Torts High Level Outline

**The Intentional Torts**

(1)    Battery

(a)    Act with Intent to Touch

(b)   Intent is harmful or offensive (or LACKS CONSENT)

(c)    Results in a touching

(d)   That is harmful or offensive

(2)    Assault

(a)    Act with intent to cause apprehension of a harmful or offensive contact

(b)   Results in apprehension of an imminent battery

(3)    False Imprisonment

(a)    An intent to and results in confinement (restraint)

(b)   To a bounded area

(c)    Where the victim is aware or is harmed

(4)    Torts to Property

(a)    Trespass to Land

(i)      Intent to enter land (purpose or substantial certainty)

(ii)    Enter the land of another

(b)   Conversion of Chattel – Trover

(i)      Intent to exercise substantial dominion

(ii)    Results in seriously interfering with plaintiff’s right of possession

(c)    Trespass to Chattel

(i)      Intent to act on chattel

(ii)    Interference with chattels

(iii)   Results in HARM = Dispossession or lost use OR harm to chattel OR plaintiff

**Affirmative Defenses**

1. Self-Defense
   1. Self-Defense
      1. Privilege to use
      2. Reasonable force
      3. To defend against unprivileged acts (battery, assault, false imprisonment)
      4. Reasonably believe to be inflicted
   2. Defense of others
2. Defense of Property
   1. Defend against Trespass (traps, weapons)
      1. The force used must be appropriate to the defense of property
   2. Repossession of Chattels (get your stuff back)
      1. Private Citizen Arrest –
         1. If the defendant acts in “fresh pursuit” he is
         2. Privileged to use a reasonable amount of force to defend his possession.
      2. Shopkeeper’s privilege
         1. Reasonable belief plaintiff took goods
         2. Proper purpose for detention
         3. Reasonable manner of detention
3. Privilege of Discipline
   1. Parents enjoy the privilege of appropriate and reasonable force
   2. Extended to teachers, bus drivers, etc
4. Consent
   1. Legal capacity
      1. Minors
         1. Age appropriate touching
         2. Age appropriate consent
      2. NO - Adults (Crazy people)
   2. Express
      1. Consent of an act bars recovery from the act
   3. Implied
      1. Customary
   4. Medical
      1. Be aware of exceeding scope of patients consent
      2. Emergency consent is implied by law
   5. Revocation of Consent
      1. Fraud
      2. Silence is not consent
5. Public and Private Necessity
   1. RS §196: Public Necessity
      1. ….necessary for averting an imminent public disaster
   2. RS §197: Private Necessity
      1. …necessary to prevent serious to actor, his chattels, or 3rd person; subject to liability for any harm done

**Negligence - DUTY**

1. **Elements of negligence**
   1. Duty
   2. Breach of Duty
   3. Actual Damage
   4. Cause of Damage
   5. Proximate Cause of Damage

Negligence: Overt conduct that creates unreasonable risk of harm that a reasonable person would avoid. Risk of harm is unreasonable when (1) a reasonable and prudent person would foresee the harm and (2) would avoid conduct that creates the risk.

* 1. General formula for Negligence, plaintiff must prove the following:
     1. The D owed the P a legal duty
     2. The D, by behaving negligently, breached that duty
     3. The P suffered actual damages
     4. The D’s negligence was an actual cause of this damage
     5. The D’s negligence was a ‘proximate cause’ of this damage
  2. P required to sustain the burden of proving each of the above 5 elements; if P fails to meet the burden of proving any one of the elements, he can’t recover

