Torts - Duncan

Defn – civil wrong between individual members of society not arising from contract from which the law provides a remedy

* Return to pre-injury state

Public Policy Considerations

* Compensation
* Optimal Deterrence (deterring just enough that people are careful)
* Corrective Justice (restoring moral balance)
* Loss Distribution (who in society is best able to bear loss)
* Redress of Social Grievances (provide forum – “their day in court”)
* Punishment (normally be imposing punitive damages, but reserved mostly for criminal system)

Intentional Torts

Prima facie case

* Intent
  + Specific
  + General
  + Recklessness (only in IIED)
* Act
  + Must be voluntary
* Causation
* Injury
  + Technical injury required of particular tort
    - not necessarily *harm*
    - nominal damages allowed
  + Battery – harmful or offensive contact
  + Assault – apprehension of imminent battery
  + FI – confinement to defined area
  + TL – entry into real property
  + TC – intermeddling or dispossession of personal property
  + Conversion – major interference/destruction of personal property
  + IIED – severe emotional distress (limited to what a reasonable person would suffer)

Intent

* Specific intent – desiring to cause the consequences of one’s act (R2T 8A)
* General intent – acted with knowledge to a substantial certainty (R2T 8A)
* Garratt v. Dailey - child may possess the requisite intent to commit a tort
* Spivey v. Battaglia – eggshell skull plaintiff rule – defendant responsible for all injuries stemming from contact, even if there are extraordinary results
* Ranson v. Kittner – good faith does not negate intent
* McGuire v. Almy – the mentally ill can still possess requisite intent
* Altieri v. Colasso – transferred intent doctrine – the intent to commit one intentional tort (B, A, FI, TL, TC) can transfer to another tort OR intent to commit a tort on one person transfers to another person
  + Not Conversion or IIED

Types of Intentional Torts

Battery

* Must be harmful (R2T 13) or offensive contact (R2T 18)
  + Harmful – any physical impairment of the condition of another’s body, or physical pain or illness
  + Offensive – bodily contact offending a reasonable sense of personal dignity
* Wallace v. Rosen – crowded world doctrine – we consent to bumping into people everyday
* Fisher v. Carrousel Motor Hotel – definition of one’s person extends to items so connected as to be customarily regarded as part of the body
* Battery action requires that plaintiff’s body be contacted, but not necessarily by defendant
* Conscious awareness of contact (i.e. assault) not required

Assault

* Imminent apprehension of a harmful or offensive contact with the person of another and the person is thereby placed in such imminent apprehension (R2T 21)
* Western Telegraph v. Hill – words alone can cause apprehension of battery, but the law will not allow a plaintiff to recover based on words alone; there must be something more (R2T 31)
* Does not require a battery
* Depends on defendant’s apparent ability to carry out a battery, not his actual ability
* Requires apprehension (belief that contact will occur), not fear of contact.
* Nominal damages are allowed

False Imprisonment

* FI requires
  + Defendant acts to confine another within boundaries fixed by the actor, and
  + Defendant’s act directly or indirectly results in such a confinement of the other, and
  + The other is conscious of the confinement or is harmed by it (must be aware of fact of confinement)
* Big Town Nursing Home v. Newman – FI = direct restraint of one person of the physical liberty of another without adequate legal justification
* Parvi v. City of Kingston – words alone may be sufficient for FI, so long as they constitute a threat or speech is composed of words a person would fear to disregard
* Hardy v. LaBelle’s Distributing – not FI if plaintiff never asks to leave or plaintiff has a reasonable means of escape
* Enright v. Groves – false arrest is FI by an agent acting under cover of law (R2T 41)
  + Attorney acting in bad faith may be liable for resulting FI
* If there is a reasonable means of escape, no FI (R2T 36)
* Nominal damages are allowed

Trespass to Land

* R2T 158 – one is subject to liability to another for trepass, irrespective if he causes him harm to any legally protected interest of the other, if he intentionally
  + Enters land in the possession of another, or causes a thing or a third person to do so
  + Remains of the land
  + Fails to remove from the land a thing which he is under the duty to remove
* Protects a possessor of real property’s right to the property
  + Owners can be held liable for trespass by possessor
* Injury can be a mere technical injury – no “damage” required
  + Dougherty v. Stepp – bending a blade of grass is sufficient injury
* Herrin v. Sutherland – possession of land includes all space upwards and downwards, within reasonable limitations (R2T 159(2))
* Rogers v. Board of Road Comm’rs- permission may be limited by time, area, and purpose (R2T 160)
* Bradley v. America Smelting – if there is a non-physical trespass (such as with microscopic particles), plaintiff must show actual and substantial damages
* Intent requires intent to enter onto the land. Does not require intent to trespass. Mistake is no defense.

