

Torts Wypadki Spring 2009



Torts II
Eric E. Johnson
Assistant Professor of Law
University of North Dakota School of Law
*Copyright 2009 by the authors.
Authored by the students of Torts II, and incorporating some material
originally authored by Prof. Johnson.
This document has not been reviewed by Prof. Johnson for legal or factual
accuracy.*

Preliminary Printing Not Authorized for Exam

This is copy of the Torts Wypadki Spring 2009 is a preliminary version for use in studying. You may not bring this copy with you to the exam to use as a reference. When you sit for the exam, you will be given a clean printed document, which will be the same as this document, except that this cover sheet will be different, and there may be markings on the interior pages to indicate that such pages are part of the official printing authorized for use in the exam.

Contents

- 1 Torts II 2009 Outline
- 2 2. Defenses to Negligence
 - 2.1 Consent
 - 2.2 Self-Defense
 - 2.3 Defenses to Negligence Based On the Plaintiff's Risk Taking
 - 2.4 Contributory Negligence
 - 2.4.1 Cases
 - 2.5 Comparative Negligence
 - 2.5.1 Black Letter Law
 - 2.5.1.1 Pure Comparative Negligence
 - 2.5.1.2 Modified Comparative Negligence
 - 2.5.1.2.1 Greater than 50% Approach
 - 2.5.1.2.2 50-50 Approach
 - 2.5.1.2.3 "Slight" Comparative Negligence
 - 2.6 Assumption of the Risk
 - 2.6.1 Black Letter Law
 - 2.6.1.1 Elements
 - 2.6.1.2 Classifications of Assumption of the Risk
 - 2.6.2 Cases
 - 2.7 Defenses to Negligence Based On Lapse of Time
 - 2.8 Statute of Limitations
 - 2.8.1 Black Letter Law
 - 2.8.1.1 Tolling
 - 2.8.1.1.1 Examples of Tolling
 - 2.8.1.2 When Does the Statute Start Running?
 - 2.8.1.2.1 Accrual Rule
 - 2.8.1.2.2 Discovery Rule
 - 2.8.1.3 Basic
 - 2.8.1.4 Rationales
 - 2.8.1.5 Criticisms
 - 2.9 Statute of Repose
- 3 3. Parties
 - 3.1 The Firefighter's Rule
 - 3.1.1 Black Letter Law
 - 3.2 Immunities
 - 3.2.1 Charitable Immunity
 - 3.2.1.1 Black Letter Law
 - 3.2.1.2 Policy
 - 3.2.1.3 Cases
 - 3.2.2 Spousal Immunity
 - 3.2.2.1 Black Letter Law
 - 3.2.2.2 Cases
 - 3.2.3 Parent Child Immunity
 - 3.2.3.1 Black Letter Law
 - 3.2.3.2 Cases
 - 3.2.4 Governmental Immunity
 - 3.2.4.1 Black Letter Law
 - 3.2.4.2 Cases
 - 3.3 Joint and Several Liability
 - 3.3.1 Joint Tortfeasors
 - 3.3.2 Black Letter Law
 - 3.3.3 Acting in Concert
 - 3.3.4 Independent Acts Causing a Single Indivisible Injury

- 3.3.5 Vicarious Liability
 - 3.3.6 Unity of Release Rule and Satisfaction
 - 3.3.7 Contribution & Indemnification
 - 3.3.8 Cases
 - 3.3.9 Black Letter Law??
 - 3.3.9.1 Allocations of Liability Among Joint Tortfeasors
 - 3.3.9.2 Impact of Settlement on Percentage Shares
 - 3.3.9.3 2 approaches to address J&S liability of settlement: [Must be Good Faith in settlement]
 - 3.3.10 Cases
- 4 4. Federal Tort Claims Act (FTCA)
 - 4.1 Black Letter Law
 - 4.1.1 Procedure
 - 4.1.2 Substance
 - 4.1.3 Exemptions based on the nature of the conduct
 - 4.1.4 Exemptions based on the cause of action
 - 4.1.4.1 Other Exemptions Talked About In Class
- 5 5. Remedies
 - 5.1 Damages
 - 5.1.1 Nominal Damages
 - 5.1.2 Compensatory Damages
 - 5.1.2.1 Property Damages
 - 5.1.2.2 Personal Injury
 - 5.1.3 Punitive damages
 - 5.1.3.1 Policy for and Against
 - 5.1.3.2 Insurance Liability for Punitive Damages
 - 5.1.3.3 Respondeat Superior and Punitive Damages
 - 5.1.4 Black Letter Law on DAMAGES
 - 5.1.5 After the Verdict
 - 5.1.6 Cases
 - 5.1.7 Examples Given In Class
 - 5.2 Restitution
 - 5.2.1 Restitutionary Remedies
 - 5.2.2 Equitable Remedies
 - 5.3 Injunction
 - 5.3.1 Types
 - 5.3.2 How to get an Injunction
 - 5.3.3 Defense to Injunctions
 - 5.3.4 Enforcement
 - 5.4 Enforcing Judgment
- 6 6. Special Issues In Rights of Action
 - 6.1 Implied Right of Action
 - 6.2 Bivens Action
 - 6.2.1 Cases
 - 6.3 Section 1983 Actions
 - 6.4 RICO Claims
 - 6.4.1 Elements P Must Show
 - 6.4.2 To violate § 1962
- 7 8. Special Problems of Standing
 - 7.1 Wrongful Death Action
 - 7.1.1 Black Letter Law
 - 7.1.2 Who can Sue
 - 7.1.3 Proof Problems
 - 7.1.4 Defenses
 - 7.1.5 Cases
 - 7.2 Survival Action
 - 7.2.1 Black Letter Law
 - 7.2.2 Defenses

- 7.2.3 Cases
 - 7.3 Loss of Consortium
 - 7.3.1 Black Letter Law
 - 8.9. Intentional Torts
 - 8.1 Generally
 - 8.1.1 Act
 - 8.1.2 Intent
 - 8.1.3 No issue of Incompetence
 - 8.1.4 Causation
 - 8.1.5 The Mistake Doctrine
 - 8.2 Assault
 - 8.2.1 Elements
 - 8.2.1.1 1. Act
 - 8.2.1.2 2. Intent
 - 8.2.1.3 3. Causation
 - 8.2.1.4 4. Apprehension
 - 8.2.1.5 5. Imminent Harmful or Offensive Touching
 - 8.2.2 Cases
 - 8.3 Battery
 - 8.3.1 Elements
 - 8.3.1.1 1. Act
 - 8.3.1.2 2. Intent
 - 8.3.1.3 3. Causation
 - 8.3.1.4 4. Touching
 - 8.3.1.5 5. Harmful or Offensive
 - 8.3.2 Issues
 - 8.3.3 Cases
 - 8.4 False Imprisonment
 - 8.4.1 Elements
 - 8.4.1.1 1. Act (or Omission)
 - 8.4.1.2 2. Intent
 - 8.4.1.3 3. Causation
 - 8.4.1.4 4. Confinement
 - 8.4.1.5 5. Bounded Area
 - 8.4.1.6 6. Awareness of harm
 - 8.4.2 Omissions
 - 8.4.3 Improper Assertion of Legal Authority (False Arrest)
 - 8.4.4 Cases
 - 8.5 Outrage (IIED)
 - 8.5.1 Elements
 - 8.5.1.1 1. Act
 - 8.5.1.2 2. Intent or recklessness
 - 8.5.1.3 3. Extreme and outrageous conduct
 - 8.5.1.4 4. Causation
 - 8.5.1.5 5. Severe emotional distress
 - 8.5.2 Issues
 - 8.5.3 Cases
 - 8.6 Trespass to Land
 - 8.6.1 Elements
 - 8.6.1.1 1. Act
 - 8.6.1.2 2. Intent
 - 8.6.1.3 3. Causation
 - 8.6.1.4 4. Real Property
 - 8.6.2 Cases
 - 8.7 Trespass to Chattels
 - 8.7.1 Elements
 - 8.7.1.1 1. Act
 - 8.7.1.2 2. Intent

- 8.7.1.3 3. Causation
 - 8.7.1.4 4. Interference
 - 8.7.1.5 5. With right of possession
 - 8.7.1.6 6. Chattel
 - 8.7.2 Issues
 - 8.7.3 Cases
 - 8.8 Conversion
 - 8.8.1 Elements
 - 8.8.1.1 1. Act
 - 8.8.1.2 2. Intent
 - 8.8.1.3 3. Interference
 - 8.8.1.4 4. Chattel
 - 8.8.1.5 5. Substantiality
 - 8.8.2 Issues
 - 8.8.3 Cases
 - 8.9 Defenses to Intentional Torts
 - 8.9.1 Consent
 - 8.9.2 Self-Defense
 - 8.9.3 Defense of Others
 - 8.9.4 Defense of Property
 - 8.9.5 Necessity
- 9 Nuisance
 - 9.1 Types
 - 9.2 Private Nuisance
 - 9.3 Public Nuisance
- 10 10. Alternatives to Tort Actions
 - 10.1 Workers Compensation
 - 10.1.1 Black Letter Law
 - 10.1.1.1 Who is an Employee?
 - 10.1.1.2 Tests
 - 10.1.1.3 Information
 - 10.1.1.4 Requirements For Obtaining Benefits
 - 10.1.1.4.1 Needs to Be a Personal Injury
 - 10.1.1.4.2 Has to Result From an Accident
 - 10.1.1.4.3 Has to Occur In the Course of Employment
 - 10.1.1.4.4 Must Arise Out of the Employment
 - 10.1.1.4.5 Types of Benefits
 - 10.1.1.4.6 Type of payments
 - 10.1.1.5 Exclusivity
 - 10.1.1.6 Preclusion
 - 10.1.2 More
 - 10.2 Safety Regulation
- 11 11. Strict Liability
 - 11.1 Black Letter Law
 - 11.2 Types
 - 11.2.1 Trespassing Livestock
 - 11.2.2 Domestic Animals With Known, Dangerous Propensities
 - 11.2.3 Wild Animals
 - 11.2.4 Products
 - 11.2.5 Ultrahazardous activities
 - 11.3 Cases
- 12 12. Regulation
 - 12.1 Black Letter Law
 - 12.2 OSHA
 - 12.2.1 Four parts
 - 12.3 Cases
- 13 13. PRODUCTS LIABILITY
 - 13.1 Black Letter Law

- 13.1.1 Defects
 - 13.2 The 4 Principal Doctrines Underlying Products Liability Suits
 - 13.3 Negligence
 - 13.3.1 Black Letter Law
 - 13.3.2 Cases
 - 13.4 Breach of One or More Warranties
 - 13.4.1 Black Letter Law
 - 13.4.2 Cases
 - 13.5 Strict Products Liability (Liability Without Faults)
 - 13.5.1 Black Letter Law
 - 13.5.2 Cases
 - 13.6 Misrepresentation
 - 13.6.1 Black Letter Law
 - 13.6.2 Cases
- 14 14. Oblique Torts
 - 14.1 (NIED) Negligent Infliction of Emotional Distress
 - 14.1.1 Black Letter Law
 - 14.1.2 Cases
 - 14.2 (NIEL) Negligently Inflicted Economic Loss
 - 14.2.1 Black Letter Law
 - 14.2.2 Types
 - 14.3 Fraud
 - 14.3.1 Black Letter Law
 - 14.3.2 Cases
 - 14.4 (IIWK) Intentional Interference With Contract
 - 14.4.1 Black Letter Law
 - 14.5 Intentional Interference with Prospective Economic Relations
 - 14.5.1 Elements
 - 14.5.2 Defenses
 - 14.6 Malicious Prosecution and Malicious Institution of Civil Proceedings
 - 14.7 INVASION OF PRIVACY
 - 14.7.1 Intrusion
 - 14.7.2 Disclosure
 - 14.7.2.1 Black Letter Law
 - 14.7.2.2 Elements
 - 14.7.3 False Light
 - 14.7.3.1 Black Letter Law
 - 14.7.3.2 Elements
 - 14.7.4 Right of Publicity
 - 14.7.4.1 Black Letter Law
 - 14.7.4.2 Elements
 - 14.8 Breach of Fiduciary Duty
 - 14.8.1 Black Letter Law
 - 14.8.1.1 Types of Fiduciary Duties
 - 14.8.2 Cases
 - 14.9 Defamation
 - 14.9.1 Black Letter Law
 - 14.9.1.1 Elements
 - 14.9.2 Libel v. Slander
 - 14.9.3 Defenses
 - 14.9.4 Constitutional Issues
 - 14.10 Seduction
 - 14.10.1 Black Letter Law
 - 14.10.1.1 Elements
 - 14.11 Criminal Conversation
 - 14.11.1 Black Letter Law
 - 14.11.1.1 Elements
 - 14.11.2 Other

- 14.12 Alienation of Affection
 - 14.12.1 Black Letter Law
 - 14.12.1.1 Elements

Torts II 2009 Outline

2. Defenses to Negligence

Consent

- Consent is a defense to tort liability
 - Can be express or implied consent when under the circumstances, the conduct of the individual reasonably conveys consent.
 - Can also be implied by law
 - Such as performing emergency medical treatment when victim is unconscious and unable to provide consent.
 - Such implied consent can be negated (through a bracelet disallowing emergency help)
- Children
 - May give consent to some things such as lending a toy.
 - Not to other things such as medical treatment.
 - Adolescents also pose a problem, especially in the arena of abortions.
- Insanity or Retardation
 - An individual w/out mental capacity due to insanity or retardation may not consent.
- Consent is invalidated if the action goes beyond the consent manifested.
 - Biting or eye gauging while tackling in football.
 - A medical treatment that goes too far in scope.
- Consent Invalid if:
 - induced by fraud or duress
 - Majority rule is that a person cannot consent to a criminal act, it is always invalid.
 - Minority rule holds that a person can consent to a criminal act for purposes of tort liability.

