TORTS

BARBRI BOOK EXAMPLE
# I. INTENTIONAL TORTS

## A. PRIMA FACIE CASE

1. Act by Defendant
2. Intent
   a. Specific Intent
   b. General Intent
   c. Actor Need Not Intend Injury
   d. Transferred Intent
      1) General Rule
      2) Limitations on Use of Transferred Intent
   e. Motive Distinguished
   f. Minors and Incompetents Can Have Requisite Intent
3. Causation

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

1. Battery
   a. Prima Facie Case
   b. Harmful or Offensive Contact
   c. Meaning of “Plaintiff’s Person”
   d. Causation
   e. Apprehension Not Necessary
   f. Transferred Intent
   g. Actual Damages Not Required
2. Assault
   a. Prima Facie Case
   b. Construction of “Apprehension”
      1) Requirement of Reasonableness
         a) Fear, Intimidation, etc., Distinguished
         b) Knowledge of Act Required
         c) Knowledge of Defendant’s Identity Not Required
         d) Defendant’s Apparent Ability to Act Is Sufficient
         e) Effect of Words
            1) Overt Act Required
            2) Conditional Threat Is Sufficient
      2) Requirement of Immediacy
   c. Causation
   d. Transferred Intent
   e. No Requirement of Damages
3. False Imprisonment
   a. Prima Facie Case
   b. Sufficient Methods of Confinement or Restraint
      1) Physical Barriers
      2) Physical Force
      3) Direct Threats of Force
4) Indirect Threats of Force ........................................... 6
5) Failure to Provide Means of Escape ......................... 6
6) Invalid Use of Legal Authority ............................... 7
   a) False Arrests .............................................. 7
      (1) When Arrests Are Privileged ........................... 7
         (a) Felony Arrests Without Warrant ....................... 7
         (b) Misdemeanor Arrests Without Warrant .............. 7
         (c) Arrests to Prevent a Crime Without a Warrant 7
      (2) Amount of Force Allowable ............................ 7
         (a) Felony Arrest .......................................... 7
         (b) Misdemeanor Arrest .................................... 7
   b) “Shoplifting” Detentions Are Privileged .................. 7

   c. Insufficient Forms of Confinement or Restraint ............. 8
     1) Moral Pressure ........................................... 8
     2) Future Threats ............................................ 8
   d. No Need to Resist ........................................... 8
   e. Time of Confinement ......................................... 8
   f. Awareness of Imprisonment .................................. 8
   g. What Is a Bounded Area? ..................................... 8
   h. Causation .................................................... 9
   i. Transferred Intent .......................................... 9
   j. No Requirement of Damages ................................ 9
   k. False Imprisonment and Malicious Prosecution Distinguished .... 9

4. Intentional Infliction of Emotional Distress ....................... 9
   a. Prima Facie Case ........................................... 9
   b. Extreme and Outrageous Conduct .......................... 9
      1) Some Courts Reluctant to Recognize Tort ............... 9
      2) Liability Limited by Requiring Proof of Outrageous Conduct 9
      3) Examples of Outrageous Conduct ....................... 10
         a) Extreme Business Conduct ............................. 10
         b) Misuse of Authority .................................. 10
         c) Offensive or Insulting Language ...................... 10
      4) Special Relationship Situations ......................... 10
      5) Known Sensitivity ...................................... 10
   c. Intent ....................................................... 10
   d. Causation ................................................... 10
      1) Intent/Causation Requirements in Bystander Cases .... 10
      2) Special Liability for Mishandling Corpses .......... 11
   e. Actual Damages Required ................................ 11

C. PRIMA FACIE CASE—INTENTIONAL TORTS TO PROPERTY ........ 11
1. Trespass to Land .............................................. 11
   a. Prima Facie Case ........................................... 11
   b. Physical Invasion of Plaintiff’s Land ...................... 11
      1) What Constitutes “Physical Invasion”? ................... 11
         a) Defendant Need Not Enter onto Land ............. 12
         b) Lawful Right of Entry Expires ...................... 12
      2) If No Physical Object Enters Land .................... 12
      3) What Constitutes “Land”? ................................. 12
c. Intent Required ................................................. 12

