

TORTS CHECKLIST

Preliminary Considerations

A. Fact Investigation

1. Plaintiff's Harm
 - a. Personal Injury
 - b. Personal Property
 - c. Real Property
 - d. Reputation/Privacy
2. Defendant's Conduct
 - a. Intentional
 - b. Negligent
 - c. Abnormally Dangerous Activity
 - d. Products Related

B. Interrogatory/Interrogatories

1. Issue Spotting
2. Conflict Pairings
3. Legal Theories

C. Checklist

1. Intentional Torts
2. Defamation/Privacy Torts
3. Negligence
4. Strict Liability
5. Products Liability
6. General Considerations

I. INTENTIONAL TORTS

A. Harm To Person

1. Assault
2. Battery
3. False Imprisonment
4. IIED
 - a. Bystander Case

B. Harm to Property

1. Trespass to Chattel
2. Conversion
3. Trespass to Land
4. Nuisance
 - a. Private Nuisance
 - b. Public Nuisance

C. Transferred Intent

1. Assault
2. Battery
3. False Imprisonment
4. Trespass to Land
5. Trespass to Chattel

D. Defenses

1. Consent
 - a. Express Consent
 - b. Implied Consent
 - c. Exceeding Scope of Consent
 - i. Medical Consent
2. Necessity
 - a. Private & Public
3. Defensive Privileges
 - a. Defense of Self
 - b. Defense of Other
 - c. Defense of Property
 - i. Recapture of Chattel
 - d. Shopkeeper's Privilege

II. DEFAMATION/PRIVACY TORTS

A. Defamation

1. Defamatory Statement
2. Of or Concerning Plaintiff
3. Published to 3dp

4. Damages (Injury to Reputation)

- a. Presumed if:
 - i. Libel Per Se; or
 - ii. Slander Per Se (LUMP)
 1. Loathsome Disease
 2. Unchastity of Woman
 3. Moral Turpitude
 4. Profession
- b. Otherwise, Special Damages Required

5. Const'l Issues (Matter of Public Concern or Public Figure)

- a. Falsity
- b. Fault
 - i. Public Figure (Malice)
 - ii. Private Figure (Negligence)

B. Privacy Torts (CLIP) (CLP requires publication)

1. Commercial Appropriation
 - a. Newsworthiness Exception
2. Light (False)
 - a. Matter of Public Concern = Malice
3. Intrusion
4. Public Disclosure of Private Facts
 - a. Matter of Public Concern = Malice

C. Defenses to Defamation/Privacy Torts

1. Consent
2. Truth (if not matter of public concern)
3. Absolute Privilege
4. Qualified Privilege
 - a. Can be lost through abuse

III. NEGLIGENCE

A. Duty of Care

1. Foreseeable Plaintiff
 - a. Zone of Danger (Cardozo)
 - b. Duty to One is Duty to All (Andrews)
2. Standard of Care
 - a. Objective RPP Standard
 - i. Exceptions:
 1. Superior Knowledge
 2. Physical Characteristics
 - b. Child Standard
 - i. Exception:
 1. Adult Activities
 - c. Professional Standard
 - d. Common Carriers/Innkeepers Standard
 - e. Custom or Usage in Industry
 - f. Owners/Occupiers of Land Standard
 - i. Unknown Trespassers
 - ii. Known Trespassers
 - iii. Child Trespassers
 1. Attractive Nuisance Doctrine
 - iv. Licensees
 1. Exceeding the Scope
 - v. Invitees
 1. Exceeding the Scope
 - g. Affirmative Duty to Act
 - i. Undertaking of Aid
 1. Reasonable Rescuer RPP
 - ii. Creation of Peril
 - iii. Special Relationship
 - iv. Controlling 3dp
 - h. Statutory Standard of Care
 - i. Negligence Per Se

B. Breach of Duty

1. Violation of Statute (Negligence Per Se)
2. Res Ipsa Loquitur

C. Causation

1. Actual Cause

- a. But For Test
- b. Substantial Factor Test
- 2. Proximate Cause
 - a. Direct Causes
 - b. Indirect Causes
 - i. Intervening Causes
 - ii. Superseding Causes

- 2. Breach
 - a. Fault Must be Established
 - b. Intermediary's Due Care in Reasonable Inspection
- 3. Causation
 - a. Actual Cause
 - i. Defect Existed at Time Product Left Control
 - b. Proximate Cause
 - i. Scientifically Unknowable Risks
 - ii. Intermediary's Negligence ≠ Superseding Cause
- 4. Damages
 - a. Pure Economic Loss Not Recoverable
- 5. Defense
 - a. Contributory Negligence
 - b. Assumption of the Risk
 - c. Comparative Negligence

D. Damages (Actual)

- Nominal Damages Not Recoverable
- Duty to Mitigate
- Eggshell Plaintiff

E. NIED

- 1. Bystander Case

F. Defenses to Negligence

- 1. Contributory Negligence
- 2. Assumption of the Risk
- 3. Comparative Negligence

IV. STRICT LIABILITY

A. Animals

- 1. Trespassing Animals
- 2. Wild Animals
- 3. Domestic Animals w/ Known Dangerous Propensity

B. Abnormally Dangerous Activity

V. PRODUCTS LIABILITY

A. Theories

- 1. Strict Liability
- 2. Negligence
- 3. Implied Warranties
- 4. Express Warranties/Misrepresentation

B. Strict Products Liability (focus on product)

- 1. is a Merchant
- 2. Defective Products
 - a. Manufacturing Defect
 - i. Consumer Expectation Test
 - b. Design Defect
 - i. Feasible Alternative Test
 - 1. Safer Alternative Design w/ Comparable Cost & Purpose
 - c. Warning Defect
 - i. Unavoidably Unsafe Product
 - ii. Government Safety Standards
 - iii. Learned Intermediary (Drugs)
- 3. Causation
 - a. Actual Cause
 - i. Defect Existed at Time Product Left Control
 - b. Proximate Cause
 - i. Scientifically Unknowable Risks
 - ii. No Unforeseeable Misuse
- 4. Damages
 - a. Pure Economic Loss Not Recoverable
- 5. Defenses
 - a. Unforeseeable Misuse
 - b. Assumption of the Risk
 - c. Comparative Negligence

C. Negligent Products Liability (focus on conduct)

- 1. Duty of Care
 - a. Foreseeable Plaintiff
 - b. Standard of Care

D. Implied Warranties

- 1. Implied Warranty of Merchantability
- 2. Implied Warranty of Fitness for Particular Purpose

E. Express Warranties/Misrepresentation

VI. MISCELLANEOUS TORTS

- 1. Loss of Consortium (Wrongful Death)
- 2. Interference with Business Relations
- 3. Malicious Prosecution
- 4. Abuse of Process

VII. GENERAL CONSIDERATIONS

A. *Are there two or more* ?

- 1. Vicarious Liability
 - a. Respondeat Superior
 - i. Employer/Employee Relationship
 - ii. Tort Committed w/in Scope of Employment
 - 1. Frolic or Detour?
 - b. Independent Contractor
 - i. Inherently Dangerous Activity; or
 - ii. Nondelegable Duty
 - c. Other Relationships
 - i. Partnership/Joint Venture
 - ii. Owner of Car/Driver of Car
 - 1. Permissive Use Statute
 - 2. Negligent Entrustment
 - iii. Parent/Child
 - 1. Negligent Supervision
 - iv. Bailor/Bailee
 - v. Tavernkeeper/Patron
 - 1. Dramshop Act
- 2. Joint & Several Liability
 - a. Contribution (partial shifting of liability)
 - b. Indemnification (shifting of entire loss)
 - c. Satisfaction & Release

B. *Is* a family member, government, or charity?

- Tort Immunities
 - Intra-Family Tort Immunity
 - Family Members
 - Husband-Wife
 - Parent-Child
 - Governmental Immunities
 - Federal Government
 - Public Officials
 - Charitable Immunity (most JXs have abolished)

- I. Intentional Torts**
 - II. Defamation/Invasion of Privacy**
 - III. Negligence**
 - IV. Strict Liability**
 - V. Products Liability**
 - VI. General Considerations**
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I. Intentional Torts

- A. Assault
- B. Battery
- C. False Imprisonment
- D. IIED
- E. Trespass to Chattels/Conversion
- F. Trespass to Land/Nuisance
- G. Defenses – Consent, Defensive Force, Necessity

II. Defamation/Invasion of Privacy

- A. Defamation
 - 1. Defamatory Statement
 - 2. Of and Concerning the Plaintiff
 - 3. Publication
 - 4. Damages
 - 5. Defenses
 - 6. Constitutional Issues
 - a. Falsity
 - b. Fault
- B. Invasion of Privacy
 - 1. Misappropriation
 - 2. Intrusion
 - 3. False light
 - 4. Publication of private facts

III. Negligence

- A. Duty – foreseeable plaintiff, standard of care
- B. Breach of Duty
- C. Actual Cause
- D. Proximate Cause
- E. Damages
- F. Defenses – Contributory Negligence, Assumption of Risk, Comparative Negligence

IV. Strict Liability

- A. Animals
- B. Abnormally Dangerous (Ultra hazardous) Activities

V. Products Liability

- A. Strict Products Liability – Defective Product
- B. Negligence – Standard of Care
- C. Express Warranties/Implied Warranties
- D. Defenses

VI. General Considerations

- A. Vicarious Liability
- B. Joint Liability
- C. Wrongful Death
- D. Immunities

TORTS

<u>Torts Major Issue Checklist</u>	<u>10 Second Checklist</u>
Vicarious Liability	VL
Defamation	D
Privacy	P
Negligence	N
Products Liability	PL
Strict Liability	SL
Intentional Torts	IT
Misc. Tort	MT

Torts Major & Sub-issue Checklist

- I. Vicarious Liability
- II. Defamation
 - a. Common Law
 - b. Constitutional Defamation
- III. Privacy
 - a. Intrusion Upon Seclusion
 - b. Public Disclosure of Private Facts
 - c. False Light
 - d. Appropriation of Name/Likeness
- IV. Negligence
- V. Products Liability
 - a. Strict Products Liability
 - b. Negligence PL
 - c. Warranties
 - d. Misrepresentation
 - e. Intentional
- VI. Strict Liability
 - a. Ultra Hazardous
 - b. Wild Animals
- VII. Intentional Torts
 - a. Battery
 - b. Assault
 - c. Trespass to Land
 - d. Trespass to Chattel
 - e. Conversion
 - f. Intentional Infliction of Emotional Distress
 - g. False Imprisonment
- VIII. Misc. Torts
 - a. Litigation Torts
 - i. Malicious Prosecution/ Wrongful Civil Proceeding
 - ii. Abuse of Process
 - b. Economic Torts
 - i. Tortious Interference with Contract
 - c. Misrepresentation
 - i. Intentional
 - ii. Negligent
 - d. Nuisance
 - i. Public
 - ii. Private

Detailed Torts Outline:

I. Vicarious Liability (& Other General Considerations)

a. Vicarious Liability

i. Respondeat Superior

□ **Tip: Fault is a 2--Step Analysis:**

a. Step 1: employer/employee relationship

b. Step 2: tort committed w/in course & scope of employment

ii. Independent contractor

1. generally principal not liable except:

a. inherently dangerous activity or

b. non--delegable duty

iii. Partner or Joint Venture

iv. Driver of Automobile

v. Bailees

vi. Parent--Child

vii. Patron of Tavern

b. Joint and Several Liability

i. releases

ii. contribution

iii. indemnification

c. Survival Acts

d. Tort Immunities

II. Defamation

□ **Writing approach:** See attached sample template

a. Common Law

i. Defamatory Statement: it is a statement that adversely affects the plaintiff's reputation within the community.

ii. Of and Concerning Plaintiff: this element is satisfied if a reasonable person understood that the statement referred to the plaintiff.

iii. Publication to 3rd Party: the statement must have been made to one who understood the statement.

iv. Damages: injury to reputation is presumed if it is libel or if slander per se, otherwise special damages are required to be shown.

b. Constitutional Defamation

i. Threshold inquiry: Is the statement a matter of public concern?

1. **Tip:** When in doubt, raise Falsity and Fault.
2. **Tip:** If the statement concerns a public figure, especially a politician, argue the statement is a MOPC based on plaintiff's status.

ii. Falsity

1. BOP is on the plaintiff to prove falsity of the statement.

iii. Fault

1. **Tip: Fault is a 2--Step Analysis:**

a. Step 1: Public or Private Plaintiff?

b. Step 2: Standard

- i. Private plaintiff Gertz v. Welch negligence standard. If private person can show malice, the he/she can get punitive damages
- ii. Public Figure New York Times Malice standard: defendant acted with knowledge of the falsity or with reckless disregard for the truth.

c. Defenses & Privileges

i. Truth

ii. Absolute Privilege

iii. Qualified Privilege

III. Privacy

a. Intrusion Upon Seclusion

- i. **Issue Spotting Tip:** IUS is usually also raised w/ PDPF – check the facts

b. Public Disclosure of Private Facts

- i. **Issue Spotting Tip:** IUS is usually also raised w/ PDPF – check the facts

c. False Light

- i. **Issue Spotting Tip:** Defamation & False Light are raised by the same facts

d. Appropriation of Name/Likeness

IV. Negligence

Writing Approach: See negligence essay writing template;; follow mini--IRAC approach

- a. Rule: Negligence requires a showing of a duty, breach, actual & proximate causation, & damages.

i. Duty of Care

1. Tip: 2--Step Writing Approach:
 - a. Paragraph 1-- Foreseeable Plaintiff
 - b. Paragraph 2-- Standard of Care
2. Standard Duty Issues:
 - a. Children: must be like age & experience for 5--18 UNLESS it's an adult activity
 - b. Custom
 - c. Experts
 - d. Common Carrier
 - e. Adults with disabilities: with like diagnosis, except with mental retardation & mental illness which has no allowance
3. Special Duty Rules:
 - a. Landowner
 - i. Trespasser
 1. No duty for undiscovered defect
 2. Duty to post warnings of known dangers
 - ii. Child Trespasser
 1. Attractive Nuisance Doctrine
 - a. artificial condition
 - b. know about possible trespassers
 - c. unreasonable risk that a child cannot appreciate
 - d. balancing of the utility versus the risks.)
 - iii. Licensee
 1. Duty to warn or make safe any known dangers
 - iv. Invitee
 1. Duty to make reasonable inspection and warn of all known dangers
4. Statutory Standard of Care/ Negligence Per Se:
 - a. D is excused from violation of statute if compliance with statute would have resulted in a harm greater than the harm produced by the violation or would have been impossible.
 - b. In order for P to sue under the statutory set forth standard of care, he must show 2 things:
 - i. 1.) P was within the protected class of persons intended to be protected and

ii. 2.) that the statute was intended to protect against the type of injury the statute was designed to protect

c. Tip: 2--Step Writing Approach:

i. Paragraph 1: P in protected class?

ii. Paragraph 2: P had a protected injury?

5. No duty to rescues UNLESS:

a. Special relationship

b. Statutorily required duty

c. Created the D's peril

d. Instrumentality is under D's control

e. Once you start to help, cannot leave P in worse off position (voluntary undertaking)

ii. Breach

1. Breach occurs when defendant falls below the applicable standard of care.

a. Analysis Tip:

i. Step 1: Identify what a RPP would have done.

ii. Step 2: Compare & contrast to what the D did in fact do.

2. Violation of Statute

3. Res Ipsa Loquitur

iii. Actual Causation

1. "But For" test

iv. Proximate Causation

1. PC 2--Step Analysis/Writing Approach:

a. Step 1: Foreseeable Injury?

i. Direct cause case: PC has to do with whether the injury was foreseeable (and not whether the plaintiff was foreseeable.)

ii. Indirect cause case

iii. Watch out for Eggshell/thin skull plaintiff rule

b. Step 2: Any intervening or superseding causes?

v. Damages

1. This element is about the actual injury – physical, property, economic, emotional

2. NIED

b. Defenses

i. Contributory Negligence

1. **Issue Spotting Tip:** If you raise Contrib. Neg, also raise AR

ii. Comparative Negligence

1. **Tip:** To save time you may raise Contrib. Neg. & Comp. Neg. under the same heading. Contrib. Neg. = CL & Comp. Neg. = modern view.

iii. Assumption of the Risk

1. **Issue Spotting Tip:** If you raise Contrib. Neg, also raise AR

V. **Products Liability** (5 theories)

Writing approach: See attached sample template for SPL & NPL

a. Strict Products Liability

- i. See attached products liability sample template. Always follow the template.
- ii. **Issue Spotting Tip:** Always raise both SPL and NPL for PL essays, unless directed otherwise in the essay.

b. Negligence

- i. See attached products liability sample template. Always follow the template.

c. Warranties

- i. Implied warranty of merchantability or fitness for ordinary purpose
- ii. Implied warranty of fitness for a particular purpose
- iii. Express warranty
 1. An affirmation of fact or promise concerning the goods that becomes part of the basis of the bargain creates an express warranty.
 2. **Issue Spotting Tip:** Same facts that give rise to Express Warranty may also give rise to Misrepresentation theory.

d. Misrepresentation

- i. A seller will be liable for misrepresentations of facts concerning a product where the statement was of a material fact concerning quality or uses of goods (mere puffery insufficient); and the seller intended to induce reliance by the buyer in a particular transaction.
- ii. **Issue Spotting Tip:** Same facts that give rise to Express Warranty may also give rise to Misrepresentation theory.

e. Intent Theory

- i. Defendant is liable if he intended the consequences or knew that they were substantially certain to occur.

VI. **Strict Liability**

a. Ultra Hazardous

□ **Writing Approach Tip**: Follow mini--IRAC writing approach

- i. Activity involves serious risk of harm
- ii. Activity cannot be performed without risk of serious harm regardless of due care
- iii. Activity is not common in particular community.

b. Wild Animals

VII. Intentional Torts

a. Battery: Battery requires that D intentional cause a harmful or offensive contact with plaintiff's person

b. Assault: Assault requires that D intentionally cause a reasonable apprehension by plaintiff of an immediate harmful or offensive contact with his/her person.

c. Trespass to Land: Trespass to Land requires D intentionally cause a physical invasion of plaintiff's land.

i. Defense: Necessity

1. If private necessity, defendant pays for actual damages.
2. If public necessity, defendant does not pay for actual damages.

d. Trespass to Chattel: Trespass to Chattel requires D intentionally cause some damage to plaintiff's personal property interest

i. □ **Issue Spotting Tip**: Same facts give rise to Trespass to Chattel & Conversion

e. Conversion: Conversion requires D intentionally cause great (c) damage to plaintiff's personal property interest

i. □ **Issue Spotting Tip**: Same facts give rise to Trespass to Chattel & Conversion

f. Intentional Infliction of Emotional Distress: IIED requires a showing the D intentionally caused P's injury using outrageous conduct causing severe emotional distress

i. □ **Issue Spotting Tip**: If you have Defamation & False Light, also consider IIED.

g. False Imprisonment: False Imprisonment requires an intentional act or omission confining the plaintiff to a bounded area, with no reasonable means of escape, and causation by the Defendant.

i. □ **Writing Approach Tip**: If a major issue (lot of facts), mini--IRAC elements

ii. Shopkeeper's Privilege

1. To assert the privilege there must have been reasonable grounds to detain, only reasonable force was used to detain, person can only be detained for reasonable amount of time so that shopkeeper can conduct a reasonable investigation.
2. □ **Memory Tip**: What do you guy in a shop? A GIFT. "**GIFT** shop": G= grounds, I = investigation, F = force, and T – time.

h. Defenses & Privileges to Intentional Torts

i. Consent

a. Was the privilege available on these facts?

(1) Did plaintiff have capacity?

(2) Was consent expressly given?

(3) Implied by custom and usage or plaintiff's conduct?

b. If yes, did defendant stay within scope?

ii. Self--Defense: Requires a reasonable belief that tort is being or about to be committed on defendant

iii. Defense of Others: Requires a tort is in fact be committed or about to be committed on third person

iv. Defense of Property: Requires a reasonable belief that a tort is being or about to be committed on property

VIII. Miscellaneous Torts

a. Litigation Torts

i. Malicious Prosecution/ Wrongful Civil Proceeding

1. **Writing Approach Tip**: If major issue, mini--IRAC elements

2. **Issue Spotting Tip**: Unless the question only asks for MP/WCP, then also always raise Abuse of Process

ii. Abuse of Process

1. **Issue Spotting Tip**: Unless the question only asks for AOP, then also always raise Malicious Prosecution/Wrongful Civil Proceeding

b. Economic Torts

i. Tortious Interference with Contract

ii. Interference with prospective advantage

iii. Trade Libel

1. **Issue Spotting Tip**: If Trade Libel is an issue, also consider Permanent Injunction.

c. Misrepresentation

i. Intentional

ii. Negligent

d. Nuisance

i. Public

ii. Private

iii. **Issue Spotting Tip**: If Nuisance is an issue, also consider Permanent Injunction

Negligence Sample Template

How to organize the issue:

- Mini--IRAC the elements when negligence is a big item issue.

Negligence

Negligence requires a showing of a duty, breach, actual and proximate cause, and damages.

Duty

Foreseeable Plaintiff

A duty is owed to all foreseeable plaintiffs. Under the majority rule a foreseeable plaintiff is one who is in the foreseeable zone of danger. However, under the minority view a defendant owes a duty of care to anyone who suffers injuries as a proximate result of his breach of duty to someone. Here, ... (insert analysis).

