Torts Outline

1. **Intentional Torts – Intentional Harms to persons or property (7 Intentional Torts)**
   1. **2 Ways of proving Intent**
      1. The act was purposefully done.
      2. Knowledge of substantially certainty that such contacts resulting harm would happen.
      3. Transfer of Intent
         1. Intent transfers between different intentional torts
            1. Intending to commit battery transfers to assault
         2. Intent transfer between different victims
            1. Intended to hit one person but hit a different person instead.
      4. **Damages not a requirement of Intentional Torts.**
   2. **Battery**
      1. An actor is subject to liability to another for battery if

(a) An act intending to cause an unconsented contact with another person or a third person

(b)and harmful or offensive contact with the person directly or indirectly results.

* + - 1. Must be more than an intent to act 🡪 intent to cause harmful contact
      2. Contact + apprehension (fear) = battery
         1. Even if contact was not intended, if fear was intended it is a battery
         2. A bodily contact is offensive if it offends a reasonable sense of personal dignity
    1. Single Intent v. Dual Intent - Jurisdiction
       1. Single Intent: Intent to cause contact only (3rd Restatement)
          1. Only need to prove that contact occurred
          2. Do not need to prove that there was an intent to harm/offend
       2. Dual Intent: Intent to cause contact and harm (2nd Restatement)
          1. Harm doesn’t have to be intentional, only the contact.
    2. Offensive Contact
       1. Indirect Contact – doesn’t have to be harm to body
          1. As long as there is contact with clothing or an object closely identified with the body.
          2. Snatching plate (Carrousel)
          3. Intentional act that contacts something connected to person, that offends a reasonable person 🡪 battery
       2. Must be offense to a reasonable sense of dignity
          1. Intentionally blowing smoke, ripping plate out of hand while yelling racial slurs.
       3. Is the contact offensive to a reasonable person in the victim’s circumstance?
          1. Doesn’t matter what the tortfeasor (person who commits the tort) finds reasonably offensive
       4. Prior relationships can affect courts with regard to the nature of the offensive contact.
  1. **Assault**
     1. Acting to cause apprehension of imminent harmful or offensive bodily contact
     2. Failed attempt of battery – Contact not necessary
        1. If defendant intends contact, but only caused apprehension, D is liable for assault
     3. An actor is subject to liability to another for assault if

(a) The actor intends to cause the other to apprehend that a harmful or offensive contact with his or her person is imminent;

(b) The actor’s conduct causes the other to apprehend that a harmful or offensive contact with his or her person is imminent; and

(c) The other does not actually consent to the [apprehension] [contact]

* + 1. Apprehension must be caused by a reasonable event
    2. Words alone cannot be assault.
       1. Additional circumstances can make something an assault (Vetter)
          1. Words + acts/circumstances = reasonable apprehension of imminent harmful or offensive contact
    3. If you have knowledge that it will scare, this is intent.
    4. There can be no assault if there is no knowledge of the act.
       1. Plaintiff has to be aware of the apprehension of physical harm
    5. Threat of harm must be imminent
       1. Not assault if someone threatens to harm the next day
    6. Actor must have apparent ability to cause bodily harm to a reasonable person.
  1. **False Imprisonment**
     1. Intentional, unlawful, and unconsented restraint by one person of the physical liberty of another(or group).
     2. Five Ways to accomplish FP
        1. Actual or Apparent Physical barrier
        2. Overpowering physical force or submission to physical force
        3. Supposed authority (faking police authority)
        4. Threat of physical force towards escape attempt
           1. Requires threat and apparent intention/ability to apply force/carry out the threat
        5. Submission of duress
           1. Imprison someone by way of threat to others
     3. Defenses
        1. Prisoner must request/attempt to escape
           1. (Herbst): prisoners never requested
        2. Confiner must have ability to confine
           1. *Herbst:* 3-1 against a small lady
        3. There must not be another escape
           1. Swimming away is not a reasonable means to escape
        4. Person must be aware they are being confined
  2. **IIED**
     1. Elements
        1. Extreme/Outrageous conduct by the defendant
           1. Outrageous can depend on nature of the parties

Ins. Co using bargaining power is outrageous

* + - 1. Intention of causing, or reckless disregard of the probability of causing, emotional distress
         1. Even if low probability 🡪 still IIED if harm is great and if easy to prevent.
         2. Reckless disregard 🡪 intent is not necessary to prove

It is a conscious disregard of a duty

* + - 1. Causal connection of harm and conduct
         1. Plaintiff did indeed suffer extreme emotional distress
      2. Actual and proximate causation between distress and conduct
         1. Easier to prove w/ intense physical manifestations
         2. Cannot be a mere passing nervous breakdown
    1. Recklessness - Intent is not necessary
       1. IIED – Reckless v. Negligence: Reckless is *consciously* disregarding a duty.
       2. Reckless provides another way to prove IIED b/c cannot fall back on negligence and intent is hard to prove.
  1. **Trespass to Land**
     1. Traditional Rule: Must show that entry was done intentionally
        1. Lights, noises and odors are not treated as a trespass
        2. Defendant need not know that the entry is wrongful or even that it is an entry.
     2. Broader Modern Approach: Covers visible or invisible matters or energy so long as that piece of matter or energy invades possessor’s exclusive interest/possession
     3. Definition
        1. Deprivation of exclusive possession of property
           1. Interference with exclusive interest of land
           2. Interference with use and enjoyment of land
        2. Trespasser does not have to be aware that their entry is wrongful
        3. Do not have to show actual damages
     4. Must be of a certain degree
        1. Particle matter can be a trespass depending on force
        2. Throwing grain of sand onto land 🡪 no trespass
     5. **Nuisance (See below separate section)**
        1. An act that diminishes the enjoyment of land.
           1. Substantial or unreasonable interference with the enjoyment of land
        2. Have to show actual damages.
           1. Shining light into theater takes away from the show.
        3. Some injury or harm results
           1. Not an intentional tort – have to prove damages
        4. No proof of physical entry onto land required
  2. **Trespass to Chattels**
     1. Must Prove Intent to interfere w/ property and damages
     2. Definition
        1. Loss caused by interference of one’s right to posses
        2. Involves a less substantial interference than with conversion
        3. Must prove actual damages
           1. Measured by diminished value
           2. Damages for repairs
           3. Loss of use
     3. Ways to take possession of Chattel
        1. Taking a chattel from another without consent
        2. Obtaining possession of a chattel from another by fraud or duress
        3. Barring the possessor access to a chattel
        4. Destroying a chattel while in another’s possession
        5. Taking a chattel into custody of the law.
     4. Remedies
        1. Repairs, loss of use, and incidental damages
     5. Valuable Information
        1. Information and ideas are not protected as property for purposes of conversion/trespass to chattels
           1. Exceptions: literary property; scientific invention
  3. **Conversion**
     1. Definition
        1. Complete or substantial deprivation of property
           1. Outright destruction or long-term interference
        2. Defendant treats the property as their own
     2. Must be intentional
     3. Remedy
        1. Typically requires full compensation of the chattel
        2. Plaintiff can recover fair market value plus incidentals
     4. Liability w/o proving actual damages.