Trespass to Chattel and Conversion

* TC (R2T 218)
  + Liable if defendant causes either
    - Dispossession of the chattel for a substantial time
    - Actual impairment of condition, value, or quality of chattel
    - Deprivation of chattel’s use
  + No nominal damages; damages based of diminution of value
  + R2T 216 – possessor brings action, not owner
* Conversion (R2T 222A) – subset of TC, unless it’s not
  + Transferred intent doctrine may apply
    - If it’s considered to be a subset of TC, no TID
    - If it’s separate, TID applies when it’s reasonable to apply it
  + Aggravated TC
  + Results in a forced sale
  + Damages based on full market value
  + An intentional exercise of dominion or control 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
  + Ex (R2T 223)
    - Dispossessing another of a chattel
    - Destroying or altering a chattel
    - Misdelivering a chattel
    - Refusing to surrender a chattel
* Glidden v. Syzbiak – a TC action must contain some form of injury (not tugging on a dog’s ear)
* CompuServe v. Cyber Promotions – value may be diminished without physical damage

Intentional Infliction of Emotional Distress

* Transferred intent doctrine DOES NOT apply
* Intent can be specific, general OR recklessness (defendant knew risk, was indifferent)
* To meet burden of Intent, actions must be either general, specific, or reckless
  + Recklessness – defendant must have been aware or risk, indifferent to it
* State Rubbish Collectors v. Silznoff – plaintiff must show actual injury
* Slocum v. Food Fair – must be calculated to cause “severe emotional distress” to a person of ordinary sensibilities, in the absence of special care or knowledge
* Wilson v. Monarch Paper – IIED requires
  + Defendant acted intentionally or recklessly
  + Conduct was extreme or outrageous
  + Actions of defendant caused plaintiff emotional distress
  + Emotional distress was severe
* Taylor v. Vallelunga – defendant has to be aware of plaintiff in order to be liable for IIED
* Nominal damages not permitted
* Defendant must be aware of plaintiff for IIED

Defenses to Intentional Torts

* All affirmative defenses must be proven by defendant

Consent

* Plaintiff cannot recover for an intentional tort if the plaintiff was willing for the consent or result to occur
* Fraud?
  + Fraudulent consent to material matter = no consent
  + Fraudulent consent to collateral matter = consent
* Koffman v. Garnett –
* Mohr v. Williams –implied consent doctrine (think emergency situations)
  + Unable to give consent AND
  + Action is necessary AND
  + Plaintiff would consent OR Reasonable person would consent
* R2T 892A - in order to consent, plaintiff must have the capacity to consent or must be capable of appreciating the nature, extent, or probable consequences of the conduct consented to
  + Infancy, intoxication, incompetence normally vitiate consent
* DeMay v. Roberts – consent may be invalid if obtained by fraud or duress
* R2T 892C – plaintiff’s consent to criminal conduct is valid, unless defendant’s conduct violates a criminal statute designed to protect a particular class of people to which the plaintiff belongs
* May be assumed based on local custom
* Participation in a sporting event may be implied consent, except for conduct disallowed by rules

Defense of Self and Others

* Poliak v. Adcock – entitled to defend oneself when
  + Plaintiff has a reasonable belief
  + Only as long as the threat of injury continues
  + And only as much force is necessary
* Threat of future harm (not imminent) not sufficient
* Deadly force can be allowed so long as its proportionate
* Defense of others
  + If 3rd person is entitled to act in self-defense, then defense of others is appropriate – “steps into shoes of 3rd person”
  + No relationship required
* Minority of jurisdictions require defendant to retreat to the wall (before using deadly force, defendant must retreat to a place of complete safety, if able)
* Defendant may not defend on the basis of self-defense if he was the initial aggressor
* A reasonable belief, even if mistaken, as to the need to defend oneself is enough.

Defense of Real Property

* Poliak v. Adcock – defense requires:
  + Plaintiff trespassing
  + Reasonable belief that force was necessary
  + A request to leave (or futility of request)
* Katko v. Briney – deadly force is not allowed to protect property

Defense and Recovery of Personal Property

* Hodgeden v. Hubbard – a person wrongfully disposed of chattel can use reasonable force to recover that chattel.
* Requires
  + Fresh pursuit – wrongful dispossession must have just occurred
  + Demand for chattel back, unless such demand would be futile
  + Must use reasonable force (no deadly force)
* Bonkowski v. Arlan’s Department Store – shopkeeper’s privilege – shopkeepers must be able tone privileged to detain for reasonable investigation a person whom one reasonably beieves t have taken chattel wrongfully
* A person is privileged to enter reasonably onto the land of another to remove a wrongfully-taken chattel

Necessity

* Surocco v. Geary – pubic necessity – permit defendant, acting as the champion of the public to destroy, damage, or use the real or personal property of another as long as the defendant reasonable believes that doing so is necessary to avert an imminent public disaster
  + Complete defense – full shield from liability
* Vincent v. Lake Erie Transp. Co. – private necessity – allows defendant to commit intentional tort, but defendant remains liable for any actual damages he causes in doing so

