Appendix A: List of Cases

This list includes cases discussed in-depth during class. It is not an exhaustive list of all cases. You are welcome and encouraged to reference cases discussed in the casebook that are not included in this list. You will not receive credit for referencing cases that were neither discussed in class nor included in the casebook. The cases are listed chronologically in the order that we discussed them in class.

Seffert v. Los Angeles Transit Lines

McDougald v. Garber

Mathias v. Accor Economy Lodging, Inc.

State Farm v. Campbell

BMW v. Gore

Adams v. Bullock

Braun v. Buffalo Gen. El. Co.

United States v. Carroll Towing Co.

Bethel v. New York City Transit Authority

Baltimore & Ohio Railroad Co. v. Goodman

Pokora v. Wabash Railway Co.

Trimarco v. Klein

Martin v. Herzog

Tedla v. Ellman

Negri v. Stop and Shop, Inc.

Gordon v. Museum of Natural History

Byrne v. Boadle

McDougald v. Perry

Ybarra v. Spangard

Sheeley v. Memorial Hospital

Matthies v. Mostromonaco

Harper v. Herman

Farwell v. Keaton

Randi W. v. Muroc Joint Unified School District

Tarasoff v. Regents of the University of California

Strauss v. Belle Realty

Reynolds v. Hicks

Carter v. Kinney

Heins v. Webster County

Riss v. City of New York
Lauer v. City of New York
Falzone v. Busch
Gammon v. Osteopathic Hospital of Maine
Johnson v. Jamaica Hospital
Stubbs v. City of Rochester
Zuchowicz v. United States
Summers v. Tice
Hymowitz v. Eli Lilly & Co.
Benn v. Thomas
Torres v. El Paso Electric Co.
Palsgraf v. Long Island Railroad Co.
Butterfield v. Forrester
Davies v. Mann
Wassell v. Adams
Hanks v. Powder Ridge Restaurant Corp.
Murphy v. Steeplechase
Lamson v. American Axe & Tool
Davenport v. Cotton Hope
Fletcher v. Rylands
Rylands v. Fletcher
Indiana Harbor Belt v. American Cyanamid
MacPherson v. Buick Motor Co.
Escola v. Coca Cola
Cronin v. J.B.E. Olson
Barker v. Lull Engineering
Soule v. General Motors
Hood v. Ryobi American Corp.
Centocor v. Hamilton
General Motors Corp. v. Sanchez
Garratt v. Dailey
Picard v. Barry Pontiac-Buick, Inc.
Wishnatsky v. Huey
Lopez v. Winchell's Donut House
Womach v. Eldridge

Hustler Magazine v. Farwell

Snyder v. Phelps

Hart v. Geysel

Courvoisier v. Raymond

Katko v. Briney

Ploof v. Putnam

Vincent v. Lake Erie Transport Co.

Frost v. Porter Leasing Corp.

Pavia v. State Farm

Appendix B: Legal Rules

This list includes legal rules covered in class that you are not expected to have memorized. You should commit to memory any legal rules covered in class or in the casebook that are not listed below.

Do not use this list to predict the legal rules that you will be tested on during the exam. That would be a big mistake, as the many of the most important rules are *not* included in the list because you are expected to have them memorized.

Keep in mind that the midterm exam will not address every topic covered in class. Therefore, only some of these rules will be relevant to answering the exam questions.

Rules of Civil Procedure

Motion to Dismiss

A motion to dismiss is a formal request for a court to dismiss a case. A defendant may file a motion to dismiss for failure to state a claim upon which relief can be granted. With this motion, the defendant contends that even if all the factual allegations in a plaintiff's complaint are true, they are insufficient to establish a cause of action. A trial court should grant this motion if the plaintiff has not asserted a plausible claim for relief based on well-pleaded facts.

Summary Judgment

Summary judgment is a judgment entered by a court for one party and against another party without a full trial. In civil cases, either party may make a pre-trial motion for summary judgment. Rule 56 of the Federal Rules of Civil Procedure governs summary judgment for federal courts. Under Rule 56, in order to succeed in a motion for summary judgment, a movant must show 1) that there is no genuine dispute as to any material fact, and 2) that the movant is entitled to judgment as a matter of law. "Material fact" refers to any facts that could allow a fact-finder to decide against the movant. Many states have similar pre-trial motions. If the motion is granted, there will be no trial. The judge will immediately enter judgment for the movant.

