Torts Outline

Intentional Torts

I. General Requirements

To prove an intentional tort, the plaintiff must prove three elements:

1. **Voluntary act**: A conscious or willed act as opposed to a purely reflexive one.
2. **Intent**: Can be shown in one of two ways: a. The actor acts with the **purpose** of causing the consequence; or b. The actor acts knowing that the consequence is **substantially certain** to follow. c. Note that the tortfeasor does not have to intend to harm or injure, only to bring about the tortious result.
3. **Causation**: Defendant's conduct must have actually caused the harm.

II. Damages

1. **General Damages**: Except as noted, proof of actual damages is not required to succeed in an action for most intentional torts. Plaintiff may recover at least **nominal damages**.
2. **Punitive Damages**: If the plaintiff can demonstrate that the defendant acted **maliciously**, the plaintiff may seek punitive damages.
3. **Injunctive Relief**: The plaintiff may seek an injunction to prevent a repetitive trespass.

III. Transferred Intent

If the defendant acts with the necessary intent to inflict certain intentional torts, but causes injury to a different victim than intended, then the defendant's intent is transferred to the actual victim. This doctrine applies to:

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

IV. Types of Intentional Torts

1. **Battery**: a. Elements: i. The defendant acts with the intent to cause contact with the plaintiff's body. ii. The contact is offensive or harmful to an ordinary reasonable person. iii. Contact is offensive if the plaintiff did not permit it. iv. The defendant's contact with the plaintiff results in injury or harm. b. "Single-intent rule" (majority rule): Defendant may be liable if the defendant (i) intends to bring about the contact; the defendant need not intend (ii) that the contact is harmful or offensive.

2. **Assault**: a. Elements: i. The defendant intentionally places a person in reasonable apprehension of. ii. An imminent. iii. Harmful or offensive contact. b. Apprehension must be reasonable. c. Words alone are not enough, but words coupled with conduct can be sufficient.
3. **False Imprisonment**: a. Elements: i. The defendant intends to confine or restrain another within fixed boundaries. ii. The actions directly or indirectly result in confinement. iii. The plaintiff is conscious of the confinement or harmed by it. b. Shopkeeper's privilege: A shopkeeper is not liable for false imprisonment if the shopkeeper has a reasonable belief that the plaintiff has shoplifted and detains the plaintiff in a reasonable manner for a reasonable time to investigate. c. The plaintiff must be aware of the confinement or be harmed by it.
4. **Intentional Infliction of Emotional Distress (IIED)**: a. Elements: i. The defendant intentionally or recklessly engages in. ii. Extreme and outrageous conduct. iii. That causes the plaintiff severe emotional distress. b. Intent: The defendant must intend to cause severe emotional distress or act with recklessness as to the risk of causing severe emotional distress. c. Extreme and outrageous conduct: Conduct that exceeds all bounds of decency tolerated in a civilized society.
5. **Trespass to Land**: a. Elements: i. Defendant intentionally causes a physical invasion of the land of another. ii. The defendant need not intend to trespass, only to enter the land. Mistake is not a defense. b. Trespass may be direct or indirect. i. Direct trespass: With the accused’s body. ii. Indirect trespass: When the accused causes an item or another person to enter upon the property. c. Trespass usually is considered a tort under civil law, but it may be a criminal offense under statutory law. However, it is not a crime in all jurisdictions.
6. **Trespass to Chattels**: a. Elements: i. The defendant intentionally interferes with the plaintiff’s right of possession of personal property. ii. The interference may be by dispossession (depriving the plaintiff of his lawful right of possession of the chattel) or by damage to the chattel. iii. The plaintiff must prove actual damages. b. Dispossession: A defendant is liable if he: i. Takes a chattel from the possession of another without the other's consent or ii. Otherwise interferes with the chattel for a substantial time. c. Damage: A defendant is liable if he: i. Harms a chattel while it is in the possession of another or ii. Interferes with another’s use or enjoyment of a chattel.
7. **Conversion**: a. Elements: i. The defendant intentionally exercises dominion or control over a chattel and ii. So seriously interferes with the right of another to control it that the defendant may justly be required to pay the other the full value of the chattel. iii. It is a serious and substantial interference with or destruction of another’s personal property. The substantial interference justifies the defendant paying the full value of the personal property. b. Factors considered when determining the seriousness of interference: i. The extent and duration of the defendant's exercise of dominion or control ii. The defendant's intent to assert a right in relation to the chattel iii. The defendant's good faith iv. The extent and duration of the resulting interference with the other’s right to control the chattel v. The harm done to the chattel vi. The inconvenience and expense caused to the other c. Remedies: The plaintiff may recover damages for the fair market value of the chattel at the time and place of the conversion or replevin.

