

i. **Intentional Torts**

A. Prima Facie Case

1. *Act by D* – a volitional movement by D
 2. *Intent* – can be either
 - a. *Specific* – the goal in acting is to bring about specific consequences, OR
 - b. *General* – actor knows with *substantial certainty* that these consequences will result
 3. *Causation* – need only D’s conduct that is a *substantial factor*
- **NOTE: *Hypersensitivity of P* is NEVER taken into account in deciding if P has a valid claim**
- **NOTE: Every D is capable of intent (D has NO incapacity defenses for intentional torts) – a drunk can commit battery, a 5 year old can commit false imprisonment**

B. Intentional Torts

1. **Battery** ⇒ harmful or offensive contact to P’s person (harm need not be shown):
 - a. *Offensive (Unpermitted) contact* – means P has not consented (consent is implied for *ordinary* contacts of everyday life)
 - (i) It is offense if **average** people don’t permit it (hypersensitive people don’t matter, must be avg person).
 - b. *P’s person*:
 - (i) Includes everything connected to P (e.g. clothing, carrying a briefcase, kick your dog on a leash)
 - (ii) Need not involve D’s touching (direct or indirect touching)
 - (iii) Does not have to result in instantaneous harm (poison lunch at 9pm, you eat it at noon)
2. **Assault** ⇒ reasonable apprehension of an immediate battery (i.e., harmful or offensive contact to P’s person),
 - a. *Apprehension* – **NOT** the same as fear
 - (i) Synonymous with *knowledge or awareness* – apparent ability sufficient
 - (ii) *Unloaded gun* or D lacks ability to bring attack to function – D threatens but cannot consummate the act - depends on P’s knowledge – put yourself in P’s shoes to decide it is an assault. If P knows he can’t be touched, it is not an assault. If P doesn’t know, it is an assault.
 - b. *Immediate battery* – threat must be specific & immediate
 - (i) Mere words lack the immediacy – mere words are insufficient without overt physical conduct. Pure verbal threat is not an assault (need some overt action – shake a fist, pull out a gun).
 - (ii) But, words can negate the threat (e.g. words in conditional or future tense) (I will beat you up 8 hours from now - is not an assault)
3. **False Imprisonment** ⇒ an act or omission on the part of D that confines or restrains P to a bounded area
 D commits an act of restraint (threats are sufficient) and there must be confinement in a bounded area.
 - a. *Confinement or restraint* – (i) physical barriers, (ii) physical force, (iii) *threats of force*, (iv) failure to release, (v) invalid use of legal authority
 - (i) *Awareness of confinement* – P must know that he’s confined or be harmed by it
 - (ii) Omission suffices if there’s a preexisting duty to help people move around.
 - (iii) Hyper sensitivity not taken into account (i.e If you leave I will blow up Saturn)
 - b. *Result is confinement in bound area* – must be locked in a bounded area
 - (i) Exclusion (lock out, denying admission) is NOT false imprisonment
 - (ii) NO reasonable means of escape reasonably known by P (must be reasonable and reasonably discoverable).

– NOTE: confinement of shoplifter – owner is not liable if there is reasonable (i) suspicion, (ii) means of detention, and (iii) amount of time
4. **Intentional infliction of emotional distress** ⇒ D engages in extreme & outrageous conduct, & P suffers severe distress as a consequence (only intentional tort requiring *damages*)
 - a. **Extreme & outrageous** – **exceeds all bounds of decency tolerated in a civilized society**; mere insults are NOT enough; need plus factors (hallmarks of outrageousness):
 - (i) *Conduct is Continuous & repetitive*
 - (ii) Committed by certain Ds – *common carrier* (transportation companies) or *inn-keeper* (hotels). They have a historic duty to be nice to their patrons
 - (iii) Directed toward certain Ps – member of a fragile class of persons; e.g. *young children, elderly, pregnant women* (*you have to know she is pregnant*)
 - (iv) *Exploitation of a known sensitivity* – if you know of someone’s hypersensitivity (phobia) *in advance*, it’s outrageous to target P’s weak spot
 - b. *Must be Severe emotional distress* – need not be manifested in physical symptoms, does not require that P sought medical care or is taking medication.

* **NY Distinctions**

D's deliberate mishandling of a corpse that causes distress to someone else

5. **Trespass to Land** ⇒ physical invasion of P's real property
 - a. **Physical invasion** – 2 ways:
 - (i) **Entering the property** – No requirement that D be aware that he's on someone else's land (intent can be lacking if you end up on the land against your will – i.e. you collapse on someone's front lawn from a seizure)
 - (a) this constitutes 98% of real-life cases & is rarely tested
 - (ii) **D propels physical objects onto the land** – negative implication of this rule is that a non-physical invasion doesn't count (e.g. light, sound, smell – but can be an action for nuisance)
 - b. **Land** – includes air above & the soil below (out to a reasonable distance)
6. **Trespass to chattels, & conversion** – civil remedies for vandalism & theft of personal (moveable) property
Intentional invasions of personal property (everything you own except your land and buildings)
 - a. **Interference** – either (i) physical damage, or (ii) deprive owner of possession
 - b. **Difference** – degree of injury + different remedy
 - (i) **Trespass to chattels**
 - (a) Harm to P's interests is slight & merely interferes with P's right of possession (keying a car)
 - (b) Remedy – actual damages (cost of repair or rental)
 - (ii) **Conversion** – *You break it, you bought it*
 - (a) Harm to P's interests is great that it requires D to pay the chattel's full value (smash car w sledgehammer)
 - (b) Remedy – treated like a forced sale of the chattel
 - Full fair market value at the time of conversion; or
 - Possession (replevin)
 - c. Mistake of ownership is no defense

* **NY Distinctions**

* In NY, Good Faith Purchaser of stolen merchandise is not considered a converter.

