Many arbitrations take place under the auspices of the American Arbitration Association, a private organization headquartered in New York, with regional offices in many other cities. The association uses published sets of rules for various types of arbitration (e.g., labor arbitration or commercial arbitration); parties who provide in contracts for arbitration through the association are agreeing to be bound by the association's rules.

Similarly, the National Association of Securities Dealers provides arbitration services for disputes between clients and brokerage firms. International commercial arbitration often takes place through the auspices of the International Chamber of Commerce. A multilateral agreement known as the Convention on the Recognition and Enforcement of Arbitral Awards provides that agreements to arbitrate—and arbitral awards—will be enforced across national boundaries.
Arbitration has two advantages over litigation. First, it is usually much quicker, because the arbitrator does not have a backlog of cases and because the procedures are simpler. Second, in complex cases, the quality of the decision may be higher, because the parties can select an arbitrator with specialized knowledge.

Under both federal and state law, arbitration is favored, and a decision rendered by an arbitrator is binding by law and may be enforced by the courts, with very few exceptions (such as fraud or manifest disregard of the law by the arbitrator or panel of arbitrators). Saying that arbitration is favored means that if you have agreed to arbitration, you can't go to court if the other party wants you to arbitrate. Under the Federal Arbitration Act and many state laws mandating arbitration, if you file suit in court when you previously agreed to arbitrate, the other party can go to court and get a stay against your litigation and also get an order compelling you to go to arbitration.

Torts

Overview of Tort Law

In civil litigation, contract and tort claims are by far the most common. The law attempts to adjust for harms done by awarding damages to a successful plaintiff who demonstrates that the defendant was the cause of the plaintiff's losses. Torts can be intentional torts, negligent torts, or strict liability torts. This section explains the different kind of torts, as well as available defenses to tort claims.

Definition of Tort

The term *tort* is the French equivalent of the English word *wrong*. The word *tort* is also derived from the Latin word *tortum*, which means twisted or crooked or wrong. Thus conduct that is twisted or crooked is a tort. The term was introduced into the English law by the Norman jurists.
Long ago, *tort* was used in everyday speech; today it is left to the legal system. A judge will instruct a jury that a tort is usually defined as a wrong for which the law will provide a remedy, most often in the form of money damages. The law does not remedy all "wrongs." The preceding definition of tort does not reveal the underlying principles that divide wrongs in the legal sphere from those in the moral sphere. Hurting someone's feelings may be more devastating than saying something untrue about him behind his back; yet the law will not provide a remedy for saying something cruel to someone directly, while it may provide a remedy for "defaming" someone, orally or in writing, to others.

Although the word is no longer in general use, tort suits are the stuff of everyday headlines. More and more people injured by exposure to a variety of risks now seek redress (some sort of remedy through the courts). Headlines boast of multimillion-dollar jury awards against doctors who bungled operations, against newspapers that libeled subjects of stories, and against oil companies that devastate entire ecosystems. All are examples of tort suits.

The law of torts developed almost entirely in the common-law courts; that is, statutes passed by legislatures were not the source of law that plaintiffs usually relied on. Usually, plaintiffs would rely on the common law (judicial decisions). Through thousands of cases, the courts have fashioned a series of rules that govern the conduct of individuals in their noncontractual dealings with each other. Through contracts, individuals can craft their own rights and responsibilities toward each other. In the absence of contracts, tort law holds individuals legally accountable for the consequences of their actions. Those who suffer losses at the hands of others can be compensated.

Many acts (like homicide) are both criminal and tortious. It is a crime because there are state laws against homicide. It is a tort because intentionally or unintentionally hurting another person is known as wrongful death under civil law. Most intentional torts are also crimes.
But torts and crimes are different, and the difference is worth noting. A crime is an act against the people as a whole. Society punishes the murderer; it does not usually compensate the family of the victim. Tort law, on the other hand, views the death as a private wrong for which damages are owed. In a civil case, the tort victim or his family, not the state, brings the action. The judgment against a defendant in a civil tort suit is expressed in monetary terms, not in terms of prison times or fines, and is the legal system's way of trying to make up for the victim's loss.

By example – if you are old enough to remember the O.J. Simpson case with the murder of his ex-wife, Nicole Brown-Simpson, and her friend Ron Goldman. Mr. Simpson was charged criminally with the murder of both individuals, for which he was acquitted (found not guilty). He was then sued civilly by the family of Ron Goldman for his son's wrongful death. Mr. Simpson was found liable for the wrongful death of Ron Goldman, even though he was acquitted of his murder.

Kinds of Torts

There are three kinds of torts: intentional torts, negligent torts, and strict liability torts. Intentional torts arise from intentional acts, whereas unintentional torts (aka negligence) often result from carelessness (e.g., when a surgical team fails to remove a clamp from a patient's abdomen when the operation is finished). Both intentional torts and negligent torts imply some fault on the part of the defendant. In strict liability torts, by contrast, there may be no fault at all, but tort law will sometimes require a defendant to make up for the victim's losses even where the defendant was not careless and did not intend to do harm, but harm resulted nonetheless.

Dimensions of Tort Liability

There is a clear moral basis for recovery through the legal system where the defendant has been careless (negligent) or intentionally caused harm. Using the concepts that we are free and autonomous beings with basic rights, when others interfere with either our freedom or our autonomy, we will usually react negatively. As the old saying goes, "Your right to swing your arm ends at the tip of my nose." The law takes this even one step further: under intentional tort law, if you frighten someone by swinging your arms toward the tip of her nose, you may have committed the tort of assault, even if there is no actual touching (battery).

