

Torts - Martin

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Negligence

I. Elements of Negligence in the Sense of Torts

- 1) ~~breach of a duty~~ *Duty*
- 2) ~~breach of a duty~~
- 3) ~~causation~~
- 4) ~~resulting damages~~

A person must prove all four in order to recover on a claim of negligence. Therefore, a person can be negligent but liable for negligence. Ex. If the plaintiff does not suffer damages from the defendant's failure to exercise due care.

In negligence cases, the burden is on P to prove negligence and D's conduct did not conform. When making the decision, it is up to the jury to decide if D acted as a reasonable person would have and it's up to the judge to decide if D had a duty to act. Results of negligence cases are usually designed to make P whole again, not so much to deter D's conduct.

II. To Claim Negligence

1) P has to show that the defendant did not act as a reasonable or prudent man would have given the circumstances.

- a) must show that a reasonable person could foresee harm, not liable for unforeseen harm
- b) reasonable person considered the extent of the risk posed by their conduct
- c) the defendant did not take all the necessary precautions a reasonable person would have to avoid accident.
- d) the burden of taking the necessary precautions to prevent actions, or the burden to act otherwise was not substantial to the defendant
- e) if D took all necessary precautions or foreseeability of harm is miniscule, D not liable

f) P has to show cheap, safer and more reasonable alternatives

In *Greene v. Sibley, Lindsay & Curr Co.*, no negligence was found when a woman at a cash register tripped over a mechanic working on the floor. The judge found that the mechanic was doing a common and simple act in plain sight of those around him. The act wouldn't take a long time and since people generally look out for themselves, probably of injury would not be high and burden of avoiding injury would be high.

III. Hand Formula in Judging Negligence (US v Carroll Towing Co.)

- 1) $B < PL$ then there is negligence
- 2) $B > PL$ then there is no negligence
 - a) B = burden of adequate precautions, if accident happened before B increases, if you don't know adequate precautions for protection B low.
 - b) P = probability of injury
 - c) L = loss if injury occurs
- 3) Formula suggests factors that a reasonable person considers and how they balance those factors in reaching a decision
- 4) Problem of formula: can't estimate loss if injury occurs and, doesn't take into account all possibilities of precautions.
- 5) If public good demands precaution, no matter how minimal it should be used.
- 6) Also a fraction of social utility. If social utility high, safer precautions are too expensive that they might put D out of business, we don't require him to take them.

IV. Reasonable Person Standard- Objective standard

- 1) Person is not perfect or infallible
- 2) Does not excel in foresight, caution, courage, judgment, self-control and altruism.
- 3) Held to community standard- general level of moral judgment of the community
- 4) Does what ought ordinarily be done and not necessarily what is ordinarily done
- 5) Defendant's conduct critical
 - a) to be measured against external objective norms
 - b) not to be measured as subjective ability, someone without free will or mind
- 6) Professionals are held to a standard of care as other people in profession, use expert knowledge and skill when acting.
- 7) When a person is below average intellect or education we hold them to a standard of a reasonable person, not someone equal in their intellect or education
- 8) Common carriers and inkeepers are held to a higher standard
- 9) You have a duty to investigate (ex- sense break problem, investigate breaks)

IV. When Reasonable Person Standard Does not Apply: Relevance of Personal Circumstances

- 1) Physical disabilities

a) must act as a reasonable person with the same disabilities would act a blind man is not asked to act as someone who sees.

b) mental disabilities such as I am not smart enough or I am a careless person or I am mentally ill are no excuses in liability

2) Age-minors only

a) We have to ask did the person act reasonably for someone of like age, intelligence and experience under the circumstances.

b) makes allowance for child's mental ability and development

1) because children have to learn to be careful

2) ought not expose children to liability for conduct in learning stage of life

c) children can be found negligent even though they did not know how to act if,

1) if found they should have known the consequences

2) if doing an activity primarily engaged in by adults (driving) held to an adult standard

d) if child under a minimum age (depending on the district) usually 4 years of age, cannot be negligent

3) Sudden physical disability- ex seizure

a) if unexpected and beyond D's control, can't be expected to act as a reasonable person

b) if D new about pre-existing condition and had opportunity to control or it was foreseeable, held to a reasonable person standard

c) driver suddenly unconscious not liable if no warning about him going unconscious

d) driver suffers a stroke and retains some control (although imperfect), reasonable standard applies.

4) Mental illness (insanity) is not a defense for negligence. Even if you say that you committed the act due to your illness.

a) recently, courts will allow it as a defense if it prevented understanding of danger

5) Intoxication is no defense

V. Reasonable Person Standard and external circumstances

1) Emergency situations: When a person is put into a sudden and unexpected emergency situation where the actor must act immediately, the actor cannot be negligent if he acted as a reasonable person in an emergency situation. Person cannot be held to same standard as someone who was not in an emergency situation. If D created emergency, might not apply

2) Customs: Person acted as others in like situations is relevant: professions and trades

a) If D follows custom doesn't guarantee an escape from liability, custom must be reasonable, jury decides if custom enough

b) P might show custom to prove D did not conform

c) D might show custom to prove he conformed to others standard

Negligence per

se - violated statute

to - use

negligent.

3) Statute; a reasonable person will obey the law (look at legislative purpose of statute)

a) if you ignore a statute you most likely are negligent; if you adhere to statute doesn't mean you are not negligent

1) must be causal link between violation of statute and injury

b) statute must apply class of people designed to protect, and particular harm statute is trying to protect (ex. leaving keys in car and they get into accident)

c) excuses

1) contributory negligence can be a excuse

2) following statute will create greater harm or risk than not following

3) statute is foolish

4) compliance would be beyond D's control (ex blind man walking across street)

d) if didn't follow licensing statute held to standard as someone who did follow

4) Equipment available

a) if substandard equipment you are to act reasonable as someone with this equipment (applies to doctors and other such situations, not cars ect.)

5) Misc.

a) Weather, machines, computers, behavior of animal etc. can affect how you act

VI. Contributory Negligence

1) Plaintiff cannot recover

2) Plaintiff did not act reasonably thus contributory in the accident

3) It's up to the jury to decide if plaintiff had contributory negligence

VII. When Standard Above Reasonable Man Standard

1) Common carriers, inn keepers ect. always have a higher standard

a) Reason for higher standard - by using a common carrier you reduce your methods of self protection opening yourself up to greater danger. You put your safety in their hands.

b) circumstance involving use of dangerous instrumentalities, he must exercise a 'higher' degree of care in proportion to the danger.

2)Professionals: When performing a professional duty, must act a reasonable specialist would act under the circumstances of your task

3)Customs: When custom dictates a standard, it is up to the jury to decide if the custom is reasonable. Custom helps tell us that the method is not expensive and readily available.

a)Except in malpractice situations, courts have generally rejected the argument that a custom sets the standard of care.

b)adherence to a custom might eliminate what otherwise may be a jury question.

c)court might make its decision by looking at social impact of saying custom unreasonable

d)To win a case for defendants failure to use custom, you must show that purpose of custom was to prevent the type of injury you recieved

4)Statue

a)To omit willfully or needlessly safeguards prescribed by law is to fall short of your duty prescribed by law.

b)failure to abide by a statue is negligence itself and can be prima facie of contributory negligence if proof can show that not following a statue helped cause the injury.

c)evidence of a violation of a statue does not guarantee negligence. It's up to jury to decide. (if person driving 57 mph in a 55 mph zone, it doesn't mean he is negligent)

c)If a legislative statue does not prescribe a higher standard of care but helps to promote public convenience or safety, there is no negligence for violation of the statue if violation is solely to prevent injury rather than cause injury

1)if following a statue subjects you to greater risk, not negligent for not following statue.

2)If a child violates a statue, the jury should be instructed that if child of a person of that age and intelligent would not have acted in violation of the statue under the circumstances, then he must be negligent.

3)No reason to disregard statue if common practice, only if the statue would further put you in danger, or there is an emergency situation

a)ex. you swerve across yellow line to avoid hitting a child running in the street

4)If harm that occurred was different from harm that statue was intended to protect against, can't use statutory violation to show negligence.

For instance, in *De Haen v Rockwood Sprinkler Co.*, a statue saying that there should be barrier erected on the sides of a hoistery was violated. A radiator fell off the hoistery and injured the plaintiff. The court refused to say violation = 's

negligence because the statute was intended to prevent people from falling off, not objects.

5) If defendant violates statute by participating in a licensed activity, without a license, the fact that the defendant did not have a license is irrelevant. Should only hold defendant to standard of care of somebody with a license.

6) sometimes conditions make it impossible to obey the law

a) ex. blizzard conditions when driving

d) 3 things about statutory violations:

1) must show a causal relationship between violation and injury

2) negligence per se cannot be used unless statute is designed to protect the type of incident or injury that occur.

3) a statute is a minimum standard that must be followed. It might not be enough so, compliance with a statute does not mean you are not negligent.

5) If defect not visible, not apparent and not existing for a sufficient period of time, can't prove negligence. Also for example, if banana peel on supermarket floor and someone trips on it, if peel only there for a second, no negligence. If peel there for a long enough time for an employee to see it, negligence even if employee didn't see it.

