

## Torts

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| <p><b>Intent for Intentional Torts</b><br/>Intent can transfer between people and between torts. Intent is satisfied when the offender either desires the consequences of his act or knew the consequences were reasonably certain to result from his act.</p>   | <p><b>Trespass</b><br/>Land: The defendant must have a purpose or a substantial certainty to enter the property of another. Physical entrance onto the land of another satisfies the act requirement.</p> <p>Chattel: An intent to interfere with the owner's dominion or use and enjoyment of the chattel. Substantial dominion or damage to the chattel of another must be shown.</p> <p>Conversion: Damages are the value of the chattel. For trespass, damages will compensate for the damage or use.</p>  | <p><b>Negligence</b><br/>Louisiana applies the duty-risk formulation of negligence. The duty-risk approach requires the plaintiff prove five elements to recover. They are cause-in-fact, traditional duty, scope of the duty, breach, and injury.</p>   | <p><b>Negligence: Breach of the Duty</b><br/>The defendant's conduct falls below the objective standard of reasonable conduct when he created a reasonable risk of harm. The defendant breached the duty when he created an unreasonable risk. Using the B&lt;PL analysis from Judge Hand, where the B is the burden of precautionary activity, the P is the possibility of resulting injury, and the L is the loss/magnitude of injury, the defendant here breached his duty.</p>  |
| <p><b>Battery</b><br/>Battery is an intentional contact that is harmful or offensive. Intent requires purpose or substantial certainty of contact that is harmful or offensive. There must be a touching of the Plaintiff's person or contact with something closely connected to the person. Damage is not required, but the contact must be harmful or offensive to a reasonable person (a person of ordinary sensibilities).</p> <p><b>Assault</b><br/>An assault is an intentionally created reasonable apprehension of an imminent battery with the apparent means to complete the battery. There must be an imminent battery, and fear does not equate to apprehension. The tortfeasor must reasonably appear to have the means to complete the battery.</p> | <p><b>Defamation</b><br/>A defendant commits defamation when he causes damage to a plaintiff's reputation. The elements include: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury.</p> <p>Defamation attaches to statements, not opinions. Publication requires that the statement be communicated to a third party by the defendant.</p> <p>Truth is an absolute defense to defamation.</p> <p>The Constitution has formed and influenced the application of the elements of defamation in every state in the union, including Louisiana. Perhaps most noteworthy is the fear that if we apply defamation too much, we may chill free speech. Thus, we have a higher standard of proof as "actual malice" to prove defamation.</p> | <p><b>Negligence: Cause-in-Fact</b><br/>Cause-in-fact is measured by the "but-for" or substantial factor tests. But for asks whether, but for the defendant's negligence, the injury would have occurred. Substantial factor asks if the defendant's negligence is a substantial factor in the injury of the plaintiff.</p>  | <p><b>Negligence: Injury</b><br/>Actual damage must be proven, either through showing personal injury damages or damage to property.</p>  |
| <p><b>False Imprisonment</b><br/>False imprisonment is an intentional actual confinement of the plaintiff. Actual, complete confinement is necessary. A reasonable means of escape will eliminate liability.</p>   | <p><b>Invasion of Privacy</b><br/>Intrusion Upon Seclusion</p> <p>Appropriation of Name or Likeness</p> <p>Public Disclosure of Private Life and Facts</p> <p>False Light</p> <p>Malicious Prosecution and Abuse of Process</p>  | <p><b>Negligence: Traditional Duty</b><br/>Traditional duty is measured by the reasonable person standard, requiring the person to behave as a reasonable, ordinary, and prudent person under similar circumstances.</p> <p>The other tests for establishing duty (the appropriate standard of care) is negligence per se (established by statute); custom; or res ipsa loquitur.</p>  | <p><b>Negligence: Controlling Third Parties</b><br/>In some instances, a defendant may have a duty to guard against or control the foreseeable actions of third parties. These include caretakers (a jailer, custodian, or chaperone), parents, and owners of a business to exercise reasonable care for the safety of persons frequenting his business (e.g., against criminal activity).</p>  |
| <p><b>IIED</b><br/>The defendant must desire to inflict severe emotional distress or be substantially certain that severe emotional distress will occur. Defendant's conduct must be beyond the toleration of reasonable members of society. Defendant's conduct must cause plaintiff's emotional distress. The distress must be severe; minor emotional upset is insufficient.</p>  | <p><b>Defenses to Intentional Torts</b><br/>Consent to an action that is believed not to be harmful vitiates the intent of the tortfeasor.</p> <p>An actor may defend herself when she has reasonable ground to believe it is necessary. An actor may only use reasonable force to defend herself. Excessive force exceeds the scope of the privilege. One may defend others to the same extent that the third person may defend herself.