1. **Defenses to Intentional Torts (5 defenses)**
   1. **Consent**
      1. A is not liable if B consented to the act
      2. Negates
         1. The offensiveness of a touching
         2. Confinement
      3. Objective test is applied to determine if consent was given
         1. Words/conduct of a person would believe that another has consented
            1. Consent 🡪 external manifestations
         2. Not measured through subjective feelings/thoughts
      4. Includes incidental contact of sport
         1. Some jurisdictions include rules and *customs* of sport
         2. Injuries outside the rules of sport are not consented to
            1. Unprovoked attack after the game ended
      5. Negated if induced via misrepresentation/coerced
         1. Misrepresentation of nature of invasion (HPV Case)
         2. Misrepresentation of extent of harm to be expected
   2. **Self-Defense**
      1. Must believe that a real danger exists, and that belief must also be reasonable
         1. It is not enough to feel threatened, a reasonable person in the same circumstances must also perceive threat
      2. Reasonable belief that danger/harm exists
         1. May use force to eliminate harm
      3. Reasonable force to stop the harm
         1. Force that a prudent person would use
         2. Deadly force only if deadly force is being used in attack
         3. No deadly force if can reasonably escape
            1. Except if escape is home or place of business
      4. Stop defending when threat is gone.
   3. **Defense to Others**
      1. Actor need only reasonable belief that other has right to self-defend
      2. If there was no right 🡪 actor only needs to prove belief was reasonable
   4. **Defense of Property**
      1. Must use reasonable force to defend property
      2. Warnings do not privilege one’s actions
         1. A warning about a spring-gun would not hold the property owner exempt
      3. It is not reasonable to use deadly force to protect property
         1. Property is not as important as human life
         2. Katko – spring gun not reasonable
         3. Exception: fighting off another deadly force/crime punishable by death
      4. Necessary force is permitted to recover property
         1. Must cease force once property is returned
            1. Cannot detain persons once property is returned (*Teel*)
            2. Superseding statutes (stores holding custody)
   5. **Necessity**
      1. Emergency situation provides limited privilege to commit intentional tort
      2. Human life is more important than property
         1. Human life is more important than property
         2. Person may trespass if the trespass is reasonably necessary to avoid the threat of injury and injury is more serious than the invasion caused by avoiding injury
      3. If damages are caused 🡪 May still have to pay damages
         1. Cannot trespass for mere convenience
2. **Negligence**
   1. Overview of Negligence Elements (**Plaintiff must prove all**)
      1. Duty
         1. The duty to exercise reasonable care
         2. Defendant has duty to conform to a specific standard of conduct
         3. Matter of law for the judges to decide
      2. Breach
         1. Failure to exercise reasonable care
         2. Hand Formula: B<PL – determines if there was a breach
      3. Cause in-fact
         1. Harm/injury would not have happened but-for Defendant’s conduct
      4. Proximate Cause
         1. Foreseeability of harm/injury
      5. Damages
         1. Plaintiff must prove actual damages for negligence
   2. Courts do not take into account
      1. Inferior Abilities
      2. Insanity
      3. Superior Abilities
      4. Intoxication
   3. Courts do take into account
      1. Physical disabilities
         1. A disabled person is held to the same standard as a reasonable person with the same disability
   4. Children: courts look at “age, intelligence and experience”
      1. Ages 0-7: child incapable of negligence
         1. Third Restatement: Child under 5 is incapable of negligence
      2. Ages 7-14: Child incapable of negligence, but the presumption could be rebutted
      3. Ages 14+: Child capable of negligence, but the presumption could be rebutted
      4. Exception: If the child is partaking in an adult-only activity
3. **Element #2 Breach** 
   1. Failure to Exercise reasonable care (Reasonable Person)
      1. Cost Benefit Analysis
         1. Hand’s Formula: B<PL
            1. Burden < Probability of accident \* Degree of Loss/Harm 🡪 breach
            2. If B is drastically less than PL, defendant was reckless
            3. Relates to the relationship between the plaintiff and the defendant
         2. What is the burden on defendant to redress conduct?
         3. What is the probability that conduct will lead to injury/loss?
         4. If there is a loss, how devastating will the injury/harm be?
         5. Not dispositive but a common tool
         6. Objective standard of reasonable care
         7. Would a reasonable person take precautions?
         8. **Usually a question of fact for the jury – Common Sense**
      2. No diminished mental capacity 🡪 objective test
         1. No exceptions for cognitive deficiencies/bad judgment
            1. Low IQ, diminished mental capacity

Policy: prevent low IQ from having high responsibility

* + - 1. Mental incapacities/insanity
         1. Policy: those in charge must be extra careful
      2. Intoxication
         1. Courts do not forgive defendant for intoxication as the conduct would be negligent if committed by a sober person.
      3. Court’s reasons to not allow mental limitations:
         1. You can see physical limitations but not mental limitations.
         2. Courts have a hard time distinguishing mental capacities.
         3. Fear people will fake mental diminishments.
    1. Industry Custom
       1. Not necessarily dispositive on the question of reasonable care
       2. Can be relevant in determining if defendant exercised reasonable care
          1. Does not preclude the possibility of breach (radio on boat)
       3. Observance shows evidence of due care but not conclusive
    2. Superior Abilities
       1. Acting within superior capacity
          1. Surgeon performing surgery
       2. Courts will factor superior abilities
    3. Physical Handicaps
       1. What would a reasonable person with that handicap do?
       2. Court takes blindness into account when assessing breach (Roberts)
    4. Children Exceptions
       1. Children are held at subjective level of reasonable care
          1. Children develop at different rates
       2. Adult Activity Exception
          1. Adult activities involve those that require a license or requires great risk

Driving, hunting, etc..

* + - * 1. R3rd: Under 5 years 🡪 no negligence
  1. Violation of Statute – Negligence Per Se
     1. Breach Element: If a party is negligent per se 🡪 they have automatically breached the duty
        1. Penal statute being interpreted for tort law
        2. No need for B<PL formula
     2. **Test of Negligence per se**:
        1. Statute must give specific standard
           1. Gives people a chance to conform their behavior
        2. Defendant must violate the Standard
        3. Injured party must be in the class of persons sought to be protected by the statute
           1. Employee injured v. consumer protection (Potts)
        4. Harm suffered must be protected by statute
           1. Sheep washing overboard v. disease spread (Gorris)
     3. Five excuses for violation of a statute
        1. No breach if following statute results in greater harm
           1. Walking on wrong side of road 🡪 safer (Tedla)
        2. Actor exercises reasonable care in attempting to comply with the statute
        3. Infancy
        4. Person violating statute neither knew or should have known the rule which made the statute applicable
           1. Ex: there’s a rule not to get within 10 feet of “something,” but you can’t see the “something”
        5. Actor violates statute due to confusing way the standards are communicated with the public
           1. Ex: Two different speed limit signs posted
     4. Exceptional statutes that do not permit the defense of contributory negligence (they have absolute liability)
        1. Child labor statutes
        2. Statutes for the protection of intoxicated persons
        3. Statutes prohibiting the sale of dangerous articles to minors
  2. Res Ipsa Loquitor
     1. Allows plaintiff to meet the presumption of breach without direct evidence
     2. 3 requirements
        1. Inference of Negligence
           1. Must be of a kind which does not ordinarily occur in the absence of someone’s negligence.