VIII. Role of judge and Jury

A) Judge decides law, what charge to give to the jury

B) Jury decides if person negligent by facts

IX. Res Ipsa Loquitur: Proof of Negligence, it occurred therefore you are Negligent

A) In Res Ipsa Loquitur cases must prove

1) Accident occurred

2) wouldn't occur without negligence

3) D was in exclusive control of object or occurrence that caused accident (not P or 3rd party)

B) Evidence speaks for itself, the fact that the act occurred is proof of negligence

1) Allows P to show that fact that act occurred, you can infer D's negligence; event doesn't normally occur without negligence

a) P doesn't have to prove negligence, just circumstances occurred

1) because P might not be able to show negligence do to they were not in place where accident began (barrell falling from window), accident happened in a specialized field P is not accustomed to etc.

b) P does not need to eliminate all other possible occurrences

c) *Connolly v Nicollet Hotel*, the manager knew that the group was roudy and throwing objects out the window however, did not do anything to stop them or prevent them from continuing these practices. The hotel was thus found negligent because they knew the dangers and did not take any steps to prevent them when they could have and had the right to do so.

d) D is in a better position to prove how accident occurred not P

2) Defendant has to prove not negligence to win, jury can infer negligence by result and knowledge of the world.

1) D can also show that object used by others and D not in exclusive control

2) D can also show accident happens by many non-negligent causes

3) D can show that he exercised due care and doesn't know how accident occurred

3) Plaintiff still has to show that his version of facts is more probable, most likely a cause of negligence and that he did not cause accident.

4) Only applied to those parties that have exclusive control of object causing injury.

a) it is enough to show that D had power to control and opportunity to exercise that power, actual possession of instrumentality is not necessary

b) For exclusive control can have continual control over object

c) If multiple D's

1) at least one D was in control

2) All D's act together in integrated relationship

d) A business possessor automatically has exclusive control for questions of *res ipsa loquitur*

5) In medical surgery, *res ipsa loquitur* applies to all those who had control over the patient if injury happens to an area not being treated.

a) an unconscious patient cannot and thus does not have to show who exactly caused the accident.

1) No matter what, lead doctor and hospital negligent because they were in charge of operation. Similar to *Service Merchandise*

b) In order to escape liability in cases like this and *res ipsa loquitur* cases, it is up to the defendant to prove that their acts were not negligent or did not cause the injury.

6) In cases of car accidents, you cannot use res ipsa loquitur by saying defendant ran into me so he is negligent. You must prove that defendant lacked due care and that is why he is negligent. If we show that defendant went over center line, then you can prove negligence do to res ipsa loquitur.

a) If you are in a car that is speeding 5 minutes before accident. Car goes around curve and over center line. You are not sure if car is speeding at that point. Can you get res ipsa loquitur, Yes.

7) to help show res ipsa loquitur courts want plaintiff to show

a) injured by an accident that normally doesn't happen without negligence

b) negligence more likely attributed to defendant than plaintiff or 3rd party

1) Difficult to prove when object not in defendant's control or has been passed around to many different hands.

8) defendant will try to prove in res ipsa loquitur

a) other non negligent causes of accident

b) other people mishandled the product so could be caused by them

c) exact cause of accident

d) he exercised due care

9) instruction usually given, but not limited to, situations in which defendant has better chance to put forth evidence to cause of accident and injury.

X. Medical Malpractice

A) Conduct measured against specialized knowledge and skill

1) higher standard of care than reasonable person

2) must act in conformity with custom of practice to escape negligence

a) usually proven by expert witnesses

1) expert does not have to be in same specialized field as field which he offers testimony about. must be a licensed physician in field he is testifying about, must show familiarity with field testifying about, and court must approve of his qualifications

2) Used to show standard of conduct and D departed from standard

b) even when using expert testimony, can use res ipsa loquitur

1) the expert educates jurors and gives them higher knowledge to make inference.

c)Used to be that had to comply with community standard because of differences in education and resources available but with modern access to material and facilities, everybody has same standard

d)good results are not guaranteed because doctors are not super human that they can cure all, as long as they followed standard not liable for bad results

B)Doctor must make patient aware of risks of procedure to make an informed decision whether to continue or not.

1)Normally must provide them with adequate information of what a reasonable patient would want. P must show D did not and he/she would not have gone through with surgery had they known about these risks. If risk 1/100,000 can't say I would not have gone through with surgery had I known since risk is too remote

2)If patient asks questions or for more info. must supply it

3)Standard different if surgery is life or death (usually an exception)

4)not liable if disclosure of risk would be detrimental to patients well being because they might not undergo a necessary surgery

5)might not be liable in situations where risk is obvious and too remote

6)Expert usually tells all risks and jury decides if the risks not disclosed are reasonable to change a patient's mind.

Duty

negligence is often described as a breach of duty. Therefore, a duty must exist, and D breached that duty to prove negligence.

I. Introduction

A) As a rule, unless there is a special relationship, D does not owe a duty, according to Martin, there is a general duty of care unless D can invoke an exception and prove no duty

B) D only owes a duty to foreseeable P's not unforeseeable P's

C) some relationships have a duty

1) inn-keeper, parent-child

D) some situations or acts give a duty to everyone

1) driving

E) when a duty is established, to prove negligence must prove:

1) you created a risk

2) you took affirmative action to make the situation worse

F) Jury decides negligence, judge decides if a duty

G) When considering whether to impose duty judges look at

1) morality

2) foreseeability and extent of harm from defendant's conduct

3) burden of duty on defendant (cost and others)

4) alternate ways to protect plaintiff's interest

5) increased safety likely to extend from duty

6) effects duty may have on defendant's conduct

7) administrative problems of enforcing duty, problems of proof

II. Failure to act

A) There is no duty to act unless you have a special relationship to protect the injured party, even if you aware that person needs help (nonfeasance)

1) keeps autonomy intact, don't want to force people to act if they don't want to

2) nonfeasance doesn't make injured party's situation any worse

2) If you do act, and you do not act as a reasonable person would you are liable (misfeasance); this brings on duty because you made person's position worse than before you started

III. Obligations to others

A) Duty arises out of special relationship

1) common carriers, inn-keepers, possessors of land open to public

2) must look at social impact. extending liability to next generation in medical case would make people put money aside just in case a tort suit instead of putting it to use now. Would also affect how doctor chooses treatment.

d) Not liable for failure to provide a benefit if not having benefit caused injury

1) Moch case, didn't furnish enough water to city caused neighbors building to go on fire. This is at most a denial of a benefit not launching a force causing harm. To make water co. to pay will be burdensome to them. Make person's fire insurance pay.

IV. Obligation to control the Conduct of Others

1) special relationships owe duty to control conduct of others (familial, professional or vicarious)

a) if you have a special relationship to offender or those in danger there is a duty to control

b) if one who supplies or supplies through a third party an item which they know or has reason to know that use could reasonably cause harm to person or others, supplier liable to resulting injury. Ex. both person who bought car and car dealership liable if know that driver is not a licensed driver.

c) no special relationship between actor and either third party or person hurt, no duty.

d) doctor liable to plaintiff if they fail to tell patient of HIV and then patient contaminates plaintiff

e) doctor employed by company to give physical examinations owes no duty to tell person examining about troubles. This is because doctor not there to help person only to help employee.

f) class of people you owe a duty to has to be determinate. A garage owes no duty to pedestrians walking by when a customer hits them with a car.

g) host liable to injured third party in car accident if they gave guest alcohol directly, and to the point that he was visibly drunk or one could reasonably infer him drunk. Duty even though class indeterminate because public policy against drunk driving. Host knowingly caused defendant to be in situation where he could foreseeably harm others.

1) if host furnishes alcohol but somebody else serves it, (at a large party waiters serve alcohol) not liable because burden too high to check everybody's drinking

2) host not liable to the guest who got in accident

2) Duty to warn third party of foreseeable harm if there is a special relationship depends on:

a) foreseeability of harm to plaintiff

b) degree of certainty that plaintiff suffered injury

c) closeness of the connection between defendant's conduct and injury suffered

d) moral blame attached to defendant's conduct

e) policy of preventing future harm

f) extent of burden to defendant and community of imposing duty

- 2) one who is in custody of another who cannot protect themselves
 - a) parent-young children or school-child
 - b) your actions put individual in peril (car accident)
 - 3) you began aiding individual
 - a) if you begin to aid, and help the person, there is no duty to follow through to the end and you are not liable for stopping unless stopping will put person in worse position than they were in before you started
 - 1) restatement of torts holds liable for breach of duty for leaving person in worse condition or failing to use reasonable care when helping.
 - 4) if you change the nature of the existing risk
 - 1) ex. a cab driver picking up person whose car is stuck does not owe a duty to driver who hits into stuck car for not warning him or calling police. didn't change nature of risk.
 - 5) make promise to act a certain way and person relies on promise when could have acted differently
 - 1) ex. sheriff promises woman to warn her when a man who raped her is released. Woman relies on promise instead of acting another way. Sheriff doesn't tell her. Sheriff breached duty
 - 6) preventing others from rendering aid is subject to liability
 - 7) innocent creation of a risk, even without negligence in creating risk (ex. if your car stalls you have a duty to warn on-coming traffic)
 - 8) Law encourages people to act and create risks, but you have a duty to act reasonably when creating risks for your own benefit
 - 9) Business relationship: Must warn or assist business visitor
 - a) Employer has an obligation to employee
 - b) University to student
 - 10) Duty assumed by contract
 - a) pay someone to build a bridge or perform surgery or supply electricity to light your apartment, they have a duty to perform reasonably
- B) Limits on those we owe a duty
- a) limit through zone of danger
 - b) limit to allow people to have predictable burden
 - c) limit duty so we are not liable to everyone
 - 1) making Con Ed liable for injury to noncustomer in apartment do to blackout will extend liability and make it burdensome to Con Ed. Since no contractual relationship with plaintiff, he is not in zone of danger to recover for injury.

