**TORTS OUTLINE – Updated December 13, 2008**

* **Main Purposes of Tort Law:**
	+ **To provide a peaceful means for adjusting the rights of parties who might otherwise “take the law into their own hands”;**
	+ **To deter wrongful conduct;**
	+ **To encourage socially responsible behavior and reinforce societal norms; and**
	+ **To restore injured parties to their original condition by compensating them for their injury.**
* **Old English Forms of Action**
	+ **Trespass – criminal, direct and forcible injury**
	+ **Action on the Case – other tangible injuries; most modern tort law came out of action on the case, including nuisance, conversion, deceit, defamation, malicious prosecution, interference with economic relations and negligence.**
* **Old 🡪 New**
	+ **Only Causation is Necessary** (Weaver v. Ward) **🡪 Intent Matters** (Brown v. Kendall)
* **Three Possible Bases of Tort Liability:**
	+ **Intentional Torts** (Intentional Interference with Person or Property)
		- **Elements of Intentional Torts:**
			* **Intent**
			* **Act**
			* **Causation**
			* **Invasion of protected interest**
		- **Intent**
			* **Definition of intent:**
				+ **Act is done for the purpose of causing the contact or apprehension or**
				+ **With knowledge on the part of the actor that such contact/apprehension was certain to be produced.**
			* **An individual of any age can have intent to commit assault/battery.** (Garratt v. Dailey)
			* **If an insane person by his actions does intentional damage to the person or property of another, they can be held liable for that damage in the same circumstances as a normal person would be held liable.** (McGuire v. Almy)
			* **Transferred Intent**
				+ **The intention of the injuring party to injure someone else other than the individual who was actually injured does not keep the injured party from recovering damages under a trespass cause of action.** (Talmage v. Smith)
				+ **Intent transfers between** (and only between) **battery, assault, false imprisonment, trespass to land and trespass to chattels.**
				+ **Mistake does not mitigate intent – actor is still liable for damages caused.** (Ranson v. Kitner)
			* **Burden of Proof:**
				+ **Plaintiff has burden of proving intent (and other elements)**
				+ **Defendant has burden of proving a privilege that would negate liability**
		- **Battery**
			* **Elements of Battery:**
				+ **Intent**
				+ **Act**
				+ **Causation**
				+ **Invasion of protected interest – harmful or offensive contact**
			* **An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contract, (b) an offensive contact with the person of the other directly or indirectly results. An act which is not done with intention does not make the actor liable for the mere offensive contact with the other’s person although the act involves risk of negligence.** (Rstmt. Torts §13)
			* **The intentional grabbing of an object from an individual’s hands by another is an offensive invasion of his person and constitutes battery.** (Fisher v. Carrousel Motor Hotel, Inc.)
		- **Assault**
			* **Elements of Assault:**
				+ **Intent**
				+ **Act**
				+ **Causation**
				+ **Invasion of protected interest – reasonable apprehension of harmful or offensive contact**
			* **To constitute assault, there must be an intentional, unlawful, offer to touch the person of another in a rude or angry manner under such circumstances as to create in the mind of the party alleging the assault a well-founded fear of an imminent battery, coupled with the apparent present ability to effectuate the attempt, if not prevented.** (Western Union Telegraph Co. v. Hill)
		- **False Imprisonment**
			* **False imprisonment is the direct restraint of one person of the physical liberty of another without adequate legal justification.** (Big Town Nursing Home, Inc. v. Newman)
			* **False imprisonment may be proved without actual damages being proved.**
			* **If there is a reasonable means of exit, without harm or injury, that the Plaintiff is aware of, it is not false imprisonment.** (David & Alcott Co. v. Boozer and Talcott v. National Expedition Co.) **Moral pressure is not enough.** (Hardy v. LaBelle’s Distributing Company)
			* **There must be contemporaneous awareness at the time it occurs by the victim or actual harm for false imprisonment to occur.** (Parvi v. City of Kingston)
			* **Must have a lack of adequate legal justification – if you are detained for a crime and you committed the crime, it is not false imprisonment.** (Enwright v. Groves)
		- **Intentional Infliction of Emotional Distress**
			* **Four elements must be present to impose liability for intentional infliction of emotional distress** (Harris v. Jones)**:**
				+ **The conduct must be intentional or reckless;**

**An intention to cause severe emotional distress exists when the act is done for the purpose of causing the distress or with knowledge on the part of the actor that severe emotional distress is substantially certain to be produced by his conduct.** (Taylor v. Vallelunga)

* + - * + **The conduct must be extreme and outrageous;**
				+ **There must be a causal connection between the wrongful conduct and emotional distress;**
				+ **The emotional distress must be severe.**

**Note: Even if the emotional distress of the plaintiff is severe, if the act would have not caused such distress in a reasonable person, they cannot recover.**

* + - * Reasons courts have hesitated in giving damages for IIMD:
				+ Damages may be speculative so courts have no real basis for review.
				+ Tort may lead to recovery for mere bad manners.
				+ Mental suffering can be easily faked and is difficult to prove.
				+ Money damages to not truly compensate mental suffering.
				+ Recovery may flood the courts with lawsuits without a limit on who can sue.
		- **Trespass to Land**
			* **Every unauthorized and intentional entry onto the land of another is a trespass.** (Dougherty v. Stepp)
			* If a trespass is socially useful or even beneficial to the plaintiff it does not affect liability.
			* **Extension of Land (to air and below ground):**
				+ **Air travel is a trespass only if it enters into the immediate reaches of the air space above to the land and interferes substantially with the others’ use and enjoyment of their land.** (Rstmt. Torts §159)
				+ **Interest of land extends below surface – owner is generally entitled to the free and unfettered control of his own land beneath the surface… generally it is a trespass to mine under the land of another.**
		- **Trespass to Chattels**
			* **Elements of intentional torts… the protected interests are: exclusive possession, the use of the chattel and in maintaining the physical integrity of the article of property.** One of these interests must be invaded to satisfy that element of the intentional tort of trespass to chattels.
			* **Trespass to chattels is the intentional meddling with a chattel in the possession of another, without consent or privilege to do so, when (a) the chattel is impaired as to its condition, quality or value, or (b) the possessor is deprived of the use of the chattel for a substantial time, or (c) bodily harm is caused to the possessor or harm is caused to the person or thing in which the possessor has a legally protected interest.** (Rstmt. Torts §178)
			* **Interference with the right to exclusive possession must be substantial.**
			* **When determining whether someone has possession the question is whether they have the “exclusive right to possession”** (i.e. if A takes B’s chattel, keeps it for several days and B takes it back, A arguably does not have the exclusive right to possession and cannot sue B).
			* **Defenses**
				+ **Mistake of identity or ownership, unless induced by the plaintiff, will usually not be an available defense.**
				+ **Good faith or reasonable care in the handling of the chattel will not mitigate intent and be an available defense.**
			* **Special Cases:**
				+ **The use of an internet services provider’s computer equipment/software/hardware to send unsolicited advertisements to the subscribers of the internet services provider constitutes trespass to personal property.** (CompuServe Inc. v. Cyber Promotions, Inc.)
				+ **Money can be considered a chattel.**
		- **Conversion**
			* **Elements of intentional torts - the protected interests is exclusive possession.**
			* **Conversion is an intentional exercise of domain or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.** (Rstmt. Torts §178)
			* **Things considered when assessing seriousness of interference and justice of requiring actor to pay damages** (Rstmt. Torts §178)**:**
				+ **Extent and duration of control;**
				+ **Intent to assert a right inconsistent with the original posessor’s right of control;**
				+ **Actor’s good faith;**
				+ **Extent and duration of resulting interference;**
				+ **Harm done to chattel;**
				+ **Inconvenience and expense caused to the original possessor.**
			* **For conversion to occur, items must be taken for a period long enough to seriously interference with the rights of the owner – if there is no interference with rights, there is no conversion.** (Pearson v. Dodd)
			* **Focus is on deprivation of possession, not on use. The actor does not have to use the chattel for conversion to lie. Also, if the actor does not intend serious deprivation, but serious deprivation occurs as a result of the use, there is no intentional conversion.**
			* **Measure of damages is the market value of goods at the time and place of conversion.** Damages would not be return of the good (that would be replevin) or actual damages (that would be trespass to chattel, seeking damages for value of interest of possession harmed).
			* **Anyone with the right to exclusive posession of a chattel at the time of conversion can maintain an action for it… one convertor can recover from another convertor.**
			* **Special Cases:**
				+ **Information is generally not protected, unless it is gathered at a cost and sold as a commodity on the market or is formulated with inventive genius and labor.** (Pearson v. Dodd)
				+ **Part of land… conversion can lie if the thing (trees, etc) are severed from the land. However, conversion cannot lie for the land itself or the things attached to it remaining attached.**
				+ **A bona fide purchaser may still be liable for conversion if they know/have reason to know that they interfering with the rightful owner’s exclusive right of possession.**
			* **Defenses:**
				+ **Good faith or mistake does not mitigate liability for conversion.**
	+ **Negligence**
		- **“DEFENDANT MUST ACT AS A REASONABLE PERSON OF ORDINARY PRUDENCE UNDER SIMILAR CIRCUMSTANCE.”**
		- **Basic Definition:**
			* **Negligence is the omission to do something which a reasonable man would do or doing something which a prudent and reasonable man would not do.** (Blyth v. Birmingham Waterworks Co.)
			* **If there is some probability of harm sufficiently serious that ordinary men would take precautions to avoid it, then failure to do so is negligence. The test is not the balance of probabilities, but of the existence of some probability of sufficient moment to induce action to avoid it on the part of a reasonable mind.** (Tullgreen v. Amoskeag Mfg. Co.)
			* **Circumstances, reasonableness of precautions and costs to society are all considered in determining existence of negligence.** (Chicago, B. & Q.R. Co. v. Krayenbuhl; Davison v. Snohomish County)
			* **A person is expected to have the general knowledge of understanding of those in the community – objective “should have known” standard.**
		- **Elements of the Negligence Cause of Action:**
			* **Duty – a duty to use reasonable care.**
			* **Breach – a failure to conform to the required standard; breach of the duty.**
			* **Causation – a reasonably close causal connection between the conduct and the resulting injury; includes CAUSATION IN FACT and PROXIMATE CAUSE**
			* **Damage – actual loss or damage resulting to the interests of another.**
		- **Duty**
			* (Restatement (Second) Torts §285) **The standard of conduct of a reasonable person may be:**
				+ **Established by a legislative enactment or administrative regulation which so provides** (law explicitly provides civil remedy)**, or**
				+ **Adopted by the court from a legislative enactment or an administrative regulation which does not so provide** (most often negligence per se)**, or**
				+ **Established by judicial decision** (rule of law)**, or**
				+ **Applied to the facts of the case by the trial judge or jury, if there is no such enactment, regulation, or decision** (reasonably prudent person standard).
			* **The Court will generally decide if a duty exists, then jury will then decide the rest of the elements.**
			* **Duty Based Upon Statute**
				+ **General - Where a statute imposes upon a person a specific duty for the protection or benefit of others (and it is established that a violation of the statute is negligence per se), and if the person neglects to perform that duty, he is liable to those for whose protection or benefit the statute was imposed for any injuries which were proximately caused by his failure to perform the statutory duty. The statute established a fixed standard by which the fact of negligence may be determined. Causation and injury must still be proved.** (Osborne v. McMasters)
				+ **Applicability of the Statute in Determining Negligence**

**General factors to consider before establishing a negligence per se action based on violation of the statute** (Perry v. S.N. and S.N.)**:**

**Does the Plaintiff belong to the class that the statute was intended to protect?**

**Is the Plaintiff’s injury of a type that the statute was designed to protect?**

Does the statute clearly define a prohibited or required conduct?

Would applying negligence per se create liability without fault?

Would applying negligence per se impose liability disproportionate to the conduct?

Did the injury result directly or indirectly from the violation of the statute?