d. Who May Bring Action? .................................. 12

e. Causation ..................................................... 12

f. Transferred Intent .......................................... 13

g. No Requirement of Damages ............................. 13

2. Trespass to Chattels ........................................ 13

a. Prima Facie Case .......................................... 13

b. Act by Defendant ........................................... 13

   1) Intermeddling ............................................. 13

   2) Dispossession ............................................. 13

c. Intent Required ............................................. 13

d. Who May Bring Trespass to Chattels Action? ........ 13

e. Causation ..................................................... 14

f. Actual Damages Required .................................. 14

g. Transferred Intent .......................................... 14

h. Trespass to Chattels and Conversion Distinguished .. 14

3. Conversion .................................................. 14

a. Prima Facie Case .......................................... 14

b. Acts of Conversion ......................................... 14

   c. Mere Intent to Perform Act Required .................. 15

      1) Bona Fide Purchaser May Be Liable ................. 15

      2) Accidental Conduct Insufficient .................... 15

d. Seriousness of Interference or Consequence ............ 15

e. Special Situation of Bailees Receiving Stolen Property 15

f. Subject Matter of Conversion ............................... 15

g. Who May Bring Action for Conversion? .................. 15

h. Causation ..................................................... 15

i. Remedies ..................................................... 16

   1) Damages ................................................... 16

   2) Replevin .................................................. 16

D. DEFENSES TO THE INTENTIONAL TORTS ............... 16

1. Consent ..................................................... 16

   a. Express (Actual) Consent ............................... 16

      1) Consent by Mistake ................................... 16

      2) Consent Induced by Fraud ............................. 16

      3) Consent Obtained by Duress ......................... 16

   b. Implied Consent .......................................... 17

      1) Apparent Consent ...................................... 17

         a) Inferred from Usage and Custom .................. 17

      2) Consent Implied by Law .............................. 17

   c. Capacity Required ....................................... 17

   d. Criminal Acts ........................................... 17

      1) Modern Trend .......................................... 17

      2) Consent Invalid Where Law Seeks to Protect Members of Victim’s Class .......................... 17

   e. Exceeding Consent Given ............................... 17

2. Self-Defense ............................................... 18

   a. When Is Defense Available? ............................ 18
1) Reasonable Belief ................................................................. 18
2) Retaliation Not Allowed ..................................................... 18
3) Retreat Not Necessary ....................................................... 18
4) Not Available to Aggressor .................................................. 18
b. How Much Force May Be Used? ......................................... 18
c. Extends to Third-Party Injuries ....................................... 18
3. Defense of Others ............................................................... 18
   a. When Is Defense Available? ........................................... 18
   b. How Much Force May Be Used? ....................................... 19
4. Defense of Property ............................................................ 19
   a. When Is Defense Available? ........................................... 19
      1) Request to Desist Usually Required .............................. 19
      2) Effect of Mistake ..................................................... 19
      3) Limited to Preventing Commission of Tort .................... 19
      4) Superseded by Other Privileges .................................. 19
   b. How Much Force May Be Used? ....................................... 19
5. Reentry onto Land .............................................................. 19
   a. Common Law Privilege .................................................. 19
   b. No Such Privilege Under Modern Law .............................. 20
6. Recapture of Chattels .......................................................... 20
   a. When Is Defense Available? ........................................... 20
      1) Timely Demand Required ........................................... 20
      2) Recovery Only from Wrongdoer .................................... 20
   b. How Much Force May Be Used? ....................................... 20
   c. Entry upon Land to Remove Chattel ................................. 20
      1) On Wrongdoer’s Land ................................................. 20
      2) On Land of Innocent Party ........................................... 20
      3) On Land Through Owner’s Fault .................................... 20
   d. Shopkeeper’s Privilege .................................................. 21
7. Privilege of Arrest .............................................................. 21
   a. Invasion of Land .......................................................... 21
   b. Subsequent Misconduct ................................................ 21
   c. Mistake ................................................................. 21
8. Necessity .............................................................................. 21
   a. Public Necessity ........................................................... 21
   b. Private Necessity .......................................................... 21
9. Discipline ............................................................................ 21

II. HARM TO ECONOMIC AND DIGNITARY INTERESTS .................. 21
A. DEFAMATION ..................................................................... 22
   1. Prima Facie Case .......................................................... 22
   2. Defamatory Language ..................................................... 22
      a. Inducement and Innuendo ............................................ 22
      b. Methods of Defamation .............................................. 22
      c. Statements of Opinion ................................................. 22
         1) Distinguishing Fact and Opinion ................................. 23
      d. Who May Be Defamed? .............................................. 23
         1) Individual .............................................................. 23
2) Corporation, Unincorporated Association, and Partnership .... 23

3. “Of or Concerning” the Plaintiff ............................................. 23
   a. Colloquium ........................................................................... 23
   b. Group Defamation ................................................................. 23
      1) All Members of Small Group ............................................. 23
      2) All Members of Large Group ............................................. 23
      3) Some Members of Small Group ......................................... 23

4. Publication .................................................................................. 23
   a. Only Intent to Publish Required ........................................... 24
   b. Repetition .............................................................................. 24
   c. “Single Publication” Rule—Statute of Limitations ................. 24
   d. Who May Be Liable? .............................................................. 24
      1) Primary Publisher .............................................................. 24
      2) Republisher ........................................................................ 24
      3) Secondary Publishers ...................................................... 24

5. Damage to Plaintiff’s Reputation .................................................. 25
   a. General and Special Damages ............................................... 25
      1) General or Presumed Damages ........................................... 25
      2) Special Damages ............................................................... 25
   b. Libel ..................................................................................... 25
      1) Definition .......................................................................... 25
      2) Damages Rules for Libel .................................................... 25
         a) General Damages Presumed ............................................. 25
         b) Libel Distinction—Minority Position ................................. 25
            (1) Libel Per Se—Presumed Damages ............................. 26
            (2) Libel Per Quod—Special Damages Usually Required .... 26
   c. Slander .................................................................................. 26
      1) Definition .......................................................................... 26
         a) Characterization of Repetitions ....................................... 26
         b) Radio and Television Broadcasts Generally Libel .......... 26
      2) Damages Rules for Slander ............................................... 26
         a) Special Damages Usually Required .................................. 26
         b) Slander Per Se—Injury Presumed .................................... 26
            (1) Business or Profession .............................................. 26
            (2) Loathsome Disease .................................................... 27
            (3) Crime Involving Moral Turpitude ............................... 27
            (4) Unchastity of a Woman ............................................ 27
   d. “Per Se” ................................................................................ 27

