Torts Outline

Joseph Mornin
Berkeley Law School
joseph@mornin.org

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Prof. Neil Levy

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§ 1 Overview

1. Tort law rests on three frameworks:
   (a) Fairness.
   (b) Loss distribution.
   (c) Law and economics.

§ 2 Intentional Torts

2.1 Intent

1. Intent requires **desire** or **substantial certainty**.
2. Reckless behavior can sometimes suffice for intent (see below).
3. "...the law of torts is not criminal law and does not condemn, but only shifts the burdens of economic loss."[1]
4. Can a child meet the requirements for intent? ***Garratt v. Dailey***: A five year old moved a chair from the place where the plaintiff was about to sit. The plaintiff fell and fractured her hip. The plaintiff's battery claim requires proof that the defendant had intent to cause contact that was not consensual or otherwise privileged. The Second Restatement indicates that intent exists if the actor is **substantially certain** that the harmful contact **will** (not might) occur. Court finds that it's unclear whether the defendant had substantial certainty. Remanded to trial court for clarification.
   (a) When should infancy make a difference in intent?
5. Can an insane person meet the requirements for intent? ***Williams v. Kearbey***: Minor shot up a school and claimed insanity. Court held that defendant intended to commit the action (even if his motivation was irrational) and is therefore liable.
6. Insanity is never a defense to intentional torts. It can sometimes be used as a defense in criminal law.[2]
7. Other notes on torts and intent:
   (a) Torts are generally excepted from workers' comp immunity.
   (b) In most jurisdictions, you can't insure against intentional torts.
   (c) The constitution's Supremacy Clause leads to three kinds of preemption of federal laws over state laws:

[1] *Understanding Torts*, p. 6.
[2] See Dressler, *Criminal Law*, p. 613.

i. *Express preemption*: Explicit or implicit overriding of a state statute.

ii. *Conflict preemption*: In case of direct conflict, federal law preempts state law.

iii. *Field preemption*: Congress legislates for an entire field of regulation, leaving no room for states to regulate.

(d) The Second Restatement on Torts blends purpose and knowledge (i.e., substantial certainty) into one rule. The Third Restatement proposes separating them into two distinct rules, since limiting liability to "purpose" can have consequences in areas like workplace litigation.

(e) Inadvertent results of actions are not intentional. (But, mistakes usually constitute intent—see below.)

(f) The substantial certainty test significantly expands the use of intentional torts in workplace and environmental litigation.

(g) A few jurisdictions have rejected the substantial certainty rule.[3]

8. Can the different approaches towards insanity and infancy and torts and criminal law be justified?

2.2 Battery

1. Battery requires **intent to cause harmful or offensive contact** and that harmful or offensive contact directly or indirectly results.

   (a) "Unpermitted" touching can be enough—see *White v. University of Idaho*, where a piano teacher touched a student's back and caused significant injury.

   (b) Any touching in anger can also be enough.

2. Is battery actionable for very small harms? ***Leichtman v. WLW Jacor Communications, Inc.***: A cigar smoker blew smoke in the face of an anti-smoking advocate. The court finds that "No matter how trivial the incident, a battery is actionable..." But it rejects the "smoker's battery" (which imposes liability if there is substantial certainty that second-hand smoke will touch a nonsmoker).

3. Does compliance with safety standards affect liability for intentional torts? Can radiation constitute contact? ***Bohrmann v. Maine Yankee Atomic Power Co.***: University of Southern Maine students took a tour of a nuclear power plant. Plaintiffs allege the company knew a flushing procedure would release radioactive gases during the tour, and that tour guides knowingly took students through plumes of unfiltered radioactive gases.

[3] Casebook p. 6.

Plaintiffs also allege the company falsely told them they had not been exposed to "bad" radiation. The court holds that compliance with federal safety standards does not affect the defendant's liability for intentional acts.

4. The proposed Third Restatement would limit intent liability based on substantial certainty to small, localized groups of people. So, for instance, tobacco companies would not be liable for second-hand smoke damages.

2.3 Assault

1. The threat or use of force on another that causes that person to have a **reasonable apprehension of imminent harmful or offensive contact**.

2. The Second Restatement does not require apprehension to be "reasonable," but most courts do.

3. Assault in torts is different than assault in criminal law. The criminal law definition requires an attempt to inflict harmful or offensive contact, but it does not require perception.[4]

4. Can damages be awarded if physical harm did not occur? ***I de S et Ux v. W de S***: Defendant tries to buy wine from the plaintiff. He beats on the door with a hatchet. When the plaintiff's wife asks him to stop, he tries to hit her with the hatchet (but did not hit her). The court ruled that the plaintiff was entitled to damages even though no physical harm was done.

5. Can forward looking verbal threats suggest imminent harm? ***Castro v. Local 1199, National Health & Human Services Employees Union***: Plaintiff has asthma, which prevented her from working in extremely hot or cold situations. After a disability leave, she attended a meeting where she didn't receive her usual assignment. She asked what was going on, and Frankel (another employee) replied, "If I was you, I would take whatever they give me, because you could lose more than your job." When asked he was threatening her life, Frankel said, "Take it any way you want." The court held that **verbal threats, without "circumstances inducing a reasonable apprehension of bodily harm," do not constitute an assault**. Here, the threat was "forward-looking" and did not suggest imminent harm. The court granted the defendant's motion for summary judgment.

6. More questions on assault:

   (a) Is it possible to rationalize the difference between the criminal and tort definitions of assault?

[4] Casebook p. 21.

(b) Why prevent assault?

(c) Why must assault be imminent?

(d) Can words alone ever be enough to constitute assault? See *Campbell v. Kansas State University*, where a university head said "he felt like hitting his assisstant on the buttocks, after he had already slapped her on the buttocks," which the court held to be assault.[5]

2.4 Transferred Intent

1. Historically, transferred intent means that intent to commit any of the five traditional torts (battery, assault, false imprisonment, trespass to land, trespass to chattel—because these are torts where you would file a writ of trespass in old English contexts) can constitute the necessary intent to commit any of the other five.

2. Transferred intent is a legal fiction.

3. The Second Restatement only incorporates transferred intent for assault and battery.

4. Generally, **intent towards anyone for anything is intent towards anyone else for anything else**.

5. Does the intended target matter? ***Alteiri v. Colasso***: The defendant threw a rock that hit the plaintiff in the eye, but he intended to scare somebody else. He did not intend to hit anyone, and he did not throw the rock recklessly. The court ruled that there was no error in the jury's verdict for willful battery.

