CONDENSED OUTLINE FOR TORTS II

[Use this only as a supplement and corrective for your own more detailed outlines!]

PART II. DEFENSES TO A PERSONAL INJURY CASE

Ch. 4. Immunity

Although the plaintiff may have a perfectly good case against the defendant in terms of his traditional burden of proof, he may be stymied by the fact that the defendant is entitled to some form of *immunity*. The most important form of immunity is that enjoyed by governments. Courts have recognized that a sovereign is immune from tort liability unless it permits suits against it. Congress passed the Federal Tort Claims Act in 1946 to waive its immunity from certain kinds of suits, while retaining immunity for others. The overall goal of the statute was to provide for liability of the government "in the same manner and to the same extent" as would apply to a private party "under like circumstances." The tricky question, of course, is whether the government is analogous to a private party in particular cases. For example, a government vehicle that strikes a plaintiff in a crosswalk will generally result in liability against the government. But other activities of the government (e.g., repair of a weather buoy) may take place in the context of a larger function of government that is not analogous to what private parties do. An important retention of governmental immunity is where government engages in a *discretionary function*; government is not held liable for harms arising from allegedly poor decisionmaking; to do so would allow the judiciary to intrude into the separate powers of the executive or legislative branch.

It should also be remembered that *each state* (as well as each Native American tribe) can set its own rules for whether or not it will be held liable for ordinary (as distinguished from constitutional) torts. Thus, to determine the contour of a state's immunity (or waiver thereof) you must typically examine the state statute on point.

Family immunity is another point at which the plaintiff's proof of negligence may not suffice to create liability. Although most states permit suits by a child against his parent for non-parental functions (for example, poor driving that results in an automobile accident), most states still make the parent immune from suits alleging negligent discharge of the *parental function*; again, letting a jury decide whether a parent was negligent in letting Johnny play in a dangerous place would intrude upon the parental discretion permitted in our pluralistic society.

Finally, *worker's compensation* systems have generally replaced tort liability as a means of addressing workplace injuries. An employer is immune from ordinary tort claims; to avoid this immunity the worker must prove the injury was intentionally inflicted.

Ch. 5. Contributory Fault

Plaintiffs are unable to recover the full extent of their damages if they have also contributed to causing the injury. The common law rule was that a plaintiff's contributory negligence barred *any* recovery; modern statutes and decisions, however, typically permit a recovery even to negligent plaintiffs if the plaintiff's recovery is reduced for his "share" of fault. *Li v. Yellow Cab* is a good statement of the modern view that liability should follow fault. Some jurisdictions limit the comparative fault principle to situations where the plaintiff is less negligent than the defendant; this is called "modified comparative negligence" (as opposed to a "pure" comparative negligence system).

Another defense at common law was assumption of risk, which (like contributory negligence) operated as a complete bar to recovery. Although assumption of risk was originally a kind of contract doctrine (a "voluntary assumption of a known risk"), in which the plaintiff has presumably "agreed" to the risk in order to induce the defendant to engage in the relationship, it eventually was muddled with concepts of unreasonable conduct and fault. Modern comparative fault systems have difficulty distinguishing the different forms of conduct described by "assumption of risk." One form (often called "secondary unreasonable" assumption of risk) is "merged" with comparative negligence (thus reducing the plaintiff's recovery). Another form of assumption of risk (often called "primary" assumption of risk)—applies where plaintiff has in effect requested the defendant to leave some danger in place (e.g. an unscreened baseball seat or a steep ski slope), and thus has the effect of defeating the claim that the defendant was negligent in not averting the risk. A final case involving assumption of risk can combine an inherent danger (like a steep ski slope) with negligence on the part of the defendant (for example, in failing to maintain a warning sign) has had a mixed reception. Some jurisdictions have barred such claims; others have permitted recovery by finding that the enhancement of the risk was not voluntarilyi assumed, while others (as in the the *Kirk* case) have permitted a comparative "fault" allocation.

