Hello, students. This is Professor Faith. I'm recording this lecture for my business law students. What I wanted to do with you this week is to talk a little bit about tort law. If you've looked at the course objectives for this week or the module objectives, you'll find these four items: we're trying to investigate the sorts of torts that happen in the business environment, the causes of damages that might result from a tort, to be able to identify and apply various types of intentional torts to factual situations, and also to apply negligence and its defenses to particular situations.

There's a really substantial amount of different ideas here this week with this material, and so I just have a few key points I wanted to try and raise as you work through some of the reading and the homework assignment for this week. So what is it, right? What are we talking about? My slide here says it's not a cake. Right, we're talking about some legal concept. Tort law is a common law remedy for injuries caused by somebody else wrongfully. And it's an old idea, but it has the same basic purpose, which is if you injure me, you should have to pay for the injury. It's not my fault I got injured; it's your fault, so therefore you should pay for it. And so that's really the underpinning of this area of law: compensation for those that are injured by the conduct of somebody else that was wrongful in some sense of the word.

If you look across the country today, there's a lot of lawsuits filed, and a lot of them involve tort issues. So I'm not sure 50% is exactly right this year if you were to look at the case statistics, but it's a lot of lawsuits that involve some kind of accident or intentional conduct that causes injury to somebody else. So it's an issue that a lot of us encounter in our lives, in business, as attorneys, or in the court system or whatever. This goes on a lot across the country in courtrooms every day, but these are not new ideas. The idea of a tort, really, you go back 1,000 years to French law, the idea of defamation, for example. There's a lot of old stuff that we have dusted off and continue to use conceptually in the practice and in the common law itself.

As you're aware, we didn't start out as states first. We really started out as colonies, and we brought with us the legal traditions of the king that chartered the colonies. So these ideas, they're inherited from that situation. And you can look back historically at what torts were recognized in the 18th century before we became states. Blackstone, I reference here, is a well-known author, a lawyer, and, I think, a judge in the British system that wrote the *Commentaries on the Laws of England.* Volume three is dedicated—of the four volumes, volume three is dedicated to tort law and describing all the various intricacies of that. When you look at that, the roots of our current tort system are really rooted in intentional torts from British practice and, to some extent, the Middle Ages and French practice.

They are intentional torts. That is, I meant to hurt you, right? I'm doing something wrongful that under the circumstances, I should have to pay for your injury that results from it. And really, this is, I think, an attitude of the 18th century, that intent was an essential element of liability, both on the tort side but also when we look at criminal law next week. You had to really mean to kill somebody to be liable for the death, at least as murder. The idea of strict

liability or no intention—sort of, I've injured you, and I'm strictly liable for it—that's almost foreign to the Middle Ages mind and to the colonial perspective on this area of law.

But we still do this today. We still have intentional torts, and many of them share in common this need for intention as a part of the calculation for liability. Now, in civil lawsuits generally, the burden of proof, and in tort lawsuits in particular, the burden of proof is on the plaintiff to prove each element of the tort was more likely than not their story, their explanation for their injury. And that can be particularly difficult even at a lesser burden like "more likely than not" because of the complexity and the specific facts that you would have to have alleged and proven in order to be able to recover for a tort in the first place, and intentional torts in particular. This is particularly difficult.

As you're reading through the textbook, you'll realize that there's a lot of specific things that have to be true for a plaintiff to be able to recover for any intentional tort. And this is a non-exhaustive list. There's more than this, but this sort of gives you the various kinds of intentional torts roaming around in the hall of the courtroom, from assault and battery to false imprisonment and so on here. And again, non-exhaustive. The textbook—I may have missed one. And the textbook itself, because this is a state-by-state area of law that's developed, it's possible that some states recognize other torts not listed here. For example, though Maryland doesn't, many states recognize a negligent infliction of emotional distress. I'll talk about that in a little bit. But there's a lot of nuance. But there's also a lot of—it's a big jungle of these different torts, intentional torts anyway, that exist. Most of them, though, share this common idea that you need to intend to do it to be liable for the other person's injury.

