INTENTIONAL TORTS!!!

Tort= civil wrong other than a breach of contract for which the law provides a remedy

- Imposes duties on persons to act in a manner that will not injure others
- the goal of tort law is; to make the plaintiff, who suffered some type of harm, whole.

Intent

- In cases of ---these are the 5 for transferred intent
    - Assault
    - Battery
    - False imprisonment
    - Land trespass
    - Trespass to chattels
- Need to prove negligence
- **Ordinary care=** common sense, knowing your surroundings and not being reckless
- **Extraordinary care=** needed to be proved by defendant
- Liability must be based on legal fault
    - Cannot be held accountable for (driving) accident if sudden and unforeseen illness causes accident
- **Strict liability:** person is legally responsible for the consequences flowing from an activity even in the absence of fault or criminal intent on the part of the defendant
- **3 basis of tort liability**
    - Intentional conduct
    - Negligent conduct that created unreasonable risk of causing harm
    - Conduct that is neither intentional not negligent but that subjects the actor to strict liability because of public policy
- Before liability was automatic, and today it is not that way and is based on what a reasonable person would do
- Mistake: intentional decision that you didn't plan on ending the way it did

---mistake is not a defense for intent (*Ranson v. Kitner)*

- Compensate victim whenever the person committing the offence had intent to do the action
- ACTUAL INTENT: I want to cause harm
- SUBSTANTIAL KNOWLEDGE: would a reasonable person in the defendant's position know their actions would likely cause harm?

Intentional Torts!!

the first element of any intentional tort is intent (actual or substantial knowledge)

Battery: EVERY BATTERY DOES NOT INVOLVE AN ASSAULT

- Consent to ordinary personal contact is assumed for all contacts that are customary and reasonably necessary to the common intercourse of life, and in such circumstances, no intent to unlawfully invade another's interest will be found. (*Wallace v. Rosen)*
    - Grounds for battery (intentional harmful, offensive contact and contact occurs)
        1. Intent
        2. Harmful offensive contact

3. Contact
   - Battery doesn't have to be physical touch, taking something from someone's hand is battery (*Fisher v. Carrousel Motor Hotel Inc.)*

Assault: EVERY ASSAULT IS NOT A BATTERY

Assault: put someone in fear or apprehension of an imminent harmful or offensive contact and be able to carry it out the assault

Elements (3)

1. Intent
2. put someone in fear or apprehension of an imminent harmful or offensive contact
3. ability to carry it out the assault
   - Not an assault if it is not an imminent threat
   - **Non-contact assault:** physical contact is not needed for an assault (*I de S et ux. V. W de S)*
     - Axe being swung at head but missing it is still assault
   - **The ability to carry out the assault is not necessarily in the literal sense**
     - The perception of the victim to reasonably perceive the offender could carry out assault is what matters (*Western Union Telegraph Co. V. Hill)*
       - She thought within reason he could reach over the counter, even though he couldn't, it doesn't matter

False Imprisonment

False imprisonment elements

1. Intent
2. Restraint of an individual without legal justification (*Big Town Nursing Home Inc v. Newman)*
   - Taking their clothes for example counts because of the embarrassment level that would happen if they left (basically no way out)
3. You have to be aware you're falsely imprisoned at the time you're being held, you don't have to remember it *(Parvi v. City of Kingston)*

- **NOT false imprisonment** if you have the means to leave without risk of danger or you agree to stay willingly *(Hardy v. LaBelle's Distributing Co.)*
  - Threat to fire someone if they leave: in some courts considered false imprisonment others don't
- No legal justification and you're arrested, false imprisoned (*Enright v. Groves)*
- Taking someone somewhere close to where they would not be falsely imprisoned, it is not enough you need to give them the means to get to the safe place (*Whittaker v. Sandford)*
  - Giving her the boat to freely leave is what was needed
  - Having the children on the boat is false imprisonment too, so she wouldn't leave

Intentional Infliction of Emotional Distress: Pg: 62-63

- Some of the hardest tort cases to prove
- One who without privilege to do so intentionally causes severe emotional distress to another is liable (*State Rubbish Collectors Ass'n v. Siliznoff)*
  - (a) for such emotional distress
  - (b) for bodily harm resulting from it

- Severe emotional distress has to be in that an ordinary person would not withstand the distress but **if you're aware they are sensitive, then that's enough to establish IIED** (*Slocum v. Food Fait Stores of Florida)*
- Elements (*Harris v. Jones)*
    1. The conduct must be intentional or reckless
    2. The conduct must be extreme and outrageous
    3. The extreme and outrageous must cause the distress
    4. The emotional distress must be severe: no reasonable person should be expected to bear it
- Transferred intent doesn't work, you need to have intent aka if you don't know someone is there you can't have intent to harm them (*Taylor v. Vallelunga)*

Trespass to Land

- Every unauthorized and therefore unlawful entry into close land of another is trespassing (*Doughtery v. Stepp)*
    - The land can be enclosed or not
    - From every entry the law infers some damage; if nothing more, the treading down the grass or shrubbery---the principle is the point, not the minor damage
        - You have a right to exclusive use of your land
        - **No direct damage is needed**
    - Liability does not change even if the trespass was useful to the owner
    - Trespass is intentional even if the defendant honestly believes it was their property
- Having a fishing or hunting license does not permit you to do that on someone's property, trespassing. *(Herrin v. Sutherland)*
    - Hovering your limb over property line is trespassing
    - Firing over the property is still trespass
    - Aircraft issues are an exception and if there's an issue, usually a negligence if anything
    - You can trespass below the property, within a reasonable depth, just as in the space above
- Continued trespass: using someone's land for longer than permission is given (*Rogers v. Board of Road of Com'rs for Kent County)*