Waking up w/ sponge

Truck getting stuck under freeway

* + - 1. Defendant must have exclusive control
         1. Exclusive control = exclusive responsibility
         2. Accident must be caused by an agency or instrumentality within the exclusive control of the defendant
      2. Negligence in no way was due to plaintiff.
         1. Accident must not be due to any voluntary action by the plaintiff
    1. Mechanical Rule
       1. Some courts require expert testimony if case involves mechanical part

1. **Element #3 Cause in-fact: \*\*\*Burden of proof is on the Plaintiff to establish\*\*\***
   1. The But-for Test
      1. 3rd R §26 “conduct is a factual cause of harm when the harm would not have occurred absent the conduct”
         1. But-For the defendant’s conduct, the plaintiff’s harm would not have occured
      2. Sole and only cause for an injury/negligent act
         1. Can not be speculative – must be dispositive
         2. Does not address subjective mindset
            1. Would the bottle thrower act if lights had been turned on? (East Texas)
      3. If 2 or more defendants contribute to a harm and but-for their contribution there would be no harm 🡪 they are both but-for cause
   2. Multiple Sufficient Causes Test (Substantial Factor)
      1. Third Restatement § 27: If multiple acts occur, each of which *under section 26 alone* would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm
      2. Multiple But/For tests satisfied
         1. Two competing causes that standing alone would be but/for cause of harm
         2. Both causes are held to be cause-in-fact
         3. Avoids competing causes pinning the other
      3. Threshold Contribution
         1. Multiple competing causes that appear close in contribution
         2. Low threshold for harm/injury
            1. 3 asbestos exposures, only need 10% of total for harm (Mavroudis)
      4. Broad v. Narrow
         1. Narrow: Each cause is sufficient alone to cause injury
         2. Broad: competing causes are not sufficient alone but they made a significant contribution
            1. Some CT’s will not apply (*June*)
            2. Considers causal set theory
      5. Causal Set Theory (no courts have adopted this yet)
         1. No one in set is sufficient or necessary but harm happens
            1. Two people on car and third comes in and tips
         2. Theory to hold liability w/o but/for or substantial factor
         3. Hypothetical: ABC push car off cliff
            1. Neither A, B, or C are a factual cause of the harm
            2. Sufficient causal sets: A/B, B/C, A/C

As a part of the causal set, A, B, or C can be held liable

Each individual just needs to be a part of the causal set to be held liable

* 1. Alternative Liability Theory
     1. Two or more Defendant’s acted tortuously but only one caused harm
        1. Two hunters shoot friend (*Summer v. Tice*)
        2. Cannot be used if only one defendant acted tortuously and plaintiff merely cannot distinguish between the defendants (*Pennfield pigs*)
     2. **Burden shifts to Defendant to prove innocence**
     3. Requires all defendants present in suit to apply
     4. All defendants must have breached the duty
  2. Market Share Theory
     1. When impossible to ID all defendants - hundreds, thousands (*Sindell*)
     2. **Burden shifts to defendants to prove they are not at fault**
     3. defendants that are named are liable for % contributed to entire market
     4. Usually limited to DES cases
  3. Concerted Action
     1. Must show that a tacit agreement existed among defendants to perform a tortious act
     2. Element #1 - A tort of common design committed with another person
        1. Drag racing
     3. Element #2 - Person knows conduct is tortious and provides encouragement
        1. Encouraging to speed
     4. Element #3 - Gives substantial assistance to the other in committing a tort and his own conduct, separately considered, constitutes a breach of duty to the third person.
     5. Mere knowledge of tortious acts is not sufficient to prove concerted action
        1. Each defendant charged with responsibility must proceed to act tortuously (act w/ intent to commit a tort or with negligence)
  4. Lost Opportunity Doctrine
     1. Defendant’s negligence caused plaintiff to miss out on a chance at an opportunity
     2. Strong and applicable within the medical malpractice context
        1. Third Restatement § 26: confines doctrine to MM cases
     3. Harm is the deprivation of a % chance at an opportunity
        1. Opportunity to live (medical case)
           1. Talking about the chance of the plaintiff to survive
        2. Most lost opportunity is applied to medical malpractice
     4. Does not consider emotional suffering
     5. The lost opportunity must be 50% or more chance at opportunity
        1. Some courts grant lost opportunity for less than 50%
           1. Not in *Grant v. American National Red Cross*
  5. Apportionment of Damages – Multiple Defendants
     1. **Inextricable Tangle of Injury Rule/Single Indivisible Injury:** Each defendant may be held to a joint and several liability for the entire damages or injuries suffered by the plaintiff, because of the indivisibility of the harm caused by the separate acts of negligence, except that the plaintiff may not collect, from all of the defendants together, more than those damages.
        1. Burden shifts to Defendants to prove innocence
           1. If plaintiff had opportunity to fix and doesn’t, burden shifts to plaintiff (going to doctor)
        2. Multiple causes, all tortious, burden shifts to the defendant (*Holtz*)
        3. Multiple causes, one tortious and one pre-existing/innocent, some courts will shift burden to the defendant and some will not
           1. Not = *Follett, Blatz*
     2. Competing against pre-existing cause
        1. Pre-existing conditions are discounted
           1. **Rule**: Tortfeasor is responsible for the effects of their conduct but not for the effects of the victims pre-existing conditions.
        2. Plaintiff has burden of proving how much was lost from conduct
           1. Harm is how much is his life was hastened until he dies.

Man has cancer 🡪 car accident hastened death (*Follett*)

* + 1. Eggshell Skull Rule: Take your victims as they come
       1. **Rule** - A tortfeasor should not be held accountable for consequences that would have befallen the victim regardless of the tortfeasor’s wrongful conduct.
       2. If victim is more susceptible to damage, Defendant still liable for actual injury or damages
          1. *Lancaster* (4 shitty foremen case)
       3. Discounting: If damage will happen w/o conduct, discount damages by likelihood of occurrence
    2. Discounting for Probability Rule:
       1. If the person can lead a normal life but for the tort, the injury caused by the tort must be discounted (?)
       2. Defendant should only be held liable for the consequences of their conduct, not the harm that would have occurred anyways
       3. *Follett, Lancaster, Blatz*
    3. Competing against non-tortious conduct
       1. Burden is still on Defendant to separate injuries
       2. Negligent navigation vs. heart condition (*Blatz*)