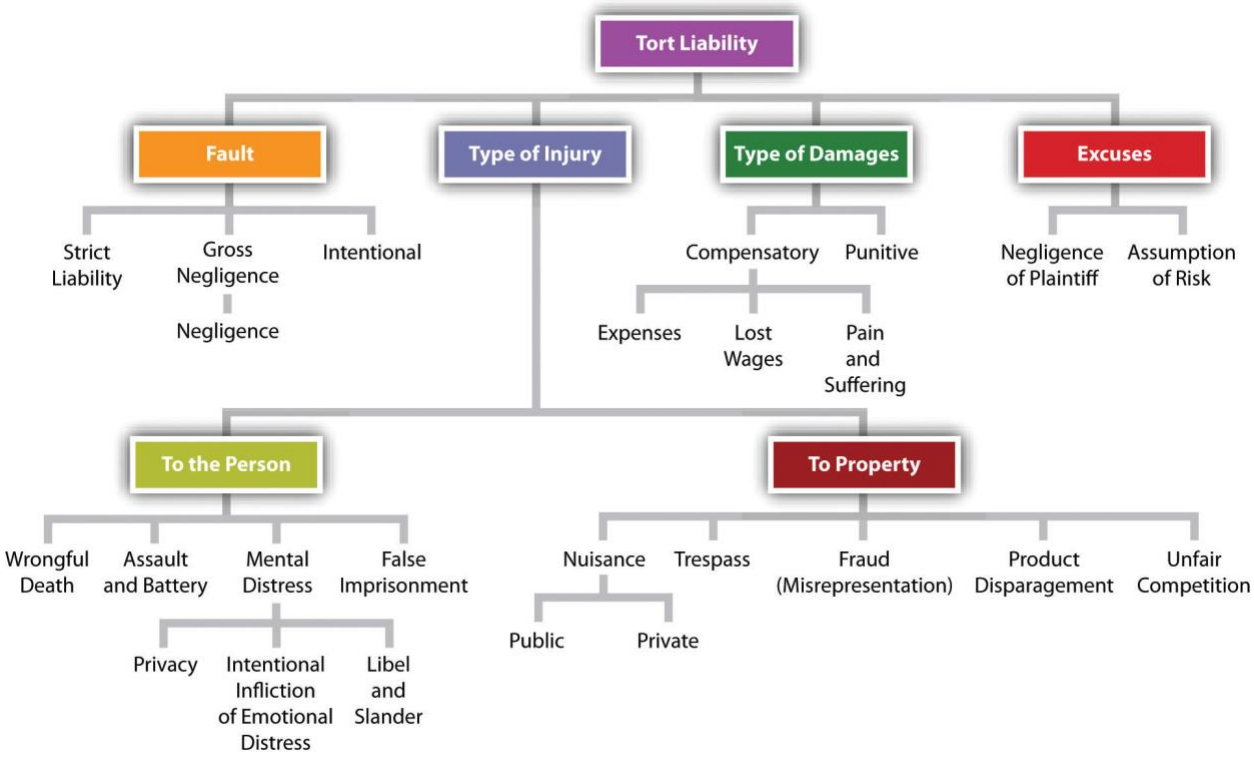

Figure 4 Dimensions of Tort Liability

Dimensions of Tort: Fault

Tort principles can be viewed along different dimensions. One is the **fault** dimension. Like criminal law, tort law requires a wrongful act by a defendant for the plaintiff to recover. Unlike criminal law, however, there need not be a specific intent. Since tort law focuses on injury to the plaintiff, it is less concerned than criminal law about the reasons for the defendant's actions. An innocent act may still provide the basis for liability. Nevertheless, tort law—except for strict liability—relies on standards of fault, or blameworthiness.

The most obvious standard is willful conduct. If the defendant (often called the tortfeasor—i.e., the one committing the tort) intentionally injures another, there is little argument about tort liability. Thus all crimes resulting in injury to a person or property (murder, assault, arson, etc.) are also torts, and the plaintiff may bring a separate lawsuit to recover damages for injuries to his person, family, or property.

Most tort suits do not rely on *intentional* fault. They are based, rather, on negligent conduct that in the circumstances is careless or poses unreasonable risks of causing damage. Most automobile accident and medical malpractice suits are examples of negligence suits.

The fault dimension is a continuum. At one end is the deliberate desire to do injury. The middle ground is occupied by careless conduct. At the other end is conduct that most would consider entirely blameless, in the moral sense. The defendant may have observed all possible precautions and yet still be held liable. This is called strict liability. An example is that incurred by the manufacturer of a defective product placed on the market despite all possible precautions, including quality-control inspection. In many states, if the product causes injury, the manufacturer will be held liable.

Dimensions of Tort: Nature of Injury

Tort liability also varies by the type of injury caused. The most obvious type is physical harm to the person (assault, battery, infliction of emotional distress, wrongful death) or property (trespass, conversion, nuisance, arson, interference with contract). Mental suffering can be redressed if it is a result of physical injury (e.g., shock and depression following an automobile accident). A few states now permit recovery for mental distress alone (a mother's shock at seeing her son injured by a car while both were crossing the street). Other protected interests include a person's reputation (injured by defamatory statements or writings), privacy (injured by those who divulge secrets of his personal life), and economic interests (misrepresentation to secure an economic advantage, certain forms of unfair competition).

Dimensions of Tort: Defenses

A third element in the law of torts is the defense or excuse for committing an apparent wrong. The law does not condemn every act that ultimately results in injury. There are many potential defenses to a tort claim, and much depends on the specific type of claim the plaintiff filed. Below we will briefly address two of the most common defenses: assumption of risk and contributory or comparative negligence.

One common defense is assumption of risk. A baseball fan who sits along the third base line close to the infield assumes the risk that a line drive foul ball may fly toward him and strike him. He will not be permitted to complain in court that the batter should have been more careful or that management should have either warned him or put up a protective barrier.

Another excuse is negligence of the plaintiff. This is broken down into two forms: contributory negligence and comparative negligence. With contributory negligence, which is only followed in a small minority of states- including Maryland, the defendant argues that the negligent conduct of the plaintiff contributed to the plaintiff's injuries. In states that allow this defense, it is a complete bar to recovery if proven by the defendant that the plaintiff was even 1% negligent. However, as with everything in law- there are exceptions to this rule.

In comparative negligence states, applied in the majority of the states in the U.S., any negligence of the plaintiff in causing the injury is used to offset the amount of damage award. Meaning, if the court finds the actions of the plaintiff contributed 15% to the injury, then the award against the defendant would be reduced by 15%. Plaintiff therefore bears the cost of their own negligent conduct. There are various forms of comparative negligence depending on the state you are in – but the basic concept is the same that the plaintiff bears the cost of their negligence.

Damages

Compensatory Damages

Since the purpose of tort law is to compensate the victim for harm actually done, damages are usually measured by the extent of the injury. Expressed in monetary terms, these include replacement of property destroyed, compensation for lost wages, reimbursement for medical expenses, and dollars that are supposed to approximate the pain that is suffered. Damages for these injuries are called compensatory damages.

Compensatory damages are broken down into two sub-categories: general damages and special damages. General damages are basically pain and suffering, damages anyone injured in a similar tort would incur. Special damages are unique to the plaintiff based on the type of injury and include medical bills, property damages, lost wages, etc.

Punitive Damages

In certain instances, the courts will permit an award of punitive damages. As the word *punitive* implies, the purpose is to punish the defendant's actions. Because a punitive award (sometimes called exemplary damages) is at odds with the general purpose of tort law, it is allowable only in extreme situations. The law in most states permits recovery of punitive damages only when the defendant deliberately committed a wrong with malicious intent or otherwise did something outrageous.

Punitive damages are rarely allowed in negligence cases for that reason. But if someone sets out intentionally and maliciously to hurt another person, punitive damages may well be appropriate. Punitive damages are intended not only to punish the wrongdoer, by exacting an additional and sometimes heavy payment (the exact amount is left to the discretion of jury and judge), but also to deter others from similar conduct. The punitive damage award has been subject to heavy criticism in recent years in cases in which it has been awarded against manufacturers. One fear is that huge damage awards on behalf of a multitude of victims could swiftly bankrupt the defendant. Unlike compensatory damages, punitive damages are taxable.

Nominal Damages

A final category of damages is nominal damages. Where plaintiff can show a wrong was suffered but he has no out of pocket costs- the court may award nominal damages – such as $1 or $10. An example would be your neighbor cuts across your backyard every day to get to the bus stop. This really annoys you and is technically trespassing. You file suit to stop your neighbor from walking across your lawn. As long as your neighbor has not damaged your lawn in any way- there are no monetary losses you can claim. So while the court will order your neighbor to stop- you will not recover any damages because you have not suffered any losses. What the court may do instead is issue an injunction requiring the plaintiff to stop walking on your lawn. An injunction is a court order to do something or in our example to stop doing something.

Table 5 Summary of Intentional Torts

Intentional Torts Against Persons	Intentional Torts Against Property
• Assault • Battery • False Imprisonment • Intentional Infliction of Emotional Distress (and Negligent Infliction) • Fraud, Deceit, Intentional Misrepresentation (and Negligent Misrepresentation) • Intentional Interference with Contract • Malicious Prosecution & Abuse of Process • Defamation • Invasion of Privacy	• Trespass To Land • Trespass to Personal Property (Chattels) • Conversion • Disparagement of Property (or Title)

Intentional Torts Against Persons

The analysis of most intentional torts is straightforward and parallels the substantive crimes covered in the material on Criminal Law. When physical injury or damage to property is caused, there is rarely debate over liability if the plaintiff deliberately undertook to produce the harm. Certain other intentional torts are worth noting for their relevance to business.

Assault and Battery

One of the most obvious intentional torts is assault and battery. Both criminal law and tort law serve to restrain individuals from using physical force on others.

- ***Assault is (1) the threat of immediate harm or offense of contact or (2) any act that would arouse reasonable apprehension of imminent harm.***

- ***Battery is unauthorized and harmful or offensive physical contact with another person that causes injury.***

Often an assault results in battery, but not always. In *Western Union Telegraph Co. v. Hill*, 67 F.2d 487 (1933) for example, the defendant did not touch the plaintiff's wife, but the case presented an issue of possible assault even without an actual battery; the defendant employee attempted to kiss a customer across the countertop, couldn't quite reach her, but nonetheless created actionable fear (or, as the court put it, "apprehension") on the part of the plaintiff's wife.