Trespass to Chattels

Chattels: personal property that is not real property (car, dog etc.)
Elements (3) (1 OR 2 OR 3)

- There must be damage to the chattel (*Glidden v. Szybiak)*
- The owner must be deprived of use of the chattel for a substantial period of time
- bodily harm (to owner/someone connected to owner) must result from the trespass
    - The dog was not injured so there was no trespass to chattel (pulling ears not sufficient here)
    - if your dog bites someone it is strict liability
    - Conduct is treated as intentional even if it is a mistake believing it is your own

- Server space (bandwidth) is a chattel, electronic impulses can interfere with it and damage it by slowing it down and taking up space *(CompuServe inc v. Cyber Promotions Inc)*
    - Spam was making internet slower
    - Court ruled: electronic impulses caused by spam is enough to constitute damage to the chattel and damaged the company because their customers were mad

Conversion

Conversion: destruction of *or* the permanent disposition of a chattel

- If you killed someone's dog when you kicked it
- Burning something of someone else
    - **Only remedy of conversion is the replacement cost (value) of the chattel (fair market value)**, no recovery for injury, emotional distress etc.

Privileges= Affirmative Defenses

1. Consent: complete defense

-Someone gets hurt in a clean tackle, they sue you, you can use this as a defense because it's part of the game they consented to

- Overt acts and outward manifestations may demonstrate such consent or lack thereof—can be explicit consent *or* implied (*O'Brien v. Cunard S.S. Co.)*
    - There were many signs in languages, she knew what was going on
    - You're not liable to someone if consent is given
        - Doctor not liable for the effects of the vaccine
- You **can** still be liable for something even if you + others are doing an inherently violent act (not consenting to all forms of violence) (*Hackbart v. Cincinati Bengals Inc.)*
    - Consider rules, custom, reasonable expectations (boxing example: not consenting to kicking)
- The consent to perform one operation does not automatically operate as consent to perform other, similar operations (*Mohr v. Williams)*
    - If not life-saving, then battery charges can be brought for doing a procedure without consent
        - If it is life saving measures, not a battery/liable
        - If not life-saving and you do it/ battery liable
- Consent given under false pretenses is not valid consent and will not operate as a defense to a subsequent action (*De May v. Roberts)*
    - Can only consent to something you know to be the truth, she consented to doctor/nurse/medically trained, not his friend

2. Self-Defense (110-113)

Stand your ground defense has courts all over the place in tort law

1. Existence of Privilege

- Anyone is privileged to use a reasonable force to defend themself against threatened battery on the part of another

2. Retaliation

- When battery is no longer threatened, the privilege of self-defense is terminated, retaliation is not covered
- Even if I hit you, when I retreat and you retaliate, I then have the right to self-defense against you

3. Reasonable Belief

- Reasonably believing that the force is necessary to protect yourself against battery, even when it's not needed "self-preservation"
    - Looking in the dark, someone is running behind you, towards you and you think they are coming after you so you hit them. But really they weren't coming for you

4. Provocation

- Insults, verbal threats, and opprobrious language do not justify self-defense (most of the time)

5. Amount of Force

- Use of force that is or reasonably appears to be necessary for protection against a threatened battery

6. Threat Before Use of Deadly Force

- Try to retreat before the event escalates to force, not standing ground to increase danger to use force

7. Injury to Third Party

- B is defending himself from A and accidently harms C in the process
- B is not held liable for the injury to C

3. Defense of Others

1. Nature of Privilege

- Defense of a third person, ie; defending a family member getting beat up

2. Reasonable Mistake

- In good faith believed to be justified by the law

4. Defense of Property (*Katko v. Briney)*

- What are you able to do in defense of property?--just to defend your real property
    - You cannot use force that is calculated to cause significant bodily harm/death in defending real property
        - No matter trespassing/welcome/ etc.
    - You can use non-calculated force to defend property

5. Recovery of Property

Requires 3 things

1. Make sure property was actually taken improperly/reasonable basis to believe that
    - Mistakenly believed she had taken something so he stopped her to check (*Bonkowski v. Arlan's Department Store*)
2. Fresh pursuit—short time/distance
    - Generally on the premises of the retail outlet is how long it lasts
    - BRIGHTLINE: As soon as person gets to their location, fresh pursuit ends, call cops
3. Reasonableness of the force

- You can use force limited under the circumstances within reason to recover property (generally violence is not reasonable) (*Hodgedon v. Hubbard*)
    - In this case the plaintiff pulled a knife, so violence (tackling him) was reasonable
    - **Fresh pursuit**: limited to prompt discovery of the dispossession, if not occurring (they get away) then leave it to the law

6. Necessity

- Public Necessity: (9/11) to protect the public, (doesn't have to work) private person or government official can partake (*Surocco v. Geary*)
    - Important part is what is the interest that is being protected?
    - No duty to pay
- Private Necessity: even though it is still privileged for equitable reasons, you have to pay for the damage (repair cost, not emotional distress, etc.) *(Vincent v. Lake Erie Transp. Co.*)

7. Justification

- If there is no threat to public property or people then this defense will not work –hard to win (*Sidle v. New York City Transit Authority*)

Negligence!!