Now, as you've probably gotten into some of the reading, you might have noticed that there's been some changes from that general principle. One of them is defamation, which is a reputational tort. You know, in the original mindset, I really think this was meant as an intentional tort. You really had to intend to publish a false statement knowing it was false to injure someone's reputation. It couldn't have just been an accidental publication of something I couldn't have known was false that injured your reputation. That's not really the mindset here. But when you look at the 20th century, the Supreme Court, *New York Times v. Sullivan* case, which changes the rules for public figures and says the only liability possible for a defendant to defame a public figure is when the defendant acts with constitutional malice, which is very different than just ordinary intentional conduct. But then on the other side of it, states have said, like Maryland, you can also negligently defame. You should have known that that statement was false before you published it. And since you didn't bother to check and you injured the person's reputation, you should still pay their actual injury for the false statement.

So negligence, which we're talking about this week, that's an accident. That's not, "I meant to hit you." "I didn't mean to run you over with my car. I just accidentally hit you, hit your bumper." And it's the same—states recognize, like Maryland, recognize that idea of a negligent defamation. Fraud is another one of these, which historically Maryland called this

deceit, which is where I intentionally, and Maryland now says it's not just the burden of just more likely than not; you have to prove fraud—the deceit version of it—by clear and convincing evidence, which is a higher evidentiary standard. But you had to prove that the person intentionally lied to you to get you to rely on their lie in order to do something that injures you. Right? That's what's required in order for you to prove deceit. That's the historical view of it. But Maryland recognizes, and many states recognize, a negligent version of this tort. It's called negligent misrepresentation, where I should have known it was false and that you would rely on it, and it would injure you. Right? It's not that I did know or that I meant to lie to you. It's just I should have checked. I had an obligation to check, and I failed to do so. That's more of a 20th-century innovation rather than the historical legacy of where we started. We still recognize deceit, but we've added onto it in the 20th century.

So when you're looking at this, there are a lot of different things. You want to be familiar with the different kinds of definitions here, the different kinds of situations where these torts might apply. Know that it might be more than one, right? It's possible there's more than one right answer. You know, if you threaten to beat somebody up and then you hit them, the threat could be the assault, and the actual hitting could be the battery, right? You could have both potentially. There could be both an emotional fear of going back to the place where the person got beat up and then the actual physical injury from the battery that sent them to the hospital. You have two separate torts with two separate things that you're recovering for, both in the same transaction, same thing happened. So you want to be familiar with that, that the law is flexible, right? It looks for potentially multiple right answers to the same basic situation, the basic same wrongful conduct.

Now, the other, and probably by far the more common tort today, is some combination of either just straight-up negligence or product or strict liability, which product liability sort of involves some level of negligence in some cases. So negligence is a lot more common. If you think about all the traffic accidents in the United States every year, how many highway fatalities—tens of thousands of highway fatalities, probably millions or tens of millions of traffic accidents every year. Most of that is a negligence case. You should have been driving more carefully, and that's the reason why I got injured, right? It’s that sort of idea. There's a lot of that. There are a lot of products that are defective or that injure people when they shouldn't

, and so there are lawsuits about that. So if you were to look statistically, many more tort lawsuits in the US involve one of these concepts rather than an intentional tort.

So what do I mean? Well, negligence normally is four different elements. Normally, there are other ways to state negligence. For example, you can have a negligence per se case, though in Maryland, it still really doesn’t work. But some states recognize that version of negligence where you violate a statute and someone's injured, you're responsible without the rest of the proof of this. You could have a res ipsa loquitur, which is the Latin phrase for "the thing speaks for itself" version of negligence. That's kind of unusual. Maryland

recognizes that tort; it's actually a 19th-century idea, but by far and away, most people, when they're talking about negligence, they really mean these four things: that you had a duty to the defendant or duty to the plaintiff, excuse me, that you breached, which is what actually caused the injury that the plaintiff sustained. You have to have those four things to state a claim in negligence. And when you read through the textbook, there are a lot of cases about what this means—different scenarios where there was a duty or there wasn't one, different situations where a court found that there was a breach of that duty or there wasn't a breach.

And the textbook talks about causation, which is really more than one concept. There's both but-for causation and also proximate cause and potentially supervening or superseding or intervening cause, which is a defense, essentially, to a claim of negligence. So even though this seems intuitive, when you actually get into the details, it's somewhat more complicated because of the case law that's developed over the last century or so about what is negligence? What does it really mean?

