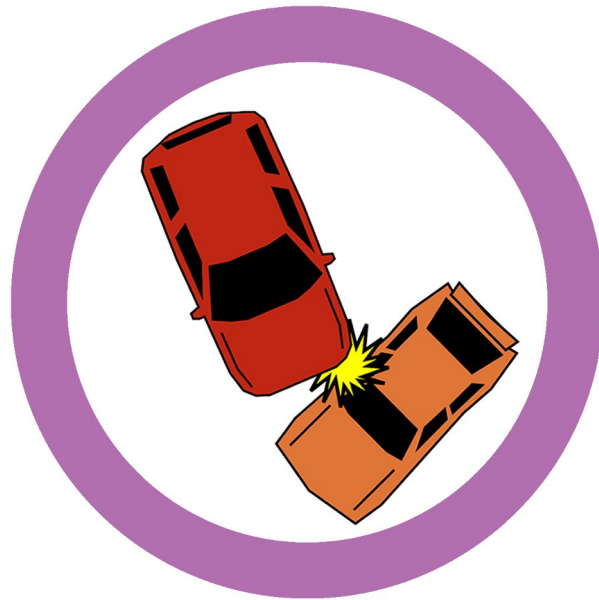


Torts



Conley Bar Review

Conley Bar Review: Torts

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Note: On the Uniform Bar Exam, assume that wrongful death claims and survival actions are available. Unless otherwise stated, apply the rules of joint and several liability with pure comparative negligence. About half of the Torts questions will concern negligence.

I. Intentional Torts

A. General requirements

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

1. Act by defendant
2. Intent
3. Causation

Act: The act by defendant must be a volitional movement on defendant's part. Reflexive or convulsive acts are not volitional. Movement caused by someone else (e.g. pushing) are not volitional.

Intent: The requisite intent may be either specific or general.

Specific intent is present if the actor's goal was to bring about the consequences.

General intent is present if the actor knows with substantial certainty that these consequences will result.

Defendant need not intend the injury, they need only intend the "consequences of the tort." E.g., for battery, they need only intend that a harmful or offensive touching occur.

Transferred intent: When a defendant intends to commit a tort against one person, their intent may be transferred to:

1. The same tort against a different person; or
2. A different tort against the same person; or
3. A different tort against a different person.

Note: the transferred intent doctrine applies only to the five original trespassory torts:

1. Battery
2. Assault

3. False imprisonment
4. Trespass to land
5. Trespass to chattel

Motive is irrelevant to intent. A defendant is liable if they intended the consequences of the tort, even for an innocent motive.

Minors and incompetents are liable for their intentional torts, under the majority view. That is, they are held to have the requisite intent.

Causation: The act by defendant must have caused the result that gives rise to liability, or set in motion events leading to the result. Causation is satisfied if defendant's act was a substantial factor leading to the result.

B. Harms to the person

Battery

Defendant will be liable for battery when they intend harmful or offensive contact and harmful or offensive contact results.

Whether the contact is harmful or offensive is judged by the reasonable person test, an objective standard.

Person: Anything connected to plaintiff's person is considered plaintiff's person, e.g. something they are holding.

Plaintiff need not be conscious that the contact occurred at the time.

Transferred intent applies.

Actual damages are not required. A court may award nominal damages, or punitive damages where malice was present.

Assault

Defendant will be liable for assault when they intend to create apprehension of immediate harmful or offensive contact and reasonable apprehension of immediate harmful or offensive contact results.

Apprehension must be reasonable. Fear or intimidation need not be present. Awareness of the imminent contact is necessary for apprehension to exist. Apprehension may reasonably exist though actual contact is impossible, so long as

there is the apparent ability to cause contact. Words alone do not constitute assault. Some overt act is necessary. However, words may negate an assault.

A conditional threat, when combined with an overt act, is sufficient for assault, so long as the defendant did not have the right to impose the condition. E.g., "Your money or your life" is assault. "If you try to hit me, I'll fight back" is not assault.

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

Transferred intent applies.

Actual damages are not required. Nominal damages may be awarded, or punitive damages when there is malice.

False imprisonment

Defendant will be liable for false imprisonment when they act to confine plaintiff within fixed boundaries and plaintiff is thereby confined.

The confinement may be accomplished by:

1. Physical barriers;
2. Physical force;
3. Threat of force, express or implied; or
4. Failure to provide escape when there is a duty to provide it.

Lawful arrests are privileged: there is no false imprisonment. Arrests with a warrant are per se lawful. Arrests without a warrant may also be privileged:

1. Felony arrests without a warrant by a police officer or private citizen acting at an officer's direction, if:
 - a. The officer had reasonable grounds to believe that a felony had been committed; and
 - b. The officer had reasonable grounds to believe the person committed it.
2. Felony arrests without a warrant by a private citizen acting independently will be valid only if:
 - a. A felony had in fact been committed; and
 - b. The private person had reasonable ground to believe that the person arrested committed it.

3. Misdemeanor arrests without a warrant, by police officers or private citizens, if the misdemeanor was a breach of the peace and was committed in the presence of the arresting party.

4. Arrests to prevent crime without a warrant, by police officers and private citizens, where a felony or breach of the peace is in the process of being, or reasonably appears about to be, committed.

The amount of force allowable for privileged arrests is limited:

1. For felony arrests, both police officers and private citizens may use the amount of force reasonably necessary to make the arrest, but deadly force is only permissible when the suspect poses a threat of serious harm to the arresting party or others.
2. For misdemeanor arrests, both police officers and private citizens may use the amount of force reasonably necessary to make the arrest, but never deadly force.

Shopkeeper's privilege: By statute or case law, many states allow a shopkeeper to detain a suspected shoplifter when:

1. There is a reasonable belief as to the fact of theft;
2. The detention is conducted in a reasonable manner and deadly force is not used; and
3. The detention is for a reasonable time and only for the purpose of making the investigation.

Moral pressure is an insufficient means of confinement. Future threats are an insufficient means of confinement. There is no requirement that plaintiff resist the physical force or test the threat that is used to confine them. There is no time requirement for the confinement. It may be momentary.

Most cases hold that plaintiff must be aware of the confinement. The Restatement provides an exception where the person confined is actually injured by the confinement.

For plaintiff to be confined within fixed boundaries, their movement in all directions must be limited. If there is a reasonable means of escape of which plaintiff is aware, there is no false imprisonment.

Transferred intent applies.

Damages: Actual damages are not necessary. There may be nominal damages. Punitive damages are possible if there was malice.

Intentional infliction of emotional distress

Defendant will be liable for intentional infliction of emotional distress when they act in a manner amounting to extreme and outrageous conduct, and with the intent to cause plaintiff severe emotional distress, or with recklessness as to the effect of their conduct, and severe emotional distress on the part of the plaintiff results.

Some courts are reluctant to recognize the tort because of the difficulty of proving emotional distress without physical manifestations. Some courts require physical manifestations.

Outrageous conduct is conduct that transcends all bounds of decency tolerated by society. In the absence of such conduct, it is generally held that the reasonable person would not have suffered the emotional distress suffered by the plaintiff.

Examples of outrageous conduct:

- Extreme business conduct, such as extreme collection methods, may be actionable.
- Misuse of authority in some circumstances may be actionable, e.g. school authorities threatening pupils.
- Offensive or insulting language will generally not be characterized as outrageous conduct unless there is a special relationship between plaintiff and defendant or a sensitivity on plaintiff's part of which defendant is aware.

Common carriers and innkeepers owe special duties to their patrons that will be a basis for liability even when the act is less than outrageous.

Special sensitivity may include children, pregnant women, and elderly people.

Bystander cases: When the defendant intentionally causes severe, physical harm to a third person and the plaintiff suffers severe emotional distress because of their relationship to the injured person, the elements of intent and causation may be harder to prove. Requirements:

1. Plaintiff was present when the injury occurred to the other person;
2. Plaintiff was a close relative of the injured person; and
3. Defendant knew that plaintiff was present and a close relative of the injured person.

Note: Plaintiff need not establish presence or family relationship if they show defendant had a design or purpose to cause severe distress to plaintiff. E.g. defendant

calls plaintiff to tell them (truthfully) that they have killed plaintiff's best friend, for the purpose of causing distress.

Many courts have allowed recovery where the mental distress results from intentional or reckless mishandling of a relative's corpse.

Transferred intent does not apply.