Standard of Care: Reasonably Prudent Person

The standard of care owed is typically that of a reasonably prudent person under the same or similar circumstances. Here, ... (insert analysis).

Standard of Care: Negligence Per Se (raise only if it applies)

Alternatively, a statute could set forth the applicable standard of care. In order for an individual to be held to the standard of care set forth in a statute instead of the general duty owed, the plaintiff must prove that she is in within the class of persons the statute is designed to protect, and that she suffered the type of injury the statute seeks to protect against.

Here, the statute provides...(insert analysis for “protected class)

In the event Patron can establish that she is within the protected class, she must also prove that the injury she sustained was the type that the statute is designed to protect against. Here, ... (insert analysis for “protected type of injury).

In sum,...(insert conclusion) Breach

A breach occurs when the defendant falls below the applicable standard of care. A reasonably prudent _____ would have _____. Here, ... (insert analysis for what the defendant did in fact do). Therefore,...(insert conclusion)

Actual Cause

The defendant is the actual cause of plaintiff’s injuries if the injury would not have occurred but for the act. Here, but for _____, Plaintiff would not have suffered _____. Therefore,...(insert conclusion).

Proximate Cause

In addition to being a cause in fact, the defendant's conduct must also be the proximate cause of the injury. The defendant is liable for all harmful results that are the normal incidents of and within the increased risk caused by his acts. Here, the _____ (injury) suffered by the plaintiff was/was not a foreseeable result from defendant's action of _____ because _____.

However, in the event plaintiff can prove her injuries were a foreseeable result of defendant's actions, there must not have been any intervening and superseding cause. Where an intervening force is an unforeseeable crime or intentional tort of a third party;; it will be deemed a superseding force that cuts off defendant's liability. Here,...(insert analysis).

In conclusion,...(insert conclusion).

Damages

Plaintiff must have suffered sufficient recoverable damages. Here,...(insert analysis and then conclusion).

Defense: Contributory Negligence

At common law, plaintiff's contributory negligence barred his right to recover even if the degree of defendant's negligence was much greater than that of the plaintiff. Modernly, contributory negligence has been almost abolished and most jurisdictions follow either partial or pure comparative negligence. Here,...(insert analysis).

In conclusion,...(insert conclusion).

Defense: Assumption of the Risk

Assumption of the risk is a complete bar to recovery. The defense requires that plaintiff voluntarily and knowingly assumed the risk. Here, ...(insert analysis).

In conclusion,...(insert conclusion).

Defamation Sample Template

How to organize the issue:

- Mini--IRAC the elements when defamation is a big item issue.

Defamation

Defamation is a defamatory statement of or concerning the P, published to a third party that causes damages to the P.

Defamatory Statement

A defamatory statement is one that tends to lower P's reputation within the community. Here, the D stated that P was a drug dealer. Accusing one of being a drug dealer would tend to lower one's reputation w/in the community because drug dealing is a crime. Thus, it's a defamatory statement.

Of or Concerning the P

A reasonable person must have understood that the statement was of or concerning the P. Here, D specifically used P's first and last name in the statement. Thus, this element is met.

Published to a 3rd Party

The statement must have been published to a 3rd party who understood the statement. Here, (insert analysis and then conclusion)

Damages

General damages are presumed for libel per se. Libel is written defamation. Here,...

(With Constitutional Defamation you can add the elements of Fault and Falsity after you analyze common law defamation.)

Constitutional Defamation/Matter of Public Concern

Whenever the statement concerns a matter of public concern, the plaintiff must also prove the additional elements of fault and falsity. Here, arguably the matter is one of public concern as it deals with the avian influenza. Thus, P will have to show both fault and falsity.

Falsity

Plaintiff is required to prove falsity of the statement. Analysis...Conclusion.

Fault

The type of fault that plaintiff must prove depends on whether plaintiff is a public or private figure. A public figure is one who achieves fame or notoriety or is in government office.

If plaintiff is a public figure, he must prove *New York Times* malice which requires a showing of knowledge that the statement was false, or reckless disregard as to whether it was false. This is a subjective test. If the plaintiff is a private figure then he must prove *Gertz* negligence which means he

need only show negligence regarding the falsity of the statement if that statement involves a matter of public concern. Where defendant is only negligent, only actual injury damages are recoverable. However, if a private plaintiff can show malice on the part of the defendant then damages may be presumed and plaintiff may be able to recover punitive damages.

Here ...

Defenses/Privileges

(Finally, raise defenses and/or privileges to defamation and do so right after the analysis of defamation elements. Only raise those that are at issue. Make sure you head note and IRAC one defense/privilege at a time. Defenses in tort for the most part are tort specific.)

Consent

Consent is a complete defense. Here,...

Truth

Where plaintiff does not need to prove the element of falsity then defendant may prove truth as a complete defense. Here,....

Absolute Privilege

Defendant may be protected by an absolute privilege for the following: remarks made during judicial proceedings, by legislators in debate, by federal executive officials, in "compelled" broadcasts, and between spouses. An absolute privilege can never be lost.

Qualified Privilege

Speakers may have a qualified privilege for the following: reports of official proceedings;; statements in the interest of the publisher such as defense of one's actions, property, or reputation;; statements in the interest of the recipient;; and statements in the common interest of the publisher and recipient.

This privilege may be lost if (i) the statement is not within the scope of the privilege, or (ii) it is shown that the speaker acted with malice. Defendant bears the burden of proving that a privilege exists.

Products Liability
Sample Template for Strict & Negligence Products Liability

Check List/Attack Plan:

- 1.) Strict Products Liability (“SPL”)
- 2.) Negligence (“NPL”)
- 3.) Warranties
 - a.) Express Warranty
 - b.) Implied Warranties
 - i.) of Merchantability
 - ii.) of Fitness
- 4.) Misrepresentation
- 5.) Intent

Organization Tips

If SPL and NPL are both issues-- then raise SPL first because it’s the harder to prove and requires more analysis. Then raise NPL, mini--IRAC the issue, and you can refer to the above analysis for elements that have the same analysis as SPL (which should be actual & proximate cause & damages).

Strict Products Liability

A commercial seller who places a product in the stream of commerce may be strictly liable in tort for injuries caused by a defective product. In order to prevail in c/a for SPL, Plaintiff must show a strict duty owed by a commercial supplier of a product, breach, actual and proximate causation, and damages.

Duty

A commercial seller has a strict duty to supply safe products. Here (now establish that Def is a commercial seller who placed goods in the stream of commerce) (notes-- casual seller will not be held strictly liable. Also, SPL only applies to products and NOT services).

Whether or not contractual privity exists between the plaintiff and defendant will not prevent plaintiff from recovering because any foreseeable plaintiff, including a bystander, can sue any commercial supplier in the chain of distribution regardless of a contractual relationship between them.

Breach

A breach of the strict duty can be shown by proving there was a manufacturing defect, design defect, or inadequate warning (next head note and IRAC the type of defect(s) at issue. There can be more than one argument but make sure to only discuss one at a time).

Manufacturing Defect

If a product emerges from manufacturing different and more dangerous than the products made properly, it has a manufacturing defect.

Here,...

Design Defect

For a design defect, plaintiff will use the Feasible Alternative Test or Consumer Expectation Test to establish the existence of a design defect. Under Feasible Alternative Test, plaintiff must show that the defendant could have made the product safer, without serious impact on the product's price or utility. Here,...

The consumer expectation test says defendant will be liable if plaintiff can show that the product failed to perform safely as an ordinary consumer would expect (defendant must anticipate reasonable use).

Inadequate Warnings

A product may be defective as a result of the manufacturer's failure to give adequate warnings as to the risk involved in using the product. For liability to attach, the danger must not be apparent to users. Here,...

Government Safety Standards

A product's noncompliance with government safety standards establishes that it is defective, while compliance with safety standards is evidence-- but not conclusive-- that the product is not defective.

Here,...

Actual Cause

To show actual cause, plaintiff must show that the defect existed when the product left defendant's control. Here,...

Proximate Cause

The type of injury must have been foreseeable at the time the product was placed in the stream of commerce. Defendant will not be held liable for dangers not foreseeable at the time of marketing. Here,...

Damages

Here,...

In conclusion, ...

Assumption of the Risk

Plaintiff may be denied recovery if she assumed the risk of any damage caused by defendant's act. Plaintiff must have known of the risk and voluntarily proceeded in the face of the risk. Here, ...

Contributory Negligence

At common law, plaintiff's contributory negligence barred his right to recover even if the degree of defendant's negligence was much greater than that of the plaintiff. Modernly, contributory negligence

has been almost abolished and most jurisdictions follow either partial or pure comparative negligence. However, contributory negligence is not a recognized defense to strict products liability in a majority of jurisdictions.

Negligence Products Liability

In order for plaintiff to prevail in a cause of action for negligence, plaintiff must show duty, breach, actual and proximate causation, and damages.

Duty

A duty of care is owed to all foreseeable plaintiffs. A foreseeable plaintiff is anyone in the zone of danger (majority view). Users of products, bystanders, and consumers of the product are all foreseeable Ps. Privity with the defendant is no longer required. Here,...

Foreseeable plaintiffs are owed a standard of care of that of a reasonably prudent manufacturing company. Here, the requisite standard of care is that of a reasonably prudent (*fill in the blank , ex: manufacturing company*).

Breach

Breach is shown by negligent conduct of defendant leading to the supplying of a defective product. Here,...

Actual Causation

For the same reasons set forth above under actual cause for SPL, actual cause exists.

Proximate Causation

Use above rule and analysis. Add: A wholesaler's/intermediary negligent failure to discover a defect does not supersede the original manufacturer's negligence unless the wholesaler's conduct exceeds ordinary foreseeable negligence. Here...

Damages

Physical or property damages must be shown to recover.

Contributory Negligence

(You can just reference your above analysis for contributory negligence)

Assumption of the Risk

(You can just reference your above analysis for assumption of the risk)

TORTS QUESTION #1

Transco, a common carrier, hauls toxic chemicals by train through an area where Paul operates a commercial greenhouse. Concerned about the risks if there were spillage from one of the boxcars containing the chemicals, Transco hired Diana, a consultant, to assess the risk. Diana concluded there was little or no risk to nearby property owners if any such spillage occurred, and she so advised Transco.

Thereafter, one of Transco's trains containing a known toxic chemical derailed because the train engineer suffered a heart attack while operating the engine. The engineer was obese and, five years earlier, had taken a leave of absence because of a mild heart attack he had suffered. The derailment caused chemical spillage near Paul's property, and Paul closed his greenhouse business out of fear that the spillage would damage his greenhouse plants and cause him to get cancer. In fact, no lasting damage resulted from the spill.

Six months after the accident, Paul moved back into his previously vacated premises and began operating the greenhouse again. Paul's fear for his health from possible exposure to the chemical continued, however, and subsequently he suffered severe anxiety and depression because of this fear.

On what theory or theories, if any, can Paul recover damages from, and what defenses may reasonably be raised by:

1. Transco? Discuss.
2. Diana? Discuss.

TORTS QUESTION #1 OUTLINE

1. Paul v. Transco

Vicarious Liability

- Employer – employee relationship: Engineer works for Transco
- Scope of employment: Engineer was on duty while operating the train

Negligence

(You should mini--IRAC this issue)

- Duty
 - o Foreseeable plaintiff: Paul’s commercial green house was along the train route.
 - o Standard of care: A reasonable prudent train company. Not a “common carrier” in the legal sense because does not carry passengers.
- Breach
 - o Engineer was known to be obese and had suffered a mild heart attack 5 years ago. Would a reasonably prudent train company hire a train engineer to haul toxic chemicals who had a known prior history of heart attacks? Debatable issue.
 - o Res ipsa loquitur: trains normally do not derail without negligence. Transco had exclusive control of train and Paul was not at fault.
- Actual Cause
 - o But for Transco’s negligence, Paul would not have closed his greenhouse and suffered health problems.
- Proximate cause
 - o Heart attack intervening cause?
 - o Business interruption foreseeable?
 - o Anxiety and depression foreseeable?
- Damages
 - o No lasting damage
 - o Fear of cancer
 - o Business loss
 - o Suffered severe anxiety and depression

Defenses to Negligence

- Contributory Negligence/Comparative Fault
- Assumption of Risk

Strict Liability - - Abnormally Dangerous Activity

- 3 requirements:
 - o Risk of serious harm -- toxic chemicals;; but Diana’s conclusion was little or no risk.
 - o Activity cannot be performed without risk of serious harm no matter how much care is taken -- toxic chemicals;; Diana’s conclusion was there was little to no risk involved.
 - o Activity is not commonly engaged in by community – transports toxic waste.
- Causation: same as negligence above
- Damages -- same as negligence below

-- Defense -- Assumption of risk – rule & analysis is same as above

Minor Issues you may also consider raising, but are not essential for passing or receiving a good score:

- Negligent Infliction of Emotional Distress?
- Trespass to Land?
- Nuisance?

2. Paul v. Diana

Negligence

- Duty
 - Foreseeable plaintiff?
 - Standard of care: A reasonably prudent toxic chemical consultant.
- Breach
 - Did Diana fall below the applicable standard of care?
- Actual Cause
 - But for Diana's negligence, Transco might not have transported the chemicals and thus Paul would not have closed his greenhouse and suffered health problems. This seems to be somewhat of a stretch.
- Proximate cause
 - Heart attack intervening cause? Business interruption foreseeable? Anxiety and depression foreseeable?
- Damages
 - No lasting damage
 - Business loss
 - Suffered severe anxiety and depression

Indemnity and Contribution

- Diana would seek from Transco if she is found liable.

TORTS QUESTION #3

(July 2006 Question 1)

After paying for his gasoline at Delta Gas, Paul decided to buy two 75-cent candy bars. The Delta Gas store clerk, Clerk, was talking on the telephone, so Paul tossed \$1.50 on the counter, pocketed the candy, and headed out. Clerk saw Paul pocket the candy, but had not seen Paul toss down the money. Clerk yelled, "Come back here, thief!" Paul said, "I paid. Look on the counter." Clerk replied, "I've got your license number, and I'm going to call the cops." Paul stopped. He did not want trouble with the police. Clerk told Paul to follow him into the back room to wait for Mark, the store manager, and Paul complied. Clerk closed, but did not lock, the only door to the windowless back room.

Clerk paged Mark, who arrived approximately 25 minutes later and found Paul unconscious in the back room as a result of carbon monoxide poisoning. Mark had been running the engine of his personal truck in the garage adjacent to the back room. When he left to run an errand, he closed the garage, forgot to shut off the engine, and highly toxic carbon monoxide from the exhaust of the running truck had leaked into the seldom used back room. Mark attributed his forgetfulness to his medication, which is known to impair short-term memory.

Paul survived but continues to suffer headaches as a result of the carbon monoxide poisoning. He recalls that, while in the back room, he heard a running engine and felt ill before passing out.

A state statute provides: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the ignition, setting the brake thereon and, when standing upon any perceptible grade, turning the front wheels to the curb or side of the highway."

1. Can Paul maintain tort claims against (a) Clerk for false imprisonment and (b) Mark for negligence? Discuss.
2. Is Delta Gas liable for the acts of (a) Clerk and (b) Mark? Discuss.

TORTS QUESTION #3 OUTLINE

Organizational notes:

- 1.) Notice how there is an “and” in both calls clearly indicating that there are actually 2 parts to each call.
- 2.) Even if you had not recognized the “and” as being a clear indication that there were 2 parts to each call, you still should have noticed that there are 2 different defendants in both calls.
Remember that you generally should not combine the plaintiff’s cause of action against different defendants as liability for each defendant is usually not the same.
- 3.) Remember to always raise defenses to major torts. Here, 2 calls are mentioned in call 1.
Since these are the only 2 calls for call 1 and after looking at the number of facts going to each you will need to raise specific defenses for each.

(a) Paul v. Clerk

False Imprisonment

Plaintiff must prove that defendant intentionally confined Paul to a bounded area with no reasonable means of escape and causation.

- Intent: P was told to follow Clerk and wait in back room until Mark arrived.
Clerk then closed the door which evidences intent to confine. Clerk’s intent to confine is also evidenced by the fact he threatened to call the police if P left the gas station.
- Confinement to a bounded area: back room with the door closed
- No reasonable means of escape: only door unlocked. No windows;; no apparent way for Paul to get out except by going by Clerk who had already threatened to call the police if he left.
- Causation – Clerk threatened Paul he would call cops and had Paul wait in room.
Paul stayed for 25 min. until Mark arrived.

Defenses to False Imprisonment

Shopkeeper’s Privilege (remember GIFT shop)

- o G: Grounds for detention must be reasonable
- o I: Investigation-- based on a reasonable investigation
- o F: Force-- used reasonable force
- o T: Time-- can only detain for a reasonable period of time.
- Grounds: reasonable belief that Paul stole? Clerk didn’t see Paul pay, saw him pocket the candy, leaving, and called him a thief.
- Investigation: Was any investigation done?
- Force: Told to stay in waiting room or Clerk would call police.
- Time: 25 minutes

Consent

- Paul complied but didn’t want trouble with police.
- Paul didn’t consent to be confined for 25 minutes or to be held up in a room with carbon monoxide poisoning.

(b) Paul v. Mark

Negligence

Plaintiff must show duty, breach, actual & proximate causation, and damages. (tip: you should mini-- irac this issue)

- Duty
 - Foreseeable Plaintiff-- Plaintiff was a patron and in the adjacent room to the garage where Mark worked.
 - Standard of Care:
 - Reasonably prudent person
 - Business Invitee standard
 - Statutory set standard of care
- Breach
 - Reasonably prudent person standard-- a RPP would not leave an unattended engine running. A RPP who took medications that caused forgetfulness would not engage in an activity that would require him to remember things-- such as turning off a car in a garage so that the room does not fill up with carbon monoxide.
 - Business Invitee standard-- Mark did not make the premises safe or warn of a latent defect or issue.
 - Statutory Standard of Care/Negligence Per Se
 - Was Paul in the class of people that the statute was intended to protect? Paul will argue that statute is designed to protect against carbon monoxide poisoning. Mark will argue that the statute is intended to protect pedestrians and others on the road and to those who are in a room.
 - Was Paul's injury the type to be prevented? Mark will argue it is to prevent cars from running or rolling away while unattended. The injury to be prevented is hitting or running over someone.
- Actual Cause
 - But for Mark leaving the truck running, Paul would not have been injured. In the alternative, Mark's negligence was a substantial factor in causing Paul's injury.
- Proximate cause
 - Intervening act of Clerk? Intentional acts by 3rd parties are usually not foreseeable however, foreseeable that employee would detain a suspected shoplifter
 - Were Paul's injuries foreseeable?
 - Foreseeable a person would suffer injury in a seldom used room?
 - Foreseeable Paul would suffer headaches from carbon monoxide poisoning, especially when he was in a windowless room adjacent to the garage.
- Damages
 - Paul was unconscious when found, suffers headaches from carbon monoxide poisoning

Contributory Negligence/ Comparative Fault

- Mark would argue Paul did not conform to a standard of care for his own safety by staying in the small room. However, there is no evidence Paul could smell the carbon monoxide. Further, he didn't know he could escape.

Assumption of Risk

- Would require Paul knew of the risk, which he did not and he did not voluntarily assume it

2. Delta Gas – Vicarious liability

Respondeat Superior

RS holds the employer liable for acts of its employees done in the scope of employment.

A. Clerk

- Employer-- employee relationship? Clerk was working for Delta at the time he put Paul in the back room.
- Within Scope? Presumably Paul was acting within the scope because as a clerk, he should detain those who steal. Further, he had Paul wait for the manager. However, Clerk was on the phone and Delta would claim this was not within the scope

B. Mark

- Employer-- employee relationship? Mark is the store manager.
- Within Scope?
- Mark had left to run an errand. If the errand was personal, Delta would argue he was not within the scope. However, if the errand was a minor deviation, Delta would be vicariously liable. Mark had left the engine of his personal truck running, which might indicate he was not working. However, Clerk had Paul wait for Mark, so likely Mark was at work. As the manager, he would handle thefts.

TORTS QUESTION #4

The four--story law school building of University, a private institution open to the public, had a defective elevator which frequently stopped between floors. The elevator had an alarm button which, if pressed, would ring a bell in the hallway and thus alert persons in the building to the fact that the elevator had stopped between floors with passengers inside it. The defective condition did not create any danger that the elevator might fall or otherwise physically injure any passenger.

Elco, an elevator maintenance company, had a contract with University to inspect, service, and maintain the elevator.

One night, Prof, a law teacher, and his secretary, Prim, had been working late in Prof's office on the fourth floor of the building on an overdue manuscript. They entered the elevator to leave at about 11:20 p.m. The official closing hour for the building was 11:00 p.m., but there were exit doors from the building which could be opened from the inside. Both Prof and Prim knew that the elevator frequently stopped between floors.

The elevator stopped between the second and third floors. Prof pressed the alarm button and the bell could be heard ringing in the hallway. Smith, a law student, was the only other person still in the building. He heard the alarm bell and realized that someone was trapped in the elevator. He thought this was very funny and he deliberately did not call the campus maintenance staff.

Prof and Prim were not discovered and released until 8:00 a.m. the next day.

Prof suffered from high blood pressure. This condition and his fright at being confined in the elevator caused him to sustain a heart attack after two hours in the elevator.

Prim suffered severe emotional distress due to being confined in the elevator and her fear that Prof was dying. She was subsequently embarrassed and humiliated by remarks of students who suggested that perhaps some amorous activity in the elevator might have caused Prof's heart attack.