Justification

* Catch-all privilege (last resort)
* Parvi v. City of Kingston – privileged to commit a tort if:
  + Reasonable under circumstances
  + To prevent plaintiff from inflicting personal or property injury
  + Done not for unlawful purposes

Negligence

* R2T 291 – unreasonable risk is one which a reasonable person would recognize as involving as risk of harm to another

Prima Facie

* Duty (Standard of Care)
  + Act as a reasonable prudent person would in the same of similar circumstances
* Breach
  + Nonconformity to the standard of care
* Causation
  + Causation in fact AND
  + Proximate/Legal Causation
* Harm
  + Actual loss/damages
  + No nominal damages

Factors

* Lubitz v. Wells – intentional torts and negligence are mutually exclusive
* Chicago v. Krayenbuhl – must strike balance the public good and benefits of a particular dangerous action with the danger inherent in performing that action
* US v. Carroll Towing – Learned Hand formula of Duty
  + B < P x L = Liable
  + B = burden of precaution
  + P = possibility of risk
  + L = magnitude of harm
* Conway v. O’Brien – “gross negligence” - failure to exercise care that even a careless person would exercise

Standard of Care

* R2T 285 – 4 ways to determine SOC
  + Reasonable Prudent Person
    - Adult
    - Child
    - Reasonable Prudent Professional
  + Establish SOC by applying a rule of law
  + Establish SOC by applying a statute for other purposes
  + Establish SOC by applying a statute for negligence
* RPP
  + Vaughn v. Menlove – RPP does not take on mental deficiencies of a person
  + Sears, Roebuck and Co. v. Midcap – RPP takes into consideration custom and still acts reasonably
  + Guaman v. Industry City Management – Compliance with custom is not a shield from negligence
  + Cordas v. Peerless Transportation – standard of care changes in sudden emergency not of his own making
    - Still must act as an RPP, but under circumstances of emergency
  + Dellwo v. Pearson – standard of care changed when a child is acting – reasonable prudent child of like age, intelligence, and experience
  + R2T 283A – adult SOC is for a child engaged in any adult activity
  + Roberts v. State of Louisiana – RPP takes on physical characteristics of actors (blindness), but not mental deficiencies
  + Breunig v. American Family Insurance Co. – RPP takes on sudden mental incapacity (not in R2T)
  + Gould v. American Family Mutual Insurance Co- RPP does not take on Alzheimer’s.
    - Firefighter’s analogy – assumption of risk, head nurse
  + Reasonably Prudent Professional
    - Defn – person belonging to a learned profession or whose occupation requires a high level of training and proficiency
    - STD – reasonable prudent professional in the same of similar circumstances
    - Heath v. Swift Wings – standard of care is minimally competent professional
    - Specialists may be held to a higher standard of care – that of the reasonably prudent specialist
    - If one holds themselves out to be a member of a profession, they are considered to be part of the profession for liability purposes
    - Wolski v. Wandel – must exercise a reasonable degree of care and skill
    - Morrison v. MacNamara – must follow a national standard – negligence cannot be excused on the ground that others in the same area practice the same kind of negligence
    - Helling v. Carey – professionals take custom into consideration and still act reasonably
    - Scott v. Bradford – informed consent – must inform patient about treatment protocol, available alternatives, and material risks
      * Exceptions – emergency, common knowledge, therapeutic privilege (full disclosure would be detrimental)
      * Duty – what a reasonable person would want to know
      * Causation – what the individual patient would have chosen
    - Ashe v. Radiation Oncology Associates - standard – would a reasonable person in the patient’s position would have consented to the procedure if adequately informed of all significant perils
    - Moore v Regents of UC – informed consent doctrine requires disclosure of research, economic, or other personal interests in patient’s treatment
  + Aggravated Negligence
    - Archibald v. Kemble – in contact sports, standard is willful and wanton misconduct
    - Parret v. UNICCO Service – contributory negligence is not a defense to aggravated negligence
* Applying a Rule of Law
  + Baltimore Co. v. Goodman – if plaintiff’s negligence at all contributed to complaint of injury, plaintiff is barred from recovery
  + Pokora v. Wabash Railway – judicial pronouncements can establish a standard of conduct
* Applying a Statute
  + Osborne v. McMasters – a statute may be applied to a negligence action even if it was enacted for non-tort purposes if:
    - Plaintiff in classes of persons statute was designed to protect AND
    - Harm suffered is the type of harm statute was designed to prevent
    - Appropriate for civil liability (later by Stachniewicz)
  + Non-tort statutes
    - Sanchez v. Wal-mart – not part of public designed to be protected, so statute can’t be applied
    - Stachniewicz v. Mar-Cam Corp. – must also look to the appropriateness of the standard as a measure of civil litigation
    - Perry v. SN and SN – statutes cannot impose an affirmative duty to act if common law does not – inappropriate under Stachniewicz
  + Statute applied to negligence
    - Zeni v. Anderson – An excused violation of a statute is not negligence
    - Teply v. Lincoln – If compliance with a statute is impossible, it is not negligence
    - R2T 288A – An excused violation of a statute is not negligence. Excused violations are:
      * Actor’s incapacity
      * Actor has no way of knowing how to comply
      * Actor is unable to comply
      * Emergency not due to his own misconduct
      * Compliance would involve a greater risk to himself or others
* Proving Negligence
  + Direct and Circumstantial Evidence
    - Goddard v. Boston and Maine RR Co – cannot show when banana peel was dropped – no show of breach
    - Anjou v. Boston Elevated Railway – peel was old and trampled on – breach
    - Wal-Mart v. Rosa – can use circumstantial knowledge rather than actual knowledge – called constructive knowledge – “should have known”
    - Wallace v. Wal-Mart – if defendant can show reasonable measures in place, no breach
  + Res Ipsa Loquitor (accident speaks for itself)
    - Evidentiary tool – designed to avoid summary judgment
    - Byrne v. Boadle – two part test
      * Defendant has exclusive control over instrumentality of harm
      * Event is sort that ordinarily does not occur without negligence
    - R2T 328D – three part test
      * Event is the sort that ordinarily does not occur in absence of negligence
      * Other responsible causes sufficiently eliminated by the evidence
      * Negligence is within the scope of duty to plaintiff
    - Ybarra v. Spangard (MINORITY JURIS)
      * Most jurisdictions won’t allow plaintiff to get all the way to jury with res ipsa – normally just a tool to get to discovery
    - Safeco Ins. Co v. Mobile Power – if defendant did not have full management and control over the instrumentality of harm OR the accident did not occur with the negligence of one in full management, no recovery for plaintiff
    - 3 types
      * Majority – permits an inference of duty/breach, but does not require a finding of negligence
      * Minority
        + Raises a presumption of duty/breach that defendant must rebut or he loses
        + Raises a presumption or inference of duty/breach AND shifts BOP to defendant to disprove duty/breach (Ybarra)