Ch. 6. Joint Tortfeasors

Plaintiffs frequently sue more than one defendant for the same injury. Even if they don't, one defendant may name another party as a third-party defendant. Two defendants are joint tortfeasors if their negligent acts (or other "fault," such as engaging in activities subject to strict liability) combine to cause an indivisible injury[1] to the plaintiff. At common law, the doctrine of joint and several liability (J&SL) made joint tortfeasors liable for all of the plaintiff's damages; since negligent plaintiffs recovered nothing, the theory was that it was better for a slightly negligent defendant to pay more than his share than for an innocent plaintiff to be unable to collect his judgment because one tortfeasor was (relatively) insolvent. Modern comparative fault, under which negligent plaintiffs are permitted to recover, made this outcome harder to justify. Some jurisdictions have retained J&SL in its entirety (*American Motorcycle*); some (Idaho) have abolished it for all but a handful of particular cases; some have made it dependent on whether the plaintiff was at fault (Washington statute; Oklahoma); and some provide for "reallocation" of defendant's insolvency (UCFA; Oregon).

A defendant usually seeks to minimize his net payout by including as many potential payors in the system as possible. He may need to file a third-party claim to bring them in, or they may already be defendants, so that he can simply cross-claim for contribution. At common law, defendants were sometimes permitted to obtain *indemnity* (a complete payment of the loss) from other defendants, on various bases. Today, the availability of *contribution* in virtually all

1. An indivisible injury is one which is a single injury caused by two separate sources, as opposed to two different injuries caused by two different people.

jurisdictions makes it a flexible procedure rather than an all-or-nothing award. Each defendant theoretically pays in proportion to his fault. However, where one defendant is insolvent, the problems mentioned above must be resolved according to the rules of the jurisdiction. Another problem arises from partial settlements. If one defendant settles with the plaintiff, but another is found liable at trial, by how much is the plaintiff's claim reduced? Again, there are three alternatives: one is to reduce the recovery only by the amount that the plaintiff has received (the "dollar method"); this is most favorable to plaintiffs; least favorable to non-settling defendants. Another approach is to reduce the plaintiff's recovery by an arbitrary "equal share" representing the number of defendants (one-half for two defendants; one-third for three defendants, etc.); a third method is to reduce the claim by the percentage share of the settling defendant.

Ch. 7. Statutes of Limitation

Statutes of limitation require a plaintiff to file a claim within a reasonable period of time. In order to determine whether the statute of limitations has run, three questions must be asked: (1) what is the proper limitation period? That is determined by the kind of claim being asserted (*e.g.*, medical malpractice, assault, general personal injury, breach of warranty, etc.). Where there is more than one theory to recover damages, courts will sometimes look to the *gravamen* of the claim is (e.g., was it basically a contract action or basically a tort action?) and then follow the limitation period that applies to that type of claim. (2) The *accrual* date must be identified. Originally this was tied to the date of the accident. But modern cases have recognized a *discovery rule* that ties the accrual date to the point when the plaintiff has enough information that would put a reasonable person on notice that a claim should be filed, or at least investigation should be pursued. Some statutes (*e.g.* construction or product liability) also contain a *statute of repose* that requires the claim to accrue within a set period of time. That way, a defendant can't be sued twenty years after the work is done. (Some courts have held such statutes an unconstitutional bar to open access to the courts.) (3) Even if the statute would ordinarily have run, it may have been *tolled* by conduct on the part of the defendant that would make it inequitable to bar the claim. For example, if a foreign object is left by a doctor, or if the defendant has fraudulently concealed the negligent act from the plaintiff, the statute will be tolled, *i.e.*, the "clock" will stop running for so long as the plaintiff was put at an unfair disadvantage. Earlier statutes tolled the statute for infants or incompetents, but modern statutes have sometimes changed this to require parents or guardians to act on their behalf or else the claim will be lost.

PART III. MODIFYING THE DEFENDANT'S DUTY BY CONTRACT

Many cases of tort liability arise out of situations where the defendant and the plaintiff have entered into some kind of contractual arrangement. Courts will often base their standard of care on a consideration of what kind of relationship the plaintiff and defendant previously entered into, but it is hard to state a general principle about how contract obligations and tort obligations are reconciled with one another.