Negligence

I. General Considerations

Negligence is conduct which falls below the standard of care established by law for the protection of others from an unreasonable risk of harm. Unlike intentional torts, negligence does not require a mental state. Negligence focuses on what the defendant *should have known* and done under the circumstances rather than what they actually knew or intended.

II. Elements

The elements of a negligence cause of action are:

1. **Duty**: A legal obligation to protect another against an unreasonable risk of injury. This duty is owed to all foreseeable persons who may be injured by the defendant's failure to meet a reasonable standard of care. Foreseeability of harm to another is sufficient to create a general duty to act with reasonable care. a. There can be no negligence unless there is a foreseeable risk of harm of sufficient magnitude that it should have been foreseen and guarded against.
2. **Breach**: The failure to meet that obligation. a. The defendant's conduct is compared to the standard of care of a reasonably prudent person under similar circumstances.
3. **Causation**: The close causal connection between the action and the injury. This involves two aspects: a. **Actual cause**: "But-for" test. The plaintiff must show that the injury would not have occurred "but for" the defendant's negligence. b. **Proximate cause**: The injury must be a foreseeable result of the breach. i. The "foreseeable plaintiff" requirement: A defendant is only liable to plaintiffs who were within the zone of danger created by the defendant's negligence. ii. The "foreseeable harm" requirement: The defendant is only liable for the types of harm that were foreseeable.
4. **Damages**: The loss suffered. The plaintiff must prove actual injury (personal injury or property damage). Nominal damages and attorney's fees are not permitted in negligence actions. a. The extent of damages need not be foreseeable.

III. Affirmative Duty to Act

Generally, a person does not have an affirmative duty to act to prevent harm to another.

Exceptions:

1. **Special relationship**: A duty to rescue or to control a third party's conduct exists if the defendant has a special relationship with either: a. The third party who committed the harm, or b. The injured party. c. Examples of special relationships: parent/child, employer/employee, custodial, property owner, psychotherapist/patient.
2. **Defendant created the peril**: If the defendant caused the danger, they have a duty to try to help.
3. **Statutory duty**: Some statutes impose a duty to act.
4. **Contractual duty**: A duty may arise from a contract.
5. **Voluntary Undertaking**: A defendant who voluntarily undertakes to aid or rescue another owes a duty of reasonable care in performing the rescue.

6. **Good Samaritan Laws**: These laws protect rescuers from liability for ordinary negligence.

