



# TORTS



# TORTS

## TABLE OF CONTENTS

I.	<b>INTENTIONAL TORTS . . . . .</b>	1
A.	<b>PRIMA FACIE CASE . . . . .</b>	1
1.	<b>Act by Defendant . . . . .</b>	1
2.	<b>Intent . . . . .</b>	1
a.	<b>Actor Need Not Intend Injury . . . . .</b>	1
b.	<b>Transferred Intent . . . . .</b>	2
1)	<b>General Rule . . . . .</b>	2
2)	<b>Limitations on Use of Transferred Intent . . . . .</b>	2
c.	<b>Motive Distinguished . . . . .</b>	2
d.	<b>Minors and Incompetents Can Have Requisite Intent . . . . .</b>	3
3.	<b>Causation . . . . .</b>	3
B.	<b>PRIMA FACIE CASE—INTENTIONAL TORTS TO THE PERSON . . . . .</b>	3
1.	<b>Battery . . . . .</b>	3
a.	<b>Prima Facie Case . . . . .</b>	3
b.	<b>Harmful or Offensive Contact . . . . .</b>	3
c.	<b>Meaning of “Plaintiff’s Person” . . . . .</b>	3
d.	<b>Causation . . . . .</b>	4
e.	<b>Apprehension Not Necessary . . . . .</b>	4
f.	<b>Transferred Intent . . . . .</b>	4
g.	<b>Actual Damages Not Required . . . . .</b>	4
2.	<b>Assault . . . . .</b>	4
a.	<b>Prima Facie Case . . . . .</b>	4
b.	<b>Construction of “Apprehension” . . . . .</b>	5
1)	<b>Requirement of Reasonableness . . . . .</b>	5
a)	<b>Fear, Intimidation, etc., Distinguished . . . . .</b>	5
b)	<b>Knowledge of Act Required . . . . .</b>	5
c)	<b>Knowledge of Defendant’s Identity Not Required . . . . .</b>	5
d)	<b>Defendant’s Apparent Ability to Act Is Sufficient . . . . .</b>	5
e)	<b>Effect of Words . . . . .</b>	5
(1)	<b>Overt Act Required . . . . .</b>	5
(2)	<b>Conditional Threat Is Sufficient . . . . .</b>	6
2)	<b>Requirement of Immediacy . . . . .</b>	6
c.	<b>Causation . . . . .</b>	6
d.	<b>Transferred Intent . . . . .</b>	6
e.	<b>No Requirement of Damages . . . . .</b>	6

<b>3. False Imprisonment . . . . .</b>	<b>6</b>
a. Prima Facie Case . . . . .	7
b. Sufficient Methods of Confinement or Restraint . . . . .	7
1) Physical Barriers . . . . .	7
2) Physical Force . . . . .	7
3) Direct Threats of Force . . . . .	7
4) Indirect Threats of Force . . . . .	7
5) Failure to Provide Means of Escape . . . . .	7
6) Invalid Use of Legal Authority . . . . .	8
a) False Arrests . . . . .	8
(1) When Arrests Are Privileged . . . . .	8
(a) Felony Arrests Without Warrant . . . . .	8
(b) Misdemeanor Arrests Without Warrant . . . . .	8
(c) Arrests to Prevent a Crime Without a Warrant . . . . .	9
(2) Amount of Force Allowable . . . . .	9
(a) Felony Arrest . . . . .	9
(b) Misdemeanor Arrest . . . . .	9
b) "Shoplifting" Detentions Are Privileged . . . . .	9
c. Insufficient Forms of Confinement or Restraint . . . . .	9
1) Moral Pressure . . . . .	10
2) Future Threats . . . . .	10
d. No Need to Resist . . . . .	10
e. Time of Confinement . . . . .	10
f. Awareness of Imprisonment . . . . .	10
g. What Is a Bounded Area? . . . . .	10
h. Causation . . . . .	10
i. Transferred Intent . . . . .	10
j. No Requirement of Damages . . . . .	10
k. False Imprisonment and Malicious Prosecution Distinguished . . . . .	10
<b>4. Intentional Infliction of Emotional Distress . . . . .</b>	<b>11</b>
a. Prima Facie Case . . . . .	11
b. Extreme and Outrageous Conduct . . . . .	11
1) Some Courts Reluctant to Recognize Tort . . . . .	11
2) Liability Limited by Requiring Proof of Outrageous Conduct . . . . .	11
3) Examples of Outrageous Conduct . . . . .	11
a) Extreme Business Conduct . . . . .	11
b) Misuse of Authority . . . . .	12
c) Offensive or Insulting Language . . . . .	12
4) Special Relationship Situations . . . . .	12
5) Known Sensitivity . . . . .	12
c. Intent . . . . .	12
d. Causation . . . . .	12
1) Intent/Causation Requirements in Bystander Cases . . . . .	12

2) Special Liability for Mishandling Corpses .....	13
e. Actual Damages Required .....	13
<b>C. PRIMA FACIE CASE—INTENTIONAL TORTS TO PROPERTY .....</b>	<b>13</b>
1. Trespass to Land .....	13
a. Prima Facie Case .....	13
b. Physical Invasion of Plaintiff's Land .....	13
1) What Constitutes "Physical Invasion"? .....	13
a) Defendant Need Not Enter onto Land .....	14
b) Lawful Right of Entry Expires .....	14
2) If No Physical Object Enters Land .....	14
3) What Constitutes "Land"? .....	14
c. Intent Required .....	14
d. Who May Bring Action? .....	14
e. Causation .....	15
f. Transferred Intent .....	15
g. No Requirement of Damages .....	15
2. Trespass to Chattels .....	15
a. Prima Facie Case .....	15
b. Act by Defendant .....	15
1) Intermeddling .....	16
2) Dispossession .....	16
c. Intent Required .....	16
d. Who May Bring Trespass to Chattels Action? .....	16
e. Causation .....	16
f. Actual Damages Required .....	16
g. Transferred Intent .....	16
h. Trespass to Chattels and Conversion Distinguished .....	16
3. Conversion .....	16
a. Prima Facie Case .....	16
b. Acts of Conversion .....	17
c. Mere Intent to Perform Act Required .....	17
1) Bona Fide Purchaser May Be Liable .....	17
2) Accidental Conduct Insufficient .....	17
d. Seriousness of Interference or Consequence .....	17
e. Special Situation of Bailees Receiving Stolen Property .....	18
f. Subject Matter of Conversion .....	18
g. Who May Bring Action for Conversion? .....	18
h. Causation .....	18
i. Remedies .....	18
1) Damages .....	18
2) Replevin .....	19

<b>D. DEFENSES TO THE INTENTIONAL TORTS . . . . .</b>	<b>19</b>
1. Consent . . . . .	19
a. Express (Actual) Consent . . . . .	19
1) Consent by Mistake . . . . .	19
2) Consent Induced by Fraud . . . . .	19
3) Consent Obtained by Duress . . . . .	19
b. Implied Consent . . . . .	19
1) Apparent Consent . . . . .	20
a) Inferred from Usage and Custom . . . . .	20
2) Consent Implied by Law . . . . .	20
c. Capacity Required . . . . .	20
d. Criminal Acts . . . . .	20
1) Modern Trend . . . . .	20
2) Consent Invalid Where Law Seeks to Protect Members of Victim's Class . . . . .	20
e. Exceeding Consent Given . . . . .	20
2. Self-Defense . . . . .	21
a. When Is Defense Available? . . . . .	21
1) Reasonable Belief . . . . .	21
2) Retaliation Not Allowed . . . . .	21
3) Retreat Not Necessary . . . . .	21
4) Not Available to Aggressor . . . . .	21
b. How Much Force May Be Used? . . . . .	21
c. Extends to Third-Party Injuries . . . . .	21
3. Defense of Others . . . . .	22
a. When Is Defense Available? . . . . .	22
b. How Much Force May Be Used? . . . . .	22
4. Defense of Property . . . . .	22
a. When Is Defense Available? . . . . .	22
1) Request to Desist Usually Required . . . . .	22
2) Effect of Mistake . . . . .	22
3) Limited to Preventing Commission of Tort . . . . .	22
4) Superseded by Other Privileges . . . . .	23
b. How Much Force May Be Used? . . . . .	23
5. Reentry onto Land . . . . .	23
a. Common Law Privilege . . . . .	23
b. Privilege Abolished in Most States . . . . .	23
6. Recapture of Chattels . . . . .	23
a. When Is Defense Available? . . . . .	23
1) Timely Demand Required . . . . .	23

2) Recovery Only from Wrongdoer .....	23
b. How Much Force May Be Used? .....	24
c. Entry upon Land to Remove Chattel .....	24
1) On Wrongdoer's Land .....	24
2) On Land of Innocent Party .....	24
3) On Land Through Owner's Fault .....	24
d. Shopkeeper's Privilege .....	24
7. Privilege of Arrest .....	24
a. Invasion of Land .....	24
b. Subsequent Misconduct .....	24
c. Mistake .....	24
8. Necessity .....	25
a. Public Necessity .....	25
b. Private Necessity .....	25
9. Discipline .....	25
<b>II. NEGLIGENCE .....</b>	<b>25</b>
A. PRIMA FACIE CASE .....	25
B. THE DUTY OF CARE .....	25
1. Introduction—General Duty of Care .....	25
2. To Whom Is the Duty of Care Owed?	26
a. Specific Situations .....	26
1) Rescuers .....	26
2) Prenatal Injuries .....	26
a) "Wrongful Life" Action Not Recognized .....	26
b) Compare—"Wrongful Birth" and "Wrongful Pregnancy" .....	27
3) Intended Beneficiaries of Economic Transactions .....	27
3. What Is Applicable Standard of Care?	27
a. Basic Standard—The Reasonably Prudent Person .....	27
1) Physical Characteristics If Relevant—Same as Defendant's ..	27
2) Average Mental Ability .....	27
3) Same Knowledge as Average Member of Community .....	28
b. Particular Standards of Conduct .....	28
1) Professionals .....	28
a) Duty to Disclose Risks of Treatment .....	28
2) Children .....	28
a) Minimum Age for Capacity to Be Negligent .....	28
b) Children Engaged in Adult Activities .....	29
3) Common Carriers and Innkeepers .....	29

4) Automobile Driver to Guest .....	29
a) Guest Statutes .....	29
5) Bailment Duties .....	29
a) Duties Owed by Bailee .....	30
(1) Sole Benefit of Bailor Bailment .....	30
(2) Sole Benefit of Bailee Bailment .....	30
(3) Mutual Benefit Bailments .....	30
(4) Modern Trend .....	30
b) Duties Owed by Bailor .....	30
(1) Sole Benefit of Bailee Bailments .....	30
(2) Bailments for Hire .....	30
c. Standard of Care in Emergency Situations .....	30
d. Standard of Care Owed by Owners and/or Occupiers of Land .....	31
1) Duty of Possessor to Those Off the Premises .....	31
a) Natural Conditions .....	31
b) Artificial Conditions .....	31
(1) Unreasonably Dangerous Conditions .....	31
(2) Duty to Protect Passersby .....	31
c) Conduct of Persons on Property .....	31
2) Duties of Possessor to Those on the Premises .....	32
a) Duty Owed to a Trespasser .....	32
(1) Definition of Trespasser .....	32
(2) Duty Owed Undiscovered Trespassers .....	32
(3) Duty Owed Discovered Trespassers .....	32
(a) When Is a Trespasser “Discovered”? .....	32
(4) Duty Owed Anticipated Trespassers .....	32
(a) When Is a Trespasser “Anticipated”? .....	33
(5) “Attractive Nuisance” Doctrine .....	33
(a) What Is a Dangerous Condition? .....	33
1] Where Applied .....	33
(b) Foreseeability of Harm Is True Basis of Liability .....	33
(6) Duty of Easement and License Holders to Trespassers .....	34
b) Duty Owed to a Licensee .....	34
(1) Definition of Licensee .....	34
(2) Duty Owed .....	34
(a) No Duty to Inspect .....	34
(b) Duty of Care for Active Operations .....	34
(3) Social Guests Are Licensees .....	34
c) Duty Owed to an Invitee .....	35
(1) Definition of Invitee .....	35
(2) Characterization of Privileged Entrants .....	35

(3) Scope of Invitation .....	35
(4) Duty Owed .....	36
(a) Warning May Suffice .....	36
(b) Obviousness of Danger .....	36
d) Users of Recreational Land .....	36
3) Duties of a Lessor of Realty .....	37
a) General Duty Rule .....	37
b) Exceptions .....	37
(1) Duty of Lessor to Lessee .....	37
(2) Effect of Lessor's Covenant to Repair .....	37
(3) Effect of Voluntary Repairs by Lessor .....	37
(4) Effect of Admission of the Public .....	37
c) Tenant Remains Liable to Invitees and Licensees .....	38
4) Duties of Vendor of Realty .....	38
e. Statutory Standards of Care .....	38
1) When Statutory Standard Applicable .....	38
a) Plaintiff Within Protected Class .....	38
b) Particular Harm to Be Avoided .....	39
2) Excuse for Violation .....	39
3) Effect of Establishing Violation of Statute .....	39
4) Effect of Compliance with Statute .....	39
5) Violation of a Civil Remedy Statute .....	39
f. Duty Regarding Negligent Infliction of Emotional Distress .....	39
1) Plaintiff Must Be Within the "Zone of Danger" .....	40
2) Plaintiff Must Suffer Physical Symptoms from the Distress ..	40
3) Special Situations Where Requirements Not Always Necessary .....	40
a) Bystander Not in Zone of Danger Seeing Injury to Another .....	40
b) Special Relationship Between Plaintiff and Defendant ..	40
g. Affirmative Duties to Act .....	41
1) General Rule—No Duty to Act .....	41
2) Assumption of Duty to Act by Acting .....	41
a) "Good Samaritan" Statutes .....	41
3) Peril Due to Defendant's Conduct .....	42
4) Special Relationship Between Parties .....	42
a) Duty of Common Carriers .....	42
b) Duty of Places of Public Accommodation .....	42
5) Role of Contract in Creating Duty .....	42
a) Nonfeasance—No Duty .....	42
b) Misfeasance—Due Care Required .....	42
6) Duty to Prevent Harm from Third Persons .....	42
C. BREACH OF DUTY .....	43

1. Custom or Usage .....	43
2. Violation of Statute .....	43
3. Res Ipsa Loquitur .....	43
a. Inference of Negligence .....	43
b. Negligence Attributable to Defendant .....	43
1) Multiple Defendants Problem .....	44
c. Effect of Res Ipsa Loquitur .....	44
1) No Directed Verdict for Defendant .....	44
2) Effect of Defendant's Evidence of Due Care .....	44
D. CAUSATION .....	45
1. Actual Cause (Factual Causation) .....	45
a. "But For" Test .....	45
1) Concurrent Causes .....	45
b. Additional Tests .....	45
1) Merged Causes—Substantial Factor Test .....	45
2) Unascertainable Causes Approach .....	45
a) Burden of Proof Shifts to Defendants .....	45
b) Applied in Enterprise Liability Cases .....	46
2. Proximate Cause (Legal Causation) .....	46
a. General Rule of Liability .....	46
b. Direct Cause Cases .....	46
1) Foreseeable Harmful Results—Defendant Liable .....	47
2) Unforeseeable Harmful Results—Defendant Not Liable .....	47
c. Indirect Cause Cases .....	47
1) Foreseeable Results Caused by Foreseeable Intervening Forces—Defendant Liable .....	47
a) Common Foreseeable Intervening Forces .....	48
(1) Subsequent Medical Malpractice .....	48
(2) Negligence of Rescuers .....	48
(3) Protection or "Reaction" Forces .....	48
(4) Subsequent Disease or Accident .....	48
b) Independent Intervening Forces .....	49
(1) Negligent Acts of Third Persons .....	49
(2) Criminal Acts and Intentional Torts of Third Persons .....	49
(3) Acts of God .....	49
2) Foreseeable Results Caused by Unforeseeable Intervening Forces—Defendant Usually Liable .....	50
3) Unforeseeable Results Caused by Foreseeable Intervening Forces—Defendant Not Liable .....	50
4) Unforeseeable Results Caused by Unforeseeable Intervening Forces—Defendant Not Liable .....	51

d. Unforeseeable Extent or Severity of Harm—Defendant Liable . . . . .	51
<b>E. DAMAGES . . . . .</b>	<b>51</b>
1. Damages Recoverable in the Action . . . . .	52
a. Personal Injury . . . . .	52
1) Foreseeability Irrelevant . . . . .	52
2) Emotional Distress Damages . . . . .	52
b. Property Damage . . . . .	52
c. Punitive Damages . . . . .	52
d. Nonrecoverable Items . . . . .	52
2. Duty to Mitigate Damages . . . . .	53
3. Collateral Source Rule . . . . .	53
<b>F. DEFENSES TO NEGLIGENCE . . . . .</b>	<b>53</b>
1. Contributory Negligence . . . . .	53
a. Standard of Care for Contributory Negligence . . . . .	53
1) General Rule . . . . .	53
2) Rescuers . . . . .	53
3) Remaining in Danger . . . . .	53
4) Violation of Statute by Plaintiff . . . . .	53
5) As Defense to Violation of Statute by Defendant . . . . .	54
b. Avoidable Consequences Distinguished . . . . .	54
c. No Defense to Intentional Torts . . . . .	54
d. Effect of Contributory Negligence . . . . .	54
e. Last Clear Chance . . . . .	54
1) “Helpless” vs. “Inattentive” Peril . . . . .	55
a) Helpless Peril . . . . .	55
b) Inattentive Peril . . . . .	55
2) Prior Negligence Cases . . . . .	55
f. Imputed Contributory Negligence . . . . .	55
1) General Rule—Plaintiff May Proceed Against Both Negligent Parties . . . . .	55
2) When Contributory Negligence Is Imputed . . . . .	55
3) Common Fact Situations . . . . .	56
a) Employer and Employee . . . . .	56
b) Partners and Joint Venturers . . . . .	56
c) Spouses . . . . .	56
d) Parent and Child . . . . .	56
e) Automobile Owner and Driver . . . . .	56
2. Assumption of Risk . . . . .	56
a. Implied Assumption of Risk . . . . .	57
1) Knowledge of Risk . . . . .	57

2) Voluntary Assumption . . . . .	57
3) Certain Risks May Not Be Assumed . . . . .	57
b. Express Assumption of Risk . . . . .	57
c. No Defense to Intentional Torts . . . . .	58
3. Comparative Negligence . . . . .	58
a. Types of Comparative Negligence . . . . .	58
1) "Partial" Comparative Negligence . . . . .	58
a) Multiple Defendants . . . . .	58
2) "Pure" Comparative Negligence . . . . .	58
b. Comparative Negligence Illustrations . . . . .	59
1) Partial Comparative Negligence Jurisdiction—Single Defendant . . . . .	59
2) Partial Comparative Negligence Jurisdiction—Multiple Defendants . . . . .	59
3) Pure Comparative Negligence Jurisdiction . . . . .	59
c. Effect on Other Doctrines . . . . .	59
1) Last Clear Chance . . . . .	59
2) Assumption of Risk . . . . .	59
a) Implied Assumption of Risk . . . . .	59
b) Express Assumption of Risk . . . . .	60
3) Wanton and Willful Conduct . . . . .	60
III. LIABILITY WITHOUT FAULT (STRICT LIABILITY) . . . . .	60
A. PRIMA FACIE CASE . . . . .	60
B. LIABILITY FOR ANIMALS . . . . .	60
1. Trespassing Animals . . . . .	60
2. Personal Injuries . . . . .	60
a. Wild Animals—Strict Liability . . . . .	60
b. Domestic Animals—Knowledge Required . . . . .	60
c. Persons Protected . . . . .	61
1) Licensees and Invitees—Landowner Strictly Liable . . . . .	61
a) Public Duty Exception . . . . .	61
2) Trespassers Must Prove Negligence . . . . .	61
a) Compare—Intentional Use of Vicious Watchdogs . . . . .	61
C. ABNORMALLY DANGEROUS ACTIVITIES . . . . .	61
1. Definition . . . . .	61
2. Test . . . . .	61
3. Products Liability . . . . .	62
D. EXTENT OF LIABILITY . . . . .	62

1. Defendant Liable Only to Foreseeable Plaintiffs .....	62
2. Harm Must Result from “Normally Dangerous Propensity” .....	62
3. Proximate Cause .....	62
4. Defenses .....	63
a. Contributory Negligence States .....	63
b. Comparative Negligence States .....	63
IV. PRODUCTS LIABILITY .....	63
A. BASIC PRINCIPLES .....	63
1. Theories of Liability .....	63
2. Existence of a Defect .....	64
a. Types of Defects .....	64
1) Manufacturing Defects .....	64
2) Design Defects .....	64
3) Information Defects .....	64
b. Proving a Defect .....	64
1) Manufacturing Defects .....	64
a) Defective Food Products .....	64
2) Design Defects .....	64
a) Effect of Government Safety Standards .....	65
c. Common Defect Problems .....	66
1) Misuse .....	66
2) Scientifically Unknowable Risks .....	66
3) Allergies .....	66
3. No Requirement of Contractual Privity Between Plaintiff and Defendant .....	66
a. Defined .....	67
b. Vertical Privity Absent .....	67
c. Horizontal Privity Absent .....	67
B. LIABILITY BASED ON INTENT .....	67
1. Tort Involved .....	67
2. Privity Not Required .....	67
3. Damages .....	67
4. Defenses .....	67
C. LIABILITY BASED ON NEGLIGENCE .....	67
1. Prima Facie Case .....	67
2. Defendant with Duty of Care to Plaintiff .....	68

a.	<b>Product Supplier</b>	68
1)	<b>Labeling Another's Product</b>	68
b.	<b>Privity Not Required</b>	68
3.	<b>Breach of Duty</b>	68
a.	<b>Negligence</b>	68
1)	<b>Proof of Negligence in Manufacturing Defect Case</b>	68
a)	<b>Liability of Manufacturer</b>	68
b)	<b>Liability of Dealer</b>	69
2)	<b>Proof of Negligence in Design Defect Case</b>	69
b.	<b>Defective Product</b>	69
4.	<b>Causation</b>	69
a.	<b>Intermediary's Negligence</b>	69
5.	<b>Nature of Damages Recoverable</b>	69
6.	<b>Defenses</b>	70
D.	<b>LIABILITY BASED ON STRICT TORT LIABILITY</b>	70
1.	<b>Prima Facie Case</b>	70
2.	<b>Defendant Must Be "Commercial Supplier"</b>	70
a.	<b>Distinction Between Product and Service</b>	71
3.	<b>Product Not Substantially Altered</b>	71
4.	<b>Privity Not Required</b>	71
5.	<b>Production or Sale of Defective Product</b>	71
6.	<b>Causation</b>	71
a.	<b>Actual Cause</b>	71
b.	<b>Proximate Cause</b>	72
7.	<b>Nature of Damages Recoverable</b>	72
8.	<b>Defenses</b>	72
a.	<b>Contributory Negligence States</b>	72
b.	<b>Comparative Negligence States</b>	72
c.	<b>Disclaimers of Liability Ineffective</b>	72
E.	<b>IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS</b>	72
1.	<b>Proof of Fault Unnecessary</b>	72
2.	<b>Scope of Coverage</b>	73
3.	<b>Implied Warranty of Merchantability</b>	73
4.	<b>Implied Warranty of Fitness for Particular Purpose</b>	73
5.	<b>Privity</b>	73

a. Vertical Privity No Longer Required .....	73
b. UCC Alternatives on Horizontal Privity .....	73
6. Effect of Disclaimers .....	73
7. Causation .....	74
8. Damages .....	74
9. Defenses .....	74
a. Assumption of Risk .....	74
b. Contributory Negligence .....	74
c. Comparative Negligence .....	74
d. Notice of Breach .....	74
F. REPRESENTATION THEORIES (EXPRESS WARRANTY AND MISREPRESENTATION OF FACT) .....	74
1. Express Warranty .....	75
a. Scope of Coverage .....	75
b. Privity Not Required .....	75
c. "Basis of the Bargain" .....	75
d. Basis of Liability—Breach of Warranty .....	75
e. Effect of Disclaimers .....	75
f. Causation, Damages, and Defenses .....	75
2. Misrepresentation of Fact .....	75
a. Defendant's State of Mind .....	76
1) Strict Liability .....	76
2) Intentional Misrepresentation .....	76
3) Negligent Misrepresentation .....	76
b. Material Fact Required .....	76
c. Intent to Induce Reliance of Particular Buyer .....	76
d. Justifiable Reliance .....	76
1) Reliance Need Not Be Victim's .....	76
e. Actual Cause .....	77
f. Proximate Cause and Damages .....	77
g. Defenses .....	77
1) Assumption of Risk .....	77
2) Contributory Negligence (Fault) .....	77
V. NUISANCE .....	77
A. BASIS OF LIABILITY .....	77
B. PRIVATE NUISANCE .....	78
1. Substantial Interference .....	78
2. Unreasonable Interference .....	78

3. Trespass to Land Distinguished .....	78
C. PUBLIC NUISANCE .....	78
D. REMEDIES .....	78
1. Damages .....	78
2. Injunctive Relief .....	79
3. Abatement by Self-Help .....	79
a. Abatement of Private Nuisance .....	79
b. Abatement of Public Nuisance .....	79
E. DEFENSES .....	79
1. Legislative Authority .....	79
2. Conduct of Others .....	79
3. Contributory Negligence .....	79
4. “Coming to the Nuisance” .....	80
VI. GENERAL CONSIDERATIONS .....	80
A. VICARIOUS LIABILITY .....	80
1. Doctrine of Respondeat Superior .....	80
a. Frolic and Detour .....	80
b. Intentional Torts .....	80
c. Liability for Own Negligence .....	81
2. Independent Contractor Situations .....	81
a. Liability for Own Negligence .....	81
3. Partners and Joint Venturers .....	81
a. What Is a Joint Venture? .....	81
1) Common Purpose .....	81
2) Mutual Right of Control .....	81
4. Automobile Owner for Driver .....	82
a. Liability for Owner’s Negligence .....	82
5. Bailor for Bailee .....	82
6. Parent for Child .....	82
a. Child Acting as Agent for Parents .....	82
b. Parent Liable for Own Negligence .....	82
7. Tavernkeepers .....	83
B. PARTIES—MULTIPLE DEFENDANT ISSUES .....	83
1. Joint and Several Liability .....	83

a. Tortfeasors Acting in Concert .....	83
b. Statutory Limitations .....	83
2. Satisfaction and Release .....	83
a. Satisfaction .....	83
b. Release .....	83
3. Contribution and Indemnity .....	84
a. Contribution .....	84
1) Methods of Apportionment .....	84
a) Comparative Contribution .....	84
b) Equal Shares .....	84
2) Contribution Tortfeasor Must Have Liability .....	84
3) Not Applicable to Intentional Torts .....	84
b. Indemnity .....	84
1) Right to Indemnity by Contract .....	84
2) Vicarious Liability .....	85
3) Indemnity Under Strict Products Liability .....	85
4) Identifiable Difference in Degree of Fault .....	85
a) Examples .....	85
(1) Retailers Who Negligently Rely on Product's Condition .....	85
(2) Where Liability Imposed Under Secondary Duty ..	85
(3) Active/Passive Negligence Doctrine .....	85
b) Effect of Comparative Negligence System .....	86
c. Comparative Contribution .....	86
C. SURVIVAL AND WRONGFUL DEATH .....	86
1. Survival of Tort Actions .....	86
a. Torts that Expire on Victim's Death .....	86
2. Wrongful Death .....	87
a. Who May Bring Action? .....	87
b. Measure of Recovery .....	87
1) Deaths of Children, Elderly People .....	87
2) Rights of Creditors .....	87
c. Effect of Defenses .....	87
1) Defenses Against Deceased .....	87
2) Defenses Against Beneficiary .....	87
D. TORTIOUS INTERFERENCES WITH FAMILY RELATIONSHIPS .....	87
1. Spousal .....	87
2. Parent-Child .....	88
a. Parent's Actions .....	88
b. Child's Action .....	88

3. Nature of Action for Family Relationship Interference .....	88
<b>E. TORT IMMUNITIES .....</b>	<b>88</b>
1. Intra-Family Tort Immunities .....	88
a. Injury to Person .....	88
1) Interspousal Immunity Abolished .....	88
2) Parent-Child Immunity Limited .....	89
b. Injury to Property .....	89
2. Governmental Tort Immunity .....	89
a. Federal Government .....	89
1) United States Still Immune for Certain Enumerated Torts ..	89
2) Discretionary Acts Distinguished from Ministerial Acts ..	89
3) Government Contractors .....	89
b. State Governments .....	90
c. Municipalities .....	90
1) Immunity Abolished—Public Duty Rule Limitation .....	90
2) Immunity Retained—Limited to Governmental Functions ..	90
a) Governmental Functions .....	90
b) Proprietary Functions .....	90
d. Immunity of Public Officials .....	91
3. Charitable Immunity .....	91
<b>VII. HARM TO ECONOMIC AND DIGNITARY INTERESTS .....</b>	<b>91</b>
<b>A. DEFAMATION .....</b>	<b>91</b>
1. Prima Facie Case .....	91
2. Defamatory Language .....	92
a. Inducement and Innuendo .....	92
b. Methods of Defamation .....	92
c. Statements of Opinion .....	92
1) Distinguishing Fact and Opinion .....	92
d. Who May Be Defamed? .....	92
1) Individual .....	92
2) Corporation, Unincorporated Association, and Partnership .....	93
3. “Of or Concerning” the Plaintiff .....	93
a. Colloquium .....	93
b. Group Defamation .....	93
1) All Members of Small Group .....	93
2) All Members of Large Group .....	93
3) Some Members of Small Group .....	93
4. Publication .....	93

a.	Only Intent to Publish Required . . . . .	94
b.	Repetition . . . . .	94
c.	“Single Publication” Rule—Statute of Limitations . . . . .	94
d.	Who May Be Liable? . . . . .	94
1)	Primary Publisher . . . . .	94
2)	Republisher . . . . .	94
3)	Secondary Publishers . . . . .	95
5.	Damage to Plaintiff’s Reputation . . . . .	95
a.	General and Special Damages . . . . .	95
1)	General or Presumed Damages . . . . .	95
2)	Special Damages . . . . .	95
b.	Libel . . . . .	95
1)	Definition . . . . .	95
2)	Damages Rules for Libel . . . . .	96
a)	General Damages Presumed . . . . .	96
b)	Libel Distinction—Minority Position . . . . .	96
(1)	Libel Per Se—Presumed Damages . . . . .	96
(2)	Libel Per Quod—Special Damages Usually Required . . . . .	96
c.	Slander . . . . .	96
1)	Definition . . . . .	96
a)	Characterization of Repetitions . . . . .	96
b)	Radio and Television Broadcasts Generally Libel . . . . .	96
2)	Damages Rules for Slander . . . . .	96
a)	Special Damages Usually Required . . . . .	96
b)	Slander Per Se—Injury Presumed . . . . .	97
(1)	Business or Profession . . . . .	97
(2)	Loathsome Disease . . . . .	97
(3)	Crime Involving Moral Turpitude . . . . .	97
(4)	Sexual Misconduct . . . . .	97
d.	“Per Se” . . . . .	97
6.	Falsity . . . . .	98
a.	Exam Approach . . . . .	98
7.	Fault on Defendant’s Part . . . . .	98
a.	Public Officials—Actual Malice Required . . . . .	98
b.	Public Figures—Actual Malice Required . . . . .	98
1)	What Constitutes a Public Figure? . . . . .	98
c.	What Is Actual Malice? . . . . .	99
1)	Test . . . . .	99
2)	What Constitutes “Knowledge or Reckless Falsity”? . . . . .	99
a)	Reckless Conduct—Subjective Standard . . . . .	99
b)	Spite, etc., Not Enough . . . . .	99

3) Alteration of Quotation as Actual Malice .....	99
d. Private Persons Need Not Prove Actual Malice .....	99
1) Matters of Public Concern—At Least Negligence Required ..	100
a) No Liability Without Fault .....	100
b) Damages Limited to “Actual Injury” .....	100
(1) “Actual Injury” .....	100
(2) Presumed Damages or Punitive Damages Allowable Where Actual Malice Found .....	100
2) Matters of Purely Private Concern—No Constitutional Limitations .....	101
3) What Is a Matter of Public Concern? .....	101
8. Defenses to Defamation .....	101
a. Consent .....	101
b. Truth .....	101
c. Absolute Privilege .....	102
1) Judicial Proceedings .....	102
2) Legislative Proceedings .....	102
3) Executive Proceedings .....	102
4) “Compelled” Broadcast or Publication .....	102
5) Communications Between Spouses .....	102
d. Qualified Privilege .....	103
1) Qualified Privilege Situations .....	103
a) Reports of Public Proceedings .....	103
b) Public Interest .....	103
(1) Publication to One Acting in Public Interest ..	103
(2) Fair Comment and Criticism .....	103
c) Interest of Publisher .....	104
d) Interest of Recipient .....	104
e) Common Interest of Publisher and Recipient .....	104
2) Loss of Qualified Privilege Through Abuse .....	104
a) Statement Not Within Scope of Privilege .....	104
b) Actual Malice .....	105
3) Qualified Privilege—Burden of Proof .....	105
9. Mitigating Factors .....	105
a. No Actual Malice .....	105
b. Retraction .....	105
c. Anger .....	105
B. INVASION OF RIGHT TO PRIVACY.....	105
1. Appropriation of Plaintiff’s Picture or Name .....	106
a. Prima Facie Case .....	106
b. Limited to Advertisement or Promotion of Product or Services ..	106

2. Intrusion on Plaintiff's Affairs or Seclusion .....	106
a. Prima Facie Case .....	106
b. Invasion of Plaintiff's Private Affairs or Seclusion .....	107
c. Intrusion Highly Offensive to a Reasonable Person .....	107
d. Intrusion Must Be into Something "Private" .....	107
3. Publication of Facts Placing Plaintiff in False Light .....	107
a. Prima Facie Case .....	107
b. Publication or Public Disclosure .....	107
c. What Is "False Light"? .....	107
d. Highly Offensive to Reasonable Person .....	107
e. Actual Malice Necessary Where Matter of Public Interest .....	108
4. Public Disclosure of Private Facts About Plaintiff .....	108
a. Prima Facie Case .....	108
b. Publication or Public Disclosure .....	108
c. Facts Must Be Private .....	108
d. Disclosure Highly Offensive to Reasonable Person .....	108
e. Facts May Be True .....	109
f. Constitutional Privilege .....	109
1) Effect of Passage of Time .....	109
2) Absolute Privilege with Regard to Matters of Public Record .....	109
5. Causation .....	109
6. Proof of Special Damages Unnecessary .....	109
7. Basis of Liability .....	109
8. Defenses to Invasions of Privacy .....	109
a. Consent .....	109
b. Defamation Defenses .....	110
9. Right of Privacy—Miscellaneous .....	110
a. Right Is Personal .....	110
b. Not Applicable to Corporations .....	110
C. MISREPRESENTATION .....	110
1. Intentional Misrepresentation (Fraud, Deceit) .....	110
a. Prima Facie Case .....	110
b. The Misrepresentation .....	111
1) No General Duty to Disclose .....	111
2) Active Concealment Actionable .....	111
c. Scienter .....	111
d. Intent to Induce Reliance .....	111
1) Continuous Deception Exception .....	112

2) Third-Party Reliance Problem . . . . .	112
e. Causation . . . . .	112
f. Justifiable Reliance . . . . .	112
1) Reliance on Fact Almost Always Justified . . . . .	112
a) No Obligation to Investigate . . . . .	112
2) Reliance on Opinion Usually Not Justifiable . . . . .	112
a) Superior Knowledge of Defendant . . . . .	113
b) Statements of Law . . . . .	113
c) Statements of Future Events . . . . .	113
g. Damages . . . . .	113
2. Negligent Misrepresentation . . . . .	113
a. Prima Facie Case . . . . .	113
b. Liability Confined to Commercial Transactions . . . . .	114
c. Duty Owed Only to Particular Plaintiff Whose Reliance Contemplated . . . . .	114
d. Other Elements . . . . .	114
D. INTERFERENCE WITH BUSINESS RELATIONS . . . . .	114
1. Not Limited to Existing Contracts . . . . .	115
2. Intent Required . . . . .	115
3. Damages . . . . .	115
4. Privileges . . . . .	115
a. Type of Business Relationship Involved . . . . .	115
b. Means of Persuasion Used . . . . .	115
c. Whether Defendant Is a Competitor of Plaintiff . . . . .	115
d. Defendant's Relationship with the Third Party . . . . .	116
E. WRONGFUL INSTITUTION OF LEGAL PROCEEDINGS . . . . .	116
1. Malicious Prosecution . . . . .	116
a. Prima Facie Case . . . . .	116
b. Institution of Criminal Proceedings . . . . .	116
1) Defendant Must Initiate Proceedings . . . . .	116
2) Prosecuting Attorneys Privileged . . . . .	116
c. Termination of Proceedings in Plaintiff's Favor . . . . .	116
d. Absence of Probable Cause for Prior Proceedings . . . . .	117
1) Effect of Indictment . . . . .	117
2) Prior Action Based on Advice . . . . .	117
e. Improper Purpose in Bringing Suit . . . . .	117
f. Damages . . . . .	117
g. False Arrest Distinguished . . . . .	117

2. Wrongful Civil Proceedings .....	117
3. Abuse of Process .....	117
a. Malicious Prosecution Distinguished .....	118



# TORTS

## I. INTENTIONAL TORTS

### A. PRIMA FACIE CASE

To establish a prima facie case for intentional tort liability, it is generally necessary that plaintiff prove the following:

- (i) **Act** by defendant;
- (ii) **Intent**; and
- (iii) **Causation**.

#### 1. Act by Defendant

The “act” requirement for intentional tort liability refers to a **volitional movement** on defendant’s part.

#### EXAMPLES

- 1) Chauncey tripped and was falling. To break the fall, Chauncey stretched out his hand, which struck Darby. Even though the movement was reflexive, it nonetheless was one dictated by the mind, and hence will be characterized as volitional.
- 2) Lulu suffered an epileptic attack. During the course of it, she struck Darby. This is not a volitional act.
- 3) Chauncey pushed Lulu into Darby. Chauncey has committed a volitional act; Lulu has not.

#### 2. Intent

The intent of the actor that is relevant for purposes of intentional torts is the intent to bring about the consequences that are the basis of the tort. An actor “intends” the consequences of his conduct if his **purpose** in acting is to bring about these consequences or if he **knows with substantial certainty** that these consequences will result.

#### EXAMPLE

D, five years old, pulls a chair out from under P as she is sitting down. Even if D did not desire that she hit the ground, if he knew with substantial certainty that she was trying to sit and would hit the ground, he will have the intent necessary for battery.  
[Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955)]

#### a. Actor Need Not Intend Injury

A person may be liable even for an unintended injury if he intended to bring about such “basis of the tort” consequences.

**EXAMPLE**

A intends to push B and does so. B falls and breaks his arm. This conduct gives rise to a cause of action for battery. The “consequences” that are the basis of this tort are harmful or offensive contact to the plaintiff’s person. In this case, the actor intended to bring about harmful or offensive contact to B. Hence, he will be liable even though it was not intended that B break his arm.

**b. Transferred Intent****1) General Rule**

The transferred intent doctrine applies where the defendant intends to commit a tort against one person but instead (1) commits a different tort against that person, (2) commits the same tort as intended but against a different person, or (3) commits a different tort against a different person. In such cases, the ***intent to commit a tort against one person is transferred to the other tort or to the injured person*** for purposes of establishing a prima facie case.

