“The life of the law has not been logic; it has been experience.”

- Oliver Wendell Holmes
Definition of Tort

- Tort: wrong (from the French “twist”) arising from a violation of a private duty, but a duty created by law

- Compare with crime: a wrong arising from a violation of a public duty

- Compare with breach of contract: injury caused by a violation of an obligation or duty created by agreement of the parties
Categorizing Torts

- **Intentional Tort:** defendant deliberately and intentionally acted and harm resulted

- **Negligent Tort:** defendant committed an act or omission that, by neglect or oversight, caused injury
Basis of Tort Liability

- **Intent** is the key that separates the two categories

- Motive (the why) is irrelevant in torts except as evidence of intent
  - motive is a key element only in a criminal case
The Elements of a Tort

• Duty of Due Care (e.g., duty not to harm)
  • Reasonable person standard
    • May be higher for professionals

• Breach of Duty

• Causation: two pronged analysis
  • proximate cause
  • foreseeability

• Injury
Causation & Tort Liability

- Causal relationship between act and injury must exist before liability is imposed
- Act of third person does not negate liability

Example 1: Sam hits Joe with car, Joe taken by ambulance to hospital, ambulance crashes. Sam still at fault for his portion of Joe’s injury

Example 2: Doctor implants defective product into patient without warning patient about defect. Manufacturer, as well as doctor, may be liable for injury.
Causation & Two Pronged Test

- Both prongs required to assess liability
  - Proximate cause: “but for” test . . . But for the particular act the harm would not have occurred
  - Foreseeability: Was the consequence of the act reasonably foreseeable?

Photo of roller coaster patron – potential injury?
Palsgraf v. Long Island Railway

- Palsgraf & daughters head to Rockaway Beach
- RR employee “helped” 2 men board moving train
- One man dropped package that exploded, injuring 13 people and causing scales on platform to fall, injuring Palsgraf

☆ Palsgraf (janitor living far below standard) had trouble walking & sued LIRR
Jury awarded Palsgraf $6000, LIRR appealed, and appellate court upheld, but LIRR appealed again.

1925: in 4 to 3 opinion, Cardozo reversed because relationship of guard's action to Palsgraf's injury was too indirect & thus not foreseeable.

Cardozo even directed that Palsgraf pay $500 in court costs & all of LIRR’s attorney fees!
Generally, tort liability imposed only if there is some *fault* on part of defendant
- E.g., driving under intoxication is fault because driver recklessly chose to drink and drive
- Exception: strict liability

SUV T-boned by drunk driver
Strict Liability

- **Absolute or strict liability** may be imposed if society considers activity so dangerous as to endanger the public.
- **No fault required**, only harm caused by dangerous activity.

Now extended to industrial activity, consumer protection, manufacturing defective products.

Firestone tire that melted, caused rollover.
Imposing Tort Liability

- Liability may be imposed for tort of employee or agent
- Liability for tort of child may be imposed on adult parent

Royce Ryan suffered brain damage due to accidental shooting by teen
Hernandez v. Arizona Board of Regents

- Frat party resulted in injury to third party when pledge drove car while drunk
- Court held fraternity liable because it was similar to tavern in this case
The Parties

- **Plaintiff** (injured party) may be the:
  - person who was injured
  - a bystander within “zone of recovery”
  - a third party with a special relationship to injured plaintiff

- **Defendant** (party who is sued) may be the:
  - person who allegedly caused injury to plaintiff(s)
  - a third party or co-conspirator who also may have injured plaintiff(s)
Joint & Several Liability

- Division of liability
  - when two or more defendants have caused harm to plaintiff, plaintiff may sue defendants for joint and several liability
  - “hunting accident” situation
A Closer Examination of Torts

- Negligent Torts
- Intentional Torts
Negligent Torts

- Negligence exists whenever the accused acted with less care than a reasonable person might have acted under similar circumstances
  - “Reasonable person” standard
  - “Reasonable person” standard is highly variable
  - “Degree of care” required: what would the ordinarily prudent person have done under similar circumstances (may depend on industry)
Stats on MVAs (Nat’l Safety Council)

- Avg. Economic Cost per Death, Injury, or Crash, 2003
  - Death $1,120,000
  - Nonfatal Disabling Injury $45,500
  - Property Damage Crash (incldg nondisabling injuries) $8,200
- Expressed on a per death basis (1 death, 54 disabling injuries, 223 property damage claims), the cost of a fatal motor vehicle crash is about $5,410,000
  - Calculable costs of MVA crashes are wage and productivity losses, medical expenses, administrative expenses, motor vehicle damage, and uninsured employer costs.
  - To estimate MVA cost per state, multiply number of fatal crashes times cost per crash amount
  - 1004 MVA deaths in NC in 2002, thus cost: $5,432,640,000
Doctrines affecting Negligence

- **Contributory negligence:**
  - Under common law, Plaintiff could not recover for injuries caused by a person’s negligence if the plaintiff’s own negligence contributed to the injury.

