

Tort Review

A tort is a cause of action that allows a plaintiff to bring a lawsuit for personal or property injury

Look for as many torts as possible; learn prima facie elements to prove up:

Tort Checklist:

Intentional:

Negligence:

Strict Liability:

Vicarious Liability:

Product Liability:

Nuisance:

Defamation:

Invasion of Privacy:

Business Torts:

Improper Litigation Torts:

Misrepresentation:

Torts Inner:

Intentional:

- Assault
- Battery
- False Imprisonment
- Trespass to Land
- Trespass to Chattels
- Conversion
- Intentional Infliction of Emotional Distress

*Defenses:

Negligence: elements that must be shown to meet the prima facie case for negligence

- Duty
- Breach
- Actual Cause
- Proximate Cause
- Damages

Strict Liability:

Vicarious Liability:

Product Liability:

Nuisance:

Defamation:

Invasion of Privacy:

Business Torts:

Improper Litigation Torts:

Misrepresentation:

Intentional: you do have to show actual intent for intentional torts

- Assault: act with intent to create an imminent apprehension
- Battery: a tort upon a person where you have either harmed him physically or through something that's offensive:
- False Imprisonment: confinement of another
- Trespass to Land: walk upon the land of another, even if you do not know it belongs to another, if you have the desired intent to walk upon that land
- Trespass to Chattels: interfere with the personal property of another
- Conversion: an interference with chattel where you exercise dominion of control over that property of another
- Intentional Infliction of Emotional Distress: you create extreme and outrageous behavior which causes another one's distress

Negligence: highly testable; many types of duty: look to facts to determine what type of duty is owed

- Duty:
 1. Special Duty:

- A. Violation of Statute (ici) To see this you need a statute on the exam
- B. Guest Statute
- C. Omission to act failure to act when a duty to act was created: based upon law you have a duty to act based upon a relationship
- D. Land Owner Occupier: occurs when a person comes upon the land of another:
What duty is owed:
 - I. Invitee:
 - II. Licensee:
 - III. Trespasser:
 - IV. Known Trespasser:
 - V. Attractive Nuisance:
- E. Lessors of Land:

2. General Duty: Where no special duties arise based upon the facts, look to general duty:

- I. Act as a reasonable prudent person
- II. Cardozo/Andrews
- III. Child
- IV. Professional
- V. Common Carriers
- Breach: Failure to act as a reasonable prudent person
 - I. Circumstantial Breach
 -Res ipsa Loquitor: occurs when the Plaintiff has no idea how the harm resulted
- **Causation:**
 - I. Actual Cause: but for standard
 - II. Proximate Cause: foreseeable
- Damages:

Defenses to Negligence:

- Contributory Negligence:
- Last Clear Chance:
- Comparative Negligence:
- Assumption of the Risk:

(defenses either release the defendant or reduce liability from the negligent act committed.)

Strict Liability: liability imposed regardless of fault: not looking to duty or breach

- Animals:
 - I. Domestic:
 - II. Wild Animals:
- Abnormally Dangerous Activity:

Causation:

- I. Actual Cause: but for standard
- II. Proximate Cause: foreseeable
- Damages:
- Defenses: which will release or relieve some of the defendant's liability

Vicarious Liability: this theory deals with imputing another's act onto a third party (I didn't do it) based upon their relationship

- Employer/Employee
- Independent Contractor
- Non-delegable duty: cannot shift liability
- Parent/Child
- Bailor/Bailee

Product Liability: **VERY TESTABLE** Based upon a manufacturer, distributor, or retailer, which places a defective product in the stream of commerce

- Battery: they have to be aware that the product was defective and still put the product in the stream of commerce
- Negligence
- Warranty
 - I. Express
 - II. Implied Warranty of Merchantability
 - III. Implied Warranty of Fitness
- Strict Liability in Tort

Nuisance: an interference with the use and enjoyment of one's property

- Public
- Private

Defamation:

- False Defamatory Statement
- Intentionally or negligently published
- Third party who knew and understood
- Libel v Slander
- Defenses
 - I. Qualified Privilege
 - II. Constitutional Privilege
 - III. Absolute Privilege

Invasion of Privacy:

- False Light in the public eye

- Intrusion upon seclusion
- Public Disclosure of private facts
- Appropriation of name or likeness

Not As Testable:

Business Torts:

Improper Litigation Torts:

Misrepresentation

Torts Rules:

Intentional: must show an act by defendant: some volitional movement:

Look for as many intentional torts as possible, break apart the facts for the elements, look to actual damages whether it is general, special, punitive, and look to defenses

Act by defendant: volitional movement: requires the defendant acts or intends the movement versus an involuntary movement such as a seizure, stroke

Intent: substantial certainty or desired result: look to see if Defendant believed that the act was substantially certain to result from the conduct or that the Defendant had the requisite intent or desire to cause the act.