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b) degree of certainty that plaintiff suffered injury

c) closeness of the connection between defendant's conduct and injury suffered

d) moral blame attached to defendant's conduct

e) policy of preventing future harm

f) extent of burden to defendant and community of imposing duty

g) availability, cost and prevalence of insurance for the risk involved

h) section restatement section 319 says, "One who takes charge of a third party whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third party from doing harm."

IV. Landowners and Occupiers

A. Introduction

1) held liable for conditions upon their land which pose an unreasonable hazard

2) Duty of landowner to those off the premises

a) natural hazards almost always have no duty to protect those off premises

b) artificial hazard general duty exists

3) Owner has a duty to inspect with reasonable care

4) Owner has no duty to protect police or firefighters in the conduct of their job

B. Licensee

1) Person who enters premise with permission but does not confer benefit onto landowner. includes social guests

2) owes a duty to reasonable warning of known dangers and dangers he should reasonably know about. duty to try to make those dangers known to him safe. (ice on driveway is a known danger and thus duty could be owed if you show it was known) No duty to inspect for unknown dangers

a) people expect to find land as possessor himself uses it, and not for owner to prepare for his reception

3) duty of reasonable care when performing dangerous activities on land

4) modern trend is distinction between licensee and invitee disappearing

B. Trespasser

1) Person who is on land who was not given permission by landowner

2) No duty to warn about known dangers or make them safe

a) exceptions occur if trespasser is a child

b) exception occurs if person always trespasses and you allow it.

3) No duty if person performing dangerous activities on land

4) No duty because of landowners autonomy and can exclude anyone from being on his land

5) if trespasser is discovered, duty to warn or make safe artificial dangerous conditions that involve risk of serious bodily harm

6) Recent cases such as Rowland v. Christian hold that owner owes duty to make a reasonable effort to avoid harm to trespassers

a) due to fact that people don't act differently on your land because they are a trespasser

C. Invitee

- 1) a person on land by permission who brings material benefit to the occupier or owner or member of public if purpose of land is open to public
- 2) Duty of reasonable inspection and warning of conditions of land
 - a) inspect conditions to find unknown dangers
- 3) Duty of reasonable care when performing dangerous activities on land
- 4) This duty is greater than that owed to a licensee because owner receiving financial benefit so should have financial burden as well.

D. Store owner

- 1) Don't owe a duty to provide security in store.
 - a) Don't want private citizens to take matters into their own hand
 - b) don't make good choices like a police does.
 - c) against public policy to allow govt. to shift burden of protection to citizens
 - d) It would also be hard to set out exact standard for protection

E. Landlord and Tenant relationship

- 1) traditionally, only liable in tort action if injury attributable to
 - a) a hidden danger in the premises of which the landlord but not the tenant aware.
 - b) premises leased for public use
 - c) premises retained under the landlord's control, such as common stairways
 - d) premises negligently repaired by the landlord
 - e) liability less likely if landlord promised to repair but failed to take steps to. This view is changing and duty becoming imposed for failure to fulfill promise.
 - 1) because tenant will forgo own repair because of promise
 - 2) also landlord has interest in repair getting down
 - f) duty of due care to outsiders to avoid unreasonable risk from falling cornices or broken braches
- 2) criminal activity on landlord tenant premises
 - a) landlord duty to take measures of protection which are within his power and capacity to take, and which can reasonably be expected to mitigate the risk of intruders assaulting and robbing tenants.
 - b) might cause lots of money but this could be passed onto tenants
 - c) landlord is only in position to take protective measures, not tenants and police.
 - d) no liability to people who are accosted outside and brought into building.

F. Liability to Child Trespassers

- 1) place where condition exists is one upon which possessor knows or has reason to know that children are likely to trespass, and

2) condition is one where knows or has reason to know and realizes or has reason to realize will involve unreasonable risk of death or serious bodily harm to such children, and

3) children, because of their age do not discover condition or realize risk, and

4) utility of possessor of maintaining condition and burden of eliminating danger slight compared to risk involved, and

5) possessor fails to eliminate danger or protect children.

G. Other situations

1) limit liability of owners of land used for recreational purposes.

2) failure to clean ice and snow and other weather conditions not a defect so not actionable, only if possessor has taken action to change condition and than land has become hazardous.

H. Duty of Stores

1) if store has specific knowledge or reason to believe that there is substantial danger to their patrons, they are liable for any injury as a result of that danger.

a) ex. a store owner sees a prolonged unruly disturbance happening and fails to warn the police, resulting in a patron being injured.

2) Some states say that prior similar instances require a store owner to take safety measures to prevent future instances.

a) requires a high degree of foreseeability that it will happen again

3) No duty to obey criminals demand, no liability to patrons for resulting injury

V. Intrafamily Duties

A) Spousal suits

1) can sue for intentional and negligent torts

2) Insurance companies won't cover suits

B) Parent-child suits

1) Courts don't want to tell the parent how to raise their child so no liability for negligent supervision.

a) some states use what would an ordinary and prudent parent do under the circumstances

2) Children can recover for sexual and physical abuse

3) Parents have a duty to protect children from harm

a) a sick child can recover if parent did not take to doctor.

VI. Governmental entities; limited liability

A) Municipal and State Liability

1) Courts can't tell municipalities how to spend their resources, only legislation can

a) no liability for failure to protect since it is limited by resources

- b) dissent says police should act as a reasonable person would
 - 1) no duty to inquire but when they inquire, reasonable person standard
- 2) If municipality induces reliance, then municipality owes a duty
 - a) ex. municipality issued a restraining order in past
 - b) ex. police failure to perform an act they did in the past
 - c) ex. municipality communicated that they would help
- 3) misfeasance vs. nonfeasance; no liability for nonaction but liability if they acted and didn't do it well.
- 4) Study about safety
 - a) can't second guess experts opinion if opinion found to be wrong later
 - 1) only liable if study was unreasonable
 - b) unreasonable delays of alleviating dangerous condition once realized results in liability
 - 1) low priority on list is considered a reasonable delay
- B) Federal Tort Claims Act
 - 1) Govt. agencies must act according to specific mandatory statutory regulations
 - a) if agency adopts a policy, they must follow it throughout since they used their discretionary power in adopting policy
 - 2) When no provisions about how to act, agency may use discretion
 - 3) If formulation of policy inappropriate or disagree with discretion, not liable

Duty to Nonphysical Harm

Courts have been reluctant to give recovery to emotional harm. They fear for fraud and flood gates of emotional harm cases.

I. Emotional Harm

A. Traditionally courts would only allow damages for emotional distress if P suffered physical harm

B. Must be in the Zone of Danger of Physical impact

- 1) P close to danger: must be in actual imminent danger not a remote chance of danger
 - a) must be physical danger and not belief that a danger exists as you are told that you have HIV but really don't.
- 2) limits claims of fright of danger
- 3) length of time plaintiff is aware of impending death or injury not important
- 4) requires foreseeability of injury, injury must be foreseeable even though it didn't happen

C. Plaintiff must show that a reasonable person would suffer emotional harm under the circumstances in order to recover. Don't have to be in zone of danger

- 1) must be foreseeable emotional harm
- 2) decision that is left up to jury
- 3) If only an overly sensitive person will suffer harm, Plaintiff cannot recover.
- 4) Do not have to suffer physical injury to yourself to recover
 - a) finding fathers amputated leg in bag given from funeral home
 - b) being incorrectly diagnosed as having HIV
 - c) being incorrectly diagnosed as being sterile
- 5) Problems are of proof. Defendant will have a hard time showing plaintiff not injured
- 6) examples of emotional distress are neuroses, psychoses, chronic depression, phobia and shock
 - a) temporary fright, disappointment and regret do not suffice

D. To prove mental or emotional distress caused by injury to another must show:

- 1) death or serious injury caused by Defendants negligence
- 2) a marital or intimate familial relationship between plaintiff and injured person
 - a) limited to relatives residing in the same household, or parents, siblings, children and grandparents of the victim. (not limited to boyfriend or girlfriend)
 - b) if relative doesn't live in same household and not one of above, no recovery
- 3) observation of the death or injury at the scene of the accident, close enough to scene of accident not at a far distance (can't see it on t.v.)
 - a) cannot recover for finding out about accident when you show up at scene
- 4) resulting severe emotional distress from observation of accident not from finding out about it
- 5) This test tries to limit liability to those at the scene; prevents open ended liability
- 6) If injured party is a girlfriend in a serious relationship but you are unmarried, some states will allow recovery.
 - 7) problem with this test is you will still suffer emotional distress when finding out about accident if you didn't witness it and friend will suffer emotional distress as well (not just family)

E. Loss of Consortium- interruption of familial relationship

- 1) Loss of enjoyment from spending time and other activities from injured and relating to injured
- 2) usually brought by spouse; some states allow a parent to show loss of consortium for their children but most states do not allow it. Same goes for child to parent
- 3) does not occur from a sudden traumatic experience but impairment over a long period of time, change in relationship or problem must last for an extended period of time.

4) immaterial if person witnesses accident

5) does not compensate for grief or sadness, just a change in relationship

F. Concerns about allowing people to recover

1) problems of proof

2) opening the flood gates of litigation

3) fraud

4) People trying to recover for loss, sympathy or grief (must prove shock from unexpected event and not seeing someone suffer so you feel grief)

II. Wrongful Birth and Wrongful Life

A. Courts don't like recovery (but allow it) for wrongful birth because you receive great joy from having a baby and this outweighs the cost of having the baby. Also, if doctor pays for expenses, this reminds child they are not wanted.

