

Start with winning points: "A jury would likely find X liable to Y for Z. Z occurs when..."; move to borderline issues where triers of fact could go either way: a. what's the majority rule? B. Why could these facts result in more than one result?; c. Where does this case fall on the dispute?; d. ; then fringe issues where facts require hypothesis

Intentional Torts—EVERYONE can form intent

NO required actual injury: Battery; Assault; FI; Tres to Land
REQUIRED actual injury: IIED; Tres to chattel; conversion

PF 1. **Intent**; Specific: intends to bring about consequences; general: knows with substantial certainty of outcome 2. **Act**: Voluntary act; external manifestation of the Δ's will 3. **Causation**: Δ's act or something set in motion by Δ must be a substantial factor in bringing about the injury; 4. **Invasion of Protected Interest**: II's reasonably defined interest that Δ does not have a right to interfere with
-Distinguish motive from intent; Δ intends act, not harm****Mistake does not mitigate**

Transferred intent: Battery; Assault; False Imprisonment; Trespass to Land; Trespass to Chattels
Battery: Intentional infliction of a harmful or offensive contact on II's person*Where a reasonable man would believe that a particular result was substantially certain, he will be held in the eyes of the law as though he had intended it** Liable for direct contact & indirect (sets in motion a force)**Can be contact beyond what II consented to**can be direct or indirect contact**No actual injury necessary

Assault: Reasonable apprehension of imminent offensive or harmful contact* Apprehension not the same as fear* Apparent ability sufficient; conditional threat sufficient ("your money or your life"); words must be in context****Too far away in time or space negates a claim**no recovery for apprehension of contact w/ 3rd party**

False Imprisonment: Direct restraint without legal authority within a bounded area**Acts or words (imminent threat to person, not to property) can be used**Must be a physical, not moral, restraint; failure to provide means of escape sufficient**Need not be by physical force. ****Contemporaneous aware of confinement in order to recover**—R2T allows recovery if person unaware but injured****Denial of entry insufficient**future threats insufficient**

Intentional Infliction of Mental Distress (note: this is a late developing tort so does not have same requirements of others)
1a. Intentional or Reckless Conduct that is b. extreme and outrageous 2a. Causal connection between conduct & emo. dist. b. that is severe**May recover from mental distress even when there is no injury**Common carriers & innkeeper have special duty to patrons****No transferred intent**: Reckless: 1) Physical 2)Relational 3)Temporal**Δ knows of sensitivity, then may be liable****Crowded world theory-reasonable expectation that II can endure normal unpleasant contacts and insults**

Trespass to Land: intentional physical intrusion onto II's property*Protected interest is II's exclusive possession of the land; mistake no defense**even w/o damages, nominal damages awarded **Trespass to chattels** Intentional interference w/ II's ownership or control of a tangible good; **Damage is required** to the "condition, quality, or value"; deprived for a substantial time* conduct treated as intentional even if innocent mistake****Intermeddling**: directly damages chattels; **dispossession**: Dispossess II of lawful right of possession

Conversion: **Severe trespass**; **warrants forced sale to Δ for value @ time of conversion** Refusal to return w/o legal excuse; purchase from thief; mis-delivery**Applies only to tangible property and intangibles reduced to physical form (historical idea of trover-items that can move around)****Information generally not**

subject unless gathered at cost and sold as commodity—formulated w/ inventive genius & labor; II may have property returned under remedy of replevin

Defenses to Intentional Tort: Privileges*Distinct from immunities - privileges arise from circumstances / immunities arise from person's status

Consent: Δ can reasonably believe that II has consented to Δ's actions Express-words used; Implied: a. Apparent consent: reasonable to infer from II's conduct; b. Outward manifestation of feelings: Behavior indicates consent; c. Usage & Custom: Ordinary contacts; also participation in activities w/ inherent contact**II must have capacity; no fraud, duress, deceit, or misrepresentation; **cannot exceed II's consent; cannot consent to an unlawful act or one that Δ doesn't have a right to require**; mistake does not invalidate consent; **consent implied in law**: action needed to save a person's life or interest in person or property****medical providers**: can act w/o express consent if a. patient cannot give consent; b. risk of serious bodily harm; c. reasonable person would consent; d. no reason to believe this patient wld refuse