**EXAMPLE**

A swings at B, intending only to frighten him. A's blow lands on C. A's intent to commit assault on B is transferred to C, and A's act constitutes a battery on C.

**2) Limitations on Use of Transferred Intent**

Transferred intent may be invoked only where the tort intended and the tort that results are both within the following list:

- a) Assault;
- b) Battery;
- c) False imprisonment;
- d) Trespass to land; and
- e) Trespass to chattels.

**c. Motive Distinguished**

**Motive** impels a person to act to achieve a result. **Intent** denotes the purpose to use a particular means to effect that result. ***Only the intent is relevant*** for purposes of establishing the prima facie case. Thus, for example, even though defendant acts without a hostile motive or desire to do any harm, or even where he is seeking to aid the plaintiff, he may be liable.

*Note:* Evil motive is not an essential element of most torts, but **malice** or ulterior purpose is an essential element of some (e.g., malicious prosecution, abuse of process). Further, malice may sometimes negate a privilege that the defendant might have, and it may permit the recovery of **punitive damages**.

d. **Minors and Incompetents Can Have Requisite Intent**

Under the majority view, both minors and incompetents will be **liable** for their intentional torts; i.e., they are held to possess the requisite intent.

3. **Causation**

The result giving rise to liability must have been legally caused by the defendant's act or something set in motion thereby. The causation requirement will be satisfied where the **conduct of defendant is a substantial factor** in bringing about the injury.

*Note:* Ordinarily, causation will not be at issue in intentional torts cases because it is usually obvious that the defendant's conduct was a substantial factor in causing the harm.

## B. PRIMA FACIE CASE—INTENTIONAL TORTS TO THE PERSON

### 1. Battery

a. **Prima Facie Case**

To establish a prima facie case for battery, the following elements must be proved:

- 1) An act by the defendant which brings about **harmful** or **offensive contact** to the plaintiff's person;
- 2) **Intent** on the part of the defendant to bring about harmful or offensive contact to the plaintiff's person; and
- 3) **Causation**.

b. **Harmful or Offensive Contact**

Contact is harmful if it causes actual injury, pain, or disfigurement. Contact is offensive if it would be considered offensive by a **reasonable person** of ordinary sensibilities. Contact is deemed "offensive" if the plaintiff has not expressly or impliedly consented to it (see D.1., *infra*).

c. **Meaning of "Plaintiff's Person"**

For purposes of a battery, anything **connected** to the plaintiff's person is viewed as part of the plaintiff's person.

**EXAMPLE**

Chauncey grabbed Lulu's purse, which was hanging from her shoulder. He may be liable for a battery. (He would also be liable if he had grabbed an article of clothing she was wearing, a cane she was holding, etc.)

**d. Causation**

The defendant is liable not only for "direct" contact, but also for "indirect" contact; i.e., it will be sufficient if he **sets in motion a force** that brings about harmful or offensive contact to the plaintiff's person.

**EXAMPLES**

- 1) Chauncey, intending to set a trap, dug a hole in the road upon which Lulu was going to walk. Lulu fell in. Causation exists.
- 2) Horace struck a glass door so that the breaking glass cut Bowater. Causation exists.

**e. Apprehension Not Necessary**

A person may recover for battery even though he is not conscious of the harmful or offensive contact when it occurs (e.g., unauthorized surgery performed on unconscious patient).

**f. Transferred Intent**

The doctrine of transferred intent **applies** in battery cases. Hence, a defendant acting with the intent to commit an assault who causes harmful or offensive contact to the plaintiff has committed a battery.

**g. Actual Damages Not Required**

It is not necessary to sustain a *prima facie* case for battery that plaintiff prove actual damages. Plaintiff can recover at least **nominal damages** even though he suffered no severe actual damage. In a majority of jurisdictions, **punitive damages** may be recovered where defendant acted with **malice**.

**2. Assault****a. Prima Facie Case**

To establish a *prima facie* case for assault, the following elements must be proved:

- 1) An act by the defendant creating a **reasonable apprehension** in plaintiff of **immediate harmful or offensive contact** to plaintiff's person;
- 2) **Intent** on the part of the defendant to bring about in the plaintiff apprehension of immediate harmful or offensive contact with the plaintiff's person; and

3) **Causation.**

b. **Construction of “Apprehension”**

1) **Requirement of Reasonableness**

The apprehension of harmful or offensive contact must be a reasonable one. Courts generally will not protect a plaintiff against exaggerated fears of contact (unless defendant knows of the unreasonable fear and uses it to put plaintiff in apprehension).

a) **Fear, Intimidation, etc., Distinguished**

Apprehension is not the same as fear or intimidation. Note that “apprehension” here is used in the sense of **expectation**. Thus, one may reasonably apprehend an immediate contact although he believes he can defend himself or otherwise avoid it.

b) **Knowledge of Act Required**

Obviously, for there to be an apprehension, the plaintiff must have been aware of the threat from the defendant’s act. Contrast this with battery (above), in which the plaintiff need not be aware of the contact at the time thereof.

c) **Knowledge of Defendant’s Identity Not Required**

In contrast, it is not necessary that the plaintiff know who the defendant is at the time of the act; i.e., one only need apprehend an immediate harmful or offensive contact, not the identity of the person who is directing this unpermitted force at him.

d) **Defendant’s Apparent Ability to Act Is Sufficient**

A person may be placed in reasonable apprehension of immediate harmful or offensive contact even though the defendant is **not actually capable** of causing injury to the plaintiff’s person. For such apprehension to be reasonable, however, it is necessary that the defendant have the apparent ability to bring about such contact.

---

**EXAMPLE**

Jan points an unloaded gun at Myron. Myron does not know that the gun is not loaded. Myron’s apprehension of immediate harmful or offensive contact is reasonable.

---

e) **Effect of Words**

(1) **Overt Act Required**

Some overt act is necessary. Words alone, however violent, generally do not constitute an assault because they cannot

create a reasonable apprehension of immediate harmful or offensive contact. A different result might occur when such words are accompanied by some overt act, e.g., a clenching of the fist. Moreover, **words may negate an assault** by making unreasonable any apprehension of immediate contact, even though the defendant commits a hostile act.

---

**EXAMPLE**

James shakes a clenched fist while talking to Myron, and says, "If I weren't such a good guy, I'd hit you." There is no reasonable apprehension of harmful or offensive contact.

---

**(2) Conditional Threat Is Sufficient**

Note that if the words and act combine to form a conditional threat, an assault will result.

---

**EXAMPLE**

Robber points a gun at Plaintiff and says, "Your money or your life." Robber is liable for an assault.

---

**2) Requirement of Immediacy**

The apprehension must be of immediate harmful or offensive contact. Threats of future contact are insufficient. Similarly, there is no assault if the defendant is too far away to do any harm or is merely preparing for a future harmful act.

**c. Causation**

Plaintiff's apprehension must have been legally caused by the defendant's act or something set in motion thereby, either directly or indirectly.

**d. Transferred Intent**

The doctrine of transferred intent **applies** to assault cases. Hence, a defendant acting with the intent to commit a battery who causes the plaintiff to reasonably apprehend immediate harmful or offensive contact has committed an assault.

**e. No Requirement of Damages**

It is not necessary to prove actual damages to sustain a prima facie case for assault. If the case is otherwise made out, plaintiff can recover **nominal damages**. Most states allow **punitive damages** to be awarded where defendant's actions have been malicious.

**3. False Imprisonment**

a. **Prima Facie Case**

To establish a prima facie case for false imprisonment, the following elements must be proved:

- 1) An act or omission to act on the part of the defendant that **confines** or **restrains** the plaintiff to a **bounded** area;
- 2) **Intent** on the part of the defendant to confine or restrain the plaintiff to a bounded area; and
- 3) **Causation.**

b. **Sufficient Methods of Confinement or Restraint**

Actionable confinement or restraint may result in a variety of ways. The following should be noted:

1) **Physical Barriers**

Defendant may falsely imprison plaintiff by confining him through the use of physical barriers.

2) **Physical Force**

False imprisonment will result where plaintiff is restrained by the use of physical force directed at **him** or a member of his **immediate family**. An action may also lie if the force is directed against **plaintiff's property**.

---

**EXAMPLE**

Lulu remained in a building because her purse had been confiscated by Chauncey. She could have left the building but that would have necessitated leaving the purse behind. False imprisonment could result if the purse was wrongfully withheld.

---

3) **Direct Threats of Force**

Direct threats of force by the defendant to the plaintiff's person or property or against persons of the plaintiff's immediate family can constitute false imprisonment.

4) **Indirect Threats of Force**

False imprisonment can also arise from indirect threats of force, i.e., acts or words that **reasonably** imply that the defendant will use force against plaintiff's person or property or persons of plaintiff's immediate family.

5) **Failure to Provide Means of Escape**

Where plaintiff has lawfully come under defendant's control and it would be impossible to leave without defendant's assistance (and it was understood

between the parties that such assistance would be forthcoming), the withholding of such assistance with the intent to detain plaintiff will make defendant liable. In short, the courts impose an **affirmative duty** on the defendant to take steps to release the plaintiff. If defendant intentionally breaches this duty, this is sufficient for false imprisonment. But, of course, it must first be established that defendant owes such a duty.

### EXAMPLES

- 1) Jailer refused to release a prisoner at the end of his jail sentence. Jailer may be liable for false imprisonment.
- 2) Plaintiff is imprisoned for failing to produce corporate records. Defendant has the records but is under no legal duty to produce them and refuses to do so. There is no false imprisonment.

## 6) Invalid Use of Legal Authority

The invalid use of legal authority amounts to false imprisonment if it results in a confinement of plaintiff.

### a) False Arrests

An action for false imprisonment does **not** lie for an arrest or a detention made by virtue of legal process duly issued by a court or official having jurisdiction to issue it. However, where an arrest by a police officer or private citizen for a criminal offense **without a warrant** is unlawful (i.e., not privileged), it may constitute false imprisonment.

#### (1) When Arrests Are Privileged

##### (a) Felony Arrests Without Warrant

A felony arrest without a warrant by a **police officer** (or a private citizen acting at the officer's direction) is valid if the officer has **reasonable grounds** to believe that a felony has been committed and that the person arrested has committed it. Such an arrest by a **private person** will be privileged only if a felony has **in fact** been committed and the private person has reasonable grounds for believing that the person arrested has committed it.

##### (b) Misdemeanor Arrests Without Warrant

Both police officers and private citizens are privileged for misdemeanor arrests without a warrant if the misdemeanor was a **breach of the peace** and was committed in the presence of the arresting party. (Note that in most states, police officers have a broader statutory privilege of arrest for **any** misdemeanor committed in their presence.)

**(c) Arrests to Prevent a Crime Without a Warrant**

Where a felony or breach of the peace is in the process of being, or reasonably appears about to be, committed, both police officers and private citizens are privileged to make an arrest.

**(2) Amount of Force Allowable**

**(a) Felony Arrest**

For felony arrests, both police officers and private citizens may use that degree of force reasonably necessary to make the arrest; however, deadly force is permissible only when the suspect poses a threat of serious harm to the arresting party or others.

**(b) Misdemeanor Arrest**

For misdemeanor arrests, both police officers and private citizens are privileged to use only that degree of force necessary to effect the arrest, but never deadly force.

**b) “Shoplifting” Detentions Are Privileged**

What if a shopkeeper suspects someone of shoplifting and detains that individual to ascertain whether this is the case? He may be liable for false imprisonment. But if he does nothing and permits the suspect to simply leave the premises, the merchandise and all possibilities of proving theft will be lost. Hence, by statute in some states and case law in others, shopkeepers have been given a privilege to detain for investigation. For the privilege to apply, the following conditions must be satisfied:

- (1) There must be a **reasonable belief** as to the fact of theft;
- (2) The detention must be conducted in a **reasonable manner** and only nondeadly force can be used; and
- (3) The detention must be only for a **reasonable period of time** and only for the purpose of making an investigation.

**c. Insufficient Forms of Confinement or Restraint**

As stated above, restraints or confinements produced by requiring the plaintiff to choose between injury to his person or property and his freedom of motion are generally actionable. However, a cause of action will not be sustained for all forms of restraint or confinement.

**1) Moral Pressure**

A cause of action will not be sustained if a person remains in the area merely because he is responding to the exertion of moral pressure.

**2) Future Threats**

Similarly, a cause of action will not be sustained if a person remains in the area in response to future threats against person or property.

**d. No Need to Resist**

Plaintiff is not under any obligation to resist physical force that is being applied to confine him. Similarly, where there is a threat of force, he is not obligated to test the threat where the defendant has the apparent ability to carry it out.

**e. Time of Confinement**

It is *immaterial*, except as to the extent of damages, how short the time period of the confinement is.

**f. Awareness of Imprisonment**

Most American cases hold that awareness of confinement is a necessary element of the tort. The Restatement provides an exception to this requirement where the person confined is actually injured by the confinement (e.g., an infant locked in a bank vault for several days).

**g. What Is a Bounded Area?**

For an area to be “bounded,” the plaintiff’s freedom of movement in *all directions* must be limited; e.g., merely blocking plaintiff’s access to a portion of a park does not constitute false imprisonment. The area will *not* be characterized as “bounded” if there is a *reasonable means of escape* of which plaintiff is aware.

**h. Causation**

Plaintiff’s confinement must have been legally caused by the defendant’s act or something set in motion thereby, either directly or indirectly.

**i. Transferred Intent**

The doctrine of transferred intent *applies* to false imprisonment.

**j. No Requirement of Damages**

It is not necessary to prove actual damages to sustain a *prima facie* case for false imprisonment. Again, if defendant’s conduct was motivated by malice, plaintiff may also be entitled to punitive damages.

**k. False Imprisonment and Malicious Prosecution Distinguished**

One who participates in, procures, or instigates an unlawful arrest without proper authority may be liable for false arrest. Note that merely giving

information to the police about the commission of a crime, leaving to the police the decision whether to make an arrest, does not constitute false imprisonment, as long as one stops short of instigating the arrest. Whether the defendant instigated the arrest or merely furnished information to the police is a question for the trier of fact. Where information only is given, there may be liability for malicious prosecution (see VII.E.1., *infra*), if not for false imprisonment.

#### 4. Intentional Infliction of Emotional Distress

##### a. Prima Facie Case

To establish a prima facie case for intentional infliction of emotional distress, the following elements must be proved:

- 1) An act by defendant amounting to **extreme** and **outrageous conduct**;
- 2) Intent on the part of defendant to cause plaintiff to suffer **severe** emotional distress, or **recklessness** as to the effect of defendant's conduct;
- 3) **Causation**; and
- 4) **Damages—severe** emotional distress.

##### b. Extreme and Outrageous Conduct

###### 1) Some Courts Reluctant to Recognize Tort

This tort covers those situations where the defendant intentionally “shocks” the plaintiff but there is **no physical injury** or threat thereof. Some states have been reluctant to recognize this as a cause of action because of the difficulty of proving “shock” (and the ease with which it could be falsified), the speculative nature of the damage, and fear of a flood of litigation.

###### 2) Liability Limited by Requiring Proof of Outrageous Conduct

To protect against potential abuses, the courts will limit liability for this tort to those situations where “outrageous conduct” on the part of the defendant is proved. “Outrageous conduct” is **conduct that transcends all bounds of decency** tolerated by society. In the absence of such conduct by the defendant, it is generally held that an average person of ordinary sensibilities would not suffer the kind of severe mental injury that is contemplated by the tort.

###### 3) Examples of Outrageous Conduct

###### a) Extreme Business Conduct

Certain extreme methods of business conduct may be construed as outrageous conduct, e.g., use of extreme methods of collection, if repeated, may be actionable.

**b) Misuse of Authority**

Misuse of authority in some circumstances may be actionable, e.g., school authorities threatening and bullying pupils.

**c) Offensive or Insulting Language**

Generally, offensive or insulting language will **not** be characterized as "outrageous conduct." This result could change if there is a **special relationship** between plaintiff and defendant or a **sensitivity** on plaintiff's part of which defendant is aware. (See below.)

**4) Special Relationship Situations**

**Common carriers** and **innkeepers** owe special duties to their patrons that will be a basis for liability even when the act is something less than outrageous, e.g., bus driver making insulting remarks to passenger.

**5) Known Sensitivity**

If defendant knows that plaintiff is more sensitive and thus more susceptible to emotional distress than the average person, liability will follow if the defendant uses extreme and outrageous conduct intentionally to cause such distress and succeeds. These rules may also apply where defendant's conduct is directed at individuals in certain groups such as children, pregnant women, and elderly people.

**c. Intent**

Defendant will be liable not only for intentional conduct but also for **reckless** conduct, i.e., acting in reckless disregard of a high probability that emotional distress will result.

**d. Causation**

The defendant's conduct must have proximately caused the plaintiff's emotional distress.

**1) Intent/Causation Requirements in Bystander Cases**

When the defendant's conduct is directed at a third person and the plaintiff suffers severe **emotional** distress, the elements of intent and causation may be harder to prove. To establish these elements in such cases, the plaintiff is generally required to show the following:

- a) The plaintiff was **present** at the time;
- b) The distress resulted in bodily harm, or the plaintiff was a **close relative** of the third party; and
- c) The **defendant knew** these facts.

*Note:* The plaintiff does not need to establish these requirements if she shows that the defendant had a **design or purpose** to cause severe distress to plaintiff.

**EXAMPLE**

Defendant called Susan and threatened to kill Mike, with whom Defendant knew Susan was living. Defendant then made good his threat. Liability will attach when Susan suffers severe emotional distress by showing that Defendant's **purpose** was to cause her severe distress, even though she was not a relative of Mike and was not present when he was murdered.

**2) Special Liability for Mishandling Corpses**

In an analogous situation, many courts have allowed recovery where the mental distress resulted from the intentional or reckless mishandling of a relative's corpse. Although this cause of action is almost always for emotional distress arising from action directed toward another (the corpse), the courts have created a special category of liability for such conduct.

**e. Actual Damages Required**

Actual damages are required (nominal damages will not suffice). But it is **not** necessary to prove **physical injuries** to recover. It is, however, necessary to establish **severe** emotional distress (i.e., more than a reasonable person could be expected to endure). Punitive damages are allowable where defendant's conduct was improperly motivated.

**C. PRIMA FACIE CASE—INTENTIONAL TORTS TO PROPERTY****1. Trespass to Land****a. Prima Facie Case**

To establish a prima facie case for trespass to land, the following elements must be proved:

- 1) An act of **physical invasion** of plaintiff's real property by defendant;
- 2) **Intent** on defendant's part to bring about a physical invasion of plaintiff's real property; and
- 3) **Causation.**

**b. Physical Invasion of Plaintiff's Land****1) What Constitutes "Physical Invasion"?**

The interest protected by this tort is the interest in exclusive possession of

realty. Hence, all that is necessary to satisfy this element is that there be a physical invasion of plaintiff's land.

**a) Defendant Need Not Enter onto Land**

It is not necessary that the defendant personally come onto the land; e.g., trespass exists where defendant floods plaintiff's land, throws rocks onto it, or chases third persons onto it.

**b) Lawful Right of Entry Expires**

A trespass to land may also exist where defendant remains on plaintiff's land after an otherwise lawful right of entry has lapsed.

**2) If No Physical Object Enters Land**

If no physical object has entered onto plaintiff's land, e.g., damage resulted from blasting concussions, the courts generally do not treat the controversy as a trespass case. Rather, they treat it as a **nuisance** case or as a case of **strict liability** if ultrahazardous activities are involved.

**3) What Constitutes "Land"?**

The trespass may occur on the surface of the land, below the surface, or above it.

Courts generally construe plaintiff's "land" to include air space and subsurface space to the height or depth plaintiff can make beneficial use of such space. Thus, for example, one could commit a trespass by stringing wires over the land, flying an airplane at low altitudes over it, tunneling under it, etc.

**c. Intent Required**

**Mistake** as to the lawfulness of the entry is **no defense** as long as defendant intended the entry upon that particular piece of land. Intent to trespass is not required—**intent to enter onto the land** is sufficient.

**EXAMPLE**

Relying on boundary markers fixed by a reputable surveyor, Farmer clears land for cultivation that he believes to be his. In fact, the survey was in error and Farmer cleared a portion of Neighbor's land. Farmer is liable to Neighbor for trespass to land.

**d. Who May Bring Action?**

An action for trespass may be maintained by **anyone in actual or constructive possession** of the land. This is so even if that possession is without title. If no one is in possession, the **true owner** is presumed in possession and may maintain the action.

If the action is maintained by a **lessee**, some decisions allow him to recover only to the extent that the trespass damages the leasehold interest. Other cases allow a full recovery for all damage done to the property, but require the lessee to account to the lessor for excess over damages to the leasehold.

e. **Causation**

The physical invasion of plaintiff's property must have been legally caused by the defendant's act or something set in motion thereby.

f. **Transferred Intent**

The doctrine of transferred intent **applies** to trespass to land.

g. **No Requirement of Damages**

As with most other intentional torts, damage is presumed; i.e., actual injury to the land is **not** an essential element of the cause of action.

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**EXAMPLE**

Tom intentionally bounced a tennis ball against the side of a building owned by Owen. Although no damage was done to Owen's building, Tom is liable for trespass. In contrast, if Tom had accidentally but negligently hit Owen's building with the ball, Tom would not be liable unless Owen established damages as part of the negligence *prima facie* case.

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## 2. Trespass to Chattels

a. **Prima Facie Case**

To establish a *prima facie* case of trespass to chattels, the following elements must be proved:

- 1) An act by defendant **interfering with plaintiff's right of possession** in the chattel;
- 2) **Intent to perform the act** bringing about the interference with plaintiff's right of possession;
- 3) **Causation**; and
- 4) **Damages**.

b. **Act by Defendant**

Trespass to chattels is designed to protect a person against interferences with his **right to possess** his chattels. Hence, any act of interference will suffice. These generally take two forms:

**1) Intermeddling**

An intermeddling is conduct by defendant that in some way serves to directly damage plaintiff's chattels, e.g., denting plaintiff's car, striking plaintiff's dog.

**2) Dispossession**

A dispossession is conduct on defendant's part serving to dispossess plaintiff of his lawful right of possession.

**c. Intent Required**

Mistake as to the lawfulness of defendant's actions (e.g., a mistaken belief that defendant owns the chattel) is **no defense** to an action for trespass to chattels. Again, as with trespass to land, the intent to trespass is not required—**intent to do the act of interference** with the chattel is sufficient.

**d. Who May Bring Trespass to Chattels Action?**

**Anyone with possession** or the immediate **right to possession** may maintain an action for trespass to chattels.

**e. Causation**

The interference with plaintiff's possessory interests in the chattel must have been caused by defendant's act or something set in motion thereby.

**f. Actual Damages Required**

As a general rule, nominal damages will not be awarded for trespass to chattels; i.e., in the absence of any actual damages, an action will not lie. However, if the trespass amounts to a dispossession, the loss of possession itself is deemed to be an actual harm.

**g. Transferred Intent**

The doctrine of transferred intent **applies** to trespass to chattels.

**h. Trespass to Chattels and Conversion Distinguished**

As discussed below, conversion grants relief for interferences with a chattel so serious in nature, or so serious in consequences, as to warrant requiring the defendant to pay its full value in damages. For those interferences not so serious in nature or consequences, trespass to chattels is the appropriate action.

**3. Conversion****a. Prima Facie Case**

To establish a prima facie case for conversion, the following elements must be proved:

- 1) An act by defendant **interfering** with plaintiff's right of possession in the chattel;
- 2) **Intent** to perform the act bringing about the interference with plaintiff's right of possession;
- 3) **Causation**; and
- 4) **Damages**—an interference that is serious enough in nature or consequences to warrant that the defendant **pay the full value** of the chattel.

**b. Acts of Conversion**

One can act in such a way as to seriously invade another's chattel interest in a variety of ways. These include:

- 1) Wrongful acquisition, e.g., theft, embezzlement.
- 2) Wrongful transfer, e.g., selling, misdelivering, pledging.
- 3) Wrongful detention, e.g., refusing to return to owner.
- 4) Substantially changing.
- 5) Severely damaging or destroying.
- 6) Misusing the chattel.

**c. Mere Intent to Perform Act Required**

The only intent required is the intent to perform the act that interferes with the plaintiff's right of possession. Even if the conduct is wholly innocent, liability may attach where the interference is serious in nature.

**1) Bona Fide Purchaser May Be Liable**

Under this principle, even a bona fide purchaser of chattel may become a converter if the chattel had been stolen from the true owner.

**2) Accidental Conduct Insufficient**

**Accidentally** causing damage to or loss of another's chattel does not amount to conversion unless the actor was using the chattel without permission when the accident occurred. (Note that the actor may be liable in negligence for accidental damage.)

**d. Seriousness of Interference or Consequence**

Usually, where the interference with possessory rights is insubstantial (e.g., where a person momentarily takes another person's property or merely moves it for her own convenience), the actor is not viewed as asserting sufficient

interference for conversion (although it may suffice for trespass to chattels). However, such interference with the possessory rights of another in the chattel, if serious enough, may amount to conversion. Thus, for example, if this person **refuses to return** the chattel when asked, or **alters** it, she may be liable for conversion because her action so seriously interferes with another's chattel rights that it amounts to a claim of dominion and control on the actor's part. No specific rule can be stated for these situations; however, the **longer the withholding period** and the **more extensive the use** of the chattel during this time, the more likely it is that conversion has resulted.

**e. Special Situation of Bailees Receiving Stolen Property**

A bailee receiving goods from a thief without notice of the improper taking may return the goods to the thief without liability to the real owner. However, if the bailee has notice and the real owner makes a demand for his goods, the bailee is liable for conversion if she returns the goods to the thief.

**f. Subject Matter of Conversion**

Property subject to conversion is limited to tangible **personal property** and **intangibles** that have been **reduced to physical form** (e.g., a promissory note), and documents in which title to a chattel is merged (e.g., a bill of lading or a warehouse receipt). Intangibles such as a bakery route, customer lists, or the goodwill of a business may not be the subject of conversion. Neither may real property be converted.

**g. Who May Bring Action for Conversion?**

Anyone with **possession** or the **immediate right to possession** may maintain an action for conversion. Possession is viewed as sufficient title against a wrong-doer. However, if the person in possession is not the true owner, she is accountable to the true owner for any recovery to the extent of the owner's interest.

**h. Causation**

The interference with plaintiff's chattel interests must have been legally caused by the defendant's act or something set in motion thereby.

**i. Remedies**

The basic conversion remedies are:

**1) Damages**

The plaintiff is entitled to damages for the **fair market value** of the chattel. This value is generally computed as of the **time and place of conversion**. The defendant is given title upon satisfaction of the judgment so that, in effect, there is a forced sale of the chattel. Note that even if the defendant wishes to return the item, the plaintiff is not obligated to take it back once it has been converted.

**2) Replevin**

If the plaintiff wishes to have the chattel returned, he may get it by availing himself of the remedy of replevin.

## D. DEFENSES TO THE INTENTIONAL TORTS

### 1. Consent

A defendant is not liable for an otherwise tortious act if the plaintiff consented to the defendant's act. Consent may be given expressly; it may also be implied from custom, conduct, or words, or by law.

#### a. Express (Actual) Consent

Express (actual) consent exists where the plaintiff has expressly shown a willingness to submit to defendant's conduct.

##### 1) Consent by Mistake

Where a plaintiff expressly consents by mistake, the consent is still a valid defense unless the defendant caused the mistake or knows of the mistake and takes advantage of it.

##### 2) Consent Induced by Fraud

If the expressly given consent has been induced by fraud, the consent generally is **not a defense**. The fraud must, however, go to an essential matter; if it is only with respect to a collateral matter, the consent remains effective.

### EXAMPLES

1) Charles expressly consents to balance an apple on his head for Roberta to attempt to shoot it off from 50 yards. She told him she was a professional trick-shot artist, which was not true. Fraud goes to an essential matter; consent is ineffective.

2) Same as above, except that Roberta was in fact a professional trick-shot artist. However, she gave him a \$10 bill she knew to be counterfeit. This is a collateral matter; consent is effective.

##### 3) Consent Obtained by Duress

Consent obtained by duress may be held **invalid**. Note, however, that threats of future action or of some future economic deprivation do not constitute legal duress sufficient to invalidate the express consent.

#### b. Implied Consent

Plaintiff's consent may also be implied in a given case. There are two basic kinds of implied consent, apparent consent and consent implied by law.

**1) Apparent Consent**

Apparent consent is that which a **reasonable person would infer** from plaintiff's conduct. Thus, for example, somebody who voluntarily engages in a body contact sport impliedly consents to the normal contacts inherent in playing it.

**a) Inferred from Usage and Custom**

Such consent may also be inferred as a matter of usage or custom. Thus, for example, a person is presumed to consent to the ordinary contacts of daily life, e.g., minor bumping in a crowd.

**2) Consent Implied by Law**

In some situations, consent may be implied by law where action is necessary to save a person's life or some other important interest in person or property. Thus, for example, consent will be implied in an **emergency** situation where the plaintiff is incapable of consenting and a reasonable person would conclude that some contact is necessary to prevent death or serious bodily harm, e.g., a surgical operation where a person is unconscious after an automobile accident.

**c. Capacity Required**

Incompetents, drunken persons, and very young children are deemed incapable of consent to tortious conduct. Consent of parent or guardian is necessary to constitute a defense in such a case.

**d. Criminal Acts**

For purposes of tort liability, the **majority** view is that a person **cannot consent** to a criminal act. A minority and the Restatement of Torts take the contrary position and view consent to a criminal act as a valid defense in a civil action for an intentional tort.

**1) Modern Trend**

The modern tendency has been to differentiate between illegal acts that are **breaches of the peace**, e.g., a street fight (consent ineffective), and those that are not a breach of the peace, e.g., an act of prostitution (consent effective).

**2) Consent Invalid Where Law Seeks to Protect Members of Victim's Class**

Where the act is made criminal to protect a limited class against its own lack of judgment (e.g., statutory rape), consent is not a good defense in an action by a member of that class.

**e. Exceeding Consent Given**

If the defendant exceeds the scope of consent by committing a more intrusive invasion or by invading a different interest, he is **liable**; e.g., consent to perform

a tonsillectomy is not consent to perform an appendectomy (unless, of course, an emergency situation is present).

## 2. Self-Defense

When a person has reasonable grounds to believe that he is being, or is about to be, attacked, he may use such force as is reasonably necessary for protection against the potential injury.

### a. When Is Defense Available?

#### 1) Reasonable Belief

The actor need only have a reasonable belief as to the other party's actions; i.e., apparent necessity, not actual necessity, is sufficient. Hence, reasonable mistake as to the existence of the danger does not vitiate the defense.

#### 2) Retaliation Not Allowed

Self-defense is limited to the right to use force to prevent the commission of a tort. Thus, one may never use force in retaliation (where there is no longer any threat of injury).

#### 3) Retreat Not Necessary

A substantial majority of the courts hold that one need not attempt to escape, but may stand his ground (and even use deadly force when necessary to prevent death or serious bodily harm to himself). A growing modern trend would impose a duty to retreat before using deadly force where this can be done safely **unless** the actor is in his own home.

#### 4) Not Available to Aggressor

The initial aggressor is not privileged to defend himself against the other party's reasonable use of force in self-defense. However, if the other uses deadly force against an aggressor who had only used nondeadly force, the aggressor may defend himself with deadly force.

### b. How Much Force May Be Used?

One may use only that force that **reasonably** appears to be **necessary to prevent the harm**. One may not use force likely to cause death or serious bodily injury unless he reasonably believes that he is in danger of serious bodily injury. If more force than necessary is used, the actor loses the privilege of self-defense.

### c. Extends to Third-Party Injuries

If, in the course of reasonably defending himself, one **accidentally** injures a bystander, he is nevertheless protected by the defense. (He might, however, be liable to the bystander on a negligence theory if his conduct warranted it.) If the

actor **deliberately** injures a bystander in trying to protect himself, he probably cannot raise the privilege of self-defense.

### 3. Defense of Others

#### a. When Is Defense Available?

The actor need only have a **reasonable belief** that the person being aided would have the right of self-defense. Thus, even if the person aided has no defense (e.g., if he were the initial aggressor), his defender is not liable as long as he reasonably believed that the person aided could have used force to protect himself.

#### b. How Much Force May Be Used?

The defender, assuming he is justified, may use as much force as he could have used in self-defense if the injury were threatened to him (see above).

### 4. Defense of Property

#### a. When Is Defense Available?

Generally, one may use reasonable force to prevent the commission of a tort against her property.

##### 1) Request to Desist Usually Required

A request to desist must precede the use of force, unless the circumstances make it clear that the request would be futile or dangerous.

##### 2) Effect of Mistake

Reasonable mistake is allowed as to the property owner's right to use force in defense of property where the mistake involves whether an intrusion has occurred or whether a request to desist is required. However, mistake is not allowed where the entrant has a privilege to enter the property that supersedes the defense of property right (see 4), below). In such a case the property owner is liable for mistakenly using force against a privileged entrant unless the entrant himself intentionally or negligently caused the mistake (e.g., by refusing to tell the property owner the reason for the intrusion).

##### 3) Limited to Preventing Commission of Tort

Defense of property is limited to **preventing the commission of a tort** against the defendant's property. Thus, once the defendant has been permanently dispossessed of the property and the commission of the tort is complete, she may not use force to recapture it. However, where one is in "**hot pursuit**" of someone who wrongfully dispossessed her of her property, the defense still operates because the other is viewed as still in the process of committing the tort against the property.

**4) Superseded by Other Privileges**

Whenever an actor has a privilege to enter upon the land of another because of necessity, right of reentry, right to enter upon another's land to recapture chattels, etc. (discussed below), that privilege supersedes the privilege of the land possessor to defend her property.

**b. How Much Force May Be Used?**

One may use **reasonable** force to defend property. However, she may **not** use force that will cause death or serious bodily harm. (Of course, if the invasion of property also entails a serious threat of bodily harm to the owner, she may then invoke the defense of self-defense and use deadly force.) Further, one may not use indirect deadly force such as a trap, spring gun, or vicious dog when such force could not lawfully be directly used, e.g., against a mere trespasser.

**5. Reentry onto Land****a. Common Law Privilege**

In former years, it was held that a person who had been **tortiously dispossessed** from her land (by fraud or force) could use **reasonable force** to regain possession if she acted promptly upon discovering the dispossession. (Note that this did not apply to a tenant merely overstaying her lease.)

**b. Privilege Abolished in Most States**

Most states today do not allow resort to "self-help"; one who has been wrongfully excluded from possession of real property may bring an **ejectment** action or other summary procedure to recover possession. Hence, the owner who uses force to retake possession is liable for whatever injury she inflicts.

**6. Recapture of Chattels****a. When Is Defense Available?**

The basic rule is the same as that for land: where another's possession began lawfully (e.g., a conditional sale), one may use only peaceful means to recover the chattel. **Force** may be used to recapture a chattel only when in "**hot pursuit**" of one who has obtained possession wrongfully, e.g., by theft.

**1) Timely Demand Required**

A demand to return the chattel must precede the use of force, unless the circumstances make it clear that the demand would be futile or dangerous.

**2) Recovery Only from Wrongdoer**

The recapture may only be from a tortfeasor or some third person who knows or should know that the chattels were tortiously obtained. If the chattels have come to rest in the hands of an innocent party, this will cut off the actor's privilege to use force to effect recapture.

**b. How Much Force May Be Used?**

**Reasonable** force, **not** including force sufficient to cause death or serious bodily harm, may be used to recapture chattels.

**c. Entry upon Land to Remove Chattel****1) On Wrongdoer's Land**

Where chattels are located on the land of the wrongdoer, the owner is privileged to enter upon the land and reclaim them at a **reasonable time** and in a **reasonable manner**. It is generally required that there be a demand for the return of the chattels before any such entry.

**2) On Land of Innocent Party**

Similarly, when the chattels are on the land of an innocent party, the owner may enter and reclaim her chattel at a **reasonable time** and in a **peaceful manner** when the landowner has been given **notice** of the presence of the chattel and refuses to return it. In this case, the chattel owner will be liable for any actual damage caused by entry.

**3) On Land Through Owner's Fault**

If the chattels are on the land of another through the owner's fault, there is **no privilege** to enter upon the land. They may be recovered only through legal process.

**d. Shopkeeper's Privilege**

Shopkeepers may have a privilege to reasonably detain individuals whom they reasonably believe to be in possession of "shoplifted" goods. (See B.3.b.6)b), *supra*.)

**7. Privilege of Arrest**

Depending on the facts of the particular case, one may have a privilege to make an arrest of a third person.

**a. Invasion of Land**

The privilege of arrest carries with it the privilege to enter another's land for the purpose of effecting the arrest.

**b. Subsequent Misconduct**

Although the arrest itself may be privileged, the actor may still be liable for subsequent misconduct, e.g., failing to bring the arrested party before a magistrate, unduly detaining the party in jail, etc.

**c. Mistake**

One who makes an arrest under the mistaken belief that it is privileged may be liable for false imprisonment. (See B.3.b.6)a), *supra*.)

## 8. Necessity

A person may interfere with the real or personal property of another where the interference is reasonably and apparently necessary to avoid threatened injury from a natural or other force and where the threatened injury is substantially more serious than the invasion that is undertaken to avert it.

### a. Public Necessity

Where the act is to avert an imminent public disaster, the defense is absolute.

### b. Private Necessity

Where the act is solely to prevent serious harm to a limited number of people (e.g., the actor ties up his boat to another's dock in a storm), the defense is qualified; i.e., the actor must pay for any injury he causes. *Exception:* The defense is absolute if the act is to benefit the owner of the land.

## 9. Discipline

A parent or teacher may use reasonable force in disciplining children, taking into account the age of the child and the seriousness of the behavior. In most states, however, this common law rule has been displaced by statutes or regulations forbidding the use of corporal punishment (physical discipline) by school teachers.

# II. NEGLIGENCE

## A. PRIMA FACIE CASE

To establish a prima facie case for negligence, the following elements must be proved:

1. The existence of a **duty** on the part of the defendant **to conform to a specific standard of conduct** for the protection of the plaintiff against an unreasonable risk of injury;
2. **Breach** of that duty by the defendant;
3. That the breach of duty by the defendant was the **actual and proximate cause** of the plaintiff's injury; and
4. **Damage** to the plaintiff's person or property.

## B. THE DUTY OF CARE

### 1. Introduction—General Duty of Care

A general duty of care is imposed on all human activity. When a person engages in an activity, he is under a legal duty to act as a **reasonably prudent person** under the same or similar circumstances. It is presumed that a reasonably prudent person will take precautions against creating unreasonable risks of injury to other persons.

Thus, if the defendant's conduct creates an unreasonable risk of injury to persons in the position of the plaintiff, the general duty of care extends from the defendant to the plaintiff. No duty is imposed on a person to take precautions against events that cannot reasonably be foreseen. Therefore, if at the time of the negligent conduct, no foreseeable risk of injury to a person in the position of the plaintiff is created by the defendant's act, the general duty of care does not extend from the defendant to the plaintiff.

In addition, certain other factors such as the status of the parties (e.g., owners or occupiers of land) or statutes may limit or extend this general duty.

## 2. To Whom Is the Duty of Care Owed?

A duty of care is owed only to **foreseeable plaintiffs**—the class of persons who were foreseeably endangered by the defendant's negligent conduct. Someone who is not within the “zone of danger” from the defendant's conduct cannot recover.

