

I. INTENTIONAL TORTS

+ Five Trespassory Torts

1. Battery
2. Assault
3. False Imprisonment
4. Trespass to Land
5. Conversion of Chattel

A. BATTERY

- a. A battery is an intentional act that causes a harmful or offensive contact with the P or with something closely connected
- b. Elements of battery
 1. Volitional act
 2. Intent with purpose or knowledge of substantial certainty that contact would cause harm or offense
 3. Harmful/offensive contact occurs. This extends to the sphere of personal autonomy
 - Harmful/offensive conduct element is satisfied if the contact would inflict pain or impairment of any body function, or if a reasonable person would regard it as offensive.
 - P does not need to be aware of conduct. Ex: R intentionally spits on B while B is sleeping. Several weeks later, B learns of R's act. R is liable for battery.
- c. Single/Dual Intent Jurisdictions
 1. Single Intent: Intent to contact
 2. Dual Intent: (a) Intent to contact, (b) Purpose w/ substantial certainty that contact would be harmful/offensive contact
- d. Issues with Battery
 - To be liable for battery, a person must both intend to cause and actually cause a harmful or offensive contact, defined as contact offending a reasonable sense of personal dignity.
 - **Snyder v. Turk**—Assault requires mental/emotional damage and when person acts with intent to make harmful or assaultive contact. The D's acts of threatening, encircling, motioning towards weapons constitutes assault. Assault requires that a person acts while intending a harmful or offensive contact with another or acts while intending to produce a reasonable apprehension of an imminent battery, causing mental or emotional damages.
 - Offensive touch occurs if actor knew of a person's susceptibility to the touching, even if touching would not reasonably be offensive to average person. **Cohen v. Smith**.
 - Issue: Is an offensive touch committed if D touches a person in a way not offensive to a reasonable person, but after the person has informed the D of an unusual susceptibility to the touching?
 - Held: A patient has every right to determine the extent of his or her own medical treatment, and an action by a doctor without the patient's consent may result in liability. An offensive touching can occur if an actor has knowledge of victim's sensitivity and proceeds with contact

- Child can be held liable if they possess consciousness and awareness. A minor may be held liable for the tort of battery if she acted intentionally, with knowledge to a substantial certainty that her actions would cause a harmful or offensive contact to another person. *Garratt v. Dailey*.
- In a dual intent J, a tortfeasor must both intentionally contact another person and intend that the contact be harmful or offensive to be liable for battery. It may be difficult for a jury to establish the mental state of a potential tortfeasor with certainty, but the fact finder may use circumstantial evidence to determine the actor's probable intentions. In the case at hand, the jury had to evaluate whether Everly understood the offensiveness of her actions by considering her mental capabilities and any other relevant personal characteristics. The jury presumably considered these factors in finding that Everly lacked the necessary intent for battery. *White v. Muniz* → Issue: To be liable for battery in a dual intent J, must a person intend that contact with another cause a harmful or offensive result?
- Only necessary to show that intent it harmful/offensive. Intent to contact is all that is necessary to meet battery. *Wagner v. State* → Issue: In a single-intent jurisdiction, is it necessary to prove both intent to contact and purpose with substantial certainty?

e. Doctrine of Transferred Intent

- Defined: When the intention to harm a person inadvertently causes a second person to be hurt instead, the perpetrator is still responsible. Can transfer from tort to tort/person to person
- *Baska v. Scherzer [DOCTRINE OF TRANSFERRED INTENT]*—The court reasoned that the D's act of punching was intentional towards one another, through the doctrine of transferred intent, P has a claim for assault and battery because the act was intentional (battery) and not non-intentional (negligence)