Self-defense: Reasonable belief of attack or imminent attack & force required to prevent the harm-proportionate force; duration of threat only may be a duty to retreat (majority: no duty)*Reasonable mistake ok**No retaliation**No defense for provocation**Size & strength considered
Defense of Others Split: Intervenor steps in party's shoes—he's liable if intervenor liable (older view) OR Reasonable mistake provides defense
Defense of Property Request to stop: force must be commensurate with property being protected; No traps (OK in TX); No mistake allowed if entrants have privilege of entry-unless entrants deceives about ID

Recapture of Chattels a. Must know tortious dispossession; b. be in hot pursuit; c. demand return; d. use reasonable force to defend self short of breach of peace or death***Shop Keepers privilege** a. Reasonable belief of wrongful act; b. limited hot pursuit; c. demand for return; d. reasonable force to recover—cannot unreasonably detain;

Necessity Public necessity: unlimited privilege; threat must exceed damage Private: Incomplete privilege against punitive damages; same****Authority of Law** Arrest by officer: May arrest without warrant to prevent felony/breach of peace Arrest by citizen for felony; FI if wrong****Discipline**: Privilege mitigates b/c of relationship; partial liability shield****Justification**: catch-all for when another privilege won't work

Negligence

Determine duty generally by: (Probability of injury x Magnitude of injury > Burden of preventing injury) PF: 1. **Duty**; 2. **Breach**; 3. **Actual & Proximate Cause**; 4. **Actual Damage****Duty owed**: 1. a. **Foreseeable II** **Cardozo** View: duty owed to foreseeable II in the foreseeable zone of danger; **Andrews** View: duty is owed to anyone injured as a proximate result of Δ's conduct**Unforeseeable fact pattern: Harm to II1 & distant II2

If there is a duty owed, what is the 1b. Applicable Standard of Care: Legislative enactment: Unexcused violation is **Negligence Per Se** Test: II falls within the protected class; 2. Designed to prevent this kind of harm; 3. Appropriate to impose tort liability for a violation?—"the violation of the statute constitutes **conclusive evidence of negligence, or, in other words, negligence per se.**" "When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them." **Doesn't apply?** **Default to Reasonable Person**; **Minority views**: Establishes a rebuttable presumption of negligence (prima facie negligence)
*Mere Evidence

Adults: Objective standard; **Knowledge & experience of an ordinary reasonable person**, NOT Δ's own traits

Children held to **age, intelligence, & maturity-matched standard** unless **engaged in activity usual exclusive to adults**

Physical disabilities standard is "reasonable person with the disability"; **mental disability—reasonable person standard**

Professionals: "skill & knowledge normally possessed by members of that profession in good standing in similar communities"-even beginner

**II usually needs expert testimony and affirmative evidence
****Locality rule**: professional is held to standards in the local or similar community; **rejected by cts that recognize a national certification**

-**Medical professionals** must disclose information to patients that a reasonable patient would want to know; Minority rule: physicians must disclose everything that this particular patient would want to know
-**Physicians do not need to disclose information: The patient does or ought to know**;

Owners & Occupiers of Land and those in privity (family members, employees,) **Duties to: Off-property**: Reasonable care to prevent unreasonable risk of harm; **no duty to protect against naturally occurring items**; **Trespasser**: Undiscovered—no duty except to not cause intentional injury; **Known—warn or make safe artificial conditions that threaten death or serious injury**; **foreseeable—same as known plus to warn of dangerous events and refrain from willful or wanton injury**; ordinary care w/ **attractive nuisance**: **licensee enters w/ permission for his own business—duty to not intentionally harm**; **invitee enters w/ permission for Δ's benefit—duty to reasonably inspect, reasonably make safe—not liable for conditions II should recognize as dangerous******Lessor and Lessee**: Lessor has no duty w/ 6 exceptions: 1. **Dangerous conditions known to lessor and not known to lessee**; 2. **Conditions dangerous to those outside the premises**; 3. **Premises leased for admission of the public**; 4. **Part of land in lessor's control that lessee entitled to use**; 5. **Where lessor contracts to repair**; 6. **Negligence by lessor in making repairs**