Self-Defense

- Self-defense can negate tort liability
- Reasonable force can be used where one reasonably believes that such force is necessary to protect oneself from immediate harm.
- Threat Must be Immediate
 - Self-defense must be in response to an immediate threat of harm.
 - Pre-emptive strike is not justified in common law.
 - Retaliation is not self-defense and is not justified.
- The Victim's Response Must Be Reasonable
 - Person must objectively believe that force is necessary to avoid unlawful attack.
- The Obligation to Retreat From Deadly Force

- Majority: not required to retreat if possible
- Minority: required to retreat if in the victim's dwelling.

Defenses to Negligence Based On the Plaintiff's Risk Taking

1. Contributory Negligence
2. Comparative Negligence
3. Assumption of the Risk

Contributory Negligence

- Definition: conduct on the part of the P which falls below the standard of conduct to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the D in bringing about the P's harm
- The standard is objective: the P, just as the D, is compared to a hypothetical person.
- Complete defense-Contribute to the negligence-Boom. You're out of there. Comparative-you're still in the game.

=== Black Letter Law ===remember quote from class about black letter law-Can't get too concerned with the black letter law. Have to get a feel for what's elastic, and what's concrete in the law.

- Contributory negligence is a defense to *negligence* but **not** to *intentional torts*.
- In **Virginia**, if you contribute to the negligence, then you cannot recover.

====Subversion of Contributory Negligence====(ameliorates (improves) effects of contributory negligence)

1. Mental Conditions Allowances for the standard of care
 1. Some courts have allowed mental conditions to be taken into account for standard of care when applied to P
2. Causation (actual or proximate)
 1. For P's conduct to preclude recovery, P's negligence for own safety must be a cause-in-fact or proximate cause of the accident resulting in injury
3. Anticipatory Mitigation
 1. You have a duty to treat your injuries (cannot get injured and not treat the injury and expect to recover on the further injury)
 2. This is so even in advance of injuries (wearing a seatbelt)
 1. If you're in car, you need to wear a safety belt;
 2. If you're in a boat, you need to wear a life jacket;
 3. If you're on a motorcycle, you need to wear a helmet
 3. If you don't mitigate, your recovery is reduced by the amount you could have mitigated
4. Wanton, Willful, or Reckless Negligence - Contributory negligence has been held to **not** be a defense to *willful, wanton, or reckless conduct*. Can drive a truck through this one because it's a definition.
5. The Last Clear Chance Doctrine
 1. Important in contributory negligence jurisdictions

2. Instructs the court to ignore the plaintiff's contributory negligence if the defendant's negligence occurred *after* the plaintiff's contributory negligence.
3. This is purely chronological
4. Shown in the *Davies v. Mann* case
6. Per Se Negligence Based on a Statute to Protect Incapacitated Persons
 1. Statutes enacted to protect a class of persons from their inability to exercise self-protective care.
 2. I.E. child labor laws and the sale of liquor to intoxicated patrons
 3. I.E. A speed limit of 15mph by a school playground
7. Jury nullification.

Cases

- *Davies v. Mann*
 - Historic case, involved the evolution of the "Last Clear Chance Doctrine." Plaintiff had tied down his donkey's feet to keep it from running away and the donkey was left by the side of the road. Defendant later drove his team of horses negligently and ran over the donkey. The Defendant argued that the Plaintiff was *contributorily negligent* by improperly tying the donkey and should have been barred from recovery. Court held that the plaintiff's contributory negligence would not bar recovery since the Defendant, had he acted with ordinary care, had the *last clear chance* to avoid the accident. P had last clear chance to avoid accident with Donkey! Based purely on chronology. Questionable policy. Ignores degree of culpability. Nullifies the impact of contributory negligence. Generally rejected when replacing contributory negligence with comparative neg. Loss is still total for one party or the other.
- *Butterfield v. Forrester*(Kings Bench)
 - Butterfield was thrown from his horse when it ran into an obstruction put up by Forrester. Butterfield was riding very fast and would not have likely hit the obstruction if he was riding slower. Butterfield is therefore contributorily negligent.
- Last Clear Chance Doctrine- Instructs the court to ignore the π contributory negligence if the Δ negligence occurred after the π contributory negligence. The doctrine is based purely on chronology. If the Δ was negligent after the π , the π contributory negligence is ignored and the π can receive a complete recovery.

Comparative Negligence

- Definition: conduct by P which falls below the standard which he should conform to for his own protection and which is a legally contributing cause cooperating with the negligence of the D in bringing about the P's harm is only a partial bar to the P's recovery
- Used in all but 4 states
- Reduces the plaintiff's recovery by the percentage of her responsibility for the injury attributable to the plaintiff.
- Has *replaced* some form of *Contributory Negligence* in all but 4 states. Contributory now is mostly considered comparative negligence. Comparative need not be a complete bar to recovery, unlike contributory negligence used to be. This acts only as a partial bar resulting in a percentage deduction from recoverable damages.

- A court determines the percentage of fault by the facts, and in essence the trier of fact simply selects a percentage based on its own appraisal of relative fault.

Black Letter Law

Pure Comparative Negligence

- Adopted by 12 States
- Under this approach, plaintiff can recover some percentage from liable defendant regardless of the extent of their own negligence
 - This is the Rule in California
 - Plaintiff is responsible for their part of the negligence
 - I.E.If A is responsible for 60% of the damages, A can still recover 40% of the damages from B.
- No matter the percent fault by P, can still recover the percent that the D is liable.

Modified Comparative Negligence

- Ps allowed a partial recovery until the P reaches a certain level of culpability.
 - Once that level is reached, the P is completely barred from any recovery just as in contributory negligence
- A majority of the states utilize one of three forms of modified comparative negligence.

Greater than 50% Approach

- P is barred when he/she is greater than 50% at fault
- Plaintiff wins if their contribution is < 50%:
 - This is the Rule in North Dakota
 - This is the Rule in 12 states
 - Your negligence is compared to all the Defendants
 - I.E. All parties are 25% responsible; Plaintiff wins because 25% < 75%

50-50 Approach

- P is barred when he/she is greater than or equal to 50% at fault
- Tie goes to the Defendant. If P's negligence is 50% or greater, he/she cannot recover.
 - This is the Rule in Minnesota, Montana, Texas
 - This is the Rule in 21 states
 - Your negligence is compared to each Defendant.
 - I.E.All parties are 25% responsible; Plaintiff loses because 25% v. 25% really looks like 50% v. 50%

"Slight" Comparative Negligence

- P is barred unless P's negligence is only slight.
- Law says that if the Plaintiff is *slightly* negligent, then they cannot recover
- This is the Rule in South Dakota (Note:this is the only state in the Union to utilize this approach!)

Determining % of fault=job of trier of fact who simply selects % based on its own appraisal of relative fault. Flexible common sense concept... in order to arrive at an "equitable apportionment or allocation of loss."

Assumption of the Risk

- Definition: P fully understands a risk of harm to himself or his things caused by the D's conduct or by the condition of D's lands or chattels, and who nevertheless voluntarily chooses to enter or remain, or to permit his things to enter or remain within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recover.
- Complete defense to negligence

Black Letter Law

Elements

1. Knowledge of a Particular Risk
 1. Plaintiff must have actual and conscious knowledge of the particular risk
 2. Employs subjective standard
 3. P must know of risk, and its magnitude and implications
2. Voluntariness
 1. Plaintiff must voluntarily expose herself or her property to the risk to assume the risk
 2. Involuntariness ranges from coercion to being unreasonably difficult to avoid the risk
3. Assuming the Risk
 1. Only works if Plaintiff has knowingly and voluntarily assumed.
 2. Similar to consent in intentional torts

Classifications of Assumption of the Risk

1. Express Assumption of Risk
 1. P expressly assumes risk by explicitly agreeing through contract or otherwise.
 2. Is a complete defense to the specific risk that the plaintiff agreed to
 1. Can be invalidated if there is an unequal bargaining power between the parties and the plaintiff has no choice but to sign.
 1. E.g. *Tunkl v. Regents of U CA* - court invalidated an express agreement by a patient to assume the risk of medical malpractice by a hospital
 3. Waivers
 1. These are not contracts, but affirmative defenses, for absurd activities (i.e. skydiving, bungee jumping) that are enforceable if signed by the participant as express consent.
 2. Certain actors, such as doctors and dentists, cannot give individuals something to sign which allows them to escape liability.
2. Implied Assumption of Risk
 1. P's voluntary exposure to risk is derived merely from her behavior, and not from explicit assent.
 2. Is implied by the plaintiff's conduct in relation to the risk
 1. Most jurisdictions are absorbing Implied Assumption of the Risk into Comparative Negligence.

Cases

- *Rush v. Commercial Realty Co.*
 - Plaintiff fell through a trap door on her way to the bathroom and was injured. The court held that the Landlord has a duty of care toward the maintenance of the privy located on property under his care and the Plaintiff did not assume the risk in using it.
- *Seigneur v. National Fitness institute, Inc.*
 - Plaintiff hurt herself during a fitness evaluation. Before engaging in the activity, the Plaintiff signed a "Assumption of the Risk" Waiver. The court ruled her participation was voluntary and the waiver did not violate public policy because the service was nonessential.

Defenses to Negligence Based On Lapse of Time

Statute of Limitations

- Basics
 - Barring a suit based on amount of time elapsed.
 - Bright line deadline
 - Affirmative defense-varies by kind of action, and by state.
 - Comparisons to equity-fairness, and reliance. Fed Statutes often borrow State statutes.
 - Legal Malpractice trap-May have to file that day!
- Why have them?
 - Deterioration of evidence
 - avoid re-ignition of conflicts quieted by time
 - peace of mind for Ds
 - ability to throw out trash
 - promotes fwd looking investments
 - avoids costs to society
- Criticisms
 - This is crazy-not rational, inflexible, bars otherwise just claims,
- Flexibilities-Ct. determines when statute starts running, (When tolled=Paused)

Statute of Repose

- SOR starts running at the act-not the harm (as in SOL).
- Counters operation of accrual or discovery - They run much longer.
- Acts as alternative-Could be 20 years.
- D's helped:
 - architects, engineers, product manufacturers, physicians.
- Helps to replace privity (connection b/w buyer and seller) rule.
- Ex: blender bought at garage sale!

Statute of Limitations

- "Statute of Limitations" is triggered by an **injury**
- There is really no rhyme or reason to these laws. Some can take a long time (kind of like North Dakota) or they can be really fast (like Kentucky). There is no mercy that can be had.

Black Letter Law

Tolling

- Legal Doctrine that allows for the **delay** or **pause** of the running time in a "Statute of Limitations."

Examples of Tolling

1. Minority age
2. Prison
3. Military service
4. Mentally incompetent
5. Another suit pending on same subject matter
6. Administrative proceedings prerequisite to suit
7. Defendant's agreement

When Does the Statute Start Running?

Accrual Rule

- Harm (vs. act) - starts when the harm occurs, not when the harmful act occurs
- When damage is done and you can sue

Discovery Rule

- When relevant facts are discovered (or should be discovered by the reasonable person)
 - I.E., foreign object left by a surgeon in someone's body

Basic

- Bright-line deadline
- Serves as a complete bar to suit (threshold inquiry)
- Affirmative defense
 - Must plead in answer
- Varies by state and kind of action
- Comparison to equity
 - Fairness inquiry
 - Reliance
 - Federal statutes borrow state limitations
 - Legal Malpractice trap

Rationales

- Deterioration of evidence
- Avoiding the re-ignition of conflicts quieted by time
- Peace of mind for potential defendants
- Ability to throw out trash
- Promotes forward-looking investments

- Avoids cost to society through increased insurance costs
- Social value of stable transactions and relationships

Criticisms

- Irrational
- Bars otherwise just claims
- Inflexible
- Prevents some kinds of torts from being compensable at all

Statute of Repose

- Is a statute, similar to a "Statute of Limitations," that is designed to cut off certain legal rights if they are not acted on by a certain time.
- Main Difference is that a "Statute of Limitations" is triggered by an **injury**, while a "Statute of Repose" is triggered by the **completion of an act**.
- Unlike a "Statute of Limitations," a "Statute of Repose" is designed to bar actions after a specified period of time has run from the occurrence of some **event** other than the injury which gave rise to the claim.
- Courts hold a Statute of Repose much more stricter than a "Statute of Limitations"
- There is no "Accrual" or "Discovery" rule.
 - i.e. a "Statute of Repose" is triggered when a blender is made, not when it injures the plaintiff.
- Defendants helped:
 - Architects
 - Engineers
 - Product Manufacturers
 - Physicians

3. Parties

The Firefighter's Rule

- Definition: precludes firefighters (and other professionals) from suing for injuries sustained fighting negligent fires (or other incidents related to a profession) kind of a reverse immunity- pg. 244-DLM. Justification for (Assumption of risk)-Extended to veterinarian's as well.

