CD 1:

Torts – form of substantive law / study of rights and duties / looks at the obligations that members of a society owe each other without regard to promises that are made to one another (contrast with contracts law where there is an agreement).

A duty is a legal obligation, something that someone is supposed to do.

A right is something you are entitled to have done for you.

Some of these obligations come from statutes promulgated by the legislature; most come from tradition. Courts will interpret the traditions on a continuous basis in light of our modern needs. This combination of tradition and judicial interpretation is known as the common law. The common law will vary from state to state because each has its own courts interpreting tradition – when we learn torts, we speak of general rules. Some courts (states) disagree on general rules – when most side one way, it is termed a majority rule. The remainder are in the minority rule. It may be important to know if a general rule is held by the minority or majority, but in most cases it is not important to know this – a majority view can change in the space of one year. Once in a while a group of scholars get together and write up outlines/summaries of what the law is or what they think it should be – these are the Restatements of Torts in our case. They are not law, but they are persuasive in trials.

There are three factors that must be considered in every tort situation:

1. basis of liability (duty) – there is no tort unless the law recognizes some basis of liability, some foundation founded in law.
   - when we speak of basis of liability we speak of three kinds of fault: intent, negligence, and aggravated negligence.
   - We can also speak of liability that is imposed without fault; this is strict liability.

1. proximate cause and damage – tort liability is not imposed unless the plaintiff has sustained damage that was proximately caused by the defendant's conduct (there are few exceptions to this).

2. affirmative defenses – a legal argument that says even though I might have done it, and usually it is a tort, in this particular case it is not a tort because some special rule of law allowed me to do it (e.g., self-defense).

Whenever you consider one of the above items, you must also keep in mind the other two – you do not want to put all your eggs in one basket.

FAULT:

Intent – the definition varies from one tort to the next. Generally, however, intent means the defendant desired or was substantially certain that a specific result would occur. We will have to specify what the result was for each tort. Intent is a subjective state of mind – it is something that was actually going on in the person's mind – it does not matter what the reasonable person was thinking or what the reasonable person was substantially certain what specific result would occur. This raises a problem, as we don't often know what a person was thinking – we often have to deduce this from the facts of the case / the defendant's behavior. This is the difference between a subjective state of mind and evidence of it – we may say that when one does this certain act they are usually thinking this. (E.g., if one points a gun at another and says "I am going to kill you," then they deliberately pull the trigger and the bullet hits the other person, you can probably go ahead a figure that the first person had a state of mind of desiring to shoot the other person). Courts may decide on objective evidence that a person who acted in a particular way had a certain intent – they use objective evidence to determine someone's subjective state of mind. This is a matter of proof – it is not what the ordinary person would have thought, it is what the defendant actually thought – it is subjective, although we may use objective (outward) evidence to reach a conclusion about the subjective state of mind.

Difference between volition and intent:

Volition is the desire to perform a particular act – the desire to use the muscles in a particular way – voluntariness of the act. Intent is the desire or knowledge to a particular certainty that a particular result will occur.

E.g., if you had a gun in your hand and you don't mean to pull the trigger, but you coughed and the trigger fired, this is not a voluntary act, you do not have volition, and if you don't have volition you cannot have intent; if you pull the trigger thinking that the gun is empty and you hit someone with a bullet, you could not have had a desire or substantial certainty that you'd hit the person and, even though your actions were voluntary you did not have the necessary intent to make you liable for certain torts.

There can never be intent without volition, but volition alone is not enough to constitute intent.

Difference between motive and intent:

Intent is the desire and knowledge that a certain consequence will result from your behavior; motive is your reason for wanting to bring that consequence about. Torts are not usually concerned with motive.