* See **PERSONAL PROPERTY** Outline below

C. Affirmative Defenses to Intentional Torts

1. **Consent:**
 - a. Need Capacity to consent – if lack of capacity, you CANNOT consent (i.e. drunk, insane) (remember lack of capacity can still be found liable of an intentional tort)
 - b. **Express (actual) consent** – words in quotation marks giving the D permission to behave in a certain way
 - EXCEPTION – express consent is void if given under circumstances of *fraud or duress* (*you have sex but don't tell partner you have an STD*)
 - c. **Implied consent** – can arise from:
 - (i) **Custom & usage** – if P participates in an activity where certain invasions are necessary, he's deemed to consent to those invasions (e.g., whether the behavior is typical or customary)
 - (ii) **D's reasonable interpretation of P's objective circumstances or conduct** (*you never consider the subjective thoughts of the P*)
 - d. Scope – if D exceeds the scope of consent, he's liable
2. **Protective privilege** – includes (i) *self-defense*, (ii) *defense of others*, & (iii) *defense of property* – 2 requirements:
 - a. Requirements
 - (i) D has to show *proper timing* – tort (threat you are responding to) must be either in progress or imminent (no revenge - It is improper if the threat is over and done with)
 - (ii) D must have a *reasonable belief* that a *tort (threat) is genuine*
 - Negative implication – an honest reasonable mistake doesn't deprive him of the defense
 - b. NOTE: if above 2 conditions are met, D can use necessary force – rule of symmetry & proportionality under the circumstances); if D uses excessive force, he's liable for battery
 - (i) **Deadly force** – if necessary to protect human (yourself or 3rd person) but NEVER to protect property
 - (ii) BUT, you can threaten/pretend to use deadly force to protect property – the assault is privileged

* **NY Distinctions (minority position)**

Duty to retreat before resorting to deadly force; BUT DOES NOT apply (i) you're in your own home, (ii) you're a cop, or (iii) cannot do so safely

3. **Necessity** - only a defense to the **property torts** (**trespass to land, trespass to chattel, or conversion**)

- a. *Public necessity* – D invades P’s property in an emergency to protect a significant group of people or the community as a whole; D must be acting as an altruist
 - (i) Absolute defense, & D is immunized from all damage liability
 - b. *Private necessity* – D invades P’s property in an emergency to protect an interest of his own (his own safety or property); D is acting selfishly
 - (i) NOT absolute defense
 - (ii) 3 legal consequences:
 - (a) *D remains liable to harm inflicted on property & must pay for harm inflicted*
 - (b) *D is NEVER liable for nominal or punitive damages*
 - (c) *As long as the emergency continues, D entitled to remain on P’s landing a position of safety*
 - Can’t be expelled or ejected (“*right of sanctuary*”)
 - If D leaves because of P and gets injured, then P must pay
- e.g. Single person crash lands a plane into a corn field.

II. Dignitary & Economic Torts

A. Defamation

1. Common Law Defamation

a. Elements:

(i) Defamatory statement of P

- (a) Defamatory statement – written or spoken statement that tends to adversely affect P’s reputation (reputation is an intangible asset that can be harmed).
- (b) Statement must be about P, who is alive (You can’t defame a dead person)
- (c) Purported or alleged *statement of fact* that affects negatively to P’s reputation or character – mere name-calling isn’t defamatory
- (d) Statement of opinion is potentially defamatory if it appears to be based on facts. (if a listener would assume that the speaker has a factual basis for the opinion)
NY Courts: Opinion can be considered defamatory based on its tone, purpose, and context.

(ii) Publication

- (a) D discloses the defamatory statement to *one or more persons other than P himself*
- (b) Can be made either negligently or intentionally.

(iii) Damages to P’s reputation – (DAMAGES MAY BE required)

- (a) **Libel** – written or printed publication of defamatory language
 - **NO need to prove damages; presumption of damages**
- (b) **Slander** – spoken or oral defamation
 - **Slander per se (no need to prove damages)** – oral statements especially devastating to reputation:
 - Statement *relating to P’s business or profession* (one nurse telling another nurse that the doctor left a sponge in a patient)
 - Statement that *P has committed a crime of moral turpitude* (My neighbor is sexually abusing his daughter)
 - *Woman is unchaste* – only applies to women
 - Statement that P suffers from a ‘loathsome’ disease – (i) leprosy & (ii) venereal disease

* NY Distinctions additional category
Statement that someone is homosexual

- **Slander NOT per se** – P must prove special damages (*actual economic loss*) to get to jury; NOT emotional distress & social harm

* NY Rules for Libel and Slander Damages – whether special damages are required		
STATEMENT AT ISSUE	Libel	Slander
Defamatory on its face & slander per se category	NO	NO
Defamatory on its face & NOT slander per se category	NO	YES
Defamatory only by extrinsic fact & slander per se category	NO	YES
Defamatory only by extrinsic fact & NOT slander per se category	YES	YES

b. Affirmative defenses to defamation:

- (i) **Consent** – complete defense (rules relating to intentional torts apply here)
- (ii) **Truth** – where P does not need to prove falsity, D may prove truth as a complete defense
 - (a) Common defamation (private matters) – P need not prove falsity, *D can assert truth as a defense*

- (b) Constitutional defamation (public matter) – P has to prove falsity
- (iii) **Privilege** – 2 kinds:
 - (a) *Absolute privilege* – turns on the identity of the speaker
 - Communication between *spouses*
 - Members of the 3 branches of *government in their scope of official conduct* – covers lawyers & witnesses
 - (b) *Qualified privilege* – based on occasion of the speech. We want people to be candid.
 - (i) *socially valuable or useful*; (ii) *relevant*; (iii) statement must be made in *good faith* (reasonable mistake of fact) (i.e. Letter of Recommendation, Credit & Job Reference, Statements to Police)

2. First Amendment Defamation (FAD)

- a. General – applicable in matters of *public concern* (if material disseminated/spoken/written is something the *general public* would have interest, P can only sue for FAD, NOT for common law defamation)
- b. Elements
 - (i) Defamatory statement (same as for common law)
 - (ii) Publication (same as for common law)
 - (iii) Damages (same as for common law)
 - (iv) P must prove **Falsity** – the statement is factually inaccurate - the burden is shifted from D to P
 - (v) P must prove **Fault** on D’s part – relates to D’s awareness of the falsity
 - (a) *Public figures* (intentional or recklessness) – if P can show that D had actual malice (i.e., **knew** the falsity or had **reckless disregard** as to truth or falsity – made no effort to investigate truth)
 - Damages are presumed – punitive damages allowed
 - (b) *Private figures* (negligence):
 - Damages for only *actual injury*
- NOTE: falsity & fault are prima facie case elements only in a FAD cases, NOT in a common law defamation case, because defamatory statements are presumed to be false, & D has the burden to prove truth as a defense

<i>Type (P & defamation)</i>	<i>Fault required</i>	<i>Damages recoverable</i>
Public official or figure	Actual malice (knowledge OR reckless disregard)	Presumed damages under common law (& punitive damages where appropriate)
Private person (<i>public concern</i>)	Negligence	Damages only for proved “actual injury” (if P proves malice, presumed & punitive damages may be available)
Private person (<i>private concern</i>)	No fault as to truth or No falsity need be proved	Presumed damages under common law (& punitive damages where appropriate)

B. Privacy Torts

- 1. **Appropriation** ⇒ unauthorized use of P’s name or picture for D’s commercial advantage
 - (i) Need D’s consent, express or implied – BUT, mere economic benefit to D by itself isn’t sufficient
 - (ii) E.g. – use in packaging, advertising, trademark
 - (iii) *Newsworthiness exception* – not actionable when a newspaper to run a picture in a newspaper