### EXAMPLE

An employee of Defendant negligently aided a passenger boarding the train, causing the passenger to drop a package. The package exploded, causing a scale a substantial distance away to fall upon a second passenger waiting on the platform. The second passenger cannot recover because a reasonable person would not have foreseen a risk of injury to her under the circumstances; in other words, she was not located in a foreseeable “zone of danger.” [See *Palsgraf v. Long Island Railroad*, 248 N.Y. 339 (1928) (Cardozo, J.)] Some courts follow the approach of the Andrews dissent in *Palsgraf*, whereby a duty of care is owed to anyone who suffers injuries proximately caused by the defendant's negligence.

### a. Specific Situations

#### 1) Rescuers

A rescuer is a foreseeable plaintiff as long as the rescue is not reckless; hence, defendant is liable if he negligently puts himself or a third person in peril and plaintiff is injured in attempting a rescue. Note, however, that the “firefighter’s rule” (*infra*, 3.d.2)c)(2)(c)) bars firefighters and police officers, on public policy or assumption of risk grounds, from recovering for injuries caused by the inherent risks of their jobs.

#### 2) Prenatal Injuries

Prenatal injuries are actionable; i.e., a duty of care is owed toward a fetus. The fetus must have been **viable** at the time of injury. (Most states also permit a wrongful death action (VI.C.2., *infra*) if the fetus dies from the injuries.)

##### a) “Wrongful Life” Action Not Recognized

In most states, the failure to diagnose a congenital defect of the fetus

or to properly perform a contraceptive procedure does **not** permit the unwanted child to recover damages for “wrongful life,” even if the child is born with a disability.

**b) Compare—“Wrongful Birth” and “Wrongful Pregnancy”**

The child’s parents, however, **do** have an action: either for failure to diagnose the defect (“wrongful birth”) or for failure to properly perform a contraceptive procedure (“wrongful pregnancy”). The mother can recover damages for the unwanted labor (medical expenses and pain and suffering). If the child has a defect, parents may recover the additional medical expenses to care for the child and, in some states, damages for emotional distress. If the child is born healthy in a wrongful pregnancy case, most cases do **not** permit the parents to recover child-rearing expenses, just damages for the unwanted labor.

**3) Intended Beneficiaries of Economic Transactions**

A third party for whose economic benefit a legal or business transaction is made (e.g., the beneficiary of a will) is owed a duty of care if the defendant could reasonably foresee harm to that party if the transaction is done negligently. Note that this is an exception to the general rule that one who suffers **only** economic loss as a result of another’s negligence cannot recover damages in a tort action (see *also* IV.C.5., *infra*).

### 3. What Is Applicable Standard of Care?

**a. Basic Standard—The Reasonably Prudent Person**

Defendant’s conduct is measured against a reasonably prudent person under the same or similar circumstances. This reasonable person has the following characteristics, measured by an **objective** standard:

**1) Physical Characteristics If Relevant—Same as Defendant’s**

Notwithstanding application of the objective standard, if physical characteristics are relevant to the claim, the “reasonable person” is considered to have the **same physical characteristics as the defendant**. A person is expected to know any of his physical disabilities and is under a duty to exercise the care of a person with such knowledge; e.g., it may be negligent for a person with epilepsy to drive a car.

**2) Average Mental Ability**

Defendant must act as would a person with average mental ability. Unlike the rule as to physical characteristics, **individual mental disabilities are not considered**; i.e., low IQ is no excuse. Likewise, insanity is no defense, and the defendant is held to the standard of a reasonable person under the circumstances.

**3) Same Knowledge as Average Member of Community**

Defendant is deemed to have knowledge of things known by the average member of the community, e.g., that fire is hot. Again, the individual shortcomings of the particular defendant are **not** considered. On the other hand, a defendant with knowledge superior to that of the average person is required to use that knowledge.

**b. Particular Standards of Conduct**

Some persons are held to a standard of conduct different from that of the ordinary person.

**i) Professionals**

A person who is a professional or has special skills (e.g., doctor, lawyer, airplane mechanic, etc.) is required to possess and exercise the knowledge and skill of a member of the profession or occupation in good standing. For doctors, most courts will apply a national standard of care to evaluate their conduct.

The professional must also use such superior judgment, skill, and knowledge as he actually possesses. Thus, a specialist might be held liable where a general practitioner would not.

**a) Duty to Disclose Risks of Treatment**

A doctor proposing a course of treatment or a surgical procedure has a duty to provide the patient with enough information about its risks to enable the patient to make an **informed consent** to the treatment. If an undisclosed risk was serious enough that a reasonable person in the patient's position would have withheld consent to the treatment, the doctor has breached this duty.

**EXAMPLE**

Patient consents to an operation not necessary to save his life. Patient is not informed that there is a 40% probability of paralysis in such operations, and paralysis results. Since a reasonable person would not have consented to the operation had the risks been disclosed, Doctor has breached his duty of disclosure.

**2) Children**

A majority of courts take the view that a child is required to conform to the standard of care of a child of **like age, intelligence, and experience**. This permits a **subjective** evaluation of these factors.

**a) Minimum Age for Capacity to Be Negligent**

There is a minimum age for which it is meaningful to speak of a child

being capable of conforming his conduct to a standard of care. Most courts, however, do not fix this age at any arbitrary figure. Each case is dealt with in terms of whether there is evidence that the individual child—plaintiff or defendant—has the experience, intelligence, maturity, training, or capacity to conform his conduct to a standard of care. It is unlikely, nonetheless, that a court would view a child ***below the age of five*** as having the capacity to be negligent. Or, to put it another way, it is unlikely that a court would impose a legal duty to avoid injuries to others or himself upon a child who is under five.

**b) Children Engaged in Adult Activities**

Where a child engages in a potentially dangerous activity that is normally one that only adults engage in, most cases hold that he will be required to conform to the same standard of care as an adult in such an activity, e.g., driving an automobile, flying an airplane, driving a motorboat.

**3) Common Carriers and Innkeepers**

Common carriers and innkeepers are required to exercise a very high degree of care toward their passengers and guests; i.e., they are ***liable for slight negligence***.

**4) Automobile Driver to Guest**

In most jurisdictions today, the duty owed by the driver of an automobile to a rider is one of ordinary care.

**a) Guest Statutes**

A few states have guest statutes. Under these statutes, the driver's only duty to a nonpaying rider is to ***refrain from gross or wanton and willful misconduct***. Note that guest statutes do not apply to "passengers," i.e., riders who contribute toward the expense of the ride; they are owed a duty of ordinary care.

**5) Bailment Duties**

In a bailment relationship, the bailor transfers physical possession of an item of personal property to the bailee without a transfer of title. The bailee acquires the right to possess the property in accordance with the terms of the bailment. A bailment obligates the bailee to return the item of personal property to the bailor or otherwise dispose of it according to the bailment terms.

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**EXAMPLE**

When the owner of a computer delivers it to a technician to be repaired, the technician becomes a bailee of the computer and the owner is the bailor.

**a) Duties Owed by Bailee****(1) Sole Benefit of Bailor Bailment**

If the bailment is for the sole benefit of the bailor (e.g., the bailor asks his neighbor (the bailee) to take in the bailor's mail while he is on vacation), the bailee is liable only for **gross negligence**.

**(2) Sole Benefit of Bailee Bailment**

If the bailment is for the sole benefit of the bailee (e.g., the bailor gratuitously loans her lawnmower to the bailee), the bailee is liable even for **slight negligence**.

**(3) Mutual Benefit Bailments**

If the bailment is for the mutual benefit of the bailor and bailee (typically a bailment for hire such as in the computer example above), the bailee must exercise **ordinary due care**.

**(4) Modern Trend**

Today the trend is away from such classifications and toward a rule that considers whether the bailee exercised ordinary care under all the circumstances. These circumstances include, e.g., value of the goods, type of bailment, custom of a trade, etc.

**b) Duties Owed by Bailor****(1) Sole Benefit of Bailee Bailments**

If the bailment is for the sole benefit of the bailee (e.g., the bailor gratuitously loans her lawnmower to the bailee), the bailor need only inform the bailee of known dangerous defects in the chattel. There is no duty with regard to unknown defects.

**(2) Bailments for Hire**

If the bailment is for hire (e.g., the bailor loans her lawnmower to the bailee for a fee), the bailor owes a duty to inform the bailee of defects known to him, or of which he would have known by the exercise of reasonable diligence.

**c. Standard of Care in Emergency Situations**

The existence of an emergency, presenting little time for reflection, may be considered as among the circumstances under which the defendant acted; i.e., he must act as the reasonably prudent person would under the same emergency. The emergency may **not** be considered, however, if it is of the defendant's own making.

**d. Standard of Care Owed by Owners and/or Occupiers of Land**

In this section, duty problems are resolved by application of special rules that have been developed imposing duties on individuals because of their relationship to property. In some cases, the duty of the owner or occupier depends on whether the injury occurred on or off his premises; in others it depends on the legal status of the plaintiff with regard to the property, i.e., trespasser, licensee, or invitee.

**1) Duty of Possessor to Those Off the Premises**

**a) Natural Conditions**

The general rule is that a landowner owes **no duty** to protect one outside the premises from natural conditions on the land.

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**EXAMPLE**

One is not liable for bugs that live in trees on one's land but that "visit" the neighbors from time to time.

*Note:* An exception exists for decaying trees next to sidewalks or streets in urban areas.

**b) Artificial Conditions**

As a general rule, there is also **no duty** owing for artificial conditions. Two major **exceptions** exist, however.

**(1) Unreasonably Dangerous Conditions**

A landowner is liable for damage caused by unreasonably dangerous artificial conditions or structures abutting adjacent land.

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**EXAMPLE**

While one would not be liable for natural collections of ice on the sidewalk, he might be liable for negligently permitting water to drain off his roof and form ice on the sidewalk.

**(2) Duty to Protect Passersby**

A landowner also has a duty to **take due precautions** to protect persons passing by from dangerous conditions, e.g., by erecting a barricade to keep people from falling into an excavation at the edge of the property.

**c) Conduct of Persons on Property**

An owner of land has a duty to exercise reasonable care with respect

to his own activities on the land and to control the conduct of others on his property so as to avoid unreasonable risk of harm to others outside the property.

**2) Duties of Possessor to Those on the Premises**

Under the traditional rule followed in many jurisdictions, the nature of a duty owed by an owner or occupier of land to those on the premises for dangerous conditions on the land depends on the legal status of the plaintiff with regard to the property, i.e., trespasser, licensee, or invitee. Note, though, that close to half the states have abolished the distinction between licensees and invitees and simply apply a reasonable person standard to dangerous conditions on the land. A few of these states have gone even further and abolished the trespasser distinction as well.

**a) Duty Owed to a Trespasser**

**(1) Definition of Trespasser**

A trespasser is one who comes onto the land without permission or privilege.

**(2) Duty Owed Undiscovered Trespassers**

A landowner owes **no duty** to an undiscovered trespasser. He has no duty to inspect in order to ascertain whether persons are coming onto his property.

**(3) Duty Owed Discovered Trespassers**

Once a landowner discovers the presence of a trespasser, he is under a duty to exercise ordinary care to **warn** the trespasser of, or to **make safe, artificial conditions** known to the landowner that involve a **risk of death or serious bodily harm** and that the trespasser is unlikely to discover. There is no duty owed for natural conditions and less dangerous artificial conditions.

The owner or occupier also has a duty to exercise reasonable care in the exercise of "**active operations**" on the property.

**(a) When Is a Trespasser "Discovered"?**

A trespasser is discovered, of course, when she is actually noticed on the property by the owner or occupier. But in addition, a trespasser is viewed as discovered if the owner or occupier is notified by information sufficient for a reasonable person to conclude that someone is on the property.

**(4) Duty Owed Anticipated Trespassers**

The majority of states now treat anticipated trespassers on

generally the same basis as discovered trespassers in terms of the duty owed them by the landowner.

**(a) When Is a Trespasser “Anticipated”?**

An “anticipated trespasser” situation arises where the landowner knows or should reasonably know of the presence of trespassers who constantly cross over a section of his land. (Although note that if the owner has posted “no trespassing” signs, this might serve to convert these “anticipated” trespassers into “undiscovered” trespassers.)

**(5) “Attractive Nuisance” Doctrine**

Most courts impose upon a landowner the duty to exercise **ordinary care** to avoid a reasonably foreseeable risk of harm to children caused by artificial conditions on his property. Under the general rule, to assess this special duty upon the owner or occupier of land with regard to children on his property, the plaintiff must show the following:

- (i) There is a dangerous condition present on the land of which the owner is or should be aware;
- (ii) The owner knows or should know that young persons frequent the vicinity of this dangerous condition;
- (iii) The condition is likely to cause injury, i.e., is dangerous, because of the child’s inability to appreciate the risk; and
- (iv) The expense of remedying the situation is slight compared with the magnitude of the risk.

**(a) What Is a Dangerous Condition?**

As noted above, a dangerous condition exists where something on the land is likely to cause injury to children because of their inability to appreciate the risk.

**1] Where Applied**

The attractive nuisance doctrine has been applied to swimming pools, abandoned automobiles, lumber piles, sand bins, and elevators.

**(b) Foreseeability of Harm Is True Basis of Liability**

Under the traditional “attractive nuisance” doctrine, it was necessary for the child/plaintiff to establish that she was lured onto the property by the attractive nuisance/dangerous condition. This no longer is the case. Most jurisdictions have

substantially revised their attractive nuisance doctrines to bring them within general negligence concepts. Foreseeability of harm to a child is the true basis of liability and the element of attraction is important only insofar as it indicates that the presence of children should have been anticipated by the landowner.

**(6) Duty of Easement and License Holders to Trespassers**

While employees and independent contractors acting on behalf of the landowner have the status of the landowner, persons with an easement or license to use the land do not; they must exercise reasonable care to protect the trespasser.

**EXAMPLE**

Power Company obtains an easement from Leonard to run high-tension wires across Leonard's land. Because of Power Company's negligent failure to maintain the wires, one of them falls and injures Plaintiff, an undiscovered trespasser on Leonard's land. Power Company is liable to Plaintiff.

**b) Duty Owed to a Licensee**

**(1) Definition of Licensee**

A licensee is one who enters on the land with the landowner's permission, express or implied, for her **own purpose or business** rather than for the landowner's benefit.

**(2) Duty Owed**

The owner or occupier owes a licensee a **duty to warn of or make safe** a dangerous condition **known** to the owner or occupier that creates an unreasonable risk of harm to the licensee and that the licensee is unlikely to discover.

**(a) No Duty to Inspect**

The owner or occupier has **no duty** to a licensee **to inspect** for defects **nor to repair** known defects.

**(b) Duty of Care for Active Operations**

The owner or occupier also has a duty to **exercise reasonable care** in the conduct of "active operations" for the protection of the licensee whom he knows to be on the property.

**(3) Social Guests Are Licensees**

The social guest is a licensee. Performance of minor services for the host does not make the guest an invitee.

c) **Duty Owed to an Invitee**

(1) **Definition of Invitee**

An invitee is a person who enters onto the premises in response to an express or implied invitation of the landowner. Basically, there are two classes of invitees:

- (a) Those who enter as members of the public for a purpose for which the land is **held open to the public**, e.g., museums, churches, airports; and
- (b) Those who enter for a purpose **connected with the business** or other interests of the landowner or occupier, e.g., store customers and persons accompanying them, employees, persons making deliveries, etc.

(2) **Characterization of Privileged Entrants**

There may be a problem of characterization regarding persons entering the premises in exercise of a privilege, e.g., police, firefighters, census takers, etc. In some situations, they are characterized as licensees, in others as invitees. The following rules should be noted:

- (a) An entrant serving some **purpose of the possessor** generally is treated as an invitee, e.g., garbage collectors, mail carriers, etc.
- (b) One who comes **under normal circumstances during working hours** generally is treated as an invitee, e.g., census takers, health inspectors, etc.
- (c) Under the "**firefighter's rule**," police officers and firefighters are generally treated like licensees rather than invitees, based on public policy or assumption of risk grounds. They cannot recover for a landowner's failure to inspect or repair dangerous conditions that are an inherent risk of their law enforcement or firefighting activity.

(3) **Scope of Invitation**

A person loses her status as an invitee if she exceeds the scope of the invitation—if she goes into a portion of the premises where her invitation cannot reasonably be said to extend. (Note that the invitation normally does extend to the entrance and steps of a building.)

**EXAMPLE**

Gas station customer, buying gas, loses status as invitee when she leaves pumps and falls into grease pit inside station. (Reversion to licensee, perhaps even trespasser, status.)

**(4) Duty Owed**

The landowner owes an invitee a general duty to use reasonable and ordinary care in keeping the property reasonably safe for the benefit of the invitee. This general duty includes the **duties owed to licensees** (to warn of or make safe nonobvious, dangerous conditions known to the landowner and to use ordinary care in active operations on the property) **plus** a **duty to make reasonable inspections** to discover dangerous conditions and, thereafter, make them safe.

**(a) Warning May Suffice**

The requirement to “make safe” dangerous conditions usually is satisfied if a reasonable warning has been given.

**(b) Obviousness of Danger**

A duty to warn usually does not exist where the dangerous condition is so obvious that the invitee should reasonably have been aware of it. “Obviousness” is determined by all of the surrounding circumstances.

**EXAMPLE**

A banana peel visible on the floor of a supermarket might not be considered obvious if a shopper’s attention would likely be diverted by shelf displays.

**d) Users of Recreational Land**

In almost all states, a different standard applies by statute to users of recreational land. If an owner or occupier of open land permits the public to use the land for recreational purposes **without charging a fee**, the landowner is not liable for injuries suffered by a recreational user unless the landowner **willfully and maliciously** failed to guard against or warn of a dangerous condition or activity.

**EXAMPLE**

The owner of a large tract of undeveloped rural land who permits the general public to use a pond on the land for swimming and fishing would be covered by this type of statute, whereas the owner of a

swimming pool who permits his house guests to swim whenever they visit would not be covered by the statute (he would owe his guests the usual duties owed to licensees).

### 3) Duties of a Lessor of Realty

#### a) General Duty Rule

Ordinarily, tort liability in regard to conditions on the property is an ***incident of occupation and control***. Thus, when the owner leases the entire premises to another, the lessee, coming into occupation and control, becomes burdened with the duty to maintain the premises in such a way as to avoid unreasonable risk of harm to others. Similarly, where the owner leases ***portions*** of the premises to tenants, the owner continues to be subject to liability as a landowner for unreasonably dangerous conditions in those portions of the premises such as corridors, entry lobby, elevators, etc., used in common by all tenants, or by third persons, and over which the owner has retained occupation and control.

#### b) Exceptions

This basic duty, however, is subject to certain exceptions and extensions, as set forth below.

##### (1) Duty of Lessor to Lessee

The lessor is obligated to give ***warning*** to the lessee of ***existing defects*** in the premises of which the lessor is aware, or has reason to know, and which he knows the lessee is not likely to discover on reasonable inspection.

##### (2) Effect of Lessor's Covenant to Repair

If the lessor has covenanted to make repairs and reserves the right to enter the leased premises for the purpose of inspecting for defects and repairing them, he is subject to ***liability for unreasonably dangerous conditions***.

##### (3) Effect of Voluntary Repairs by Lessor

If the lessor, though under no obligation to make repairs, does so, he is subject to liability if he does so ***negligently***, failing to cure the defect; it is not necessary that his negligent repairs make the condition worse.

##### (4) Effect of Admission of the Public

If the lessor leases the premises knowing that the lessee intends to admit the public, the lessor is subject to ***liability for***

***unreasonably dangerous conditions existing at the time he transfers possession*** where the nature of the defect and length and nature of the lease indicate that the tenant will not repair (e.g., lessor rents convention hall to tenant for three-day period). This liability continues until the defect is actually remedied. A mere warning to the lessee concerning the defect is **not** sufficient.

(The duty of care of tenants and lessors is also covered in the Real Property outline.)

**c) Tenant Remains Liable to Invitees and Licensees**

Keep in mind that the potential liability of the lessor for dangerous conditions on the premises does not relieve the tenant, as occupier of the land, of liability for injuries to third persons from the dangerous conditions within the tenant's control.

**4) Duties of Vendor of Realty**

The vendor, at the time of transfer of possession to the vendee, has the **duty to disclose** concealed, unreasonably dangerous conditions of which the vendor knows or has reason to know, and of which he knows the vendee is ignorant and is not likely to discover on reasonable inspection. The vendor's responsibility continues until the vendee should have, in the exercise of reasonable care in inspection and maintenance, discovered and remedied the defect.

**e. Statutory Standards of Care**

**1) When Statutory Standard Applicable**

The precise standard of care in a common law negligence case may be established by proving the applicability to that case of a statute providing for criminal penalties (including fines for regulatory offenses and ordinances, such as for speeding). If this is done, a clearly stated specific duty imposed by the statute will replace the more general common law duty of due care. In proving the availability of the statutory standard, plaintiff must show the following:

**a) Plaintiff Within Protected Class**

The plaintiff must show that she is in the class intended to be protected by the statute.

**EXAMPLE**

A statute requiring a landowner to keep a building in safe condition is meant to protect only those rightfully on the premises and not trespassers.

**b) Particular Harm to Be Avoided**

The plaintiff must show that the statute was designed to prevent the type of harm that the plaintiff suffered.

**EXAMPLE**

Violation of a Sunday closing law is not evidence of negligence in the case of an accident in a store on Sunday.

**2) Excuse for Violation**

Violation of some statutes may be excused:

- a) Where **compliance would cause more danger** than violation; e.g., defendant drives onto wrong side of road to avoid hitting children who dart into his path; or
- b) Where **compliance would be beyond defendant's control**; e.g., blind pedestrian crosses against light.

**3) Effect of Establishing Violation of Statute**

Most courts still adhere to the rule that violation of a statute is "negligence per se." This means that plaintiff will have established a **conclusive presumption of duty and breach of duty**. (Plaintiff still must establish causation and damages to complete the *prima facie* case for negligence.)

A significant **minority** of courts, however, are unwilling to go this far. They hold either that (1) a rebuttable presumption as to duty and breach thereof arises, or (2) the statutory violation is only *prima facie* evidence of negligence.

**4) Effect of Compliance with Statute**

Even though the violation of an applicable criminal statute may be negligence, compliance with it will **not necessarily establish due care**. If there are unusual circumstances or increased danger beyond the minimum that the statute was designed to meet, it may be found that there is negligence in not doing more.

**5) Violation of a Civil Remedy Statute**

Where the statute in question provides for a civil remedy, plaintiff will sue directly under the statute; i.e., it is not a common law negligence case.

**f. Duty Regarding Negligent Infliction of Emotional Distress**

A duty to avoid negligent infliction of emotional distress may be breached when the defendant creates a foreseeable risk of physical injury to the plaintiff. The plaintiff usually must satisfy two requirements to prevail: (1) plaintiff must be

within the “zone of danger”; and (2) plaintiff must suffer physical symptoms from the distress.

**1) Plaintiff Must Be Within the “Zone of Danger”**

The plaintiff usually must show that her distress has been caused by a threat of physical impact; i.e., she was within the “zone of danger.”

**EXAMPLE**

Driver negligently ran a red light and skidded to a stop inches away from Pedestrian, who was properly crossing the street in a crosswalk. Pedestrian’s shock from nearly being run over caused her to suffer a heart attack. Pedestrian can recover for negligent infliction of emotional distress because she was in the zone of danger.

**2) Plaintiff Must Suffer Physical Symptoms from the Distress**

For the plaintiff to recover damages in a zone of danger case, most courts usually require that the defendant’s conduct cause the plaintiff emotional distress that manifests itself in **physical symptoms** (e.g., a nervous breakdown, miscarriage, or heart attack, but note that severe shock to the nervous system that causes physical symptoms will satisfy this requirement). A growing minority of states have dropped the requirement of physical symptoms.

**3) Special Situations Where Requirements Not Always Necessary**

**a) Bystander Not in Zone of Danger Seeing Injury to Another**

Traditionally, a bystander outside the “zone of danger” of physical injury who sees the defendant negligently injuring another could not recover damages for her own distress. A majority of states now allow recovery in these cases as long as (1) the plaintiff and the person injured by the defendant are **closely related**, (2) **the plaintiff was present** at the scene of the injury, and (3) the plaintiff **personally observed or perceived** the event. Most of these states also drop the requirement of physical symptoms in this situation.

**EXAMPLE**

Mother sees her child struck by negligently driven automobile on the other side of the street and goes into shock. Most courts would allow recovery.

**b) Special Relationship Between Plaintiff and Defendant**

The defendant may be liable for directly causing the plaintiff severe emotional distress when a duty arises from the relationship between

the plaintiff and the defendant, such that the defendant's negligence has great potential to cause emotional distress. Most states drop the requirement of physical symptoms in this situation as well.

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**EXAMPLES**

- 1) Doctor negligently confused Patient's file with another and told Patient he had a terminal illness. Patient, who in fact did not have the illness, became extremely distressed as a result. Patient can recover for negligent infliction of emotional distress because negligently providing a false diagnosis of a terminal illness creates a foreseeable risk of severe emotional distress to the patient.
  - 2) Mortuary negligently cremated the body of Plaintiff's mother contrary to Plaintiff's explicit instructions that her body be buried. Plaintiff is devastated by the mortuary's error. Plaintiff can recover for negligent infliction of emotional distress because mishandling a relative's corpse creates a foreseeable risk of severe emotional distress to family members.
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**g. Affirmative Duties to Act****1) General Rule—No Duty to Act**

As a general matter, no legal duty is imposed on any person to affirmatively act for the benefit of others. This general rule is, however, subject to exception, as indicated below.

**2) Assumption of Duty to Act by Acting**

One who gratuitously acts for the benefit of another, although under no duty to do so in the first instance, is then under a duty to act like an ordinary, prudent, reasonable person and continue the assistance.

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**EXAMPLE**

Defendant, under no duty to aid Plaintiff who has been injured, picks her up and carries her into a room. He then leaves her there unattended for seven hours and Plaintiff's condition is worsened. Defendant, having acted, may be considered to have breached his duty to act reasonably.

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**a) “Good Samaritan” Statutes**

A number of states have enacted statutes exempting licensed doctors, nurses, etc., who voluntarily and gratuitously render emergency treatment, from liability for ordinary negligence. Liability still exists, however, for gross negligence.

**3) Peril Due to Defendant's Conduct**

One whose conduct (whether negligent or innocent) places another in a position of peril is under a duty to use reasonable care to aid or assist that person.

**4) Special Relationship Between Parties**

A defendant having a special relationship to the plaintiff (e.g., parent-child, employer-employee) may be liable for failure to act if the plaintiff is in peril.

**a) Duty of Common Carriers**

Common carriers are under a duty to use reasonable care to aid or assist passengers.

**b) Duty of Places of Public Accommodation**

Innkeepers, restaurateurs, shopkeepers, and others who gather the public for profit have a duty to use reasonable care to aid or assist their patrons and to prevent injury to them from third persons.

**5) Role of Contract in Creating Duty****a) Nonfeasance—No Duty**

In general, for mere nonfeasance, there is no tort duty of care, regardless of whether the defendant promises to undertake action gratuitously or for consideration. Liability for breach of contract extends only to parties in privity.

**b) Misfeasance—Due Care Required**

However, for misfeasance, failure to perform with due care contractual obligations owed to one may give rise to violation of a legal duty.

**EXAMPLE**

Pursuant to a contract with the building owner, Defendant inspected and repaired the elevator, and did so carelessly. The elevator operator is injured as a result. Defendant is liable to the operator.

**6) Duty to Prevent Harm from Third Persons**

Generally, there is no duty to prevent a third person from injuring another. In some situations, however, such an affirmative duty might be imposed. In such cases, it must appear that the defendant had the ***actual ability*** and ***authority*** to control the third person's action. Thus, for example, bailors may be liable for the acts of their bailees, parents may be liable for the acts of their children, employers may be liable for the acts of their employees, etc.

It is generally required for imposition of such a duty that the defendant **knows** or **should know** that the third person is likely to commit such acts as would require the exercise of control by the defendant.

## C. BREACH OF DUTY

Where the defendant's conduct falls short of that level required by the applicable standard of care owed to the plaintiff, she has breached her duty. Whether the duty of care is breached in an individual case is a question for the trier of fact. Evidence may be offered to establish the standard by which defendant's conduct is to be measured, e.g., custom or usage, applicability of a statute, etc.

### 1. Custom or Usage

Custom or usage may be introduced to establish the standard of care in a given case. However, customary methods of conduct do not furnish a test that is conclusive for controlling the question of whether certain conduct amounted to negligence.

### 2. Violation of Statute

As we have seen above, the existence of a duty owed to plaintiff and breach thereof may be established by proof that defendant violated an applicable statute.

### 3. Res Ipsa Loquitur

The circumstantial evidence doctrine of res ipsa loquitur ("the thing speaks for itself") deals with those situations where the fact that a particular injury occurred may itself establish or tend to establish a breach of duty owed. Where the facts are such as to strongly indicate that plaintiff's injuries resulted from defendant's negligence, the trier of fact may be permitted to infer defendant's liability. Res ipsa loquitur requires the plaintiff to show the following:

#### a. Inference of Negligence

Plaintiff must establish that the accident causing his injury is the type that would not normally occur unless someone was negligent.

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#### EXAMPLE

A windowpane fell from a second story window in Defendant's building, landing on Plaintiff. Res ipsa loquitur may apply.

#### b. Negligence Attributable to Defendant

Plaintiff must establish evidence connecting defendant with the negligence in order to support a finding of liability, i.e., evidence that this type of accident ordinarily happens because of the negligence of someone in defendant's position. This requirement often can be satisfied by showing that the instrumentality that caused the injury was in the exclusive control of defendant, although actual possession of the instrumentality is not necessary.

**1) Multiple Defendants Problem**

Where more than one person may have been in control of the instrumentality, *res ipsa loquitur* generally may **not** be used to establish a *prima facie* case of negligence against any individual party.

**EXAMPLE**

Plaintiff left the operating room with an injury to part of her body that was healthy prior to entering the operating room. The injury was not in the zone of the original operation. Under the traditional rule, *res ipsa loquitur* may not be available to establish that any individual in that room was negligent. This is so despite the fact that, clearly, someone was negligent. However, many courts today take a different approach in such cases where defendants have control of the evidence, requiring each defendant to establish that his negligence did not cause the injury. [See, e.g., *Ybarra v. Spangard*, 25 Cal. 2d 486 (1944)]

**COMPARE**

The doctrine would be available in all states where a particular defendant had the power of control over the site of the injury. For example, Plaintiff sues Surgeon after a sponge was left in his body at the site of the surgery. Even though Surgeon left it to her assistants to remove the sponges and close up the wound, her responsibility and power of control over the surgery itself allows Plaintiff to use *res ipsa loquitur* against her.

**c. Effect of Res Ipsa Loquitur****1) No Directed Verdict for Defendant**

The doctrine, where applicable, does not change the burden of proof, nor does it create a presumption of negligence. Where the *res ipsa* element has been proved, the plaintiff has made a *prima facie* case and no directed verdict may be given for the defendant.

**2) Effect of Defendant's Evidence of Due Care**

However, the effect of defendant's evidence that due care was exercised has the same effect in a *res ipsa* case as in all other cases. If the jury rejects the defendant's evidence and draws the permissible inference of negligence, it will find for the plaintiff. If defendant's evidence overcomes the permissible inference that may be drawn from the *res ipsa* proof, the jury may find for the defendant. Such a finding for the defendant may result even where defendant rests without offering evidence on the issue if the jury elects not to infer negligence.

## D. CAUSATION

### 1. Actual Cause (Factual Causation)

Before the defendant's conduct can be considered a proximate cause of plaintiff's injury, it must first be a **cause in fact** of the injury. Several tests exist:

#### a. "But For" Test

An act or omission to act is the cause in fact of an injury when the injury would not have occurred **but for** the act.

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#### EXAMPLE

Failure to provide a fire escape is a cause of death of one who is thereby unable to flee a fire, but it is not a cause of death of one who suffocated in bed.

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#### 1) Concurrent Causes

The "but for" test applies where several acts combine to cause the injury, but none of the acts standing alone would have been sufficient (e.g., two negligently driven cars collide, injuring a passenger). But for any of the acts, the injury would not have occurred.

#### b. Additional Tests

Under certain circumstances, the "but for" test is inadequate to determine causation in fact. The courts must rely upon other tests.

##### 1) Merged Causes—Substantial Factor Test

Where several causes commingle and bring about an injury—and any one alone would have been sufficient to cause the injury—it is sufficient if defendant's conduct was a "substantial factor" in causing the injury.

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#### EXAMPLE

Two fires meet and burn a farm. Either fire alone would have done the damage without the other. Under the "but for" test, neither was the "cause," since, looking at either fire alone, the loss would have occurred without it. Rather than reach this result, the courts consider as causes all those things that were a "substantial factor" in causing injury.

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##### 2) Unascertainable Causes Approach

###### a) Burden of Proof Shifts to Defendants

A problem of causation exists where two or more persons have been negligent, but uncertainty exists as to which one caused plaintiff's injury. Under the unascertainable causes approach, plaintiff must prove

that harm has been caused to him by one of them (with uncertainty as to which one). The burden of proof then shifts to defendants, and each must show that his negligence is not the actual cause.

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**EXAMPLE**

Alex and Basil both negligently fire shotguns in Clara's direction. Clara is hit by one pellet, but she cannot tell which gun fired the shot. Under the unascertainable causes approach, Alex and Basil will have to prove that the pellet was not theirs. If unable to do this, they may both be liable. [Summers v. Tice, 33 Cal. 2d 80 (1948)]

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**b) Applied in Enterprise Liability Cases**

This concept has been extended in some cases to encompass industry groups.

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**EXAMPLE**

Daughters of women who took the anti-miscarriage drug diethylstilbestrol ("DES") contracted cancer as a result of the drug manufacturer's negligence. However, because the cancer appeared many years after the DES was ingested, it was usually impossible to determine which manufacturer of DES had supplied the drug taken by any particular plaintiff. Several courts have required all producers of DES unable to prove their noninvolvement to pay in proportion to their percentage of the market share. [See Sindell v. Abbott Laboratories, 26 Cal. 3d 588, cert. denied, 449 U.S. 912 (1980)]

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**2. Proximate Cause (Legal Causation)**

In addition to being a cause in fact, the defendant's conduct must also be a proximate cause of the injury. Not all injuries "actually" caused by defendant will be deemed to have been proximately caused by his acts. Thus, the doctrine of proximate causation is a **limitation of liability** and deals with liability or nonliability for unforeseeable or unusual consequences of one's acts.

**a. General Rule of Liability**

The general rule of proximate cause is that the defendant is liable for all harmful results that are **the normal incidents of and within the increased risk caused by** his acts. In other words, if one of the reasons that make defendant's act negligent is a greater risk of a particular harmful result occurring, and that harmful result does occur, defendant generally is liable. This test is based on **foreseeability**.

**b. Direct Cause Cases**

A direct cause case is one where the facts present an **uninterrupted chain** of

events from the time of the defendant's negligent act to the time of plaintiff's injury. In short, there is no external intervening force of any kind.

**1) Foreseeable Harmful Results—Defendant Liable**

If a particular harmful result was at all foreseeable from defendant's negligent conduct, the unusual manner in which the injury occurred or the unusual timing of cause and effect is irrelevant to defendant's liability.

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**EXAMPLE**

D is driving her sports car down a busy street at a high rate of speed when a pedestrian steps out into the crosswalk in front of her. D has no time to stop, so she swerves to one side. Her car hits a parked truck and bounces to the other side of the street, where it hits another parked vehicle, propelling it into the street and breaking the pedestrian's leg. D is liable despite the unusual way in which she caused the injury to the pedestrian.

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**2) Unforeseeable Harmful Results—Defendant Not Liable**

In the rare case where defendant's negligent conduct creates a risk of a harmful result, but an entirely different and totally unforeseeable type of harmful result occurs, most courts hold that defendant is not liable for that harm.

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**EXAMPLE**

D, a cabdriver, is driving too fast on a busy elevated highway, threatening P, his passenger, with injury. Without warning, the section of highway that D is on collapses because its support beams had deteriorated with age. P is seriously injured. Even if D's negligent conduct was an actual cause of P's injury (because the cab would not have been on that section of the highway but for D's speeding), courts would not hold D liable for the injury to P.

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**c. Indirect Cause Cases**

An indirect cause case is one where the facts indicate that a force came into motion **after** the time of defendant's negligent act and combined with the negligent act to cause injury to plaintiff. In short, indirect cause cases are those where **intervening forces** are present. Whether an intervening force will cut off defendant's liability for plaintiff's injury is determined by foreseeability.

**1) Foreseeable Results Caused by Foreseeable Intervening Forces—Defendant Liable**

Where defendant's negligence caused a foreseeable harmful response or reaction from an intervening force or created a foreseeable risk that an intervening force would harm plaintiff, defendant is liable for the harm caused.

**a) Common Foreseeable Intervening Forces**

Intervening forces that are normal responses or reactions to the situation created by defendant's negligent act **are almost always foreseeable.**

The following are common intervening forces that are almost always foreseeable:

**(1) Subsequent Medical Malpractice**

The original tortfeasor is usually liable for the aggravation of plaintiff's condition caused by the malpractice of plaintiff's treating physician.

**(2) Negligence of Rescuers**

Generally, rescuers are viewed as foreseeable intervening forces, and so the original tortfeasor usually is liable for their negligence.

**(3) Protection or "Reaction" Forces**

Defendant usually is liable for efforts on the part of persons to protect life or property of themselves or third persons endangered by defendant's negligence when those efforts injure the plaintiff. Where defendant's actions cause another to "react" (e.g., negligently firing a gun at another's feet), liability generally attaches for any harm inflicted by the "reacting" person on another.

**EXAMPLE**

Defendant negligently swerves his car into another driver's lane, causing the other driver to swerve off the road without looking to avoid Defendant. The other driver hits a pedestrian. Defendant is liable.

**(4) Subsequent Disease or Accident**

The original tortfeasor usually is liable for diseases caused in part by the weakened condition in which defendant has placed the plaintiff by negligently injuring her. Similarly, if the plaintiff suffers a subsequent injury following her original injury, and the original injury was a substantial factor in causing the second accident, the original tortfeasor is usually liable for damages arising from the second accident.

**EXAMPLES**

1) Injury caused by Defendant weakens Plaintiff, making her susceptible to pneumonia. Defendant is liable.

2) As a result of Defendant's negligence, Plaintiff's leg is broken. Walking on crutches, Plaintiff falls and breaks her other leg. Defendant is liable.

**b) Independent Intervening Forces**

Independent intervening forces also operate on the situation created by defendant's negligence but are independent actions rather than natural responses or reactions to the situation. Independent intervening forces may be foreseeable where **defendant's negligence increased the risk that these forces would cause harm** to the plaintiff.

The following are common fact situations involving independent intervening forces:

**(1) Negligent Acts of Third Persons**

Defendant is liable for harm caused by the negligence of third persons where such negligence was a foreseeable risk created by defendant's conduct.

**EXAMPLE**

D negligently blocked a sidewalk, forcing P to walk in the roadway, where he is struck by a negligently driven car. D is liable to P.

**(2) Criminal Acts and Intentional Torts of Third Persons**

If defendant's negligence created a foreseeable risk that a third person would commit a crime or intentional tort, defendant's liability will not be cut off by the crime or tort.

**EXAMPLE**

D, a parking lot attendant, negligently left the keys in P's car and the doors unlocked when he parked it, allowing a thief to steal it. D is liable to P.