6. Falsity ......................................................................................... 27
   a. Exam Approach ..................................................................... 27

7. Fault on Defendant’s Part ............................................................... 27
   a. Public Officials—Malice Required ........................................ 27
   b. Public Figures—Malice Required .......................................... 28
      1) What Constitutes a Public Figure? ..................................... 28
   c. What Is Malice? ..................................................................... 28
      1) Test .................................................................................. 28
      2) What Constitutes “Knowledge or Reckless Falsity”? .......... 28
         a) Reckless Conduct—Subjective Standard ....................... 28
b) Spite, etc., Not Enough ............................................. 28
3) Alteration of Quotation as Malice ................................. 28
d. Private Persons Need Not Prove Malice .......................... 29
1) Matters of Public Concern—At Least Negligence Required .... 29
a) No Liability Without Fault ..................................... 29
b) Damages Limited to “Actual Injury” ................................. 29
(1) “Actual Injury” ........................................... 29
(2) Presumed Damages or Punitive Damages Allowable Where Malice Found ....................................... 29
2) Matters of Purely Private Concern—No Constitutional Limitations .... 30
3) What Is a Matter of Public Concern? ................................. 30
8. Defenses to Defamation .................................................. 30
a. Consent .......................................................... 30
b. Truth ........................................................... 30
c. Absolute Privilege .................................................. 30
1) Judicial Proceedings .............................................. 30
2) Legislative Proceedings ............................................ 31
3) Executive Proceedings ............................................. 31
4) “Compelled” Broadcast or Publication .............................. 31
5) Communications Between Spouses ................................... 31
d. Qualified Privilege ................................................... 31
1) Qualified Privilege Situations ....................................... 31
a) Reports of Public Proceedings ..................................... 31
b) Public Interest .................................................... 32
(1) Publication to One Acting in Public Interest ....................... 32
(2) Fair Comment and Criticism ..................................... 32
c) Interest of Publisher ............................................... 32
d) Interest of Recipient ............................................... 32
e) Common Interest of Publisher and Recipient ....................... 32
2) Loss of Qualified Privilege Through Abuse .......................... 32
a) Statement Not Within Scope of Privilege ......................... 33
b) Malice .......................................................... 33
3) Qualified Privilege—Burden of Proof ............................... 33
9. Mitigating Factors ........................................................ 33
a. No Actual Malice ............................................... 33
b. Retraction ....................................................... 33
c. Anger .......................................................... 33
B. INVASION OF RIGHT TO PRIVACY ................................. 33
1. Appropriation of Plaintiff's Picture or Name ......................... 34
a. Prima Facie Case ............................................... 34
b. Limited to Advertisement or Promotion of Product or Services .... 34
2. Intrusion on Plaintiff's Affairs or Seclusion .......................... 34
a. Prima Facie Case ............................................... 34
b. Invasion of Plaintiff's Private Affairs or Seclusion ................ 34
c. Intrusion Highly Offensive to a Reasonable Person ................. 35
d. Intrusion Must Be into Something “Private” ......................... 35
3. Publication of Facts Placing Plaintiff in False Light ................. 35
a. Prima Facie Case ............................................... 35
b. Publication or Public Disclosure .................................................. 35

c. What Is “False Light”? ................................................................. 35

d. Highly Offensive to Reasonable Person ........................................ 35

e. Malice Necessary Where in Public Interest .................................... 35


a. Prima Facie Case ................................................................. 36

b. Publication or Public Disclosure .................................................. 36

c. Facts Must Be Private .............................................................. 36

d. Disclosure Highly Offensive to Reasonable Person .......................... 36

e. Facts May Be True ................................................................. 36

f. Constitutional Privilege .............................................................. 36

1) Effect of Passage of Time ......................................................... 36

2) Absolute Privilege with Regard to Matters of Public Record ............... 37

5. Causation .................................................................................. 37

6. Proof of Special Damages Unnecessary .......................................... 37

7. Basis of Liability ........................................................................ 37

8. Defenses to Invasions of Privacy .................................................... 37

a. Consent .................................................................................. 37

b. Defamation Defenses .................................................................. 37

9. Right of Privacy—Miscellaneous ...................................................... 37

a. Right Is Personal ....................................................................... 37

b. Not Applicable to Corporations .................................................... 38

C. MISREPRESENTATION .................................................................. 38

1. Intentional Misrepresentation (Fraud, Deceit) .................................. 38

a. Prima Facie Case ..................................................................... 38

b. The Misrepresentation .................................................................. 38