1. **General Duty of Care**
   1. Reasonable Person
   2. Under the circumstances
   3. Single OBJECTIVE STANDARD. The flexible and subjective side is the circumstance.
   4. Characteristics of a Reasonable Person
      1. Physical Traits
      2. Average Mental Abilities
      3. Same knowledge as average member of the community
2. **Special Doctrines**
   1. **Prudent Person** - The standard of reasonable care applies to all negligence actions, i.e., the reasonable person must exercise care in proportion to the danger involved in his act, and that he or she must exercise such care not only for his own safety and the protection of his property but also to avoid serious injury to others.
   2. **Emergency Situation** - The doctrine provides that a person confronted with a “sudden emergency” which he didn’t cause and who acts with his best judgment is not guilty of negligence, even if his decision wasn’t the best one, provided he acted like a reasonably prudent person would act when confronted with the same situation.
   3. **Physically Impaired** - Reasonable person with such a physical disability in same or similar circumstances
   4. **Mental Disability** - Reasonable person in same or similar circumstances
   5. **Intoxication** – Reasonable person under the circumstances, not drunk conduct
   6. **Sudden Incapacitation** – courts have ruled where there is negligence due to incapacitation that is not foreseeable there should be no liability.
   7. **Expertise** - If actor has more qualities he is required to exercise superior qualities that he has in a manner reasonable under the circumstances.
   8. **Child Negligence** - Child accused of negligence is held to the standard of a child the same age, experiences, intelligence (AEI -> Age, Experience, IQ)
3. **Negligence Per Se** 
   1. When applied it supplants the common law and establishes the breach via statutes
   2. DUTY
      1. Common Law -> Reasonable Person Standard
      2. Negligence per se -> Statute
      3. Generally a question of law (the judge decides)
   3. Violation of Criminal Statute (or administrative code, etc)
      1. Statute protects plaintiff’s class
      2. Statute prevents plaintiff’s type of injury
4. **Excused Violations** - Excused violation of a legislation enactment is NOT negligence if:
   1. The violation is reasonable in light of a the actor’s childhood, physical disability, or physical incapacitation
   2. The actor exercises reasonable care in attempting to comply with the statute
   3. The actor neither knows nor should know of the factual circumstances that render the statute applicable
   4. The actor’s violation is due the confusing presentation of the statute to the public
   5. The actor’s compliance with the statute would have involved greater risk of physical harm to the actor or others than noncompliance.

**Negligence - Breach**

1. Foreseeability
   1. Foreseeability of Harm
      1. An actor is negligent only f his conduct created foreseeable risk and the actor recognized, or a reasonable person would have recognized, that risk.
      2. If there is an element that the risk was foreseeable it is for a jury to decide.
   2. Unforeseeable
      1. Where a reasonable person in the defendant's circumstances would not foresee any danger, then, the defendant is "simply not negligent".
2. Judging Breach:
   1. Bernier v Edison: Failure to take reasonable steps to prevent unreasonable risk of injury from reasonably foreseeable accidents is negligence.
   2. Carroll Towing Formula
      1. (P) - Probability she will break away
      2. (L) - Resulting injuries if she does break away
      3. (B) - Burden of alternate precautions
      4. Thus, the burden is less than the liability multiplied by the probability. B<PL
3. Multiple Parties
   1. **Plaintiff and Defendant**
      1. **Contributory Negligence** – Defendant pays NOTHING
      2. **Comparative Negligence** – The plaintiff’s recovery is not ordinarily reduced for an intentional tort. Recovery is reduced in negligence and strict liability cases.
   2. **Defendant and Defendant**
      1. **Joint and Several Liability** – Plaintiff can enforce claim against either tortfeasor, a judgment against both. However, cannot collect more than her damages.
      2. **Several Liability** – Proportionate share liability, comparative fault liability. No tortfeasor liable for more than his share. No contribution.
4. Proof of Conduct
   1. Burden is on plaintiff to prove
      1. What act constituted negligence
      2. Identify the safer conduct
      3. We must ask
         1. What act was negligent
         2. Was there a safer alternative
   2. Can use circumstantial evidence
   3. Three theories of proving defendants negligence in slip and fall accidents.
      1. The defendant created and failed to take reasonable actions to abate the hazard
      2. The defendant did not directly create the condition but discovered a condition (or should have) and failed to take reasonable steps
      3. Defendant’s mode of operation made it foreseeable that others would create a dangerous condition and failed to take reasonable measures to discover and remove it. Should have discovered.
5. Standards of Conduct
   1. Shopkeepers rules – manuals and policies can go to evidence, not care or standard of care.
   2. Customs vs. Ordinance
      1. Ordinance becomes a standard of care (Negligence per se)
         1. When an ordinance it is a floor for the duty of care required and becomes negligence per se
      2. When a custom it only serves as evidence
         1. Violations as evidence of negligence
      3. Compliance with a rule does not constitute care per se. Failure to comply with a code or regulation constitutes prima facia negligence
6. Res Ipsa Loquitor
   1. Injury was probably result of negligence
   2. It was probably Defendant who was negligent
      1. Limiting principles (Point to the Defendant: this will not apply unless we can show the following)
         1. Exclusive control
         2. Eliminating other causes-> Plaintiff was not responsible
   3. Using the Core Principles
      1. Injury was probably result of negligence - NOT true. These accidents can happen for other reasons.
      2. It was probably D who was negligent - NOT true.
      3. It cannot be said the injury was probably the result of negligence because these kinds of accidents happen other ways than negligence.
      4. It cannot be said it was probably the defendant who was negligent because
7. Shared Fault
   1. Plaintiff and Defendant
      1. Exclusive control rule is subordinated to its general purpose, that of indicating that it probably was defendant’s negligence which caused the accident.
   2. Defendant and Defendant
      1. Multiple actors – does not assist the plaintiff and where there is serial control can make it more difficult