4 Elements

1. **Duty**
2. **Breach**
3. **Causation**
4. **Damages**
    - Did you meet the standard of care?
    - If you breach a duty you are negligent
        - Texting and driving is a breach of duty

- Negligence in the air: not causing damages (text and driving, not causing accident) duty + breach, no damages
    - Most courts want to know **the totality of the circumstances**, was what they did reasonable? (*Lubitz v. Wells*)
        - It is *generally* not negligence if you leave an item that can be used to hurt someone in a location where kids sometimes play---golf club
            - Is it a breach of duty to do X?
    - It is breach of duty if you do not prevent/reprimand another from/for doing an action (*Pipher v. Parsell)*---driving car and having wheel grabbed
        - If you do everything in your power to prevent it, not negligent
        - When actions of a passenger that interfere with the driver's safe operation of the motor vehicle are foreseeable, the failure to prevent such conduct may be a breach of the driver's duty to his passengers or the public.
    - Need to take reasonable precautions when taking them is far less costly then the harm that might result (*Chicago, B. & Q.R. Co. v. Krayenbuhl*)---needed padlock to ensure protection

- While municipalities are required to maintain roads for public use, there are limitations to the extent of safety that can be provided to all roads (*Davison v. Snohomish County*)
    - For elevated causeways or viaducts, municipalities are required only to take such measures as are reasonable to prevent against injury
    - Can't expect community to go bankrupt to make changes
- Assess the probability (P) of harm occurring and the severity(S) of the harm that might occur and the burden (B) to prevent that harm (*United States v. Carroll Towing Co.*)--barge on the boat or not
    - If PS>B then you need to take action

The reasonable person standard!!!!!!!--objective

- What a reasonably prudent person would do using ordinary care (*Vaughan v. Menlove*)
    - If you haven't done this, you have breached a duty
    - Objective standard
- Industry custom can be very helpful, but not determinative(*Delair v. McAdoo*)
- Emergencies change what would be expected of a person, nature of those emergencies matter (*Cordas v. Pearless Transportation Co.*)
    - Put car in neutral and jumped out when being held at gunpoint to back of head, car hit people, reasonable?-- yes, totality of circumstances
    - Therefore, not a breach of duty bc he acted reasonable
- Reasonableness of a disabled person is determined by what a reasonable person w their/similar disability would do (*Roberts v. State of Louisiana*)
    - Blind man working at newsstand (state), ran into someone
    - Claimed negligence for not walking w/ cane, def claimed he was using face sense--reasonable
    - Sometimes a jury needs experts to help them determine reasonableness
    - Trier of fact determines what is reasonable
- When children are engaged in an adult activities, the adult reasonableness applies (*Robinson v. Lindsay*)
    - *Riding lawnmower, car, guns, boat, Moter cycle, snowmobiles*
    - 13 year old pulling child on snowmobile tube, kid gets hurt falling off
    - Generally in negligence, reasonability of a child is what the child of like age, experience, intellect would do **when child is doing child things**
- Mental disabilities are not considered in the reasonableness calculation, treated the same as someone without mental disabilities (*Breunig v. American Family Ins. Co.*)
    - You are still liable for negligence

The professional standard!!!!!!--objective, reasonable prudent professional

- Just because there is an industry standard, doesn't make it valid and non-negligence (*Hodges v. Carter*)--result would be different today (its below)
    - Following local custom as holding isn't a thing today
- Calling an expert will help in your case in a professional setting to explain standard of care (*Boyce v. Brown*)
    - Sues doc for not removing screw from foot that was causing pain (should take an X ray)

- The standard for medical professionals is nationally based—specialists (*Morrison v. MacNamara*)---lawyers governed by state standard (generally), other professions gauged by local/same location/ national (engineering is national)
    - Local and regional standards is not acceptable
    - Same or similar location standards for general practitioners

Informed Consent—negligence tort, applies to every profession

Requires (3 things)

- Doctor failed to inform patient of material risk they would have wanted to know (verbal or reasonable in writing)
- That patient if they knew of the risk would not have done the treatment
- The specific harm of which the patient was not informed occurred

Use patient standard: any material relevant to the treatment must be disclosed (*Scott v. Bradford*)

- EXCEPTIONS
    - Patient is unconscious
    - Conscious but there's not time to wait to disclose

Need informed consent to use someone's body/body fluids (*Moore v. The Regents of the University of California*)

- Typically when research is done at a University, the university is liable from benefiting

Rules of Law: Treating a judicial ruling in one case as a general standard (court made rules of law)

- Not favored by courts
- Not the same as negligence

Violation of Statute—negligence per se (kind of automatic)

Negligence Per Se Requirements (you are negligent as a matter of law, was there a legal excuse tho)

- need ordinance/ regulation that creates some sort of duty
-law is designed to protect a specific class of people, and plaintiff is in that class
-the type of harm protected against under the law occurred
-the law is a proper basis for imposing tort liability

- Ct decides if the statute meets negligence per se req
- Court looks at the nature of this law and gives us some reasons why law is not proper for imposing tort liability
    - Imposing tort liability would be imposing
    - Anyone can be liable for anything
    - Teachers/doctors/psychologists are held liable because they are aware of their duties and protentional harm---as witnesses negligence per se doesn't apply to general public

-what does it mean if negligence per se requirements are found-- legally?

