

TORTS: AN INTRODUCTION

- **Tort:** A civil wrong, not arising from a breach of contract or other agreement. A breach of a legal duty, proximately causing another person harm or injury.
- Generally, the purpose of tort law is to provide remedies for the violation of *protected interests*.
- **Civil vs. Criminal Wrong:** A tort is a “civil” wrong, punishable by compensating, or paying ***damages*** to, the injured party, rather than a “criminal wrong,” punishable by paying a fine to the government or being imprisoned. Some torts may also serve as the basis for separate criminal prosecution by the state.
- Tort law recognizes two categories of damages:
 - (1) **compensatory damages**, designed to reimburse the plaintiff for the actual value of the plaintiff’s injury or loss, and
 - (2) **punitive damages**, designed to punish the tortfeasor for particularly egregious conduct and to deter similar conduct in the future.

TORT REFORM

- Some critics contend that certain aspects of today's tort law encourage too many trivial and unfounded lawsuits. The federal government and a number of states have begun to take some steps towards tort reform, including:
 - (1) Limiting the amount of damages that can be awarded
 - (2) Capping the amount that attorneys can collect in contingency fees
 - (3) Requiring the losing party to pay both the plaintiff's and the defendant's expenses
- **Class Action Fairness Act (CAFA) of 2005:** Shifted jurisdiction over large interstate tort and product liability class-action lawsuits from the state courts to the federal in order to prevent *forum shopping*- looking for states sympathetic to a client's cause.

TYPES OF TORTS

- **Intentional Tort:** A wrongful act the tortfeasor committed knowingly and with the intent to commit the act (not necessarily with the intent to do harm).
- **Unintentional Tort:** A wrongful act the tortfeasor committed without knowing its wrongfulness or without intending to commit the act.

INTENTIONAL TORTS AGAINST PERSONS: PHYSICAL ACTS

- **Assault:** An intentional, unexcused act creating in another person a reasonable apprehension or fear of immediate harmful or offensive contact (*e.g.*, pointing a gun at someone).
- **Battery:** Intentional, unexcused and harmful or offensive contact (*e.g.*, firing the gun).
- **False Imprisonment:** The intentional confinement of another person or restraint of another person's activities without justification. The confinement may occur through the use of physical barriers, physical restraint, or threats of physical force.
- **Infliction of Emotional Distress:** An intentional act that amounts to *extreme and outrageous conduct* resulting in severe emotional distress to another.

DEFAMATION

- **Defamation:** Anything published or publicly spoken that injures another's character, reputation, or good name.
 - **Slander:** Oral defamation.
 - **Libel:** Written defamation.
 - **Publication:** The speaker must have communicated the statement to persons other than the defamed party.
- **Defamation *Per Se*:** Common law recognizes four types of false utterances that constitute indefensible or unjustifiable defamation:
 - (1) that another has a **loathsome communicable disease** (*e.g.*, a sexually-transmitted disease);
 - (2) that another has committed **improprieties while engaging in a profession or trade**;
 - (3) that another has committed or has been imprisoned for a **serious crime**; and
 - (4) that a person (usually unmarried persons, especially women) is unchaste or has engaged in **serious sexual misconduct**.

DEFAMATION DEFENSES

- **Truth:** Truth is normally an *absolute defense*. In other words, if the allegedly defamatory words were objectively true, the defendant cannot be held liable for publishing them.
- **Privilege:** The ability to act contrary to another person's right without giving legal redress for such acts.
 - **Absolute Privilege:** Statements made or actions taken in judicial and certain legislative proceedings (*e.g.*, statements made by attorneys during trial, statements made by legislators during floor debate) are privileged against any claim of wrongful conduct.
 - **Qualified Privilege:** In other situations, statements or actions made in good faith and, in the case of statements, made only to those who have a legitimate interest in the statement, are privileged.
 - **Absence of Malice:** Generally speaking, otherwise false and defamatory statements made about *public figures* are privileged unless they are made with *actual malice* – that is, with either knowledge of falsity or reckless disregard of the truth or falsity.

INVASION OF PRIVACY

- **Invasion of Privacy:** Common law recognizes four acts that qualify as improperly infringing on another's privacy:
 - (1) **Appropriation:** the use of a person's name, picture, or other likeness for commercial purposes without their permission;
 - (2) **Intrusion in an individual's affairs or seclusion** in an area in which the person has a **reasonable expectation of privacy**;
 - (3) Publication of information that places a person in **false light**; and
 - (4) **Public disclosure of private facts** about an individual that an ordinary person would find **objectionable**.
- **Right of Publicity:** Some states recognize a person's right to control the use of her name or likeness for commercial purposes and to sue anyone who misappropriates a person's name or likeness without permission.