Black Letter Law

- The generally accepted rule that firefighters are excluded from suing for injuries sustained while fighting "negligent" fires.
- But arsonists can be sued by firefighters
- in essence, a form of assumption of risk.
 - Firefighters have assumed the risk and their compensation already reflects the ordinary risks of negligently created fires inherent in their job

- the rule also helps address the concern that victims would be deterred from seeking assistance if liability to the firefighter was imposed on their negligent behavior which created the fire.

Immunities

- Protects a defendant from tort liability.
- Unlike a defense, it is not dependent on the P's behavior.
- Is dependent on the D's status or relationship to the P.

Charitable Immunity

Black Letter Law

- Historically, charitable organizations were immune from tort liability.
- Today, many state laws have abolished the charitable immunity. Most of the remaining states have only partially retained the immunity.
 - This has evolved this way because of prevalence of liability insurances and the business-like operations of large charities.

Policy

- A means to protect the important work done by charities.
- Funds given to the charity are meant to forward that work, not defend against litigation.

Cases

- *Abernathy v. Sisters of St. Mary's*
 - P suffered injuries as a result of D's negligence - D's employee negligently failed to assist P as he moved from his bed to the restroom. P sued for \$35K of damages for personal injuries.
 - Court abolished the doctrine of charitable immunity, ruling that an NGO charitable institution is liable for its own negligence and for the negligence of its agents and employees acting within the scope of their employment.
 - In its reasoning, the court explained that the reasons for the doctrine of charitable immunity do not exist today; today charitable organizations are big businesses. Further, it stated that immunity fosters neglect and breeds irresponsibility while liability promotes care and caution.

Spousal Immunity

Black Letter Law

- Historically, spouses could not sue each other; many said such suits would damage marital harmony.
- Today, the majority of states have eliminated spousal immunity and those that have retained it tend to impose limitations upon it.

Cases

- *Freehe v. Freehe*
 - Husband (P) was injured when wife (D) negligently maintained a tractor and failed to warn her husband of the tractor's unsafe condition.
 - Issue is whether the husband can sue his wife or if the wife enjoys interspousal tort immunity. This brings up the issue of unity - if a spouse is suing another spouse, the unity is likely gone.
 - Compare to testimonial immunity for spouses - one spouse would likely not want to testify against the other if the unity of the couple was still in tact.
 - Court held in favor of husband and allowed the claim.

Parent Child Immunity

Black Letter Law

- Historically, this immunity was created in the U.S.A. Precludes tort actions between parents and non-adult children.
- Today, Still kept in most states to prevent fraud and collusion; litigations that will deplete family resources; and destroy the harmony of the family. Some states have completely abolished parent-child immunity.
- Never held to bar property or purely economic torts, but does prevent intentional torts such as assault or battery and liability for personal injuries caused by negligence

Cases

- *Renko v. McLean*
 - Daughter suing her mother for the injuries she sustained when the mother negligently drove the car both women were in and caused an accident.
 - Court decides to keep the parent-child immunity doctrine.
 - Reasoning:
 - Prevents fraud and collusion among family members to the detriment of third parties
 - Threat of intrafamilial litigation that will deplete family resources

Governmental Immunity

Black Letter Law

- Under the common law, immunities were complete and prevented any tort suits against the government.
- There is Immunity for discretionary (policy-making) functions but not ministerial (policy implementation) acts.
 - Cannot sue the government for its "negligent" policy-making decisions
 - Can sue the government for "negligent" ministerial acts
 - Ex: Government decides to build a bridge, and the bridge is built negligently. A person injured by the negligently built bridge can sue.
- The federal government is also immune from claims based on strict liability.

Cases

- *Ayala v. Philadelphia Board of Public Education*
- *Riss v. New York*
 - Woman (P) was severely injured by a man who had threatened her for more than six months. P had complained to the police of this, but they took no action. P is now trying to sue the city for poor police protection.
 - Court upheld the immunity for the police-Crushing burden if we didn't have immunity here.
 - Worried about a slippery slope - where would liability for the police department end?
- *DeLong v. Erie County (1982)*
 - DeLong called 911 when a person broke into her house. The 911 operator failed to properly record the address and also violated other procedures. Court ruled that DeLong could recover.

Difference is reliance. She relied upon 911 call to save her. 911 dispatcher's had liability.

Joint and Several Liability

- Allows the Plaintiff to go after all tortfeasors for the entire amount. *Under common law, joint tortfeasors are jointly and severally liable for the P's total damages
 - Several: more than one tortfeasor
 - Joint: each of the several tortfeasors is fully liable for the entire damage.

Joint Tortfeasors

Two or more individuals who either

1. Act in concert to commit a tort,
 2. Act independently but cause a single indivisible tortious injury, or
 3. Share responsibility for a tort because of vicarious liability. (aider doesn't need to be the "but for" cause, tacit agreement enough).
- Each tortfeasor is jointly and severally liable for the P's total damages.
 - If P is unable to collect co-tortfeasor's part of the liability it is due, then the ones who can pay are liable for that amount.

Black Letter Law

Acting in Concert

- A person acts in concert to commit a tort with another when she **aids or encourages** another in committing the tort.

- Ex: If A, a passenger in B's car, encourages B to speed, then both are joint tortfeasors.

Independent Acts Causing a Single Indivisible Injury

- 2 or more individuals who act independently but whose acts cause a single indivisible tortious injury are also joint tortfeasors.
- Ex: If A is driving negligently in her car and B is driving negligently in her car, and they both collide to cause injury to C.

Vicarious Liability

- A defendant may be jointly liable for the actions of another through vicarious liability.
- Ex: Employers being held liable for actions of their employees through respondeat superior
 - When employee activities are within the scope of employment in the factual context of specific cases
- Liability imputed to one person for the actions of another - most common through respondeat superior - "Let the employer answer"(sometimes parent-child)
- Employers are generally not liable for torts of independent contractors, with exceptions for public policy reasons in situations involving non-delegable duties and inherently dangerous activities
- Those who hire independent contractor may also be held liable if closely supervise the contractor's day to day activities
- Partners and those participating in temporary joint enterprises are vicariously liable for torts committed by each other when acting in furtherance of the partnership or enterprise

Unity of Release Rule and Satisfaction

- Release
 - Considers a party **released** only if the release refers to him by name or with such descriptive particularity that his identity or connection with the tortious event cannot be doubted.
 - A release is a surrender of plaintiff's cause of action against a party to whom the release is given.
- Satisfaction
 - If a plaintiff recovers the full amount from one tortfeasor, either by settlement or payment of judgment, there is a "satisfaction."
 - If satisfaction, then plaintiff may not recover further against any other joint tortfeasor.
 - Until there is satisfaction, however, she may proceed against other jointly liable parties.

Contribution & Indemnification

- Contribution: If P fails to name a D, the tortfeasor sued is still liable for the damages. pg. 211, contribution to settlement from other tortfeasors- in real life, can spend a lot of time worrying about money on the backside of issues.
 - Previously, there was no way to get the other JT to contribute.
 - Now many states allow the convicted D to seek contribution from other JT
- Indemnification: Total reimbursement from another tortfeasor when the defendant was only technically liable, but the other tortfeasor was far more culpable. 100% contribution from

another tortfeasor-pg. 212. Part of fairness-go after the one tortfeasor you can find, and let them go after other tortfeasor's.

- Defendants liable for Joint & Several Liability can go after other tortfeasors not named
- Defendants can "implead" another or they can file a separate lawsuit nonsolvent
 - Reasons to use contribution instead of impleading another D
 - If a jury would find a D less sympathetic, they might want to have the judgment rendered only against them and later ask for contribution rather than implead a more sympathetic D and risk having the damages allocated disproportionately to the 1st D's disadvantage
 - Might not implead because 1st D does not know who the other D is. The 1st D might later discover who the other D was, and then can ask for contribution.

Cases

- Bartlett v. New Mexico Welding Supply
 - Case involved 3 different parties. First car caused the second car to slam on the brakes. This caused the 3rd car, a semi, to rear end the 2nd car. The identity of the first car's driver was unknown. The jury found the 1st car 70% liable and the 3rd car 30% liable. Reversed & Remanded for trial court to enter judgment for plaintiff for 30%.

Black Letter Law??

Allocations of Liability Among Joint Tortfeasors

- Traditionally: liability was divided equally.
 - 2 JT: each paid half
 - 3 JT: each paid a third
- Traditional allocation has been replaced in many states by comparative allocations of responsibility.
 - Liability is divided by the proportion of liability.
 - Fact finder decides how much each JT is liable
 - This also means that a negligent P could have to pay its own damages and also contribute any defaulting D's share.

Impact of Settlement on Percentage Shares

- Satisfaction Settlement: results in full compensation for an injury and extinguishes the claim against all potential tortfeasors
- Release Settlement: a surrender of the P's claim against only one or more of the tortfeasors (P still preserves his right to sue the other tortfeasors for remaining liability)
- Unity of Release: historically, the release of one tortfeasor constituted a release of all tortfeasors.
 - This could be avoided by instead using covenants not to sue.
 - Majority approach is now to release only the affected party and other tortfeasors can still be liable.

2 approaches to address J&S liability of settlement: [Must be Good Faith in settlement]

1. Defendant's payment is deducted from total damage award (may under or overpay)
 1. Remaining defendants required to pay the rest.
 2. Encourages settlement by allowing plaintiff to accept a low offer (immediate compensation), while still pursuing the other Δ s for full recovery, and by putting pressure on the Δ s to settle rather than be left holding the bag.
 3. "Good faith" hearing required to show plaintiff and defendant are not colluding to make another defendant pay an excessive share.
2. Defendant's percentage found by jury is deducted from award regardless of actual payment
 1. Π risks losing part of ultimate recovery if he settles too low, while non-settling Δ s are protected.
3. Defendant's "Mary Carter" agreements: Defendant settles secretly & remains active litigant
 1. Mary Carter Agreements: a D will stay in litigation despite having settled already often on an agreement that if the damages exceed a certain amount then D's liability will be reduced.
 1. Motivates that particular D to help P in the case.
 2. Some jurisdictions allow these others don't.

4 Policy Reasons for retaining Joint & Several Liability:

1. Each Defendant is liable for the entire injury if he is the proximate cause of that injury
2. If one Defendant is judgment proof, the π loses out on that share of the cost
3. Lack of due care for others is tortious, lack of due care for oneself is not
4. Elimination of J&S would not allow π to receive adequate compensation for his injuries

Cases

- Knell v. Feltman (A/C of DC 1949): Plaintiff was driving car in DC & w/ Evelyn Langland & hit taxi
 - PP: Langland sued & got jgmt for \$11,500 against Feltman & Feltman filed a 3rd party complaint against Knell & was awarded \$5750, but Knell says he was not named as a joint tortfeasor in the initial lawsuit, so he should be liable. Reasoning: Ct says the old rule from 1799 Merryweather case was misread to mean any tortfeasors couldn't get contribution, when in actuality the rule was any willful or intentional acts can't get contribution, but others could. Jgmt: Aff'd - Feltman gets his money

4. Federal Tort Claims Act (FTCA)

- Gives the federal courts jurisdiction to hear actions for injury or loss of property, or personal injury or death caused by negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the US, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred

Black Letter Law

- Sovereign immunity **prevents** suits against the U.S. government.
- The FTCA is a **limited** waiver of sovereign immunity.

- The FTCA is a comprehensive scheme of procedural and substantive law.
- Tort suits against the U.S. **must** be prosecuted under the terms of the FTCA.

Procedure

1. Plaintiffs **must** first file an administrative claim with the appropriate agency specifying a sum certain of damages.
2. The agency has six months to allow or deny the claim.
3. If denied, a plaintiff may sue in federal district court under the FTCA.

Substance

- Tort liability judged with reference to state law
- If under state law, a private actor would have a duty in negligence, then the U.S. has such a duty for negligence purposes.
 - Note: This is true even if the action performed by the U.S. would be highly unusual or unlikely for a private person.
- Exceptions: based on type of conduct or cause of action
- Cannot sue when government is doing government things (discretionary duty)
- No strict liability – must prove negligence
- The tortious action **must have been committed by a federal employee** acting within the scope of his or her employment.
 - Note: Contractors' actions cannot create federal liability, except in rare circumstances where they were so closely controlled, they were functionally employees.

Exemptions based on the nature of the conduct

1. Discretionary function or duty
2. Combatant actions of the military
3. Claims arising in a foreign country

Exemptions based on the cause of action

1. Assault, battery
2. False imprisonment, false arrest
3. Malicious prosecution, abuse of process
4. Defamation
5. Misrepresentation, deceit
6. Interference with contract rights
7. No suit can proceed under strict liability.
 1. Note: Negligence must be proven.