It is also possible to have a battery without an assault. For example, if someone hits you on the back of the head with an iron skillet and you didn't see it coming, there is a battery but no assault. Likewise, if Andrea passes out from drinking too much at the fraternity party and a stranger (Andre) kisses her on the lips while she is passed out, she would not be aware of any threat of offensive contact and would have no apprehension of any harm. Thus there has been no tort of assault, but she could allege the tort of battery. (The question of what damages, if any, would be an interesting argument.)

Can a person be battered through a computer file? That was the question posed in *Eichenwald v. Rivello*, 318 F. Supp. 3d 766 (D. Md. 2018), where the defendant sent a specially crafted, epileptogenic image file that, when opened, would display a fast-flashing strobe light with flashing circles and images flying toward the screen to the plaintiff, a journalist that suffered from epilepsy, and which caused the plaintiff to suffer several seizures as a result. While there was no direct, physical contact by the defendant against the plaintiff, the court found that the intentional delivery of such a computer file to a person that the defendant knew would suffer a seizure was sufficient to establish a battery under Texas law. *Id.* at 772.

Under the doctrine of transferred intent, if Draco aims his wand at Harry but Harry ducks just in time and the impact is felt by Hermione instead, English law (and American law) would transfer Draco's intent from the target to the actual victim of the act. Thus Hermione could sue Draco for battery for any damages she suffered.

False Imprisonment

The tort of false imprisonment originally implied a locking up, as in a prison, but today it can occur if a person is restrained in a room or a car or even if his or her movements are restricted while walking down the street.

- ***False imprisonment is the intentional confinement or restraint by physical or non-physical means (aka verbal threats).***

People have a right to be free to go as they please, and anyone who, without cause, deprives another of personal freedom has committed a tort. Damages are allowed for time lost, discomfort and resulting ill health, mental suffering, humiliation, loss of reputation or business, and expenses such as attorneys' fees incurred as a result of the restraint (such as a false arrest). But as the case of *Lester v. Albers Super Markets, Inc*., 94 Ohio App. 313 (1952) shows, the defendant must be shown to have restrained the plaintiff in order for damages to be allowed.

In *Lester*, the defendant had a policy of searching bags brought into its store from outside. The plaintiff came into the store with a bag containing a purchase she had made from another store. While rushing to leave the defendant's store to catch her bus, the plaintiff was asked to allow the store to search her bag. The plaintiff argued with the store manager that she did not have time but eventually allowed the search. The Ohio Appellate Court held that the plaintiff was not restrained to qualify as false imprisonment.

Intentional Infliction of Emotional Distress

Until recently, the common-law rule was that there could be no recovery for acts, even though intentionally undertaken, that caused purely mental or emotional distress. For a case to go to the jury, the courts required that the mental distress result from some physical injury. In recent years, many courts have overthrown the older rule and now recognize the so-called new tort. In an employment context, however, it is rare to find a case where a plaintiff is able to recover. The most difficult hurdle is proving that the conduct was "extreme" or "outrageous."

- ***Intentional Infliction of Emotional Distress is where the defendant acts either intentionally or recklessly in an extreme or outrageous manner that causes the plaintiff severe emotional or mental distress. There must be a causal connection between the action and the emotional distress.***

In *Roche v. Stern*, *675 N.Y.S.2d 133 (1998)*, the famous cable television talk show host Howard Stern had tastelessly discussed the remains of Deborah Roche, a deceased topless dancer and cable access television host. The remains had been brought to Stern's show by a close friend of Roche, Chaunce Hayden, and a number of crude comments by Stern and Hayden about the remains were videotaped and broadcast on a national cable television station. Roche's sister and brother sued Howard Stern and Infinity broadcasting and were able to get past the defendant's motion to dismiss to have a jury consider their claim.

A plaintiff's burden in these cases is to show that the mental distress is severe. Many states require that this distress must result in physical symptoms such as nausea, headaches, ulcers, or, as in the case of the pregnant wife, a miscarriage. Other states have not required physical symptoms, finding that shame, embarrassment, fear, and anger constitute severe mental distress. In Maryland, the emotional distress must be "severely disabling," such that "no reasonable man could be expected to endure it." Being "upset" and "embarrassed" is not sufficient to show severe emotional distress. Evidence that the plaintiff could continue with his normal life activities or that he did not seek professional treatment can show that the distress is not "severe."

In *Green v. Shoemaker*, *111 Md. 69 (1909),* the Maryland Court of Appeals determined that a plaintiff cannot recover for emotional distress unless a "physical injury" results from the tort. Later, the court expanded a "physical injury" to include injuries "manifested by an external condition or by symptoms clearly indicative of a resultant pathological, physiological, or mental state." The physical injury can be proven through evidence of an "external condition or by symptoms of a pathological or physiological state." Also, it can be proven through evidence that indicates a "mental state." However, medical testimony is not required in order to show mental distress. The Court relaxed the physical injury rule in more recent cases, adding an alternative theory of recovery for emotional distress where the injury is "capable of objective determination resulting therefrom." *Montgomery Cablevision Ltd. v. Beynon*, 696 A.2d 941, 503 (Md. Ct. Spec. App. 1997).

Fraud or Intentional Misrepresentation

Businesses often make claims about their products in marketing their products to the public. If these claims are false, then the business may be liable for the tort of **intentional misrepresentation**, known in some states as fraud.

- ***Fraud is where the tortfeasor misrepresents facts (not opinions) with knowledge that they are false or with reckless disregard for the truth.***

An "innocent" misrepresentation, such as someone who lies without knowing he or she is lying, is not enough—the defendant must know he or she is lying. Fraud can arise in any number of business situations, such as lying on your résumé to gain employment, lying on a credit application to obtain credit or to rent an apartment, or in product marketing. Here, there is a fine line between puffery, or seller's talk, and an actual lie. If an advertisement claims that a particular car is the "fastest new car you can buy," then fraud liability arises if there is in fact a car that travels faster. On the other hand, an advertisement that promises "unparalleled luxury" is only puffery since it is opinion. Makers of various medicinal supplements and vitamins are often the target of fraud lawsuits for making false claims about their products.

In *Martens Chevrolet v. Seney*, 292 Md. 328 (1982), the Court of Appeals recognized the common law tort of deceit as requiring intentional conduct by the defendant to deceive the plaintiff of a material fact, and that the evidence of this intention was lacking in the case. However, the Court acknowledged a separate tort of negligent misrepresentation – a kissing cousin to fraud – where the defendant knew or should have known that material fact was incorrect and in essence negligently represented the information to the plaintiff causing injury.

Intentional Interference with Contractual Relations

Tortious interference with a contract can be established by proving four elements:

- ***There was a contract between the plaintiff and a third party.***
- ***The defendant knew of the contract.***
- ***The defendant improperly induced the third party to breach the contract or made performance of the contract impossible.***
- ***There was injury to the plaintiff.***

In a famous case of contract interference, Texaco was sued by Pennzoil for interfering with an agreement that Pennzoil had with Getty Oil. T*exaco v. Pennzoil*, 729 S.W.2d 768 (Tex. Ct. App. 1987). After complicated negotiations between Pennzoil and Getty, a takeover share price was struck, a memorandum of understanding was signed, and a press release announced the agreement in principle between Pennzoil and Getty. Texaco's lawyers, however, believed that Getty oil was "still in play," and before the lawyers for Pennzoil and Getty could complete the paperwork for their agreement, Texaco announced it was offering Getty shareholders an additional $12.50 per share over what Pennzoil offered.

Texaco later increased its offer to $228 per share, and the Getty board of directors soon began dealing with Texaco instead of Pennzoil. Pennzoil decided to sue in Texas state court for tortious interference with a contract. After a long trial, the jury returned an enormous verdict against Texaco: $7.53 billion in actual damages and $3 billion in punitive damages. The verdict was so large that it would have bankrupted Texaco. Appeals from the verdict centered on an obscure rule of the Securities and Exchange Commission (SEC), Rule 10(b)-13, and Texaco's argument was based on that rule and the fact that the contract had not been completed. If there was no contract, Texaco could not have legally interfered with one. After the SEC filed a brief that supported Texaco's interpretation of the law, Texaco agreed to pay $3 billion to Pennzoil to dismiss its claim of tortious interference with a contract.