This is why we would find liability for torts committed by insane persons or infants – torts are not concerned about the mental health of the defendant, it is concerned with the defendant's subjective state of mind. A five year old may not know that pulling a trigger will make a bullet come out and hit you – the child will not have intent. But another five year old may very well know the result of his actions, and therefore, he would be liable. We don't even care about the age of the child, it is what the child's intention or knowledge was. Garrett v. Daily – tells of nephew who pulled chair out from under his aunt; if he knew that the likelihood of his action was that she'd fall to the ground, thus, he is liable in tort, as by his actions he intended the tort. McGuire v. Almy – the insane woman hit her caretaker with a table leg and the court found that even though she was insane that she knew to a degree of certainty the result of her action, and was therefore liable for it.

Intent – general definition for the two types of torts: intentional invasions of persons and intentional invasions of property:

Intent for intentional invasions of persons: the desire or knowledge to a degree of certainty that someone's rights will be violated/invaded.

Intent for intentional invasions of property: does not require knowledge that someone's rights will be invaded; requires only knowledge or desire that the particular thing (e.g., a car) will be affected by the defendant's conduct.

Each tort has essential elements. We want to look at the essential elements when we look at issues.

SPECIFIC INTENTIONAL TORTS OF INVASION OF THE PERSON:

Battery and assault go together like ham and eggs – battery is a touching of the body and assault is a touching of the mind. In both battery and assault, intent means the same thing. Intent in these cases means that the defendant desired or knew to a substantial certainty that his conduct would produce harmful contact with the plaintiff, or offensive contact to the plaintiff or make the plaintiff feel apprehension about harmful or offensive contact.

BATTERY:

1. intent
2. to commit a harmful or offensive contact with the plaintiff.

Here, we analyze the two questions "did the defendant have the necessary intent," and "was there a harmful or offensive contact with the plaintiff"?

Harmful – causing injury / facts must state there was an injury.

Offensive – unauthorized, unpermitted. The law applies an objective standard with offensive, the contact must be unauthorized by the plaintiff and it must also be the kind of contact that the reasonable person in the plaintiff's shoes would not have authorized. (E.g., if you tap someone on the shoulder to ask directions – they may not have authorized you to tap them, but most people would not find it offensive or not authorize it. An exception to this is you know that the person does not like to be tapped on the shoulder, they have a special sensitivity to it, and you go ahead and do it anyway. In that event, you could be liable for an offensive contact.)

Contact – if a part of the body touches another body, it is a contact; if you cause another thing to touch someone, it is a contact. You may even be able to make a contact without even touching the person if the thing is so close to the person it is as if touching the person themselves. In Fisher v. Carousel Motor Hotel, the waiter snatched a plate away from a diner; the court found that the plate was in the person's hand and that this made it an extension of the person such that it was the equivalent of touching the person himself. However, another court found that one who kicked a chair someone was sitting it was not an offensive touching. The chair was not a reasonable extension of the person. Keep in mind that the Fisher court may have found differently on this chair case – it goes by the judge, the court, and the state, etc. – there are not necessarily hard and fast rules. We are not reading torts cases to find out what the law is, we look to see how the court reasoned in that case. Our job is not to make a conclusion as to whether or not there was a contact, it is to justify a conclusion as to whether or not there was a contact. There will always be a counterargument. We need to come up with good reasons to conclude one way or another, but we'd want to illustrate both arguments. For example, the man was holding the plate tightly so that he would not drop it; anything that disturbs the plate disturbs the man's grip, that makes snatching the plate like snatching the person, so it is the equivalent of a contact to the person. The counterargument is that "a plate is something that is easily picked up and put down; there is nothing that really connects the plate to the person, except the person's grip, so the plate should not be considered as part of the person and therefore touching it is not touching the person." We need to have reasons for our conclusions.

ASSAULT:

1. intent
2. to reasonably induce the plaintiff's apprehension of harmful or offensive contact with the plaintiff.

Here, we analyze the two questions "did the defendant have the necessary intent," and "was there a reasonable inducement to the plaintiff of apprehension of harmful or offensive contact with the plaintiff"?

Inducing – bringing about.