B. ASSAULT

- An assault is an intentional act that causes the P to experience a reasonable apprehension of an immediate harmful or offensive conduct.
- Elements
 - Volition act
 - Intent without purpose or knowledge with substantial certainty that **reasonable** imminent apprehension of harmful or offense contact will occur. Apprehension cannot just be fear.
 - To establish a claim for assault, a plaintiff must demonstrate that he reasonably apprehended that a harmful or offensive touch was imminent.
 - Ex: An assault is committed if Frank points an unloaded gun at Paul, as long as Paul reasonably thought the gun was loaded.
 - Imminent apprehension of *reasonable* harmful or offense contact occurs. Imminent means without significant delay.
 - This element is satisfied if the contract threatened would inflict pain or impairment of any body function or if a reasonable person would regard it as offensive.
- Assault is battery w/o contact. Turns on whether the D's act would place a reasonable person in apprehension of an unwanted contact.

C. FALSE IMPRISONMENT

- a. Elements
 1. Intent w/ purpose and substantial certainty that you are going to restrain someone w/o consent
 2. In a limited place for a limited time
 3. Victim is conscious of confinement **OR** suffered actual harm
- b. Exclusion is never confinement
- c. False imprisonment does not require actual physical constraint. Confinement can be by any means of threat or duress. In this case, the duress caused by the Walmart employees (intimidation, imposing authoritative presence of security) constituted false imprisonment. *McCann v. Walmart* (held that a family falsely imprisoned in Wal Mart, an isolated area, who threatened to call the police, and were told they could not go to the bathroom would be determined by reasonable people in this situation that they would be physically restrained).

D. TRESPASS TO LAND

- a. A trespasser is someone who intentionally enters land without the owner's express or implied permission.
- b. Only an owner can bring a cause for trespass NOT a possessor. This means that adverse possessor or a lessee may maintain a trespass action
- c. Elements
 1. Volitional act
 2. Intent w/ substantial certainty that you are volitionally entering land
 - D's intent only has to be that he physically enters the land; not that he intended to invade the P's land
 - Doesn't have to harm property
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- d. Extended liability: Trespasser is liable for damages even w/o intent to harm land
- e. Lessee, even though not the owner, possesses the house bc of lease arrangement and is therefore responsible for what goes on
- f. Consider scope of consent onto land (ex: being invited to movie marathon in living room, but not to safe in study)
- g. Also, ground, sub ground, and airspace encompass the scope
- h. **Ejectment**—Ejectment is an action at law to recover possession of real property. Elements needed for ejectment:
 1. Proof of legal title
 2. Proof of the P's right to possession; and
 3. Wrongful possession by the D.
- i. **TRESPASS TO CHATTEL**
 - Trespass to chattels is an intentional act by the D that interferes with the P's chattel, causing harm.
 - Chattel refers to tangible personal property or intangible property that has a physical representation, such as a promissory note, or documents in which title to a chattel are merged
 - Elements
 1. Lack of P's consent to trespass
 2. Intent with purpose or knowledge with substantial certainty that interference will result

- Intent is satisfied when the D intentionally performs the physical act that interferes with the P's chattel.
- 3. Interference w/ owner's use
 - Interference with P's chattel is actionable if it constitutes dispossession or intermeddling. More serious interferences with the P's chattel may amount to a conversion
- 4. Actual damage not a required element
- **School of Arts v. Kuprewicz**—Held that sending and/or directing "large volumes of unsolicited job applications and pornographic e-mails" by D to P if it depletes hard disk space, drains processing power, and negatively impact other system resources of the plaintiff is sufficient to establish "a cause of action for trespass to chattels. There must be harm to an owner's materially valuable interest in physical condition, quality, or value of chattel or deprive owner of use. P must also act with intention and purpose/knowledge with substantial certainty that interference will result.