What rights do Prof and Prim each have against:

- (a) Smith?
- (b) Elco?
- (c) University?

(Sample answer is provided 2 pages down)

TORTS QUESTION #4
SAMPLE ANSWER

(a) Prof and Prim v. Smith

Negligence

Negligence is the breach of a duty of care, which is the actual and proximate cause of the plaintiff's injuries.

Duty

In general there is no affirmative duty to act for the benefit of others. However, once a person acts for the benefit of another, a duty is owed only to foreseeable plaintiffs. Furthermore, a duty may be imposed if a person's negligence places another in a position of peril, or if there is a special relationship between the parties.

Although Smith could have helped Prof and Prim by calling the campus maintenance staff, Smith as a mere passerby had no affirmative duty to act for Prof and Prim's benefit. Since Smith did not engage in any activity relating to the elevator's repair or maintenance, nor was there any special relationship between the parties, Smith owed no duty to the plaintiffs.

False Imprisonment

In order for Prof and Prim to successfully assert a cause of action for false imprisonment, they must prove: 1) an act or omission to act on the part of the defendant that confines or restrains the plaintiff to a bounded area, 2) intent on the part of the defendant to confine or restrain plaintiff, and 3) causation.

Although physical confinement occurred as a result of the plaintiffs being trapped in the elevator due to the elevator's defective condition, the plaintiffs' confinement was not due to an intentional act or omission to act of Smith. The plaintiffs were initially trapped, and thus confined, as a direct result of the defective elevator, regardless of Smith's inaction to assist in their rescue. Smith just exacerbated the situation by failing to help the plaintiffs.

However, failing to provide a means of escape may evidence confinement. Smith did not provide a means of escape, but he also did not owe an affirmative duty to take steps to release the plaintiffs. Since Smith was the only other person in the building it was impossible to leave without his assistance, however, the plaintiffs did not lawfully come under Smith's control and there was no understanding between the parties that assistance would be forthcoming. It is also a stretch to suggest that Smith's humorous take on the situation and his deliberate failure to call the campus maintenance staff rose to the level of an intentional act. The fact that someone was trapped in the elevator was very funny to Smith, but it did not appear that he intended to cause a confinement of the plaintiffs.

(b) Prof and Prim v. Elco

Negligence

See rule above.

Duty

The contract between Elco and University to inspect, service, and maintain the elevator may give rise to a legal duty owed by Elco to the plaintiffs. If Elco never began to perform its maintenance contract, its conduct would be called nonfeasance, and there would be no tort duty of care owed to the plaintiffs by Elco. Only University would have recourse for Elco's inaction based on a breach of contract claim. The elevator frequently stopped between floors and needed a maintenance worker to start it again; however, the act of restarting the elevator would not transform nonfeasance into misfeasance. If Elco committed misfeasance by attempting to fix the defect, failure to perform the repairs with due care may give rise to the violation of a legal duty.

Standard of Care

Elco will be held to the standard of care of that a reasonably prudent elevator maintenance company.

Breach of Duty

Where the defendant's conduct falls short of that level required by the applicable standard of care owed to the plaintiff, the defendant has breached its duty. Once again, if Elco committed misfeasance by attempting to fix the defect, failure to perform the repairs with due care would be a breach of its duty to the plaintiffs.

Actual Causation

An act or omission to act is the cause in fact of an injury when the injury would not have occurred "but for" the act.

"But for" Elco's possible misfeasance in fixing the elevator defect, the plaintiffs would not have been trapped in the elevator. Elco may argue that Smith was the actual cause of Prof and Prim's injuries. Not only did Smith regard the plaintiffs' predicament as funny, he failed to call the campus maintenance staff, and made no attempts to rescue the plaintiffs. However, Smith's failure to rescue the plaintiffs will not break the chain of causation.

Proximate Causation

With respect to proximate causation, one must look to whether or not it was foreseeable that the plaintiffs would have been injured due to Elco's possible misfeasance in fixing the elevator defect.

The heart attack suffered by Prof appears to be a foreseeable consequence of being trapped in an elevator late at night. Since Elco, as the defendant, takes its victim, Prof, as it finds him, Prof's pre-existing high blood pressure will not break the chain of causation, nor relieve Elco of liability.

Similarly, Prim's severe emotional distress due to being confined in the elevator and her fear that Prof was dying should not affect the chain of causation. Prim's embarrassment

and humiliation due to remarks of students who suggested that perhaps some amorous activity in the elevator might have caused Prof's heart attacks does not appear to be a foreseeable consequence of Elco's actions, and thus, liability would not attach for that injury. Even if Smith had rescued the plaintiffs or alerted the proper parties to the plaintiffs' predicament, the plaintiffs' injuries, with the exception of Prim's humiliation and embarrassment, were a foreseeable consequence of Elco's failure to repair the elevator.

Damages

Damages must be sustained to the plaintiffs' "person or property." There must be actual harm or injury. Here, Prof's damages would be medical expenses and economic losses incurred as a result of having the heart attack, plus pain and suffering. However, Prim's pure emotional distress damages are problematic.

Under the cause of action, Negligent Infliction of Emotional Distress (NIED), states vary as to whether or not a plaintiff who suffers pure emotional harm, exclusive of physical injury, should be allowed to recover. Although Prim was in the "zone of danger," and feared for her own safety, some jurisdictions would bar recovery in the absence of physical injury. Other jurisdictions may allow Prim to recover, even if she did not suffer physical harm and was not in the zone of danger.

Defenses

Contributory Negligence

Contributory negligence is negligence on the part of the plaintiff that contributes to her injuries. At common law, contributory negligence completely barred a plaintiff's right to recovery.

Elco may claim that the plaintiffs were contributorily negligent in using the elevator at 11:20 p.m. after the law school building was officially closed at 11:00 p.m. Moreover, both plaintiffs were fully apprised of the defective condition. Although the alarm was installed as a prophylactic measure specifically to avoid the situation created by the elevator's defective condition, the likelihood of anyone hearing the alarm after closing hours was minimal and appears to be further evidence of the plaintiffs' negligence.

In a comparative negligence jurisdiction, the apportionment of damages would be according to fault; therefore, the plaintiffs' negligence would not be a complete bar to their recovery.

Assumption of the Risk

An additional defense may be an implied assumption of the risk. If Prof and Prim voluntarily and knowingly assumed the risk of being trapped in the elevator, this defense would be a bar to recovery. Both plaintiffs were aware that the elevator often stopped between floors and they should have foreseen the possibility of being trapped in the elevator after the building was officially closed. However, the facts are silent with respect to whether there were any alternative ways, such as stairs, to exit. Even if there had been stairs, due to Prof's high blood pressure, he may not have been able to climb down four flights of stairs being that his office was on the fourth floor of the building.

Therefore, barring any successful assertion of defenses, the plaintiffs should be able to recover against Elco.

(c) Prof and Prim v. University

Vicarious Liability

Typically, an employer may be vicariously liable for tortious acts committed by her employee if the tortious acts are committed within the course and scope of the employment relationship. However, Elco is most likely an independent contractor rather than an employee of University. The general rule is that an institution like University would not be liable for the acts of an independent contractor such as Elco. However, the duty of University to keep its premises safe for its employees, students and visitors is non--delegable because of public policy considerations.

Negligence

University may be directly liable for the plaintiffs' injuries if University was negligent in hiring Elco. The facts are silent as to whether University was aware that Elco might not have been an appropriate company to hire for elevator maintenance. In the absence of such facts the plaintiffs will not prevail in a negligence action based on this theory.

University breached its duty to the plaintiffs by failing to ensure the safety of its premises.

Once again, "but for" University's failure to oversee the maintenance of its elevators, the plaintiffs would not have been initially trapped in the elevator. It was foreseeable that being trapped in the elevator could harm persons using the elevator.

Damages and defenses are the same as discussed above in Elco.

Therefore, barring any successful assertion of defenses, the plaintiffs should be able to recover against University.

TORTS QUESTION #5
(February 2006)

Autos, Inc. manufactures a two--seater convertible, the Roadster. The Roadster has an airbag for each seat. Autos, Inc. was aware that airbags can be dangerous to children, so it considered installing either of two existing technologies: (1) a safety switch operated by a key that would allow the passenger airbag to be turned off manually, or (2) a sensor under the passenger seat that would turn off the airbag upon detection of a child's presence. Both technologies had drawbacks. The sensor technology was relatively new and untested, and the safety switch technology had the risk that people might forget to turn the airbag back on when an adult was in the seat. The safety switch would have increased the price per car by \$5, and the sensor would have increased the price per car by \$900. Research showed that most riders were adults and that the airbags rarely hurt children who were properly belted into the seat. No federal or state regulation required either a safety switch or a sensor. Autos, Inc. chose to install neither.

Oscar bought a Roadster. On his first day of ownership, he decided to take his 10--year-- old daughter, Chloe, to a local ice cream shop. On the way home, Oscar accidentally ran the Roadster into a bridge abutment. The airbags inflated as designed and struck Chloe in the head, causing serious injury. Chloe was properly belted into the seat. She would not have been hurt if the airbag had not struck her.

What tort theories can reasonably be asserted on Chloe's behalf against Autos, Inc., what defenses can Autos, Inc. reasonably raise, and what is the likely outcome? Discuss.

TORTS QUESTION #5

Sample Outline

Chloe v. Autos, Inc.

- I. Strict Products Liability
 - a. Duty of Commercial Seller
 - b. Breach
 - i. Design Defect
 - ii. Failure to Warn
 - c. Actual Cause
 - d. Proximate Cause
 - e. Damages
 - f. Defenses
 - i. Assumption of the Risk

- II. Negligence
 - a. Duty
 - i. Foreseeable Plaintiff
 - ii. Standard of Care
 - b. Breach
 - i. Did Autos fall below the reasonably prudent person standard?
 - c. Actual Cause
 - d. Proximate Cause
 - e. Damages
 - f. Defenses
 - i. Contributory Negligence
 - ii. Comparative Fault
 - iii. Assumption of the Risk

- III. Implied Warranty of Merchantability
 - a. Was the Roadster of average acceptable quality and was it generally fit for the ordinary purpose for which the goods are used?

TORTS QUESTION #6

Twenty years ago, Ed worked in the research department of Dynorad, a private armaments manufacturer doing substantial business with the government. At that time, Ed and his colleagues were testing a newly developed strain of bacteria for use in germ warfare. From tests on animals, they found the agent to be effective, and it has since been incorporated into weapons sold to the government. The strain of bacteria has never been used in combat and has never been tested on humans. However, because of inadequate safety mechanisms at Dynorad's laboratories, Ed was accidentally exposed to the bacteria.

The exposure was very brief and Ed did not suffer immediate harm, but his health has gradually deteriorated. It recently became so poor that he checked into a hospital. Doctors quickly traced his maladies to the bacteria, but cannot cure him.

Ralph, a reporter for Courier Journal, learned of Ed's condition and entered Ed's hospital room wearing a white coat and stethoscope. Ed, thinking that Ralph was a doctor, disclosed that his mental capacities were impaired, that a lung and a kidney were no longer functioning, that he wore a wig because all his hair had fallen out, and that he was now impotent.

The next day Ralph published a story attacking the use of inhumane weapons by the government and the lack of safety precautions used by local arms manufacturers such as Dynorad. The story included Ed's name, an account of his accident twenty years ago, and a description of the symptoms that Ed had disclosed to Ralph. In addition, the story falsely stated that Ed's son, born a year after the accident, was mentally retarded, and that Ed experienced temporary seizures during which he became uncontrollably violent, once even beating his wife and child. Ralph had no reason to think that these false statements were true, and included them because he felt entitled to a certain poetic license as to assertions that cast no personal blame on Ed.

Discuss Ed's rights against Courier Journal.

TORTS QUESTION #6

Sample Outline

A. Journal's Vicarious Liability for Ralph's Conduct

1. Doctrine of Respondeat Superior
 - a. Is Ralph an employee of Courier Journal?
 - b. Was Ralph acting within scope of his employment?

B. Defamation

1. Defamatory Statement
 - Does language adversely affect Ed's reputation (e.g., impeaching his mental capacity)?
2. Of or Concerning the Plaintiff
 - A reasonable person would know statement was about Ed as the the story included Ed's name.
3. Publication
 - Story was published in the CJ, a newspaper.
4. Damage to Reputation
 - It was in writing, thus it's Libel: general damages presumed
5. Matter of Public Concern
 - Strain of bacteria for use in germ warfare is something the public should know?
 - It was 20 years ago, though. Does this affect anything?
 - Ed is not a public figure
6. Falsity
 - BOP is on Ed to prove statement is true it's a false statement.
 - The story falsely stated that Ed's son, born a year after the accident, was mentally retarded, and that Ed experienced temporary seizures during which he became uncontrollably violent, once even beating his wife and child
7. Fault
 - Ed is not a public figure, he is a private person.
 - Gertz negligence standard applies
 - i. Actual injury recoverable if negligence shown
 - ii. Presumed and punitive damages recoverable if actual malice shown
 - iii. Ralph had no reason to think that these false statements were true, and included them because he felt entitled to a certain poetic license as to assertions that cast no personal blame on Ed.
8. Defense: Truth
 - Only part of the story is true: accident twenty years ago, and a description of the symptoms

C. Invasion of Privacy

Public Disclosure of Private Facts

Rule: Publication of private information about plaintiff that is highly objectionable to a reasonable person

Defenses

- 1) Consent-- voluntary disclosure
- 2) Matter of legitimate public interest

False Light

Rule: To place one on a false light, the disclosures must have attributed to plaintiff actions that he did not take or views that he does not hold. It must also be objectionable to reasonable person.

- The story attributed to Ed that during temporary seizures he became uncontrollably violent, once even beating his wife and child, which are actions he did not take.
- It is highly objectionable as the statement accuses Ed of being violent and committing the crime of battery against his wife and son.

Defenses

- 1) Matter of legitimate public interest -- does not apply if plaintiff can show that false disclosures were made with actual malice.

Intrusion Upon Plaintiff's Affairs or Seclusion

Rule: Intrusion upon area where plaintiff has reasonable expectation of privacy, that is objectionable to reasonable person, and the facts upon which defendant intruded were "private."

- Ralph entered Ed's hospital room wearing a white coat and stethoscope.

Defenses

- 1) Consent -- voluntary disclosure?

D. Intentional Infliction of Emotional Distress

Rule: IIED requires that defendant use extreme and outrageous conduct with the intent for plaintiff to suffer severe emotional distress, causation, and damages.

- Extreme and outrageous conduct: posing as a doctor to gain trust and the information for the story;; publishing a story Ralph knew was mostly false.
- Intent: he intentionally posed as a doctor and intentionally published a false story.
- Causation: Ralph was the one who dressed up as a doctor and wrote the story.
- Damages?

TORTS QUESTION #7
(Summer 1993 Question 1)

Dina, aged 16, lives at home with her mother, Mary, in a state where the age of majority is 18. Mary is aware that Dina has recently exhibited a sometimes violent and delusionary nature diagnosed as schizophrenia and has attacked persons in the neighborhood. Medication that can control Dina's behavior has been prescribed, but without Mary's knowledge, Dina has stopped taking it.

A week after Dina stopped taking her medication, she approached a neighbor, Paul, as he walked along the sidewalk fronting Mary's home. When she was face to face with Paul, Dina, without provocation, gestured threateningly and screamed, "I know you're out to get me and I'm going to get you first," and then strode away.

Paul, who had no knowledge of Dina's mental illness, phoned Mary about the incident. Mary told Paul that "Dina has sometimes made threats to others, but I do not think she will try to hurt you and I assure you that this will not happen again." Paul believed Mary's assurances and, for that reason, did not seek to avoid Dina.

Mary questioned Dina about the incident, scolded her, and asked if Dina was taking her medication. When Dina said she was, Mary did not pursue the matter.

Two days after Dina confronted Paul, Dina saw him raking leaves which had fallen into the street fronting their adjoining homes. Dina got on her bicycle and rode it as rapidly as she could directly at Paul. Although Dina swerved away from Paul at the last moment, Paul reacted by diving to one side. He struck his head on the curb and suffered a severe concussion and facial injuries.

Paul has sued Dina and Mary, alleging tortious causes of action.

1. Is Paul entitled to recover against Dina for:
 - a. Assault? Discuss.
 - b. Battery? Discuss.

2. Is Paul entitled to recover against Mary:
 - a. On the ground that Mary was negligent as to Paul? Discuss.
 - b. On the ground that Mary is vicariously liable for Dina's conduct? Discuss.

SAMPLE OUTLINE FOR QUESTION #7 CALLS 1(a) and 1(b)

1. Paul v. Dina

(a) Assault

Dina's Initial Confrontation

An assault is an affirmative act with the intent to place the plaintiff in apprehension of an immediate harmful or offensive contact. Here, Dina committed an affirmative act by screaming at Paul that she would get Paul first and by her threatening gesture. She intended to cause apprehension, as she expressed her belief that Paul was "out to get" her and that she intended to "get" Paul. Dina could argue that there was no threat of immediate contact, as Dina's threat that she would "get" Paul first was vague as to when it would be carried out, and was likewise unclear as to the nature of the contact threatened. Thus, Dina is not liable for assault, based on this threat to Paul.

Dina's Act of Riding Bike Towards Paul

Dina would be liable for assault for her act of riding her bicycle towards Paul. Dina's act was voluntary in nature, as she consciously rode her bicycle directly at Paul, while he was raking leaves. Dina also acted with the intent to cause Paul apprehension of a harmful and offensive contact. Her previous threat to Paul, "I'm going to get you first," establishes a motive to assault Paul, and her act of riding towards Paul is consistent with the anger she may have felt towards Paul because of her mother's scolding. These facts are sufficient to prove Dina's intent. Dina's act also threatened an immediate assault, as she rode the bike rapidly at Paul, forcing him to throw himself into the curb to avoid being hit. A reasonable person would find Dina's act both harmful and offensive. Finally, Dina's act placed Paul in apprehension of an immediate contact, since he saw her riding towards him and moved in order to avoid a collision. Hence, Dina is liable for assault.

Defense to Assault

Dina may claim that she is incapable of committing an intentional tort. Dina, age 16, is a minor and has been diagnosed as schizophrenic with a history of mental illness. However, under the majority view, both minors and incompetents are liable for their intentional torts. Thus, Dina will be held to possess the requisite intent and is therefore liable for assault.

(b) Battery

Battery is an affirmative act with the intent to bring about contact with another resulting in harmful or offensive contact. The affirmative act and harmful and offensive contact elements of battery are met for the same reasons stated above. Dina may argue that because she swerved away from Paul at the last moment, she lacked the purposeful intent and desire to make contact with him.

However, Dina acted with knowledge to a substantial certainty that she would cause Paul to react as he did, causing him to hit the ground, and thus the intent requirement is met. As to the actual contact requirement, Dina must have had actual contact with Paul or something closely connected to his person. In this case, Dina's contact would be said to be indirect, because while she did not touch Paul, she acted in a manner to cause Paul harmful and offensive contact with the curb.

Thus, because all of the elements of battery are met, Dina is liable for battery.

Defense to Battery

For the same reasons set forth above under defense to assault, Dina will be held to possess the requisite intent and is therefore liable for battery.

TORTS QUESTION #8

(Summer 1995 Question 3)

Booker is the owner of The Bookstore. Walker, a clerical worker in a nearby office, came into The Bookstore every day at lunchtime to browse. Booker became annoyed because Walker read books and magazines but never bought anything. Finally, Booker told Walker that he would call the police if Walker came into the store again.

Walker returned the next day, and Booker called the police. Booker made a citizen's arrest of Walker for violation of the local vagrancy ordinance that made it a misdemeanor to "loiter in an annoying fashion in any place open to the public." Walker objected loudly to the arrest, yelling, "You can't arrest me, I didn't take anything."

Reporter overheard Walker's remarks. Reporter worked for The News, the local newspaper, and recognized Walker because one year earlier Walker had led a movement to remove certain books from the local high school library. Reporter thought that the police were arresting Walker for shoplifting and rushed back to the paper to file a story on the arrest.

The next day, The News reported that Walker had been arrested for shoplifting, in a story headlined: "Book Burner Arrested for Book Theft."

Walker was charged with vagrancy. The charge was dismissed on the ground that the vagrancy ordinance had long been construed to require actual disturbance of the peace, and in this case there was no actual disturbance.

1. What claims, if any, does Walker have against Booker? Discuss.
2. What claims, if any, does Walker have against The News? Discuss.

TORTS QUESTION #9
(Summer 2007)

Manufacturer designed and manufactured a “Cold Drink Blender,” which it sold through retail stores throughout the country. The Cold Drink Blender consists of three components: a base that houses the motor, a glass container for liquids with mixing blades inside on the bottom, and a removable cover for the container to prevent liquids from overflowing during mixing. A manufacturer’s brochure that came with the Cold Drink Blender states that it is “perfect for making all of your favorite cold drinks, like mixed fruit drinks and milk shakes, and it even crushes ice to make frozen drinks like daiquiris and piña coladas,” and cautioned, “Do not fill beyond 2 inches of the top.”

Retailer sold one of the Cold Drink Blenders to Consumer. One day, Consumer was following a recipe for vegetable soup that called for thickening the soup by liquefying the vegetables. After deciding to use her Cold Drink Blender for this purpose, Consumer filled the glass container to the top with hot soup, placed it on the base, put the cover on top, and turned the blender on the highest speed. The high speed rotation of the mixing blades forced the contents to the top of the container, pushed off the cover, and splashed hot soup all over Consumer, who was severely burned by the hot soup.