Causation

* Causation in Fact
  + Test for CIF: Sine Qua Non (without which not)
    - But for defendant’s negligence, would the injury have happened?
    - Perkins v. Texas and NO Railway – defendant’s breach must have been substantial factor in injury – if accident would have happened without defendant’s negligence, no liability
    - Riley v. Salley - if defendant aggravates a previous injury, defendant responsible for full extent (eggshell skull plaintiff rule)
  + Proving CIF
    - Reynolds v. Texas and Pacific Rail – possibility of the injury happening without defendant’s negligence does not prevent a claim when defendant’s negligence greatly multiplied chance of accident
    - Kramer Service v. Wilkins – possibility of injury not enough – must be PROBABILITY
    - Hershkovits v. Group Health – loss of chance of survival – defendant’s negligence more likely than not caused loss of chance of survival (MINORITY JURIS, ONLY APPLIES TO MEDMAL CASES)
    - Smith v. Parrott – loss of chance doctrine not a cause of action unless Lege makes it so
  + Problems in proving CIF
    - Anderson v. Minneapolis Railway Co – if two fires join, there is joint and several liability, even if either fire could have destroyed house
    - Trevino v. Hirsch – if more predominant negligence exists, no cause of action
    - R2T 433B
      * BOP on plaintiff
      * When 2 actors have combined to bring about harm, apportionment is BOP of defendants
      * If proven that only one of the defendants could have caused harm, BOP of defendants to prove whom (Summers v. Tice/alternate liability)
    - Hellums v. Raber – concert of action theory – if one defendant encourages another defendant to commit harm, first party subject to liability
    - Sindell v. Abbott Labs –
      * Enterprise liability – plaintiff brings in injury, sues everyone in industry
        + Joint and several liability
      * Market liability – everyone with a substantial market share gets sued; BOP shifts to defendants to disprove liability
        + Liable according to percentage of market share
        + Can opt out with proof not guilty/not responsible for plaintiff’s injury

Legal/Proximate Causation

1. Unforeseeable consequences
   1. Direct causation – most broad
   2. Reasonable foreseeability – majority – must foresee type of harm
   3. Cardozo’s Zone of Danger – least broad
2. Intervening causes
3. Public Policy