Other Exemptions Talked About In Class

- No incarcerated felon may bring a suit against the government for mental or emotional injury suffered while in custody without a prior showing of physical injury.

5. Remedies

Damages

- Constitutes the money awarded to the person injured by the tort of another.
- Types of Tort Damages
 1. Nominal Damages
 1. liability for a tort is established but no actual harm occurred or is proven w/ sufficient certainty.
 2. Compensatory Damages
 1. awarded to a person as compensation, indemnity, or restitution for harm sustained by him.
 3. Punitive Damages
 1. to punish and deter particularly egregious conduct; discretionary and awarded when a tort is committed with malice.

Nominal Damages

- Are symbolic awards (often \$1) given to the plaintiff when liability for a tort is established but no actual harm occurred or is proven with sufficient certainty
- Only available where the tort does not require an injury for the prima facie case
 - When you have suffered no harm
- Not available in negligence tort actions.
 - Note: Because torts like negligence require proof of the actual harm to be actionable, Nominal Damages are never awarded

Compensatory Damages

- Are typically defined as damages awarded to a person as compensation, indemnity, or restitution for harm sustained by him.
- General Damages - things like pain and suffering
- Special Damages - damages which you can peg a very **specific** number to, i.e. medical bills, loss of wages for three days
- Awarded for both Pecuniary and Non-pecuniary losses
 - Pecuniary
 - Economic, like diminished market value or medical expenses or lost wages etc...
 - Non-pecuniary
 - Non-economic, like pain and suffering
- Johnson's top 5 reasons for Compensatory Damages
 1. Compensate the Plaintiff
 2. Divest the Defendant of Ill Gotten Gain
 3. Punish the Defendant
 4. Deterrent for Insolvent Conduct
 5. Symbolic

Property Damages

- Interference with property is compensable in tort and is based upon value
- Destruction: (or permanent deprivation) is determined by the market value of the property.
- Damage: compensate for the diminished market value of property.
 - May also award repair costs
 - Less likely if repair cost more than replacement
 - More likely to allow repairs that cost more than the actual property, if property had sentimental value.
- Interference with property entitles owner to fair rental cost or damages for that time.
- When the defendant should have been aware that the possessor attached sentimental value to personal property, courts sometimes award mental distress damages in addition to compensating for the lost market value of the chattel.

Personal Injury

- Victims of personal injury can be compensated for medical expenses, lost wages or impaired earning capacity, other incidental economic consequences caused by the injury, and pain and suffering.
- Medical Expenses
 - Injured P can be awarded all reasonable medical expenses cause by the tortfeasor
 - Includes payments for: physicians, hospitals, nursing care, physical therapists, and appropriate diagnostic tests.
 - Can also recover anticipated medical costs
 - Must introduce expert medical testimony to support claims.
- Lost Wages or Diminished Earning Capacity
 - Victim can recover past and future lost wages or diminished earning capacity.
 - Lost wages Ex.: A is unable to work for 6 months and only 1/2 time for another 6 months, the lost income is calculated accordingly.
 - Diminished earning capacity: measures the victim's lost potential to earn income b/c of the injury.
 - takes into account education and prior employment history
 - Also considers the victim's special abilities, skills, and aptitude for a a career path prior to the injury if proof of these is presented.
- Incidental Economic Consequences: travel expenses to seek medical treatment, expenses incurred for housekeeping services b/c of the victim's incapacity
- Reduction to Present Value: Actual award must be reduced to take into account that the money is being transferred to the victim in advance and will gain interest to compensate for inflation.
- Pain and Suffering
 - Mental distress over an injury, distress over the inability to play a favorite sport, or concern over illnesses that the victim is at risk due to the injuries.
 - Often calculated on per diem basis and multiplied by appropriate number of days.
 - Can't get pain and suffering if you are unconscious.
 - It is for pain and suffering you already had or will have in the future.
 - Courts don't allow "Golden Rule" arguments asking jury to consider how much payment they would require to exchange places with victim

Punitive damages

- Are discretionary and awarded when a tort is committed with malice
- Used to punish and deter a particularly egregious conduct
- like a "Quasi-Crime." Unlike criminal cases, tort cases do not have preponderance of the evidence standard. Criminal punishment requires the case beyond a reasonable doubt evidence.
- Constitutionality: court has evaluated excessive damages in light of 3 factors
 - Degree of reprehensibility
 - Very high ratio between the punitive damage award and the actual damage; and
 - The much lower civil penalties generally authorized for such misconduct

Policy for and Against

- Opposition
 - Duplicative of criminal punishment w/out the safeguards provided by criminal procedures, including more rigorous burden of proof
 - Basing the award on the D's wealth is sometimes excessive and vulnerable to the jury's emotion.
 - This has created need for some states to cap punitive damages.
- Justification
 - Deters tortious conduct
 - B/c the damages are based upon the wealth of D, they can be more effective in deterrence than fines.

Insurance Liability for Punitive Damages

- Jurisdictions are divided:
 - Prohibit insurance coverage because such coverage effectively allows wrongdoer to escape a judicially imposed punishment
 - Provide insurance coverage because potential D's should be free to contract for protection from punitive damages, especially since such damages can be imposed for tortious conduct which may not be intentional

Respondent Superior and Punitive Damages

- Punitive damages may be collected from an employer for actions done by its agent if:
 - The employer or managerial agent authorized the doing and the manner of the act, or
 - The agent was unfit and the employer was reckless in retaining him, or
 - The agent was employed in a managerial capacity and acting in the scope of his employment, or
 - The employer or managerial agent approved of the act.
- This view has been adopted in many states.

Black Letter Law on DAMAGES

- Interest
 - Factors in interest from time of the commitment of the tort
- Attorney Fees
 - American Rule
 - Generally, losing party does not pay

After the Verdict

- Remitter
 - D moves for a new trial and judge says he is going to grant a new trial unless P takes a reduced verdict.
- Additur
 - Opposite of a Remitter. When the jury awards a ridiculous low amount, the judge will give P the option of either taking an increased verdict amount or a new trial.

Cases

- *Cheatham v. Pohle*
 - Husband distributed naked pictures of his ex-wife around town. She was awarded punitive damages, but, the state law requires 75% of the punitive damages to the state's violent crime victim fund. She sued to get the rest of the money, but lost.
- *State Farm Mutual Automobile Ins. v. Campbell*
 - Holding: Few awards outside a single digit ratio, will serve due process.
 - Excessive Punitive Damage Factors:
 - Degree of reprehensibility of non-disclosure
 - Very high ratio between the punitive damages award and the actual damage
 - Much lower civil penalties generally authorized for such misconduct
- *Montgomery Ward & Co., Inc. v. Anderson*
 - Woman was injured while shopping in a Montgomery Ward store and the personnel sent her to the hospital. Her total medical expenses were \$25K. She negotiated with the hospital and got the bill discounted by 50%. Montgomery Ward wants this information disclosed to the jury. Trial court denied, saying discount was a collateral source.
 - Court gives 4 situations in which a collateral source of recovery may be introduced:
 - 1. To rebut P's testimony that she was compelled by financial need to return to work prematurely or to forego additional medical care
 - 2. To show P had attributed her condition to some other cause
 - 3. To impeach P's testimony that she had paid her medical expenses herself
 - 4. To show that P had actually continued to work instead of being out of work, as claimed
- *Anderson v. Sears (1974)*
 - A heater that was made and sold by Sears caused a fire and ended up burning Anderson. Jury awarded \$2,000,000 in damages. On appeal, the damages were ruled not to be excessive or unreasonable.

Examples Given In Class

1. Caleb - 59 year old lawyer. Hit by a bus, now in a coma. Was making over \$500,000 a year.
 1. He gets no pain and suffering damages
 2. After the verdict, they could pull the plug on him

Restitution

- Rather than focusing on the Plaintiff's suffering, we are focused on the Defendant's gain.
- D wrongfully gained something through a tort

Restitutory Remedies

1. Replevin
 1. Used for Chattels
 2. You can recover a Chattel before trial, and hold onto it through the rest of the trial
 3. Ex.: If someone steals your bicycle, you can use replevin to get it back during the trial pending the outcome.
2. Ejectment
 1. Used for land
 2. Someone squats on your land and you want them off
3. Quasi Contract
 1. Can be used in Contracts or Torts
 2. Obligating the D to pay the P for unjust enrichment or unjust benefits received that are conferred as a result of a tort
 3. Ex: Someone parking on your lawn causing damage to the lawn but they do not stay there. Used as alternative to ejectment. Can sue for the damages they caused while there.
 4. Can get Compensatory Damages

Equitable Remedies

- **Constructive Trust**
 - Court is construing a situation to be as if D is holding the property in trust for P
 - Equitable way to get an interest in your property that someone else possesses
 - Ex: Someone steals \$10,000 and buys a boat with it. You can get a constructive trust in the boat.
 - Requirements
 - D got title to specific property
 - Results in unjust enrichment
 - Traceable (have to trace the money that was taken to the specific purchase made)
 - Get the trust res back:
 - Get it turned over by court order
 - Secured creditor - meaning P's debt that someone owes P is owned by specific property (E.g. bank that owns your house or car; credit card company)
 - BFP (bonafide purchaser) cuts it off
 - As the remedy, P gets the thing, the res
- **Equitable Lien**
 - The property is owned by D but there is a claim against it that is legally enforceable
 - Impose a lien to secure payment of a debt
 - Used when D misappropriated P's property that can be traced to P
 - Ex: someone steals \$10,000 and improves a boat, you can get an equitable lien. When they transfer title of the boat, you get your money from the proceeds.
 - Need a court judgment to get a lien on the property
 - Requirements
 - D misappropriated P's money or property
 - Traced to D's property

- Unjust enrichment
- Get a lien, which is good for encumbering a sale, foreclosure, or making a secured creditor

Injunction

- The court orders another party to do something or refrain from doing something

Types

1. Mandatory
 1. Must do something
2. Prohibitory
 1. Must refrain from doing something

Order of Injunctions, listed Chronologically

- **Temporary Restraining Order**
 - Before judgment
 - Must Balance the Hardships
 - Look at who is likely to win
 - Can be issued Ex Parte
 - No notice is required
 - Can last for 10 Days
- **Preliminary Injunction**
 - Have a hearing
 - Balance the hardships and see who's likely to win
 - Preliminary injunction lasts until judgment
 - Can go on for years
 - Cannot be done ex parte - other party has to be put on notice
- **Permanent Injunction**

How to get an Injunction

- To get an Injunction you must do 5 things (IPFBD or I Put Five Bucks Down)
 1. **I** - Must show it the *Inadequacy* of money damages
 2. **P** - Must show *Property* (or *Personal Right*) is affected
 3. **F** - It has to be *Feasible* to enforce the injunction
 4. **B** - You have to *Balance* the hardships.
 5. **D** - You have to look at the *Defenses*

Defense to Injunctions

1. Unclean Hands
 1. If you are also a dirty bird then the court won't intervene

2. Laches
 1. Like Statute of Limitations
3. Estoppel
 1. Some Reliance element

Enforcement

- The judge can throw you in jail.

Enforcing Judgment

- As soon as you have a judgment, the other party must pay you
- If they do not pay, there is a Judgment Debtor Exam
 - The party against whom judgment is sought comes to court on a certain day, and the opposing party can basically take their property to satisfy the judgment
 - How did you get here today? Give me the keys to your car and tell me where it is parked.
- Once someone files for bankruptcy, you can't do anything to them; there is an automatic stay on everything.
- If you want to appeal a judgment, you must ask the judge for a stay otherwise that judgment is sitting out there and the opposing party can execute on it.
 - You also must post a bond in order to appeal.

6. Special Issues In Rights of Action

Implied Right of Action

- Is a term used in United States statutory and constitutional law for circumstances when a court will determine that a law that creates rights also allows private parties to bring a lawsuit, even though no such remedy is explicitly provided for in the law.
- Implied causes of action arising under the Constitution of the United States are treated differently than those based on statutes.
- These are similar to *negligence per se*, but are a little more direct because they avoid negligence and the standard of care.
- Case: *Burnette v. Wahl*

Bivens Action

- A lawsuit brought to redress a federal official's violation of a constitutional right. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*
- A Bivens action allows federal officials to be sued in a manner similar to that set forth at 42 USCA § 1983 for state officials who violate a person's constitutional rights under color of state law.

Cases

- 4th amendment provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. That money damages are applicable, even though not specifically stated in the Constitution.
- ISSUE: Whether violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct.
- HOLDING: It does. Having concluded that his complaint states a cause of action under 4th Amend., court holds that he is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the 4th Amend.
 - It is well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.
 - The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.
 - If something is implied by the Constitution, the Court does not have to wait until Congress says something
 - The Constitution trumps all!