6. Is it appropriate to transfer intent from a property tort to a personal tort?

2.5 False Imprisonment

1. Intentional, unlawful, and unconsented restraint.

2. Can the implied threat of physical restraint be enough to constitute false imprisonment? ***Dupler v. Seubert***: Dupler was fired from her job. Her superiors (including Deubert) kept her against her will in a 1.5-hour meeting. Dupler argued that Deubert and the other defendant screamed and shouted. The trial jury found false imprisonment and awarded damages of $7,500. The trial judge offered a remittitur of $500, and Deubert appealed. The Supreme Court of Wisconsin affirmed the order, holding that false imprisonment occurred when Dupler was held against her will after her hours of employment had ended at 5 PM (in contrast to Weiler v. Herzfeld-Phillipson, where the imprisonment occurred during work hours).

[5] Casebook p. 20.

3. According to the Second Restatement, confinement may be caused by:
   (a) Physical barriers.
   (b) Force or threat of immediate force.
   (c) Omissions where there is a duty to act.
   (d) False arrest.
4. Victim must be confined in a bounded area (e.g., if movement is allowed in any direction, even if it's not the desired direction, false imprisonment did not occur).
5. The victim must usually be conscious of confinement, but not always (e.g., infant abduction).
6. False imprisonment usually does not recognize highly coercive but non-physical threats (e.g., economic retaliation).
7. Lawful restraint does not constitute false imprisonment
8. *Additur* and *remittitur*: after jury delivers damages, judge adjusts them up or down.
   (a) Should appellate courts be allowed to issue remittances? Levy says no, because appellate courts get a thin version of the case (only transcripts, etc.) and more is needed to make an accurate determination about damages.
   (b) There are generally no limits on the damages a jury can award (with a few exceptions).
9. *Shopkeeper's privilege*: Shopkeepers can detain suspected shoplifters.
10. "[A] form of false imprisonment whereby the improper assertion of legal authority can unlawfully restrain a victim."[6]

2.6 Malicious Prosecution

1. Second Restatement requires initiation of proceedings without probable cause and for a purpose other than bringing the offender to justice. It also requires that the proceedings have terminated in favor of the accused—so, a defendant who is sued and loses can't claim malicious prosecution (i.e., the defendant must have been exonerated to have a cause of action for malicious prosecution).[7] The defendant can't bring a malicious prosecution claim until the initial suit is resolved, and if charges are dropped, there are no grounds for malicious prosecution.
2. Anti-SLAPP statutes also help prevent against frivolous litigation.

[6] Casebook p. 38 n. 1.
[7] Understanding Torts p. 48.

3. Some jurisdictions recognize malicious prosecution only in criminal contexts, with the parallel civil tort "wrongful institution of civil proceedings."[8]

4. The "American Rule" dictates that the loser in a suit doesn't have to pay the winner's legal fees (in contrast to the "British Rule").

5. Can a legal process be used for a purpose other than that for which it was intended? ***Maniaci v. Marquette University***: Saralee Maniaci became dissatisfied with Marquette University and, with her father's permission, decided to leave. School administrators tried to persuade her not to leave. When they were unsuccessful, they requested that the Milwaukee police bring papers for temporary emergency detention in a mental hospital for people considered "irresponsible and dangerous." The school physician, the Dean of Women, and a registered nurse signed the application for temporary custody.

   She was held for a night until her father demanded her release. Maniaci and her father filed suit on multiple charges, all of which were dismissed except false imprisonment. The jury assessed compensatory and punitive damages, which the court reduced on motions after the verdict.

   The defendants appeal, arguing that the only legitimate cause of action was **malicious prosecution**, and moreover that the evidence was insufficient to prove malicious prosecution and that the damages were excessive. Court agrees that there is no cause of action for false imprisonment because the restraint was "lawful."

   The court does not find that malicious prosecution applies. It finds no malice because the defendants "had a genuine concern for the plaintiff's welfare."

   The court believes there is support—"skeletally at least"—for a cause of action on the basis of abuse of process. The defendants did not have serious concerns about Maniaci's mental health. Rather, their purpose was to restrain her until her parents had been notified of her decision to leave school, and had either given their permission or directed Saralee to stay in school.

   Judgment is reversed and remanded, and the plaintiffs are required to amend their claim to allege cause of action for abuse of process.

6. You can file multiple (and in California, even contradictory) causes of action.

2.7 Abuse of Process

1. Misuse of legal process for an ulterior purpose.

[8] Casebook p. 39 n. 2.

2. Does not require termination of the legal process in favor of the one bringing the complaint (or even termination at all).

3. Can a legal process be used for a purpose other than that for which it was intended? ***Maniaci v. Marquette University***: Saralee Maniaci became dissatisfied with Marquette University and, with her father's permission, decided to leave. School administrators tried to persuade her not to leave. When they were unsuccessful, they requested that the Milwaukee police bring papers for temporary emergency detention in a mental hospital for people considered "irresponsible and dangerous." The school physician, the Dean of Women, and a registered nurse signed the application for temporary custody.

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   Judgment is reversed and remanded, and the plaintiffs are required to amend their claim to allege cause of action for abuse of process.

2.8 Intentional Infliction of Emotional Distress

1. "Intentional infliction of emotional distress occurs when the defendant, through extreme and outrageous conduct, intentionally or recklessly causes the victim severe emotional distress."[9]

2. Can overlap with other torts—e.g., wrongful termination, sexual/racial harassment.

3. Not a historic tort, but a product of the 20th century. The torts (above) all have rigid factors. Courts invented intentional infliction to get around these restrictions.

[9] Casebook p. 44 n. 1.

4. No need to prove physical injury. Most states require a showing of outrageous behavior beyond all reasonable bounds of decency.

5. The relationship between the plaintiff and defendant can impact the court's characterization of the conduct as extreme or outrageous.

6. Should employers be liable for wrongful termination as well as intentional infliction of emotional distress?

7. What constitutes gross recklessness or intent to cause severe distress? ***Slocum v. Food Fair Stores of Florida, Inc.***: A shopper in a store asked the price of an item. An employee replied, "if you want to know the price, you'll have to find out the best way you can...you stink to me." She had a heart attack and sued for intentional infliction of emotional distress. The court denied the claim, reasoning that the language did not constitute "gross recklessness," nor was it intended to cause "severe emotional distress."