1. **Proximate Cause**
   1. Restatement Third
      1. § 29: An actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious…Central to the limitation on liability of this section is the idea that *an actor should be held liable only for harm that was among the potential harms-the risks-that made the actor’s conduct tortious*.
         1. Plaintiff's harm must be within the array of risks that made the defendant's conduct a breach
      2. § 30: Limiting liability to instances in which the tortious conduct increased the risk of harm is essential for appropriate incentives in a tort system that retains a factual-cause requirement…a merely serendipitous causal connection between the tortious aspect of the actor’s conduct and the other’s harm provides little reason for requiring the defendant to correct
   2. Serves as a basic function to limit liability even when there has been breach that is a cause-in-fact
      1. Defendant is the proximate cause if their harm was reasonably foreseeable (*Deere*)
      2. An actor is not liable for harm of the tortious aspect of the actor’s conduct was of a type that does not generally increase the risk of that harm (*Royal*)
         1. R 3rd: Something D did or did not do must have increased the risk to P’s product
   3. Proximate Cause Issue: Was the injury that befell the plaintiff among the array of foreseeable risks the existence of which called upon the defendant to alter his or her conduct?
   4. Four Categories
      1. Unforeseeable extent of harm: the eggshell skull rule
         1. Defendant is liable if the plaintiff’s injury was a foreseeable consequence of the defendant’s negligent conduct, even if the extent of the plaintiff’s injury was not foreseeable
      2. Unforeseeable manner of occurrence: the mechanism rule
         1. If the plaintiff and the general type of harm sustained by the plaintiff were foreseeable, recovery is permitted, even if the way in which the harm came about (the manner of occurrence of the harm) was fairly bizarre
      3. Unforeseeable type of harm
         1. Plaintiff’s injury was of a wholly different type of harm from the array of risks that made the defendant’s conduct negligent
         2. Follows the holding in *Wagon Mound*: injury/harm must be reasonably foreseen
      4. Unforeseeable plaintiffs
   5. Refocused Breach v. Restatement Third
      1. Refocused breach (don’t do it)
         1. Calls for determining proximate cause by refocusing the breach inquiry, narrowing it so that, for proximate cause purposes, the B<PL inquiry addresses solely the particular injury that befell the plaintiff
         2. Re-do B<PL with just the breach that actually occurred and see if the defendant should have taken precautions
            1. Was it worth taking precautions for that one risk?
            2. Was it reasonable?
      2. Restatement third:
         1. Considers a wider array of potential/foreseeable risks (likely and unlikely)
   6. Oleske’s Interpretation of the law
      1. A Defendant’s conduct is a breach when a reasonable person would have avoided the conduct because of the various risks of foreseeable harm AND if the actual harm suffered by the plaintiff in the case is one of those various foreseeable harms, the defendant’s breach is a proximate cause of the harm
   7. Subsequent Medical Injuries
      1. A defendant liable for negligently causing a personal injury will generally be held liable for subsequent injuries done by rescue and medical personnel in responding to and treating the injury
   8. **Limited Liability Definition**:
      1. An actor’s liability is limited to those harms that result from the risks that made the actors conduct tortious.
      2. An actor should be held liable only for harm that was among the potential harms – the risks – that made the actor’s conduct tortious.
      3. An actor is not liable for harm when the tortious aspect of the actor’s conduct was of a type that does not generally increase the risk of that harm.
   9. **Foreseeability**
      1. What are the foreseeable harm/injuries that can result from the conduct?
         1. One is only negligent for the harms in the **array of risks** (Restatement Third)
         2. Defendant deemed liable if the consequence was a reasonably foreseeable consequence of the defendant’s breach (*Wagon Mound*)
         3. Tree crushing is not a foreseeable risk of speeding
      2. Harm suffered must be one of the hazards that made the conduct a breach (*Deere*)
         1. The perception that the plaintiff’s accident consisted of harm wholly different type from those comprising the array of risks that made the defendant’s conduct negligent spells defeat for the plaintiff.
      3. Test: foreseeability of a reasonable man
         1. Refocused breach: only looks at foreseeable risk of actual harm
         2. Friendly: include all potential risks even improbable ones
         3. Must account for the foreseeable negligence or misconduct of the user or third persons may contribute to causing the injury (*Meyering*)
   10. **Eggshell Skull Rule**
       1. If the only unforeseeable feature of the plaintiff’s accident was that the damages incurred were much greater than could have been anticipated, the plaintiff will typically have no trouble reaching the jury on proximate cause.
   11. **Mechanism Rule** 
       1. if the plaintiff and the general type of harm sustained by the plaintiff were foreseeable, recovery is usually permitted, even thought the particular way in which the harm came about – the manner of occurrence of the harm – may be fairly bizzare without defeating plaintiff’s proximate cause case.
   12. **Foreseeability of Duty (Cardozo)**
       1. Foreseeable plaintiff – (*Palsgraf*)
          1. Relationship between plaintiff and defendant, did defendant have a duty to plaintiff?
          2. Did train employees have duty to lady across track?
       2. Orbit of Danger: Was the plaintiff within the orbit of danger?
          1. Car explodes and hurts office worker on 10th floor
       3. Takes decision away from jury and lets judge decide
   13. **Foreseeability: Economic Efficiency (Posner)**
       1. If likelihood of type of harm is low and cost to administer duty is high, then no duty
          1. Accident w/ fireman dying (*Honeywell*)
          2. Reign in the juries
       2. Imposing liability would provide no deterrence b/c it is unlikely to happen
       3. Let the marketplace correct the problem
          1. Stop subscribing to Honeywell Fire Protection
   14. **Intervening Force**
       1. Negligence can be absolved if harm is intentionally done by 3rd party and harm is outside of the scope
       2. Negligence is not absolved if negligence induces criminal act
          1. Leaving the keys in a tractor
2. **Duty**

**Definition (3rd R) -** *An actor ordinarily has a duty to exercise reasonable care when the actors conduct poses a risk of physical harm.*

* Justifications:
  + Corrective Justice
  + Give actors appropriate incentives to engage in safe conduct
  1. Privity of Contract
     1. Requires plaintiff to have a contractual relationship with defendant tortfeasor
        1. Intended to extend the defendant’s duty to cover foreseeable parties, but contain liability to manageable levels
     2. Acceptance Rule: Sellers protected from liability once possession/control is transferred
        1. Humanitarian exceptions: A duty remains when Contractor’s work is
           1. Dangerously defective
           2. Inherently dangerous,
           3. Imminently dangerous,
        2. Mostly gone in the courts, but rule still survives in Real Estate.
  2. Misfeasance – Misconduct
     1. Duty exists
        1. If you’ve acted and done something wrong, there’s a duty
     2. If the **entire course** of conduct created a risk of harm,
        1. even though the specific negligent act may constitute an omission(nonfeasance),
           1. Not operating your factory correctly (*Satterfield/Alcoa*)