**(3) Acts of God**

Acts of God will not cut off defendant's liability if they are foreseeable.

**EXAMPLE**

D, a roofer, negligently left a hammer on P's roof at the end of the day. P is struck by the hammer when a strong wind blows it off the roof. D is liable to P.

## 2) Foreseeable Results Caused by Unforeseeable Intervening Forces—Defendant Usually Liable

The problem: Defendant is negligent because his conduct threatens a result of a particular kind that will injure plaintiff. This result is ultimately produced by an **unforeseeable** intervening force. Most courts would generally find liability here because they give greater weight to foreseeability of result than to foreseeability of the intervening force. An exception exists, however, where the intervening force is an unforeseeable **crime** or **intentional tort** of a third party; it will be deemed a “superseding force” that cuts off defendant’s liability (see discussion below).

### EXAMPLES

1) Defendant failed to clean residue out of an oil barge, leaving it full of explosive gas. Negligence, of course, exists since an explosion resulting in harm to any person in the vicinity was foreseeable from any one of several possible sources. An unforeseeable bolt of lightning struck the barge, exploding the gas and injuring workers on the premises. Defendant is liable.

2) Same facts as above example, except that an arsonist caused the explosion. Most courts would not hold Defendant liable here. They think it unfair to make him responsible for such malevolent conduct. The important point here is that an unforeseeable intervening force may still relieve the defendant of liability if it is an unforeseeable crime or intentional tort of a third party.

## 3) Unforeseeable Results Caused by Foreseeable Intervening Forces—Defendant Not Liable

Most intervening forces that produce unforeseeable results are considered to be unforeseeable intervening forces (see below). Similarly, most results caused by foreseeable intervening forces are treated as foreseeable results. In the rare case where a foreseeable intervening force causes a totally unforeseeable result, most courts would not hold the defendant liable.

### EXAMPLE

D, a cabdriver, was driving recklessly during a violent windstorm that was blowing large branches and other debris onto the road, creating a risk to P, his passenger, that D would not be able to stop the cab in time to avoid an accident. D slammed on his brakes to avoid a large branch in the road, causing his cab to swerve sideways onto the shoulder of the road. Before he could proceed, another branch crashed onto the roof of the cab,

breaking a window and causing P to be cut by flying glass. D is not liable to P even though his negligent driving was the actual (but for) cause of P's injury and the wind that was blowing the branches down was a foreseeable intervening force.

**4) Unforeseeable Results Caused by Unforeseeable Intervening Forces—Defendant Not Liable**

As a general rule, intervening forces that produce unforeseeable results (i.e., results that were not within the increased risk created by defendant's negligence) will be deemed to be unforeseeable and **superseding**. A superseding force is one that serves to **break the causal connection** between defendant's initial negligent act and the ultimate injury, and itself becomes a direct, immediate cause of the injury. Thus, defendant will be relieved of liability for the consequences of his antecedent conduct.

**EXAMPLE**

D negligently blocks a road, forcing P to take an alternate road. Another driver negligently collides with P on this road, injuring him. Even though D is an actual (but for) cause of P's injury, the other driver's conduct is an unforeseeable intervening force because D's negligence did not increase the risk of its occurrence. Thus, the other driver is a superseding force that cuts off D's liability for his original negligent act.

**d. Unforeseeable Extent or Severity of Harm—Defendant Liable**

In both direct cause and indirect cause cases, the fact that the extent or severity of the harm was not foreseeable does not relieve defendant of liability; i.e., the tortfeasor takes his victim as he finds him. This is also known as the "eggshell-skull plaintiff" rule. Thus, where defendant's negligence causes an aggravation of plaintiff's existing physical or mental illness, defendant is liable for the damages caused by the aggravation.

**EXAMPLE**

A car negligently driven by D collides with a car driven by P. P suffers a slight concussion, which was foreseeable, and also suffers a relapse of an existing mental illness, which was not foreseeable. D is liable for all of P's damages.

**E. DAMAGES**

Damage is an essential element of plaintiff's *prima facie* case for negligence. This means **actual** harm or injury. Unlike the situation for some of the intentional torts, damage will not be presumed. Thus, nominal damages are not available in an action in negligence; some proof of harm must be offered.

## 1. Damages Recoverable in the Action

### a. Personal Injury

Plaintiff is to be compensated for **all** his damages (past, present, and prospective), both special and general. This includes fair and adequate compensation for **economic damages**, such as medical expenses and lost earnings, and **noneconomic damages**, such as pain and suffering. Plaintiff is also entitled to compensation for impaired future earning capacity, discounted to present value so as to avoid an excess award; i.e., plaintiff receives an amount that, if securely invested, would produce the income that the jury wishes him to have.

#### 1) Foreseeability Irrelevant

As noted above in the proximate cause section, it is generally not necessary to foresee the extent of the harm. In other words, a tortfeasor takes the victim as he finds him.

#### 2) Emotional Distress Damages

Plaintiff's noneconomic damages include damages for any emotional distress suffered as a result of the physical injury.

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#### EXAMPLE

Plaintiff was struck by a piece of metal when the engine blew on a defectively manufactured lawnmower. The piece of metal lodged in his spine at an inoperable location, significantly increasing his risk of future paralysis. In plaintiff's products liability action against the manufacturer of the lawnmower, plaintiff can recover damages not only for his physical injury but also for the emotional distress he suffers from his knowledge of the risk of paralysis, because it arises out of the physical injury caused by the defective product.

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### b. Property Damage

The measure of damages for property damage is the reasonable **cost of repair**, or, if the property has been almost or completely destroyed, its **fair market value** at the time of the accident. Courts generally do not permit recovery of emotional distress damages for negligent harm to property.

### c. Punitive Damages

Punitive damages generally are not available in negligence cases. However, if the defendant's conduct was "wanton and willful," reckless, or malicious, most jurisdictions permit recovery of punitive damages.

### d. Nonrecoverable Items

Certain items are not recoverable as damages in negligence actions. These include:

- 1) Interest from date of damage in personal injury action; and
- 2) Attorneys' fees.

## 2. Duty to Mitigate Damages

As in all cases, the plaintiff has a duty to take reasonable steps to mitigate damages—in property damage cases to preserve and safeguard the property, and in personal injury cases to seek appropriate treatment to effect a cure or healing and to prevent aggravation. Failure to mitigate precludes recovery of any additional damages caused by aggravation of the injury.

## 3. Collateral Source Rule

As a general rule, damages are not reduced or mitigated by reason of benefits received by plaintiff from other sources, e.g., health insurance, sick pay from employer. Hence, at trial, defendants may not introduce evidence relating to any such financial aid from other sources. A growing number of states have made exceptions to this rule in certain types of actions (e.g., medical malpractice actions), allowing defendants to introduce evidence of insurance awards or disability benefits.

*Note:* These damages rules also are generally applicable to actions based on intentional torts.

## F. DEFENSES TO NEGLIGENCE

### 1. Contributory Negligence

#### a. Standard of Care for Contributory Negligence

##### 1) General Rule

The standard of care required is the same as that for ordinary negligence.

##### 2) Rescuers

A plaintiff may take extraordinary risks when attempting a rescue without being considered contributorily negligent. The emergency situation is one of the factors taken into account when evaluating the plaintiff's conduct.

##### 3) Remaining in Danger

It may be contributorily negligent to fail to remove oneself from danger, e.g., remaining in a car with a drunk driver.

##### 4) Violation of Statute by Plaintiff

Plaintiff's contributory negligence may be established by his violation of a statute under the same rules that govern whether a statute can establish defendant's negligence (see B.3.e., *supra*).

**5) As Defense to Violation of Statute by Defendant**

Contributory negligence is ordinarily a defense to negligence proved by defendant's violation of an applicable statute. But where the defendant's negligence arose from violation of a statute designed to protect this particular class of plaintiffs from their own incapacity and lack of judgment, then plaintiff's contributory negligence is **not** a defense.

**EXAMPLE**

D is exceeding the speed limit in a school zone when a child on his way to school darts into the street without looking. Because of her speed, D is unable to stop and hits the child. Any contributory negligence on the child's part is not a defense to D's violation of the statute, because the statute was designed to protect children on their way to school.

**b. Avoidable Consequences Distinguished**

As we have seen, plaintiff owes a duty to mitigate damages to person or property after the damage is inflicted. If he does not properly do this, then damages will be reduced. Failure to do this, however, is an avoidable consequence, not contributory negligence.

**c. No Defense to Intentional Torts**

Contributory negligence is never a defense to an action for an intentional tort or for willful or wanton misconduct.

**d. Effect of Contributory Negligence**

At common law, plaintiff's contributory negligence completely barred his right to recover. This was so even though the degree of defendant's negligence was much greater than that of plaintiff.

The severe consequences of strict application of contributory negligence rules initially caused courts to develop "escape" doctrines, such as ***last clear chance*** (below). More recently, however, most jurisdictions have rejected entirely the "all or nothing" approach of contributory negligence in favor of a ***comparative negligence*** system (discussed *infra*).

**e. Last Clear Chance**

The doctrine of last clear chance, sometimes called "the humanitarian doctrine," permits the plaintiff to recover **despite** his own contributory negligence. Under this rule, the person with the last clear chance to avoid an accident who fails to do so is liable for negligence. (In effect, last clear chance is plaintiff's rebuttal against the defense of contributory negligence.)

**EXAMPLE**

Bowater negligently parked his car on the railroad tracks. The train engineer saw him in time to stop but failed to do so. The engineer had the last clear chance, and thus the railroad will be liable for the accident.

**1) “Helpless” vs. “Inattentive” Peril**

Many cases distinguish between “helpless” and “inattentive” peril situations in applying last clear chance rules.

**a) Helpless Peril**

Helpless peril exists where plaintiff, through his contributory negligence, puts himself in a position of actual peril from which he cannot extricate himself. In many states, defendant is liable under these circumstances if she had either **actual** knowledge of plaintiff's predicament or if she **should have known** of plaintiff's predicament. Other states require actual knowledge.

**b) Inattentive Peril**

Inattentive peril exists where plaintiff, through his own negligence, is in a position of actual peril from which he could extricate himself if he were attentive. Almost all courts require **actual** knowledge of plaintiff's predicament on defendant's part.

**2) Prior Negligence Cases**

For last clear chance to operate, defendant must have been able to avoid harming plaintiff **at the time of the accident**. In short, defendant must have had the “last clear chance” to avoid the accident. Hence, if defendant's only negligence had occurred earlier, e.g., she negligently failed to have the steering wheel fixed, the courts will not apply last clear chance.

**f. Imputed Contributory Negligence**

Driver and Passenger are involved in an automobile accident with Cyclist. Driver is negligent; Cyclist is also negligent. Passenger, who is injured, brings an action against Cyclist. Cyclist argues that liability should be denied because of Driver's negligence to the same extent as if Passenger had been negligent himself. This is the concept of “imputed contributory negligence.”

**1) General Rule—Plaintiff May Proceed Against Both Negligent Parties**

As a general rule, a plaintiff's action for his damages is **not** barred by imputed contributory negligence. He may proceed against both negligent parties as joint tortfeasors to the extent that each is a legal cause of the harm.

**2) When Contributory Negligence Is Imputed**

Contributory negligence will be imputed **only** where the plaintiff and the

negligent person stand in such a relationship to each other that the courts find it proper to charge plaintiff with that person's negligence, i.e., where plaintiff would be found **vicariously** liable for the negligent person's conduct if a third party had brought the action. (See *also* Vicarious Liability, VI.A., *infra*.)

### 3) Common Fact Situations

The following situations should be noted for bar examination purposes:

#### a) Employer and Employee

The contributory negligence of the employee or agent acting within the scope of employment will be imputed to the employer or principal when the latter is a plaintiff suing a third person.

#### b) Partners and Joint Venturers

The contributory negligence of one partner or joint venturer will be imputed to the other when the other is a plaintiff suing a third person.

#### c) Spouses

The contributory negligence of one spouse will **not** be imputed to the other when the other is a plaintiff suing a third person.

#### d) Parent and Child

The contributory negligence of the parent or guardian is **not** imputed to the child, nor is the contributory negligence of the child imputed to the parent in actions against a third party.

*Note:* As to sections c) and d) above, note that in a spouse's action for loss of the other spouse's services, or a parent's action for loss of a child's services or recovery of his medical expenses, the contributory negligence of the injured spouse or child **will** bar recovery by the other spouse or by the parent. This is not because negligence is imputed, but because the loss of services action is derivative and cannot succeed unless the main action succeeds (see VI.D.3., *infra*). This result would also be obtained in a wrongful death action.

#### e) Automobile Owner and Driver

Unless the automobile owner would be vicariously liable for the driver's negligence (because, e.g., the driver was an employee within the scope of employment), the contributory negligence of the driver will **not** be imputed to her. (Remember, in situations where the owner is a passenger, she may be liable for her **own negligence** in not preventing the accident.)

## 2. Assumption of Risk

The plaintiff may be denied recovery if he assumed the risk of any damage caused

by the defendant's acts. This assumption may be expressed or implied. To have assumed risk, either expressly or impliedly, the plaintiff must have **known of the risk** and **voluntarily** assumed it. It is irrelevant that plaintiff's choice is unreasonable.

**a. Implied Assumption of Risk**

Implied assumption of risk situations are harder to resolve as, of course, the fact issues are difficult to prove.

**1) Knowledge of Risk**

Plaintiff must have known of the risk. Knowledge may be implied where the risk is one that the average person would clearly appreciate, e.g., risk of being hit by a foul ball in a baseball game.

**2) Voluntary Assumption**

The plaintiff must voluntarily go ahead in the face of the risk. However, plaintiff may not be said to have assumed the risk where there is no available alternative to proceeding in the face of the risk, e.g., the only exit from a building is unsafe.

**3) Certain Risks May Not Be Assumed**

Because of public policy considerations, the courts uniformly hold that some risks may not be assumed. These include:

- a) Common carriers and public utilities are not permitted to limit their liability for personal injury by a disclaimer on, e.g., a ticket, a posted sign, etc.
- b) When a statute is enacted to protect a class, members of that class will not be deemed to have assumed any risk.

**EXAMPLE**

When a statute imposes safety regulations on an employer, the employee is held not to have assumed the risk where the statute is violated.

- c) Risks will not be assumed in situations involving fraud, force, or an emergency. Thus, for example, one could take action to save his person or property without assuming a risk unless his actions involve an unreasonable risk out of proportion to the value of those rights.

**b. Express Assumption of Risk**

The risk may be assumed by express agreement. Such exculpatory clauses in a contract, intended to insulate one of the parties from liability resulting from his own negligence, are closely scrutinized but are generally enforceable. (Note that it is more difficult to uphold such an exculpatory clause in an adhesion contract.)

### c. No Defense to Intentional Torts

Assumption of risk is not a defense to intentional torts. It is, however, a defense to wanton or reckless conduct.

## 3. Comparative Negligence

The vast **majority** of states now permit a contributorily negligent plaintiff to recover a percentage of his damages under some type of **comparative negligence** system. In every case where contributory negligence is shown, the trier of fact weighs plaintiff's negligence against that of defendant and reduces plaintiff's damages accordingly.

### EXAMPLE

Defendant negligently drove through a stop sign and collided with Plaintiff, who was contributorily negligent by driving inattentively. Plaintiff suffers damages of \$100,000. If a jury finds that Plaintiff was 30% negligent and Defendant was 70% negligent, Plaintiff will recover \$70,000.

### a. Types of Comparative Negligence

#### 1) "Partial" Comparative Negligence

Most comparative negligence jurisdictions will still bar the plaintiff's recovery if his negligence passes a threshold level. In some of these states, a plaintiff will be barred if his negligence was **more serious** than that of the defendant (i.e., the plaintiff will recover nothing if he was more than 50% at fault). In the other states, a plaintiff will be barred from recovering if his negligence was **at least as serious** as that of the defendant (i.e., the plaintiff will recover nothing if he was 50% or more at fault).

##### a) Multiple Defendants

If several defendants have contributed to plaintiff's injury, most of these states use a "combined comparison" approach to determine the threshold level (i.e., plaintiff's negligence is compared with the total negligence of all the defendants combined).

#### 2) "Pure" Comparative Negligence

The "pure" variety of comparative negligence, adopted in a third of the comparative negligence states, allows recovery no matter how great plaintiff's negligence is (e.g., if plaintiff is 90% at fault and defendant 10%, plaintiff may still recover 10% of his damages). On the MBE, pure comparative negligence is the applicable rule unless the question specifies otherwise.

## b. Comparative Negligence Illustrations

### 1) Partial Comparative Negligence Jurisdiction—Single Defendant

Plaintiff is 30% negligent and Defendant is 70% negligent in causing the accident. Each party suffers \$100,000 in damages. Plaintiff will recover \$70,000 from Defendant—\$100,000 minus 30% (\$30,000). Defendant will recover nothing from Plaintiff because Defendant was more than 50% at fault.

### 2) Partial Comparative Negligence Jurisdiction—Multiple Defendants

Plaintiff is 40% negligent in causing the accident and suffers \$100,000 in damages. D1 is 35% negligent and D2 is 25% negligent. Plaintiff can recover \$60,000 from either D1 or D2 under joint and several liability rules (*infra*, VI.B.1.). Note that if D1 or D2 also suffered damages, each of them would have a claim against the other two negligent parties because each one's negligence is less than the total negligence of the other two.

### 3) Pure Comparative Negligence Jurisdiction

Same facts as in illustration 1). Plaintiff has a right to recover \$70,000 from Defendant, and Defendant has a right to recover \$30,000 from Plaintiff. Defendant's damages will be offset against Plaintiff's damages, and Plaintiff will have a net recovery of \$40,000.

## c. Effect on Other Doctrines

### 1) Last Clear Chance

Last clear chance is **not** used in most comparative negligence jurisdictions.

### 2) Assumption of Risk

#### a) Implied Assumption of Risk

Most comparative negligence jurisdictions have abolished entirely the defense of implied assumption of risk. In these jurisdictions, traditional assumption of risk situations must be broken down into two categories:

- (1) When the defendant has only a **limited duty** to the plaintiff because of plaintiff's knowledge of the risks (e.g., being hit by a foul ball at a baseball game), a court may protect the defendant simply by holding that the defendant did not breach his limited duty of care. The defendant will still be liable for reckless conduct.
- (2) More common is the situation that is a **variant of contributory negligence**, in that defendant's initial breach of duty to plaintiff is superseded by plaintiff's assumption of a risk (e.g., builder is

negligent in not barricading torn-up sidewalk, but pedestrian chooses to use it despite availability of reasonable alternate route). Here, the **reasonableness** of plaintiff's conduct is relevant: If the plaintiff has behaved unreasonably, plaintiff is contributorily negligent and damages will be apportioned under the state's comparative negligence statute.

**b) Express Assumption of Risk**

Most comparative negligence jurisdictions retain the defense of express assumption of risk.

**3) Wanton and Willful Conduct**

In most comparative negligence jurisdictions, plaintiff's negligence **will** be taken into account even though the defendant's conduct was "wanton and willful" or "reckless." However, plaintiff's negligence is still not a defense to intentional tortious conduct by the defendant.

### III. LIABILITY WITHOUT FAULT (STRICT LIABILITY)

#### A. PRIMA FACIE CASE

To establish a prima facie case for strict liability, the following elements must be shown:

1. The nature of the defendant's activity imposes an **absolute duty** to **make safe**;
2. The dangerous aspect of the activity is the **actual** and **proximate cause** of the plaintiff's injury; and
3. The plaintiff suffered **damage** to person or property.

#### B. LIABILITY FOR ANIMALS

**1. Trespassing Animals**

The owner is strictly liable for the damage done by the trespass of his animals (other than household pets) as long as it was **reasonably foreseeable**.

**2. Personal Injuries**

**a. Wild Animals—Strict Liability**

The owner is strictly liable for injuries caused by wild animals (e.g., lion or bear), even those kept as pets.

**b. Domestic Animals—Knowledge Required**

The owner of a domestic animal (including farm animals) is **not** strictly liable for injuries it causes. Such liability does, however, attach if the owner has knowledge of that particular animal's dangerous propensities (i.e., propensities more

dangerous than normal for that species). This rule applies even if the animal has never actually injured anyone. Some states have “dog bite” statutes, applicable only to dogs, which impose strict liability in personal injury actions even without prior knowledge of dangerous characteristics.

### c. Persons Protected

#### 1) Licensees and Invitees—Landowner Strictly Liable

Strict liability for injuries inflicted by wild animals or abnormally dangerous domestic animals kept by the landowner on his land will usually be imposed where the person injured came onto the land as an invitee or licensee.

##### a) Public Duty Exception

An exception is recognized where the landowner is under a **public duty to keep the animals** (e.g., as a public zookeeper); in such cases, negligence must be shown.

#### 2) Trespassers Must Prove Negligence

Strict liability in such cases generally is **not** imposed in favor of undiscovered trespassers against landowners. Trespassers cannot recover for injuries inflicted by the landowner’s wild animals or abnormally dangerous domestic animals in the absence of **negligence**, e.g., as where the landowner knows that trespassers are on the land and fails to warn them of the animal.

##### a) Compare—Intentional Use of Vicious Watchdogs

A landowner who protects his property from intruders by keeping a vicious watchdog that he knows is likely to cause **serious bodily harm** may be liable even to trespassers for injuries caused by the animal. This liability is based on intentional tort principles: Because the landowner is not entitled to use deadly force in person to protect only property, he also may not use such force indirectly. (See I.D.4.b., *supra*.)

## C. ABNORMALLY DANGEROUS ACTIVITIES

### 1. Definition

An activity may be characterized as abnormally dangerous if it involves a substantial risk of serious harm to person or property even when reasonable care is exercised. Whether an activity is abnormally dangerous is a question of law that the court can decide on a motion for directed verdict.

### 2. Test

The courts generally impose two requirements for finding an activity to be abnormally dangerous:

- a. The activity must create a foreseeable risk of **serious harm even when reasonable care is exercised** by all actors; and
- b. The activity is **not a matter of common usage** in the community.

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**EXAMPLE**

In *Rylands v. Fletcher*, 3 H.L. 330 (1868), the House of Lords held a mill owner strictly liable when a neighbor's mines were flooded by water escaping from the mill owner's reservoir. This was considered an abnormal use in "mining country."

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Common examples of abnormally dangerous activities include blasting, manufacturing explosives, crop dusting, and fumigating.

**3. Products Liability**

There may be strict liability imposed for damage caused by products, depending on the theory used by a court in resolving such problems. (See IV.D., *infra*.)

**D. EXTENT OF LIABILITY****1. Defendant Liable Only to Foreseeable Plaintiffs**

In most states, the defendant is liable only to "**foreseeable plaintiffs**"—persons to whom a reasonable person would have foreseen a risk of harm under the circumstances. Generally, strict liability is not imposed on a defendant's blasting that hurled rock onto a person so far away that no reasonable person would have foreseen a danger. (Note, however, that some courts find liability for all blasting harm because of the intrinsic danger of defendant's activity.)

**2. Harm Must Result from "Normally Dangerous Propensity"**

The harm must result from the kind of danger to be anticipated from the dangerous animal or abnormally dangerous activity; i.e., it must flow from the "normally dangerous propensity" of the condition or thing involved.

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**EXAMPLE**

D's toothless pet leopard escapes from its cage without fault on D's part and wanders into a park, causing P to break her arm while trying to flee. D is strictly liable to P.

**COMPARE**

D's dynamite truck blows a tire without warning and hits Pedestrian. D is not strictly liable to Pedestrian. However, if the truck then crashed and exploded, and the explosion injured Bystander, D would be strictly liable to Bystander.

**3. Proximate Cause**

The majority view is that the same rules of direct and indirect causation govern in strict liability as they do in negligence—defendant's liability can be cut off by

unforeseeable intervening forces. In fact, the courts tend to hold more intervening forces “unforeseeable.”

#### 4. Defenses

##### a. Contributory Negligence States

In contributory negligence states, plaintiff's contributory negligence is **no** defense if the plaintiff simply failed to realize the danger or guard against its existence (unknowing contributory negligence). It **is** a defense, however, if plaintiff **knew** of the danger and his unreasonable conduct was the very cause of the harm from the wild animal or abnormally dangerous activity. Courts call this conduct “knowing” contributory negligence or a type of assumption of risk. Furthermore, assumption of risk of any type is a good defense to strict liability in contributory negligence states.

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##### EXAMPLE

P knowingly and unreasonably tries to pass D's dynamite truck on a sharp curve, causing it to turn over and explode. Regardless of whether P's conduct is called contributory negligence or assumption of risk, P cannot recover.

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##### b. Comparative Negligence States

Many comparative negligence states will now simply apply the same comparative negligence rules that they apply to negligence cases.

## IV. PRODUCTS LIABILITY

### A. BASIC PRINCIPLES

In this context, “products liability” is the generic phrase used to describe the liability of a supplier of a product to one injured by the product.

#### 1. Theories of Liability

Plaintiffs in products liability cases may have one of five possible theories of liability available to them:

- a. ***Intent;***
- b. ***Negligence;***
- c. ***Strict liability;***
- d. ***Implied warranties of merchantability and fitness for a particular purpose;***  
and
- e. ***Representation theories (express warranty and misrepresentation).***

In an exam question, always consider a defendant's potential liability under each of the theories unless the call of the question indicates the theory that the plaintiff is using.

## 2. Existence of a Defect

To find liability under any products liability theory, plaintiff must show that the product was "defective" when the product left defendant's control.

### a. Types of Defects

#### 1) Manufacturing Defects

When a product emerges from a manufacturing process not only different from the other products, but also more dangerous than if it had been made the way it should have been, the product may be so "unreasonably dangerous" as to be defective because of the manufacturing process.

#### 2) Design Defects

When all the products of a line are made identically according to manufacturing specifications, but have dangerous propensities because of their mechanical features or packaging, the entire line may be found to be defective because of poor design.

#### 3) Information Defects

Inadequate warnings and instructions are information defects. A product must have clear and complete warnings of any dangers that may not be apparent to users. For prescription drugs and medical devices, warnings need not be supplied to the patient; a warning to the prescribing physician usually will suffice (the "learned intermediary" rule).

### b. Proving a Defect

In most jurisdictions, a product can be the basis for a products liability action if it is in a "defective condition unreasonably dangerous" to users.

#### 1) Manufacturing Defects

For a manufacturing defect, the plaintiff will prevail if the product was ***dangerous beyond the expectation of the ordinary consumer*** because of a departure from its intended design.

##### a) Defective Food Products

Defects in food products are treated the same as manufacturing defects—the "consumer expectation" approach is used.

#### 2) Design Defects

For design defects, the plaintiff usually must show a reasonable alternative design, i.e., that a ***less dangerous modification or alternative was economically feasible***.

The factors that the courts consider under the “feasible alternative” approach are the following:

- (i) Usefulness and desirability of the product;
- (ii) Availability of safer alternative products;
- (iii) The dangers of the product that have been identified by the time of trial;
- (iv) Likelihood and probable seriousness of injury;
- (v) Obviousness of the danger;
- (vi) Normal public expectation of danger (especially for established products);
- (vii) Avoidability of injury by care in use of product (including role of instructions and warnings); and
- (viii) Feasibility of eliminating the danger without seriously impairing the product’s function or making it unduly expensive.

### EXAMPLES

- 1) Although people often cut themselves on sharp knives, knives are of great utility. Since there is no way to avoid the harm without destroying the utility of the product, and the danger is apparent to users, the product is not **unreasonably** dangerous and the supplier would not be liable for injuries.
- 2) A power lawnmower that is marketed with no guard over the opening from which cut grass is blown may be unreasonably dangerous even though the product carries several warnings that hands and feet should be kept away from the opening and that rocks may be ejected from the opening. While the product’s danger is within the expectations of the user, a court will **compare the harm caused** by the product with what it would **cost** to put a guard on the opening and consider whether the guard would impair the machine’s operation in order to determine whether the product is “defective.”

#### a) Effect of Government Safety Standards

A product is deemed to be defective in design or warnings if it fails to comply with applicable government safety standards. On the other hand, a product’s **compliance** with applicable government safety standards (including labeling requirements) is evidence—but not conclusive—that the product is **not** defective. [Restatement (Third) of Torts—Products Liability §4] Note also that federal labeling requirements **do**

**not preempt** state products liability law on defective warnings. [Wyeth v. Levine, 555 U.S. 555 (2009)—product may comply with FDA labeling requirements but still be defective due to inadequate warnings]

### c. Common Defect Problems

#### 1) Misuse

Some products may be safe if used as intended, but may involve serious dangers if used in other ways. Courts have required suppliers to **anticipate reasonably foreseeable uses** even if they are “misuses” of the product.

#### EXAMPLES

- 1) Although a screwdriver is intended only for turning screws, a manufacturer must anticipate that screwdrivers are commonly used to pry up lids of cans and must make screwdrivers reasonably safe for that use as well as for their intended use.
- 2) Liquid furniture polish provided for home use may be fit for its intended use, but the manufacturer must anticipate that it will be used around small children who may play with the bottle and spill or drink its contents. Thus, the manufacturer may have to design a product that is either safe when drunk or that has a childproof top. A simple warning of danger may not suffice in most states under the “feasible alternative” approach if a childproof top would cost little to install.

#### 2) Scientifically Unknowable Risks

Occasionally, totally unpredictable hazards of a product do not become apparent until after the product has been marketed. This situation arises most frequently with new drugs that yield unpredictable side effects. Even though these drugs might be dangerous beyond consumer expectations, courts have generally refused to find the drugs unreasonably dangerous where it was impossible to anticipate the problem and make the product safer or provide warnings.

#### 3) Allergies

Some products affect different users differently—the problem of allergic reaction. If the allergic group is significant in number, the product is defective unless adequate warnings are conveyed. The modern trend requires such **warnings** whenever the manufacturer knows that there is a danger of allergic reaction, even though the number affected may be very small.

### 3. No Requirement of Contractual Privity Between Plaintiff and Defendant

Whether the parties to the suit are in privity with each other is generally irrelevant under current law except for some of the warranty theories of liability.

a. **Defined**

The parties are in privity when a contractual relationship exists between them, such as a **direct sale** by the defendant retailer to the plaintiff buyer or the buyer's agent.

b. **Vertical Privity Absent**

Privity does not exist where the injured plaintiff, usually the buyer, is in the direct distribution chain but is suing a remote party—the wholesaler or the manufacturer—rather than the retailer who sold the product to the plaintiff.

c. **Horizontal Privity Absent**

Privity is also absent where the defendant, usually the retailer, is in the direct distribution chain with the buyer, but the plaintiff injured by the product is not the buyer, but rather the buyer's friend, neighbor, or a complete stranger.

## B. LIABILITY BASED ON INTENT

A defendant will be liable to anyone injured by an unsafe product if the defendant intended the consequences or knew that they were substantially certain to occur. Liability based on an intentional tort is **not very common** in products liability cases.

### 1. Tort Involved

If the requisite intent on the part of the defendant is established, the intentional tort on which the cause of action most likely will be based is **battery**.

### 2. Privity Not Required

The presence or absence of privity is irrelevant where liability is based on an intentional tort.

### 3. Damages

In addition to compensatory damages, punitive damages are available in a products liability case based on intent, to the same extent as with intentional torts in general.

### 4. Defenses

The usual defenses available in intentional torts cases, such as consent, would be applicable. Negligence defenses, such as contributory negligence and assumption of risk, are not applicable.

## C. LIABILITY BASED ON NEGLIGENCE

### 1. Prima Facie Case

To establish a prima facie case for negligence in a products liability case, the following elements must be proved:

- a. The existence of a **legal duty** owed by the defendant to that particular plaintiff;

- b. **Breach** of that duty;
- c. **Actual** and **proximate cause**; and
- d. **Damages**.

## 2. Defendant with Duty of Care to Plaintiff

### a. Product Supplier

Anyone who supplies a product to another owes a duty of care, including a casual seller (e.g., the owner of a used car selling it to a friend). The usual case, however, involves a defendant who is a commercial supplier of products. “Suppliers” include: the manufacturer of a chattel or a component part thereof, assembler, wholesaler, retailer, or even a used car dealer who sells reconditioned or rebuilt cars. Those who repair a product owe a general duty of care, but are not usually “suppliers” for purposes of products liability cases.

#### 1) Labeling Another’s Product

A retailer who **labels** a product as the retailer’s own or assembles a product from components manufactured by others is liable for the negligence of the actual manufacturer, even though the retailer is not personally negligent.

### b. Privity Not Required

Since the case of *MacPherson v. Buick*, 217 N.Y. 382 (1916), and its extensions, absence of privity is **not** a defense. The duty of due care is owed to **any foreseeable plaintiff**—user, consumer, or bystander (such as a pedestrian injured when struck by an automobile with defective brakes).

## 3. Breach of Duty

To prove breach of duty, the plaintiff must show (1) **negligent conduct** by the defendant leading to (2) the supplying of a “**defective product**” by the defendant.

### a. Negligence

The defendant’s conduct must fall below the standard of care expected of a reasonable person under like circumstances, considering such superior skill or training as defendant has or purports to have.

#### 1) Proof of Negligence in Manufacturing Defect Case

##### a) Liability of Manufacturer

To show negligence in a manufacturing defect case, the plaintiff may invoke **res ipsa loquitur** against the manufacturer if the error is something that does not usually occur without the negligence of the manufacturer.

**b) Liability of Dealer**

Retailers and wholesalers owe a duty of due care to their customers and foreseeable victims. But the majority view is that a dealer who buys from a reputable supplier or manufacturer with no reason to anticipate that the product is dangerous need make only a cursory inspection of the goods to avoid liability for manufacturing defects.

**2) Proof of Negligence in Design Defect Case**

To establish that a manufacturer's negligence has resulted in a design defect, the plaintiff must show that those designing the product **knew or should have known** of enough facts to put a reasonable manufacturer on notice about the dangers of marketing the product as designed. Negligence is **not** shown if the danger of the product becomes apparent to the reasonable manufacturer only after the product has reached the public. A dealer has the same limited duty for design defects as for manufacturing defects (above).

**b. Defective Product**

The analysis of whether a product is so "unreasonably dangerous" as to be defective, discussed *supra*, applies equally to products liability actions based on negligence and to those based on strict tort liability.

**4. Causation**

The standard negligence analysis for both actual causation and proximate cause applies to products liability cases based on negligence.

**a. Intermediary's Negligence**

An intermediary's negligent failure to discover a defect is **not** a superseding cause, and the defendant whose original negligence created the defect will be held liable along with the intermediary. But when the intermediary's conduct becomes something more than ordinary foreseeable negligence, it becomes a superseding cause.

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**EXAMPLE**

P buys a defective product from Retailer who bought it from D. D would still be liable to P if Retailer had negligently failed to notice a serious defect attributable to D. But if Retailer had in fact discovered the defect but failed to warn P of it, D would not be liable.

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**5. Nature of Damages Recoverable**

A plaintiff may recover for personal injury and property damages as under the usual negligence analysis. However, if the plaintiff suffers **only** economic loss (the product does not work as well as expected or requires repairs), most courts do not permit

recovery under a negligence theory, requiring the plaintiff to bring an action for breach of warranty to recover such damages.

## 6. Defenses

The standard negligence defenses are applicable to any products liability case predicated on negligence. Thus, in comparative negligence states, plaintiff's contributory negligence may be used to reduce his recovery in an action against a negligent supplier of defective chattels.

# D. LIABILITY BASED ON STRICT TORT LIABILITY

For those products liability cases where negligence on the part of the supplier would be difficult to prove, plaintiffs formerly attempted to bring their claims under traditional breach of warranty law as an alternative to using a negligence theory. Gradually, courts began to discard the privity requirement in warranty cases so that an increasing number of victims could recover without proof of negligence. This development has led to strict liability in tort for products liability cases.

## 1. Prima Facie Case

To establish a prima facie case in products liability based on strict liability in tort, the following elements must be proved:

- a. The defendant is a ***commercial supplier***;
- b. The defendant produced or sold a product that was ***defective when it left the defendant's control***;
- c. The defective product was the ***actual*** and ***proximate cause*** of the plaintiff's injury; and
- d. The plaintiff suffered ***damages*** to person or property.

## 2. Defendant Must Be "Commercial Supplier"

Plaintiff must prove that defendant is a ***commercial*** supplier of the product in question, as distinguished from a casual seller (e.g., a homemaker who sells a jar of jam to a neighbor). Thus, strict liability applies when the defendant is a manufacturer (including the manufacturer of a defective component part), retailer, assembler, or wholesaler.

## EXAMPLES

- 1) A theater may be held strictly liable for selling rotten candy. Even though the theater is not in the primary business of selling candy and similar products, it is a retail supplier of those products.
- 2) If the boiler in use on a shoe manufacturer's land explodes, the shoe manufacturer's liability is ***not*** analyzed in terms of products liability because the manufacturer is not a commercial supplier of boilers.

Most courts have expanded strict liability to include mass producers of new homes, commercial lessors of products (e.g., car rental agencies), and sellers of used products that have been reconditioned or rebuilt.

#### a. Distinction Between Product and Service

Strict liability is imposed only on one who supplies a product, as opposed to one primarily performing a service. Restaurants are treated as suppliers of products, while most courts treat a transfusion of infected blood (e.g., that gives the recipient hepatitis) as the rendition of a service.

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#### EXAMPLE

If an airplane crashes due to defective piloting of the plane, a passenger must prove negligence in order to sue the airline company. However, if the passenger sues the manufacturer for a defect in the plane itself, strict liability in tort may be used.

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### 3. Product Not Substantially Altered

To hold the commercial supplier strictly liable for a product defect, the product must be expected to, and must in fact, reach the user or consumer without substantial change in the condition in which it is supplied.

### 4. Privity Not Required

As with liability based on negligence, a majority of courts extend this liability to **any supplier in the chain of distribution** and extend the protection not only to buyers, but also to members of the buyer's family, guests, friends, and employees of the buyer, and foreseeable bystanders.

### 5. Production or Sale of Defective Product

For a strict liability action, the plaintiff need not prove that the defendant was at fault in selling or producing a defective product—only that the product in fact was “defective” (see A.2.b., *supra*) when it left the defendant’s control. As with products liability based on negligence, the two main categories of defects are manufacturing defects and design defects. The only difference in analysis is that the element of **negligence need not be proved** in a strict liability case. Thus, in contrast to a negligence action, a retailer in a strict liability action may be liable for a manufacturing or design defect simply because it was a commercial supplier of a defective product—**even if it had no opportunity to inspect the manufacturer’s product before selling it.**

### 6. Causation

#### a. Actual Cause

To prove actual cause, the plaintiff must trace the harm suffered to a defect in the product that existed **when the product left the defendant’s control.**

However, if the defect is difficult to trace (such as if the product is destroyed),

the plaintiff may rely on an inference that this type of product failure ordinarily would occur only as a result of a product defect. If the plaintiff claims that one of the defective conditions was the lack of an adequate warning, plaintiff is entitled to a presumption that an adequate warning would have been read and heeded.

**b. Proximate Cause**

The same concepts of proximate cause governing general negligence and strict liability actions are applicable to strict liability actions for defective products.

The plaintiff must have used the product in a reasonably foreseeable manner to satisfy this element. As with products liability cases based on negligence, the negligent failure of an intermediary to discover the defect does not cut off the supplier's strict liability.

**7. Nature of Damages Recoverable**

The types of damages recoverable in strict liability actions for defective products are the same as those recoverable in negligence actions, namely personal injury and property damages. Once again, most states **deny** recovery under strict liability when the sole claim is for **economic loss**.

