

Destini Aguero – TORTS – Sharkey

| Liability  | Causes of Action   | Tests & Standards  | Cases (sources)   | Defenses   | Defense Cases (sources)  |
|--|--|--|---|--|--|
| Intentional Torts<br><br>Intent Act<br>Causation<br>Damages                          | Battery  | Intent to perform an unlawful act →<br>Harmful bodily contact; subst. certainty of harm →<br><br>No need for intent to harm, just unwelcome touch →  | Vosburg v. Putney<br>Garratt v. Dailey (kid pulls out chair); 2 <sup>nd</sup> RST   | Consent (expressed & implied)<br>- Informed Consent<br>Self Defense (equal force)  | Mohr v. Williams (no consent for wrong ear surgery)<br>Hudson v. Craft (boxing, no informed consent, illegal, 3 <sup>rd</sup> party)<br>Courvoisier (shot cop, thought he was intruder, ok)  |
|  | Assault  | Threat of imminent harm/battery →<br>Puts π in apprehension →  | Allan v. Hannaford (landlord w/unloaded gun)<br>I. de S. & M. v. W. de S. (axe)   | Mere words don't constitute assault<br>- threat: actual, close (time & space)  | McGuire v. Almy (liable for hurting nurse – person capable of)<br>Tuberville v. Savage (if it were not assize-time)  |
|  | Offensive Battery  | Spitting, hitting canes, etc. →  | Alcorn v. Mitchell (spit in court)  |  |  |
|  | False Imprisonment   | Total restriction/confinement →<br>π must have conscious awareness of confinement<br>Physical force or threat of force; barring way out  | Coblyn v. Kennedy's (old man w/ascot)   | "3 walls do not a prison make"<br>Probable Cause   | Bird v. Jones (highway detour)   |
|  | IIED   | Outrageous conduct that →<br>is intentional or reckless that leads to severe emotional distress  | Wilkinson v. Downtown (prank; husband dead)<br>2 <sup>nd</sup> RST  | Non-parasitic (usually piggybacked on another tort)  |  |
|  | Trespass to Land   | Damages, even if no harm to land →   | Dougherty v. Stepp (survey of land crossed line)  | Necessity<br>- damage done at expense of property<br>Defense: Calibrated Response<br>- force must be equal   | Ploof v. Putnam (docking)<br>Vincent v. Lake Erie<br><br>Bird v. Holbrook (spring gun in garden)   |
| Negligence<br><br>Duty<br>Breach<br>Causation<br>- But For<br>- Proximate<br>Damages | Negligence (regular)   | Reasonable Person Standard (objective) →<br>NOT Defenses:<br>- Child (engaging in adult activities, liable) →<br>- Mental Illness (unanticipated event of a known illness) →<br>- Currently no Reas. Woman Standard →  | Holmes, The Common Law<br><br>Daniels (minor riding motorbike killed)<br>Breunig (Driver think's she can fly like batman)   | Contributory Negligence – bars recovery<br><br>π Defenses to Cont. Negligence:<br>- Last Clear Chance Doctrine<br>- Lawful use of own property   | 2 <sup>nd</sup> RST (rules which determine Δ's negligence also determine π's negligence)<br><br>Fuller (train Δ had time to warn pedestrian π)<br>LeRoy Fibre (stacking hay close to tracks) |
|  |  | Determining Duty<br>- Hand Formula B<PL →<br>B = Burden; P = Probability; L = Injury →<br>- Calculus of Risk →<br>Remoteness of Risk (P) v. Consequence of Injury (L)  | US v. Caroll Towing (barge)<br>Andrews v. United Airlines (falling luggage; low probability)<br>Bolton v. Stone I & II (cricket ball)   | Comparative Negligence – apportioning liab.<br>Changes to other Doctrine: Last clear chance becomes unnecessary<br>2 <sup>ndary</sup> Assum. of Risk absorbed  | Li v. Yellow Cab (speeding Δ; π cutting across 3 lanes)  |
|  |  | Res Ipsa Loquitur (circumstantial evidence – small n)<br>- Prosser: (1) doesn't occur in absence of negl. →<br>(2) excl. control of Δ; (3) no contribution by π<br>- 2 <sup>nd</sup> RST: like prosser but eliminated "excl. control" & added scope of Δ's duty to π.<br>- 3 <sup>rd</sup> RST: Δ in class of members who could cause negligence | Colmenares (handrail of escalator stops)  | Assumption of Risk<br>- Primary: (Δ wasn't negligent)<br>- Secondary: (π discovers danger but cont.)   | Lamson (assumed risk by still working next to hatchets)<br>Murphy (flopper ride)<br>Meistrich (bad ice, dumb skater knows this)  |