IV. Standards of Care

1. **Reasonable Prudent Person Standard**: The defendant's conduct is measured against the conduct of a reasonably prudent person under the same or similar circumstances. a. Objective standard: Not based on the defendant's subjective mental state or capabilities, but what a reasonable person would have known and done in the same situation. b. Physical disabilities: The standard is adjusted for physical disabilities. The defendant is held to the standard of a reasonably prudent person with the same disability. c. Mental disabilities: Generally, the standard is not adjusted for mental disabilities. However, a sudden and unforeseeable incapacity can be a defense. d. Children: Children are held to a lower standard of care, that of a reasonable child of the same age, intelligence, maturity, training, and experience. This is a subjective standard. e. Professionals: Professionals are held to the standard of care of an ordinary member of the profession in good standing. i. Specialists: Specialists are held to a higher standard of care. f. Common carriers: Common carriers are held to a higher standard of care, that of the utmost care and vigilance.
2. **Statutory Standard of Care (Negligence Per Se)** a. Definition: A method of establishing negligence (i.e., that a defendant breached a duty of care) by showing that the defendant violated the law in some manner. b. Elements: i. A criminal or regulatory statute imposes a specific duty for the protection of others. ii. The defendant neglected to perform the duty. iii. The defendant is liable to anyone in the class of people intended to be protected by the statute. iv. The harm suffered is of the type the statute was intended to protect against. c. Causation: Once the elements of negligence per se are established, the defendant is liable for injuries that were proximately caused by the defendant's violation. d. Defenses: i. Compliance with the statute was impossible or more dangerous than noncompliance. ii. The violation was reasonable under the circumstances. iii. The defendant was unaware of the factual circumstances that made the statute applicable. e. In most jurisdictions, negligence per se allows the case to go to the jury and avoids a directed verdict in favor of the defendant (allows the plaintiff to make a prima facie case of negligence without direct evidence of negligence). The jury can infer negligence, but they need not.
3. **Custom**: Custom is evidence of the standard of care, but it is not conclusive. a. In professional malpractice cases, custom is generally conclusive evidence of the standard of care.
4. **Res Ipsa Loquitur** a. Definition: A doctrine that allows the factfinder to infer negligence based on circumstantial evidence when the plaintiff cannot prove the specific act of negligence that caused the injury. b. Traditional elements: i. The accident was of a kind that does not ordinarily occur in the absence of negligence. ii. It was caused by an agent or instrumentality within the exclusive control of the defendant. iii. The plaintiff did not contribute to the injury. c. Third Restatement approach: i. The accident is a type of accident that ordinarily happens as a result of negligence of a class of actors; and ii. The defendant is a member of that class. d. Procedural effect: Res ipsa loquitur allows the plaintiff to survive a motion for directed verdict and get the case to the jury. The jury can infer negligence but they are not required to.

V. Duty of Land Possessors

A land possessor's duty of care to people on their property depends on the status of the entrant.

1. **Trespassers**: A person who enters or remains on land without permission. a. Duty owed: Landowners have a duty to refrain from willful or wanton misconduct that would injure a trespasser. b. Unknown trespasser: No duty is owed except to refrain from intentional harm. c. Known trespasser (discovered or anticipated trespasser): Landowners have a duty to warn of or make safe known conditions if they are: i. Artificial ii. Highly dangerous iii. Concealed, and iv. The landowner knew of the condition. d. Attractive nuisance doctrine: Landowners owe a higher duty to child trespassers. If a landowner knows or has reason to know that children are likely to trespass and there is an artificial condition on the land that poses an unreasonable risk of death or serious bodily injury to children, the landowner must exercise reasonable care to eliminate the danger or otherwise protect the children.
2. **Licensees**: A person who enters land with the express or implied permission of the land possessor, but not for a business purpose. This includes social guests and those who enter for their own purposes. a. Duty owed: A duty to warn of known dangerous conditions that are concealed and not likely to be discovered by the licensee. No duty to inspect or repair.
3. **Invitees**: A person who enters land with the express or implied permission of the land possessor for a purpose connected with the business of the land possessor or as a member of the public for a purpose for which the land is held open to the public. a. Duty owed: A duty to exercise reasonable care in the maintenance of the property. This includes a duty to inspect the property, discover unreasonably dangerous conditions, and warn of or repair those conditions. The duty extends to conditions that the landowner should have discovered through reasonable inspection.