**The unexcused violation of a statute while driving establishes negligence per se. The jury cannot relax standards of statutes that give an action for negligence per se. Causation and injury must still be proved for liability.** (Martin v. Herzog)

If the court determines that violation of the statute is not negligence per se, the standard of conduct defaults to the standard of a reasonably prudent person. The statute may still be used as evidence.

* + - * **Standard of Care of Reasonably Prudent Person**
				+ **The general standard is that the person is expected to use is the standard of care that a reasonably prudent person would use.** (Vaughan v. Menlove)
				+ **Where there is a customary practice, the reasonably prudent person is expected to observe the practice. If a departure from this practice was proximate to the injury, then it may serve to establish negligence and liability.** (Trimarco v. Klein) **– EVIDENCE, NOT CONCLUSIVE**
				+ **What a reasonably prudent person will do may be altered based on the circumstances, i.e. if in an emergency situation.** (Cordas v. Peerless Transportation Co.) **Asks “What would the reasonable person do in that situation?”.**
				+ **If a person has an illness or physical disability, they are expected to use the ordinary care that a reasonable man would use if they had that condition.** (Roberts v. State of Louisiana)
				+ **An insane defendant, despite by definition unable to exercise reasonable thinking, is held as a matter of public policy to the conduct of a reasonable person.**

**“Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.** (Restatement Torts)

Note: some courts make exceptions to this

Involuntary intoxication falls under this

**This accomplishes two policy objectives – assigning the loss between two innocent parties to the party who acted and avoiding dealing with mental illness. Also gives predictability to behavior of others that the plaintiff can expect.**

**Converse is true for someone with “superior” mental qualities – standard becomes that of a reasonable man with such superior attributes.**

* + - * + **A child is generally expected to use the reasonable care of a child of like age, intelligence and experience.** Exception is if they are engaged in an activity normally reserved for adults and is a dangerous activity.
				+ **For the Professional:**

**“One who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession in good standing in similar communities.”** (Rstmt. Torts §299A)

Note: “locality” standard varies by profession

**The plaintiff must offer expert testimony on the standard of professional care unless the standard of care would be overly apparent to the jury. The expert witness must show that the practice of the defendant did not conform to the standard of care of an ordinary member of the profession in the same or a similar locality – not just his particular standard.**

Professional negligence is otherwise known as malpractice.

The standard may be modified for specialists in a particular profession holding themselves out to have higher skills.

**For an Attorney** (Hodges v. Carter)**:**

**When an attorney engages in the practice of law and contracts to prosecute an action on behalf of his client, he impliedly represents that:**

**He possesses the requisite degree of learning, skill and ability necessary to the practice of his profession and which others similarly situated ordinarily possesses;**

**He will exert his best judgment in the prosecution of the litigation entrusted to him and**

**He will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client’s cases.**

An attorney cannot be found negligent for a mere error of judgment or mistake in a point of law that has not been settled unless he was truly negligent.

 **For a Physician/Surgeon:**

**One licensed to practice medicine is presumed to possess the degree of skill and learning which is possessed by the ordinary member of the medical profession in good standing in the community in which he practices, and to apply that skill and learning, with ordinary and reasonable care, to cases which come to him for treatment. If he does not possess the requisite skill and learning, or if he does not apply it, he is guilty of malpractice.** (Boyce v. Brown)

Negligence must be shown by affirmative evidence – the mere fact that a treatment was unsuccessful or caused injury is not enough to prove negligence.

**A patient suing under the theory of informed consent must allege and prove** (Scott v. Bradford)**:**

**Defendant physician failed to inform him adequately of a material risk before securing his consent to the proposed treatment;**

**If he had been informed of the risks he would not have consented to the treatment;**

**The adverse consequences that were not made known did in fact occur and he was injured as a result of submitting to the treatment.**

Note – there is a disagreement over the proper standard. Some courts say standard is what information THIS PARTICULAR patient would have wanted to know, not what the reasonable doctor would have told or what the reasonable patient would have wanted to know. Others use an objective standard – what the reasonable patient would have wanted to know.

* + - * **Where P = Probability, B = Burden and L = Loss, If B<PL, then defendant has a duty to undertake the burden of care.** (United States v. Carroll Towing Co.)
				+ Determination of Reasonableness of Action (Restatement (Second) Torts §291)

“Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.”

* + - * + Determining Utility of Actor’s Conduct (Restatement (Second) Torts §292)

 “In determining what the law regards as the utility of the actor’s conduct… the following factors are important:

(a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct;

(b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;

(c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.”

* + - * + Factors Considered in Determining Magnitude of Risk (Restatement (Second) Torts §293)

“In determining the magnitude of the risk… the following factors are important:

(a) the social value which the law attaches to the interests which are imperiled;

(b) the extent of the chance that the actor’s conduct will cause an invasion of any interest of the other or one of a class of which the other is a member;

(c) the extent of the harm likely to be caused to the interests imperiled;

(d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm.”

* + - * Special type of duty – Rescue Doctrine
				+ Courts usually agree that the defendant who caused the danger will be liable to someone who is injured attempting to help the original victim. The rescue doctrine transfers duty and breach from the original victim to the rescuer.
				+ To utilize the rescue doctrine, the plaintiff must prove:

The defendant was negligent to the person rescued and such negligence caused the peril or appearance of peril to the person rescued;

The peril or appearance of peril was imminent;

A reasonably prudent person would have concluded such peril or appearance of peril existed; and

The rescuer acted with reasonable care in effectuating the rescue.

* + - * + If the plaintiff succeeds in using the rescue doctrine, the original actor may be held liable for his damages.
				+ Even when utilizing the rescue doctrine, the rescuer must show that the defendant proximately caused the injuries.
			* **Special Cases/Types of Duty**
				+ **Duty to Act**

**Basic Rule: There is no general duty to go to the rescue of a person who is in peril/to “save” another.**

Why is there this basic rule? Because it is easier to draw a line and say there is no duty to act than to give a general and broad duty to act and then try to decide how far the duty stretches.

**Exceptions:**

**Where one party is injured as to render him helpless by an instrumentality under the control of another, the type of relation is created which gives rise to a legal duty to render such aid to the injured party as may be reasonably necessary to save his life, or to prevent a serious aggravation of his injuries. The party with the created duty to render aid may be held liable for negligence if the injury is aggravated for his failure to act.** (L.S. Ayres & Co. v. Hicks)

**A duty to act may be imposed whenever the defendant assumes or purports a responsibility to act and such undertaking increases the risk of such harm or is relied upon by the Plaintiff to his detriment.**

**Duty Imposed by Special Relationship:**

**The duty to take affirmative action to control the conduct of a third person may arise in two different ways** (J.S. and M.S. v. R.T.H)**:**

**The defendant stands in a special relation to the plaintiff that requires him to exercise affirmative care to protect him against the conduct of a third person; or**

**The defendant stands in a special relation to the third person that gives him a power of control over that person’s actions.**

**The defendant, if held to have a duty, would only be liable for failure to exercise the care of a reasonable person, in that relationship, under the circumstances.**

In determining whether a duty should be imposed, courts will analyze and balance several factors – nature of underlying risk of harm, foreseeability, opportunity to prevent harm, **public policy, fairness**, etc.

Examples:

There is no legal requirement placing on a University or its employees any duty to regulate the private lives of their students, or to control their comings and goings and to supervise their associations. (Hegel v. Langsam)

* + - * + **Duty not to Inflict Emotional Distress**

**2 Cases where damages are consistently given for negligent infliction of emotional distress:**

**Death-telegram**

**Negligent interference with dead bodies**

**When Act by Defendant is Directed at Person Directly:**

**Where a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant’s negligent conduct, the plaintiff in a properly pleaded and proved action may recover in damages for such physical consequences to himself notwithstanding the absence of any physical impact upon plaintiff at the time of the mental shock. With limitations…**

**Defendant’s standard of conduct is measured by reactions to be expected of normal persons, absent specific knowledge of plaintiff’s unusual sensitivity.**

**Plaintiff has the burden of proof that the physical harm or illness is the natural result of the fright proximately caused by defendant’s conduct.** (Daley v. LaCroix)

**When Act by Defendant is Directed at Person Indirectly:**

**A plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, and only if, said plaintiff:**

**Is closely related to the injury victim;**

**Is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and**

**As a result suffers serious emotional distress – a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.** (Thing v. Chusa)

* + - * + **Duty to Unborn Children:**

**General: There is no duty to protect unborn children. Unborn children who are injured by negligence and never born can never seek damages for negligent actions toward them.** (Endresz v. Freidberg)

**An individual harmed by a negligent action committed toward them while an unborn child may generally recover for extraordinary medical expenses incurred both by parents and by them as an adult.** Generally the individual cannot recover for pain and suffering or diminished childhood or emotional distress on a claim that they would be better off if never born. Their parents may recover for emotional distress in some cases. **Damages are given as a whole approach – recovery of parents + child should not be > actual total damages.** (Procanik by Procanik v. Cillo)

* + - * + **Duty of Owners/Occupiers of Land**

**Duty to those Outside the Premises**

**General duty is to use reasonable care for the safety of those outside the land to prevent direct harm resulting from affirmative activities on the land.**

**Landowners have no general duty to remove naturally occurring conditions, but they have a general duty to not aggravate them (i.e. ice on sidewalk, etc).**

**In urban areas, landowners may have a duty to use reasonable care to prevent harm to users of the highway from trees on the land. This may be different for rural landowners.** (Taylor v. Olsen)

**Duty to those On the Premises**

**Trespasser**

**Definition of Trespasser – any person entering onto the land without the owner’s permission.**

An invitee or licensee may become a trespasser if entering into a part of the land to which permission did not extend.

**General Rule = No duty of reasonable care to trespassers. Duty is not cause intentional injury.**

**Exceptions**

**“Known Trespassers”**

In many states, **once the landowner has discovered the trespasser’s presence on the land in circumstances that suggest he might encounter danger, the landowner comes under a duty of reasonable care.**

Foreseeability alone does not cause this – the landowner usually has to know or have reason to know that he is present.

**“Forseeable Trespassers”**

**Usually foreseeability of trespassers is enough to trigger a duty only if trespassers were “constantly” trespassing on the land.** Otherwise, the duty defaults to that to “known trespassers” once a trespasser is realized.

**“Attractive nuisance” doctrine**

**Licensee**

**Definition of Licensee – those who are on the land by the owner’s express or implied consent but are there for their own purposes.**

A licensee may become a trespasser or invitee depending on the circumstances on certain portions of the land.

**General duty toward licensee is that there is no duty of reasonable care; only a duty to not cause intentional injury. Exception is for known conditions on the land.**

**Exception for known or foreseeable danger to the licensee:**

**The landowner has a duty to warn the licensee when he knows or has reason to know both:**

**The existence of a danger; and**

**The plaintiff’s presence in a place where he might encounter it and that the plaintiff is unaware of the danger.**

Note: duty to warn IS NOT duty to prevent.

**Invitee**

**Definition of Invitee – either:**

**“public invitees” who are invited to enter the land as a member of the public, or**

**Business visitors, invited to enter the land in connection with some business dealing with the possessor.**

**“Invitation test” is essential – invitation can be through express invitation or the fact that the premises are open to the public.**

**General duty – The landowner owes to the invitee a duty of care to make conditions on the land reasonably safe and to conduct his active operations with reasonable care for the invitee whose presence is known or foreseeable.**

In some cases reasonable care may require inspection of the premises and active steps to make them safe, and in other cases, the duty is satisfied by warning the invitee.