Can extend to persons whom harm was foreseeable

* + - 1. the entirety of the conduct may still be misfeasance that created a risk of harm.
         1. Hitting pedestrian is not inaction of failing to break , but rather improperly driving
    1. If Defendant affirmatively creates danger 🡪 misfeasance (*Galanti)*
    2. Most common: Torts are meant to control not compel conduct
    3. Entire course of conduct: nonfeasance becomes a misfeasance
  1. Nonfeasance – failure to act
     1. Tort law does NOT create an affirmative duty to act
        1. Defendant not liable for inaction 🡪 invasion of civil liberties
        2. A person has no duty to warn or protect another from a foreseeable risk of harm because of one’s knowledge of the danger. (*Galanti*)
        3. A defendant has no duty to prevent harm when doing so requires that the defendant control the conduct of another person or warn others about such conduct (*Doe*)
     2. Exceptions
        1. *Good Samaritan*: If a person volunteers to rescue, fails to rescue, and dissuades those capable of rescue from rescuing (*Lacey*)
        2. ***Prior Conduct***: If person created risk of causing harm 🡪Actor has duty to prevent further harm (Hardy & the cow in road)
        3. ***Volunteer Duty***: If person assumed or incurred a duty to a specific person
        4. *Dangerous Instrument*: A person fails to control a foreseeably dangerous instrument
        5. ***Special Relation Victim***: Defendant must have control/custody over victim. Includes: carrier/passenger, Inn/guest, employer/employee, school/students, landlord/tenants
           1. Group must be responsible for their members (*Doe*)
        6. ***Special Relation Perp***: Defendant must have control/custody over perp. Includes: Parent/child, custodian/custody, employer/employees, mental health prof/patients
  2. Creating No-Duty Rules
     1. No duty rules should only be created in exceptional circumstances, an articulated countervailing principle or policy warrants denting or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification
     2. In most cases involving physical harm, there is no question of defendant’s duty
        1. Unless based on public policy (*Stagl*)
     3. Categorical exemption
        1. Rules must apply to entire class of cases
           1. Cannot apply on an ad hoc basis
        2. Must apply no-duty rules as bright line category
     4. Protecting Patrons (*Stagl v. Delta*)
        1. The obligation to take reasonable precautions to protect patrons from dangers which are foreseeable from the arrangement or use of the property, and to exercise reasonable care in protecting visitors from the foreseeable, injurious actions of third parties.
     5. Manufacturers of potentially dangerous products
        1. No duty towards misuse of product (*McCarthy –* black talon)
        2. Does party have control over issue?
           1. No control over criminal intervener
           2. No control over third parties (*McCarthy –* black talon)
           3. As a matter of law, a product’s defect is related to its condition, not its intrinsic function.
  3. Duty Limited by Kind of Harm
     1. **Negligent Mental and Emotional Harm**
        1. *Impact Rule:* Must be physical impact in order to recover (*Bosley*)
           1. Even if not related: If impact 🡪 threshold crossed
           2. Must be derived from same event
        2. *Zone of Danger Rule*: No impact but in proximity (*Neiderman*)
           1. Where plaintiff was in danger of physical force
           2. Plaintiff must actually fear the force
        3. *Bystander Rule*: Can be factors or elements
           1. Serious mental distress that reasonable person cannot cope with, i.e. parent witnessing child die from a distance (*Sinn*)
           2. 3 part Dillon Factors

Was plaintiff near the scene of accident?

Was shock from the emotional impact of the accident itself?

Closely related to victim

Can be factors or elements (Thing)

* + - 1. Did plaintiff witness the negligent act?
         1. Prior knowledge will soften the blow
         2. Only seeing the injury/result will soften blow
      2. Physical Manifestation Requirement (*Armstrong*)
         1. Did plaintiff suffer a physical injury?

Depression, insomnia, nightmares

* + - * 1. Was the plaintiff a foreseeable plaintiff? i.e. Wrong husband in hospital.
    1. Pure Economic Loss – Negligent conduct that causes financial detriment not resulting from an injury
       1. Physical Impact requirement
          1. **Damages must flow from physical injury**

Limit endless chain of liability

* + - * 1. **Has to be direct ties to physical damage**

What is the damage? What is the lost revenue from?

* + - 1. Rule Fork: Physical Harm threshold
         1. Once physical harm 🡪 crossed threshold

Limit the universe of potential plaintiffs

* + - 1. Safety vs. General performance
         1. If dissatisfied with economic performance 🡪 K Law
         2. Physical harm to purchased good 🡪 K Law
         3. Not harm to purchased property but harm that flows to other property
  1. Duty of Owners and Occupiers of Land
     1. Invitees, Licensees, and Trespassers – Status determines duty
        1. Invitees: Guest of mutual benefit, customer
           1. Should have known the risk – duty to inspect before
           2. Must keep property reasonably safe and to warn of hidden perils
        2. Licensee: Only benefitting party, social guest
           1. Had a reason to know – duty against to known risks
           2. Must refrain from wilful injury and wanton/recklessly exposing to danger
        3. Trespassers: Person not welcome, invader
           1. Duty not to willfully or wantonly injure
           2. Trichotomy largely abandoned b/c status change
        4. 3rd Restatement: Duty of reasonable care- standard rules of negligence
        5. Duty of reasonable care – leave trespasser category intact
  2. Attractive Nuisance Doctrine
     1. If nuisance is likely to attract child and cause injury 🡪 Liability
     2. Requirements for Attractive Nuisance
        1. Child presence is foreseeable
        2. Unreasonable risk is foreseeable
        3. Children will not recognize the risk
        4. Burden of precaution is slight in comparison to harm
        5. Possessor fails to take any action
     3. Rescuer Liability: Rescuers are treated as children
     4. Is there a statute that limits Attractive Nuisance?
        1. Recreational Use Statutes - Can preclude Child Nuisance Laws.
           1. When the language is clear and unambiguous, the statute will have its plain meaning
           2. Courts will construe it broadly
           3. Conduct must be willful and malicious