Actual damages are required. Nominal damages not awarded. Modernly, it is not necessary to prove physical injuries to recover. It is necessary to prove severe emotional distress. Punitive damages are allowed where defendant's conduct was improperly motivated.

C. Harms to property interests

Trespass to land

Defendant will be liable for trespass to land when they intend an entry onto plaintiff's real property and entry results.

The right protected is the right of exclusive possession of real property. Therefore, any physical invasion of plaintiff's land is sufficient. Defendant need not enter the land; it is sufficient that they cause some object or third person to enter the land. Defendant may also be liable when they remain on the land after they entered lawfully but their right to be there has lapsed.

If no person or physical object enters the land, as in the case of blasting concussions, courts usually do not treat the case as trespass, but as nuisance, or strict liability if ultrahazardous activities are involved.

Mistake as to the lawfulness of the entry is no defense so long as defendant intended entry onto that particular piece of land. Intent to trespass is not required.

Plaintiff may be anyone in actual or constructive possession of the land. This is so even if that possession is without title. If no one is possession, the true owner is presumed in possession.

If the plaintiff is a lessee, some decisions allow them to recover only to the extent that the trespass damages the leasehold interest. Other cases allow a full recovery for all damage to the property, requiring the lessee to account to the lessor for excess over damages to the leasehold.

Transferred intent applies.

No actual damages are required.

Trespass to chattel

Defendant will be liable for trespass to chattel when they intend to act in a way that causes an interference with plaintiff's right of possession in chattel.

Interference may consist of:

1. Intermeddling, or direct damage of plaintiff's chattel; or
2. Dispossession (usually temporary) of plaintiff's lawful right of possession.

Mistake as to the lawfulness of the interference is no defense so long as defendant intended the act.

Plaintiff may be anyone with possession or the immediate right to possession of the property.

Transferred intent applies.

Actual damages are generally required. Nominal damages are generally not awarded. However, if the trespass amounts to a dispossession, the loss of possession itself is deemed to be actual damages.

Trespass to chattel is distinguished from conversion in that the interference is not so serious in nature or consequences as to warrant requiring the defendant to pay the full value of the chattel in damages.

Conversion

Defendant will be liable for conversion when they intend to act in a way that causes an interference with plaintiff's right of possession in chattel that is serious enough in nature or consequence to warrant that defendant pay the full value of the chattel.

Acts that may constitute conversion include:

- Wrongful acquisition, e.g. larceny or embezzlement
- Wrongful transfer, e.g. selling, misdelivering, pledging
- Wrongful detention, e.g. refusing to return to owner
- Substantially changing
- Severely damaging or destroying
- Misusing

Defendant need not intend the damage to or loss of the property; they need only intend to perform the act that caused the damage or loss. Even a bona fide purchaser may become a converter if the chattel had been stolen from the true owner. Accidentally causing damage or loss is not conversion unless the actor was using the chattel without permission when the accident occurred. (The actor may be liable for negligence however.) Temporarily taking, merely moving, or slightly damaging property does not amount to conversion, though it may amount to trespass to chattel.

One's interference with another's property may be said to reach the level of conversion, when they act to exercise dominion or control over it. The longer the withholding period and more extensive the use, the more likely conversion has resulted, rather than trespass to chattel.

A bailee receiving goods from a thief without notice that they are stolen may return the goods to the thief without liability to the true owner for conversion. However, if the bailee has notice and the real owner makes a demand for the goods, the bailee is liable for conversion if they return the goods to the thief.

Conversion is limited to tangible personal property, and intangibles that have been reduced to physical form (e.g. a promissory note), and documents in which title to chattel is merged (e.g. a receipt). Intellectual property and real property may not be converted.

Plaintiff may be anyone with possession or the immediate right to possession. However, if the possessor is not the true owner, they are accountable to the true owner for any recovery to the extent of the owner's interest.

Transferred intent does not apply.

The remedies for conversion are damages and replevin.

Plaintiff is entitled to damages for the fair market value of the chattel. This value is usually computed as of the time and place of conversion. The defendant is given title upon satisfaction of the judgment so that, in effect, there is a forced sale of the chattel. The plaintiff is not obligated to take the chattel back should the defendant want to return it. If the plaintiff wishes to have the chattel returned, they may get it through the remedy of replevin.

D. Defenses to intentional torts

Consent

Defendant is not liable if plaintiff consented to defendant's acts.

Consent may be given expressly. It may also be implied from custom, conduct, or words, or by law.

Exceptions to express consent:

1. Mistake: still valid unless defendant caused mistake.
2. Induced by fraud: not valid if the fraud goes to an essential matter that induced the consent.
3. Obtained by duress: Usually invalid. Note that threats of future action or future economic deprivation do not constitute legal duress to invalidate consent.

Implied consent is generally of two types:

1. **Apparent consent:** valid when a reasonable person would infer from plaintiff's conduct that they consented. E.g. engaging in a contact sport. May also be inferred from usage and custom, e.g. a person is presumed to consent to the ordinary minor bumping experienced in a crowd.
2. **Implied by law:** Consent is held to be present where action is necessary to save a person's life or some other important interest in person or property. Applies in emergency situations where plaintiff is incapable of consenting and a reasonable person would conclude some contact is necessary to prevent death or serious bodily harm. E.g. emergency surgery on unconscious person.

Capacity: Incompetents, drunken persons, and very young children are deemed incapable of consent. Consent of parent or guardian is necessary.

The majority view is that a person cannot consent to criminal activity. Minority and Restatement take the contrary position. The modern trend is that consent is ineffective where the criminal act is a breach of the peace (e.g. a street fight) and effective when it is not (e.g. prostitution). Consent not a good defense when plaintiff is part of a class the law exists to protect.

When defendant's actions exceed the scope of the consent, the defense is invalid for the additional acts.

Self defense

When a person reasonably believes they are being, or are about to be, attacked, they may use such force as is reasonably necessary to protect themselves.

Reasonable mistake as to the threat of attack does not invalidate the defense. The defense does not cover retaliation. The force must be to prevent an attack. A majority of courts do not require retreat. One may stand one's ground and repel an attack. One

may not use deadly force in response to non-deadly force. The amount of force used must be reasonable. An aggressor may not use the defense. However, if the aggressor used non-deadly force, and was then confronted with deadly force, they may use deadly force in response.

The defense covers accidental injuries to third parties, though defendant might be liable to the bystander for negligence. If defendant deliberately injured a bystander to protect themselves, the defense is no good.

Defense of others

Defendant is privileged to use reasonable force to protect another when they have a reasonable belief that such force is necessary. Available even if the person aided actually had no defense (e.g. they were the aggressor but defendant did not know that).

Defendant may use the level of force that would be justified if the attack were directed at them.

Defense of property

One may use reasonable force to prevent the commission of a tort against their property.

Deadly force may never be used, including traps, spring guns, and vicious dogs. A request to desist is usually required, unless the circumstances make it clear that such request would be futile or dangerous.

Reasonable mistake does not invalidate the defense when it involves whether an intrusion has occurred or whether a request to desist is required. However, mistake will invalidate the defense where the entrant has a privilege to enter the property that supersedes the defense of property right, so long as the entrant did not cause the mistake, e.g. by refusing to inform the property owner of the facts.

Privileges to enter land that supersede the defense of property right are: necessity, right of reentry, right to enter another's land to recapture chattel.

Force may not be used to recapture property unless they are in hot pursuit.

Reentry onto land

At common law, a person who had been tortiously dispossessed from their land (by fraud or force) could use reasonable force to regain possession if they acted

promptly upon discovering the dispossession. (This did not apply to a tenant merely overstaying their lease.) Modernly, there are summary procedures that replace such self-help.

Recapture of chattels

Entry upon land to remove chattels: The owner of chattel is privileged to enter the land of a wrongdoer to remove the chattel at a reasonable time and in a reasonable manner. A prior demand for return of the chattel is generally required.

Entry onto the land of an innocent party is permitted at a reasonable time and in a peaceful manner when the landowner has been given notice and refused to return the chattel. In this case the chattel owner is liable for any actual damage caused by the entry. When the chattel is on the land of another through fault of the chattel owner, there is no privilege.

Shopkeeper's privilege for false imprisonment addressed above.

Privilege of arrest

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

The privilege of arrest carries with it the privilege to enter another's land for the purpose of effecting the arrest. Defendant is still liable for any subsequent misconduct, e.g. failing to bring the arrested party before a magistrate, unduly detaining the party in jail, etc. One who makes an arrest under the mistaken belief that it is privileged may be liable for false imprisonment.