1) No General Duty to Disclose .................................................... 38

2) Active Concealment Actionable .................................................. 38

c. Scienter ...................................................................................... 39

d. Intent to Induce Reliance ............................................................. 39

1) Continuous Deception Exception ................................................ 39

2) Third-Party Reliance Problem ..................................................... 39

e. Causation .................................................................................. 39

f. Justifiable Reliance ..................................................................... 39

1) Reliance on Fact Almost Always Justified .................................... 39

a) No Duty to Investigate ............................................................. 39

2) Reliance on Opinion Usually Not Justifiable ................................ 40

a) Superior Knowledge of Defendant .......................................... 40

b) Statements of Law .................................................................... 40

c) Statements of Future Events ...................................................... 40

g. Damages .................................................................................... 40

2. Negligent Misrepresentation ............................................................ 40

a. Prima Facie Case ..................................................................... 40

b. Liability Confined to Commercial Transactions ............................ 41

c. Duty Owed Only to Particular Plaintiff Whose Reliance Contemplated . 41

d. Other Elements ......................................................................... 41

D. INTERFERENCE WITH BUSINESS RELATIONS ......................... 41

1. Not Limited to Existing Contracts .................................................. 41
2. Intent Required .................................................. 41
3. Damages .............................................................. 42
4. Privileges .............................................................. 42
   a. Type of Business Relationship Involved ................. 42
   b. Means of Persuasion Used .................................. 42
   c. Whether Defendant Is a Competitor of Plaintiff ....... 42
   d. Defendant’s Relationship with the Third Party ....... 42
E. WRONGFUL INSTITUTION OF LEGAL PROCEEDINGS ....... 42
   1. Malicious Prosecution ........................................ 42
      a. Prima Facie Case .......................................... 42
      b. Institution of Criminal Proceedings .................... 43
         1) Defendant Must Initiate Proceedings ............... 43
         2) Prosecuting Attorneys Privileged .................. 43
      c. Termination of Proceedings in Plaintiff’s Favor ..... 43
      d. Absence of Probable Cause for Prior Proceedings . 43
         1) Effect of Indictment .................................. 43
         2) Prior Action Based on Advice ....................... 43
      e. Improper Purpose in Bringing Suit .................... 43
      f. Damages ..................................................... 43
      g. False Arrest Distinguished ............................. 43
   2. Wrongful Civil Proceedings .................................. 44
   3. Abuse of Process ............................................... 44
      a. Malicious Prosecution Distinguished ................. 44
III. NEGLIGENCE ....................................................... 44
   A. PRIMA FACIE CASE ............................................ 44
   B. THE DUTY OF CARE ............................................ 44
      1. Introduction—General Duty of Care .................... 44
      2. To Whom Is the Duty of Care Owed? ................. 45
         a. General Rule—Foreseeable Plaintiffs .............. 45
         b. The “Unforeseeable” Plaintiff Problem ............ 45
            1) The Problem ........................................ 45
            2) The Solution(s) .................................. 45
               a) Andrews View .................................. 45
               b) Cardozo View .................................. 45
         c. Specific Situations .................................... 45
            1) Rescuers ............................................ 45
            2) Prenatal Injuries .................................. 45
               a) “Wrongful Life” Action Not Recognized ........ 45
               b) Compare—“Wrongful Birth” and “Wrongful Pregnancy” 46
            3) Intended Beneficiaries of Economic Transactions ... 46
         a. Basic Standard—The Reasonable Person ............. 46
            1) Physical Characteristics—Same as Defendant’s ... 46
            2) Average Mental Ability ............................. 46
            3) Same Knowledge as Average Member of Community .. 46
         b. Particular Standards of Conduct ...................... 47
            1) Professionals ....................................... 47
a) Duty to Disclose Risks of Treatment .......................... 47
2) Children ......................................................... 47
   a) Minimum Age for Capacity to Be Negligent ............... 47
   b) Children Engaged in Adult Activities .................. 47
3) Common Carriers and Innkeepers .............................. 48
4) Automobile Driver to Guest .................................. 48
   a) Guest Statutes ............................................. 48
5) Bailment Duties .................................................. 48
   a) Duties Owed by Bailee ..................................... 48
      (1) Sole Benefit of Bailor Bailment ....................... 48
      (2) Sole Benefit of Bailee Bailment ..................... 48
      (3) Mutual Benefit Bailments ............................. 48
      (4) Modern Trend ........................................... 48
   b) Duties Owed by Bailor ..................................... 48
      (1) Sole Benefit of Bailee Bailments ................. 49
      (2) Bailments for Hire ................................... 49
c. Standard of Care in Emergency Situations .................... 49
d. Standard of Care Owed by Owners and/or Occupiers of Land .. 49
   1) Duty of Possessor to Those Off the Premises ............. 49
      a) Natural Conditions .................................... 49
      b) Artificial Conditions .................................. 49
         (1) Unreasonably Dangerous Conditions ................. 49
         (2) Duty to Protect Passersby .......................... 49
      c) Conduct of Persons on Property ....................... 50
   2) Duties of Possessor to Those on the Premises .............. 50
      a) Duty Owed to a Trespasser ............................ 50
         (1) Definition of Trespasser ........................... 50
         (2) Duty Owed Undiscovered Trespassers ............. 50
         (3) Duty Owed Discovered Trespassers ................ 50
            (a) When Is a Trespasser “Discovered”? ........... 50
         (4) Duty Owed Anticipated Trespassers ............... 50
            (a) When Is a Trespasser “Anticipated”? .......... 50
         (5) “Attractive Nuisance” Doctrine ....................... 51
            (a) What Is a Dangerous Condition? ................ 51
               1] Where Applied ..................................... 51
            (b) Foreseeability of Harm Is True Basis of Liability ...... 51
         (6) Duty of Easement and License Holders to Trespassers 52
      b) Duty Owed to a Licensee ................................ 52
         (1) Definition of Licensee .............................. 52
         (2) Duty Owed ............................................ 52
            (a) No Duty to Inspect ................................. 52
            (b) Duty of Care for Active Operations ............... 52
         (3) Social Guests Are Licensees ......................... 52
c) Duty Owed to an Invitee .................................... 52
   (1) Definition of Invitee .................................. 52
   (2) Characterization of Privileged Entrants .................. 53
   (3) Scope of Invitation ..................................... 53
   (4) Duty Owed .............................................. 53
C. BREACH OF DUTY