|  |  | Causation<br>- Cause in Fact (But For test) →<br>- Proximate Cause<br>- Foresight Test (could Δ foresee harm?) →<br>- Directness Test (intervening cause) →<br>"Substantial Factor" Test →   | Grimstad (life preservers might not have helped)<br>Palsgraf (π falls outside of "orbit of duty")<br>Polemis (plank; explosion, Yes Dir. tst, No For. tst.)<br>2 <sup>nd</sup> RST  | Joint Liab / Concert of Action – A & B (each Δ was a subst. factor of π's harm)<br>- w/no contr. rule = π can sue any Δ for all and Δ can't sue other Δs<br>- w/indemnification = less culpable Δ can pass all burden onto more culpable Δ<br>- w/pro rata = loss divided equally among all Δs   |  |
|  |  |  |   | Several Liability – each Δ can only be sued for his proportion of dmgs<br>Joint & Several – in general, π gets all dmgs, not matter if he can go after all Δs<br>- pro tanto w/contr. = π can sue for dmgs – settlement; sued Δ can go after any other Δ for his part<br>- pro tanto w/contr w/bar on settlement = same as above but sued Δ can't go after settling Δs<br>- Proportionate Share (Carve Out Rule) = if π takes settlement, remaining Δs only pay their share    |  |
|  |  |  |   | *Contribution* - π to be reimbursed by another Δ; *Pro Rata* - allocated equally among Δs; *pro-tanto* - set off   | Summers(quail hunting)   |
|  |  |  | Alternative Liab – A or B<br>Burden switches to Δ   |  |  |
|  | Negligence Per Se  | Violation of a statute →<br>(1)Class of persons; (2)Class of Risks; (3)Legislative Intent<br>If no private right of action for Fed.Ct.; small n (some evidence of Negl) in St. Tort law  | Martin v. Herzon (car w/o lights)   | No private right of Action<br>Emergency, Necessity, Infancy<br>Realized Harm/Scope of purpose<br>- If violation of statute doesn't at all increase risk of harm to those in π's situation, then cts unlikely to hold π is an intended beneficiary - Lone Palm (no lifeguard or notice of no lifeguard, father & son found floating, liable)  | Uhr (scoliosis shot not given)<br>Tedla (wrong side of road = safer)<br>Gorris (sheep overboard)   |
|  | Medical Malpractice  | Medical Malpractice (Res Ipsa Loquitur)<br>Conspiracy of Silence →<br>- burden shift to Δ<br>Failure to Disclose / Informed Consent →<br>- what reasonable person would want to know →<br>- Expert Testimony required to determine options →<br>that should be reasonably provided<br>Custom for professionals →                                 | Ybarra(goes in for appendix, gets arm pain)<br><br>Canterbury(risk of paralysis)<br>Bly (Majority View)<br><br>Lama ("conservative treatment" not prescribed)   | Statutory Compliance: not dispositive as a defense & just evidence that there was negligence if not followed (little n)<br>Fed. Preemption:<br>- Implied: Fed. clause silent on preemption<br>- Field: regardless of no clause, thoroughness of congress has area covered.<br>- Conflict:<br>- Obstacle: St. law would "Frustration of Purpose"/intention of statute<br>- Impossibility: Can't satisfy both st. & fed law. Fed Standards outweighs St. Common Law: Sup. Clause |  |
|  | Custom   | Evidence of Negligence but not dispositive<br>- Doesn't always establish reasonable care →<br>- Violation of internal rules evidence of negl →   | TJ Hooper(no radios, no warnings)<br>Lucy Webb (nurses didn't follow rules)   | Custom as a defense<br>Custom PRO  | Titus (transfer of non-standard size RR cars)<br>Custom CON  |
