**Torts Outline**

1. **Intentional Torts**
   1. Preliminary Points
      1. No Incapacity Defenses (e.g., insanity, intoxication, child)
      2. Must be Deliberate: must intent to do physical act constituting tort.
      3. Transferred Intent: if defendant has intent to produce legally forbidden consequences, that intent transfers even if a different consequence results or different person is injured.
   2. **Battery**: harmful or offensive contact with plaintiff’s person
      1. Offensive: if unpermitted by reasonable/normal person (regardless of whether permitted by this particular plaintiff)
      2. Plaintiff’s Person: includes anything plaintiff is holding, touching or carrying. Thus, mugging or purse-snatching may be battery.
   3. **Assault**: creating *reasonable apprehension* of an *immediate* battery
      1. Reasonable Apprehension: reasonable knowledge (need not be fear at all). Plaintiff must be aware of the threat, or doesn’t apprehend.
      2. Immediate Battery
         1. Words Alone Lack Immediacy: must be accompanying conduct (e.g., display of a weapon, drawing arm back).
         2. Words Can Negate Immediacy of Conduct
   4. **False Imprisonment**: act of restraint & plaintiff confined in a bounded area
      1. Act of Restraint
         1. Threats Sufficient
         2. Omissions Sufficient only if duty to assist in mobility is owed.
         3. Plaintiff Must be Aware of Confinement or Suffer Harm
      2. Bounded Area: not bounded if reasonable means of escape that plaintiff can reasonably discover.
      3. Note: robbery can constitute false imprisonment.
   5. **Intentional or Reckless Infliction of Emotional Distress**: outrageous conduct causing severe distress.
      1. Outrageous Conduct: exceeds all bounds of decency tolerated in civil society
         1. Not Outrageous: mere insults; exercise of 1st Amendment rights.
         2. May be Outrageous: continuous or repetitive conduct; defendant is common carrier or innkeeper; plaintiff is member of fragile class (child, elderly, pregnant women).
         3. Always Outrageous: exploit or target known emotional weakness.
      2. Severe Distress: plaintiff *need not* suffer physical symptoms
   6. **Trespass to Land**: *physical invasion* interfering with exclusive *possession* of land
      1. Invasion: either (a) entering property, even if *defendant* is unaware; *or* (b) deliberately throwing tangible object onto land.
      2. Interference With Exclusive Possession: proper plaintiff is person in possession, rather than owner; possession also covers air above and soil below to reasonable distance.
   7. **Trespass to Chattel & Conversion**: intentional interference (damage or deprivation of possession) with item of personal property.
      1. Slight Interference—Trespass; Significant Interference—Conversion.
      2. Remedy: *conversion* plaintiffs recover *full value*, not just cost of repair.
      3. No Defense for Mistake as to Ownership. Thus, BFP can commit.
   8. **Affirmative Defenses**
      1. **Consent**
         1. Plaintiff Must Have Legal Capacity to Consent. However, children can consent to age-appropriate issues.
         2. Implied Consent: by custom or based on reasonable interpretation of plaintiff’s objective conduct.
         3. Consent Has A Scope: if exceeded, liability. However, implied consent for doctor to address adjacent issue if likely you’d want it.
      2. **Self-Defense, Defense of Others, Defense of Property**
         1. Threat Must Be in Progress or Imminent
         2. Reasonable Belief That Threat is Genuine
         3. Force Must Be Proportional. No deadly force to protect property.
      3. **Necessity**: Defense to Property Torts Only
         1. **Public Necessity**: interference with property in an emergency to protect community as a whole or significant group of people.
         2. **Private Necessity**: invasion of property in emergency to protect personal interest. Legal consequences: (1) remains liable for compensatory damages; (2) no liability for nominal or punitive damages; and (3) during emergency, property owner cannot throw defendant off land but must allow him to remain in position of safety.
2. **Defamation**: a *published* defamatory statement specifically identifying the (living) plaintiff, causing damages.
   1. Defamatory: tends to adversely affect reputation. But not mere insults.
      1. Groups: if statement references small group, every member is identified.
   2. Publication: sharing statement with someone other than plaintiff. Publication need not be intentional, but may be negligent.
   3. **\*Damages**
      1. **Presumed** 
         1. **Libel**
         2. **Slander Per Se**: must be statement about (a) business or profession, (b) commission of crime of moral turpitude, (c) imputing unchastity to woman; or (d) loathsome disease (leprosy or venereal disease).
      2. **Must be Proven: Slander** Not Per Se: *economic* harm.
   4. **Statement of Public Concern**: plaintiff must prove falsity + fault (if plaintiff is public figure, requires malice; otherwise, negligence). Malice is subjective.
   5. **Defenses**
      1. Consent
      2. **Truth**: defendant must prove truth (unless matter of public concern).
      3. **Privileges**
         1. **Absolute**: status-based
            1. **Spouses**: may communicate defamation to each other
            2. **Government Officer in Official Duty**: also judges, lawyers, witnesses
         2. **Qualified**: where public interest in encouraging candor. Must have good faith reasonable belief in truth, and cannot include irrelevant information (e.g., student is good but is gay), even if true. E.g., letter of rec.
3. **Privacy**
   1. **Appropriation**: unauthorized *commercial* use of name or picture. Newsworthiness Exception: may be used for newsworthy purposes.
   2. **Intrusion**: invasion of physical seclusion in a way highly offensive to average person. Must have reasonable expectation of privacy.
   3. **False Light**: widespread dissemination of material falsehood highly offensive to average person. Damages: unlike defamation, can get for non-economic harm. Also, unlike defamation, falsehood need not damage reputation.
   4. **Disclosure**: widespread dissemination of (truthful) confidential information where highly offensive to average person. Newsworthiness exception applies. Also, information must truly be private.
   5. **Defenses**
      1. Consent: defense to all.
      2. Privileges from Defamation: defense in False Light and Disclosure suits only.
4. Process & Prosecution
   1. Malicious Prosecution: (1) institution of proceedings, (2) favorable termination, (3) absence of probable cause, (4) improper purpose, and (5) damages.
   2. Abuse of Process: wrongful use of process for ulterior purpose and act or threat to accomplish purpose. Doesn’t matter if suit has merit.
5. **Negligence**: Duty, Breach, Cause, & Damage
   1. **Duty of Care**: obligation to take risk-reducing cautions
      1. **Owed to Whom?** Only *foreseeable victims* of carelessness. Exception: rescuers need not be foreseeable.
      2. **How Much Care Owed**: Default: that exercised by hypothetical reasonably prudent person acting under similar circumstances. Objective standard (doesn’t matter if D is retarded, novice). Exceptions:
         1. Defendant Has Superior Skill or Knowledge: reasonable person is person with that skill or knowledge.
         2. \*Defendant’s Physical Characteristics: reasonable person is person with similar physical characteristics (e.g., blind, wheelchair).
      3. **Special Duty Scenarios**: duty owed is modified where defendant is
         1. \***Child Over 5**: hypothetical child of similar age, experience and intelligence acting under similar circumstances. Subjective standard. Exception: if child is engaged in adult activity, use default standard of care.
         2. **Professionals**: skill and knowledge normally possessed by members of that profession in good standing in similar communities. This is an empirical standard that looks to custom. Expert typically required. Note: specialists are measured on national scale, primaries on local.
         3. \***Premises Liability**