Duty to Act: There is no duty to act w/ **exceptions** for a. **parties injured by instrument under the control of another**; b. **those required to control conduct of a 3rd person to protect II**; c. **temporary legal custodians**; d. **teachers & students**; e. **Δs who enter upon undertakings by affirmative action and II detrimentally relies**; f. **R2T 322: when X negligently injures Y, X is under a duty to take reasonable affirmative action to aid**; g. **X creates a dangerous condition innocently, duty to warn or not harm others (think highways)**

Duty to not negligently inflict emotional distress: usually requires a a. **definite and object physical injury** as a b. **result of the emotional distress that was c. proximately cause by Δ negligence w/ exceptions for a. death telegrams and b. negligent handling of a dead body******Bystander recovery**, available when: a. II and victim are closely related; b. II has contemporaneous sensory perception; c. II's emotional distress is worse than a disinterested witness

Special duties: **Rescue doctrine**: Δ caused danger liable to someone injured attempting to rescue org. victim; **Unborn children**: former common law—death extinguished all claims; now split—generally, however, no wrongful life, no intergenerational injuries

2. Breach of the duty of care: Must show **what in fact happened and from those facts that Δ acted unreasonably**; can be shown by **Direct or Circumstantial evidence**: ****Res Ipsa Loquitur**: **Thing caus injury was under Δ's control**; **Event causing injury would not have occurred but for Δ's negligence in an ordinary course of events**; **minority**: Neither II nor third party contributed to the injury**Can also be used against multiple Δs when injuring party unknown; **Appical Majority**: Res Ipsa warrant an inference of negligence that the fact-finder can determine as judgment dictates****Large minority**: Create rebuttable presumption of negligence;****Small minority**: Creates a presumption of negligence and switches burden of proof to Δ to prove he did not cause the injury

****Notice**: **Direct or constructive**: II must show that Δ was aware (actual) or should have been aware (constructive) of danger

3. Causation – Part A – Causation in Fact: "But-for" test=only one cause; "Substantial factor" test=multiple causes**when multiple negligence acts combine to injure, all are actual causes and all parties are jointly & severally liable**Δ can disprove involvement in injury
****Must be causal connection**; co-existence is not sufficient****Concurrent Causes**: Need "a" cause in fact, not "the" CI If impossible to tell which party is liable, both are liable; or 2. If both contributed but neither meets the "but for" both are liable as "substantial factors"*****Market Share Liability**: if specific manufacturer (like DES) can't be identified, some courts let II recover according manufacturer's market share

Part B - Proximate/Legal cause: Selection among many causes (which should bear financial responsibility—**whether legal liability should be imposed where cause in fact has been established** solutions to legal causation: 1. **Arbitrary line drawing**: Bright-line cuts off liability at a random point; typically a policy decision;

Direct causation: Δ is liable for injuries he directly causes and should have foreseen; Two possible direct causes: **Foreseeability of causation** Test: if reasonable person would have tried to prevent it risk, it is foreseeable; **Unforeseeable Harmful Results**: Δ's negligent conduct creates a dangerous condition but totally unforeseeable result,

Intervening cause: CIF but additional cause/force contributes after Δ's actions:****Dependent Intervening Forces**: **Normal responses or reaction to the situation created by Δ's act—usually foreseeable**; **Subsequent malpractice** aggravates Δ's original injury; **Rescuers** are foreseeable intervening forces and original tortfeasor responsible for actions; **Subsequent disease** means that Δ takes II as he sees him...Thin skull rule applies; **subsequent accident** happens when original negligent act substantial factor in second accident****Independent Intervening Forces**: **Foreseeable results from unforeseeable intervening force**: Δ liable—think lightning causes a negligent abandoned oil rig to explode; **Intentional criminal act** usually breaks the causal chain