1) usually rather allow recovery under medical malpractice

2) either parent or child should recover for medical and custodial expenses of raising child until child no longer dependent on such care. Both should not be able to recover. If parent not around child should recover themselves.

3) cannot recover for loss of companionship since there was no companionship before hand

4) mother can recover for emotional distress

B. Cannot recover for Wrongful life because then you are saying it is better not to be born

1) child cannot recover for emotional distress or pain and suffering

III. Economic Harm

A. Misrepresentation Negligence between D and third party resulting in economic harm to P

1) Must show privity (representing mutual interest) or special relationship between D and third party or D and P. To show special relationship P must show:

a) an awareness by the maker of the statement that it is to be used for a particular purpose.

b) reliance by a known party on the statement in furtherance of that purpose

c) some conduct by the maker of the statement linking it to the relying party and to reveal its understanding of that reliance.

d) lawyers, accountants and other professionals liable for economic injuries

e) accountants only liable to client, not third party unless client connects them

f) lawyers are concerned with less of an indeterminate class so can be liable for third party, not many incidents which will create a party

B. D negligently causes physical harm to T resulting in economic harm to P

1) liable only to identifiable class of plaintiffs who D can foresee will be likely to suffer damages; identifiable class determined by foreseeability in terms of:

- a) type of person in class
 - b) certainty or predictability of their presence
 - c) approximate number of class
 - d) type of economic expectations disrupted
 - e) in People Express Airlines, couldn't be general public or business invitee using terminal (passenger on plane)
- 2) duty is of reasonable care
- 3) deals with proximately caused injuries

Causation

We ask if D's negligence caused the harm which P is suing for. P has duty to prove both actual cause and proximate cause to show negligence.

I. Cause in Fact (Actual Cause)- defendants act contributed to producing P's injury

A) If D not actual cause of injury, court will dismiss the case

1) exceptions to actual cause rule are;

- a) if D's conduct is a substantial factor in producing injury
- b) alternative cause case

B) But for test; Ask, if D did all that was required by law, would P still have suffered damages?

1) Could only find causation if jury finds injury would not have happened if not negligent, a more favorable test for D since its harder for P to prove.

2) When D negligent to decide causation must ask:

- a) If D would have acted properly and P still suffers damages, no causation
- b) If D would have acted properly and P would not have been injured, causation
 - 1) even in incident where other natural or negligent helped in causing accident, if his negligence also was a cause

3) concurrent causes, but for test applied where several acts combine to cause the injury

- a) if two separate negligent acts taken together cause P's injuries, both are liable (accident wouldn't have happened if either acted in due care)
 - b) 2 fires example where one was negligently started and the other by lightning burn down P's house, jury must find D was a substantial and material element in producing damage.
 - 1) leaves a lot more discretion up to jury,

2)used as alternative to but for, when it can not be proven

3)used when 2 D's are negligent and either D's negligence taken alone would have caused injury

C)Substantial element test; D's negligence was a Substantial element to injury

1)Used when several causes concur to bring out injury- and any one alone would be sufficient to cause injury- if D's conduct was a substantial factor D is liable.

a)2 negligent fires meet and burn down house, but for either fire the house would be damaged so but for test doesn't work. have to use substantial factor test

b)2 fires meet and burn down house, one negligently started and other one caused by lightning, D still liable because he created risk

2)alternative to the but for test

3)leaves more discretion up to jury

4)Jury can decide it was a major factor, not the ultimate factor

5)More favorable test for P since its easier to prove than but for

6)If many D's and each one's negligence alone would have caused injury but since all acted together, not sure whose negligence really caused injury, use substantial factor because if use but for, all can get off by saying but for my negligence, he would have been injured by the others

D)Alternative cause case

1)When multiple D's and they are all negligent but not sure whose negligence caused P's injury. They are joint and severally liable if they cannot prove their negligence or acts did not cause the injury. They have burden to prove they were not cause.

D)Evidence is used to help make jury predict what would have happened if D not negligent

1)Plaintiff does not have to eliminate all other possibilities to show causation, jury can infer by using reasonable certainty.

2)Must take all factors together, not each factor individually

a)can't say A doesn't lead to injury and B doesn't lead to injury must say A and B together lead to injury.

3)Plaintiff must show more likely than not, injury occurred because of D. If other sources are equally likely or more likely to have caused the injury, P loses.

a)example, if 58 people received typhoid this year and in past years 40 people receive typhoid, no causation because not more likely that you got it this year but,

b)if 90 people got typhoid this year, all would recover because more likely they got it do to D's negligence this year.

C)Loss of Opportunity to survive

1)Some courts allow a slight loss of opportunity to survive as satisfactory to recover

- a) less than 50% but cannot be too small (insubstantial)
 - b) only partial recovery. (full recovery times loss of opportunity)
 - c) D will say over compensation of allow P to recover for less than 50%
- 2) Majority of courts only allow a substantial loss of opportunity of survival to recover
- a) more than 50%, you get full recovery
 - b) when under 50% not real cause of it
- 3) Reasoning because a patient expects a physician to do what he is supposed to do and heirs lost something (a better chance of survival) by D's negligence
- 4) Some courts allow it only when result is death others allow it for any result
- D) Increased risk of Disease

1) Must show that injury is at least reasonably probable to occur otherwise hard to calculate damages; P can't recover if disease is greater than expected when actually contracted (can only recover once)

2) Problems with this standard is by delaying litigation until disease does occur, witnesses die, evidence disappears and statute of limitations runs out also, won't deter D from causing harms

3) Problems with allowing recovery for less than substantial risk is opens flood gates of litigation, person might not get injury, increases insurance and product costs

II. Joint and Several Liability

A) Traditionally

1) Plaintiff can sue all people (or any one they choose) who were negligent in causing injury and then gets to decide how much to collect from each up to the full extent of damages. P can recover full damages from one only if he/she wants

a) each tortfeasor liable for all of P's injuries,

b) liable for full amount since his negligence was a but for cause of P's injuries

B) Recent changes do to comparative negligence (discussed later on)

C) N.Y. Economic loss can pay full damages even if only 20% liable but for pain and suffering only pay your proportion

D) Traditionally, if you obtained a judgement against one of the tortfeasors for the full amount, the courts refused to allow that tortfeasor to recover from the other tortfeasor for their share of the damages. (No Contribution) This is no longer true

E) Right to Contribution Today: Person who has paid more than his pro rata share of damages can recover the extra amount from the tortfeasors. Pro rata means equal, if 2 tortfeasors this is 50% 3 tortfeasors this is 33.3%.

1) bars claims by an intentional tortfeasor

- 2) First must prove other tortfeasor liable for damages to recover through contribution
- 3) If other tortfeasor settled out of court, no contribution allowed but amount P can recover is diminished by amount already recovered or the pro rata share of person already recovered from.

F) Bad because victim can sue whom he thought had deeper pockets or the tortfeasor he did not have a pre-existing relationship with.

III. Multiple Defendants

A) If more than one defendant negligent, but only one caused injury (and we do not know which one it was), D has burden to prove they did not cause injury or they lose.

- 1) D in better position to show they did not cause the injury
- 2) Anyone who cannot prove they were not cause loses (All can be liable at once).
- 3) All P has to show is negligence caused injury
- 4) Makes D pay for creating risk of injury
- 5) Making P pay would be unfair
- 6) joint and several liability

B) When many defendants and P cannot show which D exactly produced the results, but all defendants are negligent they all pay a share of damages.

1) example: all manufacturers of a product are negligent because product unsafe. P cannot say which manufacturer produced the one he bought. Therefore all manufacturers pay a percentage of their market share to the P (Hymowitz v. Eli Lilly and Co.) This should be equal to the probable amount of injuries they caused by their product.

2) liability based on overall risk produced, each D produced a risk and they are paying for the overall proportion of risk they created

- 3) would be unfair to have P pay cost of damages
- 4) D can offset damages on buyers.
- 5) Majority says if a manufacturer can prove that P didn't use their product they should still pay
- 6) Dissent says if a manufacturer can prove that P did not use their product then they should not have to pay
- 7) several liability
- 8) Doesn't solve for cause in fact problem, just redistributes it.

C) Joint tortfeasors and different types of liability

- 1) joint and several liability- each person is liable up to the whole amount of damages

2)several liability- each person is liable up to a proportion of the liability, no more or no less then specified by the court. In Hymowitz v. Eli they were liable for only a proportion of their market share.

D)Successive and Independent Defendants

1)Neither act in concert nor concurrently, don't act together nor at same time

a)ex. I injure you and at hospital medical malpractice makes injury worse or gets in car accident on way to hospital

b)D1 liable for everything and D2 liable for aggravation

IV.Toxic Harm

A)Problems of identification- must find out if harm is caused by toxic exposure or everyday living

1)Must ask can this substance cause injury?

2)If Yes then must ask did this substance cause this particular injury

a)leads to proof problems, helps if you can show disease follows a different path or set of symptoms or looks different when caused by this substance

b)If can't show that this substance more likely than not caused harm by proof or by studying rates, D not liable

B)Problems of boundaries- toxic exposure can result in harm to the persons offspring, causing them to suffer genetic damages.

C)Problems of source- usually caused by a collective group of independent actors.

V.Proximate Cause (legal cause)- nearness in space or time, remote and unexpected consequences

A)Tries to limit liability by not making man liable for all the consequences (actual cause) of his acts, even if his actions were negligent.