**8. Defenses**

**a. Contributory Negligence States**

According to Restatement (Second) section 402A, ordinary contributory negligence is not a defense in a strict products liability action where the plaintiff merely **failed to discover the defect or guard against its existence**, or where plaintiff's misuse was reasonably foreseeable (*supra*, A.2.c.1)). On the other hand, other types of unreasonable conduct, such as voluntarily and unreasonably encountering a known risk (i.e., assumption of risk), are defenses.

**b. Comparative Negligence States**

As with other strict liability actions, many comparative negligence states apply their comparative negligence rules to strict products liability actions. [See Restatement (Third) of Torts—Products Liability §17]

**c. Disclaimers of Liability Ineffective**

Disclaimers of liability are **irrelevant** in negligence or strict liability cases if personal injury or property damage has occurred.

**E. IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS**

**1. Proof of Fault Unnecessary**

If a product fails to live up to the standards imposed by an implied warranty, the warranty is breached and the defendant will be liable. Plaintiff need not prove any fault on defendant's part.

## 2. Scope of Coverage

The Uniform Commercial Code (“UCC”) provisions apply to the **sale of goods** under Article 2 and the **lease of goods** under Article 2A.

## 3. Implied Warranty of Merchantability

When a merchant who deals in a certain kind of goods sells such goods, there is an implied warranty that they are **merchantable**. [UCC §2-314] “Merchantable” means that the goods are of a quality equal to that **generally acceptable** among those who deal in similar goods and are **generally fit for the ordinary purposes** for which such goods are used.

## 4. Implied Warranty of Fitness for Particular Purpose

An implied warranty of fitness for a particular purpose arises when the seller knows or has reason to know:

- a. The particular purpose for which the goods are required; **and**
- b. That the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods.

[UCC §2-315] Usually the seller will be a merchant of the type of goods in question, but this is not essential.

## 5. Privity

### a. Vertical Privity No Longer Required

Although, in the early period of warranty law, courts held strictly to the requirement of complete privity between the plaintiff and defendant, a trend developed with courts finding the needed privity between remote parties on various fictions and theories—e.g., the warranty ran with the goods, or the retailer was the manufacturer’s agent. As a result, most courts no longer require vertical privity between the buyer and the manufacturer in implied warranty actions.

### b. UCC Alternatives on Horizontal Privity

Although UCC section 2-318 is silent on the issue of vertical privity, it offers the states three alternative versions on the issue of horizontal privity: Alternative A extends implied warranty protection to a **buyer’s family, household, and guests** who suffer personal injury; Alternative B extends protection to any natural person who suffers personal injury; and Alternative C covers any person who suffers any injury. **Most states have adopted Alternative A**, the narrowest modification of the privity requirement.

## 6. Effect of Disclaimers

Disclaimers of liability for breach of implied warranty **must be specific** and are

narrowly construed. [UCC §2-316] Contractual limitations on **personal injury** damages resulting from a breach of warranty for consumer goods are *prima facie unconscionable*. [UCC §2-719]

## 7. Causation

Issues of actual cause and proximate cause are treated as in an ordinary negligence case.

## 8. Damages

In addition to personal injury and property damages, purely **economic losses** are recoverable in implied warranty actions.

## 9. Defenses

### a. Assumption of Risk

UCC section 2-715 indicates that when the plaintiff assumes the risk by using a product while knowing of the breach of warranty, any resulting injuries are not proximately caused by the breach.

### b. Contributory Negligence

Courts in contributory negligence jurisdictions have adopted an approach similar to that used in strict liability in tort—that unreasonable failure to discover the defect does not bar recovery but that unreasonable conduct **after** discovery does bar recovery.

### c. Comparative Negligence

So also, courts in comparative negligence jurisdictions use comparative fault notions in warranty cases to reduce the damage award in the same way as in strict liability cases.

### d. Notice of Breach

UCC section 2-607 requires the buyer to give the seller notice **within a reasonable time** after the buyer discovers or should have discovered the breach. Most courts have held that the requirement applies even in personal injury cases and where there is no privity between the parties.

## F. REPRESENTATION THEORIES (EXPRESS WARRANTY AND MISREPRESENTATION OF FACT)

The two theories discussed in this section differ from those previously discussed because they involve some affirmative representation by the defendant beyond the act of distributing a product. When the product does not live up to the representation, both contract and tort problems are created.

## 1. Express Warranty

An express warranty arises where a seller or supplier makes any affirmation of fact or promise to the buyer relating to the goods that becomes part of the “basis of the bargain.” [UCC §2-313]

### a. Scope of Coverage

As with implied warranties, Article 2A of the UCC extends express warranties to leases.

### b. Privity Not Required

Although UCC section 2-318 declares that its privity alternatives apply to express as well as implied warranties, most courts have held privity to be irrelevant in express warranty cases.

### c. “Basis of the Bargain”

If the buyer is suing, the warranty must have been “part of the basis of the bargain.” This is probably less difficult to show than a buyer’s subjective “reliance” on the representation. If someone not in privity is permitted to sue, this remote person need **not** have known about the affirmation as long as it became part of the basis of the bargain for someone else in the chain of distribution.

### d. Basis of Liability—Breach of Warranty

As with implied warranties, the plaintiff need **not** show that the breach occurred through the fault of the defendant, but only that a breach of the warranty did in fact occur.

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#### EXAMPLE

The defendant advertises its hand lotion as “completely safe” and “harmless.” Even if there is nothing wrong with the product itself, a buyer who suffers an allergic reaction may bring a successful warranty action.

### e. Effect of Disclaimers

UCC section 2-316 provides that a disclaimer will be effective only to the extent that it can be read consistently with any express warranties made. This has the effect of making it practically impossible to disclaim an express warranty.

### f. Causation, Damages, and Defenses

These elements are analyzed the same as under implied warranties, *supra*.

## 2. Misrepresentation of Fact

Liability for misrepresentation may arise when a representation by the seller about a product induces reliance by the buyer. In products cases, liability for misrepresentation is usually based on strict liability, but may also arise for intentional and negligent misrepresentations.

a. **Defendant's State of Mind**

1) **Strict Liability**

As long as the defendant is a seller engaged in the business of selling such products, there is no need to show fault on the defendant's part. The plaintiff need only show that the representation proved false, without regard to the defendant's state of mind.

2) **Intentional Misrepresentation**

For intentional misrepresentations, the plaintiff must show that the misrepresentation was made ***knowingly*** or with ***reckless*** disregard for the facts.

3) **Negligent Misrepresentation**

For negligence liability, knowledge of the misrepresentation on the part of the defendant need not be proved. The plaintiff need only show that a reasonable person should have known such representations to be false when making them.

b. **Material Fact Required**

The misrepresentation must be of a material fact, i.e., a fact concerning the quality, nature, or appropriate use of the product on which a normal buyer may be expected to rely. "Puffing" and statements of opinion are not sufficient.

c. **Intent to Induce Reliance of Particular Buyer**

The defendant must have intended to induce the reliance of the buyer, or a class of persons to which the buyer belongs, in a particular transaction. Evidence of a representation made to the public by label, advertisement, or otherwise is sufficient to show an intent to induce reliance by anyone into whose hands the product may come.

d. **Justifiable Reliance**

There is no liability if the misrepresentation is not known or does not influence the transaction. Reliance may be found if the representation was a ***substantial factor*** in inducing the purchase, even though not the sole inducement.

1) **Reliance Need Not Be Victim's**

As with express warranties, ***privity is irrelevant*** for misrepresentation and the required reliance may be shown to be that of a prior purchaser who passed the product on to the victim.

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**EXAMPLE**

D, a manufacturer of automobiles, advertises that its cars contain "shatter-proof" glass. H reads this advertisement and, partly in reliance on it, buys one of D's cars. While H's friend, F, is driving the car, a stone is thrown

through the windshield, shattering the glass. F, hurt by flying glass, has a strict liability action against D for misrepresentation even though F is not in privity with D and knows nothing of the “shatterproof” representation.

**e. Actual Cause**

Reliance by the purchaser serves to show actual cause.

**f. Proximate Cause and Damages**

Both elements are analyzed in the same manner as for products liability cases based on negligence or strict liability, *supra*. If the plaintiff can show that the misrepresentation was intentional, some courts will allow punitive damages to be claimed.

**g. Defenses**

**1) Assumption of Risk**

If the plaintiff is entitled to rely on the representation, a defense of assumption of risk does not apply.

**EXAMPLE**

D markets a mace pen to be used against attackers. The product's label says that it instantly renders attackers helpless when sprayed in their faces. When holdup men demanded money from P, P shot his mace pen in their faces but it had no effect—except that the attackers got angry and shot P. D's claim that P assumed the risk of injury by not complying with the attackers' demands fails, since P reasonably relied on the product to achieve its stated results.

**2) Contributory Negligence (Fault)**

Whether contributory negligence is a defense depends on the type of misrepresentation. For negligent misrepresentations, contributory negligence is a valid defense. In strict liability actions, the plaintiff's unreasonable behavior is analyzed as in other strict liability actions for defective products, *supra*. If the plaintiff can show that the defendant's misrepresentation was intentional, contributory negligence would be no defense.

## V. NUISANCE

### A. BASIS OF LIABILITY

Nuisance is **not** a separate tort in itself, subject to rules of its own. Nuisances are types of harm—the invasion of either private property rights or public rights by conduct that is tortious because it falls into the usual categories of tort liability. In other words, the defendant's conduct may have been intentional or negligent or subjected to liability on a strict liability basis. As a practical matter, nuisances generally are **intentional** interferences

because defendant has been made aware that his conduct is interfering with plaintiff's use of her land. (If strict liability is the basis for redressing a nuisance, courts sometimes refer to this as an "absolute" nuisance or "nuisance per se.")

## B. PRIVATE NUISANCE

Private nuisance is a **substantial, unreasonable interference** with another private individual's **use or enjoyment** of property he actually possesses or to which he has a right of immediate possession.

### 1. Substantial Interference

The interference with plaintiff's right in his land must be substantial. This means that it must be **offensive, inconvenient, or annoying to an average person in the community**. It will not be characterized as substantial if it is merely the result of plaintiff's hypersensitivity or specialized use of his own property.

### 2. Unreasonable Interference

For a nuisance based on intent or negligence, the interference with plaintiff's use of his land must be unreasonable. To be characterized as unreasonable, the severity of the inflicted **injury must outweigh the utility** of defendant's conduct. In balancing these respective interests, courts take into account that every person is entitled to use his own land in a reasonable way, considering the neighborhood, land values, and existence of any alternative courses of conduct open to defendant.

### 3. Trespass to Land Distinguished

Trespass to land is to be distinguished from private nuisance. In the former, there is an interference with the landowner's **exclusive possession** by a physical invasion of the land; in the latter, there is an interference with **use or enjoyment**.

## C. PUBLIC NUISANCE

Public nuisance is an act that unreasonably interferes with the **health, safety, or property rights of the community**, e.g., blocking a highway or using a building to commit criminal activities such as prostitution, bookmaking, etc. Recovery is available for public nuisance only if a private party has suffered some unique damage not suffered by the public at large.

### EXAMPLE

Pedestrians generally are inconvenienced by having to walk around an obstruction maintained by defendant on the sidewalk. Plaintiff, however, has tripped and fallen. This unique damage permits plaintiff to recover for the public nuisance.

## D. REMEDIES

### 1. Damages

For a private nuisance, or for a public nuisance where plaintiff has suffered some unique damage, the usual remedy is damages.

## 2. **Injunctive Relief**

Where the **legal remedy** of damages is **unavailable or inadequate**, injunctive relief may be granted. The legal remedy may be inadequate for a variety of reasons, e.g., the nuisance is a continuing wrong, the nuisance is of the kind that will cause irreparable injury, etc. In deciding whether an injunction should issue, the courts take into consideration the relative hardships that will result to the parties from the grant or denial of the injunction. Hardships will not be balanced, however, where defendant's conduct was willful.

## 3. **Abatement by Self-Help**

### a. **Abatement of Private Nuisance**

One has the privilege to enter upon defendant's land and personally abate the nuisance after notice to defendant and defendant's refusal to act. The force used may be only that necessary to accomplish the abatement, and the plaintiff is liable for additional harm done.

### b. **Abatement of Public Nuisance**

One who has suffered some unique damage has a similar privilege to abate a public nuisance by self-help. In the absence of such unique damage, however, a public nuisance may be abated or enjoined only by public authority.

## E. DEFENSES

### 1. **Legislative Authority**

Conduct consistent with what a zoning ordinance or other legislative license permits is relevant but not conclusive evidence that the use is not a nuisance.

### 2. **Conduct of Others**

No one actor is liable for all the damage caused by the concurrence of his acts and others.

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#### EXAMPLE

Ten steel mills are polluting a stream. Each steel mill is responsible only for the pollution it causes.

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### 3. **Contributory Negligence**

Contributory negligence is not ordinarily a defense to the tort of nuisance. However, when a nuisance is based on a negligence theory, one may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance. In such a case, a plaintiff, though pleading nuisance, may have to show his freedom from contributory negligence.

#### 4. “Coming to the Nuisance”

The problem: Has plaintiff assumed the risk, thereby being barred from recovery by the fact that he has “come to the nuisance,” by purchasing land and moving in next to the nuisance after it is already in existence or operation? The prevailing rule is that, in the absence of a prescriptive right, the defendant may not condemn surrounding premises to endure the nuisance; i.e., the **purchaser is entitled to reasonable use or enjoyment of his land** to the same extent as any other owner as long as he buys in good faith and not for the sole purpose of a harassing lawsuit.

## VI. GENERAL CONSIDERATIONS

### A. VICARIOUS LIABILITY

Vicarious liability is liability that is derivatively imposed. In short, this means that one person commits a tortious act against a third party, and another person is liable to the third party for this act. This may be so even though the other person has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done everything possible to prevent it. This liability rests upon a special relationship between the tortfeasor and the person to whom his tortious conduct is ultimately imputed.

The basic situations that you should note for bar examination purposes are set out below.

#### 1. Doctrine of Respondeat Superior

An employer will be vicariously liable for tortious acts committed by her employee if the tortious acts occur **within the scope of the employment relationship**.

##### a. Frolic and Detour

An employee on a delivery or on a business trip for his employer may commit a tort while deviating from the employer’s business to run a personal errand. If the deviation was minor in time and geographic area, the employee will still be considered to be acting within the scope of employment rather than on a “frolic” of his own (for which the employer would not be liable).

##### b. Intentional Torts

It is usually held that intentional tortious conduct by employees is **not** within the scope of employment. In some circumstances, however, courts find intentional tortious conduct to be within the ambit of this relationship, such as when:

- 1) Force is authorized in the employment, e.g., bouncer.
- 2) Friction is generated by the employment, e.g., bill collector.
- 3) The employee is furthering the business of the employer, e.g., removing customers from the premises because they are rowdy.

### c. Liability for Own Negligence

Employers may be liable for their **own negligence** by negligently selecting or supervising their employees. This is **not** vicarious liability, however.

## 2. Independent Contractor Situations

In general, a principal will **not** be vicariously liable for tortious acts of her agent if the latter is an independent contractor. Two **broad exceptions** exist, however:

- (i) The independent contractor is engaged in **inherently dangerous activities**, e.g., excavating next to a public sidewalk, blasting.
- (ii) The duty, because of **public policy** considerations, is simply nondelegable, e.g., the duty of a business to keep its premises safe for customers.

### a. Liability for Own Negligence

An employer may be liable for her **own negligence** in selecting or supervising the independent contractor (e.g., hospital liable for contracting with unqualified and incompetent physician who negligently treats hospital's patient). (This is **not** vicarious liability.)

## 3. Partners and Joint Venturers

Each member of a partnership or joint venture is vicariously liable for the tortious conduct of another member committed in the scope and course of the affairs of the partnership or joint venture.

### a. What Is a Joint Venture?

A joint venture, although similar to a partnership, is for a more limited time period and more limited purpose. It is generally an undertaking to execute a small number of acts or objectives. A joint venture exists when two or more people enter into an activity if two elements are present:

#### 1) Common Purpose

The test is not precise, but it would appear that the majority of courts would now look for a "business purpose." The sharing of expenses between individuals is often highly persuasive.

#### EXAMPLES

- 1) Two roommates were driving to a store to get decorating materials for their apartment when an accident occurred. *Held:* Joint venture.
- 2) Two parents were driving child to hospital. *Held:* No joint venture.

#### 2) Mutual Right of Control

It is not crucial that the party does or does not give directions; it is sufficient

if there is an understanding between the parties that each has a right to have her desires respected on the same basis as the others.

#### 4. Automobile Owner for Driver

The general rule is that an automobile owner is **not vicariously liable** for the tortious conduct of another driving his automobile. However, many states by statute or judicial precedent have adopted the “**family car**” doctrine, by which the owner is liable for tortious conduct of **immediate family or household members** who are driving with the owner’s express or implied permission. A number of states have now gone further by enacting “**permissive use**” statutes imposing liability for damage caused by **anyone** driving with such consent.

##### a. Liability for Owner’s Negligence

Remember that the owner may be liable for her **own negligence** in entrusting the car to a driver. Some states have also imposed liability upon the owner if she was present in the car at the time of the accident, upon the theory that she could have prevented the negligent driving, and hence was negligent herself in not doing so. (This is not vicarious liability.)

#### 5. Bailor for Bailee

Under the general rule, the bailor is **not vicariously liable** for the tortious conduct of his bailee. As above, the bailor may be liable for her **own negligence** in entrusting the bailed object. (This is not vicarious liability.)

#### 6. Parent for Child

A parent is **not vicariously liable** for the tortious conduct of the child at common law. Note, however, that most states, by statute, make parents liable for the willful and intentional torts of their minor children up to a certain dollar amount (e.g., \$5,000).

##### a. Child Acting as Agent for Parents

Courts may impose vicarious liability if the child commits a tort while acting as the agent for the parents.

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##### EXAMPLE

Parent vicariously liable if child is in an accident while running an errand for his mother, or driving his sister to school, but not while on a date.

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##### b. Parent Liable for Own Negligence

The parent may be held liable for her **own negligence** in allowing the child to do something, e.g., use a dangerous object without proper instruction. Further, if the parent is apprised of the child’s conduct on past occasions showing a tendency to injure another’s person or property, she may be liable for not using due care in exercising control to mitigate such conduct, e.g., by allowing the child to play with other children he has a history of attacking.

## 7. Tavernkeepers

At common law, no liability was imposed on vendors of intoxicating beverages for injuries resulting from the vendee's intoxication, whether the injuries were sustained by the vendee or by a third person as a result of the vendee's conduct. Many states, to avoid this common law rule, have enacted "**Dramshop Acts.**" Such acts usually create a **cause of action in favor of any third person injured** by the intoxicated vendee. Several courts have imposed liability on tavernkeepers even in the absence of a Dramshop Act. This liability is based on ordinary negligence principles (the foreseeable risk of serving a minor or obviously intoxicated adult) rather than vicarious liability.

## B. PARTIES—MULTIPLE DEFENDANT ISSUES

### 1. Joint and Several Liability

When two or more tortious acts combine to proximately cause an **indivisible** injury to a plaintiff, each tortfeasor is jointly and severally liable for that injury. This means that **each is liable** to the plaintiff for the **entire damage** incurred. Joint and several liability applies even though each tortfeasor acted entirely independently. However, if the actions are independent, plaintiff's injury is divisible, and it is possible to identify the portion of injuries caused by each defendant (e.g., Car 1 breaks plaintiff's leg, and Car 2 breaks plaintiff's arm), then each will only be liable for the identifiable portion.

#### a. Tortfeasors Acting in Concert

When two or more tortfeasors act in concert (i.e., by agreement) and injure plaintiff, then each will be jointly and severally liable for the entire injury. This is so even though the injury is divisible and one could identify what each tortfeasor has done alone.

#### b. Statutory Limitations

Many states have limited the joint liability doctrine by statute in cases based on fault. Two of the most common types of statutes abolish joint liability either (1) for those tortfeasors judged to be less at fault than the plaintiff, or (2) for all tortfeasors with regard to noneconomic damages (e.g., pain and suffering). The liability of a tortfeasor in these situations is proportional to his fault.

### 2. Satisfaction and Release

#### a. Satisfaction

If plaintiff recovers full payment from one tortfeasor, either by settlement or payment of a judgment, there is a "satisfaction." She may not recover further against any other joint tortfeasor. Until there is a satisfaction, however, she may proceed against other jointly liable parties.

#### b. Release

A release is a surrender of plaintiff's cause of action against the party to

whom the release is given. In most states, a release of one tortfeasor does **not** discharge other tortfeasors unless expressly provided in the release agreement. Rather, the claim against the others is reduced to the extent of the amount stipulated in the agreement or the amount of consideration paid, whichever is greater.

### 3. Contribution and Indemnity

#### a. Contribution

As stated above, where joint and several tort liability exists, it permits plaintiff to recover the entire judgment amount from any tortfeasor. The rule of contribution, adopted in some form in most states, allows any tortfeasor required to pay more than his share of damages to have a claim against the other jointly liable parties for the excess. Thus, contribution is a device whereby responsibility is **apportioned** among those who are at fault.

##### 1) Methods of Apportionment

###### a) Comparative Contribution

Most states have a comparative contribution system (discussed below), whereby contribution is imposed **in proportion to the relative fault** of the various tortfeasors.

###### b) Equal Shares

A minority of states require all tortfeasors to pay **equal shares** regardless of their respective degrees of fault.

##### 2) Contribution Tortfeasor Must Have Liability

The tortfeasor from whom contribution is sought must be originally liable to the plaintiff. If the contribution tortfeasor has a defense that would bar liability, such as intra-family tort immunity, he is not liable for contribution.

##### 3) Not Applicable to Intentional Torts

Contribution is not allowed in favor of those who committed intentional torts. This is so even though each of the tortfeasors was equally culpable.

#### b. Indemnity

Indemnity involves **shifting the entire loss** between or among tortfeasors, in contrast to apportioning it as in contribution. Indemnity is available in the following circumstances:

##### 1) Right to Indemnity by Contract

Contracts in which one person promises to indemnify another against consequences of his own negligence are generally upheld. The right to indemnification will not be read into an agreement unless there is evidence that the right was clearly intended.

**2) Vicarious Liability**

When one is held for damages caused by another simply because of his relationship to that person (e.g., employer for employee's torts, landowner with nondelegable duty breached by an independent contractor, etc.), this party may seek indemnification from the person whose conduct actually caused the damage.

**3) Indemnity Under Strict Products Liability**

Each supplier of a defective product, where strict liability rules apply, is liable to an injured customer, but each supplier has a right of indemnification against all previous suppliers in the distribution chain. The manufacturer is ultimately liable if the product was defective when it left its control.

**4) Identifiable Difference in Degree of Fault**

A number of jurisdictions extend the principle of indemnity to allow one joint tortfeasor to recover against a co-joint tortfeasor where there is a considerable difference in degree of fault. In other words, he who is least at fault may be able to recover indemnification from the "more wrongful" tortfeasor.

**a) Examples**

The most common examples of such indemnification are:

**(1) Retailers Who Negligently Rely on Product's Condition**

Retailers who negligently fail to discover a product's defect may receive indemnification from the manufacturer who negligently manufactured it.

**(2) Where Liability Imposed Under Secondary Duty**

One whose liability is based on a secondary duty may recover indemnification from the person who had a primary duty.

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**EXAMPLE**

Municipal corporation under duty to keep streets safe may recover from a person who creates the unsafe condition causing an accident.

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**(3) Active/Passive Negligence Doctrine**

Some jurisdictions allow a joint tortfeasor who is passively negligent to recover indemnification from a joint tortfeasor who is actively negligent.

**EXAMPLE**

Charles parked his car in a no-parking zone, blocking the view of drivers approaching the intersection. Bowater, driving at 70 m.p.h., hits a pedestrian who could not be seen until it was too late to stop. If the pedestrian sues Charles and recovers, Charles may seek full reimbursement from Bowater by way of indemnification.

**b) Effect of Comparative Negligence System**

Most states with comparative negligence systems **reject** indemnity in degree of fault situations, instead applying a general comparative contribution system and apportioning damages based upon relative fault (see discussion below). These states continue to permit indemnity where indemnity rules are not based on differences in degree of fault, e.g., vicarious liability cases.

**c. Comparative Contribution**

A **majority** of states have now adopted a comparative contribution system based on the **relative fault** of the various tortfeasors. Comparative contribution changes the traditional method of apportionment in contribution cases (*supra*) and supplants indemnification rules based on identifiable differences in degree of fault. In both situations, nonpaying tortfeasors are required to contribute only in proportion to their relative fault.

**EXAMPLE**

Plaintiff suffers \$100,000 in damages from the combined negligence of D1 and D2. The jury determines that D1 is 80% at fault and D2 is 20% at fault. Applying joint and several liability rules, plaintiff recovers all \$100,000 of her damages from D2. Under comparative contribution, D2 can recover \$80,000 from D1.

**C. SURVIVAL AND WRONGFUL DEATH****1. Survival of Tort Actions**

At common law, a tort action abated at the death of either the tortfeasor or the victim. Most states have changed this by statute, i.e., the "survival acts." Thus, a victim's cause of action will survive to permit recovery of all damages from the time of injury to the time of death. In the majority of states, these acts apply to both torts to **property** and torts resulting in **personal injury**.

**a. Torts that Expire on Victim's Death**

Exceptions exist in most jurisdictions for those torts that invade an **intangible personal interest**, e.g., defamation, malicious prosecution, etc. These torts are felt to be so personal as to expire upon the victim's death.

## 2. Wrongful Death

Every state has now enacted some form of wrongful death act.

### a. Who May Bring Action?

In some jurisdictions, the personal representative is the proper party to bring the action; in others, the surviving spouse or next of kin herself might be the proper party.

### b. Measure of Recovery

The measure of recovery in wrongful death actions under most statutes is for the pecuniary injury resulting to the spouse and next of kin. Basically, this allows recovery for loss of support, loss of companionship, etc. It does **not** allow any recovery for decedent's pain and suffering; those damages would be an element of a personal injury survival action (see above) brought on behalf of the decedent.

#### 1) Deaths of Children, Elderly People

Even though the actual loss of support may be very small where decedent is a child or elderly person, most states, nonetheless, allow recovery. Usually, the judgment is quite modest.

#### 2) Rights of Creditors

Creditors of the decedent have no claim against the amount awarded.

### c. Effect of Defenses

#### 1) Defenses Against Deceased

Recovery is allowed **only** to the extent that the deceased could have recovered in the action if he had lived. Thus, for example, his contributory negligence would reduce or bar a wrongful death recovery in comparative negligence states.

#### 2) Defenses Against Beneficiary

Defenses against potential beneficiaries do not bar the action. However, that particular beneficiary's recovery will be reduced or barred under the state's comparative negligence rules. The total damage award assessed by the jury will be reduced by the amount withheld from the beneficiary.

## D. TORTIOUS INTERFERENCES WITH FAMILY RELATIONSHIPS

### 1. Spousal

In most jurisdictions, a spouse may recover damages for loss of their spouse's consortium or services because of injuries to the spouse from defendant's tortious conduct, whether intentional, negligent, or based on strict liability.

**EXAMPLE**

Chauncey hits Husband on the head with a lead pipe, leaving him in a coma for several months and permanently disabled. Wife can recover from Chauncey for loss of consortium and services.

**2. Parent-Child****a. Parent's Actions**

A parent may maintain an action for loss of the child's services and consortium when the child is injured as a result of defendant's tortious conduct, whether such conduct is intentional, negligent, or based on strict liability.

**b. Child's Action**

A child has **no** action in most jurisdictions against one who tortiously injures his parent.

**3. Nature of Action for Family Relationship Interference**

The action for interference with family relationships is **derivative**. Recovery in the derivative action depends on the potential success of the injured family member's own action. Thus, any defense that could be raised against the injured family member, e.g., her own contributory negligence, can also be raised in the derivative action for interference with family relationships.

Furthermore, a defense against a family member seeking such a derivative recovery may also be raised in this action.

**EXAMPLE**

Husband and Wife, while driving, collide with Chauncey's car. Wife is severely injured; Husband and Chauncey are both negligent. Husband's recovery in his derivative action for loss of Wife's consortium and services will be reduced or barred by his own contributory negligence.

**E. TORT IMMUNITIES****1. Intra-Family Tort Immunities****a. Injury to Person**

Under the traditional view, one member of a family unit (spouse, parent, or unemancipated child) could **not** sue another in tort for personal injury. This view has undergone substantial change in most states.

**1) Interspousal Immunity Abolished**

Most states have abolished interspousal immunity. Either spouse may now maintain a tort action against the other.

**2) Parent-Child Immunity Limited**

A slight majority of states have abolished parent-child immunity; however, these states generally grant parents broad discretion in the parent's exercise of parental authority or supervision. The remaining states retain parent-child immunity but do not apply it in cases of **intentional** tortious conduct and, in many of these states, in **automobile accident** cases (at least to the extent of insurance coverage).

**b. Injury to Property**

A suit for property damage may usually be maintained by any family member against any other family member. In short, to the extent that intra-family tort immunity exists, it applies to personal, not property, injuries.

**2. Governmental Tort Immunity**

Under the doctrine of sovereign immunity, governmental units were traditionally not subject to tort actions unless they had consented to the suit. Now, by statute and judicial decision, that immunity is considerably limited. Note, however, that a waiver of sovereign immunity does not create any new tort duties; it only waives immunity for existing statutory or common law duties of care.

**a. Federal Government**

By virtue of the Federal Tort Claims Act, Title 28 U.S.C., the United States has **waived immunity** for tortious acts. Under its provisions, the federal government may now be held liable to the same extent as a private individual. However, the Act spells out several situations where this immunity will still attach:

**1) United States Still Immune for Certain Enumerated Torts**

Immunity still attaches for (1) assault, (2) battery, (3) false imprisonment, (4) false arrest, (5) malicious prosecution, (6) abuse of process, (7) libel and slander, (8) misrepresentation and deceit, and (9) interference with contract rights.

**2) Discretionary Acts Distinguished from Ministerial Acts**

The immunity is not waived for acts characterized as "discretionary," as distinguished from those acts termed "ministerial." In general, discretionary activity is that involving **considerations of political or economic policy**, usually made by senior officials, while ministerial acts are performed at the **operational level** of government (e.g., repairing traffic signals, driving a vehicle).

**3) Government Contractors**

A government contractor may assert the federal government's immunity defense in a products liability case if the contractor conformed to reasonable, precise specifications approved by the government and warned the government about any known dangers in the product.

**b. State Governments**

Most states have substantially waived their immunity from tort actions to the same extent as the federal government. Thus, immunity still attaches for discretionary acts and for legislative and judicial decisionmaking.

*Note:* Where federal or state sovereign immunity still attaches, it also, as a general rule, covers not only “the government” but the various federal and state agencies as well, e.g., schools, hospitals, etc.

**c. Municipalities**

About half of the states have abolished municipal tort immunity by statute or judicial decision to the same extent that they have waived their own immunity. Hence, immunity is abolished for everything but discretionary acts and policy decisions.

**1) Immunity Abolished—Public Duty Rule Limitation**

Where municipal immunity has been abolished, many courts apply the “public duty” doctrine to limit the scope of government liability. A duty that is owed to the public at large, such as the duty of police to protect citizens, is not owed to any particular citizen, and no liability exists for failure to provide police protection in the absence of a ***special relationship*** between the municipality and the citizen that gives rise to a special duty. A special relationship can be shown by: (1) an assumption by the municipality, through promises or actions, 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 affirmative undertaking.

**2) Immunity Retained—Limited to Governmental Functions**

Where municipal immunity still exists in its traditional form, the courts have sought in many instances to avoid its consequences. This has primarily been accomplished by differentiating between “governmental” and “proprietary” functions of the municipality. Immunity attaches to the former but not to the latter.

**a) Governmental Functions**

Certain functions historically have been construed such that they could only be performed adequately by the government, and thus they are held to be “governmental” in character, e.g., police, fire, courts, etc. As stated above, ***tort immunity attaches*** to those functions.

**b) Proprietary Functions**

If the municipality is performing a function that might as well have

been provided by a private corporation, the function is construed as a “proprietary” one (e.g., utility companies, maintaining airport parking lot, etc.). **No tort immunity** attaches here.

The inference that a function is “proprietary” is strengthened where the city collects **revenues** by virtue of providing the service.

#### d. Immunity of Public Officials

In addition to the immunity conferred on the government entity, government officials may also have immunity from tort liability. Immunity applies to a public officer carrying out his official duties where they involve **discretionary** acts (*supra*) done without malice or improper purpose. On the other hand, for acts that are construed as **ministerial** (which generally involve lower-level officials), no tort immunity applies.

### 3. Charitable Immunity

The majority of jurisdictions have abrogated the common law rule of charitable immunity either by statute or decision. Even where such immunity still exists, it is riddled with exceptions.

## VII. HARM TO ECONOMIC AND DIGNITARY INTERESTS

The torts in this section involve less tangible harms to a person’s relational interests with other persons in society.

Depending on the tort involved, the level of fault required for the *prima facie* case may range from intent to strict liability.

### A. DEFAMATION

#### 1. Prima Facie Case

To establish a *prima facie* case for defamation, generally the following elements must be proved:

- a. **Defamatory language** on the part of the defendant;
- b. The defamatory language must be **“of or concerning” the plaintiff**—meaning it must identify the plaintiff to a reasonable reader, listener, or viewer;
- c. **Publication** of the defamatory language by the defendant to a third person;
- d. **Damage to the reputation** of the plaintiff;
- e. **Falsity** of the defamatory language; and
- f. **Fault** on the defendant’s part.

## 2. Defamatory Language

Defamatory language is language that tends to adversely affect one's reputation. This may result from impeaching the individual's honesty, integrity, virtue, sanity, or the like.

### a. Inducement and Innuendo

If the statement standing alone is defamatory, it is defamatory "on its face." However, a statement is also actionable if the defamatory meaning becomes apparent only by adding extrinsic facts. The plaintiff pleads and proves such additional facts as inducement and establishes the defamatory meaning by innuendo. Inducement and innuendo identify to the courts and the parties that extrinsic facts are being introduced to the court by the plaintiff to establish the first element of a *prima facie* case.

#### EXAMPLE

Defendant publishes an erroneous report that Plaintiff has given birth to twins. This is defamatory because Plaintiff pleads and establishes that she had been married only one month.

### b. Methods of Defamation

Not all defamation consists of direct remarks. Pictures, satire, drama, etc., may convey an actionable defamatory meaning.

### c. Statements of Opinion

While a statement of fact may always be defamatory, a statement of opinion is actionable only if it appears to be based on specific facts, **and** an express allegation of those facts would be defamatory.

#### EXAMPLE

The statement "I don't think Robert can be trusted with a key to the cash register" implies personal knowledge of dishonest conduct by Robert, and thus may be actionable.

### 1) Distinguishing Fact and Opinion

Whether a published statement is one of "fact" or "opinion" depends on the circumstances surrounding the publication and the nature of the words used. Generally, the broader the language used, the less likely that it will be reasonably interpreted as a statement of fact or an opinion based on specific facts.

### d. Who May Be Defamed?

#### 1) Individual

Any *living* person may be defamed. Defamation of a deceased person is not actionable.

**2) Corporation, Unincorporated Association, and Partnership**

In a limited sense, a corporation, unincorporated association, or partnership may also be defamed, for example, by remarks as to its financial condition, honesty, integrity, etc.

**3. “Of or Concerning” the Plaintiff**

The plaintiff must establish that a **reasonable** reader, listener, or viewer would understand that the defamatory statement referred to the plaintiff.

**a. Colloquium**

A statement may be actionable even though no clear reference to the plaintiff is contained on the face of the statement. In such a case, however, the plaintiff is required to introduce additional extrinsic facts that would lead a reasonable reader, listener, or viewer to perceive the defamatory statement as referring to the plaintiff. Pleading and proving such extrinsic facts to show that the plaintiff was, in fact, intended is called “colloquium.”

**b. Group Defamation**

A significant issue is presented with respect to this *prima facie* case element when the defamatory language refers to a group without identifying any particular individual within that group. In such cases, the following rules operate:

**1) All Members of Small Group**

Where the defamatory language refers to all members of a small group, each member may establish that the defamatory statement was made of and concerning him by alleging that he is a member of the group.

**2) All Members of Large Group**

If, however, the defamatory statement refers to all members of a large group, no member of that group may establish this element of the cause of action.

**3) Some Members of Small Group**

Where the defamatory language refers to some members of a small group, plaintiff can recover if a reasonable person would view the statement as referring to the plaintiff.

**4. Publication**

A statement is not actionable until there has been a “publication.” The publication requirement is satisfied when there is a **communication to a third person who understood it.**

**EXAMPLE**

Libby saw a defamatory statement about Jeffrey printed in Russian. The publication requirement is not met unless it is shown that Libby understood the Russian words.

The communication to the third person may be made either ***intentionally or negligently***.

**a. Only Intent to Publish Required**

Once publication is established, it is no defense that the defendant had no idea that she was defaming plaintiff because she neither knew nor had reason to know that plaintiff existed (use of fictional name), nor knew that the publication was defamatory. It is the intent to publish, not the intent to defame, that is the requisite intent.

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**EXAMPLE**

Defendant published a false statement that Plaintiff had given birth to twins. If Defendant neither knew nor had reason to know that Plaintiff had been married only one month, Defendant is nonetheless liable.

**b. Repetition**

Each repetition of the defamatory statement is a separate publication for which the plaintiff may recover damages.

**c. “Single Publication” Rule—Statute of Limitations**

However, as to publication of a defamatory statement in a number of copies of the same newspaper, magazine, or book, most American courts have adopted the “single publication” rule. Under this rule, all copies of a newspaper, magazine, or book edition are treated as only one publication. The publication is deemed to occur when the finished product is released by the publisher for sale (a matter which is, obviously, most important for the running of the statute of limitations). Damages are still calculated on the total effect of the story on all of the readers.

**d. Who May Be Liable?**

**1) Primary Publisher**

Each individual who takes part in making the publication is charged with the publication as a primary publisher; for example, a newspaper or TV station carrying a defamatory message would be viewed as a primary publisher and held responsible for that message to the same extent as the author or speaker. Note, however, that an Internet service provider is **not** treated as a publisher when a user of its service posts defamatory content.

**2) Republisher**

A republisher (that is, one who repeats a defamatory statement) will be held **liable** on the same general basis as a primary publisher. This is so even if the repeater states the source or makes it clear that she does not believe the defamation.

*Note:* Where there has been a republication, the original defamer's liability may be increased to encompass any new harm caused by the repetition if the republication was either (1) intended by the original defamer or (2) reasonably foreseeable to her.

### 3) Secondary Publishers

One who is responsible only for disseminating materials that might contain defamatory matter (for example, a vendor of newspapers, a player of an audio recording) is viewed as a secondary publisher. Such individuals are liable only ***if they know or should know*** of the defamatory content.

## 5. Damage to Plaintiff's Reputation

In ascertaining whether this element of the plaintiff's *prima facie* case has been satisfied, it may be necessary to distinguish between libel and slander. As will be seen below, the burden of proof as to damages (to the plaintiff's reputation) may depend on this distinction.

### a. General and Special Damages

#### 1) General or Presumed Damages

General damages are presumed by law and need not be proved by the plaintiff. They are intended to compensate the plaintiff for the general injury to her reputation caused by the defamation.