Damages: do not need actual damages for intentional torts:

General Damages: those which naturally flow from the tort; pain and suffering or property loss, but for battery do not have to show that damage occurred.

Special Damages: must be pled and proven; usually consist of medical expenses, or lost wages.

Nominal Damages:

Punitive: if no damage occurs according to the facts, Plaintiff is most likely seeking punitive damages, which are awarded by the court to punish.

Transferred Intent: only applies to the five writs of trespass: battery, assault, false imprisonment, trespass to land and trespass to chattel

Assault: assault is the intentional creation of an imminent harmful or offensive touching of another

-look for creation of immediate harm to her or his own person. Threat of future harm is not actionable. The threat to destroy your house or car is not sufficient to find assault. Words alone are not actionable.

- **Battery:** battery is the intentional harmful or offensive touching of another. Can be found based on the theory of extension of oneself: a car, plate or dog can be extension of oneself.

A harmful touching would be a touching that results in injury, impairment or pain
Offensive: look to the reasonable prudent person standard.

- **False Imprisonment:** false imprisonment is the intentional confinement of another
 - I. Words alone are sufficient
 - II. No confinement would be found if there is a reasonable means of escape
 - III. Must be aware of the confinement or damaged by the confinement in order to recover

- **Trespass to Land:** trespass to land is where you enter with intent onto the land of another;
The intentional entry upon the land of another. No need to know land belongs to another, and do not need actual damages.

- **Trespass to Chattels:** Trespass to Chattels is the intentional interference with the personal property of another; need to see an interference
- **Conversion:** Conversion is the intentional exercise of dominion and control of the personal property of another.
If you receive a package by mistake and you keep the package this would be a conversion:
Need either complete destruction or a substantial interference for conversion.
* Substantial interference or destruction of the property becomes conversion
No transferred intent allowed

- **Intentional Infliction of Emotional Distress:** intentional infliction of emotional distress is the intentional extreme and outrageous conduct that is calculated to cause and does cause emotional distress.
 - I. Words alone may be sufficient
 - II. Distress must be severe in order to recover for emotional distress

*Defenses: in the call of the question, or arise based upon the facts

- Consent: consent is the voluntariness of the act that is about to occur
 - I. A complete defense to an intentional tort
 - II. Consent can be either express or implied by conduct
 - A. Express consent is a communication by the party of their willingness to submit to Defendant's conduct.
 - B. Implied consent can be found based on the circumstances.
- Self Defense: self-defense is where one is privileged to use reasonable force to protect themselves and may only use deadly force when threatened with imminent serious bodily injury.
 - I. Remember, must be like for like: fist for fist; cannot exceed force with gun
 - A. Majority Rule: no duty to retreat if you have the ability

B. Minority contra: must retreat if you have the ability

- Defense of Others: one may use reasonable force to protect another
 - I. Modern view (split) reasonable mistake is permitted: at common law it is not
- Defense of Property: defense of property is where a person may use non-deadly force to defend his chattel
 - I. Person must have reasonable belief that the force is necessary in order to prevent harm
 - II. The defense is valid for real or personal property
 - III. May never use deadly force to protect property: (can raise to deadly force if threatened)
- Recovery of Property: a shopkeeper may detain for a reasonable period of time with reasonable force and reasonable suspicion a person whom believed to have stolen property.
 - I. Use of non-deadly force
 - II. Reasonable mistake is protected
- Necessity: a private necessity is a defense when a person who enters into the land of another, or interferes with the chattel in possession of another in order to prevent destruction or injury to property, or death or serious bodily harm.
- Authority: the right given to an official by law in relation to their duties.
- Discipline: Based on the relationship a privilege exists in exercising reasonable force or restraint to control another.