VI. Damages

1. **Actual Damages**: The plaintiff must prove actual injury (personal injury or property damage), not just economic loss. a. Nominal damages and attorney's fees are not permitted in negligence actions. b. The extent of damages need not be foreseeable.
2. **Compensatory Damages**: Damages intended to make the victim whole. This includes economic damages (e.g., medical expenses, lost wages) and noneconomic damages (e.g., pain and suffering, loss of consortium).
3. **Parasitic damages**: If a tort caused physical harm, emotional distress damages can be added (e.g., NIED claims).
4. **Punitive Damages**: Punitive damages are rarely awarded in negligence cases. To recover punitive damages, the plaintiff must prove that the defendant acted willfully, wantonly, recklessly, or with malice.
5. **Duty to mitigate**: The plaintiff has a duty to take reasonable steps to mitigate their damages, such as seeking medical treatment. a. This is not a duty owed to the defendant, but a failure to mitigate can reduce the plaintiff's recovery.
6. **Collateral Source Rule**: Total damages are not reduced by benefits received from other sources, such as insurance. However, other defendants can reduce their liability by the amounts paid by other sources.

VII. Defenses

1. **Contributory Negligence**: a. A complete bar to recovery in a minority of jurisdictions. If the plaintiff's negligence contributed to their injury, even slightly, they cannot recover damages from the defendant. b. Last clear chance doctrine: Allows the plaintiff to recover even if they were contributorily negligent if the defendant had the last clear chance to avoid the accident but failed to do so.
2. **Comparative Negligence**: a. The plaintiff's negligence reduces their recovery, but it does not bar recovery entirely unless their fault exceeds a certain threshold. b. Pure comparative negligence: The plaintiff's recovery is reduced by the percentage of their own fault. This is the majority rule on the MBE unless otherwise stated. c. Modified comparative negligence: The plaintiff can recover only if their fault is less than the defendant's fault (or in some jurisdictions, no more than the defendant's fault). If the plaintiff's fault meets or exceeds the threshold, they are barred from recovery.
3. **Assumption of the Risk**: a. Express assumption of risk: The plaintiff expressly agrees to assume the risk of harm from the defendant's negligence, usually in a contract. To be valid, the agreement must be: i. Clear and unambiguous ii. Voluntary, and iii. Not against public policy. b. Implied assumption of risk: The plaintiff's conduct implies that they knew of the risk and voluntarily proceeded in the face of the risk.
4. **Superseding Cause** a. An unforeseeable intervening cause that breaks the chain of causation between the defendant's negligent act and the plaintiff's injury, relieving the original tortfeasor of liability for lack of proximate cause. b. Examples: "Acts of God," criminal acts of third parties, intentional torts of third parties.

Strict Liability and Products Liability

I. Strict Liability

A. General

- Under strict liability, the defendant is liable for injuring the plaintiff regardless of whether the defendant exercised due care.
- This means the plaintiff does not have to show proof of fault.
- The plaintiff must prove duty (which is absolute), causation, and harm.

B. Categories of Strict Liability

- **Abnormally dangerous activities:**
  - An abnormally dangerous activity is one that creates a foreseeable risk of serious harm even when reasonable care is exercised, and the activity is not a matter of common usage in the community.
  - Examples: blasting, mining, explosives.
- **Possession of animals:**
  - **Wild animals:** A defendant is strictly liable for foreseeable harms caused by wild animals.
    - Examples of wild animals include: skunks, bears, monkeys.

        - Strict liability is not available to a trespasser; the trespasser can sue under a theory of negligence but not strict liability.
    - **Domestic animals:** Negligence must be shown if the harm is caused by a domestic animal (i.e., a pet or farm animal).
        - Examples: dogs, cats, sheep, honey bees, rabbits, horses, cows.
        - An owner of a domestic animal is strictly liable for injuries caused by the animal only if the owner knows or has reason to know of the animal's dangerous propensities.
- **Products Liability**
    - **Elements:**
        - The defendant must be a merchant.
        - The product must be defective at the time it left the defendant's hands.
        - The defect caused the plaintiff's injury.
        - The product was being used in a reasonably foreseeable way.
    - **Types of Defects:**
        - **Manufacturing defect:** The product departs from its intended design and is more dangerous than expected.
        - **Design defect:** The product is manufactured as intended but there is an alternative design that is safer, practical, and cost-effective. The plaintiff will not prevail if the defendant can show that the benefits of the design outweigh the risks and the feasibility of a safer design.
        - **Failure to warn:** The manufacturer knew or reasonably should have known of a danger presented by the product and failed to adequately warn of that danger.
    - **Liability:** Everyone in the chain of distribution is liable under a strict products liability theory. This includes the commercial seller, distributor, retailer, or seller.
    - **Damages:**
        - Personal injury and property damage are available.
        - Pure economic loss is generally not permissible under a strict liability theory. These must be brought under a breach of warranty claim.
    - **Defenses:**
        - Assumption of the risk
        - Comparative negligence
        - Unforeseeable misuse of the product
        - Contributory negligence (in contributory negligence jurisdictions)
        - The product was materially altered before the injury occurred