1. Custom or Usage
2. Violation of Statute
3. Res Ipsa Loquitur
   a. Inference of Negligence
   b. Negligence Attributable to Defendant
1) Multiple Defendants Problem ............................... 60
c. Plaintiff’s Freedom from Negligence ....................... 60
d. Effect of Res Ipsa Loquitur .................................. 60
   1) No Directed Verdict for Defendant ....................... 60
   2) Effect of Defendant’s Evidence of Due Care .............. 60
D. CAUSATION .................................................. 61
   1. Actual Cause (Causation in Fact) ......................... 61
      a. “But For” Test ......................................... 61
         1) Concurrent Causes ................................. 61
      b. Additional Tests .................................... 61
         1) Joint Causes—Substantial Factor Test ............... 61
         2) Alternative Causes Approach ....................... 61
            a) Burden of Proof Shifts to Defendants ......... 61
            b) Applied in Enterprise Liability Cases ......... 62
   2. Proximate Cause (Legal Causation) ....................... 62
      a. General Rule of Liability ............................. 62
      b. Direct Cause Cases .................................. 62
         1) Foreseeable Harmful Results—Defendant Liable .... 62
         2) Unforeseeable Harmful Results—Defendant Not Liable 63
      c. Indirect Cause Cases ................................ 63
         1) Foreseeable Results Caused by Foreseeable Intervening Forces—
            Defendant Liable .................................. 63
            a) Dependent Intervening Forces ................... 63
               (1) Subsequent Medical Malpractice .......... 63
               (2) Negligence of Rescuers ..................... 63
               (3) Efforts to Protect Person or Property .. 63
               (4) “Reaction” Forces ............................ 63
               (5) Subsequent Disease .......................... 64
               (6) Subsequent Accident ......................... 64
            b) Independent Intervening Forces ................. 64
               (1) Negligent Acts of Third Persons .......... 64
               (2) Criminal Acts and Intentional Torts of Third Persons 64
               (3) Acts of God .................................... 64
         2) Foreseeable Results Caused by Unforeseeable Intervening Forces—
            Defendant Usually Liable .......................... 64
         3) Unforeseeable Results Caused by Foreseeable Intervening Forces—
            Defendant Not Liable .............................. 65
         4) Unforeseeable Results Caused by Unforeseeable Intervening
            Forces—Defendant Not Liable ....................... 65
      d. Unforeseeable Extent or Severity of Harm—Defendant Liable .... 66
E. DAMAGES ...................................................... 66
   1. Damages Recoverable in the Action ....................... 66
      a. Personal Injury ...................................... 66
         1) Foreseeability Irrelevant ........................... 66
         2) Emotional Distress Damages ....................... 66
      b. Property Damage .................................... 67
      c. Punitive Damages .................................. 67
      d. Nonrecoverable Items .............................. 67
2. Duty to Mitigate Damages .................................................. 67
3. Collateral Source Rule ...................................................... 67

F. DEFENSES TO NEGLIGENCE ............................................. 67
1. Contributory Negligence .................................................. 67
   a. Standard of Care for Contributory Negligence .................. 67
      1) General Rule ................................................. 67
      2) Rescuers .................................................. 67
      3) Remaining in Danger ...................................... 68
      4) Violation of Statute by Plaintiff .......................... 68
      5) As Defense to Violation of Statute by Defendant ........ 68
   b. Avoidable Consequences Distinguished .......................... 68
   c. No Defense to Intentional Torts .................................. 68
   d. Effect of Contributory Negligence ............................... 68
   e. Last Clear Chance .................................................. 68
      1) “Helpless” vs. “Inattentive” Peril .............................. 69
         a) Helpless Peril ........................................... 69
         b) Inattentive Peril ...................................... 69
      2) Prior Negligence Cases ........................................ 69
   f. Imputed Contributory Negligence .................................. 69
      1) General Rule—Plaintiff May Proceed Against Both Negligent
         Parties ....................................................... 69
      2) When Contributory Negligence Is Imputed .................... 69
      3) Common Fact Situations ------------------------------- 70
         a) Employer and Employee .................................. 70
         b) Partners and Joint Venturers ......................... 70
         c) Husband and Wife ...................................... 70
         d) Parent and Child ...................................... 70
         e) Automobile Owner and Driver .......................... 70