Ch. 8. Owners and Occupiers: Premises Liability

The owner (or occupier[2])'s duty to prevent harm to his visitors arising from a condition of the premises[3] usually depends upon the status of the visitor. (A minority of jurisdictions have purported to replace the traditional status categories with a duty of reasonable care under "all the circumstances." In practice this usually produces similar results.) Business and public invitees are owed the duty of reasonable care, which includes inspection of the property for potentially dangerous conditions, and reasonable efforts to repair conditions that create hazards. "Bare" licensees (including social guests), on the other hand, are only owed the duty to be warned of hidden dangers of which the owner is aware. As to trespassers—those who have no permission to be on the owner's premises—the owner need only refrain from willful or wanton injury.

Determining the plaintiff's status can be tricky; it can change depending upon the purpose for which the plaintiff happens to be using them. Business invitees are those who come upon the premises for a purpose connected with the *owner*'s business; money need not change hands on the particular occasion, but there must be some benefit to the owner in the plaintiff's presence. Public invitees are those who are invited by a nonprofit entity (or governmental entity) for the advancement of the owner's interests (e.g. a museum or library), where the visitor's expectation is the same level of care as if the visitor were entering a commercial building. An owner's invitation or permission may extend to only some parts of the premises, and thus a visitor's status may change mid-visit.

As to child trespassers, the courts have recognized the doctrine of "attractive nuisance." The RESTATEMENT sets out criteria for determining when an *artificial* condition will create liability for the owner ("O"). The criteria require proof that (1) O should have known of the likelihood of trespass; (2) O knew of a grave risk; (3) children couldn't recognize the risk; (4) a cheap fix was available; and (5) reasonable care was not taken to implement the cheap fix.

Ch. 9. Product Liability

Product liability was initially limited by contract law, which was very picky about establishing privity between consumer and defendant; frequently manufacturers were separated from victims by an intermediate seller, which defeated plaintiff's claim. Eventually the privity requirements were scrapped, and tort law came to dominate. In addition to traditional negligence remedies, courts moved to a form of no-fault recovery wherever the product was *defective*, such that the product became unreasonably dangerous. Defects come in three varieties: (1) manufacturing defects, e.g. a toaster with a short circuit or a tire with a separated tread (product is "out of spec"); (2) design defects, such as a can of Drano that doesn't have a childproof cap ("bad spec"); and (3) warning defects, e.g., a can of hairspray that doesn't warn that the spray is flammable. In cases of alleged manufacturing defects, strict liability is applied; that is, the

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2. An occupier, such as a tenant, usually acquires the same rights and obligations as the owner, and where the tenant's visitor is injured the tenant "stands in the shoes" of the owner for purposes of determining what duty is owed.

3. Bear in mind that *premises liability* arises from ownership of the premises, and is governed by special rules; where the plaintiff's claim against the defendant is not based upon ownership of the premises, but rather arises from the defendant's negligent conduct of an activity unrelated to his ownership, then the plaintiff may claim a duty of ordinary care. For example, the golfer who shows his guest how to swing a golf club and negligently hits him in the jaw is held to the same standard whether he is on his own property or at the golf course. Premises liability law does not come into play in such a case because the claim is not based upon ownership of the land where the injury took place.

court asks whether the reasonably prudent manufacturer would have put the product in the stream of commerce given the knowledge we now have about the product's dangers. In the case of alleged design defects courts may use a strict liability test (i.e., taking advantage of knowledge of risk acquired since the time of design) or may use a true negligence test (i.e., given what was known or should have been known *at the time*, would a reasonably prudent person have put the product on the market). As to warning defects, some jurisdictions impose strict liability (just as with design defects), but many courts use a simple negligence test: was the manufacturer negligent in failing to warn about the danger? Warning cases are often successful for plaintiffs because the cost to warn is arguably nothing, compared with even a remote risk that the lack of warning will result in injury.

Modern product liability reform statutes tend to provide for "statutes of repose," limiting the length of time a product is expected to perform safely; they also tend to consolidate the different theories of product liability into a unified theory of "defect." Most also permit contributory negligence as a defense to a claim based on a defective product.