Consumer filed a lawsuit against Manufacturer and Retailer, pleading claims for strict products liability and negligence. In her complaint, Consumer stated that the Cold Drink Blender was not equipped with a cover that locked onto the top of the container in such a way as to prevent it from coming off during operation and that the failure to equip the blender with this safety feature was a cause of her injuries.

Manufacturer moved to dismiss the complaint against it on the following grounds:

- (1) Consumer’s injury was caused by her own misuse of the Cold Drink Blender which, as implied by its name, was intended for mixing only cold substances.
- (2) Consumer’s injury was caused by her own lack of care, as she overfilled the Cold Drink Blender and operated it at high speed.
- (3) The design of the Cold Drink Blender was not defective since it complied with design standards set forth in federal regulations promulgated by the federal Consumer Products Safety Commission, which do not require any locking mechanism.

Retailer moved to dismiss the complaint against it on the following ground:

- (4) Retailer played no part in the manufacture of the Cold Drink Blender and therefore should not be held responsible for a defect in its design.

How should the court rule on each ground of both motions to dismiss? Discuss.

Torts Question #9 Outline

How to Organize:

Always organize per the call! This call was tricky because it mixed up the natural order that you would analyze the elements of SPL & NPL. However, you may have handled this in one of two ways. Goal is to never panic. When in doubt go with what you know. If you felt it was going to take too much time to organize your thoughts and which elements should be raised with which call, then plan B would have been to just do a standard full blown SPL & NPL analysis, and then answered the calls in the order they were given to you by giving an answer based on your above analysis.

Pre--Planning Option 1

Manufacturer's Mtn to Dismiss

Briefly-- Mtn To Dismiss-- Rule

(1) SPL

Actual Cause

Proximate Cause

Damages Defense

Misuse of the Product

A/R-- not a defense to SPL

NPL

Actual Cause

Proximate Cause

Damages Defenses

Contrib. Neg.-- to show misuse?

Comparative Fault

A/R

(2) SPL

Actual Cause-- same as above Proximate Cause

Defense

Lack of Care-- is that a valid defense?

NPL

Actual Cause-- same as above Proximate Cause

Defenses

Contrib. Neg.-- to show Lack of Care

(3) SPL

Duty

Breach

--Manufacturing Defect-- use Consumer Expectation

Test

-- Design Defect-- use Feasible

Alternative Test

-- Inadequate Warnings

-- Government Safety Standards

NPL

Duty (not the same rule as above) Breach--

not the same as above-- different standard

Retailer's Motion to Dismiss

SPL

Duty

NPL

Duty

Pre--Planning Option 2

SPL-- mini--irac all elements & defenses

NPL-- mini--irac all elements & defenses

Mtn to Dismiss-- raise rule (Rule: Failure to state a claim upon which relief can be granted)

Manufacturer's Mtn to Dismiss

(1) Answer call based on above analysis as to whether Mtn to Dismiss should be granted.

(2) Answer call based on above analysis as to whether Mtn to Dismiss should be granted.

(3) Answer call based on above analysis as to whether Mtn to Dismiss should be granted.

(4) Retailer's Mtn to Dismiss

Answer call based on above analysis as to whether Mtn to Dismiss should be granted.

TORTS RULE SHEET

I. INTENTIONAL TORTS

A. HARM TO PERSON

Assault

Assault is an intentional act caused by the creating a reasonable apprehension in of immediate harmful or offensive contact.

Battery

Battery is an intentional act caused by the which brings about a harmful or offensive contact to person. Offensive contact is contact that offends a reasonable sense of personal dignity.

False Imprisonment

False imprisonment requires: (1) an act or omission by resulting in restraint or confinement, (2) is confined to a bounded area, (3) intent, (4) causation. Acts of restraint include physical barriers, physical force, failure to release, or threats of force against his family, or property. must be aware or harmed by the act of restraint and must not have a reasonable means of escape known to him.

IIED

IIED requires: (1) extreme & outrageous conduct by (2) severe emotional distress in (3) intent or recklessness, and (4) causation. Extreme and outrageous conduct is conduct that exceeds the bounds of decency. Non-outrageous conduct may be deemed extreme & outrageous if: (i) targets known sensitivity, (ii) is a member of a fragile class (elderly, pregnant, children), or (iii) conduct is continuous or repetitive.

Bystander Case

A bystander may recover for emotional distress if: (1) conduct caused serious injury or death to 3dp, (2) is a close relative or has very close relationship with 3dp, (3) was present & perceived the injury, (4) knew was present & a close relative, and (5) suffers severe emotional distress as a result.

B. HARM TO PROPERTY

Trespass to Chattel

Trespass to chattel requires: (1) a minor interference by of right of possession in tangible personal property, (2) intent, (3) causation, and (4) damages. can recover the cost of repair or the rental value of the chattel. Mistake is no defense.

Conversion

Conversion requires: (1) a substantial interference by of right of possession in tangible personal property, (2) intent, (3) causation, and (4) damages. can recover the full market value at the time of conversion or repossess the chattel. Mistake is no defense.

Trespass to Land

Trespass requires: (1) physical invasion of real property by (2) intent, and (3) causation. Mistake is no defense. must have intended to physically enter the land or knew to a substantial certainty that his acts would create the injurious consequences that resulted.

Private Nuisance

A private nuisance is a substantial and unreasonable interference with one's use and enjoyment of his property. Substantial means offensive, annoying, or inconvenient to the average person in the community. Interference is not substantial if is hypersensitive or using her property for a specialized, abnormal purpose. Unreasonable means the severity of injury must outweigh the utility of conduct. In balancing these interests, courts take into account that every person is entitled to use his own land in a reasonable way, considering the neighborhood, land values, & existence of any alternative courses of conduct open to

Public Nuisance

A public nuisance is an unreasonable interference with health, safety, or property rights of the community. can only recover if she suffered unique damage not suffered by the public at large.

Damages for Nuisance

The standard measure for a continuing nuisance includes the value of the loss & enjoyment of the land & any costs of abating the nuisance & damages suffered by the resulting from the nuisance. If the activities are deemed a permanent nuisance, incapable of being abated, may also obtain damages measured by the permanent diminution in the value of his land. A nuisance is considered continuous if there are threats of a future harm.

In cases of continuous nuisance, the should instead seek injunctive relief b/c money damages will likely be inadequate.

C. DEFENSES

Consent

Consent is a defense to all intentional torts, and can be express or implied. must have legal capacity to give valid consent. Implied consent can be inferred through custom or observable conduct.

Exceeding Scope of Medical Consent

can be held liable for conduct that exceeds the scope of valid consent. If doctor expands the operation, implied consent will apply to expand only in the immediate area. But, in a life or death emergency where is unable to consent, a doctor has implied consent to do what he must to save life if an RPP similarly situated would have consented.

Private Necessity

Necessity is a defense to torts against property in which damages property in an effort to avoid greater danger. interference must be reasonably necessary to avoid immediate threatened injury. Private necessity is a limited defense and is liable for actual damages to property. However, if is on property to avoid dangerous conditions outdoors, has a right of sanctuary and must allow to remain as long as the emergency exists.

Public Necessity

Public necessity is an absolute defense and is not liable for any damages. invasion of property must be reasonably necessary to protect the community or a large group of people.

Defense of Self

A person may use reasonable force to defend oneself if she has reasonable belief that a tort is being or about to be committed. The force must be proportionate to the harm threatened. Deadly force can only be used if reasonably believes her life is in danger. Generally, there is no duty to retreat. However, modernly, if reasonable, must attempt to retreat before using deadly force unless is in her home.

Defense of Other

When the actor reasonably believes that the other is being attacked and has a right to defend himself, the actor may use as much force as he could have used in self-defense if he were the one threatened with the injury.

Defense of Property

A person may use reasonable force to protect her property. A request to desist or leave must first be made unless it would be futile or dangerous. Deadly force can never be used to protect property. However, if the situation occurs inside home, may use deadly force to protect herself.

Recapture of Chattels

has a privilege to enter the wrongdoer's land at a reasonable time and in a peaceful manner to recover possession of chattel taken unlawfully. However, has no privilege to enter an innocent person's land or to enter another's land if his chattel is on the property through his own fault.

Shopkeeper's Privilege

A store may detain a suspected shoplifter on store property for a reasonable amount of time. The store must have reasonable cause to suspect stole and the detention may only be for a short period of time and only for purposes of investigation.

II. DEFAMATION/PRIVACY TORTS

Defamation

Defamation is a defamatory statement of or concerning published to a third-party that causes damage to

(1) Defamatory Statement

A defamatory statement is one that tends to lower reputation in the community.

(2) Of or Concerning

A reasonable person must have understood that the statement was of or concerning

(3) Published to a 3dp

The statement must have been published to a third party who understood the statement.

(4) Damages

Damages are presumed for libel per se and slander per se. Libel is written, taped, recorded, or broadcasted defamation. Slander per se is an oral statement that concerns: (i) a loathsome disease, (ii) unchastity of a woman, (iii) moral turpitude, or (iv) profession or business of

Constitutional Defamation

If the statement is a matter of public concern or is a public figure, must prove two additional elements: (6) falsity, and (4) fault.

(6) Falsity

is required to prove that the statement is false.

(7) Fault

The type of fault that must prove depends on whether is a public or private figure. A public figure is one who achieves fame or notoriety or is in government office.

If the is a public figure, he must prove acted with malice. Malice requires a showing of knowledge that the statement was false or a reckless disregard as to its falsity.

If the is a private figure, he must prove negligence regarding the falsity of the statement. Where is only negligent, only actual injury damages are recoverable. However, if private can prove malice on the part of the then damages may be presumed and may be able to recover punitive damages.

B. PRIVACY TORTS

Commercial Appropriation

Commercial appropriation is the use of name or likeness for commercial advantage without consent. However, under the Newsworthiness Exception, there is no liability for the use of name or likeness for the purpose of reporting news.

Intrusion

Intrusion is the prying into of private affairs in a manner that would be objectionable to a reasonable person. The must have a reasonable expectation of privacy.

False Light

False light requires the widespread dissemination (publication) of a material representation or falsehood about that would be objectionable to a reasonable person. This includes the mischaracterization of views or conduct. However, if the matter is of public concern, must prove that

acted with malice. Malice requires a showing of knowledge that the statement was false or a reckless disregard as to its falsity. can recover for emotional distress and mental anguish.

Public Disclosure of Private Facts

Public disclosure is the publication of confidential or private information that would be objectionable to a reasonable person. However, if the matter is of public concern, must prove that acted with malice. Malice requires a showing of knowledge that the statement was false or a reckless disregard as to its falsity. can recover for emotional distress and mental anguish.

A. DEFENSES TO DEFAMATION/PRIVACY TORTS

Truth

Where does not need to prove the element of falsity, then may prove truth as a complete defense.

Absolute Privilege

may be protected by an absolute privilege for the following: remarks made during judicial proceedings, by legislators in debate, by federal executive officials, in "compelled" broadcasts, and between spouses. An absolute privilege can never be lost.

Qualified Privilege

Speakers may have a qualified privilege for the following: reports of official proceedings; statements in the interest of the publisher such as defense of one's actions, property, or reputation; statements in the interest of the recipient; and statements in the common interest of the publisher and recipient.

This privilege may be lost if (i) the statement is not within the scope of the privilege, or (ii) it is shown that the speaker acted with malice. bears the burden of proving that a privilege exists.

III. NEGLIGENCE

A. Prima Facie Case of Negligence

Negligence is the breach of a duty of care that is the actual & proximate cause of injuries.

(1) DUTY

A duty is owed to all foreseeable . Under the Cardozo majority view, a duty is owed to persons in the zone of danger. The zone of danger is the area around activities in which a could foreseeably be injured. However, under the Andrews minority view, a owes a duty of care to all persons.

RPP Standard of Care

The standard of care owed is typically that of a reasonably prudent person under the same or similar circumstances.

Child Standard of Care

Children are held to the standard of care of a like child of similar age, education, intelligence, and experience, which is a subjective test. However, if the child is engaged in adult activity (i.e. operating things powered by an engine), they are held to the objective RPP standard.

Common Carriers & Innkeepers Standard of Care

Common carriers and innkeepers have a heightened duty to their passengers or guests and are held to an "utmost care" standard. They are liable for even slight negligence to passengers or guests.

Professional Standard of Care

Professionals are expected to act with the care of an average member of the profession in good standing in similar communities. Specialists (i.e. neurosurgeons) are held to a national standard of care, while primary care doctors are held to a standard within the geographic community.

Statutory Standard of Care

An existing statute may establish a duty of care if: (1) is within the class of persons the statute was designed to protect, and (2) the statute was designed to protect against the type of harm suffered.

Statutory standard of care does not apply if: (i) compliance is more dangerous than noncompliance, or (ii) compliance is impossible under the circumstances.

Landowner's Standard of Care

A landowner's standard of care depends on the status of the entrant □

Unknown Trespassers & Anticipated Trespassers

There is no duty owed to unknown trespassers. However, where an owner has reason to anticipate trespassers, she owes a duty of reasonable care in carrying out activities on her property and a duty to warn or make safe any known man-made death traps (i.e. spring guns, traps).

Attractive Nuisance Doctrine

An owner must take reasonable care to eliminate dangers on her land to protect children from those dangers if: (1) she knows or should know of a dangerous artificial condition on her land, (2) knows or should know children are in the vicinity, (3) the condition is likely to cause injury if encountered (because of the child's inability to appreciate the risk), and (4) the magnitude of the risk outweighs its utility or the expense of remedying it.

Licensees

A licensee is one who enters the land with the owner's permission or one who enters for his own purpose or business (i.e. social guests). An owner owes a duty to carry out activities on her property with reasonable care and a duty to warn or make safe known dangerous conditions. There is no duty to inspect or repair. One may lose his licensee status if he exceeds the scope of the license.

Police and firefighters are considered licensees, but cannot recover for injuries sustained on the job, even if due to the negligence of landowner.

Invitees

An invitee is one who enters the land with the owner's permission to confer a commercial benefit or enters property held open to the public (i.e. customer, door-to-door salesperson). An owner owes a duty to carry out activities on her property with reasonable care and a duty to warn or make safe known dangerous conditions. Owners also have a duty to conduct a reasonable inspection to discover nonobvious dangers and make them safe. One may lose his invitee status if he exceeds the scope of his invite.

Affirmative Duty to Act

Generally, there is no duty to act except: (1) assumption of duty by acting, (2) creation of the peril, (3) special relationship between parties, or (4) controlling third parties.

If one undertakes aid, he must do so with reasonable care. Rescuers must act as a reasonably prudent rescuer in the same or similar circumstances. If one created the peril, he has an affirmative duty to act. One has an affirmative duty to act if there is a special relationship with the □ such as parent-child, common carriers, innkeepers, shopkeepers, or employer-employee when employee is injured in the course of employment. One who has actual authority or ability to control another has an affirmative duty if she knows or should know the person is likely to commit acts that would require exercise of this control.

(2) BREACH

A breach occurs when □'s conduct falls below the applicable standard of care.

Violation of Statute – Negligence Per Se

A violation of the statute is negligence per se, which is a conclusive presumption of duty and breach.

Res Ipsa Loquitur

In the absence of sufficient circumstantial evidence to establish a breach, □ can use this doctrine to show that the very occurrence of the accident causing □'s injuries suggests negligent conduct. □ must show: (1) the harm would not normally occur without negligence, (2) the type of harm is

normally caused from negligence by someone in □'s position, and (3) the injury-causing instrument was in □'s exclusive control.

(3) CAUSATION

□ must prove □'s actions were both the actual and proximate cause of □'s injuries.

Actual Cause

The □ is the actual cause of □'s injuries if the injury would not have occurred but for the act. If there are multiple causes of □'s injury and any one alone would have caused the injury, □'s breach is the actual cause if it was a substantial factor in bringing about □'s injury.

Proximate Cause

The □'s conduct must also be the proximate cause of the injury. The □ is liable for all harmful results that are the normal incidents of and within the increased risk caused by his acts.

If the □'s negligence created a foreseeable risk that a third person would commit a crime/intentional tort, □'s liability will not be cut off by the crime/tort. However, where the intervening force is an unforeseeable crime/intentional tort of a third party, it will be deemed a superseding force that cuts off □'s liability.

(4) DAMAGES

□ must prove actual (personal/property) damages, and punitive damages may be available if □ can prove □'s conduct was wanton, willful, reckless, or malicious. However, □'s damages may be reduced if he failed to take reasonable steps to mitigate the damages.

Thin-Skill Plaintiff

The □ takes the □ as he finds him and is liable for the full extent of □'s injuries, regardless of whether they are foreseeable.

Collateral Source Rule

Damages are not reduced merely because □ received benefits from other sources, such as insurance.

NIED

To establish a prima facie case of NIED □ must prove: (1) □'s negligence results in a close risk of bodily harm to □ (2) resulting in □'s severe emotional distress, and (3) □ exhibits some physical manifestation attributable to her emotional distress.

However, □ can recover for NIED without proving the elements in two situations: (i) erroneous report of a relative's death, or (ii) mishandling of relative's corpse.

B. DEFENSES TO NEGLIGENCE

Assumption of the Risk

A □ may be denied recovery if she assumed the risk of any damage caused by □'s act. □ must have known of the risk and voluntarily proceeded in the face of the risk.

Contributory Negligence

At common law, □ is completely barred from recovery if □ establishes that □'s negligence contributed in any way to her injuries. However, □ can rebut this claim by alleging that □ had the last clear chance to avoid the injury-causing accident. However, most states have abolished this doctrine and have adopted comparative negligence.

Comparative Negligence

A majority of the states allow a □ to recover a percentage of her damages even if she was contributorily negligent. □ must offer actual proof that □ failed to exercise the appropriate degree of care for her own safety. Courts apportion fault between □ and □ and reduces □'s recovery accordingly.

In states with partial/modified comparative negligence, □ can only recover damages if she was less than 50% at fault. If she is more than 50% at fault, □ cannot recover.

In states with pure comparative negligence, ☐ can recover damages even if she was more than 50% at fault and the court will apply the percentages accordingly.

IV. STRICT LIABILITY

Strict Liability

To establish a prima facie case for strict liability, ☐ must prove: (1) the nature of the ☐'s activity/conduct imposes an absolute duty to make safe, (2) the dangerous aspects of the activity/conduct is the actual & proximate cause of ☐'s injury, & (4) damages.

Trespassing Animals

Animal owners are strictly liable for all reasonably foreseeable damage resulting from their animal's trespass on another's property. The owner of livestock (cattle, horses, sheep, hogs, chickens) are strictly liable even if the animals are domesticated. However, if an unforeseeable intervening force (i.e. lightning striking down fence) was the cause of the trespass, owner is not strictly liable.

Wild Animals

Owners of wild animals are strictly liable to licensees and invitees for injuries caused by the wild animal's dangerous propensity, including injury caused by fleeing from the animal. Trespassers cannot recover under strict liability.

Domestic Animals

Owners of domestic animals (i.e. dogs) are strictly liable only if they know of their animal's dangerous propensity.

Abnormally Dangerous Activity

One who engages in an abnormally dangerous activity will be strictly liable for injuries caused by the activity. An activity is abnormally dangerous if: (1) the activity involves serious risk of harm, (2) risk of harm cannot be avoided with due care, and (3) the activity is uncommon in the community.

S/L Duty

The extent of the duty owed in a S/L case is limited to the kind of harm that results from the kind of danger to be anticipated from the activity.

S/L Damages

In a S/L case, recoverable damages are limited to the damages to ☐'s person or property & ☐ cannot recover pure economic harm.

V. PRODUCTS LIABILITY

Strict Products Liability

A merchant who places a product in the stream of commerce may be strictly liable in tort for injuries caused by a defective product. In order to prevail in a strict products liability cause of action, ☐ must show: (1) an absolute duty owed by a commercial supplier of a product, (2) production or sale of a defective product, (3) actual and proximate causation, and (4) damages.

(1) STRICT DUTY

Merchants have a strict duty to supply safe goods. A merchant is one who routinely deals in the product sold (manufacturer, distributor, supplier).

(2) DEFECTIVE PRODUCT

The ☐ need not prove that the ☐ was at fault for selling or producing a defective product – only that the product is defective as to be unreasonably dangerous. Courts have required suppliers to anticipate reasonably foreseeable uses, even if they are “misuses” of the product.

There are three types of product defects: manufacturing, design, and warning defects.

Manufacturing Defect

A manufacturing defect is when a product departs from its intended design, causing it to be more dangerous than designed. One way to prove a manufacturing defect is with the Consumer Expectation Test. ☐ must show

that the product failed to perform as safely as an ordinary consumer would expect.

Design Defect

A design defect is when a product creates an unreasonable risk of danger due to its faulty design. One way to prove a design defect is with the Feasible Alternative Test. ☐ must show that a hypothetical alternative design exists that is safer but has a comparable cost and purpose.

Warning Defect

A warning defect is when the manufacturer fails to adequately warn of a non-obvious risk associated with a product's use. For liability to attach, the danger must not be apparent to users.

Unavoidably Unsafe Products

If products cannot be made safe for their ordinary use (i.e. chainsaws, firearms), a manufacturer must give: (i) proper instructions for use, and (ii) adequate warnings of known dangers.

Government Safety Standards

A product's noncompliance with government safety standards establishes that it is defective, while compliance with safety standards is evidence, it is not conclusive that the product is not defective.

(3) CAUSATION

☐ must prove both actual and proximate causation.

Actual Cause

To show actual cause, ☐ must show that the defect existed when the product left ☐'s control.