So one of the key points to take away about negligence is that duties only arise in certain circumstances to other people. You don't have a general duty to other people to keep them safe all the time. That just doesn't exist. Maybe it ought to, but the law doesn't impose that duty on people or on businesses. So when you go back and look at the textbook, what you'll see is there are duties in certain kinds of scenarios, like a professional providing a service to a client. Think of a doctor, an accountant, a lawyer. Those sorts of people owe obligations to their clients, not generally to everybody, but specifically to their clients. When you're out driving around, you have a duty to drive in a reasonably prudent manner so you don't strike other people's cars or run over pedestrians or get into accidents, right? There's a duty to other people on the road or that might be in the road when you're driving. And then owners of real estate owe duties to keep their visitors safe, depending on the circumstances of the visit. And there are other areas where there might be a tort duty that's developed over time. These are just some examples, but my point in this slide is that it's in specific situations. It's not a duty to everybody all the time. Tort law doesn't work like that.

So you really have to think about that: where do I have a duty if I'm a business person? The slip and fall of premises liability, there's a reason why there's an insurance product for that, because that's a very common problem for brick-and-mortar businesses that have people that come and visit them, that you have a liability to keep those people safe. And if you don't, you potentially could have to pay for their injury. And again, self-professional or errors and omissions insurance, malpractice insurance—you have car insurance. Other areas where you buy insurance are probably because there's a tort liability, right? And you have a duty to the people that are covered, their injuries are covered under their insurance policy.

Now, just because you have a duty doesn't mean you're automatically liable if there's an injury. That's not really how negligence works. You have to breach that duty. The reality is, when you look at the case law, not all accidents can be prevented or are foreseeable.

Foreseeability is a big issue in negligence law generally. I have to be able to foresee in a reasonable way—I have to reasonably know that my conduct could lead to your injury in order to be liable if the injury is realized. So that's a key aspect. It comes up over and over and over again in talking about the different aspects of negligence. It's about foreseeability. But breach also recognizes the reality that just not all accidents can be prevented, and there is a weighing of the burden on the defendant to prevent the accident against the probable liability if they don't act to prevent it. That's what this BPL formula means: the burden has to be less than the probability multiplied by the potential liability for the injury.

So sometimes the burden is just too great to prevent, or the accident is just very unlikely. You know, if I had to keep everybody absolutely safe at the college, I mean, you know, you could get struck by a meteor and get killed. I mean, it's a one in 10 billion chance of that. Does that mean that I need to build, you know, a meteor deflection system around the college to keep you safe when you're here? I mean, no, of course, that's silly. You know, the cost of that would cost way more than—if you think about the chances that you might die because of a meteor strike—your life worth millions of dollars divided by 10 billion is still all I should spend is pennies to prevent that kind of an accident. There just isn't a penny solution that would prevent meteors from striking the college. Okay, that's kind of an absurd discussion, but businesses deal with this all the time. They're dealing with risk. What is the risk to our customer or to our partners, to other people to which we might have a duty? So what should we do compared to that liability or that potential liability? You know, I think about, for example, businesses that have information security technology. They take customer information for credit card processing, for example. There's a risk that cybercriminals might break in and steal all that stuff. You know, that costs real damage—billions of dollars of identity fraud every year. I mean, just imagine when Target lost everybody's credit cards ten years ago, or any of the other more recent security breaches. Well, obviously, they weren't all prevented because the reasonable security precautions that are put in place have a cost, and that has to be less than the potential liability if they're not in place. It's not that all accidents have to be prevented, that all identity theft attacks have to be prevented. That's not the standard. But what are reasonable security precautions? What are reasonable actions that we can take to prevent an accident in relation to the possibility of what might happen if we don't do that? The one has to be less than the other for it to be a breach of a duty.

And what you realize if you read through the literature on negligence, this is very fact-specific. Courts have to really look at the various aspects of what did the defendant do or could have done versus what were the chances a bad thing was going to happen if they didn't do those things? How could we have prevented this? Is it cost-effective to prevent it and make a judgment? Often juries make these decisions, but the point is that it's a balancing. It's a balancing. It's a fact-specific balancing. Even if you do breach a duty, there's still a question of whether that caused the injury, because this has to be connected. My failure to act or my ineffectiveness in acting has to be the cause of your injury. Otherwise, I'm not liable for it.