* Atlantic Coast line v. Daniels – arbitrary limits must be drawn to establish proximate cause
* Unforeseeable circumstances
  + Ryan v. NY Central RR Co – liable for first house, not any thereafter (NY rule)
  + Atchison v. Stanford – liable for damage 4 miles away (Kansas rule)
  + In re Polemis – direct causation test – negligent act is legal cause of injury if defendant could foresee or anticipate some harm from negligent conduct
    - Directly producing an unexpected result does not relieve defendant from liability
  + Palsgraf v. Long Island RR Co – zone of danger test – legal cause if:
    - Harm is general type that made conduct unreasonable in the first place (must foresee exact type of results) AND
    - Plaintiff was within the zone of danger
    - Dissent applies Polemis foreseeability test
  + Wagon Mound 1 – type of harm must be reasonably foreseeable
  + Wagon Mound 2 – if reasonable man would have foreseen and prevented risk, then defendant liable
  + In re Kinsman – last clear chance doctrine – the defendant who had the last clear chance to avert injury liable
  + Wilke v. Woodhouse Ford – determining causation:
    - But for (CIF)
    - Natural and probable result
    - No efficient intervening causes (no intervening cause sufficient to cut off defendant’s liability)
* Intervening causes
  + Derdiarian v. Felix Contracting –
    - Intervening act does not necessarily sever liability for defendant
    - Superseding cause severs connection – makes plaintiff’s case fail due to lack of prox cause
    - Act not superseding if risk is very same risk which renders defendant negligent
  + Watson v. Kentucky Bridge – intentional intervening acts are ordinarily superseding acts
  + Fuller v. Preis – suicide not superseding if directly caused by defendant’s negligence (most juris consider suicide to be intervening)
  + La Quinta v. Leech – not superseding because suicide was caused by other factors
  + Rescue Doctrine – see Joint Tortfeasors below
* Public Policy
  + Kelly v. Gwinnell – in most juris, a social host who is furnishing alcohol is not liable, person consuming it is
  + Enright/Grover v. Eli Lilly Co.
    - Enright/Grover – 3rd generation has no cause of action
    - Grover Dissent – 3rd generation does have cause of action – reasonably foreseeable
    - Where do we draw the prox cause line?

Defenses to Negligence

* Contributory negligence (full defense)
  + Not available in cases of gross negligence, intentional torts, and last clear chance
  + Butterfield v. Forrester – if plaintiff’s negligence was a cause in fact of the injury to which he is complaining, then plaintiff is completely barred from recovering
    - Only someone with completely clean hands can sue
    - Only 1% liable and defendant is 99% - plaintiff has no suit
  + Davies v. Mann – exception to contributory negligence – last clear chance doctrine
  + Burleson v. RSR Group – to decide contributory negligence as a matter of law, must show that plaintiff put himself in danger’s way and had a conscious appreciation of the danger at the moment the incident occurred
* Comparative negligence
  + McIntyre v. Balentine –
    - Pure – plaintiff’s recovery reduced by % of fault attributable to himself (if 99% liable, recovers 1% damages)
    - Modified
      * Not as great as/49% rule – plaintiff’s recovery reduce by & of plaintiff’s fault as long as plaintiff’s fault is no greater than defendant’s fault
        + greater than defendant, plaintiff recovers nothing
        + Equal, recover nothing
      * Not greater than/50% rule - plaintiff’s recovery reduce by & of plaintiff’s fault as long as plaintiff’s fault is not greater than the fault of defendant
        + If fault is greater than defendant’s , no recovery
        + If equal, recover half damages
      * Whether it’s plaintiff vs. aggregate defendants or plaintiff vs. individual defendants depends on jurisdiction
  + Hockema v. JS – if child’s fault is small enough to allow recovery, parents may do so (although additurs generally not upheld)
* Assumption of the Risk (may be a defense to gross negligence)
  + Express - McCune v. Myrtle Beach Shooting Range – express AOR waives liability if
    - Voluntarily encountering
    - Known risk
    - While appreciating magnitude of risk
    - Risk created by defendant’s negligence
  + Implied - Wirtz v. Gillogly - - implied requires:
    - Voluntarily encountering
    - Specific risk
    - About which plaintiff is actually aware
    - While appreciating magnitude of risk
    - Risk created by defendant’s negligence
    - \*plaintiff must actually know risk, not what she should have known (express)
* Statutes of Limitations
  + Genrich v. OHIC Insurance
  + Governs the time during which a lawsuit must be FILED – procedural rule
  + Accrual rule/occurrence doctrine – limitation period begins to run when plaintiff is harmed by defendant’s negligence – majority rule
  + Discovery rule – limitation period begins to run when plaintiff knows or should have known about the injury – typically applies with medmal
  + Toll – when SOL stops ticking for a period of time
    - Minors
    - Mental illness
* Statutes of Repose
  + Define time period by which a claim must arise
    - May apply either an accrural or discovery rule
  + Often longer than SOL
  + Orlak v. Loyola

