - ii) Punitive damages assessed here
 - iii) SOL broader: even unfrsbl acts along the chain, can make D liable
 - iv) Insurance & workers comp don't cover intentional torts (& no Vic Liab?)
 - b) Elements:
 - i) Intent; either:
 - (1) Purpose or desire
 - (2) Substantial certainty
 - (3) Transferred intent
 - (a) D liable for any of the consequences that follow from someone intending to IT someone else, but a 3rd party gets injured in any one of the following 5 ways.
 - (i) Battery
 - (ii) Assault
 - (iii) Trespass: land & chattels
 - (iv) False imprisonment
 - (b) Intent to cause harm transfers, but your intent to defend yourself doesn't
 - ii) Causation: but for D's affirmative voluntary act, P wouldn't've been harmed
 - iii) Harmful/Offensive Contact: H or O to a rsble person
 - iv) To a person: w/ person's body or something attached or closely associated
 - c) Assault
 - i) Threat
 - ii) Imminent harm
 - iii) (action indicating apparent ability/intent)
 - (1) generally, words alone won't do it; need ability & intent
 - (2) subjective: if victim perceives the threat as apparent
 - (a) compare relative strength/danger of aggressor v victim (Vetter)
 - iv) Victim's rsble apprehension of imminent harm
 - (1) If you can't apprehend it, assault not committed
 - (2) Don't need to follow through with the threat
 - (3) Conditional threat: "your money or your life," is an assault
 - v) Goal: mental tranquility (ppl shouldn't have to worry about this)
 - vi) Ability to defend yourself doesn't preclude assault

Torts Outline

- d) Battery (offends dignity)
 - i) Requires:
 - (1) Intentional
 - (a) Intent to cause harm (that ensues)
 - (i) ER's recklessness won't cut it here (Brown, graveyard shift)
 - (b) Intent to contact w/ knowledge that it'll harm
 - (i) Elderly/senile & children can be liable here (White v Muniz)
 - (c) Intent that the contact will harm or offend
 - (i) Dignity tort; just prove moral element (black man's plate taken)
 - (d) Intent to contact (touch)
 - (2) Harmful or offensive
 - (a) Not a rpp std necessarily
 - (b) If D knows P would be offended, that's enough
 - (3) Contact
 - ii) Nominal damages OK in battery, b/c punitive award
 - iii) Battery can occur w/out victim's awareness of it at the time (ie: asleep)
- e) Intentional Infliction of Emotional Distress
 - i) Requires:
 - (1) Intent to cause...
 - (a) Purpose or desire, or
 - (b) Substantial certainty, or
 - (c) Recklessness/conscious disregard (recklessness is enough) (Twyman)
 - (2) Extreme & outrageous (doesn't apply to assault)
 - (a) prevents over-sensitivity from being actionable
 - (b) Necessary power differentials raise a red flag (attorney, employer)
 - (c) Has to be more than words, but if words E&O enough, ct can say so
 - (d) Signs of E & O behavior:
 - (i) abuses position of power (Logan, gay, no power abuse, no ILED)
 - (ii) knows P's vulnerability & takes advantage of that
 - (iii) racial epithets (Alcorn)
 - 1. can evaluate a group's history of discrimination
 - (3) Causing... ("but for")
 - (4) ...Severe emotional distress
 - (a) rsble person of ordinary sensibilities, unless D target's P's sensitivities

Torts Outline

- (b) obj evidence helpful but not required (SED level differs via JXN)
- ii) Evaluate the context for elements 1,2,& 4
- iii) Circumstantial evidence for intent OK (Swenson, ER demoted her)
- iv) No imminence → future threat is actionable
- f) False Imprisonment
 - i) Wrongful confinement/restraint
 - (1) Force, threats, fraud
 - (2) In cases of fraud, P doesn't need to be aware of confinement (Skofield)
 - ii) Intent to confine
 - (1) Emergent's Privilege: detention not FI if it's limited to time nec to det if they stole something or not
 - (2) **Are security guards privileged?**
- g) Defenses to Intentional Torts
 - i) Consent (if you consent, there isn't an injury)
 - (1) Same idea as assumption of the risk (Hellriegel, boy paralyzed)
 - (2) Fight: (cts go both ways on this issue)
 - (a) Both consent (restatement): neither recover
 - (b) Can't consent (b/c fight is illegal): both recover
 - (3) Actual or Apparent consent:
 - (a) Apparent= Even though she's thinking "no," if her actions say "yes," she may be consenting (Reavis, dental assistant; Ellis Island)
 - (b) For consent to be effective, must not:
 - (i) Duress, fraud (if power diff, hard to say it's effective consent)
 - (ii) Mental incompetence if D knows about incompetence
 - ii) Self-Defense
 - (1) If she rsbly believes she's threatened with harm
 - (2) She can use force proportional to the force she's threatened with
 - (a) Deadly force only in response to deadly or serious threat (Bradley)
 - (b) Factors: Age, sex, strength, prior violent history, presence of other ppl
 - (3) If she later learns that she was wrong, it's still self-defense
 - (a) If she rsbly perceived the harm, then actions are justifiable
 - (4) Aggressor can never claim self-defense
 - (a) unless withdraws by:
 - (i) Abandoning fight