And again, there are different ideas kind of rolled up into this concept. One of them is there has to be a logical connection between what I failed to do and your injury. That's but-for causation. But for me failing to do x, you would not have been injured. There has to be at least that for us to even have a conversation about negligence. But the more interesting one is whether it is legally the cause. Was it a reasonably foreseeable chain of events that proximately caused your injury? That's a different question. Why is that the question? Again, while you hear me say foreseeability again, that's an aspect of all parts of negligence. And again, it's a concession to the fact that you can't—not everything that you might fail to do could you anticipate would cause every injury that might actually have occurred. So you do have to think about that. And as I mentioned earlier, there's this idea of a superseding or intervening cause. Sometimes something else happened in the middle of all this that's actually the reason why you're injured, not me, right? And so there's that other aspect of causation that you have to take into account. It's really—it should be the defendant's failure to act that is the real reason why you were injured. That's really what this is about. If you were already injured before all this happened, you know, your back hurt before you got in the car accident, that I caused your back pain is not my fault. I didn't cause it, right? You had back pain before. It has to be meaningfully worse, or you have to have some other injury that has to be related to the car accident in order for me to have liability for that. And on the other side of it, there are bad things that happen all the time, but just because I failed to act doesn't automatically mean I'm liable for every bad thing that ever occurred after that. There has to be some connection, some legal connection, some foreseeability that if I fail to do x, that that might cause this injury.

You know, you go out West—there's Canada this year is on fire, but, like, there's fires every year out West. And some of those accidents are caused by the power companies, right? They have overloaded high-vol

tage systems that spark, or the lines actually fall down, right, because they're just overwhelmed by the load on the transmission lines. That causes fires. That's foreseeable that that could cause a fire. And the people that get trapped in the fire and die or are seriously injured or lose their property, it makes sense that the power company could be liable, right? Because their failure to turn the power off before the bad thing happened is probably the real cause of the forest fire in that particular circumstance. And you see these lawsuits against—I think it's Pepco out in California. I'm not sure what the grid operator is called in Hawaii, which is a recent situation with this, but you can see the logic of why, if you lost your home, if you lost a family member to that fire, why you would sue the power company. They should have anticipated; they could have prevented potentially this horrible accident.

But on the other hand, lightning also causes forest fires. I mean, none of us have control over that. What could we do to prevent lightning, right? Now, if lightning is the real cause, you can't blame somebody else. You can't sue the thunderstorm. That's a situation where there is no recovery even though you're injured. Your injury wasn't caused by the power company in that case, or by somebody else. It was just caused by lightning. So unless there

was something we could do about it to mitigate the chances, and that we could reasonably have done to mitigate the chances of the fire caused by lightning, then how can you hold anyone accountable then?

So there's a balancing here, too. It's not just because I'm injured; you should pay. You have to do something that causes my injury. And then finally, the plaintiff actually has to be injured. You know, this is a compensation system for injured persons. It's not for the sake of suing somebody because they're a bad person, right? And there are specific kinds of damages that are discussed more in detail in the textbook here. But it's the plaintiff's burden to prove they're injured, that they actually went to the hospital, they went to a mental health counselor, they had some other kind of measurable damage. They lost their property; their car was damaged. There has to be proof of that for a plaintiff to be able to recover in tort law.

And then you notice that there is an answer. The defendant has a right to respond and say, yes, everything the plaintiff says is true, but I still have a defense that defeats their claim. The textbook talks about these, where a plaintiff can assume the risk of their injury, or in Maryland and a couple of other states can contribute to their own injury and therefore can't recover. Most other states, it's comparative negligence, which reduces the amount of recovery by the plaintiff depending on the rules of that state. But in Maryland, we still hold on to this contributory negligence rule. And then there's last clear chance, which, again, only a few states like Maryland talk about in the literature. So you want to be familiar with that.

The story I always tell for students about assumption of risk is you decide you're going to go out parachuting today, and you get on the plane, and they pack your parachute, and you just, you know, you know if you jump out and the parachute doesn't open, almost certainly you're going to die, right? The impact from 10,000 feet at 180 miles an hour in the body is unsurvivable, except if you're Bear Grylls, who apparently did survive a parachute accident like that. But the average person on an average day doesn't end well. So they could have been negligent. I mean, they could have flown you up in a thunderstorm, and that's the real reason why you died. Or heck, they could have packed your parachute wrong, you know, and the lines got crossed, and it wouldn't open up. Right, right. They're negligent. Shouldn't they pay? But, you know, if you voluntarily undertook this risk, that's what assumption of the risk is. If you voluntarily undertake a risk, knowing what the consequences are, and you do it anyway, then it's really on you, not on the person. Even if they screwed up in the part of this process, you're still really on your own to cover your damages, or your estate will be on its own if you die in an accident like that.