| NIED   | Impact Test: some phys. contact, NIED parasitic →<br>Zone of Danger Test: Harm from fear of impact →<br>Dillon Test: Proximity, observation, relationship →  | Kenny v. Wong Len (mouse hair touches tongue)<br>Mitchell (miscarriage from almost being hit by car)<br>Dillon (mom & sister see 3 yr old get run over)  | (1) – Injury Custom = Hand Formula; Courts & Juries are not as experienced in deciding these cases; Body of rec'd wisdom<br>(2) – Socially valuable industries can't be brought down<br>(3) – Easy to apply external standard | (1) – "race to the bottom" creates unsafe conditions; "whole callings can lag" – L. Hand<br>(2) – Deters Innovations<br>(3) – Injustice, custom that doesn't treat people equally.   |  |
| Affirmative Duties   | Special Relationships →<br><br>No duty to Rescue (strangers)<br>Moral Corrective Justice Framework: Party didn't put person in peril, no duty to correct anything<br>Utilitarian: cost/benefit: acting would cost party nothing, they should act<br>Feminist/Humanitarian: harm affects loved ones and society (incl. party)<br>Epstein: pers'n autonomy; Posner: reciprocity – if everyone does it it'll work | Tarasoff (psychologist & patient)  | Tri-Part Principle:<br>- Invitee (biz) – high duty of protection<br>- Licensee (social guest) – no traps<br>- Trespasser – no wanton violence   | 8 Factors after Rowland (bathroom faucet)<br>(1) foreseeability of harm (2) degree of certainty π injured<br>(3) closeness of connection b/w Δ's conduct & π's injury<br>(4) moral blame attached to Δ's conduct (5) prevention fut. harm<br>(6) extend of Δ's burden (7) community consequences if duty imposed (8) insurance availability/cost<br><br>Note! Ct's move toward Rowland in favor of higher duty for both invitees & licensees since ins. should cover injury    |  |
| Functions/Goals of Tort Law  | Corrective Justice:<br>When one party wrongs another, correction of the wrong may help to restore the moral imbalance b/w them   | Economic / Optimal Deterrence:<br>Imposing liab. not worth cost to deter. Not all risky activity worth deterrence (Knives, cars). Attempt to prevent future injuries while encouraging optimal level of safety & activity  | Loss Distribution:<br>Cost of the loss suffered by the π isn't simply transferred to Δ, but is distributed thru the Δ to a larger number of individuals.<br>Ex: insurance, share holders.                                     |  |  |

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|---|----------------------------|--|---|---|---|
| Strict Liability Act<br>Causation Damages | Ultra-hazardous Activities | Original Test: Balance: danger & commonness<br>Abnormally Dangerous →<br>(1) degree of risk (2) probability of harm<br>(3) inability to eliminate risk (4) uncommon<br>(5) inappropriate in area (6) value<br>Scope of harm →  | 2 <sup>nd</sup> RST – adds social value to balance test   | No need for SL because Negl. works                            | Indiana Harbor (chemical leak could have been prevented thru reasonable care – no SL) |
|   | Conversion                 | No interfering w/another's property w/o consent →  | Kremen (sex.com)  | No trespass if no rts of ownership                            | Moore v. Regents (no ownership over bio-waste)  |
|   | Nuisance                   | Non-trespassory invasion of another's interests, injunction is usually sought as \$\$ dmgs is inadequate<br>Not all interests are protected (air, light) →<br>"Spite Fence" – weak action, if ANY useful purpose in construction/fence, no action.   | Fontainebleau (hotel blocks pool's light, no action)  | Coming to Nuisance (not absolute)<br>Extra-sensitivity        | Esnign (dog breeder)<br>Rogers (church bell too loud for ill π, no action)            |
|   | Trespass to Chattel        | Physical harm to chattels<br>Interference w/Possessory Interests   | "eBay v. Bidder's Edge" (spiders" slowed down page)   | No harm, no foul  | Hamidi (no harm to actual computers used for email)                                   |
| Vicarious Liability                       | Respondent Superior        | ER liable when EE's actions w/i "scope of employment" →<br>ER liable for Independent Contractors when acts as EE →   | Ira S. Bushey (drunk sailor)<br>Petrovich (HMO held out as EE)  |   |   |