****Superseding Causes**: Unforeseeable cause cuts off liability; criminal activity can fall into this category

4. Actual Damages a. **Specific**: Generally things that have a receipt; b. **General**: Pain / Anguish / No evidence needed (can be assumed) / Impairment / Quality of life / Disfigurement; c. **Death cases**: pecuniary losses / grief and anguish / loss of companionship / parents, children, and spouses only / Π can only recover for damages actually caused by Δ's conduct
Apportionment of damages: Joint and Several Liability has 3 possibilities: 1. Two or more tortfeasors act in concert; 2. Multiple Δs fail to perform common duty; 3. Multi Δs combine to produce a single, indivisible harm****Proportionate responsibility**: Fact-finder may decide portion of injury caused by Δs—Joint liability makes each Δ liable for the entire amount of the injury; Other Δs may seek **contribution**—means that when one Δ is held liable for his acts as well as the acts of other, he can seek reimbursement from other tortfeasors who weren't immune from original suit; **indemnity**

when one is held responsible for damage because of a relations to the actual wrongdoer (such as respondeat superior)**NO indemnity if tortfeasors have settled with II in good faith

Satisfaction and Release--payment of total judgment satisfies judgmentOld rule:** release of 1 joint tortfeasor releases all;****New rule:** release K is covenant not to sue**award must be executed to obtain satisfaction and prevent future recovery...**Mary Carter agreements:** Δ agrees to settle with II at a reduced amount and then testify against other Δ

Affirmative Defenses to Negligence

Contributory Neg.: II barred from recovery if his negligence played a part in the injury; old rule, but still followed in some states**courts never fond of such a harsh rule, allowed last clear chance exception where if Δ had a last clear chance to prevent injury, II can still recover; II held to same standard of reasonable care as Δ; **not a def to wilfull, wanton, or negligence per se**

Comparative Neg: Apportions responsibility and avoids the harsh turn of contributory neg. **Three theories:** 1. Pure--II recovery reduced in proportion to the % ascribed to negligence; 2. 50% cap--same as pure except II only recovers if neg deemed 50% or less; 3. 49% cap--same as pure but II only recovers if neg less than 50%

Assumption of risk: Acts as complete bar to recovery b/c II shifts burden to himself****Two kinds:** **Express:** must be overt; does not need to be in writing; **Implied:** must be: a. voluntary; b. must have awareness of risk; c. must have awareness of magnitude****Does not apply to common carrier passengers or if II part of a class statute designed to protect;**

Statutes of Limitations & Statutes of Repose: SoL limits time period for recovery; old rule—SoL not tolled for any reason; starts at date of injury; **new rule—SoL starts when injury is discovered or should have reasonably been discovered** ****Statutes of Repose** are an absolute time period to recover based on fixed timetables

Immunities: Affirmative defense based on status or relationship; **Categories:** **Spousal**—new rule is that the immunity is abolished; **Parent-child**—partially abrogated to the reasonable parent standard; **Charity**—won't always be recognized if turns into large business; **employer**—workman's comp largely killed the privilege in exchange for allowing II to prevail w/o having to prove case; **Government:** Private/Proprietary for functions that can be accomplished through private entities; Governmental for those that cannot, such as the Army; **Public Officials**—limited immunities for words spoken in debate

Damages

Compensatory: Makes the II whole and restores to pre-injury condition; **Punitive:** to punish or deter; usually limited with respect to compensatory damages; **Nominal:** just makes the case of record and declares who won

Limits on recovery: Maximum recovery rule: Directs judge to determine if jury's award of damages exceeds the amount a jury could reasonably award; remittitur: Judge orders parties to take a lower award or else a new trial is granted; award is too large if it "shocks the conscience"

Collateral Source Rule: Jury may not consider payments from 3rd parties including discounted hospital rates

Physical harm to property: Market value at the time of the wrong; highest indeterminate value from the time of wrong and trial

Duty to Mitigate: II must mitigate against avoidable, foreseeable consequences; reasonable person standard applies
Death and Survival Actions: Old rule: death extinguishes all claims; New rule: legislature abrogated rule to allow for recovery****Survival** claims: decedent's estate may bring claims on behalf of dead II for pain and suffering from injury to death as well as loss of companionship, etc.; **children:** wrongful death provisions apply to children, too; can claim for loss of society, comfort, & company
% of Punitive Damages May Go to the State: Because punitive damages are a quasi-criminal matter