</p> <p>The person in possession of the property is privileged to use reasonable force in the protection of that property. Excessive force will defeat the purpose. A person may not use deadly or excessive force to defend property.</p>  | <p><b>Negligence: Scope of the Duty</b><br/>Scope of the duty (or risk) asks whether this defendant should be responsible to this plaintiff for these injuries. Louisiana considers several factors for this element. First, was the injury a foreseeable risk and was this a foreseeable plaintiff? Second, how easily was this injury associated with this negligent act? Third, were there any intervening acts that occurred between the defendant's negligence and the plaintiff's injury? Or were there any superseding acts between the negligence and the injury? A superseding act would be less foreseeable and probable and more negligent, thus relieving the defendant of liability. Finally, the court should consider the <i>Pitre</i> policy factors: (1) the need for compensation of losses; (2) historical development of precedents; (3) moral aspects of the defendant's conduct; (4) the efficient administration of the law; (5) deterrence of future harmful conduct; and (5) the capacity to bear or distribute losses.</p> | <p><b>Negligence: NIED</b><br/>Emotional distress damages are only awarded when emotional distress is the only injury. It mostly applies to bystander cases where the following elements are met: (1) the plaintiff must view the accident or come upon the scene thereafter; (2) the direct victim of the injury must suffer such harm that it can be reasonably expected that a person in the plaintiff's position would suffer serious mental anguish from the experience; (3) the emotional distress sustained must be serious and severe; (4) the plaintiff must be a family member of the direct victim; and (5) viewing the scene must cause the distress.</p> |

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| <p><b>Attorney Malpractice</b><br/>An attorney is under a duty to exercise the level of care exercised by a licensed attorney in the same custom. Once a plaintiff establishes a prima facie case that the attorney's negligence caused a loss, the burden shifts to the defendant attorney to prove the client would not have succeeded.</p> <p><b>Providers of Alcohol</b><br/>Louisiana limits the liability of those who are selling, serving, or furnishing alcoholic beverages. Drinking, not selling or serving, is the proximate cause of injuries. Permitted sellers are not responsible for injuries off the premises unless the beverages are served to an individual under the lawful age. Similarly, social hosts are not responsible for injuries occurring off the premises unless alcohol was served to an individual under the lawful age.</p> | <p><b>Strict Liability: Things</b><br/>The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect. The claimant must show: (1) ruin, vice or defect that creates an unreasonable risk of harm; (2) ownership of custody of the thing causing harm; (3) actual knowledge or constructive knowledge of the defect; (4) the damage could have been prevented by reasonable care; and (5) the defendant failed to exercise such reasonable care.</p> <p><b>Strict Liability: Buildings</b><br/>The owner of a building is answerable for the damage occasioned by its ruin. The claimant must show: (1) it is a building; (2) ruin, vice, or defect that creates an unreasonable risk of harm; (3) defendant must have knowledge or constructive knowledge of the defect; (4) ownership of the building; (5) and the defect or vice must have caused the damage.</p>  | <p><b>Vicarious Liability</b><br/>Masters and employers are answerable for the damage occasioned by their servants and overseers, in their exercise of the functions in which they are employed. For an employer to be liable for his employee's action, a claimant must show: (1) an employment relationship; (2) the employee was engaged in activities which are within the course and scope of the employment; and (3) the employee must have been at fault, which is usually found through negligence.</p>  | <p><b>Defenses &amp; Allocation of Fault</b><br/>Louisiana has a comparative fault statute. The fault of all actors is to be compared including parties, nonparties, settling tortfeasors, insolvent parties, immune actors, and those whose identity is not known.</p> <p>Under true comparative fault, the plaintiff's recovery is reduced by the amount of his negligence, no matter what the percentage of his negligence is determined to be. Comparative fault reduces recovery in strict and absolute liability cases.</p> <p>To determine each party's allotted share, apply the Watson factors: (1) whether the conduct resulted from inadvertence or involved an awareness of danger; (2) how great was the risk created by the conduct; (3) the significance of what was sought by the conduct; (4) the capacity of the actors, either superior or inferior; (5) extenuating circumstances which might require the actor proceed in haste, without proper thought; and (6) the relationship between the fault/negligent conduct and the harm to the plaintiff.</p>  |