Apprehension – not necessarily the same as fear, although fear always includes apprehension – if an exam states that the plaintiff had fear, then it is giving you apprehension as a gift. But apprehension might be less than fear – if the question tells you that the plaintiff was not afraid, that does not necessarily mean there is no apprehension. Apprehension is looking forward to or anticipating something with discomfort. You could threaten the world's heavyweight champion with a punch – the champ may not be afraid of you, but he does not want to get hit, so he make take a step back from you – this shows apprehension. The apprehension must be reasonable – what a reasonable person would have feared or anticipated with discomfort. The plaintiff's reaction is measured by an objective standard. The exception to a person's sensitivity to an event also applies here – what if you knew that a person only wanted to be touched with white gloves and you went ahead and touched them? It will cause apprehension.

Almost all courts have found that the ordinary, reasonable person would not, based on words alone, experience apprehension. If you threaten to kill someone over the phone, the courts may find that most people would not experience apprehension. However, words can turn an act into an assault. What if during a conversation you go to reach for your handkerchief; but suppose as you are doing so, you say to the other person "I am going to kill you" – your action of reaching for the handkerchief may cause the other person to experience apprehension that you're going to kill them *in connection with the words you spoke*. The words give flavor to the act. Contrast this with the case where the man reaches for his sword and states to the other, "if the judges were not in town, I'd kill you." Here, the court found that the words served to mitigate apprehension.

FALSE IMPRISONMENT:

1. intent
2. confinement of the plaintiff

Intent – the desire or knowledge to a substantial degree of certainty that the plaintiff will be confined as a result of the defendant's act. E.g., you lock all the doors and windows to a building – but you did not know someone was left inside; this is not false imprisonment where there was no intent. A twist in exams: the law does not require that you know the plaintiff's identity – if you want to lock Mary in a building, but you actually lock in Sue, you are still committing the tort of false imprisonment if you knew a human was in there.

Confinement – overcoming the plaintiff's will to leave. This is an objective standard – in a way that would overcome the ordinary person's will to leave. A confinement cannot occur by keeping someone out – examples are cases where they did not let a ticketholder to an event into the event; this is not false imprisonment. Confinement is not just keeping someone from where they wanted to go, it is preventing someone from leaving a place they want to leave. If an unconscious person is locked in a room, the law will not consider this a confinement because there can be no will to leave of an unconscious person. What about an employer who says come into the room and meet with me, and then you wish to leave the room, but then he says if you leave the room you will be fired – is this a confinement? More commonly, this will not be viewed as a confinement as you were still free to leave – you traded your freedom for your job. What if you're locked in a top floor of a ten-story office and you state you want to leave and they say use the window – an ordinary person would not use the window, thus you have been confined.

Lawfulness – every prisoner could sue their wardens for false imprisonment unless you look to the lawfulness of it – prisoners can be lawfully detained. In some jurisdictions the confinement must also be shown to be unlawful – the defendant may have an affirmative defense to the confinement if it was lawful.

INTENTION INFLICTION OF EMOTIONAL DISTRESS:

1. intent

2. outrageous conduct

3. severe mental suffering.

Intent – the desire or knowledge to a substantial degree of certainty that the plaintiff will experience emotional distress. (E.g., Christianson – mother left her child with a babysitter; the babysitter molested the child; the mother sued for her intentional infliction of emotional distress. The babysitter claimed a defense that he lacked intent where he would not have know it would cause her intentional infliction of emotional distress, since the mother was not there. The court found that when the babysitter molested the child, he must have known that the child would tell her mother about it eventually and that the mother would freak out. The court used objective evidence to establish the defendant's subjective state of mind. Taylor – daughter saw two men beat her father up from looking out her window. She sued for intentional infliction of emotional distress, and she lost her case because the defendants did not desire or know that their beating up the father would result in her infliction of emotional distress. In these cases, the courts could have ruled the opposite way – it is all up to the judge and the facts, etc.