Malicious Prosecution

- ***Malicious prosecution is the tort of causing someone to be prosecuted for a criminal act, knowing that there was no probable cause to believe that the plaintiff committed the crime.***

The plaintiff must show that the defendant acted with malice or with some purpose other than bringing the guilty to justice. A mere complaint to the authorities is insufficient to establish the tort, but any official proceeding will support the claim—for example, a warrant for the plaintiff's arrest. The criminal proceeding must terminate in the plaintiff's favor in order for his suit to be sustained.

A majority of US courts, though by no means all, permit a suit for wrongful civil proceedings. Civil litigation is usually costly and burdensome, and one who forces another to defend himself against baseless accusations should not be permitted to saddle the one he sues with the costs of defense. However, because, as a matter of public policy, litigation is favored as the means by which legal rights can be vindicated—indeed, the U.S. Supreme Court even ruled that individuals have a constitutional right to litigate—the plaintiff must meet a heavy burden in proving his case. The mere dismissal of the original lawsuit against the plaintiff is not sufficient proof that the suit was unwarranted. The plaintiff in a suit for wrongful civil proceedings must show that the defendant (who was the plaintiff in the original suit) filed the action for an improper purpose and had no reasonable belief that his cause was legally or factually well grounded. Under Maryland law, the court requires proof of "malice or a primary purpose other then bringing the plaintiff to justice" as an element of this tort. *Okwa v. Harper*, 757 A. 2d 118, 130 (Md. 2000) ("malice … may be inferred from a lack of probable cause"). However, the Court noted that punitive damages may only be award for demonstrated actual malice – conducted motivated by ill-will towards the plaintiff, rather than just an absence of probable cause. *Id.* at 133.

Defamation

Defamation is injury to a person's good name or reputation. In general, if the harm is done through the spoken word—one person to another, by telephone, by radio, or on television—it is called slander. If the defamatory statement is published in written form, it is called libel.

- ***Defamation's elements are the (1) publication, (2) of false statements, and (3) that cause harm to the person's reputation. Public figures need to show a fourth element that the statements were made with actual malice.***

The Restatement (Second) of Torts defines a defamatory communication as one that "so tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts, Section 559 (1965).

A statement is not defamatory unless it is false. Truth is an absolute defense to a charge of libel or slander. Moreover, the statement must be "published"—that is, communicated to a third person. You cannot be libeled by one who sends you a letter full of false accusations and scurrilous statements about you unless a third person opens it first (your roommate, perhaps). Any living person is capable of being defamed, but the dead are not. Corporations, partnerships, and other forms of associations can also be defamed, if the statements tend to injure their ability to do business or to garner contributions.

The statement must have reference to a particular person, but he or she need not be identified by name. A statement that "the company president is a crook" is defamatory, as is a statement that "the major network weathermen are imposters." The company president and the network weathermen could show that the words were aimed at them. But statements about large groups will not support an action for defamation (e.g., "all doctors are butchers" is not defamatory of any particular doctor).

The law of defamation is largely built on strict liability, even though defamation is categorized as an intentional tort. That a person did not intend to defame is ordinarily no excuse; a typographical error that converts a true statement into a false one in a newspaper, magazine, or corporate brochure can be sufficient to make out a case of libel. Even the exercise of due care is usually no excuse if the statement is in fact communicated, though such claims require proof of actual damages by the private plaintiff for recovery against the negligent defendant. *Hearst Corp. v. Hughes*, 297 Md. 112, 130 (1983). Repeating a libel is itself a libel; a libel cannot be justified by showing that you were quoting someone else. However, though a plaintiff may be able to prove that a statement was defamatory, he is not necessarily entitled to an award of damages. That is because the law contains a number of privileges that excuse the defamation.

In the business context, publishing false information about another business's product constitutes the tort of slander of quality, or trade libel. In some states, this is known as the tort of product disparagement. It may be difficult to establish damages, however. A plaintiff must prove that actual damages proximately resulted from the slander of quality and must show the extent of the economic harm as well.

In addition to truth, other defenses to a defamation claim are absolute privilege and qualified privilege.

Absolute Privilege

Statements made during the course of judicial proceedings are absolutely privileged, meaning that they cannot serve as the basis for a defamation suit. Accurate accounts of judicial or other proceedings are absolutely privileged; a newspaper, for example, may pass on the slanderous comments of a judge in court. "Judicial" is broadly construed to include most proceedings of administrative bodies of the government. Attorneys, as to their statements in open court and in filed court documents, also enjoy an absolute privilege, but attorneys must be careful about statements made outside of judicial process. Restatement (Second) of Torts §§ 585-592A (1977) The Constitution exempts members of Congress from suits for libel or slander for any statements made in connection with legislative business. The courts have constructed a similar privilege for many executive branch officials.

Qualified Privilege

Absolute privileges pertain to those in the public sector. A narrower privilege exists for private citizens. In general, a statement that would otherwise be actionable is held to be justified if made in a reasonable manner and for a reasonable purpose. Thus you may warn a friend to beware of dealing with a specific third person, and if you had reason to believe that what you said was true, you are privileged to issue the warning, even though false.

Maryland recognizes both a "Fair Reporting" and "Fair Comment" privilege against defamation. Fair Reporting immunizes a defendant that fairly reports information from a court case file, trial testimony or the like. "Fair Comment" immunizes a defendant from liability who "honestly expresses a fair and reasonable opinion or comment on matters of legitimate public concern." *Piscatelli v. Smith*, 35 A.3d 1140, 1152 (Md. 2012).

Likewise, an employee may warn an employer about the conduct or character of a fellow or prospective employee, and a parent may complain to a school board about the competence or conduct of a child's teacher. There is a line to be drawn, however, and a defendant with nothing but an idle interest in the matter (an "officious intermeddler") must take the risk that his information is wrong.

Public Figures and Constitutional Malice

In 1964, the Supreme Court handed down its historic decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), holding that under the First Amendment a libel judgment brought by a public official against a newspaper cannot stand unless the plaintiff has shown "actual malice," which in turn was defined as "knowledge that [the statement] was false or with a reckless disregard of whether it was false or not." In subsequent cases, the Court extended the constitutional doctrine further, applying it not merely to government officials but to public figures, people who voluntarily place themselves in the public eye or who involuntarily find themselves the objects of public scrutiny. Whether a private person is or is not a public figure is a difficult question that has so far eluded rigorous definition and has been answered only from case to case. A CEO of a private corporation ordinarily will be considered a private figure unless he puts himself in the public eye—for example, by starring in the company's television commercials.

Invasion of Privacy

The right of privacy—the right "to be let alone"—did not receive judicial recognition until the twentieth century, and its legal formulation is still evolving. In fact there is no single right of privacy. Courts and commentators have discerned at least four different types of interests:

- ***(1) the right to control the appropriation of your name and picture for commercial purposes,***
- ***(2) the right to be free of intrusion on your "personal space" or seclusion,***
- ***(3) freedom from public disclosure of private or embarrassing and intimate facts of your personal life, and***
- ***(4) the right not to be presented in a "false light."***

Appropriation of Name or Likeness

The earliest privacy interest recognized by the courts was appropriation of name or likeness: someone else placing your photograph on a billboard or cereal box as a model or using your name as endorsing a product or in the product name. A New York statute makes it a misdemeanor to use the name, portrait, or picture of any person for advertising purposes or for the purposes of trade (business) without first obtaining written consent. The law also permits the aggrieved person to sue and to recover damages for unauthorized profits and also to have the court enjoin (judicially block) any further unauthorized use of the plaintiff's name, likeness, or image. This is particularly useful to celebrities.