Necessity

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

For public necessity, the defense is absolute.

For private necessity, i.e. where the defense is to protect individual persons or property, the actor must pay for the damage they cause.

Discipline

A parent or teacher may use reasonable force in disciplining children, taking into account the age and sex of the child and the seriousness of the behavior.

II. Negligence

A. Ordinary negligence

Defendant will be liable for negligence when they breach a duty to plaintiff, and such breach is the actual and proximate cause of plaintiff's damages, and no defenses apply.

Elements:

1. Duty
2. Breach
3. Causation
4. Damages
5. Defenses

Duty

Duty of reasonable care: Imposed on all human activity. Duty to act as an ordinary, prudent, reasonable person would act.

Foreseeable plaintiffs under *Palsgraf*: When defendant acts negligently toward one person, causing an unforeseeable injury to another. May the unforeseeable plaintiff recover? Two views:

1. Andrews view: Duty is owed to everyone. If defendant acted negligently toward one person, anyone injured by this breach may recover.
2. Cardozo (majority) view: Plaintiff may recover only if they were in the "zone of danger" created by defendant's actions.

A rescuer is a foreseeable plaintiff so long as the rescue is not wanton. Defendant is thus liable if they negligently put themselves or a third person in peril and plaintiff is injured attempting a rescue.

A duty of care is owed toward viable fetuses. Thus, prenatal injuries are actionable. Most states also permit a wrongful death action if fetus dies.

Wrongful life damages are not permitted, when the plaintiff is a person born disabled because of failure to diagnose a birth defect. However, parents may have an action for wrongful birth in such cases, allowing damages for additional medical costs; or wrongful pregnancy for failure to provide a contraceptive procedure, allowing damages for unwanted labor (medical costs, pain and suffering). If the child is born healthy, most states do not allow recovery for additional child-rearing expenses.

Intended third party beneficiaries of economic transactions are owed a duty of care if defendant could reasonably foresee that negligence would cause harm.

The reasonable person is judged to have the same physical characteristics as defendant. E.g. a reasonable person at risk of seizures would not drive a car.

The reasonable person has average mental ability. Thus, people with mental disabilities are liable for harm caused by their negligence, even if it is the result of their disability.

Knowledge: Defendant is deemed to have the knowledge that an average member of their community has. Lack of knowledge is no defense if it is unreasonable. However, if defendant has special knowledge, they are required to use it.

Though some courts may say that people in certain occupations, such as commercial pilots, have a “higher” or the “utmost” standard of care, in reality the standard is to exercise reasonable care under the circumstances; a reasonable person would exercise great care in piloting a plane full of people.

Insane people do not get a lower standard. The reasonable person is sane.

Child standard: For child defendants, the duty is to exercise the level of care that a child of the same age, experience, and training would exercise. A child may be held to the adult standard if they are engaged in an adult activity or an inherently dangerous activity.

Minimum age for liability: Most courts do not have a set age at which liability cannot attach but judge each case on the evidence. However, it would be unlikely for a court to find a duty for a child below the age of four.

Breach

Proof of breach is twofold. Plaintiff must prove defendant’s conduct, then prove that defendant acted unreasonably.

To determine breach, identify the defendant’s negligent conduct. Then apply the risk/utility analysis. That is, weigh the **risk** (likelihood of injury and gravity of

potential harm) of the challenged conduct against the **burden** of an alternative action that would have prevented the harm and any **social utility** of the challenged conduct. If the risk outweighs the burden and utility, then the defendant breached their duty to exercise reasonable care.

Causation

Cause-in-fact

Two tests are used: but-for and substantial factor.

But-for: If plaintiff's injury would not have occurred but for defendant's negligence, then defendant's negligence is a cause-in-fact of plaintiff's injury. This test applies when there are several acts, none of which are sufficient to cause the injury on their own.

Substantial factor: If defendant's negligence materially contributed to causing plaintiff's injury, then defendant's negligence is a substantial factor in causing, and is the cause-in-fact of, plaintiff's injury. This test applies when there are several acts, several of which are sufficient to cause the injury on their own. (The but-for test would therefore fail.)

If plaintiff can prove that one of two defendants caused their injuries, but cannot prove which one, then the burden of proof shifts to the defendants, for each of them to prove that they did not cause the harm.

Proximate cause

Defendant's negligence will be found to be the proximate cause of plaintiff's injury if plaintiff's type of injury was a reasonably foreseeable result of defendant's negligence, or if it was within the scope of risks of defendant's negligence.

Intervening causes may cut off the chain of liability if they are found to be extremely unforeseeable and therefore superseding. Exception: even unforeseeable intervening acts will not cut off liability if the type of harm suffered is the same type that defendant's negligence would have foreseeably caused. E.g. a cow instead of a car knocking over a lamppost.

Only the type of harm need be foreseeable, not the manner and extent of the harm.

Automobile accidents in medical transport and medical malpractice have been held to not be superseding intervening causes, though the chance of them happening is slight. Extreme medical malpractice is an exception.

Other "dependent" intervening forces that will not cut off the chain of liability are:

- Negligence of rescuers
- Efforts to protect persons or property
- “Reaction” forces
- Subsequent disease
- Subsequent accident

Negligent acts by third persons and acts of god will not cut off liability if they were foreseeable.

It is irrelevant whether an intervening act is criminal. If it is foreseeable, then it will not be found to be a superseding cause.

Egg-shell skull rule: Defendant takes plaintiff as they find them. Thus, defendant is liable for unforeseeable injuries resulting from their negligence against a plaintiff with a prior medical condition.

When foreseeable results are caused by an unforeseeable intervening force, defendant is liable as long as the intervening force is not a crime or intentional tort by a third party. E.g., if defendant negligently leaves explosive gases in a garage, and an unforeseeable bolt of lightning causes an explosion, defendant is liable. But if an arsonist caused the explosion, defendant is not liable.

Ultimately, the question of whether a defendant’s negligence can be seen as the proximate cause of a plaintiff’s injury is determined by the courts, and public policy concerns may enter into the decision.

Damages

Negligence requires proof of actual harm for damages to be awarded. (Unlike, for instance, trespass, which may result in no harm but courts may award symbolic damages.) So make note of plaintiff’s actual injury in this section.

Generally, a plaintiff will be awarded compensatory damages as compensation for the injuries they sustained as a result of defendant’s negligence. Plaintiff is compensated for all injuries, past, present, and prospective.

For property damage, the damages are the loss in value, i.e. the reasonable cost of repair, or the fair market replacement value if property is damaged beyond repair.

For personal injury, pecuniary or economic damages may include compensation for medical expenses, lost wages, and diminished earning capacity. These “special damages” must be proven by evidence. Non-pecuniary losses may include pain and

suffering and emotional distress. These “general damages” are understood to flow naturally from the injury and do not need to be specially proven.

Punitive damages are not compensatory and are usually awarded only for intentional torts, but they may be awarded against a negligent defendant whose conduct was wanton and willful, reckless, or malicious.

Plaintiff may not recover interest from date of damage in personal injury actions, and may not recover attorneys’ fees. Plaintiff has a responsibility to mitigate damages.

In most jurisdictions, defendant may not introduce evidence of aid from other sources, such as insurance, to reduce the damage award. A growing minority allows this in certain actions, such as medical malpractice.

Defenses

The two main defenses to negligence are contributory negligence and assumption of risk.

Contributory negligence

Contributory negligence was historically a complete bar to recovery. In most modern jurisdictions it is not a complete defense but will reduce recovery according to the degree of plaintiff’s fault. This is called comparative fault or comparative negligence.

Note that when it is called “contributory negligence,” it is meant to be a complete defense. Look for “last clear chance doctrine” situations.

Different states have adopted different forms of comparative negligence. In a majority of states a plaintiff is barred from recovery only when they are more negligent (greater than 50 percent at fault) or equal to or more negligent (greater than or equal to 50 percent at fault) than the defendant. A minority of states have adopted pure comparative negligence, in which plaintiff may recover even if their negligence is greater than that of the defendant.

Contributory negligence is analyzed exactly like ordinary negligence: the plaintiff must have failed to exercise ordinary care, and their negligence must be a cause-in-fact and a proximate cause of their own injuries.

Plaintiff may be found contributorily negligent for remaining in danger, or for violating a statute (negligence per se).

Failure to mitigate damages is an avoidable consequence, and will reduce damages. It is not contributory negligence.