E. CONVERSION OF CHATTEL

- a. Conversion is an intentional act by a D that causes the destruction of or a serious and substantial interference with the P's chattel.
- b. Elements
 1. Intent to exercise substantial dominion
 - Actionable even if chattel is unharmed
 - Factors that affect substantial dominion: extent and duration of control, D's intent to assert a right to the property, D's good faith, harm done, expense/inconvenience caused

II. DEFENSES TO INTENTIONAL TORTS

+ Seven Kinds of Defenses—POPCANS

1. Privilege
2. Defense of Others
3. Defense of Property
4. Consent
5. Authority
6. Necessity
7. Self-Defense

A. Privilege

- a. Under certain circumstances, a D may not be liable for conduct that would ordinarily subject him to liability
- b. A privilege may exist where:
 1. The person affected by the D's conduct consent;
 2. Some importance personal or public interest will be protected by the D's ordinarily prohibited conduct, and this interest justifies the harm caused or threatened by the D's conduct; and
 3. The D must act freely in order to perform an essential function.
- c. The D has the burden of proving the existence of a privilege and that the privilege was exercised reasonably under the circumstances.

- d. **Shopkeeper's Privilege:** A shopkeeper with, reasonable, cause may detain a person suspected of shoplifting in a reasonable manner and for a reasonable time and for questioning the suspect or summoning a law enforcement officer. Any unreasonable detention, whether in terms of use of force, duration or distance from the store is not privileged however. *Brown v. Martinez* (Chokehold was excessive and only forced deemed necessary is granted privilege, and 3) No reasonableness of detention because guard did not question the boys)

B. **Defense of Others**

- a. A D is entitled to defend another person from an attack by the P to the same extent that the third person would be lawfully entitled to defend himself from that P.
- b. Ex: D and T are walking down the street. D sees T's ex-GF, Phoebe, coming toward T with a knife. Realizing that T does not see P's wrist, wrestling the knife from her. Bc T could have been injured, D is privileged to protect him.

C. **Defense of Property**

- a. A D is permitted to use reasonable force to prevent a P from committing a tort against the D's property.
- b. Elements:
 - 1. The D must first demand the P to stop the conduct that threatens injury to the property (unless it would be futile or dangerous to do so)
 - 2. The amount of force used by the D must be no greater than necessary to prevent the threatened harm. A D may use **reasonable force** to promptly recover his personal property if tortuously dispossessed of that property by the P.
- c. D may apply only such force against the P as is reasonably necessary to recover the property. D may NEVER use deadly force to recover property
- d. A D must act with reasonable diligence to discover the dispossession and to recover his property.
- e. Even if otherwise proper, a D may not use force to recover property as to which the P came into possession under a claim of right.
- f. A D cannot successfully assert the defense of recovery of property if he is mistaken about the fact that he was tortuously dispossessed of it by the P/
- g. If otherwise proper for the D to use reasonable force to recovery property., that D may enter upon the land of the P or guilty third party in order to effectuate the recovery. Such entry must be at a reasonable time and must be accomplished in a reasonable manner.
- h. A person, in protecting property (abandoned home), may not use force (shotgun trap) calculated to cause death or serious bodily injury, except where there is also a threat to personal safety that justifies self-defense. *Katko v. Briney* → The use of a firearm force to cause death or serious bodily harm is not reasonable when only a watermelon patch and not self is threatened. D acted improperly and is liable for damages. There is no privilege to use any force calculated to cause death or serious bodily injury when only property is threatened.

D. **Consent**

- a. Even though a D has otherwise committed an intentional tort, he is not liable if the P consented to the act which constituted the tort.
- b. Consent can be implied or explicit