MISREPRESENTATION

- **Fraud:** Intentional deceit, usually for personal gain. Actionable fraud requires:
 - (1) a **misstatement or omission**
 - (2) of one or more **material facts**,
 - (3) made **knowingly** and with the **intent to deceive** the innocent party,
 - (4) on which a **reasonable person would rely**,
 - (5) and the **innocent party actually relied** to her **detriment**,
 - (6) causing the innocent party **loss**.
- **Negligent Misrepresentation:** A material misrepresentation made without knowledge of its falsehood or intent to deceive.
- **Puffery:** Also known as “seller’s talk”, a statement that does not rely on a *statement of fact*.

ABUSIVE OR FRIVOLOUS LITIGATION

- Tort law recognizes a right not to be sued without a legally just and proper reason.
- **Malicious Prosecution:** Initiating a lawsuit out of malice and without probable cause.
- **Abuse of Process:** Using a legal process against another in an improper manner or to accomplish a purpose for which it was not designed.
- A plaintiff need not prove malice to prove abuse of process.

WRONGFUL INTERFERENCE

- **Interference with Contract:** The tort of interference with contract requires proof of the following:
 - (1) a **valid contract** exists between parties X and Y;
 - (2) a third party, Z, **knows** that said contract exists; and
 - (3) Z **intentionally** causes X or Y to breach the contract.
- **Interference with a Business Relationship:** Interference with a *prospective* business relationship is also actionable, where:
 - (1) While no contract or other business relationship presently exists between X and Y, Z knows or has reason to believe that X and Y might enter into a business relationship, by contract or otherwise; and
 - (2) Z intentionally interferes with X's attempt to establish a business relationship with Y.
- In either case, Z's interference will be excused if Z can establish that it was **privileged** or **justified** to act as it did. Thus, for example, bona fide competitive behavior (*e.g.*, non-predatorily underselling a competitor) will not support a claim of tortious interference.

TRESPASS TO LAND

- **Trespass to Land:** Entry onto, above, or below the surface of land without the owner's permission or legal authorization.
- Any person who enters onto another's property to commit an **illegal act** is deemed to have trespassed as a matter of law. Otherwise, the owner or legal occupant of the real property must establish that
 - (1) the trespasser ignored a posted "no trespassing" sign (or comparable notice), or
 - (2) the trespasser ignored the owner's or legal occupant's request to leave the property.
- **"Attractive Nuisance":** A landowner may be liable for injuries to children enticed to enter the property by, *e.g.*, a swimming pool or an abandoned building.
- **Defenses to Trespass:** Trespass may be justified or excused if the trespasser can prove
 - **Necessity:** she was trying to rescue another or save another's life or property, or
 - **License:** she was invited, and entered before the owner revoked the license.

OTHER PROPERTY TORTS

- **Trespass to Personal Property:** Taking or harming another's personal property, in a way that interferes with her right to exclusive possession, without the owner's permission or legal authorization.
 - The key is injury to the owner's *enjoyment* of his personal property, not injury to the property itself.
- **Conversion:** Taking, using, selling, or retaining possession of personal property that belongs to another without the other's permission or legal authorization.
 - Conversion assumes that the purported owner has a **superior right** of possession.
 - Conversion may be excused by **necessity**.
- **Disparagement of Quality:** Written (*trade libel*) or oral (*slander of quality*) publication of false information about the quality of another's product or services, proximately causing financial loss to the disparaged party.
- **Disparagement of Title:** Written or oral publication of a statement that denies or casts doubt upon another's legal ownership of any property, resulting in financial loss to the disparaged party.

NEGLIGENCE: BASIC PRINCIPLES

- **Negligence:** Failing to exercise the standard of care that a reasonable person would exercise in similar circumstances.
- Negligence requires no intent on the part of the tortfeasor, nor does it require that the tortfeasor know or believe the consequences that his act or omission may cause. Negligence merely requires that the tortfeasor's act or omission create a ***risk*** of the consequences complained of by the injured party.
- Actionable negligence requires that:
 - (1) the tortfeasor owed the plaintiff a **duty of care**,
 - (2) which the tortfeasor **breached**,
 - (3) **actually causing** the plaintiff
 - (4) a **legally recognizable injury**.
- The purpose of tort law is to compensate those who suffer ***legally recognizable injuries***. If no such injury occurs, no tort exists and there is nothing to compensate.