Imputed contributory negligence: Plaintiff will often be found to be contributorily negligent when they are in a special relationship with one negligent party, thus barring recovery against a third negligent party:

- Master/servant: imputed
- Partners and joint venturers: imputed
- Husband and wife: not imputed, but recovery barred because loss of services is derivative to main action and will not succeed if main action doesn't.
- Parent and child: not imputed, but recovery barred because loss of services is derivative to main action and will not succeed if main action doesn't.
- Automobile owner and driver: not imputed unless they would be vicariously liable (e.g. master servant, etc.)

Last clear chance doctrine: Contributory negligence will not bar recovery if it occurs before the defendant's negligence, thus giving the defendant the last clear chance to avoid injury to the plaintiff. Modernly, this doctrine is less important, as contributory negligence is rarely a complete bar to recovery anyway.

Assumption of risk

A plaintiff's recovery may be limited when they knowingly and voluntarily assume a particular risk. Public policy concerns may guide the decision of whether assumption of risk will bar recovery. The knowledge of the risk is judged by a subjective standard: it must be actual knowledge on the part of the plaintiff. The plaintiff must have knowledge of the full magnitude and implications of the risk.

Assumption of risk may be express or implied.

Express assumption of risk is a complete defense. It occurs when plaintiff explicitly states that they assume a risk, e.g. signing a waiver form. Express assumption of risk may be invalidated by the courts when it contradicts public policy, when the defendant was grossly negligent or intentionally caused the harm, or when there was not fair bargaining power between the parties.

Implied assumption of risk occurs when plaintiff does not explicitly state that they assume a risk. A majority of states subsume implied assumption of risk into comparative negligence; it is not a complete bar to recovery, but will reduce the amount of plaintiff's damages.

Common carriers and public utilities may not limit their liability with disclaimers. When a statute is enacted to protect a particular class, members of that class may not assume a risk. Risks will not be assumed in situations involving fraud, force, or an emergency.

B. Negligence per se

Duty: The duty is determined by statute. A defendant has a duty to a plaintiff if they violated a statute and:

1. The plaintiff is in the class of persons the statute was designed to protect; and
2. The harm is of the type the statute was designed to prevent.

Breach: Defendant's violation of the statute is presumed to be a breach of the duty. However, the presumption can be rebutted if:

1. There was greater danger in complying with the statute than in violating it; or
2. There was a sudden emergency not of defendant's making; or
3. Defendant did not or should not know of the reason for diligence; or
4. Defendant used reasonable care OR
5. Defendant lacked the capacity to comply with the statute OR
6. Defendant was unable to comply after reasonable efforts to comply.

Licensing statutes have been determined, as a matter of law, to be for the purpose of governmental regulation, not for people's protection.

Child defendants: In most jurisdictions, when a child defendant has violated a statute, the child standard of care is used to determine duty, rather than the violation of the statute.

Compliance with a statute cannot be used to prove that a defendant exercised reasonable care.

Causation, damages, and defenses: Determined as in ordinary negligence.

C. Res ipsa loquitur

Duty: Determined as in ordinary negligence.

Breach: Res ipsa loquitur is used to determine breach when the defendant's specific conduct cannot be identified. Breach may be found if:

1. The injury-causing accident is one that would not ordinarily occur absent negligence, AND
2. The instrumentality involved in the accident was under the exclusive control of the defendant, AND
3. The plaintiff did not contribute to their injury in any way.

The doctrine creates a permissible inference of breach from circumstantial evidence.

The doctrine does not change the burden of proof nor create a presumption of negligence. No directed verdict may be given for the defendant.

Defendant may present evidence of due care. The jury may choose not to infer negligence, even in the absence of defendant's evidence of due care.

Causation, damages, and defenses: Determined as in ordinary negligence.

D. Special duties

Nonfeasance

Duty: Nonfeasance is inaction. Some analysis may be necessary; for instance, not applying automobile brakes at a stop sign is not inaction, but negligent omission. It is misfeasance, not nonfeasance.

Absent a special relationship or circumstance, a defendant has no duty to take affirmative steps for another's safety. Nonfeasance creates no duty, and a claim of negligence will fail. However, in the case of a special relationship or circumstance, a duty to rescue or take other affirmative steps (make repairs, protect from a third party, etc.) is imposed.

In these cases, no *Palsgraf* foreseeable plaintiff analysis is necessary; the special relationship or circumstance establishes the duty.

Special circumstances:

- **Creating the peril:** if defendant created the peril, they have a duty to rescue.
- **Taking charge:** if defendant begins a rescue attempt, they have a duty either to act reasonably in continuing the attempt (majority view) or simply to not leave the plaintiff worse off than they found them (minority view). A number of states have enacted "good Samaritan" statutes which exempt gratuitous rescuers, esp. doctors and nurses, from liability for ordinary negligence. There may still be liability for gross negligence.

Special relationships:

- Innkeeper-guest
- Custodian-ward
- Carrier-passenger

- Landowner-invitee
- Employer-employee
- Statutory duty (e.g. parent-child)
- Contractual duty: misfeasance creates liability, nonfeasance does not. (E.g. if lifeguard falls asleep on the job, they are liable, but if they just don't show up, they are not.)
- Public policy
- Companions in a social venture/common undertaking
- Mutual dependence

In most modern jurisdictions, an automobile driver owes merely the reasonable person standard of care to a guest in their car.

Duty to control or protect (third party nonfeasance):

Absent a special relationship, defendant has no duty to control the behavior of another or protect another from harm.

Duty to control:

A special relationship between defendant and a third party may give rise to defendant's duty to control the third party, preventing harm to plaintiff.

In California, therapists must take reasonable steps to control a third party where the therapist knows, or based on professional standards, should know, that the therapist's patient presents a serious risk of physical harm to the plaintiff. *Tarasoff*. Some jurisdictions require that the threat be against a "readily identifiable victim."

In jurisdictions with dram shop acts, a drinking establishment has a duty to control third parties by not serving them alcohol if they are intoxicated, preventing them from injuring potential plaintiffs. A minority of jurisdictions has applied this duty to social hosts as well as bars.

A defendant may be liable for another's conduct through negligent entrustment, such as a car owner failing to take reasonable care in who they lent their car to.

Duty to protect:

A special relationship between defendant and plaintiff may give rise to defendant's duty to protect plaintiff from a third party. These relationships parallel the special relationships above that give rise to the duty to rescue.

Breach: The breach in a nonfeasance action is the failure to take affirmative steps to rescue, control, or protect. As seen above, different relationships and circumstances give rise to different duties, so the breach analysis will vary. Some analysis may be required, as when a defendant does take some affirmative steps that arguably fall short of fulfilling their duty. The risk/utility test may then be used to compare defendant's actions to hypothetical, more reasonable actions.

Causation, damages, and defenses: Determined as in ordinary negligence.

E. Negligent infliction of emotional distress

Duty: Negligent infliction of emotional distress (NIED) may be used to establish a duty to a plaintiff who was not physically harmed by defendant's negligence, but suffered emotional distress. If the plaintiff suffered physical harm, then they could sue under ordinary negligence and their emotional distress would be accounted for by damages.

Direct victims:

The plaintiff may be a direct victim, as in a case where a negligent driver speeds toward the plaintiff, narrowly missing them and causing emotional distress. Historically, the plaintiff must have suffered a physical impact from the accident, but that is no longer necessary. Modernly, a plaintiff may recover if they were in the "zone of danger." Physical manifestations of the emotional distress are required in most jurisdictions.

Direct victim cases may also include cases with no "zone of danger," as where a plaintiff is inaccurately and negligently informed that a family member has died, or where a plaintiff is negligently misdiagnosed as having a terminal disease.

Bystanders:

The plaintiff may also be a bystander, rather than the direct victim, as in the case of a bystander who suffers emotional distress at the sight of a loved one being injured by a negligent defendant.

In bystander cases, under the modern majority analysis, to establish a duty, the plaintiff must be a close relative of the victim, and be at risk of injury themselves. This is the "zone of danger" test again. The line can be blurred between whether the plaintiff's emotional distress is related to their own risk of physical injury or the sight of their relative's physical injury.

Modernly, some jurisdictions (*Dillon v. Legg* jurisdictions) will allow a plaintiff to recover even if they are outside the zone of danger, but still near the scene of the accident. They must pass a three-prong test:

- suffer physical manifestations of emotional distress (in most *Dillon* jurisdictions)
- be closely related to the victim
- have contemporaneous observance of the accident (But this has varying interpretations. *Thing v. LaChusa* in California requires actually seeing the accident happen, not coming upon the immediate aftermath.)