Section 1983 Actions

42 U.S.C. § 1983

- Provides a private right of action under federal law for someone who's constitutional or civil rights have been violated under color of state law.
 - Cause of action must be based on the U.S. Constitution or federal statute
- Persons you can/cannot sue under § 1983
 - Cannot sue a state or federal government
 - Can sue individuals
 - Can sue local, municipal governments
 - Cannot sue a state or state agency
 - Can sue a state officer in his/her official capacity
- Allows a federal claim for someone acting under color of state law
 - Person does not have to be employed by the state - if a person pretends to be a police officer and pulls you over, you may sue them under § 1983
- Qualified immunity
 - Individual officials have qualified immunity when they are performing discretionary acts
 - That qualified immunity is lost when their conduct violates clear constitutional or statutory rights
- § 1983 Used for:
 - Often used by prisoners
 - Police misconducts - excessive force, unconstitutional searches and seizures
 - Deaths caused by restraint when people are in custody
- Attorney's fees
 - If P is the prevailing party, P can get attorney's fees from D. All P has to do is win.

- D can also get attorney's fees from P if D is successful, but it is unequal; D has to show that P's action was frivolous, unreasonable, or without foundation
- Implied rights of action under other Amendments (IE: 5th and 8th Amendments)

RICO Claims

- Criminal statute to prosecute organized crime
- There is also a civil side

Elements P Must Show

- Violation of the RICO statute
- Injury to business or property
- Injury was caused by violation of § 1962

To violate § 1962

- Conduct
- Of an enterprise
- Through a pattern
- Of Racketeering Activity
 - Things often associated with racketeering
 - theft of interstate commerce
 - embezzlement from pension and welfare funds
 - drugs
 - financial institution fraud
 - money laundering
 - human trafficking
 - gambling
- Defalco v. Beras (2001)

DeFalco, a land developer, brought RICO charges against Bernas. Bernas made many threats which implied that if DeFalco didn't do as he said; he would not be given certain contracts, etc.

8. Special Problems of Standing

Wrongful Death Action

- By statute, all jurisdictions permit an action for the negligently inflicted wrongful death.
- Mostly done to compensate the family

Black Letter Law

- pain and suffering of persons closely connected to victim
- Plaintiff is suing for loss suffered due to the tortiously inflicted death of a close relative
- Spouse, parents, and children are usually permitted to bring the action

- Initially only could receive pecuniary losses
- Now can recover lost support and other benefits

Who can Sue

- Plaintiff is suing for loss suffered due to the tortiously inflicted death of a close relative
- Spouse, parents, and children are usually permitted to bring the action
- If the victim leaves his estate, for example, to a museum, the museum can bring a wrongful death and/or survival suit and receive the money.
- If the victim has no immediate family and is killed instantly, the defendant has no civil liability for anything.
- Courts tend to not allow cohabitants, including significant others and life companions, to sue

Proof Problems

- Plaintiff must prove with some degree of certainty the losses suffered from the tortious act
- Must establish relevant time period for support, focus on the value of the support that would have been provided as well as value of lost services
- Plaintiffs need to provide factual support for claim of damages not pure speculation

Defenses

- P's recovery may be limited or barred based upon P's own fault.
- Also, recovery could be limited if deceased contributed to their own death.
- In contributory negligence jurisdictions, the wrongful death P's action is barred.
- In comparative negligence states, recovery is reduced by the deceased's percentage of fault.

Cases

- *Moragne v. States Marine Lines, Inc.*
 - Rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law.
- *Selders v. Armstrong*
 - The measure of damages for the wrongful death of a minor child should be extended to include the loss of the society, comfort, and companionship of the child.
- *Benally v. Navajo Nation*
 - When a Navajo dies, immediate family members are able to recover general damages, special damages, monetary value of the life of the deceased minor, and for the loss of affection, love, and companionship of the deceased minor child.

Survival Action

- Is the continuation of the decedent's action against the tortfeasor.
- For survivor statutes, it matters how much you suffer and how long you survive.
 - Ex: if same accident and someone dies instantly or someone dies slowly in suffering the person who suffered will get much more in damages.
- The person must be aware of the suffering, can't be in a vegetative state.

- The suffering in survivor statute is for the person who died, not the person's family's suffering.
 - The injury tort passes to the family as a part of the estate.
- If a person has no immediate family and was killed instantly there is absolutely no civil liability.

Black Letter Law

- The action is brought by the administrator, executor, or personal representative of the decedent's estate
 - The rep can recover any damages the decedent would have recovered if he/she had lived
- Continues pre-existing claims
- Pain and suffering suffered by victim brought by the decedent's estate (It is what they would have been able to bring had they survived).
- Like wrongful death actions, created by statute

Defenses

- Any defenses that could have been raised against the decedent could be raised by the rep
- Where the defendant's tortious conduct leads to the instantaneous death of the plaintiff, there is no survival action available to the plaintiff's estate.

Cases

- *Murphy v. Martin Oil Co.*
 - Decedent has to be aware of pain and suffering before death.

Loss of Consortium

- Is a claim from someone who is related to (closely connected to) the direct victim of tortious conduct where the victim doesn't die to recover the lost value of the services the victim provided
- Allows compensation to spouse of person who was injured due to the negligent actions of a tortfeasor.
- Started w/ compensation to a husband for loss of his wife's services due to D's tortious conduct.
 - Gradually expanded to include more than the economic loss, but also loss of companionship, comfort, and sexual services.
- Virtually all states now permit either spouse to recover.
- Courts have been reluctant to expand beyond spousal recovery b/c the potential of double recovery (more than one child recovering, or parent and child).

Black Letter Law

- Economic loss as well as intangibles such as companionship, comfort, and sexual services. Is not an automatic recover Must prove loss.
- Statutes broaden what and who can recover
- All states now allow for spousal loss of consortium

- Victim is still alive
- Conduct of the initially injured party may affect recovery
 - Recent movement to expand it to parents and children
- In some courts it only applies where you can show pecuniary (money) losses

9. Intentional Torts

Generally

1. Act
2. Intent
3. No issue of Incompetence
4. Causation
5. Mistake Doctrine

Act

- Volitional movement
- Not reflex

Intent

- Desire the result or knows to a substantial certainty that it will occur.
- The conception of intent differs from tort to tort under the heading of "intentional torts"
- Substantial certainty or desire counts as intent and is subjective.
- D must exhibit desire or substantial certainty
 - Intent as Desire: satisfied if the D desires the consequences of her acts.
 - Intent as Substantial Certainty: substantially certain that her acts will cause the elements of the tort to occur.
 - Fact that reasonable person would have been substantially certain is not dispositive.
- Transferred intent
 - Applied to 5 intentional torts: (1) Battery, (2) Assault, (3) False Imprisonment, (4) Trespass to Chattel, and (5) Trespass to land. Does not transfer to Conversion.
 - Definition: if the D intends any one of these 5 torts, but her acts, instead or in addition, result in any of the other 5 intentional torts, the D is liable, even though she did not intend the other tort. Her intent to commit the original tort transfers to the tort actually committed.
 - Person to person
 - Tort to tort
- Motive is irrelevant, and is distinguished from intent.
 - Note: that whether evidence of motive can be used at trial to establish intent or another element is a question for evidence law

No issue of Incompetence

- Children as well as the mentally ill, developmentally disabled, and demented can commit intentional torts

Causation

- Actual
- Proximate

The Mistake Doctrine

- If a defendant intends to do acts which would constitute a tort, it is no defense that the defendant mistakes, even reasonably, the identity of the property or person he acts upon or believes incorrectly there is a privilege.
 - Ex. A is liable for trespass even if she entered believing it was her own land.

Assault

- An intentional creation of an immediate apprehension of a harmful or offensive touching
- Assault occurs when the defendant's acts intentionally cause the victim's reasonable apprehension of immediate harmful or offensive contact.

Elements

1. Act
2. Intent
3. Causation
4. Apprehension
5. Immediacy

1. Act

- Imminent Harmful or Offensive Contact
 - For assault to be actionable, the victims apprehension must be of imminent harmful or offensive contact
 - Words alone are not enough.
- Source of Contact
 - It is not necessary that D be the perceived source of the threatened harmful or offensive contact.
 - Ex: telling someone a stick is a snake

2. Intent

- Can be intent to effect an assault or intent to effect a battery
- The defendant must desire or be substantially certain that her action will cause the apprehension of immediate harmful or offensive contact.

3. Causation

- Apparent ability sufficient
- Words alone are not sufficient

- But words can negate the effect of conduct

4. Apprehension

- Victim must perceive that harmful or offensive contact is about to happen to him
 - If victim is asleep, then there is no apprehension.
- Apprehension of imminent contact need not strike fear in the victim.
 - Apprehension is more of a sense of expectation, rather than being in fear.
- Words alone are not sufficient: But words can negate the effect of conduct

5. Imminent Harmful or Offensive Touching

- The victim's apprehension must be of imminent harmful or offensive contact.
 - Apprehension - it is about to happen; it is imminent.

Cases

- *I de S et ux. v. W de S*
 - Old case where assault comes from.

Battery

- An intentional infliction of a harmful or offensive touching of a person.
- Does not require intent to harm, only necessary D intend to cause either harmful or offensive contact

Elements

1. Act
2. Intent
3. Causation
4. Touching
5. Harmful or Offensive

1. Act

2. Intent

- Can be intent to effect a battery
- Or intent to effect an assault
- Does not require intent to harm, only harmful or offensive contact.
- Harm does not have to be foreseen

3. Causation

- The defendant's voluntary action must be the direct or indirect legal cause of the harmful or offensive contact.
- D need not actually touch the victim

- Ex. throwing a rock

4. Touching

- Can be direct or indirect (e.g., setting something in motion, laying a trap)
 - Touching of a person includes anything connected to the person
 - Ex: a person's car while they are sitting in it
- Covers physical intrusions and personal autonomy as well.
- P does not have to be conscious at time of contact.

5. Harmful or Offensive

- Judged by a reasonable-person standard
- The offensive contact need not even physically touch the body.
- There is no requirement that the victim be conscious of either the contact or its harmful or offensive nature at the time of the intrusion.

Issues

- "Eggshell plaintiff" rule
 - I.E. if P has an extremely thin skull and you touch it and cause severe injury, you are responsible for all of the damages.

Cases

- *Garrett v. Dailey (1955)*
 - A five year old boy pulled the chair out from under an old lady. The child can be liable for battery.
- *Fisher v. Hotel (1967)*
 - An African-American man was going through a buffet line in Texas when one of the employees snatched his plate away from him. The court ruled this was battery. Court saw the plate as similar to a man with a cane. Basically some-what connected to the body.

False Imprisonment

- The intentional confinement, experienced or harmful, of a person to a bounded area. Unlawful acts to intentionally cause confinement or restraint of the victim within a bounded area.

Elements

1. Act (or Omission)
2. Intent
3. Causation
4. Confinement
5. Bounded Area

6. Awareness or Harm

1. Act (or Omission)

- Failure to release

2. Intent

- Can be transferred.

3. Causation

4. Confinement

- Sufficient methods of confinement
 - Physical barriers
 - Physical force
 - Threats of force
 - Can be directed at the victim, her family, companions, or property
 - The restraint that results from not abandoning her property constitutes imprisonment.
 - I.E. Victim detained on a yacht surrounded by water without access to rowboat.
 - Invalid assertion of legal authority
 - Shoplifting detentions are privileged if: (1) there is a reasonable belief of the theft; (2) detention is done in a reasonable manner; and (3) detention is for a reasonable period of time.
- Insufficient methods of confinement
 - Moral pressure
 - Future threats
- Duration of confinement is irrelevant-but obviously, the amount of compensation received will reflect the duration of the confinement.

5. Bounded Area

- Movement must be limited in all directions
- Any reasonable and reasonably knowable means of escape negates this element
 - Not reasonable if it requires the victim to be heroic, endure excessive embarrassment or discomfort, or if the victim is unaware of the means of escape.
- The bounded area cannot be the rest of the world, but can be an entire state.

6. Awareness of harm

- If plaintiff is unharmed, but is aware of the confinement, this element is satisfied
- Likewise, if plaintiff is unaware of the confinement, but is harmed by the confinement, this element is satisfied
- However, if plaintiff is unaware of the confinement and is unharmed, the element is not satisfied.

Omissions

- False imprisonment can also result from a defendant's omission when the defendant had a legal duty to act.
 - Ex. A takes B out on his boat, promises to return when B requests, but A fails to do so.

Improper Assertion of Legal Authority (False Arrest)

- Unlawfully restraining a victim is a form of false imprisonment.
 - The actor making the arrest must be privileged, i.e. police officer, private citizens of cause.
 - Confinement that is privileged is not unlawful.
 - False imprisonment requires that the victim be conscious of the confinement at the time of imprisonment.

Cases

- *Nursing Home v. Neuman*
 - Neuman was an elderly man who was confined against his will in a nursing home for 50 days.
- *Hardy v. Labelles*
 - Hardy was working for Labelles when another employee thought Hardy had stolen something. The manager then brought Hardy into one of the back rooms. There was no false imprisonment because Hardy chose to go into the room and voluntarily stayed there in order to "clear up" the situation. Furthermore, no threat of force was demonstrated and Hardy never asked to leave.