Outrageous Conduct – the conduct exceeds all the boundaries normally tolerated by decent society and it must be extremely likely (almost inevitable) to produce mental suffering in the ordinary person. However, there are exceptions – e.g., special sensitivity exception. Slocum v. Food Fair – woman insulted at a grocery store by an employee and had a heart attack and sued for intentional infliction of emotional distress – the court found that the insult was not outrageous – decent society normally tolerates some verbal abuse, especially in this country where we value freedom of speech so highly; and second, ordinary people would not have experienced great suffering from that type of an insult. Contrares – plaintiff's supervisor kept insulting him with racial slurs – the court said that the plaintiff had a special sensitivity to racial slurs, which most members of ethnic minority groups have because they have had to live with this all their lives, and the defendant must have known about the sensitivity and this brought the case into the known exceptions rule and made the conduct outrageous when it might not otherwise have been. Decent society does not tolerate that particular type of behavior anymore.

Severe Mental Suffering – mental suffering or emotional distress which is very serious and which would seriously discommode or make uncomfortable the ordinary person. Some jurisdictions go even further – some jurisdictions say that mental distress or emotional distress is not sufficiently severe unless it produces some physical symptoms; unless the plaintiff was so upset that she vomited, or go ulcers, or had a miscarriage – there must be a physical manifestation.

AFFIRMATIVE DEFENSES:

Three are so similar we can talk about them as if they were one: defense of self (self-defense); defense of others (defense of another); and defense of property. Each are rules of law that may give you permission/privilege to use force against another that was otherwise be a battery or an assault, etc. – they are privileges to prevent a tort by using reasonable force.

First, it is a privilege to prevent a tort: you can only have this form of affirmative defense if you are trying to prevent a tort. If someone raises a stick and hits you, then drops it and runs away, you no longer are able to use self-defense because you no longer have to prevent a tort being committed against you. If he hits you a first time, and then raises it to hit you a second time, then you can use reasonable force to prevent that second hit.

Second, reasonable force. This is the force that would appear necessary to a reasonable person. Appear necessary – if someone comes at you with what is a fake toy gun, but you think it is real, you could draw a conclusion that it appeared necessary to defend yourself, so you hit the person with a baseball bat to prevent them from shooting you. Ordinarily, hitting them with a bat would be a battery. Be careful in making arguments as to whether something was reasonable or not – use this trick: whenever you are performing an act, the act has some advantages and it has some disadvantages; if the disadvantages outweigh the advantages, it is unreasonable, and vice-versa. Here, how would the gun scenario appear to the reasonable person – it would have appeared that their life was in danger, because the gun looked so realistic. You hit the person with a baseball bat – what are the advantages of hitting the person with a baseball bat? What are the disadvantages? The disadvantages include that you could hurt the other person very badly; the advantages are that you saved your life or that it appeared you were saving your life – if the advantage of saving your life outweighs the disadvantage of severely injuring the other person, then the act was reasonable. When you argue about this type of situation, remember that the courts always respect the person's right to defend their own life. Even if it turns out that the other person's life is taken to save yours, the chances are that a court will find that you acted reasonably because to you, and to the reasonable person in your shoes, your life is the most valuable thing in the world. But, if someone is just stealing your pen, and you shoot them with a gun, this is completely unreasonable: you are taking a human life in exchange for a 80 cent pen. The courts always value human life more than anything. That is why deadly force is reasonable only in response to deadly force, or what appears to be deadly force.

Note Katco v. Briney – where the man was so sick and tired of people breaking into his house he set up a spring gun. A man tried to enter his house to rob it and was shot. The court found that since the house was unoccupied, the force that the owner

used to protect the house was unreasonable – property and things are not more valuable than human life. To protect things he risked life – this is unacceptable. Deadly force is never reasonable unless it is used to protect a human life.

RECAPTURE OF CHATTEL:

This is a privilege to use force after a tort is committed. A chattel is an item of property that is not realty (real estate and things permanently attached to it). If someone steals your chattel, you may have a right for a short period of time to use force to get that chattel back. The courts do not favor this defense, but it does recognize our natural tendency to want to get our chattel back. There are three essential elements:

1. wrongful dispossession
2. prompt action
3. reasonable force.