Negligence: elements that must be shown to meet the prima facie case for negligence: a duty is owed, a duty is breached, that the duty is actual and proximate cause of one's damages

- **General Duty:** many types, know which one based upon the facts:
 - Duty:** a person owes a duty to act as a reasonable prudent person would under the same or similar circumstances
 - Majority Rule:** Cardozo: you owe a duty to plaintiff who is in the foreseeable zone of danger: remote plaintiff: poisoned child v cleaning woman
 - Minority Rule:** Andrews: Andrew's says you owe a duty of care to all (Palsgraf v Long Island R.R. Co)
 - Common Carrier:**
 - Common Law: higher standard
 - Modernly: reasonable prudent person standard
 - Children:**
 - I. Majority view: children are held to the reasonable prudent person standard as a child with the same age, intelligence, and experience of the individual.
 - A. Exception: adult activity:
 - i. A child engaged in a dangerous activity will be held to a reasonable prudent person standard under the same or similar circumstances.
 - II. Minority view:

- A. 0-7 presumed incapable for committing negligence
- B. 7-14 rebuttable presumption
- C. 14+ capable

- **Breach:** based upon the duty classified: fell below the standard of care

Res Ipsa Loquitor:

Elements: (how did door fall on you?: ‘there is no evidence that ...)

- I. The instrumentality was in the exclusive control of the defendant
- II. Plaintiff did not contribute to their injury
- III. The accident would not have happened absent some one’s negligence

- Causation:

- I. Actual Cause: ‘but for’

Successive tortfeasors: (need two negligent wrong doers for this issue to arise)

(Car injury, one defendant: dr wrong prescription, second defendant)

Concurrent tortfeasors: (two independent acts (but not negligent on their own)

come together that result in negligent conduct causing Plaintiff’s harm)

(cleaning driveway with cleaning solution, neighbor throws cigarette that causes explosion.) ‘but for their concurrence’

Substantial factor: either of the defendant’s negligent conduct could have caused the single injury to the plaintiff.

(riding horse, motorcycle rider’s a and b come up on either side and rev motorcycles, which cause horse to throw rider, either bike may have cause)

Plaintiff’s choice as to who they want to sue for substantial factor

- II. **Proximate Cause:**

Direct v indirect:

Direct act: I run my car into yours: it is foreseeable that if I run my car into your, you or your vehicle will sustain injury

(on mcq’s not tested straight forward, and will need to go through steps

If Direct act go straight to see if foreseeable

If find it its indirect act, ask yourself is it dependent on your actions or

independent (hitting with car direct, dr wrong medication is indirect)

Was it dependent upon my actions or indirect? I hit you with my car

Was it foreseeable v unforeseeable

Negligent act of a third party is always foreseeable; normal acts of god, and animals

Criminal acts are always unforeseeable, and abnormal acts of god

Dependent v independent

Foreseeable v unforeseeable

Thin Skull Plaintiff Doctrine: this is a doctrine where the defendant takes the plaintiff as he finds him: preexisting condition?

- **Special Duties:** always start with a special duty before going to a general duty, as you would not need to discuss the general duty

Negligence Per Se: violation of statute:

I. **Elements:**

- A. The intent of the legislature
- B. The plaintiff was a member of the class that the statute was designed to protect
- C. The statute was designed to prevent the type of injury suffered by the plaintiff

Omission to Act: General Rule is that no duty is owed.

Look for some relationship v gratuitous promise, versus steps I take to help you.

An example is where someone sees another attempting to back their car into a parking space, no duty is owed unless you start to guide them.

Land Owner Occupier: Occurs when a person comes upon the land of another.

What duty is owed: (status can change)

Invitee: (anything opened to the public = invitee; hotel, amusement park) an invitee is one who comes upon the land with the owner's permission for the purpose for which the land is maintained.

- I. A landowner has a duty to an invitee to reasonably inspect, correct or warn of any dangers.

Licensee: (person invited to birthday party) a licensee is found when a person enters the land to benefit themselves as well as the owner of the land.

- I. A landowner has a duty to exercise reasonable care to warn of, and make safe any known dangers.

Trespasser: a trespasser is found when one enters the land without

- I. No duty is owed to a trespasser

Known Trespasser: (worn path in yard) a known trespasser is where a person is entering the property without the consent, but the owner knew or should have known of the trespass.

- I. Duty to act as a reasonable prudent person.

Attractive Nuisance: A special duty imposed on an owner occupier of land where a child comes upon the land:

There is an artificial condition creating an unreasonable risk of harm

The possessor of land knew or should have known that children are likely to trespass

Because of their youth children are unable to recognize danger

The utility of maintaining the condition is compared to the burden of eliminating the risk.