B)Three types of proximate cause

1)Scope of risk (gaining acceptance)-asks what risks were made by D's conduct and whether one of these risks caused injury. Looks at unreasonable risk created by D

a)not liable to unforeseeable plaintiff

2)Foreseeable Approach; Natural and Probable consequences- liable for those acts which are usual or predictable and likely to occur as a result of D's acts

a)problem is many acts are not very likely to occur but are foreseeable such as throwing a lamp out the window is unlikely to hit someone but it is foreseeable

3)Direct cause- you are liable for unforeseeable harm if you are the direct cause of harm (seldom used)

a) separate proximate cause from actual cause. If your negligence actually caused an unforeseeable act (drop a board which hits a spark and results in fire) then you are liable. If your negligence leads a causal chain which results in unforeseeable harm (oil spill under boat has a piece of cotton on it which catches on fire do to welding causing boat to go on fire) then you are not liable for unexpected harm.

b) If there is a superseding intervening cause, D not liable

c) tested by hindsight

C) General Rules

1) Different type: If P's injury is truly beyond the type of harm to be expected from D's conduct, no liability

2) Unexpected extent: Where particular type of injury is foreseeable, D is liable for injury sustained, even though it is more serious than might have been anticipated

a) thin skull argument- take victim as you find them

3) Foreseeable injury in an unforeseeable manner- need not predict or foresee exact manner in which injury occurs as long as you can foresee injury occurring.

a) problem is deciding if injury resulted from an unforeseeable consequence (injury) or an unforeseeable manner

4) extent of harm is different than what might have foreseen you are liable

5) addition of harm by third party D is liable

6) same result different manner still liable but if different type of harm (result) not liable

7) unexpected harm to unexpected victim not liable

D) Indirect Cause cases- force came into motion after D's negligence and combined with negligence to cause injury; intervening force; if neither intervening cause nor harm foreseeable, intervention will supersede and cut off proximate cause

1) If third party innocent or negligent then they are not a superseding cause

2) If third party is grossly negligent or reckless they are superseding cause unless they are the type of harm you are trying to protect against (RR conductor dropped girl off far from stop and she got raped)

3) D liable for foreseeable harm from a foreseeable intervening force

a) Dependent intervening forces: normal responses or reactions to D's negligence (always foreseeable)

1) subsequent medical malpractice when treating injury caused by D

2) Negligence of rescuers, danger invites rescue and D liable for injury to rescuer as well

3) disease caused by weakened condition of P as a result of injury

b)Independent Intervening Forces-nonnatural reactions or responses which are foreseeable if D's negligence increased risk of them causing harm

1)Negligent acts of third parties-D is liable where such negligence was a foreseeable risk created by D's negligence

2)D's would be liable if his negligence created a foreseeable risk that a third party will commit a crime or an intentional tort

3)D is liable for foreseeable injuries that result from acts of god

a)D leaves hammer on roof and it blows off by big wind hitting P

4)Foreseeable results caused by unforeseeable intervening forces; D usually liable

a)greater weight to foreseeability of result than unforeseeable cause

1)ex. D left gasoline in cannister and bolt of lightning blew it up.

Foreseeable harm not foreseeable source D still liable

b)exception is unforeseeable crime or intentional tort of third party or gross negligence; D not liable

c)rationale: D exposed P to unreasonable risk and foreseeable harm it would be unjust to let D off just because they could not foresee exact cause of harm

5)Unforeseeable Result caused by Foreseeable Intervening Force- D not liable

a)Rationale: not fair to hold D liable for harm not in original risk of his negligence

6)Unforeseeable Result Caused by Unforeseeable intervening forces-D not liable

a)breaks causal chain

7)D is liable for any further injuries resulting from normal efforts of a third party rendering aid which other's injuries reasonably requires irrespective of whether the aid is done proper or negligently.

a)For instance, if you injure someone, and on the way to the hospital the ambulance driver suffers a heart attack causing ambulance to hit a tree and P suffers more injuries, you are liable for those extra injuries. Same if negligent on coming driver hits ambulance.

b)If P goes to doctor by taxi because of his injury and taxi gets into accident, no recovery because not normal 3rd person giving aid.

8)Second Restatement of Torts- when an actors conduct is a legal form and is substantial factor bringing out the harm, but for case and is proximate cause

a)Only substantial factors are liable under Restatement

C)Pre-existing conditions

1) If defendant's conduct sped up pre-existing condition (Precipitating it), D is liable if negligent

2) If condition already there and D's negligence made it worse, allowed to recover

3) The fact that P already had condition or was likely to have injury and D only made it worse is a factor when awarding damages. This limits recovery.

4) This is a but for case, but for D's conduct would the injury be at the stage it is now?
NO

5) Courts say you can allow P to recover even though this harm is unexpected, you take the victim as you find him, Once act is negligent the fact that consequences were immaterial is irrelevant.

a) The thin skull theory, If P has a thin skull, and your negligence causes him to land on his head resulting in an injury that most other people would receive, you are still liable.

D) When not liable for unforeseeable damages

1) If negligence causes small and trivial damage which results in large unforeseeable damage, not liable. One should only be liable for probable consequences of his act not the improbable ones as well (Changes liable for all results of his act doctrine)

2) Must limit liable otherwise man can be liable for anything

3) Does not alter principle of take the victim as you find him. Still liable for unforeseeable consequences of your acts which directly cause substantial harm to victim since they are of a certain nature

E) Unexpected Victim- Palsgraf

1) Must be a duty to P; wrong must occur to P to cause injury and not just a social wrong

2) If not in zone of danger then P cannot recover. Even if act is negligent to someone

3) Dissent says if D is a proximate cause of injury regardless if victim is unexpected or injury unforeseeable, then D is liable. We owe a duty to society at large

4) Danger invites rescue and family member who is close to victim and helps rescue is able to recover for liability. Person must be in reasonable apprehension to accident which needs rescue.

a) Rescue is at peril of rescuer unless it is immediate and spontaneous

b) if time to deliberate, no recovery allowed

5) Time and distance between action and resulting injury (hit a circuit high causes traffic light probable miles away) is of essence between act and harm to an unexpected victim.

G) Duty v Proximate Cause

1) duty describes a whole class of cases (ex. no liability to trespassers); proximate cause is a case by case analysis looking at particular facts, plaintiff, policy and zone of danger

2) In both defendant must make argument either I owed no duty or my act was not a proximate cause, although a cause in fact, of your injury

Defenses: Plaintiff's Fault

A. Contributory Negligence (used in very few states)

1) You have a duty to protect yourself, contributory negligence has same general reasonable person standard

2) If Plaintiff's negligence contributed at all to causing the accident, P cannot recover,

3) Last clear chance rule: if P negligent first and D had last clear chance to avoid accident, P can still recover but P negligent second and D negligent first they cannot recover because P could have avoided accident.

a) Rationale for rule,

1) D could have avoided accident if he was more careful

2) If P used ordinary care accident wouldn't have happened

so P's injury was his own fault

b) Rationale not good because it implies P was own cause of accident, gets rid of multiple causation

4) Plaintiff's negligence must also be a proximate cause of the harm

a) if you follow too close to the car in front of you and you would not have been able to stop if following at a reasonably safe distance, no contributory negligence because not actual cause.

4) burden on plaintiff to prove not contributorily negligent

5) Courts thought if people are barred from recovery of injuries if they are negligent themselves, they will act more careful

6) Exceptions to contributory negligence;

a) If defendant reckless then contributory negligence does not apply

b) Last clear chance- P and D negligent but D has last clear chance to avoid accident contributory negligence not at bar, D can have avoided accident if careful

1) Last clear chance chart

			Plaintiff
	helpless P couldn't avoid		not looking (inattentive) but could have known danger and avoided it
D	Knows	recover	most
	Should know	many	only Missouri (probably wrong)

- 2)ex. P trips and falls in street, D sees and has time to swerve or stop
- 7)Capacity-based standard- P not held to reasonable standard based on their mental capacity. If P mentally disabled, held to standard of a mentally disabled person for contributory negligence. This is established in statute
- 8)Imputed Contributory negligence-recovery barred to P who is in special relationship with one of the negligent parties
- a)child-parent, master-servant, husband-wife, automobile owner-driver
 - b)Courts charge P with person's negligence through vicarious liability

B. Comparative Negligence

- 1)represents dissatisfaction with all or nothing recovery of contributory negligence
- 2)1975 Legislation adopted Comparative Negligence Rule
- 3)Liable for a percentage of the recovery depending percentage you were negligent some states look at negligence and causation together
- 4)Types of comparative negligence:
 - a)modified comparative- recover percentage if P's negligence is not as great or no greater than D's negligence, ridiculed when P 51% liable and cannot recover (most states use these forms)
 - 1)ex. P suffers \$100,000 of damage If P 20% at fault and D 80% then P gets \$80,000. If P 50% and D 50% P gets \$50,000 or nothing depending on if its no greater than or not as great standard (respectively). If P 60% and D 40% P gets nothing.
 - 2)Most jurisdictions will allow P to recover if 40% at fault D1 30% and D2 30% because D's are 60% at fault, some states will compare P's fault to each individual D and P would lose
 - b)Pure form- P recovers percentage of negligence regardless, not liked because person can recover when they are overwhelming cause of his own misfortune
 - 1)Ex. P suffers \$100,000 of damages and 80% negligent recovers \$20,000
 - 2)P suffers \$100,000 of damages and is ^{guilt} 40% at fault while A is 30%, B is 10% and C is 20%. P recovers \$60,000 from whomever he chooses If P recovers all from A then A can recover \$20,000 from C and \$10,000 from B. If C insolvent, A recovers \$50,000 because you offset C's 20%
- 5)When another party settles out of court
 - a)If one party settles out of court it doesn't affect the liability of any other party.