The NIED analysis establishes the foreseeability of the plaintiff (this replaces the *Palsgraf* analysis), but it may still be necessary to analyze what the duty is (e.g. reasonable care, duty to warn, professional standard, etc.). This depends on whom the duty is owed to.

In direct victim cases, the plaintiff is the direct victim, so the duty is owed by the defendant to the plaintiff.

In a bystander case, the NIED analysis establishes the foreseeability of the plaintiff, but the duty is the duty the defendant owed to the direct victim (whatever that duty may be). The negligence in question is the negligence toward the direct victim.

Breach, causation, damages, and defenses for direct victims: If the plaintiff is the direct victim, these elements are determined as in ordinary negligence.

Breach for bystanders: If the plaintiff is a bystander, defendant's breach is their breach of their duty to the direct victim, which establishes their negligence.

Causation for bystanders: Causation in bystander cases refers to whether the defendant's negligence is the cause of plaintiff's emotional distress. Causation of the direct victim's injury is analyzed under the direct victim's own claim. The foreseeability analysis is accomplished under the NIED duty analysis.

Damages: Determined as in ordinary negligence.

Defenses: Note that for defenses against a bystander plaintiff, defendant is permitted to use the same defenses that they can use against the direct victim's negligence claim. E.g., if the victim was contributorily negligent, that defense will be used against an NIED bystander plaintiff even though the NIED plaintiff was not themselves contributorily negligent. If the victim assumed a risk, the defense will likewise be used even if the plaintiff assumed no risk.

F. Professional standard of care

Duty: Professionals owe their clients the duty to exercise that level of care exercised by other professionals in good standing in the relevant (same or similar) community.

In addition, a professional is required to use such special and superior skills as they possess.

This is not necessarily a higher standard; the level of care need not be reasonable.

Expert testimony from other professionals is not always necessary. Some conduct is so egregious that a layperson can decide that it is negligent, e.g. leaving a sponge inside the body cavity after an operation. (This is a type of *res ipsa loquitur* for professionals.)

Doctors have an additional duty to inform patients of the risk of a procedure; see Informed Consent below.

Note that, of course, no *Palsgraf* foreseeable plaintiff analysis is necessary: any client is a foreseeable plaintiff.

Breach: The breach is the failure to exercise the level of care exercised by other professionals in good standing in the relevant community. Defendant's conduct will be compared to the conduct of other professionals through the testimony of expert witnesses.

Causation, damages, and defenses: Determined as in ordinary negligence.

Informed consent

Duty: Doctors have the duty to exercise the level of care exercised by other doctors in good standing in the relevant community. It is established that this includes the duty to inform patients of certain risks associated with a certain procedure.

A minority view (the "physician rule") follows the formula of other medical malpractice claims: the duty is determined by what other doctors in good standing in the relevant community do. Thus, a plaintiff will need to produce expert testimony indicating that it is the custom in the medical community to inform patients of the particular risk in question. This is sometimes called the "reasonable doctor" view, but actually, as in ordinary medical malpractice, there is no requirement of reasonableness.

A majority view (the "patient rule") states that doctors have a duty to inform patients of a material risk of a particular procedure. A material risk is defined as a risk that a reasonable patient would attach significance to in making the decision of

whether to undergo the procedure. This is determined by an analysis of the facts. Materiality depends on the gravity and probability of the harm.

If applicable, note that there is a possible extension of informed consent doctrine: that a doctor has a duty to inform a patient of the material risks of *failing* to undergo a particular medical procedure.

One must have the capacity to consent. One cannot consent to illegal activity.

Breach: A doctor breaches their duty to inform when they perform a medical procedure, having received the patient's consent to it without fully informing the patient of a material risk (or without following the custom of the medical community, in jurisdictions following the "physician rule"), and the risked injury occurs.

A doctor may also breach their duty by exceeding the scope of consent, i.e. by performing a procedure beyond or different from what was consented to. If the procedure is well beyond the scope of consent, the cause of action may be battery rather than negligence.

Cause-in-fact: Plaintiff must show that they would not have gone forward with the procedure if they had been fully informed of the risk.

Proximate cause: Plaintiff must show that a reasonable person would not have gone forward with the procedure if they had been fully informed of the risk.

Damages and defenses: Determined as in ordinary negligence. Note that the undisclosed adverse consequences of the medical procedure must have actually occurred.

G. Land occupier duties

Duty: Note at the outset that we do not analyze whether plaintiff is foreseeable under *Palsgraf*. This issue is resolved exclusively by the land occupier rules below.

Duty to those off the premises: No duty regarding natural conditions (exception for decaying trees next to sidewalks or streets in urban areas). No duty regarding artificial conditions, with major exceptions:

1. Landowner liable for unreasonably dangerous conditions (e.g. allowing water to run off roof and form ice on sidewalk).
2. Duty to take due precautions to protect passersby, e.g. erecting a barrier to keep people from falling into an excavation at the edge of the property.
3. Duty to control conduct of others on their property to avoid unreasonable risk of harm to others off the property.

Defendant's duty to plaintiff when plaintiff is on defendant's land must be determined. Duty must be analyzed at common law AND under *Rowland v. Christian*.

At common law, there are three categories of plaintiffs:

- **Invitee:** an official relationship, i.e. a business customer or a visitor to a public building. Owed the highest duty: duty to exercise reasonable care, and take affirmative steps for plaintiff's safety (i.e. in a nonfeasance case).
- **Licensee:** a social guest. Owed only the duty to warn of known, concealed dangers. No requirement of reasonableness.
- **Trespasser:** No duty owed. Exceptions:
 1. There is a duty to not set traps (e.g. spring guns).
 2. Habitual known trespassers: duty to warn or make safe concealed dangers.
 3. Children (attractive nuisance): When young children are attracted onto the land and a dangerous condition exists (the condition need not be the attraction), if:
 - a. the land occupier knows (or should know) that children are likely to trespass and encounter the dangerous artificial condition, AND
 - b. the dangerous condition creates an unreasonable risk of serious harm or death to the children, AND
 - c. the children are too young to fully appreciate the risk, then
The duty becomes the duty to exercise reasonable care.
 4. Holders of easements and licenses owe a duty of reasonable care to trespassers. Employees and independent contractors do not.

An essay answer must include analysis using the facts. Identify the facts that work toward each status. Choose the most likely status and say why.

If the line between invitee and licensee is blurred, the analysis includes whether plaintiff is on the land for their *own* purpose or business rather than for the land occupier's benefit; this indicates licensee status. If the land is held open to the public, this indicates invitee status.

Tenant's employees are invitees of landlord. Invitees are ones who convey an economic benefit on the landowner.

(Note that the courts have designated firefighters entering property on the job as licensees, whereas letter carriers, meter readers, etc. are invitees.)

Under *Rowland v. Christian*, one owes a duty to exercise reasonable care to all who come upon one's land, and the plaintiff's status is one of the factors in determining what is reasonable.

Most states have a different standard for users of recreational land. If the owner permits public recreational use without charging a fee, then they are not liable unless they willfully and maliciously failed to guard against injury.

Landlord duty: Historically, a landlord had no liability to a tenant or to a tenant's guests, because the lease was viewed as conveying full control of the property to the lessee. Modern exceptions to this rule include:

- defects in common areas (where the landlord has not ceded full control of the property); this duty extends beyond the tenant to foreseeable guests
- failure to disclose known, concealed defects on the property
- premises leased for admission to the public
- covenant to repair
- absent a covenant to repair, where a landlord elects or promises to repair, and does so negligently or fails to do so.

Tenant remains liable to invitees and licensees.

Vendor or realty has duty to disclose concealed, unreasonably dangerous conditions of which they are aware.

Breach: In determining breach, one must analyze the defendant's conduct under each of the possible common law statuses AND under *Rowland v. Christian*.

- **Invitee:** The duty is to exercise reasonable care. Identify the conduct and apply risk/utility analysis.
- **Licensee:** Duty is breached if defendant failed to warn of known concealed dangers.
- **Trespasser:** Breach is impossible; there is no duty. Exceptions:
 - Setting a trap is a breach of the duty to not set traps.
 - Habitual known trespassers: The breach is either not warning or not making safe.
 - Children: An attractive nuisance makes the standard that of reasonable care, so identify the conduct and apply risk/utility analysis.
- ***Rowland v. Christian*:** Duty to exercise reasonable care. Identify the conduct and apply risk/utility analysis.