- **Damages:**

- I. **General Damages:** those which naturally flow from the tort; pain and suffering or property loss. (plaintiff has a burden to prove that damage did occur)
- II. **Special Damages:** foreseeable reasonable amount and not too remote (lost medical and lost wages)
(in order to recover special damages, you must have general damages)

Defenses to Negligence:

- I. **Contributory Negligence:** contributory negligence is conduct of plaintiff which falls below the reasonable person standard of care owed to one-self, and is a complete defense to a negligence cause of action.
- II. **Last Clear Chance:** Where the court does find that the Plaintiff contributed to their own injuries, in order to avoid the harsh effect of plaintiff's contributory negligence, some jurisdictions will hold that the plaintiff is not barred from recovery where a defendant had the last clear chance to avoid the accident just before it occurred, but failed to do so.
- III. **Comparative Negligence:** (California) Comparative negligence is where the plaintiff's conduct falls below the standard of reasonable care and the amount of the plaintiff's negligence is apportioned between the responsible parties according to fault.
- IV. **Assumption of the Risk:** Assumption of the risk occurs when a plaintiff has knowledge, comprehension, and an appreciation of the danger and voluntarily elects to encounter it and cannot recover for defendant's negligence.

(defenses either release the defendant or reduce liability from the negligent act committed.)

- **Vicarious Liability:** deals with imputing another's act onto a third party based upon their relationship
 - I. **Employer/Employee:** look that conduct which occurred was within the scope of that employment, versus a frolic in detour (employer may have additional direct negligence liability for failure to duty of background search or supervision)
Also: employer may be sued for employees vicarious
 - II. **Independent Contractor: not vicariously liable for indep contractor actions**
 - III. **Non-Delegable duty:** such as maintenance of car, property maintenance,
 - IV. building design, crimes
 - V. **Joint Enterprise:** (Popejoy v Steinle) taking a trip where agreed to share expenses for travel and food: accident occurs, can sue driver or joint partner (very seldom allowed) assuming tort act was within scope of the joint enterprise; some courts hold it must be a commercial enterprise
 - VI. **Bailments:** (negligent entrustment) knowingly give keys to intoxicated friend
 - VII. **Parent/Child:** general rule is no, unless parent has ability to control that child, or parent knows of/ encourages certain propensities of that child, such as violence
 - VIII. **Some states allow for vicarious liability for lending car out** may also be directly liable under negligence
 - IX. **Contributory Negligence States allow plaintiff liability**
 - X. **Comparative Negligent States (46 states): % can be against plaintiff**

Strict Liability: liability imposed regardless of fault: not looking to duty or breach

- I. Animals:
 - A. Domestic:

- i. look to the animal's normal propensity: if normal propensity would have to sue under **negligence theory**. (example dog bite)
 - ii. If abnormal propensity that the owner is aware of, then strict liability applies
 - B. Wild Animals: injury by the plaintiff must result from the normal dangerous propensity of the animal
 - Exception: a zoo, wild animal park
 - i. Focus is the harm caused by the animal
 - ii. Look to the propensity (tiger comes up, sits on child, and smothers child: no strict liability as not animal's propensity: then look to negligence)
- II. **Abnormally Dangerous Activity**: the general rule for strict liability is where one who maintains an abnormally dangerous condition or activity on their premises, or engages in such an activity will be liable to others for the harm caused, even if the defendant exercised reasonable due care. (liability is imposed regardless of fault) toxic chemicals, crop dust, mining, explosives. (train hauling toxic waste derails due to animal gets loose, train held strictly liable due to abnormally dangerous activity)

Must then show:

Causation:

- III. Actual Cause: but for standard
- IV. Proximate Cause: foreseeable
- Damages:
- Defenses: which will release or relieve some of the defendant's liability

Comparative Negligence

Assumption of Risk

***On multi choice strict liability is better answer choice because you do not have to establish a duty or breach: liability is imposed regardless of fault**

* when see strict liability on land in essay question, always look for private nuisance

Product Liability: **VERY TESTABLE** Based upon a manufacturer, distributor, or retailer, which places a defective product in the stream of commerce **WILL APPLY MORE THAN ONE!!**

- **Battery:** Battery is the intentional placing of a product in the stream of commerce with knowledge of the defect.
(they have to be aware that the product was defective and still put the product in the stream of commerce) (Ford Pinto: Ford was aware that design of the vehicle gas tank upon impact would cause the car to explode) must show causation and damages and look to defenses:

I. **Causation:**

- A. Actual Cause: but for standard
- B. Proximate Cause: foreseeable
- II. **Damages:**
 - A. General: damages which naturally flow from tort, pain and suffering
 - B. Punitive: punish for wrongful conduct
- III. **Defenses:** which will release or relieve some of the defendant's liability
 - A. **Negligence:** show that a duty was owed, that the duty was breached and that the breach was the actual and proximate cause of Plaintiff's damages.
 - Duty:** a manufacturer, distributor or retailer has a duty to inspect, discover, and correct any known defects.
 - (*beware of the **sealed container doctrine** for retailer: **Strict liability in Tort**) **EXTREMELY TESTABLE**
 - Breach: show that they fell below the standard of care:**
 - On essay look for two or more types of defects**
 - Manufacturing:** a manufacturing defect is where the product is different in kind of the other line of products. (different than those made days earlier or later)
 - Warning:** Manufacturer (knowingly) fails to warn of a potential harm which may result from the use of the product.
 - Design:** The product is inherently dangerous in its design. (roller skates with no brakes)
 - Res Ipsa Loquitor: Tylenol poisoning with cyanide: show breach circumstantially**

Defenses:

Contributory Negligence:

Comparative Negligence:

Assumption of Risk:

- **Warranties:**

- I. Express Implied: Express representation (manufacturer warrants product expressly) involving the product: (look for puffing: '*best hair product in the world*') (tested based upon advertisement or something on the packaging of the product) **hummer driving under water like a submarine in commercial is an express warranty if it did not use the disclaimer***

Defenses:

- a. **Misuse of actual product**
- b. **Disclaimer**
- c. **Assumption of the Risk**
- II. **Implied Warranty of Merchantability:** implied warranty of merchantability warrants that the product is of fair and average use

Defenses:

- a. **Misuse of actual product**
- b. **Disclaimer**

c. Assumption of the Risk

III. **Implied Warranty of Fitness:** warranted by the seller which knows of the buyer's particular purpose and buyer is relying on the products use for that purpose. May be manufacturer, distributor or retailer. (tell seller want to climb mountain and they sell boots that are not durable for that use) (when see express warranty, implied warranty of fitness is generally there ON EXAMINATION)

Defenses:

- a. Misuse of actual product
- b. Disclaimer
- c. Assumption of the Risk

IV. **Strict Liability in Tort:** A manufacturer, distributor or retailer places a defective product into the stream of commerce will be liable to a foreseeable user (grocery store ALWAYS strictly liable for selling defective product)

Causation

Damages

Defenses

^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^ *****

Product Liability: VERY TESTABLE Based upon a manufacturer, distributor, or retailer, which places a defective product in the stream of commerce WILL APPLY MORE THAN ONE! ^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^ *****

EXAMPLE: general call on products liability case would ALWAYS Sue under negligence, implied warranty of merchantability, and strict liability in tort:

Then look to facts to raise others such as:

Battery based upon their actual knowledge

Express Representation which would bring about Express Warranty, which would likely bring about Implied Warranty of Fitness

Unless specific call says only sue under specific tort:

Nuisance: an interference with the use and enjoyment of one's property

- I. **Public:** A public nuisance is an act by the defendant that inconveniences or causes damage to the public. (public does not have standing to sue for public nuisance, must be brought by public official) example: construction on public road
Exception: private individual can sue if harm is different in kind from the public harm. (example: construction company blocks person's driveway)
- II. **Private:** The unreasonable interference with the use and enjoyment of the land of another.

To determine unreasonableness, look to a balancing test: does Plaintiff's harm outweigh the defendant's activity? (*coming to the nuisance is no defense) does a quarry (which is the main employer in the community) using dynamite harm the plaintiff more than the benefit of the blasting, such as cracking walls and windows of home.

Tends to cross over from strict liability on land

Changing targeting specific types of tort claims: changing public policy principles

Example: employer/employee relationship: workman compensation overrides contributory negligence defense

Work comp: 2/3rds of wages, no pain and suffering, but medical expenses covered

Medical malpractice: limit pain and suffering and damage and statute of limitations to protect doctors

Victims of violent crimes: recovery funds

Not very testable

Defamation: defamation is a false defamatory statement made either intentionally or negligently to a third party who knew or understood the statement which lowered the plaintiff's reputation.

Look to break apart the elements!!!

- I. False Defamatory Statement: a false statement versus merely an opinion:
Example published in local newspaper where Judge lost reelection and sued for defamation:
'Judge Bright is a very unfair judge. In a recent trial in which I was involved in his court, he clearly didn't understand what was going on. I've heard he's often drunk on the bench.'
'Judge Bright is a very unfair judge'= opinion
'In a recent trial in which I was involved in his court, he clearly didn't understand what was going on.'= opinion
'I've heard he's often drunk on the bench.'= false defamatory statement: actionable as defamation
- II. Intentionally or negligently published:
- III. Third party who knew and understood
- IV. **Libel Per Quod:**
Inducement: if a statement is not defamatory on its face Plaintiff must introduce extrinsic facts to show statement was defamatory because extrinsic facts establish the statement's meaning.
Innuendo: defamatory implication and extrinsic facts come together to prove statement is defamatory – the meaning of the statement results from the inducement. (Mary is pregnant)

Colloquium: defamatory statement makes no reference to plaintiff – plaintiff must show 3rd party understood it to apply to him – plaintiff proves it was understood it was about plaintiff. Example: I write a letter to the paper defaming my son’s kindergarten teacher at his school. Although the statement does not name the teacher, if the teacher is the only kindergarten teacher at that school, the court will find the readers knew who I was referring to.