Strict Liability

Liability for parties that engage in abnormally dangerous activities; liable even without fault
Rylands Split: Blackburn: ultra hazardous activities are those where risk cannot be eliminated even by the exercise of utmost care; Cains: based on the location and if it is abnormal/non-natural use. Elements of a strict liability activity (R2T 520): 1. Existence of a high degree of risk of some harm to the person, land, or chattel of others; 2. Likelihood that the harm that results from it will be great; 3. Inability to eliminate the risk by the exercise of reasonable care; 4. Extent to which the activity is not a matter of common usage; 5. Inappropriateness of the activity to the place where it is carried on; and 6. Extent to which its value to the community is outweighed by its dangerous activities****Courts can consider the context of the injury-what is dangerous in one set of circumstances may not be in another; not responsible for damage outside the scope of the danger created by the activity--The scared mink eats her babies rule**Acts of God (vis major) are not reasonably anticipated; even strict liability Δs not liable if damage caused by an activity precipitated by an act of God**

Animals: Owners of non-domesticated or inherently dangerous animals are strictly liable for conduct**One-free bite rule for domestic animals** determined usually on context of where animal kept**Knowledge by Δ that animal is dangerous, liability incurred

Products Liability

Liability of manufacturer, seller, or supplier of chattel...NOT insurers **Theories of Recovery:** Negligence: viable even for mass produced products and II and Δ have no privity of contract; only liable when products have reached consumer substantially unchanged Warranty: Cannot recover for personal injury; only the chattel that was damaged or destroyed**can either be express or implied: Strict liability in tort: Applied for food and cosmetics; looks to unreasonableness of product, not the person; manufacturers strictly liable for things consumer unlikely to know about or recognize

Product Defects: Manufacturing defect: Liability imposed on for the particular purpose, as in the one particular chattel that failed**usually a quality control failure; Design defect: failure in concept in the entire line of products; quality of the design typically has a direct effect on manufacturing defects; compare with the cost of safer designs **Tests for design defects: consumer expectation**—looks to what a reasonable consumer would expect; **risk-utility** analysis: balances usefulness with the desirability of the product; **Warnings Defect:** Does not convey the danger; just needs to warn of significant dangers under a reasonableness standard; different standards may apply for sophisticated purchasers and learned intermediaries

Defenses: For Manufacturers: State of the Art: what was the knowable knowledge at the time? II's conduct contributed; Misuse: may be foreseeable and not abnormal or unintended use

of product (this is a toss up...usually goes to the jury on scope of liability)

For other than manufacturer: Remote retailer outside the original producing and marketing chain: Typically excluded from liability; liability ascribed to the party that created the risk; Services look to the nature of the relationship and duty owed by Δ to II; providers of medical services not subject to strict products liability; concealment of known defect may be actionable under theory of negligence or as an intentional tort

General Tort Provisions

Vicarious Liability: Respondent Superior; employer ought to bear the risk of loss within certain limits for employee's harmful conduct in the course of his work—employer controls business AND stands to profit from employee's work; Modern rule is the exercise of control; Going and coming rule: employer usually not liable for activities that occur on the way to or home from the place of business; No liability for frolic or detour—question is whether the employer benefited or if the employee deviated sufficiently from employment to fall outside employment

Independent Contractors: Generally no vicarious liability except for: non-delegable duty; apparent authority; inherently or intrinsically dangerous activities; illegal activities

Joint Venture/Enterprise: Will be held liable if the 4-prong test is met defining joint venture/enterprise: 1. Agreement among members; 2. Common purpose of group; 3. Community or pecuniary interest in purpose; 4. Equal right to voice direction of enterprise (equal right of control)

Nuisance: Concerns with balancing a person's rights with the rights of others; based on the unreasonableness of the activity—reasonable use and enjoyment of one's property; Private Nuisance: unreasonable interference with use/employment of interest in land; claim between private citizens; cannot sue for conditions on land purchased**Public Nuisance: Unreasonable interference with a right common to general public; generally brought by a public official on the public's behalf; can come from a private citizen if interest is above and beyond that of the general public; compliance with zoning does not shield a business that interferes with health or comfort of neighbors**Possible solutions: remedy by payment of damages, allowing the activity to continue;