NEGLIGENCE: DUTY OF CARE

- **Duty of Care:** The duty of all persons to exercise reasonable care in their dealings with others.
- **Reasonable Care:** The degree of care expected of a hypothetical “reasonable person”; not necessarily how a reasonable person *would* act, rather how a reasonable person *should* act.
- Tort law presumes that the **reasonable person** will be, at a minimum:
 - (1) attentive,
 - (2) aware of his or her environs,
 - (3) careful,
 - (4) conscientious,
 - (5) even tempered, and
 - (6) honest.

NEGLIGENCE: PREMISES & PROFESSIONALS

- **Landowners' Duties:** Landowners are expected to exercise reasonable care to protect from harm those persons coming onto their property – even trespassers.

- **Business Invitees:** Retailers and other business that explicitly or implicitly invite persons to come onto their premises are expected to exercise reasonable care toward these *business invitees*.

- **Obvious Risks:** Some risks are so obvious that the owner need not warn even invitees.

- **Professionals' Duties:** If an individual has knowledge, skill, or expertise superior to that of the ordinary person, the individual is held to that standard of care expected of a reasonable person with the same or similar knowledge, skill, or expertise. Failure to perform up to the standard of a “reasonable professional” can result in the professional being subject to liability for professional *malpractice*.

NEGLIGENCE: CAUSATION AND DAMAGES

- **Causation in Fact:** An act or omission without which the plaintiff's injury would not have occurred.
- **Proximate Cause:** Exists when the connection between an act and an injury is direct enough to impose liability.
 - A common and critical element of proximate cause is **foreseeability** – if the consequence of the act or omission or the victim who is harmed by the act or omission is unforeseeable, no proximate cause exists.
- **Negligence *Per Se*:** An act or omission in violation of a statutory duty or obligation. Negligence *per se* often arises where the tortfeasor both violates a criminal statute or ordinance and causes injury to another party. The plaintiff must prove that:
 - (1) the statute or ordinance clearly sets out what standard of conduct is expected, when it is expected, and of whom it is expected,
 - (2) the plaintiff is in the class of persons intended to be protected by the statute or ordinance, and
 - (3) the statute or ordinance was intended to prevent the type of injury that the plaintiff suffered as a result of the defendant's wrongful act.

- Negligent tortfeasors typically must merely compensate the victim; however, in some cases, a court will also award *punitive damages*.
- **Good Samaritan Statutes:** Someone who is aided voluntarily by another cannot turn around and sue the “Good Samaritan” for negligence; typically used to protect physicians and medical personnel volunteering their services in a crisis situation.

NEGLIGENCE: DEFENSES

- **Assumption of Risk:** A plaintiff who *voluntarily* enters a risky situation, *knowing* the risk involved, may not recover from the alleged tortfeasor.
 - Risk may be assumed by **express agreement** or be **implied** by the plaintiff's knowledge and conduct.
 - Plaintiffs do not assume risks other than those **inherent** in the situation.
 - Assumption of risk will not arise in **emergencies**.
 - Assumption of risk will not arise when the plaintiff is a member of a **statutorily-protected** class of persons.
- **Superseding Cause:** The connection between the wrongful act or omission and the injury suffered may be broken by the occurrence of another act or omission, not caused by the alleged tortfeasor nor subject to the alleged tortfeasor's control, which supersedes the original wrongful act or omission as the cause of plaintiff's injury or loss.

CONTRIBUTORY AND COMPARATIVE NEGLIGENCE

- **Contributory Negligence:** No matter how insignificant the plaintiff's own negligence is when compared to that of the defendant, in a minority of jurisdictions any negligence on the part of the plaintiff that contributed in any way to the injury of which plaintiff complains will bar the plaintiff from recovering damages from defendant.
- **Comparative Negligence:** More popular today than contributory negligence, a comparative negligence scheme permits plaintiff to recover only for the percentage of his or her injury or loss that was not caused by plaintiff's own negligence.
- **"50% Caps"** – Some jurisdictions further refuse to permit a negligent plaintiff from recovering any damages if the plaintiff is responsible for more than 50% of his or her own injury or loss.