**Negligence – Harm**

1. Third element of a negligence prima facia case is that the plaintiff must suffer legally cognizable harm -> Actual Damages
   1. Without actual injury there can be no cause, therefore there can be no negligence

**Negligence – Actual Cause**

1. The fourth element in a negligence prima facia case is factual cause (actual cause).
2. Multiple causes and apportionment
   1. Where there are two (2) injuries, liability by CAUSE
   2. Where there is one (1) injury, liability by FAULT
3. “But-For” Test
   1. “But For” is a test of actual cause
      1. But for defendants negligence then plaintiff would have avoided injury.
      2. Also works when there is a lack of negligence.
4. Alternatives to the But-For test
   1. Indivisible Injury
   2. Duplicative Causation
      1. Cause should be defined in a way that even if there was another cause this cause should be recognized.
   3. Pre-emptive Causation
      1. Poison and gunshot. If about to drink poison and shot instead it shows the poisoners conduct is not the cause.
   4. Substantial Factor
      1. Is there a substantial factor that caused the injury (Something obvious).
      2. The but-for probably works with the substantial factor…
   5. Increased Causation (pg 190)
      1. Where there is a particular kind of harm and that is what the harm is then the inference of causation is justified.
   6. Dillon v. Twin State Gas Rule
      1. The defendant would only be liable for the few seconds of life.Damages are proportionate to the probability.
   7. Summer v. Tice
      1. (Alternative Causation.)
      2. Requires at least two defendants, and both are negligent and it is impossible to tell whom.
      3. Both will be held negligent with joint and several liable.

**Negligence – Proximate Cause**

1. There will be many but for causes and we will have to draw a line somewhere. Proximate cause is where that happens as a matter of policy.
2. Scope of Risk Rule - the liability will be limited to those risks that made the conduct negligent.
   1. What was the range of harms risked by the defendant's conduct?
   2. Does the plaintiff's harm come within the range?
3. Proximate Cause has two elements:
   1. D Responsible for the type of harms within the risk
   2. The class of persons within the risk
   3. CARDOZO
      1. Duty and Breach
      2. Harm to the plaintiff was not foreseeable
      3. The question was for the court.....
   4. ANDREWS
      1. Proximate Cause
      2. Factors: Scope and Harm
      3. Question for the jury - should have been upheld
4. Rescue Doctrine
   1. The rescuer can recover from the defendant whose negligence prompted the rescue attempt if the rescuer had a reasonable belief the victim was in peril.
5. Manner of Harm
   1. Specific manner – there is NO liability (Doughty)
   2. General character – there is liability (Hughes)
   3. Extent (Hammerstein)
      1. The extent of the liability was not foreseeable, take him as you get him (thin skull rule)
   4. Specific manner and extent of harm will be disregarded if the general character is within the scope of risk.
6. Intervening Forces
   1. A will argue B was the intervening act that supersedes A’s negligence
   2. Where an intervening cause is within the scope of the original risk it is not a superseding cause and original tortfeasor is liable.
   3. Superseding cause breaks the causal chain
      1. An intervening act of some second tortfeasor should relieve the first tortfeasor of liability only when the resulting harm is outside the scope of the risk negligently created by the first tortfeasor.