| Products Liability                        | Definitions                | Δ who sells defective product unreasonably dangerous is liable for phys. harm caused to user/buyer if seller is a merchant & expectation is product will reach consumer unaltered.<br>One engaged in business of selling/distributing products who sells/distributes a defective product is subject to liability for harm to persons or property caused by the defect. |   |   | RST § 402A<br>RST – prod. liability   |
|   | Mfg Defect                 | "construction defect", doesn't conform to Mfr's own design →<br>No privity limit (liability for remote purchasers/consumers) →   | Escola v. Coke (exploding coke bottle)<br>MacPherson (defective wooden wheel)                             | No harm to person/property                                    |   |
|   | Design Defect              | Defect in entire line of products<br>Consumer Expectation Test – perform as ord. person wud expect →<br>Risk/Utility Test – (SL) (1) danger probability (2) financial costs of improved design (3) danger posed by challenged design<br>(4) feasibility of alt. design (5) adverse consequences to product & consumer of alt. design                                   | Castro(QVC) & Denny(bronco)   | Kick Some Tort Ass!!  |   |
|   | Failure to Warn            | Warning should explain effects of misuse →   | MacDonald(birth control lead to stroke)<br>*heeding presumption<br>*learned intermediary (can be defense) | Modification of product<br>Federal Preemption<br>Duty to Read | Hood v. Ryobi (taking guard off saw)  |

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|---|--|---|--|---|
| <p><b>Cons:</b></p> <p>Over-used as presumption of negl, turns tables &amp; puts burden on Δ</p> <p>Not optimal deterrence if too much care taken; more cases brought</p> <p>(1) things that s/b covered by health ins. "collateral source rule": under tort law you get whatever dmgs are due &amp; you don't have set offs.<br/>(2) potentially limitless gfp of rs – social problem<br/>(3) inefficient resource allocation – less \$ down rd for crucial manifestations of injury (4) loosening of causation prong/req. there could be exposure that's entirely harmless; arbitrary apportionments of guilt; strain on jury to decide special verdicts; should only be done by leg. Wrong Drs; encourages cover up of mistakes instead of honesty b/w dr &amp; patient<br/>Lack of due process protections for Δ (reas. doubt v. prep of evidence) moral outrage → extremely high awards.<br/>π overcompensated; too many people suing leads to dmgs that exceed harm overcompensation violates corrective justice; ignores optimal deter.; encourages over-deterren. for deterrence to work properly, you have to be</p> | <p><b>Pros:</b></p> <p>Smokes out the truth; puts burden on party with most access to facts, redress for innocent π</p> <p>Easier to prove; lower admin. costs; puts costs on cheaper cost avoider; puts costs on actor; incentive to take extra care.</p> <p>(1) Public health interest in fostering access to testing, could lead to many positive measures. (2) Deterrence Value realized/present economic harm on Δs for risk of exposure they'd given to individuals (3) Fairness/elemental justice; π thru no fault of their own are exposed. at a min, give rs tests to decrease anxiety &amp; worry.</p> <p>juries were already doing it de facto; no harsh "all or nothing" cliff; Δ will take better care</p> <p>increased responsibility of Drs<br/>Encourages exchange of info. b/w Drs &amp; patients; Drs in better spot to prevent probs; increased confidence in med. profession.</p> <p>allows society to manifest outrage &amp; incalculable wrongs relieves pressure on Crim. System.