Rejection of Merging Categories – some jurisdictions have moved toward “imposing on owners and occupiers a single duty of reasonable care in all circumstances”, regardless of status of trespasser, invitee, or licensee. (Rowland v. Christian)

* + - **Breach**
			* **Proof of Negligence**
				+ **Generally - direct or circumstantial evidence.**
				+ **If there was Violation of a Statute**

**Types of Impact of Violation of a Statute** (in order of usual application)**:**

**Negligence Per Se**

Note: judge decides validity of excuse; if he decides that there was no excuse, the judge will decide there was negligence and the jury will decide the amount of damages

**Rebuttable Presumption**

Note: becomes negligence as matter of law unless the presumption is rebutted (this means that the jury will be given the applicable statute, but they will decide if the excuse was valid)

**Mere Evidence**

**Excused Violation of Statute:**

**If the defendant is found to have a legally sufficient excuse, the appropriate standard of care becomes that established by common law.** (Zeni v. Anderson)

**Restatement (Second) Torts §288**

**“(1) An excused violation of a legislative enactment or an administrative regulation is not negligence.**

**(2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when**

**(a) the violation is reasonable because of the actor’s incapacity;**

**(b) he neither knows nor should know of the occasion for compliance;**

**(c) he is unable after reasonable diligence or care to comply;**

**(d) he is confronted by an emergency not due to his own misconduct;**

**(e) compliance would involve a greater risk of harm to the actor or to others.”**

* + - * + **Circumstantial Evidence** (reviewed by Court and Jury)

Circumstantial evidence = facts from which you can reason that something must have occurred for the injury to happen

**To recover for negligence from an injury sustained on the property of another, the plaintiff must prove** (HEB Groc. Co. v. Resendez)**:**

**That the actor store had actual or constructive knowledge of a condition on the premises,**

**The condition posed an unreasonable risk of harm**

**The actor store did not exercise reasonable care to reduce or eliminate the risk.**

**The actor store’s failure to use such care proximately caused the plaintiff’s injuries.**

**When the operating methods of a business are such that dangerous conditions are easily forseeable, the logical basis for notice to be necessary for liability dissolves.** (Jasko)

* + - * + **Res Ispa Loquitur** (note: type of circumstantial evidence)

**To utilize the doctrine of res ispa loquitur, the plaintiff must prove** (Larson v. St. Francis Hotel):

**That there was an accident;**

**That the thing or instrumentality which caused the accident was at the time of and prior thereto under the exclusive control and management of the defendant;**

**That the accident was such that in the ordinary course of events, the defendant using ordinary care, the accident would not have happened.**

**Types of Impact of Res Ispa Loquitur (“The thing speaks for itself.”)** (in order of usual application)

**Inference of Negligence**

Note: jury may or may not use this

**Presumption of Negligence**

Note: jury finds negligence if defendant doesn’t produce evidence to rebut the presumption (res ispa loquitur pled by the plaintiff will be overcome by production of evidence by the defendant – defendant only has the burden of production)

**Shifts Burden of Persuasion to Defendant**

Note: defendant must not only produce evidence to rebut the evidence of the plaintiff, but must also meet the burden of persuasion that his evidence is better

**In general - The doctrine of res ispa loquitur recognizes that in rare instances, an injury may permit an inference of negligence if coupled with a sufficient showing of its immediate, precipitating cause. Res ispa loquitur is a rule of evidence, and beyond it, the plaintiff must still present sufficient evidence, beyond that of the accident itself, from which the jury may infer that the accident may not have occurred but for the defendant’s breach of due care.** (McDougald v. Perry) It may allow the plaintiff to prevail when he is without direct evidence and/or defendant has better access to that evidence.

**Res Ispa Loquitur should generally have a very weak procedural impact because we don’t know if the defendant was really responsible… this should be just an inference of negligence. Generally only kicks in when the plaintiff has no other evidence.**

Specific Examples:

Generally the fact that an automobile leaves the traveled portion of a road and overturns or crashes into a stationary object is enough to make out a res ispa loquitur case against the driver.

Where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment he may utilize the doctrine of res ispa loquitur, and all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon the meet the inference of negligence by giving an explanation of their conduct. (Ybarra v. Spangard)

* + - **Causation – 2 types: causation in fact and proximate cause**
			* **Causation in Fact**
				+ **“BUT FOR” AND SUBSTANTIAL FACTOR**
				+ **“Domino Effect” Test – there may be more than one “but for” cause**
				+ **Sine Qua Non** (“without which not”/”but for”)

**Question is asked – “But for the breach of duty, would the plaintiff have been injured?”**

**Negligence is not actionable unless it is a cause in fact of the harm for which recovery is sought. It need not be the sole cause, but must be a substantial factor in bringing about the harm. If the injury would have occurred irrespective of the negligence of the defendant, then their negligence is not actionable because it was not a substantial factor.** (Perkins v. Texas and New Orleans Ry. Co.)

* + - * + **Proof of Causation**

**The injury must have been caused by the negligence – it is not enough that the negligence and injury coexist.** (Kramer Service, Inc. v. Wilkins)

**Where the negligence of the defendant greatly multiplies the chances of accident to the plaintiff, and is of a character naturally leading to its occurrence, the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect between the negligence and the injury.** (Reynolds v. Texas & Pac. Ry. Co.)

When the issue lies beyond the range of experiences and observations of laymen, courts and juries must depend upon and accept the undisputed testimony of reputable specialists. (Kramer Service, Inc. v. Wilkins)

Special Cases:

In some jurisdictions, in a medical malpractice case, a question of negligence can go to the jury as long as the plaintiff shows a reduction in the chance of survival caused by the medical malpractice. A prima facie case may be shown if the negligence was the proximate cause in reduction of the plaintiff’s chance for survival. Damages will be limited to lost wages, etc. from shortened life, but will not be given for loss of life. (Herskovitis v. Group Health Cooperative of Puget Sound)

* + - * + **Concurrent Causes**

**Where there is more than one cause of the injury, the tortfeasor will be held responsible if his negligence was a material or substantial element in causing the injury.** (Anderson v. Minneapolis, St. P…)

**When there is a problem identifying which party caused the harm:**

**Where separate acts of negligence combine to produce directly a single injury and the single cause that resulted in injury cannot be identified, each tortfeasor is joint and severally liable, even though his act alone might not have caused it.** (Hill v. Edmonds) **The tortfeasors will then be left to work out between themselves apportionment for liability.** (Summers v. Tice)

**In case where a drug causes an injury but the manufacturer of the drug cannot be identified, the likelihood that any of the defendants supplied the product which allegedly injured plaintiff can be measured by the percentage of market share of each of them of the drug causing injury. Each defendant is held liable for the proportion of the judgment represented by its share of that market, unless it demonstrates that it could not have made the product which caused the plaintiff’s injuries. This is not joint and several liability** (Sindell v. Abbott Laboratories) note: not all jurisdictions follow this

* + - * **Proximate Cause**
				+ **= Legal Causation**
				+ **Not every “but for” cause is a legal cause.**
				+ **Cause in Fact v. Proximate Cause**

**Cause in fact = the cause and effect relationship between the defendant’s conduct and the plaintiff’s injury. (“but for” causation)**

**Proximate Cause = determination of whether legal liability should be imposed for a cause in fact. It is a decision made by the legislature or courts to deny liability for otherwise actionable conduct on considerations of common sense, public policy, etc.**

* + - * + **3 Different Tests for Proximate Cause** (note: varies by jurisdiction)

**3 tests:**

**Arbitrary Line Drawing** (ex. “for all fires, we will hold the defendant responsible for only the injury to the first house… not the 2nd, not the 24th and so forth) – usually based on a public policy determination

**Direct Causation/Unbroken Sequence** (i.e. “if the defendant started the chain of events and there was no intervening force, then there is proximate cause… direct causation = legal causation)

**Reasonable Foreseeability** (i.e. was the injury reasonably foreseeable to result from the conduct of the defendant? – used “reasonable man” standard in deciding foreseeability)

**Note: THIS IS THE TEST MOST OFTEN USED**

This is the test used in Palsgraf v. Long Island R.R. Co. – the defendant must have foreseen that Ms. Palsgraf, standing at the end of the track, would have been injured by his actions in causing the package to drop, to be held liable

Differences between 3 tests:

Direct causation will keep going until there is a superseding cause… may be indefinite.

Foreseeability may stop liability sooner because it interrupts causation to ask if the injury could have been foreseen.

* + - * + General factors considered when assigning legal causation:

**Proximate cause is a balance of the directness/remoteness of injury and original act, whether there was an intervening cause, if it was foreseeable, and picking an arbitrary point to cut off liability.**

The facts as to the defendant’s intent, his imputable knowledge, or his justifiable ignorance are often taken into account.

The lapse of time between the breach of duty and the injury is only one element considered.

* + - * + In a personal injury negligence case, the defendant may take the Plaintiff as he finds the Plaintiff (“eggshell skull rule”) – the defendant may be liable for all injuries, not just the ones he expected to cause.

This only applies to the proximate cause issue, not to the determination of reasonable care (negligence) or defect (strict liability). Those determinations are made in light of the ordinary person.

**Courts are most likely to apply the “eggshell skull” rule in intentional torts, least likely in strict liability, and in between in cases of negligence.**

* + - * + **Intervening/Superseding Causes**

**An intervening act that cuts off liability is referred to as a superseding cause.**

**In order for an intervening cause to relieve the negligent party from liability, such intervening cause must be truly independent of and not set in motion by the original negligence.**

**Where the acts of a third person intervene between the defendant’s conduct and the plaintiff’s injury, the causal connection is not automatically severed. An intervening act may not relieve the actor of responsibility where the risk of the intervening act occurring was created by the breach of duty by the original actor.** (Derdiarian v. Felix Contracting Corp.)

**For the intervening act to break the chain of liability, it must be something so unexpected or extraordinary that the original actor could or should not have anticipated it.** (Watson v. Kentucky & Indiana Bridge & R.R. Co.)

Types of Intervening Causes:

**Dependent v. Independent Intervening Cause - A dependent intervening cause is one which operates in response to or is a reaction to the stimulus of a situation for which the actor has caused by his conduct. A dependant cause is less likely to be held to be a superseding cause than an independent intervening cause.**

The plaintiff’s own conduct can constitute an intervening cause that breaks the causal connection between the defendant’s negligence and the injury. However, in order for it to be a superseding cause, the plaintiff’s conduct must be more than just contributory negligence.

One type of intervening force is an “act of God”… but that will not completely absolve the actor if they should have expected and prepared for the occurrence of such an “act of God”.

A criminal act may break the chain of liability if it is one that the actor would not have reasonably foreseen or does not have a duty to protect the injured party against. (Watson v. Kentucky & Indiana Bridge & R.R. Co.)

* + - * + **Public Policy Considerations**

**Public policy may lead the court to not assign legal causation to a “but for” cause – this looks at the entire impact on society of assigning proximate cause to the conduct of an actor that in some way causes injury to the plaintiff.**

Liability for Serving Alcohol

Almost all state supreme courts ruling on this issue have declined to impose liability on a social host when the recipient of alcohol is an adult. The drinker’s voluntary consumption and subsequent negligence is seen to be the sole “proximate” cause of the third party’s injury.

Some states impose liability if the social host’s service of alcohol was reckless.

Many jurisdictions have imposed liability only on those who serve alcohol to minors.

