

7: EVALUATING TORT LAW, PART 1

- tort:
 - a wrongful act or omission, **other than crime or breach of contract**, that a invades legally protected right
 - note: some items can be considered a crime or tort, but this chapter discusses them in their tort context
- 4 elements of negligence (**unintentional** tort)
 - legal duties were owed
 - legal duty: obligation imposed by law for preservation of others' legally protected rights
 - can be created by either statutes, contracts, or common law (case law)
 - ex: liab for fleeing the scene of an accident is imposed by statute
 - (ex: pedestrian has duty to stay off road unless it is safe & legal to cross there)
 - breach of those duties
 - reasonable person test: **objective** test based on how a reasonably cautious person would act
 - (ex: pedestrian breached duty if darts out in front of driver when it was unsafe & illegal to do so)
 - (ex: using inferior materials/ingredients)
 - extra high degree of care is **legally** necessary in 2 cases:
 - common carriers: cos offering transportation to any member of the public
 - people handling/storing dangerous materials
 - (ex: agent didn't breach duty if insd lied on application but agent had no reason to know)
 - proximate cause
 - a cause that if left to natural play out with no new intervening event would produce an event that otherwise wouldn't have happened
 - i.e., defendant's actions were direct cause of plaintiff's dmgs
 - (ex: if driver hit pedestrian who darted out & impact caused damage to car)
 - physical distance btwn act & inj, or distance in time doesn't mean they can't be prox cause
 - (ex: if flood dmgs wall which doesn't collapse until weeks later, flood is still prox cause)
 - determining prox cause
 - "but for" rule:
 - would plaintiff have suffered dmg **but for** defendant doing this?
 - (ex: would car have been damaged if pedestrian hadn't darted out?)
 - substantial factor rule : if there was more than one factor causing plaintiff's dmg, as long as defendant's actions were a substantial factor in causing loss they can be held liab
 - must prove duties were defendant's responsibility (as opposed to someone else's)
 - foreseeability rule
 - plaintiff's dmgs have to reasonably foreseeable consequence of defendant's actions
 - (ex: it is foreseeable that if you dart out & get hit by a car, the car can be dmg'd)
 - defendant is **not** liab if there is intervening act (independent act that causes new chain)
 - ex: pedestrian not liab if they dart out, driver stops easily, then 10 sec later another vehicle hits front car pushing them into pedestrian
 - concurrent causation: if loss is attributable to at least one covered cause, pol will still cover even if other causes denied
 - dmgs incurred
 - can't pursue defendant if plaintiff didn't actually suffer any dmgs
 - (ex: driver hit pedestrian that darted out, but car is fine)

- other types of neg
 - **negligence per se: an act that is automatically considered negligent b/c it violates law/ordinance**
 - res ipsa loquitur:
 - “when negligence can be inferred simply by loss occurring”
 - i.e., defendant must have been negligent b/c they were the only ones who had control
 - 2 factors
 - probability that under given circumstances, defendant was negligent
 - defendant’s has duty to refute negligence b/c they had exclusive control & superior knowledge of causative circumstances
 - **examples:**
 - part explodes causing inj & one co is sole maker of that part
 - **passengers getting inj'd while using common carriers (transportation co)** [since passengers have no control over vehicle]
 - **party has sole control of roll of tar paper & it falls off bldg onto someone**
- defenses against neg
 - contributory neg (if plaintiff has **any** neg, they are **completely** barred from recovery)
 - comparative neg
 - if plaintiff shares any neg, they may be barred in part or in full from recovery
 - last clear chance: party who had last chance to avoid harm & fails to do so is **solely** responsible
 - **assumption of risk: if plaintiff voluntarily incurred risk of known possible harm**
 - 4 variations:
 - pure
 - plaintiff can recover for the portion they aren’t liab
 - ex: if plaintiff is 80% at fault, they can still get 20% back from defendant
 - 50% rule
 - plaintiff can recover if their own liab is **equal to or less than** defendant’s
 - ex: if plaintiff & defendant are 50/50, plaintiff **can** recover b/c his liab is equal to
 - 49% rule
 - plaintiff can recover only if their liab is **less than** defendant’s
 - ex: if plaintiff & defendant are 50/50, plaintiff **cannot** recover b/c his liab is not less than defendant’s liab
 - slight vs gross
 - subjective decision of assigning dmgs
 - as long as plaintiff’s neg is slight compared to defendant’s gross neg
 - release (if plaintiff signed something releasing defendant from further payment)
 - exculpatory clause
 - part of agreement where someone waives their right to sue
 - usually viewed unfavorably by courts
 - **typically unenforceable by defendant if plaintiff was at a bargaining disadvantage**
 - court will uphold if:
 - clause is not adverse to public interest or against public pol
 - party excused from liab is not under duty to perform
 - contract doesn’t arise from party’s unequal bargaining power or is otherwise unconscionable
 - void if clause is made in effort to exclude liab from **willful/wanton** misconduct