Cause-in-fact: Determined as in ordinary negligence. Note that if you identified different possible statuses for the plaintiff under duty and breach, you may need to analyze causation separately for each different type of conduct that you identified as the breach.

Proximate cause: Determined as in ordinary negligence. Again, note that if you identified different possible statuses for the plaintiff under duty and breach, you may need to analyze proximate cause separately for each different type of conduct that you identified as the breach.

Damages and defenses: Determined as in ordinary negligence.

H. Bailment duties

Gratuitous bailments: where the bailment is for the sole benefit of the bailee, the bailor need only inform the bailee of known dangerous defects in the chattel. The bailee owes bailor only a duty of slight diligence, and only gross negligence is actionable.

Bailments for hire: where the bailment is for hire, the bailor owes a duty to inform the bailee of defects known to them or of which they should have known. Bailee owes a duty of ordinary due care.

Bailments for bailee's benefit: Bailee owes a duty of great diligence. Slight negligence is actionable.

The modern trend is toward abolishing these distinctions and imposing a standard of reasonable care under the circumstances.

III. Strict liability and products liability

A. Strict liability

Defendant will be liable under a strict liability theory when they had an absolute duty to make safe, they breached the duty, and their breach was the actual and proximate cause of damage to plaintiff's person or property.

The duty is owed only to foreseeable plaintiffs.

The injury must flow from the normally dangerous propensity of the activity. E.g. plaintiff injured when tire on dynamite truck blows. Defendant not strictly liable.

Strict liability is often imposed on one who uses their land in a non-natural manner for storage of a substance which is likely to do damage if it escapes from storage. The storage of water often gives rise to the application of this principle.

Proximate causation must be present. Courts may find more intervening causes unforeseeable than they do in negligence.

Damage must be related to personal injury or property damage. Lost profits will not be recoverable.

In contributory negligence states, contributory negligence is no defense if plaintiff negligently failed to realize the danger or guard against it. However, if plaintiff knew of the danger and their unreasonable conduct was the very cause of the injury, then this is a type of assumption of risk. Assumption of risk is a good defense in states with contributory negligence.

Most comparative negligence states will simply apply the rules of comparative negligence the same as they do in negligence cases.

Animals

Trespassing animals: The owner is strictly liable for damage done by trespass of their animals (other than household pets) so long as it was reasonably foreseeable.

Wild animals: Owner is strictly liable for injuries caused by lions, bears, etc. so long as the plaintiff did nothing voluntarily or consciously to bring about the injury. The injury must be by virtue of the animal being "wild," not an injury that could just as easily be caused by an ordinary domesticated animal.

Domestic animals: Owner will be strictly liable only if owner has knowledge of the particular animal's dangerous propensities, even if the animal has never actually bitten anyone. Some jurisdictions have dog bite statutes which impose strict liability in personal injury actions even without prior knowledge of dangerous propensities.

Wild or dangerous animal liability will attach when plaintiffs are licensees and invitees (must prove negligence for defendant zookeepers and others under public duty to keep animals). Trespassers as plaintiffs must prove negligence.

Vicious dogs as watchdogs may create liability even for trespassers under intentional tort theory (no deadly force to protect property).

Ultrahazardous activities

An activity may be characterized as ultrahazardous when it involves a substantial risk no matter how much care is exercised. Whether an activity is ultrahazardous is a question of law that the court can decide on a motion for a directed verdict.

Three requirements:

1. Activity must involve a risk of serious harm to persons or property;
2. The activity cannot be performed without risk of serious harm, no matter how much care is taken; and
3. It must not be an activity that is commonly engaged in by persons in the community.

There is still a foreseeable plaintiff notion in most jurisdictions.

Examples of activities held to be ultrahazardous include: manufacturing or blasting explosives, crop dusting, and fumigating.

B. Products liability

There are five types of action or theories of liability possible in products liability.

- Intent
- Negligence
- Warranty
- Strict liability in tort (most common)
- Misrepresentation

Any case where a plaintiff is injured by a defective product may give rise to a claim in several of these types of action. Consider all theories unless instructed otherwise.

In any products liability situations, the product must have been defective when it left defendant's control.

The factual situations accounting for nearly all claims in product liability are:

- Mismatch
- Defective design
- Failure to warn or inadequate warning
- Misrepresentation

Intentional tort actions are very rare in products liability cases. The tort would most likely be battery.

Negligence

Every action in negligence must fulfill the elements of the prima facie case, so a products liability action in negligence is limited by the concepts of reasonable care and reasonable foreseeability.

Duty: Privity is not an issue, plaintiff simply must be a foreseeable plaintiff. Defendant has a duty to exercise reasonable care in design, manufacture, inspection, warning, marketing, etc. A retailer has no duty to inspect if the product comes sealed from the manufacturer, unless they have reason to know it is defective. Choice of defendant is important, as obviously in a case of defective manufacture the defendant should be the manufacturer rather than the retailer. Duty can be established by statute, a type of negligence per se.

Breach: Apply risk/utility analysis to the conduct, whether it is mismanufacture, defective design, or failure to warn. For negligent design, analyze reasonable alternative design. Analyze these factors: usefulness and desirability of the product, availability of safer alternative products, dangers of product that have been identified at time of trial, likelihood and probable seriousness of injury, obviousness of danger, normal public expectation of danger, avoidability of injury by care in use or product, feasibility of eliminating the danger.

Common problems with defects are when plaintiff misused the product (manufacturer may be required to anticipate reasonably foreseeable misuse), when the risk is scientifically unknowable (no liability where manufacturer could not have known of risk), or when the plaintiff has an allergy (modern trend is to require warnings).

Causation, Damages, Defenses: Determined as in ordinary negligence.

Warranty

Duty and breach: Warranty claims arise under principles of contract. The duty is contractual and the breach is breach of contract.

Privity has some role: only the consumer or member of consumer's household may sue. The defendant is the entity which offers the warranty. For express warranty and implied warranty of merchantability, the defendant must be a commercial entity which normally sells such products. The implied warranty of fitness for a particular purpose, however, has no requirement that the seller ordinarily sells such goods.

Warranty may be express or implied. Express warranty is a written warranty or a statement by a seller. Implied warranty is the implied warranty of merchantability or implied warranty of fitness for a particular purpose. It is possible to breach, one, two, or all three of these warranties.

An express warranty must be a factual statement about the product, not mere "puffery."

The UCC provides that every new product has an implied warranty of merchantability for its ordinary purpose, when sold by a merchant who normally sells such goods. The warranty is that the product will perform as an ordinary consumer would expect.

The UCC provides that when a seller has specialized knowledge about a product and says that it is fit for a particular purpose, and the buyer relies upon that expertise and recommendation, a warranty of fitness for a particular purpose arises.

Causation: Breach of warranty must have proximately caused the harm.

Damages: A plaintiff may recover under warranty even if the only damage is to the product itself.

Defenses: A disclaimer may release defendant from liability under an implied warranty. E.g. selling a product "as is."

Strict liability in tort

Strict liability in tort is an alternative to negligence and warranty actions; it eliminates the requirements of proving negligence and showing privity.

Generally, a commercial supplier will be strictly liable when it places a defective product in the stream of commerce, and the defect causes injury to a foreseeable plaintiff.

Plaintiff must be foreseeable (consumer, user, bystander, etc.); no privity required.

Reasonableness of defendant's action, due care, etc. is no defense so long as product is defective.

Proximate causation must still be present.

Defendant may be any commercial supplier, anywhere along the chain of commerce, e.g. manufacturer, distributor, retailer. Does not include suppliers of services. Does not include private individuals who sell products.

Strict liability: No negligence required, no fault required.

The defect must be the actual and proximate cause of the injury.

The product can be defective through mismanufacture, defective design, or inadequate warning.

The determination of whether the product is defective is made using either an "unreasonably dangerous" test, a "consumer expectation" test, or a risk/utility test.

The defect must be actual and proximate cause of the injury.

Damage only to the product itself is not recoverable. There must be other property damage or personal injury (and then damage to the product itself may be tacked on).

Historically, in order for a plaintiff to recover, they had to be using the product in its intended manner. Modernly, all foreseeable uses are OK (e.g. standing on a chair).

Misrepresentation

Misrepresentation is used as a cause of action when any person is injured in reliance on the product seller's misrepresentation of fact (e.g. assurances of a product's safety).

Unlike warranty, plaintiff must prove actual reliance.