- **Rebuttal presumption (it is presumed you are negligent)**= proving something creates a presumption of law and the burden shifts to the other party to rebut that presumption
    - Presumption can be rebutted if there is a legal excuse (to rebut)

- In negligence per se cases= the ct says proving all the requirements creates a presumption of negligence---can present legal excuse to rebut those requirements/ presumption (evidence) therefore not negligent if you prove

Proof of Negligence (banana peel cases)

- Sometimes the way of doing something itself is circumstantial evidence of negligence
- Store should do what they can to prevent injury so by not doing that that is negligence
- Plaintiff has the burden of proving (duty, breach, causation and damages)

Res Ipsa—need to show both----accidental, not intentional—inference of negligence—unlike negligence per se, es Ipsa shows reasonable proof of negligence

1. wouldn't normally happen in the absence of negligence
2. exclusive control (not just ownership, but the right to control) or/and
3. excluding other likely causes

Causation

Don't need but for cause in cases where there are two fires and one was negligent and the other was planned (two independent causes merging together to cause an indivisible harm)

NEED BOTH, THEY ARE DIFFERENT

Cause in fact and proximate cause

1. **Cause in fact**: must be a substantial factor (double the harm) **&** "but for"

---but for the person texting and driving, the accident would not have happened

But for has some exceptions

- The defendant's negligence must be a substantial factor in the cause of the harm for liability to attach (*Perkins v. Texas and New Orleans R. Co.*)
  - If the train was going significantly faster than it should have been, speed would have been a substantial factor
- If the defendant's negligence is of a character naturally leading to the character of the injury, then causation is established (*Reynolds v. Texas & Pac. Ry. Co.*)
  - Stairs were not lit plus railroad was rushing people off the train
  - Substantial factor is the stairs weren't lit
- Causation requires proof of proximate cause and cause in fact for liability to attach (*Gentry v. Douglas Hareford Ranch Inc*)
- In cases where the causal link between negligence and injury is based on subject matter that is beyond the experience of laypersons, expert testimony must be considered to determine whether the link is sufficient to attach liability (*Kramer Service Inc v. Wilkins*)
  - Being a possibility is not good enough to be a substantial factor
- In torts cases, for scientific/expert the court has to decide if this is good scientific evidence & if it is useful to the court (*Daubert v. Merrell Dow Pharmaceuticals Inc.*)
  - The best experts are the ones that are working on their issue for their life, not for the sake of litigation
- When two separate acts of negligence produce a single harm, each tortfeasor is wholly responsible for the harm even though his act alone may not have caused it (*Hill v. Edwards*)

        - Can have multiple substantial factors
    - Two concurrent causes that merge into one, you only use substantial factor (not but-for) (*Anderson v. Minneapolis*)
        - Plaintiff needs to show defendant's action was substantial
    - **Burden shifts to the defendant(s)** (after plaintiff proves negligence) when you have a variety of actors that may have caused the harm and we know only one of them did it (*Summers v. Tice*)=(proportional approach)
        - Typically joint Defendents are responsible for their share of damage
        - *Cali modification*: plaintiff has to bring in manufactures, defendant is responsible for their market share and proving themselves out (*Sindell v. Abbott Laboratories*)
            - **DES EXAMPLE: If defendant gets out, then their percent gets distributed throughout those who cannot prove innocence** (always working w 100% market)

2. **Proximate cause** (go from defendants conduct to plaintiffs injury)---**jury decides**

-----no-proximate cause= place where the ct cuts causal chain, limits cause in fact, def off the hook

- You take a plaintiff as you find them and you're liable for anything that disrupts that aggravation of pre-existing conditions included (*Atlantic Coast Line R. Co. v. Daniels*)--doesn't matter if you didn't know they had this condition/issue if you put them in that condition you're liable
    - **Egg shell skull rule** applies to the extent of the injuries and you can't use no-proximate cause to get out of that
        - Plaintiff has diagnosed clinical predisposition (rule applies to NIED but if they are hypersensitive then no)
- If negligence causes a domino effect (close in time and space) you're liable for the end result (*Polemis*)
- Unforeseeable result = not a proximate cause and def off the hook (*Wagon Mound 1*)
- Proximate cause is if it was foreseeable/likely/know it could happen that something would happen (*Wagon Mound 2*)
- **Factors for proximate cause** (*Palsgraf v. Long Island R.R. Co.*)
    1. Foreseeability—foresee that your negligence could cause harm—or,
    2. Temporal (time relationship between def act and plaint harm)---or,
    3. Spatial (literal proximity)
    - Not an *intervening superseding cause*---event that cuts the chain bc no liability
- Sometimes courts will find there is no duty to unforeseeable plaintiffs, dissent teaches us that this isn't necessarily correct---leave this up to the jury, not the judge
    - **Apply/Address both the majority (Cardozo) and dissent (Andrews proximate cause, more common rule) on exam!!!!!**
        - **Cardozo = you may not owe a duty to unforeseeable plaintiffs that are far away (does not touch on proximate cause)**
        - **Andrews= when you're negligent you breach a duty to everyone**
            - **Then look at proximate cause (foreseeability, temporal and spatial)**

- **If its unforeseeable there's no proximate cause**

- Dissent: reasonable and foreseeable that someone might go to retrieve a negligent wheel assembly that falls off (*Yun v. Ford Motor Co.*)
    - Should not substitute our opinions for a jury
    - Majority says cut the causal chain---plaintiffs actions was an intervening superseding cause