   (a) Would racial identities have affected the court's holding?

   (b) Levy thinks *Slocum* is wrong—the jury's verdict should have been taken into account.

8. ***Rulon-Miller v. International Business Machines Corporation***: The plaintiff, a longtime IBM employee carried on a relationship with an employee at a rival office products firm, QYX. Her managers at first indicated they did not think the relationship constituted a conflict of interest—"I don't have any problem with that." But then her manager told her to end the relationship or lose her job, giving her "a couple of days to a week" to think about it. The next day, he said "he had made up her mind for her" and dismissed her. The court held that the manager "intended to emphasize that she was powerless to to do anything to assert her rights," affirming the judgment for intentional infliction of emotional distress.

9. Does sexual harassment constitute intentional infliction of emotional distress? ***Jones v. Clinton***: Paula Jones claimed Bill Clinton's "actual exposure of an intimate private body part" constituted extreme and outrageous conduct. The court found no evidence that the incident caused any significant lasting emotional distress and rejected the claim in a summary judgment.

10. Spectrum of intent:

    (a) Desire.

    (b) Substantial certainty.

    (c) Negligence.

    (d) Gross negligence.

    (e) Recklessness.

11. The plaintiff's sensitivity usually isn't enough—e.g., *Nickerson v. Hodges*, where a woman believed her dead relatives had buried a pot of gold in her backyard. The defendants buried a pot of dirt, which she opened at the bank, expecting gold. The court found that the joke caused her extreme distress.

2.9 Defenses to Intentional Torts

2.9.1 Self Defense

1. Force intended to inflict death or serious injury must be necessary and is only reasonable in response to the **immediate threat of serious bodily injury or death**.

2. The Restatement of Torts also requires retreat if safely possible (except from the victim's own dwelling) before the victim can respond with force intended to inflict serious bodily injury or death. Most courts disagree.[10]

3. If the threat is not immediate, self-defense is not valid. There is dispute about spousal abuse cases, however—should the smaller spouse be required to wait until the physical threat is immediate before asserting the right to self-defense?

4. There is a limited right to self defense against excessive police force.

5. Reasonable mistakes in perceiving threats can be valid bases for self defense.

6. Should good samaritans be encouraged to intervene? The Second Restatement allows bystanders to assert self defense if they reasonably believe that the third party has a privilege of self defense and that intervention is necessary to protect him. The traditional rule, however, only allows intervention when the third party is privileged. The Second Restatement would allow reasonable mistakes.

7. ***Drabek v. Sabley***: Ten-year-old Drabek and friends were throwing snowballs at passing cars. One driver, Sabley, stopped, caught Drabek, took him by the arm to his car, and drove him back to the village of Williams Bay. He turned Drabek over to the police. Drabek was with Sabley for a total of 15-20 minutes. The court held that Sabley was justified in preventing the commission of a crime, and so it was reasonable to admonish Drabek and march him home. But it was not reasonable to detain him and take him to the police station, so Sabley is liable for false imprisonment and nominal battery. Remanded to determine compensatory (but not punitive) damages.

[10] Casebook p. 64.

2.9.2 Defense of Property

1. Reasonable force can be used to protect property. Force intended to cause death or serious injury (i.e., wounding force) to protect property is **never reasonable**.

2. The Second Restatement holds that reasonable force can be used when intrusion on property is not privileged, when the actor believes the intrusion can only be prevented by force, and when the owner first makes a request to desist (or believes a request will be useless).

3. The person using force must give notice if feasible.

4. *Katko v. Briney*: spring guns protecting property are not reasonable unless the owner would have been privileged to use the same force if present.

2.9.3 Private Necessity

"Private necessity is a privilege which allows the defendant to interfere with the property interests of an innocent party in an effort to avoid a greater injury. The privilege is incomplete since the actor must still compensate the victim for the property."[11]

1. ***Vincent v. Lake Erie Transp. Co***: Defendant was moored at the plaintiff's dock to unload goods when a severe storm struck. Defendant kept his boat secured (and repeatedly replaced damaged or broken lines) to the dock throughout the storm, causing $500 in damages to the dock. The court held that an actor is justified in using another's property in extreme circumstances, but will be held responsible for any damages incurred.

2. The dissent analyzed this as a contracts problem, not a torts problem.

2.9.4 Public Necessity

Public necessity allows appropriation of property in order to prevent a greater public harm. Compensation to the property owner is not required. In *Surocco v. Geary*, the city San Francisco ordered the destruction of a building to create a gap to prevent the spread of a citywide fire. The owner unsuccessfully claimed he should have been allowed to remove his wine cellar before the building was destroyed. Not all courts, however, hold that public necessity can insulate municipalities from damages in all cases.

2.10 Intentional Interference with Contractual and Economic Relations

1. Economic torts: we want competition, but not too much.

[11] Casebook pp. 69–70.

2. Contractual interference torts are rooted in anti-labor motivations.
3. According to the Second Restatement, the elements of these two torts are:
   (a) A valid contract or economic expectancy.
   (b) Defendant's knowledge of the contract or economic expectancy.
   (c) Defendant's intent to interfere.
   (d) Interference.
   (e) Damage to the plaintiff.[12]
4. Many courts recognize various justifications:
   (a) Fair competition or proper protection of one's own financial interest (as long as the contract is freely terminable at will).
   (b) Protecting the welfare of another for whom one is responsible.
   (c) Providing truthful or honest information if requested.
   (d) Assertion of a bona fide property right (e.g., preventing a thief from selling your car).
   (e) Interfering with an agreement that is illegal or against public policy.
5. Not all courts treat these as distinct torts, though California does.
6. For non-legal reasons (e.g., public relations), these torts are rarely brought (do you really want to sue several people for leaving your firm?).
7. ***Calbom v. Knudtzon***: Mr. Henderson died and left Mrs. Henderson to execute his estate. Harry Calbom, a lawyer, had been hired to help sort out the legal issues. Mrs. Henderson's accountant, Mr. Knudtzon, told Mrs. Henderson that Calbom was unsatisfactory and provided a list of other attorneys. Mrs. Henderson found another attorney, and Calbom sued for intentional interference with his employment contract. The court held that an attorney-client relationship existed, which Calbom had every right to expect would continue. It found that the "defendants' interference was malicious, intentional, and without justification," affirming the judgment for Calbom.
   (a) Levy: this case is wrong. Knudtzon gave multiple suggestions for other attorneys, and there is no evidence of favoritism or kickbacks.
8. ***Lowell v. Mother's Cake & Cookie Co.*** : TODO (85–90)
9. ***Texaco, Inc. v. Penzoil, Co.***: TODO (90-97)
10. ***Environmental Planning and Information Council of Western El Dorado County, Inc., Superior Court***: TODO (98–104)

[12] Casebook p. 82 n. 1.