Defamation: Dignitary tort, which harms a person's dignity or perceived self-worth**Two steps for proof: 1. Judge must decide if statement was capable of defamatory meaning; 2. Finder of fact determines if it was defamatory by a "respected portion of the community"**Six elements to plead: 1. Actual event: defamatory words; 2. Publication: heard or seen by a 3rd party who understands the meaning; 3. Inducement: extrinsic facts or words that are reasonably understood to convey the defamatory meaning; 4. Colloquium: Words were spoken of and concerning the II; 5. Innuendo: allegation of particular defamatory meaning; 6. Special damages: natural, immediate, and legal consequence of the word—Exceptions to damages requirement: 1. Imputation of a major crime; 2. Loathsome disease; 3. Affects trade, business, profession, or office; 4. Serious sexual misconduct

Libel & Slander: Libel originally applied to written statements; Slander originally oral statements; Not as clear of a line in modern law...based more on the longevity of the statement and the size of the audience. Damages required for both.

Privileges: Truth is an affirmative defense; membership in a small large group of people libeled; self-interest; others' interests; comment—loss of privilege by excessive publication

Categories: Public Officials: Apply Times actual malice test and C evidence; actual malice is knowing falsity or reckless disregard for truth; Prevents litigation for defamation on people routinely reported on; must prove by evidence****Public Figures** (general celebrities) follow same requirements as public officials****Minor public figures:** States apply negligence up to Times standard****All others:** Regard purely private matters, actual malice not required; **Remedy: Self h** Contradict/correct the error to assuage falsity;

Privacy: Unreasonable appropriation of P's name and likeness; Activities that unreasonably interfere with a protected interest (i.e. right to be left alone); MUST balance and accommodate competing interests****Four-part test:** Intent; Act; Causation; Central Interest—misappropriation: improper use of P's name or likeness: central interest—reasonable control of interests of persona; P must show all elements: D used P's name/likeness; Use was for D's benefit; Causation; Damages:b. Intrusion: Reasonable expectation of non-intrusion of the conversation—central interest is intrusion into a place where reasonable solitude expected; c. Disclosure: Unauthorized dissemination of true personal information—central interest is public disclosure of true facts that P wants to keep private; d. False light: portraying P in manner of disrepute—central interest is reputation instead of right to be left alone

TX Deceptive Trade Practices Act

Arises as a result of problems with traditional contract and tort approaches-Contract: limits to privacy; waiver allows people to give away rights; damages are limited to contract**Tort: Problem provin duty and fault since manufacturer has more information

Historical Dev: 1973 legislature wants to do away with the problem defining "consumer" and give businesses certainty that it will be defined broadly so, in theory, it'll be the same burden on everyone 1995 legislature makes changes as part of tort-reform package

Construction & Application of the Statute: "liberally construed"—benefit the consumer; generally means waiver prohibited unless in writing; consumer not in disparate bargaining position; and consumer is represented by legal counsel**Application: Individual, partnership corporation, state, agency of state who: a. seeks or acquires (mea what it looks like-shopping = seeking; acquire = buying) by purchase or lease goods or services; b. business consumers w/ less than \$2 million in assets; Note on seek or acquire: "intended beneficiaries" the products are consumers; distinguish from incidental beneficiary who are not in the foreseeable category; buyer must act in good faith—no ridiculous offers just to invoke the legislation; Applies eve to gifts given w/o consideration; goes further than the UCC to cover services; Exemptions from 1995: large transactions exemption—over \$500,000; does not apply to a residence; others to make sure that violation actually took place

Claims under DTPA: Does not require a culpable mental state-se defective product, liable; failure to disclose is the one area w/ment requirements; "unconscionability" means grossly unfair; when a person takes advantage even if he didn't know it, still liable: takes away the "good guy" defense; breach of warranty either express or implied

Notice & Settlement: Must arise from a producing cause; econor damages are the norm unless the Δ knowingly damages for mental anguish; knowingly = up to 3 times economic damages; "intentione" = up to three times economic damages for mental anguish; consur attorney's fees-consumers who prevail shall be awarded court costs and reasonable & necessary attorneys fees; A gets attorney fees if suit was groundless in law or fact; or b. the suit was brought in bad faith; or c. the suit was brought for the purpose of harassment. Th "or" are the big deal here