1. **Nuisance**
   1. Private Nuisance – must prove actual damages
      1. Substantial and unreasonable interference with quiet use/enjoyment of real property
      2. Objective standard of Nuisance
         1. Would nuisance affect a reasonable person?
         2. Do not take any special/delicate conditions into account
            1. Cannot increase liabilities of neighbor (*Ampitheater)*
      3. Time and Space of Nuisance
         1. Is the nuisance located in residential neighborhood?
         2. Does the nuisance happen at sensitive hour?
         3. Does nuisance provide social utility?
      4. Injunction Rule - where a nuisance has been found and where there has been any substantial damage shown by the complaining party an injunction will be granted.
   2. General Public Issue
      1. Unwarranted interference with public safety, health, convenience or morals
      2. If nuisance is a general public issue 🡪 legislature should decide
      3. Cost Benefit Analysis: damages are so slight compared to the economic loss by an injunction to the company (*Atlantic Cement)*
2. **Med Mal**
   1. **Below the standard of care**
      1. What would ordinary doctor of the same school reasonably do?
         1. Expert Testimony Requirement
            1. Expert is sufficiently knowledgeable of standard of care in practice
            2. Standard of care in practice is substantially identical
            3. (Rule Fork): Some courts require both factors, others only one
         2. EXCEPTION: Common knowledge or experience of layman knows care was substandard (leaving sponge in abdomen)
   2. **Informed Consent** - a patient must prove that the physician has a duty to disclose certain information and that a breach of that duty caused the patients injury.
      1. Four Elements of Informed Consent
         1. Sufficiently close doctor/patient relationship
         2. Doctor knows/should have known the information
         3. Doctor should know that the information is material
         4. Doctor fails to disclose the information
      2. Materiality: Information a reasonable patient would consider material
         1. **Patient balancing test**
         2. Includes: nature of patient’s condition, nature and probability of risks involved, benefits to be reasonably expected, likely result of no treatment, available alternatives (including risks and benefits)
      3. Customary Practice: Information that another reasonable physician would disclose
         1. **Doctor balancing test**
3. **Strict Liability**
   1. **Traditional Categories:** 
      1. Law imposes liability even though defendant did not act with fault or intentionally
         1. Still proximate cause limitation, harm/victim must be foreseeable
      2. Wild Animals
         1. Defendant is liable when he keeps wild animals and those animals injure
      3. Abnormally Dangerous Activities
         1. Likely to cause mischief if it escapes (reservoir over mine)
         2. Restatement 2nd:
            1. One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent such harm.
            2. Such strict liability is limited to the kind of harm, the risk of which makes the activity normally dangerous.
         3. Abnormally Dangerous Factors
            1. Activity involves a high degree of risk
            2. Gravity of harm is likely to be great
            3. Risk cannot be eliminated by reasonable care
            4. Activity is not a matter of common usage
            5. Activity is inappropriate to the place where it is carried on
            6. The value of the activity to the community
         4. Restatement 3rd: If the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised and is not one of common usage.
4. **Products Liability**
   1. Types of Defects
      1. Warning defect: Failure to warn
         1. Obligation only to warn against foreseeable risks
            1. Warning Defect does not use hindsight measurement
         2. Some CT’s require warn foresight/hindsight b/c no burden
            1. Courts apply both the RUT foresight and RUT hindsight tests
      2. Design Defect: Entire product line is faulty
         1. Restatement 2nd: CET (see below)
         2. Restatement 3rd: Rick Utility – Foresight
      3. Manufacturing Defect: One specific article in product line is defect (piece of glass in coke bottle)
         1. Restatement 2nd CET: Manufacturer is strictly liable for any condition contemplated by the ultimate consumer that will be unreasonably dangerous to the consumer
         2. Restatement 3rd CET: Product has manufacturing defect when it departs from intended design, even though all possible care was exercised in the preparation and marketing of the product
   2. Types of Defect Tests
      1. Consumer Expectation Test: Was product dangerous beyond the extent that customer contemplated?
         1. Consumers do not always have expectations
      2. Design Defect Test: Would reasonable person put article into Stream of Commerce if they had knowledge of defect?
      3. Risk Utility Test: Is the value of the product worth the risks it imposes, B<PL
         1. In general: Weighs cost of changing the design w/ risks of putting the product on the market without changing the design
         2. Foresight Test: Only look at risks manufacture knew (foreseeable risks)
            1. Same as negligence breach
         3. Hindsight Test: Look at all risks with perfect hindsight (unforeseeable risks)
            1. Includes unknown risks of the product
            2. Makes manufacture more liable 🡪 easier to prove product defect when considering all risks
            3. Effectiveness of product rather than conduct
            4. Used for more complex product designs where consumer may not be able to form expectations of safety
      4. Alternative Design Test: plaintiff must demonstrate a superior design to impose strict liability
         1. Places high burden on plaintiff to prove product defect
            1. Products can be defective even if no superior design
         2. Plaintiff has burden of proving there is a reasonable alternative design (*Potter*)
   3. Policy Reason For
      1. Commercial companies have ability to spread the costs
         1. Cost internalization
      2. Do not want to leave the plaintiff w/o any recourse
      3. Provides deterrence against unsafe products
         1. Market/manufacture safer products
      4. Difficult to prove manufacture Negligence
         1. Where in the manufacture process did the negligence occur
   4. Still have to do Cause-in-fact, Proximate cause and Damages after Liability is confirmed by the court.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Restatement Second | Restatement Third | Various Court Approaches | | |
| Manufacturing Defect | CET: Manufacturer is strictly liable for any condition contemplated by the ultimate consumer that will be unreasonably dangerous to the consumer | Product has a manufacturing defect when it departs from its intended design, even though all possible care was exercised in the preparation and marketing of the product (513) | CET | | |
| Design Defect | CET | RUT – Foresight; Plaintiff has burden of proving there is a reasonable alternative design  (discussed in Potter) | Risk Utility Test – Hindsight  (Phillips holding) | CET or RUT – hindsight (for cases that are particularly complex)  (Potter) | RUT – Foresight + Plaintiff burden of proving there is a reasonable alternative design |
| Warning Defect | Manufacturers have a duty to warn of foreseeable risks | RUT – foresight | RUT – Hindsight  (Phillips) |  |  |

1. **Vicarious Liability – Employer Context (Respondeat Superior)**
   1. The liability of an employer for the tort of an employee who was acting in the scope of employment
      1. Defendant is held liable for the negligence of another person
   2. Employer took all possible precautions 🡪 but still liable
      1. If the employer can control the manner and means of performing the work, the relationship is employer/employee
      2. Only applies to employees, not independent contractors
         1. If the work is left to the one responsible to the employer for the result alone, the relationship is employer/independent contractor.
   3. Motive Test: Was employee serving the purpose of employer with action
   4. (Fork)Nelson Test: Employers are responsible for natural damages
      1. Action still must be in the scope of employment
      2. It is foreseeable that some harm will occur from running company
   5. Restatement: Scope of Employment
      1. It is of the kind he is employed to perform
      2. It occurs within time/space limits of employment
      3. Actions is done with purpose to serve employer
      4. If force is intentional 🡪 force is not expected by employer
   6. Independent Contractor Exceptions
      1. Employer is not liable for independent contractors - those who have the right to control the manner or means of performing the work
      2. If there is an exception imposed by a statute
      3. If the harm arises out of work that is inherently dangerous
         1. Armed security guards are inherently dangerous
            1. inherently dangerous: it creates a peculiar risk of harm to others unless special precautions are taken.
   7. Nondelegable Duty Doctrine (Exception)
      1. Duties imposed on the employer (by statute, franchise, charter or common law) that arise out of the work itself because its performance creates dangers to others (inherently dangerous)
2. **Affirmative Defenses: Negligence + Strict Liability**
   1. Contributory Negligence
      1. If plaintiff was at all at fault/negligent 🡪 barred from recovery
      2. Contributory Negligence has been largely abandoned
   2. Comparative Fault
      1. Ask juries to come up w/ fault % for each party
         1. Nature of person’s risk creating conduct
            1. How unreasonable were the respective party’s actions?
         2. Strength of causal connection between conduct and harm
      2. Pure Comparative: Split liability regardless of fault %
         1. Plaintiff can recover even if they’re at a greater fault
            1. 51% Bar Jurisdiction
      3. Modified Comparative:
         1. Plaintiff’s percentage allocation must be less than the defendants’
            1. 50% Bar Jurisdiction (equal amounts of fault would bar plaintiff from recovery)
      4. Objections (Deemed unpersuasive/against policy by courts)
         1. Semantic difficulties
         2. Will remove manufacturer’s incentive to produce safe products
         3. Jurors incapable of accurately allocating fault
   3. Multiple Tortfeasors: Comparative Fault
      1. Joint and Several Liability
         1. Plaintiff is able to collect 100% damage from one Defendant
         2. Defendant then must subsequently seek contribution from other Defendants.
      2. Cost benefit analysis
         1. What is the comparative cost for defendant to prevent versus the actual costs to the plaintiff.
      3. Preclusion Doctrine:
         1. An action by a plaintiff whose injury stems from the combination of the defendant’s negligent conduct and the plaintiffs illegal or highly immoral conduct, can be dismissed.
      4. Comparative Fault in Strict Liability
         1. Plaintiff can collect full amount from 1 defendant and then be reduced by comparative fault
         2. Allow Comparative Fault in SL 🡪 fairness/justice
         3. (Fork) Apples and Oranges 🡪 cannot combine
            1. SL is about imposing 100% fault w/o negligence
            2. Difficult for jurors to apportion relief accurately
      5. Non-Party Fault Apportionment
         1. Must consider non-parties % fault when apportioning damage (*Daly)*
            1. Ex. P-10%, D1-30%, D2-60%