* NY – ONLY privacy tort recognized in NY
- 2. **Intrusion** (multistate only) ⇒ invasion of P’s secluded space(solitude) in a way that would be objectionable to the average person
 - a. No claim unless truly in a *private space & expectation of privacy* (i.e eavesdropper at a party not actionable)
 - b. No physical trespass required
 - c. Only against private individuals, NOT the government
 - d. E.g. – wiretapping, surveillance, & any other form of low-tech or high-tech spying (peeping)
- 3. **False light** (multistate only) ⇒ widespread dissemination of a major misrepresentation about P that is objectionable to the average person (spreading lies)
 - a. Comparison with *defamation*
 - (i) Broader damages – not limited to economic damages; can recover for psychological damage
 - (ii) Dissemination – must tell lots of people; not simply someone other than P
 - (iii) Possible for a statement to be non-defamatory yet still be objectionable
 - b. E.g. – *mischaracterization of P’s beliefs (telling everyone a religious Jewish person is Catholic)*
 - c. NO intent requirement – even a reasonable mistake is not a defense
- 4. **Disclosure** (multistate only) ⇒ widespread dissemination of confidential information about P that is objectionable to the average reasonable person
 - a. Comparison with *false light* – spreading confidential information that are TRUE

- b. Academic, Financial, Medical information
 - c. E.g. – D tells everyone about P’s medical records
 - d. *Newsworthiness exception* – if there is a public reason/interest/justification of knowing the secret; interpreted very broadly
 - e. “*Dual life*” *fact pattern* – P conducts his life in 2 separate spheres, one public, one private & D carries information from one sphere to another (e.g., openly gay except at workplace); NOT a tort because underlying information is public
5. Affirmative defenses:
- a. *Consent* – defense to all 4 privacy torts
 - b. *Absolute & qualified defamation privilege* – these are defenses to false light & disclosure, but NOT to appropriation or intrusion

C. Economic Torts

1. **Intentional misrepresentation** (*fraud, deceit*) – someone lied to you with the goal of ripping you off, you fell for it and got screwed – 5 elements (NO affirmative defenses):
 - a. Must be an *affirmative misrepresentation of fact* – D must misstate a fact in connection with a commercial transaction (silence can NEVER be fraud)
 - b. *Intent or recklessness* with respect to the misstatement (scienter, i.e. intent) – knowing falsity or reckless manner
 - c. D must *intend to induce reliance* – not only do you need to know that statement is false, BUT you have to have the *intention* of luring someone into a deal
 - d. Reliance - P must *rely on the information* – even expert opinion applicable (i.e. used car salesman says that in his opinion the engine is fine)
 - e. *Economic harm* – must be actual, pecuniary loss
2. *Negligent misrepresentation* – this action is confined to misrepresentations made in a commercial setting, & liability will attach only if reliance by the particular P could be contemplated
3. *Wrongful institution of legal proceedings*
 - a. malicious prosecution – BUT prosecutors are immune from liability
 - b. wrongful civil proceedings

4. **NY – Prima Facie Tort (*Intentional infliction of pecuniary harm without justification*)**

- a. **Intent to do harm** (*economic injury*)
- b. **P suffers a commercial harm/disadvantage**
 - *If traditional tort has been established or been brought, then not actionable*
 - *Similar unfair competition – look for fact pattern where P & D are competitors (i.e. deliberately selling products below cost to drive a competitor out of business.*
 - **WILL ONLY BE ON NY EXAM**

5. **NY – Inducing a breach of Contract (*EQUITY Outline*)**

- a. **4 Elements**
 - (i) **Valid contract** between P & 3rd Party
 - (ii) **D knows existence of the contract**
 - (iii) **D approaches and persuades 3rd Party to abandon contract**
 - (iv) **Subsequent breach** by 3rd Party
- b. **Exception – Privilege Exists**
 - (i) **As 3rd Party’s mentor or counselor** (e.g. parent, lawyer, accountant)

6. **NY – Theft of Trade Secrets (*EQUITY Outline*)**

- a. **P must possess a valid trade secret**
 - (i) **Information that provides a business advantage**
 - (ii) **Not generally known**
 - (iii) **Owner takes reasonable efforts to preserve secrecy**
- b. **D takes the secret by improper means**
 - (i) **Traitorous Insider** (*breach of confidence*) – D learned secret legitimately
 - (ii) **Devious Outsider** (*industrial spies*) – stranger to enterprise learns secret through means below acceptable standards of commercial morality

- 3. Trademark Infringement
- 2. Copyright Infringement
- 1. Patent Infringement

III. Negligence (17 Q's on Negligence Torts)

A. Prima Facie Case

1. Duty to conform to a specific standard of conduct
2. Breach of that duty
3. Causation - Breach is actual and proximate cause of P's injury
4. Damages

B. Duty ⇒ D must owe P a duty of care

– 2 Questions

- a. Was the P foreseeable or unforeseeable?
- b. If so, what is the applicable standard of care?

1. To whom does D owe a duty?

- a. *Foreseeable Victims (zone of danger)* – owe a duty to foreseeable P
 - (i) YOU DO NOT owe a duty to unforeseeable victims (remote, far away victims tend to be unforeseeable)
- b. EXCEPTIONS – people who are owed duty despite unforeseeability:
 - (i) *Rescuers* – are always owed a duty of care. Have to have a foreseeable type of harm. Danger invites Rescue
 - (ii) *Fetuses* (unborn children) – several possible fact patterns:
 - (a) *Negligent impact on pregnant mother's body* – leads to injury to the newborn baby thereafter
 - If baby born alive – infant can then sue D
 - If baby is born dead – infant has NO cause of action however, it has no cause of action but the mother does
 - (b) *Misdiagnoses likelihood of birth defects* – parents can recover for economic loss (medical expenses, special costs for caring for the child), but NOT for emotional harm
 - (c) *Botched sterilization* (wrongful pregnancy)

* NY – Botched Sterilization NOT recognized in NY

2. Scope of duty (standard of care)

- a. **Basic Standard** – owe a duty of care of the **hypothetical reasonably prudent person (RPP)** acting under **similar circumstance** (compare D with reasonably prudent person)
 - (i) *Objective standard (harsh)* – inflexible – the same for every person in society - make NO allowances for D's mental illnesses or deficiencies;
 - (ii) BUT D's *physical attributes* are taken into account (i.e. if D is blind, it is a Blind RPP)
 - (iii) Also, RPP is assumed to have any superior knowledge possessed by D.
- b. **Special Standards** – based on identity of the D in the case
 - (i) **Children: customized standard** (subjective)
 - (a) Under the age of 4 – legally incapable of negligence
 - (b) Older children (Age 4-18) – owe the duty of care of children of *similar age, experience, intelligence* acting under similar circumstances (very flexible subjective standard). Hard to win negligence claim against a child.
 - EXCEPTION: when a child is engaged in an adult activity – ignore the child standard & apply the 'reasonably prudent person test' (e.g. operating something with an engine or motor)
 - (ii) **Professionals**: people who have special skill and training and provide services to the public (they often have licenses) *empirical (factually based) standard* (standards of conformity based on custom)
 - (a) Standard of care – *average member of the profession in good standing in a similar community*
 - (b) In a sense, the standard is to do what is customary
 - EXCEPTIONS:
 - *Specialists* – held to a **national standard** of all those who practice that specialty
 - *Duty to disclose the risks of treatment*