- immunity: when a party is automatically exempt from liab
 - sovereign/govt
 - courts vary on whether govt immunity is granted
 - govts are definitely subject to liab when performing proprietary functions
 - proprietary functions: when govt performs a function that a private co could do also
 - govt function: act that can only be performed by govt (more likely to have immunity)
 - public officials
 - judges & legislatures have absolute immunity for acts performed in official capacity
 - administrative/discretionary act:
 - act/decision made w/i authority of job
 - officials have full immunity if performed w/ no malice or bad faith
 - ministerial act:
 - act directed by law/auth that requires no individual judgment about whether or how to perform act
 - official is liab for acts performed improperly even if performed in good faith
 - **not immune from acts done w/ malice & bad faith**
 - charitable (most states reject that charities automatically have immunity)
 - intra-familial (btwn family members)
 - **all** jurisdictions have abolished interspousal immunity (when one spouse is automatically immune from lawsuits by other spouse)
 - **most** jurisdictions have abolished parent-child immunity (when parent is automatically immune from lawsuits by their children)
- time limits
 - statute of limitations:
 - requires suit to be filed w/i certain time after cause of action accrued
 - usually based on when inj occurred or discovered
 - ex: plumber did bad job & pipes leak causing mold; starts when mold discovered
 - statute of repose:
 - requires suit to be filed w/i certain time after wrongful act committed by defendant, regardless of when inj/dmg occurred/discovered
 - looks at when defendant actually did the hurtful action
 - ex: starts when plumber did the actual work, not when mold discovered
 - if victim is minor or incompetent, statute doesn't start until they become of age or incompetence is removed
 - if plaintiff dies before statute expires, plaintiff's rep usually has from 1 yr of death to file suit
- neg for landowners (LO) & occupants
 - natural conditions (no alterations have been made to land)
 - **generally**, LO **not** responsible but some courts may require LO to use reasonable control
 - exception: LO **is** responsible for trees if knew they would fall or failed to reasonably inspect
 - LO **definitely not** responsible to trespassers
 - artificial conditions (LO alters the prop)
 - LO can be liab for alternations or for causing nuisance (ex: generating dust during construction)
 - LO **must** warn even trespassers of conditions that can cause serious inj or death

- attractive nuisance doctrine:
 - treats child as guest/licensee rather than trespasser on land, if land contains an artificial & harmful condition that is certain to attract kids
 - serves to increase burden of care that LO owes to kids
 - ex: pool or playground
- (ex: LO damming up creek that dries up downstream would be considered **outrageous conduct**)
- duties owed to those entering LO's prop
 - invitee:
 - person who is allowed by LO to enter a prop
 - public invitee:
 - member of general public entering for purpose for which land is open
 - ex: person using a public park
 - biz invitee: person who has perm to be on prop for purpose of doing biz (ex: shopper)
 - LO owes duty to keep premise reasonably safe and to warn of concealed dangers
 - LO is **not** liab for inj due to dmg to **public sidewalk outside** [since it is not LO's prop]
 - licensee:
 - person who enters land for licensee's own purpose
 - ex: door-to-door salesman, police officer entering premise
 - LO owes **no** duty to promise safety
 - LO **does** owes duty to:
 - refrain from causing willful or wanton inj
 - acting in way that increases peril to licensee
 - to warn of **hidden** defects
 - LO **not** liab for acts of licensees
 - trespassers
 - LO owes minimal duty except to not cause intentional harm more excessive than what is necessary to remove trespasser
 - can be liab to trespassers if LO creates **hidden** danger (ex: artificial icicles)
 - (ex: not liab to a criminal that officer is chasing, but may be liab to officer)
- **intentional torts**
 - battery
 - **intentionally** harmful or offensive **physical** contact to plaintiff w/o legal justification
 - doesn't have to involve contact w/ defendant's body (ex: throwing something still counts)
 - fear or awareness of harm is **not** requirement (ex: hitting plaintiff from behind still counts)
 - defenses
 - plaintiff consented to physical contact
 - self-defense
 - physical discipline (if reasonable force used in good faith)
 - assault
 - **threat** made w/ intent of creating fear or apprehension
 - does **not** require actual contact to victim
 - false imprisonment/arrest
 - false imprisonment: **nonphysical** restraint (ex: blocking a doorway)
 - false arrest: physical restraint or threats of physical restraint (ex: dragging someone into room)