Because the publishing and advertising industries are concentrated heavily in New York, the statute plays an important part in advertising decisions made throughout the country. Deciding what "commercial" or "trade" purposes are is not always easy. Thus a newsmagazine may use a baseball player's picture on its cover without first obtaining written permission, but a chocolate manufacturer could not put the player's picture on a candy wrapper without consent.

The Restatement (Second) of Torts, § 652C defines this tort as "one who appropriates to his own use or benefit the name or likeness of another." The Restatement does not require that the plaintiff demonstrate that they are famous for this tort to apply, only that the use of the person's name or likeness "may be of benefit to him or to others." Restatement (Second) § 652C comm. a.

Maryland common law takes a slightly different tact for actions involving appropriation of name or likeness from New York, in that Maryland courts consider whether the initial use of the photograph of the plaintiff was proper and whether its subsequent republication was incidental. *Lawrence v. AS Abell Co.*, 475 A. 2d 448 (Md. 1984). In Lawrence, the Baltimore Sun had initially taken a photograph of several individuals, including children, for a story about the Afram Festival, with the permission of the persons photographed. Subsequently, the Sun used the photograph in commercial advertising for subscriptions to the paper. The Court found that the

subsequent use was incidental to the Sun's advertising, rather than as an endorsement by the children of the newspaper.

Freedom from intrusion

The Restatement (Second) of Torts defines intrusion upon seclusion as "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability … if the intrusion would be highly offensive to the reasonable person." Restatement (Second) of Torts § 652B. One form of intrusion upon a person's solitude—trespass—has long been actionable under common law. Physical invasion of home or other property is not a new tort. But in recent years, the notion of intrusion has been broadened considerably. Now, taking photos of someone else with your cell phone in a locker room could constitute invasion of the right to privacy. Reading someone else's mail or e-mail could also constitute an invasion of the right to privacy. Photographing someone on a city street is not tortious, but subsequent use of the photograph could be. Whether the invasion is in a public or private space, the amount of damages will depend on how the image or information is disclosed to others.

Public Disclosure of Private Facts

The Restatement (Second) of Torts defines publicity given to private life as "one who gives publicity to a matter concerning the private life of another is subject to liability … if the matter publicized is a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public." Restatement (Second) of Torts § 652D. Circulation of false statements that do injury to a person are actionable under the laws of defamation. What about true statements that might be every bit as damaging—for example, disclosure of someone's income tax return, revealing how much he earned? The general rule is that if the facts are truly private and of no "legitimate" concern to the public, then their disclosure is a violation of the right to privacy. But a person who is in the public eye cannot claim the same protection.

False Light

A final type of privacy invasion is that which paints a false picture in a publication. The Maryland Court of Special Appeals held that the tort of false light is "giving publicity to a matter concerning another that places the other before the public in a false light if (a) the false light in which the other person was placed would be highly offensive to a reasonable person and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Lindenmuth v. McCreer*, 165 A.3d 544, 558 (Md. Ct of Spec. App. 2017). Though false, the matter might not be libelous, since the publication need contain nothing injurious to the reputation of the plaintiff. In *Lindenmouth*, the plaintiff was a mechanic of Coca-Cola Enterprises. After being sent home from work, a rumor began circulating that the plaintiff was planning to return to the mechanic shop with a weapon and shoot other employees. The Court affirmed judgement for the defendant supervisor on the grounds that the plaintiff had failed to demonstrate that the statements about him were false and failed to show that any of the employees acted with actual malice in reporting their concerns to McCreer.

Indeed, the publication might even glorify the plaintiff, making him seem more heroic than he actually is. *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324 (1966). Subject to the First Amendment requirement that the plaintiff must show intent or extreme recklessness, statements that put a person in a false light, like a fictionalized biography, are actionable. In *Spahn*, the defendant publisher had created a fictional biography of Warren Spahn, a well-known major league baseball player, in which the defendant invented various stories about Spahn, such as a false claim that he was a decorated war hero. The New York Court of Appeals held that such a fictionalization of events was not protected speech and could be subject to an injunction of publication of the work.

Intentional Torts Against Property

Unlike intentional torts against persons, where an individual is injured, intentional torts to property result in no personal damage but in damage to property, or interference in another's use of property, due to the intentional conduct of another.

Trespass to Land

- ***Trespass is intentionally going on land that belongs to someone else or putting something on someone else's property and refusing to remove it.***

This part of tort law shows how strongly the law values the rights of property owners. The person or item going onto another's property does not even have to damage the property to have a cause of action for trespass. There are limits to property owners' rights, however.

In *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971), the plaintiff was injured by a spring gun while trespassing on the defendant's property. The defendant had set up No Trespassing signs after ten years of trespassing and housebreaking events, with the loss of some household items. Windows had been broken, and there was "messing up of the property in general." The defendants had boarded up the windows and doors in order to stop the intrusions and finally had set up a shotgun trap in the north bedroom of the house. One defendant had cleaned and oiled his 20-gauge shotgun and taken it to the old house where it was secured to an iron bed with the barrel pointed at the bedroom door. "It was rigged with wire from the doorknob to the gun's trigger so would fire when the door was opened." The angle of the shotgun was adjusted to hit an intruder in the legs. The spring could not be seen from the outside, and no warning of its presence was posted.

The plaintiff, Katko, had been hunting in the area for several years and considered the property abandoned. He knew it had long been uninhabited. He and a friend had been to the house and found several old bottles and fruit jars that they took and added to their collection of antiques. When they made a second trip to the property, they entered by removing a board from a porch window. When the plaintiff opened the north bedroom door, the shotgun went off and struck him in the right leg above the ankle bone. Much of his leg was blown away. While Katko knew he had no right to break and enter the house with intent to steal bottles and fruit jars, the court held that a property owner could not protect an unoccupied boarded-up farmhouse by using a spring gun capable of inflicting death or serious injury.

In *Katko*, there is an intentional tort. But what if someone trespassing is injured by the negligence of the landowner? States have differing rules about trespass and negligence. In some states, a trespasser is only protected against the gross negligence of the landowner. In other states, trespassers may be owed the duty of due care on the part of the landowner. The burglar who falls into a drained swimming pool, for example, may have a case against the homeowner unless the courts or legislature of that state have made it clear that trespassers are owed the limited duty to avoid gross negligence. Or a very small child may wander off his own property and fall into a gravel pit on a nearby property and suffer death or serious injury; if the pit should (in the exercise of due care) have been filled in or some barrier erected around it but was not, then there was negligence. Many states refer to this as the "attractive nuisance" doctrine. And it comes into play frequently with swimming pools, back yard play sets, etc. under the theory that a small child will not appreciate the dangers that an adult would. But if the state law holds that the duty to trespassers is only to avoid gross negligence, even if the trespasser is a child, the child's family would lose. Maryland is one state that does not recognize the attractive nuisance doctrine for children.

In general, individuals with permission to be on another's property such as guests, licensees, and invitees are owed a duty of due care and in many instances a duty to be warned of potential hazards that are not open and obvious dangers. For example, a grocery store will post signs noting wet floors to prevent customers (aka

business invitees) from slipping and falling. A trespasser may not be owed such a duty, but check your state's specific rules on this, especially when the trespasser is in a special category such as a child.

Trespass to Personal Property
(OTHERWISE KNOWN AS "trespass to chattels")

A "chattel" is personal property that is visible, tangible and moveable. Personal property is anything that is not land (land is also called "real property"), and not permanently affixed to real property. For example, suppose that instead of standing in my field, you hop onto my horse in the field, and sit there to admire the view. My horse is the chattel- because it is moveable. If you do not have my permission to sit on my horse- you have committed a trespass to chattels.

- ***Trespass to personal property or chattels is the intentional unlawful taking or harming of another's personal property without the owner's permission.***

Trespass to chattels is the intentional interference with an owner's right to use and possess his or her property. Restatement (Second) of Torts § 217(b). The property does not have to be damaged in any way – just the right of ownership interfered with resulting in harm to the plaintiff. In *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2nd cir. 2004), the Second Circuit found that a computer program that automated data collection by the defendant could be the basis of a trespass to chattels case against the defendant, on the grounds that the search robot could consume significant computing capacity of the plaintiff's systems, resulting in damage to the plaintiff.