Torts Outline

- (ii) Withdrawing
- (iii) Notifying the other party (Juarez-Martinez, LL/ER pours beer)
 - (b) Can't subjectively think this; has to let other guy know
 - (c) Jury decides whether withdrawal effective
- (5) Retreat: If innocent person attacked in own home, don't need to retreat
- iii) Defense of others
 - (1) Rules about reasonableness apply here, too
 - (2) Diff betw self-d & d of others: reasonable mistake makes actions unjustified
- iv) Defense of Property
 - (1) No deadly force in defense of stuff
 - (2) Deadly force= intended to inflict death or serious bodily injury
 - (3) Lethal weapon aimed anywhere at the body is deadly force (springgun)
 - (4) Problems occur w/ things you can't see that are dangerous
- v) Defense of necessity (briefly)
 - (1) Privileged to cause some harm in order to avoid greater harm
 - (2) Public: Gov't agency - doesn't need to pay you back
 - (3) Private: private citizen - needs to pay you back

Damages

- I. Earnings losses & Medical expenses
 - A. Past earnings losses & future earning power
 - 1. loss of household services
 - B. Past & future medical & hospital expenses
 - 1. medical inflation has outpaced the general inflation
- II. Pain, Suffering, & Emotional Distress
 - A. Consortium: harm suffered by a life partner of an injured victim (companionship, sexual relations, affection)
 - B. Anxiety is not like fear (fear is abated when danger is removed)
 - 1. physical manifestations
 - C. mental suffering: there have been serious physical injuries
 - D. emotional distress: mental suffering is the major injury
 - E. proof: nurses notes are good indications of an objective observer's evaluation of someone's pain
 - F. mental anguish for pre-impact emotional distress
- III. Loss of Enjoyment of Life
 - A. Hedonic damages—gardening, playing sports w/ children, go to movies, etc.
 - B. Sometimes w/in category of pain & suffering

Torts Outline

Torts Outline

Skills:

Format

Incorporate rules with fact analysis & only mention a rule if you'll use it
Should have 3-5 major issues that have good discussions

Don't forgo these for minor issues

Go for the fact-rich areas

Prioritize strongest rebuttal

Claim order: likely Ds, then far-out, on the edge Ds

Use Subheadings; Don't repeat; just refer back

Take them one precaution at a time & develop them

Or, develop the best one;

don't bring up a few untaken precautions & not discuss any of them

If time constraints, don't do a summary introduction

*also, bring in facts to each element of this argument

- Know rules & the facts that gave rise to them
- Issue-spot
- Apply rules → which go where & what facts give rise to what issue

If no case citation, argue really well

Keep it simple: Don't go on & on where we'll agree

ie: "doc/patient relationship—not an issue;" "negligence claim against er barred"

Argue what we'll disagree

Even if negligence per se, go over causation in case judge doesn't agree

How to overrule existing case law

- A. Work within existing case law
- B. Make distinctions with the facts & era
- C. Make policy arguments

Law plays several roles:

- Compliance (after-the-fact, you did wrong & now you're punished)
- Norm-creating (we are setting out the appropriate stds of behavior)

Breach: answer "How do we know precaution should've been taken?"

Look at any statute prof provides *carefully*—to see if it really does apply in this case

Argue for an implied right of civil action; then, go on & act like it doesn't

Policy Analysis: A FairDEAL: policy considerations a ct considers when making a duty

Allocation of loss (compensation)	Fairness	Deterrence
Economic Considerations	Administrative Concerns of Courts	
Legislative Consideration		

Torts Outline

<u>Negligence</u>	<u>Strict Liability</u>	<u>Intentional</u> <u>Torts</u>
Reasonableness	CE, RU	Intent
Custom	State of art	E&O

Duty tip-offs: Misfeasance, Nonfeasance, Triangle of relationships,
Conditions on land, Emotional distress

Without these, don't say any more unless there are 2 sides

Emotional harm parasitic on injury: cause of action = injury