2.11 Wrongful Termination of Employee

1. An employer can be liable for wrongful termination if the termination contradicts significant public policy.

2. Can an employee be fired for protecting the interests of his employer? ***Foley v. Interactive Data Corp.***: A well-regarded employee, Foley, became concerned when he learned that the person hired to be a new Vice President was under FBI investigation for embezzlement from Bank of America, his previous employer. Foley was fired within a few days. The court found that there was no wrongful termination because Foley's disclosure benefited only the private interests of his employer, not the public.

2.12 Tortious Breach of the Covenant of Good Faith and Fair Dealing

1. Every contract imposes a duty of good faith and fair dealing. Some courts hold that a breach of this covenant constitutes a tort, allowing tort damages (e.g., punitive damages and compensation for mental distress) as well as contract remedies.

2. What duties do insurance companies have to policyholders? ***Egan v. Mutual of Omaha Insurance Co.***: The plaintiff purchased a disability insurance policy from the defendant. When the plaintiff became disabled, the insurance company wrongly and maliciously withheld payments, calling the plaintiff a "fraud." The court found that the insurer "cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial." The court found for the plaintiff (but deemed the punitive damages of $5 million to be excessive).

3. Two types of insurance: first party (which bets on whether an event will happen—disability, life, etc.) and third party (which addresses incidents involving third parties–liability, homeowners, auto, etc.).

4. Many courts have limited this tort to insurance contexts. However, as many as 16 of the 36 states that recognize the tort have applied it to non-insurance contexts.[13]

2.13 Intentional Misrepresentation

1. Second Restatement definition: "One who fraudulently makes a [material] misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation."[14]

[13] Casebook p. 115.
[14] Casebook p. 121.

2. Misrepresentation must be intentional or reckless. It usually has to be a statement of fact, not opinion, except in the case of a fiduciary.

3. ***Nader v. Allegheny Airlines, Inc.***: Allegheny Airlines bumped Nader from a flight, causing him to miss a speaking engagement. The airline intentionally overbooked the flight, but told all passengers that they had "confirmed reservations." Allegheny argued that "confirmed" was reasonable language because the probability of being bumped was very low. The court held, however, that the airline's nondisclosure was misleading. It awarded $10 in compensatory damages to Nader and $15,000 in punitive damages. The court of appeal reversed the decision, arguing that Nader's reliance was not justifiable because he had been bumped many times before and knew about the airline's policy.

4. To succesfully recover, a plaintiff must have authentically relied on the misrepresentation.

5. Courts have traditionally not included broken promises within this tort (though they may constitute breach of contract). However, some courts and the Second Restatement have begun to distinguish between promises that are lies (which are tortious) and sincere promises.[15]

6. Failure to disclose can constitute concealment.

§ 3 Strict Liability

3.1 Traditional Strict Liability

1. Strict liability means that the plaintiff's prima facie case does not need to prove that the defendant acted in a blameworthy fashion.

2. Plaintiff has to prove other elements: cause-in-fact, proximate cause.

3. Most important areas: legislative programs (e.g., workers' comp.—not usually referred to as strict liability, but that's how it operates, because fault is generally not an issue), and certain "abnormally dangerous" activities (e.g., keeping wild animals, blasting, use of poisons), strict products liability.

4. An anomally in the field of torts historically—but liability without fault is present in other areas of the law: contracts (breach of contract generally does not involve fault).

5. Premised on the need for greater loss distribution that what would occur under negligence.

[15] Casebook p. 124.

3.1.1 *Siegler v. Kuhlman*

1. Overturned gas trailer caused fire.
2. Transporting gas by truck is abnormally dangerous. It possesses all of the Restatement factors for strict liability.
3. Trial court: defendants overcame charges of negligence.
4. Holding: reversed and remanded for retrial on strict liability.

3.1.2 *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*

1. Cyanamid loaded 20k gallons of acrylonitrile in a leased railroad car.
2. Indiana Harbor Belt asserted (1) negligent maintenance of the train car and (2) strict liability because transport of bulk acrylonitrile through Chicago is abnormally dangerous.
3. Distinction from *Siegler*: defendant there was the transporter; here it is the shipper.
4. Harm here was the result of carelessness, not inherent danger. Negligence would have been an effective deterrent.
5. Reversed and remanded to be tried on negligence.

3.1.3 *Kelley v. R.G. Industries, Inc.*

1. Gunshot victim claimed the manufacturing and marketing of handguns is abnormally dangerous. Court rejected the argument because under SL, the activity must be dangerous in relation to the area where it occurs.

3.1.4 *Foster v. Preston Mill Co.*

1. Blasting operations caused a mink to kill its kittens. Court rejected the strict liability argument because liability only exists for harms resulting "from that which makes the activity ultrahazardous."

3.2 Products Liability

1.
2. A manufacturer (or anyone in the chain of distribution) is strictly liable when an article is placed on the market knowing that it is to be used without further inspection for defects and proves to have a defect that causes injury.
3. Strict liability is not based on fault. The rationale is loss distribution.

4. In addition to strict liability, manufacturers can also be held liable for negligence, express/implied warranty, and representation.

5. Defect is defined as:

6. Issues in defining defect have split jurisdictions

   (a) Must the product be "unreasonably dangerous"? The majority of states require it, but CA says no, because it introduces a negligence standard. Can there be liability for an open an obvious defect? CA no, others yes.

   (b) Must the product be in a condition not anticipated by the buyer, i.e., beyond the consumer's expectation? Some jurisdictions make this a requirement. In CA, that's one method of getting to strict liability (*Barker*), but it's not necessary. Some say this introduced negligence, but (1) it's in hindsight, not foresight and (2) the burden of proof is on the defendant, not the plaintiff. But see *Sewell*: if the product is too complex, the consumer expectations test does not apply.