* **NY and MBE – Defenses for duty to disclose risk of treatment**

1. *Commonly known risk*
2. *Patient declines the information*
3. *Patient is mentally incompetent*
4. *Evidence that disclosure of risks will actually be harmful to him*

c. **Land Occupiers** – depends on how *entrant* got hurt & status of P

- (i) *How did the entrant get hurt?*
 - (a) *Activities conducted* on land by owner or his agents, etc.; &
 - (b) Encountering a *dangerous condition* on the property (e.g., going for hike in the woods & getting hurt by hanging tree limb, slipping on loose carpet, etc.)

- NOTE: in urban/residential areas, the owner/occupier is liable for damage caused off the premises by trees on his premises (e.g., falling branches); BUT not in rural areas
- (ii) **What is P's legal status on the land?** there are 4 different statuses:
 - (a) **Undiscovered trespasser:** people on land without occupier's knowledge are NEVER owed a duty of care, regardless of how they were injured
 - (b) **Discovered/anticipated trespasser:** includes not only trespassers that occupier knew about, but also those that he could *anticipate* (*people who take frequent shortcuts across the land*)
 - Activities – duty of reasonable care
 - Conditions – D owes a duty of *reasonable prudence* 4 part test: “**known, manmade deathtraps** on the land”:
 - *artificial condition on the land* – landowner must warn of or make safe concealed, unsafe conditions (no duty to protect people from natural conditions)
 - *highly dangerous* – capable of causing severe injury or death
 - *concealed from trespasser* – entrant cannot perceive danger by himself
 - *occupier knows about condition in advance* (*you don't have a duty to inspect the land*)
 - (c) **Licenses:** social guests, or people who come onto the land for their own purpose or business
 - Activities – duty of reasonable care
 - Conditions – owner owes duty where the condition is “**all known traps**”:
 - *concealed from licensee*
 - *occupier knows about condition in advance*
(*can be natural or artificial danger, can be highly dangerous or not highly dangerous*)
 - (d) **Invitees:** property has been thrown open to the public at large (e.g., hospital, school, etc.)
 - Activities – duty of reasonable care
 - Conditions – the duty is a 2 part test “**all reasonably knowable traps** on the land”:
 - *concealed from invitee*
 - *occupier knows about condition in advance, OR COULD discover through a reasonable inspection*
- NOTE:
 - (a) **Firefighter & Police Rule:** no recovery for injuries that are an inherent risk of their job
 - (b) **Child trespasser:** reasonable prudence under all circumstances (*attractive nuisance test*); child must be hurt
 - (c) Whenever a duty for *condition* – satisfaction by (i) *repair the condition*; **OR** (ii) *give a warning*

* **NY Distinction – Generic standard of reasonable prudence for all land occupiers**

- *Legal status of P no longer determines the duty owed*
- *BUT, status remains relevant in connection with foreseeability & nature of precautions required to meet standard of reasonable care under the circumstances*

- *Duty of possessor of land to those on premises:*

	<i>Activities:</i>	<i>Artificial conditions:</i>	<i>Natural conditions:</i>
<i>Undiscovered trespasser</i>	NO duty	NO duty	
<i>Discovered/anticipated trespasser</i>	Duty of reasonable care	Duty to (i) warn of or (ii) make safe <i>known, man-made death traps</i>	NO duty
<i>Infant trespasser (if presence on land is foreseeable)</i>	NO duty (unless child also qualifies as discovered or anticipated trespasser)	Duty to (i) warn of or (ii) make safe if foreseeable risk to child outweighs expense of eliminating danger	NO duty
<i>Licensee</i>	Duty of reasonable care	Duty to (i) warn of or (ii) make safe <i>all known traps</i>	
<i>Invitee</i>	Duty of reasonable care	Duty to (i) warn of or (ii) make safe <i>all reasonably knowable traps</i>	

* See **NO-FAULT INSURANCE** Outline below

3. **Statutory Standard of Care (negligence per se)**

- a. Usually a regulatory or criminal statute can be used as negligence per se (we borrow the standard from the statute rather than using the vague reasonably prudent standard)
- b. Two-part Test (“*class of person, class of risk*”)
 - (i) P must be a member of the **class of persons** that this statute seeks to protect

- (ii) P must show that the accident is within the *class of harms/risks* that the statute seeks to prevent
- c. EXCEPTIONS – don't want to borrow statute (use *reasonable prudent person test*)
 - (i) **Compliance is more dangerous than violation** – e.g. sometimes a car needs to cross a double-yellow line b/c otherwise he's hit a pedestrian
 - (ii) **Compliance is impossible under the circumstances** – D was having a heart attack while he drove through the red light (statutory compliance was impossible)
- NOTE: when using local ordinance or regulation, only use as evidence of negligence BUT not negligence per se; effort to borrow statute has no penalty

4. Affirmative Duties

- a. NO duty to act affirmatively – e.g. not duty to rescue, no matter how evil D is acting
 - NOTE: standard is the reasonably prudent person – never have to put your life at risk to help others
- b. EXCEPTIONS:
 - (i) *D put P in peril*, or
 - (ii) *Pre-existing relationship between the parties*: (i) family (relative), (ii) common carrier/innkeeper & their customers, (iii) land occupier & business invitees

If you are required to rescue, you are simply required to do what is reasonable under the circumstances.
- c. BUT if volunteers to rescue, must do it in a *reasonably prudent way* or will be liable if he screws up
 - GOOD SAMARITAN LAWS protect gratuitous rescuers from liability, unless for gross negligence (NY law exempts ONLY nurses, doctors & vets)

5. Duty regarding negligent infliction of emotional distress:

- a. Duty to avoid causing emotional distress (fear or fright) – breached when D creates a *foreseeable risk of physical injury to P* through *physical impact* or *threat of impact* (no direct physical injury)
- b. D was negligent AND
 - (i) *Subsequent physical manifestations of the distress* – emotional distress then physical symptom (e.g. heart attack, miscarriage); OR
 - (ii) *Near miss requirement (zone of danger)* – although you didn't sustain any trauma, it was a "near miss." The distress caused by threat of physical impact (e.g., passengers on airplane with drunk pilot)
- c. *Bystander Claim for recovery* – P suing for emotion of grief (e.g. negligently inflicted injury on a close family member, & P is right there, on the scene, to observe it)
 - (i) *Intentional infliction* – P bystander must be *present* when negligent injury occurs & P a close relative of the injured person, & D must know these facts
 - (ii) *Negligent infliction* – P bystander must be within "zone of danger" created by D's negligent conduct