**A legislative response to early common law liability insulation of commercially licensed vendors was the Dram Shop Act, which generally provides a civil cause of action (and criminal) against commercial furnishers of alcohol for damages resulting from a consumer’s intoxicated state. Many states have adopted Dram Shop Acts.**

Liability for the effects of drugs/medication – most states draw a line for liability after the original recipient of the drug was injured… do not allow liability to extend from generation to generation indefinitely (i.e. if a mother ingests DES, the maker may be liable for injury caused to her and her fetus, but not for injuries to grandchildren)

* + - **Damage – see section below**
	+ **Strict Liability** (because of public policy)
		- **Strict liability is given for ultra-hazardous activities.** (Spano v. Perini Corp.)
		- **In strict liability, the defendant’s fault comes from their engaging in the abnormally dangerous activity, and does not stem from the act that caused the injury.**
		- Original definition under Rylands v. Fletcher
			* “The person who for his own purposes brings into his lands 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.”
			* Distinction between something naturally on the land and something non-natural, added by the defendant
		- Post-Rylands
			* **The defendant 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.** (Miller v. Civil Constructors, Inc.)
			* **Section 519, Restatement, Torts – One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity although he has exercised the utmost care to prevent the harm. There are several factors to consider in determining whether an activity is abnormally dangerous (ultrahazardous):**
				+ **Existence of a high degree of risk of some harm to the person, land or chattels of others;**
				+ **Likelihood that the harm that results from it will be great;**
				+ **Inability to eliminate the risk by the exercise of reasonable care;**
				+ **Extent to which the activity is not a matter of common usage;**
				+ **Inappropriateness of the activity to the place where it is carried on; and**
				+ **Extent to which its value to the community is outweighed by the dangerous attributes.**

**The presence of more than one factor, but not all of them, will be necessary to declare the activity ultrahazardous as a matter of law.**

* + - * **Liability for keepers of animals - The owners or keepers of domestic animals are not answerable for an injury done by them in a place where they have a right to be, unless the animals in fact, and to the owner’s knowledge, are vicious. If a person keeps a vicious or dangerous animal which he knows is accustomed to attack and injure mankind, he assumes the obligation of an insurer against injury by such animal, and no measure of care in its keeping will excuse him.** (Sandy v. Bushey)
			* **Limitations on strict liability**
				+ **One who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity *for harm resulting thereto from that which makes the activity ultrahazardous*, although the utmost care is exercised to prevent the harm. They are not liable for necessarily all resulting injuries.** (Foster v. Preston Mill Co.)
				+ **Strict liability will not hold when the injury results from an “act of God” which the owner had no reason to anticipate.** (Golden v. Amory)
			* Typical areas where strict liability is imposed – use of dynamite and other explosives, storage of chemicals, pile driving, crop dusting, fumigation with toxic fumes, operation of hazardous waste disposal, etc. (Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.)
			* **Limitations on Strict Liability**
				+ **The defendant’s strict liability activities must at least be a cause in fact of the plaintiff’s harm, and must be a proximate or legal cause as well.**
				+ **The defendant will not be strictly liable for harms resulting from abnormally dangerous activities if those harms would not have resulted but for the abnormal sensitivities of the plaintiff’s own activities.**
				+ **Intervening acts – innocent, negligent, and even reckless acts of third persons present no barrier to strict liability, nor do forces of nature. The intervention of others is usually viewed as a part of the risk of the abnormally dangerous activity, at least when the intervening actor is not guilty of intentional harm.**
				+ **There is generally no strict liability when the injured party is a trespasser on the land of the defendant, but there is strict liability for injuries caused to invitees and licensees.**
				+ **Defenses to strict liability**

**Most jurisdictions hold that contributory negligence and comparative fault cannot be used as defenses.**

**Assumption of the risk may be used as a defense when the plaintiff knowingly and unreasonably encountered the danger.**

**Governmental immunities are almost never held strictly liable even when immunities of public entities are otherwise abolished.**

* + **Other Miscellaneous Tort Actions**
		- **Products Liability**
			* **Products liability is the liability of a manufacturer, seller or other supplier of goods, to one who suffers physical harm caused by the good. Idea is that the manufacturer should foresee all possible users of the product and has a duty to each of them.**
			* **Idea behind products liability is that the manufacturer or seller of a defective product is in the best position to make the product safe, and to insure against the consequences of loss caused by the product.**
			* **Strict liability eases the burden of proof for a plaintiff injured by a defective product. The Plaintiff still has the burden of proving that** (O’Brien v. Muskin Corp.)**:**
				+ **The product was defective;**
				+ **The defect existed when the product left the hands of the defendant; and**
				+ **The defect caused the injury to a reasonably foreseeable user.**
			* Note: product itself and container it is packaged in are viewed as one item.
			* **Product liability may stem from three things:**
				+ **Manufacturing**

**A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a manufacturing defect that causes injury to a human being.** (Greenman v. Yuba Power Plants, Inc.)

**A defectively manufactured product does not conform in some significant aspect to the intended design, nor does it conform to the great majority of products manufactured in accordance with that design. Such defects result from some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in construction.** (Rix v. General Motors Corp.)

**Ways that a manufacturing defect is established:**

**By direct evidence – usually through expert witness;**

**By circumstantial evidence;**

**By eliminating all other likely causes of failure.**

* + - * + **Design**

**The test for liability for a design defect is the same as used for negligence – the court will ask if the defendant was reasonable in the design of the product, based on risk analysis, state of the art, etc.** (Prentis v. Yale Mfg. Co.)

**Four different ways courts will determine the meaning of “defect” in design** (Prentis v. Yale Mfg. Co.)**:**

**Risk-utility analysis (\*\*most often used).**

**When a jury decides that the risk of harm outweighs the utility of a particular design, it is saying that in choosing the particular design and cost tradeoffs, the manufacturer exposed the consumer to greater risk of danger than he should have. This is like negligence.**

Compares the risk and utility of the product at the time of trial.

Consumer expectations about the product – what expectations of level of safety would the ordinary consumer would expect to have?

Combination of risk-utility and consumer expectations.

Factors Relevant in the Risk-Utility Analysis (O’Brien v. Muskin Corp.)

The usefulness and desirability of the product.

The safety aspects of the product.

The availability of a substitute product which would meet the same need and not be unsafe.

The manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

The user’s ability to avoid danger by the exercise of care in using the product.

The user’s anticipated awareness of the dangers inherent in the product and their avoidability.

The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

**Risk utility analysis may also include considerations of “state-of-the-art” evidence – the existing level of technological expertise and scientific knowledge relevant to a particular industry at the time a product is designed.**

**Two things it could mean:**

**The information necessary to design the product was out there and very knowable… defendant didn’t do it, so that factors into liability.**

**Somewhere out there was information that if put together by the defendant would have convinced them to design the product in a less risky way.**

* + - * + **Warning**

**There is a fundamental duty to warn foreseeable users of the risks inherent in the use of the product.** (O’Brien v. Muskin Corp.)

**Warnings must be effective – they must convey the necessary information but not overly cumbersome as to confuse the user.**

**Knowledge, either actual or constructive, of the potential risk or danger is necessary on the part of the defendant before strict liability for failure to warn will be imposed.** (Anderson v. Owens-Corning Fiberglass Corp.)

**The reasonableness of the defendant’s failure to warn is immaterial – the fact that the manufacturer acted reasonably in deciding not to warn does not preclude liability if the trier of fact concludes that, based on the information available to the manufacturer, the defendant’s failure to warn rendered the product unsafe to its users.** (Anderson v. Owens-Corning Fiberglass Corp.)

Special Circumstances:

Most jurisdictions have found no duty to warn of obvious dangers or of risks that are generally known.

Allergic reactions/hypersensitivity – most jurisdictions impose a duty to warn if the ingredient is one to which a substantial number of people are allergic.

Learned intermediary rule – In cases involving pharmaceuticals, most courts hold that warnings and instructions should be provided to the physician, who is a “learned intermediary” between the drug company and the patient and the best person to understand the patient’s needs and assess the risks and benefits of a particular course of treatment

In most jurisdictions, the plaintiff is entitled to a presumption that the user would have read and heeded an adequate warning.

Many courts impose a duty on the manufacturer to provide post-sale warnings about risks that are discovered after the sale, but have not extended this duty to be one of recall.

* + - * **Definition of Product Defectiveness from the Restatement (Third) of Torts**
				+ **§1. Liability of Commercial Seller or Distributor for Harm Caused by Defective Products**

**One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.**

* + - * + **§2 Categories of Product Defect**

**A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings.** A product:

Contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

Is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor… and the omission of the alternative design renders the product not reasonably safe;

Is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor… and the omission of the instructions or warnings renders the product not reasonably safe.

* + - * **…irrespective of contract, the manufacturer of this thing is under a duty to make it carefully. There must be knowledge of a danger, not merely possible, but probable. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer.”** (MacPherson v. Buick Motor Co.)
			* Special problems in products liability:
				+ Prescription drugs – most jurisdictions will not apply strict liability to the design of prescription drugs, but may assign it for a manufacturing defect.
				+ Food

Many jurisdictions provide that regardless of whether the injury-producing substance is natural or foreign, strict liability will lie if the consumer would have not reasonably expected to find the substance in the product.

Some jurisdictions use a “foreign-natural” test – strict liability is only applicable if the injury-causing substance is a piece of glass, wire or other substance “foreign” to the food

Allergic reactions – most jurisdictions handled this as a failure to warn issue and impose a duty on the manufacturer to warn of possible adverse reactions only if he knew or should have known of the risk

* + - * + Products whose inherent characteristics make them dangerous do not necessarily deserve strict liability (i.e. guns, alcohol, etc.)
			* Tort Reform in Products Liability
				+ The UCC (which has been enacted in all states but Louisiana) governs breach of warranty for the sale of goods.
				+ Many states have passed comprehensive statutory schemes to decrease the size and number of recoveries against manufacturers and sellers in products liability, with changes in caps on damages, statutes of limitation, state of the art evidence, effect of alteration/misuse of the product, etc.
		- **Wrongful Death**
			* **Old**
				+ **Cause of action died with the death of the victim or tortfeasor.**
			* **New**
				+ **Every state has some form of statutory action for the recovery of the wrongful death of another.**
				+ **Jurisdictions differ as to who the beneficiaries will be – spouses, parents, children, etc. If there is no living designated beneficiary, the action fails.**
				+ **In most states, pecuniary loss is measured by having the trier of fact attempt to determine the monetary contribution that the decedent would have made during his lifetime to the plaintiff beneficiary. The trier of fact may use mortality tables, income projections and expert testimony to aid them. A growing number of courts have allowed recovery for “loss of companionship” or consortium of a deceased family member. Some states also award damages for grief.** (Selders v. Armentrout)
				+ **Many states permit punitive damages to be awarded.**
				+ **Claimants must still show all elements of negligence – duty, breach, causation, injury to deceased.**
				+ **Contributory/comparative negligence of the decedent may be considered as defense, as if they were the plaintiff and still alive. A beneficiary whose negligence contributed to the deceased’s death is usually subjected to contributory/comparative negligence rules as well.**
				+ **When an injured victim pursues her claim against the tortfeasor to judgment or settles and releases her claim with him, the victim’s claim is terminated. As a result, in some jurisdictions no wrongful death action may be brought… but some allow it with the view that the wrongful death action creates a new cause of action in favor of the survivors.**
		- **Survival Actions**
			* **The majority of jurisdictions will allow an action for personal injuries in addition to an action under the wrongful death statute, though death is a result of injuries. Recovery for conscious pain and suffering is permitted in most jurisdictions.** (Murphy v. Martin Oil Co.)
			* **Wrongful death and survival actions are two separate causes of action, but they are often combined.**
			* **Damages for a survival action will only be allowed for what the decedent herself could have claimed at the moment of her death. They may exclude medical expenses, pain and suffering, lost wages, etc.**
			* **When an injured victim pursues her claim against the tortfeasor to judgment or settles and releases her claim with him, the victim’s claim is terminated. As a consequence, no survival action may be brought.**
		- **Nuisance**
			* **Nuisance may be intentional, negligent or deserving of strict liability. Nuisance usually starts as being negligent but may become intentional when the individual knows that they are committing the nuisance.**
			* **Two types – public and private:**
				+ **Public Nuisance**

**Public nuisance is a substantial and UNREASONABLE interference with a right common to the general public, in use of public facilities, in health, safety and convenience.**

**Circumstances that may sustain a holding that an interference with a public right is unreasonable include:**

**Whether the conduct involves a substantial interference with the public convenience, or**

**Whether the conduct is proscribed by a statute, ordinance or administrative regulation, or**

**Whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and to the actor’s knowledge, has a substantial detrimental effect to the public right. Character of the neighborhood or social expectations - “A nuisance may be merely a right thing in the wrong place.”**

**Utility of the conduct is considered in public nuisance cases – where B<PL, the act is a nuisance because the burden of refraining is less than the damage to the community.** (Carpenter v. The Double R Cattle Company, Inc.)