Outrage (IIED)

- The intentional or reckless infliction, by extreme and outrageous conduct, of severe emotional distress
- Outrage is also known as "intentional infliction of emotional distress" or "IIED"

Elements

1. Act
2. Intent or Recklessness
3. Extreme and outrageous conduct
4. Causation
5. Severe Emotional Distress

1. Act

2. Intent or recklessness

- Note that recklessness counts as "intent" for outrage

- P must prove that the D intended to cause severe emotional distress or acted w/ reckless disregard as to whether the victim would suffer severe distress

3. Extreme and outrageous conduct

- Extreme and outrageous conduct-is behavior which is "beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community."
- The standard here is high -- must be truly outrageous
- Behavior which is beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable to a civilized community.

4. Causation

5. Severe emotional distress

- **Must be enough that plaintiff sought medical attention**
- For recovery under IIED, the plaintiff must prove that the defendant intended to cause severe emotional distress or acted with reckless disregard as to whether the victim would suffer severe distress.
- Although characterized as an "intentional" tort, recklessness, in addition to intent, generally suffices for liability.
 - Requires proof both that the defendant intended or recklessly imposed the risk of severe mental distress and that the victim actually suffered severe mental distress.
- Most states no longer require that the victim suffer physical manifestations of the mental distress.

Issues

- The "eggshell plaintiff" doctrine **does not apply** to allow unusually sensitive plaintiffs to recover for act that would not cause severe emotional distress in persons generally
 - However, if the defendant knows about the unusual sensitivity, a cause of action will lie
- Innkeepers, common carriers, and other public utilities (such as a telegraph company) are liable for intentional gross insults which cause patrons to suffer mental distress.
- Third-Party recovery
 - Only available if, in addition to the normal elements of the tort, she is
 - a close relative of the primary victim;
 - present at the scene of the outrageous conduct against the primary victim; and
 - the D knows the close relative is present

Cases

- *State Rubbish Collectors Ass'n v. Siliznoff*
 - Plaintiff's sought relief for a supposed debt def. owed as a result of garbage pick-up. Defendant claimed the written agreement was the result of coercion and duress. Defendant filed a counterclaim for intentional infliction of mental distress "assault." Defendant claimed and proved that members of the association, including the board, made threats to his person, personal property, and livelihood if he did not sign the agreement to pay. As a direct result def became physically sick, and could not work.

- Holding: Evidence was sufficient for a finding that when a person intentionally subjects another to mental suffering incident to threatened physical abuse, absent assault, he is liable for mental distress
- One who, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it

Trespass to Land

- An intentional physical invasion of a person's real property. Can be the earth, other material beneath the surface, and "the air space above it."

Elements

1. Act
2. Intent
3. Causation
4. Real Property

1. Act

2. Intent

- The only intent needed is the intent to do the act that results in the physical invasion
- Not knowing that the land belongs to another person does not negate the intent element

3. Causation

- Physical invasion
- Person or object
- Does not include intangibles, e.g., vibrations or odors

4. Real Property

- Surface
- Subsurface
- Airspace to a reasonable distance Act

Cases

- *Dougherty v. Stepp*
- *Herrin v. Sutherland*

Trespass to Chattels

- An intentional interference with the right of possession of personal property.
- Defendant's acts must damage the chattel, deprive the possessor of its use for a substantial period of time, or totally dispossess the chattel from the victim.

Elements

1. Act
2. Intent
3. Causation
4. Interference
5. With Right of Possession
6. Chattel

1. Act

2. Intent

- Can be transferred
- Must only have the intent to do the act of interference.

3. Causation

4. Interference

- Actual Damage, Substantial Deprivation, or Dispossession Required
 - Trivial interference w/ another's personal chattels is not actionable in tort. (must have actual damage)
 - Depriving the possessor of the use of his chattel also constitutes trespass to chattel, provided there is severe deprivation and not mere momentary interference.
 - Also exists if the D totally dispossesses the victim of his chattel, such as by stealing or otherwise wrongfully asserting control over the property.

5. With right of possession

- Physical contact
- Dispossession
- Interference with use

6. Chattel

- Something tangible that you own, livestock, computer
- Not people
- Not real property
- Not intangible property
 - Unless reduced to a tangible form (e.g., negotiable bearer bond)

Issues

- Distinguish from conversion
 - Conversion exists only when the damage or other interference with the personal property is sufficiently serious to justify a forced sale to the defendant. The defendant is

liable for the entire market value of the chattel and not simply a smaller repair or rental cost.

Cases

- *CompuServe, Inc. v. Cyber Promotions, Inc.*

Conversion

- An intentional exercise of dominion or control over a chattel which so substantially interferes with the plaintiff's rights as to require defendant to be forced to purchase it at full value.

Elements

1. Act
2. Intent
3. Interference
4. Chattel
5. Substantiality

1. Act

2. Intent

3. Interference

4. Chattel

5. Substantiality

- So substantial, the act warrants a forced sale

Issues

- Distinguishing conversion from trespass to chattels
 - Factors mitigating in favor of conversion
 - Length of time withheld
 - Amount and severity of damage
 - "Totaled"
 - Factors tending to negate conversion
 - Repairable damage
 - Temporary nature of deprivation
- In the remedy for conversion, after paying damages, the defendant retains the converted property

- Purchasing stolen property, even if the purchaser was acting in good faith and not aware the seller did not have title, constitutes conversion by both the seller and innocent buyer. Both the seller's and the buyer's acts seriously interfere with the ownership of the rightful owner.

Cases

Defenses to Intentional Torts

Consent

1. D gives permission, making what would otherwise be tortious activity privileged.
2. Must be objectively manifested
 1. If A subjectively knows that B's otherwise objective manifestation of consent is not real, no consent exists.
 1. Ex. A knows B means no by saying yes.
3. Express and Implied
 1. Express: saying or indicating consent through gestures.
 2. Implied: under the circumstances, the conduct of the individual reasonably conveys consent.
 1. Ex. A greets B every time he walks across A's property; A had given B implied consent to trespass.
 2. Can also be based on community custom, absent contrary expression by the individual.
 1. Ex. Walking on private property to ring the door bell.
4. Consent by Law
 1. Consent recognized in the context of emergency medical treatment by health professionals when a victim is unconscious and unable to provide consent.
5. Invalidating Manifestations of Consent – both express and implied consent can be held invalid
 1. Incapacity
 1. An individual can be held to lack capacity to consent
 1. Ex. children, mentally disabled, intoxication.
 2. Incapacity not known or should not be reasonably known by the potential D should not invalidate a defense to consent.
 2. Action Beyond Scope of Consent
 1. Consent is invalidated by action that goes beyond the consent manifested.
 1. Ex. consent to play football does not constitute consent to be bitten by an opponent.
 3. Fraud
 1. Consent is invalid if it is induced by fraud that misrepresents an essential aspect of the interaction.
 1. Ex. A asks B to eat a pizza without informing B the pizza contains rat poison.
 4. Duress
 1. Consent procured under physical threat, extreme situational pressure is invalid.
 2. Does not include economic pressure.
 5. Illegality
 1. Majority Rule

1. A person cannot consent to criminal activity; the consent is void for tort liability.
 1. Ex. A and B are engaged in an illegal boxing match, the participant's consent, which would otherwise prevent liability for battery, is invalidated.
2. Minority Rule
 1. A person can consent to a criminal act for purposes of tort liability.

Self-Defense

1. Reasonable force can be used where one reasonably believes that such force is necessary to protect oneself from immediate harm.
 1. D must sincerely believe the force is necessary for protection, but must also act reasonably.
 1. Sincere but unreasonable actions are not privileged.
2. Elements
 1. Immediate Threat
 1. The threat must be immediate; a preemptive strike is not justified under common-law.
 2. Reasonable Response
 1. Only justified if the individual reasonably believes that force is necessary to avoid an unlawful attack.
 1. Even if the belief proved reasonable, the individual must also subjectively believe self-defense is necessary.
 1. The belief need not be correct.
 2. Force intended to inflict death or serious bodily injury is only justified if the individual reasonably believes she would suffer serious bodily injury or death from the attack.
3. Obligation to Retreat From Deadly Force
 1. No obligation to retreat from force NOT threatening death or serious bodily injury.
 2. Force threatening death or serious bodily injury:
 1. Majority rule
 1. No retreat required; the right and dignity of the individual can be defended with deadly force.
 2. Minority rule
 1. Requires retreat where serious bodily injury or death would otherwise be required in self-defense.
 2. No need to retreat from a dwelling
 3. Does not require retreat if the victim correctly and reasonably believes such a retreat couldn't be safely accomplished

Defense of Others

1. A person can use reasonable force to protect a 3rd person from immediate unlawful physical harm.
 1. Both family and strangers included.
2. Limited Privilege Rule

1. Privilege to use force in defense of a 3rd person exists only when the person being defended was privileged to use force; only when the person being defended has the right of self-defense can the intervener claim a privilege.
 1. Basically, "Alter-ego rule" from criminal law.
 2. Ex. A is liable for defending B against C and D if it turns out B was knowingly resisting a lawful arrest by undercover agents C and D.
2. More courts are concluding there is a privilege to use reasonable force to protect a 3rd party whenever the actor reasonably believes a 3rd party is entitled to exercise self-defense.

Defense of Property

1. An individual is privileged to use reasonable force to prevent a tort against her real or personal property.
 1. Reasonable mistakes will not excuse force directed against an innocent party.
2. Reasonable Force
 1. Only reasonable force can be exercise in protection of property.
 1. Lethal force or force intended to inflict serious bodily injury is never reasonable to protect property.
3. Defense of Habitation
 1. The use of deadly force or force likely to cause serious bodily harm is not justified unless the intruder threatens the occupants' safety, by committing or intending to commit a dangerous felony on the property.
4. Mechanical Devices
 1. Mechanical devices intended to inflict serious injury or death to protect property (i.e. spring guns) are generally not allowed.
 1. Only way permissible is if the right of self-defense is implicated in response to a threat of deadly force or serious bodily harm
 2. Barbed wire fences and similar deterrents to enter land are permissible since they are visible and less likely to cause serious injury.
 3. *Katko v. Briney*
5. Recovery of Personal Property
 1. May use reasonable force to recover property when in "hot pursuit" of the wrongdoer.
 2. If force is directed at an innocent party, the actor is liable even if the mistake was reasonable.
 3. Many states have adopted a merchant's privilege allowing stores to use reasonable force to detain a person for reasonable periods to investigate possible theft.
 1. Allows for reasonable mistake
 2. Detention must be within or near the immediate parameters of the store.

Necessity

1. Allows a D to interfere with the property rights of an innocent person in order to prevent greater injury.
2. Types
 1. Public:
 1. D uses or injures private property to protect the community from more substantial harm.

2. Complete defense; not liable for damages to the property
2. Private:
 1. D uses or injures private property to protect a private interest valued greater than the property.
 2. Incomplete defense; liable for damage to the property.

Nuisance

Types

- Private Nuisance
- Public Nuisance

Private Nuisance

- Where D's conduct interferes w/ another's current possessory or beneficial interest in the use or quiet enjoyment of land.
- Elements
 - Unreasonable Interference
 - Generally, smoke, offensive odors, noise, or vibrations that materially interfere w/ ordinary comfort may constitute nuisance b/c use of property is interfered with.
 - Current Possessory Interest
 - Must have physical control over the land at the time.
 - Intentional or Unintentional Conduct
 - Intentional or unreasonable, or Unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or abnormally dangerous conditions.
 - Invasion is intentional if the actor: Acts for the purpose of causing it, or Knows that it is resulting or substantially certain to result from it.

Public Nuisance

- Where D's conduct interferes with a public right or convenience, or the public health or safety.
- Circumstances to evaluate unreasonable interference:
 - Whether the conduct involves a substantial interference w/ the public health, the public safety, the public peace, the public comfort or the public convenience, or
 - Whether the conduct is of a continuing nature or has produced a permanent or long lasting effect and to has a substantial detrimental effect upon the public right.

10. Alternatives to Tort Actions

Workers Compensation

- A statutory regime that replaces tort law
- Rewards workers who are on the job, instead of using tort law

Black Letter Law

Who is an Employee?