If ☐ is claiming that he was injured by a lack of adequate warning, he is entitled to a presumption that an adequate warning would have been read & heeded had it been included.

Proximate Cause

The type of injury must have been foreseeable at the time the product was placed in the stream of commerce. ☐ will not be held liable for risks that were unforeseeable at the time the product was marketed.

The negligent failure of an intermediary to discover the defect or to avoid the injury does not void the supplier/manufacturer's S/L.

(4) DAMAGES

☐ may recover for physical injury or property damage, but not solely for economic losses.

Defenses

- Unforeseeable Misuse by ☐
- Assumption of the Risk
- Contributory/Comparative Negligence
 - Contributory negligence is not a recognized defense to strict products liability in a majority of jurisdictions. Modernly, most jurisdictions follow either partial or pure comparative negligence.

Negligent Products Liability

In order for ☐ to prevail in a products liability cause of action based on negligence, ☐ must show: (1) duty, (2) breach, (3) causation, and (4) damages.

(1) Duty

A duty of care is owed to all foreseeable ☐. A foreseeable ☐ is anyone within the zone of danger (majority view). Users of products, bystanders, and consumers of the product are all foreseeable ☐. Privity of contract with the ☐ is no longer required.

Foreseeable ☐ are owed a standard of care of that of a reasonably prudent merchant. Here, the requisite standard of care is that of a reasonably prudent (manufacturer, distributor, supplier).

(2) Breach

Breach is shown by negligent conduct of □ leading to the supplying of a defective product. To establish that a manufacturer's negligence has resulted in a design defect, the □ must show that □ knew or should have known of the dangers of the product as designed.

(3) Causation

□ must prove both actual and proximate causation.

Actual Cause

To show actual cause, □ must show that the defect existed when the product left □'s control.

Proximate Cause

The type of injury must have been foreseeable at the time the product was placed in the stream of commerce. □ will not be held liable for risks that were unforeseeable at the time the product was marketed.

An intermediary's negligent failure to discover a defect does not supersede the original manufacturer's negligence unless the intermediary's conduct exceeds ordinary foreseeable negligence.

(4) Damages

□ may recover for physical injury or property damage, but not solely for economic losses.

Defenses

- Assumption of the Risk
- Contributory Negligence
- Comparative Negligence

Implied Warranty of Merchantability

Implied in every sale of goods is a warranty of merchantability where seller warrants that goods are of average acceptable quality (without defects) and generally fit for their ordinary purpose. All reasonably foreseeable users can sue for a breach of an implied warranty and may recover personal, property, and economic damages.

Implied Warranty of Fitness for Particular Purpose

If seller knows or has reason to know the particular purpose for which the buyer is purchasing, and buyer relies on seller's skills or judgment, the seller implies that goods are fit for that purpose. All reasonably foreseeable users can sue for a breach of an implied warranty and may recover personal, property, and economic damages.

Express Warranty

□ may be liable if the product falls short of an affirmative representation made about it to the buyer by express warranty. An express warranty is a statement of fact or promise regarding goods sold that becomes part of the basis of the bargain. Any consumer or bystander can sue for a breach and may recover personal, property, and economic damages.

VI. MISCELLANEOUS TORTS

Loss of Consortium

The spouse of a victim may have a cause of action for loss of consortium. The spouse is entitled to recover damages from: (1) loss of services, (2) loss of society, and (3) loss of sexual intimacy. Since this is a derivative action, any defenses that can be raised against the decedent can be raised against the loss of consortium claim. However, a spouse cannot recover for decedent's pain and suffering as these damages can only be recovered in a personal injury survival action.

Interference With Business Relations

This requires: (1) a valid K relationship/business expectancy (prospective advantage); (2) □ knew of this relationship/expectancy; (3) □ intentionally interfered by inducing breach/termination of relationship/expectancy; & (4) □ suffered damages. □'s defense that no valid K existed.

Malicious Prosecution/Civil Proceedings

Malicious prosecution requires a showing of: (1) institution criminal or civil proceedings against □ (2) termination in □'s favor, (3) absence of PC in prior proceeding, (4) improper purpose, & (5) damages. Prosecutors are immune from this tort.

If the □ instituted the prior proceedings on advice of counsel after full disclosure of the facts, this establishes PC since □ reasonably relied on the advice of her counsel.

Legal fees incurred during the course of representation to defend the first suit are recoverable damages in a malicious prosecution action.

Abuse of Process

The wrongful use of process for ulterior purpose & a definite act or threat against □ in order to accomplish the ulterior purpose.

VII. GENERAL CONSIDERATIONS

A. VICARIOUS LIABILITY

Respondeat Superior

Employers are liable for the torts committed by their employees within the scope of their employment. To determine whether the employee was acting within the scope of employment when the tort was committed, it must be determined whether the employee was on a frolic or a detour. An employee making a minor deviation (detour) from employer's business for own purposes is still acting within the scope of employment unless the deviation in time & place is substantial (frolic).

Intentional torts are usually outside the scope, unless: (1) the job requires use of force (i.e. bouncer/security guard), (2) the job entails creating friction (i.e. bill collector), or (3) the intentional tort is committed to further the employer's goals (i.e. breaking up a fight in a store).

Agency Relationship

A P will be liable for torts committed by his A if: (1) P-A relationship exists; & (2) the tort was committed by the A w/in the scope of that relationship. P-A relationship requires: (1) assent, (2) benefit, & (3) control. The scope of the P-A relationship requires: (1) conduct was w/in the job description, (2) tort occurred on the job, & (3) A intended to benefit P.

Independent Contractor

Employers are generally not liable for the torts committed by their independent contractors except when the independent contractor is engaged in an inherently dangerous activity or non-delegable duty. A landowner is liable if independent contractor injures an invitee on owner's property.

B. JOINT & SEVERAL LIABILITY

If the acts of 2 or more □'s combine to produce a single indivisible injury, or if □'s were acting in concert, each □ is jointly & severally liable for the entire harm if his individual act was a substantial factor in bringing about □'s injury.

Contribution

A □ who pays more than his share of damages under joint several liability can assert a claim against his co-□'s for the excess paid. Contribution is usually imposed in proportion to relative fault. Contribution is not applicable to intent'l tort liability or to a party who is immune from liability.

Indemnification

Indemnification involves shifting the entire loss between or amongst the □'s. This is available by contract, in vicarious liability situations, or under strict products liability.

Satisfaction & Release

Satisfaction is the recovery of full payment. Until satisfaction, one may proceed against all jointly liable parties. Release of 1 joint tortfeasor was release of all under common law. Most states now provide that release of 1 tortfeasor does not discharge other tortfeasors unless expressly provided in release agreement.

TORTS

NEGLIGENCE

Negligence

A prima facie case for negligence consists of: (1) duty; (2) breach of that duty; (3) causation; and (4) damages.

Duty

All people have a duty to prevent an unreasonable risk of harm to others. Under the majority view (Cardozo approach) a duty is owed to only those plaintiffs that are foreseeable and in the zone of danger (**insert facts here**). Under the minority view (Andrews approach) a duty is owed to all (**insert facts here**).

Standard of Care

Absent a special relationship, the standard of care for this duty is one of reasonableness. All people are entrusted to act as the reasonable and prudent person would in the same or similar circumstances. Whether a person has acted reasonably is judged objectively.

(If there is no heightened standard of care, skip to breach).

Heightened Standard of Care (if applicable)

People entrusted with a heightened standard of care are liable for even slight negligence.¹

Insert facts here

Breach

A breach occurs when a defendant fails to conform to the standard of care. As noted, here the standard of care is one of _____ (if no heightened standard of care, then the answer is "reasonableness." If there is a heightened standard of care, it is "heightened reasonableness and care").²

Insert facts here

1 Be sure to review the list of people and entities that are entrusted with a heightened standard of care. The most commonly tested are landowners, professionals and common carriers. If you find that one applies, make sure you put the NAME of it in the heading next to the phrase "heightened standard of care."

2 Remember that breach is not JUST failure to conform to the standard of care. There are 3 other ways of proving breach that are a LOT faster - res ipsa loquitur, negligence per se and custom and usage. If those apply, give them headings, explain the rule and analyze them. If you are not sure whether one applies, write about it anyway but do not neglect to analyze the basic test - whether the person acted reasonably and conformed to the standard of care.

Causation

Causation must be both actual and proximate. Actual causation is "but-for" causation, wherein, the defendant is only liable if the injury would not have occurred but for his negligence.

Proximate causation exists when the act and resulting injuries were a foreseeable result of defendant's conduct or the defendant's conduct was a substantial factor in causing the injury.

Actual

Insert facts here

Proximate

Insert facts here³

Damages

A plaintiff must prove damages in the form of physical injury or property damage. Economic harm alone is insufficient for a claim of negligence.

Insert facts here

Defenses

Only discuss those that apply (contributory negligence, comparative negligence and assumption of risk)⁴

** Here is what to write if no defenses apply

All of the defenses to negligence (contributory negligence, comparative negligence and assumption of risk) require some degree of fault on the part of plaintiff. Here, plaintiff was an _____ (innocent, etc.) _____ (passenger or bystander or whatever applies), and did not contribute to his/her injuries; therefore no defenses apply.

³ Remember to look for an eggshell plaintiff here. A lot of people put that issue under damages, but it belongs under proximate causation. (It's the idea that a plaintiff's pre-existing medical condition (which makes him or her more susceptible to injury) is per se foreseeable.)

⁴ If you decide that contributory negligence applies, you can combine it with comparative negligence when writing about it.

TORTS QUESTION

Negligence

Owner hired Plummer, a plumbing contractor, to repair the plumbing in a store that Owner planned to lease. In performing the repair, Plummer used a connector on a hot water pipe made of a different metal than the pipe itself. As a result of the incompatibility of the two metals, the connector corroded and weakened. This condition was not obvious because the weakened connection was located within a wall. After the repair was completed, the store was leased to "Amy's," a swimwear retailer.

Two years after Plummer finished the repairs, the connector burst. Hot water broke through the wall and sprayed into the store, scalding Carrie, a customer who was in the store at the time. The water also ruined swimsuits on display in the store. While repairs were being made, Amy had to close for two months during the summer, causing significant financial loss. Emma, an employee of Amy's, lost her job because of the closure.

1. What rights, if any, does Carrie have against Owner and Plummer? Discuss.
2. What rights, if any, does Amy's have against Plummer? Discuss.
3. What rights, if any, does Emma have against Owner and Plummer? Discuss.

TORTS SAMPLE ANSWER

Negligence

Carrie v. Owner

Negligence

A prima facie case for negligence consists of: (1) duty; (2) breach of that duty; (3) causation; and (4) damages.

Ilucy

All people have a duty to prevent an unreasonable risk of harm to others. Under the majority view (Cardozo approach) a duty is owed to only those plaintiffs that are foreseeable and in the zone of danger.

Here, it was foreseeable that a customer would be on the premises and in danger as Owner knew the store would be open for commercial use. Therefore, Carrie is likely a foreseeable plaintiff and is owed a duty. Under the minority view (Andrews approach) a duty is owed to all. Therefore Carrie is owed a duty under Andrews as well.

Standard of Care

Absent a special relationship, the standard of care for this duty is one of reasonableness.

Heightened Standard of Care - Owner of Land

Some people are entrusted with a heightened standard of care and therefore are liable for even slight negligence. Landowners, for example, have a heightened standard of care to perform reasonable inspections to discover latent dangerous conditions and warn of them. Therefore, this is the standard of care applicable to Owner.

Breach

A breach occurs when a defendant fails to conform to the standard of care.

Here, Owner presumably did not know of the dangerous condition, as "the condition was not obvious" because it was behind a wall (unless there was some obvious sign of leaking or staining on the drywall). Moreover, even if Owner had performed a reasonable inspection of the plumbing, Owner may not have known that the metals were incompatible because Owner likely did not have the requisite expertise to make that determination (otherwise he would not have hired a plumber). Therefore, Owner likely did not breach a duty to Carrie.

Causation

Causation must be both actual and proximate. Actual causation is "but-for" causation, wherein the defendant is only liable if the injury would not have occurred but for his negligence.

Proximate causation exists when the act and resulting injuries were a foreseeable result of defendant's conduct or the defendant's conduct was a substantial factor in causing the injury.

Actual

Here, assuming Owner did have a duty to warn or breached a duty by failing to discover the defect, such a duty was likely the actual cause of Carrie's injuries as she probably would have refrained from shopping in the store had she known of the danger. Therefore, but for Owner's failure to warn, Carrie was injured.

Proximate

Here, it is also foreseeable that an injury would have resulted from defective pipes had the customers not been properly warned of such a defect. At a minimum, although Plummer is also likely liable, Owner's failure to warn (if considered a breach) was probably a substantial factor in causing Carrie's injuries.

Damages

A plaintiff must prove damages in the form of physical injury or property damage. Economic harm alone is insufficient for a claim of negligence. Here, Carrie suffered bodily injury, which is sufficient.

Defenses

All of the defenses to negligence (contributory negligence, comparative negligence and assumption of risk) require some degree of fault on the part of plaintiff. Here, plaintiff was an innocent customer in a store and therefore, Owner will have no defenses vis-a-vis Carrie.

Carrie v. Plummer - Negligence

Duty

Carrie is likely a foreseeable plaintiff because, at the time Plummer was working on the store, Plummer presumably knew that it would be open to the public and that customers would be shopping inside. Therefore, under both the Andrews and Cardozo theories, Carrie is owed a duty by Plummer.

Standard of Care

Here, Plummer will be expected to exercise the degree of care expected from a reasonable, prudent plumber in the same or similar circumstances.

Breach

Here, a reasonable plumber would have known that using two incompatible metals would result in a weakened or corroded connection that could possibly burst under pressure. Moreover, a reasonable plumber would know which metals are compatible with other metals. By using the wrong connector, Plummer failed to exercise the degree of ordinary care expected of a reasonable plumber, thus breaching a duty.

Causation

Actual

"But for" Plummer's use of an incompatible connector, the connection would not have weakened or corroded and therefore would not have burst, resulting in injury.

Proximate

It is foreseeable that a person could be injured by scalding hot water if a pipe burst while water was flowing through it. Moreover, it is foreseeable that a pipe will burst if improperly connected or corroded. Therefore, Carrie's injuries were likely proximately caused by Plummer's breach of duty.

Damages

See above for a discussion of Carrie's damages.

Defenses

See above for a discussion of defenses vis a vis Carrie.

Amy v. Plummer

Since Amy was as foreseeable a plaintiff as Carrie, the arguments pertaining to Amy are the same with respect to Plummer's duty, breach, and causation.

Damages

Amy's damages include the damaged swimsuits on display in the store, and economic losses due to having to close the store for two months during the summer. The loss of property will be compensable and the lost profits could be compensable if they are determined with some degree of certainty.

Defenses

As in Carrie v. Plummer, there are no applicable defenses.

Emma v. Owner and Plummer

Just as Amy and Carrie were foreseeable plaintiffs, it is foreseeable that an employee would be injured by a burst pipe on the premises. Therefore, Emma's argument for duty, breach and causation vis-a-vis Plummer is the same as Amy's and Carrie's.

However, Emma's injuries in the form of lost wages are not compensable because they are purely economic. Moreover, if they were compensable, she would be expected to mitigate her damages by looking for another job.

DEFAMATION

Defamation

Common law defamation requires a showing of: (1) a defamatory statement; (2) of or concerning plaintiff; (3) publication; (4) damages.

Defamatory Statement

A defamatory statement is one that injures a plaintiff's reputation and tends to subject plaintiff to hatred, contempt and ridicule or financial injury.

Insert facts here ¹

Of or Concernin2 Plaintiff

The plaintiff must establish that a reasonable recipient of the information would understand that the statement referred to plaintiff.

Insert facts here ²

Publication

Publication requires that the statement be communicated to a third party who understands the defamatory meaning and its application to plaintiff.

Insert facts here

Damages

The type of damages the plaintiff must prove depends on the type of defamation. ³

SHOW how the statement is defamatory (when discussing the effect on one's reputation, discuss employment, church, friends, school, family, etc.). Also, remember that statements of *opinion* are not defamatory. Only statements phrased as *fact* constitute actionable defamation.

² Don't spend too much time on this element if the plaintiff is directly named. If the plaintiff's name is unclear, however, or if the plaintiff is only ambiguously referenced but not directly named (i.e. "the female professor who teaches Torts at Boston College") consider discussing the issue of COLLOQUIUM (but only write about it if it applies).

³ Now go directly to writing about the one that applies - libel or slander.

Libel is defamation that is written. When libel occurs, general damages are presumed. However, the plaintiff may offer actual evidence of damages to increase his or her award.

Insert facts here⁴

Libel Per Se and Libel Per Quod

In a minority of jurisdictions, courts distinguish between libel per se (libel that is defamatory on its face) and libel per quod (libel that is not defamatory on its face).

Insert facts here⁵

Slander

Slander is defamation that is spoken. In cases of slander, plaintiff must prove damages unless the defamation is slander per se.

Slander Per Se⁶

Slander per se exists when the defamatory statement: (1) adversely reflects one's conduct in a business or profession; (2) accuses one of having a loathsome disease; (3) accuses one of a guilt involving a crime of moral turpitude; or (4) suggests a woman is unchaste.

Insert facts here⁷

4 Is the defamation written or printed? Get out of this fast.

5 Don't spend a lot of time unless the statement is *libel per quod* - not obviously defamatory. A lot of people are confused by libel per quod. A statement that is libel per quod (not obviously defamatory) is one for which extrinsic evidence is required to prove its injurious nature. For example, the written statement "Patty was distributing 'Hillary for President!' bumper stickers at school last Wednesday" is not defamatory on its face, unless extrinsic evidence is offered to prove that Patty is an intern for Obama. In that case, the statement about Patty could cause *her* reputational harm and financial injury, and therefore is libel per quod.

6 Do NOT write about slander per se unless one of the types applies. You will not have time.

7 Write about only those that apply. Usually one of these applies if the defamation is spoken. The bar examiners love the crimes of moral turpitude and the statements about one's business or profession.

Constitutional Defamation

When the defamation involves a matter of public concern, the plaintiff must prove two additional elements: (1) falsity; and (2) fault.

Matter of Public Concern

Insert facts here⁸

Falsity

Insert facts here

The type of fault plaintiff must prove depends on whether the plaintiff is a public or private figure.⁹ If the plaintiff is a private figure, negligence must be shown. If plaintiff is a public figure, malice must be shown.¹⁰

Malice

Malice is defined as knowledge that the defamatory statement was false or reckless disregard as to the statement's truth.

Insert facts here"

8 Is this a matter of public concern? This is usually debatable (President sleeping with an intern, etc.). Use all of the facts. Also, always bring up constitutional defamation even if you ultimately conclude that it isn't a matter of public concern. Just don't **analyze** and **fault**.

Also, one *major* mistake people make here is jumping to whether the PERSON is public or private before discussing whether the ISSUE is one of public concern. Those are two very distinct steps that occur at different times. Remember to start with WHAT the issue is first (is it one of public concern?) and then go to WHO the issue concerns (a public or private person?). WHAT then WHO. Those go in alphabetical order so they are easy to remember.

9 There are RULE statements for whether a plaintiff is a public or private figure but they are mostly common sense so don't stress about memorizing them - it mostly depends on whether the person voluntarily put himself/herself in the public eye - actors, politicians, etc. A good bar essay would be about someone in the middle like Monica Lewinsky or the Runaway Bride from Georgia.

10 Include only the heading that applies (malice v. negligence).

11 Only if the plaintiff is a public figure.

Negligence

Insert facts here¹²

Defenses to Defamation¹³

Truth

Insert facts here¹⁴

Consent

Insert facts here

Absolute Privilege

The defendant may assert an absolute privilege for remarks made: (1) during judicial proceedings; (2) by legislators in debate; (3) by federal executive officials; (4) in compelled broadcasts; and (5) in between spouses.

Insert facts here

Qualified Privilege

The defendant may assert a qualified privilege for: (1) reports of official proceedings; (2) statements in the interest of publisher; (3) statements in the interest of the recipient; and (4) statements in the common interest of the publisher and recipient.¹⁵

Insert facts here

12 Don't get trapped into writing a full torts negligence analysis here (with duty, breach, causation and damages). All that is required is a brief discussion of reasonableness or carelessness on the part of the defendant with respect to the truth of the statement. Also, remember that this element only applies when the plaintiff is a private figure.

13 Write about only those defenses that apply. Do not even write the definitions of the defenses that do not apply; you will not have time.

14 This defense doesn't apply if you already wrote about constitutional defamation because under that theory the plaintiff had the burden of proving falsity.

15 This is tricky. The qualified privilege may be lost if the statement goes outside the scope of the privilege, which means that the defendant either made the statement to *more parties* than just the interested recipient, gave the recipient details *outside the scope* of the defined interest (for example, a former employer telling a potential future employer details about job applicant's sexual history when the phone call was just for a job reference), or the defendant acted **with** malice when the statement was made. It is worth noting that in some states, the plaintiff need not show malice but only a good faith on the part of the defendant in making the statement.

PRIVACY TORTS

Invasion of Privacy¹⁶

There are four different torts that comprise the tort of invasion of privacy. To sue successfully for invasion of privacy, the plaintiff only has to prove one of the four torts. They are:

Intrusion Upon Seclusion or Private Affairs

A plaintiff has a claim for intrusion upon seclusion or private affairs when a defendant intrudes upon the solitude or seclusion of another OR his private affairs in a way that is objectionable to a reasonable person. Affairs and areas are private when a plaintiff has a reasonable expectation of privacy in them.¹⁷

Intrusion

Insert facts here¹⁸

Seclusion

Insert facts here¹⁹

Private Affairs

Insert facts here

¹⁶ Once you have written the intro paragraph, only address the privacy torts that apply.