1)Ex. B 80% at fault C 20% A's damage \$50,000 B settles for \$10,000, C can still only be liable for \$40,000.

6)Doesn't change joint and severally liable. P can still recover all damages from one D, but under comparative negligence, that D can get contribution from other D's for their percentage of fault

7)Last clear chance is not a defense

8)assumption of risk makes P liable for their fault

9)Pro tanto award- other D is liable, pay remainder of damages after settlement, regardless of apportionment of fault by trial. Other D cannot recover from settling D (would discourage parties from settling)

a)positives- encourages people to settle and discourages excess litigation

b)negatives- D can be liable for more than his fault and person who settles first benefits from rule

10)Equitable Share- Always pay your share regardless of settlement. Even if P will recover more because one D settled for more than their share

a)problem is P can be overcompensated or under compensated

b)some states such as N.Y. will make P's recovery reduced by equitable share or pro tanto, therefore making P recover only up to 100% of their damages.

1)positives, want to encourage settlement and P not recover more than 100%

2)If P makes bad settlement, they will recover less than 100%

3)ex. A, B and C are each 33.3% at fault. A settles for \$20,000 of the \$100,000. 33.3% is subtracted and B and C is only liable for 66.6% combined. But if A settles for \$40,000 than subtract the money and B and C liable for only \$60,000

11)Uniform act is no joint and severally liable.

C.Avoidable consequences- you were warned to take certain measures and you didn't therefore making your damages more

1)Ex. If P wore his seatbelt, damage would only be \$20,000, but since he did not damage is \$100,000.

2)In such a case, damages is reduced even if accident is solely D's fault.

3)Usually involves failing to get medical advice.

D.Assumption of Risk-No defense to intentional torts but is a defense to reckless conduct and strict liability

1) Basic Doctrine: P who is aware of risk, and knowingly decides to encounter it, voluntarily accepts liability for the consequences of that decision, and may not hold a D who created the risk liable for the resulting injuries

a) if P should have known of danger but didn't no assumption of risk

2) Express Agreement- parties agree in advance that D not liable for resulting injuries to P, in some type of contract. Even if D is negligent not liable

a) terms must be clear (unambiguous and specify particular risks not just all injury), fairly entered into (not by force and P must have meaningful alternative eg. unsanitary living conditions or medical negligence), not against public policy to be a release from liability, and injury must be caused by risk P had in mind (thought of) when signing contract

b) ex. if society expects product or land to be safe and D is negligent in its duty, then it is against public policy and D liable even though there is the agreement

1) this is because it will deter people from doing ordinary activities if they know they cannot recover

c) gross negligence or recklessness usually supersedes such agreement and makes D liable

2) Implied Assumption of Risk- no expressed language or agreement MARTIN SAYS ARGUE D NOT NEGLIGENT BECAUSE P ACTED REASONABLY AND P KNEW RISK (FLOOPER) OR P ACTED UNREASONABLY AND KNEW RISK (GONZALEZ) BUT D NOT NEGLIGENT

a) If P has a chance to see and evaluate risk, and partakes in activity (sport) even after they see dangers, they assume risk. P must see and know what risks are.

1) conduct cannot be conducted without certain unavoidable risks of injury even if conducted with due care

2) P chooses to encounter known risk, knowledge may be implied where the risk is one that an average person would appreciate

3) P assumes risk even if he reasonably assumed the risk

b) must not be very dangerous and unreasonable risk created or else, no assumption of risk

c) if dangers obscure, unobserved, serious enough to justify adequate protection then no assumption of risk

d) if injury happened due to unforeseen risk or sport operating incorrectly, no assumption of risk

e) if injury happens due to risks that are not inherent in activity and caused by D's negligence, D is liable.

f) No comparative negligence for assumption of risk

g) No liability if participant of sport did not follow rules and injured another unless, they did it intentionally

h) spectator sports (professional baseball), the spectator assumes risk for any injury if stadium provides protection required by statute.

i) If P had reasonably safe alternatives, and by free choice took unreasonable, unsafe alternative, P contributorily negligent and assumed risk. Defense merges into comparative negligence and recovery not barred

j) firefighters and police officers cannot recover from a person negligently maintaining property if they get injured in line of duty (but if walking on patrol, they can recover) Their actions must increase risk of injury MARTIN SAYS NO DUTY BECAUSE THEIR FIREFIGHTERS AND IT'S LIKE PAYING TWICE.

1) by accepting job they assume risk of injuries resulting from work.

2) their job increases risk of injury happening

3) taxpayers pay for them to assume risk; shouldn't have to pay again for injury

4) also might deter people from calling for help if they can recover

h) If D is negligent and P after becoming aware of risk continues to encounter it, P assumes risk and D not liable for resulting injuries except P can recover for comparative negligence in some states

1) ex. D waxes floor during business hours and P sees it is wet but still decides to walk on it, D not liable. If P did not see floor wet, D liable

PRACTICAL LIST TO USE ASSUMPTION OF RISK

1. PLEADING AND PROOF- BURDEN OF PROVING ASSUMPTION OF RISK ON D SO FROM D'S VIEW BETTER TO ARGUE NO NEGLIGENCE BECAUSE P HAS TO PROVE NEGLIGENCE

2. DUTY IS QUESTION FOR COURT ASSUMPTION OF RISK QUESTION FOR JURY: ASK WHO IS LIKELY TO FIND FOR D

3. WHEN D SAYS ASSUMPTION OF RISK P CAN'T SAY LAST CLEAR CHANCE.

4. ASSUMPTION OF RISK YOU CAN BAR RECOVERY THROUGH CONTRIBUTORY NEGLIGENCE.

5. WHEN D ACTED INTENTIONALLY OR RECKLESSLY CAN USE ASSUMPTION OF RISK AS A DEFENSE AND BAR RECOVERY

Strict Liability -Can try to say res ipsa loquitur

This is a form of liability without fault. You performed the act, therefore you are liable even if there is no negligence and you took adequate precautions. Strict liability is based on policy choice. Must show;

- 1)breach of that duty; duty usually owed to foreseeable P's not one extremely far away or remote
- 2)actual and proximate cause
- 3)Damage

I. Doctrinal Development

A. Person who brings or keeps something on his land for his own purpose which is likely to cause damage if it escapes, and it escapes causing damage to another or another's land, they are strictly liable for all damages that occur as a natural consequence of the escape. Even if no fault to P. Applies only to nonnatural (unusual) and abnormally dangerous activities.

1)ex. if you blast a tree and it flies onto your neighbors property you are liable

2)reason for strict liability is: you are in a better situation to control what you brought on your land, you can prepare for damage better, you know when damage could occur, and people have a right to have their property protected from others intrusions.

3)could also apply but for P bringing on land no damage would have occurred

4)public policy says safety of one's property is more important than the right for one to use their property

5)Restatement of Torts looks to see if activity is uncommon, inappropriate do to the location, utility to community, level of harm, can harm be prevented by utmost care and likelihood of harm. Is a P>LB formula

a) all are not needed for strict liability but unusual risk and uncommon use of property usually are needed.

b)court also looks to see if risk is reciprocal. Driving is a risk which is reciprocal in that many people take it but blasting buildings is not reciprocal

c)even if activity is conducted in an appropriate locale, it doesn't mean the person will not be strictly liable

6)D reasons against strict liability: it occurred do to a natural occurrence, I was not negligent. But if you bring something on land which benefit is not great and risk large, and cannot be controlled then you are liable for escape.

7)courts sometimes make a distinction saying, if you set force in motion (your blasting) then strict liability standard but, if forced escaped (ex. boiler escaped) you did not set force in motion and you are only liable if negligent except if force that escaped was dangerous and risky to keep on your property. Other courts say any abnormally dangerous activity and still other courts say ultrahazardous activities

8) Reason for strict liability used to encourage safer alternatives to the one being used, or take all the necessary precautions, or to not perform activity

9) Other arguments, did you use your land in a natural way or bring something on your land

II. Theoretical Perspectives- when to use strict liability

A. Moral Theory- you caused accident you should pay, Plus you imposed risk on someone who didn't place a risk upon you

B. Economic Theory- spreading cost of risk on another, one is better to insure against risk, better to make responsible enterprises then leave burden on victim

C. Deterrence theory- Who has a better chance to see risk and use other alternatives.

D. Impossible to eliminate risk by utmost care

E. Conclusive presumption of negligence

F. Nonnatural uses of land

G. Nonreciprocal Risks

H. Setting force in motion

I. Property rights

Advantages to using strict liability

A. encourage actor to reduce accident by taking extra precautions

B. Threat of liability will encourage actors to forgo risky activities

C. Place loss on party most easily to spread cost

D. Manufacturer knows how much to insure

E. Avoid excess litigation people willing to settle

III. Defenses to strict liability

A. Contributory negligence is no defense if P did not know of danger but if P knew of danger it is a defense (acting as an assumption of risk)

B. Assumption of risk is a defense

C. Comparative negligence is a defense and will reduce recovery but many courts won't do this because they don't want to compare strict liability to negligence

D. Only liable for risks that made activity abnormally dangerous. ex. Not strictly liable if D's truck carrying dangerous explosive gas and truck gets flat hitting into pedestrian if truck does not explode but just causes broken leg

E. D can escape strict liability if an unforeseeable intervening cause existed but Restatement rejects this view

Product Liability

Strict liability. This is because with today's technology, the ordinary consumer does not know enough to prove negligence. Therefore, the manufacturer has to show that the injury was not their fault.