C. Defenses to Strict Liability

- **Comparative negligence:** A plaintiff's own negligence will reduce his recovery in a strict liability action.
- **Contributory negligence:** A complete bar to recovery in some jurisdictions. In most comparative fault jurisdictions, it has been merged into the comparative fault analysis and merely reduces recovery.
- **Assumption of risk:** The plaintiff's assumption of the risk is a complete bar to recovery in contributory negligence jurisdictions. In most comparative fault jurisdictions,

assumption of risk only reduces recovery. A plaintiff assumes the risk of injury if they expressly or impliedly consent to undergo the risk created by the defendant's conduct.
- **Duty to mitigate damages:** The plaintiff has a duty to take reasonable steps to mitigate damages after the injury occurs. This is not a duty to the defendant but it may reduce the plaintiff's recovery.

Other Torts

I. Defamation

A. Generally

- **Definition:** Defamation is a tort that protects a person's reputation. It involves a statement that adversely affects one's reputation. It occurs when the defendant publishes defamatory material concerning the plaintiff that caused reputational harm.
- **Elements:**
  - A defamatory statement about the plaintiff
  - An unprivileged publication of the statement to a third party
  - Fault (at least negligence)
  - Damages
- **Types of Defamation:**
  - **Libel:** A written, printed, or recorded statement. This includes TV and radio broadcasts, emails, and electronic communications. Damages are presumed.
  - **Slander:** A defamatory statement that is spoken. The plaintiff must prove special damages (economic loss) unless it is slander per se.
    - **Slander per se:** Damages are presumed if the slander falls into one of these four categories:
      - Committing a crime of moral turpitude
      - Suffering from a loathsome disease
      - Unchastity if the plaintiff is a woman
      - Something that reflects badly on the plaintiff's business or profession

B. Defenses to Defamation

- **Truth:** An absolute defense to defamation.
- **Absolute Privilege:** Protects statements made:
  - During judicial proceedings
  - During legislative proceedings
  - In executive communications
  - Between spouses
- **Qualified Privilege:** This privilege protects statements made:
  - When the speaker has an interest to protect
  - When a third party's interest is being protected
  - When there is a common interest between the speaker and the recipient
  - When there is a public interest in the statement being made

II. Intentional Infliction of Emotional Distress (IIED)

A. Definition

- IIED is a tort that allows a person to recover for severe emotional distress caused by another person's outrageous conduct.
- Unlike negligent infliction of emotional distress (NIED), a plaintiff does not have to show physical harm to recover under IIED.

B. Elements

- The defendant's conduct was extreme and outrageous
- The defendant acted intentionally or recklessly
- The defendant's conduct caused the plaintiff severe emotional distress

III. Nuisance

A. Types of Nuisance

- **Private nuisance:**
  - **Definition:** An activity that substantially and unreasonably interferes with another's use and enjoyment of land.
  - **Elements:**
    - The defendant's conduct substantially interferes with the plaintiff's use and enjoyment of their property
    - The defendant's conduct is unreasonable. This means the conduct must be annoying to an ordinary reasonable person. Someone who is hypersensitive may not have a cause of action. Someone who is not actually bothered may still have a cause of action for nuisance.
- **Public nuisance:**
  - **Definition:** An unreasonable interference with a right common to the general public. This could be the public health, safety, or morals of the community.