Contributory negligence is kind of similar in that, you know, something I did is part of the reason why I got injured. You know, you think about all the traffic accidents. One of the questions is, well, what were you doing before you got injured? You know, so what if the person in front of you was texting while driving and swerved? But if you were following them too closely, that was part of the reason why you didn't have enough distance to brake and

safely stop your car before getting into the accident. Maybe you contributed to your own injury in some way. In Maryland, that could be a complete bar to recovery. Other states, it just would reduce your recovery if the other person is more at fault, let's say, than you are under the circumstances.

And then the last clear chance is another one of those, who's really supposed to pay for this accident, who had the last clear chance to prevent it? And again, that often is an interaction between the defendant being negligent, the plaintiff being also negligent. So then, was it really the defendant that had the last chance to prevent this, or was it the plaintiff? That's, you know, that's often how that's calculated out. Again, kind of an interplay of who should really pay for this injury.

Now, just two other slides in tort law. There's this idea of strict liability. When you read in the textbook about this, if you don't remember anything else, just remember this is the unusual answer on my exams. It's often the wrong answer because it involves very specific situations where courts have said there's strict liability, like chemical crop dusting or operating a nuclear power plant or dynamiting a mountain or owning a wild animal. Those are things that create strict liability for the person engaging in that activity—some ultra-hazardous, abnormally dangerous activity. It's unusual, even in modern times, this is relatively unusual in tort law that there would be strict liability for something. Most of the time, we're talking about negligence, but know that there's the possibility of this, that you can be just automatically liable for the injury caused to a plaintiff under certain circumstances, no matter what you did to prevent it. You know, you have your wild tiger, and you have a 50-foot cage and 300 handlers, and it still killed somebody—tough, right? You're strictly liable for owning a wild animal and the injuries it causes, no matter what the circumstances. But pretty much everything else in the world is a negligence kind of situation.

And I'll leave you with this. We'll talk a little bit about product liability, read a little bit about that. We get more into this in Unit 3. But this is also—it's a modern invention, this idea that manufacturers should be liable strictly for injuries caused by their products. And again, you see a lot of these cases today. You might see late-night advertisements. For example, glyphosate—there's a bunch of lawsuits against Bayer because glyphosate exposure may lead to a particular kind of cancer, and there's a large multi-billion dollar settlement. In the old days, when I was a kid, asbestos was the big mass tort action that resulted in these product liability claims for people exposed to asbestos that got mesothelioma. You still see those advertised. People still get mesothelioma today because of long-term exposure to asbestos. It's a toxic substance. Manufacturers hid the facts from people. It's a product liability claim, but it's not an absolute liability like owning a wild animal. It's—you have to prove a theory the product was defective in its design, was defectively manufactured, or it lacks sufficient warnings.

The latter of the three is the easiest one, I think, to understand because I should warn you about the known hazards. You know, if I know asbestos causes mesothelioma, the package

should say, "This could cause mesothelioma; take precautions," or glyphosate, again, demonstrated to cause cancer in sufficient quantities of exposure, probably there should be at least a warning label. So if you're out, you know, working on a farm, and you have to handle that stuff, you know, you need to take precautions or look for alternatives. There are other herbicides, though a lot of them probably cause cancer too because it's just toxic stuff we're dumping on our crops so they grow better, right? But the point that I'm trying to make is that there has to be some theory that fits into one of these concepts, and the easy one to explain is "they knew, but they didn't warn me." That's easy. That's kind of a negligence rule. They should have warned me about what they reasonably should or did know about the risks of the product. And that is the reason why you buy a power tool. I was joking to somebody the other week, so I had to buy a new toothbrush, and, you know, it's an electric toothbrush, and it comes with an 80-page manual. Part of it is like all the warnings about how to not use this product, right? Why do we have all that? Well, admittedly, I didn't read the manual, but it's to warn me, right? The known hazards that the manufacturer knows about the product—product liability law is the reason why those things exist. The goal of it is to really keep consumers safe and to be able to hold accountable the person that really is responsible, not necessarily the person you bought it from, though they can be liable, but all the

other people involved in it back to the manufacturer. That's really the person that probably is in the best position to prevent the injury. That's the rationale for this.

So I hope this—I don't know if it was really short enough, but I hope that this lecture is helpful in kind of going back and thinking about some of the concepts here. Talk to you soon.