7. No strict liability for prescription pharmaceuticals.

8. State-of-the-art defense: is the defendant relieved of liability if at the time of the manufacture, nobody could have made it more safe. Some states have adopted this rule; in CA it's only adopted in a few areas—pharmaceuticals, warning defects (*Anderson*).

9. Manufacturing defect: the product is different than all the others produced.

10. Warning defect: inadequate labels or instructions. Purposes: inform the consumer of dangers to let her avoid buying it or to use it more safely.

11. Restatement (Third) of torts would radically shift products liability in favor of manufacturers. Plaintiff would have to prove the existence of a reasonable alternative design. The *Potter* court rejected the rule as unduly requiring plaintiffs to retain expert witnesses. No chance that this rule will be adopted in CA in the foreseeable future.

12. Restatement (Third) also tries to combine products liability into a single principle (§ 550.1). Levy fears this would wipe away much of existing products liability law.

13. Strict liability does not allow recovery for economic damages.

14. If plaintiff is negligent, we will apply comparative negligence, even in strict products liability cases. There's dispute about whether fault can logically apply in strict liability contexts.

15. Preemption: when do federal rules preempt state law? There are three types of preemption under the Supremacy Clause: express, conflict, field.

16. Can there be liability for component parts of a product? Cases are not all in agreement. Best rule: (1) if the component part is defective, there can be liability. (2) If the component parts manufacturer was intimately involved in the design of the whole product, it can be held liable for the whole product.

17. The "sophisticated/professional user" defense: a manufacturer generally owes no duty to warn professionals against the danger if the danger is generally known to the profession.

18. *Daly*, comparative negligence: can you apply assumption of risk to a strict products liability case? The answer will likely be yes, though there is no California Supreme Court case that directly addresses it.

19.

3.2.1 *Pillars v. R. J. Reynolds Tobacco Co.*

1. Human toe in chewing tobacco triggered strict liability.

3.2.2 Strict products liability: *Greenman v. Yuba Power Products, Inc.*

1. This is the first case to find strict products liability for defective products.

2. A piece of wood flew out of a woodworking tool, the Shopsmith, injuring the plaintiff, Greenman.

3. 10.5 months later, he sued the manufacturer, Yuba, and the retailer for breach of warranty and negligence.

4. The court found that (1) the retailer was not negligent and did not breach an express warranty, and (2) the manufacturer did not breach an implied warranty. Thus, the only valid causes of action were (1) a breach of implied warranty against the retailed and (2) negligence and a breach of express warranty against the manufacturer. The jury found for the retailer and found $65,000 against Yuba.

5. Yuba appealed; Greenman sought appeal against the retailer only if the judgment against Yuba was reversed.

6. The jury could have reasonably found that Yuba negligently manufactured the Shopsmith.[16]

7. The requirement that consumers need not give notice of injury to manufacturers with whom they have not directly dealt. Thus, the plaintiff's cause of action was not barred.

[16] Casebook p. 520.

8. The manufacturer can be held strictly liable for a defective product even in the absence of an express warranty: **"A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."**[17]

9. Liability for defective products is governed by strict liability, not contract warranties.

10. The purpose of strict liability for defective products is to ensure that manufacturers bear the costs of injuries to consumers.

11. **Warranties**:

    (a) *Express warranties*: created when the seller makes factual assertions about a product.

    (b) *Implied warranties*: (1) "implied warranty of merchantability" is a guarantee that products conform to their description and are safe for their intended use; (2) "implied warranty of fitness for a particular purpose" is created when the seller has reason to know that the buyer buys the goods for a particular purpose. [18]

    (c) The advantage of basing a products liability case on a warranty theory is that liability is strict and there can be compensate for pure economic loss. The disadvantage is that sellers can limit remedies or disclaim warranties altogether. Warranties also historically require prompt notice of dissatisfaction to the defendant.[19]

12. **Misrepresentation**: another theory for product liability (in addition to negligence and warranty theory). It holds manufacturers liable for harm caused by justified reliance on the misrepresentation.

13. **Strict product liability**: a fourth theory. It imposes liability on manufacturers for defective products that proximately cause personal and property injuries. [What about economic injuries?] This is the theory in *Greenman*.

3.2.3 *Lee v. Crookston Coca-Cola Bottling Co.*

1. Coke bottle exploded in waitress's hands.

2. Four policy justifications for strict products liability:

    (a) Discourage marketing of defective products.

    (b) Put burden of loss on manufacturer.

    (c) Maximize legal protections for consumers.

[17] Casebook p. 521.
[18] Casebook p. 523.
[19] Casebook p. 524.

(d) Allow injured parties to bring actions directly against those who caused the injuries without involving others in the distribution chain.

3.2.4 *Gray v. Manitowoc Company*

1. Crane hit construction worker, who argued that mirrors should have been provided. Court found that the safety hazards of this type of crane were well known in the industry and thus was not "dangerous to a degree not anticipated by the ordinary consumer of this product."[20]

3.2.5 *Roysdon v. R.J. Reynolds Tobacco Co.*

1.

3.2.6 *Barker v. Lull Engineering Co., Inc.*

1.

3.2.7 State-of-the-art defense: *Beshasda v. Johns-Manville Products Corp.*

1. This was a consolidated case against six asbestos manufacturers. The defendants' "state-of-the-art" defense argued that the dangers of asbestos were unknowable at the time the injuries in question occurred.

2. The trial court denied the plaintiffs' motion to strike the state-of-the-art defense.

3. The plaintiffs claimed strict liability for failure to warn. "The issue is whether the medical community's presumed unawareness of the dangers of asbestos is a defense to plaintiffs' claims."[21]

4. The court distinguished negligence, which is conduct oriented, from strict liability, which is product oriented.

5. There is a two-part **risk equity** test to determine whether a product is safe:]

   (a) Does its utility outweigh its risk?

   (b) Has that risk been reduced to the greatest extent possible consistent with the product's utility?[22]

6. In strict liability cases, there is no need to prove that the manufacturer knew or should have known of the product's danger. Knowledge is imputed to the manufacturer. "...in strict liability cases, culpability is irrelevant."[23]

[20] Casebook p. 531.
[21] Casebook p. 549.
[22] Casebook p. 551.
[23] Casebook p. 552.

The state-of-the-art defense is a negligence defense because it rests on the defendant's conduct.