- * **NY Distinction – negligent infliction (very narrow)**
 - 1. *Blood relative; and*
 - 2. *In "zone of danger" (almost gets creamed himself)*

- NOTE: if physical injury caused by another tort, P can tack on damages for emotional distress as a "parasitic" element of P's physical injury damages
- NOTE: If doctor mismanages a pregnancy that results in stillbirth, the mother can sue for her emotional distress.
- d. Distinguish between
 - (i) *Intentional infliction of emotional distress* – requires that D was *deliberate & outrageous*
 - (ii) *Negligent infliction of emotional distress* – requires that D was *careless*

B. Breach of duty

- 1. Assert theory + proves it with evidence (e.g., & "here, P would allege that the breach was... the failure to nail down the loose board on the deck/driving while intoxicated")
- 2. **Res ipsa loquitur** ("the thing speaks for itself") ⇒ a doctrine used by P's who cannot tell us precisely what D did that was wrong. allow P to continue the case by showing 2 part test
 - a. *Accident occurred is of a type which does not normally occur in the absence of negligence* – all about probability, reasoning backward from an outcome.
 - b. *Accident ordinarily happens by a person in D's position (D had exclusive control)* – P has to show that D is the party most likely responsible for the mysterious screw-up that led to the accident
- NOTE:
 - (i) P has made a prima facie case and thus *allows P to defeat D's motion for a directed verdict* against P, & get his case to the jury
 - (ii) BUT, the court will almost always deny P's motion for directed verdict UNLESS P has established negligence per se through (a) violation of statute & (b) there are no issues of proximate cause

C. Causation – on essays, need to talk about BOTH (first factual, & then legal causation)

- 1. **Factual causation** – linkage cause/effect & breach/damage

- a. **But-for test** – builds on the breach by showing that *but for* the breach, P wouldn't be injured (D will try to negate factual causation arguing "but for doesn't apply, because *even if* D had been careful, P still would've sustained its injuries")
 - b. Alternative tests – *multiple Ds*
 - (i) **Merged causation** (*substantial factor test*) – Mingled Cause Cases - substantial factor test asks whether each D contributed to the disaster in a substantial way; if so, we hold them *jointly liable*
 - (ii) **Unascertainable causation** (*alternative causation test*)
 - (a) Simultaneous event (only one of which is liable) – true cause is unascertainable
 - (b) Shift burden of proof to D to exonerate themselves by preponderance of evidence – if each D can't, they are *jointly liable*
- NOTE: (i) merged causation – both parties caused harm; (ii) unascertainable causation – only 1 party caused harm
2. **Legal causation** ("proximate cause" – it is just a label) – this is the 'FAIRNESS' element (whether liability is proportional)
 - a. **Foreseeability test** – only for foreseeable consequences of their carelessness
 - Analysis: *consider whether the consequences are what your worried about*
 - b. **Direct Cause Case**: an uninterrupted chain of events from the negligent act to P's injury – D is liable for foreseeable harmful results, regardless of unusual manner or timing
 - c. **Indirect Cause Case**: an affirmative *intervening force* (e.g., an act by a 3rd person or an act of god) comes into motion after D's negligent act, & combines to cause P's injury
 - (i) "*Intervening causation*"- if intervening force is foreseeable, D will be held liable
 - (ii) 4 well-settled fact patterns, *D always liable for everything (foreseeable)*:
 - (a) **Intervening medical negligence**
 - Doctor remains liable for medical malpractice (there will be joint liability here)
 - (b) **Intervening negligent rescue**
 - Rescuer remains liable, unless Good Samaritan law applies (doctor, nurse or veterinarian)
 - (c) **Intervening protection or reaction forces**:
 - E.g. crowd try to avoid negligently driven car, stomping on victim who was run over
 - (d) **Subsequent accident or disease**:
 - E.g. D runs a red light, after hospital, victim in crutches & falls & breaks his arm (D liable)
 - d. Look at the breach and ask "Why is this a breach?" Just look at the final outcome. If the final outcome is what you were afraid of, it is foreseeable.
 - e. The term "proximate cause" is just a label. You use it at the end of your analysis. If you find the negligence was foreseeable, you say "The breach was the proximate cause of P's injuries"
 - f. Proximate cause rules:

	<i>Direct cause cases</i>	<i>Indirect cause cases (foreseeable intervening force)</i>	<i>indirect cause cases (unforeseeable intervening force)</i>
<i>Foreseeable harmful result:</i>	D liable	D liable	D liable unless intervening force is crime or intentional
<i>Unforeseeable harmful result:</i>	D NOT liable	D NOT liable	D NOT liable (intervening force is superseding)

D. Damages

1. **Eggshell skull doctrine** (foreseeability of extent of harm irrelevant) – once P establishes all the other elements of a tort, D liable for ALL damages no matter how great in scope. Applies to ALL torts, not just negligence. **You take your P as you find him.**
2. Punitive damages – maybe in gross negligence
3. Duty to mitigate – P has a duty to take reasonable steps to mitigate damages
4. Property damage – reasonable cost of repair, or, fair market value if property is nearly destroyed
5. NON-recoverable items include – interest from date of damage in personal injury case, & attorney's fees
6. **Collateral source rule** – damages not reduced just because P received benefits from other sources

* *NY Distinction – collateral source rule*
In all actions, reduce P's damage award by amount of any benefits from collateral sources

* See **EQUITY** Outline below

E. Negligence Defenses

1. NO defense in intentional torts
2. Historically (minority) – P's claim completely barred if
 - a. *Contributory negligence*, or

- b. *Assumption of risk* (implied or express) – P denied recovery if assumed risk of any damage caused by D
- 3. **Comparative negligence** – D must show that *P is guilty* of some fault, defined as his failure to exercise the relevant degree of care for his safety (*reasonable prudence*)
 - a. **Pure comparative fault** (DEFAULT) – Jury weighs the fault and assigns % numbers. P’s damage award reduced by percentage of P’s fault.
In a counterclaim situation, we apply the fault to each separate judgment.
 - b. **Modified/partial comparative fault** – (i) P’s fault is less than 50% reduces recovery, but (ii) P’s fault above 50% then absolute bar

* **NY Distinction – negligent defenses**
Pure comparative fault – BUT no recovery if P commits a serious crime

IV. Strict Liability – safety precautions are irrelevant and never taken into account

A. Causes of Action

1. Liability for Animals

- a. *Trespassing cattle* – strict liability for foreseeable damages
- b. *Wild animals* – if you keep wild animals, strict liability (i.e. circuses)
- c. **Domesticated animals** (i.e., a dog) – general rule NO strict liability, UNLESS, you know the dog has vicious propensities strict liability (i.e., 1st bite negligence; next bite strict liability)

2. Ultrahazardous activities – 3 elements make an activity ultrahazardous

- a. *Activity can’t be made safe*
- b. Activity poses the *risk of severe harm* – if something goes wrong, it’ll be a catastrophe; and
- c. Activity is *uncommon in the community* where it is being conducted
 - (i) *Blasting or explosives*
 - (ii) *Dangerous chemicals or biological substances/agents (tanks of sulfuric acid, chlorine gas, anthrax spores)*
 - (iii) Anything involving *nuclear energy or radiation*

3. Nuisance – interference with your ability to use and enjoy your land to an **unreasonable** degree (inconsistent land use) (not a separate tort in itself, but rather, a *type of harm*). The court balances the equities.