Then Classify as Libel or Slander:

- **Libel**: libel is a defamatory statement that is in writing, or some form of permanency
- **Slander**: slander is a defamatory statement that is oral
- **Damages**:
- **Libel**: libel is a defamatory statement that is in writing, or some form of permanency
General Damages will be presumed:
- **Slander**: slander is a defamatory statement that is oral.
General Damages will not be presumed and plaintiff will have to show damages
Exception: where General Damages are presumed: also, can plead special damages if can prove them

Slander Per Se:

Crime: reference that plaintiff was convicted of a crime

Unchaste act of a Female: making statements imputing unchastity of a female (or male modernly)

Loathsome Disease: making a reference to a plaintiff having some loathsome disease

Profession: making a reference such as a teacher can’t teach.

- **Defenses:**
 - I. Consent:
 - II. Truth:
 - III. **Absolute Privileges:** HIGHLY TESTABLE
 - A. Legislative Privilege: all state or federal legislative members are absolutely privileged to make defamatory statements while the committee is in session.
 - B. Judicial Privilege: during any judicial proceeding, you are privileged to make any defamatory statement
 - C. Executive Privilege: high official, policy maker, privileged to make statements within the scope of their duties, and relevant to those duties, in order to exercise the privilege.
 - D. Domestic Privilege: husband and wife are allowed to make defamatory statements to each other about a third party.
 - IV. **Qualified Privileges:** a conditional privilege:
 - A. Protection of private interest: reasonable belief of importance and relates to the matter. (believe someone is stealing from store, or homeowner)
 - B. Protection of public interest: utterance necessary to protect a legitimate public interest and the statement is made to someone who can protect that interest.

V. **Constitutional Privileges: Generally Occurs with a Media Defendant Stems from 1st Amendment: HIGHLY TESTABLE**

- A. Public official or public figure needs to show actual malice:
Malice: statement was made knowingly of its falsity or with a reckless disregard of the truth.
- B. Private Person dealing with a matter of public concern needs to prove negligence.
- C. Private person on private matter does not need to prove fault.

Invasion of Privacy Torts: (think of it as an umbrella to prove or disprove)

- **Intrusion into Plaintiff's Private Life:** Requires a highly offensive intrusion into Plaintiff's life, either intentionally or negligently. (reporter filming movie star through her window with a high lens camera about twenty feet away would be intrusion upon seclusion)

Defenses: consent relieves liability.

- **Public Disclosure of Private Facts:** A public disclosure by the Defendant of a private fact about the Plaintiff that is highly offensive. (disclosure of a private disease which only patient and doctor know about) like nurse says star has aids

Defenses: consent or constitutional privilege.

- **Appropriation of Plaintiff's Name or Likeness:** Unauthorized use of Plaintiff's name or likeness for a commercial purpose. (highly testable) using name and photo and saying this person uses our services

Defenses: consent or newsworthiness.

- **False Light in the Public's Eye:** A publication by the Defendant that places the Plaintiff in a false light made knowingly or recklessly that is highly offensive. **Usually another Tort to bring when you see defamation has occurred.** This is the only invasion of privacy tort where truth is a defense.

Defenses: consent, truth, newsworthiness. **ONLY INVASION OF PRIVACY TORT WHERE TRUTH IS A VIABLE DEFENSE**

Business Torts:

Improper Litigation Torts:

Misrepresentation:

Intentional Torts:

Improper Litigation Torts:

Abuse of Process: Abuse of process is where the Defendant brings a cause of action unlawfully, either in the criminal or civil process, for a purpose in which it was not intended, to annoy, harass, or enjoin where no right exists.

To establish a prima facie case, the plaintiff must show –

- There was an intentional misuse of process; and
- There was resulting damage to the plaintiff.

Malicious Prosecution: Malicious Prosecution is the wrongful institution of criminal proceedings with the lack of probable cause which terminated in the Plaintiff's behalf.