Directed Verdict

A directed verdict is a ruling entered by a trial judge after determining that there is no legally sufficient evidentiary basis for a reasonable jury to reach a different conclusion. Directed verdicts have been largely replaced by judgment as a matter of law. In federal court, motions for a directed verdict are governed by Rule 50 of the Federal Rules of Civil Procedure. A court should grant this motion if no reasonable jury could have legally sufficient evidence to find for a party on a particular issue.

Excessive Verdict

An excessive verdict is a verdict that shocks the conscience because it appears to stem from factors extraneous the judicial proceedings. For instance, the jury may have been prejudiced against the defendant or overly swayed by emotionally draining evidence. Most verdicts are deemed excessive because the money damages awarded far exceed

the compensation given in similar cases; the typical result is a judge-ordered decrease of the award.

Remittitur

Remittitur is a trial court order in response to an excessive damage award or verdict by a jury which gives the plaintiff the option to accept a reduced damage award or conviction, or the court may order a new trial. Latin for "to send back, to remit." The purpose of remittitur is to give a trial court the ability, with the plaintiff's consent, to correct an inequitable damage award or verdict without having to order a new trial.

Additur

Additur is a procedure by which a court increases the amount of damages awarded by the jury. A party may move for additur, or the court may *sua sponte* order additur, if the jury awards an inadequate amount of damages. The purpose of additur is to allow the court to assess and increase the jury award having to order a new trial. The Supreme Court held in *Dimick v. Schiedt* that additur violates the Seventh Amendment and so is not permissible in federal courts. Many state courts allow additur, however, when the defendant agrees to the increased award on the condition that the court deny plaintiff's motion for a new trial.

Punitive Damages

In *BMW of North America, Inc. v. Gore* the Supreme Court instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

As an example of state law governing punitive damages, under California Civil Code § 3294, "where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to actual damages, may recover damages for the sake of example and by way of punishing the defendant."

These terms are defined as follows:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

<u>Rules of Tort Law</u>

Duty and Breach

"Common carriers . . . must keep pace with science, art, and modern improvement." *Treadwell v. Whittier*, 80 Cal. 574, 600 (Ca. 1889).

Common carriers must use the best precautions in practical use "known to any company exercising the utmost care and diligence in keeping abreast with modern improvement in . . . such precautions." *Valente v. Sierra Ry.*, 151 Cal. 534, 543 (Ca. 1907).

To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it. *Negri v. Stop & Shop* 480 N.E.2d 740 (Ny. 1985).

In *Killings v. Enterprise Leasing Co.*, 9 So. 3d 1216 (Ala. 2008), the court recognized a third-party negligent spoliation claim, conditioned on: 1) actual knowledge of "pending or potential litigation" on the part of the spoliator; 2) a voluntary undertaking, agreement, or specific request establishing a duty; and 3) evidence that the missing evidence was vital to the underlying claim.

Generally, a special relationship giving rise to a duty to warn is only found on the part of common carriers, innkeepers, possessors of land who hold it open to the public, and persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection. Restatement (Second) of Torts § 314A (1965).

Section 324 of the Second Restatement provides that one who, being under no duty to do so, takes charge of another who is helpless is subject to liability caused by "(a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him." Restatement (Second) of Torts § 324 (1965). The Restatement expresses no opinion as to whether "an actor who has taken charge of a helpless person may be subject to liability for harm resulting from his discontinuance of the aid or protection, where by doing so he leaves the other in no worse position than when the actor took charge of him." The Third Restatement requires an actor to exercise reasonable care in discontinuing aid for someone who reasonably appears to be in imminent peril. Restatement (Third) Torts: Liability for Physical and Emotional Harm § 43.