- a. **Private nuisance** – disturbance that (i) **substantially** AND (ii) **unreasonably interferes with another private individual’s use or enjoyment** of property
 - (i) Balancing test: interest v. equity
 - (ii) Can be intentional / negligent / strict liability
 - (iii) Standard for *substantial harm* – whether disturbance is offensive to a normal person in community
– NOTES: Trespass (interference with *possession*) – Nuisance (interference with *use/enjoyment*)
NOTE: It is irrelevant that P “moved” to the nuisance (D was there first for years) = STILL NUISANCE
- b. **Public nuisance** – an act that unreasonably interferes with health, safety, or property rights of the community

4. Strict Liability for Products Liability

- a. Claim for products-liability – can sue multiple parties based on different causes of action (i.e. intent, negligence, strict liability, breach of warranty, fraud)
- b. **Strict Liability requirements**
 - (i) **D is a merchant** (i.e., routinely deals in good of this type) – there are 4 fact patterns here:
 - (a) *Casual seller* – NOT merchant; no strict liability
 - (b) *Service providers* – NOT merchant of items incidental to the service (goods collateral to the service)
 - (c) *Commercial lessors* – YES. merchants (i.e. car rental company, car lease)
 - (d) **Any merchant in the chain of distribution can be liable (regardless of privity – no privity is required)**
 - (ii) **Product is defective** – either:
 - (a) **Manufacturing defect** (the “one-in-a-million” product) – P’s product differs from all the other products that came off the same assembly line in a way that makes it more dangerous than consumers would expect (remember D’s precautions are irrelevant – safety precautions DO NOT count)
 - (b) **Design defect** – P must prove there was a better hypothetical alternative design (HAD)
 - HAD must be: (i) **safer**, (ii) **cost-effective (economical – just a little more expensive or the same cost), & (iii) practical (can’t interfere with the primary purpose or make the product difficult to use)**
 - NOTE: instructions & warnings are elements of the product design. Product can’t be made safer at a reasonable cost and the risk is not obvious to the consumer, so lack of a warning is design defect because a warning is safer, cost-effective, and practical.
NOTE: Not all warnings are created equal. Some warnings may need to be prominent, some may need illustrations.
 - (iii) **Defect existed when the product left D’s control** – If product is brand new, and purchased through normal channels, it is assumed that the defect existed when it left the D. Difficult for P who tries to demonstrate

- manufacturing defect if product is used or sold through non-normal channels
- (iv) **P must make foreseeable use of the product** – must be customary/intended use. (i.e. You stand on a chair to reach something. Although that is not the intended use of the chair, it is still a foreseeable use)
- NOTE: most courts don't extend strict products liability to cases in which P suffers only economic losses, when not accompanied by physical harm to P

B. Defenses

1. *Comparative fault* – balance P's fault with D's fault (committing a serious crime bars recovery)

V. Other Considerations to All Torts

A. Vicarious Liability – flows from relationships

1. **Employer/employee relationship** (*Respondeat superior*) – vicarious liability for acts within *scope of employment*, (interpreted broadly including minor departures from work)
 - a. *Minor departures* – (BUT not liable for *frolic* – going outside scope); and
 - b. *Employee acts that make himself comfortable*
 - c. NO vicarious liability for *intentional torts* UNLESS:
 - (i) *Authorized* in the employment (i.e. employee has right to use force, but exceeds his scope)
 - (ii) *Friction is generated by employment* (i.e. repo-man)
 - (iii) *Over-zealous employee* (acting in a misguided effort to serve the boss's purposes)
2. **Hiring party/independent contractor** – NO vicarious liability EXCEPT:
 - a. Independent contractor is engaged in *inherently dangerous activities*
 - b. *Non-delegable duty* (land occupier liable when contractor hurts invitee)
 - c. Land Occupier is vicariously liable if an independent contractor hurts an invitee
3. **Car owner /driver of a car** – NO vicarious liability EXCEPT:
 - a. Driver is the owner's agent (e.g., owner lends driver the car to run an errand for Owner)

* **NY Distinction – Permissive Use Doctrine**
 Owner vicariously liable even if the driver is not owner's agent.
 Anyone driving your car is presumed to be an authorized driver.

4. **Parents/children** – NO vicarious liability

* **NY Distinction** – allow limited recovery (5K) for willful & intentional property torts of their minor children over age 10

5. **Tavern Owner/Patron** – can be vicariously liable for unlawfully serving *minor or a drunk* (really a ½ relationship)
- NOTE: before using vicarious liability, *first ask whether negligence applies*

B. Joint Tortfeasors - Co-Defendants Issues

1. NY, see CPLR
2. Multistate
 - a. *Comparative contribution* – jury assigns D relative fault in percentages; out-of-pocket D can recover in proportion to those percentages
 - b. *Indemnification* – allows shifting the entire loss
 - (i) Vicarious liability – out-of-pocket D allowed indemnification from active tortfeasor
 - (ii) Strict products-liability – non-manufacturing D's can get indemnification from manufacturer

C. Wrongful Death

1. NOT A TORT. Procedural device (not a tort) allows surviving family members to bring a tort action against D – limited to recover only *pecuniary damages* (i.e., income P would have made if not been killed), NOT pain & suffering
2. Litigation is entirely derivative; *in NY*

D. Loss of Consortium – if victim of (any) tort is a married person, the uninjured spouse gets a separate cause of action in his/her name to recover for 3 elements of damage:

1. Loss of *services* (cooking, cleaning, etc.)
2. Loss of *society* (lost his best friend, etc.)
3. Loss of *sex*

* See **WORKERS' COMPENSATION** Outline below

PERSONAL PROPERTY

- A. Finder of Personal Property** – rights depend on whether property is
1. **Abandoned** ⇒ owner gives up possession with intention to relinquish title and control
 - Finder is the lawful owner when he finds the abandoned property and takes possession
 2. **Lost property** ⇒ owner accidentally parts with possession but no intention to relinquish title or control
 - a. True owner has superior rights
 - b. If property value under \$20 – finder must make a reasonable effort to locate the finder; wait 1 year then may keep if owner doesn't show up
 - c. If property value over \$20 – finder must turn it over to the police, who must hold onto it for a specified statutory period of time; if owner doesn't show up in that time, the finder can return & take possession
- B. Gifts**
1. **Inter vivos gifts** – gifts made while you are alive; need 3 elements
 - a. *Donative intent* - circumstantial evidence (i.e. a statement) that Donor intended to pass title
 - b. *Acceptance by recipient/donee* – silence is good enough (if Donee affirmatively rejects it, he cant ask for it later)
 - c. *Valid delivery* – either actual property or symbolic (e.g. title to car)
 - d. either the actual personal property is handed over, or something representative of the item is handed over (e.g., the car keys are handed over)
 - (i) Donor's checks (First Party Checks) – delivery is only complete when the check is cashed or negotiated (So Donor can stop payment if it hasn't been cashed/negotiated)
 - (ii) 3rd party checks – delivery is complete when you hand it over (donor can't stop payment)
 - (iii) Stock certificates – delivery is complete when you hand over the certificate
 - (iv) Agent – (i) in the hands of donor's agents – NOT delivered; BUT (ii) in donee's agent's hands – delivered. If there is an ambiguity over whose agent it is (fed ex guy), it is the Donor's agent.
 2. **Gift causa mortis** – a gift in contemplation of death substitute for the idea of donative intent the idea of imminent danger
 - a. **Elements – imminent risk of death, & death is reasonably likely to occur (objective test)**
 - b. If Donor doesn't die, he can take the gift back
 - c. Donor has to die – if donee dies first, it doesn't count
- C. Liens** ⇒ right to possess & retain some item of personal property that has been improved, repaired or enhanced in value, until the person claiming or owning the property satisfies a debt
- General lien** – **Granted in favor of an agent who has a bunch of property and can retain all that property for a lump sum due (releasing some property does not release the lien on the rest of the items)**
- Special Lien** – **Attaches to one unique item that has had one unique service performed on it. (If they give up physical possession, they no longer have a lien on the item (they do have a contract action))**
1. *Debt has arisen from service performed (mechanic fixes your car and you owe him money)*
 2. *Debtor has formal title to the item (it's your car)*
 3. *Creditor has possession (the garage physically has your car)*
- D. Bailments** ⇒ giving somebody possession of personal property for some particular purpose (when you lend your car to a friend, check your coat at a restaurant, etc.) – bailee has an obligation to take care of the property, & his losing the property or allowing it to get damaged is a source of liability
- BAR ISSUE: Things inside things. General Rule: if the stuff is normally contained there, it is a bailment. (i.e You lend your car, the jack and spare tire are also bailments, the Picasso in the trunk is not)
1. Creation – examples
 - a. Cars in parking lot – must give keys (if its park and lock, its not a bailment)
 - b. Safe deposit box – bank is the bailee even if they have no idea what's in there
 - c. Coat-check operators – liability statutory limited (\$200 no valued declared and you didn't pay; \$300 if higher value declared, you paid, and got a receipt) (if there is negligence, then you can get the full value)
 2. Liability of bailee – reasonable prudent person under the circumstances
 3. Exculpatory clauses – can limit (contract away liability for ordinary negligence) BUT cannot avoid liability entirely (intentional or gross negligence); requires *notice*

NO-FAULT INSURANCE

- A. General Matters**
1. Scheme that trumps & replaces ordinary in-court negligence litigation in only *minor automobile accidents* cases only – instead of suing, seek insurance
 2. Applicability – ONLY to *personal injury*; NOT to property damage

3. Portability – No-fault insurance applies if you get into an accident in another state

B. Coverage

1. Mandatory insurance scheme – (i) no-fault coverage 50K minimum; & (ii) conventional liability insurance 25K/person 50k/occurrence coverage minimum
2. Individuals covered
 - a. Covered – (i) owners; (ii) permitted drivers; (iii) occupants of car; (iv) pedestrians hit
 - b. NOT covered – (i) drunk drivers; (ii) drag racers; (iii) car thefts; (iv) fleeing felons
3. Recovery
 - a. NO non-economic loss (e.g. NO pain & suffering)
 - b. Basic Economic Loss (50k limit, the sum of):
 - (i) Actual medical expenses;
 - (ii) Lost earnings (80% of actual earnings, up to 2K per month); and
 - (iii) Miscellaneous expenses (\$25 per day)

C. Getting out of No-Fault to file a Negligence Claim – need to show

1. *Suffer more than basic economic loss* – e.g. more than 50K; OR
2. *Serious injury* – (i) death, (ii) dismemberment, (iii) significant disfigurement, (iv) serious fracture, (v) permanent & total loss of a bodily organ or function

EQUITY - I

A. Equitable remedies (P may seek an equitable remedy/injunction in some cases)

1. *Negative or Prohibitory injunction* – order *refrains* D to do an action (e.g., stop trespassing on P's land, stop punching D)
 2. *Mandatory or Affirmative injunction* – order *compels* D to do an action (e.g., build a fence, desegregate schools)
- NOTE: monetary & injunctive relief are NOT mutually exclusive – *courts can freely combine*

B. Permanent injunction (occurs after a trial on the merits)

1. P shows that D committed a tort AND 4 part test for relief:
 - a. *NO adequate remedy at law* – money damages aren't good enough because:
 - (i) D has *no money*
 - (ii) Harm is *impossible to measure in monetary terms*
 - (iii) Conduct is *repetitive/continuous/ongoing*
 - b. *Tort affects a property right or protectable interest or right* – this requirement is reduced to a formality
 - c. *Injunction is enforceable*:
 - (i) Negative injunctions – no enforcement problems
 - (ii) Mandatory injunctions – difficult to enforce; courts will consider the following factors:
 - (a) Complexity of conduct (complex less likely)
 - (b) Length of time (longer time less likely)
 - (c) Location (outside jurisdiction less likely)
 - d. *Balance of hardships tips in P favor* – benefit to P must outweigh the detriment to D
2. Equity Defenses
 - a. **Unclean hands** – argument that P is guilty of misconduct relating to *same transaction* involved in the litigation (not an absolute defense)
 - b. **Laches** – means prejudicial delay (neglected to file lawsuit for a long period of time)
 - c. **1st Amendment considerations** – infringement on the 1st Amendment (e.g. no prior restraint)

C. Preliminary injunction – *preserve the status quo*; ask for it immediately after the complaint is filed; 2 requirements:

1. *Likelihood of success on the merits* (a mini-trial)
 2. *Suffer irreparable harm* if preliminary injunction isn't granted (balance of hardship tips decidedly in P's favor)
- Posting a bond required