7. There are three reasons for imposing strict liability for failure to warn:
   (a) *Risk spreading*: spreading costs of harm to manufacturers and purchasers is preferable to imposing it on innocent consumers.
   (b) *Accident avoidance*: industries play an important role in safety research, and we want them to maximize it.
   (c) *Fact finding*: the dangers of asbestos *could have been known*, but weren't. Regardless, it's better to leave out the negligence concept of knowability, because the framework here is strict liability, not negligence.
8. The court granted the plaintiffs' motion to strike the state-of-the-art defense.
9. (In contrast to New Jersey, the majority trend is to allow the state-of-the-art defense, including in California.[24])

3.2.8 Federal preemption: *Riegel v. Medtronic, Inc.*

1. The Medical Device Amendments (MDA) to the FDCA established various levels of federal oversight for medical devices depending on their risks. Devices that were already on the market were grandfathered, and new devices that were "substantially similar" to the existing devices could also sidestep premarket approval.
2. Here, the doctor inflated a balloon catheter beyond the pressure limit indicated on its label, causing injury to the plaintiff.
3. The district court held (1) that the MDA preempted the plaintiff's common law tort claims and (2) that the MDA preempted the plaintiff's negligent manufacturing claim because it did not claim that the manufacturer violated federal law.[25]
4. Justice Scalia:
   (a) The MDA only preempts state requirements that are different or in addition to the applicable federal requirements. The court here, relying on *Lohr*, found that state law negligence and strict liability claims are different and therefore the MDA preempts them.
   (b) If federal regulations did not preempt state common law, then states and individual juries would be able to undermine the FDA's expert evaluations and policies.

[24] Casebook p. 557.
[25] Casebook p. 562.

(c) The consequence is that the FDA's approval of the device preempts state tort law actions based on negligence and strict liability.[26]

3.2.9 *McKenney v. PurePac Pharmaceutical*

1. PurePac manufactured the generic drug metoclopramide. McKenney claimed she was injured because of "false or misleading statements" in the drug's labeling.[27]

2. The CA Superior Court sustained PurePac's demurrer and entered summary judgment in its favor.

3. In its demurrer, PurePac contended that McKenney's claim was barred by the defense of federal preemption. Because it submitted its labeling to the FDA and won approval, PurePac argued it could not be held liable for state tort law claims regarding any deficiencies in the labeling.

4. *Brown* and *Carlin* affirmed strict tort liability for pharmaceutical manufacturers in California.

5. The court found that FDA approval of labeling does not preempt state tort claims against manufacturers.

6. Reversed (demurrer rejected).

7. Reconciling *Riegel* and *McKenney*: courts will likely allow state causes of action that are parallel to the federal rules.

3.2.10 Restatement (Third) Approach: *Potter v. Chicago Pneumatic Tool Co.*

1. Plaintiffs claim they were injured from excessive vibrations as a result of defective warnings on the defendant's product.

2. Courts are divided on the definition of design defects.

3. The Restatement (Third) requires plaintiff to prove the existence of a "reasonable alternative design."[28] The defendants argue that the court should adopt this standard.

4. The court here reasoned that the Restatement (Third) approach puts an undue burden on plaintiffs by requiring expert witnesses even in cases where a lay jury could infer a design defect. Moreover, cases exist where a product is defective even though no alternative design exists.

[26] Casebook p. 565.
[27] Casebook p. 89.
[28] Casebook p. 566.

5. The Restatement (Third) holds that a product is defective only if there are foreseeable risks that a reasonable alternative design would have avoided. Thus, it allows the state-of-the-art defense and imposes a burden on plaintiffs more onerous than ordinary negligence (because under ordinary negligence, the plaintiff only needs to prove a foreseeable risk, but not the existence of an alternative design).

3.3 Compensatory Damages

3.3.1 Loss of Enjoyment and Pain and Suffering: *MacDougald v. Garber*

1. Nonpecuniary damages compensate a victim for physical and emotional consequences, such as pain and suffering or loss of ability. Pecuniary damages compensate for economic loss.

2. The victim here suffered permanent brain damage and entered a coma after a C-section.

3. After a remittitur, the plaintiff won $2,000,000 for conscious pain and suffering and loss of the pleasures and pursuits of life. Her husband won $1,500,000 for loss of services.

4. The trial court accepted the plaintiffs' argument that damages for loss of enjoyment of life could be awarded even though the plaintiff was not aware of the loss. The appellate court held (1) that awareness is required to recover for loss of enjoyment of life and (2) separating damages for pain and suffering from damages for loss of enjoyment is not possible because suffering and enjoyment cannot be directly converted into monetary values.

5. The purpose of tort damages is to compensate the victim. They should not be punitive unless the defendant acted with malice.[29]

6. Pain and suffering generally encompass loss of enjoyment.[30]

7. Judge Titone, dissenting: Pain and suffering are logically distinct from loss of enjoyment. Damages for each should be kept separate.

3.3.2 Collateral Source Rule: *Helfend v. Southern California Rapid Transit District*

1. A bus crushed the plaintiff's arm.

2. At trial, the defendant sought to introduce evidence showing that insurance had paid 80%, possibly more, of the plaintiff's medical bills. The

[29] Casebook p. 607.
[30] Casebook p. 610.

court ruled that the defendants could not show that the plaintiff had received medical coverage from any **collateral source**.

3. On appeal, the defendant argued that the trial court erred in preventing evidence that a collateral source had paid the plaintiff's medical bills and denying the defendant the opportunity to discover whether the defendant had recovered costs from more than one collateral source.

4. The collateral source rule exists to create an incentive for people to buy health insurance. Moreover, attorneys generally draw compensation from damages at trial, which would be put in peril if juries knew the plaintiff had already recovered from an insurance company.

5. Changes to the collateral source rule "would be more effectively accomplished through legislative reform."[31]

6. Subrogation clauses in insurance policies entitle the insurer to tort damages up to the amount the insurer paid.

3.4 Punitive Damages

3.4.1 *State Farm Mutual Automobile Ins. Co. v. Campbell*

1. The plaintiff, Campbell, tried to pass six cars on the highway. To avoid colliding with the plaintiff, Ospital swerved, killing himself and permanently disabling Slusher.