Advanced Topics

* Privity of K
  + K cannot confer any rights or liabilities to parties other than those bound by it
  + WInterbottom v. Wright – a plaintiff may not sue a defendant for damages based on non-performance of a contractual duty
  + MacPherson v. Buick - …unless the non-performance would put another in danger
  + Clagett v. Dacy – duties and obligations of an atty-client relationship will not flow to a third party
* Failure to Act
  + No common law duty to affirmatively act
  + Unless an exception applies
    - Defendant causes situation from which plaintiff needs rescue
    - Defendant assumes responsibility to act thereby increasing the risk of harm or reliance by plaintiff to their detriment
    - Special relationship
      * Between plaintiff and defendant
      * Between defendant and third party
  + Hegel v. Langsam – no duty to act
  + JS and MS v. RTH – there is an affirmative duty to act reasonably
  + Tarasoff v. Regents of UC – therapist with specific information about a patient that represents a specific harm to a 3rd person owes an affirmative duty to act (CA exception)
  + Thapar v. Zezulka – therapist must keep info confidential
* Pure Economic Loss
  + Generally no recovery in tort for pure economic injuries
  + If coupled with personal or property injuries, recovery usually allowed
  + Aikens v. Debow – no right to recovery for interruption of commerce
* NIED
  + Common law – no recovery in negligence for pure mental injuries
  + Recovery permitted without physical injuries as long as (Daley v. LaCroix)
    - Objective, definite physical injury resulting
    - Emotional reactions within normal reactions (absent specific knowledge)
    - Common law exceptions
      * Death telegrams
      * Mishandling corpses
        + But must show severe emotional distress (Jaynes v. Strong-Thorne Mortuary, Inc.)
  + Plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injuries of a third party if (Thing v. La Chusa)
    - Plaintiff closely related to victim (blood or marriage)
    - Plaintiff is present at the scene of the event at the time it occurs and is then aware it is causing injury (contemporaneous perception) AND
    - As a result, plaintiff suffers serious emotional distress
  + Jurisdictions disagree –
    - Some require manifestation, some not
    - Some require bystander liability (“within zone of danger”), some don’t
* Wrongful Life and Wrongful Birth
  + Wrongful Birth
    - Defective birth
    - Parent’s COA
    - Recognized in majority of jurisdictions
    - SOL: begins to run at birth
    - Clark v. Children’s Memorial Hospital – parents may recover damages (both general and special, including emotional) for child’s entire life (i.e., for expenses past 18)
  + Wrongful Life
    - Child should not have been born; life itself is harm
    - Child’s COA
    - Recognized in minority of jurisdictions
    - SOL: begins to run when child reaches 18
    - Procanik by Procanik v. Cillo – child may recover only special damages
* Owners and Occupiers of Land
  + When plaintiff is injured-
  + Outside premises
    - Generally no duty
  + On premises
    - Trespassers (Sheehan v. St. Paul and Duluth Ry. Co.)
      * Unlawfully on premises
      * No duty of care owed to a trespasser when that plaintiff is trespassing on defendant’s land
      * But if discovered or known, defendant has a duty to not willfully or wantonly injure plaintiff
        + Discovered trespasser more like a licensee
    - Licensees (Barmore v. Elmore)
      * Enters with permission for the licensee’s own purpose (like a social guest)
      * Defendant has duty to warn about hidden dangers about which the landowner has actual knowledge - SUBJECTIVE
    - Invitees (Barmore v. Elmore)
      * Enters in furtherance of landowner’s business/purpose (business meeting)
      * Duty to keep premises reasonably safe from dangers actually or constructively known (should be aware) – OBJECTIVE
      * Campbell v. Weathers – a business that impliedly invites guests onto the premises owes a duty to them as invitees, even if they don’t buy anything
      * Foss v. Kincade – duty to invitee must be reasonably foreseeable
  + Status of guest may change during a single visit
    - Hypo – vacuum saleswoman goes door-to-door selling vacuums (licensee). Landowner says no, but invites her in to buy Mary Kay cosmetics (invitee). When leaving, she wanders into the backyard to see the dog (trespasser). She then gets bit. What SOC?
  + Evans v. Hodge – if a person is on the land for the benefit of someone who is on the land for the benefit of the landowner, that status transfers to the third person