</p> <p>Comp. dmgs are systematically too low; allows atty fees; non-economic dmgs hard to estim.</p> <p>Comp. dmgs too low to deter; Δ doesn't get sued everytime; takes the wrongful profit away from Δ. unpredictability. →</p> | <p>Market Share Liability (4 requirements est. in Sindell – DES)</p> <p>(1) Substantially all possible Δs incl. in action;<br/>(2) fungible product; (3) Each Δ is a potential tortfeasor;<br/>(4) π can't identify liable Δ thru no fault of their own</p> <p>Hymowitz: Disallows exculpation (proving it wasn't ur product) if you were negligent<br/>Lead Paint: Skipworth = paint isn't fungible (no liab)<br/>Gramling = "risk contribution theory"</p>  | <p><b>Standards of Expert Testimony:</b></p> <p>Frye (old) – Expert testimony must be "generally accepted" by the scientific community.</p> <p>Daubert (new) – Expert testimony must be Relevant and Reliable. It allows for cutting edge testimony.</p> <p>GE v. Joiner (expert testimony at discretion of trial court)</p> | <p><b>Medical Monitoring:</b></p> <p>πs can recover for cost of medical surveillance based upon enhanced, although unqualified, risk of disease in the future. πs can't recover for anxiety or fear of physical manifestations.</p> <p>Ayers (town drank bad water, yes); Buckley (exposed at work, no symptoms or physical injuries, could be b/c he was smoker, no)</p> <p>(1) likelihood of disease; (2) significance &amp; extent of π's exposure; (3) toxicity of chemicals; (4) seriousness of diseases π at risk for; (5) value of early detection</p> |
| <p><b>Coase Theorem:</b> In a world w/zero transaction costs, the economically efficient outcome would always occur no matter which party had the legal entitlement. In a world with transaction costs, entitlement should be placed where it will minimize costs.</p>  |  |   |  |   |
| <p><b>Res Ipsa Loquitur</b></p> <p>Strict Liability</p> <p>Medical Monitoring</p> <p>Comparative Neg. Under Li</p> <p>Medical Malpract.</p> <p>Punitive Dmgs (Punishment)</p> <p>Punitive Dmgs (Compensation)</p> <p>Punitive Dmgs (Deterrence)</p>   | <p><b>Incompatible Land Use</b></p> <p>Nuisance (Homeowner M, entitled to clean air)</p> <p>No Nuisance (Factory T, entitled to pollute)</p>   | <p>Calabresi's "Cheapest Cost Avoider" Theorem:<br/>There are always transaction costs, liability s/b allocated to the party who can avoid costs most cheaply. This should take into consideration ability to perform Hand evaluations, ability to spread loss, externalization of cost to other parties (like gov't), and ability to more easily apportion costs.</p>  |  |   |
| <p>Property Rule/Injunction</p> <p>Liability Rule/Damages</p>   | <p>T can't pollute w/o M's perm; M can enjoin to stop polluter</p> <p>T may pollute at will &amp; will only cease if M bribes</p> <p>T may pollute but must pay M dmgs</p> <p>M may stop T from polluting but must pay dmgs</p>  | <p><b>Damages:</b></p> <p>Compensatory:<br/>Non-Economic / Hedonic (pain &amp; suff.; loss of enj. of life)<br/>-Cognitive Awareness Req'd - McDougald (O<sub>2</sub> Deprivation, brain dmg)<br/>Calculations:<br/>- "per diem" rule – Amt of P&amp;S x # of yrs left to live<br/>- Economic (Med. expenses; Lost earnings)<br/>Calculations: Per O'Shea (cook fell, can't stand)<br/>- Expected earnings of each future year<br/>- Probability π will be in workforce<br/>(1) career path w/o injury – (2) State of world given injury = Dmgs<br/>*Race/Gender tables inappropriate: J. Weinstein<br/>Lump Sum Dmgs: value of stream of income &amp; figure how much to give today. (\$1 will be worth more in 10 years)<br/>Inflation s/b accounted for: when computing future lost profits.<br/>O'Shea (cook fell off boat)</p> <p><b>Punitive:</b><br/>State Farm: represents most authoritative Sup. Ct decision on approp. Constitutional standards using BMW guideposts.<br/>(1) Reprehensibility; (2) Ratio of Pun. Dmgs to harm;<br/>(3) Comparable Penalties</p> |  |   |