*Note:* Constitutional free speech and press considerations may restrict an award of presumed damages when the defamation involves matters of "public concern." [Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985)] (See 7.d.3), *infra*.)

#### 2) Special Damages

Special damages in a defamation law context means that the plaintiff must specifically prove that she suffered ***pecuniary loss*** as a result of the defamatory statement's effect on her reputation, and are not proved merely by evidence of actual injury—such as the loss of friends, humiliation, or wounded feelings. The loss of a job, a prospective gift or inheritance, an advantageous business relationship, or customers are pecuniary losses such as those contemplated by the special damages requirement.

### b. Libel

#### 1) Definition

Libel is a defamatory statement recorded in ***writing or some other permanent form***. A libel may also be recorded by radio or television in some circumstances. (See below.)

## 2) Damages Rules for Libel

### a) General Damages Presumed

In most jurisdictions, general damages are **presumed by law** for all libels; that is, special damages need not be established.

### b) Libel Distinction—Minority Position

A substantial minority of courts distinguish between libel per se and libel per quod in determining whether a libel is actionable without proof of special damages.

#### (1) Libel Per Se—Presumed Damages

These courts take the position that injury to the reputation of the plaintiff is presumed by law only if the statement is libelous and defamatory on its face (libel per se). Thus, such libels are actionable without pleading or proving special damages.

#### (2) Libel Per Quod—Special Damages Usually Required

The libelous statement that is not defamatory on its face, but that requires reference to extrinsic facts to establish its defamatory content, is characterized as libel per quod by these courts. These courts generally require special damages to be pleaded and proved for such libels.

## c. Slander

### 1) Definition

Slander is **spoken defamation**. It is to be distinguished from libel in that the defamation is in less permanent and less physical form.

### a) Characterization of Repetitions

Where the original defamation is libel, any repetition, even if oral, is also libel. On the other hand, the written repetition of a slander will be characterized as libel.

### b) Radio and Television Broadcasts Generally Libel

Most courts today treat defamation in radio and television broadcasts as libel, regardless of whether it was scripted. [See Restatement (Third) of Torts §568A]

## 2) Damages Rules for Slander

### a) Special Damages Usually Required

In slander, injury to reputation is **not presumed**. Thus, ordinary slander is not actionable in the absence of pleading and proof of special damages.

**b) Slander Per Se—Injury Presumed**

If, however, the spoken defamation falls within one of four categories, characterized as slander per se, an injury to reputation is presumed without proof of special damages. These four categories are:

**(1) Business or Profession**

A defamatory statement adversely reflecting on the plaintiff's abilities in his business, trade, or profession is actionable without pleading or proof of special damages. Statements that the plaintiff is dishonest or lacks the basic skill to perform his profession or carry out his office are examples of this slander per se category. The statement must, however, directly relate to the plaintiff's profession, trade, or business.

**EXAMPLE**

Statement about an engineer stating "he is a terrorist" is not directly related to his trade.

**(2) Loathsome Disease**

A defamatory statement that the plaintiff is presently suffering from a loathsome and communicable disease is actionable without pleading or proof of special damages. Historically, this slander per se category has been limited to venereal disease and leprosy.

**(3) Crime Involving Moral Turpitude**

A defamatory statement that the plaintiff is or was guilty of a crime involving moral turpitude is actionable without pleading or proof of special damages. Because common law crimes generally are deemed to involve moral turpitude (for example, assault, larceny, perjury), this category of slander per se incorporates a large number of statements. The Restatement extends this category to all crimes punishable by imprisonment.

**(4) Sexual Misconduct**

A defamatory statement imputing that the plaintiff has engaged in serious sexual misconduct is actionable without pleading or proof of special damages.

**d. “Per Se”**

“Per se” means defamatory on its face when used in libel actions and means slander within one of the four categories when used in slander actions.

## 6. Falsity

At common law, a defamatory statement was presumed to be false. The Supreme Court, however, rejected this presumption in all cases in which the plaintiff is constitutionally required to prove some type of fault (see below). In these cases, the plaintiff must prove as an element of the *prima facie* case that the statement was false. [Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)] A majority of states also now require that the plaintiff establish falsity in all defamation cases as a matter of state law.

### a. Exam Approach

Even where the statement is true, it may nonetheless give rise to liability if it is uttered under circumstances sufficient to constitute intentional infliction of severe emotional distress or invasion of the right to privacy; hence, consider these torts as well when your exam question presents potentially defamatory statements. However, where the plaintiff is a public figure or the matter is one of public concern, and recovery for defamation would be barred on First Amendment grounds, he will not be allowed to rely on these other tort theories. [Snyder v. Phelps, 562 U.S. 443 (2011)]

## 7. Fault on Defendant's Part

Although at common law defamation liability could be strict, a number of Supreme Court decisions based on the First Amendment impose a fault requirement in cases involving public figures or matters of public concern depending on the type of plaintiff. In addition, a majority of states now require a showing of fault on the part of the defendant (at least negligence) in all defamation cases as a matter of state law.

### a. Public Officials—Actual Malice Required

A public official may not recover for defamatory words relating to his official conduct in the absence of “clear and convincing” proof that the statement was made with “actual malice.” (See below.) [New York Times v. Sullivan, 376 U.S. 254 (1964)]

### b. Public Figures—Actual Malice Required

The rule of *New York Times v. Sullivan* has been extended to cover litigation where the plaintiff is a public figure. [Associated Press v. Walker, 388 U.S. 130 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)]

#### 1) What Constitutes a Public Figure?

A person may be deemed a “public figure” on one of two grounds: (1) where he has achieved **such pervasive fame or notoriety** that he becomes a public figure for all purposes and contexts (for example, celebrity sports figure); or (2) where he voluntarily assumes a **central role** in a particular **public controversy** (for example, prominent community activist) and

thereby becomes a “public figure” for that limited range of issues. [Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)]

In *Gertz*, the Court indicated that it might be possible for a person to become a public figure through no purposeful action of his own, but considered such instances to be “exceedingly rare.” Subsequent cases support this interpretation. [Time, Inc. v. Firestone, 424 U.S. 448 (1976); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Wolston v. Reader’s Digest Association, 443 U.S. 157 (1979)]

c. **What Is Actual Malice?**

1) **Test**

Actual malice was defined by the Supreme Court in *New York Times v. Sullivan* as:

- a) **Knowledge** that the statement was false, **or**
- b) **Reckless disregard** as to its truth or falsity.

2) **What Constitutes “Knowledge or Reckless Falsity”?**

It must be shown that the defendant was subjectively aware that the statement he published was false or that he was subjectively reckless in making the statement. [*New York Times v. Sullivan, supra*]

a) **Reckless Conduct—Subjective Standard**

“Reckless” conduct is **not** measured by a reasonable person standard or by whether a reasonable person would have investigated before publishing. There must be a showing that the defendant in fact (subjectively) **entertained serious doubts** as to the truthfulness of his publication.

b) **Spite, etc., Not Enough**

It is not enough that the defendant is shown to have acted with spite, hatred, ill will, or intent to injure the plaintiff.

3) **Alteration of Quotation as Actual Malice**

A journalist deliberately altering a quotation attributed to a public figure can be found to have “knowledge of falsity” if it can be established that the alteration results in a **material change in the meaning conveyed by the statement**. [*Masson v. New Yorker Magazine*, 501 U.S. 496 (1991)]

d. **Private Persons Need Not Prove Actual Malice**

Where the defamatory statement relates to a **nonpublic** person, there is less concern for freedom of speech and press. In addition, private individuals are

more vulnerable to injury from defamation because they usually do not have the same opportunities for rebuttal as do public persons. Accordingly, defamation actions brought by private individuals are subject to constitutional limitations only when the defamatory statement involves a matter of “public concern.” And even in those cases, the limitations are not as great as those established for public officials and public figures. [Gertz v. Robert Welch, Inc., *supra*]

**1) Matters of Public Concern—At Least Negligence Required**

When the defamatory statement involves a matter of public concern, Gertz imposes two restrictions on private plaintiffs: (1) it prohibits liability without fault, and (2) it restricts the recovery of presumed or punitive damages.

**a) No Liability Without Fault**

Where the statement published is such that its defamatory potential was **apparent** to a reasonably prudent person, the plaintiff must show that the defendant permitted the false statement to appear, if not through actual malice, at least through **negligence** as to its truth or falsity.

- (1) The Supreme Court has left open the question of what the fault standard would be where the statement published involved **no** apparent defamatory potential (that is, factual misstatements that are innocent on their face and require proof of extrinsic facts to be defamatory, such as libel per quod).

**b) Damages Limited to “Actual Injury”**

Assuming the defendant was in fact negligent in ascertaining the truth of what it published—but still it had no actual knowledge of the falsity, nor was it guilty of reckless disregard for the truth—damages can be recovered but are limited to the “**actual injury**” sustained by the plaintiff; that is, presumed damages are prohibited.

**(1) “Actual Injury”**

The Supreme Court has deliberately chosen not to define this term, but has stated that it is **not limited to out-of-pocket loss**. It may include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering (that is, an injury to reputation not resulting in special damages may still be actionable). The important point is that there must be **competent evidence** of “actual” injury (no presumed damages), although there need be no evidence that assigns an actual dollar value to the injury.

**(2) Presumed Damages or Punitive Damages Allowable Where Actual Malice Found**

It follows that if the plaintiff cannot prove “actual injury,” he cannot

recover any damages, **unless** he can show that the publication was made with knowledge of its falsity or with reckless disregard for the truth. There is no constitutional protection for publications made with “knowledge or reckless falsity,” and hence, the plaintiff is entitled to whatever recovery is permitted under state law in such cases (that is, “presumed” or general damages and even punitive damages in appropriate cases). Note that this approach is simply a restatement of the general rule in torts that damages must be proved in negligence actions (see *supra*, II.E.) but usually are not required where the defendant is more culpable, such as for intentional torts.

**2) Matters of Purely Private Concern—No Constitutional Limitations**

When the defamatory statement involves a matter of purely private concern, the constitutional limitations established by *Gertz* do not apply. Thus, presumed and punitive damages might be recoverable even if actual malice is not established. Note, though, that most states now require proof of negligence as a matter of state law even for defamation on matters of private concern.

**3) What Is a Matter of Public Concern?**

To determine whether the matter is a public or private concern, the courts will look to the content, form, and context of the publication. [Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., *supra*]

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**EXAMPLE**

In *Dun & Bradstreet*, the Court determined that a credit agency’s erroneous report of plaintiff’s bankruptcy, distributed to five subscribers, was speech solely in the private interest of the speaker and its specific business audience. The content (the bankruptcy of a small business), the form (a credit agency report), and the context (a communication to only five subscribers) established that a matter of public concern was not involved.

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## 8. Defenses to Defamation

### a. Consent

As with all torts, consent is a complete defense to a defamation action. (The rules relating to consent discussed under intentional torts, *supra*, also apply here.)

### b. Truth

In cases where the plaintiff is not obligated to prove falsity of the statement as part of their own case, the defendant may establish the truth of the statement as a complete defense.

**c. Absolute Privilege**

Under certain circumstances, the speaker is not liable for defamatory statements because he enjoys an absolute privilege. Such absolute privileges are **not** affected by a showing of malice, abuse, or excessive provocation, as in the case of qualified privileges (see below). Absolute privilege exists in the following cases:

**1) Judicial Proceedings**

All statements made by the judge, jurors, counsel, witnesses, or parties in judicial proceedings are absolutely privileged. The privilege attaches to **all** aspects of the proceedings, for example, statements made in open court, pretrial hearing, deposition, or in any of the pleadings or other papers in the case.

There is a requirement that the statement bear some ***reasonable relationship*** to the proceedings.

**2) Legislative Proceedings**

All remarks made by either federal or state legislators in their official capacity during legislative proceedings are likewise absolutely privileged.

There is ***no requirement of a reasonable relationship*** to any matter at hand.

**3) Executive Proceedings**

A governmental executive official is absolutely privileged with respect to any statement made by her while exercising the functions of her office.

There is a requirement that the statement have some ***reasonable relationship*** to the executive matter or proceeding in which she is acting.

**4) “Compelled” Broadcast or Publication**

A radio or TV station compelled to allow a speaker the use of the air, a newspaper compelled to print public notices, etc., is absolutely privileged in an action based on the content of the compelled publication. [Farmers Educational Cooperative v. WDAY, 360 U.S. 525 (1959)]

**EXAMPLE**

Radio station gave time to one candidate for public office and hence came under obligation to extend similar treatment to other candidates for the same office. Station had no right to censor these later speeches. Thus, no liability attaches for defamation they might contain.

**5) Communications Between Spouses**

Communications from one spouse to another are generally treated as being absolutely privileged.

*Note:* Some states have dealt with communications between spouses on the basis that there is no publication. This is not the preferred view.

#### d. Qualified Privilege

In certain situations, a speaker may say something defamatory without being liable because of the existence of a qualified privilege.

##### 1) Qualified Privilege Situations

Included within the category of qualified privilege situations are the following:

###### a) Reports of Public Proceedings

There is a qualified privilege for reports of public hearings or meetings. This includes judicial, legislative, or executive proceedings as well as other proceedings of sufficient public interest, for example, political convention, trade association meeting, etc.

The privilege **excuses accurate reports** of statements that were false when made, but it **does not excuse inaccuracies** in the reporting of statements.

###### b) Public Interest

###### (1) Publication to One Acting in Public Interest

Statements made to those who are to take official action of some kind are qualifiedly privileged.

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###### EXAMPLE

Statements made to a parole board about a prisoner by one who opposed the grant of parole are privileged.

###### (2) Fair Comment and Criticism

One is permitted to make remarks that disparage another's acts in the course of a critique of public interest, for example, book reviews, articles on public institutions, etc. The matter commented upon must be of **general public interest**.

*Note:* Obviously, the "qualified privilege" areas of subsections a) and b) have generally been preempted by the constitutional requirements imposed by *New York Times v. Sullivan* and its progeny, *supra*.

**c) Interest of Publisher**

When the defendant's statement is made to defend her own actions, property, or reputation, it may be privileged.

**EXAMPLE**

A statement by a debtor explaining to a collection agency her reason for not paying a bill is qualifiedly privileged even if defamatory statements are contained therein.

**d) Interest of Recipient**

A qualified privilege is recognized when the recipient has an interest in the information and it is reasonable for the defendant to make the publication, that is, when she is not a mere intermeddler.

**EXAMPLES**

- 1) A statement by a credit bureau to a customer is qualifiedly privileged.
- 2) A statement made by a former employer to a prospective employer about a job applicant is qualifiedly privileged.

**e) Common Interest of Publisher and Recipient**

When there is a common interest between the publisher and the recipient, there is a qualified privilege.

**EXAMPLE**

A statement by one board member of a charitable foundation, relating to the foundation's business, to another board member is qualifiedly privileged.

**2) Loss of Qualified Privilege Through Abuse**

A qualified privilege exists only if exercised in a reasonable manner and for a proper purpose. Thus, even though the facts might otherwise give rise to a qualified privilege situation, the actor may have lost this privilege by virtue of his conduct. There are two basic ways in which this generally occurs:

**a) Statement Not Within Scope of Privilege**

The allegedly protected statement must fall within the scope of the privilege. Hence, the privilege does not encompass the publication of irrelevant defamatory matter unconnected with the public or private interest entitled to protection.

Similarly, the privilege does not cover publication to any person whose hearing or reading of the statement could not reasonably be believed to be necessary for the furtherance of that interest.

**b) Actual Malice**

A qualified privilege will be lost if it is shown that the speaker acted with actual malice, that is, (1) **knowledge** that it was untrue or (2) a **reckless disregard** as to its truth or falsity.

*Note:* At common law, many courts held that malice in the sense of ill will of the defendant toward the plaintiff would result in loss of the qualified privilege. Most courts no longer apply common law malice here, however. As long as the defendant is using a proper occasion for a qualified privilege in a proper way, she will not lose this privilege simply because she bears ill will toward the plaintiff.

**3) Qualified Privilege—Burden of Proof**

The **defendant bears the burden** of proving that a privilege exists. If the privilege is qualified, the plaintiff then bears the burden of proving that the privilege has been lost through excessive publication or actual malice.

## 9. Mitigating Factors

Several matters, while not defenses to an action, may be considered by the trier of fact on the issue of damages. These include:

**a. No Actual Malice**

Malice may be inferred from some statements, but if the jury is shown that there was no actual malice, such evidence is admissible to mitigate damages. To this end, the defendant may prove the source of her information and grounds for her belief.

**b. Retraction**

Unless made immediately after publication so as to negate the defamatory effect of a statement, retraction does not undo the wrong. But the court may consider it to show **lack of actual malice** in mitigation of damages. A failure to retract after a request to do so is often allowed as evidence to the opposite effect.

**c. Anger**

Anger of the speaker may be a mitigating circumstance **if provoked** by the plaintiff.

## B. INVASION OF RIGHT TO PRIVACY

The right to protection against unreasonable interferences with an individual's solitude is well recognized. The tort of invasion of privacy as it has developed, however, includes

protection of “personality” as well as protection against interference with solitude. In all, the tort includes the following four kinds of wrongs:

- (i) **Appropriation** by defendant of plaintiff’s picture or name for defendant’s **commercial advantage**;
- (ii) **Intrusion** by the defendant upon plaintiff’s **affairs** or **seclusion**;
- (iii) Publication by the defendant of facts placing the plaintiff in a **false light**; and
- (iv) Public disclosures of **private facts** about the plaintiff by the defendant.

## 1. Appropriation of Plaintiff’s Picture or Name

### a. Prima Facie Case

To establish a prima facie case for invasion of privacy—appropriation of plaintiff’s picture or name—only one element need be proved:

- 1) **Unauthorized use** by defendant of plaintiff’s picture or name for defendant’s **commercial advantage**.

### b. Limited to Advertisement or Promotion of Product or Services

Liability is generally limited to the use of plaintiff’s picture or name in connection with the promotion or advertisement of a product or service, e.g., use of plaintiff’s picture to advertise an automobile.

The mere fact that defendant is using plaintiff’s picture or name for his own personal profit may not, by itself, be sufficient. Thus, for example, the use of a personality’s name in a magazine story, even if motivated by profit, may not be actionable.

## 2. Intrusion on Plaintiff’s Affairs or Seclusion

### a. Prima Facie Case

To establish a prima facie case for invasion of privacy—intrusion on the plaintiff’s affairs or seclusion—the following elements must be proved:

- 1) **Act of prying or intruding** on the affairs or seclusion of the plaintiff by the defendant;
- 2) The intrusion is something that would be **highly offensive to a reasonable person**; and
- 3) The thing to which there is an intrusion or prying is “**private**.”

**b. Invasion of Plaintiff's Private Affairs or Seclusion**

For liability to attach, there must be an invasion of the plaintiff's private affairs or seclusion; e.g., defendant puts a microphone in plaintiff's bedroom.

**c. Intrusion Highly Offensive to a Reasonable Person**

For liability to attach, the intrusion by defendant must be something that would be highly offensive to a reasonable person.

**d. Intrusion Must Be into Something "Private"**

For liability to attach, the intrusion by defendant must be into something within the plaintiff's own private domain. Thus, for example, taking pictures of a person in a public place is not actionable.

### 3. Publication of Facts Placing Plaintiff in False Light

**a. Prima Facie Case**

To establish a prima facie case for invasion of privacy—publication by defendant of facts placing plaintiff in a false light—the following elements must be proved:

- 1) Publication of **facts** about plaintiff by defendant placing plaintiff in a **false light** in the public eye;
- 2) The “false light” is something that would be **highly offensive to a reasonable person** under the circumstances; and
- 3) **Actual malice** on the part of defendant where the published matter is in the **public interest**.

**b. Publication or Public Disclosure**

For liability to attach, there must be **publicity** concerning the “false light” facts; this requires **more** than “publication” in the defamation sense.

**c. What Is “False Light”?**

A fact will be deemed to present plaintiff in a false light if it attributes to him:

- 1) Views that he does not hold, or
- 2) Actions that he did not take.

*Note:* This element involves falsity and, as such, may also involve defamation if the falsity affects reputation.

**d. Highly Offensive to Reasonable Person**

To be actionable, this “false light” must be something that would be highly offensive to a reasonable person under the circumstances.

**e. Actual Malice Necessary Where Matter of Public Interest**

In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), a case involving this particular invasion of privacy branch, the Supreme Court held that the First Amendment prohibits recovery for invasion of privacy in cases where the published matter is of public interest, unless the plaintiff establishes that the defendant acted with actual malice (i.e., knowledge of falsity or reckless disregard for the truth).

After *Gertz* and *Dun & Bradstreet* (discussed *supra* under Defamation), the Supreme Court may be expected to give the states a slightly larger scope in which to protect privacy where a public figure is not involved. Thus, where the public interest in the information is not overriding and where the risks to the privacy interests of the private person are clear on the face of the material to a reasonably prudent publisher, the Supreme Court may choose in the future to permit an action in privacy without proof of actual malice. However, at least in public figure cases, the *Time, Inc. v. Hill* requirement of actual malice still holds. [See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)]

**4. Public Disclosure of Private Facts About Plaintiff**

**a. Prima Facie Case**

To establish a prima facie case for invasion of privacy—public disclosure of private facts about plaintiff—the following elements must be proved:

- 1) Publication or public disclosure by defendant of **private** information about the plaintiff; and
- 2) The matter made public is such that its disclosure would be **highly offensive to a reasonable person**.

**b. Publication or Public Disclosure**

For liability to attach, there must be publicity concerning a private fact; i.e., the disclosure must be a public disclosure, not a private one.

**c. Facts Must Be Private**

The facts disclosed must be “private.” For example, there is no liability for matters of public record, since these facts are not private.

**d. Disclosure Highly Offensive to Reasonable Person**

To be actionable, the disclosure of private facts must be such that a reasonable person would find it highly offensive.

**EXAMPLE**

Barbara showed, in a public exhibition, a movie of Sandy’s cesarean operation. This may be actionable.

e. **Facts May Be True**

Liability may attach under this privacy branch if the elements of a *prima facie* case are satisfied even though the factual statement about the plaintiff is true.

f. **Constitutional Privilege**

The rationale of *Time, Inc. v. Hill* appears to encompass this branch of the invasion of privacy tort as well. In other words, if the matter is one of **legitimate public interest**, the publication is privileged if made without actual malice.

1) **Effect of Passage of Time**

The mere passage of time does not preclude the “public interest” characterization of a publication. Hence, it has frequently been held that the life of one **formerly** in the public eye has become public property, even though that person is no longer in the public eye.

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**EXAMPLE**

A magazine published the life history of a former child prodigy. This may be construed to be a matter in the public interest.

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2) **Absolute Privilege with Regard to Matters of Public Record**

Where the matters republished are taken from official public records, there is an absolute constitutional privilege (e.g., rape victim’s name obtained from police records or court proceedings used in newspaper article).

5. **Causation**

The invasion of plaintiff’s interest in privacy must have been **proximately caused** by defendant’s conduct.

6. **Proof of Special Damages Unnecessary**

In an action for invasion of right to privacy, the plaintiff need not plead and prove special damages, provided the elements of a *prima facie* case are present. In other words, emotional distress and mental anguish **are** sufficient damages.

7. **Basis of Liability**

The basis for liability in a privacy action may rest upon an **intentional** or **negligent** invasion. It also appears that **strict liability** may be a sufficient basis (as in defamation).

8. **Defenses to Invasions of Privacy**

a. **Consent**

Consent is a defense to an action for invasion of the right to privacy. Some states, by statute, require that the consent be in writing. Here, as in all consent defense situations, the defendant may nonetheless be liable if the consent granted has been exceeded.

**EXAMPLE**

Plaintiff consents to be interviewed, and a picture taken during the interview is used in conjunction with an advertisement for a product. Liability may attach.

Note that mistake, even if reasonable, as to whether consent was given (which in fact it was not) is **not** a valid defense.

**b. Defamation Defenses**

Those defenses to actions for defamation that are based on **absolute and qualified privileges** appear applicable to those invasion of right to privacy actions predicated on publication grounds, i.e., “false light” and “public disclosure of private facts” actions. Thus, for example, one may have an absolute privilege to comment as a participant in judicial proceedings or a qualified privilege to report public proceedings.

*Note:* Truth is **not** a good defense to most invasion of privacy actions. Similarly, inadvertence, good faith, and lack of malice generally are **not** good defenses.

**9. Right of Privacy—Miscellaneous****a. Right Is Personal**

The right of privacy is a personal right and does not extend to members of a family. The right of privacy does not survive the death of plaintiff and is not assignable.

**b. Not Applicable to Corporations**

Only individuals may avail themselves of a right to privacy action; it does not apply to corporations.

**C. MISREPRESENTATION****1. Intentional Misrepresentation (Fraud, Deceit)****a. Prima Facie Case**

To establish a prima facie case of intentional misrepresentation, fraud, or deceit, the following elements must be proved:

- 1) **Misrepresentation** made by defendant;
- 2) **Scienter**;
- 3) An **intent to induce** plaintiff’s **reliance** on the misrepresentation;
- 4) **Causation** (i.e., actual reliance on the misrepresentation);
- 5) **Justifiable reliance** by plaintiff on the misrepresentation; and
- 6) **Damages**.

**b. The Misrepresentation**

Usually, there is a requirement that the false representation be of a **material past or present fact**. In certain cases, however, a misrepresentation of opinion may be actionable. (This is really a justifiable reliance question. See below.)

**1) No General Duty to Disclose**

No general duty to disclose a material fact or opinion to one is imposed upon another. Thus, simple failure to disclose a material fact or opinion does not generally satisfy the first element of this cause of action. A few general **exceptions** exist, however:

- a) Defendant stands in such a **fiduciary relationship** to plaintiff as would call for a duty of disclosure.
- b) Defendant selling real property knows that plaintiff is unaware of, and cannot reasonably discover, material information about the transaction (e.g., builder does not tell buyer that the house was built on a landfill).
- c) Where defendant speaks and her **utterance deceives plaintiff**, she will be under a duty to inform plaintiff of the true facts.

**2) Active Concealment Actionable**

Where a person actively conceals a material fact, she is under a duty to disclose this fact, and failure to do so satisfies the first element of a *prima facie* case (e.g., salesperson turns back odometer on an automobile).

**c. Scienter**

To establish a *prima facie* case, plaintiff must prove that defendant made the representation knowing it to be false or, alternatively, that it was made with reckless disregard as to its truth or falsity. This element of the *prima facie* case is often given the technical name of “scienter.”

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**EXAMPLE**

A corporation’s president stated falsely that last year’s profits were \$100,000 without having looked at a profit and loss statement. Scienter is present.

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*Note:* If scienter is not present, defendant may still be liable for negligent misrepresentation (discussed below).

**d. Intent to Induce Reliance**

The defendant must have intended to induce plaintiff or a class of persons to which plaintiff belongs to act or refrain from acting in reliance on the misrepresentation.

**1) Continuous Deception Exception**

An exception exists where the misrepresentation is a “continuous deception,” e.g., mislabeling of product by manufacturer, misrepresentation in negotiable instrument. In such cases, it is not necessary that the reliance of a particular plaintiff be intended. Anyone into whose possession the product or instrument has come may bring an action.

**2) Third-Party Reliance Problem**

One recurring problem is where the defendant communicates directly to one person and another relies upon the misrepresentation. In such cases, the defendant is viewed as intending to deceive the person who relies upon the misrepresentation ***if the defendant could reasonably foresee that the plaintiff will have such reliance.***

**EXAMPLE**

Chauncey sends an intentionally false profit statement to a stockbroker, and a customer of the stockbroker relies on this statement to his detriment. Liability exists.

**e. Causation**

Plaintiff must prove that the misrepresentation played a substantial part in inducing him to act as he did. In short, plaintiff must prove “actual reliance.”

**f. Justifiable Reliance****1) Reliance on Fact Almost Always Justified**

Even though it may have been intended by defendant that plaintiff rely on the representation, plaintiff must nonetheless prove that such reliance was “justified.” As a practical matter, the reliance of plaintiff on representations of fact is almost always justified. Only where the facts are obviously false is such reliance not justified.

**a) No Obligation to Investigate**

Courts do not impose an obligation on plaintiff to reasonably investigate the veracity of defendant’s representation of fact. This is so even though it would be easy for plaintiff to do this. If, however, plaintiff does in fact investigate, he may not rely on representations by defendant inconsistent with the facts reasonably ascertainable from such investigation.

**2) Reliance on Opinion Usually Not Justifiable**

As a general matter, reliance on false statements of opinion, value, or quality will be viewed as unjustified. Some exceptions to this general rule do exist, however.

**a) Superior Knowledge of Defendant**

If the defendant making a false representation of opinion has a superior knowledge of the subject matter, then reliance by a person without such knowledge may be viewed as justified.

**b) Statements of Law**

Statements of law are treated as statements of opinion if they are merely predictions as to the legal consequences of facts; they may not be justifiably relied upon unless the statement is made by a lawyer to a layperson, in which case the “superior knowledge” rule operates. On the other hand, a statement of law that includes an express or implied misrepresentation of fact is actionable.

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**EXAMPLE**

Defendant falsely states that the house she is offering for sale conforms to the city plumbing and electrical requirements. Liability exists.

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**c) Statements of Future Events**

Statements of future events are viewed as statements of opinion and may not be justifiably relied upon. An exception exists if the statement of future events may be characterized as a statement of “present intent,” which is viewed as a statement of fact.

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**EXAMPLE**

Defendant promises to pay plaintiff \$50 per month installments for the next two years. This may be viewed as a statement of “fact.” (Characterization of statements of future events as “present intent” statements is generally limited to those cases where the defendant has control over the future event, as in this example.)

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**g. Damages**

In an action for intentional misrepresentation, plaintiff may recover **only** if he has suffered **actual pecuniary loss** as a result of the reliance on the false statement. Most courts use a contract measure of damages—plaintiff may recover the “benefit of the bargain,” i.e., the value of the property as represented less the value of the property as it actually is.

## 2. Negligent Misrepresentation

**a. Prima Facie Case**

The prima facie case for negligent misrepresentation is similar to that for intentional misrepresentation. The following elements must be proved:

- 1) ***Misrepresentation*** made by defendant in a ***business or professional capacity***;
  - 2) ***Breach of duty*** toward ***particular plaintiff***;
  - 3) ***Causation***;
  - 4) ***Justifiable reliance*** by plaintiff upon the misrepresentation; and
  - 5) ***Damages***.
- b. Liability Confined to Commercial Transactions**  
The ambit of liability for negligent misrepresentation is much more confined than that for deceit. Generally, the action is confined to only those misrepresentations made in a commercial setting, i.e., made by the defendant in a business or professional capacity.
- c. Duty Owed Only to Particular Plaintiff Whose Reliance Contemplated**  
Liability attaches for a negligent misrepresentation only if reliance by the particular plaintiff could be contemplated. In other words, defendant is under a duty of care only to those persons to whom the representation was made or to specific persons who defendant ***knew*** would rely on it. Foreseeability that the statement will be communicated to third persons may be sufficient to impose liability for deceit (above), but it does ***not*** suffice for negligent misrepresentation in most states.

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**EXAMPLE**

Chauncey sends a negligently prepared profit statement to a stockbroker, and a customer of the stockbroker relies upon this statement to her detriment. Liability does not exist. (Compare example in section 1.d.2), *supra*.)

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**d. Other Elements**

The elements of causation, justifiable reliance, and damages are analyzed the same as under intentional misrepresentation.

## D. INTERFERENCE WITH BUSINESS RELATIONS

To establish a prima facie case for interference with contract or prospective economic advantage, the following elements must be proved:

- (i) Existence of a ***valid contractual relationship*** between plaintiff and a third party or a ***valid business expectancy*** of plaintiff;
- (ii) ***Defendant's knowledge*** of the relationship or expectancy;
- (iii) ***Intentional interference*** by defendant that induces a breach or termination of the relationship or expectancy; and

- (iv) **Damage** to plaintiff.

#### 1. Not Limited to Existing Contracts

Plaintiff has a cause of action not only for interference with existing contracts but also for interference with probable future business relationships for which plaintiff has a reasonable expectation of financial benefit.

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##### EXAMPLE

A real estate broker may have a cause of action against one who improperly diverts potential buyers of the property that the broker was selling.

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#### 2. Intent Required

Defendant must have **intended** to interfere with the existing or prospective contractual relationships of plaintiff. Most courts do not permit recovery for negligent interference with contract in the absence of some independent tort, such as negligent misrepresentation (*supra*).

#### 3. Damages

Plaintiff must prove actual damage from the interference, but may also recover mental distress damages and punitive damages in appropriate cases.

#### 4. Privileges

An interferor's conduct may be privileged where it is a proper attempt to obtain business for the interferor or protect its interests.

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##### EXAMPLE

A bank collecting on an existing promissory note is privileged to induce the debtor to pay it off, even if that will cause the debtor to fail to satisfy obligations owing to other parties.

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Several factors will determine whether a privilege exists:

##### a. Type of Business Relationship Involved

Interference with a prospective business relationship that the plaintiff is pursuing is more likely to be privileged than interference with the plaintiff's existing contract with a third party.

##### b. Means of Persuasion Used

Interference using legitimate and commercially acceptable means of persuasion is more likely to be privileged than interference using illegal or threatening tactics.

##### c. Whether Defendant Is a Competitor of Plaintiff

Interference with the plaintiff's prospective business relationships is likely to be

privileged if the defendant is a competitor of the plaintiff pursuing those same prospective customers.

**d. Defendant's Relationship with the Third Party**

Interference may be privileged if the defendant has responsibility for, or a financial interest in, the third party, or if the third party has sought the business advice of the defendant.

## E. WRONGFUL INSTITUTION OF LEGAL PROCEEDINGS

### 1. Malicious Prosecution

**a. Prima Facie Case**

To establish a prima facie case for malicious prosecution, the following elements must be proved:

- 1) ***Institution of criminal proceedings*** against plaintiff;
- 2) Termination ***favorable to plaintiff***;
- 3) ***Absence of probable cause*** for prosecution;
- 4) ***Improper purpose*** of defendant (i.e., malice); and
- 5) ***Damages***.

**b. Institution of Criminal Proceedings**

For liability to attach for malicious prosecution, the defendant must have initiated a ***criminal*** proceeding against the plaintiff, such as by filing a police report to procure the plaintiff's arrest. The "initiation" of the proceeding can be by warrant, arrest, indictment, etc.

**1) Defendant Must Initiate Proceedings**

Remember, the defendant must have initiated the proceedings himself. Simply giving the full story to the prosecutor, whereupon the prosecutor decides to prosecute, is not sufficient for a later malicious prosecution action against the informer in most states.

**2) Prosecuting Attorneys Privileged**

Prosecuting attorneys are absolutely privileged and cannot be sued for malicious prosecution (even when they act in bad faith and without probable cause).

**c. Termination of Proceedings in Plaintiff's Favor**

The plaintiff may bring such an action only if the prior proceedings were

terminated in her favor; e.g., she was acquitted, the case was dismissed, charges were dropped, etc. The termination must demonstrate the **innocence** of the accused.

**d. Absence of Probable Cause for Prior Proceedings**

To recover, the plaintiff must establish that the defendant initiated the prior proceedings without probable cause. She may do so by showing **either** (1) that there were insufficient facts for a reasonable person to believe that plaintiff was guilty; **or** (2) that the defendant did not actually believe the plaintiff to be guilty.

**1) Effect of Indictment**

Note that indictment by a grand jury is *prima facie* evidence of probable cause. However, failure of a grand jury to indict is **not** evidence that there was no probable cause.

**2) Prior Action Based on Advice**

If defendant instituted the prior proceedings on advice of counsel after full disclosure of the facts, this establishes probable cause.

**e. Improper Purpose in Bringing Suit**

For purposes of malicious prosecution, the malice or improper purpose element of the *prima facie* case is satisfied when it is shown that defendant's primary purpose in instituting the prior action was something other than bringing a person to justice.

**f. Damages**

Damages must be **proved**. Plaintiff may recover damages for all harms that are the proximate result of defendant's wrong, e.g., expenses in defending criminal suit, embarrassment, etc. Punitive damages are often awarded, since defendant's improper purpose is, of course, already proved to establish the case.

**g. False Arrest Distinguished**

In a false arrest situation, the false arrest itself is illegal, e.g., made without a valid warrant. In a malicious prosecution situation, the arrest itself is carried out in a lawful manner, but is pursuant to a maliciously instituted prosecution.

**2. Wrongful Civil Proceedings**

Most jurisdictions have extended the malicious prosecution action to encompass wrongfully instituted civil cases. The same general rules govern as apply in malicious prosecution. However, lack of probable cause is harder to show in civil actions because reasonable people would more readily file a doubtful case where the only consequences to the person sued are civil.

**3. Abuse of Process**

It is a tort to use any form of process—civil or criminal—to bring about a result other

than that for which the form of process was intended; e.g., defendant garnished an account to force plaintiff to sign a lease. The *prima facie* elements of the action are (1) the wrongful use of the process for an ulterior purpose, and (2) some definite act or threat against plaintiff to accomplish the ulterior purpose.

**a. Malicious Prosecution Distinguished**

If the defendant uses the particular machinery of the law for the immediate purpose for which it was designed, he is not liable for abuse of process notwithstanding any malicious intent. Abuse of process is not the wrongful institution of the action or proceeding, but rather the improper use of process in connection therewith. Hence, the merits of the action itself are of no relevance. In contrast to malicious prosecution, therefore, neither want of probable cause nor favorable termination are elements of the tort.