Damages

* Purpose
  + Seek to restore a plaintiff to pre-tort position
  + Deterrence
    - Specific – deter that defendant
    - General – deter others like him from engaging in similarly tortious conduct in the future
* Nominal
  + Recognize legal wrong (usually $1 or like)
  + Typically not taxable
* Compensatory – compensate; restore to pre-tort status
  + - Aren’t income, so not taxed
  + Special/pecuniary – economic
    - Medical expenses (past and future)
      * Past ME – accident to trial
      * Future ME – trial to death
    - Lost wages (looks back in time)
    - Loss or impairment of future earning capacity (looks forward)
      * Based on work expectancy pre-accident
  + General – non-economic
    - Physical pain and suffering (past and future)
    - Mental anguish (past and future)
    - Loss of enjoyment of life/Hedonic damages
      * Minority – like McGee v. AC and S
      * Most jurisdictions don’t allow it recovery; those that do don’t allow it to be itemized
    - Loss of consortium – detriment to third party’s quality of life
  + Amounts
    - May be deemed excessive if it falls outside the range of fair and reasonable compensation or results from passion or prejudice, or if it is so large is shocks the judicial conscience – Richardson v. Chapman
    - Amount of property damages is based either on (In re September 11 Litigation)
      * Diminution of the property’s market value OR
      * Replacement cost
    - Collateral Source Rule - Tortfeasor should not benefit from payments made to the plaintiff from sources independent of the tortfeasor (Montgomery Ward v. Anderson)
      * Collateral sources include – insurance payments, continued wages, disability payments, pension payments, gratuitous services
      * Payments by tortfeasor or his insurance company will satisfy judgment
      * About half of jurisdictions have modified by statute – reduce recovery by payments outside of X amount
    - Doctrine of Avoidable Consequences – plaintiff has responsibility to mitigate permanent injury/damages (Zimmerman v Ausland)
      * Not forcing a person to seek out medical attention, but defendant not liable for permanency of injury
* Punitive/Exemplary - in excess of compensatory damages; designed to punish
  + Mere negligence is not sufficient for punitive damage – must be recklessness or gross negligence (depending on jurisdiction)
  + Also applies to intentional torts and strict liability
  + No right to receive PD
  + States may modify/eliminate ability to recover
  + Should reflect constitutional limitations: (BMW of North America v. Gore)
    - Degree of reprehensibility
    - Ratio (of compensatory to punitive)
      * Single digit multipliers best (State Farm v. Campbell)
    - Sanctions for comparable misconduct
  + Taxable

Joint Tortfeasors

* Joinder and Liability of defendants
  + Joint – liable with other tortfeasors for the total liability
    - Most plaintiff friendly – allows greater means of recovery
  + Several – individually liable for their own liability
  + Typically applicable when tortfeasors
    - Act in concert (R2T 876/Bierczynski v. Rogers)
      * Or one gives substantial encouragement to the other to breach, OR one gives substantial assistance in committing the tort (Hellums v. Raber)
    - Fail to perform a common duty to plaintiff (Coney v. JLG Industries)
    - Cause an indivisible harm (Summers v. Tice, Banks v. Elks Club Pride of TN)
  + Independent/Dependent (Banks v. Elks Club)
    - Initial tortfeasor hose negligence causes subsequent, dependent act causing further aggravation of plaintiff’s injury is responsible for entire injury
    - Joint tortfeasors are severally liable for separate, independent negligent acts
    - Defendant rendering subsequent negligent medical treatment is severally responsible for his/her negligent act
  + Rescue doctrine (Cardozo)
    - Defendant #1 causes plaintiff to be put in peril, defendant #2 tries to rescue him, but does so negligently
    - Defendant #2 not superseding cause, but pays for aggravation of injury
* Satisfaction and release
  + Plaintiff may have several judgments, but only one satisfaction (full compensation for injury) – Bundt v. Embro
  + Release (Cox v. Pearl)
    - Surrender of plaintiff’s claim
    - Release of one joint tortfeasor releases all
  + Covenant not to Sue (Cox v. Pearl)
    - K not to sue a particular defendant on a particular action
    - Does not extinguish claim in its entirety
  + Note:
    - Judgment – amount of injury set by factfinder
    - Satisfaction – collection of that judgment
    - Release – manifestation that plaintiff is fully satisfied
* Mary Carter agreements – in TX, void as against public policy (Elbaor v. Smith)

Wrongful death and survival

* Common law: death of either party extinguishes action
  + Every state has a statute reversing this
* Wrongful death actions – provide expressly for a brand new COA for the wrongful death of a person
  + Statutorily defined beneficiaries – if no defined beneficiaries, no COA
  + Proceeds go to defined beneficiaries
  + Moragne v. States Marine Lines, Inc. – first case to recognize WD action
  + Selders v. Armentrout – parents may receive pecuniary damages for WD of child. Court adds on damages based on loss of companionship (because children technically have negative worth)
  + May be brought concurrently with battery action, i.e. defendant lingers
* Survival statutes – cause of action survives death; allows estate to continue suit
  + Brought by heirs/estate
  + Subject to estate’s creditors before being distributed
  + Murphy v. Martin Oil – survival actions may be used if the remedy from wrongful death would be grievously incomplete