I. Introduction

A. Manufacturers owe a duty to those people who do and do not buy product directly from them

1) manufacturer has a duty to make products safe; according to Restatement a defective product is one which is unreasonably dangerous to user

2) don't need privity relationship

a) we don't expect middle man to inspect product

b) expect product hasn't been modified before consumer buys it

c) if no liability, manufacturers would always sell to middle men to pass on to consumer and can thus make product defective.

d) want to protect life and limb so look to see if product is inherently dangerous

3) If manufacturer makes an expressed statement about quality of product and P relies on that statement, D liable for injury if not that quality.

4) P doesn't have to show D's negligence, just that product didn't perform up to societies expectations. Called implied warranty

a) court believes accident wouldn't have occurred if made properly

b) Second Restatement says; knowing what you know now, would you have sold this product, it looks at liability from hindsight.

5) manufacturer can anticipate accident and insure against it or pass on to consumer, victims cannot and thus are burdened

a) if victim does not compensate from manufacturer, his insurance will pick it up and then loss will be spread to people who don't use product

b) if manufacturer has to pay for injury to victim, they will spread loss to only those people who use the product

6) If manufacturer sells to a retailer, and retailer fails to inspect, manufacturer liable to consumer for product defect

a) if retailer inspects product and finds defect but fails to warn consumer, breaks causal chain of manufacturers liability

B. Two defenses to product liability cases

1) injury is P's fault

2) liability preempted

II. Manufacturing Defects (individual deviates from line)

A. Liable, even if no fault to their own, for failing to discover defect; strict liability

1) use *res ipsa loquitur*, product deviated from line must be negligence

2) manufacturer better able to spread costs

3) manufacturer knows product and better able to inspect and understand product

4) no privity relationship

5) use better investigation and better alternatives but D will say how much money am I supposed to spend on research and testing every product when defect doesn't show up.

6) If third party inspected product and saw defect but still used product, cannot recover

7) *ex post*- look from hindsight

III. Design Defects (whole design is defective)

Defect can be a cause in fact of injury since resulted from conditions use of product

A. Courts say P can show design defect by:

1) Consumer expectations (strict liability) First step, courts will try to look at consumer expectations

a) consumers have minimum reasonable expectations of products

b) must adhere to ordinary knowledge, infer from knowledge of product

c) cannot be used if expert testimony is needed to increase knowledge of product

d) can use for complex product if design defect is obvious (ex car blows up when standing still)

e) product has to be used in its ordinary or foreseeable manner

f) cannot be used third party uses object, rationale: you didn't buy it

g) some courts will dismiss this test altogether (no matter what)

2) Risk Utility Standard (Excessive preventable danger)- used when people don't have expectations about products safety

a) Ortho Test; risk utility factors

1) usefulness of product

2) safety aspects of product

3) availability of substitute product to meet the need and not be as unsafe

4) manufacturer's ability to eliminate unsafe characteristics of product without impairing usefulness or making it too expensive

5) Plaintiff careless, ability to avoid danger

6) users anticipated awareness of inherent dangers of products

7) feasibility of spreading costs

b) do benefits outweigh design; talks about cost, risk and benefits

c) used when consumer expectation not used

d) ex post facto v. ex ante facto

1) ex post facto approaches after accident, doesn't focus on D's conduct just conduct of product; knowing what we know now would should manufacturer have known about risk (strict liability) P wants

2) ex ante facto looking at what manufacturer knew at time they distributed product (negligence) D wants

a. D will try to say didn't know defect at time

b. P will say D should have known or other manufacturers

knew

f) burden on D

3) crashworthiness argument, lack of safety features

a) gets past proximate cause

b) when accidents are foreseeable, failure to provide safety devices to reduce severity of accident breeds liability. accidents are foreseeable and D should be liable because they can foresee injury

c) liable even if design defect didn't cause accident only made injury more severe

d) the fact that the dangers are open and obvious isn't an automatic defense to bar liability

1) assumption of risk is only a defense to strict liability only when P has active and subjective knowledge of risk and uses it unreasonably. (not unreasonable standard)

a) plaintiff has to ask about specific safety advice and say that he knows that it is needed to protect

b) active and subjective knowledge cannot be inferred

2) dissent says injured party knew of dangers and had choice to buy product or not

e) defenses for lack of safety feature

1) competitive products also lack safety feature (not great defense)

2) feature is unduly expensive

3) safety feature would prevent product from being used for its intended

use

4) product modified by user or third person

a) safety features removed, manufacturer not liable even if foreseeable that safety feature would be removed

b) as long as injury would not have resulted if product not modified, no liability, but if injury would have happened if not modified, liability

c) some courts say manufacturer cannot escape liability if they know product is being modified and/or modification is foreseeable

5) Restatement

a) Second Restatement is strict liability and ex post facto

b) Third Restatement does not use consumer expectations only risk utility, ex ante analysis and once you prove product negligently made all people involved are strictly liable (manufacturer and middleman)

6) arguments for strict liability

a) manufacturer can insure against damage

b) will deter defects and make manufacturers pay more money for safety and researching safety or putting out defective products

c) no reciprocal risk

d) avoids excessive litigation by not involving middleman in suits

e) manufacturer can always spread costs by raising prices

7) arguments for negligence

a) manufacturers don't always know or cannot always find out danger

b) encourage growth of business and industry

c) product might be a high utility product and you discourage it from being produced

IV. Instructions and Warnings

A. Two types of questions

1) does warning reduce risk

2) will warning let consumer know there is a risk

B. Two types of cases

1) We know what risk is

2) We find out about risk later

C. Two kinds of warning:

1) adequate warning to make product safer (keep away from young children)

2) identify warning (drugs) inherent risk and no warning will make product safer but prevent people from using it unintended manner, main question is value of product to society

D. Adequate warning- words that reduce risk

1) adequate efforts must be made to communicate warning

2) a reasonable person must be able to understand

1) way warning reasonable
2) could accident have been avoided with different warning

- a)not decided by P's intelligence and experiences
- 3)must decide if warn about any known or foreseeable risks
 - a)problem is listing all risks might make them seem less dangerous because there are so many risks or people will not read warning because it's too long
- 4)question is who do you address warning to, can be a defense
 - a)learned intermediary policy
 - 1)give warning to a knowledgeable intermediary who will pass warning on to ultimate consumer
 - 2)prescription drugs give warning doctor because they will pass it on to patient and he is in better position to tell patient of risks and important warnings.
 - 3)exceptions are vaccines and statutory exceptions, and physician unlikely to make an individualized recommendation and contraceptives

E. Warnings of intrinsic risk- judge believes that drug is unavoidably dangerous

- 1)Some products cannot eliminate all risks but still on market because benefit is so great to society
- 2)No strict liability in intrinsically risky drugs because it will discourage manufacturers from producing them or price will be too high.
 - a)could only be liable if they knew about danger beforehand or should have known
 - b)negligence standard except when social value of product not high
 - c)when properly used and has proper warning they are not dangerous
 - d)argument for strict liability cost spreading, accident avoidance (spend more time and money on research)

V. Beyond Products

A. Doctor can not be liable for strict liability for defective service rendered (applies to most professional services)

- 1)if you have problem and go to doctor to get it fixed, not liable if they were not negligent in performing service and you still had problem
- 2)by imposing strict liability you would set level of professional service too high, they must cure all the time
- 3)would make price for medical service too high
- 4)medicine is experimental in nature and depends on many factors so it could not work
- 5)increased courts would hamper advancement in profession
- 6)many professional services cannot assure results

VI. Defenses to product liability

A. Plaintiff's fault

- 1) Contributory negligence does not bar recovery if P did not know risk, but if P assumed risk no recovery
- 2) comparative negligence reduces recovery
 - a) problem arises in deciding who is at fault for what percent, the court should do this not the jury
- 3) assumption of risk bars recovery
- 4) Dissent believes that products are dangerous weapons and manufacturer should be liable for full amount regardless

B. Preemption

- 1) Govt. agencies and legislation which sets rules, can sue manufacturer for violation of those rules and this preempts (bars) suit by individuals in state law claims
 - a) relief must be different from or in addition to federal law claim
 - b) must read intent of statute to decide if claim is preempted
 - c) reason for preemption
 - 1) allows uniform results in that otherwise some states will say liable while others won't
 - 2) Govt. agency will win damages and can pass them on to consumer
 - 3) Allowing state law claim will disturb balance between protecting public and regulating industry
 - d) reasons against preemption
 - 1) sometimes consumer doesn't get compensated
- C. Defective product was not proximate cause a proximate cause of my injuries
- D. Plaintiff misused product
- E. State of art techniques, not dispositive but said D acted reasonably
- F. Inherently dangerous product but utility high
- G. Purley economic harm

VII. The Intersection Of Tort and the Uniform Commercial Code

A. A product cannot injure itself and therefore damages to the product alone are not tort cases but contract cases.

- 1) loss must be purely economic and not to person or other property
- 2) Tort concerned with safety, this would be a breach of warranty
- 3) Losses can be insured and you can bargain price to adjust for loss and warranty

B. If a seller misrepresents the quality of a product, he is liable for harm as a result of that misrepresentation, if person relied on misrepresentation.