Wrongful Dispossession – you are only allowed to use force to get the chattel back if the chattel is taken from your possession. You are only allowed to use force against the person who actually took the item – suppose someone steals your briefcase, and you start chasing after them, and you come upon someone else with a similar briefcase and, believing that is your briefcase and that is the person who stole it, you use force against that person to retrieve it – you cannot do this, this would be a battery, you can only do this to the actual person who took it and the fact that you go the wrong person is no defense to you no matter how reasonable your actions were. Sometimes the law says that one acting to recapture chattel does so at his or her own risk.

Prompt Action – it means that you start acting immediately to recover your chattel; there is not delay; you have no cooling down period.

Reasonable Force – deadly or serious physical force is not going to be reasonable – all you are trying to do is get back a chattel – you have to look at the advantages/disadvantages analysis again here – you are trying to get back a $200 briefcase here; suing a baseball bat to get your briefcase back is creating a disadvantage of serious harm to the thief over a $200 briefcase – it would not be reasonable.

SPECIFIC INTENTIONAL TORTS OF INVASION OF PROPERTY:

TRESPASS TO LAND: the oldest tort there is recognized by the common law of England; it was usually used to decide who was the rightful owner of property – now we use an action to quiet title. No damage is required in a trespass to land case – a court held that every entry has damage, even if it is that the person trampled a blade of grass – but there is no damage requirement.

1. intent
2. entry onto the plaintiff's realty
3. the entry was unauthorized.

Intent – in the case of invasions of property, it is not necessary that the defendant knew that anyone's rights were going to be violated; all we mean is that the defendant desired or knew that his or her act would result in an entry on that particular piece of realty. Suppose that a friend of yours says you can use his cabin in the woods to study for your final exam. He gives you the keys and you take off. In the meantime, he sells to property, and has no way to reach you to let you know that you can no longer use it. You let yourself into the cabin. You had the desire and intention to enter. Since the cabin now belongs to someone else, however, you have probably committed a trespass to land. It seems weird, but it is because of the origins of the tort – that is because courts wanted to recognize ownership of land. The penalty is not going to be jail, it may be a small fine.

Entry on Plaintiff's Realty – going in or on the realty, but it also occurs when anything tangible makes contact with the realty. There are a few courts that have allowed trespass due to entry of gas, or dust – those jurisdictions are in the minority – usually it is something more tangible. The "realty" means the land and everything above it and below it, and permanently attached to it. It does not require that the person actually make the trespass – a thing can make the trespass. E.g., a man was shooting ducks, and his bullet went through the air and into the plaintiff's land – some of the air belongs to the land, and the bullet therefore made a contact or entry onto the realty.

Entry Must be Unauthorized – the person who had the right to possess the realty did not give permission for the entry; remaining on the realty after permission has run out is also an unauthorized entry.

TRESPASS TO CHATTEL AND CONVERSION:

What do we do when someone messes around with your chattel?

Trespass to chattel – tort action for damage that resulted from someone messing around with someone else's chattel.

Conversion (formerly known as trover) – based on contract theory; by messing around with my chattel, that person took it and made it his, so there is an implied promise that he will pay me for it – a forced sale.

1. intent
2. interference with plaintiff's chattel
3. damage

The difference between trespass to chattel and conversion is the seriousness of it – if I sue you for trespass for chattel, you will have to pay for the damage I sustained as a result of whatever it is you did to my chattel; if I sue you for conversion, you're going to have to buy the chattel from me for whatever it was worth at the time you messed with it. It is the plaintiff's choice as to which way to sue. Under conversion, where you make the other person buy it, this is why it is known as a "forced sale." This is considered a stringent remedy; the law of conversion, therefore, usually requires a more serious interference than does trespass of chattel.

Intent – desire or knowledge that the particular thing would be affected by your conduct. Suppose you park your unique car in spot 17, and it gets stolen but you do knot know this and you come out and there is an identical car sitting there, you think it is yours, and you paint some design on its side. It is not your car, but since you desired to paint the design on the car, you have the necessary intent to be liable to trespass to chattel or conversion, because you had the desire or knowledge that the car would be affected by your conduct.