**Exception doctrines:**

**Hypersensitivity – it is generally held that the harm must be of a kind that would be suffered by a normal person in the community.**

**Right to farm statutes – prevent new residents from restricting established agricultural practices.**

**A private individual cannot usually bring an action for public nuisance unless the plaintiff’s enjoyment of a public right is diminished and her injury differs in kind from injury to the general public.**

* + - * + **Private Nuisance**

**Private nuisance is an UNREASONABLE nontrespassory invasion of another’s interest in the private use and enjoyment of land to such an extent that the landowner cannot reasonably be expected to bear without compensation. Interference must be one that would interfere with the normal use and enjoyment of a normal person.** (Restatement, Second, Torts §821D)

**Considerations:**

**Magnitude, frequency, or duration exceeding neighborhood norms – the defendant’s use of his land may be broadly consistent with the uses to which the neighborhood is dedicated, but because of those three things, the use may constitute a nuisance.**

**“Coming to the nuisance” – see below**

**Gravity of harm – may be nuisance as a matter of law based on legislative or rules from administrative agencies.**

**Even in the conduct of lawful business, the owner is subject to reasonable limitations – he must not unreasonably interfere with the health or comfort of neighbors or with their right to the enjoyment of their property. If a lawful business is operated in an unlawful or unreasonable manner so as to produce material injury or great annoyance to others or unreasonably interferes with the lawful use and enjoyment of their property, it will constitute a nuisance.** (Winget v. Winn-Dixie Stores, Inc.)

**To recover for nuisance there must be an actual nuisance in the use of the property – it is not enough that it makes neighboring property less valuable.** (Winget v. Winn-Dixie Stores, Inc.)

**Generally the plaintiff will not be barred for recovery for nuisance by the sole fact that he “comes to the nuisance” by buying property adjoining it. This will however be a factor considered.** If the plaintiff is successful in obtaining an injunction requiring the defendant to shut down or move the nuisance, he may be required to pay part of the cost of shutting down/moving the nuisance (because the plaintiff knowingly moved next to the nuisance.) (Spur Industries, Inc. v. Del E. Webb Development Co.)

Historic role of private nuisance law was a means of efficiently resolving conflicts between neighboring, contemporaneous land uses… idea was that neighbors have no opportunity to protect themselves through inspection and negotiation.

* + - * **Special Types – Non-Invasive Nuisances**
				+ **Blocking light, air or view – plaintiff will usually not be able to recover for this unless such obstructions have no useful purpose to either the defendant himself or to others.**
				+ **Aesthetic nuisance – courts are reluctant to say that an inappropriate or ugly sight can be a nuisance.**
				+ **Recovery for nuisances creating anticipated harm without invasion – some courts are willing to impose liability when activities outside the land threaten future harm.**
			* **Except for the kind of vicarious liability that may occur when a landowner is responsible for nuisances initially caused by the previous landowner, strict liability will usually only be imposed if the plaintiff can show that the defendant maintained or pursued an abnormally dangerous activity.**
			* **Self-Help to Abate a Nuisance**
				+ **Privilege is analogous to the privilege of using reasonable force to protect the possession of land against trespass.**
				+ **Privilege is open only to those to whom the condition is a nuisance. A public nuisance may be abated by a private individual only when it causes or threatens special damage to the private individual, apart from that which it poses to the general public.**
				+ **Privilege depends on the actual existence of a nuisance – a mistaken belief will not justify the action.**
				+ **Abatement does not justify the infliction of personal injury or a breach of the peace.**
				+ **If possible/time permits, the actor must notify the wrongdoer of the existence of the nuisance and demand removal of the condition.**
			* **Remedies:**
				+ **General remedy for nuisance is injunction.**
				+ **However, where the injury is slight, the remedy for minor inconveniences may be damages – idea of “balancing of conveniences”. Measure of damages is the harm done to the plaintiff – diminution of value, cost of restoring land, compensation for personal injury/illness,**
				+ **A plaintiff may be able to recover for nuisance from a defendant that would have normally been shielded by immunities in a negligence action.**
			* **Statutes have begun to regulate nuisance, especially public nuisance.**
		- **Defamation**
			* **Defamation is a publication that tends to damage the plaintiff’s “reputation” – to diminish the respect, good will, confidence or esteem in which he is held, or to excited adverse or unpleasant feelings about him.**
			* **General elements to be proved by plaintiff – “clear and convincing evidence”:**
				+ **Defendant’s publication to a third person,**
				+ **Of defamatory material,**
				+ **Of and concerning the plaintiff AND**
				+ **That the statement was false,**
				+ **Some degree of fault on the publisher (intent or negligence in publishing),**
				+ **Actual damages.**
			* **Publication is a general term – means intentional or negligent communication of the defamatory words to someone other than the person defamed.**
			* **If the communication is substantially true, there is no cause of action for defamation – true statements are protected by the 1st Amendment. The plaintiff has the burden of proving that the communication was false.**
			* **In a defamation action, the judge will make a screening determination of whether the publication is capable of carrying defamatory meaning, and the jury will decide whether it was in fact understood as defamatory.**
			* **Plaintiff must prove actual injury to recover for defamation. This is not limited to out of pocket loss – it may include impairment of reputation and standing in the community, personal humiliation, mental anguish and suffering.** (Gertz)
				+ Note: actual damages are broader in scope than special damages, as required for statements that are not slander per se
			* **The fact that a publisher had no actual intention to defame a particular person does not prevent recovery of damages by the person defamed.** (Corrigan v. Bobbs-Merill Co.)
				+ **Exception – A vendor or distributor of a newspaper, magazine or book, or internet services provider, is called a “secondary publisher” and is not liable if he had no knowledge of libelous matter in the publication and had no reason to be on guard. A newspaper or book publishing company does not qualify as a secondary publisher.**
			* **2 different types – libel and slander**
				+ **“The area of dissemination, the deliberate and premeditated character of its publication, and the persistence of the defamation are factors to be considered in determining whether a publication is libel rather than a slander.”** (Rstmt. Torts)
				+ **Libel – written or printed words**

**“Libel consists of the publication of defamatory matter by written or printed words, or by its embodiment in physical form, or by any other form of communication which has potentially harmful qualities characteristic of written or printed words.”** (Rstmt. Torts)

**Does not require proof of special damages to be actionable**

* + - * + **Slander – oral**

**“Slander consists of the publication of defamatory matter by spoken words, transitory gestures, or by any form of communication other than those [defined as libel].”** (Rstmt.Torts)

Most statutes provide that broadcast defamation is to be treated as slander, regardless of the existence of a script. (Shor v. Billingsly)

**Plaintiff must prove “special damages” (i.e. pecuniary/monetary loss) for slander unless the words fall within slander per se.**

**Proof of damages:**

**Special damages must have been the natural, immediate and legal consequences of the words. Does not include sickness, etc. Must be a substantive loss that can be measured by money.** (Terwilliger v. Wands)

Once special damages are pleaded and proved, the plaintiff may recover additional damages for his mental distress, wounded feelings and humiliation.

**Types of slander that are actionable without showing of special damages:**

**Imputations of major crime – for crime involving “moral turpitude” (character, not categorization, of crime matters)**

**Loathsome disease – permanent, lingering and incurable disease.** Accusations of insanity or communicable diseases are not included.

**Business, trade, profession or office – defamation of a kind incompatible with the proper conduct of the business, etc, itself**

**Serious sexual misconduct** (accusation against a woman… does not generally apply for similar charges against men or homosexuality).

* + - * **Public v. Private Individuals**
				+ **Consideration of state interests in punishing defamatory speech v. federal interests in protection of 1st amendment rights.**

**For public individuals there is more emphasis on 1st amendment rights of person committing the “defamation”.**

**For private individuals there is more emphasis on state interests in punishing defamatory speech.**

* + - * + **Fair Comment Privilege – If the Plaintiff is a public official or a public figure, she must prove that the defendant published a statement with knowledge that the statement is false or reckless disregard of the truth (“actual malice”) and actual injury. This is because of the Constitutional guarantee of free speech.** (NY Times Co. v. Sullivan)

**Public official – test is whether “the position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all governmental employees.” A person may be deemed a public official in some or all aspects of his life.**

**Public figures include:**

**People who, because of such power, fame, influence and notoriety, are public figures for all situations;**

**People who thrust themselves into a public controversy in order to have an impact on the outcome; and**

**People who may find that they become involuntary figures.**

Note: usually will not include attorney for high profile cases. (Gertz)

**Actual injury may include emotional harm, physical harm, lost business, lost reputation, humiliation, money spent or repair damages, etc… any kind of normal common law damages.**

* + - * + **Matter of Public or General Interest**

**The state can use any standard for defamation provided it is less than strict liability – can use negligence, “actual malice”, etc.** (Gertz)

**If the plaintiff is a private citizen but the issue is one of public concern, the plaintiff may be required to prove the same “actual malice” and may be limited to recovery for “actual harm”.** (Gertz v. Robert Welch, Inc.)

**The state interest in protecting the right to privacy for a state individual when a matter of public concern is at issue should not extend further than compensation for actual injury – states may not permit recovery of presumed or punitive damages without “actual malice” - knowledge of falsity or reckless disregard for the truth (to protect 1st amendment rights)** (Gertz v. Robert Welch, Inc.)

* + - * + **Private Individuals (with no “public concern”)**

**A private individual suing on a defamatory statement not a matter of public concern doesn’t have to prove actual damages – they must prove that the statement was false and that the defendant failed to used reasonable care in establishing the truth of the statement. (to overcome 1st amendment).**

**Private individuals are more vulnerable to injury by defamation, so the state’s interest in protecting them generally carries more weight than 1st amendment freedom of speech rights.** (Gertz v. Robert Welch, Inc.)

**Private individuals may recover punitive as well as compensatory damages, based on the jurisdiction.**

* + - * **Privileges**
				+ **Judicial Privilege**

**Judge has absolute immunity for defamatory words published in the course of judicial proceedings.**

**Privilege attaches to judge, attorneys, jurors and witnesses.**

**Only limitation is that what is said must be found to have some reasonable bearing upon or relation to the subject of inquiry.**

* + - * + **Legislative Proceedings**

**Members of the Legislature/Congress have absolute immunity for defamatory words published in the performance of legislative functions.**

**Privilege extends to hearings and witnesses at hearings.**

**To be privileged, it must have some relation to business of legislature.**

* + - * + **Public Officials**

**Federal – immunity is given to executive officers and federal agents while acting within the scope of their position.**

**State – high officials generally have absolute immunity, and it varies by state whether the privilege is extended to officials of lower rank.**

* + - * + **Publications Consented To**
				+ **Publications Required by Law**
				+ **Publication about a public official/public interest – see above.**
			* **Damages/Remedies**
				+ **Damages:**

**Most common remedy is damages.**

**For a public figure or private person suing on a matter that is of public concern, damages are confined to compensation for actual injury unless the plaintiff establishes actual malice.** (Gertz) **A private person suing on a matter not of public concern may seek punitive damages without proving actual malice.**

**Pecuniary damages must be proved for a slander cause of action that is not slander per se.**

* + - * + **Self-Help – the defamed party may make a response to the defamatory statement about him, provided he can find a suitable medium for making a response. He is given a conditional privilege – he is not liable to the orginal defamor unless he abuses the privilege by making irrelevant charges, or charges of his own reckless disregard of their truthfulness.**
				+ **Injunctive relief may be given provided it is not a 1st Amendment violation of freedom of speech.** (Near v. Minnesota)
		- **Torts that Violate Privacy Rights**
			* **Violation of privacy is treated as an intentional tort – must prove intent, act, causation and invasion of protected interest (which is the right to privacy).**
			* **1st Amendment Considerations come into play – right of defendant to write, speak or publish the truth. If the plaintiff’s name or likeness is privileged under the 1st Amendment, the plaintiff cannot recover.**
			* **4 types:**
				+ **Misappropriation**