2. Assumption of Risk ...................................................... 70
   a. Implied Assumption of Risk ....................................... 70
      1) Knowledge of Risk ......................................... 70
      2) Voluntary Assumption ...................................... 71
      3) Certain Risks May Not Be Assumed .......................... 71
   b. Express Assumption of Risk ...................................... 71
   c. No Defense to Intentional Torts .................................. 71

3. Comparative Negligence ................................................. 71
   a. Types of Comparative Negligence ................................. 71
      1) “Partial” Comparative Negligence ............................ 71
         a) Multiple Defendants ................................. 72
      2) “Pure” Comparative Negligence ............................. 72
   b. Comparative Negligence Illustrations ............................ 72
      1) Partial Comparative Negligence Jurisdiction—Single Defendant 72
      2) Partial Comparative Negligence Jurisdiction—Multiple Defendants 72
      3) Pure Comparative Negligence Jurisdiction .................. 72
   c. Effect on Other Doctrines ........................................ 72
      1) Last Clear Chance .......................................... 72
      2) Assumption of Risk ........................................ 72
         a) Implied Assumption of Risk ............................ 73
IV. LIABILITY WITHOUT FAULT (STRICT LIABILITY) .................................................. 73
   A. PRIMA FACIE CASE ..................................................................................... 73
   B. LIABILITY FOR ANIMALS ............................................................................ 73
      1. Trespassing Animals .............................................................................. 73
      2. Personal Injuries .................................................................................... 74
         a. Wild Animals—Strict Liability .............................................................. 74
         b. Domestic Animals—Knowledge Required ........................................... 74
         c. Persons Protected ............................................................................... 74
            1) Licensees and Invitees—Landowner Strictly Liable ......................... 74
               a) Public Duty Exception ................................................................ 74
            2) Trespassers Must Prove Negligence .............................................. 74
               a) Compare—Intentional Use of Vicious Watchdogs ....................... 74
   C. ABNORMALLY DANGEROUS ACTIVITIES ............................................... 74
      1. Definition ................................................................................................ 74
      2. Test ........................................................................................................ 75
      3. Products Liability .................................................................................. 75
   D. EXTENT OF LIABILITY .............................................................................. 75
      1. Scope of Duty Owed ............................................................................. 75
         a. To Whom Is the Duty Owed? ............................................................... 75
         b. Duty Limited to “Normally Dangerous Propensity” ......................... 75
      2. Proximate Cause .................................................................................... 75
      3. Defenses ................................................................................................ 76
         a. Contributory Negligence States ......................................................... 76
         b. Comparative Negligence States .......................................................... 76
   V. PRODUCTS LIABILITY ............................................................................. 76
      A. BASIC PRINCIPLES .............................................................................. 76
         1. Theories of Liability ............................................................................ 76
         2. Existence of a Defect ......................................................................... 77
            a. Types of Defects ............................................................................. 77
               1) Manufacturing Defects ................................................................. 77
               2) Design Defects .......................................................................... 77
                  a) Inadequate Warnings ................................................................. 77
            b. What Is a “Defective Product”? ...................................................... 77
               1) Manufacturing Defects ................................................................. 77
                  a) Defective Food Products .......................................................... 77
               2) Design Defects .......................................................................... 77
                  a) Effect of Government Safety Standards ................................... 78
            c. Common Defect Problems .............................................................. 78
               1) Misuse ........................................................................................... 78
               2) Scientifically Unknowable Risks ................................................ 79
               3) Allergies ....................................................................................... 79
      3. No Requirement of Contractual Privity Between Plaintiff and Defendant .... 79
         a. Defined ............................................................................................... 79
         b. Vertical Privity Absent ...................................................................... 79
c. Horizontal Privity Absent ........................................ 79

B. LIABILITY BASED ON INTENT ........................................ 79
1. Tort Involved .................................................. 79
2. Privity Not Required ............................................. 80
3. Damages .......................................................... 80
4. Defenses .......................................................... 80

C. LIABILITY BASED ON NEGLIGENCE .................................. 80
1. Prima Facie Case .................................................. 80
2. Defendant with Duty of Care to Plaintiff ......................... 80
   a. Commercial Suppliers ........................................ 80
      1) Labeling Another’s Product .............................. 80
   b. Privity Not Required .......................................... 80
3. Breach of Duty .................................................. 80
   a. Negligence ..................................................... 81
      1) Proof of Negligence in Manufacturing Defect Case ...... 81
         a) Liability of Manufacturer ............................... 81
         b) Liability of Dealer ....................................... 81
      2) Proof of Negligence in Design Defect Case ............... 81
   b. Defective Product ............................................. 81
4. Causation .......................................................... 81
   a. Intermediary’s Negligence .................................... 81
5. Nature of Damages Recoverable .................................. 81
6. Defenses .......................................................... 82