Interference – doing something that only the rightful possessor is entitled to do. If you paint a design on the car, you have interfered because only the true owner has the right to do this.

Damage – does not necessarily mean damage to the chattel itself – what if you just got in the car and drove it away? You have damaged the true possessor of possession, so this satisfies the criteria of damage. Damage can just be the interference with the chattel from the true owner's possession.

Remember that the remedies for the two torts are different – in conversion, you have to buy the chattel, and in trespass you pay for damages – and the courts treat the interference and as having different requirements for the two torts. If the damage is not very serious, and the interference is not very serious, then the court will have you recover in trespass to chattel. If it is serious, the court will probably consider it a conversion if the plaintiff wants to call it one. An example is that if you had a prized goat that you bred, and someone came along a bred his goat off yours to avoid the stud fee – is this a conversion or a trespass to chattel? Look at the essential elements of the two torts. The fact pattern fits intent and interference and damage. You did not get your stud fee. But does this rise to conversion? If you sue for conversion, he gets to keep your goat. Chances are a court would not find a conversion here, however, because the damages are not that severe. This is a trespass to chattel, so the guy is liable for money damages to you. What if the guy's goat was sick, and this resulted in your goat dying because of his breeding off your goat without your permission? Now, the chattel has been totally destroyed. This is going to be a conversion – the courts will think this serious enough to warrant a forced sale, he did something serious that ended up with your goat dying and your damage is great – the fact that he did not mean to kill your goat is irrelevant. He will have to pay whatever the goat was worth, and of course, he can have the dead goat for whatever it is worth. What if this guy bred his goat off of your prized goat without your permission (and in this case the goat does not die), and the goats turn out to be the ugliest goats in the world – people come from far and wide to see these ugly goats, and now no one wants to have your goat be a stud. Has the guy committed a trespass to chattel or a conversion? One judge could rule that the damage to your goat's reputation is a conversion because your goat is now rendered useless, and the guy should have a forced sale imposed upon him. Another judge would find it just a trespass to chattel. You need to make the argument as to how serious the interference and damages are.

AFFIRMATIVE DEFENSES:

Necessity or privileges of necessity – allows a reasonable invasion of property rights in the face of an emergency. An emergency is a situation that threatens the lives or the property and requires immediate action. If it threatens the lives or property of the general public, it is known as a public emergency, and the privilege is called public necessity. If the emergency is individually- or small-group related, this is a private necessity and the privilege is called private necessity. The difference

is that public necessity is a complete privilege; private necessity is a limited privilege. If I burn your house down to save the town, this is a public necessity and I don't have to pay for the damage. If I burn it down to save myself or my kids or my property, then this is a private necessity, and I do have to pay for the damage (although it may not be a trespass). There is no privilege of necessity unless you are acting reasonably. What if you just bought a book and it accidentally caught on fire – but you see a bucket of water through a very expensive stained glass Tiffany window, so you break the window to get the bucket. Is this a legitimate private necessity? It was an emergency, your property was on fire, but is it reasonable to smash an expensive stained glass window to save a $5 paperback book? We have to balance disadvantages with advantages – this was not reasonable. In public necessities, there is an absolute right to reasonably invade property rights. In private necessity, you must have an emergency, but the person invading the rights must pay for the damage, but if the invasion is reasonable, it is not a trespass.

Consent – willingness – if you are willing to allow the thing to happen, then it is not a tort when it does happen. Willingness is a complete defense to all of the intentional torts. If you induced the consent by fraud or deceit, then the defense does not count. Suppose you told someone you were a police officer and you needed their car to chase a criminal – they gave you their car – but it turns out you are not a police officer, and they sue you for trespass to chattel. The defense that they gave you permissions does not hold up because the consent was obtained through lies.

CD 3:

NEGLIGENCE

A breach of the duty of reasonable care. Be careful with this definition – negligence has a duty of reasonable care, not just a breach of a duty. We have to look to see if the defendant owed a plaintiff a duty of reasonable care.