- **Comparative negligence:**
  - Most states reject common law rule of contributory negligence and “compare” or weigh the degree of negligence of plaintiff and defendant.
  - Plaintiff’s negligence doesn’t bar recovery, but reduces award.
Doctrines affecting Negligence

- **Res Ipsa Loquitur** (thing speaks for itself):
  - Plaintiff has burden to show defendant had duty, failed to exercise reasonable care, that defendant’s act or omission injured plaintiff, and plaintiff suffered injuries
  - *Under res ipsa loquitur*, fact of injury is evidence of negligence

Doctrines affecting Negligence

- Violation of statute is *negligence per se* if the statute was intended to protect from the harm that occurred.
  - *Example:* Mac speeds & hits Jane @ intersection; Mac gets ticket from city (purpose of speed limit is to prevent injury) and is *negligent per se* in Jane’s lawsuit against him.

Car Crash
Doctrines affecting Negligence

- **Assumption of risk:**
  - Plaintiff’s recovery barred or reduced if plaintiff assumed risk or took chances with known danger
  - Practical effect (limits plaintiff’s recovery) similar for either assumption of risk or contributory negligence

Snowboard Accident
Specific Negligent Torts

Demonstrative evidence of car crash

Baby scarred by surgeon’s scalpel during C-section birth
(birthlove.com)
Malpractice

- Liability imposed for negligent performance by a professional
- Medical malpractice called “preventable adverse events;” see FDA presentation 1
  - 44,000 to 98,000 Americans die in hospitals each year as a result of medical errors.
    - Institute of Medicine, To Err is Human, 1999
- Making a mistake that causes no harm is not malpractice
2006: 123,927 complaints filed against attorneys for malpractice.

American Bar Association

Injuries Associated With Medical Negligence Claims

- 15% Major Physical Injury
- 39% Significant Physical Injury
- 26% Death
- 17% Minor Physical / Emotional Injury / Breach of Consent
- 3% No Adverse Injury

American Association of Justice

Basis for audit malpractice claims

Anderson & Wolfe, Journal of Accountancy
Specific Negligent Torts

- **Negligent Hiring**
  - tort liability imposed for failing to perform an adequate background check on personnel
  - About 30 states recognize this theory
  - 30% of business failures are due to poor hiring practices
    - Department of Commerce

Nursing home abuse
Negligent Retention

- tort liability imposed for failing to terminate (fire) potentially dangerous or negligent employee
- Example: Kiesau v Bantz & Buchanan Co. Iowa

- Bantz (son-in-law of Sheriff Davis!) fired after appeal turned down; $96,000 compensatory + $60,000 punitive damages
- Buchanan Co. settled the 3-year-old negligence lawsuit with Kiesau for $70,000
- Sheriff Davis not re-elected
Specific Negligent Torts

- **Negligent Security**
  - tort liability imposed for failing to maintain adequate security in dangerous situation
  - E.g., *Ann M. v. Pacific Plaza Shopping Center*

- Ann M. was employed in Pacific Plaza photo shop. After opening store at 8 am, she was attacked and raped in the shop by an unknown man with a knife.
- Court held that violent criminal assaults were not sufficiently foreseeable to impose a duty upon Pacific Plaza to provide security guards in common areas.
Defendant deliberately and intentionally acted and harm resulted!

- Generally, defendant intended harm to result
- Defendant may not have intended to cause harm, but was reckless or indifferent to possible consequences of the act

Road rage photo
Intentional Torts

• **Invasion of Privacy**
  • invasion of physical privacy
  • unnecessary publicity to personal matters
  • commercial exploitation without permission
  • false public association with some product or principle

Intentional Torts

• **Defamation**
  - *Slander* = oral defamation (injury to reputation)
  - *Libel* = written defamation (or other visible form)

• **Elements**: false statement, communicated to third party, without privilege, that causes damages to the person’s reputation

• **Defense**: truth of the matter asserted

• A *privileged* statement is justified and protected by law (e.g., media reports)
• 1990: McDonald's served libel writs on 5 volunteers in a UK non-profit group over a 'What's Wrong With McDonald's?' leaflet. 3 volunteers apologize and Steel and Morris go to court as defendants
• June 1997, judge rules against the two volunteers

• Appeals begin
• Feb. 2005, European Court of Human Rights declared that the McLibel case breached the right to a fair trial and right to freedom of expression
Intentional Torts

- **Disparagement of goods & services**
  - malicious or false statements against goods & services of another, and slander of title to goods or land (aka “Veggie Libel Law”)
  - Example: **TEXAS BEEF GROUP v OPRAH WINFREY**

Oprah won
Intentional Torts

- **Lanham Act torts** (related to trademark)
  - Defendant made misleading or false statements against goods & services of another in commercial advertising or promotion creating a likelihood of harm to plaintiff

Pizza Hut sued Papa John’s under Section 43(a) of the Lanham Act…and lost.
Intentional Torts

- **Infringement**: trademark, patent, copyright
- copying trademark or service mark of another
- interfering with patent belonging to another
- copying an artistic or literary work resulting from another’s intellectual labor (including software via Digital Millennium Copyright Act)