If a cause is an intervening superseding cause it ALWAYS cuts the causal chain, sometimes proximate cause does not apply because there are not the factors needed but if this is there, we'll cut the chain

- Elements for ISC (most jurisdictions you just need Un foreseeability and 1 other)
    1. Unforeseeable
    2. Extraordinary
    3. Independent of defendants conduct
- Asteroid hitting someone is an ISC
- **There are many intervening causes that are not superseding** (*Derdiarian v. Felix Contracting Corp.*---seizure driver, hits hot liquid tank—foreseeable because a car could have hit site)
- Intentional/criminal conduct will usually cut causal chain as an ISC (*Watson v. Kentucky & Bridge & R.R. Co.*)
- Generally: suicide is an intervening superseding cause

  Fuller v. Preis= *exception*= irresistible impulse and traumatic brain injury
- If you put someone in danger it is foreseeable that someone might help them (*McCoy v. American Suzuki Motor Corp.*)
    - Danger invites rescue
- Social host that knows guest is *hammered* is held accountable of their actions if know they are driving—foreseeable and knew they would be driving (*Kelly v. Gwinnell*)
    - Held accountable for any minor driving if they gave them alcohol
- When there has been negligence against the mother or father that has resulted in birth defects of their grandchild, courts usually hold the grandchild cannot recover (DES)(*Enright v. Eli Lilly & Co.*)

Joint and Several Liability—more than one defendant can be responsible for the harm

- Today, we do have joint and several liability for tortfeasors who cause an indivisible harm (don't have to be acting concurrently)---both defendants are responsible for 100% of the damages (*Bierczynski v. Rogers*)--drag racing

Comparative negligence:

- In the old days, "contributory negligence"= is plaintiff was even 1% negligence they can recover nothing

Majority rule=(use this on multiple choice unless noted otherwise)

- Defendants should have to be jointly and severally liable for their negligence bc plaintiff pays for own % negligence (*Coney v. J.L.G. Industries, Inc.*)
- if plaintiff is 20% at fault, they can only recover 80% of damages
    - Move to comparative negligence keeps joint and several liability (plaintiff can recover 100%)

Minority rule= if comparative negligence is adopted joint and several liability is not a thing (*Bartlett v. New Mexico Welding Supply, Inc.*)---plaintiff can only recover what the defendant is responsible for

- Even when the plaintiff is 0% responsible, the plaintiff can only obtain the % the defendant is responsible for
- Not joint and several

Apportionment

Payors

Satisfaction and Release

- There can only be one **satisfaction** and you cannot recover more than one set of damages, cannot get more than 100% of the damages (*Bundt v. Embro*)
    - Satisfaction can be plaintiffs valuation of claim or jury's

Release: surrender of the plaintiff's claim that can be only partial compensation or none at all

- Covenant not to sue, is a contract. It is not an actual release so all the parties (defendant in this case) are not released just the party the contract was with (*Cox v. Pearl Investment Co.*)
    - This reserved the right to sue other parties
    - Covenant not to sue is not a full release
- Cannot get contribution from a settlement defendant (majority approach)--unless fraud/collusion

Contribution and Indemnity

- You have a right to contribution as a defendant even if a plaintiff doesn't bring a party into the case (*Knell v. Feltman*)
    - Defendant can bring in someone to suit (defendant in this case wanted to bring in driver who was probably plaintiff's friend so they didn't bring him in)
    - The friend was the other negligent party
- The defendant/plaintiff cannot bring in another immune defendant (*Yellow Cab Co. v. Dreslin*)
    - Can't get contribution from an immune defendant and plaintiff can't recover from immune defendant
    - Spousal immunity is gone
- Contribution and indemnity are not the same thing (*Slocum v. Donahue*)
    - Contribution: claims for part of the damages can happen during the case or after
    - Indemnity: claim that is only brought after the case and is for the full amount of damages --- when you have to pay 100% of damages when someone else was responsible
        - This is not available for Slocum because the jury found he was responsible/partially responsible

Apportionment of Damages

- You should apportion damages in accordance with the accident the best you can do (*Bruchman v. Pena*)
    - The prior defendant is not responsible for a future incident that exaggerates the injury, but just the natural flow of the injury caused
    - Apportionment: the jury determines who is responsible for what

Privy of contract is not part of tort law anymore

Failure to Act

- Normally there is not a duty to warn...without a special relationship
    - If there is a special relationship, in many jurisdictions...
        - Have to show that it was immanent that something would happen (not going to be tested on this one) **or,**
        - have to show that it was foreseeable (what we're going to cover)
            - All universities are held to this standard for shootings today....
- Virginia tech did not have a reason to see this shooting as foreseeable (*Commonwealth v. Peterson*)
    - They thought it was a domestic when in reality it was an active shooter
    - Today however, it is extremely foreseeable so there is a *duty to warn* on the part of universities
- There is no requirement of the law placing on a university or its employees, any duty to regulate the private lives of their students, to control their comings and goings and to supervise their association (*Hagel v. Langsam*)
    - NOTE 3 ON 443 IS ON EXAM
- There is a duty to act is once you're aware of something (in a professional setting) (*L.S. Ayres & Co. v. Hicks*)
    - Worker should have helped kid once he heard it crying
    - In the old common law, there was no duty to act
        - No duty to throw a life preserver if someone was drowning and you had one
- As a spouse, if you know something inappropriate is happening you have a duty to act, if you do not, then there is no foreseeability (*J.S. and M.S. v. R.T.H.*)
    - Once the wife was aware of the husbands actions, she had the duty to act...warn parents, make sure she was there when kids were there, make police aware
        - What a reasonably prudent person would do
- There is a duty of reasonable care to protect a foreseeable victim (*Tarasoff v. Regents of University of California*)
    - Psychiatrists should have warned the protentional victim that they released patient
    - If there is no reason to believe patient will harm foreseeable victim/s/place and time, cannot be held accountable for duty to warn