## DUTY OF POSSESSOR OF LAND TO THOSE ON THE PREMISES

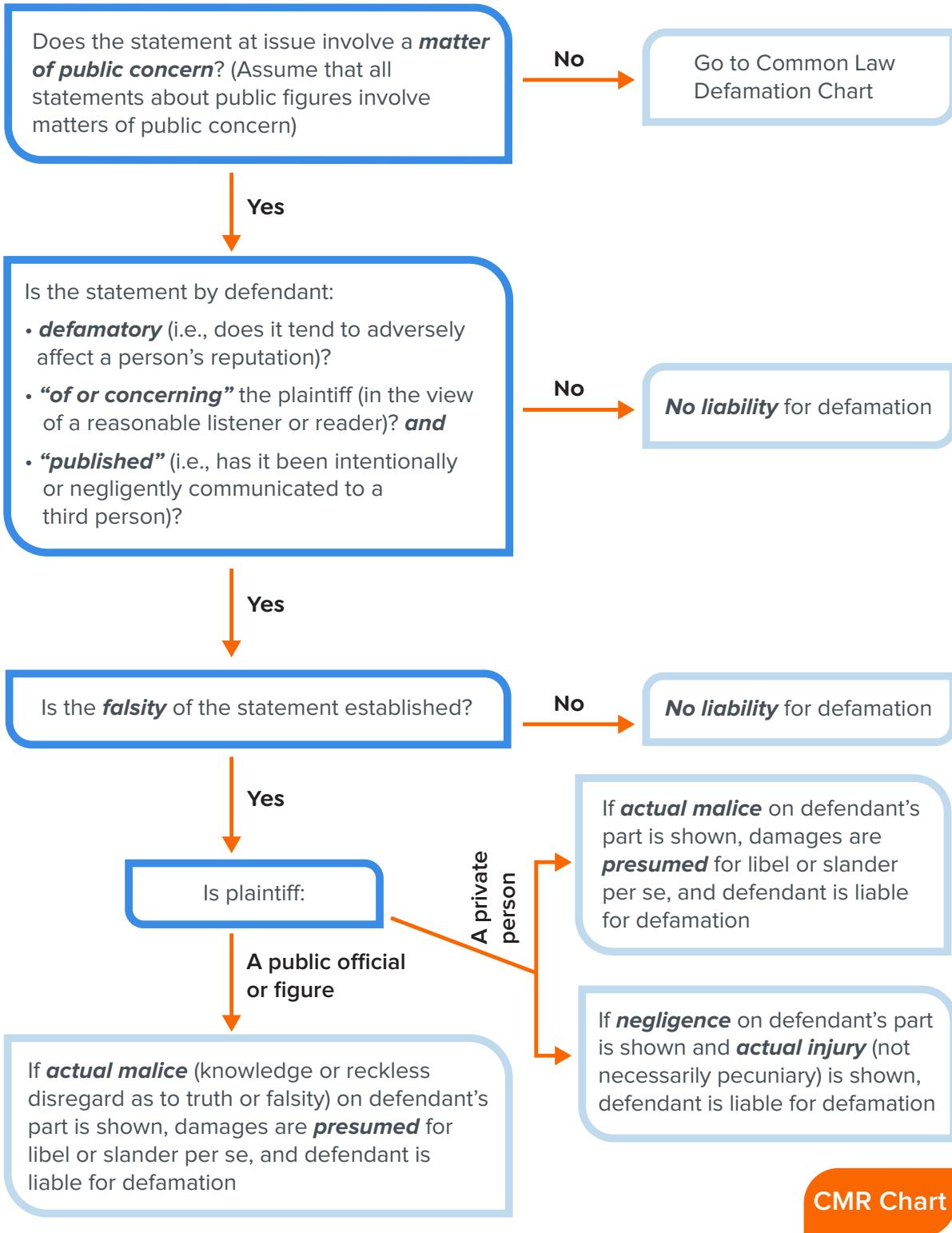
Status of Entrant	Duties Owed		
	Artificial Conditions	Natural Conditions	Active Operations
<b>Undiscovered Trespasser</b>	No duty	No duty	No duty
<b>Discovered or Anticipated Trespasser</b>	Duty to warn of or make safe known conditions if nonobvious and <b>highly</b> dangerous	No duty	Duty of reasonable care
<b>Child</b> (if presence on land foreseeable—attractive nuisance doctrine)	Duty to warn of or make safe if foreseeable risk to child outweighs expense of eliminating danger	Same as for Artificial Conditions but balancing test less likely to be met	Duty of reasonable care
<b>Licensee</b> (under traditional rule)—includes social guest	Duty to warn of or make safe known conditions if nonobvious and dangerous	Duty to warn of or make safe known conditions if nonobvious and dangerous	Duty of reasonable care
<b>Invitee</b> (under traditional rule)—includes member of public, business visitor	Duty to make reasonable inspections to discover nonobvious dangerous conditions and warn of or make them safe	Duty to make reasonable inspections to discover nonobvious dangerous conditions and warn of or make them safe	Duty of reasonable care

## INFILCTION OF EMOTIONAL DISTRESS

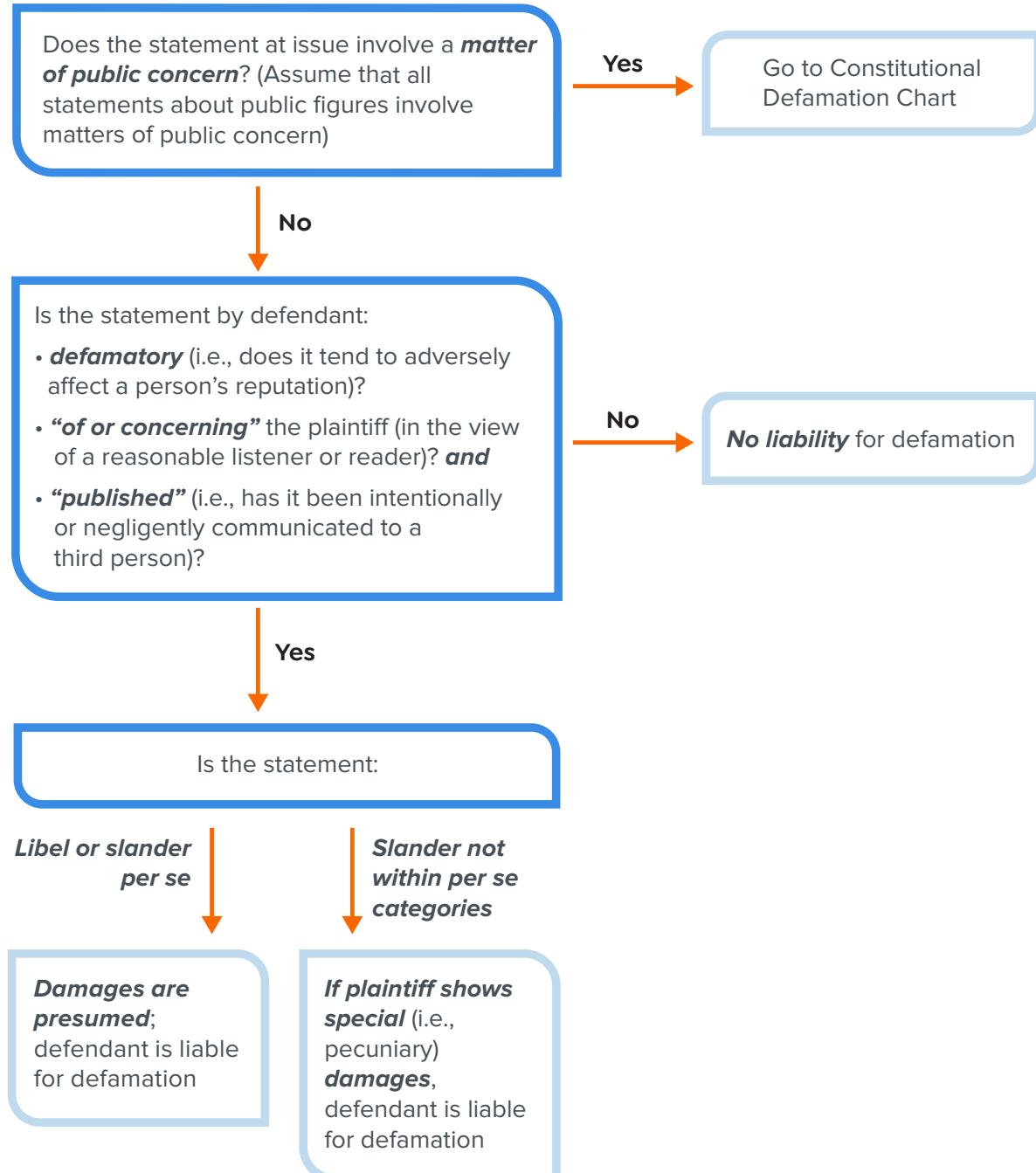
	Intentional	Negligent
Conduct Required	<i>Extreme and outrageous conduct</i> by defendant	Subjecting plaintiff to <i>threat of physical impact or severe emotional distress</i> likely to cause <i>physical symptoms</i>
Fault Required	<i>Intent</i> to cause severe emotional distress <b>or recklessness</b> as to the effect of conduct	<i>Negligence</i> in creating risk of physical injury to plaintiff
Causation and Damages	Defendant's conduct must cause severe emotional distress	Defendant's conduct generally must cause physical symptoms from the distress (growing minority of states drop this requirement)
Bystander Recovery When Another Is Physically Injured	Plaintiff bystander must be (1) present when the injury occurs and (2) a close relative of the injured person, and (3) defendant must know these facts when he intentionally injures the other person (or defendant must have intent to cause plaintiff distress)	Plaintiff bystander must (1) be closely related to the injured person, (2) be present at the scene, and (3) observe or perceive the injury

CMR Chart

## CONSTITUTIONAL DEFAMATION



## COMMON LAW DEFAMATION



## TORTS MULTIPLE CHOICE QUESTIONS

### INTRODUCTORY NOTE

You can use the sample multiple choice questions below to review the law and practice your understanding of important concepts that you will likely see on your law school exam. More questions are available through the 1L and 2L/3L Mastery programs on the BARBRI website.

#### Question 1

A physician performed scheduled surgery on her patient's right ear for a condition caused by prolonged and repeated infections in that ear. During the surgery, the physician determined that her patient had been particularly susceptible to this condition due to a previously unsuspected anatomical abnormality. The physician reasonably believed that this same abnormality was likely to exist in the patient's left ear. Though the patient had not had many infections in the left ear, if a similar course of recurring infections were to transpire involving that ear, it would probably develop the same condition as the right and require surgery. The physician therefore decided to perform surgery on her patient's left ear, although she had received his consent only to operate on the right ear. The surgery was performed with due care and was successful.

In an action by the patient against the physician, what is the likely result?

- (A) The patient will not recover because the extension of the operation was successful.
- (B) The patient will not recover because the extension of the operation was carried out with due care.
- (C) The patient will recover at least nominal damages on a negligence theory.
- (D) The patient will recover at least nominal damages on a battery theory.

#### Question 2

A tenant remained in possession of the house she was renting after her lease term had expired, prompting the landlord to begin eviction proceedings. While the tenant was still in the house, a heavy snowfall covered the driveway, requiring her to shovel the driveway so she could get her car out of the garage. Shortly after she finished shoveling, the tenant's neighbor used a snowblower to blow all of the snow from his driveway onto the tenant's driveway. Consequently, the tenant had to shovel it again before she could get her car out.

Which party may bring a trespass action against the neighbor?

- (A) Just the landlord, because the tenant no longer had a right to possession of the property.
- (B) Just the tenant, because the neighbor blew the snow onto her driveway.
- (C) Just the tenant, because the neighbor interfered with her use of the driveway.
- (D) Both the landlord and the tenant.

## 2. TORTS MULTIPLE CHOICE QUESTIONS



### Question 3

A boat owner gave his brother-in-law permission to use his boat for a few hours for fishing. The brother-in-law instead kept the boat overnight, and the next day the boat was struck and seriously damaged by a large tree that fell on it at the boat launch. It was dark when the brother-in-law finally brought the boat home, and the owner immediately went over to the brother-in-law's house to retrieve it. The owner accidentally ran over a corner of the brother-in-law's garden when he backed his truck up to the boat trailer in the dark. However, when he saw the damage to the boat up close, the owner left the boat there and went home.

Assuming that the boat was worth \$18,000 before it was damaged and sustained \$9,000 worth of damage, what should the owner be entitled to recover in an action against the brother-in-law?

- (A) \$9,000 and damages for loss of use.
- (B) \$9,000 and damages for loss of use, offset by the damage to the brother-in-law's garden.
- (C) \$18,000.
- (D) \$18,000, offset by the damage to the brother-in-law's garden.

### Question 4

A patient met with a surgeon prior to a surgical procedure that would involve the implantation of a medical device in the patient's artery. The surgeon advised the patient of risks and benefits, but she did not advise him that there was a 1% chance of a defect occurring in the manufacturing process of the medical device that would cause the device to break during the surgery. The patient gave his consent and underwent the surgery. The medical device did break during surgery as a result of the manufacturing defect, causing damage to his artery. The patient then underwent additional surgery that repaired the damage. He subsequently learned about the 1% risk of the medical device breaking.

In a malpractice action by the patient against the surgeon, which of the following questions will NOT be at issue?

- (A) Would a reasonable person have refused consent on learning of the 1% risk of failure?
- (B) Could the manufacturing process have been modified to eliminate the 1% risk of failure?
- (C) Did the patient make a full recovery from the surgery?
- (D) Would the patient have refused consent had he known of the 1% risk of failure?

**Question 5**

A state barred the use of studded snow tires on its roads because of the damage they caused to the road surface. Although he knew of the state law, a motorist did not remove his studded tires from his vehicle because he enjoyed the extra traction they gave him driving on snow and ice. As he was driving over some rough roads, a metal stud broke off his tire and struck a pedestrian in the eye, causing permanent loss of vision in that eye.

The pedestrian sued the motorist for damages. At trial, the pedestrian introduced the statute and presented evidence that the motorist operated a vehicle equipped with studded tires in violation of the statute. The pedestrian testified as to his injuries and presented evidence of his damages, and then rested his case. The defense immediately moved for a directed verdict.

How is the court likely to rule on the defense motion?

- (A) Grant it, because the statute was designed to protect roads, not people.
- (B) Grant it, because violation of motor vehicle statutes is not sufficient evidence of negligence.
- (C) Deny it, because violation of a statute is generally negligence per se.
- (D) Deny it, because the statute has a rational basis and is designed for the good of all citizens.

**Question 6**

A shopper was in a large department store that was remodeling its menswear department and had hired a contractor to do the work. A carpenter employed by the contractor was working on the remodeling job. When the carpenter left the store to take a break, she left a carpenter's level projecting out into one of the aisles, unbeknownst to any store employees. Shortly before she returned 15 minutes later, the shopper came down that aisle and tripped over the level. He fell and struck his head on the sharp corner of a display case. The shopper required hospitalization and sued the store for his injuries.

Will the shopper prevail in his suit against the store?

- (A) Yes, because the contractor's employee left the level in the aisle.
- (B) Yes, because the store's employees had a reasonable time to discover the level before the shopper fell.
- (C) No, because the store's employees did not leave the level in the aisle.
- (D) No, because the store's employees were unaware that the level was in the aisle.

#### 4. TORTS MULTIPLE CHOICE QUESTIONS



##### Question 7

A 12-year-old snowboarder at a ski resort lost control while he was going down a slope and collided with a middle-aged skier who was ahead of him. The collision caused the skier to fall hard and sustain multiple fractures of her leg. The injuries required surgery and several months of rehabilitation before the skier could walk again.

If the skier prevails in a personal injury action against the snowboarder, what is the most likely reason?

- (A) The skier had not signed a ski resort waiver assuming the risk of any injuries suffered while skiing.
- (B) The severity of the skier's injuries dictated that an adult standard of care be applied to the snowboarder's activity.
- (C) A 12-year-old of like education, intelligence, and experience would have avoided the accident in the exercise of reasonable care.
- (D) The snowboarder had used a fake pass to gain entrance to the ski resort.

##### Question 8

A law enforcement officer was transporting a prisoner on a plane to testify in a criminal case. Unknown to those on the plane, an assassin hired to kill the prisoner had bribed an airport baggage handler to sneak a timed-release crate of poisonous snakes into the cargo hold of the plane. Once the crate was triggered to open, the snakes were able to slither into the passenger compartment through gaps in the conduits between the cargo hold and the passenger compartment. In the ensuing panic caused by the snakes, the officer was struck in the head by a fire extinguisher that another passenger threw at a snake, and suffered a severe concussion.

The officer filed suit against numerous parties, including the person who designed the conduit system on that type of plane. At trial, evidence established that the design for the conduit system that he used had been rejected in the industry because of the danger of pressure loss between the cargo hold and the passenger compartment. An industry-approved design that the designer could have used would have kept the snakes from getting into the passenger compartment of the plane.

As between the officer and the designer, which party is likely to prevail?

- (A) The officer, because the designer is strictly liable for designing the conduit system of the plane.
- (B) The officer, because of the high degree of care owed to passengers of a common carrier.
- (C) The designer, because the assassin's actions were an unforeseeable intervening force.
- (D) The designer, because the officer was injured by another passenger rather than a snake.

**Question 9**

A student purchased a chemistry set from the manufacturer through its website. The set contained printed warnings instructing users to mix the chemicals only according to the formulas provided. Nevertheless, the student combined a variety of chemicals in an attempt to make an adhesive remover. The chemicals he mixed generated toxic fumes, which caused him to suffer lung damage. The student brought a strict liability action against the manufacturer.

If the court decides in favor of the manufacturer, what is the likely explanation?

- (A) Manufacturing chemistry sets is not an abnormally dangerous activity.
- (B) It was not economically feasible to modify the chemistry set to make it less dangerous.
- (C) The manufacturer used the utmost care in the process of manufacturing the chemistry set.
- (D) The student failed to follow the instructions when he mixed the chemicals.

**Question 10**

A consumer purchased a grass trimmer from a hardware store. He took it out of the sealed box and assembled it according to the instructions. He noticed that there were bolts and screws left over and some joints that could have accepted additional fasteners, but he just disposed of the extra hardware. As he was using the trimmer, the housing came apart and a hard piece of plastic flew off. His neighbor, who was standing nearby, was struck in the eye by the piece of plastic and suffered permanent injuries.

The neighbor sued the hardware store and the manufacturer of the trimmer in a strict liability action. Through discovery, it was determined that the instructions omitted a critical step in the assembly process that would have used the extra hardware, which is why the housing came apart, and that the manufacturer had received some complaints about the instructions previously.

The hardware store had no knowledge of any complaints regarding any of the manufacturer's products. As to the hardware store, the neighbor will:

- (A) Recover, because the manufacturer had reason to know that the design was defective because of faulty instructions.
- (B) Recover, because the consumer's failure to recognize the improper assembly does not cut off the store's liability.
- (C) Not recover, because the neighbor is not a consumer and can only recover against the manufacturer of the product.
- (D) Not recover, because the hardware store had no opportunity to inspect the product and no reason to anticipate that the instructions were faulty.

## 6. TORTS MULTIPLE CHOICE QUESTIONS



### Question 11

A resident living near a factory brought a private nuisance action against the factory, alleging that emissions from the factory's smokestack were aggravating her sinus condition and interfering with the use and enjoyment of her property.

What is the most relevant factor in the factory's defense of the lawsuit?

- (A) The plaintiff moved to her current residence after the factory's smokestack was releasing that level of emissions.
- (B) No other residents of that neighborhood have complained about the factory.
- (C) The factory complies with local zoning ordinances.
- (D) No particulate matter from the emissions has landed on the plaintiff's property.

### Question 12

After leaving ceremonies at which the chief justice of a state supreme court had been named distinguished jurist of the year, an associate justice was interviewed by the press. The associate justice told a reporter that the chief justice "is a senile imbecile who lets his clerks write all his opinions. He hasn't had a lucid thought in decades, and he became a judge by being on the payroll of the mob." Enraged, the chief justice brought an action for defamation against the associate justice.

Which of the following, if established by the chief justice in his defamation action, would permit recovery against the associate justice?

- (A) The associate justice negligently made the statements, which were false, and caused the chief justice actual injury.
- (B) The associate justice made the statements knowing they were false.
- (C) The associate justice made the statements because he hated the chief justice and wished to destroy his reputation in the legal community.
- (D) The associate justice made the statements in order to ensure that the chief justice's political career was nipped in the bud.

## ANSWERS TO MULTIPLE CHOICE QUESTIONS

### Answer to Question 1

- (D) The patient will recover at least nominal damages. The patient here need only show that the extension of the operation was an intentional, unpermitted, offensive contact in order to recover at least nominal damages in battery. The patient may recover in battery regardless of whether she was harmed. Battery is a tort where no physical harm need be shown, and no actual damage need be proven. (A) is incorrect because the patient here can show that the extension of the operation was an intentional, unpermitted, offensive contact. Therefore, the patient may recover in battery regardless of whether or not she was harmed. Battery is a tort where no physical harm need be shown, and no actual damage need be proven. Actual harm is an element of the *prima facie* case of negligence, but is not required for most intentional torts. (B) is incorrect because the patient may recover in battery regardless of whether she was harmed and whether the physician's conduct was incompetent (i.e., negligent). Battery is a tort where no physical harm need be shown, and no actual damage need be proven. Also, no negligence or incompetence need be shown in battery. The patient here need only show that the extension of the operation was an intentional, unpermitted, offensive contact. (C) is incorrect because, in a negligence action, actual harm must be shown. The plaintiff must establish that she suffered damage as a result of the defendant's conduct. Damages will not be presumed and nominal damages cannot be awarded in a negligence action. Nominal damages are only appropriate in a suit based on an intentional tort where no actual harm can be shown.

### Answer to Question 2

- (B) Only the tenant may bring a trespass action against the neighbor. Trespass to land is an interference with the right of possession of the land. It requires (i) an act of physical invasion of the plaintiff's real property by the defendant, (ii) intent on the defendant's part to bring about the physical invasion, and (iii) causation. Here, the tenant can allege that the neighbor knowingly blew all of the snow from his driveway onto the tenant's driveway, causing an invasion of the tenant's possession of her property. (A) and (D) are incorrect because an action for trespass may be maintained by anyone in actual or constructive possession of the land, even if that possession is without title or legal right. One who is not in possession, however, generally has no right to sue for trespass, and the landlord would not have a right to sue here because the tenant is in actual possession of the land. While some modern cases allow a landlord to bring a damages action against a trespasser for injury to the landlord's interest (i.e., for any permanent damage to the property), there was no such injury in this case. Hence, the landlord is not entitled to sue for trespass because he has suffered no interference with his right to possession. (C) is incorrect because trespass is an interference with possession of the land rather than use and enjoyment (which would be the basis of a nuisance action). The tenant could bring a trespass action even if the snow blown onto the property did not interfere with her use of the driveway.

### Answer to Question 3

- (C) The owner can recover \$18,000 from the brother-in-law for conversion. A conversion is an interference with the plaintiff's possessory rights in a chattel that is so serious as to warrant that the defendant pay full value for the chattel. Here, the brother-in-law's permission to use the boat had long since expired when the boat was severely damaged by the tree. While the brother-in-law would not have been responsible for that damage had it occurred while he was still rightfully in possession of the boat, the combination of the wrongful detention and the severe damage amounts

## 8. ANSWERS TO MULTIPLE CHOICE QUESTIONS



to a conversion. Hence, the owner is entitled to recover damages for the fair market value of the boat at the time and place of conversion, in effect creating a forced sale of the boat. (A) and (B) are wrong because the owner can recover more than the actual damage to the boat and damages for dispossession; those remedies are appropriate for trespass to chattels, which is a less serious interference with the plaintiff's possessory rights in a chattel. (B) and (D) are wrong because the owner is not liable for the damage to the brother-in-law's garden when he went to retrieve the boat. When a chattel is located on the land of a wrongdoer, the owner is privileged to enter on the land and reclaim it in a reasonable manner. Unlike an entry onto the land of an innocent party, reasonable entry onto the land of a wrongdoer is completely privileged; i.e., the chattel owner does not have to pay for any actual damage caused by the entry.

### Answer to Question 4

- (B) The manufacturer's ability to eliminate the risk of failure is not at issue in the patient's malpractice action against the surgeon. The patient is suing the surgeon for negligence, which requires a showing of (i) duty, (ii) breach of duty, (iii) actual and proximate causation, and (iv) damages. A physician proposing a course of treatment or a surgical procedure has a duty to provide the patient with enough information about its risks to enable the patient to make an informed consent. Question (A) is at issue because, if an undisclosed risk was serious enough that a reasonable person in the patient's position would have withheld consent to the treatment, the doctor has breached this duty. The question in (D) is at issue for establishing actual cause. If the patient can establish that, but for the surgeon's failure to disclose, he would have refused consent, he can establish actual causation. The question in (C) is at issue in establishing the element of damages. Even though the facts state that the additional surgery repaired the damage from the device breaking, the patient still suffered damage from having to undergo an additional surgery. Whether he fully recovered from the surgery impacts the amount of damages he can recover. (B) is the correct choice because it is not relevant to the action against the surgeon. Whether the manufacturer could have eliminated the risk of failure may be at issue in a products liability action against the manufacturer, but is not at issue in the malpractice action against the surgeon. There is nothing to suggest that the surgeon had any influence over the manufacturing process or that she had an option to select a medical device from a different manufacturer.

### Answer to Question 5

- (A) The court is most likely to grant the motorist's motion. This statute was designed to protect roads from being damaged by studded snow tires. The pedestrian does not have a case for negligence based on violation of the statute, because the pedestrian is not a member of the class the statute was designed to protect. The statute was designed to protect roads from damage to the metal studs, not people. The pedestrian may have had a cause of action based on a breach of ordinary care, but the facts tell us that the pedestrian only presented evidence of violation of the statute. So the court will grant the defense's motion. (B) is incorrect. If a motor vehicle statute is applicable, its violation will be sufficient evidence of negligence. (C) is wrong because the statute must be applicable before violation of the statute can be considered negligence per se. (D) states a rationale applicable to constitutional law rather than torts. The statute may be constitutionally valid, but it does not establish liability here.

### Answer to Question 6

- (A) The shopper will prevail because the employee of the contractor hired by the store left the level in the aisle. The general rule that a principal will not be vicariously liable for the acts of its indepen-

dent contractor's agent is subject to several broad exceptions, including one for duties that are nondelegable because of public policy considerations. One of these duties is the duty of a business to keep its premises safe for customers. Hence, a business would be liable for the negligence of an employee of an independent contractor to the same extent as for the negligence of its own employee. Here, the carpenter was employed by the contractor, which was hired by the store. The carpenter breached the duty owed to customers such as the shopper by leaving the level projecting out into one of the aisles. The shopper was injured as a result, so he will prevail in a suit against the store. (B) is wrong. As part of the duty owed to customers, the store employees have a duty to make reasonable inspections of their premises to discover unsafe conditions (such as if a customer had spilled something slippery in an aisle). However, regardless of whether they had a reasonable time to discover the level, the store is liable because it is responsible for the carpenter's conduct. (C) is wrong because, as discussed above, the store is liable under these circumstances for the conduct of its independent contractor's employee. (D) is wrong because the store is liable regardless of the knowledge of its employees.

### Answer to Question 7

- (C) The skier will prevail if a 12-year-old snowboarder acting reasonably would have been able to avoid the accident. A child is required to conform to the standard of care of a child of like age, education, intelligence, and experience in the usual case. This permits a subjective evaluation of whether that particular defendant acted reasonably under the circumstances. If the snowboarder acted unreasonably under this standard, the skier will recover. (A) is incorrect because even if a waiver had been signed by the skier, it would allow only the ski resort to raise the defense of express assumption of risk if sued; the snowboarder could not rely on a waiver to which he was not a party. Thus, the skier's failure to sign a waiver is irrelevant. (B) is wrong because the severity of the skier's injuries does not dictate whether an adult standard of care applies. Courts will require children to conform to an adult standard of care when they are engaged in potentially dangerous activities that normally only adults engage in, such as driving an automobile. Snowboarding would not be considered that type of activity, so an adult standard of care would not apply regardless of the severity of the skier's injuries. (D) is incorrect because the fact that the snowboarder had used a fake pass to gain entrance to the resort does not indicate whether he was complying with the applicable standard of care when he struck the skier, which is the critical question here.

### Answer to Question 8

- (C) The designer will prevail because the assassin's actions were an unforeseeable intervening force. To establish a *prima facie* case for negligence, the following elements must be proved: (i) the existence of a duty on the part of the defendant to conform to a specific standard of conduct for the protection of the plaintiff against an unreasonable risk of injury; (ii) breach of that duty by the defendant; (iii) the breach of the duty by the defendant was the actual and proximate cause of the plaintiff's injury; and (iv) damage to the plaintiff's person or property. The general rule of proximate cause is that the defendant is liable for all harmful results that are the normal incidents of, and within the increased risk caused by, his acts. An indirect cause case is one where the facts indicate that a force came into motion after the time of defendant's negligent act and combined with the negligent act to cause injury to the plaintiff. Whether an intervening force will cut off the defendant's liability for the plaintiff's injury and be deemed superseding is determined by foreseeability. Here, the designer, as a professional designing a component of a plane, owed a duty of care to passengers such as the officer. He breached that duty of care by using a design for the conduit system that had been rejected in the industry because of the danger of pressure loss. His

## 10. ANSWERS TO MULTIPLE CHOICE QUESTIONS



breach was the actual cause of the officer's harm because, but for his use of that design, the snakes would not have gotten into the passenger compartment of the plane. However, the conduct of the assassin in causing snakes to be placed on the plane is an unforeseeable intervening force. While criminal acts of third persons may be foreseeable if the defendant's negligence increased the likelihood of the crime being committed, there is nothing to suggest that the designer's negligence had any influence on the assassin's conduct. Hence, that conduct cuts off the designer's liability to the officer for the negligent design of the conduit system. (A) is incorrect. To establish strict tort liability, the plaintiff must prove that the defendant is a commercial supplier of a product. The designer, however, provided a service of designing a conduit system in a plane; because the facts do not suggest that he is a commercial supplier of a product, he cannot be held strictly liable. (B) is incorrect. Even assuming that the designer would be held to the high degree of care that common carriers owe their passengers, the officer must still establish the other elements of the tort. As discussed above, he would not be able to establish proximate cause under these facts. (D) is incorrect because the response by the other passenger is a foreseeable "reaction" force that does not cut off the causal connection between the act and the harm. If the designer were deemed to be a proximate cause of the snakes getting into the passenger compartment, the fact that the officer's injury was caused by the reaction of another passenger rather than a snakebite would not matter.

### Answer to Question 9

- (B) If the manufacturer prevails, it will be because the product was not defectively designed. In most jurisdictions, a product can be the basis for a products liability action if the product was in a dangerous condition unreasonably dangerous to users. For design defects, the plaintiff usually must show a reasonable alternative design, i.e., that a less dangerous modification or alternative was economically feasible. If it was not economically feasible to modify the chemistry set to make it less dangerous, the product was not defectively designed. Hence, (B) provides a basis for the manufacturer to prevail. (A) is incorrect because, while it may be true, it is not applicable to the student's action. The student was not hurt by the manufacturer's activity of manufacturing chemistry sets; he was hurt by the product itself during his use of it. Even if the manufacture of chemistry sets were an abnormally dangerous activity, the student would have to show that the set itself was a defective product to recover. (C) is incorrect because the manufacturer's care in manufacturing the product is irrelevant in a products liability action based on strict liability. The plaintiff need prove only that the product was so defective as to be unreasonably dangerous. (D) is incorrect because the student's contributory negligence in failing to follow the instructions would not be the basis for the manufacturer prevailing. Many comparative negligence states apply their comparative negligence rules to strict products liability actions. Hence, in a pure comparative negligence jurisdiction, any negligence on the plaintiff's part would only reduce his recovery and not bar it. *Note:* Even if the question indicated that the jurisdiction here applied traditional contributory negligence rules to strict products liability actions, the result would be no different. In strict products liability actions in those jurisdictions, the plaintiff's ordinary contributory negligence in failing to discover or guard against the danger is not a defense. While voluntarily and unreasonably encountering a known risk is a defense in those jurisdictions, there is no indication here that the student knew of the fumes that would be generated by mixing those chemicals or that he had even read the warnings and instructions that came with the set.

### Answer to Question 10

- (B) The neighbor will recover against the hardware store. In a products liability action based on strict liability, the plaintiff need show only (i) the defendant is a commercial supplier, (ii) the defendant produced or sold a product that was defective when it left the defendant's control, (iii) the

defective product was an actual and proximate cause of the plaintiff's injury, and (iv) the plaintiff suffered damages to person or property. Here, the hardware store is in the chain of supply of the product. The product was defective because the instructions omitted a critical part of the assembly process. Finally, the omission was an actual and proximate cause of the neighbor's injury, allowing him to recover against the hardware store. As indicated by choice (B), an intermediary's negligent failure to recognize the danger does not cut off the supplier's strict liability. (A) is incorrect because the manufacturer's awareness of the faulty instructions does not affect whether the hardware store will be liable. The hardware store was not aware of any problems with the product, but it is nevertheless liable as a commercial supplier. (C) is incorrect. The neighbor, as a bystander, is within the foreseeable zone of danger and is therefore a foreseeable plaintiff who can recover in this action. (D) is incorrect because the fact that the hardware store was not at fault and had no opportunity to inspect is irrelevant. It is liable because it is a commercial supplier of a defective product and the neighbor is suing under a strict liability theory.

### Answer to Question 11

- (B) The most relevant factor in the factory's defense is that no one else in the neighborhood has complained. A private nuisance is a substantial, unreasonable interference with another private individual's use or enjoyment of her property. To constitute a substantial interference, the activity must be offensive, inconvenient, or annoying to an average person in the community. It will not be characterized as substantial if it is merely the result of the plaintiff's hypersensitivity. Here, if no other residents of the plaintiff's neighborhood have complained about the emissions, that indicates that the interference may not be substantial, and that the lawsuit may stem just from the plaintiff's hypersensitivity caused by her sinus condition. (A) is incorrect because the fact that the plaintiff "came to the nuisance" would not preclude her from recovering. Even though the factory was emitting the same level of emissions before she moved to the property, she can recover as long as she shows a substantial and unreasonable interference. (C) is incorrect because compliance with government authority is not a defense to a private nuisance action. The fact that the factory complies with zoning requirements may be some evidence as to the reasonableness of the activity but it is not determinative, nor is it as persuasive as showing that the emissions did not interfere with anyone else's use of their property. (D) is incorrect because particulate matter landing on the plaintiff's property would be necessary for establishing a trespass action but not a nuisance action. The interference may be substantial and unreasonable even though there was no physical invasion of the plaintiff's property.

### Answer to Question 12

- (B) The chief justice could recover if the associate justice made the statements knowing that they were false. To make out a case for defamation, a plaintiff must show that the defendant published a defamatory statement of or concerning the plaintiff that damaged his reputation. If the plaintiff is a public figure (or public official) or a matter of public concern is involved, the plaintiff must also prove falsity and fault on the defendant's part. The type of fault required when a public figure or public official is involved is "actual malice," defined as knowledge that the statement was false or reckless disregard as to its truth or falsity. Here, the chief justice is a public official. Thus, he would be able to recover if the associate justice made the statement knowing that it was false, since all of the required elements would be present: (i) the statement was defamatory of the chief justice and communicated to a third person; (ii) damage to reputation is presumed because it was slander per se (it adversely reflected on his abilities in his profession); and (iii) if the associate justice knew that the statement was false, there is fault and falsity. Thus, (B) is correct. (A) is incorrect because negligence and actual injury would not be sufficient to establish the *prima facie*

## 12. ANSWERS TO MULTIPLE CHOICE QUESTIONS



case. Since the judge is a public official, actual malice must be proved, and actual malice can be shown only if the defendant made the statement knowing that it was false or in reckless disregard as to its truth; negligence is not enough. Once actual malice is established, actual injury is not required. (C) is incorrect because, even if the associate justice hated the chief justice and wanted to harm him, he would not be liable for defamation if the statements were true, since a public official such as the chief justice must prove that the statement was false. (“Actual malice” in the constitutional sense is different from malice in the sense of ill will.) Thus, it would not be enough merely to show that the associate justice had bad motives. (D) is essentially the same answer as (C) and is incorrect for similar reasons.

## APPROACH TO EXAMS

### TORTS

**IN A NUTSHELL:** A tort is a civil wrong committed against another. A tort may arise from the defendant's intentional conduct, negligent conduct, or conduct that creates liability in the absence of fault (strict liability torts). A typical Torts exam question will involve multiple torts committed by and against multiple parties. For each potential tort, first identify the *prima facie* case elements of the tort and apply the elements to the facts provided. For those torts for which the *prima facie* case is established, consider any defenses that are supported by the facts. Finally, consider any supplemental rules that may apply, typically involving multiple parties (e.g., vicarious liability and joint tortfeasor rules).

### I. INTENTIONAL TORTS

#### A. Identify the Tort

1. Battery
  - a. Defined: A **harmful or offensive contact** with the plaintiff's person intentionally caused by the defendant
  - b. "Person" includes things connected to the person
  - c. Contact is deemed "offensive" if the plaintiff has not expressly or impliedly consented to it
2. Assault
  - a. Defined: Intentional creation by the defendant of a **reasonable apprehension** of immediate harmful or offensive contact to the plaintiff's person
  - b. "Apprehension" need not be fear
  - c. Words alone generally are not enough
3. False imprisonment
  - a. Defined: An intentional act or omission by the defendant that causes the plaintiff to be **confined or restrained to a bounded area**
  - b. Confinement or restraint includes threats of force, false arrests, and failure to provide a means of escape when under a duty to do so
4. Intentional infliction of emotional distress
  - a. Defined: Intentional **extreme and outrageous conduct** by the defendant that causes the plaintiff to suffer **severe emotional distress**
  - b. Physical injuries are not required, only severe emotional distress
5. Trespass to land
  - a. Defined: An intentional act by the defendant that causes a physical **invasion of the plaintiff's real property**
  - b. The defendant need not have intended to commit a trespass, only to do the act of entering onto land

6. Trespass to chattels
  - a. Defined: An intentional act by the defendant that causes an **interference with the plaintiff's right of possession in a chattel**, resulting in damages
  - b. The tort typically involves damage to or dispossession of the plaintiff's chattel
  - c. The defendant need not have intended to commit a trespass to the chattels, only to do the act that causes interference with chattel
  - d. If the damage to the chattel is serious, conversion may be more appropriate
7. Conversion
  - a. Defined: An intentional act by the defendant that causes a **serious** interference with the plaintiff's right of possession in a chattel
  - b. The defendant need not have intended a conversion, only to do the act that constitutes a conversion
  - c. The interference with the chattel is so serious as to require the defendant to pay the full value of the chattel (in effect, a forced sale of the chattel)

## B. Consider Transferred Intent

1. Intent will transfer from the intended tort to the committed tort, or from the intended victim to the actual victim
2. Both the tort intended and the tort committed must be battery, assault, false imprisonment, trespass to land, or trespass to chattels

## C. Apply Relevant Defenses

1. Consent
  - a. Consent may be either **express or implied** (apparent or implied by law)
  - b. The plaintiff must have capacity to consent and the defendant must not exceed the bounds of the consent
2. Self-defense, defense of others, defense of property
  - a. The defendant must **reasonably believe** that a tort is being or about to be committed against himself, a third person, or his property
  - b. Only **reasonable force** may be used
    - 1) Deadly force is permitted if reasonably believed to be necessary to prevent serious bodily injury
    - 2) Deadly force is never permitted to defend only property
  - c. The **shopkeeper's privilege** permits the reasonable detention of someone the shopkeeper reasonably believes has shoplifted goods
3. Necessity
  - a. A defendant whose property tort was justified by a public necessity has an absolute defense
  - b. If justified only by a private necessity, the defense is qualified (the defendant must pay for any damage caused)
  - c. This privilege trumps a property owner's right to defend his property

## II. NEGLIGENCE

### A. Elements of the Prima Facie Case

1. The defendant owes a **duty of care** to conform to a specific standard of conduct
2. The defendant **breached** that duty
3. The breach of duty was the **actual and proximate cause** of the plaintiff's injury
4. The plaintiff suffered **damages** to person or property

### B. Standards of Care

1. The general standard of care is that of a **reasonably prudent person** (average mental ability but the same physical characteristics as the defendant)
2. **Professionals** must exercise the knowledge and skill of a member of the profession in good standing
3. **Children** must conform to standard of care of a child of like age, intelligence, and experience (except the adult standard applies if the child is engaged in an adult activity)
4. A **landowner's** standard of care under traditional rules usually depends on the status of the person injured on the property
  - a. Trespassers
    - 1) The landowner owes no duty to **undiscovered** trespassers
    - 2) For **discovered and anticipated** trespassers, the landowner owes a duty to **warn of or make safe** known **highly dangerous artificial** conditions if not obvious to the trespasser
  - b. Licensees
    - 1) Licensees are those who come onto the land with express or implied permission but for their own purpose (includes social guests)
    - 2) The landowner's duty is the same as for discovered trespassers except that it applies to **all** dangerous artificial **and** natural conditions
  - c. Invitees
    - 1) Invitees are those entering as members of the public or for a purpose connected to the business of the landowner
    - 2) The landowner's duty is the same as for licensees but with the additional duty to reasonably **inspect** for dangerous conditions
  - d. Note that the ordinary reasonable care standard applies for active operations on the property and for conditions on the land that injure children (the "attractive nuisance" doctrine)
5. A criminal **statute** may serve to establish a specific standard of care in place of the general standard of ordinary care if:
  - a. The plaintiff is within the class that the statute was intended to protect
  - b. The statute was designed to prevent the type of harm suffered
6. Negligent infliction of emotional distress
  - a. General basis of liability: The defendant breaches a duty to the plaintiff by creating a risk of physical injury and the plaintiff suffers emotional distress as a result

- 1) The plaintiff must be within the “zone of danger” and ordinarily must suffer physical symptoms from the distress
- 2) *Exception:* The defendant breaches a duty to a bystander **not** in the zone of danger who (1) is closely related to the injured person, (2) was present at the scene of the injury, and (3) personally observed or perceived the event
- 3) *Exception:* A relationship exists between the defendant and the plaintiff under which the defendant’s negligence has great potential to directly cause emotional distress (e.g., hospital erroneously reports death of plaintiff’s family member).