D. LIABILITY BASED ON STRICT TORT LIABILITY .................. 82
1. Prima Facie Case .................................................. 82
2. Defendant Must Be “Commercial Supplier” ....................... 82
   a. Distinction Between Product and Service .................. 82
3. Product Not Substantially Altered ................................ 83
4. Privity Not Required ............................................. 83
5. Production or Sale of Defective Product ......................... 83
6. Causation .......................................................... 83
   a. Actual Cause .................................................... 83
   b. Proximate Cause ............................................... 83
7. Nature of Damages Recoverable .................................. 83
8. Defenses .......................................................... 83
   a. Contributory Negligence States .............................. 84
   b. Comparative Negligence States ............................... 84
   c. Disclaimers of Liability Ineffective ......................... 84

E. IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS .... 84
1. Proof of Fault Unnecessary ....................................... 84
2. Scope of Coverage ............................................... 84
3. Implied Warranty of Merchantability ............................. 84
4. Implied Warranty of Fitness for Particular Purpose ............ 84
5. Privity ............................................................ 84
   a. Vertical Privity No Longer Required ......................... 85
   b. U.C.C. Alternatives on Horizontal Privity .................. 85
6. Effect of Disclaimers ............................................. 85
7. Causation .......................................................... 85
8. Damages ............................................................... 85
9. Defenses .............................................................. 85
   a. Assumption of Risk ........................................... 85
   b. Contributory Negligence ...................................... 85
   c. Comparative Negligence ...................................... 85
   d. Notice of Breach ............................................... 85

F. REPRESENTATION THEORIES (EXPRESS WARRANTY AND
MISREPRESENTATION OF FACT) .................................... 86
   1. Express Warranty ............................................. 86
      a. Scope of Coverage ......................................... 86
      b. Privity Not Required ....................................... 86
      c. “Basis of the Bargain” .................................... 86
      d. Basis of Liability—Breach of Warranty .................. 86
      e. Effect of Disclaimers ....................................... 86
      f. Causation, Damages, and Defenses ......................... 86
   2. Misrepresentation of Fact ..................................... 86
      a. Defendant’s State of Mind .................................. 87
         1) Strict Liability .......................................... 87
         2) Intentional Misrepresentation ........................... 87
         3) Negligent Misrepresentation ............................ 87
      b. Material Fact Required ..................................... 87
      c. Intent to Induce Reliance of Particular Buyer .......... 87
      d. Justifiable Reliance ......................................... 87
         1) Reliance Need Not Be Victim’s .......................... 87
      e. Actual Cause ................................................ 87
      f. Proximate Cause and Damages .............................. 88
      g. Defenses ..................................................... 88
         1) Assumption of Risk ....................................... 88
         2) Contributory Negligence (Fault) ......................... 88

VI. NUISANCE ............................................................. 88
A. BASIS OF LIABILITY ............................................... 88
B. PRIVATE NUISANCE ............................................... 88
   1. Substantial Interference ...................................... 88
   2. Unreasonable Interference .................................... 89
   3. Trespass to Land Distinguished .............................. 89
C. PUBLIC NUISANCE .................................................. 89
D. REMEDIES ............................................................ 89
   1. Damages ......................................................... 89
   2. Injunctive Relief ............................................... 89
   3. Abatement by Self-Help ....................................... 89
      a. Abatement of Private Nuisance ............................ 89
      b. Abatement of Public Nuisance ............................ 89
E. DEFENSES ............................................................ 90
   1. Legislative Authority ......................................... 90
   2. Conduct of Others ............................................. 90
   3. Contributory Negligence ...................................... 90
   4. “Coming to the Nuisance” .................................... 90
VII. GENERAL CONSIDERATIONS FOR ALL TORT CASES

A. VICARIOUS LIABILITY

1. Doctrine of Respondeat Superior
   a. Frolic and Detour
   b. Intentional Torts
   c. Liability for Own Negligence

2. Independent Contractor Situations
   a. Liability for Own Negligence

3. Partners and Joint Venturers
   a. What Is a Joint Venture?
      1) Common Purpose
      2) Mutual Right of Control

4. Automobile Owner for Driver
   a. Liability for Owner’s Negligence

5. Bailor for Bailee

6. Parent for Child
   a. Child Acting as Agent for Parents
   b. Parent Liable for Own Negligence

7. Tavernkeepers

B. PARTIES—MULTIPLE DEFENDANT ISSUES

1. Joint and Several Liability
   a. Tortfeasors Acting in Concert
   b. Statutory Limitations

2. Satisfaction and Release
   a. Satisfaction
   b. Release

3. Contribution and Indemnity
   a. Contribution
      1) Methods of Apportionment
         a) Comparative Contribution
         b) Equal Shares
      2) Contribution Tortfeasor Must Have Liability
      3) Not Applicable to Intentional Torts
   b. Indemnity
      1) Right to Indemnity by Contract
      2) Vicarious Liability
      3) Indemnity Under Strict Products Liability
      4) Identifiable Difference in Degree of Fault
         a) Examples
            (1) Retailers Who Negligently Rely on Product’s Condition
            (2) Where Liability Imposed Under Secondary Duty
            (3) Active/Passive Negligence Doctrine
         b) Effect of Comparative Negligence System
   c. Comparative Contribution