| <p><b>Strict Liability: Children</b><br/>Parents are responsible for the acts of children residing with them when the act of the child would be negligent if performed by an adult. The elements are: (1) parent/child relationship and (2) child fault measured by an adult standard.</p> <p><b>Strict Liability: Animals</b><br/>Owners of animals are held to a negligence standard, unless the animal is a dog. Owners of dogs are strictly liable: (1) if the owner could have prevented the injury and (2) the injured person did not provoke the dog.</p>  | <p><b>Absolute Liability</b><br/>Absolute liability, unlike negligence and strict liability, imposes liability without fault. Under La. Civ. Code 667, absolute liability for an ultrahazardous activity is strictly limited to pile driving or blasting with explosives. Defendants will be held liable for damages caused by these activities, regardless of knowledge or exercise of reasonable care.</p>  | <p><b>Vicarious Liability: Employment Relationship</b><br/>The existence of an employment relationship is typically measured by the control test: could the employer have exercised control over how the work was done?</p> <p>A borrowing employer is liable for the torts of a borrowed employee. To determine a borrowed employee, consider: (1) the right of control; (2) actual exercise of control by the borrowing employer; (3) relinquishment of control by the general employer; and (4) whether the borrowed employee is doing the work for the borrowing employer.</p> <p>An employer is not vicariously liable for the torts of an independent contractor.</p> <p>An employer is responsible for the intentional torts of his/her employee when the conduct is so closely related in time, place, and cause that it constitutes a risk of harm attributable to the employer's business.</p> | <p><b>Worker's Compensation</b><br/>The Worker's Compensation Act provides an exclusive remedy for the employee against his/her employer or co-employee where the terms of the statute are met. The compromise allows the injured employee to recover damages pursuant to the statute, but the employer and the co-employee will be immune for civil tort lawsuits, except for international acts. The requirements are: (1) an employment relationship; (2) compensable injury; and (3) injury arises out of and in the course of employment – focusing on the character and origin of the risk and the time and location of the incident.</p> <p>The exceptions are: (1) horseplay; (2) personal disputes unrelated to employment; (3) negligent hiring or training or supervision; and (4) intentional acts.</p>  |
| <p><b>Prescription</b><br/>Prescriptive periods require that a lawsuit must be initiated within a statutorily defined time period. The prescriptive period generally begins to run at the time of the incident. The time period applicable to most torts in Louisiana is one year.</p> <p>Contra Non Valentum: The prescriptive period may be extended beyond the one-year period in four instances: (1) when some legal cause preventing the filing of the lawsuit; (2) when the defendant concealed the facts; (3) when the defendant did something to prevent the plaintiff from filing; and (4) where the elements of the action are not known or easily knowable. The discovery doctrine can only be extended for medical malpractice cases for three years.</p>   | <p><b>Products Liability: General Overview</b><br/>The Louisiana Products Liability Act (LPLA) establishes the exclusive remedies against manufacturers of products for personal injury actions. The LPLA has the following elements:</p> <p>The defendant must be a manufacturer. A manufacturer is a person or entity in the business of manufacturing a product for placement into trade of commerce; "manufacturing a product" means producing, fabricating, constructing, etc. a product. A seller who exercises control over design, construction, or quality of the product is also a manufacturer.</p> <p>The damage must have been proximately caused by a defective condition of the product.</p> <p>The product must be defective through its construction or composition, a design defect, failure to adequately warn, or breach of express warranty.</p> <p>The defect must have existed at the time the product leaves control of the manufacturer or arises from a reasonably anticipated modification of its use.</p> <p>There must be an injury that results from a reasonably anticipated use of the product.</p> | <p><b>Vicarious Liability: Course and Scope</b><br/>The employer is vicariously liable for the actions of its employee if the act is within the course and scope of the employment. Factors to consider whether the employee was in the course and scope of his employment include: (1) payment of wages; (2) control over work and work methods; (3) time, place, and purpose of act; (4) relationship between employee's act and employer's business; (5) benefits received by the employer; (6) employee's duty to perform the particular act; and (7) reasonable expectation of the employer that the employee would perform the act.</p> <p>A cause for negligent hiring must examine if the employer has exercised reasonable care in hiring employees who, in the performance of their duties, will not subject third parties to a serious risk of harm.</p>                                      | <p><b>Damages</b><br/>Nominal damages are only available for some intentional torts.</p> <p>Compensatory damages return the plaintiff to the position in which he would have been had he not been injured. There are three types: special damages are specific economic losses (e.g., lost wages) that can be determined with certainty. General damages are noneconomic losses for which the amount is speculative (e.g., pain and suffering). Damages related to the plaintiff's inability to engage in pleasurable activities are known as "hedonic" damages, or the lost enjoyment of life.</p> <p>Punitive damages are meant to punish the defendant and deter this defendant and others from engaging in similar conduct. They are only available if specifically authorized by statute: Driving while intoxicated, sexual abuse of a minor, and child pornography.</p> <p>Recovery for property damages will either be the diminution in value for partial destruction, or fair market value for total destruction. In a tort case, plaintiff has a choice to recover either damages include the cost of restoration or the difference in property value before and after the harm.</p> |