Pure Economic Loss

the store you supply sues you because your store was closed for 3 days and couldn't supply them

- In privity of contract w that person (supplier) is the **only** place today that privity of contract still matters --- no recovery for pure economic harm if there's not privy of contract---
- (*State of Louisiana v. M/V Testbank*)

Emotional Distress (NIED)---when there is no physical injury to victim

- Liability only arises for significant emotional distress that would be reasonable for someone to have...*not hypersensitivity* (someone in city over trying to file claim)

- Just need negligent defendant and generally there should be some sort of physical manifestation of emotional distress (loss of appetite)
    - If you injure someone physically and they happen to have extreme emotional distress, that is just negligence not NIED
    - SPECIAL KIND: when you see a loved one being injured, need close relationship (below)

Must meet all elements of negligence to prevail on these claims, do not have to meet the elements of IIED

- Emotional distress claims no longer require physical impact (*Daley v. LaCroix*)
    - *Physical manifestation rule:* emotional distress can only be compensable without a physical injury if there is a physical manifestation (weight gain/ loss, bodily responses etc.)----some physical manifestation is required and should be significant
    - some jurisdiction still use old rule, FL
- Law is drawn based on public policy for NIED
    - 3 rules (*Thing v. La Chusa*)
        - Have to have actual/immediate/contemporaneous perception of the accident (seeing, hearing etc) (can't be 3 blocks away)
            - facetime counts generally if you can view accident
            - Some jurisdictions have it before first responders come
        - Has to be a close family relation (blood relative/spouse/adoptive/in role of parent/grandparent)
            - estranged parent does not count
        - Significant emotional distress that you would only expect to arise from a close relationship with victim

Unborn Children

- *Common law:* until there is a live birth there is not compensation for an unborn child (*Endresz v. Friedberg*)---parents can have complete recovery (emotional distress/mother medical expenses etc) but not compensation for child

Owners and Occupiers of Land

Outside the Premises

- For natural conditions on a property you have to use reasonable behavior(*Taylor v. Olsen*)
    - Common law: there was no liability to people outside the premises
    - Today we base it off reasonableness
    - In most cases in a rural area, there is less likely to be liability (more likely in suburban)
- When you create something artificial on your land, you have a greater duty (*Salevan v. Wilmington Park*)
    - Park owners knew/should have known (reasonably) balls were going out of stadium and done something to stop them

On the Premises

Trespassers

- The only duty you have to a trespasser is that you cannot willfully want them to get harmed (*Sheehan v. St. Paul & Duluth*)

- Don’t have to be reasonable, but just minimize protentional harm
- If you have no reason to believe anyone would be on property then you probably won't be liable ---no real duty of reasonableness
- If you're aware trespassers are there, then drive slower - have duty to warn

Licensees---OLD COMMON LAW—DO NOT WRITE IN ESSAY

- You have a duty to warn of thing you know of and you have reason to know other people would not (*Barmore v. Elmore*)
    - Warning someone that an individual had mental illness that could cause harm

Invitees---OLD COMMON LAW---DO NOT WRITE IN ESSAY

- Exercise reasonable care to keep property safe for invitees---higher duty (*Campbell v. Weathers*)----financial benefit-----
    - Invitee: Anyone who is invited to benefit the business of the inviter
    - If store was closed and a non-customer came over just to drink and something happened~~friend would be a Licensee~~
    - Trap door case~~~use a sign to warn about the door
- Once you're done buying goods, you become a Licensee and are only owed a warning if owner was aware (*Whelan v. Van Natta*)

Rejection or Merging of Categories

- You owe a duty of reasonable care to anyone on your property *unless* they are a trespasser (*Rowland v. Christian*)
    - For trespassers---have a duty to warn on a condition of which you know (to known trespassers) + not willful harm = put up a sign if there's a hazard and you know trespassers come
    - No duty if you do not know trespassers have been there/come
    - Threw out Licensees and Invitees and use general reasonableness

Lessor and Lessee

- The tenant was liable because the tenant had knowledge of the problem and took no steps to prevent/ fix it (*Borders v. Roseberry*)
    - Under old common law landlords were not liable for injury to tenants on property w exceptions....
        1. Undisclosed dangerous conditions that the landlord knows but is unknown to tenant
        2. Conditions are dangerous to people outside the premises
        3. The premises are leased to the public
        4. Parts of the land are retained by landlord but they give tenant right to use it
        5. If the lessor is contracted to repair it/ agreed to do
        6. Negligence by the landlord in making a repair
- There is a common law transfer from landlord to tenant, but the 6 exceptions apply, and even when they don't the landlord still has a reasonable duty of care (*Pagelsdorf v. Safeco Inc. Co. Of America)*
    - Today it is just a duty of reasonable care
    - Landlord has duty of reasonable care, even though they didn't know railing was rotting---should have inspected/have someone check it

- Duty to protect tenants from foreseeable acts (increase in crime, get a doorman) (*Kline v. 1500 Massachusetts*)

Damages

Three types of damages in tort law
- Nominal (usually like one dollar)
- Compensatory (big category in torts, damages for bills/pain/suffering/property/etc.)--in negligence, this is most common
- Punitive/exemplarity (mostly often awarded in intentional torts--brazen: negligence/strict liability)

Wrongful death: If either party dies, there is no claim
- When negligence kills the plaintiff
- Most jurisdictions allow this but not all
- Claims for the death of the statute: death resulting from the tortious conduct

Survival Statute: claim survives the death of either party
- Every jurisdiction allows claims to go forward if either party dies
- Can happen no matter how party dies

Defenses...