C. SURVIVAL AND WRONGFUL DEATH

1. Survival of Tort Actions
   a. Torts that Expire on Victim’s Death

2. Wrongful Death
a. Who May Bring Action? ................................................................. 96
b. Measure of Recovery ................................................................. 96
  1) Deaths of Children, Elderly People .................................................. 96
  2) Rights of Creditors ........................................................................... 96
c. Effect of Defenses ............................................................................... 97
  1) Defenses Against Deceased .............................................................. 97
  2) Defenses Against Beneficiary ........................................................... 97

D. TORTIOUS INTERFERENCES WITH FAMILY RELATIONSHIPS ............... 97
  1. Husband-Wife ................................................................................... 97
  2. Parent-Child ..................................................................................... 97
     a. Parent’s Actions .............................................................................. 97
     b. Child’s Action ................................................................................ 97
  3. Nature of Action for Family Relationship Interference ......................... 97

E. TORT IMMUNITIES ............................................................................. 97
  1. Intra-Family Tort Immunities ............................................................. 98
     a. Injury to Person .............................................................................. 98
        1) Husband-Wife Immunity Abolished .............................................. 98
        2) Parent-Child Immunity Limited .................................................. 98
     b. Injury to Property .......................................................................... 98
  2. Governmental Tort Immunity ........................................................... 98
     a. Federal Government ....................................................................... 98
        1) United States Still Immune for Certain Enumerated Torts ...... 98
        2) Discretionary Acts Distinguished from Ministerial Acts ... 98
        3) Government Contractors ......................................................... 98
     b. State Governments ....................................................................... 99
     c. Municipalities ................................................................................ 99
        1) Immunity Abolished—Public Duty Rule Limitation ............ 99
        2) Immunity Retained—Limited to Governmental Functions ... 99
           a) Governmental Functions .......................................................... 99
           b) Proprietary Functions .............................................................. 99
     d. Immunity of Public Officials ......................................................... 100
  3. Charitable Immunity .......................................................................... 100
I. INTENTIONAL TORTS

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

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

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

Examples:
1) Chauncey tripped and was falling. To break the fall, Chauncey stretched out his hand, which struck Darby. Even though the movement was reflexive, it nonetheless was one dictated by the mind, and hence will be characterized as volitional.

2) Lulu suffered an epileptic attack. During the course of it, she struck Darby. This is not a volitional act.

3) Chauncey pushed Lulu into Darby. Chauncey has committed a volitional act; Lulu has not.

2. Intent
The requisite intent for this type of tort liability may be either specific or general.

a. Specific Intent
An actor “intends” the consequences of his conduct if his goal in acting is to bring about these consequences.

b. General Intent
An actor “intends” the consequences of his conduct if he knows with substantial certainty that these consequences will result.

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

c. Actor Need Not Intend Injury
The intent of the actor that is relevant for purposes of intentional torts is the intent to bring about the consequences that are the basis of the tort. Thus, a person may be liable even for an unintended injury if he intended to bring about such “basis of the tort” consequences.

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

d. Transferred Intent

1) General Rule

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

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

2) Limitations on Use of Transferred Intent

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

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

e. Motive Distinguished

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

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

f. Minors and Incompetents Can Have Requisite Intent

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

3. Causation

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

B. PRIMA FACIE CASE—INTENTIONAL TORTS TO THE PERSON

1. Battery

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

      1) An act by the defendant which brings about harmful or offensive contact to the plaintiff’s person;

      2) Intent on the part of the defendant to bring about harmful or offensive contact to the plaintiff’s person; and

      3) Causation.

   b. Harmful or Offensive Contact
      Whether any given contact is to be construed as harmful or offensive is judged by whether it would be considered harmful or offensive by a reasonable person of ordinary sensibilities. Contact is deemed “offensive” if the plaintiff has not expressly or impliedly consented to it (see D.1., infra).

   c. Meaning of “Plaintiff’s Person”
      For purposes of a battery, anything connected to the plaintiff’s person is viewed as part of the plaintiff’s person.
      Example: Chauncey grabbed Lulu’s purse, which was hanging from her shoulder. He may be liable for a battery. (He would also be liable if he had grabbed an article of clothing she was wearing, a cane she was holding, etc.)

   d. Causation
      The defendant is liable not only for “direct” contact, but also for “indirect” contact; i.e., it will be sufficient if he sets in motion a force that brings about harmful or offensive contact to the plaintiff’s person.
      Examples: 1) Chauncey, intending to set a trap, dug a hole in the road upon which Lulu was going to walk. Lulu fell in. Causation exists.

      2) Horace struck a glass door so that the breaking glass cut Bowater. Causation exists.

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

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