Immunities

* Defns
  + Privileges/Defenses – avoid or decrease liability only in certain circumstances
  + Immunities
    - Absolution from liability in all circumstances
    - Based on status of defendant
* Families
  + Interspousal
    - Common law – spouses immune from liability for negligence
      * Before or after marriage
      * Can only sue for divorce
      * Intentional torts not shielded
    - Majority of jurisdictions have abolished spousal immunity (Heiner v.Harper)
  + Parental
    - Common law – parents enjoy immunity from suits from their children (majority of jurisictions still recognize parental immunity)
    - Still applies after child reaches age of majority
    - Most jurisdictions apply immunity even if based on intentional torts, including death (Zellmer v. Zellmer)
    - R2K 895G(1) says differently – no immunity, but still privileged
    - Where parental immunity has eroded, it’s been with intentional torts (rape, death)
    - Zellmer v. Zellmer – for stepfather (or other non-biological, non-adoptive “parent”) to receive immunity, he must stand in the shoes of a parent
    - Parents immune for negligent parental supervision, but not willful or wanton misconduct
* Charities
  + Common law – immune
  + Majority of jurisdictions have abandoned doctrine of charitable immunity
  + Exists in modified form in several jurisdictions
    - Caps on damages
    - definitions of liability
    - not completely abolished
* Employers
  + Common law - immune from employee liability
  + Worker’s comp statutes exist in all jurisdictions as a work-around
* Government
  + Governmental immunity applies to local, state, and federal government
  + Government must give permission by statute to be sued (ex. state legis, Federal Tort Claims Act)
  + Riss v. NY – municipality cannot be held liable for mere failure to provide adequate police protection
  + DeLong v. Erie County – BUT when a municipality assumes a duty to a particular person, it must perform the duty in a non-negligent manner
    - Based on R2T 323 – one who undertakes to render services to another is liable for failure to exercise reasonable care if
      * Failure to exercise reasonable care increases risk of harm OR
      * Harm is suffered because of other’s reliance on the undertaking
  + Public officer immunity (R2T 895(1)(a)) – officer acting within general scope of authority is not liable in
    - Engaged in exercise in discretionary party
    - Privileged and does not abuse privilege

Vicarious Liability

* Respondeat superior
  + Employer may be held jointly and severally liable for the wrongful acts of its actors or employees when those injuries were committee within the scope of employment
    - Economic theory of VL - SOE = Furthering business purpose (Papa John’s v. McCoy)
    - Typically question of fact
  + Comings and goings rule – No RS if travelling to or from work – falls outside of employment
  + Frolic and Detour – stepping away from business, even for a minute, falls outside scope of employment
  + Does not mean employer was tortious in training/supervising/hiring of employees – that would be vanilla negligence
  + Vicarious liability and direct liability ARE NOT mutually exclusive
  + Can be argued that it’s liability without fault
  + Agency relationship may be shown by circumstantial evidence (Handy v. DeKalb Medical Center)
  + RS applies to both negligence and intentional torts
  + Franchisee Liability (Papa John’s v. McCoy)
    - Franchisor must have control or right of control over the daily operation of the specific aspect of the franchisee’s business alleged to have caused the harm
* Independent contractors
  + Contractor – controls means and methods of his work (rather than controlled by principal, as with an employee)
  + No VL for torts of ICs (Bell v. VPSI, Inc.)
  + EXCEPT for non-delegable duties
    - Dangerous instrumentality (R2K 423) – making or repair of an instrumentality used in highly dangerous activities – VL allowed (Hypo 12-2)
  + Paychecks have no bearing on whether a person is an independent contractor or employee
* Joint enterprise
  + Undertaking by two or more parties with pecuniary interest and an equal right to direct and benefit from the endeavor (Erickson v. Irving)
  + Partial defense
  + One party’s negligence may be imputed to others involved in the joint enterprise

Strict Liability

* Liability imposed on a party , without regard to intent and without regard to due care
* Not mutually exclusive from intentional torts or negligence (but intentional torts are mutually exclusive from negligence)
* PF case
  + Qualifying animal or activity
  + Causation
  + Harm (of the type foreseeable by that sort of animal/activity)
    - Must be physical injury or property damage
* Strict liability isn’t absolute liability – harm limited to the type foreseeable
* Trespassers cannot recover in strict liability; invitees and licensees may
  + Unless they’re known trespassers – see discussion above
* Two types
  + Animals (Irvine v. Rare Feline Breeding Ctr.)
    - Wild animals
      * Non-domestic animal
        + May be issue of fact – honeybees?
      * Domestic animal with vicious propensities that owner or possessor knows or had reason to know
    - Harm must be characteristic of wild animal of that class
    - Defenses
      * Assumption of the Risk
      * Contributory Negligence/Comparative Fault
  + Activities
    - “anything likely to do mischief” (Rylands v. Fletcher)
    - R1T – ultrahazardous, R2T/R3T – abnormally dangerous
    - R2T – 6 factors to consider (Indiana Harbor Belt R.R. v. American Cyanamid Co.)
      * Existence of high degree of harm
      * Likelihood that harm will be great
      * Inability to eliminate risk of harm by reasonable care
      * Whether activity is common usage
      * Inappropriate activity
      * Whether its value to the community is outweighed by dangerous attributes
    - Usually only concerning non-natural use of land (no SL if a lake builds up on property through naturally)
    - Same defenses – AOR, CN/CF