Conversion

Conversion takes trespass to chattels one step further (you not only sit on my horse, but you also ride it off into the sunset). The basic idea is that you not only deprive another of the exclusive use and possession of her property, but you expect to do so permanently, without just cause. Conversion is the civil equivalent to the crime of theft.

- ***Conversion is the intentional interference with another's use or possession of personal property to the extent that the defendant must pay the value of the property to the plaintiff.***

In determining if a defendant's interference with another's personal property rises to the level of conversion, the Restatement (Second) of Torts, Section 222A sets forth six factors the courts will use:

- the extent and duration of the defendant's exercise of control over the property;
- the extent and duration of the resulting interference with the plaintiff's right of control;
- the defendant's intent to assert a right inconsistent with the plaintiff's right of control;
- the defendant's good faith;
- the harm done to the chattel; and
- the inconvenience and expense caused to the plaintiff.

Disparagement of Property

This is the type of "defamation" that is directed more at "defaming" *property* than persons—it's called "injurious falsehood (trade disparagement)" and has also been called "slander of quality" or "slander of title," depending upon the circumstances. According to the treatise *Washington Practice*, which digests Washington law according to case law and statutes, "Tort Law and Practice," Section 19.3, a claim for "slander of title" requires proof of the following five elements:

- the statements concerning the plaintiff's title must be false;
- the statements must be maliciously published [not made in good faith or with a reasonable belief in its truthfulness];
- the statements must be spoken with reference to some pending sale or purchase of the plaintiff's property;
- the plaintiff must suffer pecuniary [monetary] loss or injury as a result of the false statements; and
- the statements must be such as to defeat the plaintiff's title [indicate that plaintiff does not have an ownership interest in the property].

See also Disparagement of Title – Wiki

Negligence

Negligence is basically carelessness. When an individual is careless, but not intentional in their conduct, and someone is injured as a result, a cause of action for negligence may exist.

Table 6 Theories of Negligence

Negligence	*Res Ipsa Loquitor*	Negligence *Per Se*
• Duty • Breach • Causation (in fact and proximate) • Damages	• Instrument under exclusive control of defendants • Accident ordinarily would not occur absent negligence	• Violation of statute • Damages to plaintiff

Elements of Negligence

Physical harm need not be intentionally caused. A pedestrian knocked over by an automobile does not hurt less because the driver intended no wrong but was merely careless. The law imposes a duty of care on all of us in our everyday lives. Accidents caused by negligence are actionable.

Determining negligence is not always easy. If a driver runs a red light, we can say that he is negligent because a driver must always be careful to ascertain whether the light is red and be able to stop if it is. Suppose that the driver was carrying a badly injured person to a nearby hospital and that after slowing down at an intersection, went through a red light, blowing his horn, whereupon a driver to his right, seeing him, drove into the intersection anyway and crashed into him. Must one always stop at a red light? Is proof that the light was red always proof of negligence? Usually, but not always: negligence is an abstract concept that must always be applied to concrete and often widely varying sets of circumstances.

The tort of negligence has four elements:

- ***a duty of due care that the defendant had,***
- ***(2) the breach of the duty of due care,***
- ***(3) connection between cause and injury, and***
- ***(4) actual damage or loss.***

Even if a plaintiff can prove each of these aspects, the defendant may be able to show that the law excuses the conduct that is the basis for the tort claim. We examine each of these factors below.

Duty: Standard of Care

Not every unintentional act that causes injury is negligent. If you brake to a stop when you see a child dart out in front of your car, and if the noise from your tires gives someone in a nearby house a heart attack, you have not acted negligently toward the person in the house. The purpose of the negligence standard is to protect others against the risk of injury that foreseeably would ensue from unreasonably dangerous conduct.

Not every careless act is negligence where the defendant does not owe a duty to the plaintiff to act reasonably. With the prior example, as a driver you owe a duty of car to the other drivers on the road and the pedestrians crossing the street. You would not owe a duty to the person sitting in their house as it would not be foreseeable (we will discuss causation and foreseeability below) that you would potentially injure that person by driving your car. However, in those situations where you are found to owe a duty, – the duty is to act reasonable under the circumstances.

Given the infinite variety of human circumstances and conduct, no general statement of a reasonable standard of care is possible. Nevertheless, the law tried to encapsulate it in the form of the famous standard of "the reasonable man." This fictitious person "of ordinary prudence" is the model that juries are instructed to compare defendants with in assessing whether those defendants have acted negligently. Analysis of this mythical personage baffled several generations of commentators. How much knowledge must he have of events in the community, of technology, of cause and effect? With what physical attributes, courage, or wisdom is this nonexistent person supposedly endowed? If the defendant is a person with specialized knowledge, like a doctor or an automobile designer, must the jury also treat the "reasonable man" as having this knowledge, even though the average person in the community will not? (Answer: in most cases, yes.)

Despite the many difficulties, the concept of the reasonable man is one on which most negligence cases ultimately turn. If a defendant acted "unreasonably under the circumstances" and his conduct posed an unreasonable risk of injury, then he is liable for injury caused by his conduct. Perhaps in most instances, it is not difficult to divine what the reasonable man would do. The reasonable man stops for traffic lights and always drives at reasonable speeds, does not throw baseballs through windows, performs surgical operations according to the average standards of the medical profession, ensures that the floors of his grocery store are kept free of fluids that would cause a patron to slip and fall, takes proper precautions to avoid spillage of oil from his supertanker, and so on. The "reasonable man" standard imposes hindsight on the decisions and actions of people in society; the circumstances of life are such that courts may sometimes impose a standard of due care that many people might not find reasonable.

Duty of Care and Its Breach

The law does not impose on us a duty to care for every person. If the rule were otherwise, we would all, in this interdependent world, be our brothers' keepers, constantly unsure whether any action we took might subject us to liability for its effect on someone else. The law copes with this difficulty by limiting the number of people toward whom we owe a duty to be careful.
In general, the law imposes no obligation to act in a situation to which we are strangers. We may pass the drowning child without risking a lawsuit. But if we do act, then the law requires us to act carefully. The law of negligence requires us to behave with due regard for the foreseeable consequences of our actions in order to avoid unreasonable risks of injury. As noted above, this is the reasonable man standard. If we do not act reasonably in a given situation, we may be liable for negligence as we would have breached our duty of care.

For example, if you own a grocery store it would be reasonable to have the aisles inspected for various hazards on a regular basis – maybe every hour. This would prevent patrons from being injured by items that have fallen on the floor. It would also be reasonable for you to post signs noting any hazardous conditions on the floor – such as wet floors. If you fail to regularly inspect the store aisles or to post signs when there are

hazards on the floors and someone gets injured you would have breached your duty of care by not acting reasonably given the situation.

Part of the duty of care and its breach is whether or not a specific action could foreseeably cause injury. During the course of the twentieth century, the courts have constantly expanded the notion of "foreseeability," so that today many more people are held to be within the zone of injury than was once the case. For example, it was once believed that a manufacturer or supplier owed a duty of care only to immediate purchasers, not to others who might use the product or to whom the product might be resold. This limitation was known as the rule of privity. And users who were not immediate purchasers were said not to be in privity with a supplier or manufacturer. The privity limitation has long since gone away in the legal field and now anyone injured by a product, even from misuse of a product- if the misuse was foreseeable, can sue the seller, manufacturer, distributor, etc. for damages. Go back to our Robinson v. Audi case under the Role of the Judiciary section.

Determining a duty of care can be a vexing problem. Physicians, for example, are bound by principles of medical ethics to respect the confidences of their patients. Suppose a patient tells a psychiatrist that he intends to kill his girlfriend. Does the physician then have a higher legal duty to warn prospective victim? The California Supreme Court has said yes. *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Calif. 1976).