¹⁷ WARNING! Many people lose points here because they don't realize that this tort is actually divided into TWO different parts - intrusion into "private affairs" or intrusion upon "seclusion." One refers to the plaintiff's personal AFFAIRS (think "mind your own business") and the other refers to the PLACE where the plaintiff is (like a private dressing room, restroom or car). Although they are separate torts, the bar examiners love to test both in one question (for example, an intrusion into a private hospital room (PLACE) and the viewing of plaintiff's private medical records (PRIVATE AFFAIRS)). Even if the fact pattern only calls for one, remember that both have the elements of intrusion, objectionable and reasonable expectation of privacy in common (see below).

¹⁸ Intrusion is a very broad term. It can be an actual physical intrusion into an area, use of senses by the defendant to observe a secluded area or overhear a private conversation (think eavesdropping or spying with binoculars) or some other form of spying or investigation (such as obtaining a person's credit report, medical records, etc.).

¹⁹ This is where all of the money is with respect to the factual analysis. Is there an expectation of privacy? Is that expectation reasonable? Would a reasonable person feel as though their privacy was violated? Would a reasonable person find this violation to be objectionable? You can do separate headings for the elements of reasonable expectation of privacy and objectionable if you want or you can analyze them under the headings of seclusion and private affairs.

Misappropriation (Appropriation of Name or Likeness)

Misappropriation occurs when a defendant engages in an unauthorized use of plaintiff's name or likeness for commercial benefit. Liability is limited to commercial advertisements or promotions.

Insert facts here

False Light

False light occurs where a defendant gives publicity to plaintiff concerning views he does not hold or actions he did not take. The false light must be highly offensive to a reasonable person and the information must be made public.

Insert facts here

Publication of Private Facts

This tort is committed when a defendant publicly discloses private information about plaintiff that is highly offensive to a reasonable person and not of legitimate concern to the public.²⁰

Insert facts here

Common Elements

In order for a plaintiff to have a claim for any of these torts, he or she must also establish (1) causation; and (2) damages.

Causation

Insert facts here²¹

Damages

Insert facts here

²⁰ Public figures have a lessened expectation of privacy.

²¹ Remember that causation here is PROXIMATE CAUSATION. No need to go into actual causation. Keep this short. This is usually not where the money is, and you won't have much time for it anyway if the privacy torts are crossed over with other issues.

Defenses²²

Consent

Insert facts here²³

Absolute Privilege

Defendant may assert an absolute privilege for remarks made: (1) during judicial proceedings; (2) by legislators in debate; (3) by federal executive officials; (4) in compelled broadcasts; and (5) in between spouses.

Insert facts here²⁴

Qualified Privilege

Defendant may assert a qualified privilege for: (1) reports of official proceedings; (2) statements in the interest of publisher; (3) statements in the interest of the recipient; and (4) statements in the common interest of the publisher and recipient.²⁵

Insert facts here²⁶

22 Discuss only those that apply.

23 Again, only if they apply.

24 Again, only if they apply.

25 This is tricky. The qualified privilege may be lost if the statement goes outside the scope of the privilege, which means that the defendant either made the statement to more parties than just the interested recipient, gave the recipient details outside the scope of the defined interest (for example, a former employer telling a potential future employer details about job applicant's sexual history when the phone call was just for a job reference), or the defendant acted with malice when the statement was made. It is worth noting that in some states, the plaintiff need not show malice but only a lack of good faith on the part of the defendant in making the statement.

26 Again, only if they apply (are you sick of me yet?)

TORTS QUESTION

Defamation/Privacy Torts

Paula is the president and Stan is the secretary of a labor union that was involved in a bitter and highly publicized labor dispute with City and Mayor. An unknown person surreptitiously recorded a conversation between Paula and Stan, which took place in the corner booth of a coffee shop during a break in the contract negotiations with City. During the conversation, Paula whispered to Stan, "Mayor is a crook who voted against allowing us to build our new union headquarters because we wouldn't pay him off."

The unknown person anonymously sent the recorded conversation to KXYZ radio station in City. Knowing that the conversation had been surreptitiously recorded, KXYZ broadcast the conversation immediately after it received the tape.

After the broadcast, Paula sued KXYZ for invasion of privacy in publishing her conversation with Stan. Mayor sued Paula and KXYZ for defamation.

1. Is Paula likely to succeed in her suit against KXYZ? Discuss.
2. Is Mayor likely to succeed in his suit against Paula and KXYZ? Discuss.

TORTS SAMPLE ANSWER

Defamation/Privacy Torts

Paula v. KXYZ

Invasion of Privacy

There are four different torts that comprise the tort of invasion of privacy. To sue successfully for invasion of privacy, the plaintiff only has to prove one of the four torts. They are: (1) intrusion upon seclusion or private affairs; (2) publication of private facts; (3) false light; and (4) misappropriation. The tort of misappropriation does not apply here.

Intrusion Upon Seclusion or Private Affairs

A plaintiff has a claim for intrusion upon seclusion or private affairs when a defendant intrudes physically or otherwise upon the solitude or seclusion of another OR his private affairs in a way that is objectionable to a reasonable person. Affairs and areas are private when a plaintiff has a reasonable expectation of privacy in them.

Intrusion

Here, there was no physical intrusion when Paula was recorded; however courts have held that intrusion by way of sensory perception is enough to constitute an intrusion. Since Paula's privacy was intruded upon by the anonymous recorder who was eavesdropping using senses (and later ratified by KXYZ when they played the tape) an intrusion occurred.

Seclusion

The question is whether the coffee booth in which Paula was sitting was an area of seclusion - namely whether Paula had a reasonable expectation of privacy in it. Although she was in a public place where servers and other staff could easily intrude upon her area for the purpose of doing their jobs, it is likely that she chose the corner booth and was whispering because she intended to keep her conversation private. That expectation was probably reasonable given that many people conduct business in coffee shops (in fact, many people use them as mini-offices) and don't expect their transactions to be recorded, even if they are overheard.

Private Affairs

Here, although the facts disclosed concerned a public issue (namely the conduct of an elected official with respect to a labor dispute) the discussion included Paula's opinion on that matter, something she may have wanted to keep private given the sensitive nature of the negotiation and her role in it. Although many people publicly voice their opinions over political matters, the intrusion into Paula's personal feelings by KXYZ would likely be more offensive to a reasonable person because its dissemination could have compromised her position in the negotiations.

Publication of Private Facts

This tort is committed when a defendant publicly discloses private information about plaintiff that is highly offensive to a reasonable person and not of legitimate concern to the public.

Private Facts

Here, for the same reason as noted above, although Paula and Stan were discussing a public issue and a public dispute, Paula's personal feelings about the mayor's conduct may be considered private enough for KXYZ to be liable under this tort.

Legitimate Concern to the Public (Free Speech Concerns)

When the publication involves a matter of public concern, the speaker's constitutional rights to free speech are implicated and otherwise tortious publication of private facts becomes legitimate.

Here, it is evident that the public would be concerned about improper conduct by an elected official of their city. Indeed, if the mayor had been taking bribes, this would impact the way he governs the city and would adversely impact the general public vs. the special interest groups. Moreover, the City labor unions likely represent a large number of working people in City, and how they are treated is undoubtedly a matter of public concern. However, it is less clear that Paula's opinion of the mayor (however legitimate it may be) is one of public concern since it's not clear that the public would believe her anyway.

False Light

False light occurs where a defendant gives publicity to plaintiff concerning views he does not hold or actions he did not take. The false light must be highly offensive to a reasonable person and the information must be made public.

Here, Paula's views about the mayor were truthful (at least as to her) and therefore, she was not placed in a false light.

Mayor v. KXYZ and Paula

Defamation

The common law elements of defamation are: (1) a defamatory statement; (2) of or concerning plaintiff; (3) publication; (4) damages. Plaintiff must establish these elements for a prima facie case.

Defamatory Statement

A statement is defamatory if it adversely affects a plaintiff's reputation and subjects him to hatred, contempt, or ridicule.

Here, Mayor will argue that the statement about him being a crook adversely affects his reputation as an honorable public servant. The statement subjects him to hatred by members of his administration, contempt by voters who elected him into office and ridicule by the media. Being called a crook will cause him to lose the respect of his voters and might cost him reelection.

On the other hand, if Paula's statement was merely an opinion that Mayor's actions were the result of not receiving bribes, that may not be sufficient to be defamatory as only factual representations (not opinions) are defamatory.

Of or Concerning the Plaintiff

Plaintiff must show that a reasonable listener would understand that the statement referred to the plaintiff.

Here, the listeners of the radio station are City residents and since there is only one mayor of City, the reference to him (although his name wasn't directly used) was easily understood by listeners.

Publication

Publication means communicated to a third party. Here, the statement was published when communicated by Paula to Stan and then by KXYZ to the public over the airwaves.

Damages

The type of damages a plaintiff must prove depend on the type of defamation.

Libel-KXYZ

Libel is defamation that is written. When libel occurs, general damages are presumed. However, courts have held that statements broadcast over the radio constitute libel for purposes of defamation even though they are not written. Therefore the statements broadcast by KXYZ would constitute libel and damages to Mayor's reputation are presumed.

Slander/Slander Per Se - Paula

Slander is defamation that is spoken. In cases of slander, plaintiff must prove damages unless the defamation is slander per se. Slander per se includes any defamatory statement that, among other things, adversely reflects on one's conduct in a business or profession, or involves a crime of moral turpitude.

Here, the accusation that Mayor has taken bribes is definitely a crime of moral turpitude as it suggests he is corrupt and dishonest to his constituents. Moreover, the fact that he did it in the course of his job as Mayor reflects on his conduct in his profession. Therefore, the statement by Paula is likely slander per se.

Constitutional Defamation

When the defamation involves a matter of public concern, the plaintiff must prove two additional elements: (1) falsity; and (2) fault.

Matter of Public Concern

As noted above, the issue of whether Mayor was in the practice of taking bribes is one that would undoubtedly concern his public as it would affect his honesty as Mayor and ability to perform his job as an elected official. Moreover, even though the statement was Paula's personal opinion of his actions, given her close working relations with Mayor, it is likely that she may have some insight into how he negotiates with interest groups and the public may be interested in knowing that.

Falsity

If Mayor has another legitimate reason for voting against the building of the union headquarters, he may be able to demonstrate that Paula's statement is false.

Fault

The type of fault plaintiff must prove depends on whether the plaintiff is a public or private figure. If the plaintiff is a private figure, negligence must be shown. If plaintiff is a public figure, malice must be shown. Since Mayor is a public figure, he must demonstrate that Paula and KXYZ acted with malice.

Malice - Paula

If Paula acted with reckless disregard for the truth, she will be deemed to have acted with malice. However, since Paula didn't know her statement was being recorded, she probably was just blowing off steam to a colleague and likely did not act with the requisite disregard for the truth of the statement she made. Since Stan knew the details of the situation, she could trust that he might not take her statements at face value anyway.

Malice - KXYZ

KXYZ may have been acting with reckless disregard for the truth because they quickly aired the tape without questioning its legitimacy or investigating the truth of the statement or its source.

Defenses

Qualified Privilege

The defense of qualified privilege exists for: (1) reports of official proceedings; (2) statements in the interest of the publisher; (3) statements in the interest of the recipient; and (4) statements in the common interest of the publisher and recipient.

As noted above, KXYZ may argue that it was in the public's best interest to know whether or not their elected official was corrupt, and the public was the "interested recipient" of the statement. However, given that the allegation was phrased in the form of an opinion, it cannot be said that it is in the public's interest to know the biased opinion of someone in an adversarial relationship with Mayor. Moreover, it's likely that KXYZ's audience extends beyond the boundaries of City - Mayor's territory - and therefore, it's likely that people who were not actually his constituents (and therefore not actually interested in or impacted by the statement) heard the accusation. This means that the scope of the privilege may be lost.

PRODUCTS LIABILITY

Products Liability - Manufacturer¹

There are five theories of liability upon which to base a products liability claim: (1) strict liability; (2) negligence; (3) implied warranties; (4) representation/express warranties; and (5) intent.

Strict Liability

The prima facie case for strict products liability is: (1) strict duty; (2) breach of that duty (supply of a defective product); (3) causation; and (4) damages.

Strict Duty

Commercial suppliers have a strict duty to supply safe products that are free from defects.

Breach

Under a strict liability theory, a breach occurs if the defendant supplies a defective product and that product was defective when it left defendant's control.

Defect

There are three types of defects: design defects, manufacturing defects, and inadequate warnings. A product can only be defective if it is unreasonably dangerous.

Design Defect

A design defect occurs when every product on an assembly line has the same dangerous propensities. To prove the existence of a design defect, the plaintiff must show either **that**: to perform as safely as the ordinary consumer would expect, using the product in a reasonably foreseeable manner; or (2) that the product fails to perform as safely as the ordinary consumer would expect, using the product in a reasonably foreseeable manner.

As far as Bar Exam subjects go, products liability is the most challenging topic to cover in the one-hour time limit. Therefore, you need to take out those products liability theories that don't apply. You will get credit for listing them at the top of the essay. But BE CAREFUL which ones you exclude. Definitely write about any theory that you think any reasonable lawyer would try to include in his or her Complaint.

As far as other time-saving techniques go, never write about defenses that don't apply or at least save the defenses section for the very end instead of addressing the defenses after each products liability theory. If you are reafu: pressed for time, the next things to take out are the definitions of the DEFECTS that don't apply. For example, if you are only going to write about a manufacturing defect, take out the definitions for design defects and inadequate warnings. Jump right to the one that applies.

defendant could have made the product safer without serious impact on the product's price or utility (the **feasibility or risk-utility** test).

Insert facts here ²

Manufacturing Defect

A manufacturing defect occurs when one of the products on an assembly line is more defective than the rest. To prove a manufacturing defect, the plaintiff must prove either of the two elements laid out under the design defect section.

Insert facts here ³

Inadequate Warnings

Inadequate warnings are a type of design defect that result from the manufacturer's failure to give adequate warnings as to the risks involved in the product. For liability to attach, the danger must not be apparent to user and use of the warning must not have a serious impact on the product's price or utility.

Insert facts here ⁴

Present When it Left Defendant's Control

Insert facts here ⁵

Causation

Actual causation

This element is inferred if the defect was present when it left defendant's control.

Insert facts here ⁶

² SHOW the reader how the design defect makes the product dangerous (i.e. products containing certain chemicals are dangerous *because* they are flammable or can burn skin). If both the consumer expectation and feasibility tests apply, do a separate heading for each if you have time and are going to write a substantial amount under each heading.

³ Discuss this only if it applies. SHOW the reader how the "manufacturing defect" makes this product dangerous. For example, a treadmill with a malfunctioning STOP button could kill a person who desires to stop running but must jump from or be violently thrown off of the treadmill in order to quit, as opposed to using the button to slow safely to a halt.

⁴ Discuss this only if it applies.

⁵ Don't spend too much time on this. This element is usually obvious through the chain of commerce.

⁶ All you need to write here is "see above analysis" and reference the section dealing with "present when it left defendant's control."

Proximate causation

Proximate causation exists when the act and resulting injuries were a foreseeable result of defendant's conduct or the defendant's conduct was a substantial factor in causing the injury.

Insert facts here

Damages

Plaintiff must prove that he or she sustained damages in the form of physical injury.

Insert facts here

Defenses

Insert facts here⁷

Ne2li2ence Theory of Products Liability⁸

In order for a plaintiff to recover under a "negligence" theory for products liability, she must show that the manufacturer of the product had a duty to her; that the manufacturer breached that duty, and that the breached duty caused her damages.

Duty and Breach

Breach of a duty is inferred when negligent conduct leads to the supplying of a defective product. Defect has been discussed supra.

Ne2li2ent Conduct

Insert facts here⁹

⁷ Discuss only those that apply and give each a heading. Note that misuse is not a defense if the misuse was reasonably foreseeable. Also, under a strict liability approach, most states apply comparative fault schemes when dealing with fault on the part of the plaintiff (here, the defense that involves fault on the part of the plaintiff is *misuse*, which is similar to *contributory negligence* under the negligence section. Nonetheless, the courts still use the comparative fault scheme to apportion liability when misuse is involved; don't let the word negligence throw you off; you can still discuss comparative *fault* if you have time).

Don't forget about assumption of risk as well (the plaintiff who reads the warning label and ignores it).

⁸ Most people lose all of the possible points here. They confuse *negligence* under a *products liability approach* with *general negligence* (which would take WAY longer to write about). Note the differences below: you don't go all the way into a *duty-standard of care-breach* analysis. This will save you time!!

⁹ This is actually the SAME as a plain breach analysis under regular negligence. Just talk about reasonableness.

Causation

See above.¹⁰

Damages

See above.

Defenses

Insert facts here

Implied Warranty

There are two warranties implied in every sale of goods that can serve as the basis for a products liability suit. Any buyer, family member or houseguest can sue under these theories and the plaintiff does not have to prove fault on the part of the defendant.¹¹

Warranty of Merchantability

This warranty is breached when the goods are not of average acceptable quality or are not fit for the general purpose for which they were intended.

Insert facts here

Warranty of Fitness for a Particular Purpose

The warranty of fitness for a particular purpose is breached when the defendant has reason to know the particular purpose for which the consumer goods are required, and that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods that conform to that purpose.¹²

Insert facts here

10 Remember that you already discussed this under the strict liability section. You will NOT have time to repeat yourself.

11 Discuss only the theories that apply. If neither apply, take this section out completely.

12 A recent example of this issue comes from the lawsuit filed against McDonald's by a plaintiff who suffered third degree burns when she spilled a cup of McDonald's hot coffee all over herself, after she purchased it from the drive-thru and drove off with it placed between her legs (and with the lid off). Although the plaintiff in that case was clearly partially at fault, the jury awarded her a large sum of money because they determined that the coffee McDonald's sold her was 40-50 degrees hotter than was fit for consumption. Since the pm:pose of coffee is to *drink* it, and the coffee was too hot to drink, it was not fit for its particular pm:pose. What's funny about this is the plaintiff never actually drank the coffee.

Defenses

Insert here

Express Warranty/Representation Theories¹³

Breach of an express warranty arises when a product does not conform to the affirmative representations made by the defendant. The representation must have been part of the bargain at the time the purchase was made. Any consumer, user or bystander can sue under this theory.

Insert facts here

Defenses

Insert here

Intent¹⁴

A defendant will be liable to anyone injured by an unsafe product if the defendant intended the consequences or knew that they were substantially certain to occur.¹⁵ If intent is present, most likely the tort is a battery. Any injured plaintiff can sue under this theory.

Insert facts here

Defenses

Insert here

13 Discuss this theory only if it applies (look for MAJOR representations like guaranteed diet pills, etc.)

14 Discuss this theory only if it applies (it rarely does, but remember to discuss punitive damages if it does).

15 Note that battery is only to be discussed if intent on the part of the defendant is present, which is different than whether the defendant knew that the harm was substantially certain to occur. Very few commercial suppliers actually intend to harm their customers with their products; nonetheless many of them have reason to know that certain injuries will result from the use of their products (they simply hope and pray those injuries occur infrequently or do not result in lawsuits). The former would constitute a battery; the latter would not.

TORTS QUESTION

Products Liability

Peters, a suburban homeowner, decided to resurface with bricks the concrete area surrounding his pool. He purchased from Homeco, a local home improvement store, a concrete cutter manufactured by Conco, which had a blade manufactured by Bladeco. He then took the concrete cutter home and assembled it following the instructions provided by Conco.

The blade that Peters purchased was clearly labeled "Wet." Although no instructions or warnings came with the blade, Conco included several warnings throughout the instructions to the concrete cutter stating, "If using a wet blade, frequently water the blade and surface being cut to avoid risk of blade degradation." No other warnings relating to the blade were included with the concrete cutter.

Peters began cutting the concrete with the concrete cutter without using water. Less than five minutes into the job he noticed that the cutter was vibrating excessively. He turned the machine off by hitting the "kill switch" located near the blade at the bottom of the cutter, with his right foot. The cutter's handle did not have a "kill switch." After carefully examining the concrete cutter and blade, Peters became convinced that nothing was wrong and continued to operate it. Nevertheless, within seconds, the concrete cutter again began vibrating violently.

As Peters reached with his right foot to hit the "kill switch" again, the blade broke into pieces, forced off the cutter's safety guard, spiraled into Peters' right foot and caused permanent injuries.

On what theory or theories might Peters recover damages from and what defenses may reasonably be raised by:

1. Conco? Discuss.
2. Bladeco? Discuss.
3. Homeco? Discuss.

TORTS SAMPLE ANSWER

Products Liability

1. Liability of Conco

Products Liability - Manufacturer

There are five theories of liability upon which to base a products liability claim: (1) strict liability; (2) negligence (3) implied warranties; (4) representation/express warranties; and (5) intent.

Strict Liability

The prima facie case for strict products liability is: (1) strict duty; (2) breach of that duty (supply of a defective product); (3) causation; and (4) damages.

Strict Duty

Commercial suppliers have a strict duty to supply safe products that are free from defects. Here, Conco is a commercial supplier of concrete cutters and therefore is bound by this duty.

Breach

Under a strict liability theory, a breach occurs if the defendant supplies a defective product and that product was defective when it left defendant's control.