WORKERS' COMPENSATION

A. General Matters

1. Statutory insurance scheme that is the exclusive remedy for covered employees (almost anyone) who gets hurt on the job.
2. Employer is *strictly liable* for an on-the-job injury – no need to show employer's fault (so you get your money quick)
3. 3 downsides to the scheme:
 - a. NO pain & suffering;
 - b. O punitive damages
 - c. Can't go to court (exclusive remedy) – So you can't sue your boss or co-workers (unless co-workers acted intentionally), BUT employees can sue any 3rd parties

B. Coverage

1. Individuals covered – almost everyone, BUT NOT independent contractors (only employees)
 - a. NOT covered by statute (meaning they can sue in court):
 - (i) *Teachers or white-collar* who work for *non-profit organizations*;
 - (ii) *Part-time domestic household employees* (e.g. babysitters or cleaning person);
 - (iii) Members of the *clergy*
2. Injuries covered – must arise out of the employment (***even illegal acts are covered***); EXCEPTIONS:
 - a. Injured due to his *own intoxication*
 - b. *Intentionally injure yourself*
 - c. Injury occurred during a *voluntary off-duty athletic activity* (e.g. softball game)
 - d. *Horseplay* – blue-collar workers goofing around on the factory floor (can go either way - depends on the facts)
3. Recovery – (i) all out of pocket medical expenses, & (ii) 2/3 of lost wages, and/or (iii) if you die, *scheduled death benefit plus funeral expenses*

TORTS – ESSAY QUESTIONS

I. QUESTION – 7

- A. Whether airport's failure to adequately maintain the fence was negligent
 - 1. Negligence
 - 2. Also, in NY P's legal status no longer determines duty
- B. Whether bystander suffered a physical injury for negligent infliction of emotional harm
- C. Contributory negligence defenses
- D. *Survival action for pain & suffering*, receive *pecuniary damages* in a *wrongful death* suit

II. QUESTION – 28 (& NY PRACTICE)

- A. Prima facie case for defamation and defenses – whether need to prove specific pecuniary loss / libel per se / qualified privilege (negligent or malicious)
- B. Prima facie case for assault and defenses

III. QUESTION – 97

- A. Whether a parent can be sued for his child's injuries allegedly caused by the *negligence* of the parent
 - 1. NY does NOT recognize *parent-child immunity*
 - 2. Elements of negligence – for proximate cause ask *superseding intervening* forces (extraordinary forms of negligent conduct, against which D was under no obligation to take precautions)
- B. Whether a 3rd party with no privity can use a manufacturer for injuries caused by its product
 - 1. Negligence – can prove without privity
 - 2. Strict Liability – can prove without privity
- C. Whether a *republisher* of an allegedly defamatory article be held liable

IV. QUESTION – 48 (& WILLS)

- A. Who is entitled to wrongful death proceeds
 - 1. Recovery is pecuniary lost – this not included as party of the decedent's estate
 - 2. Distribute proportionately based on pecuniary loss to the beneficiaries
- B. Who is entitle to personal injury action
 - 1. damages recovered in action for pain & suffering are included in the estate

V. QUESTION – 85 (& FEDERAL JURISDICTION)

- A. Whether P has proved tortious interference with a contract
 - 1. *Intentional interference with a contract* – person, with knowledge of contract, intentionally and without justification induced one of the parties to breach the contract
- B. Whether P has sufficiently stated a cause of action for negligence
 - 1. Duty – breach – causation (but for) – damages

VI. QUESTION – 98 (& WILLS & NY PRACTICE)

- A. What causes of action survive P's death
 - 1. Personal injury – decedent's estate may continue or commence any such actions (part of estate)
 - 2. Wrongful death – damages are limited to pecuniary losses (NOT part of estate)
- B. Owner of vehicle
 - 1. Indemnity action – against the negligent driver

VII. QUESTION – 5 (& NY PRACTICE & EVIDENCE)

- A. What is required to maintain an action in strict liability in tort or in negligence
 - 1. *Strict Liability* – (i) *manufacturer produced product was dangerous beyond the expectation of ordinary consumer; or (ii) safer alternative or modification was economically feasible*
 - 2. Negligence – whether manufacturer's duty of care to users was breached

VIII. QUESTION – 3 (& NY PRACTICE & FEDERAL JURISDICTION)

- A. What may be recovered under a wrongful death cause of action
 - 1. Pecuniary losses and Punitive damages
 - 2. NOT for grief, sorrow, and headache, or loss of consortium

IX. QUESTION – 18 (& NY PRACTICE)

- A. What is needed to establish a prima facie case under *manufacturing defect theory*
 - 1. Manufacturing defect arises when a product emerges from manufacturing different from and more dangerous than properly made products –
 - a. product failed to perform as safely as an ordinary consumer would expect
 - b. defect must have existed when the product left D's control
 - c. retailers may be liable if they had no opportunity to inspect (inferred if the product moved through normal channels of

distribution)

2. Liability can be based on (i) strict liability, or (ii) negligence

X. QUESTION – 44 (& *NY PRACTICE & CONTRACTS*)

- A. Theory of recovery grounded on *unfair competition* – P must show D has misappropriated a right belonging to P
- B. Trade Secret – must show that D took trade secret (a customer list is secret ONLY if it can be shown that the list is proprietary information)

XI. QUESTION – 101 (& *CONFLICT OF LAWS & NY PRACTICE*)

- A. Whether a retailer can be held liable for defectively designed products on a strict liability tort theory
 1. P need only prove a strict duty owed by a commercial supplier, breach of that duty, actual and proximate cause and damages
 2. All commercial suppliers, owe a duty to not put unreasonably dangerous goods in the market – no fault need to be proved

XII. QUESTION – 9 (& *NY PRACTICE*)

- A. Whether D's claim that P negligently supervised son (the victim) should be dismissed
 1. A counter-claim or third-party complaint against a parent for negligent supervision is **DISALLOWED**
 2. To dismiss a claim, the court must take all the allegations of the claim as true and determine that D has stated no cause of action upon which relief may be granted
- B. Whether a proper cause of action for *negligent infliction of emotional distress* has been stated
 1. Must have been within the "zone of danger" at the time of injury
 2. Viewed injury to an immediate member of the family

XIII. QUESTION – 49 (& *NY PRACTICE*)

- A. Whether cause of action for negligence and strict liability was stated
 1. Strict Liability in *leases*
 - a. Theory of strict products liability despite absence of privity – because merchants and manufacturers can spread their losses for harm from injury-causing products through pricing and insurance
 - b. Same rationale apply to business in *leasing* a particular product
 - (i) Applicable to commercial supplier of leasing equipment
 - (ii) Though NOT apply to "casual or isolated lease"