Trespass and Nuisance

I. Introduction

A. Trespass and Nuisance are related in that they both deal with use and enjoyment of land

B. Trespass v Nuisance

- 1) Trespass is an interference with exclusive possessory interest and a one shot deal, it is a direct deposit on land
- 2) Nuisance is an interference with possessors use and enjoyment of ones land and continuous
- 3) A trespass can be a nuisance because invisible particles which do not harm can constitute a trespass

II. Trespass

A. Trespass has to be a physical intrusion on another's land

- 1) Want to protect owners interest in their property and right to have undisturbed ownership
- 2) common law says you are strictly liable even if no harm occurs if you intend to enter land

B. Restatement of torts says unintended intrusions- those resulting from reckless or negligent conduct or from abnormally dangerous activities will only be subject to liability if it causes actual harm

C. Restatement says one is liable for intentional trespass regardless if it causes harm or not

- 1) intent refers to intent to enter the land not intent to invade anothers interest in exclusive possession of property

D. Size of material invading property doesn't matter, can be invisible because in today's society we know the dangers of invisible particles

- 1) Focuses on energy and force of intrusion not size

III. Nuisance

A. Public Nuisance

- 1) an unreasonable interference with a right common to the general public
- 2) includes public safety, health, peace, comfort or convenience
- 3) either is conduct written in a statute or conduct which has a known long lasting effect
- 4) individual citizens must sue, not public officials

B. Private Nuisance

- 1) invades private use and enjoyment of ones land
- 2) invasion is either unreasonable and intentional or unintentional and arising out of negligent or reckless conduct or abnormally dangerous activities or conditions, injury must be related to use and enjoyment of land

3) weighs factors of social value of use and enjoyment of land, burden of injured party avoiding harm and whether gravity of harm outweighs conduct

4) When deciding about injunction look at effect of injunction on society and party that is harming another

a) if effect is big such as shutting down a co. then will award damages for past and prognosis of future harm

b) dissent says, should allow permanent injunction if intrusion is serious, you are telling companies they can pollute if they pay a small fee

c) majority says public policy should set regulations not court

5) If harm not identifiable from an identifiable source, no action many plants in area polluting air no identifiable source)

Damages and Insurance

I. Damages Introduction

A) Jury decides damages. Sometimes it is decided in same trial as liability, but lately it is decided in a separate trial.

B) Fundamental aspect of damages is to return P whole to position they were before accident.

C) You can only be awarded damages once, they make predictions about future expenses due to injury

1) this prevents victims from consciously slowing down injury and incurring more expenses to receive more damages

2) also limits D's time in court

II. Compensatory Damages

A. Includes medical expenses, pain and suffering and lost wages

1) medical expenses (pecuniary losses) shown by past bills and expert testimony (usually own doctor) telling future medical problems and its expense

2) pain and suffering (Non pecuniary losses) could be a multiple of medical expenses or medical expenses and lost wages.

a) decided by jury, if seems excessive by trial judge they can reduce if P agrees or grant new trial

1) P usually agrees to reduction because of risk of getting substantially lower

b) if appealed to higher court, they can only reduce if they find it shocking at first glance, this is because they do not have benefit of hearing evidence and seeing whose side is more believable.

c) dissent believes that on appeal, damages should be viewed against similar cases and if a lot higher, reduce them

d) based on the individual since each individual has a different threshold for pain.

e) loss of enjoyment of life is part of pain and suffering

1) no recovery if person in comatose state because they don't know what they are missing, also P won't be able to enjoy damages. Therefore money cannot compensate and compensation is the purpose of tort damages

2) making it a separate category from pain and suffering could allow double recovery

3) dissent allows recovery even if in comatose state because family can get money and victim should be made completely whole

3) Lost wages proven by

a) normal earning power- derived from P's earning history

1) problems arise in self-employed people, people who have not worked yet (children), housewives, unemployed, people who voluntarily choose not to work

b) work life expectancy and work advancement

1) problem with modification for taxes, usually left up to judge, sometimes not taxed at all

c) once lost wages proven, the court discounts it to present value since future value would be overcompensation due to inflation and other things

4) For loss of child take into account services child might have taken in future to help parents, subtract money for food, clothes, shelter and education and then add for loss of companionship, guidance, advice, counsel and pleasures from child

5) collateral source rule- Even if P gets gratuitous services from another (mother nurses him to health), they can still collect damages for what that service would cost.

a) courts want to compensate P for full loss, this includes free services

b) it's unfair to say if services are free your injury is worth less

c) doing otherwise would hurt the poor who cannot afford to pay for help

d) dissent says, P did not incur any out-of-pocket expenses, it is like a reward for being injured

6) When D negligently injured and then dies gets back compensatory damages for injury before death as well as damages for death.

III. Punitive Damages

A) Damages which do not seek to compensate

1) Used to punish D or make an example of D so that others will avoid this very serious kind of misconduct (deterrence)

a) Punitive damages not picked up by insurance while compensatory damages sometimes are, therefore, it comes directly from D's pocket and deters when compensatory damages might not

b) Punitive damages helps pay lawyer because otherwise, compensatory damages don't make P whole since part of it goes to lawyer

2) Up to jury to decide whether to award or not; not all states have it

3) Usually awarded for intentional conduct but this is expanding

a) some courts allow recovery for malice disregard for life (ex. product defect or known serious danger and take it anyway)

4) Dissent says this could lead to unjust enrichment since P already compensated by compensatory damages, also D's conduct could be doubled punished in that he will be subject to criminal sanctions, finally if there are punitive damages insurance company might not pick up any damages (including compensatory) making P get nothing or less (depends on insurance contract)

5) Punitive damages awarded in product liability cases if ; a) manufacturer aware of or culpably indifferent to unnecessary risk of injury and b) refuses to take steps to reduce danger to acceptable level

a) compensatory damages not enough because they are predictable and companies factor them in to the price of the product and these manufacturers would be held to same liability as those who aren't aware of dangers

b) punitive damages makes company weigh costs and benefits since they are large and unforeseeable

c) problems arise in change of times about seriousness of danger as discover harm years later, first people awarded punitive damages might eat up funds and cause company to go bankrupt before they can pay for later suits compensatory damages, awarding punitive damages to multiple P's keeps on punishing manufacturer for same act adding up to excessive punishment, if long time elapses might not be punishing those who made decision since they retired

IV. Insurance

A) Three types of insurance

1) Life

a) term insurance- for a specific time, usually a year protects financial burden of immediate death

b) whole life insurance- security payment plan

2) First Party Insurance- bands together to spread risk of loss of property to yourself

a) includes fire, medical and disability insurance

- 3) Third Party insurance- claimant insured not the person who pays bill
 - a) medical malpractice, auto, pollution and product liability insurance

B) Loss Insurance, Collateral Sources and Subrogation

- 1) Traditional rule- P gets to keep both collateral source money (1st party insurance) and money from tort recovery
 - a) D complains about double recovery
 - b) court says its ok because its like winning the lottery and some of tort recovery goes to paying attorney

- 2) Another option is, when P recovers from collateral source, subtract that from amount D has to pay P

- a) helps D but does not act as a deterrent or a punishment

- 3) Majority rule is subrogation which allows collateral to recover money they paid out in damages from tortfeasor.

- a) prevents double recovery and punishes D
- b) if insured settles out of court, collateral source can still go on with suit
- c) if subrogation right is not in contract, injured receives all from tortfeasor and insurance company cannot recover anything (happens in medical expenses not property because in property it could lead to double recovery in medical it usually won't lead to double recovery)

- 1) concur says because ordinary people do not have right of subrogation and insurance companies do so they can bargain for it

- d) leads to problems because who controls litigation, victim or insurance company, especially when victim wants nonpecuniary damages

B) Liability insurance

- 1) insurer liable to pay up to policy limits regardless if insured can pay that amount or not
 - a) guarantees some compensation

C) Impact of Insurance on Tort litigation

- 1) impact on substantive rulings

- a) courts like to lay loss on those who can insure against loss

- 1) person liable for his own fire damage to his own property but limit liability if it spreads to other peoples property because they can insure for loss when he can't

- b) suing the insurer

- 1) liability insurers sometimes fail to settle claim when it can be settled under limit. This can lead insurance co. to be liable for bad faith since they could have settled but now case went to court where insured has to pay damages over claim amount

- 2) Must show a disregard of insured's interest by insurer to make insurance company pay full damages, in not, tortfeasor pays damages above policy limit.

a) insurance company had opportunity to settle claim and all serious doubts about insured's liability were removed

Intentional Torts

I. Intentional Torts Introduction

- 1) Contributory negligence is no defense in intentional torts
- 2) Punitive damages is available both
- 3) Proximate cause is applied less strictly in intentional torts
- 4) all P has to do is show an invasion of a protected interest and that invasion is intentional, if A intended to cause harm to B but mistakenly causes harm to C liable to C for intentional tort through transferred intent
- 5) Defenses
 - a) consent
 - b) self-defense
 - c) necessity
 - d) defense of property
- 6) Basic intentional torts are; battery, assault, false imprisonment, intentional infliction of emotional distress and invasion of land

II. Basics

A. Intent

- 1) must be intentional infliction of injury or knowledge that injury will occur with substantial
 - a) age of actor not a factor except for determining the knowledge they may possess at that age, which is determined by experience, capacity and understanding as well (objective standard)
- 2) Damage done by intentional torts need not be foreseeable to be liable
 - a) emphasis on compensating victim not protecting wrongdoer, therefore, if person would not be liable if the act was not intentional, they can still be liable since it is intentional

III. Assault and Battery

A) Assault is different from battery in that:

- 1) assault is threat of contact that place individual in reasonable apprehension of bodily harm, need not have contact with person, words are not sufficient, act must be offensive or harmful, words and an act can be assault such as I'm going to knock you out and then putting up your fists
 - a) threat of future harm is not sufficient since it is a threat of imminent bodily danger
- 2) battery needs actual harm to be caused

B) For battery, need not have physical contact with person if you have physical contact with an