- Types
 - Independent Contractor: aren't considered employees for workers comp
 - Employee: must be employee to qualify

Tests

- **Right-To-Control Common Law Test**
 - If the employer has the ability to control your work, then you're an employee
 - This test is more narrow than the economic realities test
 - The IRS uses the Right-To-Control Test to determine whether workers are employees for the purposes of federal taxation.
- **Economic Realities Test**
 - If the worker is economically dependent on the hiring party, then the worker is an employee.
 - Factors considered:
 - **Control**
 - If a D controls the manner in which the work is done, rather than relinquishing control to the worker, the D is an employer
 - This factor is similar to the entire common-law test.
 - **Profit and Loss**
 - If the workers are more exposed to profit and loss, then they are likely an independent contractor
 - **Capital Investment**
 - Interrelated to profit-and-loss, the more of an investment workers make in tools, supplies, or other initial outlays, the less likely they are to be employees
 - **Degree of Skill Required**
 - High degree of skill militates in favor of workers not being employees
 - **Permanency**
 - The more temporary the relationship, the less likely it is to be an employment relationship. Permanent arrangements (even if they are seasonal and recurring) favor finding that workers are employees.
 - **Integral Part of Hiring Party's Business**
 - The more integral the work is to the would-be employer's business, the more likely it is that the persons doing such work are employees.
 - **Dependence of Workers**
 - The more the workers depend upon income from the D, the more likely it is that they are employees. Independent contractors often have more than one party for which they work.
 - Fair Labor Standards Act (FLSA) which requires minimum wage

- This test is more broad than the Common Law test due to FLSA (wanting people to get minimum wage)

Information

- Pros for Workers
 - Don't have to prove fault, any injury from workplace qualifies for coverage
 - You can recover for accidents that did not happen with negligence
 - Causation and duty concepts taken away, replaced w/ "in the course of and arising out of employment"
 - Because you don't have to prove fault, there is no real need for lawyers
 - Generally get benefits like medical cost and part of lost wages
- Cons for Workers
 - Give up suing under tort law
 - Thus, can't get punitive damages or kinds of compensatory like pain and suffering

Requirements For Obtaining Benefits

Needs to Be a Personal Injury

- Physical-Physical: Generally compensable in most jurisdiction
 - Where both the cause and the effect are physical
 - Ex- Security camera falls from ceiling and causes blackjack dealer to lose a finger.
- Physical-Mental: Generally compensable in most jurisdiction
 - Where the cause is physical and the effect is physical and mental
 - Ex. security camera falls in front of blackjack dealer, who loses her arm, causing a nervous breakdown.
- Mental-Physical: Generally compensable in most jurisdiction
 - Where the cause is mental and the effect is physical
 - Ex. Employee held up at gunpoint, suffers emotional distress causing her to injure herself.
- Mental-Mental: Not held compensable in most jurisdictions
 - Where both the cause and the effect are mental and there is no accompanying physical cause or effect
 - Ex. Employee is held up at gun point and suffers a nervous breakdown as a result.

Has to Result From an Accident

- Long term exposure is generally held to be not an accident
 - E.g. Asbestos linked cancer

Has to Occur In the Course of Employment

- Recreational Activities: not usually covered?
 - E.g. Company softball game - may or may not be covered
 - Reasonable Expectancy Test - if employee was expected to participate in recreational activity, then covered
 - must be met both subjectively and objectively

- Relevant Factors: encouragement by employer, benefit to employer, involvement by employer
- Horseplay: usually covered
 - e.g. rubber band fights
 - Instigator Defense by employer - the person who started it doesn't get covered, generally
- Commuting and Travel
 - Coming and Going Rule:
 - Going to work and back home is generally not covered
 - Business Trips: Generally not covered, but increasingly are.
 - Exceptions
 - Necessary Narrow Passage
 - Special Hazards Near Employers Property
 - E.g. Avalanches on road up to ski resort
 - Returning to Work
 - When employee has been at work and goes home, but is called back in
 - Usually covered
 - Travel On Employer Owned Conveyances
 - Exception applies even if not clocked in yet
 - If Your Vehicle is Required at Work
 - E.g. Reporter at newspaper - commute is covered here because reported needs vehicle at work

Must Arise Out of the Employment

- Replaces Causation
- Need to Ask "What Type of Risk Is This?"
 - Occupational Risk
 - Covered
 - Personal Risk
 - Not covered
 - I.E. Dying of a heart attack because of poor dieting
 - Neutral Risk
 - Proximate Cause Doctrine
 - If the employer did something creating a foreseeable risk of harm to the employee
 - Generally Covered, Not very Favored
 - Most Conservative
 - Peculiar Risk
 - Is there a risk peculiar to that workplace
 - Not Favored
 - Accident must be something the public would not normally be at risk from
 - I.E. Having a box of GAP sweaters fall on you
 - Increased Risk
 - I.E. Like a delivery man
 - Used by courts
 - Ask-does employment put you at increased risk for harm?
 - Actual Risk

- Is the accident an actual risk of employment
- Does not include acts of God like meteor strikes
- Positional Risk
 - If you were where you were because of your job.
 - Any accident
 - Includes Acts of God
 - Most Liberal

Types of Benefits

- Disabilities Benefits
 - Pay for your inability to work: lost wages, death, permanent disability that harms ability to work
 - When reach a plateau, get lump sum permanent disability payment

Type of payments

- Temporary Partial Disability
 - Doesn't prevent you from work but does prevent you from working to full capacity
- Temporary Total Disability
 - Can't work at all for certain amount of time
 - Cash payments equal to some percentage of wages (e.g. 2/3 - not taxed)
- Permanent Partial Disability
 - Different states have different ways of doing this - some unscheduled (case by case); others have schedules
 - Have nothing to do with reduced earning capacity (e.g. losing a leg as a typer and losing a leg as a supermodel - both get same amount if supermodel is an employee)
- Permanent Total Disability
 - Usually based on earnings capacity - what disabled party lost out on
- Death
 - Survivors get some kind of payment in most jurisdictions

Exclusivity

- If the employer intentionally hurts you, then you can sue
- If it is wanton or reckless, it depends
- Can sue over worsening of injury even though initial injury covered by workers comp
- Dual capacity relationship with employer
 - E.g. Employee works for chicken company and eats chicken as consumer, employee can sue in court over tainted chicken

Preclusion

- Third party plaintiffs, like worker's family, are generally not allow to recover under workers comp.

More

Worker's Compensation Not torts, a statutory scheme that is an alternative to torts

History: employees had a hard time suing their employers when there was injuries in the work place Workers are more likely to get compensation from workmen's comp because you don't have to prove negligence

o But workers cannot get punitive damages and their recovery is more limited than what it would be for damages under torts Various circumstances can bar your recovery for worker's comp, depending on jurisdiction but the following are things that are looked at

o Horseplay

o Recreational activities such as an employer sponsor softball game o Commuting to and from work o Personal activities on business trips

3 kinds of risks

Occupational - Always arises out of employment and will be covered; directly related to job at hand

Personal - never arises out of employment and will never be recovered

Neutral - gray area, sometimes accidents are covered and sometimes they are not (depends on type of risk) from least to most likely to be compensated o Proximate cause - foreseeability o Peculiar risk - risk has to be peculiar to the employment o Increased risk - so long as the kind of injury you suffered is one where your job puts you in increased risk then you are covered o Actual risk - as long as the risk is one that actually accompanies employment and will be compensated o Positional risk - if an injury would not have occurred but for a fact you were in a certain place because of your job, then it's covered

Difference between worker's comp and torts

Causation: for worker's comp, causation is replaced with the concept arising out of the course of employment

Benefits: instead of being based upon how much P has

suffered or lost, it's based around the idea of P's lost earning capacity

4 elements you must prove for worker's comp

* Must be a personal injury during the course of employment

* That results from an accident
* And arises out of employment

* That occurs

Benefits from workman's comp

medical care paid for disability - temporary partial/total, permanent partial/total, death precludes tort suits - intentional wrongs, fraudulent concealment, dual capacity, 3rd party D's or P's

Safety Regulation

- See OSHA section in Regulation

11. Strict Liability

Black Letter Law

- Just like negligence except where Plaintiff gets a pass on proving duty of care and breach of duty
- Still need proximate cause (foreseeability)
- Some activities create such grave risks when accidentally released from the control of the manufacturer, transporter, or user, that responsible parties may be strictly liable—liable without fault—even where they exercised scrupulous care

Strict Liability

Strict Liability = liability without fault

a person will be held liable in damages for injury or loss even if he exercised all possible care to prevent it

a recognized subset of conduct for which, should injury or damage occur, the actor will be responsible in damages without regard to due care or fault

2 categories of strict liability

Strict liability for damage or injury caused by animals owned or possessed by D

Strict liability for abnormally dangerous activities ranging from blasting operations to aerial pesticide spraying - that pose unavoidable risk of substantial harm to others even where the actor has exercised the utmost care

Two reasons to have it:

Judge Posner says...wants the actor to consider the possibility

of making accident-reducing activity changes.

Negligence vs. Strict Liability

* Duty -vs. X (SL Qualifier - wild animals)	* Standard of care - vs. X (SL Qualifier)
* Breach - vs. X (SL Qualifier)	* Cause-in-fact (actual cause) -
yes	* Proximate cause - yes
* Damages - yes	o Intent not needed in either SL or negligence

Defenses

Assumed the risk or comparative fault

In SL, you cannot have comparative fault, but there is still a defense

o The person who harbors the wild animal may have a defense—all depends on the incident and the jurisdiction

Types

Trespassing Livestock

- The owner is strictly liable for the damage done by the trespass of his animals as long as it was reasonably foreseeable.
- Livestock:

o Possessor of trespassing livestock liable unless:

+ The trespass by animals being “driven”/herded along the highway is confined to abutting land + State common law or statute requires the complaining landowner to have erected a fence

o Dogs & cats are exempt (b/c they are “difficult to restrain & are unlikely to do any substantial harm by their intrusion”) o A separate provision is made for animals that demonstrate a dangerous propensity not characteristic for the species (ie, horse that developed a habit of attacking persons whom wander into a pasture)

Domestic Animals With Known, Dangerous Propensities

- The owner of a domestic or inherently non-dangerous animal is not strictly liable for injuries it causes unless the owner has knowledge of that particular animal's dangerous propensities.
- Domestic Animals = “customarily recognized as devoted to the svc of mankind”

o Liable only where the possessor knew or should have known of the animal’s vicious disposition “and no measure of care in its keeping will excuse him”

o In many Jurisdiction’s, dog bite statutes supersedes the CL & creates the exclusive remedy for dog bite victims

Wild Animals

- Includes birds, fish, reptiles, and insects.
- The owner is strictly liable for injuries caused by wild animals, as long as the person injured did nothing, voluntarily or consciously, to bring about the injury.
- Wild Animals:

o Possessor is liable even though the utmost care was exercised

o The keeper of a wild animal “is req’d to know the dangerous properties normal to the class to which it belongs”

o Some Jurisdiction’s, have manifest a reluctance to extend Strict Liability this far unless directed to do so by the Legislature & opt instead for a negligence std

- Defenses

- o P's contributory negligence should not bar a claim in some jurisdictions
- o However - P's assumption of risk is a defense (minority)
- o Comparative fault in some Jurisdiction's (minority)

- Restatement of Torts § 515

o A P is not barred from recovery by his failure to exercise reasonable care to observe the propinquity of a wild animal or an abnormally dangerous domestic animal or to avoid harm to his person, land, or chattels threatened by it

o A P is barred from recovery by intentionally and unreasonably subjecting himself to the risk that a wild animal or abnormally dangerous domestic animal will do harm to his person, land, or chattels

Products

Ultrahazardous activities

- Activities that create such grave risks when accidentally released from control of the manufacturer, transporter, or user make the responsible party strictly liable.
- Restatement:
 - o The risk of an abnormally great harm should D's safety efforts fail
 - o Virtual impossibility of D's elimination of the risk of harm even with the utmost care; and
 - o Resultant harm to P, or P's property, caused by the very hazards the risk of which led to describing D's conduct as abnormally dangerous/ultrahazardous in the first instance
- Factors:
 - o Degree of risk of harm to persons or property
 - o Magnitude of that harm
 - o Inevitability of some risk irrespective of precautionary measures that might be taken
 - o The ordinary (or conversely, unusual) nature of the activity in the community in which it is found
 - o Activity's value to the community in comparison to the risk of harm created by its presence
- If the harm suffered by the P is other than that which makes the activity dangerous in the first place, strict liability will not apply.
 - o i.e. D would not be held strictly liable for toxic runoff from an explosive storage facility.
- Examples
 - o Explosives, fumigation, crop dusting, storage of flammable liquids, pile driving, and the maintenance of a hazardous waste site.

(2) Ultrahazardous activities (abnormally dangerous)

Abnormally dangerous = The activity creates a foreseeable & highly significant risk of physical harm even when reasonable care is exercised by all actors; and the activity is not one of common usage

- Danger unavoidable even with the exercise of due care

o Requirement of an activity under D's control

o Type of hazard contemplated

+ Pose an unavoidable risk of substantial harm to others even where the actor has exercised the utmost care

+ D's conduct must be characterized as "abnormally dangerous"

+ P can prove liability w/out having to prove D's culpable conduct

+ P must show:

The risk of an abnormally great harm should D's safety efforts fail

The virtual impossibility of D's elimination of the risk of harm even with the utmost care

A resultant harm to P, or P's prop, caused by the very hazards the risk of which led to describing D's conduct as "abnormally dangerous" in the 1st instance

- no intent by D req'd
- in many cases of explosives injuries, locational appropriateness should have no bearing & liability should be truly strict
- Six factors in determining if an activity is "abnormally dangerous"

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

* Defenses

o Only the Ps assumption of the risk is a Defense to a SL action based on an abnormally dangerous activity

Rylands v. Fletcher : Reservoir built on the mine case in England

- American courts adopted to form this non-negligence doctrine of Strict Liability
- the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.
- If by the operation of nature, that accumulation of water had passed off into the land of the P, the P could not have complained that that result had taken place.
- Rule: The D will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings

Klein v. Pyrodene Corp. (1991): Fireworks case where P was injured. Court held strictly liable; products liability claim was dismissed.

- Detonating fireworks displays constitutes an abnormally dangerous activity warranting strict liability. Public policy also supports this conclusion. Furthermore, RCW 70.77.285 mandates

the payment of all damages caused by fireworks displays, regardless of whether those damages were due to the pyrotechnicians' negligence. This establishes the standard of strict liability for pyrotechnicians.