Section 311 of the Restatement Second of Torts, involving negligent conduct, provides that: "(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results (a) to the other, or (b) to such third persons as the actor should reasonably expect to be put in peril by the action taken. (2) Such negligence may consist of failure to exercise reasonable care (a) in ascertaining the accuracy of the information, or (b) in the manner in which it is communicated."

Rowland v. Christian, 443 P.2d 561 (Cal. 1968), enumerates a number of considerations that have been taken into account by courts in various contexts to determine whether a departure from the general rule of not imposing an affirmative duty is appropriate. "[T]he major [considerations] are the foreseeability of harm to the plaintiff,

the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." The foreseeability of a particular kind of harm plays a very significant role in this calculus, but a court's task—in determining 'duty'—is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party."

For specific policy reasons thought to be important, courts sometimes determine that no duty exists, thereby withdrawing the possibility of the defendant being held liable for the harm, even if negligent. Courts properly do this, according to the Third Restatement, when they articulate "categorical, bright-line rules of law applicable to a general class of cases." Restatement (Third) Torts: Liability for Physical and Emotional Harm § 7(b).

Carter v. Kinney, 896 S.W.2d 926 (Mo. 1995), traces the historical rules of premises liability, "Historically, premises liability cases recognize three broad classes of plaintiffs: trespassers, licensees and invitees. All entrants to land are trespassers until the possessor of the land gives them permission to enter. All persons who enter a premises with permission are licensees until the possessor has an interest in the visit such that the visitor 'has reason to believe that the premises have been made safe to receive him.' That makes the visitor an invitee. The possessor's intention in offering the invitation determines the status of the visitor and establishes the duty of care the possessor owes the visitor. Generally, the possessor owes a trespasser no duty of care; the possessor owes a licensee the duty to make safe dangers of which the possessor is aware; and the possessor owes invitees the duty to exercise reasonable care to protect them against both known dangers and those that would be revealed by inspection. The exceptions to these general rules are myriad."

Section 332 of the Restatement Second extends invitee status to a person who is "invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public."

Section 333 of the Restatement Second states the duty owed to trespassers, "Except as stated in §§ 334–339, a possessor of land is not liable to trespassers for physical harm caused by his failure to exercise reasonable care (a) to put the land in a condition reasonably safe for their reception, or (b) to carry on his activities so as not to endanger them." The listed exceptions create obligations to warn, for example, when the possessor knows that persons "constantly intrude upon a limited area" of the land and may encounter a hidden danger, or when the possessor fails to exercise reasonable care for the safety of a known trespasser. Generally, though, the duty is simply not to willfully or wantonly harm trespassers.

Section 342 of the Restatement Second provides that an occupier is subject to liability to invitees if the occupier "(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger,

or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger."

Section 339 of the Restatement Second provides rules governing child trespassers, "A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children."

In *Cuffy v. City of New York*, 505 N.E.2d 937 (N.Y. 1987), the court stated the general rule that there is no tort duty to provide police protection, but recognized an exception in cases of "special relationship"—the elements of which were held to be, "1) an assumption by the municipality through promises or action, of an affirmative duty to act on behalf of the party who was injured; 2) knowledge on the part of the municipality's agents that inaction could lead to harm; 3) some form of direct contact between the municipality's agents and the injured party; and 4) that party's justifiable reliance on the municipality's undertaking."

Section 47 of the Third Restatement provides for liability when negligently inflicted serious emotional harm "occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm," but also specifies that "an actor who negligently injures another's pet is not liable for emotional harm suffered by the pet's owner."

Causation

"For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." Restatement (Second) of Torts § 876 (1965).

Defenses to Negligence

In *Tunkl v. Regents of the University of California*, 383 P.2d 441 (Cal. 1963), the court concluded that exculpatory agreements violate public policy if they affect the public interest adversely; [ ]; and identified six factors (Tunkl factors) relevant to this determination: "[1] [The agreement] concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to

perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents."

Strict Liability

"[T]he true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." *Fletcher v. Rylands*, 1 LR Exch. 265 (1866).

"[I]f the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril." *Rylands v. Fletcher*, 3 LRE & I. App. 330 (HL) (1868).