| **Kind of Trespasser** | **Cause of Injury** | |
| --- | --- | --- |
|  | **Activity Being Done by Possessor On the Land** | **Dangerous Condition On the Land** |
| **Unknown Trespasser** | No Duty Owed | |
| **Known or Anticipated Trespasser** | Default | Possessor must protect against conditions that are (1) artificial, (2) highly dangerous, (3) concealed, & (4) known to possessor. |
| **Licensee** (enters with permission but confers no economic benefit on possessor,  e.g. social guests) | Default | Possessor must protect against any conditions (1) concealed and (2) known by possessor. |
| **Invitee** (either enter premises for commercial purposes or enters land open to public) | Default | Possessor must protect against any conditions (1) concealed and (2) either known or could have discovered through reasonable inspection. |

* + - * 1. **Firefighters & Police Officers**: never recovers negligence damages for injuries inherent to their employment. They assumed risk.
        2. **Child Trespassers**: owed duty of reasonable prudence with regard to artificial conditions on land. The more foreseeable the trespass, the more care required (e.g., pool, candy). May also consider child’s own ability to appreciate danger and take precautions.
        3. **Avoiding Liability**: fix the problem or give a warning.
      1. **Statutory Standards of Care**: criminal statutes providing duty which plaintiff might seek to import to tort. “Borrowing” permitted if (1) plaintiff is in class of persons statute seeks to protect, and (2) accident is in class of risks that statute seeks to prevent. Exceptions to Borrowing: compliance with statute (1) more dangerous than violation, or (2) impossible.
      2. **Duties to Act Affirmatively**: Generally, none. No duty to rescue imperiled person. Exceptions: (1) if relationship, duty to rescue; or (2) defendant put plaintiff in peril. But, defendant need not put own life in peril. Gratuitous Rescuer: if voluntarily opt to rescue, liable for negligence.
      3. \***Negligent Infliction of Emotional Distress**: negligent act (but unlike others because) causing *no physical trauma* *itself* but causing emotional distress: plaintiff can recover for emotional distress only in any of the following:
         1. Near Miss: (1) plaintiff in zone of danger of act; (2) distress caused subsequent physical manifestations (but modern trend to relax).
         2. Bystander: (1) serious injury to or death of third person, (2) close relationship between bystander and third person, and (3) plaintiff sees injury and is distressed.
         3. Relationship: (1) plaintiff and defendant in business relationship, and (2) highly foreseeable that negligence will distress plaintiff. E.g., lab.
  1. **Breach**: plaintiff must identify specific behavior (act or omission) that was wrongful and articulate theory as to why unreasonable.
     1. **Res Ipsa Loquitur**: used by plaintiff that cannot identify wrongful conduct: plaintiff must show accident of a type *normally* associated with negligence of someone in defendant’s position (usually shown by control). This gets issue to jury, but jury need not accept inference.
  2. **Causation**
     1. **Factual: But For** breach, plaintiff would be uninjured today. Modifications for multiple tortfeasors:
        1. **Merged Causes**: each liable if each a *substantial factor*—i.e., each breach could have caused the harm by itself.
        2. **Unascertainable Cause**: burden shifts: each defendant must demonstrate his breach did not cause the harm.
     2. **Legal: Proximate:** harm must be foreseeable. Following are examples of instances in which proximate cause has been found despite attenuation:
        1. Intervening Medical Negligence
        2. Intervening Negligent Rescue
        3. Intervening Protection or Reaction Forces
        4. Subsequent Disease or Accident: after D causes weakened condition