- Consent may be implied from a course of conduct b/w parties. 2 friends have engaged in similar conduct for years, and unless something changed or there was implied consent, a battery suit would be unsustainable.
- c. Consent by mistake of fact = never a defense
 - Ex 1: Doc obtains a consent to exam, but actually seeks sexual gratification.
 - Ex 2: D obtains P's consent to sex, but does not reveal STD status
- d. No consent if:
 - by fraudulent means
 - product of mistake of fact or law
 - Power imbalance in relationship (employer/employee, inmate/guard)
 - Made under duress
 - Made by incapacity (minor or mental incapacity)
 - Under violation of criminal statute
 - Consent is not available as a defense when there is a special relationship—power imbalance, such as in the case of a security guard and female inmate. *Robins v. Harris*.
- e. The doctor had consent to operate on certain discs, but not others. The battery occurs if doc performs a substantially different treatment from that covered by the patient's expressed consent. Doctor who operates on patient w/o patient's consent commits a battery. *Kaplan v. Mamelak*. (doc liable for battery if he operates on a patient w/o specified consent).
- f. If a person assumes the risk of sexual contact, it doesn't mean they are absolved of liability. One who knows of venereal disease condition and know his partner is not aware of condition, commits a battery by having sexual intercourse. *Doe v. Johnson* (a battery committed if a person who is aware of condition of venereal disease infects a person who is consenting to sexual contact, but is unaware of condition of V-disease)

E. Authority

- a. Arrest
 - Where the D is an officer acting pursuant to a duty issued warrant, valid on its face, he is not liable for the fact of arrest.
- b. Shopkeeper's privilege
- c. Discipline
 - If a D is charged with maintain discipline, he may use reasonable force to perform this duty

F. Necessity

❖ Public Necessity

- a. A privilege where a D interferes with a P's property in an emergency situation to protect the community as a whole from a greater harm that would have occurred if the defendant had not committed trespass. Public necessity serves as an absolute defense, and a D is not liable for *any* damages caused by his trespass.
- b. The individual rights of give way to higher natural laws that protect the interests of society. A person can avoid liability on the destruction of a property if it is proven that they acted in the private and public necessity. *Surocco v. Geary*. (If a person, in good faith, destroys the property of another individual under public necessity to protect a society, can they be found liable for incurring damages to the P, even though the fire continued to spread?)

❖ Private Necessity

- a. Under privilege of private necessity, a person can enter the land of another w/o permission or consent to avoid serious imminent harm.
- b. D who commits trespass and invokes the defense of private necessity must still pay for any harm done to the property caused by his trespass.
- c. If ongoing emergency situation, D is entitled to remain on the P's land and cannot be ejected as long as the emergency situation continues.
- d. In times of private necessity, the landowner has no right to exclude a person operating under the privilege from access to her property.
- e. An act of necessity can justify entry onto land that would otherwise be considered trespass. *Ploof v. Putnam*
- f. When a person is acting out of necessity to protect private property, it may be reasonable to absolve them of trespass, but the actor will be liable for damages when acting at the expense of the other person's property. *Vincent v. Lake Erie Transportation Co.*

G. Self-Defense

- a. Elements
 - 1. There is an unprovoked threat/attack—cannot be original aggressor*
 - 2. Of imminent harm
 - 3. Only an objectively proportionate degree of force may be used
 - 4. Must be reasonable fear of serious bodily harm/death
- b. Deadly force may only be used by defendant if he reasonably believes that he has been threatened with deadly force
- c. **Exception to Self-Defense—The Aggressor Rule:** Cannot use self-defense if the defendant was the original aggressor. Original aggressor can only have privilege of self-defense back when:
 - 1. He withdraws force from opponent, and
 - 2. The opponent escalates his force. *Grimes v. Saban.*
- d. **Castle Doctrine:** Allows a person to defend their “castle” from threat of intruder and may use deadly-force
- e. If a bystander is hurt by a person's use of defensive force against another then there is no liability if the defensive force was reasonable.

III. WHAT IS NEGLIGENCE?

- A. Definition—Negligence is the breach of a duty of due care owed to plaintiff that is the direct and proximate cause of injury.
 - a. **Due:** Refers to the standard of care of a reasonably prudent person under the same or similar circumstances. It is the standard of care that is required, in other words, “due.”
 - b. **Duty:** Courts use it to address the question of whether a person is owed a duty of care at all. Used to define the amount of care that is required (how much care is in your duty to provide). Courts may sometimes rephrase a breach question as a duty question to remove a case from your jury, as the TC inappropriately and unsuccessfully attempted in the Limones (defibrillator case).
 - c. **Foreseeability:** When it comes to the question of breach, most courts require that the harm that occurs be foreseeable or the duty of care is not breached. When foreseeability is applied to a breach, it's a macro question. Was harm foreseeable to some person? The answer must be yes

for there to be a breach of the duty of due care to act as a reasonably prudent person would under the same or similar circumstances.