**Elements:**

**Defendant used plaintiff’s name or likeness,**

**Use of plaintiff’s name or likeness was for defendant’s own purposes or benefit, commercially or otherwise,**

**Plaintiff suffered damages,**

**If damages are intended to remedy a proprietary injury the plaintiff’s commercial interest, they will be required to prove the value of their identity. If the plaintiff only seeks damages for mental anguish, the value of the plaintiff’s identity will not be relevant.**

**Defendant caused the damages incurred.**

**Plaintiff may be able to recover for personal injuries such as mental anguish and injured feelings resulting from the misappropriation. Varies by jurisdiction.**

**Newsworthiness Privilege**

**There is a 1st Amendment privilege that permits the use of a plaintiff’s name or likeness when that use is in the context of, and reasonably relates to, a publication concerning a matter that is newsworthy or of legitimate public concern.**

**Court will determine whether it is used for the purposes of communicating news or marketing a product or service. Content of the speech, not the motivation of the speaker, determines whether it is commercial.**

* + - * + **Intrusion**

**Elements:**

**Intrusion into a private place, conversation or matter;**

**Privacy is evaluated with respect to the identity of the alleged intruder and the nature of the intrusion.**

**An expectation of complete privacy isn’t necessary –expectation of privacy in the area intruded upon is all that is required.**

**In a manner highly offensive to a reasonable person.**

**Means conduct must be substantial.**

**Note: does not involve publication like other privacy torts**

**Does not require proof of trespass or emotional distress.**

**In a workplace where the general public does not have unfettered access, employees enjoy a limited but legitimate expectation that their conversations and other interactions will not be recorded, videotaped, etc, even if their actions were not completely private from co-workers. Whether or not their reasonable expectation of privacy is violated depends on the exact nature of the conduct and surrounding circumstances.** (Sanders v. American Broadcasting Companies)

* + - * + **Disclosure**

**Disclosure is the public disclosure of private facts about the plaintiff when disclosure would be highly offensive to a reasonable person.**

**Note: Constitutionally suspect tort (1st Amendment violations)… this tort is in some but not all jurisdictions.**

**Falsity is not required – defendant may be liable for disclosing true facts about the plaintiff (this is where 1st amendment violations come into play).**

**Disclosure generally must be to more than just a few persons.**

**Limitations:**

**Facts must be private – facts that are in the public domain cannot give rise to a claim for disclosure.**

**One who is held to be a “public figure” or when the disclosure is of public concern cannot have a claim for disclosure.**

* + - * + **False Light**

**Elements:**

**Defendant publicized a matter about the plaintiff to a substantial group of persons or to the public;**

**The matter put the plaintiff in a false light;**

**The false light would be highly offensive to a reasonable person; and**

**The defendant knew of the falsity or acted in reckless disregard whether the matter was false or not.**

**Same 1st Amendment concerns as disclosure.**

False light is like defamation.

* + - * **If you cannot recover for defamation or privacy, you cannot seek damages for IIMD… if 1st Amendment protects the rights of the defendant, then there is no relief.** (Hustler case)
* **Affirmative Defenses**
	+ **Privileges (used against Intentional Torts)**
		- The Plaintiff has the burden of pleading, the burden of production and the burden of persuasion. **The defendant has the burden of proving an affirmative defense that would remove their liability.**
		- **Types of Privileges**
			* **Consent** (may be express or implied)
				+ **One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.**
				+ **Things that void consent:**

**Consent is invalidated if it obtained under duress, fraud, deceit or misrepresentation.** (DeMay v. Roberts)

**Consent is ineffective if the person making it is incapable of expressing rational will.**

**Criminal activity – consent may be effective to bar recovery in a tort action although the conduct consented to is a crime, unless conduct is made criminal in order to protect a certain class of persons irrespective of their consent and the plaintiff is in that class.**

* + - * + **Implied Consent:**

**Consent is implied if a reasonable person upon receiving would take it to be consent – outward manifestation, not internal existence of consent, matters.**

**Consent may be shown through the actions and outward manifestation of the feelings of the “victim”. If the “victim’s” behavior is such to indicate consent, then the actor is justified in his act. An intentional tort cannot occur with consent.** (O’Brien v. Cunard S.S. Co.)

**Impact of Custom:**

**Consent may be implied by the custom of the activity.** A professional football player only consents to normal and common actions and injuries, but he does not waive his rights to be free from abnormal bodily harm when playing the game. (Hackbart v. Cincinnati Bengals, Inc.)

* + - * + **Express Consent**

**Medical Operations:**

**Medical care providers may act in the absence of express consent if** (Kozup v. Georgetown U. Hosp., 851 F.2d 437)**:**

**the patient is unable to give consent (unconscious, intoxicated, mentally ill, incompetent),**

**there is a risk of serious bodily harm if treatment is delayed,**

**a reasonable person would consent to treatment under the circumstances, and**

**the physician has no reason to believe this patient would refuse treatment under the circumstances.**

**Consent is usually sufficiently general in its terms as to justify the physician in doing whatever the physician believes necessary in the course of an operation.** (Rothe v. Hull, Baxter v. Snow)

**If a medical operation is performed without the consent of the patient and the circumstances are not such to justify the physician in not obtaining consent, then the operation is unlawful and may be battery.** (Mohr v. Williams)

Special Case – If the parents of a young child object to operation on their child for religious reasons, the doctor can still act on the basis that it is in the best interest of the child.

Doctrine of Informed Consent: Failure to disclose can be treated as negligence. When the physician exceeds the boundaries of consent, the matter is treated as battery.

* + - * **Self-Defense**
				+ **Existence of Privilege – anyone is privileged to use reasonable force to defend himself against a threatened battery on the part of another.**
				+ The trial court judge will make the initial determination of whether an instruction of self-defense to the jury is warranted on the facts.
				+ **Retaliation – when the original victim is no longer threatened, the privilege terminates;** thereafter, the original victim himself becomes liable for battery. Even a person who was the initial aggressor, once he has retreated, has the right to self-defense against the person he originally threatened.
				+ **Reasonable Belief – the privilege exists when the “victim” reasonably believes that force is necessary to protect himself against battery, even if there is no true necessity.**
				+ **Provocation – insults and verbal threats, by themselves do not justify self-defense.** The privilege of self-defense only exists if the abusive words are accompanied by actual threat of physical violence.
				+ **Amount of force – privilege is limited to the use of force that is or reasonably appears to be necessary for protection against threatened battery (“proportionate force”).**
				+ **Retreat – most jurisdictions say that retreat is not necessary** and the “victim” may stand his ground and use deadly force without first retreating.
				+ **Injury to a third party - the “victim” is held not to be liable to an accidently injured third party in the absence of negligence.**
			* **Defense of Others**
				+ Privilege is similar to that of self-defense and is recognized for the defense of a third person.
				+ Better answer – **Many courts hold that the intervenor steps into the shoes of the person he is defending and is privileged only when that person would be privileged to defend himself. If it turns out that he has intervened to help the aggressor, he is liable.**
				+ Some courts hold that the defendant is privileged to use reasonable force to defend another, even if he is mistaken in his belief that intervention is necessary, as long as his mistake was reasonable.
			* **Defense of Property**
				+ **General Defense of Property**

**Classic Recovery of Property** (Chattels) **Privilege Model:**

**Actual tortuous dispossession** (“must be right”)

**Fresh pursuit**

**Demand**

**Proportionate Action to Interest**

**The privilege to defend property is limited to the use of force reasonably necessary to the situation as it appears to the defendant.**

**There is no privilege to use force intended/likely to cause death or serious harm against another whom the possessor sees about to enter his premises or meddle with his chattel, unless the intrusion threatens death or serious bodily harm to the occupiers or users of the premises or is used to prevent the commission of a crime.** (Katko v. Briney) If the threat to property is coupled with threat to the person, then greater force may be used because the privilege becomes self-defense. Greater force may also be used to prevent the commission of a serious felony crime.

**The privilege to defend one’s land or chattels against an intruder is limited to unlawful intrusions.** There is no privilege to use force to defend against those who are authorized to enter.

**A possessor’s privilege to eject the actor from his property is limited in that he cannot do so if the ejection places the actor into a position of unreasonable physical danger.** If the plaintiff’s presence endangers the personal safety of those on the premises, the privilege of self-defense or defense of third persons may justify the ejection.

* + - * + **“Shopkeepers Privilege”**

**Shopkeepers Privilege Model:**

**Reasonable Belief**

**Property of Shop-Owner/Close Proximinity**

**Demand**

**Proportionate Action to Interest**

**A shopkeeper has the privilege to detain an individual for a reasonable investigation of the facts that they believe has committed theft.** This privilege extends from beyond their shop, into the immediate vicinity. (Bonkowski v. Arlan’s Department Store) Reasonable force, short of bodily harm, may be used to get the shopper to stay. A request to stay must be made before any use of force if it is practical to do so. (Restatement (Second) torts §120A)

**A seller has the right to retake property when discovered immediately that it was “sold” under fraud and the retaking can be done without unnecessary violence to the buyer.** (Hodgeden v. Hubbard)

**Fresh pursuit is limited to prompt discovery of the dispossession, and prompt and persistent efforts to recover the chattel.** Any undue lapse of time during which the pursuit has not been commenced or has come to a halt will mean that the owner is no longer privileged to fight himself back into possession, but must resort to the law. (Restatement (Second) of Torts, §103).

**The privilege is limited to force reasonable under the circumstances. It is not reasonable to use force calculated to inflict serious bodily harm to protect a property interest. (**Restatement (Second) of Torts, §106)**. If the wrongdoer resists, the owner may use force necessary to protect his person.**

**A resort to force will not be justified until a demand has been made for the return of the property, but is not required when it reasonably appears that demand would be useless or dangerous.** (Restatement (Second) of Torts, §104).

With a conditional sale (i.e. with installment plan), title remains in the seller, and he may retake the chattel peaceably without liability. Since he has voluntarily surrendered possession, he has to privilege to recapture it by force, and if the buyer will not return it, he must resort to legal remedies.

Limitations of privilege - Most courts agree that the shopkeeper is not justified in detaining the shopper until they sign a confession. The shopkeeper is also not justified in using threats to detain the shopper until he pays for “stolen” merchandise. The shopkeeper’s privilege does not extend to protect him against an action for defamation.

* + - * **Necessity**
				+ **A public official has the privilege of necessity if his action was done in good faith and with a reasonable belief of necessity.** The public official will not be personally held liable for his act of necessity. (Surrocco v. Geary)
				+ **A person (not a public official) may still be liable for damages to the property of another even when damages occur from an act done out of necessity.** Private necessity is an incomplete privilege – it does not negate liability, but will be considered in the calculation of damages. (Vincent v. Lake Erie Transp. Co.)
				+ Necessity is not available to trespassers protesting against war, use of nuclear weapons, availability of abortions, the draft, etc. The privilege of necessity also does not extend to the taking of another’s life.
			* **Authority of Law**
				+ **Police officers, military personnel, etc may act under authority of law, engaging in conduct that otherwise would be tortious. If the defendant is authorized by law to do what he does, he is not liable for doing it.**
				+ **Arrest:**

**Arrest under a warrant, or the seizure of goods under civil process, is an act generally considered to be “ministerial” so that the officer is liable if he acts improperly.**

If the court issuing the warrant is entirely without jurisdiction to do it, it is commonly held that the invalid order affords the officer no protection.