Defect

There are three types of defects: manufacturing defects, design defects, and inadequate warnings. A product can only be defective if it is unreasonably dangerous.

Design Defect

A design defect occurs when every product on an assembly line has the same dangerous propensities. To prove the existence of a design defect, the plaintiff must show either that: (1) the product failed to perform as safely as the ordinary consumer would expect (anticipating reasonable misuse); or (2) that the defendant could have made the product safer without serious impact on the product's price or utility.

Here, the concrete cutter failed to operate as a consumer would expect because it vibrated violently when used, which resulted in the blade breaking. Even if this occurrence didn't cause injury, it would result in inefficient cutting at a minimum, which is not what normal consumers would expect from a power cutter. And because fixing this problem would actually result in greater utility of the cutter, the defendant could have made the product safer. Therefore, if this problem occurred in all of the Conco cutters on an assembly line, it would easily qualify as a design defect.

A second potential design defect in the Conco cutter is the lack of a kill switch on the handle. This forces consumers to use one foot to terminate power, which would be hard to do while balancing and holding a vibrating cutter. Since kill switches are used most frequently in an emergency, it would make sense to have the switch located near the area in which the user is working for easy access, namely the handle.

Since all of the cutters are likely manufactured without a handle kill switch, this is a design defect. Finally, it seems easy to relocate the kill switch to the handle of the cutter without interfering with the product's utility or cost. If anything, the product would probably be cheaper to manufacture because there would be no separate foot switch to manufacture.

Manufacturing Defect

A manufacturing defect occurs when a single of the products on an assembly line is more defective than the rest. To prove a manufacturing defect, the plaintiff must prove either of the two elements laid out under the design defect section.

Here, although the kill switch was likely a design defect, if the vibrations occurred only in this cutter and not in every product on Conco's assembly line, the vibration will be a manufacturing defect.

Inadequate Warning

Inadequate warnings are a type of design defect that result from the manufacturer's failure to give adequate warnings as to the risks involved in the product. For liability to attach, the danger must not be apparent to the user and use of the warning must not have a serious impact on the product's price or utility.

Here, Conco had *assembly* instructions and additional instructions regarding the use of water when using a wet blade. Nonetheless, the instructions appeared to warn only of blade degradation and not serious injury. An adequate warning would have informed the user that failure to apply water to the blade could result not only in blade degradation but blade disintegration, which could cause serious injury as the pieces of blade detach from the moving cutter.

Although it would be apparent to a reasonable user that a vibrating blade might result in damage to the blade itself, it is not apparent that the vibrating will cause the blade to detach from the cutter in pieces and cause injury. Therefore, the warning that Conco did include was likely inadequate. Moreover, since Conco already paid to have a warning included, it would not have resulted in any extra cost to add a few more words to it.

Present When it Left Defendant's Control

Because the cutter went through the typical chain of commerce, it can be inferred that the defect was present when it left the defendant's control.

Causation

Actual causation

This element is inferred if the defect was present when it left defendant's control. See above.

Proximate causation

Proximate causation exists when the act and resulting injuries were a foreseeable result of defendant's conduct or the defendant's conduct was a substantial factor in causing the injury.

Here, it is foreseeable to a commercial supplier that consumers will disregard warnings when serious injury is not a likely consequence. Therefore, failure to include an adequate warning about potential bodily harm proximately caused Peters' injuries.

Damages

Here, Peters was permanently injured.

Defenses

Misuse

When a consumer uses a product in a way other than for what it was intended, the defendant will have a defense of misuse to a strict liability cause of action. Here, Peters used the cutter with a "wet" blade. However, he did not follow the instructions to frequently water the blade and surface being cut. Therefore, Conco may be able to argue that he misused the product.

Nonetheless, when a misuse is foreseeable by a manufacturer, the defense will not be available. Here, as noted above, failure to wet the blade and concrete surface was likely foreseeable because the instructions did not warn against personal injury, only blade degradation. Therefore, it is foreseeable that a user will decide to risk the blade degradation and proceed without following instructions.

Therefore, it is likely that Peters' misuse was sufficiently foreseeable to overcome Conco's misuse defense.

Negligence Theory of Products Liability

In order for a plaintiff to recover under a "negligence" theory for products liability, he must show that the manufacturer of the product had a ; that it breached that duty, and caused his damages.

Duty and Breach

Breach of a duty is inferred when negligent conduct leads to the supplying of a defective product. Defect has been discussed supra.

Negligent Conduct

Negligent conduct occurs when the defendant fails to act reasonably. Here, it was unreasonable for Conco to include warnings and instructions relating to the *assembly* of the product and risk of *blade degradation* but not *personal injury*. It was probably foreseeable to Conco that the cutter would vibrate if not used on a wet surface (which is why Conco warned of blade degradation) and therefore it should be foreseeable that a

vibrating blade may break into pieces and fly off of a moving cutter onto a person.

Defenses

Contributory/Comparative Negligence

When a plaintiff's unreasonable conduct contributed to his injuries, the defendant may have a defense for contributory negligence. In some jurisdictions, courts apportion fault between the plaintiff and defendant and reduce the plaintiff's damages in a comparative fashion, known as comparative negligence.

Here, there is no evidence that Peters assembled the cutter incorrectly, but he may have acted unreasonably when he failed to wet the blade and surface (as instructed) and failed to stop using the cutter when it continued to vibrate violently. Therefore, Conco may have a defense for contributory negligence.

2. Bladeco

Strict Liability

Here, Bladeco will likely be liable under an inadequate warning theory. Labeling the blade "wet" would have been wholly insufficient had Conco not supplied additional warnings explaining what use of a wet blade entails. Nonetheless, it was likely Bladeco's responsibility to warn of blade breakage in the event the blade or a surface is not watered down prior to use. Since Bladeco undertook to label the blade, it would not have compromised the .QQ.S.t or utility of the product to add another warning about potential personal injuries (perhaps in a paper insert that came with the blade).

Therefore, Bladeco will likely be strictly liable for failure to warn. And because the failure to warn was unreasonable, given how dangerous blades are and how unlikely it is that consumers will understand the meaning behind the word "wet," Bladeco is probably liable for its unreasonable conduct under a negligence theory as well.

3. Homeco

Strict Liability

There is no evidence that Homeco was negligent in supplying the cutter and blade to Peters. And since custom in the industry does not dictate that retailers inspect all products they sell, Homeco likely acted reasonably. Nonetheless, Homeco is strictly liable as a commercial supplier (here, a retailer) in the chain of commerce that supplied a defective product.

VICARIOUS LIABILITY

Vicarious Liability

(This generally goes first before discussing the tort of the employee)

The question is whether _____(employer) is liable for the tort of _____ (employee) even though _____(employer) was not the direct cause of plaintiff's injury. (This sentence can be omitted if you are running out of time)

Vicarious liability is the liability of one party for the torts committed by another party.

Respondeat Superior

Respondeat superior is a type of vicarious liability wherein the employer is liable for the torts committed by its employees who are acting in the course and scope of their employment.

Therefore, in order to determine the liability of _____(employer), it is necessary to determine whether _____(employee) committed a tort within the course and scope of employment.

Insert facts here

(Was employee in scope of employment at the time the tort occurred?)'

INSERT TORT HERE²

Remember that intentional torts are usually OUTSIDE the scope and course of employment because they are considered frolic and detours (use that term). However, even an intentional frolic and detour CAN be in the course and scope of employment if the employer somehow benefits from it (even if the employer did not authorize it).

2 This is where the heading for the actual tort goes (the one committed by the employee). Examples are NEGLIGENCE, FALSE IMPRISONMENT, etc.

Standard of Care Attack

Two Times we depart from RPP:

1. **Special Physical Attributes of the defendant** such as blind or in wheel chair. Then hold to an RPP standard of an RPP who is blind or in wheel chare.
2. **Superior Skill or Knowledge:** Nascar Driver is treated as an RPP professional driver and Rocket Fuel Scientist is treated as an RPP who has expert knowledge of explosive materials.

Standard of Are Owed by **Child under 5:** They owe no duty of care to rest of world and won't be held liable.

Standard of Care for **Child from 5 to 18:** Subjective and different for each child. Have to look at age, experience and intelligence of the child and compare to an RPP child of same age, experience and intelligence.

Standard of Care for Child **Engaged in Adult Activity:** Regular Adult RPP standard

Professional Standard of Care: Professionals must exercise the same level and knowledge possessed by the average member of that profession in good standing in the same or similar community

Specialist: Same as above but based on national standard. (specialist rather than general practitioner)

Common Carrier and Innkeepers: Very high standard of care and are liable for even the slightest negligence. But, only owe this high standard to passenger or guest.

Bailment: For gratuitous bailment, bailor must inform of known, dangerous defects in chattel. For bailment for hire, bailor must inform chattel defects of which he is or should be aware.

Standard of care **Automobile driver owes to Guest:** Reasonable duty of ordinary care. RPP standard.

Possessors of Land: Possession is Key. Can be owner or renter.

Standard of Care to **Unknown Trespassers:** No duty to trespasser on the land who is unknown or unanticipated regardless of whether the injury was caused by natural or unnatural conditions. Unknown or unanticipated trespassers always lose

Standard of Care for **Known or Anticipated Trespassers:** Duty to warn or make safe artificial man made hazards that are highly dangerous that the possessor has knowledge of and that are not open and obvious.

- Don't have to protect against natural conditions.
- Don't have to protect against moderately dangerous conditions
- Don't have to protect against obvious conditions
- Don't have to protect against hazards you don't know about
- Only have to protect known trespasser from known, manmade death traps.

Child Trespassers: Attractive Nuisance Doctrine: when there is an artificial condition on the land that can lure a child onto the land.

Rule: Possessors of land owe a RPP standard of care to children lured onto the land by artificial conditions if:

1. Possessor knows or should have known of the dangerous condition
2. Possessor knows or should know children frequent the vicinity or property
3. The artificial condition is likely to cause injury
4. The expense of remedying the condition is slight compared to the magnitude of the risk.

Standard of care owed to **Licensees** (Guests or people like girl scouts that come to your door): Duty to protect from hidden dangers that the possessor knows about in advance.

Standard of Care owed to **Invitees** (enter land for economic/commercial benefit to possessor or enter land held open to general public): Possessor owed an RPP to protect invitees from:

1. Hazards that are hidden which possessor knows about.
2. Duty to make an RPP inspection of premises to protect invitee from all dangerous conditions.
3. Very high standard. Reasonable inspection depends on property, cost and difficulty in looking or touching and testing.

Standard of Care owed to **Firefighters and Police:** Are usually licensees because are normally entering land with implied permission, not to confer pecuniary benefits. But, they cannot recover for any injury that is inherent risks of their job. They have assumed the risk by accepting the dangerous job. Ex: firefighter won't win negligence claim for burns even if homeowner negligently set the fire.

Standard of Care **owed by Lessee:** Lessee has general duty to maintain premises and protect licensees from hidden dangers that the possessor knows about in advance.

Standard of Care **owed by Lessor:**

1. Warn of existing defects lessor knows of or has reason to know of an lessee is not likely to discover on reasonable inspection (Ex: Faulty wiring)
2. If lessor covenants to make repair, he is liable for unreasonably dangerous conditions
3. If lessor volunteers to make repair, he is liable if he is negligent in making the repair or fails to do it reasonable and someone gets hurt.

Avoiding Liability in All Cases where possessor of land owes Duty → Can Warn or Make Safe.

In any case where possessor owes duty to protect from hazardous condition, D possessor can satisfy duty and avoid liability by either:

- 1. Fixing the Problem or Danger, OR;**
- 2. Giving Warning**

Both are just as effective for possessor to satisfy the duty! Don't have to fix the problem. Putting up sufficient warning is good enough. Warning satisfied duty of care just as good as fixing the problem

If Try to Satisfy Duty by Warning, the warning must be:

1. Procedurally Adequate: Right place, right size, Might need pictures or colors, might need multiple languages.
2. Procedurally adequate: Must be able to be read and comprehended and must inform of risks that may occur if don't follow warning.

Watch out for warning in child trespass case. Child might not understand and appreciate warning either.

MBE: a warning answer is a good answer. Think, in the real world, people just put up a "caution, wet floor."

Standard of Care with Abnormally Dangerous Activities

Abnormally dangerous activity: A person is strictly liable for any harm liable for an abnormally activity.

Activity is abnormally dangerous if

1. The activity ***creates foreseeable risk of serious harm*** even when reasonable care is exercised; **AND**
2. The activity is ***not a matter of common usage*** in the community (activity is out of place, out of context)
 - Blasting: always abnormal activity
 - Use of highly toxic chemical or biological activity (lab with live viruses)
 - Company transporting chemical in truck
 - Anything involving nuclear energy or radiation.
 - Crop dusting (spraying chemicals from low---flying aircraft) depends on where activity is being done;
 - D's safety precautions are irrelevant; court will hold D strictly liable for any abnormally dangerous activity

Trick: they will load up the question with safety precautions.

Intentional Torts Attack

Intent can be actual if the plaintiff acts with the purpose or desire to achieve the forbidden result or when plaintiff commits an act with knowledge that there is a substantial certainty the consequence will result.

Transferred intent can transfer intent from one plaintiff to another or from one tort to another.

Note: Transferred Intent does not apply to IIED

Causation: D's conduct can be the actual cause of the forbidden consequence or plaintiff's conduct was a substantial factor in bringing about the forbidden result.

Damages are not an essential element of an intentional tort like they are for negligence. The court will award nominal damages just to establish the rights of the plaintiff.

Assault is an intentional act caused by the defendant creating a reasonable apprehension in the plaintiff of a harmful or offensive touching.

***Threat must be imminent, words are not enough, future threats are not enough, and watch for negating words.

Battery is an intentional act caused by the defendant which results in a harmful or offensive contact with the plaintiff's person.

False Imprisonment: In order for the P to establish a prima facie case False Imprisonment, the Plaintiff must plead and prove: 1) an act or omission on the part of the defendant that confines or restrains the plaintiff to a bounded area, 2) Intent on the part of the defendant (actual or substantial certainty) on the part of the defendant to confine the P to the bounded area 3) Causation and 4) that the P did not have a reasonable method of escape

*** Time can be long or short, bounded area can be big like a part or forest or small like stand in place and don't move as I rob you, and P is not required to risk harm, humiliation or disgust to escape.

Intentional Infliction of Emotional Distress: requires an act by the defendant amounting to extreme and outrageous conduct, Intent (actual or substantial certainty) or recklessness by the defendant to cause severe emotional distress, causation, and the plaintiff must suffer severe emotional distress.

*** No formal requirement constituting severe emotional distress. Watch for fragile classes of persons such as young children, elderly people, pregnant women, supersensitive adults only if D knows of their sensitivity.

Trespass to Land occurs when D commits a physical invasion onto the plaintiff's land with intent and causation.

***Mistake is no defense, intent is just to enter or remain after told to leave. Damages can be nominal. Not liable if no intent to end up on land if fall over, get pushed, accident lands you there.

Trespass to Chattels: A defendant is liable for trespass to chattels if he commits an intentional act that interferes with the plaintiff's right of possession in his chattel resulting in damage.

*** Minor intrusion that would only require the D to pay rental value or value or repair

Conversion: A defendant is liable for conversion if he commits an intentional act that interferes with the P's right of possession in the chattel that is serious enough in nature or consequences to warrant the defendant to pay the full market value of the chattel at the time of the conversion.

*** Permanent deprivation, substantial alteration, major damage or total destruction.

Defenses to intentional Torts: Consent, Defensive Force, Private or Public Necessity.

INTENTIONAL ENTRY	NEGLIGENT OR RECKLESS ENTRY	ACCIDENTAL/ NON-NEGLIGENT ENTRY
1. One is subject to liability regardless of whether he thereby causes harm to the land if he intentionally enters the land in possession of another.	1. One who negligently or recklessly enters the land of another is subject to liability if, but only if, he causes harm to the land or to a thing on the land.	1. NO liability (ex: hit golf ball and hit tree limb & the golf ball then ricochets to X's ppty- no liability because it was accidental)
2. A trespass covers intrusion upon, beneath, and above the surface of the earth.		
3. Mistake is NO defense. It is the intent to enter, not the intent to trespass that determines liability.		

False Imprisonment Tips

There are 4 ways to confine:

1. Physical barriers
2. Force or threat of immediate force against P, P's family, or property
3. Omissions where D has a duty to act
4. Improper assertion of legal authority (ex: false arrest)

Trespass to Land Tips

1. If a 3rd pty trespasses then LL cannot sue for T/L. T must instead sue UNLESS the apt is vacant, then LL can sue that 3rd pty trespasser.
2. Mistake as to lawfulness of entry or the identity of the land is no defense (including mistaken consent)

Tips for Trespass to Chattel & Conversion

1. Mistake is no defense to T/C or Conversion
2. For T/C dispossession or damages must be proven.
3. For conversion, if the remedy is a forced sale on the D, then P does not get property back. The court will apply FMV at time and place of conversion.

Tips for Negligence

1. Standard Duty Issues:
 - a. Children- must be like age & experience for 5-18 UNLESS it's an adult activity
 - b. Custom
 - c. Experts- higher standard than average RPP
 - d. Common Carrier- higher standard than average RPP (planes, trains, etc.)
 - e. Adults with disabilities- with like diagnosis, except with mental retardation & mental illness- no allowance
2. Special Duty Rules:
 - a. Landowner
 - i. Trespasser- No duty for undiscovered defect
 - ii. Trespasser- Duty to post warnings of known dangers

- iii. Trespasser- Kids- must take into account the Attractive Nuisance Doctrine (artificial condition, know about possible trespassers, unreasonable risk that a child cannot appreciate, balancing of the utility versus the risks.)
- iv. Licensee- Duty to warn or make safe any known dangers
- v. Invitee- Duty to make reasonable inspection and warn of all known dangers.
- b. Statutory Standard of care:
 - i. D is excused from violation of statute if compliance with statute would have resulted in a harm greater than the harm produced by the violation or would have been impossible.
 - ii. In order for P to sue under the statutory set forth standard of care, he must show 2 things: 1.) P was within the protected class of persons intended to be protected and 2.) that the statute was intended to protect against the type of injury the statute was designed to protect
- c. No duty to rescues UNLESS:
 - i. Special relationship
 - ii. Statutorily required duty
 - iii. Created the D's peril
 - iv. Instrumentality is under D's control
 - v. Once you start to help, cannot leave P in worse off position (voluntary undertaking)
- d. Lessor- no duty at common law
- e. NIED situations- must avoid causing distress to another. (Tortfeasors awareness is the difference between NIED 3rd party & IIED 3rd party claims)

Tips for Strict Liability- Wild Animals

WILD		DOMESTIC	
Lions	Rattle Snakes	Cattle	Mules
Tigers	Alligators	Sheep	Bulls
Bears	Ostriches	Horses	Stallions
Elephants	Tsetse Flies	Cats	Parrots
Wolves	Killer Bees	Domestic Bees	Goats
Monkeys	Guard Dogs	Dogs	
Spiders			

1. Do not be tricked by the person who does not actually get directly injured by the wild animal. So long as the injury resulted from an action that was a result of a dangerous propensity of the wild animal, then owner is liability. Ex: pet spider is accidentally let out of his cage during a flight, and someone sees the spider and starts running away from it, then that person falls and trips and breaks his/her arm. Owner of the spider is still liable. Do not fall for the red herring that the bear has been declawed or the spider has been defanged.
2. Possessor of livestock (including cattle, horses, sheep, hogs, and such wandering fowls as turkeys, chicken, and pigeons) are **strictly liable for their trespass** even if the animal is a domestic one.

Torts Issues Tested

July 2000	Torts x remedies	Negligence
February 2001	Tort x remedies	Restitution, injunction, unjust enrichment
July 2001	Torts	Malicious Prosecution, Abuse of Process, IIED, Defamation + Absolute Privilege, P.R. (Frivolous lawsuit, Candor + Perjury, W/drawal)
July 2002	Torts	Strict PL, Negligence PL, Intentional Tort (Battery), Express & Implied Warranty
July 2003	Torts	Privacy, defamation
July 2004	Torts	Negligence, statute, malpractice
Feb 2006	Torts	Strict Products Liability (Alternatives), Negligence, IW Merchantability
July 2006	Torts	False Imprisonment (Shopkeeper's Privilege), Negligence, Negligence Per Se (NOT Class of Persons/Class of Risk), Landowner Duties, Vicarious Liability
Feb 2007	Torts, Property	Assignment, easement, eviction, nuisance
Feb 2008	Torts	Strict liability, negligence
Feb 2009	Torts	Defamation
July 2009	Torts x Civ Pro x P. R	12(b)(6), S/L (Ultrahazardous Act.), Negligence, Malicious Prosecution
July 2009	Tort remedies x civ pro x P.R.	Injunction, res judicata, duty of confidentiality
July 2010	Torts	Negligence, all intentional torts, and negligence again
Feb 2011	Torts	Negligence (child's), vicarious liability, NIED
Feb 2013	Remedies (in tort)	conversion remedies: equitable lien, constructive trust, purchase money resulting trust
Feb 2013	Torts	Products Liability

July 2013	Remedies (tort)	Intentional tort - (trespass to land & chattel) remedies
Feb 2014	Remedies (contract & tort)	all remedies for misrepresentation in land sales contract
July 2014	Torts	Negligence, negligence per se, vicarious liability
Feb 2015	Partnership x Torts	Defamation (liability of partnership plus individual partners), authority to contract
Feb 2016	Wills & Trusts	Testamentary trust, violation of trustee duties, remedies
Feb 2017	Remedies x contracts	Misrepresentation, breach of K, fraud, remedies, rescission
July 2017	Torts	Negligence, negligence per se, defenses, strict liability (abnormally dangerous activity), products liability (warranty), apportioning damages
Feb 2019	Torts	Negligence, strict liability
Feb 2020	Torts	Defamation – public vs. private figure; slander per se; NIED; IIED
July 2021	Torts	Vicarious liability; negligence; premise liability; negligence per se; proximate cause and foreseeability of third party tortfeasor; defenses to negligence; vicarious liability; contribution
Feb 2022	Torts x Remedies	Public and private nuisance; trespass to land
July 2023	Torts	Products liability; manufacturing defect; design defect; damages; negligent products liability; warranties; misrepresentation

INTENTIONAL TORTS

Two basic principles: 1) Ignore π 's 'hyper-sensitives' & 2) There are no incapacity defenses in *Intentional Torts*.