Contributory negligence (really stupid, numerous defenses arose against the defense)
Plaintiffs either get everything or nothing
- Thrown out in all but 4 states—use comparable negligence instead
- If plaintiff is negligent, they lose even if the defendant was also negligence (*Butterfield v. Forrester*)
    - Defendant has to prove plaintiff was negligent
        - Plaintiffs get nothing even if they are only a little negligent
- Defendant had the last clear chance to avoid harm and therefore, you are responsible (*Davies v. Mann*)
    - Even though the plaintiff was negligent, the plaintiff collects 100%

Comparative Negligence: plaintiff's negligence- - -will be told what the state
--More logical system than comparative negligence
--3 different kinds of comparative negligence

1. *Pure comparative negligence*: even if plaintiff is 99% negligent, they can still collect 1%
2. *50/50 or no more than*: plaintiffs negligence is no more than the defendants (it was less than or equal to) **(***McIntyre v. Balentine***)**
    - in states w this, if the plaintiff's negligence is more than defendant then they cannot recover
    - Not comparing the plaintiffs negligence to just one defendant, the 50% is all the defendants together, does not work that way for plaintiffs
        - Included defendant who are unnamed/cannot be found
    - Both drivers were drunk driving
3. *50/49 or less than*: plaintiffs negligence has to be less than the defendants, cannot be equal to

Majority rule is no matter what of the 3 you adopt, you'll still have joint several liability

Assumption of Rules

1. *Express assumption of risk (still a good defense)*
    - Usually a written document usually is binding (adhesion gym contract)

- Exculpatory clauses generally need to be written in plain English
- Exculpatory clause has to be very clear (big, bold writing)
    - Exceptions
        1. When the party protected by the clause intentionally causes harm or engaged in wanton acts/gross negligence (intentional tort)
        2. Bargaining power of one party is significantly unfair/unequal
        3. When the transaction involved public interest

2. *Implied assumption of rick (not really a thing anymore)--CONSIDER IT COMPARATIVE NEGLIGENCE*
    - Voluntarily confront a situation of which you are aware of the protentional risk
    - Implied assumption of risk does not exist as a separate defense in a large number of jurisdictions
    - DO NOT WRITE ON THE EXAM

Statute of limitations

- Where you don't file a claim in the right amount of time so you lose the chance to file it
- Tolling of SOL: put them on hold, statute of limitations does not start running until a certain time
- Generally longer for negligence claims than they are for intentional claims
    - Intentional torts are usually one year

Family immunities

- Spousal: doesn’t exist anymore in most places
    - Spouses can't sue each other
- Parental:
    - What counts as a parent child immunity?
    - Usually in the negligence context, for intentional torts parents are generally not immune
    - Parents can be sued by their children when they are injured in an accident
    - In loco parentas (in the role of a parent)

Vicarious Liability

- One party being responsible for the action of another (usually an employer/employee situation)
- "coming and going rule": employee is outside the scope of his employment while commute and going from work
- Generally employer is liable if serving alcohol at work for a party and employee drives home drunk and gets in accident – exception to coming and going
- Have to be acting within the scope of employment
- Deviation rule: slight deviation = respondent superior

Independent Contractors

- Supervision, dominion and control level are the factors in determining
- Intentional torts are not usually vicarious liability but can be

Strict Liability!!!

You are strictly liable for harm if you meet the elements of strict liability
You don't need to be negligent/ intentionally cause harm
Earliest cases stemmed from an animal

- If you have a wild animal and it harms someone you're liable
- If your dog bites someone you're liable, usually one bite and you're responsible for it
- Abnormally dangerous

You are strictly liable when something escapes from your property (artificial/unnatural/ you have control over)

- Not a natural use of your property (building a reservoir/keeping wild animals/abnormally dangerous activities)

How to know if an activity is abnormally dangerous

a. Existence of a high degree of risk of some harm to the person, land or chattels of others
b. Likelihood that the harm that results from it would be great
c. Inability to eliminate the risk by the exercise of reasonable care
d. Extent to which the activity is not a matter of common usage
e. Inappropriateness of the activity to the place where it is carried on
f. Extent to which its value to the community is outweighed by its dangerous attributes

Just because something seems dangerous, that does not mean it was abnormally dangerous (shipping chemicals isn't abnormally dangerous)

Strict liability applies to the things you expect will result from abnormally dangerous activity

Vis major (act of God)---defense---something that is unpredictable

If someone knows a dog is dangerous and taunts it and then gets bit, the defense works (case before McPherson)

Products Liability

Negligence is a cause of action
Negligence is a valid cause of action
Breach of warranty: promise to have shatterproof glass but it wasn't (*express warranty*)
Implied Warranty