If the court has general jurisdiction to issue similar process, it is generally held that the officer is privileged if the warrant is “fair on its face”. **The warrant protects the officer only if he carries out the order given him exactly… it does not cover a mistake.**

* + - * **Discipline**
				+ **Parent/Child Relationship**

**Privilege is given to parents and those deemed to stand in the place of a parent to have the control of their children and the privilege of exercising reasonable force and restraint upon them.**

Factors to use to determine whether the conduct was within the privilege of discipline: age, sex, condition of child; nature of offense and apparent motive; influence of child’s conduct as example on other children in same family; whether force/confinement is reasonably necessary and appropriate to compel obedience; whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm.

* + - * + **Instructor/Child Relationship**

**An instructor generally has the privilege to use discipline to maintain reasonable order in the school/classroom environment.**

**An instructor will be subject to liability for using “excessive” force.** Court will look at the nature of the punishment, the conduct of the student, the age and physical condition of the student, and the motive of the instructor.

* + - * **Justification - catch-all affirmative defense.**
	+ **Defenses special to negligence**
		- **Comparative Negligence**
			* **The Plaintiff’s fault is compared with that of the defendant and plaintiff’s damages are reduced according to the measure of fault.**
			* **2 Different Applications of Comparative Negligence:**
				+ **Pure - Plaintiff can recover for the X% of injuries caused by the defendant, cannot recover for the Y% that the plaintiff caused**
				+ **Modified – plaintiff can recover for X% of the injuries caused by the defendant, as long as the plaintiff’s fault is “not as great as” the defendant’s. If the plaintiff’s fault is equal to or greater than the defendant’s, the plaintiff is completely barred from recovery.**
				+ Note: instructing the jury on which “rule” for comparative negligence may change outcomes… the jury may be tempted to change the percentage of negligence they assign to the plaintiff to ensure the plaintiff can still collect based upon whether the 50% or 49% rule is followed.
			* This has replaced contributory negligence in most states (where any negligence on the part of the plaintiff would bar relief to them from the acts of the defendant).
			* Doctrine of Last Clear Chance
				+ If the defendant had the opportunity to avoid the accident after the opportunity was no longer available to the plaintiff, the defendant should bear the loss. Application will occur when the plaintiff is helpless, unable to avoid the danger or inattentive.
				+ Note: this has been largely removed in jurisdictions that apply comparative negligence theory.
			* General outcomes when comparative negligence is applied:
				+ In cases of multiple tortfeasors, plaintiff will be entitled to recover so long as their fault is less than the combined fault of all tortfeasors.
				+ Because a particular defendant will only be liable for the percentage of plaintiff’s damages caused by their negligence, situations where a defendant has paid more than his “share” of a judgment will no longer arise.
		- **Assumption of Risk**
			* **Express – plaintiff may expressly assume risk, in some cases barring the defendant from liability**
				+ **Example - exculpatory clause** (Seigneur v. National Fitness Institute, Inc.)

**May insulate the defendant from liability if it clearly and specifically indicates the intent to release the defendant from liability for personal injury caused by the defendant’s negligence.**

**Three exceptions where the public interest will render an exculpatory clause unenforceable:**

**When the party protected by the clause intentionally causes harm or engages in acts of reckless, wanton or gross negligence;**

**When the bargaining power of one party to the contract is so grossly unequal so as to put that party at the mercy of the other’s negligence; or**

**When the transaction involves the public interest.**

**Court will also consider whether the defendant offered services of great importance to the public which were a practical necessity for some or all members of the public. If services are a necessity, than an exculpatory clause may not be enforceable.**

* + - * **Implied**
				+ **The plaintiff may impliedly assume risk when they are aware of the risk and its magnitude and voluntarily encounter the risk.** (Rush v. Commercial Realty Co.)
				+ The fact that a plaintiff protests against the defendant’s conduct is evidence that he did not consent to the risk. But having protested, the plaintiff may thereafter accept the situation and “waive” the protest. In that case, whether he has then assumed the risk is a question for the jury.
		- **Statutes of Limitations and Repose**
			* **The statute of limitations is a complete bar to actions that do not meet its time limits. It is in no way dependent on the merits of the case.**
			* **Most statutes of limitation provide that the time within which to file begins to run when the cause of action “accrues”, leaving to the courts to fix that point. Most courts have held that the statute begins to run when there has been an actual injury to the plaintiff’s person or property.**
			* In Medical Malpractice cases:
				+ The cause of action accrues and the statute of limitations commences to run when the patient discovers, or in the exercise of reasonable care and diligence for his own health and welfare, should have discovered the resulting injury. (Teeters v. Currey)
			* Statute of limitation v. statute of repose:
				+ A statute of limitation limits the time during which the cause of action can be brought.
				+ A statute of repose is substantive, rather than procedural in nature.
		- **Immunities**
			* **Immunity avoids liability in tort under all circumstances within the limits of the immunity itself. It is based on the role of the defendant or their relationship with the plaintiff.**
			* **Types:**
				+ **Families**

**Interspousal - There has been a general movement away from interspousal immunity.** (Freehe v. Freehe)

**Parent/Child**

**Courts generally still believe that parent-child immunity is in the best interests of both children and parents for their relationship.** (Renko v. McLean)

**Common exceptions to parent-child immunity:**

**When the action is for personal injury inflicted intentionally, or is “willful” or “wanton”**

**When the relation has been terminated before suit by the death of the parent or child or both**

**When the defendant is a step-parent or other person standing in as the parent**

**When the child has been legally emancipated**

**In the context of automobile cases**

* + - * + **Charities**

**Charities originally had immunity from tort liability on the theories of “implied waiver” by the victim and the “trust fund theory”** (that the institutions funds were intended for charitable functions, not for litigation)**.**

**Changes to this doctrine include** (based on jurisdiction):

**Entirely abolishing immunity.**

**Abolishing the immunity to charitable hospitals but retaining it as to religious institutions and other charities.**

**Limiting the immunity to recipients of the benefits of charity.**

**Abolishing the immunity to the extent that the defendant is covered by liability insurance or to the extent that the judgment can be satisfied by other non-trust fund assets.**

* + - * + **Government**

**General:**

**Discretionary v. Ministerial Acts:**

**Many states and the federal government continue immunity for discretionary functions, but have eliminated it for ministerial acts. Discretionary functions are those where the government is acting to establish policy and ministerial functions are those that implement/effectuate policies.**

2 part analysis to decide whether the discretionary function exception applies:

Whether the actions were discretionary – a “matter of choice”.

Whether the judgment is the kind that the discretionary function exception was designed to shield.

**State specific:**

**Most jurisdictions have abolished state/local governmental immunity.** (Ayala v. Philidelphia Board of Public Education)

Tort liability for police protection to the public – there is no general tort liability for police officers. **If the police authorities undertake responsibilities to particular members of the public and expose them, without adequate protection, to the risks which then materialize into actual losses, then there is no immunity.** (Riss v. New York)

**Federal Specific**

**By enacting the Federal Tort Claims Act, Congress opted to waive the sovereign immunity to civil suit enjoyed by the United States.** (Deuser v. Vecera)

* + - * + **Public Officer – may be shielded from liability if the official’s conduct comes within common law immunity** (note: separate from governmental immunity).
	+ **Defenses special to product liability**
		- **Comparative fault may be used as a defense, similar to as in negligence.**
			* Adopting comparative fault will not frustrate the goals of strict liability because:
				+ The principle of protecting the defenseless is preserved because plaintiff’s recovery will be reduced only to the extent that his own lack of reasonable care contributed to his injury.
				+ The manufacturer’s incentive to produce safe products will not be reduced because the manufacturer cannot assume that the user of a defective product that is injured will be blameworthy.
				+ System of comparative fault is extended to actions founded on strict products liability.
			* **The manufacturer will not be liable for injuries resulting from abnormal or unintended use of his product, if such use was not reasonably foreseeable.**
		- **Defense because of status in the supply chain**
			* **Most courts have extended strict liability to retailers, wholesalers and distributors in the chain of distribution, with exceptions:**
				+ Many courts decline to impose strict liability on sellers of used products.
				+ An occasional seller who does not hold himself out as having commercial knowledge or skill will not be subject to strict liability.
				+ A provider of services who does not sell the product, but where the transaction is predominately a service) will not be subject to strict liability for a product given in connection with their services (i.e. a hospital is not strictly liable for a defective product provided to the patient during the course of treatment). (Hector v. Cedars-Sinai Medical Center)

Two primary policy reasons:

In a service transaction, there is no mass production and distribution, and hence no real ability to spread the risk of loss to consumers.

Service transactions do not involve a group of consumers needing protection from a remote and unknown manufacturer.

* **Damages/Legal Outcomes**
	+ **Purposes of Damages:**
		- **Make the plaintiff whole.**
		- **Encourage people not to engage in such behavior in the future or again**
	+ **Apportionment of Responsibility among Parties**
		- **Traditional Apportionment - Joint & Several Liability**
			* In cases where harms done by two or more tortfeasors were seperable or divisible as to which tortfeasor caused which part of the harm, apportionment was required. Tortfeasor would be required for their portion and no more.
			* **3 types of cases when joint & several liability was imposed:**
				+ **When tortfeasors act in concert;**
				+ **When defendants fail to perform a common duty to the plantiff**
				+ **When defendants have acted independently to cause an invisible harm**
			* Problems with joint & several liability - May force one tortfeasor to pay without regard to the degree of his culpability (if there are immunities, other tortfeasors are insolvent, etc.)
			* Different states solutions to joint & several liability problems
				+ Joint & several liability is generally abolished with some exceptions.
				+ … abolished, but when it appears that the plaintiff cannot collect judgment against one of the tortfeasors, liability is reallocated.
				+ … abolished, but only for tortfeasors whose comparative fault is below a stated threshold.
				+ … abolished for non-economic damages but retained for economic damages.
			* **In jurisdictions that apply comparative negligence, joint & several liability is obsolete.**
		- **Contribution and Indemnity under Joint & Several Liability**
			* **Right to contribution**
				+ **Contribution = two defendants will share in the ultimate liability… each tortfeasor will be liable for their portion of the harm caused**
				+ Note: contribution is denied to intentional tortfeasors
			* **Right to indemnity**
				+ **Indemnity allows someone who is without fault, compelled by operation of law to defend himself against the wrongful act of another, to recover from the wrongdoer the entire amount of his loss.** (Slocum v. Donahue)
		- **Satisfaction**
			* **The one who has been injured by the joint wrong of several parties may recover damages against either or all, but, although there may be several suits and recoveries, there may be only one satisfaction.** (Bundt v. Embro)
			* **“Where it is evident that the consideration paid to the plaintiff was not intended to be in full compensation for his injuries, and the agreement signed by him although in form a release was clearly intended to preserve the liability of those who were not parties to it, many of the courts have sought to give effect to that intention by construing the agreement in legal effect a covenant not to sue and not a technical release.”** (Cox v. Pearl Investment Co.)
		- **Mary Carter Agreement**
			* **A “Mary Carter Agreement” exists when the plaintiff enters into a settlement agreement with one defendant and goes to trial against remaining defendants. The settling defendant, who remains a party, guarantees the plaintiff a minimum payment, which may be offset in whole or in part by an excess judgment recovered at trial.**
			* As a matter of public policy, Courts usually favor settlements, but do not favor partial settlements that promote rather than discourage further litigation. The Court does not favor settlement agreements that skew the trial process, mislead the jury, promote unethical collusion, and create the likelihood that a less culpable defendant will be hit with the full judgment. Public policy favoring fair trials outweighs public policy favoring partial settlements.
		- **Collateral-Source Rule** (Montgomery Ward & Co., Inc. v. Anderson
			* **A trial court must exclude evidence of payments received by an injured party from sources collateral to the wrongdoer, such as private insurance or government benefits. Recoveries from collateral sources do not create benefit for the tortfeasor, even though double recovery for the same damage by the injured party may result.**
			* **4 situations when collateral source evidence is allowed:**
				+ **To rebut the plaintiff’s testimony that they were compelled by financial necessity to return to work prematurely or forego additional medical care;**
				+ **To show that the plaintiff had attributed his condition to some other cause, such as sickness;**
				+ **To impeach the plaintiff’s testimony that he/she had paid the medical expenses themselves; or**
				+ **To show that the plaintiff actually continued to work instead of being out of work as claimed.**
			* **The collateral-source rule applies unless the evidence of the benefits from the collateral source is relevant for a purpose other than mitigation of damages.**
		- **Vicarious Liability - Respondeat Superior**
			* **Under the doctrine of respondeat superior, an employer is ordinarily liable for the injuries its employees cause others in the course of their work. General respondeat superior imposes liability whether or not the employer was negligent, and whether or not the employer had control/right of control of the employee.** (Bussard v. Minimed, Inc.)
			* **Application of respondeat superior requires that the employee be acting within the scope/course of her employment.** (Bussard v. Minimed)
				+ **“An employee is acting within the scope of his employment when he is performing services for which he has been employed, or when he is doing anything reasonably incidental to his employment.”** (O’Shea v. Welch)
				+ **Personal acts done at work generally will not take the employee outside the scope of employment.**
				+ **Where the employee is combining his own business with that of the employer, the question is whether he was acting on a frolic (abandonment of employer’s business while in pursuit of his own) or detour (slight deviation from employer’s business for his own reasons). If the employee wholly abandons, a frolic, the act is not within the scope of employment and the employer is generally not liable.** (O’Shea v. Welch)

Factors considered: employee’s intent, nature, time and place, whether incidental acts were expected by the employer, etc.