Prima facie case \square 1) Voluntary act; 2) Intent; 3) Causation.

Intent: *Specific Intent:* purpose in acting is to bring about specific consequences. *General Intent:* actor knows with "substantial certainty"

Transferred Intent: *only if* both the tort intended & tort results are one of the following: Assault, battery, FI, Trespass to Land or Chattels.

Battery 1) H or O contact, 2) P's Person 3) Intent 4) Causation

1) **Harmful or offensive contact** (offensive = unpermitted by reasonable Person) objective standard *unless* you make quirkiness known!

2) **Contact must be with P's person** (includes anything P is holding/touching/connected to P)

Assault Act by D creating: 1) RA, 2) Imm. H or O, 3) Intent, 4) Causation

1) **D places P in reasonable apprehension** (apprehension = knowledge, not fear)

-Unloaded gun/Idle threat—If D lacks the ability to consummate the battery, answer turns on whether P knows the battery can be completed - if no info, what would RP believe...

2) **Apprehension must be of an immediate battery**

-Words alone lack immediacy, there must be conduct (i.e. menacing gesture)

-Words can negate immediacy its conditional, i.e. "if you weren't my friend..."

-Several hours in the future = not imminent

False Imprisonment 1) confines/restrains to bounded area, 2) Intent, 3) Cause

1) **D must commit an act of restraint**

-Can be a threat or an omission (if there was a preexisting duty) as long P was aware of the restraint

2) **P must be confined in a bounded area** (not bounded if reas means of escape) - no req. specific boundaries – humiliating/disk \square not reas.

3) **P must know of OR be harmed by the confinement**

Shopkeeper's Privilege: can detain suspect for shoplifting if:

1) **Reasonable belief;** 2) **Reas. manner;** 3) **Reas. engh of time**

IED 1) extreme/outrageous, 2) Intent or reck., 3) cause, 4) severe ED (dmg req.)

1) **Extreme/Outrageous conduct** (exceeds bounds of decency/not mere insult)

Look for: repetitive/continuous conduct/ D is a common carrier/ D is a member of a fragile class (children, elder, pregnant woman)/ D knows of P's emotional sensitivity

2) **P must suffer severe emotional distress (cannot be "mildly annoyed");** 3) **P must suffer severe stress**

* Do NOT need to show physical symptoms of distress

Trespass to land 1) Physical invasion of P's RP, 2) Intent, 3) Causation

Prima facie case: 1) physical invasion of P's property; 2) intent; 3)

Causation

1) **Act of physical invasion** (entering property OR throwing s/g on it) — *mistaken entry actionable* – no trespass if heart attack/horse spook

-Invasion must be tangible, i.e. not by sound or smell

2) **Interferes with P's exclusive possession of the land** (includes air/ground)

Trespass to Chattels & Conversion – *Difference lies in degree of harm*

Both involve intentional interference with personal property

(everything except land, includes money and data files)

Interference occurs in 2 ways: 1) Damaging the property; 2) theft of property

Difference between both claims: chattels=modest harms/ conversion = extensive

Remedies: conversion = full market value/ trespass = cost of repair

Mistake over ownership: NOT a defense

AFFIRMATIVE DEFENSES:

Consent⁷: look at where there was legal capacity to consent

Developmental disability = CAN consent to things capable of und

Children CAN consent to age appropriate invasions (i.e. to wrestle)

Express consent i.e. "come on it"(void if there is fraud or duress)

Implied consent: custom (haircut/football) or D's reasonable interpretation based on P's objective conduct and surrounding circumstances

Scope: D cannot exceed the scope of consent (Dr. operates on wrong body part)

Protective Privileges: Δ *claims threat frm π will hurt me, else, or my stuff?*

1) **Self defense;** 2) **defense of others;** 3) **defense of property**

Proper timing (threat must be imminent or in progress)

Reasonable Belief: mistake does not destroy privilege

Amount of force: must be necessary to repel the threat (i.e. proportional)

-Can include deadly force, BUT not for defense of property

Necessity Defenses: only available if the underlying claim is property tort

Public Necessity: D commits 1) a property tort; 2) to protect the community or a significant group (this is an ABSOLUTE DEFENSE)

Private Necessity: D invades to protect his OWN interests

LIMITED DEFENSE: D liable for actual damages only/can stay long as sit lasts

DEFAMATION

Prima facie case: 1) Defamatory statement; 2) Of and concerning the P; 3) publication the 3rd party; and 4) Damage to P's reputation

1) **Defamatory Statement specifically identifying the P**

-Needs to adversely affect reputation (i.e. not just name calling)

-Must be an assertion of fact that reflects negatively on the character of the person

-P can also be identified by description, NOT just name

-Of and concerning can apply to all members of a group (NOT large)

-Only applies to living Plaintiff

2) **The statement must be published**

-Publication = statement is shared with s/o other than the P (1= ok)

-Does not have to be deliberate publication/ can be failure to remove

3) **Damages to reputation of the P**

Slander: (spoken words/Statements) must prove special damages (pecuniary harm) in order to recover general damages

Slander Pe Se: do NOT need to prove special damages, general = presumed

A) P's business or profession; B) loathsome disease; C) unchastity; D) serious crime

Libel: (written) P does NOT need to prove special damages, general=presumed

Matters of Public Concern:

P must prove additional elements of 1) falsity and 2) fault (i.e. negligence)

Standard for fault if P is a Public Official/Public Figure: actual malice

1) Reckless disregard as to falsity OR 2) knowledge it was false

DEFENSES

Truth: D can always show what he said was factually accurate

CL defamation, truth is a defense because P doesn't have to show falsity

Absolute Privilege: (cannot be lost)

1) Defamatory statement made to a spouse; 2) government

officials in the course of their official duties; 3)

lawyers/judges/witnesses in court

Qualified Privilege: reports of official proceedings;

statements of interest to the recipient; 3) statements of common interest

to publisher and recipient

*These privileges can be lost if abused

INVASION OF PRIVACY

1) **Commercial Appropriation:** **unauthorized use** of P's **name or likeness** for D's **commercial advantage** (includes products or advertisements)

2) **Public Disclosure of Private Facts:** **public disclosure** of private information and disclosure is **highly offensive** to a reasonable person

3) **False Light:** **attributing P's views** in a way he does not take **and highly offensive** to a reasonable person (matter of public interest = must prove malice)

4) **Intrusion upon seclusion:** **intrusion into a private area** (expectation of privacy) and **highly offensive** to a reasonable person

*Right of privacy is not assignable, does not survive the death of P

MISREPRESENTATION (fraud)

1) Misrepresentation of fact; 2) Scierter; 3) intent to induce reliance; 4) causation; reliance; damages

NEGLIGENT MISREPRESENTATION

1) Misrepresentation by D in a business/professional capacity; 2)

breach of duty owed to P; 3) Reliance; 4) damages

INTERFERENCE WITH BUSINESS RELATIONS

1) Valid k between P and third party; 2) D has knowledge of the k/relationship; 3) D intentionally interferes with the k/causes breach; 4) damages

NEGLIGENCE

Prima facie case: 1) Duty; 2) breach; 3) actual and proximate cause; 4) damage

Duty of Care

1) Duty to all foreseeable Plaintiffs (P in the zone of danger?)

Exception to foreseeable Plaintiffs: rescuers—danger invites rescue

2) If so, what standard of care applies? (how much care is owed?)

General Rule: reasonably prudent person acting under same/similar circumstances (default standard)

Exceptions:

1) Superior skill/knowledge = RPP w/ similar skill/knowledge;

2) Important physical characteristic = RPP with same trait (i.e. blind)

Special Duty Standards:

Children: Age 0-5 = no duty/ Age 5-18 = child of same age,

experience, intelligence in similar circumstances/ child doing adult activity = RPP

Fire fighters/police: can NEVER recover b/c they assume the risk

Professionals: (doctor/lawyer/architect, etc.) held to care of average members of that same profession, meaning what those professionals ACTUALLY do

*Note: expert witness can be used to show custom in the industry

Common Carriers/Inkeepers: If P is a guest = high standard of care (even slight negligence)

Premises Liability: entering land an encountering hazardous condition

1) **Unknown trespasser** = no duty of care

2) **Known/Anticipated trespasser** = duty for known, concealed, dangerous, artificial, conditions

3) **Licenses** (social guests who enter w/ permission) = all known, concealed, dangerous conditions

4) **Invitee** (member of public or business visitor) = all known or reasonably knowable, concealed, dangerous conditions

Attractive Nuisance: D is liable if 1) dangerous condition on land that D knew or should have known about; 2) children likely to visit the vicinity; 3) condition likely to cause injury; 4) little expense to fix it vs. the risk

Statutory Standards of Care: a clearly stated statutory duty may replace RPP standard if P is within the class the statute is designed to protect AND the statute was designed to protect the type of harm suffered

Exceptions: 1) obeying the statute is *more dangerous* than the violation; 2) compliance w/ statute was *impossible* under circumstances

Affirmative Duties: generally NO duty to rescue UNLESS

1) Pre-existing relationship between P and D

2) D caused the Peril

3) Gratuitous Rescuer—liable if they chose to rescue and make the situation worse

Duty Re: NIED (negligent D with NO trauma to body of P)

1) Near Miss Cases: D's negligence while P in the *zone of danger* AND P suffered subsequent *physical manifestations* of distress

2) Bystanders: D kills/injures third party and P is *close relative* AND P sees/observed it in *real time*

3) Relationships: P and D are pre-existing business relationship and high probability that careless performance will distress P (E.g. dead relative put in wrong coffin)

Breach of Duty

P must identify with specificity what D did wrong or failed to do AND explain why an RPP would have done it differently

Res Ipsa Loquitur: doctrine used by P who lacks information about specific wrongful conduct the occurrence of the event shows breach

1) Accident is the type normally associated with negligence &

2) Type of accident would normally be due to negligence by D

Effect of Res Ipsa: No directed verdict may be given for D

Causation:

Actual Cause: *P must show the conduct was cause of the injury*

"But for" test: But for the breach, injury would not have occurred

Substantial Factor test: if two "joint" causes bring about injury, D's was "cause in fact" if it was a substantial factor

Alternative Cause: Two acts, but only could have caused the injury and we don't know which one (burden shifts to each D to show NOT the actual cause—if they cant, then joint liability)

Proximate Cause: concerned with fairness—only want D to pay for “foreseeable consequences” (it’s a limitation of liability)

Direct Cause case: uninterrupted chain of events from negligent act to plaintiff’s injury = defendant liable for foreseeable harm

Indirect Cause cases:
“foreseeable intervening forces” = D liable

- Intervening medical malpractice* (Dr. makes injury worse)
- Good Samaritan* (S drags P to curb and dislocates his shoulder)
- Reaction forces* (pedestrians run after accident & step on P)
- Subsequent Disease/Accident* (P using crutches & breaks arm)

“Unforeseeable Intervening forces” = superseding, no liability

Damages: *essential to negligence claim because not presumed*

Eggshell Principle: P can recover for all damages suffered, even if great in scope (i.e. if P is feeble/ extra sensitive)

Personal injury = economic & non economic damages (pain and suffering) & emotional distress

Property damage = cost of repair or fair market value

Punitive damages = ONLY if conduct is reckless/malicious
* P has a duty to mitigate

*Collateral source rule: Damages not reduced because P received benefits from other sources

AFFIRMATIVE DEFENSES

Contributory Negligence: *P’s negligence bars recovery (CL)*

Defense: *last clear chance doctrine*—person with last clear chance to avoid the accident and fails to do so is liable for negligence

Comparative Negligence: Δ may introduce E that π failed to ex. care for own safety. Π’s oblig. to ex. reas. care & observe self protecting statute.

Pure comparative Negligence (Minority - USE): damages awarded regardless of % that P contributed

Partial/Mod. Comparative negligence (Maj) = P’s negligence reduces damages accordingly to % of P’s fault (as long D fault = 50% plus)

Assumption of Risk: P may be denied recovery if she assumed the risk of damage caused by D: 1) knew of the risk and 2) voluntarily proceeded in the face of the risk.

Implied Assumption of Risk: Knowledge implied where the risk is one that an avg. person would clearly appreciate. Common carriers and public utilities may not limit liability via disclaimer.

STRICT LIABILITY:

Prima facie case = 1) Nature of D’s activity imposes an **absolute duty to make safe**; 2) the dangerous aspect of the activity was the **actual and proximate cause** of P’s injury; and 3) P suffered **damages** to person or property

Strict Liability for Animals: owner is strictly liable for all trespassing animals that cause reasonably foreseeable damage

Domesticated Animals: (pets/livestock) no strict liability for injuries causes by domesticated animals *unless* owner had prior knowledge of their vicious propensities (i.e. previous attack)

*But no strict liability to trespassers

Wild Animals: You are strictly liable for wild animals you keep. Safety precautions & warnings are legally irrelevant.

Abnormally Dangerous Activities:

Two-Part Test: 1) activity causes a *foreseeable risk of serious harm* even when reas care is exercised. 2) activity is *uncommon in the area/community* where Δ pursues it.

Common Activities: blasting, explosives, farmer blowing tree stumps, dangerous chemicals/bio, radiation, nuclear energy.

Extent of Liability: Extends only to foreseeable π’s. safety precaution legally irrelevant. But SCOPE of liability only to dangers that would be anticipated from the activity involved.

DEFENSES

Contributory neg. not a defense if π has failed to realize the danger or guard against it. IT is a defense if π knew of the danger and π’s unr. conduct was the very cause of the harm from wild animal or ADA.

Comparative Negligence □ applicable defense to Strict Liability

Assumption of the Risk is a defense to Strict Liability

PRODUCTS LIABILITY:

Liability of a supplier of a defective product to someone injured by the product. 5 Theories of Liability: i) intent, ii) negligence, iii) strict liability, iv) implied warranty of merchantability & fitness for particular purpose, v) representation theories (express warranty and misrepresentation)

Common Elements: π must show 1) a *defect*, and 2) existence of the defect *when the product left defendant’s control*.

1. **Merchant Δ:** A commercial seller/someone who routinely deals in goods of this kind. *Not Merchants:* casual sellers & service providers.

Merchants: Commercial lessors (individuals that rent goods – ex. car rental, leases comp. equip) and every entity in a distribution chain. *No privity requirement.* Can sue both wholesaler and manufacturer.

2. **Defective Product:** π must demonstrate the product is defective. Gov. safety standards: non-compliance = defective. Compliance = not conclusive – may still be defective. Δ liable for foreseeable dangers at the time of marketing.

Three Kinds of Products Defects:

1. **Manufacturing Defect**

When it differs from ALL the other products that come off the same assembly line in a way that makes it *more* dangerous than *consumers would expect* (the on in a million bad one that slipped through)

Proving MD: Δ liable if π can show the product failed to perform as safely as an ordinary consumer would expect (Δ must anticipate misuse).

2. **Design Defect**

When all products of a line are the same but have *dangerous propensities*. When risks associated with product design outweigh the utility of the design.

Proving DD: When there is another way the product could have been built that is □ **Feasible Alternative Test:** 1) A **safer** alternative design, which is 2) **cost effective**, and 3) **practical** (can’t be hard to use&def. prim purp. Gov. regulation specifying how designed, failure □ proves design defect. Viable & safer alternative – based on comparison of **risk and utility** – cost of design. Weigh alternative design vs. used: c/p price difference, difference in risk of harm (safety), diff. in each design’s utility.

3. **Information Defect**

Defective b/c the mfr failed to give adequate warnings as to the risks involved in using the product & risks involved not apparent to user.

(1) When it has residual risks that cannot be designed out, (2) not apparent (unaware) to consumers, and (3) lacks adequate warnings to that effect.

Adequate: prominent, so that it comes to the attention of the consumer. Reed and heed presumption: if product has inadequate warnings, π is entitled to presumption that an adequate warning would be read & heeded.

3. **Unaltered Product:** product must not have been altered since leaving the hands of Δ. But, there is a presumption the product has NOT been altered if it moved in the ordinary channels of distribution. Shift to D!

4. **Foreseeable use:** π must have been making foreseeable use (misuse).

PL Based on Intent: □ most likely *battery* if there! – *IT defenses apply*

Δ liable to anyone injured by an unsafe product if Δ intended the consequence or knew that they were substantially certain to occur.

PL Based on Negligence: *Neg. defenses apply*

Π must show duty, breach actual and proximate cause, and damages.

Duty: owed to any foreseeable π – anyone who could use/consume the product is a foreseeable π.

Who can Sue? Privity not required, so any foreseeable π can sue (users, consumers, bystanders)

Who can be held liable? Anyone who supplies a product to another may be held liable.

Breach: shown by 1) Δ’s negligent conduct leading to 2) the supplying of a defective product (manufacturing, design, or info). Π may invoke *res ipsa* in manufacturing defect case. For Design, must show Δ knew or should have known of the danger of the product as designed. Difficult to hold *retailers* and *wholesaler* liable for neg. b/c they can satisfy their duty through a *cursory inspection*.

Cause: an intermediary’s (e.g., wholesaler’s) negligent failure to discover a defect does not supersede og mfc negligence *unless* intermediary conduct exceeds ordinary foreseeable negligence.

Damages: physical injury or property damages must be shown.

SL for Defective Products: Prima Facie Case: 1) **commercial supplier**, 2) **producing or selling a defective** product, 3) **actual and proximate cause**, and 4) **damages**. *No privity is required*.

AFFIRMATIVE DEFENSES – for 3 strict liability

In **contributory** JX, ordinary contrib. is no defense where π merely failed to discover the defect or guard against its existence, or where π’s misuse was reasonable foreseeable.

Comparative Responsibility: Any π misconduct/stupidity/foolishness will result in an assignment of a % of fault to π and a reduction in recovery. **Assumption of Risk** is a defense!

NUISANCE:

Involves interference w/ ones ability to enjoy real estate. Can be based on SL, Negligence, or Intent.

Private Nuisance: substantial, unreasonable interference with another individuals with another individual’s use or enjoyment of his land

Substantial = offensive, inconvenient, annoying to the average person in the community

Unreasonable= severity of the interference outweighs the utility of the conduct

Public Nuisance: unreasonable interference with the health, safety, or property rights of the community

Remedies: damages or injunction, but a private party suing for a public nuisance can only get an injunction if his damages are unique

-**First in time** is NOT a defense

General Considerations for ALL tort cases:

Vicarious Liability: *when one person commits a tortious act against a third party and another person is responsible to the third party*

4 Relationships:

1) **Respondent Superior:** an employer is vicariously liable for the torts of his employee if it occurs during the scope of employment -**Minor detour** from employer’s business IS within the scope of employment (if substantial then employer is NOT liable)

-**Intentional Torts:** not within the scope of employment UNLESS

Force is authorized; job involves friction/tension/controversy; employee is attempting to further the interests of the employer

2) **Independent Contractors:** **NO liability**

Employee vs. independent contractor: 1) is employment for a short period of time? Is compensation task based? Parties beliefs?

Exceptions: *independent contractor engaged in an inherently dangerous activity* AND *non-delegable duty*

3) **Auto Owner/Driver:** generally NO liability for torts of person driving your car UNLESS running an errand FOR the owner

4) **Parents/Children:** Generally NO liability

5) **Joint Partners:** each partner **IS liable** for the torts of the other during the scope and course of the affairs of the partnership

6) **Bailor/bailee:** Bailor **NOT liable**

7) **Patron of Tavern:** tavern-keeper **NOT** vicariously liable

Co-Defendant Liability

On exam: Assume that the co-Ds are jointly and severally liable

-Meaning P can collect all money from a single D

Can the out-of-pocket D get payment from the other Ds?

Yes, by way of **comparative contribution**

-Each D is assigned a percentage, and the D who pays can recover that for which he is not responsible from the other Ds

AND □ D may be **INDEMNIFIED** *in full* if:

1) by contract; 2) in vicarious liability situations; 3) non-manufacturer in a products liability case

D’s acting in Concert: When two or more D’s act in concert and inure P, each is jointly and severally liable for the entire injury. Even if the injury is divisible.

Survival of Tort Actions: *Survival acts allow one’s cause of action to survive the death of one or more parties (does not include defamation/invasion of privacy)*

Wrongful Death: *recovery for pecuniary injury resulting the spouse and next of kin*

Recovery = what deceased could have recovered if he lived (can be reduced by contributory negligence)

Loss of Consortium: *granted to married person whose spouse has been injured in a tort*

3 main types of recovery:

- 1) Loss of household services (i.e. cooking/cleaning)
- 2) Loss of society (companionship)
- 3) Loss of sexual intimacy