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| <p><b>Medical Malpractice</b><br/> The action will be a malpractice claim, which depends on if the provider is a Qualified Healthcare Provider (“QHCP”) or a regular health care provider. A QHCP is someone who has obtained a minimum of \$100,000 insurance coverage for malpractice liabilities.<br/> Advantages for a QHCP include: (1) no suit can be filed until the claim has been processed through a medical review panel; and (2) liability is limited to \$100,000 per plaintiff with a maximum of \$500,000, where the Patient Compensation Funds pays any damages above \$100,000.</p> <p>The benefits of a QHCP only applies to acts of medical malpractice, determined by the Coleman v. Deno factors: (1) was the wrong “treatment related” or caused by a dereliction of professional skill; (2) does the wrong require expert evidence to determine breach; (3) did the wrong involve an assessment of the patient’s condition; (4) was there a physician-patient relationship; (5) would the injury have occurred if the patient had not sought treatment; and (6) is the alleged tort an intentional tort.</p> <p>Regardless if the provider is a regular provider or a QHCP, the elements of medical malpractice are identical to a negligence claim, with the elements of duty, breach, causation and injury. The duty of a healthcare professional is a customary standard where the standard must exhibit the level of care exhibited by a duly licensed professional in the same community. Breach is met if the provider failed to exercise the customary level of due care. Causation is measured by the “but for standard”. Injury is measured the same as in a negligence theory.</p> | <p><b>LPLA: Defective Products</b><br/> For a product defective due to its construction or composition, plaintiff must prove the product contained a material deviation from identical products that caused harm. There is a strict liability theory and no knowledge of the defect is required.</p> <p>For a product unreasonably dangerous in design, plaintiff must prove: (1) an alternative design existed that would have prevented the plaintiff’s damage (or at least reduced injuries); and (2) a balancing test would favor the plaintiff due to the moral, social, and economic utility of the product; the effects of an alternative design in the utility of the product; any new or additional risk created by the design; and the extent to which the alternative design would have prevented or reduced the harm. State of the Art Defense: The manufacturer has the burden of proving that he could not have known of an alternative design.</p> <p>For a product defective due to an inadequate warning, plaintiff must prove the adequacy of warning is tested through considering the likelihood of the gravity of danger, the feasibility of providing a warning given the scientific and technological knowledge at the time, and the manufacturer’s ability to anticipate that a user would be aware of the nature of potential danger. Defenses: (1) the danger was obvious to an ordinary, reasonable user; (2) user already knew or should have known the dangerous characteristic of the product; (3) manufacturer did not know and reasonably could not know the dangerous characteristic; or (4) the warning was not passed on by the seller or was removed.</p> <p>For a product defective due to a breach of express warranty, plaintiff must prove: (1) the manufacturer made an express warranty to which the product did not conform; (2) the claimant was induced to use the product by the representation made; (3) the express warranty was untrue; and (4) the claimant sustained damages proximately caused because the express warranty was untrue.</p> | <p><b>Wrongful Death and Survival</b><br/> The decedent must have suffered injury and died as a result of conduct by the defendant.</p> <p>Wrongful death and survival actions allow designated beneficiaries to bring tort actions when the tort victim dies. Wrongful death and survival actions are separate actions with distinct damages.</p> <p>The survival action allows the designated beneficiaries to recover damages which the victim could have recovered if he had not been injured. Damages are those suffered by the decedent from the time of injury until death, and include medical expenses, lost wages, pain and suffering, and mental anguish suffered.</p> <p>The wrongful death action is brought by the beneficiaries for damages they suffered. Damages included loss of love, affection, services, support and society, and grief.</p> <p>The categories are: (1) surviving spouse and/or children; (2) surviving parents; (3) surviving brothers and sisters; (4) surviving grandparents; (5) succession representative.</p> <p>Both wrongful death and survival actions prescribe one year from the date of death.</p> |  |
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