B. Defenses to Nuisance

- **Contributory negligence:**
  - Only a defense when the nuisance arises from the defendant's negligence.
  - Not a defense if the defendant's conduct is intentional or reckless.
  - Only a defense if the plaintiff voluntarily and unreasonably subjected themselves to the risk of harm when the nuisance is caused by an abnormally dangerous activity.
- **"Coming to the nuisance":** This is not a complete defense but it is a factor that may be considered in determining whether the defendant's conduct was unreasonable or whether to grant an injunction.

IV. Trespass

A. Types of Trespass

- **Trespass to land:** Occurs when a person intentionally enters or causes something to enter the land of another without permission.
- **Trespass to chattels:** Occurs when a person intentionally interferes with another person's personal property.
  - **Interference:** The defendant uses or borrows the chattel without authorization.
  - **Conversion:** The defendant exercises dominion or control over the chattel and seriously interferes with the owner’s right to possess it. The defendant is liable for the full value of the property.

V. Misrepresentation

A. Intentional Misrepresentation (Fraud)

- **Elements:**
  - False representation
    - Must be about a material fact
    - Can involve deceptive or misleading statements
    - Can arise through concealing a material fact
    - Generally, no duty to disclose material facts to other parties (may be an exception for fiduciary relationships)
  - Scienter: Defendant knows or should know the statement is false and the plaintiff would consider it true. Defendant may be liable if the statement is made recklessly.
  - Intent to induce reliance: Defendant makes the representation with the intent to induce reliance by the plaintiff.
  - Causation: The misrepresentation must cause the plaintiff to act or refrain from acting.
  - Justifiable reliance: Plaintiff’s reliance on the misrepresentation was justifiable.
  - Damages: The plaintiff suffered actual economic loss.

B. Negligent Misrepresentation

- **Elements:**
  - **Business Capacity:** Defendant makes a representation in the course of their business or in a transaction where the defendant has a pecuniary interest.
  - **Breach of Duty:** The defendant owed a duty to a foreseeable plaintiff and did not exercise reasonable care or competence in obtaining or communicating information.
  - **Causing Damages:** A plaintiff suffers a pecuniary loss by justifiably and actually relying on the representation.

C. Defenses to Misrepresentation

- **Negligence defenses cannot be raised against intentional misrepresentation.**
- **Contributory or comparative negligence is a valid defense to negligent misrepresentation.**

VI. Invasion of Privacy

A. Types of Invasion of Privacy Claims:

- **Appropriation of name or likeness:** Use of a person’s name or likeness without their consent for commercial purposes (e.g., for advertising or to endorse a product or service).
- **Intrusion upon seclusion:** An intentional intrusion into a person’s private affairs that would be highly offensive to a reasonable person (e.g., eavesdropping, spying, or taking photos in someone's home without permission).
- **False light:** Publicizing false information about a person that would be highly offensive to a reasonable person.
- **Public disclosure of private true facts:** Disclosing true facts about a person that would be highly offensive to a reasonable person and are not newsworthy.

B. Defenses to Invasion of Privacy

- **Consent:** Applicable to invasion of privacy torts.
- **Qualified and absolute privilege:** Applicable to “false light” and “public disclosure” claims.
- **Truth:** NOT a defense to invasion of privacy torts (unlike defamation).

VII. Interference with Business Relations

A. Intentional Interference with a Contract

- **Elements:**
  - A valid contract existed between the plaintiff and a third party
  - The defendant knew of the contractual relationship
  - The defendant intentionally interfered with the contract
  - The defendant’s interference caused a breach
  - The plaintiff suffered damages

B. Intentional Interference with Prospective Contractual Relations

- **Elements:**
  - The plaintiff had a reasonable expectation of economic advantage
  - The defendant knew of the plaintiff’s expectation
  - The defendant intentionally interfered with the plaintiff’s expectation
  - The defendant’s interference was wrongful by some measure beyond the fact of the interference itself (e.g., by independently tortious means, or by threats or violence)
  - The defendant’s interference caused the plaintiff’s damages

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