B. Elements of Negligence

1. D owes P a legal duty
2. D breached that duty
3. P suffered actual damage
4. D's negligence was an actual cause of damage
5. D's negligence was a proximate cause of damage

C. NEGLIGENCE PER SE

- a. The unexcused violation of a legislative enactment or administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence itself aka commonly phrased, negligence per se. An omission or failure to perform an act as required by statute constitutes negligence per se.
- b. The violation of a **criminal** statute constitutes negligence per se where the plaintiff can show that:
 1. he was a member of the class of persons the statute was designed to protect; and
 2. he suffered the type of harm the statute was designed to prevent. In such instances, statutory violation will be considered sufficient to prove duty and breach of duty, but a plaintiff is still required to show causation and damages.
- c. Unlike ordinary negligence, a P alleging negligence per se need not prove that a reasonable person should have acted differently—the conduct is automatically considered negligent, **and the focus of the suit will be over whether it proximately caused damage to the P**
- d. In a lawsuit alleging negligence, P seeks to use D's violation of a statute to help establish his prima facie case. The following 3-step analysis is essential to P's claim against D because it determines whether a statute can be used to establish a D's breach of standard of care. The court conducts an inquiry to determine:
 1. Whether P is a member of the class the legislature intended to protect in enacting the statute;
 2. Whether the hazard about which P is complaining is one the legislature intended to prevent; and
 3. Whether tort liability is appropriate.
- e. Three ways to allow jury to consider the violation of a statutory standard of care in determining negligence, but avoid making it automatically determinative
 1. A negligence per se w/ "excuse"
 2. Presumption of negligence
 3. Evidence of negligence
- f. Absence of Negligence Per Se
 - Even in absence of statutory requirement, the operator of a motor vehicle must exercise due care as a reasonable person under similar circumstances.
 - **Marshall v. Southern Railway Co.** (D's train tracks had supports by a road. P drove into the supports because he was distracted by car brights)
- g. Reasonable Person Standard and Negligence Per Se

- Negligence uses reasonable person test which requires determination on whether a person acted as a reasonable person under the same or similar circumstances. *Chaffin v. Brame*.
- g. Contributory Negligence and Negligence Per Se
- When a person violates a statute that results in his serious injury or death, he will be responsible for contributory negligence and therefore will be unable to recover. *Martin v. Herzog*.
- h. A standard duty of care will replace the reasonable person standard in a negligence action only if:
- 1) the statute must clearly define the required standard of conduct;
 - 2) the statute must have intended to prevent the type of harm the D's act or omission caused;
 - 3) P must be a member of the class of persons the statute was designed to protect; and
 - 4) the violation must have been the proximate cause of the injury. *O'Guin v. Bingham County*.
- i. Under certain circumstances, reasonable persons with substantial evidence could conclude the act can be excused in the event of an emergency. A standard duty of care will replace the reasonable person standard in a negligence action only if:
- *Getchell v. Lodge* (Could reasonable persons conclude that the D acted negligently in an auto collision if the D violated two traffic violations in the event of an emergency situation in which she had little time to react?)