Ch. 10. Medical Malpractice

Medical malpractice law is based on ordinary negligence principles, with two major variations: First, in determining the standard of reasonable care, expert testimony is required as to what the reasonably prudent physician *in those circumstances* would have done. The circumstances include the physician's degree of specialization and the resources available in the community. However, differences of opinion about alternative therapies (*e.g.*, Sabin vaccine v. Salk vaccine) do not allow the jury to find that one therapy is "correct" and the other is negligent. The second variation concerns "informed consent." A patient has a right to choose whether or not to undergo a medical procedure, even if a reasonably prudent person would have chosen it, and even though the physician acts with reasonable care in performing it. Although originally considered part of the law of battery (since it is an "unconsented" touching), modern approaches to informed consent consider failure to provide informed consent as a close relative of the basic negligence claim. To avoid liability for informed consent, the health care provider must disclose material facts connected with the treatment, including the risks and benefits of the procedure, as well as alternative forms of treatment.

Ch. 11. Rescuers, Justifiable Reliance, and Special Relationships

In some cases courts have a difficult time determining whether the defendant owes a duty to exercise reasonable care toward the plaintiff. Although most cases start with the presumption that everyone owes a duty to use reasonable care, it is not necessarily the case. A defendant doesn't owe a duty to use reasonable care if his conduct can be characterized as a simple failure to act (nonfeasance). A defendant is required to use reasonable care in two kinds of cases: first, if the defendant's conduct *increases the risk* that an injury will occur. For example, driving a car or putting a product out on the market creates the risk that an injury will occur. The defendant then has a duty to use reasonable care to prevent such injuries. Second, a defendant must use reasonable care if he has *induced justifiable reliance* that care will be used to avoid an injury. For example, if an ambulance service is called and indicates they will respond to a call for medical assistance, they have acquired a duty to use reasonable care to perform. Finally, courts may decide that there is a "special relationship" between the defendant and the plaintiff that requires the defendant to use care for the plaintiff's safety. For example, a doctor who knows of a child's abuse by its parents may be under a statutory duty to act for the child's benefit.

PART IV. INTENTIONAL TORTS

Intentional torts were among the first causes of action recognized at common law (and earlier legal systems) as ones requiring the defendant to pay compensation. However, they have receded in importance as a result of the prominence of insurance as the compensating mechanism. Most insurance policies exclude coverage for injuries caused intentionally; the typical insurance contract language provides coverage only for an "occurrence," which is usually defined as some kind of accidental harm. However, many cases still arise, frequently in the context of an employer whose employee oversteps his bounds (in law enforcement, debt collection, or the like).

Ch. 12. The Prima Facie Case

The elements for each cause of action are specified in the RESTATEMENT OF TORTS, and there is no substantial departure in any jurisdiction from the elements of the torts of battery, assault, or false imprisonment. The essence of battery is a touching—either harmful or offensive. In both cases the defendant must act intending to cause either the touching or the apprehension of such a touching, although under the doctrine of "transferred intent" it is possible for the plaintiff to show intent by proving that the contact was intended for a third party. The essence of assault is causing fear—imminent apprehension of a harmful or offensive contact by the defendant. The same rules about transferred intent apply. As to false imprisonment, the key issues are whether the defendant intended to confine the plaintiff, and whether the confinement is complete. Finally, the tort of outrage (RESTATEMENT § 46, Intentional Infliction of Emotional Distress) allows a recovery for cases where (1) the distress is inflicted intentionally (in some jurisdictions, or recklessly); (2) the conduct is extreme and outrageous; and (3) severe emotional distress results.

Ch. 13. Defenses to Intentional Tort Claims

Defenses to intentional torts are sometimes referred to as "privileges." That is, even if the defendant acted with the requisite state of mind, he may claim that he had a right to do so. In some cases the plaintiff consented to such contact by the defendant; but in other cases the plaintiff's consent is held ineffective because a plaintiff cannot consent to engage in criminal conduct (although the cases on this point are ambiguous). The most important privileges for battery come out of the defense of person or property. The general rule is that deadly force can only be used for defense of person; even there, such force can only be used where the defendant reasonably believes that death or serious bodily harm will be inflicted unless he uses such force. The standard is whether or not the defendant reasonably believed such injury was threatened—even if it actually wasn't. In defense of property, only reasonable force is permissible. Where there is a legal dispute over ownership (e.g., the *C.I.T.* case) a court's determination should be first obtained; a person can't retake possession if it will lead to a breach of the peace. Finally, many states provide a privilege for storeowners to detain suspected shoplifters, but they must exercise reasonable care in doing so.