Unlike strict liability, the product need not be dangerously defective.

Defenses

For negligence, both contributory negligence and assumption of risk may be used; they will both be a complete bar.

Defendants in strict liability actions are limited to assumption of risk as a defense, on the theory that plaintiff's own conduct is immaterial. However, unforeseeable intervening acts by plaintiff, such as tampering with the product, may cut off the chain of liability.

Defendants in warranty may use assumption of risk and waiver.

IV. Other torts

A. Defamation

Defamation is the defendant's publication to a third party of an injurious statement concerning the plaintiff, that injures the plaintiff.

When the defamation refers to a public figure or involves a matter of public concern, the language must be false, and the defendant must be at fault.

Written defamation is libel. Spoken defamation is slander. An oral repetition of libel is still libel, not slander.

Radio and TV: scripted material is libel, spontaneous comments may be slander, but the modern trend is to treat it as libel.

The defamation must be concerning an identifiable group. (E.g., saying, "Someone in San Francisco is a draft dodger," is not slander.)

Defamation must be:

- a statement that has a negative effect
- a statement of or concerning the plaintiff
- published to a third party.

Statements of fact may always be defamatory, but statements of opinion may also be if they appear to be based on specific facts and express allegation of those facts would be defamatory.

The statement may be defamatory on its face, or by innuendo, e.g. statement that a woman has just given birth when she has only been married one month. Defamation must be of a living person. Corporations may be defamed in a limited way, e.g. regarding financial condition, honesty, integrity, etc. The statement must be published to a third person who understood it.

A republisher may be liable even if they state that they do not believe the allegation and that it came from a different source.

Slander per se: Certain statements about a person are defined by law as harmful to one's reputation; general damages need not be proven. These statements are that plaintiff:

- has committed a crime
- is unchaste or impotent
- has a loathsome disease
- is incompetent to perform in their occupation

Historically, defamation was a strict liability tort. Modernly, different requirements of fault have been established in different circumstances:

For public officials and public figures criticized by the media, Constitutional malice must be shown. This is defined as actual knowledge that the statement is untrue or reckless disregard for the truth. *New York Times v. Sullivan*.

For private persons criticized by the media, there is no need for malice but plaintiff must show some level of fault (left up to the states). At a minimum, negligence must be shown.

Most states allow plaintiff to recover without proof of actual damage, but the Supreme Court has held that unless malice is shown, actual damage must be proved.

Note that some statements, even if true, may give rise to liability if they are uttered under circumstances sufficient to constitute intentional infliction of emotional distress or invasion of privacy. However, where plaintiff is a public figure who would be barred on First Amendment grounds from recovering for defamation, they will not be allowed to rely on these other tort theories.

For slander, general damages are not presumed and must be proven, except in the cases of slander per se.

For libel, general damages are presumed and need not be proven. Special damages in this context mean pecuniary losses.

A minority of courts, for libel, require general damages to be proven when the libel is by inference (libel per quod), but do not require proof of general damages when the allegation is libelous on its face (libel per se).

Defenses:

1. Consent is a complete defense
2. Truth is a complete defense for cases of purely private concern
3. Absolute privilege:
 - a. Judicial proceedings
 - b. Legislative proceedings
 - c. Executive proceedings
 - d. "Compelled" broadcast or publication (e.g. equal time for candidates)
 - e. Communication between spouses
4. Qualified privilege:
 - a. Reports of public proceedings: excuses accurate reports only
 - b. Public interest: e.g. statements to a parole board
 - c. Fair comment and criticism: matters of general public interest

B. Invasion of privacy

Invasion of privacy is a relatively new tort, having been established within the last century. There are four types:

1. Intrusions upon seclusion: wiretapping, peeping toms, etc.
2. Public revelation of private facts
3. Commercial appropriation of likeness

4. Portraying one in a false light

Intrusion upon seclusion has these elements:

1. An act of prying or intruding by defendant upon plaintiff;
2. The intrusion would be objectionable to a reasonable person; and
3. The thing to which there is an intrusion or prying is "private."

Public revelation of private facts:

1. Publication or public disclosure by defendant of private information about the plaintiff; and
2. The reasonable person would object to the facts being made public.

For public revelation of private facts, the facts may be true. A public figure usually may not be a plaintiff in this type of action.

Matters of public record may never constitute private facts.

Appropriation of likeness has one element:

1. Unauthorized use by defendant of plaintiff's picture or name for defendant's commercial advantage. Limited to advertisements and promotions.

False light:

1. Publication of facts about plaintiff by defendant placing plaintiff in a false light in the public eye.
2. The "false light" would be objectionable to a reasonable person; and
3. If the matter is of public interest, defendant must have malice.

False light is defined as attributing to plaintiff views they do not hold or actions they did not take.

The right to privacy is personal. It does not extend to family members and is not assignable.

Corporations have no right to privacy.

Defenses:

1. Consent. Some states require consent be in writing. Acts may not exceed scope of consent. Mistake as to whether consent was given (which in fact it was not), even if reasonable, invalidates the defense.

2. Privileges: The privileges to defamation appear to apply to invasion of privacy as well.

C. Misrepresentation

Prima facie case:

1. Misrepresentation (false statement) made by defendant;
2. Scienter (defendant knew the representation was false);
3. Intent to induce plaintiff's reliance on misrepresentation;
4. Causation (i.e. actual reliance)
5. Reliance was justifiable; and
6. Damages

Usually, the misrepresentation must be of a material past or present fact. In certain cases, a misrepresentation of opinion may be actionable; this is actually a justifiability question.

Failure to disclose a material fact is not actionable unless:

1. There is a fiduciary relationship; or
2. Defendant is selling real property and knows plaintiff is unaware of and cannot reasonably discover material information; or
3. Defendant speaks and their utterance deceives plaintiff (they must inform plaintiff of true facts).

Active concealment is actionable.

Scienter includes knowledge of falsity and reckless disregard as to truth or falsity. Where scienter is absent, defendant may still be liable for negligent misrepresentation.

Defendant must intend reliance by plaintiff or a class of persons to which plaintiff belongs. In case of mislabeling of product or misrepresentation of negotiable instrument, the deception is continuous and anyone who comes into possession of the thing may sue.

Third party reliance: Liability may attach where defendant made a misrepresentation to one party and plaintiff, a third party, relied on it, if defendant could reasonably foresee that plaintiff would have such reliance. E.g. defendant's false profit statement to stockbroker: defendant liable to stockbroker's customer.

Reliance: Plaintiff has no duty to investigate truth of defendant's statement.

Usually, only statements of fact, not opinion, are actionable. Exceptions:

1. Defendant has superior knowledge; or
2. Statements of law by a lawyer, or statements of law that imply the existence of false facts (e.g. the plumbing is up to code); or
3. Statements of present intent, where defendant has control over future events.

Damages: plaintiff must have suffered actual pecuniary loss.

Negligent misrepresentation:

1. Misrepresentation made by defendant in a business or professional capacity;
2. Breach of a duty toward particular plaintiff;
3. Causation;
4. Justifiable reliance; and
5. Damages.

D. Wrongful institution of legal proceedings

Malicious prosecution:

1. Institution of criminal proceedings against plaintiff;
2. Termination favorable to plaintiff;
3. Absence of probable cause for prosecution;
4. Improper purpose of defendant; and
5. Damages.

Defendant must have instituted criminal proceedings against plaintiff. This may be by warrant, arrest, indictment, etc. Prosecuting attorneys are absolutely privileged and cannot be sued for malicious prosecution.

Termination favorable to plaintiff means that plaintiff must have been acquitted, case dismissed, charges dropped, etc. The termination must indicate that the accused was innocent. Indictment by grand jury is prima facie evidence that probable cause existed. However, failure of grand jury to indict is not evidence that no probable cause existed.

If defendant instituted the prior proceedings on advice of counsel after full disclosure of the facts, this establishes probable cause. Malice or improper purpose is shown by any purpose other than bringing the person to justice.

Damages must be proved. Punitive damages are often awarded, since improper purpose is already an element of the suit.

Wrongful institution of legal proceedings is distinguished from false arrest in that the arrest itself was proper but the prosecution is malicious.

Most jurisdictions have expanded the scope of the tort to include wrongfully instituted civil proceedings. Lack of probable cause is harder to prove.

Abuse of process is a separate tort. Defendant will be liable when they use any form of process, civil or criminal, to bring about a result other than that for which the process was intended. E.g. garnishing an account to force plaintiff to sign a lease. The action itself may have merit, but it is instituted for an ulterior motive.