Example: prosecution brings a charge of larceny without proof or facts and go ahead with trial, and you are found not guilty.

Abuse of Process and Malicious Prosecution are two torts that could be discussed on the same examination

Malicious Institution of Civil Litigation: Malicious Institution of Civil Litigation is where a State has extended malicious prosecution to include civil action brought with no merit. Must show that there was no merit to bring the cause of action, its purpose was to annoy or harass, and that the case was found in your favor.

Misrepresentation:

Intentional Misrepresentation (aka Fraud/Deceit): Intentional Misrepresentation is where there is a false representation of a material fact, made knowingly in order to induce reliance in which Plaintiff relies to their detriment. No defenses.

Negligent Misrepresentation: Negligent Misrepresentation is where there is a false misrepresentation of a material fact by one who knew or should have known in which Plaintiff justifiably relies to their detriment.

Defenses:

Contributory Negligence:

Assumption of Risk:

Same as in negligence

(The difference between Intentional Misrepresentation and Negligent Misrepresentation is intent, and negligent misrepresentation has defenses.)

Injurious Falsehood (similar to defamation): An Injurious Falsehood, also known as “disparagement,” “slander of title” or “trade libel,” is where a false disparaging statement is made, with intent, about a plaintiff’s business or property, which basically causes others to not deal with that business or property.

To establish a prima facie case, the plaintiff must show:

- There was a false statement by the defendant;
- There was a publication to others;
- The defendant’s statement was disparaging to the business, financial interests, etc., of the plaintiff;
- There was intent;
- There was actual cause;
- There was proximate cause; and
- The plaintiff incurred special damages.

Defenses:

Consent:

Privileges- Same as Defamation:

- Absolute Privilege
- Legislative Privilege
- Judicial Privilege
- Executive Privilege
- Domestic Privilege

Torts to Property:

Business Torts

Interference with Contract: Interference with Contract is the intentional interference with the contract of another. You need to have intent, and you need to have knowledge of the existence of the contract, and you interfere with that contractual relationship; once those elements are shown, then there is a viable cause of action for interference with contract.

Prima Facie Case:

- Defendant's Interference with existing contract - Must play active role. Breach not required.
- Intent - Acted with awareness of the existing contract, and intended to cause interference that proximately resulted from her conduct. No mere negligence.

- Causation - Actual and proximate
- Special Damages - actual damages, consequential (unforeseen), mental suffering, damage to reputation, punitive

Defenses: one of privilege: not liable if proper justification for the interference and only reasonable methods employed. Requires proof that both the ends and the means justified.

- Ends - arise from acts undertaken for a social good or to protect one's interests
- Means - Even if interference for justifiable purpose, never justified to use unethical or wrongful means.

Interference with Prospective Advantage: Interference with Prospective Advantage is the intentional interference with a prospective economic advantage. Must have knowledge that there are negotiations, and must have intent to interfere with those negotiations, and have interfered with those negotiations. This would provide a viable cause of action to the Plaintiff for interference with prospective advantage.

Injurious falsehood

Injurious falsehood involves malicious intent through a false statement made about another business, used to induce others to act in a way that causes that business harm.

Compensatory Damages

- Compensatory damages are measured through causation – plaintiff get the cash equivalent of the difference between (1) his situation now, and (2) what his situation would have been if defendant had not damaged him. Damages are not based on the difference between plaintiff's situation now and his situation before; defendants pay only for what they caused.

Excessive Damages

- After an award of damages, a defendant can make a motion for a new trial or for remittitur.
- The legal standard for this is to ask whether a reasonable jury could have awarded an amount this large. Courts may also phrase this as whether the award “shocks the judicial conscience,” or if the award was a result of passion or prejudice on the part of the jury.

Future Damages

- Future damages can be speculative and thus hard to prove with enough certainty.
- Future damages for things like plaintiff's future needs, plaintiff's damaged future career path, etc., often require expert testimony to establish.

- A dollar today is worth more to you than a dollar next year. A dollar next year is therefore the equivalent of less than a dollar today. Because future damages are converted to an immediate lump sum payment, they must be discounted.
- Personal injury awards are not taxable, but damages for non-physical injury are.
- Damages for physical harm to property are based on fair market value.

Punitive Damages

- Punitive damages are those in addition to what is needed to restore plaintiff’s position – they punish defendant and deter defendant and others like him.
- In most states, to collect punitive damages a plaintiff must prove wanton and willful conduct by defendant, by clear and convincing evidence.
- If that threshold is crossed, the jury will then calculate an award of punitive damages which it thinks is appropriate, if any, based on how bad defendant’s conduct was, and how effective of a deterrent punitive damages would be.