Plaintiff can recover 60% if he only sues D2

* + - 1. Take non-party % off the table and calculate based on percent left
      2. Remand case w/o non-party and assign new 100 points
      3. Charge plaintiff with excess portion
      4. Charge defendant with excess portion
    1. Employer Settlement (*Varela)*
       1. If plaintiff is an employee of one of the tortfeasors 🡪 can still get full amount from other party if employer settles out of workers comp
          1. Ex. P-10%, D1-30%, D2-60%

Option #1 – Plaintiff can recover 90% if he sues D1 after D2 settles workers comp claim.

Option #2 - Plaintiff can recover 75% if he sues D1 after D2 workers comp is settled, 30/40=75%

Option #3 – Plaintiff can recover 30% from D1 after D2 settles because the percentage is just removed

Option #4 – Case remanded for reallocation with just P1 and D1 in the case.

* + 1. Pre-Trial Settlement (*McDermott)*
       1. One defendant settles out w/ plaintiff
       2. That defendants’s % fault is deducted from total 100% fault
       3. Remaining defendant’s still pay % fault of their own
       4. Size of settlement has no effect
    2. Contribution/Indemnity/Partial Settlement
       1. Joint and Several Liability
          1. Multiple ∆’s 🡪 π can recover 100% from one ∆
          2. ∆1 will have to indemnify
       2. Indemnity: Primary v. Secondary causes
          1. Secondary cause may indemnify against primary
          2. Largely abandoned
       3. Non-party Suit
          1. A ∆ may bring in a non party to the suit in order to decrease the % of their fault
          2. Non-party: Person that is not involved in the suit for whatever reason

Settled out, immune, don’t want to sue son (*Brown)*

* + - * 1. Reduce Defendant’s fault by the plaintiff and non-party’s fault
      1. Contribution: ∆’s contribute to other ∆ after settlement
         1. Pro Tanto(1): subtract settlement raw number from total raw number damage, settle ∆ contribute to other ∆ if more.
         2. Pro Tanto(2): No subsequent contribution
         3. Discount damages by % of fault settled out
      2. Proportionate reallocation
         1. Settled fault % and taking it off the table
         2. Company is covered by workers comp 🡪 their fault goes off the table

Π – 10/40, ∆ 30/40 🡪 60% taken off table

* + - 1. Proportionate share
         1. Take fault % settled out and subtract that fault out of ∆’s total fault

∆1 = 60%, ∆2 = 40%, ∆2 settles out 🡪 ∆1 =20% fault

* 1. Imputed Contributory Fault
     1. Plaintiff held responsible for other’s liability
        1. Flipside of vicarious liability
     2. Special Relationship requirement
        1. Relationship between P and X is such that P would be vicariously liable for the damaging effects of X’s fault
     3. Control Element
        1. Plaintiff must have an element of control
     4. Reluctant to use in order to bar plaintiff from recovery
     5. Claim that derives from the harm that the defendant gave to another person
        1. Husband makes derivative claim against the harm defendant did to his wife
        2. Wife’s negligence will be imputed to reduce or bar claim (30% Husband, 30% Wife, 40% Defendant = 40% v. 30% Def to Husband)
           1. Wife’s percentage of fault will reduce damages amount. (Husband can only recover 30% of total damages)
  2. Assumption of Risk
     1. Express assumption of risk: expressed in writing
        1. Exculpatory agreements are scrutinized
           1. What is the nature of the parties?

If dependency 🡪 no enforcement

Parents cannot sign pre-injury release for children without courts approval.

* + - * 1. Against public policy

A parent can sign an arbitration agreement for children

* + - * 1. Was assumption of risk related to public interest
        2. Was it an adhesion contract?

How conspicuous was the language

* + - * 1. Was there an option to pay instead of signing?
      1. Express Assumption of the Risk is not allowed in Intentional Torts.
    1. Implied assumption of risk: inherent risk
       1. If risk is inherent of activity (rules, customs and mores) 🡪 no duty
          1. Getting hit by foul ball at baseball game
          2. Getting injured by a mogul while skiing
       2. Subjective knowledge is not considered in implied assumption of the risk
          1. “I had never skied before” is no defense
    2. Secondary assumption of risk (Voluntary Assumption of Risk)
       1. Person has knowledge of the risk and takes the risk on regardless. *Jackass the TV show…*
       2. Some states bar plaintiff completely, others use comparative fault to determine percentage.
  1. Failure to Avoid Consequences
     1. Pre-Injury conduct that causes injuries from an accident to worsen
        1. Failure to wear a seatbelt/bike helmet
     2. Damages are reduced by the proportion of the plaintiff conduct
  2. Failure to Mitigate Damages
     1. Failure to take reasonable action after an injury has occurred
     2. Reasonable action would have stopped/reduced damages
        1. Allowing a wound to fester and not seeking medical help
     3. (Fork) Off the table vs. proportionate comparative
        1. Some CT’s take excess damage off the table
        2. Some CT’s factor excess damage into comparative principles
  3. Unanticipated Impacts of Comparative Principles
     1. Causation issues (Phase 1)
        1. Single indivisible injury rule - When the tortious conduct of more than one defendant contributes to one indivisible injury, the entire amount of the damage resulting from all contributing causes is the total amount of the damages recoverable by the plaintiff.
           1. Burden is on defendant’s when injury is inextricably tangled
           2. Principle is separate from apportioning damage issue
        2. Proximate cause issues
           1. If other proximate causes for subsequent injuries 🡪 ∆’s may join party to apportion/reduce fault
        3. Successive Injury Rule - an actor whose tortious conduct causes physical harm to another is liable for any enhanced harm the other suffers due to the efforts of third persons to render aid reasonably required by the others injury, as long as the enhanced harm arises from a risk(foreseeable) that inheres in the effort to render aid.
           1. Original tortfeasor is liable for subsequent harm when that harm is foreseeable
     2. Apportioning Damages issues (Phase 3)
        1. The amount of damages ∆ must pay is in direct proportion to % of fault from that ∆
        2. Which ∆ was more at fault for causing π injuries?
           1. Texting while driving vs. merely driving
        3. Apportionment is a dividing damages issue 🡪 doesn’t affect causation
  4. Statute of Limitations
     1. Discovery Rule: SOL doesn’t run until:
        1. SOL begins to run when the plaintiff has suspicion of an injury and something about the cause
        2. Or when the plaintiff discovers something about the cause
     2. What plaintiff has to discover: 3 options
        1. Knew/should have known what caused their injury
           1. Most defendant friendly option
        2. Suspects the cause was wrongful conduct
        3. Knew/should have known facts constituting the wrongful conduct
           1. Most plaintiff friendly option
     3. Continuing Tort Rule
        1. Violation is viewed as a one continuous tort
           1. Usually involves some element of control
           2. Certain torts are better suited: FP, IIED 🡪 more fluid
        2. SOL doesn’t begin until time of last tortious instance
        3. Doesn’t apply to continuing flow of initial wrongdoing
           1. Subway being built 🡪 continuous noise
        4. Doesn’t apply to separate discrete violations
           1. Illegal business allocations, battery
        5. Must be continuous unlawful acts, not the continual ill effects of one act
  5. Statute of Repose
     1. Begins running at time the tort occurs, not when symptoms show
     2. Limits the time within which an action may be brought and is not related to the accrual of any cause of action
     3. Provides ultimate bar 🡪 no exceptions
  6. Governmental Immunity
     1. Most states have waived governmental immunity
     2. Special doctrine that protects states after immunity is waived
        1. Would normal tort law interfere w/ government function
           1. If so 🡪 apply no duty rule
     3. Nonfeasance
        1. Cannot hold government liable for nonfeasance
           1. Fear of abuse of system
        2. Exception: If city volunteers for rescue 🡪 duty
     4. Public Duty Doctrine
        1. After states waive their immunity 🡪 Governments have no duty under certain circumstances
        2. Police have no duty to protect citizens (*Riss*)