Establishing a breach of the duty of due care where the defendant has violated a statute or municipal ordinance is eased considerably with the doctrine of negligence per se, a doctrine common to all US state courts (though Maryland follows a modified doctrine of negligence per se, in that violation of a statute is evidence of negligence, but more must be demonstrated by the plaintiff for the violation to make the defendant liable, namely that the violation was the proximate cause of the plaintiff's injury *Brooks v. Lewin Realty,* 835 A.2d 616 (Md. 2003)). If a legislative body sets a minimum standard of care for particular kinds of acts to protect a certain set of people from harm and a violation of that standard causes harm to someone in that set, the defendant is negligent per se.

If Harvey is driving sixty-five miles per hour in a fifty-five-mile-per-hour zone when he crashes into Haley's car and the police accident report establishes that or he otherwise admits to going ten miles per hour over the speed limit, Haley does not have to prove that Harvey breached a duty of due care. She will only have to prove that the speeding was an actual and proximate cause of the collision and will also have to prove the extent of the resulting damages to her.

Causation: Actual "But For" Cause and Proximate Cause

"For want of a nail, the kingdom was lost," as the old saying has it. Virtually any cause of an injury can be traced to some preceding cause. The problem for the law is to know when to draw the line between causes that are immediate and causes too remote for liability reasonably to be assigned to them. In tort theory, there are two kinds of causes that a plaintiff must prove: actual cause and proximate cause.

Actual cause (causation in fact) can be found if the connection between the defendant's act and the plaintiff's injuries passes the "but for" test: if an injury would not have occurred "but for" the defendant's conduct, then the defendant is the cause of the injury. Still, this is not enough causation to create liability. The injuries to the plaintiff must also be foreseeable, or not "too remote," for the defendant's act to create liability. This is proximate cause: a cause that is not too remote or unforeseeable.

Suppose that the person who was injured was not one whom a reasonable person could have expected to be harmed. Such a situation was presented in one of the most famous US tort cases, *Palsgraf v. Long Island Railroad*, 248 N.Y. 339, 162 N.E. 99 (1928), which was decided by Judge Benjamin Cardozo. Although Judge Cardozo persuaded four of his seven brethren to side with his position, the closeness of the case demonstrates the difficulty that unforeseeable consequences and unforeseeable plaintiffs present.

In *Palsgraf*, the plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package the man was carrying was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks exploded when they fell. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries. *Palsgraf v. Long Island Railroad*, 248 N.Y. 339, 340-41, 162 N.E. 99 (1928).

In finding for the defendant in *Palsgraf*, the Court held that it was not foreseeable that the package would have exploded as nothing indicated its contents where explosive, nor was it foreseeable that the explosion would have caused scales on the far end of the platform to fall over injuring Mrs. Palsgraf.

Damages

For a plaintiff to win a tort case, she must allege and prove that she was injured. The fear that she might be injured in the future is not a sufficient basis for a suit. This rule has proved troublesome in medical malpractice and industrial disease cases. A doctor's negligent act or a company's negligent exposure of a worker to some form of contamination might not become manifest in the body for years. In the meantime, the tort statute of limitations might have run out, barring the victim from suing at all. An increasing number of courts have eased the plaintiff's predicament by ruling that the statute of limitations does not begin to run until the victim discovers that she has been injured or contracted a disease.

The law allows an exception to the general rule that damages must be shown when the plaintiff stands in danger of immediate injury from a hazardous activity. If you discover your neighbor experimenting with explosives in his basement, you could bring suit to enjoin him from further experimentation, even though he has not yet blown up his house—and yours.
Damage awards in tort cases require proof of actual loss. As such, damages are limited to compensatory damages in 99.9% of all negligence cases. As we discussed in the general section on Torts, there are three main types of damages for torts: compensatory, punitive and nominal. Punitive damages rarely apply in negligence cases as the conduct has to be egregious and that usually falls beyond the bounds of negligence-unless you are arguing a gross negligence standard. And nominal damages are awarded where the plaintiff has been wronged but incurred no out of pocket losses – again, not typically seen in negligence as damages are an element of the cause of action.

As noted previously, compensatory damages are divided into general and special damages depending on the type of injury incurred. General damages typically cover pain and suffering – damages general to all similarly situated plaintiffs. Special damages are unique to the plaintiff and include lost wages, medical bills, property damages, etc.

Gross Negligence/Recklessnesss

Between intentional conduct and mere negligence is a middle level of gross negligence, often referred to as recklessness. This is conduct that is not intentional but is more than merely unreasonable. It is conduct that results in a willful disregard for the safety of others. The defendant does not intend for anyone to be injured as a result of his actions, but it is highly likely that someone will. Some examples of gross negligence include:

- a driver speeding through a parking lot where pedestrians are walking;

- a doctor amputating the wrong limb;
- a person shooting a gun in the air in a crowd of people;
- a person throwing a lit pack of fireworks into a crowd.

Problems of Proof

The plaintiff in a tort suit, as in any other, has the burden of proving his allegations by a preponderance of the evidence standard.

He must show that the defendant took the actions complained of as negligent, demonstrate the circumstances that make the actions negligent, and prove the occurrence and extent of injury. Factual issues are for the jury to resolve. Since it is frequently difficult to make out the requisite proof, the law allows certain presumptions and rules of evidence that ease the plaintiff's task, on the ground that without them substantial injustice would be done.

One important rule goes by the Latin phrase res ipsa loquitur, meaning "the thing speaks for itself." The best evidence is always the most direct evidence: an eyewitness account of the acts in question. But eyewitnesses are often unavailable, and in any event they frequently cannot testify directly to the reasonableness of someone's conduct, which inevitably can only be inferred from the circumstances.

In many cases, therefore, circumstantial evidence (evidence that is indirect) will be the only evidence or will constitute the bulk of the evidence. Circumstantial evidence can often be quite telling: though no one saw anyone leave the building, muddy footprints tracing a path along the sidewalk are fairly conclusive. Res ipsa loquitur is a rule of circumstantial evidence that permits the jury to draw an inference of negligence. A common statement of the rule is the following: "There must be reasonable evidence of negligence but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."*Scott v. London & St. Katherine Docks Co.*, 3 H. & C. 596, 159 Eng. Rep. 665 (Q.B. 1865).

If a barrel of flour rolls out of a factory window and hits someone, or a soda bottle explodes, or an airplane crashes, courts in every state permit juries to conclude, in the absence of contrary explanations by the defendants, that there was negligence. The plaintiff is not put to the impossible task of explaining precisely how the accident occurred. A defendant can always offer evidence that he acted reasonably—for example, that the flour barrel was securely fastened and that a bolt of lightning, for which he was not responsible, broke its bands, causing it to roll out the window. But testimony by the factory employees that they secured the barrel, in the absence of any further explanation, will not usually serve to rebut the inference. That the defendant was negligent does not conclude the inquiry or automatically entitle the plaintiff to a judgment. Tort law provides the defendant with several excuses, some of which are discussed briefly in the next section.

Defenses

There are more defenses (excuses) than are listed here, but contributory negligence or comparative negligence, assumption of risk and Act of God are among the principal defenses that will completely or partially excuse the negligence of the defendant.

Contributory and Comparative Negligence

Under an old common-law rule, contributory negligence was a complete defense to show that the plaintiff in a negligence suit was himself negligent, if only partially. Therein, even if the plaintiff was only mildly negligent, most of the fault being chargeable to the defendant, the court would dismiss the suit if the plaintiff's conduct contributed to his injury in a contributory negligence state. In a few states today, including Maryland, this rule of contributory negligence is still in effect.

Although referred to as negligence, the contributory negligence rule encompasses a narrower form than that with which the defendant is charged, because the plaintiff's only error in such cases is in being less careful of himself than he might have been, whereas the defendant is charged with conduct careless toward others. This rule was so manifestly unjust in many cases that most states, either by statute or judicial decision, have changed to some version of comparative negligence.