E. Interference with business relations

Interference with contract or with prospective economic advantage:

1. Existence of a valid contractual relationship between plaintiff and a third party or a valid business expectancy of plaintiff;
2. Defendant's knowledge of the relationship or expectancy;
3. Intentional interference by defendant that induces a breach or termination of the relationship or expectancy; and
4. Damage to the plaintiff.

Interference with business relations is not limited to existing contracts; it is applicable to probable future business relationships.

The defendant must have intent. Most courts do not recognize negligent interference, unless in combination with some other tort, such as negligent misrepresentation.

An interferor's conduct may be privileged when it is a proper attempt to gain business for themselves, particularly if the interference is only with prospective advantages rather than existing contracts.

F. Nuisance

Nuisance is not a separate tort, but a type of harm: the invasion of private property rights, or interference with public rights such as health and safety.

Defendant's conduct may have been intentional, negligent, or subject to strict liability. Intentional is most common. For strict liability, courts may refer to "absolute nuisance" or "nuisance per se."

Private nuisance is a substantial, unreasonable interference with another private individual's use or enjoyment of property they actually possess or have an immediate right to possess.

If plaintiff has no property rights, they have no private nuisance claim. The interference must be offensive, inconvenient, or annoying to the average person in the community. For nuisance based on intent or negligence, the injury must outweigh the utility of the conduct.

Nuisance is distinguished from trespass to land in that there need not be an interference with landowner's right to exclusive possession, merely to their use or enjoyment.

Public nuisance is an act that interferes with the health, safety, or property rights of the community, e.g. blocking a highway or using a building to commit criminal activities. Recovery is available only if plaintiff has suffered unique injuries not suffered by the public at large.

Damages may be damages or injunctive relief. Injunctive relief is only available where damages would be unavailable or inadequate.

One has the privilege to enter upon defendant's land to use self-help to personally abate the nuisance after notice is given and defendant refuses to act. Only force necessary to accomplish the abatement is allowed and plaintiff is liable for any harm done.

Defenses:

1. Legislative authority: conduct consistent with zoning laws, etc. is highly persuasive but not conclusive proof that no nuisance exists.
2. Conduct of others: No one actor is liable for the conduct of others.
3. Contributory negligence: only used under a negligence theory
4. "Coming to the nuisance": when a purchaser knew of a nuisance before moving in, they may still sue, so long as they did not move in for the purpose of instituting a harassing lawsuit.

V. General considerations for all torts

A. Vicarious liability

Respondeat superior: Employer vicariously liable for tortious acts committed by their employee if the tortious acts occur within the scope of the employment relationship.

Frolics and detours are not within the scope of employment if they are major in time and geographic area.

Intentional torts by employees are generally not within the scope, except:

1. Force authorized in the employment: e.g. bouncer
2. Friction generated by employment, e.g. bill collector
3. Employee furthering business of employer, e.g. removing customers from premises because rowdy.

Independent contractors: Principal generally not liable for acts of their agent when agent is an independent contractor, where the agent controls the manner in which the work is done. Exceptions:

1. Independent contractor is engaged in inherently dangerous activities, e.g. blasting with dynamite.
2. Duty is nondelegable for public policy reasons, e.g. duty to keep business premises safe or duty of motorist to keep car in safe working order.

Employer may always be liable for their own negligence in selecting the employee or independent contractor. This is not vicarious liability.

Persons engaged in a concert of action are regarded as members of a joint enterprise. Each partner or joint venturer is vicariously liable for the torts of the others. A joint venture must have a common purpose (sometimes a common business purpose) and mutual control.

Automobiles: The general rule is that owner is not vicariously liable. Some states make owner liable for immediate family members. Others impose liability for anyone driving with owner's consent. In these cases, the owner is liable but may collect from the negligent party.

Owner may always be liable for their own negligence in entrusting the car to a particular driver. This is not vicarious liability. Bailor is not vicariously liable for torts of bailee, but may be liable for their own negligence in entrusting the bailee.

Parents are not vicariously liable for torts of their children at common law. Most states make parents liable for willful and intentional torts of their children up to a certain dollar amount (e.g. \$5,000).

Regarding capacity for intentional torts, a child or insane person is liable so long as they intended the action required by the tort. If an insane person intended a harmful or offensive contact with a person, it does not matter what other circumstances the insane person thought were present. However, if the insane person intended a contact with a person whom they believed was a horse, then they are not liable for battery.

Courts may impose vicarious liability when child is acting as agent for parent. Parent may be liable for their own negligence in allowing the child to do something.

Tavern keepers: At common law, no liability for drunken customers' torts. Many states have enacted "dramshop acts" imposing liability. Other states' courts have imposed liability without dramshop acts, based on ordinary negligence.

B. Joint and several liability

When two or more tortious acts combine to form an indivisible injury, each tortfeasor is jointly and severally liable for the injury. This means that each is liable to the plaintiff for the entire damage.

If the injury is divisible, then joint and several liability does not apply unless the tortfeasors were acting in concert.

Statutory limitations on joint and several liability apply in some states:

1. Where plaintiff is more at fault than tortfeasors; or
2. For noneconomic damages.

In such situations, the tortfeasor is liable only proportional to their fault.

Satisfaction: When plaintiff recovers full payment from a tortfeasor, there is satisfaction, and they may not recover against another joint tortfeasor.

Release: A release is surrender of the cause of action against a party. At common law, such a release against one joint tortfeasor necessarily released the others. A majority now reject that rule. Rather, the claim against the others is reduced by the

amount stipulated in the agreement or by the amount of consideration paid, whichever is greater.

Contribution: Adopted in most states, allows a tortfeasor who pays more than their share of damages to have a claim against any other jointly liable parties for their shares. Thus, contribution is a device for apportionment.

Methods of apportionment:

1. Comparative: in proportion to relative fault (majority)
2. Equal shares (minority)

Contribution is not allowed in favor of those who committed intentional torts.

Indemnity involves shifting the entire loss between or among tortfeasors, in contrast to apportioning it as in contribution. Available in these circumstances:

1. Right to indemnity by contract
2. Vicarious liability
3. Indemnity under strict products liability
4. Identifiable difference in degree of fault
 - a. Retailers who negligently rely on product's condition may receive indemnification from manufacturer who negligently manufactured it.
 - b. Secondary duty: one with primary duty may recover from one with secondary duty
 - c. Active/passive: one who is passively negligent may recover from one who is actively negligent.

Most states with comparative negligence systems reject indemnity in degree of fault situations, instead simply applying comparative negligence. Most states now use a comparative contribution system based on the relative fault of the tortfeasors.

C. Survival and wrongful death actions

At common law, a tort action abated at the death of either the tortfeasor or the victim. Most states have changed this via "survival acts."

In most states, highly personal torts such as defamation or malicious prosecution still expire on victim's death. Wrongful death acts may be brought by the personal representative or surviving kin of the deceased, only for pecuniary losses, not pain and suffering of decedent.

Recovery in the case of children or elderly people is allowed, though it will usually be quite modest.

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

Defenses: Contributory negligence of the deceased.

D. Tortious interference with family relationships

Loss of consortium: Spouses may recover damages for loss of consortium or services because of injuries to the spouse caused by defendant's conduct, whether intentional, negligent, or based on strict liability.

Parents have a similar action for loss of children's services, but children have no action for loss of parent's services.

The action is derivative and depends on potential success of the injured person's own action. Thus any defense that would prevent recovery by the injured person will apply to the derivative action.

E. Tort immunities

At common law, immediate family members could not sue each other in tort for personal injury. Most states have now abolished interspousal immunity. Parent-child immunity is limited. A suit for property damage is usually not subject to family immunity.

Governmental units were traditionally not subject to tort suits under sovereign immunity. This immunity is now limited.

The U.S. federal government has waived immunity except:

1. Assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel and slander, misrepresentation and deceit, and interference with contract rights.
2. Discretionary acts: immunity not waived for acts at the planning or decisionmaking level rather than the operational level.
3. Government contractors may assert governmental immunity when they conformed to government specifications.

Most states have waived their sovereign immunity to the same extent as the federal government.

Municipalities: about half the states have abolished municipal immunity. However, in the case of a public duty, a special relationship between the municipality and the plaintiff must be shown for liability to attach. Where immunity still exists for municipalities, it is usually only for traditional government functions, not functions that could just as easily be performed by a private entity.

Public officials and charities may also have limited immunity.