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|  | Foreseeable Results | Unforeseeable Results |
| Foreseeable Intervening Force | **Defendant Liable**  Defendant’s negligence caused a foreseeable harmful response or reaction or created a foreseeable risk.  D negligentlyblocks sidewalk, P walks on road, struck by negligently driven car. | **Defendant Not Liable**  Most intervening forces producing unforeseeable results are then considered unforeseeable. |
| Unforeseeable Intervening Force | **Defendant Usually Liable**  Defendant is negligent because his conduct threats on a result of a particular kind that injure plaintiff.  D failed to clean oil residue from barge, vapors in barge. Lightning strike and explodes, D liable.  Same facts, but arsonist, D not liable. | **Defendant Not Liable**  D negligently blocks road, P takes alternate road. Another driver negligently collides with P. Driver 2 is a superseding force. |

Fault of the Plaintiff

1. These are defenses to negligence
2. Contributory negligence
   1. Historically a bar to any recovery
3. Comparative Fault Rules
   1. New York McKinney’s Civ Practice Law §1411
      1. Culpable conduct attributable to the claimant shall reduce by the percentage
   2. Wisconsin Stat. Ann §895.045
   3. If that negligence is not greater than the negligence of defendant?
4. TERMINOLOGY VERY IMPORTANT – use contributory negligence for the common law rule all or nothing. Comparative negligence if talking about the reduction of damages.
5. Mitigation of damages (Note 9) – she commented it is a doctrine and excludes a specific item of injury that could be avoided by the plaintiff.
   1. Excludes recovery for a specific item of damages that could have been avoided by the plaintiff.
   2. Example was the antibiotic.
6. Duty to protect against plaintiff’s negligence (Bexiga)
   1. Duty of the defendant to protect plaintiff from the plaintiff’s foreseeable fault
7. Nonreciprocal/Reciprocal risk
   1. in each of these cases the defendant imposes a risk upon the plaintiff.
   2. Factors Limiting Con/Com Negligence
      1. Vulnerability of the Plaintiff
      2. Defendant Knowledge of Vulnerability
      3. Defendant in a Caretaker Role
      4. Non-Reciprocal risk of Plaintiff
   3. Plaintiff incapacity
   4. Structure Safety
   5. Role Definition
   6. Process Value
   7. Fundamental Values
8. EXCEPTIONS
   1. The Rescue Doctrine (UNLESS the rescuer acted negligently)
      1. Rescue doctrine: one who rescues a person in imminent danger caused by the negligence of another cannot be charged with contributory negligence unless the rescuer acted recklessly.
   2. Last Clear Chance or Discovered Peril
      1. Courts allowed the negligent plaintiff a full recovery when the plaintiff was left in a helpless position by his own negligence and the defendant, who had the last clear chance to avoid injury, negligently inflicted it anyway.
   3. Plaintiff’s Illegal Activity
      1. When plaintiff’s act is a direct result of his knowing and intentional participation in a criminal act he cannot seek compensation for the loss, if the criminal act is judged to be so serious an offense as to warrant denial of recovery.

**Four assumptions of risk**

1. Express or with consent
   1. complete bar
2. Traditional Implied
   1. Knowledge of risk
   2. Plaintiff appreciated the risk
   3. Plaintiff voluntarily exposed himself to risk
3. Sports Risks
   1. Primary
      1. Inherent risks cannot be avoided by reasonable care
      2. Ski resort – no duty
   2. Secondary
      1. Co-participants must avoid recklessness
      2. Organizers do not increase risks

**Carriers and Host Drivers**

1. Drivers for higher owe a higher standard of care