1. **Damages**
   1. Compensatory Damages – Not taxed
      1. Restore plaintiff to pre-injury condition
         1. Cannot use other case outcomes to argue damages amount
            1. Fact dependent on your case
         2. **#1 Medical expenses** 🡪 economic damages
         3. **#2 Loss of earnings** 🡪 economic damages
            1. Loss of Earnings Capacity is what they could have earned, not what they would have earned.
            2. Future earnings are discounted by present value
         4. **#3 Physical & Mental Pain and suffering** 🡪 non-economic damages
            1. Compensation for physical discomfort and the emotional response to the sensation of pain caused by the injury itself
            2. No definite standard for calculating 🡪 jury decision
            3. Not discounted by present value
      2. If court believes award is excessive
         1. Grant new trial on all issues
         2. Grant new trial on damages issues only
         3. Order a remitter: a partial/complete new trial is ordered unless the plaintiff agrees to remit a specified amount of the award
      3. Hedonic Damages – Loss of enjoyment of life
         1. Compensate for the limitations of the injured person’s ability to participate in and derive pleasure from the normal activities of daily life
         2. (Fork) Some CT’s put hedonic damages in Pain and Suffering
            1. Other CT’s put hedonic damages as separate

May overlap with P+S 🡪 duplicative effect

* + - 1. Many states put cap on non-economic damages
    1. Collateral Source Rule
       1. Defendant cannot benefit on recovery based on a benefit intended for a Plaintiff
          1. Defendant is obligated for % fault regardless of Plaintiff benefit
          2. Tort law must provide a deterrence to defendant 🡪 cannot let off hook
          3. Argument against: windfall for the plaintiff
          4. Argument for: If you allow plaintiffs to recover the full amount, Medicaid would/could try to get the funds from p
       2. Patrimony
          1. Consideration that plaintiff’s pay in order to receive a benefit
          2. Can be economic or social

Insurance premiums or asking friend for favor

* + - 1. Write-Off’s
         1. 1st approach: plaintiff gets full recovery

plaintiff can recover amount written off

Most commonly applied

* + - * 1. 2nd approach: Recovery is discounted by write off

Compensatory damages don’t include write off

* + - * 1. 3rd approach: plaintiff only recover for what paid some consideration for

Private insurance 🡪 recover write-off

Medicare 🡪 recover write-off

Even if forced payment 🡪 still patrimony

Medicaid 🡪 NO write-off recovery

Consideration (tax paying) is too far removed from the benefit

* + 1. Wrongful Death
       1. Recovering for loss of surviving heirs
       2. Statutory creation 🡪 CT’s hesitant to make changes in WD law
          1. Courts stick close to statutory language for definition of heirs and eligibility for recovery of consortium
       3. Loss of consortium
          1. Loss of society, companionship
          2. Children can sue for loss of consortium

Not the case in Personal Injury

* + - 1. Loss of earnings
         1. Heirs can recover loss of lifetime earnings less the amount the deceased would have spent on themselves

Strength of relationship and generosity come into account

* + - 1. Heir Issue
         1. Must be formal heir in order to recover

Wife, family member, children

* + - * 1. Person who brings suit cannot necessarily recover full amount

Bringing suit on behalf of all heirs, court divides damages.

* + 1. Survival Action
       1. Action the deceased would have brought had they still been alive
          1. Personal injury claim, loss of earnings
       2. Loss of earnings
          1. Only collect loss of earnings of time deceased was unable to work b/c of injury

No lifetime earnings

* + - 1. **No** Loss of consortium
      2. Pain and Suffering
         1. Usually collected under a survival action
         2. Some CT’s have it under WD claim
         3. Pain and suffering is limited by how quickly the person died

Recoverable from time of injury to death

If person suffered instance death 🡪 no chance for P+S

* + - 1. Heir Issue
         1. Does not have to be legal heir to recover
         2. Can be the person who the estate is left to in will
  1. Punitive Damages – are taxed
     1. Rule: defendant’s conduct is such that they consciously disregard a high degree of risk
     2. Punitive damages are grossly excessive when it violates the due process law.
     3. 3 Guideposts for assessing
        + 1. Reason: Give some consistency in punitive awards

Gives notice of consequence

* + - * 1. Reign in juries to limit penalties, due process reasons
      1. **Degree of Reprehensibility**
         1. Consider:

Whether there was indifference/reckless disregard for health and safety of others

Whether Defendant acted in bad faith

Whether defendant made deliberate false statements/acts of misconduct

* + - * 1. How widespread is the harm
        2. Must be similar conduct causing similar harm
        3. Cannot use widespread harm for final punishment 🡪 only for reprehensibility (*Philip Morris*)
        4. Cannot punish for harm to non-parties

Maybe nonparties knew of the risks

* + - * 1. Does the harm threaten safety/physical harm
      1. **Ratio**
         1. What is the ratio between compensatory and punitive damages

Single Digit ratio – Courts typically enforce 9:1 maximum

Not a hardened fast rule 🡪 can be greater

* + - * 1. Would a smaller penalty still provide a deterrence

If yes 🡪 likely reduce

* + - * 1. If ratio is excessive 🡪 raise a judicial eyebrow (*BMW*)

Can reduce penalty b/c of excessiveness

* + - 1. **Comparable criminal sanctions under state law**
         1. Can compare other punitive awards given out in similar cases
         2. Provide consistency among similar types of harms

Equitable administration of the law

* + 1. Maritime Cases – Not a Due Process Case
       1. Doesn’t apply to common law cases
       2. Punitive should not exceed 1:1 ratio
       3. Degree of blameworthiness can allow punitive damages to exceed 1:1 ration
          1. Must be exceptional blame