"In determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes." Restatement (Second) of Torts § 520 (1977).

"An activity is abnormally dangerous if: (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and (2) the activity is not one of common usage." Restatement (Third) Torts: Liability for Physical and Emotional Harm § 20 (2010).

"A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product: (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product; (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe; (c) is defective because of inadequate

instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe." Restatement (Third) of Torts: Products Liability § 2 (1998).

"[W]hen a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks." Restatement (Third) of Torts: Products Liability § 2 cmt. 1 (1998).

"A reasonable warning not only conveys a fair indication of the dangers involved, but also warns with the degree of intensity required by the nature of the risk. [ ] Among the criteria for determining the adequacy of a warning are: 1. the warning must adequately indicate the scope of the danger; 2. the warning must reasonably communicate the extent or seriousness of the harm that could result from misuse of the [product]; 3. the physical aspects of the warning must be adequate to alert a reasonably prudent person to the danger; 4. a simple directive warning may be inadequate when it fails to indicate the consequences that might result from failure to follow it and, . . . 5. the means to convey the warning must be adequate." *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 429 (Tenn. 1994).

"Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability." Restatement (Second) of Torts § 402A cmt. n (1965).

"When the defendant claims that the plaintiff failed to discover a defect, there must be evidence that the plaintiff's conduct in failing to discover a defect did, in fact, fail to meet a standard of reasonable care. In general, a plaintiff has no reason to expect that a new product contains a defect and would have little reason to be on guard to discover it." Restatement (Third) of Torts: Products Liability § 17 (1998).

Intentional Torts

"An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results." Restatement (Second) of Torts § 13 (1965).

"An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) an offensive contact with the person of the other directly or indirectly results." Restatement (Second) of Torts § 18 (1965).

"An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension." Restatement (Second) of Torts § 21 (1965).

"An actor is subject to liability to another for false imprisonment if (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and (b) his act directly or indirectly results in such a confinement of the other, and (c) the other is conscious of the confinement or is harmed by it." Restatement (Second) of Torts § 35 (1965).

"One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Restatement (Second) of Torts § 46 (1965).

Section 2 of the Third Restatement provides the following approach to recklessness, usually considered to be synonymous with willful or wanton misconduct: "A person acts recklessly in engaging in conduct if: (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk."

"An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him." Restatement (Second) of Torts § 63 (1965).

"(1) Subject to the statement in Subsection (3), an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that (a) the other is about to inflict upon him an intentional contact or other bodily harm, and that (b) he is thereby put in peril of death or serious bodily harm or ravishment, which can safely be prevented only by the immediate use of such force. (2) The privilege stated in Subsection (1) exists although the actor correctly or reasonably believes that he can safely avoid the necessity of so defending himself by (a) retreating if he is attacked within his dwelling place, which is not also the dwelling place of the other, or (b) permitting the other to intrude upon or dispossess him of his dwelling place, or (c) abandoning an attempt to effect a lawful arrest. (3) The privilege stated in Subsection (1) does not exist if the actor correctly or reasonably believes that he can with complete safety avoid the necessity of so defending himself by (a) retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling of the other, or (b) relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest." Restatement (Second) of Torts § 65 (1965).

"An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another's intrusion upon the actor's land or chattels, if (a) the intrusion is not privileged or the other intentionally or negligently causes the actor to believe that it is not privileged, and (b) the actor reasonably believes that the intrusion can be prevented or terminated only by the force used, and (c) the actor has first requested the other to desist and the other has disregarded the

request, or the actor reasonably believes that a request will be useless or that substantial harm will be done before it can be made." Restatement (Second) of Torts § 77 (1965).

"The intentional infliction upon another of a harmful or offensive contact or other bodily harm by a means which is intended or likely to cause death or serious bodily harm, for the purpose of preventing or terminating the other's intrusion upon the actor's possession of land or chattels, is privileged if, but only if, the actor reasonably believes that the intruder, unless expelled or excluded, is likely to cause death or serious bodily harm to the actor or to a third person whom the actor is privileged to protect." Restatement (Second) of Torts § 79 (1965).

END OF EXAM