Note: intervening criminal acts and intentional torts can, in some cases, be foreseeable result of negligence, where negligence increases their likelihood.

* 1. **Damage**
     1. **Eggshell Skull**: defendant is liable for all harms suffered even if surprising (this applies to all torts, not just negligence).
  2. **Affirmative Defense** 
     1. **Comparative Negligence**: plaintiff failed to exercise reasonable care for his own safety. Jury assigns percentage of fault to each, plaintiff’s recovery is reduced accordingly.
        1. Pure: Majority Rule: go strictly by numbers.
        2. Modified/Partial: if P >50% negligence, P gets nothing.
     2. Contributory Negligence: at common law, barred recovery entirely
     3. Voluntary Assumption of Known Risk

1. **Strict Liability**
   1. **Injuries Caused by Animals**
      1. Domestic: No Strict Liability, unless knowledge of vicious propensities—unless victim is trespasser on your property.
      2. Wild: Strict Liability.
   2. **Abnormally Dangerous Activities**: activity (1) creates foreseeable risk of serious harm even with reasonable care, and (2) not common where conducted.
   3. **Products**: strict liability for (1) merchants of a (2) defective productthat (3) has not been altered and (4) is being used in a foreseeable manner.
      1. Essay Tip: see if question asks about strict liability, negligence, or breach of contract (e.g., warranty of merchantability). It is possible for products liability to be based in strict liability, but also, as alternative, in negligence or contract.
      2. Elements: plaintiff must prove
         1. **Merchant**: *routinely* deals in goods of this type. Includes lessors, but not service providers who provide attending product. Every party in chain of distribution is a merchant and potentially strictly liable.
         2. **Defective Product**
            1. Manufacturing Defect: product differs from all others from same assembly line in manner making it more dangerous than expected
            2. Design Defect: there is a hypothetical alternative design (1) safer, (2) economical, and (3) practical. Warning will not absolve.
            3. Information Defect: no superior design and still has residual risks that are not adequately disclosed.
         3. **No Alteration**: product not altered since left defendant. Presumed if product moved in ordinary channels of distribution.
         4. **Plaintiff Making Foreseeable Use of Product**
      3. **Affirmative Defense**: **Comparative Responsibility**: plaintiff misconduct will reduce liability accordingly.
      4. Disclaimers of Liability are Irrelevant
      5. Intermediary’s Failure to Discover Defect is No Defense
2. **Nuisance**: *excessive interference* with ability to use and enjoy one’s property. Court balances interests, very subjective.
3. **Vicarious Liability**
   1. **Employer-Employee**: employer liable provided tort committed in scope of employment. Generally, intentional torts outside scope, unless (1) job involves use of force, (2) tort serves employer’s interest (even if overzealous), or (3) employer authorized tort.
   2. **Hiring Party-Independent Contractor**: no vicarious liability unless contractor injures invitee on business’s property.
   3. **Car Owner-Driver**: no vicarious liability unless driver is doing errand for owner.
   4. **Parent-Child**: no vicarious liability, no exceptions. However, parents liable for own torts that enable kids to commit torts.
4. **Co-Defendant Contribution**: Comparative Contribution: assign percentages of fault and pay accordingly. However, Co-Defendant can recover complete contribution (i.e., Indemnity) from co-defendant: (1) in vicarious liability cases, the purely passive party can get indemnity from tortfeasor, and (2) in product liability, a non-manufacturer can be indemnified by manufacturer.
5. **Loss of Consortium**: in any case where victim of tort is married, *uninjured spouse* has a separate tort claim. Allows uninjured spouse to recover loss of household services, loss of society/companionship, and loss of sex. Any defense asserted against injured spouse can be asserted against uninjured spouse.