2. Campbell initially insisted he was not at fault, but a consensus emerged that his attempted pass caused the accident. But State Farm contested liability and declined settlement offers from Slusher and Ospital's estate. State Farm assured the Campbells that their assets were safe, they had no liability, and they did not need to seek outside counsel. When the jury determined that Campbell was at fault and awarded $185,849 in damages, State Farm told the Campbells "to put for sale signs on your property to get things moving."[32]

3. While the appeal was pending, the Campbells struck a deal with Ospital and Slusher to pursue a bad faith action State Farm. Slusher and Ospitals attorneys would represent the three of them, with Slusher and Ospital entitled to 90% of any verdict against State Farm.

4. The jury awarded $145 million in punitive damages and $1 million in compensatory damages against State Farm.

[31] Casebook p. 614. The California legislature did in fact remove the collateral source rule—see *Fein*, p. 629.
[32] Casebook p. 615.

5. The Supreme Court here considered whether the punitive damages were excessive. It noted that compensatory damages redress concrete losses while **punitive damages aim for deterrence and retribution**. Supreme Court here considered whether the punitive damages were excessive and in violation of due process.

6. In *BMW v. Gore*, the Supreme Court established three criteria for reviewing punitive damages:[33]

   (a) The reprehensibility of the defendant's conduct.

   (b) The disparity between actual/potential harm and the punitive damages.

   (c) The difference between damages awarded and damages in similar civil cases.

7. Applying the *Gore* criteria, the court found that "this case is neither close nor difficult. It was error to reinstate the jury's $145 million punitive damages award."[34]

8. Four states have abolished punitive damages (Levy).

9. Punitive damages resemble criminal punishment in some respects (e.g., retribution). The burden of proof is lower (preponderance of the evidence vs. beyond a reasonable doubt), but the punishments are purely economic.

3.4.2 Cal. Civ. Code § 3294

1. Burden of proof for punitive damages is "clear and convincing evidence."[35]

3.5 Vicarious Liability

1. Vicarious liability is the doctrine that holds one party liable because of that party's relationship to a tortfeasor.

2. The most common form of vicarious liability is respondeat superior, which hold an employer liable for its employees' torts.

3. You cannot insure for punitive damages.

3.5.1 Respondeat Superior: *Rodgers v. Kemper Construction Co.*

1. Respondeat superior: an employer is liable for an employee's torts committed within the scope of employment.

[33] Casebook p. 616.
[34] Casebook p. 617.
[35] Reader p. 102.

2. Kemper employees frequently drank after their shifts. Herd and O'Brien finished their shifts, drank a few beers, walked across the job site, and asked Rodgers for a ride on the bulldozer. They beat him up when he refused. Rodgers later asked Kelley to help find out his assailants' identities. As Rodgers wrote down O'Brien's license plate number, Herd, O'Brien, and a third, Dieffenbauch, attacked Rodgers and Kelley, causing serious injury to both.

3. The trial court found Kemper liable for the injuries under respondeat superior.

4. On appeal, Kemper argued that it could not be held liable under respondeat superior because (1) the assault occurred after O'Brien and Herd had finished their shift and (2) the assault was based on personal malice.

5. The appellate court rejected both of Kemper's arguments on the grounds that the injuries resulted from "a dispute arising out of the employment."[36]

3.5.2 Going-and-Coming Rule: *Caldwell v. A.R.B., Inc.*

1. Generally, there is no employer liability for an employee's actions while commuting.

2. A.R.B. workers at a Shell Oil plant were sent home because of bad weather. Brandon offered to give Richardson a ride home. On the way, Brandon collided with Caldwell. Caldwell sued Brandon and A.R.B., alleging that Brandon was acting within the scope of employment. A.R.B. filed a motion for summary judgment on the grounds that Brandon was outside of the scope of employment, which the trial court granted.

3. Although A.R.B. compensated its employees for travel expenses, the appellate court held that Brandon was outside the scope of employment.

3.5.3 Independent Contractors: *Mavrikidis v. Petullo*

1. Gerald Petullo was driving a dump truck full of hot asphalt when he collided with Mavrikidis. Petullo and his father had been working on renovations of the Clar Pine service station, which Karl Pascarello owned,

2. Malvrikidis argued that Petullo was an employee of Pascarello, but the court held that he was an independent contractor. Restatement (Second) of Agency lists several factors for determining whether an actor is an employee.[37] Applying these factors, the court found that Petullo was not an employee.

[36] Casebook p. 636.
[37] Casebook p. 647.

3. The court listed three exceptions to independent contractor non-liability: (1) when the principal retains control of the work, (2) when the principal hires an incompetent contractor, and (3) when the work is inherently dangerous. None of these exceptions applied to Petullo.

4. Pascarello was not liable.

3.5.4 Vicarious Liability for Children: *Wells v. Hickman*

1. L.H. (15) beat D.E. (12) to death. D.E.'s mother (Wells) filed a wrongful death action against L.H.'s mother (Hickman) and grandparents.

2. An Indiana statute held parents strictly liable for their children's knowing, intentional, or reckless torts for damages up to $3,000. The trial court granted summary judgment for Hickman.

3. The appellate court here reasoned that there are four common law exceptions to the rule that a parent is not liable for a child's torts: (1) when the parent entrusts the child with an instrumentality that may pose danger to others, (2) where the child acts as the parents' agent, (3) where the parent consents, and (4) where the parent fails to exercise control when the parent knows or should know that injury is possible.

4. Wells argued that the Hickman's actions fell under the fourth exception and that the statute did not limit recovery. The appellate court agreed.

§ 4 Tort Reform

4.1 *Fein v. Permanente Medical Group*

1. Lawrence Fein felt chest pain and went to his doctor's office, where a nurse practitioner told him that his pain was due to a muscle spasm and sent him home with Valium. The chest pains returned that night. He went to the emergency room, where the doctor also diagnosed the problem as muscle spasms, giving him a Demerol injection and a codeine prescription. The next day, he went back to the emergency room, where an EKG showed he was suffering from a heart attack.

2. Fein sued Kaiser for malpractice, arguing at trial that the failure to initially diagnose his heart attack caused much of his heart muscle to die, reducing his life expectancy by at least 16 years. The trial court awarded $1 million in economic damages.

3. On appeal, Fein argued that the trial court erred in applying two provisions of the Medical Injury Compensation Reform Act (MICRA), (1) limiting non-economic malpractice damages to $250,000 (Cal. Civ. Code § 3333.2) and (2) modifying the collateral source rule in malpractice cases (Cal. Civ. Code § 3333.1.