Under the rule of comparative negligence, damages are apportioned according to the defendant's degree of culpability. Some states follow a "pure" form of comparative negligence and some follow a modified comparative negligence form. In a pure comparative negligence state, even if plaintiff was 80% negligent in causing his injury, plaintiff can sue defendant for his 20% of the fault.

In modified comparative negligence, plaintiff's negligence must be less than the defendant's negligence. Under comparative negligence, plaintiff's negligence must be less than 50% in order to recover. For example, if the plaintiff has sustained a $100,000 injury and is 20 percent responsible, the defendant will be liable for $80,000 in damages.

Assumption of Risk

Risk of injury pervades the modern world, and plaintiffs should not win a lawsuit simply because they took a risk and lost. The law provides, therefore, that when a person knowingly takes a risk, he or she must suffer the consequences.

The assumption of risk doctrine comes up in three ways. The plaintiff may have formally agreed with the defendant before entering a risky situation that he will relieve the defendant of liability should injury occur. ("You can borrow my car if you agree not to sue me if the brakes fail, because they're worn and I haven't had a chance to replace them.") Or the plaintiff may have entered into a relationship with the defendant knowing that the defendant is not in a position to protect him from known risks (the fan who is hit by a line drive in a ballpark). Or the plaintiff may act in the face of a risky situation known in advance to have been created by the defendant's negligence (failure to leave, while there was an opportunity to do so, such as getting into an automobile when the driver is known to be drunk).

The difficulty in many cases is to determine the dividing line between subjectivity and objectivity. If the plaintiff had no actual knowledge of the risk, he cannot be held to have assumed it. On the other hand, it is easy to claim that you did not appreciate the danger, and the courts will apply an objective standard of community knowledge (a "but you should have known" test) in many situations. When the plaintiff has no real alternative, however, assumption of risk fails as a defense (e.g., a landlord who negligently fails to light the exit to the street cannot claim that his tenants assumed the risk of using it).

At the turn of the century, courts applied assumption of risk in industrial cases to bar relief to workers injured on the job. They were said to assume the risk of dangerous conditions or equipment. This rule has been abolished by workers' compensation statutes in most states.

Act of God

Technically, the rule that no one is responsible for an "act of God," or *force majeure* as it is sometimes called, is not an excuse but a defense premised on a lack of causation. If a force of nature caused the harm, then the defendant was not negligent in the first place. A marina, obligated to look after boats moored at its dock, is not liable if a sudden and fierce storm against which no precaution was possible destroys someone's vessel.

However, if it is foreseeable that harm will flow from a negligent condition triggered by a natural event, then there is liability. For example, a work crew failed to remove residue explosive gas from an oil barge. Lightning

hit the barge, exploded the gas, and injured several workmen. The plaintiff recovered damages against the company because the negligence consisted in the failure to guard against any one of a number of chance occurrences that could ignite the gas.

Vicarious Liability

Liability for negligent acts does not always end with the one who was negligent. Under certain circumstances, the liability is imputed to others. For example, an employer is responsible for the negligence of his employees if they were acting in the scope of employment. This rule of vicarious liability is often called *respondeat superior*, meaning that the higher authority must respond to claims brought against one of its agents. Respondeat superior is not limited to the employment relationship but extends to a number of other agency relationships as well.

Legislatures in many states have enacted laws that make people vicariously liable for acts of certain people with whom they have a relationship, though not necessarily one of agency. It is common, for example, for the owner of an automobile to be liable for the negligence of one to whom the owner lends the car. So- called dram shop statutes place liability on bar and tavern owners and others who serve too much alcohol to one who, in an intoxicated state, later causes injury to others. In these situations, although the injurious act of the drinker stemmed from negligence, the one whom the law holds vicariously liable (the bartender) is not himself necessarily negligent—the law is holding him *strictly liable.*

Strict Liability

Historical Basis of Strict Liability: Animals and Ultrahazardous Activities
To this point, we have considered principles of liability that in some sense depend upon the "fault" of the tortfeasor.

Aside from acts intended to harm, the fault lies in a failure to live up to a standard of reasonableness or due care. But this is not the only basis for tort liability. Innocent mistakes can be a sufficient basis. As we have already seen, someone who unknowingly trespasses on another's property is liable for the damage that he does, even if he has a reasonable belief that the land is his. And it has long been held that someone who engages in ultrahazardous (or sometimes, abnormally dangerous) activities is liable for damage that he causes, even though he has taken every possible precaution to avoid harm to someone else.

Likewise, the owner of animals that escape from their pastures or homes and damage neighboring property may be liable, even if the reason for their escape was beyond the power of the owner to stop (e.g., a fire started by lightning that burns open a barn door). In such cases, the courts invoke the principle of strict liability, or, as it is sometimes called, liability without fault. The reason for the rule is explained in *Klein v. Pyrodyne Corporation*, 810 P.2d 917 (Wash. 1991).

In *Klein*, the Washington Supreme Court held Pyrodyne Corp. liable when fireworks misfired during a 4th of July fireworks celebration. The court found the activity to the abnormally dangerous and satisfied four of the six factors for determining strict liability of abnormally dangerous activities:

- Existence of a high degree of risk of some harm to the person, land or chattels of others.
- Likelihood that the harm that results from it will be great.
- Inability to eliminate the risk by the exercise of reasonable care.
- Extent to which the activity is not a matter of common usage.
- Inappropriateness of the activity to the place where it is carried on.
- Extent to which its value to the community is outweighed by its dangerous attributes

Strict Liability for Products

Because of the importance of products liability, we will cover Products Liability in detail in a later section. However, strict liability may also apply as a legal standard for products, even those that are not ultrahazardous. In some national legal systems, strict liability is not available as a cause of action to plaintiffs seeking to recover a judgment of products liability against a manufacturer, wholesaler, distributor, or retailer. (Some states limit liability to the manufacturer.) But it is available in the United States and initially was created by a California Supreme Court decision in the case of *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

In *Greenman*, the plaintiff used a home power saw and bench, the Shopsmith, designed and manufactured by the defendant. The plaintiff was experienced in using power tools and was injured while using the approved lathe attachment to the Shopsmith to fashion a wooden chalice. The case was decided on the premise that Greenman had done nothing wrong in using the machine but that the machine had a defect that was "latent" (not easily discoverable by the consumer). Rather than decide the case based on warranties, or requiring that Greenman prove how the defendant had been negligent, the court found for the plaintiff based on the overall social utility of strict liability in cases of defective products. According to the decision, the purpose of such liability is to ensure that the "cost of injuries resulting from defective products is borne by the manufacturers…rather than by the injured persons who are powerless to protect themselves."

Today, the majority of US states recognize strict liability for defective products, although some states limit strict liability actions to damages for personal injuries rather than property damage. Injured plaintiffs have to prove the product caused the harm but do not have to prove exactly how the manufacturer was careless. Purchasers of the product, as well as injured guests, bystanders, and others with no direct relationship with the product, may also sue for damages caused by the product.

The Restatement of the Law of Torts, Section 402(a), was originally issued in 1964. It is a widely accepted statement of the liabilities of sellers of goods for defective products. The Restatement specifies six requirements, all of which must be met for a plaintiff to recover using strict liability for a product that the plaintiff claims is defective:

- The product must be in a defective condition when the defendant sells it.
- The defendant must normally be engaged in the business of selling or otherwise distributing the product.
- The product must be unreasonably dangerous to the user or consumer because of its defective condition.
- The plaintiff must incur physical harm to self or to property by using or consuming the product.
- The defective condition must be the proximate cause of the injury or damage.
- The product must not have been substantially changed from the time the product was sold to the time the injury was sustained.

Section 402(a) also explicitly makes clear that a defendant can be held liable even though the defendant exercised "all possible care." Thus in a strict liability case, the plaintiff does not need to show "fault" (or negligence).

Defenses

For defendants, who can include manufacturers, distributors, processors, assemblers, packagers, bottlers, retailers, and wholesalers, there are a number of defenses that are available, including assumption of risk, product misuse and comparative or contributory negligence, commonly known dangers, and the