Nominal Damages

Recall that in intentional torts, plaintiff need not prove (compensatory) damages.

- If a successful plaintiff does prove compensatory damages, he can collect them, but if a successful plaintiff in an intentional tort suit cannot prove compensatory damages, he still gets nominal damages to show that he won the case.

Wrongful Death

- Every state now allows suit for wrongful death.
- “Wrongful death” is a type of damage and a type of procedure, not a separate tort by itself – plaintiff must still establish an intentional tort, negligence, etc.
- Depending on the state, either the personal representative of the estate or the next of kin brings the suit. Not both.

Survival Actions

- Most states no longer terminate a cause of action upon the death of one of the parties.
- This applies both to cases in which the death is related to the tort being sued over, and those where it is not.
- Some states combine survival and wrongful death to allow the dead victim to recover for losses and suffering before death (the survival part) and post-mortem damages (the wrongful death part).

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Miscellaneous Factors Affecting the Right to Sue:

- **Survival Actions:** Must prove the underlying theory, as to whether it is negligence, products liability claim, or strict liability claim, based upon the facts.
 - I. At common law a cause of action did not survive at the death of the party injured, or the party which actually caused the harm (the tort died with you)
 - II. Modernly, the cause of action survives and allows the estate of the deceased to bring an action for personal injury and/or property damaged that occurred p to the time of death. (modernly, the cause of action does survive and allows the state to bring a cause of action on your behalf, or allows another part to bring an action on behalf of their party against your estate)

Damages:

lost wages, pain and suffering, medical expenses

- **Wrongful Death:**

At common law, no action could be brought for the wrongful death of a person

Modernly, you can bring a suit for losses sustained. set by statute, whereas a surviving relative can bring a law suit in order to recover the pecuniary loss sustained by the relative.

Loss of value for the companionship, support, services and contributions that they would have received had he or she not been killed.

Can also bring about a cause of action for loss of a child in same manner.

Defenses:

All defenses viable for underlying tort are applicable.

Damages:

No loss for pain and suffering, or medical expenses, but merely for the independent loss of companionship

Differences between Survival Action and Wrongful Death: Differences between Survival Action and Wrongful Death is who is getting the recovery.

- For survival action the recovery is going to the estate.
- Wrongful death is going to the party which did not receive the injury directly, but merely suffered based upon the actual loss.

Joint and Severely Liable: pro plaintiff mechanism, plaintiff can collect more money more quickly

At Common Law:

- When defendants are acting in concert: working together towards some purpose which injure plaintiff.
- Vicarious Liability:
- Indivisible harm: A & B both act negligently, they both are joint and severely liable.
- Can collect damages from one, the other, or both

Modernly:

- Comparative Negligence: States scaled back joint and severely liability because once juries started assigning percentage of liability to defendants it became practice to assign percentages of liability to those defendants.
- Some states use mixes
- When one defendant is broke, plaintiff can recover entire amount from co-defendant

Satisfaction: The more collected by another defendant, the less the other owes.

Pro Tanto: subtract amount from amount paid

Pro Rata: subtract % of responsibility (plaintiff can end up with more or less of amount of damages owed)

Collateral source: such as insurance is not treated as satisfaction., because it reduces defendant's liability

Contribution: restitution from overpaying defendant from nonpaying defendant. In contributory states, equal distribution owed; comparative=%; defendant can sue if plaintiff could have sued.

No right of contribution for intentional joint tortfeasors

Good faith settlement renders immune from joint tortfeasors

Indemnity: Liability and zero responsibility has indemnity to recover from guilty such as employer can recover from employee

Defense:

Defendants can seek divisibility or apportioning to avoid joint and severe liability, can show he only had x amount % of contribution.

Which defendant caused which injury and what %

Elements of a Memorandum in an IRAC Format

Questions Presented: Questions Presented should directly raise the legal issues and briefly describe the law upon which you based your answer.

Statements of the Case: Statements of the Case

Statements of the Facts: Statements of the Facts should only have those facts relating to the issue which you are going to present before the court.

Summary of the Arguments: A Summary of the Arguments is a brief summary of the answers to the Questions Presented, as a summary of the points and arguments you will be making in your memorandum.

Argument: The Argument is a persuasive discussion of your points and authorities. The argument is the main body of your memorandum, and it clearly applies the statutes, regulations, or the case law which you have used and looked up in your research. Use proper citations in your Argument.

Conclusion: Conclusion is based upon the overall statements which you have made in the use of law with your facts.