- When you put a product on market, there is an implied warranty that it is fit for its use
- Safe for the use of which it was intended, if not then there's strict liability
    - Exception is if you're using the product not for its intended use
- Generally not applied when there is unequal bargaining power and when their purpose is to waive liability for personal injury
    - Exculpatory clauses will not be enforced generally under these conditions

Manufacture, design, and warranty
Strict Liability: does not require negligence, if you put a product on the market you're responsible for the defect that affects the consumers, does not matter if you aren't aware of the defect (NOT ABSOLUTE liability)

Strict Liability Cases

Negligence
Warranty (express and implied)
Strict Liability

- **Manufacture Defects (one product out of millions)**
    - If it is not defective when it leaves the line then this claim will not work

        - Something that doesn't meet the product design, this will make it susceptible to injury
            - The products should be exactly the same and if not that's a defect
            - Plaintiff has the burden of proof to show it was defective
- **Design Defects (can be negligence/strict)--the entire line is negligent**
    - **Risk utility analysis (use on exam)**: almost every jurisdiction used some form of this
        - Look at the risk of a product design and the likelihood it can cause significant harm, and look at alternative designs.....was this really the best design? Would a reasonable person expect the harm?
        - Factor balancing: **utility** of the product (as currently designed)/benefit of product v. the **risk** of the product as currently designed
        - There is a possibility of strict liability if the product has no real utility/is dangerous (so little utility and so high chance of risk)
    - **Consumer expectation analysis**: what do they expect from the product when it is put on the market
- **Failure to Warn (warnings defect)---duty to warn of any risk you are aware of or should be aware of**
    - Defense: you can't warn against something you don't know about or couldn't know (state of the art project)
    - there are elements of negligence that can come into play

Proof: Strict liability in general

- Don't need proof that something happened, just need to show that the product behaved in a way it shouldn't have behaved
- Will come down to evidence on both sides to show strict liability to the jury
- Most of the time manufacture defects blow up and do not exist so design defect won't work
    - Circumstantial evidence is very common

Defenses to Product Liability

Plaintiff's Conduct

- Comparative negligence is a defense to products liability (also in negligence)
    - Defendant has to prove
    - Will lower the damages NOT a complete defense
    - Not wearing seatbelt and product is defective
- Unforeseeable use is a COMPLETE defense
    - There is a good defense to all of products liability---unforeseeable use of a product
- Foreseeable misuse is NOT a defense
    - But if plaintiff is comparatively negligent then this is a good defense

Other Suppliers of Chattels

- Used car dealer sold car as is and the brakes didn't work
    - Court said there was no way to show the car was defective off the low, should have brought negligence claim
    - Dissent said they had a duty to check the safety of vehicle
    - In most cases used dealers are not strictly liable
- Ways to solve this today
    - Use negligence: used car dealerships need to check basic necessities for safety
    - State legislation: prohibit even vehicles even sold as is, from being sold without basic check of safety features

    - Small amount of jurisdictions: Used sellers can be liable for strict liability for putting product back on market
- When a generic company manufactures a product you have to go after the main manufacture when there is extreme legislation and the generic is just manufacturing it (minority rule)
- There is a lot of regulation in product liability, limit liability and when you can sue companies/limiting damages

NEGLIGENCE ESSAY

DUTY

If PS>B then you have a duty to take action

If there is an unforeseeable victim

- Cardozo would say there is no duty to the plaintiff because they were unforeseeable to the defendant
- Some jurisdictions follow the Andrews approach. This approach states you have a duty to everyone to not act negligent

If there is a foreseeable plaintiff

- How would a reasonably prudent person act while using ordinary care?
- This is an objective standard

Standard of care

- national/state/local if relevant
- duty of reasonable care to anyone who is on your property
- landlord has duty of reasonable care to protect from foreseeable harm!

LANDLORD TO TRESPASSERS = ONLY DUTY TO WARN!!

BREACH

If there is an unforeseeable victim

- Cardozo approach would say you did not breach a duty because you only owe a duty to foreseeable victims
- Under the Andrews approach you breach a duty to everyone when you act negligent, even unforeseeable victims.

If there is a foreseeable victim

- Did the defendant act as a reasonably prudent person would in the situation?
- LANDLORD exceptions?

CAUSATION

Causation requires two factors: cause in fact and proximate cause. If one of these factors are missing, the defendant is not liable.

Cause in fact

- Cause in fact has two elements: substantial factor and a "but for" cause
- When two individual causes merge to form an indivisible harm there is no need for a but for cause (only exception)
    - Substantial Factor: the main facto of the claim must come from the defendant's actions
        - Can have multiple factors
    - But for cause: without the defendant's actions the claim would not have occurred

Proximate Cause

--discuss both Cardozo and Andrews approach in relation to the facts if unforeseeable victim

1. Foreseeability: foresee that your negligence could cause harm
2. Spatial: literal proximity
3. Temporal: relationship between the defendant's negligence and plaintiff harm

Eggshell skull rule: you take the plaintiff as you find them and you're responsible for anything that disrupts pre-existing conditions

Intervening Superseding Cause: always cut the causal chain

1. Unforeseeable
2. Extraordinary
3. Independent of defendant's conduct

DAMAGES: Just put what the damages would be not in money = broken leg cost

DEFENSES (options below)

Comparative Negligence: will be given the state law

- Pure plaintiff?
- 50/50?
- 50/49?

Express Assumption of Risk: gym membership contract like defense

Statute of Limitations

Family Immunity

Vicarious Liability