Cases

- Rylands v. Fletcher (1865)
 - Mill builds large reservoir next to a mine and doesn't reinforce so the reservoir floods the shaft.
 - Decision stated: the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape

12. Regulation

Black Letter Law

OSHA

- Occupational Safety and Health Act which created the Occupational Safety and Health Administration (under the Department of Labor)
- OSHA refers to the law and administration itself
 - Doesn't provide compensation, just requires employers to do certain things to safeguard work environment for employees
 - Provides no private right of action - cannot sue under OSHA; only OSHA can sue
 - Could use as part of negligence per se
 - Applies to those affecting interstate commerce
 - A state can opt out and create own OSHA if it wants
- OSHA Sect 5a - general duty clause
 - Substantive part
 - OSHA must show 2 things:
 - Harm was 1) recognized (must meet objective and subjective test) and 2) preventable (is it feasible?)
 - Should've or would've
 - Accident first requirement not necessary
 - Defense - specific standard - if employer knows that specific standard is not enough there is exception to the standard
- Promulgation of Standards
 - OSHA Sect 6a - interim standards
 - OSHA Sect 6b - new standards
 - Procedural
 - Substantive
 - Significant risk
 - Reasonably necessary and appropriate
 - Feasibility (toxic materials)
 - OSHA Sect 6c - Emergency standards

- Can only last six months; during that time OSHA can go through procedural requirements and try to pass it as a new standard
 - Substantive
 - Necessary
 - 'Grave danger'
 - Don't need a warrant to search
- OSHRC (Outside of Dept. of Labor)
 - Independently reviews grievances with OSHA
 - Administrative judge in charge
 - If an appeal, then to court where judge has been appointed by the Executive and confirmed by the Senate
- General Defense held by employer - Employee Misconduct Defense
 - Created by employee, not reasonably foreseeable by employer

Four parts

1. Since the violation employer has established rules to prevent further violations
2. Communicated these adequately to workers
3. Employer attempted to discover unknown violations
4. Corrected violations when found them

Cases

13. PRODUCTS LIABILITY

Black Letter Law

- Definition - Refers broadly to the decisional and statutory law permitting money damages from manufacturers and sellers of defective products that injure persons or property
- Does not work with pure economic damage
- Cannot attach property damage to product itself
 - E.g. does not work if video game system fries itself
- Can be imposed on lessors or renters
- Hard part is proving the defect - a lot like proving a breach of due care at least when it comes to design and warning defects
- Defect is substantial causal factor in causing the harm

Defects

1. Manufacturing Defect
2. Design Defect
 1. Risk/Utility Test
3. Warning Defect

The 4 Principal Doctrines Underlying Products Liability Suits

1. Negligence
2. Breach of One or More Warranties
3. Strict Products Liability (Liability Without Faults)
4. Misrepresentation

Negligence

Black Letter Law

- Focuses primarily on compensating persons suffering personal injury or property loss due to another's failure to act with due care under the circumstances

Cases

Breach of One or More Warranties

Black Letter Law

Cases

Strict Products Liability (Liability Without Faults)

Black Letter Law

- Designed to alleviate the burden on P to prove a duty of care was breached by manufacturer and the evidentiary problems to prove that breach
- Seller of product will be liable even if exercised all possible care
- Requirements
 - Necessity of Showing a Defect
 - P must establish that the product was defective and that the defect was a substantial factor in bringing about P's harm.
 - Effects of Changes After Leaving Control of D
 - Defect must be proved to have existed at the time the product left D's control
 - P must be foreseeable user making a foreseeable use of product
 - Necessity of Showing Unreasonable Danger
 - Product must be dangerous to the extent beyond that contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics

Cases

- *Announced in Greenman v. Yuba Power Products, Inc. (1963)*
 - Remedy of tort liability w/out the necessity of proving negligence, i.e. strict liability in tort.

- “A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used w/out inspection or defects, proves to have a defect that causes injury to a human being.”

Misrepresentation

Black Letter Law

Cases

14. Oblique Torts

(NIED) Negligent Infliction of Emotional Distress

Black Letter Law

- Traditionally, as a prerequisite to recovery for mental distress, the D’s negligence must have caused some form of physical impact on the P’s person.
 - Still minority rule.
- Most states today only require that the D must have been in some risk of physical impact known as the “zone of danger”
 - P must be at risk of physical impact and suffered a physical manifestation of distress.
 - Allows Ps to recover for mental distress caused by near misses.
- Bystander recovery
 - Majority of states allow a bystander to recover if also within the zone of physical risk
 - P can recover for emotional harm suffered from witnessing negligently inflicted harm causing death or serious injury to another (generally a close relative) when she is in a position to fear for her own safety.
 - Minority allow to bystanders not in the zone of physical risk if they
 - are physically near the accident
 - have contemporaneous sensory perception of the accident and
 - are closely related to the victim

Cases

(NIEL) Negligently Inflicted Economic Loss

Black Letter Law

- D’s unreasonable conduct has caused neither physical harm or harm to property, but sole harm is economic.
- Majority of jurisdictions find a duty in these cases

Types

- Liability of Negligent Information Suppliers
- Where an accountant, auditor, or other supplier of information is negligent, the typical injury is economic

Fraud

Black Letter Law

- Intentional or reckless misrepresentation which induces a victim's reliance and causes economic damage.
- Consists of 5 elements:
 - A material misrepresentation: past or present material fact
 - Material means that a reasonable person would regard it as important
 - Failure to disclose a fact can qualify
 - The D acted with the requisite scienter: she knew the statement was false or made it with reckless disregard as to its truth or falsity
 - The D intended to induce reliance: Not a joke
 - The misrepresentation (Not mere opinion) caused P's justifiable reliance
 - Pecuniary damages
 - Punitive damages available if done with malice.

Cases

(IIWK) Intentional Interference With Contract

Black Letter Law

- Allows recovery when the D intentionally interferes with a valid contract between other parties
- Damages in such cases can be awarded for: Economic losses, Mental distress, Punitive Damages if malice is proven
- Elements
 1. A valid K or economic expectancy between the P and 3rd Party
 2. Knowledge of the valid K or economic expectancy by D
 1. Just means D must know the facts from which she should have concluded a K existed.
 3. Intent by D to interfere with the K or economic expectancy
 1. Substantial certainty counts as intent
 4. Interference caused by the D (causation)
 5. Damages to P

Intentional Interference with Prospective Economic Relations

1. Allows recovery when Defendant intentionally and unjustifiably disrupts Plaintiff's economic expectations not in an actual contract.
 1. Ex. making it unpleasant to visit a competitor's business.

Elements

1. Valid economic expectancy between Plaintiff and a 3rd party
 1. Mere hope of profit/customers not enough
2. Knowledge of the economic expectancy by the Defendant
3. Intent by the Defendant to interfere with the economic expectancy
 1. Substantial certainty counts
4. Interference caused by the Defendant
5. Damages to the Plaintiff

Defenses

- Fair and equitable competition is a justification defense
- Employee can notify clients that he will be leaving before leaving
 - Can solicit those clients after leaving.

Malicious Prosecution and Malicious Institution of Civil Proceedings

- Elements:
 - Institution or continuation of criminal or civil proceedings against the plaintiff
 - Termination of the proceeding in favor of the plaintiff
 - Absence of probable cause
 - Must have been no reasonable basis for instituting prosecution/civil claim.
 - Improper purpose or malice of the accuser
 - Damages

INVASION OF PRIVACY

Intrusion

- A person who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for the invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.
1. How many people must know to be a tort?
 1. Not Applicable,
 2. Does it have to be True or False?
 1. Not Applicable
 3. Does it have to be Highly Offensive?
 1. Yes
 4. Does there have to be Intent?
 1. Yes

Disclosure

Black Letter Law

1. How many people must know to be a tort?
 1. Must be to the Public
2. Does it have to be True or False?
 1. Must be True
3. Does it have to be Highly Offensive?
 1. Yes
4. Does there have to be Intent?
 1. Yes

Elements

1. Publicity of
 1. Must be communicated to a significant group of people.
2. Private facts
 1. True facts
3. Highly offensive to a reasonable person which are
4. Not of a legitimate public interest.

False Light

- Similar to defamation.

Black Letter Law

1. How many people must know to be a tort?
 1. Must be to the Public
2. Does it have to be True or False?
 1. False
3. Does it have to be Highly Offensive?
 1. Yes
4. Does there have to be Intent?
 1. There must be Actual Malice

Elements

1. Publicizing
 1. D must communicate the false facts to a substantial number of people.
2. False facts
3. That a reasonable person would object to
4. Actual malice required to be proven by all Ps.

Right of Publicity

Black Letter Law

1. How many people must know to be a tort?

1. Must be Commercial
2. Does it have to be True or False?
 1. Can be True or False
3. Does it have to be Highly Offensive?
 1. No
4. Does there have to be Intent?
 1. No intent required

Elements

1. One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.
2. Applies to unauthorized endorsement of a product.
 1. Not to placing a person's picture on the cover of a magazine and writing an article about them.
3. Heirs of a celebrity estate may sue for exploitation of celebrity's identity.

Breach of Fiduciary Duty

Black Letter Law

- Is a legal relationship of confidence or trust between two or more parties, most commonly a fiduciary or trustee and a principal or beneficiary-Key thing is you have to find a fiduciary duty!

Types of Fiduciary Duties

1. Trustee to the Beneficiary
2. An Agent to his Principal
3. Attorney to Client
4. Business Partners owe a duty to one another
5. Joint Ventures owe a duty to each other
6. Officers owe a duty to the corporation
7. Can be in an Agreement or Contract

Cases

- *April Enterprises v. KTTV*-from Website-back in days when videotape was very expensive-April Enterprises on remand got 17.8 Million dollars on remand!
 - a joint venture exists when both may profit or both may lose

Defamation

Black Letter Law

- A Strict liability tort

1. How many people must know to be a tort?
 1. At least 1
2. Does it have to be True or False?
 1. False
3. Does it have to be Highly Offensive?
 1. No
4. Does there have to be Intent?
 1. Sometimes

Elements

1. Defamatory statement
 1. Must scorn, ridicule, or contempt the Plaintiff; harm the reputation of the Plaintiff.
 2. Mere insults, pure opinion do not count.
 3. Must show that a substantial and respectable minority or a right thinking minority would comprehend the defamatory nature of the statement.
 4. A jury question
2. About the plaintiff
 1. Must show that the defamatory communication was understood as referring to the P.
 2. Group Defamation
 1. Depends on the size of the group
 1. The larger the group, the less likely
3. That was published
 1. Means it must simply reach one person other than the P, and that other person must be able to understand it.
4. Damages
 1. Compensation for reputational injury, emotional trauma
 2. Need to prove special damages for slander.

Libel v. Slander

- Libel: a written, photographic, statute or sculpture
- Slander: oral

Defenses

- Substantial truth
- If the statement is substantially true, no defamation
- Absolute privilege
 - Judicial, legislative, and executive communications are absolutely privileged.
- Qualified privilege
 - Based on social utility of protecting communications made in connection with the D's moral, legal, or social obligations.
 - Can be lost if:
 - D failed to have an honest belief that the statement was true
 - Failing to have an objectively reasonable belief that the statement was true
 - By disclosing the information to more people than necessary (excessive publication.)

Constitutional Issues

1. Public Officials
 1. Must be shown that D either knew that the statement was false or recklessly disregarded whether the communication was false - "actual malice"
 1. Failure to investigate the truth of the statement does not count.
 2. Basically, a qualified privilege.
 3. Public officials are those individuals who are positioned to affect policy.
 4. Actual Malice
 1. P must prove that D knew of the falsity or was reckless as to truth or falsity if a public official, public figure, or private plaintiff in cases of public concern.

Seduction

Black Letter Law

- The offense that occurs when a man entices a woman of previously chaste character to have unlawful intercourse with him by means of persuasion, solicitation, promises, or bribes, or other means not involving force.

Elements

1. Enticement, persuasion or solicitation of some nature (or a promise of marriage)
 1. Usually brought by fathers
2. Chastity of the female at the time of the alleged seduction
3. Sexual intercourse must have taken place as a result of the enticement

Criminal Conversation

Black Letter Law

- A tort action for adultery, brought by a husband against a third party who engaged in sexual intercourse with his wife.
- Criminal conversation has been abolished in most jurisdictions.

Elements

1. There must be an actual marriage
2. Defendant must have had sexual intercourse with plaintiff's spouse

Other

- Only defenses: the consent or connivance of the plaintiff's spouse (non-cheating spouse needs to consent)
- plaintiff sues the person who cheated with plaintiff's spouse
- not limited to men or women

Alienation of Affection

Black Letter Law

- A tort based on willful and malicious interference with the marriage relation by a third party without justification or excuse.

Elements

1. Defendant must have engaged in wrongful conduct
2. Plaintiff must have lost affections or consortium of his or her spouse
3. There must be a causal connection between defendant's conduct and the loss of affection

Retrieved from "http://www.law.und.edu/Class/torts/wiki/index.php/Spring_2009_Torts_Wypadki"