4. Fein contended that § 3333.2 ($250,000 limit on non-economic damages) denied due process. The court held that the legislature pursued a legitimate statute interest in enacting the statutory limits on recovery. Fein also argued that the limit denied equal protection by discriminating against malpractice victims and against malpractice plaintiffs with non-economic damages above $250,000. The court rejected both arguments.[38]

5. Fein also raised a constitutional challenge to § 3333.1 (allowing collateral source evidence and preventing the collateral source from obtaining subrogation). The court held that although the provision affected a plaintiff's recovery, it was constitutional because it promoted the legitimate state interest of containing health care costs.

6. Affirmed.

4.2 Eisenberg and Sieger, "The Doctor Won't See You Now"

Rising insurance costs prompt malpractice recovery reforms.

4.3 Treaster and Brinkley, "Behind those Medical Malpractice Rates"

Increases in insurance premiums do not closely correlate with increases in the number of malpractice claims or the size of damage awards. Rather, the increases may be due to unsuccessful insurance company investments.

4.4 Colliver, "We Spend Far More, but Our Healthcare is Falling Behind"

U.S. healthcare costs skyrocket while relative quality drops.

4.5 Sack, "Doctors Say 'I'm Sorry' before 'See You in Court"'

Disclosing mistakes to patients dramatically reduces malpractice litigation which, in turn, reduces health care costs.

4.6 Patient Protection and Affordable Care Act § 6801

The Senate supports exploring alternatives to civil litigation of malpractice disputes.

[38] Casebook p. 627.

§ 5 Workers' Compensation

1. Workers' compensation allows employees to recover damages for injuries without needing to prove negligence. The full economic loss is generally not recovered, and compensatory damages for intangibles (e.g., pain and suffering) and punitive damages are generally excluded.[39]

2. The injury must have occured within the scope of employment.

3. *Fellow servant rule*: under common law, contributory negligence of a co-employee is attributed to the injured employee, making it more difficult for the injured employee to sue his employer under negligence.[40]

5.1 Immobility Requirement: *Bletter v. Harcourt, Brace & World, Inc.*

You're allowed to dance on the job.

1. A high school textbooks editor was feeling good. He "attempted to do a dance step but fell and fractured his thigh."[41]

2. The workers' compensation board "finds that claimant's casual indulgence in a little dance step on the employer's premises and while in a swiftly moving elevator, was not an unreasonable activity in view of his feeling of well-being created by his liking for both the job and his co-workers, so as to be deemed a deviation from the employment."

3. The court agreed with the board that employees are "not required to remain immobile."

4. Many jurisdictions have an exception for intentional torts. Courts are divided on whether the threshold is desire or substantial certainty.[42]

5.2 Off Duty Employees: *Ralphs Grocery v. Workers' Comp. Appeals Bd.*

Employees are not within the scope of employment when they are off duty.

1. Moeller was on disability leave for a finger injury. He also had congenital heart disease. His employer, Ralphs Grocery, laid him off while he was on disability leave, but he was scheduled to return several months later. The night before he wsa scheduled to return, Ralphs called to tell him that his position had been reduced to part time without benefits. Moeller immediately suffered a fatal heart attack.

[39] Casebook p. 661–62.
[40] Casebook p. 661.
[41] Casebook p. 657.
[42] Casebook pp. 674–75.

2. The Workers' Compensation Judge found that the call caused Moeller's death and that the call arose in the course of employment, awarding damages to Moeller's widow.

3. The appellate court held that employer-employee relationship is severed while the employee is off duty. Moeller was off duty when he received the call from Ralphs, and therefore he was outside the scope of employment. Reversed.

5.3 Special Risk Exception: *Johnson v. Stratlaw, Inc.*

A plaintiff cannot bring a negligence cause of action if the employee was within the scope of employment when the harm occurred. The special risk exception to the going and coming rule puts an employee within the scope of employment.

1. Daryl worked at Stratlw's Straw Hat Pizza Parlor. One evening, Straw Hat required Daryl to work from 5 p.m. to 2 a.m. Daryl died of a car accident while driving home.

2. Daryl's family sued for wrongful death and negligent infliction of emotional distress. Stratlaw demurred that workers' compensation barred negligence actions and that the NIED claim was invalid because the plaintiffs had not witnessed the accident.

3. The trial court sustained the NIED demurrer but overruled on all other grounds. The trial later granted summary judgment on all counts for the defendants.

4. On appeal, plaintiffs argued that Daryl was not within the scope of employment when the accident occurred.

5. The appellate court held that the going and coming rule generally puts the employee outside the scope of employment while commuting. However, the **special risk exception** applies "if (1) 'but for' the employment the employee would not have been at the location where the injury occurred and (2) if 'the risk is distinctive in nature and qualitatively greater than risks common to the public.'"[43]

6. The court held that the special risk exception applied here. Affirmed.

5.4 Intentional Torts: *Fermino v. Fedco, Inc.*

In California, workers' compensation does not bar employees' claims against employers for intentional torts.

[43] Casebook p. 666.

1. Fermino worked at Fedco's department store. Fedco accused her of stealing and interrogated her in a room for more than an hour. Fermino sued for false imprisonment and negligent and intentional infliction of emotional distress.

2. Fedco demurred that workers' compensation barred the claims. The trial court sustained and the appellate court affirmed.

3. The California Supreme Court held that "the basis for the exclusivity rule in workers' compensation law is the 'presumed compensation bargain, pursuant to which the employer assumes liability for industrial and personal injury or death without regard to fault in exchange for limitations on the amount of that liability."[44] It is possible for an employer to step out of its proper role.

4. Fedco's actions constituted false imprisonment. The question was whether such behavior goes beyond the "compensation bargain" (which allows for "reasonable interrogation and detention"[45]). Tne court found that it did.

5. Reversed.

§ 6 Automobile No-Fault Insurance

§ 7 Defamation

[44] Casebook p. 670.
[45] Casebook p. 672

§ 8 Final Exam

1. Closed book.
2. Not necessary to memorize case names.
3. Three ways to organize a response:
   (a) Chronologically.
   (b) By party.
   (c) By tort causes of action.
4. No purposeful red herrings—so **use all facts**.
5. Disputed facts should go to a jury.
6. Always discuss each part of a rule, in case you're wrong about an element.
7. Need to know California and federal rules, but no others.
8. In negligence, discuss *both* negligence per se and common law negligence.

§ 9 Bibliography

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