* + - * + **An employee’s tortuous conduct may be within the scope of employment even if it contravenes an express company rule and confers benefit to the employer.**
				+ **Generally the employee is outside the scope of his employment while engaged in the normal commute to and from his place of work – “going and coming rule”.**

**There is an exception when an employee endangers others with a risk arising from or related to work. Court will use a foreseeability test – was the actual occurrence a generally foreseeable consequence of the activity?**

* + - * **Most courts follow the view that the principal is only liable for punitive damages if the principal authorized or ratified that act, was reckless in employing or retaining the agent, or the agent was employed in a managerial capacity.**
			* **General rule is that one who arranges work to be done by an independent contractor is not vicariously liable for the contractor’s torts. There are exceptions.** (Murrell v. Goertz)
				+ Note: the distinction between an employee and independent contractor is that the contractor does work on his own time, in his own way, under no one’s directions but his own, and the person who selected him has no control over him.
				+ **If a company is negligent in selecting the contractor, in giving improper directions or equipment or in failing to stop any unnecessarily dangerous practices that come to its attention, the company will be held liable for its own negligence, which combines with that of the contractor.**
				+ **See vicarious liability for nondelegable duties.**
				+ **Someone who contracts for performance of an illegal act is vicariously liable for any damage, even if the agent is an independent contractor.**
		- **Vicarious Liability – Nondelegable Duties**
			* **Courts conclude that some duties cannot be transferred or shifted to contractors.**
				+ **“One who carries on an activity which threatens a grave risk of serious bodily harm or death unless the instrumentalities used are carefully maintained, and who employs an independent contractor to maintain such instrumentalities, is subject to the same liability for physical harm caused by the negligence of the contractor in maintaining such instrumentalities as though the employer had himself done the work of maintenance.”** (Restatement of Torts §423)
				+ **“One who by a statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.”** (Restatement of Torts §424)
				+ Examples of nondelegable duties:

Those imposed by a public authority as a condition of granting a franchise,

The duty of a condemning agent to protect a severed parcel from damage,

The duty of a general contractor to construct a building safely,

The duty to exercise due care when an independent contractor is employed to do work which the employer should recognize as necessarily creating a condition involving an unreasonable risk of bodily harm to others unless special precautions are taken,

The duty of landowners to maintain their property in a reasonably safe condition and to comply with applicable safety ordinances, and

The duty of employers and suppliers to comply with the safety provisions of Labor Codes.

* + - * + **Even when the duty is nondelegable, the employer is not responsible for “collateral negligence” of the independent contractor. Collateral negligence creates a risk that is not a usual or inherent part of the work or is outside the scope of the employer’s enterprise.**
		- **Vicarious Liability – Joint Enterprise**
			* **Joint enterprise theory imposes liability vicariously upon one person who is engaged in the same activity with another person committing the tortious act.** (Popejoy v. Steinle)
			* Restatement, Second, Torts §491 – Elements of Joint Enterprise
				+ An agreement, express or implied, among members of the group;
				+ A common purpose to be carried out by the group;
				+ A community of pecuniary interest in that purpose, among the members; and
				+ An equal right to a voice in the direction of the enterprise, which gives an equal right of control.
	+ **3 Basic Types of Damages:**
		- **Nominal**
			* **Consist of a small sum of money awarded to the plaintiff to vindicate rights, make the judgment available as a matter of record in order to prevent the defendant from acquiring prescriptive rights, and carry a part of the costs of the action.**
			* **Amount is unimportant – nominal damages make a statement.**
			* **Cannot be recovered in negligence cases.**
		- **Compensatory**
			* **Intended to represent the closest possible financial equivalent of the loss or harm suffered by the plaintiff, to make the plaintiff whole again, to restore the plaintiff to the position they were in before the tort occurred.**
			* **Two types:**
				+ **General – for past, present and future pain/suffering, mental distress, etc.**

Note: there are no set values/fixed standard for general damages

* + - * + **Special – for past, present and future “out of pocket” expenses**

Note: these can usually be reasonably calculated

* + - * **Personal Injury**
				+ 5 Basic Types of Damages (Anderson v. Sears, Roebuck & Co.):

Past physical and mental pain

Future physical and mental pain

Future medical expenses

Loss of earning capacity

If the injury is one from which the plaintiff cannot recover and reenter the workforce, the measure of damages will include loss/impairment of earning capacity.

Expert testimony will be needed to help the jury estimate what the plaintiff would have earned during their lifetime.

Permanent disability and disfigurement

* + - * + Damages may also be classified as “economic” or “non-economic”. Lost earnings and medical and other related expenses would be classified as “economic” and “special” damages, while pain and suffering and emotional distress would be treated as “non-economic” and “general”.
				+ **The plaintiff must plead special damages with specificity or is deemed to have waived them. These special damages must be established with some degree of certainty.**
				+ **The recovery of damages that the plaintiff could have avoided by reasonable conduct on the part of the plaintiff after a legal wrong has been committed by the defendant are not recoverable.**

Ex. - Award of damages for permanent injuries – the plaintiff will not be able to recover for an otherwise permanent injury if the permanency of the injury could have been avoided by submitting to treatment by a physician, including possible surgery, when a reasonable person would do so under the same circumstances. (Zimmerman v. Ausland)

* + - * + Plaintiff will usually be awarded a lump sum to compensate for all current and future losses, reduced to its present value. Inflation is usually considered in the calculation of present value. Since pain and suffering do not have a precise market value, there is no need to reduce them to present value.
				+ Plaintiff’s award for personal injuries is not subject to federal income tax.
				+ Courts generally do not permit the plaintiff to collect interest on the award until judgment is entered or until a verdict is reached.
				+ Structured settlements and periodic payments of judgments:

Traditional common law treatment is to provide for lump-sum damages, with the money to go to the injured party to spend or invest as he sees fit.

Attorneys have begun using structured settlements to settle some cases. A structured settlement is any settlement that provides that payments are to be made periodically instead of in a lump sum.

* + - * **Physical Harm to Property – Damages for physical harm to land or chattels is closely tied in with the concept of value – what the property is worth.**
				+ **Two basic ways of measuring damages – diminution in value or cost of repair**
				+ **If the property is completely destroyed, its measure of damages is its entire value at the time and place of the tort.**

Varies by jurisdiction – in some it is the highest price that could have been realized, not the lowest price at which there reasonably could have been a sale. (“highest replacement value” rule); others is the value of the chattel at the time it was destroyed; others fall in between the two extremes

If the chattel has no market value, the “personal value” may be used.

* + - * + **If it is damaged, but not destroyed or converted, the damages are measured by the difference in value before and after the injury.**
				+ **If there is merely a deprivation of use, as in the case of dispossession for a limited time, the damages consist of the value of the use of which the plaintiff has been deprived.**

Measure becomes the rental value of the property for that period – the amount the owner could have obtained in the market by renting out the property.

* + - * + **The owner of the chattel is entitled to recover, as special damages, any expense incurred in locating or replacing it.**
		- **Punitive/Exemplary**
			* **An additional sum, over and above the compensation of the plaintiff, awarded in order to punish the defendant, to make an example of the defendant, and to deter the defendant and others from engaging in similar conduct.**
			* **Punitive damages are permitted for intentional torts or strict liability, but not allowed for negligence. The defendant’s conduct and state of mind will determine whether punitive damages are appropriate – “extreme departure from lawful conduct” that is motivated by an “antisocial mental state”.**
			* **Because punitive damages do not compensate the plaintiff, the plaintiff has no right or entitlement to any award of punitive damages in any amount.** There is no deprivation of property if a portion of a punitive damages award goes to the state and not the plaintiff for this reason. (Cheatham v. Pohle)
			* Plaintiff has the burden of proving the factual basis for punitive damages by a preponderance of the evidence or by clear and convincing evidence, depending on the jurisdiction.
			* Some jurisdictions will take into account the defendant’s wealth before awarding punitive damages. Because this may factor into the award of damages, jurisdictions may use bifurcation – basic liability issues are handled first, then evidence of wealth is admitted, then damages will be awarded.
			* **Review of punitive damages** (State Farm Mutual Auto Ins. Co. v. Campbell):
				+ **The Due Process Clause prohibits imposition of grossly excessive or arbitrary punishments on a tortfeasor. To the extent an award is grossly excessive; it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.**
				+ **Three guideposts when courts review punitive damages:**

**The degree of reprehensibility of the defendant’s misconduct;**

**The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded;**

**The difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.**

* + - * + A state cannot punish a defendant for conduct that may have been lawful where it occurred (outside of its borders), nor does a state, as a general rule, have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the state’s jurisdiction.
				+ **There is no bright line ratio of acceptable punitive damages – standard is that courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to general damages recovered. Single digit multipliers are more likely to comport with due process.**
	+ **Judicial Control of Amounts Recoverable**
		- **An award of damages will be deemed excessive if it falls outside the range of fair and reasonable compensation or if it is so large that it “shocks the conscience” as to demonstrate that the jury/judge acted contrary to the law.** (Richardson v. Chapman)
		- **If the judge decides to grant a new trial, on damages alone, the judge may make the grant conditional:**
			* **Remittitur – Trial court judge grants a motion for a new trial that is conditioned upon the refusal of the plaintiff to accept a lesser amount.**
			* **Additur – Trial court judge grants the motion for new trial conditioned on the defendant’s refusal to pay a larger sum set by the court.**
		- **Legal standard by which to gauge a jury verdict for remmititur purposes is the “maximum recovery rule” – rule directs the trial judge to determine whether the verdict of the jury exceeds the maximum amount which the jury could reasonably find, and if it does, the trial judge may then reduce the verdict to the highest amount that the jury could properly have awarded.** (Anderson v. Sears, Roebuck & Co.)
	+ **Legislative Control of Amounts Recoverable**
		- Tort Reform - About half the state legislatures have passed laws that in some way limit the amount of damages recoverable.
		- The biggest objection to this is that reduction of damages actually suffered eliminates appropriate compensation and reduces appropriate levels of deterrence.
		- Another argument is that damages caps are unconstitutional – may compromise rights to jury trial, equal protection, due process and separation of powers, etc.
		- Statutes may also place limits on the amount of punitive recoveries.
		- Several states provide for allocation of a portion of the punitive award to a state agency as a means of tort reform. Problem is that it is a cap on the amount of money the plaintiff will actually receive but doesn’t change the amount of money the defendant will pay.