IV. THE FIVE ELEMENTS OF NEGLIGENCE

1) D Owes P a Legal Duty

- a. P must show that D owed a legal duty to P. The element of duty is usually described as an *obligation* recognized by law that requires the D to conform to a certain standard of conduct to protect others against unreasonable risk.
- b. Reasonable person acts reasonably to avoid injury to others. Will consider **foreseeable** risks on injury, **extent** of the risks imposed, and the **likelihood** of risk causing harm. Standard of reasonable care: duty that requires us to avoid injuring others by carelessness. Breached when we fail to exercise duty.
- c. **Affirmative Duty**—The traditional rule is that there is no affirmative duty to aid or protect a plaintiff who is at risk of injury unless such action is undertaken by a defendant. The fact that the defendant realizes or should realize that action on his part is necessary for another's aid or protection does not by itself impose a duty to take such action.
- d. **Legal Duty and Dangerous Instrumentality**—In a negligence action, the defendant is held to the standard of care that a reasonable person would exercise under the circumstances, even if the defendant is engaged in the use of a dangerous instrumentality. *Stewart v. Motts* (Auto shop, fuel tank explosion)
- e. **Legal Duty and Sudden Emergency**—When a person is confronted with a sudden emergency which he does not create, who acts according to her best judgment or because of insufficient time to form a judgment fails to act in the most judicious manner, is not guilty of negligence if she exercises the care of a reasonably prudent person. *Posas v. Horton*.

- f. **Legal Duty and Special Relationship.** D has a duty to take affirmative action in aid of a plaintiff where a special relationship exists between D and P. Ex: Student/teacher; employer/employee; parent/child
- g. **Legal Duty and Physical Disability**— A person w/ a physical disability is required to act as a reasonable person **w/ that disability** would act. They are not required to exercise a higher degree of care to avoid injury. *Shepherd v. Gardner Wholesale, INC* (Does a person with a physical impairment, such as less than normal vision, required to exercise more than ordinary care?)
- h. **Legal Duty and Mental Illness**—The reasonable person standard does not consider mental incapacities. Unless insane or mentally deficient, mental illness does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable person under similar circumstances. *Creasy v. Rusk* (Alzheimer’s patient, kicking, orderly)
- i. Professional standard of care: General rule is that the professional standard of care must be established by expert testimony.
- j. **Legal Duty and Special Expertise**—Standard of care requires a person to only possess a minimum of attention, perception, memory, knowledge, intelligence, and judgment. If he even has just the bare minimum of these qualities, he is required to act reasonably. He is found liable. *Hill v. Sparks* (Do we consider special expertise a factor when deciding that a person breached the duty of due care?)
- k. **Legal Duty and Adult/Dangerous Activities**—Policy: Generally, the capability of a minor is not determined by an adult standard of conduct, but by how a minor the similar age, mental capacity, and experience would conduct himself. However, it would be unfair to the public to hold minors, who are engaged *in the same activity as adults*, at a different standard of care. Some activities are so dangerous that the risk borne by the beginner and lack of competence is not an excuse for a lower standard of care. *Stevens v. Veenstra* (A minor who engages in an adult activity, that is dangerous, is charged with the same standard of conduct of care as an adult.)

2) BREACH OF DUTY

- a. Once duty is determined, the question for the jury is whether the D breached the duty by failing to exercise the requisite amount of care.
- b. Was the harm foreseeable/was the harm within the scope of the risk
- c. The defendant had a duty to exercise reasonable care to protect his passengers from that harm. The jury has the right to decide “reasonableness.” A driver owes a duty of care to his passengers because it is foreseeable that they may be injured if, through inattention or otherwise, the drivers involves the car he is operating in a collision. *Pipher v. Parsell* (Teen drivers, “fooling around” at the steering wheel)
- d. *Limones v. School District of Lee County*—Does a school employee have a duty to act with reasonable care under the circumstances to avoid or mitigate further aggravation of injury when an AED is easily available?
 - Procedural Issue: When TC says that D did not have a duty to make an AED available during a game, was that an appropriation of duty or was it a breach question that should go to the jury?
- e. **Unstructured Weighing of Risks and Costs**
 - In a negligence action, the person is held to the “reasonable person in same or similar circumstances” standard. This policy values human life over property and applies even in the face of a sudden emergency not of the person’s own making.