### C. Breach of Duty

1. Whether the defendant breached the applicable duty of care is a question for the trier of fact
2. Under ***res ipsa loquitur***, the fact that an injury occurred may create an inference that the defendant breached his duty. The requirements:
  - a. The accident causing the injury is a type that would not have occurred absent negligence
  - b. The negligence is attributable to the defendant (usually because the defendant is in exclusive control of the instrumentality causing the injury)

### D. Causation

1. Actual cause
  - a. Usually established by the “but for” test—an act is the actual cause of an injury when it would not have occurred **but for** the act
  - b. Merged causes—when two acts bring about an injury and either one alone would have sufficed, either of the acts is an actual cause of the injury if it was a “substantial factor” in bringing it about
  - c. Unascertainable causes—when two acts were negligent but it is not clear which was the actual cause of the injury, the burden shifts to each of the negligent actors to show that his negligent act was not the actual cause
2. Proximate cause
  - a. Limits liability for **unforeseeable** consequences of the defendant’s actions
  - b. The defendant is liable for all harmful results that are the normal incidents of and within the increased risk from the defendant’s actions
  - c. Indirect cause cases: An ***intervening force*** occurs after the defendant’s negligent act and combines with it to cause the injury
    - 1) Foreseeable intervening forces do not cut off the defendant’s liability for the consequences of his negligent act

### E. Damages

1. The plaintiff must show actual harm or injury to complete the *prima facie* case
2. The plaintiff can recover economic damages (e.g., medical expenses) and noneconomic damages (e.g., pain and suffering)

3. The extent or severity of the harm need **not** have been foreseen (the tortfeasor takes his victim as he finds him)

#### F. Defenses to Negligence

1. Contributory negligence—the standard of care required of a plaintiff to avoid injury is judged using a reasonable person standard
2. Comparative negligence—almost all states have rejected the rule that a plaintiff's contributory negligence will totally bar her recovery
  - a. In a **pure** comparative negligence state, a negligent plaintiff can recover damages reduced by the percentage of her fault even if she was primarily at fault
  - b. In a **partial** comparative negligence state, a negligent plaintiff can recover reduced damages as long as her fault is not above a certain level (usually 50%); if it is, she is barred from recovering
3. Assumption of risk—arises when the plaintiff is aware of a risk and voluntarily assumes it (either expressly or impliedly)
  - a. In comparative negligence states, most implied assumption of risk situations are analyzed under comparative negligence rules

### III. STRICT LIABILITY

Imposes liability on a defendant for the plaintiff's injury even though the defendant was not negligent

#### A. Situations Where Strict Liability Is Imposed

1. On the owner of a wild animal or an abnormally dangerous domestic animal for injuries caused by the animal
2. On one engaged in an abnormally dangerous activity—an activity that creates a foreseeable risk of serious harm even when reasonable care is exercised by all actors

#### B. Extent of Liability

1. The harm must result from the kind of danger that makes the animal or activity abnormally dangerous
2. Most states apply their comparative fault rules to strict liability cases

### IV. PRODUCTS LIABILITY

#### A. General Principles

1. Liability for defective products may be brought under various theories of liability: intent, negligence, strict liability, implied warranties of merchantability and fitness for a particular purpose, and representation theories
2. Liability arises when a commercial supplier supplies a product in a **defective condition** unreasonably dangerous to users

- a. A product has a **manufacturing** defect when it varies from the other products in the manufacturing process and is dangerous beyond the expectation of the ordinary consumer
- b. A product has a **design** defect when all products of the line have dangerous characteristics because of mechanical features or packaging and a less dangerous modification or alternative was economically feasible
- c. A product has an **information** defect when it has **inadequate warnings** of any dangers that may not be apparent to users

## B. Liability Based on Negligence

1. Standard elements of negligence *prima facie* case apply (see II.A., *supra*)
2. Breach of duty is shown by negligent conduct by the defendant that leads to supplying a defective product to the plaintiff

## C. Liability Based on Strict Liability

1. Liability arises from supplying a defective product even if the defendant exercised due care and was not negligent
  - a. Even a retailer who had no opportunity to inspect the product may be liable as a commercial supplier
2. The defect must have existed when the product left the defendant's control

## V. NUISANCE

### A. Types of Nuisance Actions

1. A nuisance is a type of harm that may be based on intent, negligence, or strict liability
2. A private nuisance is a substantial, unreasonable interference with another person's use or enjoyment of her property
3. A public nuisance is an act that unreasonably interferes with the health, safety, or property rights of the community

### B. Remedies and Defenses

1. The usual remedy is damages, but injunctive relief may be available for a continuing nuisance
2. One who has just moved onto land adjacent to a nuisance may bring a nuisance action; in other words, "coming to the nuisance" is not a defense

## VI. GENERAL CONSIDERATIONS FOR ALL TORTS

### A. Vicarious Liability

1. The defendant may be vicariously liable for the tort of another based on the relationship between the defendant and the tortfeasor
2. Employer-employee (respondeat superior)—the employer is liable for torts of an employee that occur **within the scope of the employment relationship**

3. Principal-independent contractor—the general rule is that a principal is not vicariously liable for the torts of an independent contractor, but broad **exceptions** exist:
  - a. The independent contractor is engaged in inherently dangerous activities
  - b. The principal's duty cannot be delegated because of public policy considerations
4. Automobile owner-driver—an automobile owner is not vicariously liable for the negligence of the driver unless the state has adopted:
  - a. A permissive use statute (imposing liability for the torts of anyone driving with permission), or
  - b. The family purpose doctrine (imposing liability for the torts of a family member driving with permission)
5. Parent-child—a parent is not vicariously liable for a child's torts at common law (but statutes in many states impose limited liability for the child's intentional torts)
6. Note that, regardless of whether vicarious liability applies, the defendant can be liable for his **own negligence**, e.g., negligence in hiring the employee, supervising the child, or entrusting the car to the driver

## B. Multiple Defendants

1. Under the rule of **joint and several liability**, when two or more tortious acts combine to proximately cause an indivisible injury to the plaintiff, each tortfeasor is jointly and severally liable for the injury
  - a. The plaintiff can recover his entire damages from any one of the tortfeasors
  - b. Many states have abolished the rule for (1) those tortfeasors less at fault than the plaintiff, or (2) all tortfeasors for noneconomic damages
2. If joint and several liability applies, **contribution** allows a tortfeasor who paid more than his share of the damages to recover the excess from other tortfeasors in proportion to their fault

## C. Survival and Wrongful Death

1. Survival statutes preserve a victim's cause of action after his death, except for torts involving intangible personal interests (e.g., defamation)
2. Wrongful death statutes permit a personal representative or surviving spouse to recover damages from a tortfeasor for loss of the decedent's support and companionship

## D. Tort Immunities

1. Intra-family tort immunities—the rule that one family member could not sue another in tort for personal injury is abolished in most states, except that children generally cannot sue their parents for their exercise of parental supervision
2. Governmental immunities—governments generally have waived their sovereign immunity from suit for **ministerial** acts (acts performed at the operational level that do not require the exercise of judgment) but have not waived immunity for **discretionary** acts (acts taking place at the planning or decisionmaking level)

## VII. DEFAMATION AND OTHER HARMS TO ECONOMIC AND DIGNITARY INTERESTS

### A. Defamation

1. Apply the common law *prima facie* case: **Defamatory language** concerning the plaintiff **published** to a third person that causes damage to the **plaintiff's reputation**
  - a. Damage will be presumed if the defamation is libel (in writing or other permanent form) or if it is slander (spoken) within one of the four *per se* categories (business or profession, loathsome disease, crime of moral turpitude, or serious sexual misconduct (traditionally, unchastity of a woman); otherwise, special (pecuniary) damages must be shown)
2. Apply the constitutional rules if the plaintiff is a public official or figure, or if the defamation involves a matter of public concern:
  - a. The plaintiff must prove that the statement was false
  - b. Public officials or figures must prove "actual malice," i.e., that the statement was made with knowledge of its falsity or reckless disregard of its truth or falsity
  - c. Private figures suing on a matter of public concern must show (1) at least negligence as to truth or falsity, and (2) actual injury (no presumed damages)
3. Consider any applicable defenses
  - a. Truth (when the constitutional requirement of proof of falsity does not apply)
  - b. Absolute privilege for statements in judicial, legislative, or executive proceedings
  - c. Qualified privilege for matters in the interest of the publisher and/or the recipient (may be lost if the statement is outside the scope of the privilege or made with actual malice)

### B. Invasion of Privacy—Four Kinds of Wrongs:

1. Appropriation of the plaintiff's picture or name
  - a. Unauthorized use of the plaintiff's picture or name for the defendant's **commercial advantage**
  - b. Limited to the advertisement or promotion of products or services
2. Intrusion on the plaintiff's affairs or seclusion
  - a. An act of prying or intruding on the plaintiff's **private affairs or seclusion** that would be highly offensive to a reasonable person
3. Publication of facts placing the plaintiff in a false light
  - a. The publication of facts about the plaintiff putting her in a **false light** in the public eye in a way that would be highly offensive to a reasonable person
  - b. Actual malice must be shown if the publication is in the public interest
4. Public disclosure of private facts about the plaintiff
  - a. The public disclosure of **private information** about the plaintiff such that the disclosure would be highly offensive to a reasonable person
  - b. Public disclosure requires publicity, not just publication to a few people
5. Defenses—consent and absolute or qualified privileges

### C. Misrepresentation

1. Intentional misrepresentation (fraud)
  - a. Defined: Misrepresentation by the defendant with **scienter** (knowledge of falsity or reckless disregard as to truth/falsity) and intent to induce reliance, causation (**actual reliance** on misrepresentation), **justifiable reliance**, and damages
  - b. The defendant generally has no duty to disclose material facts but may be liable for active concealment
2. Negligent misrepresentation
  - a. Defined: Misrepresentation by the defendant **in a business or professional capacity**, breach of duty to the plaintiff, causation (actual reliance on misrepresentation), justifiable reliance, and damages
  - b. The defendant owes a duty only to those to whom the misrepresentation was directed or those who the defendant knew would rely on it

### D. Interference with Business Relations

1. Defined: A valid **contractual relationship** or **business expectancy** of the plaintiff and a third party, the defendant's knowledge of the relationship, intentional interference by the defendant inducing a breach or termination of the relationship, and damages
2. The defendant's conduct may be privileged if it is a proper attempt to obtain business or protect the defendant's interests

### E. Malicious Prosecution

1. Defined: Initiating a **criminal proceeding** against the plaintiff ending in plaintiff's favor, absence of probable cause for the prosecution, improper purpose (malice), and damages



## ESSAY EXAM QUESTIONS

### INTRODUCTORY NOTE

The essay questions that follow have been selected to provide you with an opportunity to experience how the substantive law you have been reviewing may be tested in the hypothetical essay examination question context. These sample essay questions are a valuable self-diagnostic tool designed to enable you to enhance your issue-spotting ability and practice your exam writing skills.

It is suggested that you approach each question as though under actual examination conditions. The time allowed for each question is 60 minutes. You should spend 15 to 20 minutes spotting issues, underlining key facts and phrases, jotting notes in the margins, and outlining your answer. *If* you organize your thoughts well, 40 minutes will be more than adequate for writing them down. Should you prefer to forgo the actual writing involved on these questions, be sure to give yourself no more time for issue-spotting than you would on the actual examination.

The BARBRI technique for writing a well-organized essay answer is to (i) spot the issues in a question and then (ii) analyze and discuss each issue using the “CIRAC” method:

- C — State your ***conclusion*** first. (In other words, you must think through your answer ***before*** you start writing.)
- I — State the ***issue*** involved.
- R — Give the ***rule(s)*** of law involved.
- A — ***Apply*** the rule(s) of law to the facts.
- C — Finally, restate your ***conclusion***.

After completing (or outlining) your own analysis of each question, compare it with the BARBRI model answer provided herein. A passing answer does ***not*** have to match the model one, but it should cover most of the issues presented and the law discussed and should ***apply the law to the facts*** of the question. Use of the CIRAC method results in the best answer you can write.

**EXAM QUESTION NO. 1**

In an outlying, sparsely settled area, Doe's car collided one evening with a car driven by Crane, resulting in damage to Crane's car. Crane was blameless. Doe had been driving at 30 miles per hour in an area where the traffic law prescribes a maximum speed of 15 miles per hour. Doe is prepared to show that, in the area in question, this legal requirement is pretty universally ignored by motorists.

When Doe started out again, he forgot to turn on his lights. He soon ran into another car which, in the darkness, he had failed to see in time. The car thus hit belonged to Smith, who had negligently parked on the highway with his lights out and had gone to sleep in his car. In this accident, Doe's passenger, Jones, suffered a deep cut from which she bled profusely.

Doe's car was heavily damaged and rendered inoperable. Smith's car was damaged but remained operable, although in testing it Smith reported that the brakes were "soft" and untrustworthy as a result of the collision. No houses or other cars were in sight. After a hurried discussion, all three agreed that, despite the known condition of the brakes, it would be best to take Jones in Smith's car to the hospital about two miles down the road. On the way, the brakes failed, and in the resulting accident Jones suffered a fracture and the car was further damaged.

Discuss possible recoveries by Crane, Smith, and Jones.

**EXAM QUESTION NO. 2**

Mistkill, Inc. manufactured and distributed a weed-killing spray for use by growers of narrow-leaved plants. It was very effective on broad-leaved weeds—and any other broad-leaved plants—but imaginative research and a rigorous system of quality control had eliminated all toxicity to human or animal life. Mistkill sold to Upwind a barrel of its spray that had become contaminated with strychnine. There is no evidence that the contamination was due to any lack of care in the manufacturing process or that it should have been detected by Mistkill or Upwind. Upwind sprayed the contents of the barrel on his crop of rye grass from an airplane in a manner recommended by the Department of Agriculture. A gentle breeze carried a small quantity onto his neighbor Potter's land. Fortunately, this missed Potter's broad-leaved tobacco crop but, unfortunately, some of it was inhaled by Eagle Scout, Potter's valuable stud horse. The inhalation would have caused no more than a mild stomach upset in a normal horse, but Eagle Scout had a very acute, very rare, and hitherto unsuspected susceptibility to strychnine and died as a result of inhaling the spray.

Potter sued Mistkill and Upwind for the loss of her horse, and (as permitted by local procedure) Upwind cross-claimed for recovery from Mistkill in the event that he should be held liable. The case was tried without a jury and all of the above facts, and the horse's value, were proved without substantial contradiction.

What judgments? Discuss.

**EXAM QUESTION NO. 3**

Andrew took his car to Bob's Repair Shop and directed him to lubricate the car and adjust the steering mechanism. While so doing, Bob noticed that an important steel pin connecting the braking mechanism was worn nearly through, although it was still holding. Bob said nothing about it to Andrew.

Several days thereafter Andrew was driving at a high rate of speed on the highway. About 100 feet ahead of him and standing on the curb was Peter, who was obviously inattentive and was preparing to walk into the street in the face of dangerous oncoming traffic. Andrew, at this time, had glanced away from the road. If he had been looking, he would have had plenty of time to bring the car to a halt, or to slow it down sufficiently so there would have been no risk of striking an inattentive pedestrian such as Peter. As it was, Andrew first saw Peter when Peter was only a short distance directly ahead of him in the street. By the time Peter looked up and saw Andrew's vehicle, he was unable to get out of the way. Andrew jammed on his brakes with great force and would have stopped in time but for the fact that the worn pin in the braking mechanism snapped under the heavy pressure, and the brakes failed to function. Peter was struck by Andrew's car and seriously injured.

Discuss Peter's rights, if any, against Andrew and against Bob.

**EXAM QUESTION NO. 4**

A town ordinance prohibited the parking of cars so as to block driveways. In violation of this ordinance, Jones parked his car blocking Dr. Paul's driveway.

Smith, who resided in a nearby rural area, telephoned Dr. Paul to come right out because her son, Tom, had been bitten by a snake. Dr. Paul said he would come, started to go, but was unable to back his car out because of Jones's car. Seeing no one around, Dr. Paul released the brake on Jones's car and attempted to push it away. However, in so doing, he suddenly developed a hernia, suffered excruciating pain, and returned with difficulty to his office, where he made several phone calls trying to get another doctor to go see Tom. Due to unavoidable circumstances, he was unable for a long time to contact another doctor, but finally reached Dr. White, who said she would go.

When Dr. White arrived at Smith's home, she found the poison had spread so far that she was unable to save Tom's life. It is agreed that had Dr. Paul been able to respond to Smith's call without delay, he would in all probability have arrived in sufficient time to save Tom's life. (A statute in the jurisdiction gives an action for wrongful death to the parent of a deceased child.)

As Dr. White was driving back to her office, she negligently took her eyes off the road to examine her appointment book. Because of this, she failed to notice Adams, who was staggering on the highway in a helpless, drunken condition, until it was too late to avoid striking and injuring him.

What are the rights of Dr. Paul, Smith, and Adams? Discuss.



## ANSWERS TO ESSAY EXAM QUESTIONS

### ANSWER TO EXAM QUESTION NO. 1

#### First Crash

**Crane v. Doe:** Doe will be liable to Crane. At issue is whether Doe's violation of the speed limit will establish the requisite standard of care.

The *prima facie* case for negligence consists of: (i) a duty owed by the plaintiff to the defendant to act as a reasonably prudent person under the same or similar circumstances; (ii) breach of such duty; (iii) such breach actually and proximately caused the plaintiff's injuries; and (iv) damages. A court has discretion whether to use a criminal statute to set the applicable standard of care. The statute will establish the standard if: (i) the plaintiff is in the class intended to be protected by the statute; and (ii) it was designed to prevent the harm that occurred.

The procedural effect of a statutory violation takes one of three forms. A majority of courts holds that the violation constitutes negligence *per se*; i.e., duty and breach thereof are established. In a "presumption" state, the jury is charged that negligence is presumed from the violation, but the jury may find the violator not negligent if he persuades them that he acted reasonably. In an "evidence" state, the jury is instructed that the violation is mere evidence of negligence. Whichever approach is used, the plaintiff must still establish causation and damages.

The collision between Doe's car and Crane's car is the type of occurrence meant to be prevented by the speed limit law, and Crane, as the driver of another car, is among the class of persons intended to be protected by the law. Thus, the speed limit statute will be used to establish the standard of care. The fact that the speed limit is ignored by motorists will not provide a defense. It makes no difference that the area is sparsely settled. The speed limit is in effect and it cannot be negated by the public's failure to obey it.

As noted above, the violation will have a different procedural effect depending on a particular state's approach. Under any of the three approaches, it appears that Doe was negligent.

Crane will then have to show a causal connection between Doe's violation and Crane's property damage. Actual cause is established if the injury would not have occurred but for the act. Proximate cause is established if the injury was a foreseeable consequence of the defendant's negligence. The facts do not reveal how the accident occurred, but given that Crane was blameless, he likely can establish that, but for Doe's speeding, the collision could have been avoided. The collision also was a foreseeable result of Doe's speeding, so causation likely can be established. Crane suffered damage to his car, completing the *prima facie* case of negligence against Doe.

#### Second Crash

**Smith v. Doe:** Smith will recover against Doe. At issue is whether Smith's negligent parking of his car will preclude his recovery.

Applying the elements for a negligence action discussed above, Doe breached his duty of care to others on the road by driving without his lights on. The collision appears to have occurred because of the darkness, thus establishing causation. Smith's damaged car completes the *prima facie* case.

Smith was also negligent in parking on the highway with his lights off. Such negligence may have contributed to the collision. In a traditional contributory negligence state, Smith's negligence would defeat his case. Smith can avoid this defense by invoking the doctrine of last clear chance, which provides that the person with the last clear chance of avoiding the accident is liable. At the time of the collision, Smith's negligence was complete and he was asleep, thus putting him in a position of helpless peril. Doe should have been aware of Smith's peril, and would have been aware had Doe turned on his lights. Thus, last clear chance would counteract Smith's contributory negligence in a traditional contributory negligence state.

Most states have rejected the “all or nothing” approach of contributory negligence and have adopted some form of comparative negligence. In states with “partial” comparative negligence, the plaintiff’s damages will be reduced by his percentage of fault unless it passes a threshold level (in which case it is barred). States with “pure” comparative negligence allow some recovery no matter how great the plaintiff’s fault is. Hence, if the accident occurred in a comparative negligence state, Smith’s negligence would bar or reduce his recovery, depending on the version adopted and on Smith’s degree of fault relative to that of Doe. Last clear chance does not apply in a comparative negligence state.

**Smith v. Jones:** Smith likely will not recover against Jones. At issue is whether Jones, as a passenger in Doe’s car, breached a duty owed to Smith.

Smith may claim that Jones was negligent in not reminding Doe to turn on his lights. He may argue that, as a passenger, Jones owed a duty to the drivers of other cars. However, any duty she may have owed is minimal compared to the duty of the driver. As a passenger, Jones did not have a duty to pay attention to the road, so she may not have been aware that Doe’s lights were off (or she even may have been disoriented by the first crash). Hence, it is doubtful that Jones would be found to have acted negligently. If Jones were found to have been negligent, Smith’s contributory negligence (as discussed above) could be a defense.

**Jones v. Doe:** Jones may recover from Doe. Doe’s negligence relative to the second crash is discussed above. Doe owed his passenger the duty to refrain from active negligence in the operation of his car. This duty was clearly breached, which actually and proximately caused Jones’s injury (the deep cut). As noted above, it is possible that Jones’s failure to warn of the absence of lights was negligent. If so, the effect of her contributory negligence will be taken into account.

**Jones v. Smith:** Jones may recover from Smith. The facts establish Smith’s negligence. Once again, it is possible that Jones will be found to have contributed to her injury. On the other hand, the negligence of Doe will not be imputed to his passenger. The general rule is that another person’s contributory negligence will be imputed to the plaintiff only when the parties are in a relationship that would suffice for vicarious liability. It does not appear that Doe and Jones were engaged in a joint enterprise or that any other applicable relationship was present, so Jones’s recovery will not be reduced by Doe’s negligence.

Because Doe’s and Smith’s negligence combined to cause Jones’s indivisible injury, Doe and Smith may be jointly and severally liable to Jones. If a state applies joint and several liability, each defendant is liable to Jones for the entire amount of the damages from that injury. In states that do not apply that rule, each defendant will be liable only for the amount of damages that correspond to his degree of fault.

### Third Crash

**Jones v. Smith:** Jones may recover from Smith. At issue is whether Jones’s fracture was proximately caused by Smith’s original negligence.

Given the emergency presented by Jones’s profuse bleeding, it was not unreasonable to use Smith’s untrustworthy car in an attempt to reach a hospital. Hence, no new negligence is established by the facts. However, when the defendant’s original negligence creates a foreseeable risk that an intervening force would harm the plaintiff, the defendant remains liable for the harm caused. Here, because Smith’s original negligence caused damage to his brakes, it was foreseeable that Jones’s injuries could be aggravated on the way to seeking medical attention. Thus, Smith is liable for the fracture. Note that Jones will not be deemed to have assumed the risk or to have been contributorily negligent, because her decision to ride in the car resulted from the joint negligence of Smith and Doe, and was reasonable in light of her need for medical care.

**Jones v. Doe:** The analysis applied above against Smith also applies against Doe; i.e., the fracture can be traced to the earlier cut and the damage to Smith’s car, for which Doe is jointly liable.

**Smith v. Doe:** Smith’s action for further damage to his car is based on the previously described theory of negligence on the part of Doe; i.e., Smith will claim this as damage proximately flowing

from the second crash. As before, Doe may argue that Smith's negligence contributed to the second crash. The effect of Smith's negligence will depend on the jurisdiction.

### Note to Students

The first crash raises one point and is worth about 25%. The second crash is major, with its issues of contributory negligence; duty owed to and by a guest; and joint and several liability. The analysis of the second crash controls the treatment of the third one since no new negligence appears. Proximate cause analysis becomes central. The second and third crashes are worth equal credit. This is a very long and complex question in which some credit should be given for sensible organization and consistent analysis. Organization by crash, rather than by parties, greatly facilitates discussion of the second and third crashes.

## ANSWER TO EXAM QUESTION NO. 2

### Potter v. Mistkill

Potter will be able to recover against Mistkill based on either negligence or strict liability, and possibly against Upwind based on strict liability; if Upwind is liable, it has an indemnity claim against Mistkill. At issue are the causes of action that Potter may raise to recover for the loss of her horse.

**Negligence:** A *prima facie* case for negligence consists of (i) a duty of care owed by the defendant, (ii) breach of that duty, (iii) actual and proximate causation, and (iv) damages suffered by the plaintiff. Under the modern common law rule, a manufacturer owes a duty of due care to all persons who may foreseeably be damaged by negligence in manufacturing the product. Virtually all states extend that duty to claims for property damage.

Even though there is no direct evidence of negligence, Mistkill's breach of duty may be established inferentially under the doctrine of *res ipsa loquitur*. The doctrine should apply here because the prerequisites to its application are present:

- (i) It is more likely than not that the injury or damage would not have occurred but for someone's negligence (permitting the spray to become adulterated with strychnine).
- (ii) The negligence is attributable to the defendant (that is, this type of accident ordinarily happens because of the negligence of someone in the defendant's position); this can often be established by showing that the instrumentality causing the injury (the spray) was in the exclusive control of the defendant (Mistkill) when the force causing the injury (the adulteration of the spray) was set into motion.

These elements being present, Mistkill may be found negligent by the judge in her capacity as trier of fact. In some states, the application of *res ipsa loquitur* creates a presumption of negligence that will result in a judgment for the plaintiff in the absence of facts that would tend to rebut the presumption. No such facts appear here. In other states, the operation of the doctrine raises only an *inference* of negligence, which the trier of fact is free to draw or reject.

Mistkill's negligence is a cause in fact of the death of Potter's horse because, but for the adulteration of the spray, the spray would not have resulted in the horse's death.

All of the intervening forces were arguably foreseeable. Aerial spraying is a common method of applying weed-killing sprays in farming areas. It must be expected that a breeze may be blowing when the activity takes place, and that some of the spray may blow over into neighboring lands where valuable farm animals may be present. Furthermore, it should be foreseeable that an animal exposed to spray adulterated with strychnine would be physically injured thereby.

An additional question of proximate cause is presented by Eagle Scout's abnormal susceptibility to strychnine. This situation would seem close to that of the personal injury cases in which courts hold that one must "take his victim as he finds him." But the question is whether that doctrine is applicable only to human life. It is arguable that in negligence cases the party at fault should always be liable for the unforeseeable weaknesses of his innocent victim—even a horse. If this argument is accepted, Mistkill's negligence should be held to be a proximate cause of Eagle Scout's death, and Mistkill should therefore be liable to Potter for the value of Potter's horse.

**Strict Liability:** Most states now extend a manufacturer's strict liability in tort to a *bystander* for damages (either personal injury or property damage) proximately resulting from a defect in a product, if the damage occurred while the product was being used in the manner for which it was designed.

To prove strict liability, the plaintiff must show (i) the defendant is a commercial supplier; (ii) the defendant produced or sold a product that was defective when it left the defendant's control; (iii) actual and proximate cause; and (iv) damages.

If the strict liability doctrine is applied to the case at bar, it would eliminate the necessity of proving Mistkill's negligence directly or inferentially. Here, Mistkill is a commercial supplier of the spray. That there was a defect is stated in the facts—whether it occurred in the manufacture or in the design. The same considerations of proximate cause discussed above would be equally applicable here. Although it was unlikely to cause death, some damage from the poison was to be expected and liability should follow—as in the negligence discussion.

### Potter v. Upwind

**Negligence:** Upwind's liability, if any, is based on his act of spraying his crop from an airplane. Although this activity took place on his own land, Upwind had a landowner's duty to exercise due care not to expose the property of adjoining landowners to unreasonable risk of harm. Compliance with the Department of Agriculture's recommendations might be evidence of compliance with a standard required by law (depending upon the purpose of the recommendations), but would not conclusively establish due care. The breeze may have come up after the spraying started, in which case there is no actionable negligence by Upwind at all.

Even if negligence can be established, the breach of duty would have been toward the broad-leaved tobacco, since Upwind could not have known about the poison. While it is true that, but for the spraying, Eagle Scout would not have been killed, the risk of injury to the horse was not within the scope of the risk created by the defendant's negligence. Hence, inasmuch as most jurisdictions now apply "scope of the risk" analysis, Upwind would not be found liable for Eagle Scout's death on this theory.

**Strict Liability:** If an activity not a matter of common usage involves substantial risk of damage to the person or property of others despite the actor's exercise of reasonable care, it is classified as an abnormally dangerous activity, and the actor may be held liable, even in the absence of negligence, for the proximate results of that activity. In some jurisdictions, aerial spraying has been classified among those activities considered abnormally dangerous—because of both the risk of crashes and the risk to others' crops. Whether it would be so considered in this case would depend upon the trier of fact's determination of two factors: first, whether in the present state of the art the exercise of reasonable care can eliminate the serious risk of damage to the property of adjoining landowners; and second, whether the activity is so common in the community in which it took place that the imposition of absolute liability would be impracticable. Inasmuch as aerial spraying is common in many agricultural communities, it may well be classed as an activity which, although dangerous, is too common for the law to impose strict liability for damages resulting therefrom.

If strict liability were imposed, the danger of poisoning animals would probably be found well within the scope of the risk created, since it is the result of the normally dangerous propensity of aerial spraying. The other proximate cause considerations discussed in the section dealing with Upwind's liability for negligence are equally applicable here.

### Upwind v. Mistkill

Upwind could base his cross-complaint on an indemnity theory. As between Upwind and Mistkill, Mistkill is primarily liable because the defect occurred while the product was in Mistkill's hands. Therefore, if Upwind is held liable to Potter on any extended negligence or strict liability theory, the entire liability should fall on Mistkill, who was primarily responsible.

### ANSWER TO EXAM QUESTION NO. 3

#### Peter's Rights Against Andrew

Peter has a cause of action against Andrew based on negligence. However, his recovery may be reduced or barred because of his contributory negligence. At issue is whether Peter has a viable claim against Andrew to recover for his injuries.

The *prima facie* case for negligence consists of: (i) a duty on the part of the defendant to conform to a specific standard of conduct for the protection of the plaintiff against an unreasonable risk of injury; (ii) breach of that duty by the defendant; (iii) actual and proximate causation; and (iv) damage to the plaintiff's person or property.

While Andrew was driving his car, he owed a duty to other drivers and pedestrians in the vicinity (such as Peter) to refrain from creating an unreasonable risk of injury to them. Andrew breached this duty by glancing away from the road while driving at a high rate of speed.

The breach of duty was an actual cause of the accident. The plaintiff can show actual cause by proving that, but for the defendant's negligence, the harm would not have occurred. The facts state that if Andrew had been looking, he would have had plenty of time to stop or slow down the car so as to avoid striking a pedestrian. Although Andrew could have stopped in time to avoid the accident had the steel pin not been defective, the pin snapped under the heavy pressure of jamming the brakes with great force. Thus, the injuries would not have occurred but for Andrew's breach of duty, making the breach an actual cause of the injuries.

Andrew's breach was also a proximate cause of Peter's injuries. Under the rule of proximate cause, a defendant is liable for harmful results that are the normal incidents of and within the increased risk caused by his acts, i.e., a test based on foreseeability. Although Andrew was unaware of the defective pin, it was certainly foreseeable that inattentive driving at a high rate of speed posed a risk of harm to a pedestrian such as Peter.

The final element of the *prima facie* case, damages, is established by the fact that Peter was seriously injured. Peter can claim damages arising from his medical expenses, lost earnings, pain and suffering, and impaired future earning capacity.

A plaintiff has a duty to exercise reasonable care for his own safety. Under a traditional contributory negligence scheme, the plaintiff's contributory negligence completely bars his right to recover. Peter's inattentiveness, as exemplified by his walking into the street in the face of traffic, constituted contributory negligence. However, Peter may be able to recover under the doctrine of last clear chance. This doctrine allows a plaintiff to recover despite his own negligence if the defendant had the last clear chance to avoid the accident. It can be argued that Andrew had the last clear chance to avoid the accident, because he could have avoided the accident if he had been looking at the road.

Most states have adopted some type of comparative negligence system, whereby the trier of fact weighs the plaintiff's negligence against that of the defendant and reduces the plaintiff's damages accordingly. Under a partial comparative negligence system, the plaintiff's recovery is barred if his negligence exceeds a threshold of 49% or 50%; otherwise his recovery is reduced by the percentage of his fault. Under a pure comparative negligence system, the plaintiff will recover something as long as he is not 100% at fault. As stated above, Peter was negligent with regard to his own safety. Thus, in a comparative negligence jurisdiction, his recovery will be reduced, rather than barred, unless his negligence crosses whatever threshold applies under a scheme of partial comparative negligence.

### Peter's Rights Against Bob

Peter has a cause of action against Bob based on negligence. As is the case regarding Peter's negligence action against Andrew, principles of contributory negligence or comparative negligence may affect the outcome. At issue is whether Peter has a viable claim against Bob to recover for his injuries.

Applying the elements of the *prima facie* case for negligence set forth above, Bob owed a duty of ordinary reasonable care in his job as a mechanic, pursuant to which he was required to exercise the knowledge and skill of a member of his occupation. When Bob noticed that an important steel pin connecting the braking mechanism was worn nearly through, ordinary reasonable care would have required him to report his discovery to Andrew, the car's owner, so as to alert him to the potential seriousness of the problem. Bob owed this duty not just to Andrew but to all foreseeable plaintiffs, which would encompass anyone who might be on the road when Andrew is driving the car. Bob should have reasonably foreseen a risk of injury to pedestrians or people riding in other cars arising from his failure to mention the defective pin. Thus, Bob breached a duty of care owed to Peter.

Peter is entitled to a presumption that, had Bob told Andrew about the pin's defective condition, Andrew would have had the condition repaired or refrained from driving until it was repaired. If the pin had been in proper working condition, Andrew would have been able to stop the car in time to avoid the accident. Thus, Bob's breach of duty was an actual cause of Peter's injuries.

Regarding proximate cause, the accident and the injuries that befell Peter were well within the range of foreseeable risks caused by Bob's failure to disclose the condition of the pin. Andrew's negligence in glancing away from the road was an intervening force; i.e., a force that came into motion after Bob's negligent act that combined with it to cause the injury to the plaintiff. Intervening forces will not cut off the defendant's liability for his own negligence if the intervening force was foreseeable. Here, Andrew's negligence in driving inattentively was ordinary foreseeable negligence; thus, it will not cut off Bob's liability for the foreseeable consequences of his negligence.

As explained in the previous section, Peter's negligently stepping into the street, without which he would not have been injured, would defeat his cause of action in a contributory negligence jurisdiction; however, unlike Andrew, Bob did not have the last clear chance to avoid the accident. In a state that has adopted some form of comparative negligence, Peter's recovery will be reduced (or in some states barred altogether if his negligence exceeds the designated threshold of 49% or 50%).

### ANSWER TO EXAM QUESTION NO. 4

**Smith's Rights:** Smith may have a viable cause of action against Jones for her son's wrongful death. At issue is whether breach of the ordinance is negligence per se.

The *prima facie* case for negligence consists of the following: (i) a duty on the part of the defendant to conform to a specific standard of conduct for the protection of the plaintiff against an unreasonable risk of injury; (ii) breach of duty; (iii) actual and proximate causation; and (iv) damage to the plaintiff's person or property. Under the principle of negligence *per se*, the requirements of a statute providing for criminal penalties, including fines under a municipal ordinance, can establish the applicable duty if: (i) the plaintiff is in the class intended to be protected by the statute; and (ii) the statute was designed to prevent the type of harm suffered by the plaintiff.

The ordinance at issue was probably enacted to promote free access to the street, both for purposes of convenience and for safety in case of emergencies, and a patient in need of emergency treatment by a doctor would likely be in the class intended to be protected by the statute. Jones breached his duty under the ordinance by blocking the doctor's driveway. Absent this breach, the doctor would have reached Tom in time to save his life. This establishes actual causation. Regarding proximate cause, it will be a question of fact for the jury whether it was foreseeable that the doctor would be unable to obtain alternative emergency assistance after he determined that he could not get out. The recoverable

damages by the mother in a wrongful death action would include loss of support and loss of companionship.

Note that Smith does not have a viable cause of action against Dr. Paul. The doctor did all that he could reasonably have been expected to do in his efforts to help Smith's son. It was not the doctor's fault that his driveway was blocked, and he tried to push the car out of the way. When those efforts failed, he did his best to reach another doctor.

**Dr. Paul's Rights:** Dr. Paul has a claim against Jones for his personal injuries. At issue is whether Dr. Paul can establish common law negligence by Jones.

It is likely that the doctor will have to establish a common law negligence duty, because it is doubtful that the harm he suffered was the type of harm that the ordinance was designed to prevent. Jones owed a duty to the doctor to park his vehicle so as to avoid creating an unreasonable risk of injury. Jones breached this duty by blocking the doctor's driveway. This breach actually caused the doctor to suffer injury when he tried to push the car to provide emergency treatment. While again a question for the jury, it was probably foreseeable that the owner of the driveway might be injured in trying to move the car, thus establishing proximate cause. The doctor's hernia and pain constitute his injuries. Because the doctor was attempting to respond to an emergency, he will not be found to have been contributorily negligent in trying to push the car.

**Adams's Rights:** Adams has a strong case against Dr. White but does not have a good case against Jones. At issue is the respective fault of the parties in causing Adams's injuries.

Dr. White negligently took her eyes off the road, so she breached her duty to drive in a manner so as to avoid an unreasonable risk of injury to pedestrians. Actual causation is clear, and the clear foreseeability of what happened establishes proximate cause. Finally, the facts indicate that Adams suffered injuries.

Dr. White can raise the issue of Adams's contributory negligence, because he was staggering on the highway in a helpless drunken condition. Absent such conduct, the accident would not have happened, and the injury was a foreseeable result of such conduct. In a contributory negligence jurisdiction, this would defeat the plaintiff's cause of action. However, because Adams was in a helpless situation, the court may find that Dr. White had the last clear chance to avoid the accident, allowing Adams to recover despite his contributory negligence. In a state that has adopted some form of comparative negligence, the fault of Adams will be weighed against that of Dr. White, and will reduce Adams's recovery or bar it altogether in a state applying partial comparative negligence if it exceeds the specified threshold in that state.

A suit by Adams against Jones will fail because proximate cause is absent. Although it is true that but for Jones's negligent blocking of Dr. Paul's driveway, Dr. White would probably not have been at the scene of the accident with Adams, this type of harm was not within the scope of reasonably foreseeable consequences that might occur as a result of blocking the driveway.