*Is this infringement?*
Intentional Torts

• **Unfair competition**
  • imitating storefronts, advertisements, or packaging of another
  • also known as “trade dress” infringement
  • consumers protected by unfair competition laws as well as competitors

• **Conspiracy to Divert Trade**
  • business relationships intended to prevent customers from dealing with another business
  • furthering lawful interests not illegal
Malicious or Tortious Interference with Contracts

- occurs when defendant – without privilege – interferes with economic or contractual relationship between plaintiff and customer causing customer to breach contract or end business relationship with “original” company
  - privilege: advice or interference given in good faith is privileged (i.e., acceptable) interference
  - malicious intent required
  - protection exists even if contract was oral or could be terminated at will
Misrepresentation (negligent or intentional) or Fraud (intentional)

- Tort liability imposed because society protects people from false or misleading statements
- Watch out for “phishing” -- scammers use email or telephone to try and obtain personal information
Torts Against Person or Property

• *Trespass to the Person*
  
• **Battery**: intentional, wrongful physical contact with a person without the person’s consent resulting in injury or offensive touching
  
• **Assault**: putting *fear* of nonconsensual touching into another person

⬅️ Chris Brown on way to assault & battery sentencing.

Pit bulls can be used in assault & battery. ➔
Torts Against Person or Property

- **Trespass to the Person**
  - **False Imprisonment:** intentional, unprivileged (no reasonable grounds) detaining (any restraint for any duration) of a person without that person’s consent

Retail stores sometimes engage in false imprisonment of alleged shoplifters
Torts Against Person or Property

- **Trespass to Land or Personal Property**
  - Intentional or negligent, but unpermitted, entry below, on, across, or over land of another or invasion of another’s property rights
  - good faith defense

- **Conversion**
  - Taking personal property of another
  - Civil side of theft
  - good faith is *not* a defense
A court may award *direct* compensatory damages:

- Past expenses for past medical treatment or property loss
- Past pain and suffering
- Past mental anguish or emotional distress
- Past loss of consortium, society, or companionship
- Lost wages (past)
A court may award *consequential* damages:

- Future expenses for past medical treatment or property loss
- Future pain and suffering
- Future mental anguish or distress
- Future loss of consortium, society, or companionship
- Future lost wages or earning capacity (future)
Courts usually will not award consequential damages that are

1) too speculative:
   - E.g., a lost opportunity, sales, or profits
     - Compare a new business with an established business – a brand new business without track record cannot successfully claim lost profits since it doesn’t know what the profits would be

2) for damages to third party arguably caused by primary tort
Though often written as a claim or “cause of action,” mental distress is a damage issue:
- may be intentionally or negligently inflicted;
- bystander recovery allowed in most states if spectator within zone of danger views negligent act, causing the spectator mental distress.
Punitive Damages in Torts

• A court may also award punitive damages for extreme or outrageous behavior
  • intended to prevent defendant from repeating the act

2004: court awarded punitive damages of $4.5 billion to victims of Exxon Valdez spill; Exxon appealed
Exxon earned $90,000 an hour in 2004

Oil, 15 years later
Tort Law: Facts & Myths

- Tort claims account for only 5% of the 19.7 million civil claims filed in state courts (Nat’l Center for State Courts, 1992)

- Products liability cases account for 4% of all tort cases in state courts (Nat’l Center for State Courts, 1992)
Tort Law: Facts & Myths

- Business cases (financial damages) account for 47% of all punitive damage awards (Rand Institute for Civil Justice, 1996)

- In contrast, only 4.4% and 2% of punitive damage awards are due to product liability and medical malpractice cases respectively (Rand Institute for Civil Justice, 1996)
Businesses suing each other over contracts comprised nearly half of all federal court cases filed between 1985 and 1991 (The Wall Street Journal, 12/93)

Contract and property cases - most involving business - comprise more than 1/3 of all civil cases in state courts; by comparison, only 0.21% of all civil cases were product liability claims (National Center for State Courts, 1995)
The McDonald’s Coffee Case

- Stella Leibbeck, 79 at the time, bought and spilled coffee from McDonald’s in 1992
- Vascular surgeon determined that Liebeck suffered third degree burns over 6% of her body, primarily thighs and groin area, requiring hospitalization for 8 days and skin grafting and debridement treatments
The McDonald’s Coffee Case

- Liebeck sought to settle her claim for $20,000 and McDonald’s refused
- Discovery showed that over 700 complaints had been lodged against McDonald’s for coffee burns prior to Liebeck’s case
The McDonald’s Coffee Case

- Discovery showed that McDonald’s enforced requirement that coffee be held @ 185° F
- Discovery also showed that a burn hazard exists with foods served at 140° F or more and most restaurants do NOT hold coffee at such high temperatures
The McDonald’s Coffee Case

- Jury awarded Leibbeck $200,000 compensatory damages
- Amount reduced to $160,000 because jury found Liebeck 20% at fault for spill
- Jury awarded punitive damages of $2.7 million (2 days of McDonald’s’s coffee sales)
- Trial court reduced puni award to $480,000
- Parties entered post-verdict settlement
Next

- Torts & Product Liability Part 2
- Next Week: Contracts