- police officers' liab:
 - almost complete immunity if arresting w/ warrant
 - can arrest w/o warrant if felony committed in front of them or they had reasonable grounds
 - can arrest w/o warrant for only certain **misdemeanors**
- citizens' liab:
 - **are** liab for arrests made if victim didn't commit **felony**
 - **cannot** arrest for **misdemeanor** unless there was a breach of the peace
- intentional infliction of emotional distress
 - **intentional** act causing mental anguish resulting in physical reaction (ex: vomiting)
 - i.e., bullying that results in physical symptom
 - if act wasn't intentional, that is poss defense
- defamation
 - making false statements about someone that hurt their reputation
 - publication: the communication of a defamatory statement to another person
 - libel (written/printed)
 - *Sullivan v. New York Times* – US Supreme Court held that **media's** statements must be **knowingly** false before defamation is proved
 - public figures must also prove malice to recover dmgs
 - slander (spoken/speech)
 - law requires substantial proof of inj to plaintiff's reputation as statement is unlikely to be repeated
 - defenses
 - statement was true
 - defendant made retraction (isn't complete defense but reduces dmgs)
 - statement had absolute privilege (is legally allowed to be shared)
 - judicial & legislative proceedings
 - executive officers' & spousal communications
 - plaintiff consented
 - statement had conditional or qualified privilege (made w/o malice & for valid purpose)
 - issues of public interest
 - petitions regarding appointments
 - fair commentary on public matter
 - by credit reporting agencies
 - commercial speech **including advertising** has far less legal protection than public speech
 - product disparagement/trade libel: intentional false/misleading statement about a product's quality, resulting in financial dmg to plaintiff
- invasion of privacy
 - *intrusion on solitude* (includes unlawful surveillance/eavesdropping)
 - *physical invasion* (includes taking pics of embarrassing/compromising position)
 - disclosure of info
 - public disclosure of private fact
 - publicity placing plaintiff in false light (i.e., info taken out of context)
 - unauth release of confidential info
 - appropriation (use) of plaintiff's name/likeness

- defenses
 - plaintiff already published info
 - plaintiff consented
 - plaintiff is public figure, or info is public knowledge
 - info was part of news event
 - info would not offend person of ordinary sensibility
 - matters were disclosed in a judicial proceeding
 - info is of public interest (public has right to know)
- fraud/misrepresentation (misrep)
 - 6 elements that must be proved
 - false statement or misrep was made
 - involving a material fact
 - knowingly made
 - w/ intent to influence or deceive
 - victim had reasonable reliance on truth (**requires proof**)
 - victim suffered dmg
 - disproving any of 6 elements is a defense
 - (ex: incorrect product specs is considered material misrep)
- bad faith/outrage
 - breaching the duty of good faith & fair dealing
 - defenses
 - no intent or recklessness involved
 - no outrageous or extreme conduct occurred
 - defendant didn't breach any implied duty to exercise good faith or fair dealing
 - (for contract cases) defendant owed no contractual duty to plaintiff
 - (for ins cases) no valid ins contract existed
- interferences w/ relationships btwn others
 - injurious falsehood:
 - group of torts involving harm to any kind of legally protected intangible prop (ex: title, lease, trademark)
 - includes negative statements about quality/validity of someone's **intangible** prop right (ex: validity of ownership title)
 - similar to defamation, but also requires proof of dmgs suffered
 - same defenses as defamation
 - malicious interference w/ prospective economic advantage: **malicious** interference w/ commercial/financial dealings
 - unfair competition:
 - use of wrongful or fraudulent biz practices to gain unfair advantage over competitors
 - involves deceiving public into thinking your product is another brand's product
 - i.e., knock-offs/counterfeit goods
 - interference w/ employment
 - interference w/ copyright, patent, trademark
 - interference w/ right to use one's own name in biz

- interference w/ family relationships
 - husband/wife
 - *alienation of affection*
 - suing 3rd party who persuades your spouse to leave marriage
 - some states have abolished this
 - personal inj (suing 3rd party for causing inj to spouse)
 - loss of consortium (suing 3rd party for lost companionship/services of spouse)
 - parents can sue 3rd party for inj to child based on lost services if child helped family economically
 - wrongful-life actions: lawsuit for child w/ birth defect, alleging that parents wouldn't have conceived child or would've terminated pregnancy but for doctor's negligent advice
 - wrongful-pregnancy actions: dmgs resulting from pregnancy after failed sterilization
- misuse of legal process
 - malicious prosecution:
 - improperly instituting legal proceedings against another
 - i.e., suing someone just to stress them out
 - defenses
 - defendant acted on advice of counsel (atty)
 - defendant fully disclosed facts to an impartial atty
 - genuinely belief in plaintiff's guilt
 - acted on atty's advice
 - plaintiff's guilt of crime
 - probable cause for arrest
 - malicious abuse of process:
 - use of civil or criminal procedure for purpose other than which they are designed
 - ex: lying to someone that they need to fly in to be wit for case, when you have other motive for bringing them to your state
- trespass
 - unauthorized entry to someone's prop or interference w/ someone's use of their prop
 - actual entry to a prop is not required (ex: you cut tree & it lands in neighbor's prop)
 - defendant can be liab even if trespass is accidental
 - defenses
 - plaintiff didn't own/possess prop
 - plaintiff consented
 - defendant didn't enter onto or take control of prop
- nuisance
 - based on how uncomfortable a **normal** person would be, not the actual victim
 - nuisance per se: action, occupation, or structure that is automatically considered a nuisance at all times under any conditions regardless of location or surroundings
- conversion:
 - unlawful exercise of control over someone else's non-real property
 - interference must be major and not fleeting
 - i.e., theft